

Response to call for evidence on NDAs

The Bar Standards Board welcomes the LSB's call for evidence. We are keen to engage with this issue and look forward to reviewing the evidence that is provided.

The BSB recognises that NDAs can be an important way of protecting clients' interests and may be mutually beneficial to both parties. For example, employers have a legitimate right to protect confidential information when people leave their employment. Similarly, NDAs can be a legitimate part of settlement agreements that seek to resolve workplace disputes without going to an Employment Tribunal, which can be beneficial for both parties.

However, we also recognise that ethical issues may arise, particularly where they seek to prevent the reporting of matters that are disclosable to regulatory or law enforcement bodies or under the Public Interest Disclosure Act, or where undue pressure is put on a person to agree to terms, or to threaten or intimidate someone against making a proper disclosure.

Our Board considered the matter of additional guidance in relation to NDAs in 2018. Having done so carefully and in detail, the board concluded that formal regulatory guidance in this area was not appropriate at that time. The Board considered that barristers advising clients on the drafting and/or application of NDAs must bear the BSB Handbook's core duties in mind, in particular the requirements to act with honesty, integrity and independence. In addition, they should have in mind any statutory and common law principles applicable to the enforceability of NDAs as the law stands. For example, there are in place legal protections for individuals such as the requirement for independent legal advice under the Employment Rights Act 1996.

Given those duties and principles, the board considered that, unless and until Parliament legislates to provide either that NDAs are unlawful per se, or that the circumstances of their lawful use should be further restricted, it was not for the BSB, as a regulator, to perform that role.

Our preference remains for Parliament to legislate in this area. We think this would be the optimum way of ensuring clarity for the public, lawyers and parties to NDAs, whether or not they seek the advice of a legal professional. Although barristers may be instructed to provide advice (and should act in accordance with the BSB's Handbook in doing so) the content of an NDA is ultimately the responsibility of those signing it. A barrister's instructions may not always reveal whether an NDA is likely to be misused by their client. Hence, changing the law is the most effective way of avoiding the misuse of NDAs.

However, we will be looking again at whether additional rules or guidance would be useful in relation to the misuse of NDAs and we will consider the responses to the LSB's call for evidence in doing so.

The BSB is not currently in a position to provide quantitative evidence to the LSB. The way that reports against barristers are recorded means it is not possible easily to identify those historic cases that may have involved misuse of an NDA. However, we believe the number of such cases involving barristers to be low. We are currently considering how we might better track cases that involve the possible misuse of an NDA.

Bar Standards Board

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