



Law Society of Northern Ireland

REGIPCG7 Non-Disclosure Agreements – Regulation Guidance

Purpose of this Guidance

This policy provides guidance to the public and members on the Roll of Solicitors in Northern Ireland on the appropriate use of Non-Disclosure Agreements (“NDAs”), also known as Confidentiality Disclosure Agreements (“CDAs”), referred to here as “NDAs”, regardless of the reasons for which same have been produced. The aim of this policy is to:

1. fulfil our obligations in protecting the public interest and observe the fundamental principles in human rights of openness and transparency to ensure accountability, informed participation and awareness of other human rights, for example, freedom of speech, access to justice, and privacy rights; and
2. to ensure solicitor compliance with the relevant regulatory framework in Northern Ireland when drafting, negotiating or enforcing an NDA. NDAs should not be used routinely but it is accepted that they are necessary in certain circumstances, primarily to protect confidential information. Such agreements should uphold legal, ethical, and professional standards and not conflict with any regulatory responsibilities.

The Society’s Stance on the use of NDAs

NDAs are legal agreements used in various contexts to protect business interests and sensitive information or to safeguard individual’s privacy, examples include intellectual property protection and employment relationships. They should be drafted, executed, and enforced in accordance with the laws of Northern Ireland and regulatory framework with a focus on protecting client and public interests.

As stated above, NDAs should not be used routinely nor be used to prevent someone from:

- reporting any offences pertaining to, for example, crime, discrimination or sexual harassment (including any future acts) to any relevant authority;
- making disclosures to any medical professional/advisor or caregiver, including family;
- reporting to HMRC or other Government department, for example, where benefits are being sought;
- whistleblowing¹ to any relevant organisation;
- reporting a crime to law enforcement or cooperating with a criminal investigation or prosecution;
- reporting misconduct to the Society or other regulatory authority to avoid scrutiny. A solicitor should not attempt to prevent a person from complaining or providing information about a breach of regulatory obligations.

Similarly, NDAs should not be used to:

- force or pressurise a person into settlement of a matter and prevent them reporting or disclosures around the facts of that matter where there is a wider public interest at stake;
- take unfair advantage of another party;
- obstruct or delay proceedings.

An NDA should not stipulate or give the impression to the party signing the NDA that reporting or disclosure in circumstances set out above are prohibited.

The above conditions are not exhaustive and this policy applies to all firms/organisations in Northern Ireland, who may be involved in the preparation, negotiation, or execution of NDAs. The onus is on the partners of a firm to ensure that all staff are informed of their obligations and that adequate training in the use and application of NDAs is undertaken.

¹ the Public Interest Disclosure (Northern Ireland) Order 1998 ("PIDA") protects whistleblowers from detrimental treatment by their employer; reference: <https://www.legislation.gov.uk/nisi/1998/1763/contents/made>

Regulatory Provisions

The Council of the Law Society of Northern Ireland has delegated authority to the Professional Conduct Committee under Article 73A of the Solicitors (Northern Ireland) Order 1976 (“the Order”)² concerning the practice, conduct and discipline of solicitors.

Solicitors in this jurisdiction are also bound by the Regulations subsequent to the Order, a full list of which can be viewed on the Society’s webpage at: <https://lawsoc-ni.org/about-the-law-society/our-role>.

The provisions of the Solicitors Practice Regulations 1987 as amended³ should be adhered to when dealing with matters where NDAs are being considered or applied, in particular:

- Regulation 8(1) *A solicitor shall at all times carry out his work and conduct his practice to the highest professional standards and shall observe in relation thereto any decisions or directions which may be adopted, issued or promulgated by the Council either to the solicitor personally or to the profession at large.*
- Regulation 12 *A solicitor shall not, except where he is expressly permitted so to do by these regulations or any waiver thereof, directly or indirectly obtain or attempt to obtain, or permit to be obtained, instructions for professional work in any manner which compromises or impairs, or is likely to compromise or impair the client’s freedom to instruct a solicitor of his choice or the solicitor’s independence and shall not in any circumstances take any action which compromises or impairs, or is likely to compromise or impair,*
 - (a) his integrity;*
 - (b) his duty to act in the best interests of the client;*
 - (c) the good repute of the solicitor or of solicitors in general;*
 - (d) his proper standard of work.*
- Regulation 18 *In any contentious or non-contentious business undertaken by him a solicitor shall, in so far as is practicable, having regard to his client’s interests and instructions and to the circumstance of the case, observe the procedures and practices recommended or directed from time to time by the*

² <https://www.legislation.gov.uk/nisi/1976/582>

³ <https://lawsoc-ni.org/assets/general/files/regulations-and-standards/DERVAL1.pdf>

Council as being good practice in the category or type of contentious or non-contentious business so undertaken, provided however and it is hereby declared that any procedures and practices so recommended or directed shall not be regarded as being comprehensive unless they shall expressly be stated so to be.

In addition, the Code of Conduct for European Lawyers appended to the Solicitors Practice Regulations 1987 as amended should be adhered to, in particular item “2: GENERAL PRINCIPLES”

- 2.2. *Trust and Personal Integrity*

Relationships of trust can only exist if a lawyer’s personal honour, honesty and integrity are beyond doubt. For the lawyer these traditional virtues are professional obligations.

- 2.7. *The Client’s Interest*

Subject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of the client and must put those interests before the lawyer’s own interests or those of fellow members of the legal profession.

The following legal obligations must also be observed:

- Data Protection Act 2018; NDAs must be drafted or negotiated in line with data protection laws, including the UK General Data Protection Regulation (UKGDPR). Information subject to confidentiality under an NDA should not conflict with an individual’s right to access or the organisation’s duty to disclose information where required by law.
- Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (AML/CTF); NDAs must not be used to conceal activities that would violate AML/CTF legislation. The terms of an NDA must be assessed to check if it is inadvertently shielding illicit or unethical activities from regulatory scrutiny.
- Regulatory Reporting Requirement: Members must be mindful of their obligations to report certain information to the Society and ensure that an NDA does not prevent such reporting, especially in cases involving misconduct, fraud, or other illegal activities. Regulation 25

Solicitors Practice Regulations 1987 as amended, states:

25 *A solicitor shall bring to the notice of the Society (having where necessary first obtained his client's consent) any conduct on the part of another solicitor which appears to him to be a breach of these regulations.*

Suggested Best Practice for Solicitors when drafting or implementing NDAs:

- Transparency: all parties should understand the terms and exceptions regarding disclosure (referred to above), implications, associated risks and obligations on them when entering into an NDA. It would be prudent to recommend that each party seek independent legal advice and recognise if any party may be vulnerable or require additional support e.g.:
 - A. litigants in person, for which a Charter has recently launched and is available on our website at <https://lawsoc-ni.org/agenda-for-justice/responses-to-policy-issues/effective-participation-and-communication-between-solicitors-and-litigants-in-person-in-northern-ireland>; and
 - B. any persons requiring reasonable adjustments such as additional time to consider matters, agreements to be set out in different formats or providing extra aids or services e.g. interpreters, induction loops for hearing aids or change of venue for meetings. Useful guidance in respect of reasonable adjustments can be found on the website of the Equality Commission for Northern Ireland.
- Clarity: language should be **plain** and **specific** in relation to what information within the NDA is confidential, what each party's responsibilities are, if there are any time periods for confidentiality and what the remedies are in the event of a breach, including damages, injunctive relief, and any other actions available under the laws of Northern Ireland. The legal process should be outlined in the event of a breach.
- Compliance: the structure and content of NDAs should be reviewed to ensure that they comply with applicable laws and regulations.

- Training: any persons within a firm involved in the drafting of an NDA should have appropriate training regarding their confidentiality obligations and regulatory requirements.
- Audits: regular audits should be carried out to ensure that confidential information is being handled in compliance with both the NDA terms and regulatory requirements.

Recommendations for the Public

- The Society is not mandated to give legal advice, therefore if you have any concerns about entering an NDA or one that you have entered, you may exercise your personal rights to seek independent legal advice to protect your interests – a directory of solicitors in this jurisdiction is available on our website via the following link: <https://lawsoc-ni.org/using-a-solicitor/find-a-solicitor>.
- If you believe that a solicitor may have breached their regulatory obligations in connection with the drafting and execution of an NDA, you are at liberty to report the matter to the Society via our website at: <https://lawsoc-ni.org/using-a-solicitor/making-a-complaint>. Please read the guidance carefully in relation to making a complaint and note that you will be required to submit documentary evidence to substantiate any allegations that you raise.
- Please note that the Society is not the correct organisation to which to report breaches of any laws. You may notify us of any concerns via the above noted channels with supporting documentation but ultimately you may need to consider if your complaint requires you to make such other reports to agencies such as the PSNI as may be appropriate in accordance with the general law in Northern Ireland.

Reporting Your Concerns

Improper use of an NDA or any attempt to prevent a person from complaining or reporting matters of professional misconduct to the Society may encompass a regulatory breach for which disciplinary action will be considered.

In order to advance a complaint, you will be required to submit a complaint form via our website

at: <https://www.lawsoc-ni.org/professional-conduct-complaint> which is our preferred method of delivery of a Professional Conduct Complaint. If there is any difficulty uploading any supporting documents, they can be forwarded to regulation@lawsoc-ni.org once a complaint form has been lodged and acknowledged by the Society.

In the alternative, a complaint pack can be forwarded by hard copy upon request to regulation@lawsoc-ni.org.

Conclusion

NDA's are vital for protecting confidential information, but they must be used within a legal framework that respects individual rights, promotes transparency, and ensures data protection. Solicitors must have a clear understanding of their regulatory obligations surrounding the use of NDAs ensure the protection of the public interest while being mindful of the integrity of the profession when dealing with NDAs.