THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

Challenging Non-Disclosure Agreements (NDAs) and the Harm they Cause:

Paving the Way for more Trauma-Informed Approaches

These materials were prepared by Jennifer Khor, Cayleigh Shiff and Celia Taylor of Community Legal Assistance Society, Vancouver, BC and Clea Parfitt of Vancouver, BC for the Continuing Legal Education Society of British Columbia, November 2022.

CHALLENGING NON-DISCLOSURE AGREEMENTS (NDAs) AND THE HARM THEY CAUSE: PAVING THE WAY FOR MORE TRAUMA-INFORMED APPROACHES

Contents

Challenging Non-Disclosure Agreements (NDAs) and the Harm they Cause: Paving the Way for more Trauma-Informed Approaches

#MeToo has sparked an influx of people coming forward with their stories of sexual harassment. Some of those people were targeted, harmed, discriminated against, chased out of jobs or professions without any compensation; others settled out of court, often for inadequate amounts of money, in exchange for their silence. Some, such as Zelda Perkins (former assistant to Harvey Weinstein), broke their non-disclosure agreements ("NDAs") in order to bring light to a predator's dangerous behaviour at great personal and legal risk to themselves.

The incredible influx of public awareness about the harm and prevalence of sexual harassment, and accompanying policy changes, since the #MeToo movement demonstrates that people telling their stories can change the world. It has also demonstrated that many people who experience workplace sexual harassment suffer when they are kept silenced by non-disclosure agreements – that forcibly silencing someone who has been traumatized by sexual harassment will continue to traumatize and re-victimize them as long as they are muzzled.

Beyond the people who came forward with complaints after #MeToo, there are even more who continue to suffer in silence because of NDAs they signed – often told by legal counsel that agreeing to an NDA is the only way to get compensation without going to trial or hearing. NDAs, even when someone receives a fair financial settlement and has independent legal advice, continue to harm the complainant and breed dangerous work environments where serial harassers are allowed to jump from job to job with impunity and no warning to others that they may be a danger to the public.

NDAs have become so normalized in the legal profession that many employer- and complainant-side counsel advise their clients that they are a normal part of the settlement process and that complainants are unlikely to get a settlement without one. Many in the legal profession have accepted this as fact, believing this is the way a settlement needs to work and that it's beneficial to both employer and complainant.

NDAs are a relatively recent phenomenon since the 1980s, and they were not originally intended to shield predators from accountability or companies from public scrutiny. Even though they have since crept into all kinds of settlement agreements, advocates and policymakers made huge strides in legislating limits on the use of NDAs in sexual harassment cases. Globally, at time of writing 15 jurisdictions have passed legislation.

As lawyers, we are often the ones on the ground, directly advising clients about NDAs. We are in the unique position to adapt our practices to limit the harm of NDAs. The legal profession can rethink the way we use NDAs and ask ourselves whether they are necessary, how we can limit the negative impacts on a complainant and adopt a more trauma-informed approach to our practice, and whether our ethical and professional obligations align with the current way NDAs are used.

This paper will discuss the evolution of NDAs in settlement of sexual harassment cases and types of NDAs commonly used, the existing global legislation limiting NDAs, and the advocacy efforts of those fighting to limit NDAs. We will also look at the harm caused by NDAs on both individual complainants, workplaces, and the public. Next, we consider the ethical, professional, and legal obligations of counsel when drafting

or advising clients about NDAs. Finally, we will discuss what the legal profession can do to limit the harm caused by NDAs and use a trauma-informed approach when dealing with them.

I. The Evolution and Expanded Use of NDAs

A. History of NDAs

The secretive nature of NDAs makes it difficult to pinpoint their exact history and evolution. Their origins in Canada are somewhat unclear; however, there are media mentions in the United States of NDAs around the 1940s regarding maritime law and confidentiality[1]. In 1949, the Third Circuit Appeals Court upheld a confidentiality clause for "maritime admirals during interrogatory fact findings of whether prospective witness testimonies were obtainable under the United States Admiralty Rule 31."[2] It wasn't until the technology boom of the 1970s and 1980s that NDAs became commonplace in business to protect trade secrets to obtain an economic advantage over another business.[3]

Since the 1980s, NDAs have crept into a wide range of settlement agreements in Canada and abroad. For instance, a minor child entered into a confidentiality agreement with Michael Jackson in 1993.[4] Reports in the 1980s and 1990s identified secret settlements involving allegations of public health hazards caused by "Honda Civics, Bic lighters, DPT vaccines, Zomax and Feldene painkillers, Zenith television sets, Pfizer heart valves, General Motors fuel tanks, Xerox toxic leak sits" and asbestos, tobacco, and silicone breast implants.[5]

The exact time when NDAs first started appearing in Canadian settlements is difficult to ascertain. Senior counsel might recall when they were more widely used in settling employment-related disputes. However, they were originally used only to keep the settlement amount confidential; they did not apply to the underlying facts giving rise to a claim, and a signatory was still free to share their story to whomever they wanted, as long as they did not disclose the settlement amount.

Now, NDAs barring a complainant from disclosing the facts of their claim are increasingly used when settling almost all employment-related disputes. Many employers, and their counsels, have an expectation they will not settle a dispute without an NDA. There is also evidence that NDAs are widely used in employment contracts, prohibiting an employee from disclosing events that have not happened yet. One U.S. study found that 87.1 percent of all CEO employment contracts NDAs preventing them from

---

[1] Michelle Dean, "Contracts of Silence," (Winter 2018), online: Columbia Journalism Review, <https://www.cjr.org/special-report/nda-agreement.php)>

[2] Rachel S. Spooner, (2020) "The Goldilocks Approach: Finding the "Just Right" Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases," (2020) 37:2 Hofstra Labor & Employment Law Journal, 331 at 335.

[3] Ibid, at 336.

[4] Christopher R. Drahozal & Laura J. Hines, "Secret Settlement Restrictions and Unintended Consequences" (2006) 54:5 U Kan L Rev 1457 at 1457.

[5] Ibid, quoting Barry Siegel, "Dilemmas of Settling in Secret: Companies Offer Hefty Sums in Exchange for Keeping the Details of Public-Hazard Lawsuits Quiet. Plaintiffs Must Choose Their Own Interest or the Public Good," L.A. Times, Apr. 5, 1991, at Al, quoted in Christine Hughes, Confidential Settlements: A White Paper 3 (2003).

disclosing "confidential information."[6] Another U.S. study found that one third of all employees in the U.S. had similar NDAs in their employment contracts.[7] A study by TeamBlind Inc. found that 15% of surveyed workers in the technology industry had been silenced from speaking out about important issues through NDAs, and that similar rates existed in the hospitality industry.[8] The Free Legal Advice Centre reviewed their files from 2017-present and found 4 out of 10 discrimination cases they had settled included an NDA in the settlement agreement.[9]

NDAs were not originally intended to shield harassers from accountability or protect the reputation of employers. They were used to protect companies from having important trade secrets passed to competitors by their own employees. Individuals and companies have since co-opted NDAs to protect their reputations and hide public health hazards. NDAs are routinely added to settlement agreements and employment contracts, particularly in situations of sexual harassment, making it difficult for complainants to resolve their matter without signing one.

B. Types and Scope of NDAs

An NDA is a signed legal document that restricts one or more of the signatories from sharing certain information designated as "confidential" by the NDA. It usually means the person signing cannot disclose information about a specific event, series of events, misconduct such as sexual harassment or discrimination, the conduct of an employer, and/or the terms of the NDA itself. NDAs are usually a part of a larger contract, such as a settlement agreement, release, arbitration or mediation agreement, employment contract, or termination of employment agreement.

NDAs are sometimes referred to as "confidentiality clauses," although the term "confidentiality clause" can refer to an agreement to keep only some information private, such as the terms of a settlement agreement, but not to any other information. In this paper, we use the term "NDA" generally to refer to confidentiality clauses that seek to keep the underlying facts of the claim or other conduct confidential.

Generally, NDAs do not have a time limit. A signatory to an NDA is bound by it for life unless it specifies otherwise. Additionally, someone who has signed an NDA may not even be able to disclose the fact that they signed an NDA.

1. NDAs in Settlement Agreements

NDAs in settlement agreements have arguably received more public attention than other types of NDAs.[10] It is often in settlement negotiations where complainants are particularly vulnerable, oftentimes in the

[6] Spooner, supra note 2, at 336.
[7] Emily Otte, "Toxic Secrecy: Non-Disclosure Agreements and #MeToo", (2020) 69:3 Kan L Rev 545 at 551.
[8] Olivia Leahy, "The Channel 4 News Women are Just the Tip of the Iceberg – Have Women of Colour Been Disproportionately Silenced via NDAs for Years?" online: Speak Out Revolution <https://www.speakoutrevolution.co.uk/the-speak-out-blogs/vsllc12tng5vff83uqilxgn7uyrxaj>.
[9] Ireland, Department of Children, Equality, Disability, Integration, and Youth, *The Prevalence and use of Non-Disclosure Agreements (NDAs) in discrimination and sexual harassment disputes,* (Dublin: The Department of Children, Equality, Disability, Integration, and Youth, 2022.) ("Ireland Report")
[10] Kim Elsesser, "Five Years After #MeToo, NDAs Are Still Silencing Victims" (March 21, 2022) online: Forbes, <https://www.forbes.com/sites/kimelsesser/2022/03/21/five-years-after-metoo-ndas-are-still-silencing-victims/?sh=5310da00588b> ; Elizabeth Tippet, "Non-Disclosure Agreements and the #MeToo Movement" (2019) online: American Bar Association: Dispute Resolution Magazine

thick of sexual misconduct-induced trauma and needing a financial settlement to survive. Employers are usually on the other side of the "table," holding the purse strings and the power.

Perpetrators want a complainant's silence, so their reputation is undamaged, and to protect themselves from other legal liability. NDAs effectively allow the perpetrator to continue their misconduct with an unblemished background. Employers may seek NDAs in settlements to avoid the risk of opening the door to further liability from others who have been affected by the same behavior but who haven't yet spoken up, to shield their public reputation, or to avoid being pressured into making systemic change to their workplace culture and handling of sexual harassment complaints.

Confidentiality clauses are not an implied term of settlement. A party cannot include a confidentiality clause in a settlement agreement unless it is specifically negotiated.[11] When the parties have agreed to include a confidentiality clause as a part of settlement, the parties agree they will not disclose certain information covered by the agreement.

Some confidentiality clauses might only seek to keep the settlement amount secret, while others may restrict parties from talking about the settlement negotiations, or the underlying facts of the claim. Settlement agreements can also contain non-disparagement clauses which prohibit someone from saying anything negative about the other party, even if it's true.

2. Pre-emptive NDAs

Pre-emptive NDAs are often found in employment contracts. These types of NDAs prevent employees from discussing the employer's trade secrets or other confidential information. This means that someone signing a pre-emptive NDA doesn't even know what information they are promising to keep secret at the time of signing. However, not all pre-emptive NDAs prohibit an employee from disclosing misconduct. Some may only seek to keep other business information confidential, such as trade secrets.

3. Non-Disparagement Clauses

A non-disparagement clause can appear in a settlement agreement or a pre-emptive NDA. Non-disparagement clauses prevent the signatory from ever speaking negatively about the other party, often the employer. This means, that someone who signs a non-disparagement clause cannot say anything that casts a negative light on the other party, even if their comments are true. This type of NDA was commonly used in Harvey Weinstein's film production company.[12] This type of NDA shields perpetrators from legal and reputational risk.

<https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/> ; Sara Ganim and Sunlen Serfaty, "Why some victims of sexual harassment can't speak out" (November 24, 2017) online: CNN Politics <https://www.cnn.com/2017/11/24/politics/non-disclosure-agreements-sexual-harassment/index.html >

[11] *Abouchar v. Conseil scolaire de langue française d'Ottawa-Carleton - Section publique, 2002 CanLII 49423 (ON SC)*) <https://www.canlii.org/en/on/onsc/doc/2002/2002canlii49423/2002canlii49423.html> ; *Dube v. Shooman*, 2013 ONSC 4348 < https://www.canlii.org/en/on/onsc/doc/2013/2013onsc4348/2013onsc4348.html>

[12] Otte, supra note 7, at 551.

4. Employment Termination Agreements

Employers commonly include NDAs and/or non-disparagement clauses in employment termination agreements or severance packages, whether they are aware of any past misconduct or not. Employees being presented with termination agreements usually need to agree to the terms, including the NDA and/or non-disparagement clause, in order to receive the termination or severance package they are being offered. In these cases, the employer has significantly more bargaining power than the employee whose employment is being terminated, and employees may sign because of their financial need.

II. The Harms Caused by NDAs

The way NDAs are currently used to silence complainants of sexual harassment negatively impacts individuals, the administration of justice, and public safety. Being silenced and unable to seek support can cause a host of negative mental, emotional, and physical health problems, layered on top of trauma already caused by the sexual misconduct. Even though NDAs cannot prevent someone from reporting a crime to the police, signatories often misunderstand or are misled to believe they cannot speak to *anyone*, preventing them from reporting to the police. Clauses are sometimes drafted so broadly that someone is barred from, or afraid to, seeking the support of a counsellor. Employers and harassers often rely on NDAs to keep misconduct secret and protect their reputations, allowing perpetrators to move from workplace to workplace without warning to the public of the danger they pose and allowing employers to cover up harassment instead of creating safer workplaces. Signatories are often unclear about the extent of the NDA's powers and may be concerned that they are breaching their NDA by talking about it, even anonymously for research purposes.[13]

A. Lessons from #MeToo

The #MeToo movement exposed a glut of influential men who used their power to sexually harass, abuse, bully, and intimidate women.[14] Many of these men were able to hide their misdeeds in plain sight under the shield of non-disclosure agreements, many of which were signed by women suffering the mental and emotional aftermath of the sexual misconduct and who were under enormous pressure by the harasser and employer.

Zelda Perkins, former assistant to film producer Harvey Weinstein, famously broke the NDA she signed with Weinstein. Perkins called the process of drafting the non-disclosure agreement in her settlement agreement "incredibly distressing" and felt her own lawyers were not supportive, leaving her feeling isolated.[15] Weinstein also sexually abused Ambra Battilana Guitierrez, who said that when she signed her

[13] Ireland report, supra note 9, at 13.
[14] Ronan Farrow, "Harvey Weinstein's Secret Settlements" (Nov. 21, 2017), online: The New Yorker, https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements [https:// perma.cc/8XLC-NVN4] [hereinafter Farrow, *Harvey Weinstein's Secret Settlements*].
[15] Otte, supra note 7, at 565 citing Matthew Garrahan, "Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims," (Oct. 23, 2017), online: Financial Times <https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589> [https://perma.cc/2VJH-BYDY].

NDA she was "really disoriented" and that she "didn't even understand…what [she] was doing with all those papers…"[16]

Even though #MeToo uncovered a colossal number of serial predators hidden by NDAs, there are undoubtably countless more still protected.

B. Bargaining Power

Some who are opposed to legislation restricting NDAs have argued harassers and employers may be willing to pay a higher price for secrecy than a complainant may be awarded by a court or tribunal.[17] The argument is that some complainants may be satisfied with the tradeoff they receive. However, this perspective fails to account for the fact that sexual harassment, as with most other forms of discrimination, is rooted in power imbalances.[18] Even leaving aside the fact that marginalized groups are significantly more likely to face sexual harassment in the workplace (see below), there is an inherent power imbalance between an employer and an employee. [19] An employee will almost always have unequal bargaining power relative to their employer, which can present significant obstacles to negotiating a settlement. Many employees fear retaliation, being treated differently at work, or simply being fired if they raise concerns about sexual harassment.

Additionally, employees usually lack the same access to resources and legal support that their employers have, and this disparity has been associated with unethical practices. For instance, some signatories report not being allowed to keep a copy of the document they signed,[20] signing without access to independent legal advice,[21] and feeling coerced or rushed into signing an NDA.[22] In some cases, NDAs may appear in a larger document that also contains important clauses that a complainant needs in order to feel safe. They may feel that the only way to get their safety concerns addressed is by signing the NDA.

Even if accepting that some employers and harassers would pay more to keep a complainant silent, it is nearly impossible to know what an appropriate settlement amount is without understanding the legal exposure a respondent faces if the claims were to become public.[23] Complainant counsel do their best to evaluate the value of their client's claims; but when the respondent(s) ask for an NDA, counsel would ideally be able to identify how much their client's silence is worth. However, only a complainant with information about the extent of the sexual misconduct would be able to identify how much they should ask for in exchange for an NDA.[24] Because NDAs can obscure the number and identity of other people harmed by the perpetrator's behavior, complainants and their counsel risk undervaluing their claim.[25] This

[16] Farrow, supra note 14.
[17] Howard Levitt, "Why abolishing NDAs doesn't do the victims of harassment any favours" (September 9, 2022) online: Financial Post <https://financialpost.com/fp-work/howard-levitt-abolishing-ndas-harassment-victims>
[18] Anne-Marie Slaughter, "Sexual harassment is rooted in power imbalances," (October 26, 2017) online: Financial Times < https://www.ft.com/content/1d624ee0-b8af-11e7-bff8-f9946607a6ba>
[19] Spooner, supra note 2, at 348.
[20] Spooner, supra note 2, at 339.
[21] Ireland Report, supra note 8, at 35.
[22] Ibid.
[23] Otte, supa note 7, at 560
[24] Ibid.
[25] Ibid.

information asymmetry gives the perpetrator and employer all the bargaining power and harms the complainant's ability to seek justice.[26]

It is also important to remember that the purpose of a settlement is to compensate for a wrong which has occurred. Many complainants that have experienced discrimination, especially sexual harassment, do not feel that money alone—even a substantial amount of it—can truly compensate for what has happened to them.

C. Negative Impacts on the Complainant

The use of non-disclosure and non-disparagement clauses in sexual harassment claims can continue to traumatize those silenced by them. Using NDAs "extends the healing process indefinitely by its mandate of secrecy, while perpetuating the occurrences of workplace sexual harassment, thereby allowing the harasser and employer to escape accountability."[27] There is a link between secrets and physical and mental illness. Studies have shown that people hiding personal traumatic secrets display more signs of poor health, such as "hypertension, influenza, cancer, and other disease.[28] 95% of those who report signing an NDA experience negative impacts on their mental health.[29] Conversely, there are health benefits to confiding in others. Research shows that revealing secrets "can reduce rumination and worry, freeing up mental quagmires that hinder social relationships. Putting experiences into words has a powerful effect on the healing process.[30] Many signatories experience feelings of isolation as they are prohibited from confiding in friends, family, and counsellors, with some going on to develop Post Traumatic Stress Disorder (PTSD).[31] The isolation and silencing of complainants of sexual harassment exemplifies the trauma NDAs cause complainants while they are already in the process of trying to heal from sexual misconduct.

Additionally, many NDAs effectively silence complainants even when they lack the legal "teeth" to do so. Some NDAs have the effect of misleading the complainant to believe they cannot report a crime that is covered by the NDA. Many NDAs may not be enforceable if they were signed under duress or coercion or if they are void as against public policy. However, in order to test whether their NDA is unenforceable a complainant would have to break their NDA, be sued by the other party for breach of contract, and defend themselves in court. This is a risky and costly burden for someone to bear who has already been traumatized by sexual misconduct and a taxing legal battle.

Complainants who sign NDAs and lost their jobs may be unable to find work in their sector with an NDA preventing them from fully explaining the gap in their employment history. This can be a significant barrier given that people who report sexual harassment often face serious retaliation. In a BBC News interview with Nuala Walsh, Founding Director of *the Global Association of Applied Behavioural Scientists*, Walsh

[26] Ibid.
[27] Bernadette Baum, "Workplace Sexual Harassment in the "Me Too" Era: The Unforeseen Consequences of Confidential Settlement Agreements," (2019) 31:1, Journal of Business and Behavioral Sciences 4 at 8
[28] Ibid at 9-10, citing K.J. Petrie, R.J. Booth, J.W. Pennebaker, K.P. Davison & M.G. Thomas, "Disclosure of trauma and immune response to a hepatitis B vaccination program" (1995) 63:5 *Journal of Consulting and Clinical Psychology,* 787–792.
[29] Leahy, supra note 8.
[30] Baum, supra note 27 at 9-10.
[31] Ireland Report, supra note 8, at 37

stated that her research showed that a majority of complainants regretted reporting because of the retaliation they received after.[32] She referenced a study by *California Law Review* that showed 82% of complainants experiencing harassment after whistle blowing, 60% being fired, 17% losing their homes, and 10% committing suicide.[33] NDAs limit someone's ability to explain why they left their last job and why they may not have positive references from their previous employment. While some complainants want confidentiality over their claim because of fears that their professional reputation could be harmed if others in their industry knew about their claim, others need to be able to discuss what happened to them in order to find another job.

We have heard from clients who signed an NDA 15-25 years ago who talk about how they live in a constant fear they may break it. That they see the harasser have a career that flourished while they struggled to explain why they left working with such a well-known person or employer, and are unable to explain the gap on their resumé having been unable to work due to mental health issues caused by the sexual harassment. As lawyers in assisting complainants to reach a settlement in sexual harassment cases we see all types of NDAs and attempt to carve out exceptions that the client will find acceptable and make them feel safe. During those discussions, invariably the complainant raises how they cannot believe the employer is trying to silence and control them, often after feeling beaten down through the negotiation, and how this further continues the abuse and harassment. Sometimes negotiations of exclusion wording take months, this wears on the complainant's mental health. In some cases, the complainant endures the process until reaching some wording that is palatable; more often than not they are worn down and give in. The latter is more likely when they are in financial difficulties, where their mental health issues may be preventing them from working or they are retraining as they are unable to continue to work in their original occupation due to the trauma of the harassment.

D. Disproportional Use on the More Marginalized

NDAs disproportionately affect marginalized groups, demonstrating that the current use of NDAs represents an important equity concern. Anonymous data collected by Speak Out Revolution reveals that racialized women are disproportionately silenced by NDAs after formally reporting unfair treatment in their workplaces. Black women were more likely to report having signed an NDA (75%) compared to their White counterparts (28%). Women were also more likely to have been silenced via NDA (29%) versus men (18%). NDAs also affect women in some age categories more than others. 33% of those 18-24-years old who formally reported unfair treatment subsequently signed NDAs, and 43% of those over 55-years old[34].

While NDAs appear to be widely used across all company levels in a wide range of industries, people earning lower incomes are likely to be more affected by NDAs. Data shows that sexual harassment is especially common in industries dominated by workers earning low wages.[35] This suggests that

[32] Ireland Report, supra note 8, at 36, citing Nuala Walsh, "Sexual Harassment: Can Smart Tech Help?" (June 16, 2021), Business Daily (Podcast), BBC News.
[33] Ibid.
[34] Leahy, supra note 8.
[35] Otte, supra note 7, at 561, citing David A. Hoffman & Erik Lampmann, "Hushing Contracts", 97 Wash U L Rev 165 and 186 (2019).

complainants of sexual misconduct are most often those who are likely to need the financial compensation the most and may be more likely to settle for lower amounts.[36]

E. Public Safety Risks

The unchecked use of NDAs in sexual harassment cases puts the safety of the public at risk. NDAs hiding sexual misconduct "allow patterns of abuse to continue undetected within an organization, contributing to an organisational culture in which sexual harassment and discrimination become endemic."[37] Even though employers have the obligation to investigate and address workplace sexual harassment when there has been a complaint, employers might instead ask the complainant to sign an NDA to protect the reputation of the organization and harasser, and shield them from future litigation. When protect by confidentiality, employers may not take the steps necessary to make sure the workplace is safe from the harassment complained of, leaving the rest of the workers open to the same treatment. Without the ability to get information about other workplace sexual harassment complaints, others who try bringing complaints might have no information about how widespread the conduct is. Enforced secrecy through NDAs makes it possible for organizations to avoid making the structural and cultural shifts in their work environments necessary to protect their workers from harassment.

NDAs can facilitate perpetrators transferring from one job to another where they can continue their behavior without warning to others. Serial harassers can hide their conduct behind NDAs and continue moving from job-to-job, ascending professional ladders. They can continue to gain professional clout while those they harassed are unable to warn others about the risk the harasser might pose.

III. Campaign Against NDAs

Since #MeToo, there has been increased attention and public outcry to the use of NDAs in sexual misconduct cases. This has given rise to a global groundswell of advocacy to restrict their use. A few examples include:

Can't Buy My Silence

Can't Buy My Silence is a global campaign founded by English activist Zelda Perkins, Harvey Weinstein's former assistant, and Canadian University of Windsor professor emeritus Julie Macfarlane both survivors of sexual abuse themselves. [38] Can't Buy My Silence aims to push for worldwide legislative and regulatory change that will make NDAs unenforceable for any purpose beyond protecting trade secrets or confidential business information.[39] They were directly involved in the development of anti-NDA legislation in Ireland and PEI.[40] In January 2022, Can't Buy My Silence partnered with English Minister for Further and Higher Education Michelle Donelan to mount a campaign encouraging English universities to sign a pledge committing to not using NDAs to silence victims and survivors.[41]

---

[36] Ibid.
[37] Ireland Report, supra note 8, at 6
[38] "Who We Are" (2022), online: Can't Buy My Silence <https://www.cantbuymysilence.com/about>
[39] "The Campaign Goal" (2022) online: Can't Buy My Silence <https://www.cantbuymysilence.com/about>
[40] Ibid.
[41] "Universities Pledge" (2022) online: Can't Buy My Silence <https://www.cantbuymysilence.com/uni-pledge>

Lift Our Voices

Lift Our Voices is an American nonprofit which is dedicated to campaigning for elimination of workplace NDAs for "toxic work issues". To that end, they work to "illuminate the negative impact of NDAs" and "educate the public about state and local laws regulating their use."[42] Lift Our Voices was co-founded by Gretchen Carlson, the journalist and former Fox News anchor who famously filed a sexual harassment lawsuit against Roger Ailes in 2016.[43] Recently, Lift Our Voices has gathered support from major corporations, including Wells Fargo and Conde Nast, who have committed to eliminating NDAS for matters involving harassment and discrimination, and successfully called upon numerous presidential candidates to support a ban on NDAs for workplace harassment and discrimination.[44]

NWCI (National Women's Council of Ireland)

The National Women's Council of Ireland is an Irish non-governmental organization which advocates for gender equality and the advancement of women's rights. They have affirmed the need for reform, arguing that employers should be prohibited from silencing workers who have been subjected to discriminatory or harassing behaviour with NDAs.[45]

Speak Out Revolution

Speak Out Revolution is an English nonprofit, founded in 2020, which seeks to empower those affected by harassment and bullying in the workplace to share their experience, and to hold employers and harassers accountable.[46] To that end, they have created the Speak Out Dashboard.[47] Speak Out Revolution collects data anonymously from people who have experienced workplace harassment all over the world, including about NDAs, and makes the data accessible in an online dashboard. Their goal is for human resource professionals, campaigners, and other interested parties to use the data to "make a difference for more inclusive workplaces."[48] Can't Buy My Silence and Community Legal Assistance Society partner with Speak Out Revolution.

Community Legal Assistance Society – SHARP Workplaces

Community Legal Assistance Society (CLAS), a nonprofit providing legal assistance based in Vancouver, BC and Ending Violence Association of BC, a provincial anti-violence umbrella organization, launched the Sexual Harassment Advice, Response, and Prevention for Workplaces (SHARP Workplaces) program in 2020. CLAS operates the SHARP Workplaces Legal Advice Clinic providing free legal advice to anyone who experiences workplace sexual harassment in B.C., and EVA BC leads the public education component. In September of 2022, CLAS's SHARP Workplaces Legal Advice Clinic launched a campaign against the misuse

[42] "Who We Are" online: Lift Our Voices <https://www.liftourvoices.org/>
[43] "Gretchen Carlson" online: Lift Our Voices <https://www.liftourvoices.org/gretchen_carlson>
[44] "Here is What Lift Our Voices Has Been Up to in the Past Few Months" online: Lift Our Voices <https://www.liftourvoices.org/wins>
[45] Ireland Report, supra note 8, at 27.
[46] "The Speak Out Revolution" online: Speak Out Revolution <https://www.speakoutrevolution.co.uk/the-speak-out-revolution>
[47] "The Speak Out Dashboard" online: Speak Out Revolution <https://www.speakoutrevolution.co.uk/dashboard>
[48] Ibid

of NDAs. [49] CLAS partners with Can't Buy My Silence and Speak Out Revolution to educate and raise awareness about the reality of NDAs, and advocate for legislation in BC.[50]

IV. Legal and Policy Arguments Against NDAs in Human Rights-Based Claims

There are a number of legal and policy arguments against the use of NDAs in sexual harassment situations, and more broadly in other discrimination cases.

A. Health and Safety Legislation: Employer's Statutory Obligations

Every time a workplace safety concern is covered up by an NDA, an employer may be breaching their statutory obligations. The *Workers Compensation Act,* R.S.B.C. 2019, c.1 (the "*WCA*"), sets out the legislation framework of BC's workers' compensation system. The *WCA*, together with its regulations, the *Occupational Health and Safety Regulation,* B.C. Reg. 296/97 and the *Prevention Manual,* imposes various obligations on employers to prevent unsafe work conditions and to ensure workplaces are safe and healthy.

This legislative framework creates various rights for workers, including:

1. The right to know about hazards in the workplace;
2. The right to participate in the process of identifying and resolving workplace hazards;
3. The right to refuse to do unsafe work; and
4. The right not to be retaliated against for exercising health and safety rights or participating in workplace health and safety activities.

Covering up workplace sexual harassment with an NDA arguably violates the rights of other workers in that environment to know about health and safety hazards in their workplace. The legislation considers improper conduct, workplace violence, and bullying and harassment to be workplace hazards from which an employer must protect workers.[51] NDAs conceal a harasser's conduct from the rest of the workplace and prevents other workers from knowing that someone they work with could pose a danger to them.

Both employers and workers have obligations to report workplace hazards. Workers are obligated to report any hazard that is likely to endanger a worker or any other person to their supervisor or employer. Notably, employers must immediately report any serious injury to a worker to the Workers' Compensation Board (the "Board") and investigate these, as well as cases of less serious injury or serious near-misses. These investigations require involvement of a worker's representative and investigation reports must be sent to the Board, as well as joint occupational health and safety committees.[52] It follows that in order for

[49] Jennifer Khor, "Who Are We Really Protecting? The Use of Nondisclosure Agreements (NDA) in Sexual Harassment and Sexual Misconduct Cases" (September 26, 2022), online: Community Legal Assistance Society <https://clasbc.net/who-are-we-really-protecting-the-use-of-non-disclosure-agreements-nda-in-sexual-harassment-and-sexual-misconduct-cases/>
[50] Ibid.
[51] *OHS Regulation,* ss. 4.24–4.26 and *Prevention Manual*, policy item R4.25-1; *OHS Regulation,* ss. 4.27–4.31 and *Prevention Manual*, policy items R4.27-1, R4.28-1, R4.29-1, R4.29-2, R4.30-1, and R4.31-1; and *Prevention Manual*, policy items D3-115-1, D3-116-1, and D3-117-2.
[52] *Workers Compensation Act*, RSBC 2019, c 1, sections 69-71.

an employer to fulfill their statutory duties under the *WCA* and accompanying regulations they must report workplace sexual harassment. This may mean that employers who ask complainants to sign NDAs that would ultimately prevent disclosure to the Board and joint health and safety committees are in violation of their statutory obligations under the *WCA.* It is an offence under *WCA* if an employer fails to report a worker's injury to the Board (s. 150(6)). As *WCA* creates a statutory insurance scheme to benefit all British Columbians "by promoting occupational health and safety and protecting workers and other persons present at workplaces from work-related risks to their health and safety"[53] and investigating and reporting incidents is an essential component to prevention, an NDA cannot bar reporting to the Board.

Similar protections for federal workers and reporting requirements for federal employers exist.[54]

B. Public Policy

While the enforceability of NDAs in sexual harassment has not been tested in Canadian jurisprudence[55], if challenged they may be void as against public policy. As NDAs cause further harm to complainants, effectively cover up safety concerns permitting serial harassers to harm other individuals, and may also prevent a complainant from reporting to other authorities such as police or regulators, NDAs are arguably unenforceable on public policy grounds. A contract that contravenes fundamental values even where there has been no contravention of a legal obligation may be found to violate public policy.[56] NDAs cannot restrict reports to the police, statutory authorities, and professional regulators where the purpose of reporting is protection of the broader public good.[57] It is well established that a party cannot contract out of statutory rights and responsibilities where it would be contrary to public policy to do so.[58] Moreover, reports to law enforcement or regulatory bodies are privileged, meaning that they are without prejudice and cannot give rise to legal liability.[59]

---

[53] *Workers Compensation Act,* RSBC 2019, c 1, s14.

[54] *Work Place Harassment and Violence Prevention Regulations*, SOR 2020-130. Moreover, Section 36 of the regulations require employers submit an annual report including details of the number of occurrences related to sexual harassment and violence and non-sexual harassment and violence, occurrences under each prohibited ground of discrimination in s. 3(1) of the *Canadian Human Rights Act*, including information on locations of occurrences, professional relationships between parties, and length of time to resolution.

[55] No evidence of published decisions dealing with NDAs in sexual harassment cases has been found.

[56] Brandon Kain and Douglas T. Yoshida, "The Doctrine of Public Policy in Canadian Contract Law" in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2007) 1 at 18-28.

[57] *Ontario Human Rights Commission et al.* v. *Borough of Etobicoke* , 132 D.L.R. (3d) 14 1982 CanLII 15 (SCC) <https://www.canlii.org/en/ca/scc/doc/1982/1982canlii15/1982canlii15.html;>*Malaspina University-College Records, Re*, 2000 CanLII 14412 (BC IPC) <https://www.canlii.org/en/bc/bcipc/doc/2000/2000canlii14412/2000canlii14412.html>

[58] *Etobicoke*, supra note 58, at paras 213-214; *Fleming v Massey,* 2016 ONCA 70 <https://www.canlii.org/en/on/onca/doc/2016/2016onca70/2016onca70.html> at paras 29-33; *Future Four Agro Inc v Gustafson,* 2019 SKCA 68 < https://www.canlii.org/en/sk/skca/doc/2019/2019skca68/2019skca68.html> at paras 37-40.

[59] *R. v. Leipert*, 1997 1 SCR 281 at 14 <https://www.canlii.org/en/ca/scc/doc/1997/1997canlii367/1997canlii367.html> ; Hung v. Gardiner, 2003 BCCA 257 <https://www.canlii.org/en/bc/bcca/doc/2003/2003bcca257/2003bcca257.html> . Note that he U.S. Securities and Exchange Commission banned NDAs regarding securities regulation violations making it illegal not

In the USA there has been one case invalidating agreements that prevented disclosure of acts related to sexual harassment based on public policy grounds: *Equal Employment Opportunity Commission v. Astra USA Inc*.[60] The investigation by the Equal Employment Opportunity Commission into three sexual harassment charges against Astra was hampered by confidential settlement agreements. Out of ninety employees contacted, only twenty-six replied including one who reluctantly would not confirm whether she had entered a settlement agreement with Astra. Evidence was that Astra entered into at least eleven settlement agreements with employees who claimed to have been subjected to, or witnessed, sexual harassment. The court found enforcing the non-assistance provisions of the settlement agreements would seriously hinder the Commission's enforcement of laws against sexual harassment. It was held as a matter of public policy that "non-assistance" provisions in settlement agreements—that is, provisions which prohibited communication with the Commission and prohibited individuals from aiding the Commission's investigations—were void. In balancing the public interest, the court found that while public policy "strongly favors encouraging voluntary settlement of employment discrimination claims"[61] voiding the NDA terms did not disturb the finality of a negotiated settlement agreement, and this did not create substantial disincentive to reach a settlement.[62]

Another decision on NDAs in a similar situation is *Bowman v. Parma Board of Education,* where the Ohio court held that an NDA preventing a teacher's former employer from disclosing the reason for his termination to a future employer was void as against public policy.[63] The court said it would "expose [the] most vulnerable citizens to …unacceptable…harm."[64]

In an interview about the #MeToo movement, former U.S. Supreme Court Justice Ruth Bader Ginsburg said "…. whether we will see an end to the confidentiality pledge… I hope those agreements will not be enforced by courts."[65] However, asking complainants to defend themselves in litigation over the enforceability of their NDAs burdens them with an unreasonable task. In order for a court to rule that a particular NDA is unenforceable, it would require that a complainant breach their NDA and for the respondent to file a lawsuit against them. They would then bear the enormous burden, cost, and risk of taking the question of enforceability through the courts. If they lost, they could be liable to the other party for financial damages resulting from their breach of the contract. Even if an NDA is clearly unenforceable, the mere threat of having to litigate the issue has a chilling effecting on complainants disclosing the wrongdoing.[66]

---

only to enforce an NDA that sought to hide a securities regulation violation but made it illegal to ask an employee to enter into such an agreement: see Spooner, supra note 2 at 366.

[60] *Equal Employment Opportunity Commission v. Astra USA, Inc.* (1996) No. 96-1751 United States Court of Appeals, First Circuit, <https://caselaw.findlaw.com/us-1st-circuit/1120759.html>

[61] Ibid.

[62] Ibid.

[63] Ireland Report, supra note 8, at 22

[64] Ibid at 366.

[65] Joan Biskupic, "Ruth Bader Ginsburg 'skeptically hopeful' about preserving Roe v Wade and the court's future" (November 2, 2019), online: <https://lite.cnn.com/en/article/h_6aac3ef025a0bfe5d37aeed1a2002cbf>

[66] Spooner, supra note 2, at 370.

C. Duress and Unconscionability

A contract, or specific clauses, may be invalidated as unconscionable if found to be unfair or if signed under duress. There is little available case law where NDAs are challenged.[67] This may be attributed to the risk and costs faced by complainants in challenging these contracts in court. In *Coughlin v. Stonehouse Bed & Breakfast and another*[68], the BC Human Rights Tribunal rejected the complainant's argument to set aside a settlement agreement that included a non-disparagement clause for unconscionability. In considering the application to dismiss, the Tribunal rejected that the settlement was unconscionable noting that the plaintiff had legal representation for the negotiations of the settlement agreement.

In *Lobtok v. Loblaws oa Zehrs Store*[69], the Ontario Human Rights Tribunal rejected the complainant's claim that the settlement reached, negotiated by the complainant's union, was unconscionable. The settlement included a non-disparagement and confidentiality clause. As it was important to the complainant to be able to discuss what happened to her, the settlement included a clause that restricted the complainant from disclosing the detailed terms of the settlement, the name of the company, the name and location of the specific store, and the names and job titles of any employees. The union representative testified that this was unusually lenient. The Tribunal noted that there was a high threshold for establishing duress requiring a "coercion of the will"[70] which was not met. In considering unconscionability, the Tribunal found that the complainant failed to meet the two-part test articulated in *Uber v. Heller*[71] of an inequality of bargaining power and that it resulted in an unfair bargain that unduly benefited the stronger party. The Tribunal held that the settlement was not unfair because the complainant had the benefit of a union grievance process as well as advice from the union's legal counsel and the terms of the settlement included benefits to her.

Therefore, in both *Coughlin* and *Lobtok*, the decision of unconscionability turned on the fact that the complainants had legal advice at the time of settlement. Both complainants were self-represented in their human rights complaints.

In the United States, an arbitration agreement and NDA were found to be unconscionable in *Zuver v. Airtouch Communications Inc.*[72] of the Supreme Court of Washington because as it prevented the employee from demonstrating past patterns of discrimination. The court found this solely benefitted the employer. In *Baltazar v. Forever 21 Inc.*[73], a case that involved allegations of discrimination and harassment based on race and sex, the California Court of Appeal held that a confidentiality clause that accompanied the mandatory arbitration clause that stated: "all necessary steps will be taken to protect

---

[67] Bethany Lindsay, "Abuse and harassment survivors 'silenced' by non-disclosure agreements fight for change to B.C. law" (July 23, 2022) online: CBC News <https://www.cbc.ca/news/canada/british-columbia/abuse-and-harrassment-survivors-silenced-1.6520001>

[68] *Coughlin v. Stonehouse Bed & Breakfast and another*, 2019 BCHRT 232 <https://www.canlii.org/en/bc/bchrt/doc/2019/2019bchrt232/2019bchrt232.html>

[69] *Lontok v. Loblaws oa Zehrs Store*, 2021 HRTO 523 <https://www.canlii.org/en/on/onhrt/doc/2021/2021hrto523/2021hrto523.html>

[70] *Ibid*, at 42.

[71] *Uber Technologies Inc. v. Heller*, 2020 SCC 16. <https://www.canlii.org/en/ca/scc/doc/2020/2020scc16/2020scc16.html>

[72] *Zuver v. Airtouch Communications Inc.*, 153 Wn. 2d 293, 153 Wash. 2d 293, 103 P. 3d 753 (Wash. 2004)

[73] *Baltazar v. Forever 21 Inc.* 150 Cal. Rptr. 3d 845 (Cal. App. 2nd, 2013).

from public disclosure trade secrets and proprietary and confidential information" was sufficiently narrow to only apply to trade or commercial secrets.

D. Professional Ethics

It has been recognized that the justice system, and other legal dispute resolution processes, may be re-traumatizing. The focus on legal professionals adopting a trauma-informed approach in their practices has been gaining momentum in British Columbia and other jurisdictions. The choices lawyers make throughout our daily practice, whether it is how we interview a client, the way we deal with a self-represented litigant, or cross-examine a witness, can traumatize those involved.

While our profession is in the process of grappling with how it can minimize the harmful impacts of the legal system, we must also question whether using NDAs to silence sexual harassment complainants to protect the reputation of employers and harassers aligns with our professional obligations. Is the practice of using NDAs to silence sexual harassment complainants to protect the reputation of an employer and the accused harasser ethical? As the profession and other justice stakeholders move towards adopting a trauma-informed approach to practice, does this necessitate a limit on the broad use of NDAs?

1. United Kingdom

The professional ethical considerations that arise with NDAs have been considered in the United Kingdom where the Solicitors Regulation Authority (SRA) has issued a warning notice related to the use of NDAs.[74] While the SRA does not prohibit the use of NDAs, recognizing that there are legitimate uses for NDAs, it raises three areas of concern related to NDAs: 1) NDAs preventing reporting to regulators, including itself, and law enforcement agencies; 2) NDAs preventing someone from making disclosures protected by law, and 3) ensuring solicitors and law firms do not take unfair advantage of another party through the use of an NDA. Using an NDA improperly may lead to disciplinary action. The notice also reminds solicitors of their duty to report breaches of the SRA regulations. In articulating the SRA's expectations it states:

> Your duty to act in the best interest of your client does not override your professional obligations to uphold the proper administration of justice, act in a way that maintains public trust and confidence, and to act with independence and integrity.[75]

The Law Society of England and Wales has provided practice guidance in a practice note on NDAs and confidentiality clauses in an employment law context.[76] The practice note focuses on situations where confidentiality provisions are being used to prevent the disclosure of conduct or other circumstances, specifically related to harassment. The practice note reminds solicitors that "[w]here two or more mandatory principles are in conflict, the principle which takes precedence is the one which best serves the public interest…, especially… in the proper administration of justice." The practice note sets out guidance related to drafting and using NDAs:

---

[74] *Warning notice: Use of non disclosure agreements (NDAs)*, Solicitors Regulation Authority, updated 12 November 2020 (date first published: 12 March 2018). https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/

[75] Ibid

[76] "Non-disclosure agreements and confidentiality clauses in an employment law context, "(December 12, 2019), online: Practice Note, The Law Society. 12 Dec 2019. <https://www.lawsociety.org.uk/topics/employment/non-disclosure-agreements-and-confidentiality-clauses-in-an-employment-law-context>

- They cannot prevent reporting of illegal activities;
- They cannot prevent reporting under the *Employment Act* 1996, and *Public Interest Disclosure Act* 1998 (whistleblowing);
- It would not be normal to prohibit disclosure to any professionals for legal or tax advisory, medical or therapeutic reasons;
- (Partial) disclosure to others may be required to comply with the agreement, such as HR administrators, line managers, prospective employers;
- For clarity clauses that set out exceptions or restrictions on any broad duty of confidentiality may be included;
- To ensure the agreement is understood, parties should be given time and opportunity to obtain independent legal advice;
- The parties should normally be provided with a copy of the agreement; and
- Solicitors should consider possible conflicts of interests in these situations.

2. United States

In the USA, it has been argued that secrecy clauses in settlements undermine the effective functioning of the adversarial system and the fair opportunity for lawyers to gather evidence without interference in violation of Rules 3.4(f) and 5.6(b) of the Model Rules of Professional Conduct.[77] Rule 3.4(f)[78] addresses requesting "a person other than a client refrain from voluntarily giving relevant information to another party." The exception to ask a client's employees not to cooperate with adversaries only applies to current employees. NDAs that prohibit discussion of underlying facts and fail to make exceptions for disclosure to other litigants have been found to violate this rule by the ethics committees of the Indiana, Chicago, and Connecticut Bar Associations. Interestingly, Rule 5.6(b) prevents agreements that restrict a lawyer's right to practice as part of a settlement. The D.C. Bar Legal Ethics Committee indicated that secret settlements prevent lawyers from disclosing their relevant experience, interfering with a client's ability to identify experienced lawyers. As in the UK, lawyers are prohibited from "engaging in conduct that is prejudicial to the administration of justice."[79]

3. British Columbia

Similar to the United Kingdom and the United States, the legal profession in Canada, including British Columbia, has a duty to ensure the proper administration of justice. The Standards of the Legal Profession are set out in Chapter 2 of the Code of Professional Conduct for British Columbia[80]. Rule 2.1 Canons of Legal Ethics indicates the canons state general principles that underlie all the rules and:

> …it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and to demonstrate personal integrity.

---

[77] Patrick Malone and Jon Bauer, "When Secret Settlements are Unethical"*, The Trial*, American Association for Justice, May 2015 (originally published September 2010).
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1631844

[78] A version of this rule has been adopted by every state. *Ibid* (Malone and Bauer), at 3.

[79] *Model Rules of Professional Conduct*, Rule 8.4(d), American Bar Association.

[80] *Code of Professional Conduct for British Columbia*, effective January 1, 2013; updated September 2022.

Rule 2.1-1 (a) further states that:

> A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

Regarding public trust and confidence Rule 5.6-1 states:

> A lawyer must encourage public respect for and try to improve the administration of justice.

Lawyers must act with integrity, and owe a duty not only to their clients, and tribunals, but also to the public as stated in Rule 2.2-1:

> A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

The duty to advocate for one's client is limited by a lawyer's general duties, which may occasionally be lost in the passion of negotiations. It may be trite to state that lawyers should not ask someone to sign NDA who is under duress, being coerced, or where it is against public policy. However, where lawyers may be dealing with an unrepresented party, particularly one that has lived through a traumatic event, counsel need to take particular care not to overstep. An analysis of the legal profession's responsibilities under the Code related to the use of NDAs may similarly follow the reasoning of the SRA and the Law Society of the United Kingdom.

E. Legislation Restricting Use of NDAs

A number of jurisdictions have already sought to mitigate the harmful effects of NDAs by passing legislation limiting their use in sexual harassment and/or discrimination cases.

There are significant differences among anti-NDA legislation, both existing and proposed. In Canada, the legislation is very similar from province to province and primarily modelled after Ireland's legislation. The United States, on the other hand, shows considerably more variation between state laws. **Appendix A** contains a summary table of some of the key features of the different legislation.

The following is a brief overview of the existing and proposed legislation seeking to limit the use of NDAs.

1. Canada

As of October 2022, Prince Edward Island is the only Canadian province to have passed legislation restricting the use NDAs in the context of sexual harassment. However, Manitoba and Nova Scotia have both introduced bills, neither of which has yet been passed. Federally, Manitoba Senator Marilou McPhedran has announced plans to introduce legislation on non-disclosure agreements in September 2022.[81]

[81] Dylan Robertson, "Senator wants to end federal non-disclosure agreements silencing misconduct victims" (August 11, 2022) online: Winnipeg Free Press <https://www.winnipegfreepress.com/breakingnews/2022/08/11/senator-wants-to-end-federal-non-disclosure-agreements-silencing-misconduct-victims>

Prince Edward Island

The PEI Legislature passed the *Non-disclosure Agreements Act* unanimously on November 17, 2021, making PEI the first Canadian jurisdiction to place limits on NDAs.[82] The bill was introduced as a private member's bill by MLA Lynne Lund.[83] It bars NDAs relating to harassment or discrimination unless an NDA is the wish and preference of the person subjected to the discrimination and harassment.[84] The *Act* is not limited to sexual harassment or assault. Harassment is defined broadly as "any action, conduct or comment that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to a person," including, of course, "conduct or comments of a sexual nature."[85]

When an NDA *is* the expressed wish and preference of a complainant, it is only valid if it meets certain conditions. The individual must have had the opportunity to receive independent legal advice; there cannot have been any "undue attempts to influence" the individual; the agreement must not adversely impact a third party or the public interest; there must be an opportunity for the individual to choose to waive their own confidentiality in the future; and the agreement must be of a set and limited duration.[86] If the NDA does not comply with any of these conditions, it is null and void. [87]

The *Act* also sets out that even when an NDA is entered into at the request of the victim and in compliance with the established restrictions, certain classes of persons will be exempt. An individual may discuss the circumstances which are the subject of an NDA with, for example, a psychologist, a lawyer, a doctor, or a community elder.

Nova Scotia

In Nova Scotia, a private member's bill seeking to limit the use of NDAs, Bill 144, underwent its first reading on April 7, 2022.[88] It too will be called the *Non-disclosure Agreements Act* if it is successfully passed in the Legislature. It was modelled after both the PEI *Non-disclosure Agreements Act* and California legislation restricting the use of NDAs. The text of the Nova Scotia bill is substantially lifted from the PEI legislation: it sets out the same conditions for a valid NDA and establishes the same exemptions.[89]

Manitoba

Manitoba's proposed legislation, Bill 225, was introduced by the Manitoba Liberals on April 26, 2022.[90] Like Nova Scotia's, it is closely modelled on PEI's legislation, with respect to scope, exceptions, and conditions for validity.

---

[82] Shane Ross, "Victims no longer silenced as landmark legislation takes effect on P.E.I.," (May 17, 2022) online: CBC News <https://www.cbc.ca/news/canada/prince-edward-island/pei-non-disclosure-agreement-legislation-1.6456439>

[83] Ibid.

[84] Non-disclosure Agreements Act, RSPEI 1988, c N-3.02 ("PEI Act").

[85] Ibid.

[86] Ibid.

[87] Ibid.

[88] Bill 144, *An Act Respecting Non-disclosure Agreements*, 1st Sess, 64th Leg, Nova Scotia, 2022.

[89] Ibid.

[90] "Bill to Ban Abuse of Non-Disclosure Agreements in Harassment, Bullying, and Misconduct Cases," (April 26, 2022) online: Manitoba Liberals <https://www.manitobaliberals.ca/post/bill-to-ban-abuse-of-non-disclosure-agreements-in-harassment-bullying-and-misconduct-cases>

Federal

Unaffiliated Manitoba Senator Marilou McPhedran plans to introduce legislation on non-disclosure agreements in September of 2022, but there are currently no other federal plans in place to move towards restricting their use.[91]

2. United States

Over the past few years, an ever-increasing number of American states have moved to limit or ban outright the use of NDAs in the context of sexual harassment and other human rights violations. As of July 2022, a total of fifteen states have passed legislation that restricts NDAs: Arizona, California, Hawaii, Illinois, Maine, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Virginia, and Washington all currently have laws in place limiting the application of NDAs.[92] Legislation is pending in several other states. The existing legislation demonstrates a range of different approaches.

Some states have taken a relatively narrow approach. Arizona's legislation, for instance, only prohibits the use of an NDA to prevent a victim from testifying in a criminal proceeding, or to prevent a victim from speaking to a police officer.[93] In other contexts, such as a civil suit, for instance, NDAs are likely to continue to be enforceable. Some states have not banned NDAs explicitly but have placed implicit restrictions on their use: Maryland has introduced legislation which voids any provision in an employment contract which waives a right to a future claim for sexual harassment.[94]

Other states have a broader approach, and not all of them confine their NDA restrictions specifically to cases of sexual harassment. Several states have drafted legislation where NDAs are restricted in situations involving harassment or discrimination of any kind, including California, Illinois, Maine, New Jersey, New York, Oregon, and Washington State. Some states take further steps to include broader protections. New Jersey's legislation sets out that any waiver of a "substantive or procedural right or remedy" is legally unenforceable.[95] Illinois, meanwhile, bans *all* non-disclosure clauses in agreements between employers and employees (including independent contractors) regardless of subject matter.[96]

Some states also provide broader protection by setting out that their NDA restrictions operate retroactively. While some legislation specifies that only NDAs entered into after its passing will be deemed void, other legislation sets out that *all* non-disclosure agreements, clauses, or waivers are void from the time that the legislation is effective. A few states, including Illinois and Maryland, take a further step towards ensuring protection by establishing that employees who willingly enter into NDAs are entitled to attorney's fees.[97] Illinois also provides a week-long grace period, in which employees have seven calendar days after an NDA is signed to change their mind and revoke the agreement. [98]

---

[91] Robertson, supra note 79.
[92] Chris Marr, "States Expand Bans on Nondisclosure Pacts Beyond #MeToo Claims" (July 7, 2022) online: Bloomberg Law <https://news.bloomberglaw.com/daily-labor-report/states-expand-bans-on-nondisclosure-pacts-beyond-metoo-claims>
[93] Spooner, supra note 2, at 355.
[94] Ibid, at 357.
[95] Ibid, at 359.
[96] Ibid, at 346.
[97] Ibid.
[98] Ibid.

Few states are willing to introduce a ban on NDAs that is absolute and ineluctable. Many of the laws include a caveat that an NDA may be permissible and enforceable if, and only if, it is introduced at the request of the victim. California, Hawaii, Illinois, Maine, Nevada, New Mexico, New York, Oregon, and Vermont all include exceptions whereby a complainant can request a non-disclosure provision.[99]

The vast majority of anti-NDA legislation in America has been drafted in the context of employment: most laws apply specifically to employment contracts, or to settlement agreements between employers and employees.[100] Some states include the context of landlord and tenant relations within their scope, including California and Nevada. In contrast to the priorities of some other jurisdictions (see below) it is not clear how or if NDA restrictions might apply to a settlement agreement in the context of sexual abuse within, for example, a university. Arizona's legislation, uniquely, does not place limitations on its applicability: it appears to be drafted to apply within all contexts.[101]

The United States has also begun the process of introducing legislation at the federal level. A new bill, dubbed the Speak Out Act, was introduced in June of 2022.[102] As it currently reads, the Speak Out Act is broad in its application. It sets out that, in sexual assault or harassment cases, no NDA "shall be judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal, or State law."[103] This suggests that the law would operate retroactively and would not give complainants the option of choosing to enter into an NDA if they wanted to.

3. United Kingdom

A bill to restrict the use of NDAs, proposed by Conservative MP Dame Maria Miller, is at second reading in the House of Commons as of June 29, 2022. Additionally, the English Minister for Further and Higher Education, Michelle Donelan, is seeking to eliminate the use of NDAs for sexual harassment complaints on university campuses. In the wake of a 2020 BBC investigation which found that almost a third of universities had resolved student complaints with NDAs, Donelan is urging university vice-chancellors to sign a pledge to stop using NDAs on campus.[104]

4. Ireland

A bill to restrict the use of NDAs, Bill 2021 (i.e., the *Employment Equality (Amendment) (Non-Disclosure Agreements)* or *An Bille um Chomhionannas Fostaíochta (Leasú) (Comhaontuithe Neamhnochta*)[105] is currently making its way through the Irish legislature. Like some of the American legislation, it applies specifically to employer/employee relationships, and prevents employers from entering into NDAs with

---

[99] Ibid, at 355-363.
[100] Ibid.
[101] Ibid.
[102] Cat Zakrzewski, "NDAs can muzzle sexual harassment victims. Congress could change that" (June 27, 2022), online: Washington Post < https://www.washingtonpost.com/technology/2022/06/27/congress-ndas-bipartisan-legislation/>
[103] Ibid.
[104] Michele Donelan, "Universities pledge to end use of non-disclosure agreements" (January 18, 2022) online: United Kingdom Department of Education <https://www.gov.uk/government/news/universities-pledge-to-end-use-of-non-disclosure-agreements>
[105] An *Bille um Chomhionannas Fostaíochta (Leasú) (Comhaontuithe Neamhnochta*), 2021 / Employment Equality (Amendment) (Non-Disclosure Agreements) Bill 2021. ("Ireland Bill")

employees who have made allegations of sexual harassment or discrimination. As of July 6, the Bill is at the fourth stage of the Seanad Éireann, the upper house. This bill is a Private Member's bill, which originated in the Seanad Éireann, so it will make its way through the Seanad Éireann before progressing to the Dáil Éireann, the lower house.

5. Australia

In the state of Victoria, a Ministerial Taskforce on Workplace Sexual Harassment was established in March of 2021 to investigate the problem of sexual harassment in the workplace and propose reforms.[106] One of the reforms the Taskforce proposed was the introduction of legislative amendments to restrict the use of NDAs in relation to workplace sexual harassment. In July of 2022, the Victorian government accepted this recommendation in principle, noting the "complexity of NDAs and the significant further work required before any legislative amendments are made to NDAs."[107]

V. Towards a More Trauma-Informed Approach

Recognizing the harm that NDAs used to silence complainants perpetrate on the complainants, the public, and the administration of justice, and as the profession moves towards more trauma-informed practice, what can we do to address the harm?

A. Legislative Reform

Consider legislative reform to restrict the use of NDAs in specific situations, such as employment and sexual misconduct. Engage in the discussion on the specifics of possible legislation that best protect complainants or, at a minimum, does not cause further trauma, while still ensuring fairness and justice to all parties. Areas for discussion regarding possible legislation include:

1. Specify Exceptions

Exclusions to the application of NDAs may be specified in the legislation. This would make it clear that complainants were protected by absolute privilege in disclosing to relevant legal and regulatory authorities. Jurisdictions that have adopted NDA legislation have noted the strong public policy interests in ensuring that complainants are not barred from accessing certain legal or regulatory processes, especially co-operating with existing or future criminal investigations.

EXAMPLE: Vermont's Act relating to the prevention of sexual harassment establishes that:

> (2) An agreement to settle a sexual harassment claim shall expressly state that:
>
> > (A) it does not prohibit, prevent, or otherwise restrict the individual who made the claim from doing any of the following:
> >
> > > (i) lodging a complaint of sexual harassment committed by any person with the Attorney General, a State's Attorney, the Human Rights No. 183 Page 4 of 15 2018 VT LEG #333687 v.1 Commission, the Equal

[106] Victoria State Government, "Victorian Government response to the Ministerial Taskforce on Workplace Sexual Harassment," at 10.
[107] Ibid.

> Employment Opportunity Commission, or any other State or federal agency;
>
> (ii) testifying, assisting, or participating in any manner with an investigation related to a claim of sexual harassment conducted by the Attorney General, a State's Attorney, the Human Rights Commission, the Equal Employment Opportunity Commission, or any other State or federal agency.[108]

NDA legislation could also establish a list of categories of persons who would be exempt from their application.

EXAMPLE: PEI's legislation sets out that NDAs will not apply to:

> any communication relating to the harassment or discrimination between the relevant person and
>
> (i) a person whose duties include the enforcement of an enactment or Act of the Parliament of Canada, with respect to a matter within the person's power to investigate,
>
> (ii) a person authorized to practise law in the province pursuant to section 20 of the Legal Profession Act R.S.P.E.I. 1988, Cap. L-6.1,
>
> (iii) a medical practitioner as defined in the Interpretation Act R.S.P.E.I. 1988, Cap. I-8.1,
>
> (iv) a psychologist or psychological associate as defined in the Psychologists Act R.S.P.E.I. 1988, Cap. P-27.2,
>
> (v) a registered nurse or nurse practitioner as defined in the Registered Nurses Regulations (EC350/18) under the Regulated Health Professions Act R.S.P.E.I. 1988, Cap. R-10.1,
>
> (vi) a social worker as defined in the Social Work Act R.S.P.E.I. 1988, Cap. S-5;
>
> (vii) a person who provides victim services pursuant to the Victims of Crime Act R.S.P.E.I. 1988, Cap. V-3.1,
>
> (viii) a community elder, spiritual counsellor or counsellor who is providing culturally specific services to the relevant person,
>
> (ix) the Office of the Ombudsperson within the meaning of the Ombudsperson Act R.S.P.E.I. 1988, Cap. O-5.01,
>
> (x) a friend, a family member or personal supporter as specified or approved in the non-disclosure agreement, or
>
> (xi) a person or class of persons prescribed in the regulations.[109]

2. Applicability

The applicability of anti-NDA legislation may be broad or narrow. Some jurisdictions limit restrictions on NDAs to the employment context, and/or exclusively to cases involving sexual harassment. While it is true that many of the most egregious uses of NDAs concern workplace sexual harassment, legislation should take into account other human rights violations which may occur in other scenarios.

[108] No. 183, "An Act Relating to the Prevention of Sexual Harassment" Sec. 1. 21 V.S.A. § 495h. ("Vermont Act")
[109] PEI Act, supra note 82.

EXAMPLE: Some jurisdictions, such as California and Nevada, specify that their anti-NDA legislation applies to landlord and tenant scenarios, as well as the employment context. California's Code of Civil Procedure sets out, at s. 1001:

> (a) Notwithstanding any other law, a provision within a settlement agreement that prevents or restricts the disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action, regarding any of the following, is prohibited:
>
> […]
>
> (3) An act of workplace harassment or discrimination, failure to prevent an act of workplace harassment or discrimination, or an act of retaliation against a person for reporting or opposing harassment or discrimination, as described in subdivisions (a), (h), (i), (j), and (k) of Section 12940 of the Government Code.
>
> (4) An act of harassment or discrimination, or an act of retaliation against a person for reporting harassment or discrimination by the owner of a housing accommodation, as described in Section 12955 of the Government Code.[110]

Other jurisdictions' NDA legislation applies to all contexts. PEI's legislation, along with other legislations in development in other Canadian provinces, is broad in its applicability. It sets out that:

> no party responsible or person who committed or who is alleged to have committed harassment or discrimination shall enter into a nondisclosure agreement with a relevant person where
>
> a) the relevant person has experienced or made allegations of harassment or discrimination; and
>
> b) the non-disclosure agreement has the purpose or effect of concealing the details
>
> relating to a complaint of harassment or discrimination.[111]

3. Complete ban or allow NDA in specific circumstances

Broadly speaking, there are two options for implementing restrictions on NDAs. Some jurisdictions have chosen to pursue an outright ban, in which NDAs relating to certain types of discriminatory conduct are impermissible under any circumstances. Others have left the door open for NDAs as long as certain criteria are adhered to—for example, an NDA related to sexual assault or harassment might be enforceable only if proposed or agreed to by the complainant. There are merits and detriments to each approach. Some have argued that an outright ban may limit options for those who have experienced sexual harassment. An employer or harasser may be unwilling to confer a monetary settlement without motivation, in the form of an NDA, to do so.[112] This argument ignores the fact that it is almost always in the best interest of all partiers to reach a settlement to avoid the length, cost, and unpredictability of a hearing, and that

[110] *An Act to Amend Section 1001 of the Code of Civil Procedure, and to amend Section 12964.5 of the Government Code, relating to civil actions,* 2021, c 638. ("California Act")
[111] PEI Act, supra note 82.
[112] Levitt, supra note 17.

complainants are being compensated for the harm that has been caused. Additionally, some have argued that leaving the door open for some NDAs leaves the door open for their exploitation.[113]

EXAMPLE: Irish legislation sets out that:

> An employer may only enter into a non-disclosure agreement with a relevant employee in accordance with this section if such an agreement is the expressed wish and preference of the relevant employee concerned.[114]

Similarly, PEI's legislation sets out, at s. 4(2):

> A party responsible or person who committed or who is alleged to have committed harassment or discrimination may only enter into a non-disclosure agreement with a relevant person in accordance with this section if such an agreement is the expressed wish and preference of the relevant person concerned.

On the other hand, Hawaii places a unilateral ban on sexual harassment-related NDAs in the workplace:

> No employer shall require an employee to enter into a nondisclosure agreement that prevents the employee from disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work-related events, between employees, or between an employer and an employee.[115]

4. Time limits to NDAs

Legislation could establish time limits to NDAs: setting out that they will not be enforceable unless they are of a limited duration and expire after a set period of time.

EXAMPLE: PEI legislation establishes that:

> The agreement shall only be enforceable where […] the agreement is of a set and limited duration.

5. Retroactive

Most anti-NDA legislation is in effect from the date that it is passed. However, including provisions to place retroactive limitations on the use of NDAs would provide broader protection for survivors of sexual harassment and other human rights violations.

EXAMPLE: Washington's anti-NDA legislation is effective retroactively, but only respecting employment agreements, not settlement agreements:

> As an exercise of the state's police powers and for remedial purposes, this section is retroactive from the effective date of this section only to invalidate nondisclosure or nondisparagement provisions in agreements created before the effective date of this section and which were agreed to at the outset of employment or during the course of employment. This subsection allows the recovery of damages only to prevent the

[113] Elsesser, supra note 10.
[114] Ireland Bill, supra note 103.
[115] *Hawaii Revised Statutes*, s 378-2.2(a).

> enforcement of those provisions. This subsection does not apply to a nondisclosure or nondisparagement provision contained in an agreement to settle a legal claim.[116]

PEI's legislation, meanwhile, establishes at s. 5 that while NDAs which came into effect prior to the Act may still be valid, the established exemption categories will apply retroactively:

> Notwithstanding the provisions of a non-disclosure agreement entered into before the coming into force of this Act, no such agreement shall apply to disclosures permitted under subsections 4(6) and 4(7)

6. Independent Legal Advice

In order to address concerns about exploitative NDAs, even those ostensibly agreed to by the complainant, NDA-restricting legislation could mandate further criteria. For instance, some existing legislation sets out that a signatory to an NDA must receive independent legal advice before agreeing to it. Legislation could include a provision stating that a signatory must have a minimum number of days to obtain independent legal advice ("ILA"), or that the employer or other party must cover a reasonable portion of the lawyer's fees.

There remain challenges to ensuring comprehension and fairness with the provision of ILA, as counsel experienced in the practice area, with awareness of the possible long-term considerations for a complainant from a trauma-informed approach, may not readily be accessible. In the UK the Equity and Human Rights Commission recommended that employers pay for the ILA as a good practice. [117]

EXAMPLE: The PEI Non-disclosure Agreements Act establishes, at 4(3) that:

> Where a non-disclosure agreement is made under subsection (2), the agreement shall only be enforceable where […] the relevant person has had a reasonable opportunity to receive independent legal advice.[118]

7. Cooling off period

Another possible means of protecting the interests of complainants could be to include a "cooling-off period": that is, a certain number of days in which a complainant could choose to revoke an NDA after it has been signed.

EXAMPLE: Illinois legislation establishes that:

> unless knowingly and voluntarily waived by the employee, prospective employee, or former employee, he or she has 7 calendar days following the execution of the agreement to revoke the agreement and the agreement is not effective or enforceable until the revocation period has expired.[119]

---

[116] "Engrossed Substitute House Bill 1795," 2022. ("Washington Act")
[117] "Guidance: The use of confidentiality agreements in discrimination cases", (October 2019), online: Equality and Human Rights Commission, at 22. <https://www.equalityhumanrights.com/en/publication-download/use-confidentiality-agreements-discrimination-cases>
[118] PEI Act, supra note 82.
[119] *Workplace Transparency Act,* 820 ILCS 96 ("Illinois Act").

8. Protection against Retaliation

NDA legislation could also include provisions that would protect claimants against retaliation. Some existing legislation covers NDAs relating to claims of retaliation as well as harassment or discrimination, but future legislation could be expanded to protect individuals who agreed to sign an NDA but changed their minds, or took advantage of the "cooling-off period", from retaliation.

EXAMPLE: Washington legislation currently sets out

> A provision in an agreement by an employer and an employee not to disclose or discuss conduct, or the existence of a settlement involving conduct, that the employee reasonably believed under Washington state, federal, or common law to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual assault, or that is recognized as against a clear mandate of public policy, is void and unenforceable.[120]

9. Compensation/Fine if NDA violates legislation

NDA legislation could be enforced by means of a fine or other penalties for parties who violate it.

EXAMPLE: PEI legislation sets out, at s. 6, that:

> A party responsible or person who committed or is alleged to have committed harassment or discrimination who, after the coming into force of this Act, enters into a non-disclosure agreement that is not made in accordance with section 4, is guilty of an offence and is liable on summary conviction to a fine of not less than $2,000 or more than $10,000.[121]

B. Recognizing an NDA and Practical Tips when Negotiating Settlements

1. Recognizing NDAs

Releases generally always contain language requiring the complainant to keep the terms of the settlement confidential. As long as this language makes exceptions for family members, legal and financial advisors, and health care providers, it does not usually pose a problem. Often there will be language about requiring the complainant to obtain a promise of confidentiality from the recipient of any information. As long as the language only requires the complainant to obtain the promise, and not to guarantee it, that is not usually a problem either.

NDAs consist of any language that limits what the complainant can say about the misconduct, or poor respondent response to that misconduct, which forms the substance of their complaint. It can be expressed in quite general terms, such as "the complainant agrees not to disclose any information about the circumstances underlying this complaint", or something similar. Non-disparagement clauses contain language which requires the complainant not to say anything negative about the respondents, including any individual respondent, or any person or entity connected with the respondent, has the same effect or is even broader. The complaint is a form of negative commentary about the respondents.

[120] Washington Act, supra note 114.
[121] Ibid.

The difficulty with these requirements is that being constrained about what can be said about a traumatic experience often repeats the loss of control and subjugation of one's own needs to the needs or desires of another or others that is at the core of the discriminatory event in the first place. In a settlement both parties are seeking closure; having to continue to worry about how the respondents are going to respond to their comments or conduct is the opposite of closure for many complainants.

NDAs are extremely problematic when combined with clauses which say that a payment of a certain amount will need to be made if confidentiality provisions are breached. This is because such language makes the stakes for the complainants very high.

2. Strategies

The first line of defense to NDAs and non-disparagement clauses is simply to say no to them. This saves the complainant from the harm of them, which is often hard to anticipate. It can be difficult for complainants to predict how they will feel about not being permitted to speak about their own critical life experiences in future. It is also difficult to predict when the feelings from the misconduct will come up again, and in what form, and how these might need to be addressed in the moment.

Whether saying no is workable depends on how wedded to the language the respondents are. Often, refusing this language will be a deal-breaker in a settlement negotiation, at least in the early going. It may be then that the natural course of a human rights complaint will solve the problem, as a decision along the way may disclose the underlying facts, at least in general. However, desire for confidentiality can give rise to applications for anonymity, which the Tribunal does grant in some circumstances. Once there are decisions, even with anonymity in place, the opportunity to craft less restrictive language can be lost as any disclosure by the complainant can then reveal whom an anonymized decision is about.

If refusing an NDA outright is not an option for the complainant, seeking to limit the impact of the language agreed to may reduce the harm of an NDA.

Less restrictive language could include:

Limiting public forms of disclosure: An option is to try and agree to limit more public forms of disclosure such as publication on social media or some other public format. Sometimes this meets the real concerns of the respondents, which is not to be publicly disparaged. However, negotiation over this can get bogged down in concerns that even if the complainant agrees to forego publication in a broad context, someone they have spoken to may not.

Limiting what is disclosed: Another option is to permit discussion of events, but without identifying information. This can work very well if events have happened in a fairly generic context, such as a workplace, and it is not going to be that easy for others to determine which workplace, or when. It works less well in contexts where the institution and even the persons involved may be quite obvious, or may seem obvious to the respondents. This can be an issue in educational context as many people have more employers than places they went for education.

Limiting who can receive disclosure: A third option is to limit disclosure to health care providers and others who may already have an obligation of confidentiality with respect to private information, including employers. This can provide the respondents with some confidence that confidentiality will be maintained. Clearly, in considering alternative language, it is important to work with the complainant to

consider what forms of disclosure they may need to make in future for their own mental health. Examples of common exclusions include:

- Disclosure to immediate family members;
- Disclosure for legal/tax purposes;
- Disclosure in the context of ongoing investigations (criminal or regulatory) relating to the same or similar allegations;
- Disclosure to treating physicians, counsellors, psychologists;
- Disclosure in the event of criminal charges relating to same or substantially same allegations;
- Disclosure as part of recovery program (for example, Alcohol Anonymous) or other healing program; and
- Prospective employers or recruiters (with limited details).

Ultimately, the degree of resistance to NDAs depends to a great degree on whether complainants are willing to jeopardize a settlement to avoid them. The coercive element of NDAs comes into play when complainants are signing them because they need the matter to settle. If the complainant is not willing to put the settlement at risk, everything must be done that can be done to ensure that no pre-estimate of damages or flat damages is in place, as these clauses create real additional risk for complainants.

Finally, it is important to consider whether confidentiality is possible and practical in the circumstances. Complainants should not take on confidentiality commitments where there has already been disclosure of the underlying facts beyond a very narrow circle of people on either side.

C. Consider Professional Ethical Obligations and Best Practices in adopting a Trauma-Informed Approach

There has been a movement and general acceptance that the profession, and justice system as a whole, should take a trauma-informed approach to practice. In relation to the use of NDAs, what does that mean for employer counsel? And complainant's counsel? With the growing evidence of how NDAs contribute to further traumatizing a complainant is it trauma-informed to ask complainants to sign NDAs?

Adopting a trauma-informed approach to practice accords with our professional ethical obligations. Employees in sexual harassment situations are often unrepresented and additional care must be taken when dealing with self-represented/unrepresented litigants. The Law Society of BC provides specific guidance on taking a trauma-informed approach when dealing with self-represented/unrepresented litigants.[122] In taking a trauma-informed approach, counsel should be cognizant of vulnerabilities of complainants related to their gender, Indigeneity, ethnic and cultural background, immigration status, religion, ableism, socio-economic status that often contribute to a complainant being more fearful and likely to have experienced past trauma.

[122] "Discipline Advisory: Self-represented/Unrepresented Litigants", (June 28, 2021), online: Law Society of British <https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/discipline-advisories/june-29,-2021/>

Counsel should consider the purpose of a client's request to keep information confidential and what truly is necessary. Complainants want to resolve the matter and move on; NDAs continue to tie a complainant to the employer and to the incidences never truly allowing them to move on. At a time when the legal profession is beginning to recognize the legal system's role in (re)traumatizing people engaged in the system, we ought to be asking whether the way lawyers use NDAs is contributing to trauma, and if so, what we can do to change it.

Appendix A: NDA Legislation Summary Chart

CANADA

Jurisdiction	Date	Prohibits NDA pre-claim	Prohibits NDA in settlement	NDA permitted on request of Complainant	Specific exclusions	When does legislation apply?	Applies retro-actively	Other
Manitoba	Introduced April 26, 2022 (not yet passed)	Yes	No	Yes, subject to certain conditions (independent legal advice, no adverse effect on third party or public interest, etc.)	NDAs are unenforceable to the extent that they restrict: -Disclosure protected/require under legislation -artistic expression -Communication w certain classes of persons (e.g., lawyer, physician, elder, etc.)	-All allegations of harassment or discrimination -In all contexts	No	Text substantially borrowed from PEI legislation
Nova Scotia	First reading April 7, 2022 (not yet passed)	Yes	Yes, unless "expressed wish and preference" of victim	Yes, subject to certain conditions (same as above)	Same exclusions as listed above	-All allegations of harassment or discrimination -All contexts	No	Text substantially borrowed from PEI legislation
PEI	Effective May 17, 2022	Yes	Yes, unless "expressed wish and preference"	Yes, subject to certain conditions (same as above)	Same as above	-All allegations of harassment or discrimination -All contexts	No	
Canada (Federal)	Unaffiliated Manitoba Senator Marilou McPhedran plans to introduce legislation on non-disclosure agreements in September of 2022.							

UNITED STATES: PASSED

Jurisdiction	Date	Prohibits NDA pre-claim	Prohibits NDA in settlement	NDA permitted on request of Complainant	Specific exclusions	When does legislation apply?	Applies retro-actively	Other
Arizona	Passed April 2018	No	No	Yes	-Responding to a peace officer or prosecutor -Making a statement not initiated by the party in a criminal proceeding	Only in cases of sexual assault or sexual harassment	No	Public monies cannot be used as consideration for a sexual assault related NDA
California (SB-820)	Passed Nov 8, 2018	No	Yes	Yes, unless a gov't agency is a party to the agreement	Not specified	-Only in cases of sexual assault or sexual harassment -Only in employment context	Yes	
California (SB-331)	Passed October 7, 2021	Yes	Yes	Yes, unless a gov't agency is a party to the agreement	Not specified	-In all instances of harassment/discrimination -In employment and landlord/tenant context	Yes	
Hawaii	Effective July 12, 2022	Yes	Yes	No	Not specified	- Only in cases of sexual assault or harassment -Only in employment context	No	

Illinois	Effective Jan 1, 2020	Yes	Yes	Yes, subject to conditions (right to legal advice, 7-day period to change their mind)	Not specified	-Unlawful discrimination and harassment -Only in employment context	Yes	Employees are entitled to "reasonable attorney's fees and costs incurred"
Maine	Passed May 12, 2022	Yes	Yes, in certain circumstances	Yes	Individual must retain right to report to federal/state agencies and testify in court proceedings	-All employment discrimination -Only in employment context	No	
Maryland	Passed May 15, 2018; effective Oct 1, 2018	Yes	Yes	No	Not specified	-Only sexual harassment -Only employment context	Yes	-Specifically prohibits retaliatory action by employer -Sets out that certain employers are liable for attorney's fees
Nevada	Effective July 1, 2019	No	Yes	Yes, unless a gov't agency is a party to the settlement	Not specified	-Only sexual harassment/discrimination on the basis of sex -Employment and landlord/tenant context	No	
New Jersey	Effective March 18, 2019	Yes	Yes	Yes(?)	Not specified	-All claims of discrimination, retaliation, or harassment	Yes	Existing NDAs are only enforceable against employers *unless* the employee

						-Only employment context		"publicly reveals sufficient details of the claim that the employer is reasonable identifiable"
New Mexico	Passed Feb 20, 2020; effective May 20, 2020	Yes	Yes, under certain circumstances	Yes	-NDA can't prevent disclosure of information in a "judicial, administrative, or other governmental proceeding"	-Sexual harassment, discrimination, and retaliation claims -Only employment context	Yes	
New York	Effective October 12, 2018	Yes	Yes	Yes	NDA void to the extent that it prevents participation in gov't investigation or disclosing any facts necessary to receive unemployment insurance, Medicaid, etc.	-All types of discrimination -Only in employment context	No	
Oregon	Effective Jan 1, 2023	Yes	Yes	Yes	Not specified	-All types of discrimination -Only in employment context	Yes	
Tennessee		Yes	?	No	Not specified	-Only sexual harassment -Only in employment	No	

						context (and specifically restricts employers from making NDAs a condition of employment)		
Vermont	Passed May 28, 2018	Yes	Yes	Yes	An NDA must expressly state that it does not prohibit: lodging a sexual harassment complaint w/ a government agency, testifying in court, or exercising any collective bargaining rights	-Only sexual harassment -Only in employment context	Yes	
Virginia	Effective July 1, 2019	Yes	Yes	Yes(?)	Not specified	-Only sexual assault -Only employment context	Yes	
Washington	Effective June 9, 2022	Yes	Yes	No	Not specified	-All forms of discrimination, harassment, or retaliation -Only employment context	Yes	

UNITED STATES: NOT YET PASSED

Jurisdiction	Date	Prohibits NDA pre-claim?	Prohibits NDA in settle-ment?	NDA permitted on request of Complainant	Specific exclusions	When does legislation apply?	Applies retro-actively	Other
Connecticut	Introduced Jan 2019	Yes	Yes	No	Not specified	-Only sexual harassment/assault -Only employment context	No	
Kansas	Died May 21, 2020	No	Yes	No	Not specified	-Only sexual harassment/abuse -Only employment context	Yes	
Pennsylvania	Referred to committee March 17, 2021	Yes	No, if voluntary	Yes	Not specified	-Only sexual harassment -Only employment context	No	
United States (Fed)	Introduced in the house June 24, 2022	Yes	Yes	No	Not specified	-Only sexual assault/harassment (which violates the law) -All contexts	Yes	

OTHER JURISDICTIONS

Jurisdiction	Date	Prohibits NDA pre-claim	Prohibits NDA in settlement	NDA permitted on request of Complainant	Specific exclusions	When does legislation apply?	Applies retro-actively	Other
Ireland	Seanad fourth	No	Yes, unless "expressed	Yes, subject to certain	NDA will not apply to disclosure of	-Sexual harassment and	Yes	NB: agreements made before this

	stage as of July 6, 2022 (not passed yet)		wish and preference" of employee	conditions (independent legal advice, no adverse effect on third party or public interest, etc.)	information under Protected Disclosures Act, or to certain protected classes of person (lawyer, doctor, family member, etc.)	other forms of discrimination -Only employment context		legislation that do not conform to it are void; an employer that makes an NDA that does not conform after it passes is guilty of an offence
Victoria, Australia	Reforms proposed and accepted, but no set timeline	?	?	?	?	-Only sexual harassment -Only employment context	?	Task force recommended legislative amendments to restrict the use of NDAs in re workplace sexual harassment. The government accepted the recommendation in principle. Legislation to be developed.
England	First reading 29, June 2022.	?	?	?	?	?	?	[text of the bill not yet available online.] (Previous bill reached second reading May 2022 before govt prorogued)