

The Dark Side of Non-Disclosure Agreements

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Non-Disclosure Agreements, or NDAs, are typical legal forms used in a wide variety of situations for reasons of maintaining confidentiality, most prominently in business transactions, employment contracts, and private settlements. The intention of such agreements is to avoid parties from disclosing information that is regarded as sensitive or proprietary. Though NDAs play a crucial role in protecting confidential information, their enforcement in criminal prosecutions, particularly sex scandals, have been more debatable. In criminal cases, the need to prioritize justice and public safety often conflicts with private interests protected by NDAs, which can sometimes be used to prevent the reporting of criminal behavior. The key issue is whether such agreements can be rendered enforceable where they undermine the public interest in pursuing criminal offenses and protecting the rights of victims. The application of NDAs—particularly in high-profile sexual abuse cases where NDAs have been used to silence victims—is highly controversial. The enforceability of non-disclosure agreements presents a significant legal challenge, prompting legislative reforms like the Speak-Out Act to ensure that victims are not silenced by private agreements.

NDAs are traditionally enforced in civil cases, where they are used to prevent confidential information from being disclosed to third parties. In commercial settings, NDAs are often used to protect trade secrets, private data, and other confidential business information that can harm the business if disclosed. In employment contracts, NDAs stop employees from disclosing confidential information or sharing business plans that could destroy employee reputation. NDAs are also used in settlement negotiations, in which parties can settle disputes without going to trial. These settlements carry confidentiality provisions that prohibit the parties

from disclosing the terms of the settlement or the sensitive details of the dispute. The general principle is that parties are free to enter agreements that protect their private interests so long as they are deemed unlawful.

Even so, the use of NDAs in criminal offenses, particularly those of sexual misconduct, is extremely worrisome. In the case of sexual misconduct, the use of an NDA will serve to deter a victim from reporting the offense to authorities or testifying in court. A fundamental concern comes up in this case: can private agreements such as NDAs override the need to prosecute criminal behavior? The issues of to what extent NDAs can be enforced—especially in the case of sexual misconduct—is highly controversial, where perpetrators may use NDAs to silence victims in order to avoid criminal liability. Victims of sexual harassment, assault, and other sexual misconduct could be denied justice in the criminal justice system when they are bound by an NDA. In the majority of cases, victims of sexual misconduct are coerced into signing NDAs, often as an alternative to financial compensation. Such contracts typically contain clauses that prohibit the victim from revealing the misconduct to the public or further pursuing a lawsuit. Enforcing the contract can effectively deprive victims of their right to justice by allowing perpetrators to go unpunished. The enforceability of NDAs in sexual misconduct cases presents a conflict between confidentiality agreements and the rights of victims to seek justice

One of the most significant legal principles in criminal law is that justice must be served in the public interest. The criminal justice system is designed to keep the public safe from criminal behavior, hold perpetrators liable, and protect the public from future misconduct. If an NDA is used to inhibit the reporting of a crime, it can undermine these purposes by shielding the criminal from criminal responsibility. This becomes particularly problematic when victims are financially incentivized to sign NDAs as part of a settlement which may include provisions that

bar them from reporting criminal charges. As a result, the criminal justice system can be deprived of information that would lead to proper prosecution. The weaponization of NDAs to gag victims can be considered a threat to the integrity of the justice system, and a violation of public interest.

Former Hollywood producer Harvey Weinstein infamously used NDAs to silence his victims and avoid taking accountability for his actions. Weinstein's case demonstrates the extent to which powerful individuals can use the legal systems to conceal their wrongdoings and silence their victims. Over the years, numerous women accused Weinstein of sexual harassment, assault, and misconduct, but most of these allegations were hidden for a long time as the NDAs were effectively used by Weinstein on his victims. In fact, Weinstein's attorneys routinely offered settlements to women in exchange for their silence, and NDAs were part of the agreements of the settlements. These settlements silenced the victims from speaking about their experiences or pursuing any form of legal action, as well as provided financial compensation. In many cases, victims were not only barred from speaking out about the misconduct itself, but were also forbidden from speaking about the terms of the settlement. Weinstein was able to escape accountability and financially incentivize his victims to remain silent. Through these NDAs, Weinstein avoided publicity, continued his behavior, and maintained his position of power. The manipulation of NDAs in this manner demonstrates how when left unchecked, these agreements can obstruct the legal system and protect perpetrators from criminal liability.

In response to the malicious use of NDAs to silence victims of sexual abuse, the US Congress passed the Speak Out Act in December 2022. This Act criminalized the enforcement of NDAs in cases of sexual assault or harassment where the victim did not voluntarily sign the agreement after the abuse occurred. This legislation is a response to the abuse of NDAs in cases

like Weinstein's, where victims of sexual assault were threatened into signing agreements that silenced them. The Speak Out Act shields victims of sexual harassment or assault from being legally obligated to stay silent, and proves them with the freedom to report and speak about their case without fear of retaliation. The Act is a significant step towards protecting the rights of victims, so they are able to voice themselves without fear of being sued for contract breach. It inhibits the abuse of NDAs to cover up misconduct and avoid accountability.

The Speak Out Act isn't the only form of legislation designed to prevent the manipulation of NDAs to silence victims of sexual misconduct. The law on NDAs has been largely influenced by the #MeToo movement, the Weinstein effect, and other legislation like the STAND (Stand Together Against Non-Disclosures) Act of California. The #MeToo movement gained traction in 2017 following the aforementioned allegations against Harvey Weinstein which shed light on the prominence of sexual harassment in industries where power imbalances make it difficult for victims to speak out. The movement discovered the widespread use of NDAs to silence victims while perpetrators continued their wrongdoings without consequence. This practice was witnessed in the Weinstein Effect, the wave of public allegations and legal actions taken against powerful men accused of sexual misconduct, including Kevin Spacey and Charlie Rose. Weinstein's case made the public realize how NDAs could be employed to shield abusers from prosecution. In reaction, legal reforms such as California's STAND Act sought to prohibit NDAs in settlements related to sexual harassment, assault, and other forms of misconduct. The STAND Act in particular addressed the ways that people like Weinstein had managed to stay hidden, ensuring survivors would be able to come forward without fear of legal repercussions. These advances have become one part of a greater push to achieve a balance between privacy and the right of victims to seek justice.

Despite these efforts to limit the use of NDAs in sexual abuse cases, NDAs continue to persist where the terms of the agreement do not conflict with criminal law. However, as more and more states move to restrict the use of NDAs in settlements for sexual misconduct, the legal climate is shifting to an era of greater transparency and accountability. Victims are becoming increasingly empowered to speak out and abusers may now face more legal repercussions for their actions.

In conclusion, the enforceability of NDAs, especially in matters of sexual misconduct, raises significant legal challenges. While NDAs are crucial in ensuring confidentiality, the potential for NDAs to be used as a silencer for victims of sexual abuse is worrisome. As demonstrated by the passage of legislation like the Speak Now Act and the STAND Act, there is growing recognition for the need to protect the rights of victims. Ultimately, it is essential that the legal system strikes a balance between protecting confidentiality and upholding justice for victims when considering the extent to which NDAs can be implemented.

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