The (Un)Ethics of NDA's in Sexual Harassment Settlement Agreements

By Nancy Richards-Stower

If sunlight is antiseptic, then non-disclosure agreements ("NDA's") breed bacteria. In employee sexual harassment settlements, oft-requested NDA's involve confidentiality, non-cooperation and non-disparagement provisions. Employers are willing to "pay for silence" to protect their reputations and to avoid inspiring new claims. But lawyers on both sides should be careful about asking, or agreeing, to restrict the ability of the victim-plaintiff from sharing with others the facts underlying her claims.

Confidentiality Provisions. NDA's blasted into the public consciousness in the fall of 2017 with the "Me, Too Movement" following publication of sexual assault claims brought against Bill Cosby, Harvey Weinstein, and Jeffrey Epstein. The common theme: their victims settled their cases with agreements containing NDA's. Breach by publication of their allegations would trigger return of their settlement funds, and payments for liquidated damages and attorney fees. Secrecy pacts enabled rich and powerful men to rape again and again.

For victims of sexual harassment/assault, their injuries are exacerbated by confidentiality promises:

"Keep these secrets! Otherwise, you're in breach of your settlement agreement and must return all settlement funds and pay our attorney fees. You can never again talk about the facts of these significant life-altering experiences to anyone besides your spouse, lawyer, doctor or tax adviser."

A week, a year or a decade after the case settles, the victim will want, even need, to talk about her experiences. It may be during a lunch with an old friend, a book club discussion, a night out with her sister or co-workers, or even during a new job interview. "Gag clauses" formalize the baseless, but common feelings of shame already burdening assault victims. That no one would likely find out, or report, the victim's conversations is not the point (although it is one made repeatedly to me by experienced counsel). Lawyers cannot ask clients to make promises they probably cannot keep, at least without harming themselves.

For employees concerned about post-settlement publication of their allegations or allegations about them, the ability to bring invasion of privacy, defamation and retaliation claims provides both shield and sword. Reference concerns? Settlement provisions can specify the procedure for responses to reference requests, including an agreed upon letter of recommendation, and identification of the corporate officer to whom all reference requests will be directed. Adding a "mediation first" provision as a prerequisite to future litigation provides additional protection.

Mutual Non-Disparagement provisions. What IS disparagement? Non-Disparagement provisions are muzzles. When victims of sexual harassment tell the truth about their experiences, does this disparage their employers? Solution: make mutual promises of non-defamation. At least truth is a defense.

Non-Cooperation provisions. In 1997, the EEOC issued its Enforcement Guidance on Non-Waivable Rights prohibiting employers from interfering with their employees' rights to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding under Title VII, the ADA, the ADEA and the Equal Pay Act. Subsequent court decisions prohibit employers from requiring subpoenas preceding employee cooperation. Also, Rule 3.4 of the N.H. Rules of Professional Conduct reads in pertinent part:

A lawyer shall not

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

In Informal Ethics Opinion 2012-10, the Chicago Bar Association interpreted "another party" as including persons outside the dispute being settled. How can an employer's counsel permissibly request the non-disclosure of underlying facts or past claims? How is it ever permissible for an employee's counsel to facilitate her client's execution of a settlement inclusive of such NDA's? The South Carolina Bar Ethics Advisory Opinion 93-20 on the same rule held: "If the defense lawyer is attempting to prevent the plaintiff from providing relevant information, the request cannot be recommended to the client."

Also in play is N.H. R. Prof. Conduct 5.6(b) which reads in pertinent part:

A lawyer shall not participate in offering or making:

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Does a confidentiality provision restricting future use or disclosure of allegations, or supporting evidence interfere with plaintiff's lawyer's use of that information in future litigation for other clients? N.H. Ethics Committee Advisory Opinion #2009-10/06 on Rule 5.6(b) opined that it was impermissible for a settlement to prevent plaintiff's attorney from disclosing publicly available information, including that the attorney had sued the defendant. But it also noted, "it is not uncommon for the parties to condition a settlement upon the mutual agreement of parties and their counsel to refrain from disclosing certain information in which the parties have a privacy interest"; and "In most cases, a narrowly drawn settlement agreement that limits the disclosure of specific information in which the parties or a party has a privacy interest will not be an impermissible restriction on the right to practice under Rule 5.6(b). It also referenced ABA Formal Op. 00-417: "The ABA has concluded that offering or agreeing to condition a settlement upon an attorney's non-disclosure of particular information, like 'the facts of the particular matter or the terms of the settlement[,]' does not violate Rule 5.6(b)."

"DANGER WILL ROBINSON, DANGER!"[1]

The above N.H. opinion did not mention, let alone analyze, Rule 3.4 or its interplay with the EEOC rules. Accordingly, the scholarship behind Rule 3.4 opinions in other locations, plus the special harm created by covering up sexual assaults, provide ample support for avoiding NDA's on the alleged facts in sexual harassment/assault cases.

Public Policy Favors Disclosure

In 2014, President Obama issued Executive Order 13673 banning mandatory arbitration provisions for federal contractors, including because arbitration hides allegations of sexual harassment from the public. (revoked by President Trump on March 27, 2017.) In December 2017, Congress reacted to the "Me, Too!" revelations by stripping tax deductions for employers' attorney fees and settlement payments under agreements containing NDA's. By late 2018, seven states had passed legislation prohibiting enforcement of NDA's in sexual harassment cases and President Trump's attorney plead guilty to campaign finance violations for payments to a porn star and a Playboy model under NDA's.

There is general agreement (including in the above N.H. Opinion) that parties may keep confidential the amounts paid for settlement. However, public policy could also support revealing the size of settlement payments so they can be compared with the employer's budget for preventing harassment and assault.

1. The Robot warning the child, Will Robinson, about a threat in the 1960's television series, "Lost In Space."

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Safety. "The New Hampshire State Police takes safety and security threats very seriously and has a team of experts working on operations plans to ensure safety."

The Department of Safety reviews intelligence and communicates with local and national law enforcement, according to the statement, which also said the NH State Police and National Guard will be deployed if necessary.

According to a statement from the FBI's Boston Division Office of Public Affairs, the FBI is currently supporting all state, local and federal law enforcement.

"Our efforts are focused on identifying, investigating, and disrupting individuals that are inciting violence and engaging in criminal activity. As we do in the normal course of business, we are gathering information to identify any potential threats and are sharing that information with our partners."

While the FBI memo released Jan. 11 pertaining to threats against all 50 state houses, the Boston Division's office was not aware of credible information of violent activity in New Hampshire as of this writing.

Black Lives Matter protestors at the State Capitol in Concord on June 6, 2020. Protestors marched from Memorial Field chanting "Black Lives Matter." Photo/Scott Merrill

"The FBI Boston Division is not currently in receipt of any credible information regarding violent activity in or around the capitol buildings in New Hampshire or Maine, connected to the events of Jan. 6 or the upcoming inauguration in our area."

The statement emphasized that the FBI's focus is not on peaceful protestors, "but on those threatening their safety and the safety of other citizens with violence and destruction of property."

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State House security in Concord is overseen by the office of the Chief Legislative Operating Officer, whose director, Terry Pfaff, said his office works with state and local authorities to secure the building.

"Trump supporters have been on our property and none have had permits," he said, when asked about the permitting process which is handled the Department of General Services. "Our security can't arrest them or make them leave."

Permit requests for demonstrations on state house property are shared with Concord's Health and Licensing Officer, Gwen Williams.

William's office had received no permit requests for demonstrations at the time of this writing, she said, explaining that her office does not require permits for demonstrations or protests that don't impact traffic or the public right-of-way and are exclusively citizens holding signs or verbally sharing their perspectives.