What is the role for non-disclosure agreements after #MeToo?

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Since the *New York Times* first published its powerful exposé of allegations against Harvey Weinstein, the #MeToo movement has revealed the magnitude and pervasiveness of sexual misconduct in almost every workplace and sector. It has also shone a light on the power structures and legal mechanisms that have served to protect those accused of wrongdoing.

One of the most controversial of these has been the use of non-disclosure agreements (NDAs), often cast as coercive tools that muzzle survivors and embolden predators. Calls for a ban on them in the wake of #MeToo have resulted in legislative restrictions in a number of jurisdictions, including California, New York, and New Jersey.[1] But, as we move into a new stage of #MeToo – one in which celebrity scandals may be fewer, but internal complaints to employers, human rights applications, and constructive dismissal suits are more common – it is appropriate to reconsider how confidential settlements can play a constructive role, responsive to the needs of survivors.

Non-disclosure agreements – legal contracts which guarantee that the complainant will keep allegations confidential, generally in exchange for a monetary settlement or other benefit – have too often played a role in concealing illegal and even criminal conduct, allowing predatory and powerful men to continue their destructive behaviour without any real accountability. One NDA used by Harvey Weinstein, for example, prohibited his former assistant from sharing her story with treating physicians, unless they too signed NDAs,[2] and even from possessing a copy of the NDA itself. Bill O'Reilly reportedly used NDAs to force complainants to give up diaries, photos, or emails, and even required the complainant to claim such materials were forged if they ever became public.[3] Examples like these have brought deserved scrutiny and criticism of the use of NDAs. In 2019, Justice Ginsburg of the Supreme Court of the United States said she did not believe courts would enforce NDAs because they are so coercive, and that the time of NDAs had come to an end.[4]

What the critics of NDAs sometimes miss, however, is that not every survivor wants to be made the public face of #MeToo. It's one thing to publicly accuse a powerful aggressor in the company of dozens of other women; it's another to be the lone voice. For this reason, some lawyers who advocate for survivors have cautioned that overly broad restrictions on NDAs – while well intentioned – are deeply misguided.[5]

It takes extraordinary courage to accuse an aggressor (whether or not they have celebrity status) of sexual harassment, and it can also result in real personal sacrifice – including re-traumatization, serious stigma, reputational damage, legal costs, and tremendous time and energy for as long as the legal battle wears on, and after.

Survivors of sexual harassment and assault often struggle with depression, insomnia, anxiety, and post-traumatic stress disorder. For many individuals in these circumstances, the key priorities are getting the harmful behaviour to stop and putting the traumatic events behind them. Often complainants are low-wage workers who do not have the financial means to pursue a legal case, never mind pay for the kind of therapeutic care that may be important to their well-being. A financial settlement that helps to bridge to new employment, or allows for therapeutic care, can be critical to redressing the harms complainants have experienced.[6] In these cases, there are much smaller amounts of money in question, and most allegations are of little interest to the media.

Given that settlement may be the most effective means to achieve

some form of justice and compensation, many survivors may perceive confidentiality as an acceptable price to pay in order to avoid lengthy and costly litigation. Indeed, many survivors seek justice before civil courts or labour or human rights tribunals precisely because they want to control their claims in a way that would not be possible through the criminal justice system. Banning NDAs may unintentionally dissuade survivors from coming forward and impede their ability to obtain a timely and meaningful resolution that they have identified as in their own best interests.

As lawyers practising in the areas of human rights, labour, and employment, we do not want to discourage survivors from coming forward or fighting their case to the end. We need women (and men) to take a stand so that we can push the law forward and shift societal norms. But while there have been numerous occasions where we would have wished a client litigate an important human rights claim rather than settle, we recognize that, as lawyers, it's not our job to push our clients into fighting the battles that we want to see fought.

Public allegations are an important mechanism for accountability, but some survivors will never come forward unless they can be assured of some measure of confidentiality. The risks of stigma and reprisal are too great. If individuals do not come forward, they are denied the opportunity for redress. Equally, the institution within which the violation occurred loses a valuable opportunity to learn more about the extent and nature of sexual misconduct in the organization. This includes, for example, not only information about the number of incidents that have taken place, but also the risk factors that contribute to their occurrence. This deeper understanding is, in turn, important to the institution's ability to take appropriate preventive measures going forward. In this sense, confidentiality can be key to broader institutional and cultural change.

Indeed, for these reasons a number of initiatives designed to address sexual misconduct have focused on *enhancing* mechanisms for confidential reporting. For example, coming out of Justice Marie Deschamps' review of sexual misconduct in the Canadian Armed Forces, the military established the Sexual Misconduct Response Centre to allow reporting on a completely confidential basis. Survivors are able to access counselling and referrals to medical care, as well as advice about legal options, without necessarily triggering a formal investigation.[7] Similarly, legislative changes in Ontario[8] have created mandatory obligations on all universities and colleges to establish confidential reporting mechanisms for students who have experienced sexual violence. Confidential reporting is understood to be a key pillar to address widespread incidents of sexual harassment and assault on campus, and to improve the low rate of reporting.

These are just two examples of how confidentiality has been understood to be a tool for accountability, and not an impediment.

At the same time, it is clear that not all NDAs are created equal. Undoubtedly, those used by Weinstein, O'Reilly, and others are oppressive, unconscionable, and likely to cause further harm to complainants. But the deservedly negative reputation of such NDAs shouldn't mean that complainants cannot themselves benefit from confidentiality if that is an important objective for them, or a trade-off they are willing to make.

So how can legislatures, or we, as lawyers, strike an appropriate balance? How can we craft appropriate confidentiality clauses that advance complainants' objectives without allowing them to become coercive? Is there a way to draft confidentiality clauses that is responsive to the #MeToo movement and does not simply perpetuate the gendered structures of power that have allowed sexual misconduct to persist for so long?

To date, no Canadian jurisdiction has restricted the use of NDAs, nor does the case law provide substantial guidance regarding the application of doctrines such as unconscionability and public policy where NDAs prohibit the disclosure of underlying allegations.[9] And despite calls for law societies to take a more active role, our professional regulators have yet to provide guidance on lawyers' professional and ethical duties when entering into NDAs involving harassment or discrimination claims.[10]

In the absence of any such restrictions, the professional and ethical burden falls on lawyers to ensure that confidentiality clauses are not overly broad, unduly restrictive, or oppressive, but rather are tailored to the client's specific needs and goals.

As a first step, here are our observations:

- *Do not impede complainants from seeking appropriate counselling supports or medical care, or include otherwise unconscionable terms*. A survivor should never be expected to trade off access to medical supports for a financial settlement. Similarly, complainants should never be required to lie or fabricate information.
- *Avoid restrictions that would contravene obligations to report misconduct to legal authorities and professional regulators.* Such restrictions are particularly of concern where the respondent is a member of a regulated profession.
- *Restrict confidentiality clauses to a reasonably necessary minimum.* If the complainant is willing to release or withdraw legal action, consider carefully whether it is really necessary to prohibit the complainant from speaking to friends and family about the experiences that led to the allegations. Or, if the complainant is willing to keep the allegations confidential, is it necessary to demand that the fact of the settlement itself be confidential? Restrictions should not be imposed simply because the respondent has the leverage to extract greater confidentiality.
- *Avoid non-disparagement clauses*. Such clauses generally prohibit the complainant from disparaging the reputation of the respondent, or in some cases parties may agree to mutual non-disparagement. But broad and expansive non-disparagement clauses are understandably difficult for many claimants to stomach. Why, for example, should complainants be forced to restrict their speech about other aspects of their employment unrelated to the allegations, in order to obtain a settlement? Such clauses can also be difficult to comply with, given that even an innocent comment, unrelated to any allegation of sexual misconduct, could be interpreted as "disparaging" and therefore a breach of the settlement.
- *Leave room for other forms of expression*. Complainants should not be precluded from engaging in artistic expression, academic research, or even public commentary about sexual misconduct or the #MeToo movement, even if they have agreed not to publicly disclose the specific allegations or to identify the respondent. Such expression may also be an important way for complainants to process and understand their own experiences.
- *Include systemic remedies where possible.* Complainants sometimes express dissatisfaction with the settlement process because they feel they are "selling-out," or betraying other victims, by accepting a financial settlement in exchange for silence. In these circumstances, agreement to broader systemic remedies may be particularly meaningful.[11]

For example, improvements to an employer's sexual harassment policy and procedures, or enhancements to training (including specialized training for senior members of management), can reassure complainants that meaningful change will nevertheless occur, despite the fact that their individual claims have been settled on a confidential basis.

- *Share information about corrective measures with the complainant where possible*. An institution responding to a claim of sexual harassment should, where possible consistent with any privacy obligations, share with the complainant information about disciplinary steps taken *vis-à-vis* an individual respondent, or other corrective or preventive measures. Again, these measures may go a long way to reassuring the complainant that the claim has resulted in meaningful change, even if the claimant agrees to resolve the matter on the basis of a confidential settlement.
- *Discuss the issue of confidentiality early.* It is important to discuss with a complainant the likelihood that the respondent may eventually seek a confidential settlement. If complainants have a strong interest in engaging in public expression about the allegations (for example, through social media posts), they should consider engaging in that expression *before* the legal action is filed or at least before settlement discussions commence. In such circumstances, the complainant may not have to trade off a promise of non-disclosure in exchange for settling the complaint. At the same time, the complainant should be made aware of the risks of such a strategy, including the impact that public comments could have on the likelihood or quantum of settlement, the possibility that the respondent may respond by attacking the complainant's credibility, and the likelihood of cross-examination on prior statements.
- *Remind complainants that they have a choice*. It may seem obvious, but it can be empowering for complainants to be reminded that if they agree to a confidential settlement, this is an active choice on their part. Such a reminder underscores their own agency and power to make choices about what is in their own best interests.
- *Prompt clients to consider potential sexual harassment claims*. NDAs can form part of wrongful dismissal settlements or proposed employment contracts even where no allegation of harassment has been made. It is always important to review these provisions with clients so they understand the scope of future legal actions they may be releasing.

Underlying all these considerations is the importance of adopting a trauma-informed approach to representing survivors of sexual violence,[12] including by recognizing the power imbalance that is very often at play between a complainant and respondent in circumstances of a sexual harassment complaint, and which likely gave rise to the misconduct to begin with. The more oppressive the terms of the confidentiality clause, the more that complainants may feel this imbalance of power is being replayed or exploited, and that they are being revictimized by the settlement discussions themselves. Where the complainant is self-represented, this dynamic will be particularly exacerbated.

The uncertainty surrounding the enforceability of NDAs creates new opportunities for lawyers to forcefully advocate for the

tailored use of NDAs, and to reject coercive terms or blanket provisions that unfairly impose overly broad restrictions on expression. In the post–#MeToo era, lawyers representing complainants have a sound basis to argue that a settlement agreement should only invoke confidentiality with care, tailor restrictions to clearly reflect the intent of the parties, and protect the privacy and agency of survivors.

In the absence of any explicit restriction of NDAs in Canadian jurisdictions through legislation, by our professional regulators, or in the courts, it falls to lawyers in individual cases of sexual misconduct to determine the propriety of terms of settlements and to protect their clients' best interests. For some survivors, any restriction on expression may be simply unacceptable. For many others, however, confidentiality may be an acceptable – even desirable – condition for resolving a complaint. Sexual violence is devastating in part because it undermines the survivor's agency. Part of the remedy is to empower survivors by returning that agency to them.

Notes

1. For example, in California, Senate Bill 820, which came into effect in January 2019, prohibits NDAs that prevent parties from discussing the underlying facts of the case. While complainants can choose to keep their identity private, employers are prohibited from keeping confidential the identity of the alleged perpetrator or the underlying conduct. In New York, amendments to the state's General Obligations Law (Section 5-336) and Civil Practice Law and Rules (Section 5003-b) prohibit employers from including confidentiality provisions in discrimination and harassment claims unless such a provision is requested by the complainant. Complainants have 21 days to consider accepting the confidentiality clause and seven days to revoke their acceptance. In New Jersey, a March 2019 amendment to the state's Law Against Discrimination (Senate No. 121) voids non-disclosure provisions in any case involving discrimination, harassment, and reprisal as contrary to public policy, and requires every settlement agreement of such a claim to include a notice to the employee that they cannot be punished for speaking publicly about their claim. Over a dozen other states have passed or introduced legislation to restrict the use of NDAs in sexual harassment claims.
2. Stacy Perman, "#MeToo law restricts use of nondisclosure agreements in sexual misconduct cases," *LA Times*, December 31, 2018, accessed online: https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html.
3. *Ibid*.
4. Associated Press, "Ruth Bader Ginsburg says the #MeToo movement may signal the end of non-disclosure agreements," Market Watch, November 7, 2019, accessed online: https://www.marketwatch.com/story/ginsburg-questions-whether-confidentiality-agreements-will-exist-in-metoo-movement-2019-11-07.
5. Debra S Katz and Lisa J Banks, "The call to ban NDAs is well-intentioned. But it puts the burden on victims." *The Washington Post*, December 10, 2019, accessed online: https://www.washingtonpost.com/opinions/banning-confidentiality-agreements-wont-solve-sexual-harassment/2019/12/10/13edbeba-1b74-11ea-8d58-5ac3600967a1_story.html.
6. The need for a financial settlement to fund counselling or therapy is even greater since October 2019, when the Ontario provincial government terminated all new Criminal Injuries Compensation Board claims. While the government created the Victim Quick Response Program, this program imposes a strict deadline for application, with the result that many complainants will be ineligible for funding for trauma therapy and other compensation.
7. External Review into Sexual Harassment and Sexual Misconduct in the Canadian Armed Forces, March 27, 2015; https://www.canada.ca/en/department-national-defence/corporate/reports-publications/sexual-misbehaviour/external-review-2015.html#sum. Notably, the Sexual Misconduct Response Centre has experienced a steady rise in the number of incidents reported since it was established in 2016.
8. Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016, SO 2016, c 2.
9. Alexander Gay, "#MeToo and restricting the use of non disclosure agreements in Canada," *Canadian Bar Association National Magazine*, March 28, 2019, accessed online: https://www.nationalmagazine.ca/en-ca/articles/law/opinion/2019/metoo-and-restricting-the-use-of-non-disclosure-ag. Also see *Kamloops-Cariboo Regional Immigrants Society v Herman*, 2015 BCSC 886, and *Watson v The Governing Council of the Salvation Army of Canada*, 2018 ONSC 1066.
10. Amy Salyzyn, "Are Canadian Law Societies Ready for the Legal Profession's Me Too Moment? (Spoiler: Probs Not)," *Slaw*, February 9, 2019, accessed online: http://www.slaw.ca/2019/02/07/are-canadian-law-societies-ready-for-the-legal-professions-me-too-moment-spoiler-probs-not/; Alice Woolley, "#Yesallwomen/#Notallmen: Sexual Harassment in the Legal Profession," *Slaw*, June 10, 2014, accessed online: http://www.slaw.ca/2014/06/10/yesallwomennotallmen-sexual-harassment-in-the-legal-profession/. In the UK, commentators have suggested that law societies could play a constructive role by publishing model confidentiality clauses. See Gerald J Byrne and Nadine P Tollefsen, "Justice must come first – the #MeToo movement and non-disclosure agreements," *International Bar Association*, September 2, 2019, accessed online: https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=075585B2-A314-4723-85F4-EE5CC83A1CA6.
11. Such measures may also be in the institutional respondent's interests, given the legal obligation under many occupational health and safety laws and human rights codes to enact harassment prevention policies and procedures, and to respond appropriately where incidents of harassment have taken place.
12. Professors Sarah Katz and Deeya Haldar describe the four key characteristics of trauma-informed lawyering as "identifying trauma, adjusting the attorney-client relationship, adapting litigation strategy, and preventing vicarious trauma." Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 360 Clinical Law Review Vol 22:359 (2016). For further guidance on trauma-informed lawyering, see e.g. the American Bar Association's *Establishing a Trauma-Informed Lawyer-Client Relationship*, October 01, 2014; online: https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/october-2014/establishing-a-trauma-informed-lawyer-client-relationship/.