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# The Right to Retain Silence?- The Enforceability of NDAs After #MeToo

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# The Right to Retain Silence?- The Enforceability of NDAs after #MeToo

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## I. INTRODUCTION

In the last few years, the #MeToo and Time's Up movements have shone a spotlight on the pervasiveness of sexual misconduct in America. Just a few of the shocking examples[2] covered extensively in media reports and by investigative journalists include the prison sentences imposed on Hollywood moguls Harvey Weinstein[3] and Bill Cosby[4] for criminal sexual assault; the ouster of network news heavyweights Matt Lauer,[5] Bill O'Reilly,[6] Roger Ailes,[7] Charlie Rose,[8] and Les Moonves[9] for sexual harassment; and U.S.A. Gymnastics' settlement with Olympic gold-medalist McKayla Maroney over child sexual abuse she suffered at the hands of team doctor Larry Nasser.[10] A common thread running through many reports is the role that nondisclosure agreements (NDAs) played in settling and silencing allegations of sexual misconduct. Disturbingly, many cases involve claims of serial sexual misconduct against numerous victims over many years—raising the grim specter that NDAs enabled the abuse to continue, unseen and unabated.[11] Yet another controversial use of NDAs that has come to light—albeit involving consensual sexual conduct—involves the National Enquirer's use of "catch and kill" practices to purchase, with the intention of never publishing, stories regarding women's extramarital affairs with then-presidential candidate Donald Trump during the 2016 election.[12]

The use of NDAs—typically used to protect trade secrets and other business proprietary data—to shield claims of sexual misconduct from public scrutiny has raised complex legal, ethical, and moral questions. A debate continues to unfold over whether courts should enforce these types of NDAs. While there is no case law to date in Texas addressing the specific question of the enforceability of these NDAs, developments in the last few years show that Texas is an active participant in the national conversation. When a Texas court has to decide whether a sexual

misconduct NDA is enforceable or not, what will guide the court's decision? This discussion focuses on answering that question and identifying best practices for counsel in negotiating and drafting such NDAs.

## II. WHAT ARE "SEXUAL MISCONDUCT NDAs" AND WHY MIGHT THEY BE UNENFORCEABLE?

NDAs "prevent the disclosure of confidential information and trade secrets."[13] NDAs "are readily enforced in Texas and do not generally violate public policy."[14] But while plenty of Texas case law exists affirming the general enforceability of NDAs in the sphere of protecting trade secrets and proprietary business data,[15] as of this writing, none exists regarding the enforceability of a sexual misconduct NDA.

"Sexual misconduct NDA" is an umbrella term. These agreements may go by many names or have many off-shoots (including confidentiality, non-disparagement or non-assistance agreements) and can spring from a variety of sources—employment agreements, settlements of pending lawsuits or before a lawsuit is ever filed, and arbitration agreements. Further, "sexual misconduct" may refer to a wide range of wrongful conduct with very different legal ramifications—from sexual harassment in the workplace (a civil complaint) to sexual assault (a criminal violation).[16] For ease of this discussion, the term "sexual misconduct NDA" will refer broadly to any type of contractual agreement preventing the disclosure to third parties of information regarding sexual misconduct, whether or not the misconduct constitutes a criminal offense. Where distinctions matter to the analysis, that will be clearly noted.

The revelation that NDAs played a central role in hushing high-profile sexual misconduct scandals has sparked a charged public debate as to whether these agreements disserve the public interest and should be enforced by courts.[17] There are compelling arguments on both sides. As one commentator put it, "[t]he battle over NDAs is genuinely complicated."[18]

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