

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

Karima Maloney and Samantha Jarvis

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#MeToo Movement Focuses Attention On NDAs

- Since 2017, #MeToo, Time's Up, and reports in the national press have laser-focused the public's attention on the pervasiveness of sexual misconduct in America.



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#MeToo Movement Focuses Attention on NDAs

- #MeToo has also revealed the role of nondisclosure agreements (NDAs) in settling sexual misconduct claims, sparking an ongoing public debate over their enforceability.

BBC

NDAs 'should not silence sexual harassment claims'

The Washington Post

How NDAs kept the lid on harassment scandals — and why that might be changing



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Debate Over NDAs Is Genuinely Complicated

BENEFITS

- Financial settlements usually conditioned on confidentiality
- Financial settlements are valuable for victims
- Victims may desire confidentiality for a host of other reasons
- NDAs can protect the falsely accused or those with valid defenses

CONCERNS

- Often a power imbalance between accuser and accused
- May allow serial perpetrators to re-offend by hiding their behavior
- NDAs may be structured in ways that raise questions about investigatory obstruction

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NDA's in Texas

- **NDA's prevent the disclosure of trade secrets and confidential information.** See *In re Mktg. Inv'rs Corp.*, 80 S.W.3d 44, 47 (Tex. App.—Dallas 1998, no pet.).
- **NDA's are generally enforceable and do not violate public policy.** See *McGowan & Co., Inc. v. Bogan*, 93 F. Supp. 3d 624, 636 (S.D. Tex. 2015) (citing *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011)).
- **Unlike noncompete covenants, NDA's are not restraints on trade. Thus, reasonable time, geographical, and scope-of-activity limitations are not prerequisites to an NDA's enforceability.** See *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663 (Tex. App.—Dallas 1992, no writ).

What Are Sexual Misconduct NDA's?

- **No case law in Texas addressing enforceability of sexual misconduct NDA's.**
 - “Sexual misconduct NDA” is an umbrella term.
 - Such agreements can go by many names or take many forms (*e.g.*, confidentiality, non-disparagement, non-assistance).
 - Such agreements can arise from a variety of sources (*e.g.*, employment agreements, settlement agreements, arbitration agreements).
 - Sexual misconduct covers a broad spectrum of wrongful conduct, from civil torts (*e.g.*, workplace sexual harassment) to criminal conduct (*e.g.*, sexual assault).
 - These distinctions may matter in a public policy analysis.

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