

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

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30th Annual Conference on State and Federal Appeals  
June 4-5, 2020  
Austin, Texas

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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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First appeared as part of the conference materials for the

30<sup>th</sup> Annual Conference on State and Federal Appeals session

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