ARTICLES

Balancing Private and Public Interests in the Disclosure of Sexual Harassment Information

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ABSTRACT

Legal ethicists, advocacy groups, and politicians have called for greater restrictions on the use of nondisclosure agreements (NDAs) when parties resolve sexual assault and sexual harassment claims, and recently broad bans on the use of NDAs have been put in place. However, as shown by the original empirical research reported here, most members of the public recognize that nondisclosure may be appropriate in some cases and support allowing parties to a dispute to bargain over privacy. A large-scale survey found that public concern about NDAs depended on a variety of factors, including the level of compensation paid to the claimant to settle a matter, whether both parties had counsel, and whether the NDA contained an exception allowing disclosure if the accused harasses again. Furthermore, most respondents believed that the disclosure of information should be determined on a case-by-case basis, even where the alleged behavior was quite serious. NDA reforms that preserve the right of parties to bargain over privacy but condition that privacy on the accused's good behavior would better balance private and public interests in sexual harassment information than reforms that bar any use of NDAs.

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INTRODUCTION

Long before Harvey Weinstein used nondisclosure agreements (NDAs) to prevent the public and his future victims from learning of his sexual assaults,[1] the Catholic Church regularly used confidential settlements to hide clergy abuse and conceal how the Church dealt with abusive priests.[2] The revelation of the Catholic Church's practices prompted several changes to statutes of limitations pertaining to sexual assault; however, there was little legislative action to restrict the use of secret settlements to conceal sexual misconduct.[3]

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1. On the use of nondisclosure agreements to conceal Weinstein's actions, see, for example, JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT 66–68 (2019).

2. *See, e.g.*, Raymond C. O'Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 437–39 (2004) (discussing widespread use of confidentiality agreements in cases of clergy abuse); Danielle Shayne Shapero, Note, *A Solution to the Silencing and Denial: How ADR Can Harmonize Catholic Law with the International Communities Demand to End the Sexual Victimization of Children in the Catholic Church*, 21 CARDOZO J. CONFLICT RESOL. 247, 265–68 (2019) (discussing the long history of institutional secrecy concerning sexual abuse by clergy); Ryan M. Philip, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 845 (2003) ("For years, the Church used confidential settlements to silence abuse victims. Although these agreements protected the identity of the victim, they also concealed the identities of the priests who often continued to serve at their parishes or other ministries." (footnotes omitted)); *see generally* THE INVESTIGATIVE STAFF OF *THE BOSTON GLOBE*, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH (Media Tie In, updated ed. 2015).

3. *See* Mayo Moran, *Cardinal Sins: How the Catholic Church Sexual Abuse Crisis Changed Private Law*, 21 GEO. J. GENDER & L. 95, 118–25 (2019) (discussing state reforms of limitations periods for child sexual abuse claims). Beginning with Florida in 1990, a number of states did pass "sunshine in litigation" laws in response to publicity about how companies had used sealed court orders and NDAs to conceal the dangers of

The legislative terrain shifted dramatically following the discoveries of Weinstein's abuses of power and the many accusations against others that followed.[4] Seizing the opportunity created by the #MeToo movement, women's advocates called for stronger protections against harassment in the workplace,[5] and many state legislators answered the call, signing on to the National Women's Law Center's pledge to support reforms in twenty states by 2020.[6] That goal was almost reached when nineteen states passed significant reforms by the end of 2020, before the pandemic stalled legislative activity.[7] By 2022, twenty-two states and the District of Columbia had strengthened their laws against workplace harassment.[8] These changes included requiring new anti-harassment training, lengthening the time available to pursue legal relief, expanding the category of workers protected by sexual harassment laws, and limiting the use of NDAs to conceal sexual misconduct in the workplace.[9]

Significant changes occurred at the federal level as well. The Tax Cuts and Jobs Act of 2017 contained a provision rendering payments made to settle sexual assault and harassment claims a disallowable business expense deduction if the settlement agreement contained an NDA.[10] In 2018, President Trump signed into law amendments to the Congressional Accountability Act that extended workplace protections to unpaid employees working for legislators, and made members of Congress personally liable for judgments or settlements concerning their acts of harassment or retaliation.[11] In March of 2022, President Biden signed into law an amendment to the Federal Arbitration Act allowing workers with sexual

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hazardous products. *See, e.g.,* FLA. STAT. § 69.081 (2023). These statutes prohibit courts from entering orders that would conceal a public hazard and declare void any contract seeking to do the same. *Id*. at §69.081(3).

4. *Vox* compiled a list of prominent persons (predominantly men) accused of sexual misconduct from April 2017, when the #MeToo movement began, until February 2020. *A List of People Accused of Sexual Harassment, Misconduct, or Assault*, VOX (July 21, 2021), https://www.vox.com/a/sexual-harassment-assault-allegations-list [https://perma.cc/SNN6-B4DA].

5. *See, e.g*., Maya Raghu & JoAnna Suriani, *#MeTooWhatNext: Strengthening Workplace Sexual Harassment Protections and Accountability*, *passim*, NAT'L WOMEN'S L. CTR., (Dec. 21, 2017), https://nwlc.org/resource/metoowhatnext-strengthening-workplace-sexual-harassment-protections-and-accountability/ [https://perma.cc/8BE3-AS22]; Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 47–48 (2018).

6. See the pledge and current signatories at *#20StatesBy2020 Letter*, NAT'L WOMEN'S L. CTR. (Mar. 5, 2020), https://nwlc.org/wp-content/uploads/2020/03/20-States-by-2020-Letter-3.13.20-v2.pdf [https://perma.cc/Z7U6-EK5J].

7. Andrea Johnson, Ramya Sekaran & Sasha Gombar, *2020 Progress Update: MeToo Workplace Reforms in the States*, NAT'L WOMEN'S L. CTR., 2–3 (Sept. 29, 2020), https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report-MM-edits-11.11.pdf [https://perma.cc/X38C-6NNU].

8. Andrea Johnson, Samone Ijoma & Da Hae Kim, *#MeToo Five Years Later: Progress & Pitfalls in State Workplace Anti-harassment Laws*, NAT'L WOMEN'S L. CTR., 2–3 (Oct. 4, 2022), https://nwlc.org/wp-content/uploads/2022/10/final_2022_nwlcMeToo_Report-MM-edit-10.27.22.pdf [https://perma.cc/MU5F-M6DF].

9. *See id*. at 4; *see also* Terry Morehead Dworkin & Cindy A. Schipani, *The Times They Are A-Changing?: #MeToo and Our Movement Forward*, 55 U. MICH. J.L. REFORM 365, 383–84 (2022).

10. *See* Margaret Ryznar, *#MeToo & Tax*, 75 WASH. & LEE L. REV. ONLINE 53, 58 (2018) (discussing reform now codified at 26 U.S.C. § 162(q)).

11. *See* Congressional Accountability Act of 1995 Reform Act, Pub. L. No. 115–397, 132 Stat. 5297, III § 302 (2018).

misconduct claims to avoid pre-dispute arbitration agreements and agreements waiving their right to proceed as a class.[12] In December of 2022, President Biden signed the Speak Out Act, barring the judicial enforcement of NDAs contained in employee contracts that are used to conceal future acts of sexual misconduct in the workplace.[13] Most recently, the National Labor Relations Board issued a decision prohibiting employers from including NDAs in severance agreements that might interfere with the right of an employee to discuss workplace conditions with other employees.[14]

Advocacy continues for additional reforms to federal and state law to further restrict the use of NDAs to silence victims of sexual assault and harassment, but legal ethics provide a second path to NDA reform that requires no legislative action: interpret existing regulations governing the practice of law to prohibit lawyers from including nondisclosure clauses in settlement agreements.[15] The basic argument is that creating a settlement agreement that requires secrecy about alleged wrongs violates ethical rules against restricting access to evidence and the practice of law. A number of state bars already interpret their ethical rules to limit the scope of NDAs in this context, and more bars are likely to consider similar approaches.[16] Legal scholars have also called for even more aggressive interpretations of lawyer regulations that would effectively ban lawyer participation in the making or enforcement of NDAs.[17]

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12. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 136 Stat. 26 (current version at 9 U.S.C. § 402).

13. *See* Press Release, Joe Biden, President of the United States, Bills Signed: H.R. 7132 and S. 4524 (Dec. 7, 2022), https://www.whitehouse.gov/briefing-room/legislation/2022/12/07/bills-signed-h-r-7132-and-s-4524/ [https://perma.cc/SC8F-WQUR].

14. McLaren Macomb, 372 N.L.R.B. No. 58, 2023 WL 2158775 15 (Feb. 21, 2023).

15. Well before the #MeToo movement began, Professor Bauer offered a detailed argument for how legal ethics rules could be interpreted to prevent attorneys from assisting in the creation of NDAs. *See generally* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481 (2008); see also Stephen Gillers' prescient argument:

> Noncooperation promises are also problematic under the profession's ethics rules. Model Rule 3.4 (f), widely adopted, forbids a lawyer to 'request a person other than a client to refrain from voluntarily giving relevant information to another party. . . [I]t would seem that a lawyer who assists a client in securing the noncooperation promise will violate Rule 3.4(f).

Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1, 15 (2002) (footnotes omitted).

The #MeToo Movement has renewed interest in using legal ethics to limit lawyer involvement in the making of NDAs. I use the term "legal ethics" as it is typically understood by practicing lawyers, to refer to compliance with the rules of professional conduct imposed on lawyers by their licensure in a particular state or by their admission to practice before a particular court. *See* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 19 (2010) ("Lawyers often use the term 'legal ethics' to refer to the rules of professional conduct promulgated and enforced by public institutions." (footnote omitted)). I often refer to these rules of professional conduct with the shorthand "ethical rules," and I sometimes refer to the regulatory bodies charged with promulgating and enforcing these rules as "ethical boards."

16. *See infra* Section I.C.

17. *See, e.g.*, Lori E. Andrus, *Rein in Secret Settlements*, 54 TRIAL 40, 41 (Oct. 2018) ("One of the strongest arguments to oppose secrecy comes from the Model Rules of Professional Conduct, adopted by nearly every

Restrictions on NDAs, whether achieved through general legislation, agency action, or lawyer regulations, place in tension the interests of persons involved in a sexual misconduct case who may want to keep the matter private, the interests of the public generally in exposing and punishing sexual misconduct, and the interests of other possible victims, specifically those who may be at greater risk of victimization or have more difficulty obtaining relief if information about another incident remains secret. Many of those advocating for reform recognize this potential conflict between private and public interests and seek to pass reforms that maintain some level of party autonomy while reducing the exploitation of victims in vulnerable positions and limiting the ability of serial harassers to use secret settlements to enable further abuse.[18] Others lean heavily toward the public interest side of the calculus, emphasizing the need for greater transparency and unencumbered sharing of information to fight sexual harassment.[19]

Missing from the discussion are ordinary peoples' views about whether and when confidentiality may be appropriate when settling sexual harassment cases. To the extent legislation seeks to respond to public concerns, knowing how much the public fears and values secrecy in disputes about sexual misconduct should be an important consideration when determining the shape of NDA reforms. A survey examining the views of over 3,000 Americans about privacy in sexual harassment matters and the use of NDAs in settlement agreements sought to provide this missing data.[20]

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state."); Peter A. Joy & Kevin C. McMunigal, *The Ethics of Buying Silence*, 36 CRIM. JUST. 57, 57 (Fall 2021) ("We conclude both that it currently is and should be unethical for a lawyer to use the sort of agreements revealed in [the Harvey Weinstein cases]."); see also Vasundhara Prasad's argument:

> One way to assist lawyers in balancing [their ethical] duties effectively is to enact and use anti-secrecy laws like those passed in Florida and California . . . An attorney who drafts a confidentiality clause that conceals conduct that can be prosecuted as a felony sex offense, or even advises a client to sign such an agreement, may be disciplined by the State Bar of California. More states should therefore adopt a version of this law, as it serves as an explicit warning to lawyers engaging in these settlements and, in some ways, heightens the duty that they owe to society.

Vasundhara Prasad, Note, *If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2547–48 (2018) (footnotes omitted).

18. *See, e.g.*, *From Silicon Valley to the Factory Floor: Time's Up for Sexual harassment in Male-Dominated Jobs: Hearing Before the Congressional Caucus for Women's Issues*, 115th Cong. (Apr. 24, 2018), https://nwlc.org/resource/nwlc-testimony-before-the-congressional-caucus-for-womens-issues/ [https://perma.cc/VNA9-M4N3] (statement of Fatima Goss Graves, President and CEO, National Women's Law Center) ("[R]egulation of nondisclosure clauses in settlements must be carefully calibrated to balance . . . competing interests, restoring power to a victim to decide what should be confidential."); Daniel Hemel, *How Nondisclosure Agreements Protect Sexual Predators*, VOX (Oct. 13, 2017), https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda [https://perma.cc/4QDC-AEBQ] (discussing how NDAs can be used to hide and perpetuate abuse but acknowledging that NDAs may sometime benefit victims, and concluding that "while there is room for debate about the shape of the remedy, the status quo is clearly not working").

19. *See, e.g.*, Joy & McMunigal, *supra* note 17, at 59 ("Allowing lawyers to advise, negotiate, draft, and accept agreements buying the silence of potential witnesses and victims impedes the proper functioning of the criminal, civil, and regulatory facets of our legal system.").

20. *See infra* Section II.

The survey found that the great majority believed that parties to a dispute should be allowed to keep a matter private if they so desired.[21] Furthermore, with respect to settling a harassment dispute, the great majority believed that the parties to the dispute should be allowed to bargain over privacy and saw inclusion of an NDA in a settlement agreement as appropriate in most cases.[22] Support for bargaining over privacy increased where the accuser used the NDA to bargain for more compensation, where both parties had counsel, and where the accuser or the employer of the accused retained the right to disclose information about the incident if further accusations against the accused arise.[23]

To provide a proper background for the empirical results and their implications, Part I describes existing restrictions on NDAs and proposals for further restrictions. Federal law prohibits NDAs that may interfere with the right of workers to discuss conditions in the workplace, seek administrative relief, cooperate with government investigations, or comply with a subpoena.[24] State laws similarly restrict NDAs, and a number of states have recently imposed additional restrictions on the use of NDAs in sexual misconduct cases.[25] Finally, ethical rules prohibit attorneys from using NDAs in ways that violate federal or state law, and several ethical boards interpret the rules more expansively to ban the lawyer's use of any NDA that may restrict others' access to evidence or the lawyer's right to use and disclose information from a settled matter, even if a fully informed client wants to enter into an NDA as part of a settlement.[26]

Part II then presents the results of the study and links those results to the different arguments for and against further NDA restrictions. The empirical study provides little support for a complete ban on NDAs, but it also provides little support for a hands-off approach that allows those accused of sexual misconduct to purchase iron-clad secrecy. Rather, the results of the empirical study support a middle-ground position that respects the parties' right to bargain over information disclosure but ensures disclosure where the accused may be a serial abuser.[27] Requiring that NDAs be contingent on the accused not being involved in other incidents of harassment would respect individuals' privacy interests while incentivizing the accused to act legally. Requiring that NDAs be disclosed to a public or private entity would allow for external monitoring of potential serial harassers and would allow victims to petition for access to the NDA database to obtain information about other incidents involving their harasser.[28]

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21. *See infra* Section II.
22. *See infra* Section II.
23. *See infra* Section II.
24. *See infra* Section I.A.
25. *See infra* Section I.B.
26. *See* discussion *infra* Section I.C.
27. *See, e.g.,* Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76 (2018); Rachel S. Spooner, *The Goldilocks Approach: Finding the "Just Right" Legal Limit on Nondisclosure Agreements in Sexual Harassment Cases*, 37 HOFSTRA LAB. & EMP. L.J. 331 (2020).
28. Professor Estreicher notes that the EEOC already has authority to require employers to disclose data on settlement of sexual misconduct cases, which could serve as a database for enforcement actions when patterns of abuse

The study's results also suggest that interpreting ethical rules to forbid attorney participation in NDAs would prevent victims from having a powerful advocate when dealing with sexual misconduct and would place the interests of lawyers and other potential clients above those of current clients despite alternative ways to better balance client and public interests. With some ingenuity, private lawyers, public agencies, and legislators can fashion NDA terms that respect private interests in information control without sacrificing the public's interest in transparency and the deterrence of sexual misconduct.

I. EXISTING AND PROPOSED LIMITATIONS ON NDAS

Agreements aimed at keeping accusations of sexual assault or harassment confidential take a variety of forms.[29] Some employers ask employees to agree not to reveal any information about the workplace that could harm the business as a condition of employment, with the clause written broadly enough to cover future incidents of sexual misconduct.[30] Sometimes an employer, or the person who is accused of sexual misconduct, will require as a condition of settlement that the accuser agree not to disclose information about the alleged harassment or the details of the settlement, including the amount paid.[31] Alternatively, some settlement agreements include a non-disparagement clause that is written broadly enough to cover disclosure of the harassment accusation.[32] Some settlements will

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are detected. *See* Samuel Estreicher, *How to Stop the Next Harvey Weinstein*, BLOOMBERG (Nov. 12, 2017), https://www.bloomberg.com/opinion/articles/2017-11-12/how-to-stop-the-next-harvey-weinstein#xj4y7vzkg [https://perma.cc/GD8F-4M5L] (arguing for the EEOC to require employers to provide data on settlement agreements entered into involving allegations against particular employees and to initiate investigations into settlement patterns suggesting serial abuse).

29. Many of these accusations may be true. The term, "accusation," is used simply because in many cases, the facts that are in dispute will never be officially resolved due to a settlement before trial.

30. *See, e.g.*, *Limiting Nondisclosure and Nondisparagement Agreements That Silence Workers: Policy Recommendations*, NAT'L WOMEN'S L. CTR., 2 (Apr. 24, 2020), https://nwlc.org/wp-content/uploads/2020/04/NDA-Factsheet-4.27.pdf [https://perma.cc/H8ZY-K2WJ] ("For example, the use of broad NDAs to cover up harassment was highlighted in a sexual harassment lawsuit filed by a restaurant manager against restauranteur Mike Isabella. The complaint alleged that since 2011, workers had been required to sign, as a condition of employment, NDAs that prevented them from sharing any 'details of the personal and business lives of Mike Isabella, his family members, friends, business associates and dealings,' on pain of a $500,000 penalty per breach. Moreover, the complaint alleged that workers at Isabella's restaurants were threatened with enforcement of the NDA if they spoke out about sexual harassment in the workplace." (footnotes omitted)).

31. "In settlement agreements regarding an employee's allegations of sexual harassment or other unlawful discrimination, a confidentiality provision frequently prohibits the employee from disclosing to anyone any details about the settlement or any facts that led up to the settlement. Exceptions may be negotiated for disclosures to the employee's spouse, attorneys, or tax advisors. It is not uncommon for these provisions to be one-sided—in other words, only the complainant is prohibited from disclosure. Sometimes, these provisions also provide an exception for the employee to be able to testify truthfully if subpoenaed for deposition or trial (bur sometimes they do not)." Ann Fromholz & Jeanette Laba, *#MeToo Challenges Confidentiality and Nondisclosure Agreements*, 41 L.A. LAW. 12, 12 (2018). In some cases, "the lawyers negotiating these confidentiality provisions on behalf of the defendant organization or employer may try to extend the confidentiality provision to the lawyer representing the complainant." *Id.*

32. *See, e.g.*, Katie Benner, *Abuses Hide in the Silence of Nondisparagement Agreements*, N.Y. TIMES (Jul. 21, 2017), https://www.nytimes.com/2017/07/21/technology/silicon-valley-sexual-harassment-non-disparagement-agreements.

also compel the accuser to destroy or turn over evidence relating to the accusation, and the most aggressive require the accuser to resist giving evidence in a government investigation or court proceeding.[33]

Some of these NDAs run afoul of existing state and federal laws, but continue to be used nonetheless, likely in the hope that accusers signing them will not know the law nor fight their enforceability because of the hassle or fear of losing part of the compensation paid to settle a claim.[34] As a result, some states have begun penalizing employers who try to use illegal NDAs,[35] and some have banned NDAs altogether. Other states and the federal government, while not completely banning NDAs, have passed or are considering legislation further restricting the use of NDAs. This section first details these new federal and state law restrictions on NDAs, and then it turns to ethical rules that limit attorney participation in the making or enforcement of NDAs.

A. FEDERAL LAW RESTRICTIONS

Federal law presently places several restrictions on the use of NDAs to conceal possible sexual misconduct. First, an NDA that prevents employees from collectively discussing working conditions, including a hostile work environment created by sexual harassment, may violate the National Labor Relations Act

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html [https://perma.cc/3L7J-SPW4] ("As more harassment allegations come to light, employment lawyers say nondisparagement agreements have helped enable a culture of secrecy. In particular, the tech start-up world has been roiled by accounts of workplace sexual harassment, and nondisparagement clauses have played a significant role in keeping those accusations secret.").

33. For instance, Harvey Weinstein's settlement agreement with Ambra Battilana Gutierrez required that Gutierrez destroy any audio recordings she had of Weinstein admitting his misconduct, turn over her phone and any other recording devices to a private security firm retained by Weinstein, and provide passwords to email accounts and other digital locations where evidence might be stored. *See* Ronan Farrow, *Harvey Weinstein's Secret Settlements*, THE NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements [https://perma.cc/FX42-RDNR]. Similarly, Weinstein's settlement agreement with Zelda Perkins, his former assistant, required that Perkins notify Weinstein or his company, Miramax, if asked to provide testimony in a government proceeding, that she use "all reasonable endeavours to limit the scope of the disclosure as far as possible," and that she assist Miramax if it chooses to contest the proceeding. *See* Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017), https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589 [https://perma.cc/3NUD-USAM]. Weinstein's settlement agreement with Rose McGowan did not include an NDA, but Weinstein attempted to get McGowan to sign an NDA when she began making Weinstein's assault on her public. *See* Rose McGowan, Submission to the Women and Equalities Committee on Sexual Harassment and the Abuse of Non-disclosure Agreements (NDAs) (Apr. 19, 2018), https://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Women%20and%20Equalities/Sexual%20harassment%20in%20the%20workplace/written/81746.html [https://perma.cc/6MM7-X49C].

34. *See, e.g.*, In re Stanford, 48 So. 3d 224, 231–32 (La. 2010) ("Respondents, either by intent or through a high degree of negligence, had the victim sign a confidentiality agreement which could create an impression in the victim's mind that she was legally barred from discussing the meeting with her father with anyone, including Ms. Billeaud. This conduct had the potential to inhibit the victim from testifying at trial and could have impeded the prosecution of the underlying criminal case.").

35. For example, under New Jersey's new law declaring NDAs in sexual harassment cases against public policy, an employer who enforces or attempts to enforce an invalid NDA shall be liable for the employee's attorney fees and costs incurred in resisting that enforcement. *See* N.J. REV. STAT § 10:5–12.9 (2019).

(NLRA).[36] In fact, the National Labor Relations Board (NLRB) recently ruled that a company violated the NLRA when it proposed a severance agreement containing broad non-disparagement and confidentiality clauses that could interfere with the right of workers to discuss workplace conditions with co-workers.[37] Following the Board's decision in this case, the General Counsel of the NLRB issued a guidance memorandum stating that this ruling would apply retroactively, that it applied to any confidentiality or non-disparagement clause containing terms that might deter employees from assisting others on workplace issues or communicating with the NLRB about workplace issues, and that it was irrelevant whether the employee requested the clause—a scenario the General Counsel characterized as "unlikely."[38] This guidance did allow that "a narrowly tailored, justified, non-disparagement provision that is limited to employee statements about the employer that meet the definition of defamation as being maliciously untrue . . . may be found lawful."[39] Because the NLRA covers most private sector workers,[40] this ruling constitutes a broad and significant limitation on the use of NDAs in employment disputes.

Second, federal anti-discrimination statutes have been interpreted to prohibit NDAs that may deter current or former employees from pursuing a charge of discrimination with a government agency or cooperating in a government investigation into possible discrimination.[41] If an NDA interferes with such activities, the

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36. *See, e.g.*, Harbor Freight Tolls USA, Inc., 2021 WL 961659 (NLRB Div. of Judges Mar. 12, 2021) ("I also find that [the company's confidentiality rule], reasonably construed, would restrict employees' protected activities. The rule at issue is not limited to Respondent's own nonpublic, proprietary, or confidential records but also includes a specific prohibition on an employee's right to disclose or share information contained in an employee's personnel file including events and circumstances at work and wage and benefits information, disciplinary actions, performance reports, personal contact information, and other terms and conditions of their employment."). *Cf.* Motor City Pawn Brokers, Inc., 2020 WL 4339249, at *6 (NLRB Jul. 24, 2020) ("A reasonable employee would not read the handbooks' references to the 'proprietary information . . . of employees' without taking into account the specific examples of confidential information listed in the documents. Accordingly, we reverse the judge and dismiss the allegations regarding the above confidentiality rules because employees would reasonably understand, from the numerous examples of confidential information specified in the Employment Agreement and the Employee Handbooks, that they are limited to prohibiting disclosure of legitimately confidential and proprietary information rather than information pertaining to employees' terms and conditions of employment." (footnotes omitted)).

37. *See* McLaren Macomb, *supra* note 14.

38. NLRB, Office of the General Counsel, *Memorandum GC 23-05* (Mar. 22, 2023), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos [https://perma.cc/7NPX-48SY].

39. *See id.* at 5–6.

40. The NLRA applies to non-supervisory, private sector workers, but it does not cover independent contractors or persons working select jobs such as agricultural and domestic work. *See* National Labor Relations Board, *Are You Covered?*, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/are-you-covered [https://perma.cc/9YZM-R9RG] (last visited Sept. 22, 2023). However, the inclusion of an NDA in an agreement with a supervisory employee that settles a claim for retaliation against the supervisor for failing to violate the terms of the NLRA could violate the NLRA. *See Memorandum GC 23-05*, *supra* note 38, at 3.

41. *See, e.g.*, U.S. Equal Employment Opportunity Commission, News Release, 2018 WL 721620 (Feb. 6, 2018) ("Following an investigation, the EEOC found that it was probable that Coleman violated Section 503 of Americans with Disabilities Act (ADA) and Section 704 and 706 of Title VII of the Civil Rights Act of the 1964, by conditioning employees' receipt of severance pay on an overly broad severance agreement that

clause is against public policy, allowing courts to reform or construe the NDA to permit such activities.[42] Likewise, courts deem NDAs that discourage compliance with lawful subpoenas as being against public policy and unenforceable.[43]

Third, President Biden recently signed into law the Speak Out Act, which renders unenforceable an NDA signed as a condition of employment if the NDA would prevent disclosure of subsequent sexual assault or sexual harassment.[44] Under this new law, no court may rely on an NDA or non-disparagement clause in an employment contract to prevent an employee from publicly disclosing information about a sexual assault or harassment dispute.[45]

In addition, the recent change to tax law disallowing deductions for settlements of sexual misconduct claims that are subject to an NDA is designed to deter the use of NDAs.[46] Although this law does not directly restrict NDAs, the goal of this tax on secrecy is to reduce the use of NDAs in sexual misconduct cases.[47]

The Speak Out Act makes NDAs contained in employment contracts judicially unenforceable if used to block sexual misconduct accusations; however, the Speak Out Act has no application to settlement agreements entered into after a dispute has arisen.[48] Congress is presently considering a bill that regulates NDAs contained in settlement agreements signed after a dispute has arisen. The Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act, or the BE HEARD in the Workplace Act, if passed in its current form, will make it illegal to include NDAs in settlement or separation agreements between workers and employers unless (a) a dispute arose before the agreement was reached, (b) the NDA is mutually agreed upon and mutually beneficial, (c) the worker freely and knowingly entered into the NDA, (d) the settlement agreement gives the worker the right to consider the NDA for 21 days before signing and gives the worker the right to revoke consent for seven days after signing, and (e) the NDA expressly states that it does not interfere with

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interfered with employees' rights to file charges and communicate with the EEOC, and which precluded employees from accepting any relief obtained by the EEOC, should the agency take further action.").

42. *See, e.g.*, *id.* ("Courts generally deem contract provisions that preclude employees from filing charges with the EEOC or cooperating with the EEOC during an investigation to be void as against public policy." (citations omitted)). The case most often cited for this proposition is EEOC v. Astra USA, Inc., 94 F.3d 738 (1st Cir. 1996).

43. *E.g.*, Yockey v. Horn, 880 F.2d 945, 950–51 (7th Cir. 1989) ("[T]he Yockey–Horn settlement agreement does not preclude participation in litigation against the other party under subpoena or other court process; it therefore is not obstructive, as Horn alleges, of the fair and just administration of justice.").

44. The act is codified at 42 U.S.C. §§ 19401–03.

45. 42 U.S.C. § 19403(a).

46. *See* Act of Dec. 21, 2018, Pub. L. No. 115-397, 132 Stat. 5297; *see also supra* text accompanying note 10 (regarding Tax Cuts & Jobs Act of 2017).

47. *See* Ryznar, *supra* note 10, at 56–57 ("In the 2017 tax reform, Congress offered an additional tool to curb sexual harassment in the workplace by eliminating the deductibility of sexual harassment settlements subject to a non-disclosure agreement. This raises the price of secrecy, lessening the appeal of non-disclosure agreements in sexual harassment settlements.").

48. *See* 42 U.S.C. § 19403(a) (limiting application to NDAs "agreed to before the dispute arises").

a worker's right to pursue administrative charges, cooperate with government investigations, give testimony, or comply with discovery requests.[49] The Act would also cap damages for a breach of an NDA at the amount paid to the worker for signing the NDA.[50]

B. STATE LAW RESTRICTIONS

State courts, like their federal counterparts, construe NDAs that interfere with parties' participation in government investigations or compliance with lawful subpoenas as being against public policy and thus unenforceable.[51] However, settlement agreements that merely restrict the voluntary sharing of information with others generally do not violate public policy under state law.[52]

Before the #MeToo movement began, a few states passed sunshine-in-litigation statutes that could arguably be used to invalidate NDAs hiding sexual misconduct where the harasser poses a risk to others.[53] For instance, Florida law prevents settlements that conceal a public hazard.[54] Some advocates contend that serial harassers should be seen as public hazards and that this law could then be used to prevent secret settlements made by serial harassers.[55] But it does not

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49. BE HEARD in the Workplace Act, H.R. 2148, 116th Cong. (2019–2020) https://www.congress.gov/bill/116th-congress/house-bill/2148/text [https://perma.cc/CKE5-YKVT].

50. BE HEARD in the Workplace Act, S.3219, 117th Cong. (2021–2022), https://www.congress.gov/bill/117th-congress/senate-bill/3219/text#toc-id1BF5F0E1DEF34D81AFED1F5DC8C3FCEB [https://perma.cc/BFB7-8LSB]. The NDA restrictions are found in Section 302.

51. *E.g.*, Camp v. Eichelkraut, 539 S.E.2d 588, 597–98 (Ga. Ct. App. 2000) ("If the public policy of Georgia does not permit parties to contract to keep embarrassing-but-discoverable materials secret, then with greater force, that public policy does not permit parties to enter into an enforceable agreement to keep arguably criminal matters secret in the face of an official investigation."). However, courts retain discretion to determine the scope of proper inquiry and limit disclosure through protective orders. *See, e.g.*, Perricone v. Perricone, 972 A.2d 666, 688 (Conn. 2009) ("Factors that have weighed against the enforcement of contractual waivers include the 'critical importance' of the right to speak on matters of public concern; the fact that the agreement restricts a party from communicating with a public agency regarding the enforcement of civil rights laws; the fact that the agreement requires the suppression of criminal behavior; the fact that the information being suppressed is important to protecting the public health and safety; and the fact that the party benefiting from the confidentiality provision is a public entity or official." (citations and footnote omitted)).

52. Generally, courts uphold settlement agreements that do not interfere with lawful discovery requests or government investigations:

> Absent a showing of compelling need, a purely private agreement among the parties to keep the terms of their contractual arrangements and their own records confidential will be enforced. Even when private confidentiality agreements are enforced, however, not all factual matters concerning the issues resolved by the contract will necessarily be muzzled; often courts will protect the terms of the agreement but will not allow a confidentiality agreement to prevent discovery directed to witnesses who can testify to otherwise admissible factual matters.

Davis v. Geo Grp., 2011 WL 2941291, *at 1 (D. Colo. Jul. 21, 2011) (citations omitted).

53. *See* NAT'L WOMEN'S L. CTR., *supra* note 30, at 3 (noting that Florida was the first state to pass a "sunshine in litigation" law, with other states following, including New York, North Carolina, Oregon, and Washington).

54. FLA. STAT. § 69.081 (1990).

55. *See* Chloe Roberts, *The Issue with Confidential Sexual Harassment Settlements*, LAW360 (Nov. 21, 2016), https://www.law360.com/articles/863553/the-issue-with-confidential-sexual-harassment-settlements

appear that any court has used these laws to invalidate an NDA in a sexual harassment case.[56]

Since the #MeToo movement began, several states have enacted legislation that restricts the use of NDAs to conceal acts of sexual misconduct.[57] The strongest restrictions have been imposed by Hawaii, New Jersey, and Washington, which now broadly prohibit NDAs that would prevent employees from discussing work-related sexual misconduct.[58] A few states also prohibit NDAs, but only in cases involving public employers.[59] Several states now prohibit employers from making an NDA a condition of hiring or retention if the NDA would prevent discussion of future acts of work-related sexual harassment,[60] and some only allow NDAs in dispute settlements if the NDA is requested by the claimant.[61] Finally, some states passed laws prohibiting employers from seeking NDAs that might interfere with a worker's right to pursue administrative relief, cooperate with government investigations, comply with subpoenas, and/or comply with civil discovery requests.[62] One state also requires employers to report information about the settlement of sexual harassment claims, including information about settlements

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[https://perma.cc/8MKY-87QP] ("In the employment context, sexual harassers are arguably individuals and workplace conditions that cause injury to the unknowing public and create a public hazard. Confidentiality agreements designed to conceal public hazards in the workplace, including sexual harassers, are thus void as illegal and unenforceable.").

56. *See* Loune-Djenia Askew, *Confidential Agreements: The Florida Sunshine in Litigation Act, the #MeToo Movement, and Signing Away the Right to Speak*, 10 U. MIAMI RACE & SOC. JUST. L. REV. 61, 65 (2019) ("[T]o date, there has been no published court decision on whether a person against whom a sexual abuse claim has been made can be considered a 'public hazard.' This note argues, however, that alleged sexual abusers do fit the Act's definition of a "public hazard," and that, as such, Florida courts should interpret the Act to prohibit concealing information via confidentiality agreements." (footnote omitted)).

57. For a detailed account of these laws as of September 2020, see the compilation of state reforms maintained by the National Women's Law Center, *State Workplace Anti-Harassment Laws Enacted Since #MeToo Went Viral*, (Oct. 2022) https://nwlc.org/resource/state-workplace-anti-harassment-laws-enacted-since-metoo-went-viral/. [https://perma.cc/6BXR-9AMH]. A number of states have subsequently revised these laws, and additional states have passed reforms.

58. *See* HAW. REV. STAT. § 378-2.2 (2022); N.J. STAT. ANN. § 10:5-12.8 (West 2019); WASH. REV. CODE § 49.44.211 (2022). Once a claim has been filed in court or with an administrative agency, California permits settlement agreements to keep the settlement amount and facts relating to the identity of a claimant confidential, so long as confidentiality is requested by the claimant; NDAs that cover other facts relating to the incident are deemed void as a matter of public policy. *See* CAL. CIV. PROC. CODE § 1001 (West 2023).

59. *See, e.g.*, CAL. CIV. PROC. CODE § 1001(c) (West 2023); LA. STAT. ANN. § 13:5109.1 (2020).

60. *See, e.g.*, 820 ILL. COMP. STAT. 96/1-30 (2019); OR. REV. STAT. § 659A.370 (2023); VA. CODE ANN. § 40.1-28.01 (2019).

61. *See, e.g.*, N.Y. C.P.L.R. § 5003-b (McKinney 2019); *see also* NEV. REV. STAT. § 10.195(1) (2020) (allowing claimant to request NDA that protects claimant's identity). Some states impose additional requirements beyond confidentiality being requested by the claimant, such as requiring that the claimant have 21 days to consider the NDA and have seven days to revoke the agreement after signing. *See, e.g.*, 820 ILL. COMP. STAT. 96/1-30 (2020); Maine H.P. 711, Legislative Document 965, An Act Concerning Nondisclosure Agreements in Employment (May 12, 2022), http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0711&item=11&snum=130 [https://perma.cc/DKD8-PPMY].

62. *See, e.g.*, MD. CODE ANN., LAB. & EMPL. § 3-715 (West 2018); VT. STAT. ANN. tit. 21, § 495h(h)(2) (West 2018). Vermont also banned "no-rehire" provisions in settlement agreements. *See* VT. STAT. ANN. tit. 21, § 495h(h)(1) (West 2018).

involving the same alleged offender.[63] Further state reforms are likely in the near future.[64]

C. ETHICAL RESTRICTIONS

A fundamental tenet of the rules regulating the practice of law is that lawyers shall not help their clients violate the law.[65] This directive means that lawyers should not assist their clients in the preparation, execution, or enforcement of an NDA that violates existing state or federal law. Thus, lawyers should not participate in the creation, execution, or enforcement of an NDA that must be signed as a condition of employment if the NDA interferes with a worker's right to (a) discuss or report acts of work-related sexual misconduct, (b) cooperate in a government investigation of such misconduct, (c) comply with a subpoena to give testimony about the misconduct, or, in some jurisdictions, (d) comply with discovery requests in civil cases.[66] Likewise, when helping clients settle disputes involving allegations of sexual misconduct, lawyers must be mindful of the restrictions on NDAs entered into as part of a separation or settlement agreement under the NLRB's current interpretation of the NLRA: proposing NDAs that might chill speech by employees about workplace practices violate the NLRA, even if that proposal comes from the employee instead of the employer.[67] Furthermore, under some state laws, NDAs in any settlement agreement of a sexual misconduct claim will be unenforceable, although most states allow post-dispute NDAs so long as they do not prevent parties from sharing information with government agencies or giving testimony in legal proceedings.[68]

Whether the ethical rules require more than compliance with existing state and federal law in relation to NDAs is the subject of some disagreement across

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63. When it passed its NDA law in 2018, Maryland included a provision that required employers to report to the to the Maryland Commission on Civil Rights the following information: (a) the number of settlements involving harassment claims, (b) the number of those settlements over the past ten years that involved allegations against the same employee, and (c) the number of settlements containing mutual confidentiality provisions. S.B. 1010, 2018 Leg., 438th Sess. (Md. 2018) (as approved by the Governor, May 15, 2018), https://mgaleg.maryland.gov/2018RS/chapters_noln/Ch_739_sb1010E.pdf [https://perma.cc/U84F-88ES]. This reporting requirement ended on June 30, 2023. *Id.* This provision, if more widely adopted, could provide important data on the frequency with which employers retain persons accused of serial abuse and help conceal possible serial abuse through NDAs.

64. Indeed, by the time you read this article, substantial additional changes may have occurred because the pace of change in this area has been fairly remarkable. For instance, in 2018 Washington passed a law barring pre-dispute NDAs that would cover future sexual misconduct, but Washington legislators repealed this law in 2022 and replaced it with a broader ban on any NDA that prevents employees from disclosing sexual assault or harassment that occurs in the workplace or at work-related events (although the law does allow confidentiality regarding the settlement amount). *See* WASH. REV. CODE §§ 49.44.210–211 (2022).

65. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2018) [hereinafter MODEL RULES]; MODEL RULES R 1.16 cmt. 2 ("A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law.").

66. *See supra* Sections I.A–B (detailing state and federal law restrictions on NDAs that an attorney cannot assist a client in violating, lest the attorney violate Model Rule 1.16(a)).

67. *See supra* notes 36–38 and accompanying text.

68. *See supra* Section I.B.

jurisdictions. In all states, the client controls the decision to settle a dispute, and the attorney must defer to this decision unless it violates professional regulations or other laws.[69] Furthermore, in all states, the client controls the information an attorney obtains during representation of the client, and attorneys may only disclose this information with the client's consent or when the information fits into one of the exceptions to the confidentiality rules.[70] Therefore, because the client controls the settlement decision and the information relating to a dispute, the client controls whether the settlement agreement contains a nondisclosure clause. As the Connecticut Committee on Professional Ethics recently explained, NDAs "have the same practical effect as if the parties agreed not to provide their respective lawyers with consent to disclose information about their matters pursuant to Rule 1.6 (or 1.9)."[71]

However, client control over information is subject to two important qualifications in all jurisdictions. First, because an NDA cannot lawfully prevent a party to a settlement agreement from cooperating with a government investigation or complying with a subpoena, the practical effect of an NDA is only to restrict the parties and their attorneys from *voluntarily* disclosing dispute-related information with others (i.e., a third party could compel disclosure of information subject to an NDA through a valid subpoena). This limitation is nonetheless significant, as it may be difficult for parties to a lawsuit to learn of others with potentially relevant information they could compel to testify using a subpoena when those other persons or their lawyers cannot voluntarily make themselves known.

Second, the NDA cannot prevent a lawyer from using information learned from the settled case in the representation of other clients so long as the lawyer does not disclose the information. This limitation arises from ethical rules that prohibit lawyers from participating in the offering or making of a settlement agreement that restricts the lawyer's right to practice law.[72] Because information

69. *See* MODEL RULES R. 1.2(a).

70. *See* MODEL RULES R. 1.6(a); MODEL RULES R. 1.9(c). Information subject to a confidentiality provision in a settlement agreement will not typically fit any of the established exceptions to the confidentiality rules. *See* MODEL RULES R. 1.6(b). Furthermore, information presented to the court orally or in writing remains covered by these confidentiality rules, although information concerning a former client that becomes generally known may be disclosed. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 479 (2017) ("Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes." (footnote omitted)). If the NDA is honored, it is unlikely that information relating to the representation of a former client will become generally known thus permitting disclosure under the former client confidentiality rule.

71. Conn. Comm. on Prof'l Ethics, Informal Op. 19-02 (2019). Rules 1.6 and 1.9 prohibit lawyers from disclosing client information absent client consent or an exception to the confidentiality requirement. MODEL RULES R. 1.6(a); MODEL RULES R. 1.9(c).

72. *See* MODEL RULES R. 5.6(b). This rule clearly bars an attorney from offering or making an agreement not to represent others with claims against a settling party as part of the settlement, and all states have adopted this provision in some form. *See* MODEL RULES R. 5.6(b). The question here is whether NDAs that do not explicitly restrict practice nevertheless violate the rule by restricting what information an attorney can use in other cases.

learned through a case that settles may be helpful to other clients, any settlement agreement that prevents a lawyer from using this information in subsequent matters would be an improper restriction on the lawyer's practice: "As long as the lawyer does not disclose information relating to the representation of the former client to a third party, the lawyer may use that information in subsequent representations."[73] For example, if a lawyer representing one of Harvey Weinstein's victims learns the identity of important witnesses through that representation, the lawyer could use that information when representing other victims of Weinstein even if the specific statements made by those witnesses in the first case fell under a confidentiality provision in the settlement agreement brokered by this lawyer.

Thus, existing state and federal laws combine with the ethical rules to place important limits on the scope and effect of NDAs included in settlements negotiated with the aid of lawyers: (a) the NDA should not seek to prohibit cooperation with government investigations, subpoenas, or any civil discovery request in some states, and (b) the NDA cannot prevent the lawyer from using information learned in the case to assist in the representation of others so long as confidential information is not disclosed, for such a limitation would constitute an unethical restriction on the lawyer's practice of law.

However, some jurisdictions go further in their interpretation of the rule against restrictions on the lawyer's practice and conclude that this rule guarantees not only the future use, but also the disclosure of client information regardless of whether the client that signed the NDA consents to the disclosure. These ethical boards have taken the position that an NDA limiting a lawyer's right to disclose *publicly available* information about a case violates the lawyer's right to inform current and potential clients about her experience and knowledge, improperly limiting the lawyer's practice.[74]

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73. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000). State bars have mostly adopted the ABA's decision. *See, e.g.*, Fla. Bar Comm. on Prof'l Ethics, Op. 04-2 (2005); *see also* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 730 (2000) (agreeing with the ABA position but making clear that information learned through some source other than representation of a settling party cannot be made confidential).

74. *See* D.C. Bar Ass'n, Ethics Op. 335 (2006) ("The line that we draw is that the confidentiality of otherwise public information cannot be part of a settlement agreement even if the lawyer's client agrees that such a provision be included . . . [I]f the parties can agree to keep all public information about all cases confidential, clients' ability to identify qualified lawyers would be greatly restricted. A reasonable resolution is to draw a line between information that is public at the time of settlement and information that remains confidential."); Ill. State Bar Ass'n Comm. on Prof'l Responsibility, Op. 12-10 (2013) ("[T]he Committee believes that pursuant to Rule 5.6(b) a settlement agreement may not prohibit a party's lawyer from *disclosing* publicly available information or information that would be obtainable through the course of discovery in future cases."); Ohio Bd. of Prof'l Conduct, Op. 2018-3 (2018) ("Requiring lawyers in the litigation to limit their future communication of information contained in court records, including their participation in a case, serves as a restriction on their right to practice law and advertise their services prohibited by Prof. Cond. R. 5.6(b). A lawyer is ethically obligated to refuse to participate in the finalization of the written settlement agreement when his or her client is presented with an offer to settle that includes a provision that will operate as a restriction on the lawyer's right to practice. While lawyers are required to follow their client's direction whether to accept a settlement offer, the lawyer may not violate other Rules of Professional Conduct when doing so. If the client insists on accepting the agreement with the restrictive provision, the lawyer is obligated to

Furthermore, most jurisdictions have a rule prohibiting lawyers from advising persons other than the client to not share information with other parties,[75] and two ethical boards have interpreted this rule to bar settlement agreements that contain NDAs. Although the rule in question prohibits lawyers from advising persons to not share information with "another party," the boards extending this rule to NDAs in settlement agreements construe the phrase "another party" to mean anyone who might benefit from having information about a case, even if those persons are not formally parties to the settlement or have not even instituted a claim against one of the settling parties.[76] Thus, in these jurisdictions, if an NDA could prevent a plaintiff from voluntarily sharing information with anyone who may have been harmed by the actions of the defendant, the lawyer for the defendant who requests an NDA and the lawyer for the plaintiff who advises her client to sign the NDA have both participated in the making of an NDA that unfairly and

withdraw from the representation."); Tenn. S. Ct. Bd. Prof'l Responsibility, Formal Ethics Op. 2018-F-166 (2018) ("To the extent settlement provisions which contain confidentiality agreements which prohibit attorneys from discussing any facet of the settlement agreement with any other person or entity, regardless of the circumstances . . ., such provisions are prohibited by Tennessee Rules of Professional Conduct 5.6(b), if such confidentiality agreements will restrict the attorney's representation of other clients."). Recall that all information relating to a representation, even information made public through court filings, is ordinarily considered confidential client information that cannot be disclosed without consent or until it becomes generally known by the public. *See supra* note 70. Thus, these jurisdictions have effectively replaced the "generally known" exception for disclosure of former client information found within Rule 1.9 with an exception for "publicly available" information, giving attorneys the power to use *and disclose* information that was public at the time the NDA was signed or that could be obtained through discovery, even if the client desires otherwise.

75. *See* MODEL RULES R. 3.4(f) ("A lawyer shall not . . . 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."). Most jurisdictions have adopted this rule, but notably New York has not. *See* N.Y. RULES OF PROF'L CONDUCT R. 3.4 (N.Y. STATE BAR ASS'N 2009) (omitting section (f)).

76. *See* S.C. Bar Ethics Advisory Comm., Op. 93-20 (1993) ("Rule 8.4(a) prohibits a lawyer from knowingly assisting another to violate any Rule. By recommending to his client an improper request of defense counsel, plaintiff's counsel would be assisting the defense counsel in violating Rule 3.4(f), since that lawyer should not ask one who is not a relative or employee of his client to refrain from voluntarily giving relevant information."); Ill. State Bar Ass'n Comm. on Prof'l Responsibility, Op. 12-10 (2013) (opinion by the Professional Responsibility Committee of the Chicago Bar Association) ("Settlement agreements are not exempt from Rule 3.4(f). S.C Ethics Advisory Comm. Op. 93-20 (1993). Therefore, when negotiating a settlement agreement, a lawyer cannot ethically request that the opposing party agree that it will not disclose potentially relevant information to another party. *Id.* The Committee believes that 'another party' in Rule 3.4(f) means more than just the named parties to the present litigation. Rather, it should be interpreted more broadly to include any person or entity with a current or potential claim against one of the parties to the settlement agreement. A more narrow interpretation would undermine the purpose of the rule and the proper functioning of the justice system by allowing a party to a settlement agreement to conceal important information and thus obstruct meritorious lawsuits."). *See also* Bauer, *supra* note 15, at 550–53 (arguing for a broad interpretation of "another party" and for an application of the rule to settlement agreements). Presumably, NDAs that protect only trade secrets or proprietary information would not be acceptable to these ethical boards, so long as this information is not relevant to the potential claims of others.

unethically limits access to information about the underlying case in the eyes of these ethical boards.[77]

In sum, all boards of professional responsibility recognize that (a) a lawyer's client has an interest in controlling information about a sexual misconduct dispute or any other kind of dispute; and (b) the client has a right to determine the terms on which the dispute is settled, including the degree to which information about the dispute may be publicly disseminated. However, some ethical boards have determined that the interests of the public outweigh the interests of the settling client concerning information about a case and allow lawyers to disclose case information despite a client's wishes to the contrary, and a few ethical boards consider lawyer participation in an NDA covering case information to be unethical.[78] With increasing attention paid to the harms concealed and perpetuated through the use of NDAs in sexual misconduct cases, we are likely to see ethical boards consider new rules limiting attorney participation in NDAs, or see more jurisdictions adopt interpretations of existing ethical rules that impose greater limitations on attorney participation in NDAs.

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77. Most jurisdictions read the rule as protecting only against efforts by one party to prevent a witness from sharing information with another party in the case. They emphasize that the rule permits attorneys to ask their clients to refrain from voluntarily sharing information with other parties and that the rule is aimed at protecting only the parties in an ongoing matter, not the public in general. Thus, these boards conclude that the rule on evidentiary access has no application to NDAs in settlement agreements. *See, e.g.*, Ky. Bar Ass'n v. Unnamed Att'y, 414 S.W.3d 412, 423 (Ky. 2013) ("There is nothing in the leading secondary authorities to support the proposition that ABA Model Rule 3.4(f) (and the state rules based thereon) applies to provisions in settlements."); Timber Point Properties III, LLC v. Bank of Am., No. 13–3449–CV–S–DGK, 2015 WL 4426223, at *3 (W.D. Mo. July 20, 2015) ("Paragraph 3.K does not violate Rule 3.4(f). No 'lawyer' is 'request[ing]' any party to refrain from divulging information here. The parties themselves negotiated and agreed to a mutual confidentiality provision, as reflected by the parties' signatures on the Memorandum of Settlement. The attorneys presumably counseled the parties in making this decision, but such was not unlawful; Rule 3.4(f) proscribes only requests to persons 'other than a client.'"); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Informal Op. 2002-08 (2002) ("[N]othing precludes a consensual and voluntary settlement by and between duly represented clients, particularly where the party claiming to have been wronged is a large financial institution that regularly addresses problems associated with nonpaying customers. Inasmuch as there are no provisions in the agreement that would be deemed coercive, a bribe or otherwise forbid the provision of truthful testimony or cooperation with the authorities, there would appear to be no basis for a contention of a Rule 3.4 (Fairness to Opposing Party and Counsel) violation.").

78. Legal scholars have made additional arguments for why the law governing lawyers should be interpreted to completely bar the use of NDAs in settlement agreements, at least where there is reason to believe the settlement is being used to conceal harms to others or enable further wrongdoing. *See, e.g.*, Bauer, *supra* note 15, at 552 ("[R]equesting or offering inducements to a witness to withhold voluntary testimony should be considered a violation of Rule 8.4(d). Even if it is relatively easy for an opposing party to subpoena the witness, it still places an obstacle in the path of the core fact-finding function of a hearing, and sometimes it may matter a great deal, such as when a witness is beyond the geographic reach of a subpoena."); Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 793–802 (2002) (arguing that some NDAs can be seen as violating criminal statutes against compounding, or refraining from reporting a possible crime in exchange for compensation). However, to date, these arguments have not been accepted by courts or ethical boards.

II. PUBLIC VIEWS ON NDAS IN HARASSMENT SETTLEMENTS

As federal and state legislatures and boards of professional responsibility consider existing and future restrictions on the use of NDAs in sexual misconduct cases, judgments will undoubtedly be made about the harms and benefits of NDAs. Given the difficulty of obtaining reliable data on the extent to which NDAs enable misconduct and make recovery by other victims more difficult, case studies and anecdotal evidence will understandably play a prominent role in these debates.

An important complement to case studies and anecdotes are surveys of the public to gather information about the nature and frequency of sexual misconduct, how individuals respond to such misconduct, and how the public believes such misconduct should be dealt with.[79] In an attempt to enrich this database, the present study reports the results of a large-scale survey designed to shed light on public beliefs about the frequency of sexual harassment, the frequency of true accusations of sexual harassment, whether it is ever appropriate to keep a sexual harassment matter confidential, and whether those beliefs differ by gender, race, politics, age, income, or education.

The survey assessed public views about the propriety of confidentiality clauses in settlements of sexual harassment claims in two ways. First, participants were asked whether they would personally want to keep a matter private if they were sexually harassed or accused of sexual harassment. Second, participants were presented with cases in which the persons involved in a sexual harassment dispute settled the matter with or without an NDA, and then they were asked to evaluate those settlement agreements and the degree to which the person accused of harassment poses a future risk of harassment. Survey participants were presented with a variety of cases that differed in terms of who allegedly harassed whom, whether the accused denied the allegation, whether the parties were represented by counsel, how much compensation was paid to the accuser, and whether the settlement included an NDA. By comparing reactions to these cases, we can gain insight into the value the public places on bargaining over privacy and into the situations that raise the greatest public concern and perceived risk of future misconduct.

The survey contrasted three confidentiality scenarios: settlement agreements containing no NDA; settlement agreements containing a broad, unqualified NDA; and settlements agreements containing a qualified NDA which becomes void if the alleged harasser is accused of other acts of harassment. Something like the latter NDA has been proposed as an alternative method to respond to serial harassers, as opposed to a complete ban on NDAs, which is presently the primary

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79. *See, e.g.*, Holly Kearl, Nicole E. Johns & Dr. Anita Raj, *Measuring #MeToo: A National Study on Sexual Harassment and Assault*, U.C. SAN DIEGO CTR. ON GENDER EQUITY AND HEALTH (Apr. 2019), https://geh.ucsd.edu/wp-content/uploads/2019/05/2019-metoo-national-sexual-harassment-and-assault-report.pdf [https://perma.cc/259B-S5RU] (discussing a national survey examining the nature, frequency, locations, and effects of sexual assault and harassment).

response to the problem of serial abusers using NDAs to hide their actions.[80] The key goals of the survey were to examine (a) the degree to which the public values bargaining over privacy in sexual harassment matters, (b) the degree to which allowing qualified versus unqualified NDAs in settlement agreements protects that interest if it exists, and (c) the degree to which qualified versus unqualified NDAs increase the perceived risk of future abuse by the alleged harasser.

A. PARTICIPANTS

Using CloudResearch's crowdsourcing platform for online research,[81] 3,052 participants were recruited using demographic targets aimed at creating a sample that approximates the U.S. population with respect to gender, race/ethnicity, age, and household income (Table 1 provides a summary of sample demographics).[82]

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80. The qualified or limited NDAs examined here are simplified versions of the proposals made by Professors Samuel Estreicher and Ian Ayres. *See* Ayres, *supra* note 27, at 79 ("NDAs should be enforceable only (1) if they explicitly describe the rights which the survivor retains, notwithstanding the NDA, to report the perpetrator's behavior to the Equal Employment Opportunity Commission (EEOC) and other investigative authorities; (2) if they explicitly make the accuser's promises to not disclose conditional on the perpetrator not misrepresenting any of the survivor and perpetrator's past interactions; and (3) if the underlying survivor allegations are deposited in an information escrow that would be released for investigation by the EEOC if another complaint is received against the same perpetrator."); Estreicher, *supra* note 28 (arguing for the EEOC to require employers to provide data on sexual misconduct settlement agreements and to initiate investigations into settlement patterns suggesting serial abuse).

81. CloudResearch, formerly known as TurkPrime, makes use of Amazon's MTurk online workers but utilizes quality control measures to select reliable workers who do not engage in mindless responding and to prevent non-human participants (i.e., bots):

> The system CloudResearch has constructed relies on three types of information: (1) researcher generated data, (2) a series of open- and closed-ended instruments that are administered to Mturkers, and (3) technological measures such as geolocation tracking that are gathered by CloudResearch. Collectively, these measures are aimed at identifying a participant's level of attention and capability to accurately respond to survey items. People who demonstrate that they are unwilling or unable to provide quality data are added to a Blocked List of participants.

David J. Hauser, Aaron J. Moss, Cheskie Rosenzweig, Shalom N. Jaffe, Jonathan Robinson & Leib Litman, *Evaluating CloudResearch's Approved Group as a Solution for Problematic Data Quality on Mturk*, BEHAV. RSCH. METHODS, at 2–3 (2022), https://link.springer.com/article/10.3758/s13428-022-01999-x [https://perma.cc/A85C-3UFL]. A recent examination of the quality of data provided by participants approved by CloudResearch concluded that:

> CloudResearch's Approved Group appears to be one way to overcome issues with data quality on Mturk. The Approved Group may succeed where other methods fail because it does not rely on researcher rejections or repeatedly measuring attention with the same items. Because CloudResearch can aggregate participant data across thousands of academic users to establish an independent data-quality filter, it has the potential to evolve as flexibly as bad actors do and remain viable into the future.

Id. at 10.

82. Women are overrepresented in the sample relative to their population in the U.S., but, given that women are more often the victims of sexual harassment than men, *see* Kearl et al., *supra* note 79, this overrepresentation was not considered problematic. Furthermore, given the size of the sample, the survey was able to obtain the views of a large and diverse group of men. Democrats were also overrepresented, but again, given the size of the sample, the survey nonetheless obtained the views of many who do not identify as Democrats.

Each participant gave informed consent before answering any questions and received $2.50 for participation in the survey.[83]

TABLE 1:
DEMOGRAPHIC INFORMATION FOR THE SAMPLE

Gender	%	Age	%	Race/ Ethnicity	%	Educational Attainment	%	Income ($1000)	%	Political Party	%
Women	52.3	18–30	24.7	White	76.8	Attended HS/ HS Degree	11.4	<10	3.3	Democratic	56.0
Men	47.6			African American	9.6			10–29	14.3	Republican	29.2
Non-binary	.1	31–50	43.4	Hispanic	12.0	Some College/ College Degree	72.6	30–49 50–69	20.2 19.3	Neither	14.6
		51–70	29.0	Asian	5.8			70–89	13.4		
						Advanced Degree	16.0	90–109	10.9		
		>70	3.0	American Indian/ Alaska Native	.3			110–129 130–149	6.2 4.1		
				Pacific Islander/ Native Hawaiian	.1			<149	8.0		
				Other	1.0						

B. PROCEDURE AND SURVEY[84]

Participants anonymously completed the web-based survey (administered through the Qualtrics application) on their own computers or smartphones between January 5–11, 2023. After giving informed consent, participants were asked to provide demographic information (age, gender, race/ethnicity, household income, and education), information on political ideology (placement of their overall views on a liberal-conservative continuum, placement of their views specifically on economic matters on the same continuum, and placement of their views specifically on social

83. The project was approved by the Institutional Review Board at the University of Virginia, and participants were informed that any questions could be skipped without any consequences. The great majority of participants answered all questions.

84. The survey questions, as well as the data file, are available at https://osf.io/pxy97/ [https://perma.cc/F5Y9-NJB7].

matters on the same continuum), and information on political party preferences (Republican, Democratic, or neither of the two main parties). The three questions on political ideology formed a highly reliable scale ($\alpha = .95$), so mean scores on the three items were computed for each participant and used as a composite measure of ideology, with higher scores reflecting greater conservativism.

After being presented with these questions, participants were randomly assigned to consider one of the three sexual harassment scenarios. Participants received the following introduction to this portion of the survey:

> Please read the following description of a work-related incident carefully and then answer the questions that follow the description. (The names and location involved in this incident are fictional, but the situation captures events that occur in real work settings.)[85]

Then, participants were presented with a description of an incident in which the male president of an accounting firm was accused of making inappropriate comments to and engaging in inappropriate touching of one of the employees of the firm. In each case, the employee reported the harassment to the head of Human Resources for the firm, and the parties engaged in discussions that resulted in a private resolution of the matter.

The particulars of the harassment scenario varied along the following dimensions:

(a) Identity of the accuser: The president was accused of harassing either his female administrative assistant or a female accountant employed by the firm.[86]

(b) Response by the accused: The president either stated that he could not recall the details of the incident because he was drunk at the time or denied the accusation and offered evidence to support his denial.

(c) Presence of attorneys: The parties had no attorneys, both had attorneys, or only the president had an attorney during a settlement meeting.

(d) Compensation paid to settle the dispute: The president paid the accuser nothing, $10,000, $20,000, $50,000 or $100,000.

(e) Nondisclosure terms in the settlement agreement: The settlement agreement contained no NDA, contained an unqualified NDA, or contained an NDA but the parties agreed that information about the incident would be documented in the company file and publicly disclosed if the president was accused of harassment in the future.[87]

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85. *See id.*

86. This gender combination was chosen because men are more commonly reported to be harassers and women more commonly the victims of harassment. *See* STOP STREET HARASSMENT, THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 7–8 (2018), https://stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf [https://perma.cc/99GF-D54B].

87. Two additional qualified NDAs were examined with a smaller subset of the sample: (a) an NDA providing that the accuser could disclose information covered by the NDA if the accused subsequently characterized the accusation as false to others, and (b) an NDA making clear the agreement did not limit the accuser's right to

The goal was to construct a range of scenarios that varied concerning the seriousness of the conduct involved, the bargaining power of the parties, and the settlement terms, to test the limits of public approval or disapproval of NDAs in settlement agreements. The Appendix contains two examples of the scenarios used in the study.[88]

After reviewing the sexual harassment scenario, participants were asked to rate the settlement agreement overall (very bad deal, bad deal, good deal, or very good deal), and then to do the same from the perspectives of the accuser and the accused. Participants were then asked to rate the level of sexual harassment risk the president posed to other employees going forward, with four risk options (no risk, low risk, moderate risk, and high risk), and were asked whether incidents like the one in the scenario should ever be kept confidential (with the following response options: Yes, always; No, never; It would depend on the facts of the case).

Participants were then asked whether, if they were sexually harassed or accused of sexual harassment, they would want to keep the matter private (both questions had the following response options: Yes, always; No, never; It would depend on the facts of the case). Next, participants were asked to estimate separately (a) the percentage of female and male employees subjected to at least one act of sexual harassment on the job each year, (b) the percentage of female and male supervisors who engage in at least one act of sexual harassment on the job each year, and (c) the percentage of sexual harassment accusations made by women and men that are true.[89] To gauge levels of personal concern about harassment, participants were asked how much they worry about being sexually harassed on the job and how much they worry about being falsely accused of sexual harassment on the job (both questions used the following response options: I never worry about this; I hardly ever worry about this; I worry about this occasionally; I worry about this frequently; I worry about this almost daily).

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cooperate with government investigations or give testimony in court. These alterations to the NDA had little impact on judgments about the scenarios.

88. The survey and full set of scenarios can be viewed at https://osf.io/pxy97/ [https://perma.cc/F5Y9-NJB7].

89. The survey intentionally did not define the phrase "sexual harassment" to allow respondents to deploy their own conceptions because the goal here was to gather estimates of the frequency of behaviors that the respondents personally considered sexual harassment. This expansive approach means that respondents may have conceived of sexual harassment in different ways, but the goal was to gather personal beliefs about the prevalence of sexual harassment rather than estimating the occurrence of particular behaviors that may constitute sexual harassment. An alternative approach that asks about the frequency of specific behaviors risks omitting behaviors considered forms of harassment by some and complicates the survey by requiring more questions that may address sensitive issues. Nevertheless, a behavior-based approach would surely produce different estimates than those reported here.

C. RESULTS

We first consider responses to the questions asking about general views on the frequency of sexual harassment and whether it is appropriate for accusations of sexual harassment to be kept private. These questions revealed considerable agreement across groups. We then turn to views on the propriety of NDAs in agreements settling a variety of sexual harassment incidents. Respondents recognized the potential risks posed by NDAs, particularly where the parties exhibited a power imbalance within a company, but respondents also saw considerable value in allowing parties to bargain over privacy.

1. GENERAL VIEWS ON HARASSMENT AND ON PRIVACY IN HARASSMENT DISPUTES

Responses to the questions about the prevalence of sexual harassment, the truth of sexual harassment accusations, and privacy in harassment cases revealed considerable consensus across groups.[90] Respondents estimated that considerably more female employees (mean estimate of 48.8%) are subjected to harassment in any given year than male employees (mean estimate of 19.3%), and that considerably more male supervisors (mean estimate of 39.4%) harass than female supervisors (mean estimate of 18.8%). Respondents estimated that most sexual harassment accusations by both women and men are true (mean estimates of 65.8% for women and 62.7% for men), but those estimates mean that many accusations are seen as debatable or false. As shown in Table 2, there were some notable and interesting differences in estimates by demographic group (e.g., liberals and conservatives differed considerably in their estimates of true accusations), but these general patterns held across groups.

90. Because these questions assessing general views on harassment and privacy followed exposure to the sexual harassment scenarios, there was a risk that answers to these questions could be affected by the details of the scenario reviewed. As discussed in an online supplement, some question order effects were observed, but these effects did not alter the pattern of results presented here. This supplement can be viewed at https://osf.io/73rpk/ [https://perma.cc/58C6-2GMT].

TABLE 2:
MEAN ESTIMATES OF WHO IS HARASSED, WHO HARASSES, AND TRUTHFUL ACCUSATIONS

		Gender		Race		Age				Education		Annual Income			Political Ideology		
Mean Estimate of:	**Overall**	**Women**	**Men**	**Persons of Color**	**White Persons**	**18–30**	**31–50**	**51–70**	**>70**	**High School**	**College and Above**	**<$50,000**	**$50,000 – 110,000**	**>$110,000**	**Liberal**	**Moderate**	**Conservative**
% Female Employees Harassed Per Year	48.8	53.0	44.2	54.4	47.1	53.3	49.3	44.3	46.4	47.6	48.9	49.6	48.8	47.3	54.8	49.2	40.7
% Male Employees Harassed Per Year	19.3	20.5	17.9	22.7	18.2	20.9	19.4	17.7	15.4	20.9	19.0	19.7	19.2	18.4	18.8	19.7	19.1
% Female Supervisors Who Harass Per Year	18.8	19.8	17.8	23.4	17.5	21.7	18.8	16.6	15.5	20.6	18.6	19.9	18.7	16.8	18.1	19.2	19.1
% Male Supervisors Who Harass Per Year	39.4	44.0	34.5	44.8	37.8	42.7	39.2	36.3	43.1	40.3	39.3	40.6	39.3	37.4	42.9	39.7	33.9
% True Accusations by Women	65.8	68.5	62.9	64.9	66.1	68.9	66.5	62.5	64.3	59.8	66.6	65.4	66.1	65.8	77.6	64.3	53.6
% True Accusations by Men	62.7	63.3	62.0	58.2	64.0	65.5	63.7	59.4	57.1	60.7	62.9	61.4	63.4	64.1	70.3	59.8	55.8

When asked how they would personally deal with a sexual harassment incident, the majority indicated that privacy should be determined on a case-by-case basis. When asked how they would deal with being accused of sexual harassment, many respondents stated that they would always want to keep the matter private (1,229, or 40.4%), while a much smaller minority stated that they would never want to keep the matter private (264, or 8.7%); the majority indicated that the decision to keep the matter private would depend on the facts of the case (1,548, or 50.9%). With respect to being a victim of sexual harassment, the majority likewise indicated that privacy would depend on the facts of the case (1,969, or 64.7%), while sizable minorities indicated that they would never want to keep the matter private (621, or 20.4%) or would always want to keep the matter private (452, or 14.9%).

As shown in Table 3, a preference for deciding privacy on a case-by-case basis was the dominant view across demographic and political groups. However, some groups did differ in their level of support for always, or never, keeping harassment matters private. For instance, persons of color, young people, and liberal respondents were most likely to state that they would never want information about their having been harassed to be kept private, while the wealthiest

respondents and conservative respondents were most likely to say that they would always want information about their being accused of harassment to be kept private.

TABLE 3:
VIEWS ON PRIVACY IF ACCUSED OF HARASSMENT OR IF HARASSED

		Gender		Race		Age				Education		Annual Income			Political Ideology		
If you were accused of sexual harassment, would you want to keep the matter private? Percent choosing each option:	**Overall**	**Women**	**Men**	**Persons of Color**	**White Persons**	**18–30**	**31–50**	**51–70**	**>70**	**High School**	**College and Above**	**<$50,000**	**$50,000 – 110,000**	**>$110,000**	**Liberal**	**Moderate**	**Conservative**
Would depend on facts of case	50.9	52.5	49.2	55.5	49.5	53.1	50.5	49.8	53.3	50.7	51.0	54.4	49.1	47.7	54.8	53.8	45.9
Yes, always	40.4	39.6	41.3	30.4	43.4	34.6	41.1	43.5	43.3	39.5	40.5	37.1	41.3	45.7	34.2	38.3	46.8
No, never	8.7	7.9	9.5	14.1	7.1	12.3	8.4	6.6	3.3	9.8	8.5	8.5	9.7	6.7	11.1	7.9	7.3
If you were sexually harassed, would you want to keep the matter private? Percent choosing each option:	**Overall**	**Women**	**Men**	**Persons of Color**	**White Persons**	**18–30**	**31–50**	**51–70**	**>70**	**High School**	**College and Above**	**<$50,000**	**$50,000 – 110,000**	**>$110,000**	**Liberal**	**Moderate**	**Conservative**
Would depend on facts of case	64.7	65.7	63.7	58.9	66.5	56.7	65.8	69.8	66.7	63.1	65.2	64.8	63.3	67.6	64.9	65.1	65.8
Yes, always	14.9	13.2	16.7	12.9	15.4	14.6	14.9	13.9	13.9	16.4	14.5	13.5	15.9	15.3	9.2	15.9	19.4
No, never	20.4	21.2	19.6	28.2	18.1	28.7	19.3	16.4	16.4	20.5	20.3	21.7	20.8	17.1	25.9	19.0	14.8

The survey found that most people do not worry persistently about being sexually harassed on the job or being falsely accused of harassment on the job: 2,407 (79.8%) of respondents stated that they never or hardly ever worry about being harassed, and 2,486 (82.4%) of respondents stated that they never or hardly ever worry about being falsely accused of harassment. However, as shown in Table 4, women and men differed dramatically in the degree to which they worry about sexual harassment and false accusations: (a) almost one-third of female respondents worry occasionally, frequently, or daily about sexual harassment on the job, compared to fewer than ten percent of male respondents who do; (b) conversely, almost one-third of male respondents worry occasionally, frequently, or daily about being falsely accused of sexual harassment on the job, compared to fewer than ten percent of female respondents who do.[91]

91. A similar mirror-image pattern on these questions appeared for liberal versus conservative respondents, although the differences were not as large as those between women and men (the three ideology groups were constructed by differentiating between the most liberal third and most conservative third of respondents in the sample as measured by the composite political ideology measure, with the middle third designated moderates).

TABLE 4:
WORRIES ABOUT HARASSMENT AND HARASSMENT ACCUSATIONS

Worry about sexual harassment? Percent choosing each option:	Overall	Gender		Race		Age				Education		Annual Income			Political Ideology		
		Women	Men	Persons of Color	White Persons	18–30	31–50	51–70	>70	High School	College and	<$50,000	$50,000 – 110,000	>$110,000	Liberal	Moderate	Conserv-ative
Never	52.0	38.3	67.1	46.6	53.6	45.4	50.5	57.9	76.1	57.8	51.4	51.1	51.1	56.3	45.8	50.7	62.8
Hardly Ever	27.8	31.1	24.2	28.1	27.7	27.5	27.6	28.8	17.0	23.1	28.3	26.3	29.5	27.2	26.3	29.3	26.2
Occasionally	14.6	22.2	6.3	17.6	13.7	17.7	15.9	10.8	5.7	12.7	14.8	15.7	15.2	10.7	19.9	14.5	8.1
Frequently	4.3	6.7	1.5	5.9	3.8	7.1	4.8	1.6	1.1	3.8	4.3	4.8	3.7	4.2	7.1	3.3	1.9
Almost Daily	1.3	1.7	0.8	1.9	1.1	2.3	1.2	0.8	0.0	2.6	1.1	2.0	0.5	1.6	0.9	2.2	1.0
Worry about false accusation? Percent choosing each option:	**Overall**	**Women**	**Men**	**Persons of Color**	**White Persons**	**18–30**	**31–50**	**51–70**	**>70**	**High School**	**College and Above**	**<$50,000**	**$50,000 –110,000**	**>$110,000**	**Liberal**	**Moderate**	**Conservative**
Never	55.6	72.5	37.0	48.3	57.8	49.0	55.3	61.2	59.1	65.3	54.4	57.6	54.9	52.9	59.7	51.2	56.7
Hardly Ever	26.8	20.6	33.6	30.4	25.8	29.0	26.2	25.8	29.5	16.8	28.1	25.4	26.9	29.9	27.2	28.9	23.4
Occasionally	11.9	5.2	19.4	12.5	11.8	13.5	12.4	10.5	8.0	11.6	12.0	11.4	13.0	10.9	8.0	14.3	13.7
Frequently	4.1	1.1	7.4	6.2	3.4	6.3	4.3	1.8	2.3	4.0	4.1	4.0	4.0	4.2	3.7	3.9	4.3
Almost Daily	1.6	0.6	2.6	2.6	1.2	2.2	1.9	0.7	1.1	2.3	1.4	1.6	1.3	2.2	1.4	1.8	1.9

2. REACTIONS TO THE SEXUAL HARASSMENT SETTLEMENTS

The terms of the settlement agreements, and the conditions under which the agreements were entered into, affected how participants evaluated the deal overall and how they evaluated the deal from the perspective of the accuser and the accused. Across all scenarios, participants rated the accuser as getting a better deal than the accused 39.3% of the time, rated the accused as getting the better deal 31.9% of the time, and rated the deal as equally good or bad for both parties 28.8% of the time. Most notably for present purposes, the inclusion of an NDA in the settlement agreement significantly affected perceptions of the settlement.

When the settlement included an NDA, participants were more likely to rate the accused (David) as getting the better deal[92] and were more likely to rate the overall deal negatively.[93] However, when the NDA provided that information about the incident would be retained in David's personnel file and could be disclosed if David were subsequently accused of harassment (i.e., the settlement contained the qualified NDA as opposed to the unqualified NDA), assessments of the deal shifted significantly in favor of the accuser (Mary) as getting the better

92. $b = -.12$, $p = 03$. For ease of interpretation, unstandardized betas from linear regressions are reported here even for dependent measures that were ordinal or categorical; logistic regressions produced similar results.

93. Mean rating of $-.04$ when the settlement included an NDA versus mean rating of .12 when the settlement did not include an NDA, $F(1, 3048) = 12.27$, $p < .001$ (scores below zero reflect a negative evaluation of the agreement, and scores above zero reflect a positive evaluation of the agreement; scores could range from -2 to $+2$).

deal,[94] and the overall deal was rated more favorably.[95] Ratings of the deal from Mary's perspective were not significantly affected by inclusion of this term in the NDA (i.e., participants did not see this qualification to the NDA as significantly increasing or decreasing the value of the deal to Mary).

Inclusion of an NDA had a positive effect on evaluations of how Mary fared under the agreement because adding the NDA allowed Mary to obtain more compensation from David (i.e., the NDA variable interacted with the compensation variable).[96] Comparatively speaking, the amount of compensation paid to Mary had a larger impact on evaluations of the settlement than whether the settlement contained an NDA. When Mary received $10,000 or more in compensation, practically all respondents rated Mary as receiving a good or very good deal, even when she agreed to an NDA as part of the settlement. As Mary was paid more, judgments that Mary had received the better deal increased significantly,[97] while ratings of the overall deal became significantly more negative as the deal was more lopsided in favor of Mary.[98] The presence of an NDA made the deal look more favorable for David, but increases in the amount paid to Mary made the deal look much more favorable to Mary despite her agreeing to an NDA to get that compensation.

The presence of an NDA and the level of compensation were not the only factors important to respondents: the identity of the accuser and how the accused responded to the accusation also affected how the settlement agreements were evaluated. When the accuser (Mary) was identified as an administrative assistant, participants were more likely to rate the deal as more favorable to David,[99] regardless of whether the settlement contained an NDA.[100] However, this effect

94. $B = .21, p = .005$.

95. Mean rating of -.14 when the NDA was unqualified versus mean rating of .15 when the NDA allowed disclosure if David is accused again, $F\ (1, 1739) = 24.18$, $p < .001$. Two other types of qualified NDAs were tested but with smaller groups because these qualified NDAs were not the focus of the study: (a) one adding a provision that Mary could disclose information if David characterized her accusation as false ($n = 79$), and (b) one adding language making clear that the NDA did not prevent Mary from cooperating with government investigations or complying with subpoenas ($n = 80$). Surprisingly, neither led to shifts in favor of rating Mary getting the better deal nor more positive evaluations of the deal overall. These results should be viewed cautiously, however, given the smaller sample sizes used to test these provisions. Less attention was given to these NDAs because the former does not address the concern about serial harassers using NDAs to enable further abuse, and the latter only makes explicit a limitation on NDAs that exists under current law.

96. $F\ (1, 3052) = 5.00$, $p = .025$. The main effect of the NDA variable was not significant. Thus, ratings of the deal for Mary were not significantly affected by the presence or absence of the NDA, but when the settlement contained an NDA and compensation to Mary increased, Mary was seen as getting a better deal.

97. In a regression using the level-of payment variable and NDA variable (present or not) as predictors, the payment variable significantly predicted whether Mary or David was rated as having received the better deal, $b = .55$, $p < .001$, but the NDA variable did not, $b = .08$, $p < .17$. Likewise, examining just those agreements containing an NDA, adding a variable for whether the NDA was qualified or unqualified added no predictive value above the payment variable.

98. $b = -.31, p < .001$.

99. $b = -.33, p < .001$.

100. That is, the identity-of-accuser variable (accountant or assistant) and the NDA variable (present or absent) did not interact.

was neutralized when both parties brought an attorney to the settlement meeting (i.e., no longer did the identity of the accuser affect judgments of the settlement). It appears that the presence of an attorney on the side of the administrative assistant quelled concerns about disparity in bargaining power and possible abuse of that power by David.

When David denied the accusation and claimed to have proof supporting that denial, participants were more likely to view Mary as getting the better deal,[101] although this effect became non-significant when the settlement agreement contained an unqualified NDA.[102] These results suggest that participants viewed David's settling of the matter as a bad decision when he had credible evidence to support his denial. Nonetheless, David's ability to keep the matter private reduced negative perceptions of the deal from his perspective.

Turning to participants' estimates of the sexual harassment risk posed by the accused following the settlement, the presence of an NDA increased perceptions of David as a harassment risk.[103] Thus, it appears participants saw the NDA as making it easier for David to harass in the future and/or saw David's request for an NDA as possible evidence that he has harassed others or plans to do so. Other conditions also amplified the perception of risk: (a) when the alleged victim was the administrative assistant, (b) when only David brought an attorney to the settlement meeting with the administrative assistant, (c) when David admitted to being drunk at the time the alleged harassment occurred, and (d) when larger amounts were paid to settle the matter.[104] When the NDA provided that the incident would be noted in David's personnel file and could be disclosed if David were involved in another incident, the perception of risk was reduced, but this reduction was only marginally significant across all cases.[105] However, when we focus only on the cases involving the administrative assistant—cases in which David was seen as a greater risk of future harassment compared to cases in which David was accused of harassing an accountant—participants rated David as a lower future risk of harassment when the settlement agreement contained the qualified NDA instead of the unqualified NDA.[106]

After reading the sexual harassment scenario, participants were asked whether incidents like the one they read about should ever be kept confidential. The

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101. $b = .21, p < .001$.

102. $b = .17, p = .11$.

103. Mean harassment risk of 2.61 in the presence of an NDA versus mean of 2.53 when the settlement agreement did not contain an NDA, $F\ (1, 3050) = 6.93, p = .009$.

104. All *p's < .001*.

105. $F\ (1, 1741) = 3.71, p = .054$.

106. $F\ (1, 746) = 4.08, p = .044$. David was perceived as the greater risk for serial abuse where he was accused of taking advantage of the administrative assistant, as opposed to the accountant. Perhaps this is because the former power dynamic was seen as much more lopsided, because the specifics of David's behavior directed at the assistant were seen as more troubling, and/or because David was seen as having more opportunities for harassment of the assistant. Further study is needed to better understand the different risk perceptions associated with the harassment of the assistant versus the accountant.

dominant response given by 2,285 (75.1%) of the participants was that confidentiality would depend on the facts of each case; 255 (8.4%) stated that such matters should always be confidential, while 502 (16.5%) stated that such matters should never be confidential.

These views did vary with the details of the harassment scenario the participant had reviewed. When the complainant was the assistant, significantly more participants stated that incidents like this one should never be kept confidential compared to when the complainant was the accountant (22% v. 13%, respectively). When David credibly denied the accusation instead of claiming no memory due to drunkenness, respondents were significantly more likely to rate the incident as one that should always be confidential. When only David had an attorney, significantly more participants stated that incidents such as this should never be kept confidential (23%, compared to approximately 16% when both had attorneys or neither had attorneys). As the size of the payment to Mary increased, the number stating incidents like this should never be private increased.

Views on confidentiality also varied with risk perceptions. When David was seen as a low risk, only 5% stated that incidents like this one should never be kept confidential, but that percentage increased significantly for those rating David a moderate risk (19%), and even more for those rating David a high risk (43%) (Table 5 provides a breakdown of views by demographics). Together, these results indicate that concerns about NDAs vary with the degree to which the NDA was feared to be the product of the accuser exploiting a power differential or the accuser using the NDA to enable other harassment. However, for every scenario, over 60% of the respondents (and usually more than 70%) stated that confidentiality should be determined on a case-by-case basis. Furthermore, these views were largely consistent across demographic groups, as shown in Table 5: a majority of every group favored determining privacy on a case-by-case basis.

TABLE 5:
VIEWS ON KEEPING INCIDENTS LIKE THE ONE INVOLVING DAVID AND MARY PRIVATE

Should incidents like the one involving David and Mary ever be kept confidential? Percent choosing each option:	Overall	Gender		Race		Age				Education		Annual Income			Political Ideology		
		Women	Men	Persons of Color	White Persons	18–30	31–50	51–70	>70	High School	College and Above	<$50,000	$50,000 –110,000	>$110,000	Liberal	Moderate	Conservative
Would depend on facts of case	75.1	75.2	75.1	68.4	77.2	68.7	75.6	79.5	80.0	73.8	75.4	74.4	75.2	76.4	75.3	75.4	73.6
Yes, always	8.4	6.7	10.1	8.5	8.3	6.9	8.7	8.7	11.1	9.5	8.2	7.4	8.5	10.1	4.6	8.5	12.8
No, never	16.5	18.0	14.8	23.1	14.5	24.4	15.7	11.8	8.9	16.7	16.5	18.2	16.3	13.5	20.0	16.1	13.6

D. IMPLICATIONS OF THE SURVEY RESULTS FOR NDA REFORMS

One clear message from the empirical study is that the public does not support a complete abolition on NDAs in sexual misconduct cases. The survey revealed that most people—regardless of gender, age, race, education, income, and politics—believe that parties to a sexual harassment dispute should have the right to determine, on a case-by-case basis, whether to keep the matter private. This view dominated even when participants in the study considered NDAs in concrete cases that involved serious incidents, such as when the president of an accounting firm was accused of engaging in an escalating pattern of harassment against his much younger administrative assistant, beginning with verbal harassment and ending with inappropriate touching and a sexual comment. Respondents recognized the seriousness of the case and the power disparity it presented; nonetheless, they believed that the parties should have the right to bargain over privacy.

Three considerations appear to explain why most members of the public do not support total bans on NDAs. First, bargaining over privacy allowed the accuser to obtain increased compensation, and the level of compensation obtained by the accuser was the main driver of evaluations of the settlement. As compensation to the accuser increased, the deal was seen as significantly better for the accuser. Some plaintiffs may feel strongly that an incident should not be kept secret or may feel that they have ample bargaining power without the NDA option, but allowing victims of harassment to negotiate over an NDA may provide a valuable bargaining chip, one that the public supports keeping in plaintiffs' pockets.

Second, when asked how they would respond to being sexually harassed, most respondents wanted the option to keep the matter private. Thus, independent of any bargaining value the NDA option may provide, many members of the public value the right to determine whether to maintain privacy over incidents in which they have been harassed.

Third, when asked how they would respond to being accused of sexual harassment, a majority wanted the option to keep the incident private, and a large minority stated that they would always want to keep the matter private. This option is particularly valuable where there is good reason to believe an accusation is mistaken: when the president accused of harassment in our hypothetical case credibly denied the accusation, respondents saw his settlement as a bad deal unless it contained an NDA. In the eyes of the public, most harassment accusations are true, but they also see many accusations as not being clearcut. Indeed, on average, respondents believe that more than one-third of sexual harassment accusations are not necessarily true.[107] Where a genuine dispute exists about what occurred, both the accused and accuser may have good reasons to sign an NDA.

These results stand in stark contrast to the many laws recently passed and proposed that implement complete or near complete bans on NDAs or that give only the claimant the power to seek privacy. If the premise for these laws is that the public sees little value in maintaining privacy over sexual harassment information, the survey results are at odds with that premise. If privacy bargaining can be used to obtain greater compensation, it has value in the eyes of the public. However, survey participants favored the option to keep a matter private independent of its role in settlement negotiations. Moreover, the privacy option was seen as particularly important when one was facing an accusation of harassment. Unless we suppose that all accusations of sexual misconduct are true, a view not held by the public, then it is hard to justify providing only accusers with the option to seek privacy. A world where all NDAs are against public policy is a world where even those who are falsely accused, or who credibly dispute the allegation, cannot validly contract for privacy to avoid the potentially greater costs associated with litigating the matter publicly.[108]

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107. It is important not to equate the estimates of true accusations as also reflecting estimates of false accusations. An accusation may not be true because it is intentionally false or because a party is mistaken about what occurred or what was intended. A subsequent survey will need to disentangle estimates of true, false, and mistaken accusations.

108. The counterargument in the context of truly false accusations is that blackmail based on a threat of public disclosure of false or embarrassing information has no value if the target cannot buy secrecy; therefore, blackmail attempts should decrease once contracts to keep accusations secret are not enforceable. However, the accuser and accused may bargain over secrecy even where they know the contract is unenforceable, simply because both parties have an interest in secrecy or because the target can recover sums paid if the blackmailer goes public. Under the Restatement of Restitution Law, one falsely accused of harassment who knowingly enters into an illegal contract may not be able to recover sums paid to the false accuser due to unclean hands. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 63 (AM. L. INST. 2011) ("Recovery in restitution to which an innocent claimant would be entitled may be limited or denied because of the claimant's inequitable conduct in the transaction that is the source of the asserted liability."). However, an

However, another clear message from the study is that the public recognizes that harassers can use NDAs to conceal abuse. Respondents to the survey viewed settlements as significantly worse when the agreement included an unqualified NDA, and respondents estimated the future risk posed by the accused to be higher when the settlement contained an unqualified NDA. Conditioning enforcement of the NDA on the accused not being involved in further incidents significantly reduced the perceived risk posed by the alleged harasser, and changing the NDA to one that allowed the incident to be recorded in the accused's personnel file and disclosed to others, should the accused be involved in other harassment incidents, led to more positive assessments of the deal overall.

The public, in short, sees party control over sexual harassment information to be beneficial but potentially dangerous. NDA regulations that enable the parties to bargain over privacy but also enable government agencies or other alleged victims to overcome an NDA and obtain information about an accused's past strike a better balance of private and public interests in sexual harassment information than regulations that outlaw all confidentiality agreements in sexual misconduct cases.

This balance can be achieved by implementing something like the qualified NDA examined here, giving the employer or accuser a right to disclose information when the accused is involved in another harassment case. Implementation of this idea could be most easily achieved by permitting the parties to include NDAs in their settlement agreements but requiring that employers submit information about the settlement to the EEOC so that it can investigate where there is evidence of serial abuse or problematic workplaces, as Professor Estreicher has proposed.[109] An attractive feature of this approach is that the NDA need not contain a triggering event that must be proved in order to permit disclosure of previously confidential information. A downside is that this proposal does not permit disclosure to other alleged victims of an abuser, and it may be difficult for the EEOC to track abusers who change jobs after incidents. One way of dealing with wandering abusers would be through the creation of a settlement registry that makes the

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alternative provision allows some people to recover sums paid on illegal contracts, and includes amount paid to a blackmailer. As an example: "A pays B $10,000 in response to B's threat to reveal information about A's activities that would expose A to criminal prosecution. A later reports the transaction to the authorities and seeks to recover the money from B. The agreement between A and B to stifle a prosecution is itself punishable as a crime, but A (as a victim of blackmail) will not on that account be barred from recovery. A is entitled to restitution from B." *Id*. § 32, Illustration 16.

109. *See* Estreicher, *supra* note 28; *see also* Spooner, *supra* note 27, at 335. A variant of this proposal is contained in the proposed Ending Secrecy About Workplace Sexual Harassment Act, which has been introduced into Congress twice, but has not yet passed. *See* Ending Secrecy About Workplace Sexual Harassment Act, H. R. 1828, 116th Cong. § 2(a) (1st Sess. 2019). As proposed in this bill, the information could be incorporated into the annual disclosures required by employers in the EEO-1. *See* U.S. Equal Emp. Opportunity Comm'n, EEO-1 Component 1 Data Collection (2023), https://www.eeoc.gov/data/eeo-1-data-collection [https://perma.cc/CUQ3-HECS]. As noted above, Maryland implemented, albeit for a limited period, a similar reporting requirement. *See* S.B. 1010, 2018 Leg., 438th Sess. (Md. 2018), *supra* note 63 and accompanying text.

enforcement of an NDA conditional on depositing the settlement or information about the settlement into the registry so that those involved in repeated settlements involving secrecy would be easily detected.[110]

Such a registry would be similar to the "information escrow" approach proposed by Professor Ayres,[111] and it could be adapted to permit disclosure not only to government agencies charged with investigating discrimination, but also to private individuals and/or courts where there is cause to believe an individual has previously settled sexual misconduct claims.[112] The gatekeeper could establish rules for when information will be released to prevent frivolous accusations or claims from being used to trigger disclosure of information covered by an NDA, or the court could determine the relevance of such information as part of the discovery process.

To enhance the bargaining value of the NDA to victims and protect against exploitation of the NDA option, procedural safeguards could be mandated to ensure that victims have an opportunity to consult with counsel before entering an NDA. In our sexual harassment scenarios, when the accuser was an administrative assistant, as opposed to a professional accountant, having an attorney was viewed as an important way to ensure the fairness of the bargain. Some states have already enacted procedural requirements aimed at ensuring the victim has time to consider a proposed NDA and obtain advice of counsel,[113] and the survey provides support for using procedural protections as opposed to complete bans on NDAs.

The finding that the public places considerable value on a victim having the privacy option and the ability to negotiate over privacy to increase compensation, combined with the finding on the importance of having counsel during settlement talks, create a tension with interpretations of ethical rules that limit attorney participation in the making of NDAs. The public sees an attorney for the accuser as

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110. The registry could also contain information about whether the parties had counsel and if so, whom, and the source of funding to monitor for possible patterns of abuse or exploitation. Providing information about counsel would facilitate the sharing of information across cases.

111. *See* Ayres, *supra* note 27, at 84–85. As Ayres proposes, the registry could also contain submissions by the parties that would convey their position on what transpired to assist in determinations of the relevance of the incident for other incidents.

112. This proposal is also similar to that made by Ellen Zucker, an attorney who represents victims of harassment, who proposed that NDAs be required to "provide that *all complaints* or expressed concerns about harassment, discrimination or retaliation be maintained in an alleged perpetrator's personnel file and, in the event that civil litigation is initiated by another claimant or a government investigation related to the conduct of the alleged perpetrator is commenced and such information is requested, disclosure of all such prior complaints must occur without objection based upon privacy or confidentiality." Ellen J. Zucker, *NDAs: Is There Anything Worth Keeping?*, 66 BOS. BAR J. 22, 24 (2022).

113. *See, e.g.*, N.Y. CIVIL PRACTICE LAW AND RULES § 5003-b (McKinney 2019) (for settlement agreements entered into after a claim is filed, an agreement should not contain an NDA unless it is the plaintiff's preference, the plaintiff had 21 days to consider the term, and the plaintiff had seven days to revoke the agreement). The federal BE HEARD Act would also impose procedural protections if passed. *See supra* note 49 and accompanying text.

an important check on the accused's ability to exploit the accuser to procure silence. Additionally, the public sees obtaining a larger payment in exchange for the NDA to be a very positive outcome for the accused. Indeed, evaluations of the settlement agreement were much more sensitive to the level of compensation paid to the accuser than to the presence of an NDA or the terms of the NDA. To the extent ethical regulations prevent lawyers from providing counsel to parties who may want to consider an NDA as part of a settlement agreement, the regulations undercut an important check on abuses of NDAs by sophisticated parties who may seek to include illegal terms in a settlement agreement. Counsel may also provide bargaining power and expertise that many victims do not have.[114]

Of course, any prospect of future disclosure and added procedural protections will reduce the value of NDAs in settlement negotiations. However, if a conditional NDA is an option rather than a requirement (as it presently is in states that have opted to give claimants control over whether to negotiate an NDA as part of a settlement), then arguably the bargaining power of the accuser increases, and procedural protections without substantive constraints should cause minimal added transaction costs. On the other hand, if the goal is to maximize deterrence while maintaining some party control over disputed information, then a uniform rule that NDAs must be disclosed to the EEOC, deposited into a settlement registry, or contain a disclosure trigger in the event of future misconduct would be a more desirable approach.[115]

CONCLUSION

Serial abusers can, and have, taken advantage of secrecy purchased through settlement agreements to conceal and perpetuate their harms, but some harassment cases involve a genuine dispute over whether illegal behavior has occurred, and some victims of harassment desire privacy rather than publicity.[116] Banning all NDAs to ensure that no serial abusers can exploit them ignores legitimate interests in privacy for both accusers and the accused, interests that the public strongly supports. Most importantly, a complete ban is not necessary to achieve the goal of preventing serial abusers from using NDAs to hide and perpetuate their abuse: permitting NDAs conditioned on future good conduct would

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114. The results also cast doubt on interpretations of the ethical rules that allow lawyers to disclose public information about a case even if the parties entered into an NDA, because such disclosures not only intrude on the client's privacy rights but reduce the bargaining value of an NDA.

115. To protect against the use of insincere accusations in the future to trigger the disclosure, the disclosure could be limited to only that other accuser or to a government body, as proposed by Spooner, *supra* note 27, at 369.

116. *See, e.g.*, Debra S. Katz & Lisa J. Banks, *The Call to Ban NDAs Is Well-intentioned. But It Puts the Burden on Victims*, WASH. POST (Dec. 10, 2019), https://www.washingtonpost.com/opinions/banning-confidentiality-agreements-wont-solve-sexual-harassment/2019/12/10/13edbeba-1b74-11ea-8d58-5ac3600967a1_story.html [https://perma.cc/Z6LB-9VBH] ("Banning NDAs for sexual harassment claims will make many employers unwilling to enter negotiations at all. Where negotiations do occur, victims of sexual harassment will find themselves with less bargaining power than other legal claimants have, amplifying the imbalance that lies at the heart of sexual harassment itself.").

incentivize employers and employees to behave properly and avoid risky situations while ensuring that those harmed by the same harasser can share information with one another, and a requirement to register or report settlements containing an NDA would allow government or private watchdogs to monitor for repeat offenders.

APPENDIX: EXAMPLES OF THE SEXUAL HARASSMENT SCENARIOS

Administrative Assistant Harassed by President Who Claims to Have Been Drunk; Only the President Has Counsel at Settlement Meeting; Parties Agree to Unqualified NDA, with President Paying $20,000:

David Harris is the president of an accounting firm in Kansas City, Missouri, and Mary Thompson has served as his administrative assistant for the past year. David Harris is 50 years old and married. Mary Thompson is 26 years old and unmarried.

Recently, Mary sent an email to the head of Human Resources at the firm stating that for the past month David had made comments to Mary about her appearance and had been asking about her dating life. Mary stated that those comments made her very uncomfortable, but she had not complained because the comments were fairly mild. However, Mary stated that after work on Friday of the prior week, Mary, David, and others at the firm had gone to a bar to celebrate the signing of a new major client for the firm. While at the bar, David placed his hand on Mary's lower back and whispered to Mary that she looked very sexy. Mary stated that she was alarmed by David's behavior and decided that she had to complain.

The head of Human Resources immediately contacted David Harris, who confirmed that he, Mary, and others had been together at the bar to celebrate a new client. However, David stated that he could not recall what happened because he had drunk too much that night.

The head of Human Resources arranged a meeting between David and Mary, with the head of Human Resources also attending the meeting.

David brought an attorney to the meeting, but Mary did not. During the meeting, David's lawyer stated that his client was prepared to litigate this matter in court if the parties could not settle this matter privately. David's lawyer then said that, although David did not do anything illegal, David was willing to pay Mary $10,000 to bring the matter to a close. The lawyer also said that Mary would need to agree to keep the matter private if she accepted the money.

They took a break to give Mary some time to consider the offer. When the meeting resumed, Mary told David and his attorney she would settle the matter and keep it private, but only if David paid her $20,000. After conferring with his lawyer, David agreed. David and Mary then signed an agreement to keep the matter confidential, and David paid Mary $20,000.

Accountant Harassed by President Who Denies Allegation; Neither Party Has Counsel at Settlement Meeting; Parties Agree to NDA That Permits Disclosure if President is Accused Again, with President Paying $10,000:

> David Harris is the president of an accounting firm operating in Kansas City, Missouri. Mary Thompson is an accountant who works for this firm. On December 15, 2022, during the firm's annual holiday party, David and Mary had drinks and danced together. The day after the holiday party, Mary Thompson sent an email to the accounting firm's head of Human Resources stating that David Harris had engaged in inappropriate conduct toward Mary at the party, grabbing Mary's hips and telling her how sexy she looked.
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> The head of Human Resources immediately contacted David Harris, who confirmed that he and Mary had been drinking and dancing together at the party to celebrate a new client they had jointly recruited. David stated that he did not touch Mary inappropriately and Mary had in fact tried to kiss him. David stated that he politely declined Mary's advances and then got an Uber ride to take Mary home. David was adamant that he had done nothing wrong, and he stated that he could provide evidence that he paid for Mary's Uber ride home.
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> The head of Human Resources then contacted the attorney who handles employment matters for the accounting firm and related what she had learned. The attorney arranged a meeting between David and Mary, with the head of Human Resources present. Mary threatened to pursue a claim for sexual harassment in court if David did not leave the firm. David refused to do that, but he agreed to pay Mary $10,000 to address her concerns so long as Mary agreed to keep the matter confidential.
>
> The attorney for the accounting firm said that arrangement would be acceptable, but the attorney insisted that a record of Mary's complaint be kept in David's personnel file and stated that this information would become public if further complaints about David are received. Everyone agreed to these terms and considered the matter resolved.