

Ethical Issues in Sexual Harassment Nondisclosure Agreements

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Nondisclosure agreements (“NDAs”), especially in the sexual harassment and sexual assault context, have been much in the news since the “Me Too” movement went viral in 2017 with the revelation of the torrent of allegations against Hollywood superproducer Harvey Weinstein. Many have decried the use of such agreements to silence sexual harassment and sexual assault survivors, and some notable holders of such agreements, such as the Weinstein Company itself, have released victims from them in the wake of such criticism. A dozen states, including California, have passed measures restricting the use of NDAs to settle certain kinds of cases have been passed in a dozen states and similar measures have been proposed in many others.¹ Foreign authorities have also weighed in. For example, the British Solicitors Regulation Authority issued a “Warning Notice” in 2018 that certain kinds of nondisclosure agreements, including those that prohibit reporting misconduct or cooperating with a criminal investigation, are improper.²

Less closely examined has been the role of U.S. lawyers in crafting, advocating for, and enforcing nondisclosure agreements. Are there times when these actions can violate attorneys’ ethical duties?

The answer depends on many things, including the facts of the legal controversy, the posture and timing of the dispute leading to the NDA, and the precise contours of the NDA. But it is clear that in California at least, certain attorney practices regarding NDAs have long been, and some additional NDA practices are likewise now, unethical and prohibited by law.

Attorneys have been criminally charged with obstruction of justice, bribery, and witness dissuasion under Penal Code §136.1 for assisting clients to enter settlements in which the victim promises not to testify.³ These criminal acts would obviously also violate California Rule of Professional Conduct (CRPC) 8.4, which defines professional misconduct as, *inter alia*, committing criminal acts that “reflect adversely on the lawyer’s honesty. . . .” or engaging in “conduct that is prejudicial to the administration of justice.”

¹The author is a member of LACBA’s Professional Responsibility and Ethics Committee. The views expressed here are her own.

²Solicitors Regulation Authority, “Warning Notice: Use of Non-Disclosure Agreements (NDAs)” (12 March 2018), available at <https://www.sra.org.uk/solicitors/guidance/warning-notices/use-of-non-disclosure-agreements-ndas--warning-notice/>. Legislation proposing limits on nondisclosure agreements has also been introduced in Britain. See BBC News, ANDAs: New laws to crack down on ‘gagging’ clauses,” (21 July 2019), available at <https://www.bbc.com/news/uk-49060456>.

³See, e.g., *Santana v. Superior Court of Yuba County*, 2012 WL 1777801 (Cal.Ct.App. 2012).

Some of the conduct of lawyers assisting Harvey Weinstein would appear to fall into this category as well. For example, it has been reported that some of Weinstein's agreements with his victims required them to sign not just NDAs, but also sworn affidavits stating (falsely) that no improper conduct by Weinstein had taken place.⁴ Introducing any such false affidavit into any legal proceeding would obviously constitute the crime of suborning perjury as well as a violation of CRPC 3.4(c) (which bars attorneys from falsifying evidence and counseling or assisting a witness to testify falsely). It would also likely violate Rules 1.2.1(a) (prohibiting lawyers from counseling or assisting a client to engage in criminal or fraudulent conduct); 3.3(a)(3) (prohibiting the offering of false evidence in court); 3.4(a) (prohibiting the falsification of evidence and the counseling or assisting of a witness to testify falsely); and 4.1 (prohibiting false statements of material fact or law). It is clearly inconsistent with the State Bar Act (Bus. & Prof. Code § 6068(d))'s command that attorneys employ only "such means as are consistent with truth."

But even short of criminal offenses such as perjury, obstruction of justice, falsification of evidence, and the like, practices once common in settlement of sexual harassment cases may nonetheless be unethical. For example, Chapter 3.5 of the California Code of Civil Procedure (CCP) regulates "Confidential Settlement Agreements" and consists of CCP sections 1001 and 1002. Originally adopted in 2006, the Chapter has been amended in each of the last four years and deals exclusively with settlements in matters of sexual harassment, sexual assault, sexual exploitation of minors, and workplace or housing harassment or discrimination based on sex.

Section 1002(a) covers settlement "in any civil action the foundation for which establishes a cause of action for civil damages" for (1) an act that may be prosecuted as a felony sex offense, (2) an act of childhood sexual assault, (3) an act of sexual exploitation of a minor, or (4) an act of sexual assault against an elder or dependent adult." It forbids "a provision within a settlement agreement that prevents the disclosure of factual information related to the action" in these covered cases, while preserving the right to enter an agreement preventing disclosure of medical or personally identifying information of the victim except by the victim. The statute also specifies that settlement provisions adopted in violation of this statute after January 1, 2017, are void as a matter of law and against public policy.

Section 1001, added in 2018, likewise prohibits provisions preventing "disclosure of factual information related to a claim" but covers claims in administrative proceedings as well as those filed in civil actions. And Section 1001(a) covers a somewhat different array of claims than Section 1002, including (1) acts of sexual assault not governed by Section 1002a [which appears to mean either acts that are not the subject of civil actions, or acts that are not felonies, or not committed against minors, elders, or dependent adults]; (2) acts of sexual harassment as defined by Civil Code section 51.9, (3) workplace harassment, discrimination, or retaliation based on sex; and (4) harassment, discrimination, or retaliation in housing. Like its companion Section 1002, section 1001 renders such provisions void, while preserving the right of victims to enter agreements shielding certain personal information. In section (f), the section appears expressly to contemplate damage actions for violations.

⁴See, e.g., Ronan Farrow, "Harvey Weinstein's Secret Settlements," *The New Yorker* (Nov. 21, 2017).

Significantly, Section 1002(e) contains a provision explicitly stating that “an attorney’s failure to comply with the requirements of this section by demanding that a provision be included in a settlement agreement. . . or advising a client to sign an agreement that includes such a provision, may be grounds for professional discipline. . . .” Moreover, the same section mandates that “the State Bar . . . shall investigate and take appropriate action in any such case brought to its attention.” This latter provision may be unique among those states have passed in the wake of #Me Too.

There is currently only one (unreported) case citing Section 1002(e).⁵ However, it is possible that some victims, should they learn that State Bar oversight and discipline are explicitly contemplated by California statute in at least some sexual misconduct cases, might turn to the Bar for vindication, if not redress. One might expect to see bar complaints by victims (or even friends or relatives of victims) against their own attorneys or Weinstein’s attorneys in instances of false affidavits, agreements not to testify, and the like.

In addition to the changes to CCP §1002 and the addition of CCP §1001, our state legislature in 2018 also added Civil Code section 1670.11, making any provision in a contract or settlement agreement void and unenforceable if it waives a party’s right to testify in an administrative, legislative, or judicial proceeding about alleged criminal conduct or sexual harassment. And the lawmakers also made it an unlawful employment practice to require that an employee sign a release of claim or right under the Fair Employment and Housing Act as a condition of employment.⁶ Arguably, lawyers who continue to include these void and unenforceable provisions in contracts or settlement agreements may be violating Rule 8.4(d) by engaging in conduct prejudicial to the administration of justice, since the provisions would seem to have no purpose other than to dissuade victims from exercising legal rights that cannot in fact be waived.

Finally, NDAs, to the extent they seek to bind lawyers as well as clients from disclosing or using information about sexual misconduct (or other behavior), may also violate CRPC 5.6. This rule prohibits restrictions on a lawyer’s right to practice, which can be direct (by explicitly preventing the lawyer from representing others against the wrongdoer) or indirect (by prohibiting the lawyer from using in later cases information learned about the wrongdoer in the initial case). Several state and city bar associations have issued ethics opinions holding that nondisclosure agreements prohibiting use of information violate their jurisdictions’ version of Rule 5.6, even if restrictions on disclosure do not.⁷

⁵Santana v. Superior Court of Yuba County, 2012 WL 177801, *8 (Cal.Ct. App. 2012).

⁶See Gov. Code § 12964.5.

⁷See Florida State Bar Association Committee on Professional Ethics, Opinion 04-2 (2005 WL 4692972); Board of Professional Responsibility of the Supreme Court of Tennessee, No. 2018-F-166 (“Confidentiality Provisions in Settlement Agreements”) (2018); Chicago Bar Association Informal Ethics Opinion 2012-10. In 2004, LACBA’s Professional Responsibility and Ethics Committee issued Opinion 512 which reaches much the same conclusion. *See also* Cal. Practice Guide “Civil Procedure Before Trial” Ch. 12 (II)-H, §12:1030-12:1033 (noting that such agreements “probably violate” CRPC 5.6.) Other states have opined that some

While the ethical aspects of nondisclosure agreements may be to this point under-examined, it is likely that the conduct of lawyers in this arena will not continue to escape scrutiny. California attorneys would be wise to familiarize themselves with the changes to law and consider the ethical rules before entering new non-disclosure agreements or advising their clients to do so.

confidentiality provisions can also violate their version of ABA Model Rule of Professional Conduct 3.4(d), which prohibits a lawyer from requesting that a person refrain from voluntarily giving information to another party. California has not adopted this part of Rule 3.4.