BUYING SECRECY: NON-DISCLOSURE AGREEMENTS, ARBITRATION, AND PROFESSIONAL ETHICS IN THE #METOO ERA

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We've heard the horrific reports of sexual assault on children, women, and men, in the context of the workplace, Hollywood, sports, and even sacred places. But often these incidents took place many years ago, and we are just now learning why and how because of secret settlements. Deals reached in private to buy secrecy in exchange for the release and dismissal of claims; oftentimes through private and alternative dispute resolution ("ADR") processes such as negotiation, mediation, or arbitration. In most cases, the parties are represented by lawyers, loyal advocates, who are also officers of the court, and third-party neutrals serving as mediators or arbitrators who administer the dispute resolution process. While the immediate cases were privately resolved, the accused harasser/predator remained at large.

This paper examines the role, use, and possible misuse or complicity of lawyers, neutrals, and ADR in the process of procuring and enforcing "secret settlements" in cases that effectively shielded predation, harassment, and other misconduct and left similarly situated non-parties at risk. This Article examines the existing rules, structures, and rationales for confidentiality and private dispute resolution, alongside the ethical considerations for lawyers, neutrals, and the ADR process in reaching and enforcing "secret settlements." The paper then explores the legal and ethical considerations for the professionals involved in situations where a secret settlement or provision for nondisclosure leaves similarly situated nonparties at risk. The Article counsels that lawyers, neutrals, and ADR consider the impact on others and protection of vulnerable persons from potential harm as professional ethics obligations in the advocacy and representation of parties to private settlements in order to ensure integrity of people, process, and substantive outcomes.

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TABLE OF CONTENTS

I. INTRODUCTION

In the run up to the 2016 U.S. Presidential election, Stephanie Clifford, also known as Stormy Daniels, sought to sell her story of an alleged sexual relationship with then-candidate Donald Trump. Eleven days prior to the election, on October 28, 2016, Clifford, referred to in the document as "Peggy Peterson," entered into a "Confidential Settlement Agreement and Mutual Release Assignment of Copyright and Non-Disparagement Agreement" with EC, LLC., pseudonym for a fictitious Delaware entity, Essential Consultants, Inc., and Trump's then-personal lawyer, Michael Cohen.[1] The Agreement provided that Clifford release all rights to any claim, along with photos, text messages, and anything else relating to the affair, as well as providing for full confidentiality and nondisparagement,[2] in exchange for $130,000 paid through EC, LLC.[3] The Agreement further stipulated to a liability of $1 million in liquidated damages for breach of the nondisclosure and nondisparagement conditions and designated arbitration for dispute resolution.[4]

Despite the Agreement, Clifford later sought to speak publicly about the affair. In February 2018, an arbitrator in Los Angeles granted Cohen's *ex parte* request to issue a temporary restraining order against Clifford to enforce the agreement.[5] Seeking to have her claim heard in public court, Clifford initiated

1. CONFIDENTIAL SETTLEMENT AGREEMENT AND MUTUAL RELEASE; ASSIGNMENT OF COPYRIGHT AND NON-DISPARAGEMENT AGREEMENT 1 (2016) [hereinafter "DANIELS SETTLEMENT"], https://toedtclassnotes.site44.com/StormyDanielsNDA.pdf [https://perma.cc/67U7-XPUX] (stating that the names of the parties to the agreement—"EC, LLC," "David Dennison" ("DD"), and "Peggy Peterson" ("PP")—are pseudonyms whose true identity will be acknowledged in a Side Letter Agreement).

2. A "non-disparagement" agreement restricts the parties from making negative or critical comments about the other. Elizabeth Tippet, *Non-Disclosure Agreements and the #MeToo Movement*, A.B.A. DISP. RESOL. MAG. (Winter 2019), https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/ [https://perma.cc/XPT5-BYAS].

3. DANIELS SETTLEMENT, *supra* note 1, at 2.

4. *Id.* at 9–11 ("In recognition of the mutual benefits to DD and PP of a voluntary system of alternative dispute resolution which involves binding confidential arbitration of all disputes which may arise between them, it is their intention and agreement that any and all claims or controversies arising between DD on the one hand, and PP on the other hand, shall be resolved by binding confidential Arbitration to the greatest extent permitted by law.").

5. *See* Jim Rutenburg & Peter Baker, *Trump Lawyer Obtained Restraining Order to Silence Stormy Daniels*, N.Y. TIMES (Mar. 7, 2018), https://www.nytimes.com/2018/03/07/us/politics/stormy-daniels-trump.html [https://perma.cc/V97U-3NA7]; Temporary Restraining Order, EC, L.L.C. v. Peterson, ADRS Case No. 18-1118-JAC (Feb. 27, 2018).

legal action to invalidate the agreement, alleging that both the settlement agreement and the arbitration provision were invalid.[6] As questions erupted as to whether President Trump had approved the payment, whether campaign finances were improperly used, or whether this contract to keep Clifford silent was legal and enforceable, then-White House Communications Director, Sarah H. Sanders stated that "[t]his case has already been won in arbitration."[7] Did arbitration actually resolve these legal questions?[8]

The law promotes private settlement of disputes. The use of private "alternative dispute resolution" or ADR processes, such as negotiation, mediation, and arbitration, to resolve legal disputes is generally lauded as promoting party control, process efficiency, and fiscal benefits, as opposed to protracted public litigation.[9] To promote private settlement, laws generally protect statements made in furtherance of settlement negotiations, confidentiality in the mediation and arbitration process, and private parties' agreements for confidentiality or nondisclosure in the terms and resolution of a dispute. In many cases where parties willingly choose private dispute resolution, parties report satisfaction with the process.[10]

The use of private dispute resolution, at times however, can have a "darker side."[11] In 2015, the New York Times published a series of articles which de-

6. *See* First Amended Complaint at 4, Clifford v. Trump, No. 2:18-CV-02217-SJO-FFM (C.D. Cal. Mar. 26, 2018); *see also* Anthony P. Fritz, *Clifford v. Trump*, HERRIG & VOGT LLP (Mar. 22, 2018), https://www.herrigvogt.com/clifford-v-trump-stormy-daniels/ [https://perma.cc/J45Z-CMWD]. Under the arbitration clause in the settlement agreement, however, such a dispute must be heard in private arbitration, resulting in a confidential award subject to limited grounds for judicial review. DANIELS SETTLEMENT, *supra* note 1, at 10.

7. *See* Ruttenberg & Baker, *supra* note 5. Trump did not sign either document but later admitted to repaying Cohen $100,000. *Id.*

8. See *infra* Section IV.C. for further analysis of the Clifford/Trump arbitration case.

9. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) ("The advantages of arbitration are many: it usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties . . . .").

10. *See, e.g.*, Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 44–51 (2014) (reporting on the frequency of corporations using mediation and arbitration).

11. For many years, commentators have critiqued fairness concerns raised by mandatory arbitration in employment and consumer cases. *See, e.g.*, Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635 (2005); Jean R. Sternlight, *Is the U.S. Out on a Limb?: Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIA. L. REV. 831, 831–32 (2002); Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 457–60 (2004); Benjamin P. Edwards, *Arbitration's Dark Shadows*, 18 NEV. L.J. 427, 427 (2018); *see also* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) 9 (2015) (reporting on the widespread use of arbitration in consumer financial contracts). In 2001, the San Francisco Chronicle reported on perceived injustices of forced arbitration in the workplace. *See* Reynolds Holding, *Private Justice: Millions Are Losing Their Legal Rights*, S.F. CHRON. (Oct. 7, 2001, 4:00 AM), https://www.sfgate.com/news/article/PRIVATE-JUSTICE-Millions-are-losing-their-legal-2872314.php [https://perma.cc/D7V3-G7XN].

scribed arbitration as "secret courts" and profiled egregious examples of arbitration in consumer, employment, and religious disputes.[12] That same year, the Academy Award-winning movie *Spotlight* chronicled the legal fight of investigative journalists to unseal documents in which the Boston Archdiocese had settled numerous cases of appalling clergy sexual abuse with individual victims in mediation, conditioned upon confidentiality or "Nondisclosure Agreement" ("NDA") provisions.[13] In 2018, a grand jury in Philadelphia revealed rampant clergy sexual abuse that had been kept secret for decades.[14]

Powerful individuals and institutions have been able to silence reports of sexual assault through the use of settlements exchanging "hush" money for NDAs.[15] After investigative reports by the *New York Times* and *The New Yorker* revealed that Hollywood mogul Harvey Weinstein had for decades abused his power to lure women and condition acting roles on satisfaction of his sexual demands,[16] a 2017 Twitter post asking anyone else who had experienced sexual assault or harassment to indicate "#MeToo" went viral and opened the floodgates

12. *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?action=click&contentCollection=DealBook&module=RelatedCoverage&region=Marginalia&pgtype=article [https://perma.cc/D8MH-DX7D]; Jessica Silver-Greenberg & Michael Corkey, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [https://perma.cc/MWJ3-CAGL]; Michael Corkey & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html?_r=0 [https://perma.cc/DR3H-SMAB].

13. Paul Elie, *What Do the Church's Victims Deserve?*, NEW YORKER (Apr. 8, 2019), https://www.newyorker.com/magazine/2019/04/15/what-do-the-churchs-victims-deserve [https://perma.cc/92RJ-DNKV] (discussing the Catholic Church's hiring of a mediator to administer Independent Reconciliation and Compensation Fund for victims of priest sexual abuse, noting critics who question the mediator's independence and assert that the church used the program to avoid publicity or the release of documents). Elie notes that when Father Doyle served as a canon lawyer to the Church, he produced a report which described priestly abuse as "probably the single most serious and far-reaching problem facing our Church today." *Id.* "Yet the real 'problem' it identified was not that of priests sexually abusing children; it was 'the possible cost to the Catholic Church of many millions of dollars and the potential devastating injury to its image.'" *Id.* "The solution, then, was to devise a legal strategy to avoid discovery and testimony, and a public-relations strategy to cast the Church 'as a sensitive, caring and responsible entity which gives unquestioned attention and concern for the victims.'" *Id.* "Although the report was never officially sanctioned, the bishops adopted its approach, managing accusations of priestly abuse in secret." *Id.*

14. *See* Laurie Goodstein & Sharon Otterman, *Catholic Priests Abused 1,200 Children in Pennsylvania, Report Says*, N.Y. TIMES (Aug. 14, 2018), https://www.nytimes.com/2018/08/14/us/catholic-church-sex-abuse-pennsylvania.html [https://perma.cc/FU63-R3TW].

15. The Daily, *Silenced*, N.Y. TIMES, at 00:35 (Mar. 9, 2018) (available on Apple Podcasts). Michael Barbaro, reporting on the Stormy Daniels complaint against President Donald Trump, also noted the use of tactics such as hiring a private investigator to dig up scandal on the accuser, presenting a "dirt file" to threaten public exposure, or employing a "catch and kill" tactic to engage a person (or friend) in the media (*e.g.*, National Enquirer) to "catch" the story by having a reporter secure exclusive rights to the story from the accused and then "bury" it. *Id.*

16. *See* Jodi Kanter & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/C7B2-DT4A]; Ronan Farrow, *From Aggressive Overtures to Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories [https://perma.cc/VBE9-RZRR].

to a movement that sparked a national and international discussion and reckoning.[17]

Reports of sexual abuse and harassment from seemingly every sector of society continue to surface.[18] Nondisclosure provisions were included in the private settlements that arose from the horrific serial sexual abuse of elite child gymnasts by former USA Gymnastics team doctor and serial predator Larry Nassar.[19] In her claim against Nassar, gymnast McKayla Maroney reportedly "'was forced to agree to a nondisparagement clause and confidentiality provision' and . . . would have had to pay more than $100,000 should she 'speak of her abuse or the settlement.'"[20]

Disturbingly, the number of cases settled in secret (and/or never prosecuted) cannot be ascertained, as a practical manner.[21] How could the parties or lawyers (on either side), or the presiding neutrals, *not* report sexual misconduct, harassment, or public safety concerns? Yet, could they, even if they wanted to? [22] Third-party neutrals are largely immunized from testifying and from liability.[23] Lawyers are not considered "mandatory reporters" of child sexual or other abuse[24] but rather are generally obligated to protect attorney-client privileged

17. Alia E. Dastagir, *It's Been Two Years Since #MeToo Exploded. Now What?*, USA TODAY (Sept. 30, 2019, 6:00 AM), https://www.usatoday.com/story/news/nation/2019/09/30/me-too-movement-women-sexual-assault-harvey-weinstein-brett-kavanaugh/1966463001/ [https://perma.cc/FNP3-HJ7B] (noting that actress Alyssa Milano is credited with initiating the social media movement with a #MeToo Twitter post, but the hashtag was first used by Tarana Burke ten years prior to bring attention to sexual assault of poor women of color); *see also* 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, 2510 (2018).

18. Dastagir, *supra* note 17 (reporting that, since 2017, "[m]ore than 5,000 people have requested help from Time's Up Legal Defense Fund, and the Rape Abuse & Incest National Network says calls to its hotlines have increased more than 60%."); *see also infra* Section III.A.

19. Scott M. Reid, *USA Gymnastics Denies Using Non-Disclosure Agreements but Two Settlements Say Otherwise*, ORANGE CNTY. REG. (Apr. 4, 2018, 12:40 PM), https://www.ocregister.com/2018/04/04/usa-gymnastics-denies-using-non-disclosure-agreements-but-two-settlements-say-otherwise/ [https://perma.cc/U3T9-KD9S]; Maureen A. Weston, *Tackling Abuse in Sport Through Dispute System Design*, 13 U. SAINT THOMAS L.J. 434, 435–39 (2017) (discussing the development of the U.S. Center for Safe Sport to address sexual abuse of athletes).

20. Victor Mather, *McKayla Maroney Said USA Gymnastics Forced Confidentiality in Settlement Agreement*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/sports/olympics/mckayla-maroney-usa-gymnastics-confidentiality-agreement.html [https://perma.cc/GZR3-8T4S].

21. *See* Prasad, *supra* note 17, at 2509–10; Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html [https://perma.cc/S3QR-7U3J].

22. Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980–81 (6th Cir. 2003) ("[C]onfidential settlement communications are a tradition in this country."). Controversy over sealed protective orders and secret settlement agreements that shielded defective product liability, financial fraud, toxic torts and other public health and safety concerns occurs also over court seals in litigation; courts favor public access and transparency, however, and are unlikely to allow secrecy absent a legitimate proprietary need or good cause. *See* Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI. KENT. L. REV. 463, 464–65 (2006). Doré notes that "[i]n contrast to litigation, then, ADR largely operates in an 'environment of secrecy' whose 'closed doors can mask a world of mischief.'" *Id.* at 466.

23. *See infra* Part II.

24. Art Hinshaw, *Mediators as Mandatory Reporters of Child Abuse: Preserving Mediation's Core Values*, 34 FLA. ST. U. L. REV. 271, 290 (2007) (advocating for mediator reporting legislation).

communications and to maintain confidentiality of matters relating to client representation.[25] By failing to report, however, predators remain at large.[26]

The #MeToo movement has empowered individuals to expose sexual assault in Hollywood, in government, in the everyday workplace, sports, schools, and even in sacred places.[27] The ability to "buy secrecy" through the use of NDAs, private dispute resolution processes, and provisions that require any disputes relating to violations to go to mandatory arbitration (and potential *ex parte* enforcement as in the *Clifford* case) can result in harm and trauma to others. Granted, confidentiality and privacy can allow for the flexibility, candor, and acknowledgments valued in dispute resolution processes.[28] Confidentiality can also shield scandalous allegations and evidence from the public headlines and guard against reputational damage. And confidentiality, frankly, is currency that may be of value to both parties.[29] But where private settlement results in a contractual agreement that contains a nondisclosure provision and calls for arbitral enforcement, does this protection enable the cover-up of conduct that poses a threat to the physical and emotional health and safety of other potential victims and the public?

While the private nature of ADR processes is valuable insofar as it respects party concerns for confidentiality and privacy, the potential to shield misconduct is certainly disconcerting. As ADR has become a principal means for dispute resolution, scrutiny upon the processes and professionals involved therein, as well as the impact on others, is warranted.[30] This Article examines the role, use, potential misuse, and complicity, of lawyers, neutrals, and ADR in the process of reaching and enforcing "secret settlements" in cases involving alleged sexual

25. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.6(a)–(b)(1) (AM. BAR ASS'N. 1983) (exception for death or bodily harm).

26. Joe Markowitz, *Spotlight: Unsealing Court Records*, SO. CAL. MEDIATION ASS'N, (Apr. 7, 2016), https://www.scmediation.org/spotlight/ [https://perma.cc/HD4K-794H] (distinguishing confidentiality and judicial protection that shield criminal and wrongful acts, from the necessity to foster candor in settlement negotiations).

27. JODI KANTOR & MEGAN TWOHEY, SHE SAID: BREAKING THE SEXUAL HARASSMENT STORY THAT HELPED IGNITE A MOVEMENT 5 (2019).

28. *See* UNIF. MEDIATION ACT prefatory note (UNIF. L. COMM'N 2003) ("[T]he participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes."); *see also* Sarah Rudolph Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 KAN. L. REV. 1419, 1445 (2006) ("[C]onfidentiality is important to ensure public confidence in the mediation process. Only if people are certain that the mediator will not take sides or disclose their statements in judicial proceedings will the public consider mediation a fair process."). Cole argues in favor of sanctions against parties who violate mediation privilege statutes by and who intentionally misuse and divulge mediation communications. *Id.* at 1420–23.

29. *See* Gloria Allred, Opinion, *Assault Victims Have Every Right to Keep Their Trauma and Their Settlements Private*, L.A. TIMES (Sept. 24, 2019, 3:00 AM), https://www.latimes.com/opinion/story/2019-09-23/me-too-sexual-abuse-victims-confidential-settlements-lawsuits [https://perma.cc/RT62-C8WQ].

30. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2807 (2015) (describing trend toward private dispute resolution processes as "the eclipse of court-based adjudication as the primary paradigm for government-authorized dispute resolution.").

misconduct. Part II reviews the existing rules, structures, and rationales for confidentiality in private dispute resolution, alongside the ethical rules of conduct for lawyers, in reaching and enforcing "secret settlements."

Part III considers situations in which confidentiality protections effectively prevented the disclosure of alleged misconduct or harassment and, as a result, jeopardized the health and safety of those left in the dark. With particular focus on the role of lawyers and private dispute resolution in enforcing nondisclosure agreements, Part IV analyzes the legal limits of NDAs as well as the debate on recent legislative efforts to restrict enforcement of NDAs in sexual misconduct cases. Part V focuses on the ethical and professional conduct considerations for advocates and neutrals in procuring and enforcing NDAs, and benefits and drawbacks of privacy. This Article aims to determine whether existing rules, ethical obligations, and structures for confidentiality applicable to lawyers, neutrals, and ADR processes in reaching and enforcing "secret settlements"—settlements that otherwise shield misconduct and leave similarly situated parties at risk— can nonetheless permit a lawyer, neutral, or provider to report, disclose, or otherwise counsel parties to prevent recurrence or similar harm to others. This Article submits that where a secret settlement or provision for nondisclosure leaves similarly situated nonparties at risk, legal and ethical obligations nonetheless obligate lawyers and ADR neutrals to consider the impact on others, and protection of vulnerable persons from potential harm, in order to ensure integrity of process and durable, informed settlements. The Article concludes by proposing that legislation and good practice require that negotiations and ADR processes involving NDAs in sexual misconduct settlements include notices informing all parties of the professional conduct and ethical standards governing lawyers, neutrals, and ADR provider organizations.

II. NDAS AND CONFIDENTIALITY IN THE PRIVATE JUSTICE SYSTEM

Settlements reached in cases using private dispute resolution processes may include provisions precluding the parties from disclosing any terms of the underlying settlement or factual allegations, also known as "non-disclosure agreements" or NDAs. These contracts may contain a dispute resolution provision requiring alternative dispute resolution ("ADR"), such as private mediation or arbitration, in the event of a dispute regarding compliance with the settlement agreement. The combination of the NDA and ADR provisions ensure the case allegations and disposition remain confidential.

A. Non-Disclosure Agreements

Nondisclosure agreements are provisions in a settlement agreement that obligate parties to maintain confidentiality regarding the disputed matters at issue. NDAs have long been used in certain industry contracts to protect proprietary

information and trade secrets.[31] Individuals may enter NDAs to protect privacy and reputational interests.[32] NDAs have also been invoked to silence reports of misconduct, negligence, sexual harassment, and even sexual assault. Corporations, institutions, and individuals accused of, and seeking to avoid publicity concerning, serious misconduct may insist upon an NDA and in exchange pay "hush money" to settle a dispute.[33] An NDA contract may designate arbitration for dispute resolution involving an alleged breach or other challenge.[34] As contracts, NDAs are subject to standard contract law defenses, such as fraud, duress, incapacity, unconscionability, and violation of public policy.[35] Increasingly, legislators are weighing in on the use of NDAs, especially in sexual misconduct employment cases.[36]

B. Confidentiality Protections in Private Dispute Resolution Processes

A hallmark of private alternative dispute resolution, involving the range of consensual processes from negotiation and mediation to consensual-adjudicatory processes such as arbitration, is the private context in which deals are made, agreements reached, and decisions rendered. As an alternative to the public court system with its attendant prescribed rules for process, appeal, public record and access, ADR processes typically employ private neutrals who either facilitate or decide outcomes in a closed setting. The processes are accorded substantial privacy, either through private agreement or by a statute. The following section explains the legal basis supporting confidentiality in arbitration and mediation.

1. Arbitration

Under the U.S. Federal Arbitration Act ("FAA"), written agreements to resolve disputes in arbitration are enforceable, subject only to contract defenses that exist at law or in equity, and arbitral awards are subject to limited judicial review.[37] Arbitration historically has been, and continues to be, a preferred and private forum for many commercial parties because the process is considered

31. Pavirthra Mohan, *'How Much Is My Silence Worth?': Amid a Racial Reckoning, Women Are Rejecting NDAs*, FAST CO. (Aug. 11, 2020), https://www.fastcompany.com/90529393/how-much-is-my-silence-worth-amid-a-racial-reckoning-women-are-rejecting-ndas [https://perma.cc/NBT9-YMC2]; *see also* Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 157 (2019).

32. Allred, *supra* note 29.

33. Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/nda-agreement.php [https://perma.cc/U7AU-B9ZQ]; Mohan, *supra* note 31.

34. *See* Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know* Can *Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115 (1999). *See generally* Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 KAN. L. REV. 1457 (2006); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

35. *See infra* Part IV.

36. *See infra* Section IV.D.

37. Federal Arbitration Act, 9 U.S.C. §§ 2, 10 (2018). Defenses must be directed to the arbitration agreement itself, not the entire contract, through the separability doctrine recognized in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

faster, less expensive, allows the parties to select decision-maker(s), procedural rules, maintain relationships, and results in a final and binding award.[38] In the United States, arbitration provisions are also prevalent and generally enforceable in individual consumer and employment contracts.[39] Arbitration is also provided for in the governing rules for athletes in Olympic sports.[40] For example, the U.S. Amateur Sports Act requires arbitration for disputes relating to eligibility, as well as claims involving sexual misconduct, of athletes and constituents in the U.S. Olympic sports.[41]

a. A Private Proceeding

Arbitration is a private dispute resolution process in which parties agree, by contract, to have their dispute resolved by a third-party arbitrator for final and binding resolution.[42] Parties thereby waive their rights to access the public judicial system.[43] And, "arbitral proceedings are not publicly docketed and are generally closed to nonparticipants."[44] Nor are arbitrators "required to issue written, reasoned opinions or to publish their awards or decisions" unless requested by the parties.[45] "Unlike the public courthouse," arbitration lacks open dockets that

38. *See* Kotkin, *supra* note 34, at 930; Todd B. Carver & Albert A. Vondra, *Alternative Dispute Resolution: Why It Doesn't Work and Why it Does*, HARV. BUS. REV., May–June 1994, https://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does [https://perma.cc/K8MW-DWNM].

39. The U.S. Supreme Court regards the FAA as a national policy favoring arbitration and as the basis to enforce arbitration agreements in numerous contexts, including consumer and employment contexts. *See, e.g.*, Epic Sys., Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345–46, 352 (2011). The FAA was enacted in 1925. Section 1 defines application of the Act applies to maritime transactions or interstate commerce, but also states that "[n]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. The Supreme Court has construed the exception provision narrowly to transportation industry employment rather than all employment contracts. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001).

40. 36 U.S.C. § 220541; *see also*, Resnik, *supra* note 30, at 2839 ("[T]he Court has ruled that the FAA can be used to bar access to courts when individuals claim breaches of federal securities laws; when employees allege discrimination on the basis of age; when employees file sex discrimination suits under state law; when consumers assert rights under state consumer protection laws; when merchants allege violations of the antitrust laws; and when family members claim that negligent management of nursing homes resulted in the wrongful deaths of their relatives.").

41. In 2018, Congress amended the ASA to establish the U.S. Center for Safe Sport, charged with establishing policies and procedures (including binding arbitration) regarding the prevention, education, and *resolution* of allegations of emotional, physical, and sexual abuse of athletes. 36 U.S.C. § 220541. At the Olympic level, international athletes are bound to arbitrate disputes, ultimately to the Court of Arbitration for Sport. *History of the CAS*, CT. OF ARB. FOR SPORTS, https://www.tas-cas.org/en/general-information/history-of-the-cas.html (last visited Jan. 20, 2021) [https://perma.cc/94T6-GY42].

42. KRISTEN M. BLANKLEY & MAUREEN A. WESTON, UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION 175 (2018).

43. Colvin v. NASDAQ OMX Grp., Inc., No. 15–cv–02078–EMC, 2015 WL 6735292, at *2 (N.D. Cal. 2015) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (quoting AT&T Techs., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 648 (1986)).

44. Doré, *supra* note 22, at 490.

45. *Id.*

notify "the public or the media of the filing of an arbitration claim or the existence of the dispute."[46] And, "[d]iscovery, if permitted, is generally limited in scope and restricted to use only in the arbitration proceedings."[47] Nor can parties share—or the public access—"evidence, testimony, briefs, motions, and other information disclosed."[48] Further, there is no public filing or notice of a claim or set location for an arbitral proceeding.[49] Accordingly, affected consumers, employees, or athletes, including those who allege sexual harassment or who are claimed to have violated an NDA, find themselves unable to tell a jury, the media, coworkers, or to have their day in a public courtroom.

b. Privacy by Contract or Provider Rule

While federal and state laws provide for the enforcement of arbitration agreements and awards,[50] these laws do not address arbitration's procedural aspects or confer specific confidentiality privileges to arbitral proceedings or awards. Such features are generally covered where parties agree by contract or by selecting an institution's procedural rules.[51] For example, JAMS Comprehensive Arbitration Rules oblige its neutrals to maintain confidentiality of the proceedings and awards, but otherwise do not require that parties should or should not agree to keep the proceeding and award confidential between themselves.[52] JAMS rules authorize an arbitrator to issue protective orders "[t]o protect the confidentiality of proprietary information, trade secrets or other sensitive information" and to exclude third parties and the public from accessing the proceedings.[53] Similarly, the American Arbitration Association's ("AAA") *Statement of Ethical Principles* addressing privacy and confidentiality state that the AAA does

46. *Id.* at 484.

47. *Id.*

48. *Id.* "Arbitration is frequently conducted pursuant to confidentiality rules and agreements that can conceal the existence and substance of a dispute, the identities of the parties, and the resolution of the controversy. Mediation proceedings, frequently cloaked with an evidentiary privilege, are accorded even more privacy." *Id.* at 466.

49. *Id.* at 484.

50. *See* 9 U.S.C. § 2; 710 ILL. COMP. STAT. ANN. 5/1 (West 2020).

51. Resnik, *supra* note 30, at 2852; *see also* PRINCIPLES OF THE NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE: CONSUMER DUE PROCESS PROTOCOL § 12(2) (AM. ARB. ASS'N 2006); *JAMS Comprehensive Arbitration Rules and Procedures*, JAMS (July 1, 2014), https://www.jamsadr.com/rules-comprehensive-arbitration/ [https://perma.cc/5THL-KQK3].

52. JAMS R. 26(a)–(c) ("JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award or unless otherwise required by law or judicial decision."). These rules merely provide guidelines of what the parties may agree to and what information the arbitrator may protect.

53. *Id.* Absent party agreement providing for specific confidentiality protection for the hearing and the ensuing documents and evidence, Rule 26(a) if disclosure is required by law or judicial decision then the parties must disclose the information. *Id.*

not regulate or limit the extent to which the parties may agree to protect the confidentiality of their arbitration hearing and information; however, AAA staff and neutrals are obligated to keep information confidential.[54]

2. Mediation and Settlement Negotiations

Mediation is a consensual process in which a third-party neutral (mediator) works with parties to help facilitate them in privately resolving their dispute.[55] Confidentiality guarantees communications made in mediation are considered sacrosanct and are secured by statute, court rule, provider institutional rule, and/or private contract.[56] Although the terms appear interchangeable, mediation privilege and confidentiality are distinct.[57] A mediation privilege is an evidentiary rule that prohibits the introduction of mediation communications in a judicial context.[58] On the other hand, a confidentiality obligation can arise by statute or private contract and bar a person from disclosing mediation communications to third parties, with few exceptions.

a. Evidentiary Privilege

Court evidentiary rules render evidence of statements made in settlement negotiations or offers of compromise inadmissible to prove claim validity, liability, or to impeach at trial in an effort to encourage private settlement of lawsuits.[59] These rules, however, do not protect statements made in the settlement negotiation process that are offered *in court* for another purpose, such as to demonstrate evidence of knowledge, bias, delay, bad faith, or any other purpose.[60]

b. Statutory or Court Rule

State legislation or court rules can provide confidentiality protection for oral and written communications made in mediation. For example, the Uniform

54. *Statement of Ethical Principles*, AM. ARB. ASS'N, https://www.adr.org/StatementofEthicalPrinciples (last visited Jan. 20, 2021) [https://perma.cc/PA87-WXG8]. These guidelines to do not state the judicial exception akin to the JAMS Rules where information/evidence from a confidential arbitration may be disclosed pursuant to law or judicial decision. *Id.*

55. Adrienne Krikorian, *Litigate or Mediate? Mediation as an Alternative to Lawsuits*, MEDIATE.COM (Jan. 2002), https://www.mediate.com/articles/krikorian.cfm [https://perma.cc/UMB5-EXU2].

56. *E.g.*, *id.*

57. T. Noble Foster & Selden Prentice, *The Promise of Confidentiality in Mediation: The Practitioners' Perceptions*, 2009 J. DISP. RESOL. 163, 164 (2009); *see also* BLANKLEY & WESTON, *supra* note 42, at 96 ("The primary reason for protecting mediation communications is to encourage full and frank discussion in the mediation process.").

58. BLANKLEY & WESTON, *supra* note 42, at 98 ("[C]onfidentiality and privilege rules apply in different realms, and the disclosure of information in one realm may not affect the legal protections for mediation communications in another realm . . . [t]he rules of privilege will apply during a court proceeding but not at the hair salon.").

59. *See, e.g.*, FED. R. EVID. 408(a); CAL. EVID. CODE § 1152.

60. Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L.J. 29, 45 (2003).

Mediation Act ("UMA")[61] proposes that each of the parties, mediator, and any nonparty participants (lawyers, support persons, experts, etc.) hold a mediation privilege with the ability to "refuse to disclose" mediation communications during *both* the discovery process and before a tribunal, with limited exceptions.[62] Under the UMA, parties have the right to refuse to disclose and to restrict others from disclosing mediation communications.[63]

The California Evidence Code similarly establishes both a mediation privilege and confidentiality protection to any documents, statements, and all other evidence created for, during, and as a result of mediation.[64] The statute restricts a mediator from being called to testify at trial as to what was said in the mediation.[65] The confidentiality guarantees are expected to promote candor and frank discussions leading to the settlement of cases.[66]

Mediation, however, cannot be used to "bury documents" made *prior* to the mediation that are otherwise discoverable.[67] Those documents will still be subject to discovery in any later litigation or arbitration.[68] The California statutory scheme, for example, permits mediation communications to be disclosed or admitted if "[a]ll persons who conduct or otherwise participate in the mediation expressly agree in writing," or enter into a recorded oral agreement that is memorialized in writing in a timely fashion."[69] In general, however, like the Las Vegas rule, what is said and done in mediation, largely (and seemingly) stays in mediation.[70]

61. UNIF. MEDIATION ACT, § 4, 5(c) (UNIF. L. COMM'N 2003) ("A person that intentionally uses a mediation to plan, attempt to commit, or commit a crime, or to conceal an ongoing crime . . . is precluded from asserting [such] privilege."). Twelve states have adopted the Uniform Mediation Act.

62. Exceptions to the mediation privilege generally exist for: agreements reached in mediation, mediations subject to sunshine laws, threats of bodily harm, statements commissioning crimes, statements sought to prove or disprove mediator or attorney malpractice, or statements regarding child or elder abuse. BLANKLEY & WESTON, *supra* note 42, at 175. In some circumstances, an exception to privilege will apply in criminal cases and cases in which the parties seek to rescind a mediated agreement. *Id.* The UMA also prohibits mediators from making reports to courts and other decision-makers. *Id.* Mediators may disclose whether a mediation occurred, who attended, and whether the parties settled. *Id.* Mediators may also disclose reports of abuse to the appropriate agency, such as the state's Department of Health and Human Services. *Id.*

63. In 2001, the National Commission on Uniform Laws ("NCCUSL"), presented the Uniform Mediation Act, which has since been adopted in twelve states. *Id.* at 95–96.

64. CAL. EVID. CODE § 1119.

65. *See id.* § 1119(c).

66. *See* Benesch v. Green, No. C-07-03784 EDL, 2009 WL 4885215 at *3–4 (N.D. Cal. 2009) ("[T]he Legislature designed the mediation confidentiality statutes to promote candid and informal exchange regarding events in the past . . . the statutory scheme [the mediation privilege] does not protect items that would be admissible or subject to discovery merely because they were introduced in mediation." (internal quotations and sources omitted)).

67. The privilege protects documents made in and for the mediation, not underlying facts or documents merely produced in mediation. *See* Rojas v. Superior Court, 93 P.3d 260, 271 (Cal. 2004).

68. *See* CAL. EVID. CODE § 1126 ("Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends.").

69. *See id.* § 1122(a)(1) (The foregoing are admissible if "[a]ll persons who conduct or otherwise participate in the mediation expressly agree in writing.").

70. Phyllis Pollack, *Mediations Are Supposed to be Confidential . . . But Are They Really?*, MEDIATE.COM (Sept. 2015), https://www.mediate.com/articles/pollackconfidential.cfm [https://perma.cc/468X-ZB5L].

c. Private Contract or Institutional Rules

Parties who agree to mediation typically contractually agree to maintain confidentiality as a condition of the agreement to mediate. Parties may agree to abide by the rules of a particular ADR institutional provider, such as American Arbitration Association or JAMS, and therefore agree to confidentiality. These rules generally require both the mediator and parties to maintain confidences[71] and protect any statements made by a party or other participant in the course of the mediation proceedings, including proposals, suggestions, admission, or refusal to accept a proposal.[72]

C. Ethical Guidelines for ADR Professionals and Providers

Although ADR professionals and providers are not regulated by a State Bar or otherwise subject to enforcement of a code of conduct or certification, the ADR industry has developed various guidelines and codes of ethics to harmonize good practice standards.[73] For example, the American Arbitration Association and American Bar Association ("ABA") created the Code of Ethics for Arbitrators in Commercial Disputes[74] to guide arbitrators and parties. These Canons obligate an arbitrator to uphold the integrity and fairness of the arbitration process, to disclose any interest or relationships that might create actual or apparent impartiality, and to independence and deliberate decision, as well as to be "faithful to the relationship of trust and confidentiality inherent in that office."[75] Where a secret settlement or provision for nondisclosure leaves similarly situated nonparties at risk, do legal and ethical considerations obligate or permit a lawyer, neutral, or provider to report, disclose, or otherwise counsel parties in order to prevent recurrence or harm to others?

Like arbitrators, mediators are unregulated, but an affiliating provider organization may require adherence to certain ethical standards. In 2005, the AAA and ABA adopted Model Standards of Conduct for Mediators, which include

71. AM. ARB. ASS'N., COMMERCIAL MEDIATION RULES AND PROCEDURES 42 (2013) (requiring parties to maintain the confidentiality of the mediation).

72. *Id.* ("Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. . . . [A]ll records, reports, or other documents received by a mediator while serving in that capacity shall be confidential."); *see, e.g.*, JAMS R. 26 (Confidentiality and Privacy).

73. *See* Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 468 (2004) (noting arbitration's lack of regulation but longstanding self-enforced codes for arbitral conduct).

74. *See* AM. ARB. ASS'N & AM. BAR ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2004) [hereinafter "CODE OF ETHICS"] ("[T]he use of arbitration to resolve a wide variety of disputes has grown extensively and forms a significant part of the system of justice on which our society relies for a fair determination of legal rights. Persons who act as arbitrators therefore undertake serious responsibility to the public, as well as to the parties. Those responsibilities include important ethical obligations."); Weston, *supra* note 73, at 453 n.18.

75. CODE OF ETHICS, *supra* note 74, at Canons I–IV.

principles of party autonomy and self-determination, mediator neutrality, competency, and confidentiality.[76] The Standards also emphasize a mediator's responsibility to ensure quality process and to proceed "in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants."[77]

D. Attorney Professional Conduct Standards

The Model Rules of Professional Conduct serve as a national framework setting forth standards for the ethical practice of law governing the legal profession.[78] As a member of the legal profession, a lawyer is both "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[79] These professional conduct rules impose duties upon lawyers simultaneously as a representative of clients, advisor, advocate, negotiator, and evaluator:

> As *advisor*, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As *advocate*, a lawyer zealously asserts the client's position under the rules of the adversary system. As *negotiator*, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an *evaluator*, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.[80]

Certainly, a lawyer's duties include loyalty, diligence, and conflict-free representation.[81] Moreover, the duty of an attorney to not divulge privileged client communications and to maintain client confidences is core to the attorney-client relationship.[82] The Rules authorize a narrow exception to permit a lawyer to reveal information relating to the representation involving risk of death or bodily harm.[83] Some states (though not California) also permit attorney disclosure to prevent or to mitigate client actions that could cause financial harm to others in which the lawyer's services are used.[84] As advocate, the lawyer has a duty of candor toward the tribunal and not to abuse legal procedure.[85] Lawyers also have duties of fairness to opposing party and counsel which precludes a lawyer from "request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party."[86]

76. *See* AM. ARB. ASS'N, AM. BAR. ASS'N & ASS'N FOR CONFLICT RESOL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standards I–V (2005), https://www.pamediation.org/archives/Ethics-PartTwo.pdf [https://perma.cc/4KWG-27PL].

77. *Id.* at Standard VI(A).

78. MODEL RULES OF PRO. CONDUCT: PREAMBLE & SCOPE ¶¶ 11–19 (AM. BAR ASS'N 2020).

79. *Id.* ¶ 1.

80. *Id.* ¶ 2 (emphasis added).

81. *See id.* ¶¶ 4, 9.

82. *Id.* r. 1.4, 1.6(a), 1.7.

83. *Id.* r. 1.6(b)(1) ("to prevent reasonably certain death or substantial bodily harm").

84. *Id.* r. 1.6(b)(2)–(3); *cf.* CAL. RULES OF PRO. CONDUCT r. 1.6 (2018).

85. MODEL RULES OF PRO. CONDUCT r. 3.1.

86. *Id.* r. 4.3(f).

Lawyers also have duties of fairness in transactions with nonclients. Lawyers are obligated to be truthful in dealing with others, this includes not assisting a client's crime or fraud.[87] In dealing with unrepresented persons, lawyers also have duties of fairness to avoid misunderstanding and exploitation.[88] Rule 8.4 also defines professional misconduct for a lawyer to engage in conduct "involving dishonesty, fraud, deceit or misrepresentation; [or, *inter alia*] [to] engage in conduct that is prejudicial to the administration of justice."[89] The Rule also prohibits lawyers from engaging in conduct that is discriminatory or harassment, such as sexual harassment.[90] Where a lawyer is employed or retained by an organization or company, the lawyer's obligation is to the company and must explain this in dealing with company directors, officers, employees or other constituents when the company's interests are adverse to the individual.[91] This means, where a company and executive are both sued, the company lawyer must assess conflicts of interest in joint representation.[92] The practice of representing clients in private settlement can seemingly put a number of these duties in potential conflict.[93]

III. ADR'S CONFIDENTIALITY IN #METOO CASES

Alternative Dispute Resolution processes, such as mediation and arbitration, can provide parties a private forum in which to enter settlement agreements, which can include NDAs and designate arbitration as the means to enforce the NDAs.[94] In private settlement of sexual misconduct claims, NDAs prohibit both parties from publicizing information regarding the case, including the allegations of harassment, discrimination, and other information.[95] NDAs have been common legal tools but have recently come under severe scrutiny in the context of the #MeToo Movement.[96]

87. *Id.* r. 4.1.

88. *Id.* rs. 4.1, 4.3; *see also* Michael S. McGinnis, *Breaking Faith: Machiavelli and Moral Risks in Lawyer Negotiation*, 91 N.D. L. REV. 247, 265 (2015) ("[T]he positive law of legal ethics already requires a higher standard of truthfulness for lawyers when negotiating with unrepresented persons than with opposing counsel. . . . Regardless of whether the opposing party is represented by counsel, significant doctrinal and practical reasons exist for not imposing on lawyers a duty to ensure the substantive fairness of negotiation." (emphasis omitted) (footnote omitted)).

89. MODEL RULES OF PRO. CONDUCT r. 8.4(g)

90. *Id.* (defining as misconduct for a lawyer to "engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.").

91. *Cf. id.* r. 1.13(a)–(b), (f).

92. Jeffrey A. Van Detta, *Lawyers as Investigators: How* Ellerth *and* Faragher *Reveal a Crisis of Ethics and Professionalism Through Trial Counsel Disqualification and Waivers of Privilege in Workplace Harassment Cases*, 24 J. LEGAL PROF. 261, 340 (2000).

93. *See, e.g.*, McGinnis, *supra* note 88, at 249.

94. *See supra* Part I.

95. *See supra* Section II.A.

96. *See supra* note 31.

A. ADR Role in Enabling NDAs in Sexual Misconduct Cases

Reports of silencing sexual misconduct via NDA contracts span across industries and at all levels of society. In sports, the National Football League's Carolina Panthers owner, Jerry Richardson, required his accusers to sign NDAs to shield reports of his alleged misconduct.[97] NFL cheerleaders must sign employment contracts that contain confidentiality, nondisclosure, and arbitration provisions.[98] International soccer star Cristiano Ronaldo paid $400,000 to settle a sexual assault claim in 2009 with a nondisclosure provision, although the woman later spoke publicly about the alleged incident.[99] When Ronaldo's accuser sought to void the settlement and sue Ronaldo in 2019 for breach of contract, conspiracy, coercion, and fraud in Nevada state court, the court ordered the case to private arbitration.[100]

The practice of using NDAs and confidentiality clauses to hide misconduct can leave similarly situated others in grave danger. In 2016, U.S. Olympic gymnast McKayla Maroney signed an NDA with USA Gymnastics as part of a settlement agreement regarding sexual abuse claims involving the team doctor, Larry Nassar.[101] Later, it was discovered that Nassar had abused hundreds of girls over decades.[102] The extent of harassment or discrimination is often not known because of NDAs in employment contracts or in dispute settlements.[103]

97. *See* Michael McCain, *Fallout from Latest Accusations Against Panthers Owner Jerry Richardson*, SPORTS ILLUSTRATED (Apr. 26, 2018), https://www.si.com/nfl/2018/04/26/jerry-richardson-allegations-carolina-panthers [perma.cc/D7WE-WE25]; Shalise Manza Young, *Former Panthers Employee, a Victim of Jerry Richardson's Sexual Harassment, Pens Open Letters*, YAHOO SPORTS (Apr. 26, 2018, 1:05 PM), https://sports.yahoo.com/former-panthers-employee-victim-jerry-richardsons-sexual-harassment-pens-open-letters-180512022.html [https://perma.cc/EB6Q-6VXN].

98. *See* McCain, *supra* note 97; Juliet Macur & John Branch, *Pro Cheerleaders Say Groping and Sexual Harassment Are Part of the Job*, N.Y. TIMES (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/sports/cheerleaders-nfl.html [https://perma.cc/YE4Y-4JSX]; Juliet Macur, *Washington Redskins Cheerleaders Describe Topless Photo Shoot and Uneasy Night Out*, N.Y. TIMES (May 2, 2018), https://www.nytimes.com/2018/05/02/sports/redskins-cheerleaders-nfl.html [https://perma.cc/BH8K-9U2Z].

99. Mark Callaghan & Joshua Kirkpatrick, *Cristiano Ronaldo, NDAs, and How the #MeToo Movement Is Spurring Legal Changes*, LAW.COM INT'L (Nov. 12, 2018, 8:34 AM), https://www.law.com/international-edition/2018/11/12/cristiano-ronaldo-ndas-and-how-the-metoo-movement-is-spurring-legal-changes/ [https://perma.cc/8SCW-25KB].

100. Ken Ritter, *US Judge Claims Ronaldo Belongs in Arbitration*, ASSOC. PRESS (Feb. 4, 2020), https://apnews.com/article/16e08fb4f3f9189e633d456137677edf [https://perma.cc/CG9L-3Y43].

101. Mather, *supra* note 20.

102. *Id.*; *Larry Nassar Case: The 156 Women Who Confronted a Predator*, BBC NEWS (Jan. 25, 2018), https://www.bbc.com/news/world-us-canada-42725339 [https://perma.cc/RS2Q-TBAL].

103. *See, e.g.*, Sheila Liming, *The Silencing of Sexual Violence Survivors*, INSIDE HIGHER EDUC. (Mar. 24, 2017), https://www.insidehighered.com/advice/2017/03/24/trouble-nondisclosure-agreements-sexual-assault-cases-essay [https://perma.cc/59QN-VPF4]; Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOY. J. PUB. INT. L. 53, 74 (2018); Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1609 (2018) (discussing various corporate harassment lawsuits and prescribing remedies for corporations and shareholders).

B. The Rise of #MeToo and Emboldened Voices

Since the rise of the #MeToo movement, alleged victims have begun to name and shame, regardless of an NDA.[104] Hollywood mogul Harvey Weinstein engaged in decades of serial sexual misconduct and used NDA and private settlement to silence reports.[105] Fox News required a number of its employees to sign confidential arbitration agreements which restricted challenges to discriminatory practices.[106] Dozens of women had reported that they were sexually harassed by Roger Ailes, former Chairman and CEO of Fox News, and Bill O'Reilly, former celebrity anchor at the network.[107] This harassment reportedly spanned over a decade, and Fox News failed to stop the abuse.[108] The terms of the O'Reilly settlement agreement, made public, shockingly required full turnover and destruction of all evidentiary materials, confidentiality, nondisparagement, and arbitration.[109] Only "[a]fter significant negative press coverage" did Fox News "hire outside investigators and, ultimately, fire many of the accused, costing the network over $80 million in pay-outs to the departing executives and settlements to the targets of the executives' harassment."[110] Media portrayals of Ailes's harassment in movies, such as *Bombshell* and *The Loudest Voice*, brought increased public awareness of and ridicule to the Ailes/Fox News treatment of harassment claims.[111]

104. Prasad, *supra* note 17, at 2511, 2518–19 (describing the #MeToo movement's surge following a Twitter post by actress Alyssa Milano asking people to post "#MeToo" if they had been sexually assaulted or harassed after news of Harvey Weinstein broke).

105. Farrow, *supra* note 16 (discussing that Harvey Weinstein used NDAs "to evade accountability for claims of sexual harassment and assault for at least twenty years.").

106. Emily Steel, *How Bill O'Reilly Silenced His Accusers*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/business/media/how-bill-oreilly-silenced-his-accusers.html [https://perma.cc/5JKR-5BMP].

107. *See* Emily Steel & Michael S. Schmidt, *Bill O'Reilly Settled New Harassment Claim, Then Fox Renewed His Contract*, N.Y. TIMES (Oct. 21, 2017), https://www.nytimes.com/2017/10/21/business/media/bill-oreilly-sexual-harassment.html [https://perma.cc/H6A8-Z7A2] (noting Fox's $25 million contract with O'Reilly after harassment settlements).

108. *Id.*

109. Confidential Settlement Agreement and Amendment to Confidential Settlement Agreement, Pls. Exhibit B at 3–9, Bernstein v. O'Reilly 1:17-cv-09483 (No. 58-3) (S.D.N.Y. 2017), https://static01.nyt.com/files/2018/business/58-3.pdf [https://perma.cc/7DRR-D3B9]; *see also* Steel, *supra* note 106; *Sexual Harassment, NDAs, and Bill O'Reilly*, EISENBERG & BAUM, LLP (May 25, 2018), https://www.eandblaw.com/employment-discrimination-blog/2018/05/25/sexual-harassment-non-disclosure-agreements/ [https://perma.cc/H8Q9-J4W7] ("Sexual harassment victims may agree to sign a non-disclosure agreement if they: [p]lan to return to the workplace or seek employment from a competitor[;] [n]eed financial compensation quickly to cover life expenses, medical bills, or mental health costs[;] [v]alue privacy for themselves or their families[;] [or] [c]ould face a counter-suit for wrongdoing at work or violation of company contracts[.]").

110. Kate Webber Nuñez, *Toxic Cultures Require a Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463, 465 (2018). *See generally* Benjamin Lee, '*Ready to Go to War?': Full Trailer for Oscar-Tipped Fox News Film Bombshell*, GUARDIAN (Oct. 15, 2019, 1:55 PM), https://www.theguardian.com/film/2019/oct/15/bombshell-trailer-fox-news-roger-ailes-charlize-theron [https://perma.cc/6Z57-HWNG].

111. *See* Lee, *supra* note 110 ("In preparation for the script, Oscar-winning *The Big Short* screenwriter Charles Randolph conducted numerous interviews with ex-Fox staffers, many of whom decided to violate their NDAs in order to provide background information.").

C. Arbitration Backlash and Corporate Response

Heightened awareness of the use of forced arbitration in sexual misconduct cases has caused a number of major corporations to reconsider their use.[112] In a class action against Uber Technologies Inc. ("Uber"), fourteen women claimed that Uber drivers had sexually assaulted or harassed them.[113] Uber moved to compel arbitration, arguing that the women had consented to arbitration when they signed up for its app.[114] Uber disputed that the arbitration process would silence them.[115] In a letter to Uber's Board of Directors, the women insisted that their class-action lawsuit be allowed to go forward in open court.[116] The women charged that "[s]ecret arbitration takes away a woman's right to a trial by a jury of her peers and provides a dark alley for Uber to hide from the justice system, the media and public scrutiny.[117] Uber later stated that it would no longer require its employees to sign mandatory arbitration agreements.[118] Notably, the company did not offer the same to its passengers (or drivers),[119] presumably fearing that abandoning arbitration clauses altogether would expose the company to an unlimited number of lawsuits, frivolous or otherwise, due to its global customer base.

The Uber plaintiffs also demanded that Uber enhance its background check system to ensure that incidents of sexual assault are less likely to occur.[120] In April 2018, Uber said it would begin conducting annual background checks on its drivers and receive updates when new infractions are added to an Uber driver's record.[121] The media attention to this issue and pressure raised by these women has brought about a positive change that might not have occurred absent the public profile in the court system.

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112. The #MeToo movement has been influential in raising public awareness of arbitration agreements. *Cf.* Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 KANS. L. REV. 985, 988 (2012) (**"**There is strong evidence that consumers do not read the fine print of arbitration agreements . . . [and] people who find themselves in binding arbitration programs may have very little information about the rules and procedures under which they are expected to operate.").

113. Trisha Thadani, *Supreme Court Arbitration Ruling Could Slow #MeToo Movement*, S.F. CHRON. (May 21, 2018, 8:40 PM), https://www.sfchronicle.com/business/article/Supreme-Court-ruling-could-unravel-progress-of-12932175.php?psid=l2fl4 [https://perma.cc/D6TV-Z4Z7]; Eric Newcomer & Peter Blumberg, *Uber Rape Accusers to Firm's Board: Free Us from Arbitration*, BLOOMBERG L. (Apr. 26, 2018, 6:55 AM), https://www.bloomberg.com/news/articles/2018-04-26/uber-rape-accusers-to-firm-s-board-free-us-from-arbitratio [https://perma.cc/AA4C-8YLS].

114. Newcomer & Blumberg, *supra* note 113.

115. *Id.* ("Arbitration clauses have proliferated in corporate America and aren't unique to Uber. Typically, they prevent people from joining together to bring class-action lawsuits that can force companies to change their practices under the threat of big monetary damages.").

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id. But see*, Johana Bhuiyan, *Uber Will Now Allow Riders, Drivers and Employees to Pursue Individual Claims of Sexual Assault in Open Court*, VOX (May 15, 2018, 6:00 AM), https://www.vox.com/2018/5/15/17353978/uber-lawsuit-sexual-assault-arbitration-open-court [https://perma.cc/WUR9-WYVH].

120. Newcomer & Blumberg, *supra* note 113.

121. *Id.*

Protests against forced arbitration of sexual misconduct and harassment claims disrupted other corporate practices in 2019. Twenty thousand workers at Google forged a walkout in protest of the tech company's handling of sexual misconduct claims.[122] Workers at the popular video game company, Riot Games, walked out to protest the company's decision to force plaintiffs in two sexual discrimination lawsuits into arbitration instead of trial.[123] The employees asserted that the company has a culture of sexism and harassment against women.[124] Riot stated that it would not change its stance on mandatory arbitration while in active litigation, but it later brought in consultants, modified its board, and restructured its HR systems to facilitate cultural transformation.[125] Nonetheless, another five female employees sued Riot over gender-based discrimination and harassment.[126] In April 2018, the company filed motions to move two of the suits to arbitration instead of trial, stating that the plaintiffs had signed arbitration clauses when hired.[127] In response, Riot employees started organizing the walkout with demands to end forced arbitration in sexual discrimination and assault cases.[128] The company announced it would allow an opt-out of forced arbitration to new hires after ongoing lawsuits were resolved and would consider giving current employees the same option.[129]

Some corporations and law firms are responding to public pressures to abandon mandatory arbitration of sexual harassment claims. Tech giant Microsoft announced that "if [they] were to advocate for legislation ending arbitration requirements for sexual harassment, [they] should not have a contractual requirement for [their] own employees that would obligate them to arbitrate sexual harassment claims."[130] Microsoft's decision to eliminate mandatory arbitra-

122. *Id.*; *see also* Daisuke Wakabayashi, Erin Griffith, Arnie Tsang & Kate Conger, *Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment*, N.Y. TIMES (Nov. 1, 2018), https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html [https://perma.cc/8MFW-PD6B] (discussing 20,000 Google employees who staged a walkout in November 2018 after it was reported that the company gave a golden parachute to an executive with credible evidence of sexual harassment. Google later removed its forced arbitration provision).

123. Sam Dean, *Riot Games Workers Walk Out to Protest Forced Arbitration of Sex Discrimination Suits*, L.A. TIMES (May 7, 2019, 1:37 PM), https://www.latimes.com/business/technology/la-fi-tn-riot-games-walkout-protest-forced-arbitration-20190506-story.html [https://perma.cc/62HM-3P3K].

124. *Id.*; *see also* Sarah Min, *Riot Games Employees Walk Out to Protest Forced Arbitration in Sexual Harassment Claims*, CBS NEWS (May 7, 2019, 2:24 PM), https://www.cbsnews.com/news/riot-games-walkout-league-of-legends-employees-protest-forced-arbitration-sexual-harassment-claims/ [https://perma.cc/8Q4R-6SVU].

125. *See* Samantha Masunaga, *Riot Games Keeps Requiring Arbitration in Sexual Harassment Cases, Despite Protest*, L.A. TIMES (May 17, 2019, 11:42 AM), https://www.latimes.com/business/la-fi-tn-riot-games-arbitration-sexual-harassment-discrimination-20190517-story.html [https://perma.cc/CTW9-FNHJ].

126. *Id.*

127. *See* Dean, *supra* note 123.

128. *Id.*

129. Matt Perez, *Riot Games Employees Will Walkout to Protest Forced Arbitration*, FORBES (May 6, 2019, 4:44 PM), https://www.forbes.com/sites/mattperez/2019/05/06/riot-games-employees-will-walkout-to-protest-forced-arbitration/#2b468bc0e5c3 [https://perma.cc/K32G-SR5W].

130. Diane M. Zhang, *Microsoft Voids Forced Arbitration Clause in Employee Contracts for Claims of Sex Discrimination, Harassment*, AM. ASS'N FOR JUST. (Jan. 25, 2018), https://web.justice.org/news-and-research/

tion of sexual harassment claims was announced shortly after media outlets reported on the contents of unsealed documents from a 2014 class action against Microsoft alleging gender discrimination at the company.[131] Although this move does not completely halt Microsoft's use of arbitration clauses in all of their agreements, it does provide employees with process choice.

Despite the legal prohibitions against sexual harassment in the workplace, the foregoing and seemingly endless examples of sexual misconduct that occurred over an extended period of time demonstrate a serious failure of the law.[132] While increased media and public scrutiny has helped to expose many sexual misconduct cases,[133] much of this misconduct was and remains concealed and consequently allowed to persist, aided by confidential settlements and arbitration.[134]

IV. LEGAL LIMITS OF NDAS, FORCED ARBITRATION AND CONTRACTUAL SECRECY

The ability to contract for secrecy and to shield sexual misconduct has both legal and ethical limits.

A. Defenses to NDAs

Private parties are generally accorded freedom to contract, both for secrecy as in NDAs and for private adjudication in arbitration proceedings.[135] A contract requires mutual assent, and ordinarily one who signs an instrument which on its face is a contract is deemed to assent to all its terms.[136] Although an NDA is a "contract for silence," absent illegality, parties are generally free to commit to being silent about almost anything.[137] These agreements may also provide for penalties or liquidated damages which stipulate the monetary damages a party will owe in the event of a breach.[138] As contracts, NDAs must conform with standard contractual requirements (offer, acceptance, and consideration) and are

law-reporter-and-trial-news/january-25-2018-trial-news [https://perma.cc/9EML-H24H]; Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html [https://perma.cc/2GLS-4QF8].

131. Zhang, *supra* note 130.

132. *See* Webber Nuñez, *supra* note 110, at 475.

133. *See id.*

134. *Id.* at 467.

135. *See* Brian Farkas, *Donald Trump and Stormy Daniels: An Arbitration Case Study*, AM. BAR ASS'N (Nov. 20, 2018), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2018/november-2018/donald-trump-stormy-daniels-arbitration-case-study/ [https://perma.cc/SFB9-CXAZ].

136. Colvin v. NASDAQ OMX Grp., Inc., No. 15-cv-02078-EMC, 2015 WL 6735292, at *3 (N.D. Cal. Nov. 4, 2015) (describing where the court found mutual assent existed between the parties to validate an arbitration clause within a five-page confidentiality agreement which was on its face clearly a contract though the plaintiff did not read the terms nor did she know about the arbitration clause in the agreement).

137. *See* Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 263–64 (1998).

138. Farkas, *supra* note 135, at 14. Liquidated damages clauses must be reasonable and must not act as a penalty. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (AM. L. INST. 1981).

subject to defenses, such as fraud, duress, unconscionability, illegality, and public policy.[139]

1. Unconscionability

An unconscionability challenge to contracts such as an NDA or arbitration agreement requires showing both substantive and procedural unconscionability.[140] This analysis considers whether the substantive contractual terms are adhesive, unfair, oppressive, or "shock the conscience," and procedurally, whether the contracts involved parties with significantly unequal bargaining power who attempted to take advantage of the weaker party or oppressive circumstances as in "take it or leave it" transactions.[141] The United States Supreme Court has held that states are to treat arbitration agreements as any other contract and has invalidated laws hostile to arbitration.[142] Studying how state courts apply the unconscionability defense to arbitration agreements, Professor Susan Landrum reported a significant variation among states in enforcing arbitration contracts along a spectrum of conservative, moderate, to liberal application.[143] Studying twenty states, she determined that California is far more likely to strike an arbitration agreement for unconscionability, while other states are more conservative or moderate.[144] Thus, while unconscionability is a stated defense to an arbitration agreement, state courts vary in their reception to invalidation on such grounds.[145] Unconscionability may also be asserted as grounds to invalidate an NDA obligation which may be lodged by a person seeking to void the NDA or when a nonparty seeks discovery of an NDA in a separate privately settled case.[146]

2. Duress

A contract procured by duress involves one party essentially forcing another to agree to contractual terms in a situation where there is no other reasonable alternative but to enter into the contract or the party takes advantage of the

139. Garfield, *supra* note 137, at 277, 285.

140. *See id.*; *see also* Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 767 (2014) (noting that most states require both substantive and procedural unconscionability); RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS § 5 (AM. LAW INST., Tentative Draft, 2019) (defining unconscionability).

141. Garfield, *supra* note 137, at 285; Landrum, *supra* note 140, at 768–69.

142. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (noting the Federal Arbitration Act was enacted to reverse longstanding judicial hostility to arbitration agreements).

143. Landrum, *supra* note 140, at 767 (noting significant variation in how courts apply the unconscionability doctrine).

144. *Id.* at 771–72, 781, 792 (listing states following a conservative approach in striking arbitration agreements as Colorado, Maine, Maryland, Minnesota, Nebraska, New Hampshire, North Carolina, Oregon, Rhode Island, and South Carolina and citing Ohio and Mississippi as following a moderate approach).

145. *Id.* at 802 (concluding noting that states are not generally hostile to arbitration agreements on grounds of unconscionability).

146. *See, e.g.*, Newton v. Clearwire Corp., No. 2:11–CV–00783–WBS–DAD, 2011 WL 4458971, at *3 (E.D. Cal. Sept. 23, 2011).

other party's dire circumstances. Examples of duress include circumstances of blackmail, threats, or physical force in the making of the agreement.[147]

3. Public Policy

NDAs are generally enforceable if they are deemed reasonable, but they will be struck if deemed in violation of public policy, such as when they would prevent enforcement of state criminal law.[148] The public policy exception to contract validity is narrowly construed and generally requires violation of specifically articulated law or policy that outweighs enforcement of the contract.[149] The factors considered include measuring: (1) the strength of the policy as manifested by legislation or judicial decisions; (2) the likelihood that refusing to enforce the term will further public policy; (3) the seriousness of any wrongdoing and whether it was deliberate; and (4) the connection between the misconduct and the term in the contract.[150] Debatably, courts could construe the misconduct as not being closely related to the term in the contract.

Courts may strike the entire contract or any provision within because it violates public policy.[151] Seemingly, violation of public policy is the strongest grounds to invalidate NDAs where nondisclosure leaves others vulnerable and at risk.[152] This arises when a promise of silence threatens the public interest but not the interests of the party making the commitment. For example, it was not contrary to Ms. Daniels' interest to receive $130,000 in exchange for her silence regarding the affair and the return of the "Property," but it was arguably contrary to the interest of the American public who were not fully informed of a Presidential candidate's conduct.[153] The same concerns arise in other cases of sexual misconduct. Certainly, the sexual abuse cases such as the abuse perpetrated by Nassar are even more compelling.

147. *See* RESTATEMENT (SECOND) OF CONTRACTS § 176 (AM. L. INST. 1981).

148. Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATL. (Oct. 18, 2017), https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/ [https://perma.cc/7HYF-Q5LY].

149. *See* § 178(1) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."). In weighing the interest in the enforcement of a term, account is taken of (a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term. *Id.* at (2); Doré, *supra* note 22, at 505 ("Absent legislation expressly prohibiting a confidentiality clause, a court must 'derive' public policy from other laws and 'its own sense of public welfare.'").

150. § 178(3).

151. *Id.* § 178(1).

152. Wilson R. Huhn, *The Trump/Clifford Non-Disclosure Agreement: Violation of Public Policy and the First Amendment*, JURIS MAG. (May 13, 2018), http://sites.law.duq.edu/juris/2018/05/13/the-trump-clifford-non-disclosure-agreement-violation-of-public-policy-and-the-first-amendment/ [https://perma.cc/QC3C-LZZ7] ("Under the doctrine of 'violation of public policy,' a court must refuse to enforce an agreement where the interest of the party in enforcing the contract is 'clearly outweighed' by a countervailing interest of the public.").

153. *See* DANIELS SETTLEMENT, *supra* note 1, at 2.

4. Illegality

NDAs cannot protect criminal acts.[154] For example, a California law holds that an NDA provision will be invalid in any civil action if the factual foundation which the NDA attempts to keep private establishes a cause of action for civil damages for an act that may be prosecuted as a felony sex offense, an act of childhood sexual abuse, or an act of sexual exploitation of a minor.[155] To enforce such NDAs would perpetuate criminal behavior and violate public policy. But the distinction of whether an act is excepted from an NDA on these grounds is not always clear. To illustrate the complication: although physical assault is a crime, unwanted romantic advances are generally not a crime. As such, an NDA could not prohibit a sexual assault victim reporting a crime but could restrict someone from reporting unwanted advances or noncriminal sexual behavior.[156] For example, a report of Harvey Weinstein's nonconsensual sexual assault could not be a valid subject of an NDA.[157] Allegations that involve a consensual sexual encounter, however, such as that of Stormy Daniels, could be covered by a valid NDA.[158] In practice, NDA settlements appear to attempt to cover both forms of conduct.[159]

B. Potential Federal Law Defenses to NDAs

1. NDAs as Restrictions on Free Speech

An NDA is a voluntary restriction on speech among private parties. Thus, challenges to NDAs on First Amendment grounds as restrictions on speech largely fail. In *Perricone v. Perricone*, a divorcing couple's settlement agreement included a confidentiality provision that forbade the wife from disseminating information obtained in discovery and acknowledged that Mr. Perricone and his business interests could be severely harmed by the public dissemination of defamatory information about him to the public.[160] The court rejected the argument that the NDA constituted a prior restraint in violation of the First Amendment.[161] In enforcing a permanent injunction upholding the NDA, the court relied upon a five-factor balancing test considering (1) whether there was state action; (2) the constitutional validity of a prior contractual restraint; (3) whether there was a waiver of free speech rights; (4) whether public policy barred enforcement of the

154. Garfield, *supra* note 137, at 307. Factors that courts balance for enforcing the term include (a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term. RESTATEMENT (SECOND) OF CONTRACTS § 178(2) (AM. L. INST. 1981).

155. CAL. CIV. PROC. CODE § 1002(a); *see also* 18 U.S.C. § 1833(b)(1) (protecting whistleblowers from civil and criminal liability).

156. Callaghan & Kirkpatrick, *supra* note 99.

157. *Id.*

158. *Id.*

159. *See infra* Section V.A.

160. Perricone v. Perricone, 972 A.D.2d 666, 669–72 (Conn. 2009).

161. *Id.* at 675.

waiver; and (5) indefiniteness of the agreement.[162] Concluding that these factors weighed in favor of enforcing the agreement, the court stated that "[t]he agreement does not prohibit the disclosure of information concerning the enforcement of laws protecting important rights, criminal behavior, the public health and safety or matters of great public importance, and the plaintiff is not a public official."[163] Additionally, "the restriction on speech imposed by the confidentiality agreement was tailored to advance its primary purpose of protecting the value of the plaintiff's business."[164] Accordingly, the court determined that the confidentiality agreement did not violate the public policy favoring free speech.[165]

2. Federal Agency Not Bound by Employee's NDA

Private confidentiality agreements can hinder an employee's ability to report and obtain redress for discriminatory treatment.[166] Confidentiality obligations can prevent disclosure of misconduct or harassment, and private dispute resolution plays a role in enforcing nondisclosure agreements. These contracts also can attempt to bar an employee from reporting to a federal agency charged with enforcing nondiscrimination laws. This practice poses a threat to employment discrimination and harassment cases where many employees must sign pre-employment arbitration clauses.[167]

NDAs or confidentiality agreements may violate worker rights under the National Labor Relations Act ("NLRA") if the provision prohibits an employee from talking about the underlying dispute and circumstances, as opposed to only the terms of a settlement.[168] Arbitration agreements in employment cases, however, are not considered to violate worker rights to collective action under the NLRA.[169]

The Equal Employment Opportunity Commission ("EEOC") is charged with investigating claims of civil rights violations, including sexual discrimination claims.[170] The United States Supreme Court in *Equal Employment Opportunity Commission v. Waffle House,* recognized that an employee's obligation to

162. *Id.* at 670–71.

163. *Id.* at 688–89.

164. *Id.* at 689.

165. *Id.*

166. *Id.* at 678–79; *see supra* Section II.B.1.a.

167. *See* IMRE S. SZALAI, EMP. RTS. ADVOC. INST. FOR L. & POL'Y, THE WIDESPREAD USE OF WORKPLACE ARBITRATION AMONG AMERICA'S TOP 100 COMPANIES 3 (2017).

168. Hassan A. Kanu, *Labor Board Could Loosen Curbs on Nondisclosure Agreements*, BLOOMBERG L.: DAILY LAB. REP. (Jan. 10, 2018), https://www.bloomberglaw.com/document/XDA0GTC000000?bna_news_filter=daily-labor-report&jcsearch=BNA%252000000160b741dda6a7f9ff6150de0002#jcite [https://perma.cc/98M5-KZPL] (quoting Joseph Sellers, a partner at Cohen Milstein, opining that the most important question to ask is what does the NDA prohibit?).

169. Epic Sys. Corp. v. Lewis, 138 S.Ct. 1612, 1618 (2018) (holding that the two federal statutes can be harmonized).

170. 42 U.S.C. § 2000e-5(a); *see* Equal Emp. Opportunity Comm'n v. Astra, 94 F.3d 738, 744 (1st Cir. 1996) ("Congress entrusted the Commission with significant enforcement responsibilities in respect to Title VII . . . . '[I]t is crucial that the Commission's ability to investigate charges of systemic discrimination not be impaired.'").

arbitrate cannot preclude investigation by the EEOC, a federal agency and non-party to the arbitration agreement.[171] Nor is the EEOC bound by a settlement agreement which purports to bar an employee from providing information or assistance to the EEOC.[172]

C. Practical Limits: NDAs' Deterrent Impact

Although the foregoing constitutes potential defenses to defeat an NDA, realistically proving such a defense *ex post facto* is a risky and expensive proposition. A person who breaches an NDA may be liable for breach of contract, and the breaching party liable for the amount paid in the NDA, as well as additional monetary damages and injunctive relief.[173] In the *EC Consulting/Stormy Daniels* case, Clifford acknowledged the significant risk she was taking during an interview with Anderson Cooper on *60 Minutes*.[174] Cooper asked, "for sitting here talking to me today, you could be fined a million dollars. I mean, aren't you taking a big risk?"[175] Daniels responded, "I am . . . . [But] it was very important to me to be able to defend myself."[176] The NDA included in Section 5.1.2 a "Liquidated Damages" provision stating that a breach of the agreement would result in payment of $1,000,000 from Clifford to Trump as the "reasonable and fair value to compensate DD [Trump] for any loss or damage resulting from each breach."[177] Zelda Perkins faced a similar risk as her NDA in the settlement with Harvey Weinstein restricted her reporting to authorities and medical personnel.[178]

In many cases, recovering such payment from the party with limited resources, often an alleged victim of sexual misconduct, is, in practice, difficult. But, the specter of such liability serves as a deterrent to speaking out, though as a legal remedy it is often inadequate, and the enforcing party may also seek injunctive relief and order to prevent disclosure and/or action.[179] Although NDAs cannot prevent individuals from disclosing illegal conduct, victims may not speak out because of fear of the legal repercussions.[180]

171. 534 U.S. 279, 280 (2002).

172. *Astra*, 94 F.3d at 744–45 (holding that nonassistance covenants which prohibit communication with the EEOC are void as against public policy and stating that "[i]f victims of or witnesses to sexual harassment are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered.").

173. McCain, *supra* note 97.

174. Farkas, *supra* note 135, at 15.

175. *Id.*

176. *Id.*

177. *Id.* at 14 (noting that the agreement may be enforceable but in violation of professional ethics rules in terms of attorney discipline standards).

178. *See infra* Section V.B.2.

179. Garfield, *supra* note 137, at 292–93.

180. Callaghan & Kirkpatrick, *supra* note 99 ("This chilling effect exists despite the fact that in many US jurisdictions, there are laws that require citizens to report crimes.").

D. Taking a Stand: Legislative Responses to NDAs and Arbitration in Sexual Misconduct Cases

1. State Legislation on NDAs in Employment Sexual Harassment Cases

In response to the deluge of harassment claims raised in the #MeToo movement, some states have introduced or passed legislation to limit the use of NDAs and contracts that mandate arbitration of sexual misconduct claims.[181] The National Conference of State Legislatures and the National Women's Law Center, tracking such legislation, reported in December 2019 that twenty-six states had introduced legislation prohibiting employers from requiring NDAs in employment or settlement contracts.[182] To date, sixteen states passed such legislation.[183] For example, California enacted the Stand Together Against Non-Disclosures Act ("STAND"), effective January 1, 2019, which outlaws confidential settlement agreements that prevent disclosure of factual information relating to claims of sexual assault, sexual harassment, or sex discrimination that are filed in a civil or administrative action.[184] The law prohibits defendants from requiring NDAs in settlement of sexual misconduct cases, but allows claimants to request such confidentiality.[185] STAND expanded upon a pre-existing law which prohibited nondisclosure provisions regarding felony sexual abuse or such abuse involving a minor.[186] New York amended existing law in order to expand sexual harassment protection for employees, including a ban on mandatory arbitration of sexual harassment claims.[187] New Jersey has introduced legislation that "would render unenforceable any clause in an employment contract that limits an employee's right to speak out after experiencing discrimination, retaliation or harassment in the workplace."[188] New Jersey's law also makes NDA's unenforceable when victims breach the agreement.[189] None of the legislation has fully

181. Dastagir, *supra* note 17 (citing the National Women's Law Center, reporting that approximately 200 state bills have been introduced to address workplace harassment as of September 2019); *see also States Move to Limit Workplace Confidentiality Agreements*, CBS NEWS (Aug. 27, 2018, 8:39 AM), https://www.cbsnews.com/news/states-move-to-limit-workplace-confidentiality-agreements/ [https://perma.cc/ZL7K-9UNE]; Callaghan & Kirkpatrick, *supra* note 99.

182. *See* ANDREA JOHNSON, KATHRYN MENEFEE & RAMYA SEKARAN, NAT'L WOMEN'S L. CTR, PROGRESS IN ADVANCING METOO WORKPLACE REFORMS IN #20STATESBY2020 5–8 (2019), https://nwlc.org/wp-content/uploads/2019/07/final_2020States_Report-12.20.19-v2.pdf [https://perma.cc/7SCA-Q6TU]; Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html [https://perma.cc/S3QR-7U3J].

183. Tippet, *supra* note 2.

184. CAL. CIV. PROC. CODE § 1001(a).

185. *Id.* § 1001(c).

186. *Id.* § 1002(a).

187. N.Y. C.P.L.R. 7515(a)(2), (4)(b)(i)–(iii) (CONSOL. 2019); *see also* Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Harassment Cases*, 20 LOY. J. PUB. INT. L. 53, 70–74 (2018) (discussing different approaches at the state level).

188. John McCoy, *New Jersey Latest to Examine Nondisclosure Pacts in #MeToo Era*, Human Resources Report, BLOOMBERG L.: DAILY LAB. REP. (Mar. 23, 2018, 1:12 PM), https://news.bloomberglaw.com/daily-labor-report/new-jersey-latest-to-examine-nondisclosure-pacts-in-metoo-era [https://perma.cc/E6RA-5QPL].

189. Harris, *supra* note 182.

prohibited the use of NDAs, and the laws primarily pertain only to employment.[190]

2. State Legislation on Forced Arbitration in Employment

The National Women's Law Center reports that six states have also enacted laws to ban "forced arbitration" of sexual harassment-related claims.[191] California Assembly Bill (AB51), signed into law October 2019, prohibits conditioning waiver of a right to a judicial forum in employment contracts.[192]

New York has amended its laws to prohibit forced arbitration in all discrimination claims.[193] Maryland similarly enacted a new law restricting mandatory arbitration of sexual harassment claims by rendering null and void any "provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment."[194] Similarly, Washington passed legislation restricting mandatory arbitration regarding employment discrimination, prohibiting the employment contract provisions from "requir[ing] an employee to waive the employee's right to publicly pursue a cause of action. . . . or requir[ing] an employee to resolve claims of discrimination in a dispute resolution process that is confidential."[195]

3. Likely FAA Preemption of State Anti-Arbitration Laws

State legislation that purports to invalidate arbitration clauses in employment cases risks likely preemption as in conflict with the pro-arbitration policy of the Federal Arbitration Act.[196] The FAA requires that agreements to arbitrate be enforced according to their terms, absent generally applicable contract law defenses. The Supreme Court has made it clear that the FAA preempts state anti-

190. *See* Susan Sholinsky, *#MeToo's Impact on Sexual Harassment Law Just Beginning*, LAW360 (July 11, 2018), https://www.law360.com/articles/1061044/-metoo-s-impact-on-sexual-harassment-law-just-beginning [https://perma.cc/KMS3-27MU].

191. JOHNSON ET AL., *supra* note 182, at 9.

192. Employment Discrimination: Enforcement, A.B. 51, Ch. 711, 2019–2020 Reg. Sess. (Cal. 2019), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB51 [https://perma.cc/G7QC-ZZCV].

193. N.Y. C.P.L.R. 7515 (CONSOL. 2020); *see also* JOHNSON ET AL., *supra* note 182, at 9 (describing legislation in Maryland, New York, Vermont, Washington, and New Jersey that seeks to bar "forced arbitration" of sexual harassment related claims).

194. 2018 Md. Laws Ch. 739 (S.B. 1010).

195. WASH. REV. CODE § 49.44.085 (LexisNexis 2020); *see also* Sholinsky, *supra* note 190, at 4 (reporting that the Washington law "[e]xpressly does not prohibit the inclusion of a confidentiality provision in a sexual harassment settlement agreement with an employee. However, a companion statute makes unlawful any NDA, including an arbitration agreement, which limits the ability of any person to produce evidence regarding past instances of sexual harassment or assault by a party involved in a civil action.").

196. *See, e.g.*, AT&T Mobility v. Concepcion, 563 U.S. 333, 357 (2011). Under the doctrine of preemption, if the federal government intends to occupy the field in a certain area then the federal law trumps any conflicting state law. *See id.* at 339; *see also* David I. Greenberger, *Does the Federal Arbitration Act Preempt State Laws Banning the Mandatory Arbitration of Sexual Harassment Claims?*, 73 DISP. RESOL. J. 47, 47 (2018).

arbitration laws, making them unenforceable. In *Epic Systems Corp v. Lewis*,[197] the Supreme Court held that the National Labor Relations Act's provision for worker rights to unionize and collective action did not override the FAA's enforcement command.[198] State laws that prohibit arbitration of particular claims, sexual harassment claims and discrimination, constitute "blatant discrimination against arbitration."[199] These state laws are likely to be construed as hostile to arbitration,[200] as demonstrated by a California district court's injunction restraining enforcement of Assembly Bill 51's arbitration ban in *Chamber of Commerce of USA v. Becerra*.[201]

4. Proposed Federal Legislation – Snowball's Chance

Federal legislation could, but is unlikely to, ban mandatory arbitration of sexual harassment claims. A bill introduced in 2017 as the "Ending Forced Arbitration of Sexual Harassment Act of 2017" sought to prevent employers from using pre-dispute arbitration agreements to resolve sex discrimination disputes but failed to garner enough votes to pass.[202] The public outrage evoked by the #MeToo critiques on "forced arbitration" again prompted Congress to pay attention. In September 2019, the Democratic House passed, by a vote of 225 to 186 the "Forced Arbitration Injustice Repeal Act" ("FAIR" Act) that amends the FAA to invalidate pre-dispute contractual obligations to arbitrate employment, consumer, antitrust, or civil rights disputes.[203] In April 2020, the Senate Judiciary Committee, chaired by Sen. Richard Blumenthal (D-CT) and Lindsey Graham (R-SC) held hearings on "Arbitration in America," hearing testimony of six witnesses, including academics, consumer, commerce, and the lead plaintiff in *American Express Co. v. Italian Colors Restaurant*.[204] Although the FAIR Act has gained more traction than prior Arbitration Fairness Act ("AFA") efforts, the

197. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018). Justice Ginsburg wrote for the dissent, finding that the decision was "egregiously wrong," stating: "[b]ecause [she] would hold that employees' § 7 rights include the right to pursue collective litigation regarding their wages and hours, [she] would further hold that the employer-dictated collective-litigation stoppers, i.e., 'waivers,' are unlawful." *Id.* at 1633, 1641 (Ginsburg, J. dissenting).

198. *Id.* at 1632.

199. Kindred Nursing Ctrs. Ltd. P'ship v. Clark., 137 S. Ct. 1421, 1428–29 (2017); *see also* Greenberger, *supra* note 196, at 53.

200. Sholinsky, *supra* note 190, at 3 ("It is quite possible that one or more of the enacted arbitration bans will face a legal challenge on the ground that such bans are contrary to the Federal Arbitration Act. The FAA embodies the federal principle that arbitration is a preferable process for resolving disputes. The U.S. Supreme Court has repeatedly affirmed that the FAA preempts state laws disfavoring arbitration . . . .").

201. Chamber of Com. of the United States v. Becerra, 438 F. Supp. 3d 1078, 1108 (E.D. Cal. 2020).

202. Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. § 402(a) (2017).

203. Forced Arbitration Injustice Repeal Act, H.R. 1423, 116th Cong. § 402(a) (2019).

204. *Arbitration in America*, *Comm. on the Judiciary*, 116th Cong. (2019) (statements of Kevin Ziober, Navy Reservist; Myriam Gilles, Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University; Alan S. Kaplinsky, Partner, Ballard Spahr LLP; F. Paul Bland, Jr., Executive Director, Public Justice; Alan Carlson, Italian Colors Restaurant; Victor E. Schwartz, Co-Chair, Public Policy Practice Group, Shook, Hardy, & Bacon LLP), https://www.judiciary.senate.gov/meetings/arbitration-in-america [https://perma.cc/M8ZL-7ZA2].

bill is similarly stalled in the Senate.[205] For now, agreements to arbitrate employment related sexual harassment claims will generally be enforced.[206]

E. Critiques of Anti-NDA Legislation: NDAs as Victim "Currency"

The STAND laws seek to bar NDAs that otherwise shield the identity of alleged sexual harassers, who may then proceed to continue the pattern of abuse in the workplace.[207] Yet this legislation limiting NDAs has its critics, including by some proclaimed victim rights advocates.[208] For example, NDAs may be desired by the victim to protect their privacy or retaliation from employers or coworkers. Victims may fear reporting harassment and discrimination that occurs in the workplace due to shame, backlash, and fear. The victim of harassment may want to avoid publicity.[209] Long time plaintiff "victims-rights" lawyer Gloria Allred has argued in support of NDAs, contending that to deny a victim the right to choose private settlement unfairly exposes her to unwanted publicity, stress, and risk of jury disbelief.[210]

A ban on NDAs raises concerns that victims will be denied a major bargaining chip and could prevent victims from coming forward. Further, employers will be deterred from making substantial monetary settlements if neither can be assured that information will be confidential.[211] New Jersey's legislation gives employees the option of breaching an NDA;[212] this uncertainty dilutes the value of the NDA to the party seeking confidentiality.

V. ETHICAL LIMITS: LAWYERS AND NEUTRALS IN SEXUAL MISCONDUCT CASES

What about the lawyers? The Neutrals? What about the fact that these deals that include NDAs were drafted and negotiated by lawyers, reached in private mediation, or enforced in arbitration? While the perpetrators were kept at large? Lawyers are, rightfully, advocates for their clients, and representation of a client does not constitute an endorsement of that client's actions or beliefs.[213] But as

205. Forced Arbitration Injustice Repeal Act, S. 610 116th Cong. (2019) This act was introduced in the Senate on February 28, 2019.

206. *See* Thomas J. Stipanowich, *The Third Arbitration Trilogy: Revelation, Reaction and Reflection on the Direction of American Arbitration*, SCOTUSBLOG (Sept. 21, 2011, 8:36 AM), https://www.scotusblog.com/2011/09/the-third-arbitration-trilogy-revelation-reaction-and-reflection-on-the-direction-of-american-arbitration/ [https://perma.cc/X7GY-DK7S] (noting that that Supreme Court in this era is very pro-arbitration).

207. CAL. CIV. PROC. CODE § 1001; *see* McCain, *supra* note 98.

208. *See* Allred, *supra* note 29.

209. *Id.* (arguing that many assault and harassment victims choose to settle privately with their abusers because filing public lawsuits often only increases their suffering).

210. *Id.*; *see also* Susan Faludi, *'She Said' Recounts How Two Times Reporters Broke the Harvey Weinstein Story*, N.Y. TIMES (Sept. 8, 2019), https://www.nytimes.com/2019/09/08/books/review/she-said-jodi-kantor-megan-twohey.html# [https://perma.cc/NEP2-CSK3] (stating that "Gloria Allred, the crusading feminist lawyer, whose law firm, in 2004, negotiated a nondisclosure agreement for one of Weinstein's victims; the firm pocketed 40 percent of the settlement.").

211. Allred, *supra* note 29.

212. N.J. STAT. ANN. § 10.5-12.8(b) (West 2020).

213. MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2020).

lawyers are the likely drafters of the disputed NDAs and drivers in advocating for enforcement in private dispute resolution settings,[214] what are the lawyers' ethical obligations in this setting?

A. The Lawyers' Role in Negotiating and Enforcing NDAs

Public policy favors the voluntary settlement of legal disputes. The privacy accorded ADR processes, the confidential nature of attorney-client communications, and the ability to procure silence via NDAs can promote private settlement. Lawyers are at the forefront of this process, representing their respective clients; and, neutrals assist the parties including in disputes that are resolved using NDAs.[215] Yet, NDAs can deprive the public of knowledge about misconduct and impede individuals at risk of similar harm from obtaining proof necessary to their cases as well as impair regulatory agencies from investigating and enforcing statutory rights.[216] The following examines high profile sexual misconduct cases where the conduct of lawyers was undoubtedly questionable.[217]

B. The Lawyer's Dubious Ethical Role in NDA Settlements

1. O'Reilly/Fox News

The lawyers' conduct in *Bernsten v. O'Reilly*,[218] involving Bill O'Reilly and Fox News' settlement of sexual harassment claims with two women, illustrates ethical concerns with lawyer conduct.[219] The settlement agreements were made public as part of a defamation lawsuit against O'Reilly and Fox News filed by women who had reached harassment settlements involving O'Reilly.[220] The Fox News settlement agreement with its former TV producer Andrea Mackris provided that her lawyer, Benedict Morelli, and his firm, Benedict P. Morelli & Associates, P.C., agreed not to represent other parties with similar sexual harassment claims against O'Reilly or Fox News.[221]

The settlement also stipulated that Morelli agreed to provide legal advice to O'Reilly regarding sexual harassment matters and that both O'Reilly and

214. To ensure confidentiality of the proceedings, attorneys will often include language in the arbitration clause ensuring that any dispute that may arise will remain confidential. This verbiage will often include the existence of the dispute and any resulting award, as well as testimony and filings related to the dispute. *See, e.g.*, Farkas, *supra* note 135, at 14.

215. *See supra* note 21–25 and accompanying text.

216. Doré, *supra* note 22, at 509.

217. *See, e.g.*, Hemel & Lund, *supra* note 103, at 162–68 (discussing various sexual misconduct cases involving corporate officers).

218. Bernsten v. O'Reilly, 307 F. Supp. 3d 161 (S.D.N.Y. 2018).

219. Mindy L. Rattan, *Bill O'Reilly Settlement Raises Ethics Issues for Lawyers*, BLOOMBERG L.: BUS. & PRAC. (Apr. 6, 2018, 5:21 PM), https://biglawbusiness.com/bill-oreilly-settlement-raises-ethics-issues-for-lawyers [https://perma.cc/SBT3-TXV2].

220. *Id.*

221. Confidential Settlement Agreement, Bernsten v. O'Reilly, 307 F. Supp. 3d 161 (S.D.N.Y. 2018) (No. 58-3) [hereinafter O'Reilly Settlement].

Mackris waived any conflict in O'Reilly's retention of the Morelli firm.[222] Further, the plaintiff's lawyer Morelli was restricted from later bringing similar suits against the defendants on similar claims.[223] The agreement also required full turnover and destruction of all evidentiary materials, confidentiality, nondisparagement, and arbitration.[224]

As Exhibit A, the Confidential Settlement concludes that:

> The Parties regret that this matter has caused tremendous pain, and they have agreed to settle. All cases and claims have been withdrawn, and all Parties have agreed that there was no wrongdoing whatsoever by Mr. O'Reilly, Ms. Mackris, or Ms. Mackris' counsel, Benedict P. Morelli & Associates. We now withdraw any assertion that any extortion by Ms. Mackris, Ms. Mackris' counsel, Benedict P. Morelli & Associates occurred. Out of respect for their families and privacy, all Parties and their representatives have agreed that all information relating to the cases shall remain confidential.[225]

The next page is a hand-written "Affirmation," dated October 28, 2004, that states: "John Houston Pope, an attorney duly admitted in New York, affirms under penalty of perjury: I will cause the Investigative Materials as defined in paragraph 4(c) of the Confidential Settlement Agreement to be permanently deleted and/or destroyed no later than 6pm, October 29, 2004."[226]

The *O'Reilly* settlement is rife with professional misconduct concerns. To wit, professional conduct rules prohibit lawyers from entering into agreements that limit the lawyer's right to practice, such as not to bring similarly situated claims, as part of a settlement.[227] These types of arrangements create conflicts of interests between lawyers and their clients and prevent experienced lawyers from bringing claims.[228] The agreement did not mention Morelli ceasing representation of Mackris or purport to disqualify Morelli in any proceedings to enforce the agreement.[229] Such a scenario where Morelli could represent both Mackris

222. Rattan, *supra* note 219 (quoting the O'Reilly/Mackris Settlement Agreement and stating that Morelli "won't 'represent, assist or cooperate with any other parties or attorneys in any action against O'Reilly' or Fox News involving 'alleged sexual harassment issues.'"); *see also* Steel, *supra* note 106.

223. Steel, *supra* note 106.

224. Rattan, *supra* note 219 (noting interview with University of Connecticut School of Law Professor Leslie C. Levin who opined that this limitation was to "lock [Morelli] up so that he could not do any damage down the line."). It would be a problem if Morelli did any work for O'Reilly while finalizing the settlement agreement.

225. O'Reilly Settlement, *supra* note 221, at 14.

226. *Id.* at 15.

227. MODEL RULES OF PRO. CONDUCT r. 5.6(b) (AM. BAR ASS'N 1989) ("A lawyer shall not participate in offering of making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.").

228. Steel, *supra* note 106 (reporting Morelli's contention that "[e]very step we took was to negotiate the best possible deal for Ms. Mackris. We worked extremely hard to secure a significant financial settlement for her. The claim that I did not vigorously represent her, or that I represented O'Reilly during or after the settlement process, is absolutely false.").

229. O'Reilly Settlement, *supra* note 221, at 7 ("O'Reilly (i) has agreed to waive any and all actual or alleged conflicts of interest that may arise from Mackris' retention of the Morelli Firm to enforce the terms of this Agreement, and (ii) has agreed not to seek to disqualify the Morelli Firm in any proceedings to enforce the terms of this Agreement.").

and O'Reilly would constitute a conflict of interest involving current clients.[230] The agreement seemingly foretold of knowing violations by incorporating a severability provision that stated if the provisions restricting Morelli's right to bring other claims violates legal ethics rules, the rest of the agreement will remain valid and binding.[231] A New York State Bar Association's Committee on Professional Ethics, in a 2000 opinion, stated that an "agreement restricting a lawyer's right to practice law may be enforceable even if it violates the disciplinary rule."[232] Clearly, the lawyers tested the boundaries of the professional conduct rules. Lawyers on both sides were complicit.

2. Harvey Weinstein/Miramax Films, Co.

Claims that former entertainment industry mogul Harvey Weinstein engaged in serial sexual harassment, assault, and rape of women over a span of decades triggered the #MeToo movement.[233] Weinstein's accusers are speaking out in public and in the courtroom. Both Weinstein and his company, Miramax Films Corporation, face numerous lawsuits as well as criminal charges against Weinstein.[234]

A 1998 settlement of sexual assault claims by Zelda Perkins and a female co-worker against Harvey Weinstein and Miramax raise similarly disconcerting lawyer conduct concerns.[235] Perkins was an assistant in London to Weinstein. At age 24, Perkins signed an NDA as part of a settlement of sexual assault allegations. After nineteen years of silence, Perkins spoke out publicly.[236]

Reports of the settlement negotiation state that the negotiations took place between a team of Weinstein/Miramax lawyers and Perkins' solo practice lawyer two years out of practice "over a period of about one week, with long negotiation sessions over three days, including one twelve-hour session concluding at 5am. That negotiation included a meeting where Perkins and Weinstein were present in the same room for a discussion prior to the signing of the agreement."[237]

230. MODEL RULES OF PRO. CONDUCT rs. 1.7, 1.8 (concurrent conflicts of interest); *see also* N.Y. RULES OF PRO. CONDUCT rs. 1.7, 1.8 (N.Y. STATE BAR ASS'N 2010).

231. O'Reilly Settlement, *supra* note 221, at 9; *see also* MODEL RULES OF PRO. CONDUCT rs. 1.7, 1.8.

232. Rattan, *supra* note 219.

233. *See* KANTOR & TWOHEY, *supra* note 27; Farrow, *supra* note 16.

234. *See, e.g.*, First Amended Complaint at 28, Geiss v. The Weinstein Co., 383 F. Supp. 3d 156 (S.D.N.Y. 2019) (alleging—in a class action against Weinstein and his corporate employers—that "[w]ielding unfettered power in the movie and television industry, Weinstein has admitted that his predatory and sexually harassing behavior toward women was his modus operandi.").

235. Alex Ritman, *Former Harvey Weinstein Assistant Zelda Perkins Says She Was "Defrauded" by Non-Disclosure Agreement*, HOLLYWOOD REP. (Mar. 28, 2018), https://www.hollywoodreporter.com/news/harvey-weinstein-assistant-zelda-perkins-says-she-was-defrauded-by-disclosure-agreement-1097987 [https://perma.cc/65E5-BR8J].

236. Emily Maitlis & Lucinda Day, *Harvey Weinstein: Ex-Assistant Criticises Gagging Orders*, BBC NEWS (Dec. 19, 2017), https://www.bbc.com/news/entertainment-arts-42417655 [https://perma.cc/Y72C-DNPX].

237. Richard Moorhead, *Ethics and NDAs: A CELs Think Tank Report*, CTR. FOR ETHICS & L. 1, 4 (Apr. 2018). Indeed, Perkins was furious she was in the same room as him. *See Former Weinstein Assistant Zelda Perkins Broke a NDA to Speak Out. Now, She Wants to Stop Their Misuse*, CBC RADIO (Jan. 10, 2020, 6:29 PM), https://www.cbc.ca/radio/day6/mourning-iran-crash-victims-former-weinstein-aide-zelda-perkins-watching-cats-while-high-design-20-more-1.5421075/former-weinstein-assistant-zelda-perkins-broke-a-nda-to-speak-

On behalf of Weinstein, his esteemed London-based law firm, Allen & Overy, paid Perkins £125,000 for "compensation for loss of office from my employers Miramax Film Corp."[238] The settlement agreement restricted Perkins' from testifying in "any criminal legal process" by requiring "where reasonably practicable" at least forty-eight hours written notice to a named lawyer at the firm before any such disclosure. Perkins was required to "use all reasonable endeavours to limit the scope of [such] disclosure as far as possible" and authorized disclosure of the sexual misconduct to medical personnel only if the medical professional(s) signed confidentiality agreements agreed with Miramax.[239]

As part of the settlement, Perkins insisted that Weinstein commit to therapy and that Miramax enact a proper reporting procedure and fire Weinstein if others bring similar claims.[240] Yet Perkins reports "the document was so guarded in secrecy" that even she was not given a copy of the document, and that Weinstein mocked her for assuming he would comply.[241] Perkins also faults the lawyers, stating, "[t]his is also a question of legal ethics - the Weinstein story has highlighted an area in the law that can cover up sexual crime."[242] She testified before the British Parliament, pleading that British law on NDAs be "[r]eformed to dismantle a legal system which she says enables the rich and powerful to cover up sexual assault and harassment."[243]

Some of the top lawyers in the country have compromised their stature in representing Weinstein. David Boies, represented Weinstein over a span of nearly twenty years and knew of Weinstein's "philandering" and private settlements of sexual misconduct claims.[244] Boies also arguably crossed the ethical line in his representation of Weinstein when he reportedly personally signed a contract with a private investigation company, hired to unearth facts in an attempt

out-now-she-wants-to-stop-their-misuse-1.5421083 [https://perma.cc/M3YC-ZS9D]. Having to face the attacker could be an unsettling dynamic for women, particularly those suffering from PTSD, and could factor into a duress/unconscionability analysis. Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCH. TODAY (Nov. 16, 2017), https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner [https://perma.cc/4EAG-ZMNV].

238. Alexandra Ma, *Harvey Weinstein's Former London Assistant Breaks 19-Year Gagging Order To Accuse Movie Mogul of Sexual Harassment*, BUS. INSIDER (Oct. 24, 2017, 4:56 AM), https://www.businessinsider.com/harvey-weinstein-zelda-perkins-breaks-nda-on-sexual-harassment-2017-10 [https://perma.cc/367D-4Z8B].

239. Moorhead, *supra* note 237, at 4.

240. Maitlis & Day, *supra* note 236; Ritman, *supra* note 235.

241. Maitlis & Day, *supra* note 236.

242. *Id.*

243. *Id.*

244. James B. Stewart, *David Boies Pleads Not Guilty*, N.Y. TIMES (Sept. 21, 2018), https://www.nytimes.com/2018/09/21/business/david-boies-pleads-not-guilty.html [https://perma.cc/A8GP-H965] (reporting a Times statement that "We never contemplated that the law firm would contract with an intelligence firm to conduct a secret spying operation aimed at our reporting and our reporters . . . . Such an operation is reprehensible.").

to stop publication of New York Times report exposing Weinstein's sexual assault, while Boies' law firm was also representing the Times.[245] Boies admitted that his legacy of over fifty years of practicing law is tainted by this action.[246]

In advising Weinstein on sexual assault claims in California, attorney Lisa Bloom, daughter of Gloria Allred, who usually fights on behalf of women in sexual assault cases, wrote a memo to her client, providing a shocking and detailed strategy for how to discredit his accusers.[247] The memo was revealed in the book, *She Said*, written by the New York Times reporters who helped to break the initial story against Weinstein.[248] Bloom, whom Weinstein paid the hourly rate of $895 and who had also recently signed a book deal with Weinstein, advised her client to use tactics such as to:

> Initiate "counterprops online campaigns," place articles in the press painting one of his accusers as a "pathological liar," start a Weinstein Foundation "on gender equality" and hire a "reputation management company" to suppress negative articles on Google. Oh, and this gem: "You and I come out publicly in a pre-emptive interview where you talk about evolving on women's issues, prompted by death of your mother, Trump . . . grab tape and, maybe, nasty unfounded hurtful rumors about you. . . . You should be the hero of the story, not the villain. This is very doable.[249]

Consider these and other situations of lawyer involvement, such as Trump's lawyers seeking *ex parte* enforcement of the NDA in *Daniels*, priest abuse settlements, and similar cases.[250]

245. Deborah L. Rhode, *David Boies's Egregious Involvement with Harvey Weinstein*, N.Y. TIMES (Nov. 9, 2017), https://www.nytimes.com/2017/11/09/opinion/david-boies-harvey-weinstein.html?auth=login-email&login=email [https://perma.cc/SA4F-5WC5] ("What makes the involvement of Mr. Boies so egregious is not only that it helped Mr. Weinstein conceal his abuse and undermined the First Amendment interests of the press and the public. It is also that Mr. Boies's representation posed a conflict of interest, because his firm, Boies Schiller Flexner, was representing The New York Times, the 'leading NY Newspaper,' in libel litigation at the same time.").

246. *Id.*

247. Hadley Freeman, *Lisa Bloom on Working for Weinstein: Attorneys Represent a lot of Distasteful People*, GUARDIAN (Dec. 14, 2019), https://www.theguardian.com/world/2019/dec/14/lawyer-lisa-bloom-harvey-weinstein-jeffrey-epstein-hadley-freeman [https://perma.cc/S6WS-VYJR]; Megan Twohey & Johanna Barr, *Lisa Bloom, Lawyer Advising Harvey Weinstein, Resigns Amid Criticism from Board Members*, N.Y. TIMES (Oct. 7, 2017), https://www.nytimes.com/2017/10/07/business/lisa-bloom-weinstein-attorney.html?smid=pc-thedaily [https://perma.cc/JB3J-W9KR].

248. KANTOR & TWOHEY, *supra* note 27, at 99–101.

249. Faludi, *supra* note 210.

250. Perkins had not heard from Weinstein's legal team about her breaking the NDA, yet similar to Stormy Daniels, she is taking a risk. As part of the agreement, she could not talk about the case with her colleague and friend who was also a victim. *See Former Weinstein Assistant Zelda Perkins Broke a NDA to Speak Out. Now She Wants to Stop Their Misuse*, *supra* note 237.

C. Ethical & Professional Conduct Considerations in Negotiating, Drafting and Seeking to Enforce NDAs

Professional conduct rules do not prohibit lawyers from drafting NDA provisions in a confidential settlement regarding sexual harassment or misconduct.[251] But the role of lawyers and other professionals involved, including ADR neutrals, in potential overreaching and unethical conduct in this process cannot be overlooked.[252] Unfortunately, the accounts of lawyer conduct in some of these sexual misconduct settlement negotiations and enforcement proceedings raise the question of potential, if not actual, professional misconduct.

Although an advocate for their clients, whether in the courtroom or drafting a confidential settlement, a lawyer cannot counsel or aid his client in breaking the law. If a lawyer finds a client's actions or course of action so morally repugnant that they cannot possibly provide proper representation, then the lawyer should withdraw if withdrawal would not be detrimental to the client.[253] This is arguably subjective. One lawyer's moral boundary may be different than another. But professional conduct rules provide guidance where conscience cannot.

Recall the lawyer's duties as advisor, negotiator, advocate, evaluator, and officer of the court.[254] A lawyer is a counselor to the client as well as holds duties of fairness to the process and in dealings with nonparties. Professional conduct rules hold lawyers and ADR professionals to a higher standard of process fairness to ensure integrity of the profession and process.

1. Duty to Process Integrity-ADR Neutrals

ADR neutrals also facilitate the settlement of sexual assault claims in mediation or through enforcing NDAs in arbitration. Do they have any ethical responsibility in this context where the rights of others are at risk? Currently, the laws do not impose any mandatory reporting. The confidentiality laws noted in Section II above have few exceptions and do not impose mandatory reporting obligations for mediators or arbitrators. But the ethical standards for mediators and arbitrators hold neutrals to integrity of process.

Informed consent is paramount to integrity of process. Mediation prior to forced arbitration may be one option where the neutral can ensure the parties understand the costs and benefits of confidentiality, process fairness, and consideration of the impact on others.

251. Hafiz, *supra* note 148.

252. Sashy Nathan, *Are NDAs Ethical?*, LITTLE ATOMS (Oct. 24, 2018), http://littleatoms.com/are-ndas-ethical [https://perma.cc/Q7LP-GYGV] ("[W]hat if the people tasked with being the officers of the Court, and who manage the general public's relationship with the laws of the land, pursue the narrow set of interests of their client so vigorously that they undermine the structures of legal principle they are supposed to uphold?").

253. *Id.*; MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS'N 1989).

254. *See supra* Section II.D.

2. A Proposal

Parties to an NDA settlement contract have a right to informed consent, free of duress, and certainly free of professional conduct violations by lawyers or ADR professionals. Accordingly, legislation or good practice should require that negotiations and ADR processes involving NDAs in sexual misconduct settlements include notices informing all parties of the professional conduct and ethical standards governing lawyers, neutrals, and ADR provider organizations, certified by the parties for compliance.

VI. CONCLUSION

Private dispute resolution empowers parties to control process choice.[255] Protections for confidentiality or nondisclosure that keep the settlement or resolution secret are valued and even constitute a form of "currency" in settlement.[256] A defendant may pay more in exchange for confidentiality in order to avoid potentially detrimental outcomes such as negative publicity, future lawsuits, or to shield the disclosure of trade secrets or other proprietary information.[257] While secrecy may provide increased settlement leverage, plaintiffs may likewise value confidentiality for other reasons such as avoiding publicity of embarrassing or emotionally damaging information.[258]

Untethered confidentiality in private dispute resolution, however, has public costs and can adversely impact others. The public loses the value of a published written judicial decision, which can provide precedential value to guide the conduct of others on how to comply with the law.[259] Secret settlement impedes the transparent resolution of disputes and inhibits public sentiment that courts perform an inherent public service by facilitating a social and political dialogue in the open access to courts.[260] Arguably, private dispute resolution is not being done for the benefit of the public, and parties' choice for privacy should be respected to facilitate settlement.[261] Nevertheless, if certain facts are not disclosed to the public, critical evidence relevant to the public's interest may be lost and jeopardized. With an increasing number of cases diverted to private dispute resolution rather than publicly filed in court, the press and public are kept from learning about disputes involving individuals and companies.[262]

Public litigation provides transparency and can inform the public but can also be unduly costly and protracted. Processes which offer parties choices for

255. Erik S. Knutsen, *Keeping Settlements Secret*, 37 FL. ST. L. REV. 945, 956 (2010).
256. *Id.* at 951 (noting that nondisclosure agreements can create value in the settlement).
257. *Id.* at 952.
258. *Id.* at 953.
259. *Id.* at 955.
260. *Id.* at 954–55.
261. *Id.* at 955–56.
262. Doré, *supra* note 22, at 494–95; *see also* Carol Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627 (1999) (proposing a balancing of factors, such as necessity, reasonableness, and public policy, to determine when the public interest outweighs the private and proposing protection for information related to trade secrets but otherwise favoring disclosure).

control and privacy are important, but the price of buying or selling silence, in certain situations, may impose harms and costs that require tempered and counseled professionalism. The role of the lawyer, neutral and ADR process is to ensure informed consent, fair process, and consideration of the impact on others.