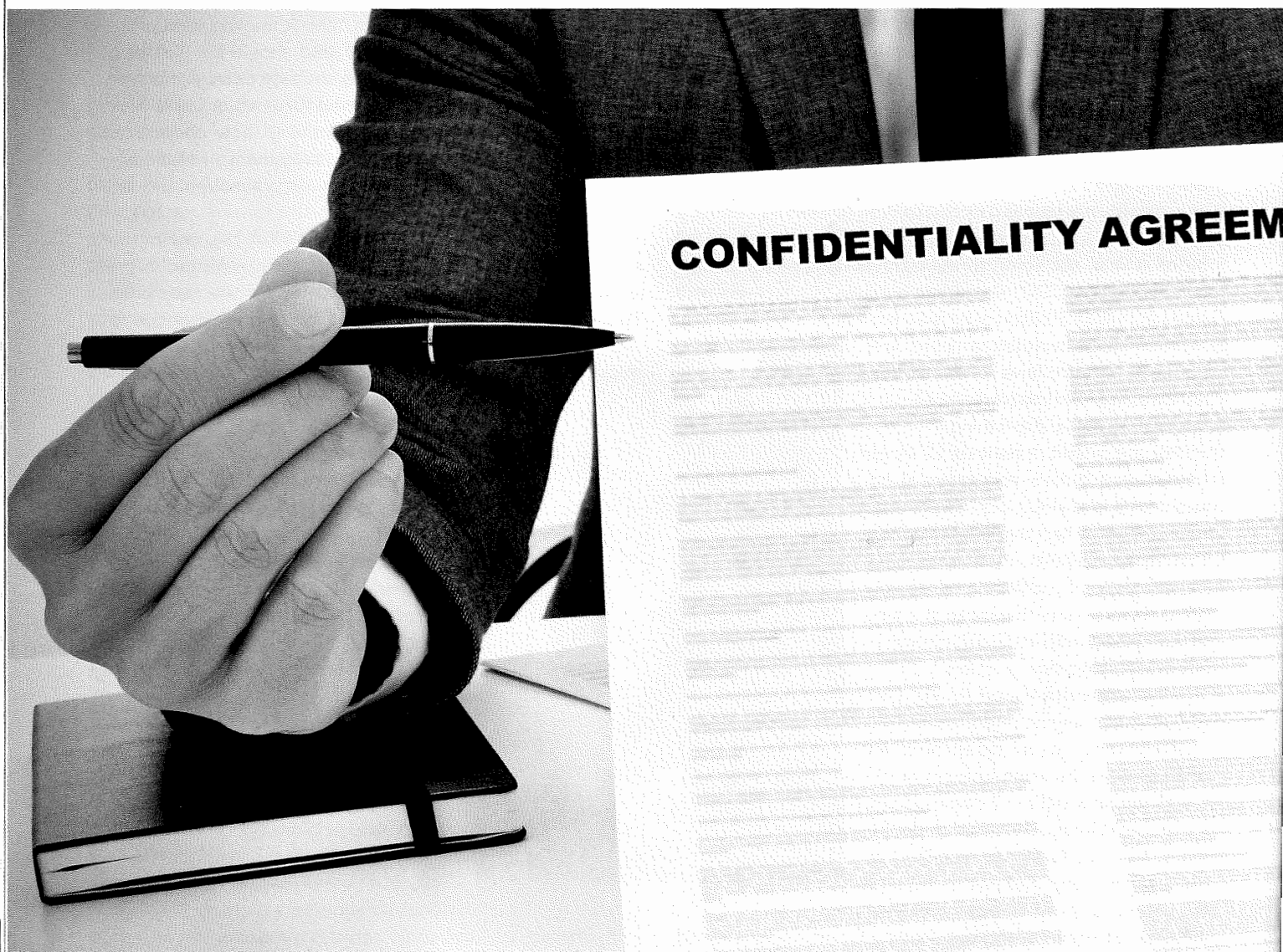


Reconsidering Non-D

BY GLENNISHA MORGAN



“How was this allowed to go on for so long?” It is one of the central questions being asked in sexual harassment and assault cases where a number of women come forward with stories about a single perpetrator who got away with it for years. The answer lies, in part, in a web of secrecy woven with a legal document that can go by many names—a non-disclosure agreement, a confidentiality agreement or confidential disclosure agreement.

These legally binding contracts prevent those involved from divulging information noted in the agreement and are commonly a requirement of settlements with victims. Amid this recent spate of sexual harassment and sexual assault accusations coming to light that involved such agreements, questions are being raised whether the harm these agreements can do to victims outweighs the protections they provide to businesses.

Lawmakers in California, New York, New Jersey and Washington are also examining statutes that would restrict using non-disclosure

agreements and out-of-court settlements with confidentiality clauses in these cases as a way to keep such incidents and crimes out of the shadows and prevent perpetrators from striking again.

A Common Practice

Debra Weiss Ford, the managing principal and litigation manager of Jackson Lewis P.C. in Portsmouth, says that throughout her 35 years of practicing law, “I can’t remember the last time that there wasn’t a confidentiality agreement. I think that is a normal procedure. The whole point is to get an amicable resolution and move forward.”

Ford, who says that she’s settled hundreds of cases, says that for both parties, non-disclosure agreements are beneficial because they’re able to reach a resolution. “It can take years to get through the court system, and it’s expensive,” she adds.

Ford notes that in most settlement cases, whether it’s sexual harassment, discrimination, or something related to employment

Disclosure Agreements



law, usually the employee and the employer agree not to disclose any information regarding the existence or the substance of the separation agreement.

"The gist of it is that the employee agrees not to disclose information about the settlement itself," Ford explains. "For most of these cases, an issue is disputed. The employer may say that it did not happen, and the employee may say that it did and often there's just not an agreement on what exactly happened, so the settlement is meant to end any litigation and any further involvement in a claim. From the employer's side, often confidentiality is important because they're disputing the charges and they want to keep the information confidential because it only pertains to that employee and it shouldn't be public information that others can see," she says.

Ford says many employees will sign an agreement because they're interested in moving on. "They have brought a claim and they are sat-

isfied with the money that is being paid, or any other non-monetary issues," says Ford. "They are releasing the claim to move forward and not have any further involvement with the employer."

According to The Spiggle Law Firm, there are various types of NDAs [non-disclosure agreements]. Agreements are not cookie cutter. The agreements can include whatever the employer and employee agree to within a certain broad framework. The extent to which the NDA limits the employee varies. They don't always prohibit an employee from talking about the dispute. An NDA may even restrict the employee from discussing the settlement amount, but leave the employee liberated to discuss the allegations. A more draconian NDA may prevent the employee from speaking about the incident at all, and even prevent the employee from taking any other legal action against the employer.

Silencing Victims

But signing non-disclosure agreements can come with a price as employees may be unable to discuss any part of what they experienced, and that can possibly halt or slow down a victim's healing process. One of the first and biggest steps in healing from trauma is acknowledging that it happened and then talking about it.

"What can be really difficult about that is it's silencing. Often, someone who is a victim is suing. It's not just because they want money. They're suing because they want to have some sort of feeling of justice," says Amy Culp, the University of NH's Sexual Harassment and Rape Prevention Program (SHARRP) director. "And justice might not be served in the criminal justice system.... The non-disclosure is really difficult for them because part of healing in any of these situations is sharing your story, whether public or private. And those non-disclosures are so tight that if you break them, you could be sued in return."

Nancy Richards-Stower, a NH attorney with 42 years of experience in litigating workplace-related discrimination, sexual harassment and sexual assault cases, says that she never recommends that her clients sign confidentiality agreements.

"What my clients do not do, if they take my advice, is they never agree to keep the allegations confidential. So, what you've been hearing on the media with regards to [Bill] O'Reilly, [Bill] Cosby, and perhaps some of the new information that is coming forth on the Capitol Hill settlements, is that the allegations are required to be kept confidential under the terms of the settlement agreements that have been signed by the victim," says Richards-Stower. "I think this is very unhealthy, let alone morally wrong. It's unhealthy because [for] victims of sexual harassment, sexual assault, or otherwise, it is clearly therapeutic to be able to talk about those things and not be ashamed to talk about what happened to you in your own life. So, to be told to shut up about it takes a toll."

The biggest argument against non-disclosure agreements is that if allegations are held in silence, perpetrators will continue to commit these offenses. "That just allows the pigs to continue perpetrating their assault and their harassment," says Richards-Stower. ■