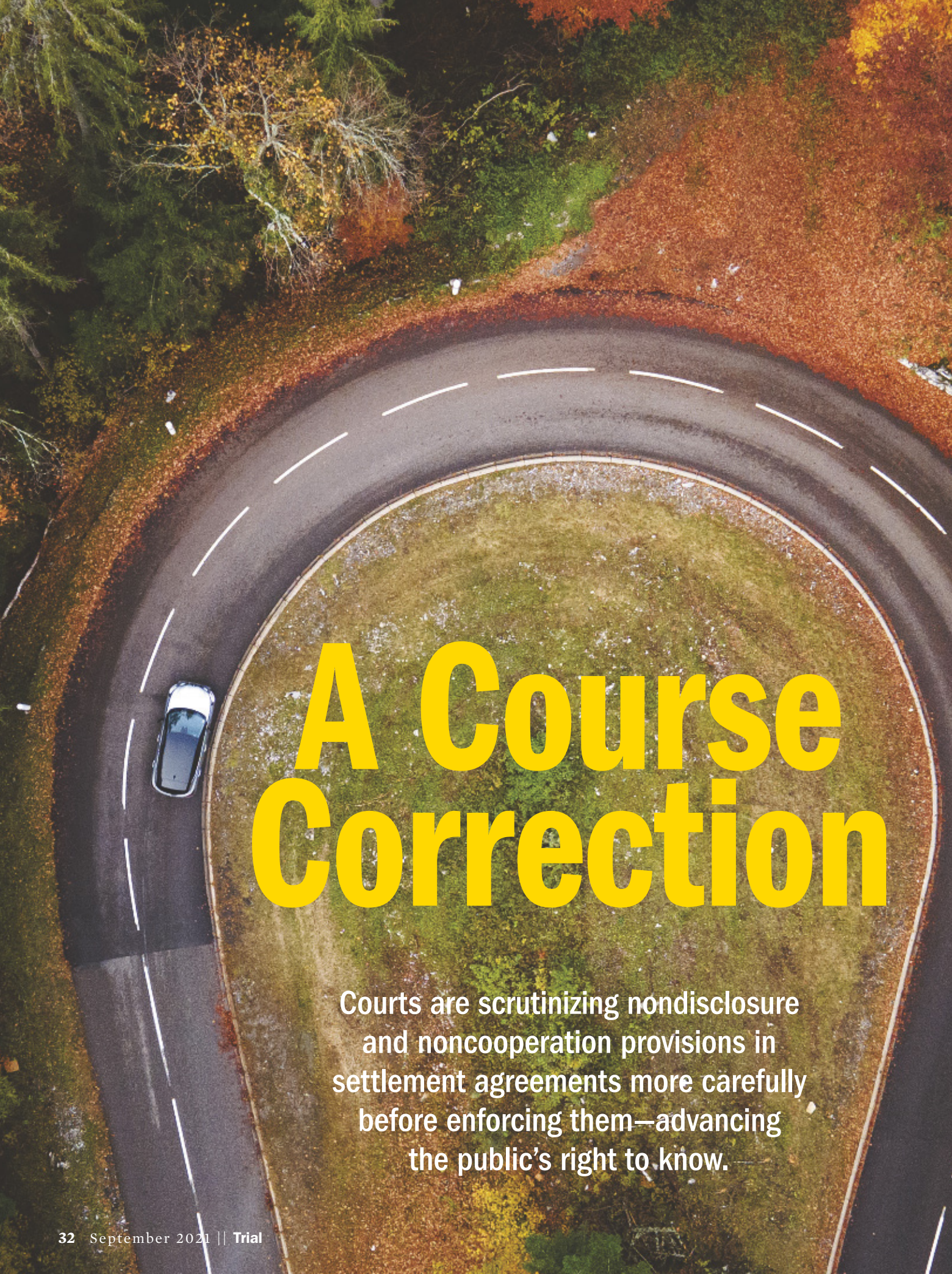


A Course Correction

Courts are scrutinizing nondisclosure and noncooperation provisions in settlement agreements more carefully before enforcing them—advancing the public's right to know.

ANNA BERKUT/STOCKSY

By || **Lynne Bernabei and Devin Wrigley**

Large corporations and government agencies routinely use secrecy provisions in settlements to stop the public—including future plaintiffs—from accessing information that could aid the litigation of similar civil rights and employment claims. To prove their claims, these plaintiffs frequently need evidence of a pattern and practice of discrimination or retaliation. So when defendants use secrecy tactics, they are actively concealing evidence that could be relevant to the immediate lawsuit and future ones, and they are attempting to avoid bad publicity. While in the past courts often enforced broad confidentiality provisions without much thought, they now are scrutinizing the use of these provisions more carefully and invalidating them more often.

Confidentiality Provisions

In nearly all settlements, defendants require confidentiality or nondisclosure provisions. In turn, plaintiff lawyers require that these provisions be mutual. If a case is already filed in court, the provisions typically require that the terms of the settlement, including the amount paid by the defendant, be confidential. If the matter has not yet been litigated, defendants often try to obtain broader confidentiality terms that keep the negotiations leading to the agreement and the facts of the case secret.

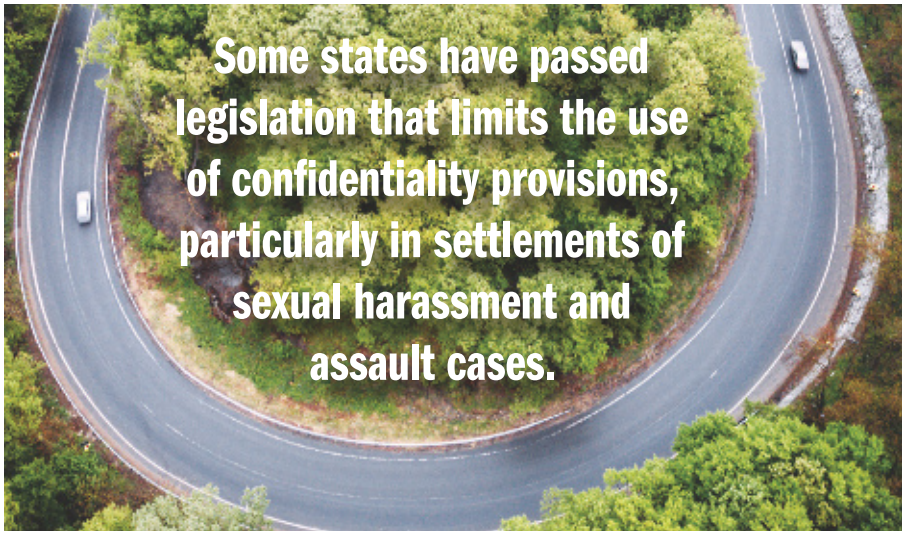
State legislation. The #MeToo movement initiated public scrutiny of confidential settlements—because of their enforcement, alleged past abusers may have been able to continue sexually assaulting more women. As a result, some states have passed legislation that limits the use of confidentiality provisions, particularly in settlements of sexual harassment and assault cases. For example, in 2018, New York prohibited settlements that prevent the parties from disclosing the "underlying facts and circumstances" of sexual harassment cases

"unless the condition of confidentiality is the complainant's preference."[1]

California went further in the Stand Together Against Non-Disclosure (STAND) Act of 2018, which prohibits *all settlements* that prevent the parties from disclosing facts related to claims of sexual assault or harassment, or workplace sex discrimination or retaliation, regardless of the complainant's preference.[2] More than a dozen other states have enacted similar legislation, in varying forms.[3] However, most of these statutes are limited to sexual harassment and retaliation claims and do not cover other types of civil rights claims.

A handful of states also have "sunshine in litigation" laws that deem settlements concealing public health or safety hazards unenforceable and contrary to public policy. For example, Florida's Sunshine in Litigation Act prohibits courts from accepting or enforcing settlements that conceal information about a public hazard—any instrumentality "that has caused and is likely to cause injury"—and further prohibits confidentiality in settlements when the state or local government is a party.[4] And the Louisiana Code of Civil Procedure prohibits settlements that conceal public hazards or information related to public hazards, with limited exceptions for trade secrets and other proprietary information.[5]

Federal legislation. Unfortunately, Congress has not enacted any similar legislation at the federal level. In 2017, Rep. Jerrold Nadler (D-N.Y.) introduced the Sunshine in Litigation Act of 2017, which would have prohibited courts, in civil matters involving information "relevant to the protection of public health or safety, from entering an order restricting the disclosure of information obtained through discovery, approving a settlement agreement that would restrict such disclosure, or restricting access to court records."[6]



The act included an exception under narrow circumstances when the court found that no public health or safety information would be restricted, or that a "specific and substantial" confidentiality interest overrode the public interest in the information at issue and the protective order was "no broader than necessary" to advance that overriding interest.[7] However, the House never voted on the bill, and it did not reach the Senate.[8]

Sunshine laws generally apply to settlements of products liability cases focused on "public hazards," but the laws could be expanded to settlements of civil rights claims. In the products liability context, the public should have access to information about dangerous consumer goods; likewise, the public also should have access to information about a company or perpetrator's discriminatory conduct to prevent others from falling victim to that same harm.

When the U.S. Equal Employment Opportunity Commission (EEOC) litigates cases, "the agency will not enter into settlements that are subject to confidentiality provisions, it will require public disclosure of all settlement terms, and it will oppose the sealing of resolution documents."[9] This guidance, however, only applies to the handful of cases that the EEOC litigates itself.[10]

So plaintiff attorneys are left waiting for the states to expand restrictions on confidential settlements. In the meantime, we will continue to face the practical reality that, in most cases, defendants will insist on strict confidentiality to settle a case.

The courts step in. In a refreshing move, some courts now have started to strike down confidentiality agreements. When a former employee of the Trump campaign, Jessica Denson, sued the campaign for sex discrimination and retaliation, the campaign sought to compel private arbitration pursuant to the nondisclosure agreement (NDA) Denson had signed during her employment.[11] Denson then filed a separate, federal lawsuit to void the agreement as contrary to public policy.[12]

The federal court granted the defendant's motion to compel arbitration, and the arbitrator awarded damages to the defendant, but a New York state appellate court vacated the award in its entirety. It held that the portion of the award premised on Denson's alleged disparagement of the defendant in connection with her federal lawsuit violated "a deep-rooted, long-standing public policy in favor of a person's right to make statements during the course

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of court proceedings without penalty."[13]

In March of this year, the Southern District of New York held that the nondisclosure and nondisparagement provisions contained in Denson's and other employees' contracts with the Trump campaign were so vague and overbroad as to be unenforceable.[14]

The court noted that under New York law, restrictive covenants "are subject to specific enforcement to the extent that they are reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee," and then determined that the nondisclosure provision at issue failed to meet that standard.[15] It further noted that "because the effect of these burdens is to chill the speech of Denson and other former Campaign workers about matters of public interest, the nondisclosure provision is harmful not only to them but also to the general public."[16]

And courts also have recognized that confidentiality provisions in settlements or employment agreements cannot bar those agreements from being turned over in other lawsuits. In *Kelly v. Romines*, the District of New Mexico ordered a third-party witness to comply with a subpoena to produce her confidential separation agreement with a venture capital firm controlled by one of the defendants.[17] During a hearing on the motion to quash the subpoena, "the court stated that it would [be] problematic for private parties to enter into confidentiality agreements that prevent discovery, because then wrongdoers could essentially shield their behavior."[18]

In its subsequent order, the court held that "the Federal Rules of Civil Procedure's liberal discovery rules trump private party agreements seeking to limit available information" and "do not except confidential agreements from discovery."[19] The court reasoned that, "otherwise, corporations and individuals could shield from discovery their documents by giving them to a third party and entering into a confidentiality agreement; that scenario cannot be sound law."[20]

Noncooperation Clauses

Noncooperation clauses typically prohibit a settling party from voluntarily cooperating with plaintiffs who sue the same defendant—for example, by providing documents or an affidavit. Lower court precedent has established that clauses prohibiting *involuntary* cooperation with other claimants—by responding to a subpoena—are void on public policy grounds.[21]

In *Baker v. General Motors Corp.*, the U.S. Supreme Court largely sidestepped the issue, holding that a confidentiality order entered by a Michigan court that prohibited the future testimony of a former General Motors employee without the company's consent could not bind a Missouri court's determination of the admissibility of that employee's testimony in a subsequent products liability action.[22] While this holding advanced public access to the gagged employee's testimony, the Court based its decision on the "full faith and credit clause" and ignored the key issue before it—whether agreements prohibiting testimony about issues of public concern are void on public policy grounds.[23]

In recent years, some courts have gone even further by invalidating prohibitions on voluntary cooperation. For example, in *General Steel Domestic Sales, LLC v. Steelwise, LLC*, General Steel sued multiple third parties, alleging they conspired to create the "false impression" that it had violated consumer protection laws, and then sought to prevent witnesses from voluntarily cooperating with the defendants based on noncooperation clauses contained in prior settlements.[24] The District of Colorado voided those clauses and noted that one factor "to be considered in examining confidentiality clauses is whether the public may suffer from the confidential settlement if a defendant repeatedly causes harm and then covers it up through confidential settlements."[25]

Although products liability issues are more frequently recognized as being of public concern, courts have long recognized that information about employment discrimination and other civil rights claims is also of significant public importance.

In *Chambers v. Capital Cities/ABC*, an age discrimination case, the plaintiff's attorney sought to conduct pre-deposition interviews with current and former employees of the defendant.[26] The defendant objected on the basis that the witnesses had signed employment agreements that prevented disclosure of certain information obtained during their employment.[27]

The Southern District of New York permitted voluntary interviews with the former employees and stated that "at least in some circumstances, agreements obtained by employers requiring former employees to remain silent about underlying events leading up to disputes, or concerning potentially illegal practices when approached by others can be harmful to the public's ability to rein in improper behavior."[28]

It added that "absent possible extraordinary circumstances . . . it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of such law."[29] It further stated that it would order an adverse inference against the defendant unless it notified all former employees, in writing, that they could freely reveal to the plaintiff's counsel information "dealing with the specific subjects of

hiring, assignment and discharge policies of defendant or any of its affiliates."[30]

Along the same line, in *Hoffman v. Sbarro*, a Fair Labor Standards Act class action, Sbarro sought a protective order limiting the plaintiffs' lawyers from communicating with current and former Sbarro employees, except through formal discovery methods or "to the extent necessary to obtain limited information directly relevant" to the plaintiffs' claims—Sbarro reasoned that the information the plaintiffs obtained could violate a NDA executed by the Sbarro employees.[31]

The court denied the protective order and, citing *Chambers*, held that "to the extent that the agreement might be construed as requiring an employee to withhold evidence relevant to litigation designed to enforce federal statutory rights, it is void."[32]

And in a 2002 case, *In re JDS Uniphase Corp. Securities Litigation*, the Northern District of California held that it would violate public policy to allow the defendant to "muzzle" ex-employees with "overbroad" confidentiality agreements that would prevent them from assisting plaintiffs in a securities fraud class action.[33] The court noted that while the defendant could use the agreements "to protect its confidential business information and trade secrets," it could not use them "to prohibit its former employees from providing whistleblower-type information about allegedly unlawful acts that occurred during their employment" or "to chill former employees from voluntarily participating in legitimate investigations into alleged wrongdoing."[34]

Administrative agency investigations. Courts also have recognized that contractual limitations on a party's ability to cooperate with administrative agency investigations are unenforceable, though a party may waive his or her right to recover damages through such an investigation.

In recent years, some courts have gone even further by invalidating prohibitions on voluntary cooperation.

For example, in *EEOC v. Astra USA, Inc.*, the First Circuit upheld an injunction voiding noncooperation clauses that would have prevented employees who settled prior sexual harassment claims with the defendant from voluntarily disclosing information related to those claims to the EEOC, which was investigating similar claims against the same employer.[35] The court noted that public policy favors a "free flow of information" to an agency charged with vindicating wrongs and that "any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest."[36] The EEOC itself also has issued guidance that "an employer may not interfere with an individual's protected right under Title VII, the EPA, the ADA, or the ADEA to file a charge, testify, assist, or participate in any manner in an EEOC investigation, hearing, or proceeding."[37]

Similarly, in the whistleblower context and in furtherance of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[38] the U.S. Securities and Exchange Commission (SEC) adopted Rule 21F-17 in 2011 to prohibit certain noncooperation provisions in employment agreements, including those that require employees to represent that they have not assisted with any investigations of their employers.[39] Unless employment agreements include specific carve-outs for voluntary disclosures to the SEC, they may not prevent disclosure of confidential information or require employees to provide notice to their employers or seek their consent prior to disclosing information.[40] Agreements also may not ban all disclosures other than those "required by law."[41]

The Defend Trade Secrets Act of 2016 (DTSA) also provides certain protections and immunities for whistleblowers' disclosure of their employers' trade secrets.[42] Under the DTSA, individuals

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may not be held criminally or civilly liable for disclosing trade secrets to their lawyers or government agencies, in confidence, for the purpose of reporting or investigating a suspected law violation.[43] It also provides immunity for whistleblowers who disclose trade secrets in court filings, such as in the context of an antiretaliation lawsuit, provided that their filings are made under seal.[44]

The DTSA further requires employers to provide notice of those protections in employment agreements.[45] If an employer fails to comply with the notice provisions, it will be unable to recover the exemplary damages and attorney fees that are otherwise available under the DTSA in cases of willful and malicious misappropriation.[46]

Use of information in subsequent cases. A newer defense tactic is to draft a variant of the noncooperation provision that restricts plaintiff attorneys' ability to represent others in subsequent actions against the same defendant or from using information obtained when representing one person in subsequent cases. The ABA and state bars have expressly recognized that such provisions constitute unethical restraints on an attorney's ability to practice law, contrary to Rule 5.6(b) of the Model Rules of Professional Conduct, which prohibits a lawyer from "offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties."[47]

Interpreting this rule, ABA Formal Opinion No. 00-417 states that a "lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related party, except in limited circumstances."[48]

Similar ethical issues can arise when an attorney represents two clients against the same defendant. If the defendant offers settlement terms to Client A that are unfavorable to Client B, such as a provision barring Client A's voluntary cooperation with Client B, then the lawyer faces a clear conflict. Under Model Rule of Professional Conduct 1.4, the lawyer must communicate the offer to Client A.[49]

However, if the lawyer advises Client A to accept those terms, the lawyer is encouraging Client A to act contrary to Client B's interests. In that situation, the lawyer should make clear to Client A that he or she cannot provide legal advice on that particular term because it would create a conflict of interest and suggest that Client A seek independent legal counsel.[50]

Courts and legislators are taking a fresh look at confidentiality and noncooperation provisions to determine whether they are really needed or whether they only hide misconduct and discrimination that the public needs to know about. In the past, courts reflexively entered and enforced these agreements. Now, however, they seem to be aware of the great public harm that can result from a corporation or government agency hiding its misconduct from public view.

While change is not coming overnight, exposure of the public harm caused by systemic sex discrimination, sexual assault, and race discrimination has left many courts reluctant to enforce overbroad gag clauses and secrecy provisions in settlements and employment agreements.

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Notes

1. N.Y. Gen. Oblig. Law §5-336 (Consol. 2018); *see also* N.Y. Gen. Oblig. Law §5-336(2) (Consol. 2019).
2. Cal. Civ. Proc. Code §1001 (West 2018).
3. *See* Andrea Johnson et al., *2020 Progress Update: MeToo Workplace Reforms in the States*, Nat'l Women's Law Ctr., at 8–10, Sept. 2020, https://tinyurl.com/4kezhfbe.
4. Fla. Stat. Ann. §69.081 (West 1990). Note that while Florida's law may now be used in sexual harassment cases, that was not its original intent.
5. La. Code Civ. Proc. Ann. art. 1426(D) (1976).
6. Sunshine in Litigation Act of 2017, H.R. 1053, 115th Cong. (2017), https://www.govtrack.us/congress/bills/115/hr1053. For more on how secrecy in the legal system endangers consumers, employees, and others, see Mandy Brown, *Speaking Up, Speaking Out: Q&A With Rep. Jerrold Nadler*, Trial, Oct. 2018, at 30.
7. H.R. 1053.
8. *Id.*
9. U.S. Equal Emp't Opportunity Comm'n, *Settlement Standards and Procedures* §(A)(1)(e) (2005), https://www.eeoc.gov/settlement-standards-and-procedures.
10. For example, in Fiscal Year 2019, the EEOC received 72,675 charges but filed only 144 lawsuits. *See* U.S. Equal Emp't Opportunity Comm'n, *Fiscal Year 2019 Annual Performance Report*, 38, 43 (2019), https://tinyurl.com/df9jbvfu.
11. *Denson v. Donald J. Trump for President, Inc.*, 180 A.D.3d 446, 446–48 (N.Y. App. Div. 2020); *see generally* Juliet Dee, *Can Contract Law Trump First Amendment Law*, 1 Comm. L. Rev. 130 (2019), https://tinyurl.com/8tu7umd5.
12. *Denson*, 180 A.D.3d, at 448.
13. *Id.* at 453–55.
14. *Denson v. Donald J. Trump for President, Inc.*, 2021 WL 1198666, at *15 (S.D.N.Y. Mar. 30, 2021).
15. *Id.* at *14–17.
16. *Id.* at *15. As to the nondisparagement provision, the court held that the provision covered too many individuals and entities, including over 500 entities affiliated with President Trump alone, which rendered the provision overbroad in scope and also unenforceable. *Id.* at *16–17.
17. *Kelly v. Romines*, 2012 WL 681806, at *1, 7 (D.N.M. Feb. 27, 2012).
18. *Id.* at *3.
19. *Id.* at *6 (citing Fed. R. Civ. P. 26(c); *Carrel v. Davis*, 2011 WL 3319746, at *3 (D. Kan. Aug. 1, 2011)). The court did note, however, that the alleged "confidential information should be subject to a protective order."
20. *Id.* The court did note, however, that the information sought by the subpoena would

be subject to the parties' Stipulated Protective Order.

21. *See, e.g., Gard v. Grand River Rubber & Plastics Co.*, 2021 WL 75655, at *8 (N.D. Ohio Jan. 8, 2021).
22. 522 U.S. 222, 241 (1998).
23. *Id.* at 231–41.
24. *Gen. Steel Domestic Sales, LLC v. Steelwise LLC*, 2009 WL 185614, at *1 (D. Colo. Jan. 23, 2009).
25. *Id.* at *8. The court also noted that a "violation of consumer protection statutes is an ultimate public concern; such statutes are designed to protect all consumers, not just those involved in one discrete litigation matter."
26. *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 442 (S.D.N.Y. 1995).
27. *Id.*
28. *Id.* at 444.
29. *Id.*
30. *Id.* at 445–46.
31. *Hoffman v. Sbarro, Inc.*, 1997 WL 736703, at *1 (S.D.N.Y. Nov. 26, 1997).
32. *Id.* (citing *Chambers*, 159 F.R.D. at 442).
33. *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1135–37 (N.D. Cal. 2002).
34. *Id.*
35. *Equal Emp't Opportunity Comm'n v. Astra USA, Inc.*, 94 F.3d 738, 740–42 (1st Cir. 1996).
36. *Id.* at 744–45 (citing *Equal Emp't Opportunity Comm'n v. Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987) ("an employer and an employee cannot agree to deny to the EEOC the information it needs to advance this public interest")); *see also Peterson v. Seagate*, 534 F. Supp. 2d 996, 999–1000 (D. Minn. 2008) (voiding in its entirety a settlement agreement that barred plaintiff from filing administrative charges with the EEOC).
37. U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes*, Apr. 10, 1997, https://tinyurl.com/2vrzszvy.
38. 12 U.S.C. §53 (2010).
39. 17 C.F.R. §240.21F-17 (2011) (applying to all "confidentiality agreement[s]"). The same prohibition would apply to defendants' inclusion of a similar noncooperation provision in a settlement or severance agreement.
40. *Id.*
41. *Id. See also In the Matter of Merrill Lynch*, No. 3-17312 (June 23, 2016), https://www.sec.gov/litigation/admin/2016/34-78141.pdf (The SEC sanctioned Merrill Lynch under Rule 21F-17 for prohibiting, in standard severance agreements, former employees from disclosing any confidential information or trade secrets to anyone outside of Merrill Lynch or its affiliates, except pursuant to legal process or with Merrill Lynch's prior written approval.).
42. 18 U.S.C. §1836 (2016).
43. 18 U.S.C. §1833(b)(1) (2016).
44. 18 U.S.C. §1833(b)(2).
45. 18 U.S.C. §1833(b)(3)(A).
46. 18 U.S.C. §1833(b)(3)(C) & 18 U.S.C. §1836(b)(3)(C)–(D).
47. Model R. Prof'l Conduct 5.6(b) (Am. Bar Ass'n 1983).
48. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 00–417, at 5–6 (2000).
49. Model R. of Prof'l Conduct R. 1.4 (Am. Bar Ass'n 1983).
50. Consider consulting your bar association for ethics advice. If a state bar objects to such a provision, opposing counsel usually will agree to withdraw it.