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NDAs and Gag Orders in Sexual Misconduct Cases

By Loretta P. Merritt

The vast majority of civil lawsuits end up in a negotiated settlement, rather than an adversarial trial. Settlements avoid the risk and cost of a trial. In a civil trial, the only thing a court can do is award damages. Of course, after winning a trial, an abuse survivor may feel that he or she was acknowledged, heard, and may feel the satisfaction of having come forward. They may experience some vindication after which some healing and closure may follow. But again, the only thing the survivor gets from the court is an award of damages if they are successful.

In a settlement, anything is possible. Settlements are only limited by the parties' creativity. Some settlements include things like apologies (The *Apology Act* 2009, S.O. 2009, c. 3 now makes apologies inadmissible in civil cases), or information about how an institutional defendant has taken steps to ensure that further abuses do not occur, in addition to a monetary payment. Settlements often provide the best outcome for both parties. However, confidentiality agreements or "gag orders" or non-disclosure agreements ("NDAs") are sometimes requested by defendants as part of a civil settlement.

Confidentiality agreements have been part of standard form settlement documentation since long before sexual abuse cases were being brought before the civil courts. It has been a standard practice to use a "boilerplate" confidentiality agreement. In personal injury and employment cases, the typical settlement agreement includes a provision where the parties agree to keep the terms of the settlement confidential.

Years ago, when survivors started suing for sexual abuse, it was not uncommon for defendants to ask for very broadly worded confidentiality agreements. Such agreements would go much further than keeping the terms of the settlement confidential and, in fact, some agreements prevented the abuse survivor from ever again disclosing or discussing their abuse. Obviously, such agreements are offensive in a sexual abuse context. As recognized by the recommendations coming out of the Cornwall Inquiry in 2009, "for survivors of sexual abuse, where secrecy and shame are part of their injury, having to maintain silence in return for a payment can have very negative consequences."

More recently, Prince Edward Island has introduced legislation that limits organizations from using non-disclosure agreements to prevent victims of harassment or discrimination from speaking out. P.E.I. is the first province in Canada to limit the use of NDAs in cases of sexual misconduct. The law allows parties to enter such an agreement in cases of harassment or discrimination only if it's in accordance with the wishes of the person who made the allegations. The law also provides mechanisms for those who do enter NDAs to waive their confidentiality in the future and raises the requirements under which such agreements can be enforceable. They can't be unduly influenced or pressured into an agreement and they must have been given legal advice. It must be clearly spelled out in the agreement who they're always allowed to talk to.

It is important to realize that, like all the other terms of a civil settlement, the specifics of a confidentiality agreement can be negotiated. A survivor may not object to agreeing to keep the amount of the monetary payment confidential, but he or she should give very careful thought before agreeing to keep the details of the abuse confidential. In some cases, the survivor may, at a future time, wish to speak publicly to help other abuse victims. In this context, disclosing the identity of the perpetrator or the institution with which he or she is affiliated, may not be an important issue to the survivor, however, when talking to counsellors, family members or close personal friends, providing all the details of the settlement may be important.

Over the last 20-plus years of litigating civil sexual abuse cases, I have come to find that more and more institutional defendants are recognizing that abuse survivors need to keep their voice. Some institutions have established a policy of not requiring any confidentiality agreements at all. In other cases, institutions have agreed to waive confidentiality agreements previously signed. I suspect it is just a matter of time before a court strikes down (as against public policy) an NDA that effectively silences a sexual abuse victim and prevents them from ever speaking about their abuse again. In any case, where a confidentiality agreement is requested, it should be carefully reviewed to ensure that a survivor’s current and future interests and rights are protected.

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