

## Thinking of signing an NDA?

We hear increasingly from people who are right in the middle of negotiating over a workplace complaint, a tribunal application, or a lawsuit and who tell us that they are being asked to sign a non-disclosure agreement (NDA), but do not want to.

Complainants are being told – by the lawyers on the other side, and often by their own lawyer – that they “must” sign an NDA in order to settle and avoid going to court or a hearing of some kind.

The following tips are not legal advice, but are intended to give you some tools and strategies that you can use in standing firm on not signing an NDA. They explain the growing pushback against the inclusion of an NDA as part of a settlement agreement.

By informing yourself about the changing situation you can make arguments in your negotiation that will give you greater power and the knowledge you need to make an informed decision about signing an NDA.

**Q: My lawyer tells me that I “must” sign the NDA to settle my case. Is this true?**

**A: No, it is neither true nor accurate.** The *only* legal requirement for a settlement agreement is that it “release” the parties from any legal obligations in relation to the claim – so as a complainant you would have to agree to end your action/ complaint/ grievance.

That release (sometimes called the “waiver” clause) will say something like this:

“A (the complaining party/ the plaintiff/ you) agree that for the above stated consideration” (which means, any compensation agreed) “hereby release and forever discharge X (the defendant) of and from all manner of action, causes of actions, claims, civil complaints or demands.”

Sometimes the expression “in full and final settlement of all past, present and future claims” is used.

Since ending the complaint or the lawsuit is the whole point of settlement, a clause like this is going to be in every settlement agreement. Indeed, we know that for the last 35 years, **90-95%** of cases have settled before a trial or a formal hearing for lots of good reasons – including costs, stress, and uncertainty.

BUT that does **not** mean that an NDA requiring you to keep everything about the case secret is legally required for a settlement release or waiver. **It is not.**

This has been made very clear by a decided case (known as a “precedent” by lawyers) in Ontario ([Bouzanis v. Greenwood et al.](#) 2022, Ontario Superior Court). The judge here made it clear that an NDA was not a required or a necessary part of a settlement agreement and

instead is something additional that must be understood and agreed by the parties. One of our volunteers, law student Leigh Lester, has written an [excellent blog on this](#).

So if your lawyer continues to insist that you “must” sign an NDA, tell them that you know that this case states clearly that an NDA is *not* required for a legal settlement.

As with all these tips, it is important that you show that you are well informed on this issue, and this may make them back off quickly.

**Q: My lawyer says that “everyone signs an NDA” and that I should stop worrying about it. Is that right?**

It is certainly true that the implosion in the use of NDAs and their acceptance by many lawyers on both sides of a case has created a situation that up to 95% of civil settlements include an NDA.

At *Can't Buy My Silence*, we know that this pushes people into signing even when they hesitate (you can read the testimonies of others [here](#)).

But this is beginning to change. More and more people are pushing back. The fact that many people have been pushed into signing NDAs in an unfair and inappropriate way for does not mean that it should, or will, continue.

Tell your lawyer that you are aware of these changes. For example, legislation is beginning to be passed around the world to make NDAs illegal and unenforceable, eg

- In the US, 18 states have now passed non-disclosure laws restricting their use and there is a [federal law](#) forbidding NDAs on sexual harassment in employment contracts
- In Canada, five (5) provinces have now introduced NDA legislation (so far just one of these, The [Non-Disclosure Agreements Act](#) in Prince Edward Island, has passed into law). Also in Canada the [Strengthening Postsecondary Institutions Act](#) in Ontario which came into force on July 1 bans universities from using NDAs to cover up faculty sexual misconduct. There is also a [Bill](#) proceeding in the federal Parliament.
- In the UK, the [Higher Education Freedom of Speech Act](#) bans NDAs in universities in England & Wales and further legislation is in the works.

**Q: What else can I say to my lawyer or show them that will make it clear I am informed and make them take me seriously?**

A: Drawing your lawyer’s attention to these legal developments (above) will show that you are informed and expect accurate advice which reflects changing attitudes towards NDAs.

But as well, and importantly, there are now guidelines and warnings from organizations that regulate and represent lawyers themselves about the “proper” use of NDAs.

Here is the information you need.

If you live in England and Wales:

- The Solicitors Regulatory Authority (SRA) which oversees the work of lawyers has published first a “warning notice” to the legal profession about NDAs, and most recently more formal “guidance” updated in [2022](#).

This Guidance explicitly states that:

*“We are ...concerned to ensure that those we regulate do not take unfair advantage of the other party when dealing with NDAs.”*

This is important because it recognizes that if your lawyer or the lawyer on the other side is putting unfair pressure on you, the SRA explicitly warns lawyers against doing this.

If you feel you are being pressured or taken advantage of, you can point out [this clause](#) to the lawyers you are working with, on either side. Ask them if they realize that they may be breaking this Guidance?

As well, the Guidance refers to the fact that if you are a whistleblower making a “protected disclosure” an NDA can never stop you from speaking out. To learn more about this, watch PROTECT’s great video on this [here](#).

*“We are concerned to ensure that NDAs are not used to prevent reporting to us, other regulators and law enforcement agencies or making disclosures which are protected by law.”*

You can use both these quotes to show you understand their responsibility to follow this Guidance, and that you want to remind them of the same...

- As well, the oversight regulator of the SRA, the Legal Services Board, is in the middle of a consultation considering whether lawyers need to stop using NDAs altogether for any form of misconduct, in order to meet their professional ethical obligations. The results of the consultation will be announced later this year.

If you live in Canada:

- The Canadian Bar Association or CBA which represents lawyers across Canada passed (by 94%!) [a motion](#) at their February 2023 AGM in which the CBA undertakes to “promote the fair and proper use of NDAs as a method to protect

intellectual property and discourage their use to silence victims and whistleblowers who report experiences of abuse, discrimination and harassment in Canada”.

Here is a CBC story on the successful motion and what it means

<https://www.cbc.ca/news/canada/british-columbia/lawyers-across-canada-approve-groundbreaking-resolution-to-help-prevent-abuse-of-non-disclosure-agreements-1.6741976>

While this resolution no disciplinary force, it is a very important indication of how the legal profession is changing its stance on NDAs in anticipation of future legal changes.

**Q: What are my other options when I want to make sure my name is kept private as a complainant/ victim?**

A: Instruct your lawyers (see more about “giving instructions” further down) to negotiate a **one-sided confidentiality clause** that protects your identity but does not require you to protect the other side in exchange (that’s what an NDA does).

There is growing recognition in law that victims should always have their identity protected and that this is different from concealing and protecting the identity of the wrongdoer.

If your lawyer is unwilling to tell you about alternatives to the NDA, we strongly recommend you putting this request in writing and stating as follows:

*“I am not willing to give instructions to sign an NDA.*

*I wish to learn about alternative ways of protecting my privacy and confidentiality to an NDA. I want this for myself and would want you to negotiate for this in the strongest possible terms.*

*I know this must include negotiating a one-sided confidentiality agreement to protect me but not force me into protecting my abuser/ employer.*

*Please advise in writing what my alternatives are to an NDA.”*

**Q: My lawyer says I will get more compensation if I agree to silence. Is that true?**

A: Because of the secrecy of many of these settlement agreements, this question cannot be accurately answered. However, research shows that settlements for workplace harassment and discrimination (which may include lost wages as well as compensation for the harm and distress caused) are often very low, despite most of these case settlements including an NDA:

- a. The settlement “quantum” or dollar/ pound figure is generally very low in harassment, discrimination and misconduct cases. UK organization [Pregnant Then](#)

[Screwed](#) found that almost 20% of 696 pregnant women who signed an NDA related to pregnancy and maternity discrimination received settlements of less than £5,000 (\$7500 CAD) (2022).

- b. The US Center for Employment Equity found that the average settlement for sexually harassment at work between 2018 and 2021 was \$36,000 US and many were much less.

The notion popularized by some “celebrity” lawyers is that they can get “big bucks” for clients if they sign an NDA. But this does not appear to be true.

**Q: What does it mean to “give instructions” to my lawyer?**

You are the client. Legal services are just that – “services”. The client will ask for and listen to the lawyer’s advice, and then give “instructions”. If a lawyer will not take your instructions, you should be clear that you will find another lawyer to represent you.

Research on lawyer/ client relationships (eg Macfarlane, *The New Lawyer* 2<sup>nd</sup> ed 2016) shows that traditionally, “instructions” were always controlled by the lawyers themselves who told their clients what was best for them. Many lawyers acknowledged this openly. But as the passive nature of the client relationship has changed – stimulated by access to the Internet and a strong feeling that clients should have the final decision-making role in a professional relationship that they pay for – so has this paternalistic practice.

If you show your lawyer that you understand that you “wear the pants” ie you make the final decisions after weighing their advice, and that only what you have agreed to is their “instructions”, you may find they are less likely to try to bully you into accepting their advice on NDAs.

**Q: Where else could I go for advice?**

A: CBMS may be able to refer you to a lawyer in the UK or Canada who is a campaign ally and can give you accurate advice that explains alternative ways to protect your privacy without agreeing to an NDA. Write to us at [info@cantbuymysilence.com](mailto:info@cantbuymysilence.com)

As well, [PROTECT](#) is a UK-based whistleblowing charity that can give you advice on your situation for free. They can explain to you your rights and what a protected disclosure is – if this is your situation you can watch a PROTECT video on UK whistleblower rights and protected disclosures made for our website [here](#). You may find that you are in a protected position already, but your lawyer has not alerted you