

Confidentiality Agreements: The Florida Sunshine In Litigation Act, The #Metoo Movement, And Signing Away The Right To Speak

Loune-Djenia Askew

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Confidentiality Agreements: The Florida Sunshine In Litigation Act, The #Metoo Movement, And Signing Away The Right To Speak

Loune-Djenia Askew*

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I. INTRODUCTION

Television network *Lifetime* recently aired a documentary titled “Surviving R. Kelly.” This six-part documentary featured woman after woman discussing their experiences of sexual abuse by one of the entertainment industry’s biggest stars. Not only were most of these victims underage at the time of the abuse, many waited to speak out because they were bound by confidentiality agreements with R. Kelly’s management company. The series was received with mixed opinions, but many stood in solidarity with the women due to the open forum started by the #MeToo¹ movement.

Prior to the R. Kelly story, Hollywood was under scrutiny for a very similar story about Harvey Weinstein. “On October 5, 2017, the *New York Times* revealed that Hollywood producer Harvey Weinstein had reached at least eight settlements with women in response to allegations of sexual harassment, some dating back to 1990.”² Like R. Kelly, Harvey Weinstein used confidentiality agreements to keep his transgressions secret.³ Specifically, Weinstein used confidentiality agreements in settlements with the victims, where the victims accepting payouts agreed to strict confidentiality clauses prohibiting them from discussing the deal and the events leading to it.⁴ The Harvey Weinstein story also received heightened scrutiny due to social media and the #MeToo movement.

Even before social media and the #MeToo movement, one famous example that demonstrates the consequence of using confidentiality agreements in sexual abuse cases “came to light”⁵ about fifteen years ago from the Catholic Church.⁶ “For years, the Church used confidential settlements to silence victims who had been abused by priests.”⁷ These confidentiality agreements hid the identities of the priests, and thus allowed the priests to continue to serve at their parishes or other ministries

¹ The #MeToo movement is a movement against sexual harassment and sexual assault. This movement has shed light on the prevalence of sexual abuse, especially in the workplace. *See also* ME TOO, www.metoomvmt.org.

² 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, 2507-2508 (2018); Jodi Kantor & 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>.

³ Kantor & Twohey, *supra* note 2.

⁴ *Id.*

⁵ “For there is nothing hidden that will not be disclosed, and nothing concealed that will not be known or brought out into the open.” Luke 8:17 (NIV).

⁶ Prasad, *supra* note 2, at 2516-17.

⁷ *Id.*

despite allegations of sexual assault.⁸ In one specific case from 1997, the Roman Catholic Diocese of Albany settled with a young man who had been regularly abused by a priest since the age of twelve, for almost \$1 million, using a confidentiality agreement.⁹ The \$1 million was just under the amount required to trigger the Church from having to request approval from its oversight board.¹⁰ Therefore, the strategic settlement protected the priest and the church from any public inquiry.¹¹ The confidential settlement “allowed the abusive priest to keep his identity private, continue working with the Church, and presumably, even repeat his abuse with impunity,” in exchange for the victim’s silence.¹²

With the current social climate, the right to speak is more important than ever. Even in the employment sector, where confidentiality agreements are frequently used, these agreements can be detrimental to society. The public has a right to know when private parties are contracting about matters of public interest and sexual abuse is a major area of public interest as evidenced by the #MeToo movement. However, the public is currently limited in its knowledge due to confidentiality agreements in this realm.

This comment will discuss why Florida courts should not enforce confidentiality agreements in sexual abuse settlements, especially in light of the #MeToo movement, and how Florida courts should interpret the Sunshine in Litigation Act in sexual abuse settlements. Confidentiality agreements in sexual abuse settlements make it possible for the abuser to continue to victimize others. Therefore, confidentiality agreements in sexual abuse settlements should be deemed void under the Florida Sunshine in Litigation Act (“Act”), which voids any court order or private agreement that conceals a “public hazard.”¹³

The Florida legislature enacted the Sunshine in Litigation Act in 1990.¹⁴ This Act provides that “a court may not enter a judgment that conceals a public hazard.”¹⁵ The Act has only been brought up in disputes a few times before the Florida courts. However, no actions disputing the Sunshine in Litigation Act has been brought in the sexual abuse context.¹⁶

⁸ *Id.*

⁹ Matt Carroll et al., *Church Allowed Abuse by Priest for Years*, BOS. GLOBE (Jan. 6, 2002), <https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTlrAT25qKGvBuDNM/story.html>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Prasad, *supra* note 2, at 2516-17.

¹³ FLA. STAT. § 69.081 (2018).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ The third district referred to the Act in *Smith v. TIB Bank of the Keys*, 687 So. 2d 895, 896 n.1 (Fla. 3d DCA 1997), but denied construing the Act in any way.

And, to date, there has been no published court decision on whether a person against whom a sexual abuse claim has been made can be considered a “public hazard.” This note argues, however, that alleged sexual abusers do fit the Act’s definition of a “public hazard,” and that, as such, Florida courts should interpret the Act to prohibit concealing information via confidentiality agreements.¹⁷ As a result, confidentiality agreements in sexual abuse settlements would be void under Florida law. Currently, courts perform a balancing test when presented with contracts that may violate public policy. However, this remedy is not adequate to protect the public’s interest in knowing about the settlement of such claims because it includes a fact-intensive inquiry that applies on a case by case basis only, rather than being applied as a bright-line rule, as this note suggests. This comment also argues that, if it were construed that the concealment of sexual abuse settlements and related confidentiality agreements are not prohibited by the Sunshine in Litigation Act, the Florida legislature should enact a statute prohibiting the concealment of such settlements.

While Part I of this paper has provided an introduction to some of the most salient issues affecting this topic, Part II of this comment will discuss the clash of two freedoms – the freedom of speech and the freedom of contract – as it relates to confidentiality agreements in cases of alleged sexual abuse. Part III will discuss the remedy for sexual abuse victims under current contract principles. Part IV will discuss the Florida Sunshine in Litigation Act and how Florida courts should interpret confidentiality in sexual abuse settlements. Part V will discuss a possible resolution while considering a victim’s privacy concerns and Part VI will provide a conclusion.

II. BACKGROUND: THE CLASH BETWEEN TWO FREEDOMS

Before analyzing confidentiality agreements in sexual abuse settlements and the Florida Sunshine in Litigation Act, it is important to discuss the important beliefs which may be implicated by this issue. Confidentiality agreements create a tension between two longstanding American ideals: the freedom of speech and the freedom of contract. Both of these freedoms derive from the Constitution of the United States. This section of the comment will discuss the freedom of speech, the freedom of contract and the tension between both freedoms that is evident in when discussing the current presence – and perhaps, future prohibition – of confidentiality agreements.

¹⁷ Fla. Stat. § 69.081.

Freedom of Speech

The freedom of speech is a fundamental right and specifically provided for in the language of the First Amendment. The First Amendment of the United States Constitution prescribes, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech.”¹⁸ The rights described within the First Amendment are considered fundamental rights – ones that are “implicit in the concept of ordered liberty,”¹⁹ or “deeply rooted in this Nation’s history and tradition.”²⁰ Indeed, the freedom of speech has historically been considered so valuable that it has been deemed as a preferred right over other rights, to be protected at all costs. And, although the First Amendment was originally written to protect “the people”²¹ from the government’s infringement on their right to speak, the protection of the freedom of speech has now become a matter not only of constitutional law and construction, but of public policy as well.²² The First Amendment right to free speech is essential to keep the public informed of matters of public interest, because an individual’s right and ability to speak affects the public’s knowledge. Indeed, the right to speak is essential to democracy and liberty. As Harvard professor Steven Pinker wrote:

There’s a systematic reason why dictators brook no dissent. The immiserated subjects of a tyrannical regime are not deluded that they are happy. And if tens of millions of disaffected citizens act together, no regime has the brute force to resist them. The reason that citizens don’t resist their overlords *en masse* is that they lack what logicians call *common knowledge* — the knowledge that everyone else shares their knowledge. Common knowledge is a prerequisite to coordinating behavior for mutual benefit: two friends will show up at the same café at a given time only if each knows that the other knows that both know about the appointment. In the case of civil resistance, people will expose themselves to the risk of

¹⁸ U.S. CONST. amend. I.

¹⁹ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

²⁰ *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., concurring) *Bowers v. Hardwick*, 478 U.S. 186, 186 (1986).

²¹ “We the people . . .” See U.S. CONST. pmb. l.

²² Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 320-21 (1998).

reprisal by a despotic regime only if they know that others are exposing themselves to that risk at the same time.²³

It is clear that confidentiality clauses limit one's ability to speak freely, thus also impacting the ability of the public to know certain details about particular allegations, or even to know that the allegations exist at all. And, while contracting away one's right to speak in this limited way may not necessarily lead to tyranny, it nonetheless places a chokehold on democracy by limiting a fundamental right to free speech, thus limiting common knowledge as well.

Freedom of Contract

However, the freedom of speech is not the only constitutional right that matters in this scenario. Indeed, limiting one's ability to contract away their right to speech implicates one's freedom of contract, which is found in the Fourteenth Amendment of the U.S. Constitution. While a contract is a generally enforceable agreement,²⁴ it is often deemed void when "it produces no legal obligation."²⁵ Contracts may also be struck down on grounds of public policy.²⁶ Part III of this comment will discuss the balancing test under Restatement (second) of Contracts §section 178 that strikes down contracts on grounds of public policy. However, the section 178 balancing test favors the enforcement of contracts. The general purpose of contract law is to "recognize [] the power of parties to order their own affairs without the intrusion of the government" – and, contract law accomplishes this by providing a method of legal enforcement for people's private promises to each other.²⁷ Contract law allows people to make their own private law as legally enforceable as the laws made by legislatures.²⁸

The freedom of contract essentially provides that individuals have the right to sign contracts including whatever terms to which they choose to agree. This is beneficial because it promotes a free market and a laissez-faire economy, which is why public policy usually favors the enforcement of contracts. Nevertheless, the "government can generate rules prohibiting

²³ Steven Pinker, *Three Reasons Free Speech Matters*, FOUNDATION FOR ECONOMIC EDUCATION (Nov. 7, 2014), <https://fee.org/articles/three-reasons-free-speech-matters/>.

²⁴ A contract is an enforceable agreement. CONTRACT, *The Wolters Kluwer Bouvier Law Dictionary Desk Edition*.

²⁵ PERILLO, JOSEPH M., *CONTRACTS* 19 (7th ed. 2014). Under the Sunshine in Litigation Act, discussed in Part IV of this comment, a confidentiality agreement would produce "no legal obligation" in sexual abuse settlements.

²⁶ Prasad, *supra* note 2, at 2513-15.

²⁷ HILLMAN, ROBERT A., *PRINCIPLES OF CONTRACT LAW* 2 (4th ed. 2019).

²⁸ *Id.*

certain types of private agreements . . . “and “can refuse to enforce certain private contracts,” usually on the grounds that these types of agreements run contrary to public policy.²⁹ Part IV of this comment will discuss how the Sunshine in Litigation Act can serve to deem a contract void even if it is not considered contrary to public policy under a section 178 balancing test.³⁰ Indeed, unlike, the section 178 balancing test, the Act provides a clear rule that favors not enforcing contracts that conceal a public hazard.³¹ Once the “public hazard” language has been applied to confidentiality agreements in the context of sexual assault and abuse, it will be clear that these agreements cannot stand under the Sunshine in Litigation Act, regardless of whether they can or cannot be construed as running contrary to public policy.

Confidentiality Agreements: Promises of Silence and Signing Away the Right to Speak

As previously discussed, confidentiality agreements within settlement contracts for alleged sexual abuse can create a direct tension between the freedom of speech and the freedom of contract. “If a contract is a legally enforceable promise, a contract of silence is an enforceable promise to keep quiet about something.”³² A confidentiality agreement—also termed *nondisclosure agreement*—is “often required as a condition of employment.”³³ However, there are other purposes besides employment that require signing a confidentiality agreement. These agreements are especially utilized in settlements.³⁴

During litigation, the parties may reach an agreement and seek “a court order of secrecy.”³⁵ In essence, the parties will ask the judge to approve the settlement with a confidentiality order.³⁶ “Alternatively, the parties may make the settlement contingent on the claimant dropping the case against the defendant and further promising to never speak about

²⁹ Mark Pettit, Jr., *Freedom, Freedom of Contract, and the “Rise and Fall”*, 79 B.U.L. REV. 263, 280.

³⁰ The Sunshine in Litigation Act will deem a contract void even if it is contrary to public policy favoring the enforcement of contracts.

³¹ “(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy and may not be enforced.” FLA. STAT. § 69.081(4) (2018).

³² Prasad, *supra* note 2, at 2513-15.

³³ *Supra*, note 1.

³⁴ An agreement ending a dispute or lawsuit. SETTLEMENT, Black’s Law Dictionary (10th ed. 2014).

³⁵ Prasad, *supra* note 2, at 2513-15.

³⁶ *Id.*

either the settlement or the events leading to the settlement.”³⁷ The consequences of breaking “contracted silence,” once a confidentiality agreement is signed by the parties may include a financial penalty, in addition to full repayment of the settlement amount and the payment of the opposing party’s legal fees.³⁸ The possibility of financial liability severely impacts the freedom of victims to “speak publicly about [their abuse, or] the events that led to the signing of these agreements.”³⁹

Several advocates active in the #MeToo movement have criticized confidentiality agreements, specifically in connection with allegations of sexual abuse, arguing that they have “the detrimental negative effects” of “silencing victims” and enabling “repeat offenders.”⁴⁰ R. Kelly and Harvey Weinstein are clear examples of how confidentiality agreements can contribute to a legal and social culture that protects sexual abusers and enables them to become repeat offenders, as critics have recently discussed. In 2003, the Justice Department’s Bureau of Justice Statistics announced that “5.3 percent of sex offenders (men who had committed rape or sexual assault) were rearrested for another sex crime.”⁴¹ The announcement also stated that “. . . sex offenders were about four times more likely than non-sex offenders to be arrested for another sex crime after their discharge from prison – clearly outlining that repeat offenders in the sexual abuse context are a valid and pressing concern.”⁴²

Confidentiality agreements are usually considered to be enforceable, largely because courts rarely interfere with the freedom of contract.⁴³ However, in limited circumstances, the courts have declined to enforce a contract in the name of public policy and in the interest of disclosure to the public.⁴⁴ In civil cases, courts also have the authority to nullify confidentiality agreements “where disclosure is in the public interest.”⁴⁵ However, when there is a lack of a clear, legislative expression, courts are more and more hesitant to tamper with contracts or

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Hogan Lovells, *#MeToo Movement’s Impact on Nondisclosure Agreements or Clauses Covering Sexual Harassment*, HOGAN LOVELLS ALL IN A DAY’S WORK: THE EMPLOYER’S LEGAL GUIDE (Apr. 10, 2018), <https://www.hlemploymentblog.com/2018/04/metoo-movements-impact-nondisclosure-agreements-clauses-covering-sexual-harassment/> [hereinafter, *Hogan Lovells*].

⁴¹ Bureau of Justice Statistics, *5 Percent of Sex Offenders Rearrested for Another Sex Crime Within 3 Years of Prison Release*, BJS (Nov. 16, 2003, 4:30PM), <https://www.bjs.gov/content/pub/press/rsorp94pr.cfm>.

⁴² *Id.*

⁴³ See Prasad, *supra* note 2, at 2513-15.

⁴⁴ *Id.* at 2513.

⁴⁵ *Id.* at 2513-14.

to develop “broad social policy.”⁴⁶ Due to the courts’ hesitation to develop policy of this kind, it is important for legislatures to step in and create laws that prevent confidentiality agreements in sexual abuse settlements.⁴⁷

III. CURRENT REMEDY FOR VICTIMS UNDER CONTRACT PRINCIPLES: WHEN CONTRACTING AWAY YOUR RIGHT TO SPEAK DOES NOT ALIGN WITH PUBLIC POLICY

Balancing

Due to the lack of legislation on this matter currently, the remedy for victims of sexual abuse seeking to invalidate a confidentiality agreement at this point would be found via the principles laid out in the Restatement (Second) of Contracts, section 178.⁴⁸ Under section 178, courts perform a balancing test when presented with any contract, or any piece of a contract, that might violate public policy.⁴⁹ For example, courts could theoretically find confidentiality agreements in sexual abuse settlements void as a matter of public policy if “the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”⁵⁰ Though confidentiality agreements are contracts between private parties, they present a conflict between the public policy favoring the freedom of contract and the public policy favoring the freedom of speech.

Unenforceability on Grounds of Public Policy: Restatement (Second) of Contracts § 178

The Restatement (Second) of Contracts section 178 states:

When a Term Is Unenforceable on Grounds of Public Policy:

⁴⁶ *Id.* at 2514; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. b (1981) (discussing how, in reaching the conclusion “that a term is unenforceable[,]” the court relies on both “its own perception of the need to protect some aspect of the public welfare or from legislation that is relevant to that policy although it says nothing explicitly about unenforceability).

⁴⁷ *See* RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. a (1981) (“Occasionally, on grounds of public policy, legislation provides that specified kinds of promises or other terms are unenforceable”).

⁴⁸ RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

⁴⁹ *Id.*

⁵⁰ RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981).

(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.

(2) 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.

(3) In weighing a public policy against enforcement of a term, account is taken of

- (a) the strength of that policy as manifested by legislation or judicial decisions,
- (b) the likelihood that a refusal to enforce the term will further that policy,
- (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
- (d) the directness of the connection between that misconduct and the term.⁵¹

The power of courts to deny enforcement to a contract on public policy grounds is not only indisputable, but also open-ended.⁵² Under the Restatement (Second) of Contracts section 178, "a contract or term will be unenforceable when public policy considerations against enforcement clearly outweigh the interests in favor of enforcement."⁵³ The balancing test "allows courts to derive public policy by considering other laws as well as their own sense of what restrictions are needed to protect the public welfare."⁵⁴ When applying the balancing test, the decision of whether or

⁵¹ *Id.*

⁵² Garfield, *supra* note 22, at 294-95.

⁵³ RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

⁵⁴ Garfield, *supra* note 22, at 295.

not to enforce a confidentiality agreement is based on a “fact-intensive inquiry.”⁵⁵ “Such fact-intensive inquiries are common when courts police contracts for public policy violations.”⁵⁶ In conducting balancing tests for contracts of silence, the court would weigh the fundamental right to speak and the value of the information being protected, versus the importance of upholding the contract and affirming an individual’s right to freedom of contract.

This balancing test has been used in the past to invalidate confidentiality agreements as a matter of public policy. For example, the Equal Employment Opportunity Commission (EEOC) has decided that a settlement agreement, even in sexual abuse circumstances, can prevent an employee “from seeking monetary or other individual relief at the agency.”⁵⁷ However, “courts and the EEOC have invalidated agreement terms that interfere with an individual’s non-waivable right as a matter of public policy to file a charge or otherwise communicate with the EEOC.”⁵⁸ Despite this limited success in application, utilizing a fact-intensive balancing test (as required under section 178 of the Restatement ((Second)) of Contracts) as a method of invalidating confidentiality clauses as a remedy is not sufficient to protect victims of sexual abuse and their right to speak, as well as the public’s right to know. This is because using a fact-intensive balancing test produces different results on a case by case basis.⁵⁹ As such, a more desirable method of attacking these problematic confidentiality agreements would be via the adoption of a clear rule that can be applied with confidence, whenever a court is presented with confidentiality agreements in sexual abuse settlements.. Legislatures can help the courts by providing a clear, administrable rule to help solve this issue; or, courts can choose to interpret laws that are already on the books – namely, the Florida Sunshine in Litigation Act – as clearly prohibiting these confidentiality agreements in this context. Parts IV and V of this comment will analyze the Florida Sunshine in Litigation Act as a possible avenue to providing Florida courts with a clear rule for the invalidation of these worrisome agreements.

⁵⁵ *Id.* at 318.

⁵⁶ *Id.*

⁵⁷ Hogan Lovells, *supra* note 40.

⁵⁸ *Id.*

⁵⁹ Prasad, *supra* note 2, at 2541-42.

IV. THE FLORIDA SUNSHINE IN LITIGATION ACT

Confidentiality agreements in sexual abuse settlements should be deemed void⁶⁰ under the Florida Sunshine in Litigation Act (“Act”), which voids any court order or private agreement that conceals a “public hazard.”⁶¹ The Act, in part, states:

69.081 Sunshine in Litigation; Concealment of Public Hazards Prohibited.

(1) This section may be cited as the “Sunshine in Litigation Act.”

(2) As used in this section, “public hazard” means an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury.

(3) Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy⁶² and may not be enforced . . .

⁶⁰ This could serve a similar purpose as the first Restatement of Contracts definition of “illegal bargain.” A bargain is “illegal . . . if either its formation or its performance is criminal, tortious or otherwise opposed to public policy. RESTATEMENT (FIRST) OF CONTRACTS § 512 (1932). Here, the formation of a bargain under confidentiality agreements in sexual abuse settlements, in Florida, would be criminal in a sense because it would violate Florida law.

⁶¹ FLA. STAT. § 69.081 (2018).

⁶² Although public policy favors the enforcement of contracts, the Act favors public disclosure.

(6) Any substantially affected person, including but not limited to representatives of news media, has standing to contest an order, judgment, agreement or contract that violates this section. A person may contest an order, judgment, agreement or contract that violates this section by motion in the court that entered the order or judgment, or by bringing a declaratory judgment action pursuant to chapter 86 . . .⁶³

The Florida Supreme Court has not yet reviewed any case concerning the Sunshine in Litigation Act. But there have been about twenty-four cases heard in other Florida courts regarding the Act, with the most recent case being from 2017 and with three opinions being withdrawn altogether. Furthermore, Florida courts have not yet gotten the chance to review a sexual abuse settlement case under the Sunshine in Litigation Act. The Third District Court of Appeal referred to the Act in *Smith v. TIB Bank of the Keys*, 687 So. 2d 895, 896 n.1 (Fla. 3d DCA 1997), but only “to observe that it was *not* called upon to decide whether the statute prohibited enforcement of the confidentiality provisions of a settlement agreement in a sexual harassment case.”⁶⁴ Regardless of there being no case law in this particular, niche issue, this section will discuss certain relevant cases to provide background as to the courts’ interpretation of the Act in the context of sexual abuse settlements.

Most sexual abuse settlements settle out of court, but Florida courts can still provide a safeguard to prevent confidentiality in these circumstances. If a case did go to the Florida Supreme Court, the Court should rule that alleged sexual abusers⁶⁵ are a “public hazard” because they are “person[s] . . . that ha[ve] caused and [are] likely to cause injury.”⁶⁶ Withholding valuable information of public interest, such as the identity of a sexual abuser due to a confidentiality agreement in a sexual abuse settlement, should qualify as a “condition of a person . . . that has caused and is likely to cause injury.”⁶⁷ Therefore, the Act would prevent concealing a sexual abuser’s identity because the Act favors public disclosure of a public hazard.⁶⁸ And, as a result of this construction, sexual abuse settlements in Florida should be prohibited from concealment under the Act, and confidentiality agreements in sexual abuse settlements would

⁶³ FLA. STAT. § 69.081 (2018).

⁶⁴ *Smith v. TIB Bank of the Keys*, 687 So. 2d 895, 896 n.1 (Fla. 3d DCA 1997).

⁶⁵ A sexual abuser could also be defined as “a person who could be charged with a felony sex offense.” CAL. CIV. PROC. CODE § 1002 (2019).

⁶⁶ FLA. STAT. § 69.081 (2018).

⁶⁷ *Id.*

⁶⁸ *Id.*

be considered void under Florida law. Particularly in the context of the #MeToo movement, it is clear that many victims would have been protected if the public knew of the abuse of previous victims. Especially in egregious cases such as the sexual abuse running rampant in Catholic church, as well as the repeated abuses of Harvey Weinstein and R. Kelly, it is obvious that some of this abuse could've been curtailed had the public been properly informed. Indeed, it is even possible that some of these perpetrators (including Harvey Weinstein and R. Kelly) would have been jailed years ago, thus thereby reducing the number of victims he was able to access and reducing overall the amount of harm that inflicted upon society as a whole. Keeping this in mind, it is all the more vital that Florida courts uphold a bright-line rule invalidating confidentiality agreements in sexual abuse contexts, at this particular point in history; and, there is some common law basis for the promulgation of this rule, as well.

Case Law in Favor of the “Public Hazard” Standard

In 1992, the First District Court of Appeal in Florida applied the Florida Sunshine in Litigation Act and invalidated a court order for protection.⁶⁹ In *AcandS, Inc. v. Askew*, an asbestos action, the trial court granted a protective order covering documents and depositions.⁷⁰ However, the Act, as applied by the appellate court, invalidated the court order because it concealed information concerning asbestos, which is considered a “public hazard” under the language of the Act.⁷¹ Just as a court order obfuscating from public view information related to an asbestos action is invalid,⁷² similarly, a court order covering up an offender’s sexual misconduct should be invalid – because, just as asbestos has been viewed by courts as a public hazard, alleged sexual abusers should be viewed as the same.⁷³

Further support for this argument is found in *Jones v. Goodyear Tire & Rubber Co.*, wherein the Third District Court of Appeal found a public hazard in a personal injury action against a tire manufacturer.⁷⁴ Specifically, there the jury found that the plaintiff had been injured from an explosion of the manufacturer’s tire, and the court then deemed the tire to be a “public hazard” – as such, the court then chose to overturn a motion for a confidentiality order (which had prohibited the parties and their

⁶⁹ *ACandS, Inc. v. Askew*, 597 So. 2d 895, 895 (Fla. 1st DCA 1992).

⁷⁰ *Id.* at 896.

⁷¹ *Id.*

⁷² *ACandS*, 597 So. 2d at 895.

⁷³ Florida courts could also interpret the Sunshine in Litigation Act considering the “California Felony Sex Law” that will be discussed further under section V of this comment.

⁷⁴ *Jones v. Goodyear Tire & Rubber Co.*, 871 So. 2d 899, 899 (Fla. 3rd DCA 2003).

counsel from disclosing the manufacturer's documents obtained during the discovery).⁷⁵ Following this ruling, no order could be entered which would conceal information regarding the tire, because it had been determined by a jury – by a preponderance of the evidence, presumably – that that tire had injured a member of the public (namely, plaintiff Jones).⁷⁶ And, in a similar case – *Goodyear Tire & Rubber Co. v. Schalmo* – the Second District Court of Appeal found that the trial court erred in entering a blanket confidentiality order without conducting an in-camera review to ensure that no information being concealed contained data on any public hazard, particularly regarding the treads (or lack thereof) of Goodyear's tires.⁷⁷ Following the holdings in *Jones* and *Schalmo*, it is only natural to argue that sexual abusers can be considered a public hazard because they cause personal injury to their victims, and have the potential to cause even further injury to future victims. Particularly when one considers that, within the context of Sunshine in Litigation Act jurisprudence, the burden to conceal is on the offender and the Act favors disclosure,⁷⁸ it is clear that Florida courts should not be allowed to enter confidentiality orders in sexual abuse settlements as a matter of law.

Case Law Against the "Public Hazard" Standard

While the previous cases illustrate the attempts of Florida courts to determine what *does* qualify as a public hazard, courts in Florida have also worked to interpret what does *not* qualify as a public hazard. However, these cases are easily distinguishable from cases involving alleged sexual assault and abuse. For example, in *State Farm Fire & Casualty, Co. v. Sosnowski*, a Florida court held that economic fraud causing financial loss was *not* a public hazard within the meaning of the Florida Sunshine in Litigation Act.⁷⁹ Clearly, cases involving sexual abuse concern more than mere financial injury and, as such, would not be constrained by this decision. Indeed, the main barrier that could prevent courts from declaring confidentiality clauses in the sexual abuse context to be void comes not in the form of conflicting case law, but in an analysis of legislative intent.

Unfortunately, the Sunshine in Litigation Act is not written specifically for sexual abuse settlements and, as such, its language may provide "wobble-room" for offenders. Indeed, since the Act was not

⁷⁵ *Id.*

⁷⁶ *Id.* at 905-06.

⁷⁷ *See generally, Goodyear Tire & Rubber Co. v. Schalmo*, 987 So. 2d 142, 145 (Fla. 2nd DCA 2008).

⁷⁸ FLA. STAT. § 69.081 (2018).

⁷⁹ *State Farm Fire & Cas. Co. v. Sosnowski*, 830 So. 2d 886, 888 (Fla. 5th DCA 2002).

enacted specifically to apply in the context of sexual abuse claims, Florida courts are not obligated to interpret the Act to apply in these kinds of claims. It is possible that a Florida court may regard a sexual abuse victim's motion—to determine that a secret settlement with their offender is concealing a public hazard—as overbroad, and therefore choose not to protect the settlement from concealment under the Sunshine in Litigation Act. There may be other grounds, as well, for courts to refuse to apply the Sunshine in Litigation Act as prohibiting confidentiality agreements in this context. As such, the best solution to this problem is for the Florida legislature to enact legislation specifically prohibiting confidentiality agreements in sexual abuse settlements.

V. RESOLUTION: THE FLORIDA LEGISLATURE SHOULD ENACT LEGISLATION DISFAVORING CONFIDENTIALITY AGREEMENTS IN SEXUAL ABUSE SETTLEMENTS

Because leaving this matter up to the interpretation of the Sunshine in Litigation Act by Florida courts may result in uneven and uncertain results due to their *ad hoc* decision-making methods, it is necessary for the Florida legislature to enact a statute prohibiting the concealment of sexual abuse settlements. This law would actually follow new trends in the law which, as a result of the #MeToo movement, discourage confidentiality agreements in sexual abuse cases.⁸⁰ The Florida legislature can use these newly enacted laws as models to draft and enact its own legislation to specifically disfavor confidentiality agreements in sexual abuse settlements. The remainder of this section will discuss this potential law as a resolution to this problem, including proposed language that the Florida legislature can consider, while keeping in mind a victim's privacy concerns.

The #MeToo Movement and New Legislation

In light of the #MeToo movement, confidentiality provisions in settlements for sexual abuse claims have come under increased criticism.⁸¹ Recently, the United States Congress amended the federal tax code to disfavor sexual abuse settlements that are subject to confidentiality agreements. Specifically, the code now states (under section 162(q)) that settlements and payments for sexual harassment or sexual abuse claims subject to confidentiality agreements are not able to be deducted as a

⁸⁰ Hogan Lovells *supra* note 40.

⁸¹ *Id.*

business expense.⁸² This new policy encourages companies to settle sexual harassment or sexual abuse claims without the use of confidentiality agreements so that the payments related to these claims can be valid business deductions under the tax code.⁸³ This is a very persuasive policy since settlements of these kind of claims can cost businesses thousands and sometimes millions of dollars. And, while Congress did not specifically mention the #MeToo movement as a reason for the amendment, Congress enacting the specific provision under the current climate demonstrates a clear correlation, if not a specific causation.

The #MeToo movement has also affected legislation at the state level in the United States. In response to the #MeToo movement, states such as California, New Jersey, New York, Pennsylvania and Washington, have announced legislation to prevent the use of confidentiality agreements in workplace related sexual abuse settlements.⁸⁴ “Each state proposal has its own specifics, but in general they render invalid the use or enforcement of [confidentiality] provisions related to sexual abuse, either as part of any non-disclosure agreement, or in the context of settlement agreements, or both.”⁸⁵ An example of a newly enacted state legislation is the law in Washington. The Washington legislation considers confidentiality agreements in sexual abuse cases “void and unenforceable.”⁸⁶ The Washington legislation specially states:

2) Except for settlement agreements under subsection (4) of this section, any nondisclosure agreement, waiver, or other document signed by an employee as a condition of employment that has the purpose or effect of preventing the employee from disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises is against public policy and is void and unenforceable.⁸⁷

Like in Washington, there was a bill recently introduced by the legislature in California that is geared towards sexual abuse in the workplace.⁸⁸ The

⁸² 26 U.S.C.A. § 162.

⁸³ *Id.*

⁸⁴ Hogan Lovells *supra* note 40.

⁸⁵ *Id.*

⁸⁶ Non-disclosure agreements that prevent disclosure of sexual assault or sexual harassment prohibited--Settlement agreement exception, Wash. Rev. Code Ann. § 49.44.210.

⁸⁷ *Id.*

⁸⁸ Prasad, *supra* note 2, at 2522.

bill was introduced following the Harvey Weinstein scandal.⁸⁹ This bill is titled “STAND (Stand Together Against Non-Disclosures Act).”⁹⁰ When speaking on the importance of the STAND bill, Senator Leyva made these comments:

“SB 820 is an important bill that will finally ban secret settlements, one of the primary tools that perpetrators have used time and time again to silence victims and prevent them from publicly acknowledging the harassment, assault, and discrimination they have endured,” Senator Leyva said. “I am grateful that my Senate colleagues approved this bill today, since it sends a loud and clear message to victims that we believe them, we stand by them and will do all we can to protect them. SB 820 shreds the curtain of secrecy that has forced victims to remain silent and empowers them to speak their truth so that we can hopefully protect other victims moving forward. Perpetrators must be held accountable for their actions and SB 820 is a sensible bill that helps to keep workplaces in California, both in the public and private sectors, free from sexual harassment and assault. Enough is enough!”⁹¹

Even countries outside of the United States have begun disfavoring confidentiality agreements in cases of sexual assault and harassment, most likely due in no small part to the #MeToo movement. For example, in Great Britain, the Solicitors Regulation Authority (which regulates law firms), recently issued a warning notice that confidentiality agreements were being used improperly.⁹² The regulation authority said that confidentiality agreements “should not be used to prevent people from reporting misconduct to regulators or offenses to law enforcement agencies, or as a means of improperly threatening litigation against, or otherwise seeking improperly to influence, an individual in order to prevent or deter or influence a proper disclosure.”⁹³ Soon after the Solicitors Regulation Authority’s warning notice, the British Parliament’s

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Senate Passes Leyva Bill Banning Secret Settlements in Sexual Assault and Harassment Cases*, (May 21, 2018), <https://sd20.senate.ca.gov/news/2018-05-21-senate-passes-leyva-bill-banning-secret-settlements-sexual-assault-and-harassment>.

⁹² Ben Martin, *What are confidentiality agreements at the heart of Britain’s ‘Me Too’ debate?*, REUTERS (Oct. 26, 2018, 9:56 AM), <https://www.reuters.com/article/us-britain-nda-explainer-idUSKCN1N01WP>.

⁹³ *Id.*

Women and Equalities Committee released a report on sexual abuse in the workplace, which urged the government to “clean up” the use of confidentiality agreements.⁹⁴ The committee also urged the government to enforce better control and regulation of the agreements due to the concern that these agreements are being used to silence victims.⁹⁵ As a result, Prime Minister Theresa May commented that some employers are using confidentiality agreements unethically, and promised to “. . . bring forward measures for consideration for consultation to seek to improve the regulation around non-disclosure agreements and make it absolutely explicit to employees when a non-disclosure agreement does not apply or cannot be enforced.”⁹⁶

While these reforms do illustrate a shift towards the increased regulation of confidentiality agreements in sexual abuse settlements, they are largely limited to the employment context. This is undesirable, because legislation limited to the employment sector does not provide enough protection to all possible victims of sexual harassment or sexual assault. For example, the children who were abused by Catholic priests would not be protected under laws preventing confidentiality in sexual abuse claims only in the employment context. Instead of enacting legislation particularly aimed at employees, it would be more effective for state and federal legislatures to create laws that prevent confidentiality agreements in sexual abuse settlements across all sectors. California has actually passed a statute which disfavors confidentiality clauses in sexual assault and harassment settlement agreements, which applies outside of the workplace context.⁹⁷ California’s “Felony Sex Law”⁹⁸ “prohibits the use of confidentiality clauses in civil settlements if the ‘factual foundation’ for the underlying allegations involved acts that could be prosecuted as felony sexual offenses.”⁹⁹ Furthermore, California requires attorneys to comply with the law as well, under threat of reprimand by the state bar association.¹⁰⁰ Specifically, the statute prescribes that “an attorney who demands that a confidentiality provision be included in a settlement agreement that conceals an act that may be prosecuted as a felony sex offense, or even advises a client to sign such an agreement, may face discipline by the State Bar of California.”¹⁰¹ This enforcement of the law against the attorneys provides an additional level of protection for a

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ CAL. CIV. PROC. CODE § 1002; Prasad, *supra* note 2, at 2534-35.

⁹⁸ *See* CAL. CIV. PROC. CODE § 1002.

⁹⁹ Prasad, *supra* note 2, at 2534-35.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

victim's right to speak. Yet, the law does not apply to cases which are only likely to be convicted as misdemeanors.¹⁰²

Even though there are currently no cases where courts in California have interpreted or applied the "Felony Sex Law,"¹⁰³ on its face, the California law generally appears to have been successful in providing significant protection for victims and their right to speak in sexual abuse cases. "Given that [the California law] covers sexual acts that can be prosecuted as felonies, however, it has tremendous potential to be applied to rapes or sexual harassment with criminal undertones that are settled with confidentiality agreements."¹⁰⁴ In comparing the California "Felony Sex Law" to the other legislations of this kind, on its face, the California law provides more protection to victims than the other legislations because it is not limited to an employment context. As such, if the Florida legislature were to consider enacting laws invalidating confidentiality clauses in sexual abuse settlements, California's felony sex law may be a good place to start (although Florida's law should not limit its disfavor of confidentiality clauses to cases involving sexual assault or harassment that can be prosecuted as a felony, and should instead expand it to include misdemeanors, as well). The proposed language of this statute is as follows:

(a) Notwithstanding any other law, a provision within a settlement agreement that prevents the disclosure of factual information related to the action is prohibited in any civil action the factual foundation for which establishes a cause of action for civil damages for any of the following:

- (1) An act that may be prosecuted as a sex offense.
- (2) An act of childhood sexual abuse.
- (3) An act of sexual exploitation of a minor, or conduct prohibited with respect to a minor pursuant.
- (4) An act of sexual assault against an elder or dependent adult.¹⁰⁵

It should be noted that the language of this proposed statute does not *prevent* a victim from refusing to speak – that is, from keeping the details

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

of her alleged assault, harassment, or abuse confidential – if she so chooses. Instead, the proposed statutory language attempts to protect a victim’s right to privacy by reserving victims the right to keep these details private while preventing the alleged abuser from requiring the victim to remain silent, as a condition of settlement. This balances a victim’s privacy interests with their right to speak, as well as their ability to seek justice in a court of law.

VI. CONCLUSION

The #MeToo movement has given many victims of sexual abuse a voice to finally speak out, discuss their potentially traumatizing experiences, and seek healing and support from their community. However, a hashtag and comments on social media simply are not enough. The law must also give these victims support and provide protection for victims by preventing predators from becoming repeat offenders under promises of silence guaranteed by confidentiality agreements. Indeed, the utilization of confidentiality agreements in sexual abuse settlements dates as far back as the Catholic church scandal (with Catholic priests abusing children) and have continued to be used in cases as recent as the Harvey Weinstein and R. Kelly scandals. These clauses should be void, by law. Confidentiality clauses in sexual abuse settlements permit the sexual abusers to hide their identities from the public and enables them to repeat their offenses. They infringe upon the public’s right to know and the victims’ right to speak.

Under the Sunshine in Litigation Act, sexual abusers are a “public hazard” because they are “person[s] . . . that ha[ve] caused and [are] likely to cause injury.”¹⁰⁶ Since the Act prohibits concealment of public hazards, sexual abuse settlements should not be kept from the public and victims should not be prevented from speaking.¹⁰⁷ Therefore, this interpretation of the Act would prevent concealing a sexual abuser’s identity and, as a result, confidentiality agreements in sexual abuse settlements would be considered void under Florida law.¹⁰⁸ If Florida courts were to determine that the concealment of sexual abuse settlements is not prohibited by the Sunshine in Litigation Act, the Florida legislature should then enact a statute prohibiting the concealment of sexual abuse settlements. This law could mirror California’s felony sex law, but without limiting it to felonies. This would provide the maximum protection for sexual abuse victims and help prevent future victims by encouraging public disclosure of sexual

¹⁰⁶ FLA. STAT. § 69.081 (2018).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

abusers instead of shielding their identities under confidentiality agreements. The #MeToo movement has illuminated many of the deficiencies in our social and legal approaches to victims of sexual assault, harassment and abuse – it is vital that our state courts and legislatures attempt to close these gaps, for the protection of current and future victims, and the preservation of the rule of law, for years to come.

