

Rutgers experts: Silencing victims of sexual abuse must end | Opinion

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By [Star-Ledger Guest Columnist](#)

By **Linda Stamato and Sanford M. Jaffe**

"The very word 'secrecy' is repugnant in a free and open society... the dangers of excessive and unwarranted concealment of pertinent facts far outweigh the dangers which are cited to justify it." (President John F. Kennedy in an [address](#) before the American Newspaper Association, on April 27, 1961)

Shrouding sexual harassment acts, abuse and discrimination in secret settlement agreements is just the latest in a long stream of cases in which perpetrators pay their way out and hide their sins. The results, for individuals and for society, are consequential. It's time to end the practice once and for all.

Routine settlements conceal serious product failures that allow additional injuries and death to occur. Ford and Firestone, for example, [hid exploding tires](#) and GM [covered up defects](#) in ignition switches.

Cases involving [major flaws in medical devices](#) and the use of surgical sponges, settled in secret, left more people to experience injury, pain and disability. And, settlements between landowners and [hydraulic fracturing](#) (fracking) companies hid the risk of contaminated drinking water from the public.

Joining in the [conspiracy to silence victims](#), the Catholic Church concealed abuses by priests, entering settlements that demanded confidentiality, and, adding insult to injury, permitted the transfer of [pedophile priests to new parishes](#) to prey on others.

This list barely covers the terrain.

And, now, the cover of secrecy over sexual discrimination, harassment, aggression and assault has been lifting. Indeed, floodgates opened following press coverage that exposed media mogul [Harvey Weinstein's payments](#) to at least eight women who accused him of harassment and unwanted contact and by the highly visible fall of prominent men at Fox News, including Roger Ailes ([\\$20 million to Gretchen Carlson](#)) and Bill O'Reilly (a [payment totaling \\$45 million](#) involving six women).

More recently, the New York Times revealed four settlements at [Vice Media](#) that appear to be more than isolated cases; indeed, they, reportedly, reflect a culture at the "edgy" global media company.

Others are joining the parade of ignominy as credible victims come forward to expose them: journalists, film stars, radio show hosts, sportscasters, chefs and restaurant owners, members of the judiciary, and teachers, professors, medical professionals and supervisors in a variety of institutions and organizations, and, not least, [members of Congress](#) (whose victims were silenced and compensated with public funds).

Individuals, institutions and organizations that paid compensation to victims relied on confidentiality -- specifically on non-disclosure agreements (NDAs) or mandatory arbitration clauses -- to silence the victims and to protect them from prosecution, negative publicity, larger payouts and damage to "their brand" and, as individuals, to protect them from exposure, shame, expulsion, or prosecution. Companies continued to produce their tires and switches, implants and other medical devices, and individuals remained in good standing, in positions of power, free to attack, discriminate and harass at will. In the workplace, at the film studio, or on the manufacturing floor, it was, mostly, ["business as usual."](#)

Not anymore.

As we witness shaming, expulsion, forfeiture of jobs and income, and expectations for serious efforts to change the culture that tolerates, even enables, abuse, there are demands to end the use of non-disclosure clauses and mandatory arbitration in cases relating to sexual harassment, discrimination and abuse. But, why stop there?

On the Legislative front

The time is ripe for legislation prohibiting secrecy in *all* cases involving harm to individuals and to society. There are compelling policy reasons for ensuring public review of claims of race, national origin, religion, disability and age-related claims, as well as ensuring public review of products and services that have caused injury, sickness or death.

But, previous efforts to restrict confidentiality in settlements have stalled as lobbyists blocked them, year after year. The so-called [Sunshine Law](#) (HR 1053), for example, that would prohibit agreements that restrict the disclosure of information relating to the protection of public health or safety, has been introduced for several years, and each session, it languishes "in committee." This year 2017 is no exception.

Now, however, there is a [push in Congress](#)--perhaps given [the public outcry](#) -but only to ban the use of arbitration clauses and non-disclosure requirements in cases relating to sexual harassment and abuse.

Legislators in [several states](#) are moving aggressively in this limited direction as well.

New Jersey, however, is embracing the comprehensive approach. Senator Loretta Weinberg (D-Bergen) introduced the "[New Jersey Sunshine in Litigation Act](#)" (S. 3548) in late November. It would [ban non-disclosure agreements](#) that cover up anything that has to do with life safety, sexual assault, abuse, harassment, discrimination or retaliation; it "requires disclosure of judgments, records, and settlements concerning public hazards."

She was joined by colleagues across the aisle including Representative Jon Bramnick (R-Union) who indicated that he hopes to prevent manufacturers from buying the silence of consumers who have been maimed or killed by faulty or dangerous products because, he said, " I know of cases from 25 years ago where the public never knew of household products that left people injured and killed."

But, whether they will pull this off remains to be seen. The bill wasn't considered in the last session and Weinberg is currently revising it.

Making Disclosure the norm and the opposing voices

A compelling case against secrecy can be made most easily in the public domain. In cases involving public figures -- police officers, government officials -- with public funds being used to settle the issues in contention, the case for secrecy has little support and, consequently, inroads against the practice, in states, have been made. Courts, increasingly, refuse to enforce such clauses. Federal District Court Judge, Cathy L. Waldor, for example, recently confirmed her decision to refuse the [City of Bayonne](#)'s request to seal a settlement in a police brutality case.

The settlement payment comes from Bayonne taxpayers after all.

So, when settlements are filed with courts the terms should be made available to the public. When settlements are reached outside of court, cases that involve public entities or public officials, or public money, terms of those settlements should be made accessible to the public as well. (It only became public knowledge recently, for example, that [New Jersey Transit has paid multi-million dollar settlements in at least 30 discrimination lawsuits since 2012](#), an item that reportedly surprised legislators.)

But opponents argue that without secrecy parties would not settle and courts would be burdened by increased litigation. We challenge that view. The primary reason cases settle is to avoid the high cost, disruption, and the risks of trial and the possibility of punitive damages. Cases will still settle, we think, with or without the protection of secrecy; any vital information, relating to trade secrets that legitimately need a shield, for example, can be protected.

It is asserted that victims do not want to be exposed and, thus, want the secrecy settlement accords them. But, victims have little interest in protecting those who have harmed them and who pose continuing threats to others. Confidentiality could be extended to victims, if they wish, while denying the same protection to perpetrators. Compensation for victims certainly should not function as a trade-off against vital public interests.

When private parties do not come to court at all, moreover, and settle their matters on their own, they should be prohibited by a strong public policy against secrecy and be aware that any confidentiality clause might not be enforceable in court.

Changing culture, practices and law

We may well have entered that critical moment when the need for change is so deep and widespread that we must establish new standards. Americans are questioning the culture of their work places and the interactions that take place in and outside of them, and, they are expecting changes to take place and wanting attention to be paid.

At the very least, employees will demand more effective processes for handling sexual abuse complaints, validating and legitimizing their use so that people are encouraged to use them. [Microsoft](#) appears to be leading the way by its unilateral effort to end the use of NDAs for sexual harassment claims.

But, as we say, why stop there? It's more than past time to end the shield of secrecy extended to corporate malefactors. The interests of powerful individuals or large, well-funded organizations should not prevail over the public interest.

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