

PRACTICING SAFE TEXT: DRAFTING TIPS FROM THE STORMY DANIELS NDA

Posted on March 22, 2018

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Over the past few weeks, the non-disclosure agreement ("**NDA**") allegedly between Stormy Daniels and Donald Trump [\[1\]](#) has dominated the news not only in the United States but around the world. Commentators of all political stripes have had a field day offering opinions about the meaning and enforceability of the NDA, often, it seems, without having actually read the document. As entertaining as the speculation may be, and regardless of where your sympathies lie, there are many lessons to be learned from the way in which the NDA is drafted.

The NDA came to light when counsel for adult film actress Stormy Daniels launched a complaint asking a California court to find the NDA invalid – ostensibly to confirm that she was free to speak publicly about an alleged 2006 sexual affair with Mr. Trump. The complaint asserts that the parties to the NDA, who were given pseudonyms David Dennison "**DD**", Peggy Peterson "**PP**" and EC, LLC "**EC**", are, respectively: Donald Trump; Stephanie Clifford aka Stormy Daniels; and Essential Consultants, LLC, a company incorporated by Mr. Trump's personal lawyer. Pursuant to the NDA, EC is the entity required to pay (and which presumably did pay) \$130,000 to PP in exchange for a transfer to DD of intellectual property rights and confidentiality obligations owed to DD, in respect of PP's alleged affair with DD.

The highly public nature of this dispute presents an opportunity take a closer look at the unforeseen legal complexities that can often arise out of what might initially seem like a straightforward deal. Agreements that are ambiguous, hastily-assembled or ill-conceived can too easily become fodder for litigators, and morph into disputes that keep the parties tied up in courts for years. This particular controversy has seen lawyers, judges, scholars, commentators, pundits and even social media scrutinizing every detail and clause of the NDA, many of whom take contradictory positions on what the NDA actually says. As we discuss below, there are several lessons that can be learned from taking a closer look at the NDA and the ambiguity around it.

Some disclaimers: first, we are Canadian lawyers not qualified or equipped to comment on American jurisprudence, electoral finance laws, California or federal court practice, or Delaware corporate matters. Second, any agreement that is put to the same scrutiny as the NDA will inevitably reveal its typos and drafting glitches, and so we will largely ignore those (keeping in mind that such things can, indeed, be important if they

create ambiguity!). Last, we do not purport to opine or comment on the substance of the complaint made by Ms. Daniels or the likelihood or outcome of the case. Our commentary relates to the application of Canadian common law (relatively non-jurisdictional) issues, leveraging the public scrutiny to highlight issues that lawyers and their clients should consider when drafting agreements generally.

Who are the Proper Parties and How Can Confidentiality be Achieved?

Mr. Trump's counsel has claimed that DD was not a party to the NDA, or at least not a required party, and has pointed to the fact that the agreement was never signed by DD. On the flip side, Ms. Daniels' legal team argues that because DD, a named party to the NDA, never signed the NDA, the NDA is therefore not effective. Both sides point to the language of the NDA to advance their opposing views.

While it may seem obvious, an important first step in drafting any agreement is to determine the proper parties. Failure to do so can have serious consequences, particularly for confidentiality obligations. This is certainly true when there may be more than one person involved in a relationship because lawyers must consider inter-party and intra-party issues; it is often a mistake to simply insert another party to a contract without carefully considering how that party fits into each provision.

For example, where three parties are involved, one cannot simply draft a contract that assumes that all rights and obligations are owed by each party to each of the other parties. Instead, one must take care to ensure that the contractual provisions address the way that the parties interface with one another. If two parties are on the same "side" of a deal, the contract will be drafted very differently than if all three parties are at arm's length.

Recitals (clauses containing non-contractual background information) are commonly used to explain the relationships between the parties; but it is often advisable to be explicit in the main body of an agreement – for example, in a multi-party NDA, it is critical to address which party owes confidentiality obligations (and over what information) to which other parties.

It appears that the inclusion of EC as a party to the NDA may have been a last-minute decision,^[2] or at least one that was not carefully thought through or drafted. Apart from a few notable instances, EC is almost totally ignored in the NDA – the recitals completely ignore EC, and most of the NDA reads as though it is an agreement between two individuals.^[3]

The parties to the NDA are described in the document as "[EC] and/or [DD], on the one part, and [PP] on the other part", which is inherently ambiguous but at least sets up the framing that there are two sides (EC/DD and PP). But EC and DD are both clearly, separately defined, and the NDA contains a signature line for each of EC, DD and PP, giving the impression that all three are intended parties. The body of the NDA itself does not help resolve the ambiguity. For example, it contains a provision stating that "this [NDA], when signed by all Parties [*sic-undefined*], is a valid and binding agreement, enforceable in accordance with its terms"^[4], suggesting that

it may not be valid or binding until then). The NDA also inconsistently uses the pronouns “it/he/she” in some clauses, and “she/he” in others.^[5]

To add to the confusion, the NDA outright states (in the recitals) that DD is, in fact, a party:

“[PP’s obligations are a] material inducement to DD’s entry into this Agreement, absent which DD would not enter into this Agreement. DD expects and requires that PP never communicate with him or his family for any reason whatsoever.”^[6]

These internal inconsistencies and ambiguities demonstrate that the insertion of EC into the NDA was not carefully thought through. And, more importantly, the insertion of EC in this fashion contributes to a fundamental lack of clarity in the NDA as a whole.

We note that, from our perspective, the addition of a corporate party to the NDA could have been used very effectively to insulate DD with a little more careful drafting. The addition of a simple provision stating that EC was DD’s agent and had the authority to bind or sign on behalf of DD, or that DD was a “third party beneficiary”, would answer the question: “Why didn’t DD sign?” and would have taken away PP’s argument that the NDA is invalid because DD failed to sign.

Further clarity (and fewer internal inconsistencies) could potentially have been achieved if the agreement was structured in such a way as to eliminate the need for DD to be a party at all. DD could have assigned all his rights in this matter to EC (either through the NDA itself or in a side letter), and EC could have entered into a two-party agreement with PP, stepping into DD’s shoes. With a two-party agreement, Ms. Daniels’ remedy would be to sue EC as the only other party to the contract, instead of suing Mr. Trump personally. That being said, the two-party approach may not have sufficiently addressed Ms. Daniels’s entitlement to a release and other personal covenants from DD.

Privity of Contract and Consideration – Essential Elements of Any Contract

For DD to be able to sue for breach of the NDA (a situation which is contemplated in the NDA), DD would have to be a party to the contract. Typically, someone who is not a party to the contract can neither seek to enforce it, nor be bound by it—this concept is called “privity of contract”. The statements in the media by Mr. Trump’s lawyers that Mr. Trump may be entitled to some \$20 million (because of PP’s alleged breaches) run counter to the well-established doctrine of privity, and of course are contrary to the assertions that Mr. Trump is, in fact, not a party to the NDA.

There is also the matter of consideration. For a contract to be effective, each party must provide adequate consideration: that is, they must each provide something of value in exchange for the benefits they receive under the contract.

Under the terms of the NDA, DD receives property and the benefit of various representations, warranties and covenants, including one of confidentiality, from PP. In exchange, PP is to receive money from EC and the benefit of various representations, warranties and covenants by DD, including a release of all claims DD might have against PP. The NDA does not specify what consideration, if any, EC is to receive for its agreement to pay. Indeed, the NDA stipulates that the \$130,000 is being paid by EC to PP, and Mr. Trump's lawyers have publicly stated that this payment was in no way connected to the President or his organization.^[7] If DD is not a party as claimed by Mr. Trump's lawyers, and EC received no consideration for its payment to PP, is there a binding contract? If DD is not a party, how is PP to receive the benefit of the release by DD as expressly contemplated in the NDA?

Some commentators have speculated that DD was intended to be a "third party beneficiary" to the NDA and thus entitled to its benefits (this despite DD not having given any consideration, and having expressly being described as a party who is required to perform certain personal covenants that can only be performed by DD). A third party beneficiary is someone who receives a benefit under a contract without actually being party to the contract. The legal standing of third party beneficiaries in Canada is unsettled and, generally speaking, one must be a party to a contract in order to receive rights or benefits under that contract.^[8] Due to the changing nature of the law (and, also, "why not?" because it is very easy to draft) contractual parties wishing to establish a third party beneficiary or some sort of trust relationship between third parties and contractual parties should include clear and unambiguous language to this effect to increase the chances that it will be upheld.

Mr. Trump's lawyers have publicly stated that not only was he not a party to the NDA, he also had no knowledge of the NDA. This raises some interesting questions as to what legal authority EC, its counsel and Mr. Trump's counsel possess to enter into an agreement under which Mr. Trump is a beneficiary. However, it is inconceivable under the common law in Canada that a third party such as EC or its lawyer (or one's own lawyer) could make representations, warranties or covenants that are binding on someone such as Mr. Trump without that person's express knowledge and consent.

Clarity is always the Objective

Lawyers are sometimes criticized for drafting agreements that are said to be unnecessarily wordy and complicated. The rationale for drafting long and detailed documents is to achieve clarity and, as is often said to be motivated by "an abundance of caution".

Interestingly, while Mr. Trump denies the events in question took place, DD's lawyers thought to include in the NDA an assignment of all pictures, paintings, and other images that Ms. Daniels might have of the event along with an assignment of all copyright and other intellectual property rights therein. Presumably, any images of a non-event will not be particularly illuminating, however, the idea of taking an assignment of the underlying

copyright in confidential information is actually a good one.^[9]

If one is acting out of an abundance of caution, it is worth asking why the NDA did not contain an express assignment of any other tangible property. If history is a guide, perhaps the NDA should have included a transfer of any apparatus, furnishings or equipment in Ms. Daniels' possession that might contain evidence. Given Ms. Daniels' occupational background, absent express knowledge of what transpired, it may be a daunting challenge to develop a comprehensive list. Regardless, the point is that if you are drafting an agreement to achieve a particular, broad purpose, it would be wise to be thorough and to consider all potential scenarios.

Remedies and Unconscionability

It is also important to consider what will happen upon a breach of the NDA. The NDA includes a liquidated damages clause which obligates PP to pay to DD “the sum of One-Million Dollars (\$1,000,000.00) as a reasonable and fair amount of liquidated damages to compensate DD for any loss or damage resulting from each breach”.^[10] A recent filing by Mr. Trump's lawyer alleges that Ms. Daniels has breached the NDA 20 times, meaning she could be theoretically on the hook for 20 million dollars.^[11] If that sounds excessive, it's because it probably is.

While it may be appealing to include a harsh monetary punishment to deter the other side from breaching, parties need to be aware that such clauses may not be upheld. In Canada, a court will not enforce a damages clause if it finds the “penalty” to be arbitrary, as opposed to being a genuine pre-estimate of damages that would likely result from a breach. Parties who wish to include pre-determined monetary penalties in a contract should engage in serious attempts to estimate actual damages and all parties should be involved in the discussion.

Similarly, courts will not uphold a penalty clause or other contractual provisions where those provisions are found to be oppressive or so unfair as to be unconscionable. A determination that provision of a contract, or a whole contract, is void for unconscionability requires a highly factual inquiry including considerations of: bargaining power, unfairness of the bargain, relative sophistication of the parties, nature of the relationship between the parties, the existence of *bona fide* negotiations, gravity of the breach, and conduct of the parties.^[12]

Why is this Matter in the Courts and not Private Arbitration?

Arbitration proceedings offer parties many benefits that traditional litigation through the courts cannot, chief among them being: confidential proceedings that are not on the public record, often a faster resolution than going to court, and more flexible procedures that can be customized to the parties and the dispute.

In this case, it comes as no surprise that the NDA contains an arbitration clause indicating that any disputes relating to the NDA should proceed by way of binding, confidential arbitration. Because Ms. Daniels takes the position that the NDA is not valid (since DD did not sign it or for its unconscionability) she also takes the position that there is no agreement to arbitrate and has accordingly proceeded to court. Interestingly, the provision in the NDA for arbitration does not refer to EC: EC has no express right to invoke arbitration.

Where parties have equal bargaining power, Canadian courts are likely to uphold a properly drafted arbitration clause and refuse to take jurisdiction over a dispute, however this isn't necessarily the case in other jurisdictions. In some jurisdictions, courts will allow a legal action to proceed despite the presence of an arbitration clause. It is therefore imperative to consider this when choosing what procedure and law will apply to a dispute, and if necessary, to seek additional legal advice from a lawyer in that jurisdiction. The reality is that a party to an agreement may have to take action against the other party in whatever jurisdiction the other party resides or operates, and so one can never truly be insulated from the intricacies of local legal requirements.

What did we Learn?

Ultimately, no matter what comes of the Stormy Daniels NDA and the legal actions surrounding it, it remains a valuable example of what can go wrong when a seemingly simple contract is drafted using unclear language or is ambiguous about the rights and obligations of the parties.

The NDA, like many contracts, contains a lot of redundant language and 'legalese', which gives the impression of a carefully crafted agreement. But it fails to meet the basic tests of clarity and consistency: it doesn't 'hang together'. The best course of action when drafting an agreement is to carefully consider all the potentialities and to involve skilled legal counsel. Depending on the issues at stake and the level of urgency, it is also advisable to get as many pairs of eyes looking at the agreement as you can afford, so that issues of interpretation and enforcement are not left to chance.

by Karl Gustafson, Ryan Black, Katherine Reilly and Holly Sherlock, Articled Student

[1] The Confidential Settlement Agreement And Mutual Release; Assignment Of Copyright And Non-Disparagement [*sic*] Agreement, attached as an exhibit to the Complaint for Declaratory Relief filed by Stormy Daniels in California Superior Court.[ps2id id='1' target='']

[2] A Delaware company search shows that EC was incorporated ten days before the NDA was signed.[ps2id id='2' target='']

[3] The notice provisions of the NDA, section 8.8, do not even give an address for EC, but remarkably show DD's address as "Essential Consultants LLC, c/o: Michael Cohen, Esq.," with a physical address at... Trump Tower.[ps2id id='3' target='']

[4] See Section 8.6 of the NDA.[ps2id id='4' target=""]

[5] See, for example, Sections 5.2 and 8.1 of the NDA.[ps2id id='5' target=""]

[6] Section 2.4 of the NDA.[ps2id id='6' target=""]

[7] Incredibly, media reports indicate that Mr. Trump's lawyer stated he used personal debt, drawn against his home equity, without reimbursement from Mr. Trump.[ps2id id='7' target=""]

[8] Traditional contract law in Canada is based on the doctrine of privity; however, over time, Canadian courts have relaxed this principle and allowed for the creation of third party beneficiaries in certain circumstances. (See: London Drugs Ltd. v. Kuehne & Nagel International Ltd., (1992) 3 SCR 299; Fraser River Pile & Dredge Ltd. V. Can-Dive Services Ltd., (1999) 3 SCR 108.)[ps2id id='8' target=""]

[9] This does prompt the question of whether Ms. Daniels owned the copyright she purported to assign. Ownership of copyright can be a complicated legal question depending on the circumstances, so specific consideration needs to be given in each case as to who owns the copyright.[ps2id id='9' target=""]

[10] See s. 5.2 of the NDA [emphasis added].[ps2id id='10' target=""]

[11]

https://www.washingtonpost.com/investigations/trump-attorney-accuses-stormy-daniels-of-violating-nondisclosure-agreement-20-times-claims-right-to-see-20-million-in-damages/2018/03/16/a5fd1686-296b-11e8-b79d-f3d931db7f68_story.html?utm_term=.ba3b8f61d95a. [ps2id id='11' target=""]

[12] Redstone Enterprises Ltd. v. Simple Technology Inc., 2017 ONCA 282.[ps2id id='12' target=""]

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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