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Where Confidentiality and Transparency Collide

In sexual harassment cases, mediators face a modern-day dilemma

Jan Frankel Schau

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We have now gone far beyond the “he said, she said” controversy in sexual harassment cases. Reports of complaints about Hollywood producer Harvey Weinstein first appeared in the *New York Times* in early October 2017, prompting hundreds of women to come forward with other accounts of unlawful and unwanted sexual misconduct by bosses and coworkers and teachers and coaches in the entertainment industry, workplaces, schools, government offices, and many other venues. Both those who were harmed and the public have demanded full investigations and complete accountability, even when the alleged misconduct took place decades ago. In this #MeToo era, a simple denial of misconduct or a claim that the behavior was consensual is no longer enough to make allegations go away.

Today victims of sexual harassment and misconduct are filing lawsuits, demanding compensation, and publicly sharing details of the abuses. These actions often provide comfort for others who have experienced similar treatment and help create safer workplaces. As the number of allegations swells, mediators are increasingly being called upon to help parties settle these disputes before lawsuits go to trial. This may be encouraging for mediators and for the field, but it raises new practice questions and causes tension for mediators who must grapple with employers’ (and often their employees’) desire to settle these claims confidentially and the public’s demand for transparency and accountability.

**Some of the new key questions**

One of the key principles of mediation is that the participants should feel free to communicate intimate, personal, and yet-unproven details that underlie their claims. Under many state statutes and court rules, anything said or any admission made for the purpose of, in the course of, or pursuant to a mediation is protected from discovery and admissibility as evidence. For example, the California Evidence Code prohibits the mediator from testifying in any subsequent civil proceeding. 1 1

**(For a discussion about a revision of California’s confidentiality rule, see “**[**On Professional Practice**](file:///groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/on-professional-practice/)**”  in this issue.**)

As mediators, knowing that we will never be called upon to take sides in a dispute that came before us or accurately recall all that was said during a mediation (much of which is not memorialized in writing) gives us considerable comfort.

But what happens to that comfort if we are called upon to mediate a series of disputes against the same employer, prompted by multiple claimants who allege that the company’s powerful leaders have repeatedly taken sexual advantage of the young women who work for them? When many allegations are repeated against the same bosses, is the duty of confidentiality stronger than an individual’s personal sense of moral duty to disclose ongoing harm? It is noteworthy that, as a general principle in cases involving allegations about workplace misconduct, the individual alleged perpetrator is seldom present at the mediation, but the company and its lawyers (and often times insurance carriers) are there to do “damage control” and settle these matters before they become public.

If the parties expressly agree that their settlement is not confidential, does the mediator then have the responsibility – or even the legal competence – to testify about the negotiations leading up to the settlement or the ultimate settlement terms? Are the statutes that so carefully protect the confidentiality of the mediation process now overridden by the interests of the public or other potential victims?

The purpose of offering confidentiality is to provide a safe place in which disputants may air their grievances and resolve their differences without a judge, a jury, or the public listening in. Is this fair, just, and right in the context of sexual harassment cases? Are mediators playing a role in obfuscating the public’s “right to know” about a history of sexual assault or mistreatment? Are we making a politically-based judgment that acts of sexual harassment must be disclosed, whereas discrimination based on race or disability, for example, is entitled to the full protections of confidentiality? It is an ethical conundrum – but one that has solutions for the creative mediator.

**Confidentiality: one of mediation’s basic principles**

In employment disputes, both sides typically agree – or at least accede to the employer’s demand – to include a confidentiality clause in the settlement agreement. (This is in addition to the mediator’s customary Agreement to Participate, which usually includes language explaining that the process is confidential.) The confidentiality clause in the settlement agreement will usually identify a few necessary exclusions under the law (such as enforcement of the agreement, information to attorneys and accountants, or disclosure where required by other lawful process). Occasionally, the parties may negotiate a specific statement to be used in the event that either party is asked to comment on the settlement publicly. **(For a more extended discussion of non-disclosure agreements, see**[**Non-Disclosure Agreements and the #MeToo Movement).**](file:///groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/)

While those who favor prohibiting non-disclosure clauses in sexual harassment settlements see a strong value in exposing abusers so that other potential victims (as well as those who have been wronged by the same “bad actor”) will be aware of the claims, from both the victim and perpetrator’s point of view there is a competing value in keeping the claims private. Many parties and their lawyers choose mediation as a means to resolve their disputes expressly because they want to avoid the publicity, anxiety, risk, and expense of discussing the disputes in open court. By their nature, these types of cases are deeply personal. They may include the most intimate of details and may expose those involved to personal and professional backlash that may extend far beyond the payment of damages.

As we know from news reports, these kinds of claims can be deeply embarrassing, bringing shame and hurting the wrongdoer’s reputation as well as damaging marriages and other relationships. They can result in loss of employment and, in the case of Harvey Weinstein, may even result in criminal charges.

There is good reason to keep the salacious details involved in many sexual harassment cases out of the public eye. Yet by doing so, the process of mediation can become a legal way to “hush” the victims, to keep them from disclosing the facts or outcome to potential claimants, other victims, or even just citizens who may be interested in knowing about this conduct by, for example, their elected officials, clergy, or other public figures.

Employers and employees have effectively used confidentiality clauses as part of the settlement of employment-related disputes arising out of allegations of sexual harassment. Yet the combination of a new tax law and the societal pressure to expose the misconduct may confound and obfuscate that process.

**A new consideration: ‘the Harvey Weinstein tax’**

Until the end of 2017, federal tax law allowed businesses and employees to claim a business expense deduction for litigation arising out of claims of sexual harassment if the settlement of those claims was kept confidential. But federal tax legislation filed in 2017, known as “the Harvey Weinstein tax” and prompted by the political movement toward disclosure and the wish to provide information for future claimants, disallowed this deduction. Any payment on account of alleged sexual harassment or abuse may not be deducted as a business expense if it is subject to a confidentiality provision. If the parties expressly hold that their agreement is confidential, the employer cannot deduct the payment as an ordinary business expense and the claimant may not deduct her attorney’s fees as an expense.

In practical terms, confidentiality is often a huge incentive, providing leverage for the plaintiff and her lawyer in early settlement negotiations. Typically, these negotiations take place at a time when many facts are still in dispute and liability has not been admitted or clearly established. Also, the employer or its insurance carrier typically is paying for the misconduct alleged to have been committed by an individual, and the “punishment” is inflicted upon the payor, not the harasser himself. Accordingly, the employer may be trying to avoid the negative publicity and damage to its reputation that may come from the lawsuit or claim, even though the wrongdoer may already have been disciplined or fired. Subjecting the employer to public disclosure of the claim or the settlement may serve as a disincentive for the employer to settle the lawsuit for what the plaintiff would consider to be a reasonable amount, in part for fear of setting a “floor” for future claims.

In many instances, an employee (or former employee) has a desire to keep her claims confidential for fear of reprisal or recrimination in future personal or business relationships. For some private individuals (as opposed to celebrities or other public figures), making their claims known to the perpetrator and his or her employer is enough to satisfy the individuals, and they have no need to publicly shame the wrongdoer or the company or publicize their claims.

For most employees, payment of damages, an apology or explanation, and a commitment by the employer to make changes to ensure that the misconduct will not be repeated are sufficient compensation, and they have no need to publicize their settlement – especially if this means they will get higher damages in exchange for keeping the settlement confidential.

But the #MeToo movement has brought about a big change in how companies – and individuals – respond to allegations of sexual misconduct, and today most people (except perhaps public figures and their employers) agree that public figures, especially officials, should not be able to buy their way out of sexual harassment and assault charges through non-disclosure agreements. Yet in the context of civil litigation, there is equal justification for applying the principles of confidentiality that adhere to every other type of case that is resolved through mediation.

It is often the case that neither the employer nor the employee wants the publicity and potential embarrassment that comes from a public airing of this type of very personal experience. In addition, the employer may actually be trying to make things right by paying serious settlement money to the plaintiff but will not do so willingly if the employer also must suffer the negative publicity from a public disclosure that its employee, especially someone in a leadership role, failed to abide by the employer’s own policies. Also, these settlements can readily reach well into six figures, and the business deduction usually realized under corporate tax codes makes that expense much more palatable to a business. Under the Weinstein tax, if the terms of the agreement are kept confidential, there is no deduction available to either side, even for legal fees and costs of litigation.

These types of cases can be expensive, stressful, contentious, and embarrassing to both employer and employee, and the prospect of an early settlement is attractive to both sides as a way to avoid all that. Once the accuser “goes public,” however, the employer has less incentive to pay substantial damages because the employer may then want to defend its reputation and protect its “goodwill” in the public eye, which may require harsh litigation and media attention.

**Voluntariness, informed decision-making, and self-determination**

Mediation is, at its core, a voluntary process. Where there is a willing buyer and a willing seller, the mediators usually do not interfere with the bargain the parties strike, even when we believe it may not be in one side’s best interest. Other, maxims of mediation are that it is designed to give parties the right to make their own decisions and get all the information they need to make well-informed choices. As long as mediators believe that one party has not been coerced or overpowered, they usually do not interfere with the bargain the parties strike, even when we think it may not be in one side’s best interest.

But informed decision-making has limits: When a mediator uses private caucuses, this essentially guarantees an imperfect or incomplete exchange of information, as the mediator will not reveal all of what either side says or believes to the other. Consequently, there are limitations on the “informed” aspect of informed decision-making when parties divulge their confidential interests or rationale for settlement to the mediator in private caucus.

If sexual harassment or abuse cases are uniquely carved out as an exception to the general confidentiality protections afforded in mediation, the parties may be less willing to disclose the underlying interests or motivations toward settlement. In other words, they may not be making a decision out of their own free will, but rather the optics of how the settlement will appear in the public eye.

**Some options to consider**

When working on sexual harassment cases, plenty of creative options may serve to maximize recovery, minimize tax consequences, and preserve the integrity of the confidential mediation process. Where both sides are prepared to carefully consider the consequences of a confidentiality agreement or an express disclaimer of confidentiality, settlements may be more achievable and enforceable than they would be if people simply gave in to the new wave of transparency without thinking about everyone’s best interests.

In cases where both sides want the settlement to be confidential, mediators and parties still have several good options to consider in the course of the negotiations. The parties can explicitly allocate a reasonable amount of the damages to claims arising out of sexual harassment, leaving the balance of the payment of damages for other, non-sexual harassment-related claims, such as wage and hour violations, retaliation for whistleblowing, disability discrimination, or whatever else has been raised in the pleadings or other demand letters. Those damages will be non-confidential and therefore can still be deducted for tax purposes. The amount must be fair and reasonable, to avoid running afoul of the new tax law, but the other contentions or allegations don’t need to be the predominant cause where the claims are broader than a single cause of action of sexual harassment or abuse.

Or the parties can negotiate the terms of the confidentiality and reflect that in their agreement so that it does not rise to the level of a “non-disclosure agreement.” For example, the claims and terms of agreement may be disclosed “upon request” by subpoena or in the course of other legal processes but may not be subject to general disclosure via media or other private communication except to a spouse, attorney, or accountant.

As a third option, the parties can cooperate in drafting an approved statement that will constitute the public disclosure if either party is asked. For example, specific language could state “The parties to this lawsuit have decided it is in both side’s best interests to resolve the pending dispute in order to focus upon business and personal matters. Accordingly, effective immediately, employee has dismissed her claims against the employer and any further inquiries should be directed to the human resources director.”

Finally, the parties can expressly expunge all preliminary non-disclosure agreements but maintain that the terms of the settlement will not be publicized without notice to the company in advance – and if the terms are made public, provide for an opportunity to craft an acceptable statement to release to current employees and to the public.

**Conclusion**

There are no easy answers to questions such as whether it’s justifiable to allow people in cases of race discrimination – but not those involved in sexual harassment and misconduct cases, for example – to keep details of their claims confidential. However, there are practical ways to address the parties’ desire to maintain confidentiality while still taking advantage of the tax benefits that are afforded to all other employment-related cases, by allocating only a part of the settlement to the sexual harassment-based claims. As with all matters in mediation, the agreement to disclose or keep information confidential is a voluntary matter that is subject to negotiation between the parties, helping them arrive at the best possible solution. Because mediation is meant to be self-determinative, the skillful mediator will know to raise the issue but not provide the solution.

In the end, only after the parties carefully analyze the costs and benefits of confidentiality and the public’s right to know can they determine whether they will keep the terms of the agreement confidential. New tax laws make confidentiality less financially appealing, but there are still plenty of justifications to keep mediated agreements in such cases confidential, just as there are in other cases.

And what about a mediator’s moral duty to protect future victims and not contribute to “hushing” up a culture of harassment? The reality is that in today’s world, allegations against public figures, celebrities, and high-profile individuals are often likely to come to light, helping inform the public, comfort other victims, and ensure that sexual misconduct is well understood and never tolerated. Mediators can sleep soundly knowing that parties who choose mediation, rather than trying their case in the courtroom or the public forum, typically do so with good reason. And with understanding of various confidentiality options, mediators can protect and safeguard the dispute’s details as well as its eventual resolution.