

## The Mediator's Role: Nimbleness in an Accelerated Age

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**M**ediators have to quickly assess what their parties believe about their legal claims and judge if it comports with the current state of the law. This used to be a fairly straightforward proposition, as legal precedent and societal change developed over decades; however, this is no longer the case. We have entered an era of accelerated political and social change, and mediators must work in a shifting environment and adjust accordingly.

Political and legislative change used to take decades, and legal interpretation took years more. As technology interconnects and amplifies political movements, what once took decades now happens in mere months. The news article that coalesced the #MeToo movement was published in October 2017 and quickly ignited a firestorm. Additional reporting netted public figures in quick succession. Section 13307 of the Tax Cuts and Jobs Act of 2017, which was enacted barely two months later, removed the tax deductibility of any attorney fees and settlement payments related to sexual harassment or sexual abuse that were subject to a nondisclosure agreement.

The change in the federal tax code happened quickly and was propelled by the political momentum of the #MeToo movement. The resulting legislation created a special subcategory in tax treatment for sex discrimination, differentiating its tax treatment from other forms

of prohibited discrimination. The well-meaning legislative intent was to create incentives for openness and transparency, resulting in more accountability for sex discrimination. However, all this ignores increased accountability for other prohibited forms of discrimination, such as disability and racial discrimination. One can foresee inventive lawyering being used to get around negative tax consequences, which could encourage the obscuring of sex-based allegations within other types of allegations—and produce exactly the opposite intended effect. Additionally, it has taken the choice of confidentiality away from sexual harassment plaintiffs in cases where that is desired. New York State has done better in this regard; it passed legislation in March 2018 that prohibits non-disclosure as it relates to sexual harassment, but allows for it when it is the employee's preference.

The negotiation framework for lawyers has also shifted, and settlement talks occur within the renewed momentum of #MeToo as political backdrop. Overall, this has increased the calculus of settlement, particularly if the accused is a high-profile media figure. Insurance companies that are being asked to shoulder these increased financial settlement numbers have not priced their policies according to this new reality, and the premiums they charged did not take into account the political dimension of the settlements that are now being hammered out.

The white-hot heat of political movements like #MeToo has pushed institutional systems to their limits. Lawyers



and insurance companies must adjust on the fly. As attorneys select mediators for such cases, they should look for neutrals who are aware of the limitations of the law and our systems, and are able to adjust for political and social change and the rapidly changing legal landscape. Nimble negotiators in the age of acceleration have a distinct advantage.

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