

Role Of The Mediator In The Age Of #MeToo

By **Linda Singer and Carol Wittenberg** (May 24, 2018, 11:49 AM EDT)

There is no question that the #MeToo movement has encouraged women across the board to come forward with complaints of sexual harassment in the workplace. As mediators, we have witnessed the increase in these cases over the past six months, triggered, no doubt, by seeing women publicly report allegations of sexual harassment against high-profile men; something that rarely happened in the past. The #MeToo movement has also affected the way in which these cases are mediated.

The traditional role of a mediator in a sexual harassment case was to be engaged weeks, if not months, after the employer had received a demand letter from counsel and after the employer had an opportunity to conduct a thorough investigation. The issue of proportionality was part of the mediation process and the mediator discussed with the parties liability and the probability of jury awards based on the particular facts of the case and prior jury awards, including those that had been reduced on appeal. There was no question about whether the settlement would be confidential because confidentiality routinely was the price of settlement. In many cases, employers succeeded in negotiating liquidated damages provisions to ensure that the facts of the case, as well as the settlement amount, remained confidential. The complainant had little or no ability to demand that the harasser be terminated or even disciplined. Moreover, even if the harasser had been disciplined, that information was rarely shared with the complainant.

Prior to #MeToo, employers would either have their human resources departments investigate the allegations or use their outside law firms. In light of complaints by women at some companies that human resources was not perceived as being responsive to women's complaints of sexual harassment, many employers looked to their own law firms to conduct confidential investigations. Today, increasingly, they are engaging outside investigators, sometimes neutrals, including those who mediate these cases, as well as independent law firms. They believe women are more likely to be forthcoming if they perceive that their complaints will be taken seriously and evaluated fairly by someone not connected with the company. Companies seek thorough investigations not only to evaluate their potential liability if other women come forward, but because they are aware that these claims can result in great reputational harm and affect workplace morale. Thus, there are new roles for mediators even before the mediation commences.



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Today, the mediator is engaged within days of counsel sending the employer a demand letter. Thus, the employer has little opportunity to investigate and assess potential liability prior to mediating the case. Demands and settlements are often high. There is little discussion of proportionality or the possibility for a significant award from a jury, particularly where there is concern about the allegations being made public. Further, women are emboldened to demand that their harasser be terminated as part of their settlement and that demand is often met. In cases in which the individual is a public person, the alleged harasser has been seen to resign from their position. The role of the mediator today has become more challenging as a result of these changes.

Some women making these claims are changing in other ways. Many do not fear the idea of going public with their allegations, empowered by the women of the #MeToo movement. This is particularly true for younger women, who are not as concerned that a public airing of their allegations will affect their ability to find other employment either in the same industry or elsewhere. These are women who are used to revealing aspects of their life on social media platforms. These are women who will not agree to nondisclosure agreements when they settle their claims.

Employers continue to be concerned about the issue of confidentiality, even where a confidentiality clause is built into the settlement. However, the ability to keep settlements confidential has become questionable.

The latest legal developments around nondisclosure agreements in the wake of the #MeToo movement raise doubts about the legality of confidentiality agreements. Bills related to sexual harassment have been introduced in Congress and state legislatures around the country. Many seek to limit an employer's ability to require confidentiality of harassment complaints, while others allow for confidential settlements only if the woman making the complaint agrees to settle on a confidential basis.

Yet, there are still a significant number of women who do not want their cases to be made public. These women want confidentiality built into their settlement agreements and many attorneys representing women in these cases have lobbied to allow women to make the decision about whether or not to enter into nondisclosure agreements and not have that option removed legislatively.

And, where women have the choice to agree to a confidentiality provision, employers seek enforcement of these provisions. Some may choose to negotiate a liquidated damages provision, while others may choose to stagger payments over time, conditioned on confidentiality. However, we are aware of extremely few instances where the enforcement provisions have been invoked.

A new wrinkle making it more difficult for mediators to help resolve sexual harassment cases has been introduced by well-meaning but clumsy legislators. As part of the federal tax bill signed into law in December 2017, employers may not deduct as business expenses any money spent either on settling sexual harassment claims or on the associated legal fees. It is unclear whether plaintiffs' fees are nondeductible as well. Some state legislators are following the example. This development makes settlement in mediation more complicated by motivating people to find other bases with which to label their agreements (race? age? retaliatory termination?). It also raises the societal question of why sexual harassment should be treated differently from other prevalent types of discrimination based on gender, race, age, national origin or disability.

What questions should we be asking about the impact of the #MeToo movement going forward? Will

the volume of these cases continue? Will the value of these cases diminish over time? Will we learn what kind of training is successful to changing employees' perceptions of what is acceptable in the workplace? What kind of changes will we see in companies who are committed to changing their culture?

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