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Fresh insights

THE MEDIATION OF SEXUAL-HARASSMENT AND ABUSE CASES; WHICH CASES SHOULD BE MEDIATED AND HOW THAT MEDIATION SHOULD PROCEED

Tina Turner famously belted out: "What's love got to do with it?" in her 1984 album, "Private Dancer." It turns out that Turner was still recovering from a long and abusive marriage to Ike Turner and some of the lyrics reveal her pain and private struggles with that abuse. She sang: "I've been taking on a new direction, but I have to say. I've been thinking about my own protection. It scares me to feel this way."

The mediation of sexual-harassment or abuse claims presents a unique challenge based upon both subjective interpretations of past behavior and changes in acceptable and unacceptable societal interactions. Both judges and mediators have noticed that the defense asserted in many workplace sexual-harassment cases is grounded upon a contention that the relationship was consensual and mutual. Once a particular line is crossed, however, and the victim of the harassment confers with a lawyer – who may shine a brighter light on what is and is not acceptable conduct in or out of the workplace – the alleged perpetrator may seem surprised by the plaintiff's claims that the conduct was actually offensive or unwanted and rises to the level of abuse or harassment.

Under California law, an employer has the affirmative duty to investigate any claim of harassment, but very often does not reach a decisive conclusion that the behavior was severe and pervasive enough to create an abusive work environment. This leaves the employer vulnerable to a claim for failure to prevent the harassment from occurring or taking appropriate corrective action afterwards. The employer may conclude that there is insufficient evidence to determine that the alleged misconduct occurred at all, leading to a defense premised on the suggestion that plaintiff is exaggerating about the incident or lying about it altogether, or that he/she consented to the behavior or even invited it.

Because so much that goes into a relationship in the modern era includes exchanges via text or email or social media, the evidence can be murky about whether these interactions arise out of a mutually flirtatious or friendly relationship, a loving one, or one that is clearly and unmistakably unwanted, unwelcome and actionable. What is almost always present, however, whether in a school, work or religious setting, is evidence of an actual relationship between the two individuals both before and after the offending event.

The laws that protect workers against sexual harassment in the workplace don't define "intimate relationships" and don't limit sexual harassment to acts of touching or other lewd conduct. (Gov. Code, § 12940.) Instead, conduct is considered actionable if it is "so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." Like romance, the test is somewhat subjective. It becomes abusive when the victim considers it to be severe or pervasive or when it alters the conditions of her employment. The challenge in these cases is that the alleged harasser is often unaware that his conduct has become "severe" or "pervasive" or that his actions have altered the conditions of the plaintiff's employment. Instead, he may see it as "playful," "friendly," "mutual" or arising out of a close friendship that was not sexual until it became so.

There is indisputably both great risk and potential for significant rewards in bringing these cases to trial. They generally require hard work, are fact-intensive, and often contain many layers of unknown "evidence" until depositions are taken and documents scrutinized. They present the risk of making public what would otherwise be a supremely private matter. On the other hand, such cases can result in substantial verdicts and damaging publicity to both the employer and perpetrator.

The cases can be extremely emotional and complex, paving the way for psychological and potentially criminal implications that may extend far beyond the civil action.

So why mediate the sexual harassment case?

In an informal poll amongst Distinguished Fellows of the International Academy of Mediators, there was a striking convergence on the challenging issues that present themselves in the mediation of sexual harassment or abuse cases.

Which sexual-harassment or abuse cases should be mediated?

There are a number of considerations that the litigator, together with her client, should carefully consider before deciding how to approach the question of whether, when and how to mediate the sexual harassment dispute.

The primary consideration should always be the client's objectives in bringing the action. Is she seeking to effect change in the workplace? Does she want to see the perpetrator (or the company) punished for its misconduct by having to pay a large monetary award? Does she want to make sure that the company or perpetrator acknowledge the wrongs that were done in some meaningful way? Does she want the public to know? The plaintiff's attorney should also consider whether to test the company's "accountability" by engaging in an early mediation to see if the claim is being taken seriously and has been appropriately evaluated.

From the International Academy of Mediators

Cliff Hendler, from Toronto, Ontario, sees these issues as "obvious." According

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to Hendler, "The lawyer should always first determine whether his/her client is expecting a resolution beyond a financial outcome and whether the client wants or needs an apology or acknowledgement in order to resolve their claim. The choice of going to court eliminates those non-financial remedies."

Thierry Beriault, of Montreal, believes that the key to success is to "make a good call at the beginning on what situations warrant a mediation, and those which are not suitable. After that, the journey will be difficult, but rewarding for all if the mediation is conducted with empathy and (quiet) energy."

Michael Dickstein, of Ontario, Canada, cautions that a plaintiff's attorney should "never assume you know what your client wants and that you know how all sexual harassment plaintiffs will react. Make sure you have talked thoroughly with your client about what will make them as comfortable as possible at the mediation and what they hope to accomplish. Sometimes being heard is most important, but at other times, it is all about making someone pay for what they did. Sometimes it is something entirely different from either of those."

After you have identified your client's goals, you should, according to Dickstein, "talk through any tensions in the various goals a plaintiff may have." These may include the tension between getting to tell the story in their own voice and the possibility of getting a higher settlement as well as the tension between maintaining confidentiality and the call for full transparency.

Jeremy Lack of Zurich, Switzerland, adds that it is crucial to check in with each participant in advance to clarify what they expect from the process. He notes that "it is dangerous to assume it is all about the money or an apology." In a country that appears to be relatively homogenous, culturally, Jeremy has had harassment cases involving allegations that turned out to be more about intercultural issues than gender-based ones. It is only after they were understood in that light that many observed behaviors were fully comprehensible.

Andrea Morrison of Montreal works for a Canadian human rights commission and has mediated cases where there is an ongoing relationship between the two individuals involved in the complaint. For example, in one remote northern community, two teachers (co-workers) wanted to keep their jobs but couldn't get back to work without negotiating some preferred code of conduct for future relations. In that case, they agreed to be polite, but otherwise avoid interaction and to maintain strict confidentiality regarding the outcome of the mediation.

In a mediation, lawyers can also negotiate conditions for reintegration into the workplace, restoration processes for teams of workers, training, policy implementation and other measures aimed at creating a safe environment and to prevent future misconduct.

Questions of "convening" the mediation

Once the decision has been made to pursue mediation, the careful practitioner will also evaluate the timing that will be most effective to getting a resolution. In some cases, the optimal time for a mediation is pre-litigation. That is, by laying out your client's contentions in a detailed "demand letter" (sometimes without a monetary demand), there may be a great deal of leverage in recommending a mediation be conducted before the filing or service of the initial complaint. In other cases, the optimal time for a mediation will be after the initial deposition has been taken of the plaintiff, or the preliminary exchange of documents, including the personnel file of both victim and perpetrator (if you can get it) and the investigation file have been produced. Some of the most challenging cases may require the filing or hearing on a Motion for Summary Judgment before they are "ripe" for settlement. Again, the determination should always be guided by your client's interests and goals in bringing the claim.

The timing will also be guided by the discovery that needs to be done and what it leads to in each case. Like a fine wine, you want to engage in mediation (or opening and drinking a fine wine) after enough discovery/time has taken place so that all of the elements are well understood, but not so much time that the parties are emboldened in their positions and the case has become "overripe."

Designing the process of mediation

After you and your client have made the decision to mediate, the choice of mediator becomes the next issue to consider. Some mediators are well known to be highly evaluative. Is the conduct you are alleging one that screams out "offensive" and would command a seven-figure verdict in a former judge's courtroom? Other mediators are more facilitative – allowing the parties to express their positions freely and directly, with a goal of communication between the two sides. Still others consider themselves to be "transformative" mediators, who may have as their own objective to take the "victim" from a low place of vulnerability to a place of power and vindication (or at least acknowledgement.) It is not always readily apparent which style a mediator possesses, but most mediators have strong reputations that will hint at their approach to these types of sensitive conflicts.

Most good mediators know the power of flexibility so that they can be very facilitative at the beginning of the day and evaluative when necessary towards the end of the negotiation, with the potential of becoming transformative at the closing in order to allow both the aggrieved and the perpetrator to move on in a more positive way than they have during the litigation, or while the abuse was taking place.

Eric Galton, of Austin, Texas, a highly respected national mediator and one of the founders of the International Academy emphasizes the need for

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mediators to "be open to the emotional needs of both sides" of these issues. He describes the "thorniest cases" as the ones in which the bad conduct is denied by the defendant or there are claims that the behavior was consensual or even encouraged.

Jeremy Lack thinks these are also cases that call for adapting the process to address each case a little differently. In some, additional external professional support may be appropriate (like a psychologist or economic advisor). Barry Fischer of Ontario, Canada, agrees. Whether the plaintiff is accompanied by a family member, friend or advisor, he prefers to have that "support" person in the caucus room throughout the day, so that he can observe how s/he is affecting the chances for settlement or whether, instead, s/he may be presenting a barrier.

Cliff Hendler thinks it is critical to have plaintiff's lawyers find out in advance who their client may want or not want to see at the mediation session. Specifically, knowing whether your client wants to see the perpetrators or wants to avoid seeing them is an important inquiry and one that is too often overlooked in the conversation about the remedies you may be targeting to achieve.

Joyce Mitchell of Rockville, Maryland, tells the story of a mediation where a 20-year-old claimant alleged that she endured ongoing sexual harassment by her 44-year-old employer, whose son attended high school with her. Among the many decisions to be made about the process of the mediation was the physical location (separate rooms throughout the day), a "staggered arrival" time, which was designed to avoid encountering the family of the "harasser" in the coffee shop adjacent to the building and a strategy for managing the dissemination of information among the many mutual friends and contacts in their small community both before and after the process.

All mediators polled agreed that these cases take a lot more time than other types of disputes at the beginning of the mediation day. Fischer concedes that "this often upsets the lawyers" because he takes time to talk with all of the people in the room, including client, lawyer and support person. While it may appear to be wasting times, he is, instead, deliberately building trust and bonding, which he has confidence will pay off later when the mediator may need to apply a little pressure about the numbers.

Thierry Beriault describes his practice as usually starting with the individual in a confidential pre-mediation session. There, he spends more time than usual, taking caution and time to allow the parties to speak about the important elements of the dialogue to come that they would not normally be inclined to voice at the earliest stages of mediation. This gives him an opportunity to test the readiness of the parties to engage in the process and to assess whether there are psychological hurdles that should be dealt with through another professional in advance of the mediation session.

The controversial joint session

While joint sessions in mediation may be generally disfavored in Southern California, a joint session in a sexual-harassment or abuse case may be surprisingly useful.

Jon Fidler, one of the preeminent mediators in Canada, states: "I have found that in sexual abuse cases, particularly historical ones involving teachers, coaches, family members or clergy, a joint session should not be avoided but rather should be encouraged whenever the defendant is present. Allowing the plaintiff to express themselves is often hollow when they can't express themselves to the defendant directly."

Obviously, there should not be a joint session without first reviewing it with plaintiff and her lawyer to ensure that plaintiff is well prepared for the encounter. The mediator's job will be to make the joint session safe. When conducted with care, these meetings can give the plaintiff an opportunity to confront the defendant and overcome their fears in order to move forward beyond the fear and anger that the incident created," says Fidler.

In the employment cases that he mediates, Barry Fischer finds that the employer usually denies the accusation and instead accuses the plaintiff of lying about the behavior. In those cases, he sees no fruitful purpose to a joint session. Instead, he finds it much more effective to allow each party to tell their story to the mediator, and then have the mediator convey only the information he believes will help bring about settlement to the other room.

Orit Asnan, of Haifa, Israel, notes that although many plaintiffs resist participating in a joint session at the outset of a mediation, after establishing trust in both the process and the mediator, many agree to such a joint meeting towards the end of the mediation. It can be a meaningful chance to map the situation and get an acknowledgment of the wrongs which occurred.

Thierry Beriault has had a similar experience, where at some point in the process, both parties may request a face-to-face meeting with the mediator in the room, but outside the presence of the "support" person or the employer representative. Although quite emotional, Beriault notes that "sexual harassment cases are very complex and rarely one-sided. Parties have a lot to share and they almost always seek closure of the inevitable relationship that was established, whether based upon wrongdoings as alleged or not."

Michael Dickstein, a plaintiff's side attorney turned mediator, notes: "Think about how powerful the plaintiffs' voice can be to get what the plaintiff wants, or to interfere with getting it." He relates an incident in which the plaintiff's presentation was so compelling that the defense attorney was brought to tears. Not only was that joint session effective, but it was cathartic for the plaintiff to experience being "heard" for the first time by the company she had sued. Yes, it can come at a great emotional cost, but it is always worth considering.

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John Sturrock, of Edinburgh, Scotland, who is a preeminent commercial mediator, shared the experience that in one case where the plaintiff accused her boss of behaving inappropriately in a hotel bedroom during a business conference they both were attending, the parties requested to meet privately during the mediation. While Sturrock saw the matter as purely a question of fact, the two disputants somehow worked out their differences and reached a settlement only after they had this very personal "confrontation."

There should also be a consideration of the extent to which the plaintiff or her lawyer want to confront the defendant or the company that represents him in these mediation sessions. As Dickstein points out, "Although in court it is necessary to blame the company for the harassment," you may not want to do so in the context of the mediation. Instead, you may want to separate the company representatives from the alleged wrongdoer and try to get them on your side, creating an alliance that would effectively address the Human Resources policies, training, supervision and monetary compensation that the plaintiff may be seeking.

The remedies available in mediation may go beyond those awardable in court

Cliff Hendler cautions that in every sexual harassment or abuse case, the plaintiff's counsel should find out early and communicate to their mediator and, where appropriate, to their opposing counsel, what terms will be required in order to settle the case with their client. Will the plaintiff agree to confidentiality? Will she settle for monetary damages alone and agree to a voluntary resignation from her employment or will she insist upon a re-hire?

Eric Galton notes that valuation of these cases runs the entire spectrum, depending upon the nature of the alleged conduct as well as the financial wherewithal of the Defendant. Cases may be "anything from borderline actionable to terribly reprehensible." He agrees that non-monetary requests should be identified and brought up early, or even before the mediation session so that the mediation session can focus upon the available remedies in a most productive way.

Sometimes, the "victim" of the sexual harassment may want to make a statement or write a statement to be made on her behalf. In those cases, the mediator will want to know that in advance, review the statement in private caucus and negotiate the appropriate timing and delivery of the statement without jeopardizing the agreed-upon terms of the ultimate settlement.

One of the major remedies that can be attained in a non-court setting is an apology or acknowledgement that the conduct that took place was improper and caused the plaintiff harm. But an apology, as Cliff Hendler points out, "can be a minefield" if not properly delivered and received. Hendler recalls hearing what he thought was "a perfect apology" from a monsignor, who accepted liability for the conduct of his church and acknowledged the injuries this had caused the young plaintiff to sustain. Although the mediator was "wowed" by this sermon, the plaintiff was nothing but enraged. She did not want to hear such an apology from the church on behalf of a rogue priest who had caused such profound damage to so many young parishioners!

Jeff Jury, a former President of the International Academy, and very well-respected Texas mediator, never suggests an apology as an element of settlement in these cases. Instead, when an apology is suggested, he asks the plaintiff and her counsel to take some time while he's out of the room to think about what they wish to hear and how they would have it delivered. Then he tests to see if that can be accomplished through the other side. In the "apologizer's room," he asks them to write down what they would like to convey in an apology. He then coaches both sides towards an acceptable apology. Where there is convergence, he moves forward. In many cases, where the apology is likely to ring hollow or, worse yet, be demeaning or deprecating, he counsels against it.

As an example, imagine someone saying "I apologize for how you feel about what you say happened. I know you have since married and had a child. Thank goodness, you are moving on with your life and now I can move on with mine too." The results of such an insincere or incomplete apology could prove disastrous and are better left unsaid.

A good mediator can also convey a sincere apology without risking putting the perpetrator and victim together for a raw, unedited one. For example, in a case of a highly compensated and experienced executive experiencing gender discrimination by the new, much younger CEO of her company, the mediator may be able to express how truly sorry the CFO is during the course of the mediation. Instead of risking putting the two together, the mediator can say: "The company representative wants you to know how sorry he is that you didn't bring this to his attention sooner and that he was unable to correct or change any of this conduct. In agreeing to pay $X in a settlement, he wants you to understand that the company is now taking responsibility for this conduct and will make sure it is never repeated."

Closure

In a nationwide survey of labor and employment lawyers, Eric Galton found that the #MeToo movement has resulted in a significant culture change within many institutions and workplaces. There is a real increase in training and education, which, together, will hopefully positively affect the number of incidents leading to future claims. Those that go forward in light of this training and added education, would seem to be more egregious, more likely to get past a Summary Judgment Motion and more likely to withstand an appeal.

Still, the potential for negative publicity continues to loom over every case. This requires sensitivity throughout the mediation but should be delicately

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addressed near the conclusion in order to balance the element of transparency against the desire to protect the privacy of the individuals.

Some mediators are deliberate about keeping the clients engaged throughout the process, to and including drafting the ultimate terms of settlement. Joyce Mitchell, for example, sometimes asks the plaintiff to help her type the terms of the proposed agreement on her iPad and email them to the other room for counsel to review. This has the interesting chance to shift the claimant's focus from the highly emotional stage to a more logical one.

Another idea, which Mitchell learned from Columbia University Professor Lela Love, is to always ask the aggrieved party what they plan to do with the settlement funds. According to Mitchell, one of the young plaintiffs for whom she mediated broke down in tears in response to that question and spoke of helping her younger brother to finish college. While she had entered the mediation hearing room with such an aspiration, the numbers they were negotiating could easily be computed to allow for two years of college tuition at a certain point, and she could "pivot" from being in a time of fear and dread to being in a place of hope. She could look towards a better future and beyond the painful past.

Orit Asnan sees mediation of sexual-harassment disputes as sometimes offering a healing opportunity, not only for the plaintiff, but for his or her spouse. Orit says she has witnessed plaintiffs requesting that their spouses be a part of the entire process so as to use the mediation process as a platform for ending a marital crisis and as an opportunity for both partners to recover from the trauma and destruction these events have caused in their relationship. Orit reports: "I remember a husband of a plaintiff that felt frustrated for not protecting his wife from her boss, and how he felt appreciated and empowered after taking part in the mediation and being her 'support' throughout the process."

In other cases, plaintiffs may need the mediation in order to recover their position in the workplace. It is only after a full settlement of the case that they can have their own integrity and reputation fully restored, allowing them to advance in their professional community.

Finally, there is sometimes an opportunity for personal growth, redemption and forgiveness as well. Geoff Sharp of Christchurch, New Zealand, recalls one such mediation where, after the monetary settlement was agreed upon and "the light of day was beginning to fade," the bishop of the church in which the elderly victim of abuse was a part, asked the mediator and the plaintiff for a chance to request forgiveness and attempt to restore the victim's faith in some way. He reports: "Forgiveness was gracious and unspoken." The bishop offered and the victim received Holy Communion in a corner of the law firm's big, shiny conference room, where the many, well-dressed lawyers had completed their jobs and sat awkwardly at the table staring at their feet while this intimate ritual played out. According to Geoff, "When they looked up, not one had a dry eye."

Jan Frankel Schau, Esq. settles litigated cases arising out of employment and tort disputes. Before becoming a full-time mediator, she was a litigator for 20 years.

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