# #METOO WHERE CONFIDENTIALITY AND TRANSPARENCY COLLIDE

**By Jan Frankel Schau**

We have now gone far beyond the "he said, she said" controversy in sexual harassment cases. Today, victims of sexual harassment and misconduct are filing lawsuits, demanding compensation, and publicly sharing details of the abuses. As the number of allegations swells, mediators are increasingly being called on 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' 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.

As mediators, knowing that we will never be called on to take sides in a dispute that came before us or accurately recall all that was said during a mediation gives us considerable comfort. But what happens to that comfort if we are called on 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? Is the duty of confidentiality stronger than the public's right to know about ongoing sex harassment in the workplace?

> IS THE VALUE OF CONFIDENTIALITY STRONGER THAN THE PUBLIC'S RIGHT TO KNOW?

If the parties expressly agree that their settlement is not confidential, the mediator will still be protected from testifying about the negotiations leading up to the settlement under confidentiality statutes in the underlying action, but may be called to testify about the settlement terms in the action or in other unrelated actions, including criminal charges. 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?

**Confidentiality: One of mediation's basic principles.** In employment disputes, both sides typically agree to include a confidentiality clause in the settlement agreement. While those who favor prohibiting non-disclosure clauses in sexual harassment settlements see a strong value in exposing abusers so that other potential victims will be aware of the claims, often there is value in keeping the claims private from both the victim's and the perpetrator's point of view.

These claims can be deeply embarrassing, hurting the reputation of both the wrongdoer and, in some cases, the victim, within her current or future employment. Claims of sexual harassment have the potential of damaging marriages and other relationships, especially if they have not been revealed before the claim is made. They can result in loss of employment and even 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

**Jan Frankel Schau** is a neutral with ADR Services in Southern California and an adjunct faculty member at the Straus Institute of Dispute Resolution.

keep them from disclosing the facts or outcome to potential claimants, other victims, or even citizens who may be interested in knowing about this conduct by 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 that process.

**A new tax law.** 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 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 fees as an expense.

**Voluntariness and informed decision making.** Mediation is, at its core, a voluntary process. 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. Mediation is designed to give parties the right to make their own decisions and get all the information they need to make well-informed choices.

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.

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.

**Options to consider.** When 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 claims not related to sexual harassment. Those damages can be characterized as "non-confidential" and therefore can still be deducted for tax purposes.

Alternatively, the parties can negotiate the terms of the confidentiality allowing disclosure for some purposes 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.

The parties also 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 sides' best interests to resolve the pending dispute in order to focus on business and personal matters. Accordingly, effective immediately, the 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 or to the public. ■


## ABA SECTION OF DISPUTE RESOLUTION

**This article** is an abridged and edited version of one that originally appeared on page 6 of *Dispute Resolution Magazine,* Winter 2019 (25:2).
**For more information** or to obtain a copy of the periodical in which the full article appears, please call the ABA Service Center at 800/285-2221.
**WEBSITE:** americanbar.org/dispute
**PERIODICALS:** *Dispute Resolution Magazine,* published three times per year; *Just Resolutions,* electronic newsletter published ten times per year.
**CLE AND OTHER PROGRAMS:** Annual spring conference, the world's largest dispute resolution conference; advanced mediation, arbitration, and negotiation training institutes; monthly teleconferences and webinars.
**BOOKS AND OTHER RECENT PUBLICATIONS:** *Negotiation Essentials for Lawyers; Early Neutral Evaluation; Structured Negotiation: A Winning Alternative to Lawsuits; Beyond Smart: Lawyering with Emotional Intelligence; The Organizational Ombudsman: Origins, Roles and Operations—A Legal Guide; Appellate Mediation: A Guidebook for Attorneys and Mediators.*