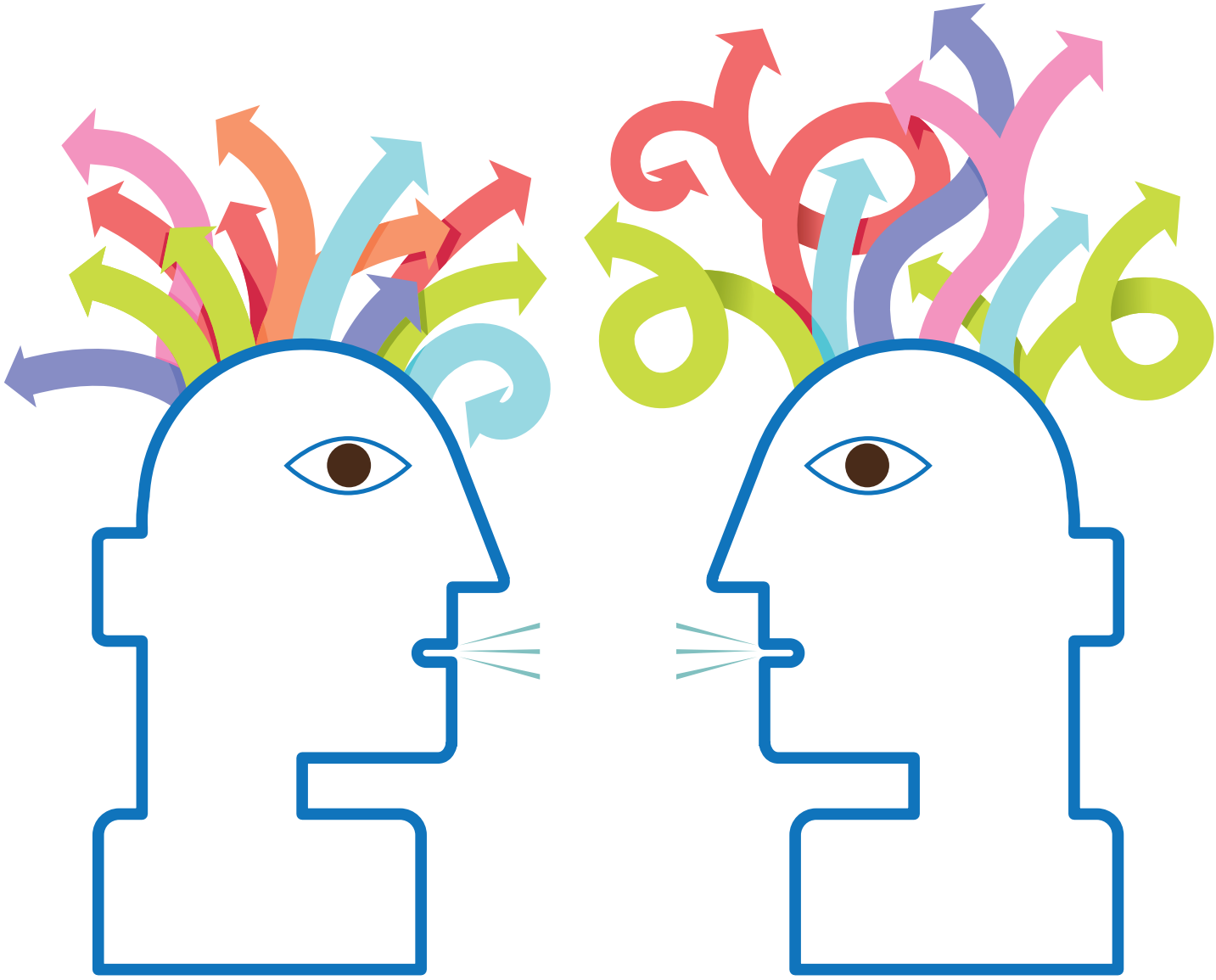

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MEDIATING SEXUAL HARASSMENT AND DISCRIMINATION DISPUTES

By Felicia T. Farber

In the wake of the #MeToo and #TimesUp movements, there has been a great deal of attention given to the topic of sexual harassment in the workplace. There seems to be endless publicity surrounding allegations of sexual harassment and discrimination against leading figures in politics, Hollywood, big business and the media. As a result, there have been increased reports and claims of sexual harassment filed across the country.[1]

The heightened awareness of sexual harassment issues has been reflected in social media. In the year following the exposure of the Harvey Weinstein scandal (October 2017), the #MeToo hashtag was used approximately 19 million times on Twitter[2] and an ongoing national dialogue has ensued with a concomitant uptick in complaints, litigation and mediation. Attorneys and mediators who handle sexual harassment and discrimination cases need to have an understanding of what makes these matters different from other types of employment mediations, and use an informed, distinct approach.

The Special Nature of Sexual Harassment Disputes

Matters involving sexual harassment and discrimination are among the most personal types of cases in that they cut to the core of an individual's identity. Gender is one of a person's most basic characteristics, and when that person believes they've been mistreated or discriminated against for who they are, it can be extremely distressing and damaging emotionally, psychologically and physically, especially when it puts their livelihood in jeopardy.

Sexual harassment cases are highly sensitive in nature, requiring attorneys and mediators to have an increased appreciation for the emotionally charged state of the participants. Both the employee and employer representatives who attend mediations are likely anxious and uneasy about the nature of the claims, and merely discussing them can cause emotions to spike. Skilled mediators have the delicate task of helping both sides navigate through the difficult and uncomfortable process of talking about disturbing allegations and finding a mutually satisfactory outcome. They will recognize the special needs of the parties and create a safe, non-judgmental environment for all sides.

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Current or former employees who appear at sexual harassment mediations can still be traumatized from their employment situations and require extra care and sensitivity. These employees often felt powerless or humiliated at their jobs and were afraid to take action to stop the alleged harassment, lest their treatment would worsen or they'd be terminated. They can arrive at the mediation frightened and apprehensive and need assistance setting aside their negative feelings in order to think clearly and focus on a joint resolution of the problem.

Employers typically come to mediation denying knowledge or culpability of any offending behavior but understand that they have no choice but to deal with the complainant's allegations even if they believe they are meritless. For companies with strong value systems that have implemented preventative practices, policies and trainings, it can be hard to accept that they now face accountability.

In the digital era, employers must also contend with the added difficulties presented by social media platforms and online outlets that create limitless opportunities for employees to run afoul of corporate guidelines and existing laws. Using electronic devices, employees can freely post, email, text or send messages that can be misconstrued, which can create potential employer liability.[3]

Mediation can be used by employers to re-examine their company policies and procedures and explore the most efficient, effective and economical means of resolving problems. In deciding how to best handle pending sexual harassment claims, employers will want to consider their reputational risk, the cost of extended discovery, and the impact an ongoing lawsuit or settlement will have on other employees.

Who should participate?

Prior to the in-person mediation session, the parties and their attorneys will have the opportunity to speak with the mediator jointly in a pre-mediation teleconference or separately in a one-on-one conversation. One of the primary goals of the initial teleconference is to ensure the right people attend the mediation.

New Jersey Court Rule 1.40-4(g) provides that "Mediators may require the

participation of persons with negotiating authority." Whether a mediation is court-referred or private, it is always beneficial to have the decision-makers in attendance. In order to optimize the likelihood of a successful mediation outcome, the people sitting at the mediation table should be empowered to make decisions on the spot. When a party's decision-makers are not present, they operate at a disadvantage and shortchange the mediation process, as they will neither experience the exchange of information nor the evolution of the mediation firsthand.

Sometimes it is beneficial for complainants who are highly apprehensive or distraught to have a support person present to help them deal with their emotional difficulties. This could be a family member, friend or co-worker that they trust and will rely on in their decision-making process. Emotions can override rational thought and the support person can help them rein in their emotions and focus on the problem. If the complainant does elect to bring a non-party to the mediation, this must be disclosed to the other side in advance, and approval should be obtained from all participants before bringing the non-party into the mediation room.

Employers should have respresentatives attend the mediation who have the authority to evaluate risks and costs objectively and approve a deal. If the employer has Employment Practices Liability Insurance (EPLI), the presence of the EPLI adjuster will greatly increase the likelihood of settlement. The carrier understands the importance of making business decisions to keep costs down, manage risks and get to the end stage sooner. While the employer could get stuck on personal issues or principles, the carrier will evaluate the dispute through a business lens and cut out the emotional baggage that can cloud sound decision-making.

Sexual harassment claims change the mediation environment

Sexual harassment and discrimination cases require special considerations on the part of attorney advocates and mediators. These types of disputes are often personal and tense, involving intimate details no one is comfortable discussing. They need to be handled with a great degree of sensitivity, and all parties and counsel must treat each other and the mediator with dignity and respect. The mediator should ensure all participants feel safe in the mediation setting and advise them of the confidential nature of the proceeding. Confidentiality is a fundamental component of mediation that makes it an ideal forum to resolve such matters.

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In emotionally charged cases, it is important to give distressed parties the opportunity to express themselves. If a party has experienced trauma that has impacted their judgment and they are not given the opportunity to tell their story and express their feelings, they will not experience emotional release, and their actions could be dictated by negative thoughts and feelings. If these negative emotions are not removed or diffused, they will be an impediment to logical, rational thought and impair the person's ability to be an effective mediation participant and arrive at a resolution.

Various techniques can be utilized by both mediators and attorneys to aid in gaining a better understanding of a traumatized individual's needs and help them control their emotions. Some examples are: showing *empathy* so the person knows you can see the situation from their perspective; engaging in *active listening* to demonstrate through words and body language that the person has your full attention and understanding; and, *reframing* the person's situation from a different point of view so they can look at it in a more constructive way. It is also important to engage in a discussion rather than an inquisition-style question and answer session so the person will be encouraged to talk and not feel as though they're being interrogated or cross-examined.

A mediator can be instrumental in helping the traumatized party to manage their emotions, focus on the problem at hand, and shift into a positive mode where they can start to look forward and put the matter behind them.

Use of caucus

Every mediation should be tailored to the parties' needs. There are no set rules. Before a mediation begins, the mediator should inquire as to the preference of the parties and attorneys regarding whether they would like to be in the same room or apart. In cases involving deeply personal claims such as sexual harassment and sexual assault, the parties almost always opt to mediate via caucus rather than in a joint setting.

The mediator should use caucus time to listen to each party and explain that the other side has a different version of the facts that needs to be considered as well. When parties are separated it is much easier for them to dismiss their adversaries' positions and belittle their

claims and defenses. The mediator should help the parties understand that the other side has valid points and strong convictions too, even if they don't agree with them.

Mediation is an interactive process which works best when the stakeholders actively participate. In the caucus room, attorneys should give the mediator the information they need to fully and clearly explain their client's positions and provide the mediator with all of the issues they want to mediate. Parties and attorneys should advise the mediator what questions they want asked of the opposing parties, what information is still outstanding, and what issues need to be clarified. By working closely with the mediator, they'll ensure their interests and priorities are known and conveyed, maximizing their opportunity for the most favorable outcome.

Setting expectations

It is extremely helpful if attorneys take the time to properly prepare their clients in advance of the mediation and realistically set their expectations. When parties enter mediation with very little knowledge of the realistic value of their case and have high expectations of "winning," it takes longer to work everyone into a productive session and a mediated resolution becomes far more challenging.

If attorneys have oversold their positions, their clients will probably be reluctant to adjust their numbers at the mediation table even when they learn new information and additional interests emerge. However, if attorneys have primed their clients to be flexible and open-minded entering the mediation, they will more likely be receptive to gaining new insights and exploring a myriad of settlement possibilities. When the end goal is shifted to finding an outcome that all sides find fair and reasonable, everybody wins.

At the start of negotiations, it is important to note that opening numbers are not indicative of the success or failure of the mediation. Complainants should not be offended by lowball starting offers, and defendants need to resist the urge to get up and walk out if they receive overly high demands. Initial negotiating figures are part of the mediation process. When a skilled mediator is allowed to work their magic and take the parties through the full mediation, it is amazing how often seemingly unresolvable disputes at the outset can turn into mutually satisfactory settlements for all sides.

When mediating, keep in mind that negotiating numbers need to make sense and parties must be prepared to justify them. If a party cannot adequately explain or substantiate a monetary figure, how can the mediator be expected to sell it? How can the other side be expected to buy it? There may be a big difference between what a party requests and what is realistic or reasonable.

With respect to final numbers, bottom line approaches—especially early on—can be counterproductive to mediation. Once a party has drawn a hard line in the sand and dug in their heels with a take-it-or-leave-it offer or demand, it becomes much harder for them to move off it because now they have to save face and maintain credibility. And the other side will lose motivation to proceed if they see that they're the only one with any movement. Parties are in a much better position to negotiate if they leave themselves the latitude to explore new options and approaches.

Emotional distress

Emotional distress claims in cases of harassment and discrimination can no longer be downplayed or overlooked. Recent verdicts in New Jersey for "garden variety" emotional distress—where complainants haven't sought medical treatment but claim ailments like lost sleep, anxiety and depression—have been enormous.

In the notable case *Cuevas v. Wentworth Group*, 226 N.J. 480 (N.J. 2016), a jury awarded two Hispanic brothers $1.4 million in emotional distress damages stemming from race-based discrimination and retaliation under the New Jersey Law Against Discrimination (NJ LAD) despite the brothers neither seeking mental health treatment nor using expert testimony or independent corroborative evidence. The trial court, Appellate Division and Supreme Court all denied the defendant's motion for remittitur.

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In 2019, in another case where plaintiff had no documented medical care, (see *Nathan* J. *Johnson v. State of New Jersey, Department of Banking and Insurance* [Docket No.: MER-L-416-14]), a Mercer County jury awarded a black banking regulator $986,238 in emotional distress damages caused by harassment and retaliation under NJ LAD.

No one can predict whether a case will result in runaway damages or fee shifting, but these are factors that must be considered in employment matters. A professional mediator will help all parties benefit from a customized mediation process that aims to avoid the risks associated with trial.

Confidentiality and tax issues

One of the main advantages of mediation is the confidentiality that it affords. During the mediation itself, the mediator will not share information with the other side if he or she is instructed to keep it confidential, and will only relate what he or she can safely disclose. If a settlement is reached and the parties elect not to discuss the terms of the deal, a nondisclosure agreement (NDA) will be incorporated into a written agreement.

In the context of employment mediations, an NDA was a standard part of a settlement agreement until enactment of the Tax Cuts & Jobs Act (TCJA) effective on Jan. 1, 2018[4] and New Jersey Senate Bill No. S-121 (S-121) supplementing Title 10 of the Revised Statutes.[5]

Under the TCJA, deductions are no longer allowed for settlements or payments related to sexual harassment or sexual abuse if the settlement or payments are subject to an NDA.[6] While this new act aims to stop secret settlements that have allowed sexual predators to remain hidden from law enforcement and the public, it puts employers in the position of having to choose between nondisclosure and deductibility. If employers enter into a settlement of a sexual harassment case, they cannot deduct the settlement if they want to keep the matter confidential. Moreover, neither side can deduct attorneys' fees for settling sexual harassment claims if there is an NDA.[7]

S-121, also called the #MeToo Bill, is the new law sponsored by Senate Majority Leader Loretta Weinberg and Senator Nia H. Gill, intended to help make workplaces safer by prohibiting NDAs that have been used to silence and intimidate victims of sexual assault and harassment.[8] Under S-121, "A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable against a current or former employee who is a party to the contract or settlement."[9]

As a result of S-121, questions have arisen as to how complainants who want confidentiality can be accommodated, whether non-disparagement clauses can be construed as confidentiality agreements and treated as NDAs, and whether the new law will have the deterrent effect on sexual harassment in the workplace that lawmakers intended. While these issues continue to be interpreted, parties need to be sure to identify, discuss and agree upon all non-monetary components of a settlement prior to signing an agreement. Mediators and counsel should make certain that parties understand their settlements have tax implications and know what they can deduct, exclude, and report to the IRS.

Importance of early resolution

Prompt resolution avoids unnecessary expense and exposure, especially in contentious employment disputes where fee-shifting, emotional distress and punitive damages awards are real risks. Attorneys and mediators need to help parties understand that if they can settle their cases with acceptable terms, it will yield significant savings of time, money and disruption in their lives and businesses.

For complainants weighing an offer versus continuing with litigation, they must be fully advised of the consequences of not settling in order to make an informed decision. In cases of sexual harassment and discrimination, they need to be aware that by rejecting an offer, they face the prospect of reliving the event in the courtroom, potentially paying the costs of a full trial, and ending up with less or nothing.

During the mediation session, the mediator can help the aggrieved party focus on the value of closure. If the party can envision what they will do when the case is over and focus on a positive outcome, they will have added motivation to settle. By getting past this bad chapter in their life, they will be able to look ahead to the future.

Defense attorneys should use the help of the mediator to get a better feel for what their clients' priorities are and whether it makes sense for them to continue with years of litigation or eliminate their risks early on. In sexual harassment cases with ugly allegations, businesses have to consider whether they can afford the public exposure of such claims. If cashflow or finances are a concern, they must also assess whether this is a battle worth fighting, or whether their time and energy could be better spent elsewhere, such as growing their business.

Conclusion

Mediation is becoming more acceptable to employment lawyers on both sides of the bar as they recognize the value of settling presuit, minimizing the costs and uncertainties of trial, and avoiding the potential for fee shifting and runaway damage awards. Mediation is an ideal early dispute resolution forum for emotionally-charged matters such as sexual harassment and discrimination in that it can be tailored to the specific needs and goals of the parties and provide the aggrieved party with a safe environment and outlet for their emotions. ⚖

Endnotes

1. https://www.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm U.S. EEOC reported a 13.6% increase in sexual-harassment complaints from FY 2017 to FY 2018. The increase is significant in that the overall number of workplace charges filed with the EEOC decreased during the same time period.
2. https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral
3. See *Blakey v. Continental Airlines, Inc.,* 992 F**.** Supp. 731 (D.N.J. 1998) and 164 N.J. 38 (2000)
4. S.2254 (115th): Tax Cuts & Jobs Act**,** *Section 13307*
5. P.L. 2019, Chapter 39, approved March 18, 2019 Senate, No. 121 - codified as N.J.S.A. 10:5-12.7 through 12.8.
6. S.2254 (115th): Tax Cuts & Jobs Act**,** *Section 13307*
7. *Ibid.*
8. P.L. 2019, Chapter 39, approved March 18, 2019 Senate, No. 121 - codified as N.J.S.A. 10:5-12.7 through 12.8.
9. *Ibid.*

ARBITRATION IN NEW JERSEY: IS IT ALWAYS CONFIDENTIAL?

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City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

2. *See, e.g., Ragone v. Atl. Video at the Manhattan Ctr.,* 595 F. 3d. 115 (2d Cir. 2010); *Isaacs v. OCE Business Servs., Inc.* 968 F. Supp. 2d 564 (S.D.N.Y. 2013).
3. *Atalese v. U.S. Legal Services Group, L.P.,* 219 N.J.430. 99 A.3d 306 (2014). *Atalese* has not been reviewed by the New Jersey Supreme Court but is inconsistent with *DIRECTV, Inc. v. Imburgia,* 136 S.Ct. 463, 471 *(2015*), where Justice Breyer, writing for the majority, quoted the FAA, 9 U.S.C. § 2, as mandating that any state rule invalidating a contract would have to apply to the revocation of any contract. Indeed, in *In re Remicade (Direct Purchaser) Antitrust Litigation*, __ F.3d __, 2019 U.S. App. LEXIS 27669 (3d Cir. Sept. 13, 2019), the Third Circuit established that, while *Atalese* may control in New Jersey state courts, it will not be applied in the federal courts in the Third Circuit.
4. In *Flanzman v. Jenny Craig* __ N.J. Super. __(App. Div. Nov. 13, 2019), the Appellate Court held that the failure to name an arbitral provider invalidated the arbitration agreement because there was no meeting of the minds about the rules that would govern the arbitration (characterizing this as a standard contract defense); see also *Kleine v. Emeritus at Emerson,* 445 N.J. Super. 545,552-53 (App. Div. 2016)(finding lack of mutual assent because the arbitration process contemplated by the arbitration clause was unavailable at the time the parties executed the agreement).
5. *See* 9 U.S.C. § 10(a).
6. N.J.S.A. 2A: 23B-1 *et seq*. I
7. N.J.Stat.§2A:23B-4(c). *See also Minkowitz v. Israel*, 433 N.J. Super. 111, 132 (2013) (Further, "parties may agree to a broader review than provided for by the default provisions in the…Act," *citing*, *Fawzy v Fawzy*, 199 N.J. 456, 482n 5 (2009). Their agreement must "accurately reflect the circumstances under which a party may challenge the award and the level of review agreed upon.") This New Jersey exception derives from a concurrence authored by Chief Justice Robert Wilentz in *Perini Corp. v. Greater Bay Hotel & Casino, Inc.,* 129 N.J. 479 (1992).
8. *See,* Canon VI of The Code of Ethics for Arbitrators in Commercial Arbitration (2004).
9. *See, e.g.*, Rule R-39b, AAA Employment Arbitration Rules.
10. S*ee, e.g., Canada v. Perkins Coie,* No. 18 Civ. 11635, slip op. (S.D.N.Y. Dec. 12, 2018) (refusing to keep documents sealed in discrimination lawsuit despite a joint request by plaintiff and defendant).
11. NJ S 10:5–12.8