

Challenges of Sexual Harassment Mediation on Campus by Naomi Z. Levine

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With an increase in understanding of the liabilities and expense of sexual harassment, more colleges and universities are considering the use of mediation.

A neutral mediator facilitates a structured process to assist the parties in generating options to resolve their dispute. The mediator has no power to bind the parties to any solution, but may assist in drafting a contract which articulates the agreements arrived at by the parties. The use of mediation suggests fewer costs, avoidance of lawyers and costly litigation, a speedy solution, the likelihood of more confidentiality, the avoidance of publicity, and not having to involve other unwilling "witnesses" in the dispute. When it works, it's a "win-win" situation which promotes mutual respect, dignity, and understanding.

Unfortunately, the use of mediation may, in sexual harassment matters, result in problems. Sexual harassment complainants often have low self-esteem and little understanding of their rights and options. They may experience enormous pressures from their friends to not "make a fuss." They may fear ramifications and retaliation, and suspect that everyone knows all about the complaint. Often their friends and family think that they must have provoked the harassment.

For the respondent, the mediation process may offer the illusion of

a quick, relatively painless solution to an embarrassing situation, a solution which may avoid punitive action. If the respondent believes him/herself to be "innocent" of the allegations, mediation may appear to be a lure to end the matter. The respondent may go along with the process and seem to be cooperative, but post-mediation bitterness and anger may result in disruptive behaviour.

In such highly charged issues as sexual harassment, complainants may have expectations of possible disciplinary options or of punishment which may not be in keeping with the particulars of the case. Respondents, too, may come to the mediation table with expectations that they can make the situation "go away" by appearing to be conciliatory, apologetic, and cooperative. They may cajole the complainant, play at repentance, and convince the complainant that they have "learned their lesson." It's a good strategy; it puts the complainant on the defensive, causes him or her to feel unsure (perhaps he or she "misjudged" the behaviour or "over-reacted"), and may result in a resolution which would be far softer than would be appropriate, simply because the respondent has played on the emotions, vulnerability, and insecurities of the complainant. It is entirely possible that the disputants may arrive at a resolution that is, on the face of it, mutually satisfactory, but which would not satisfy the responsibility of the college or university.

It is often accepted that, in any dispute, there is "right" and "wrong" on both sides; the "blame" is never solely the fault of one of the parties. In sexual harassment, however, that is not necessarily the case. The one thing that many complainants and respondents have in common is that they both are ready to blame the complainants. In a "true" case of harassment, however, the complainant has no culpability, has not provoked, seduced, encouraged or condoned the harassing behaviour. To bring the parties together in a mediation

may suggest that the educational institution has placed the responsibility for solving the problem on the complainant. Complainants may be forced, through mediation, to consider that the respondent has a position which may "justify" the behaviour.

There must, therefore, always be a "third party" vested interest at the mediation, i.e., the responsibility of the college or university, and, perhaps, there may be a fourth party, the Public Interest, represented by such pieces of legislation as a Criminal Code.

Whether to embark on the mediation process is a judgment call that an experienced and knowledgeable advisor should be free to make in consultation with both parties. The advisor should be clear in explaining to both parties that the mediated resolution must be within the bounds of acceptability under the law, and in accordance with the college's or university's responsibility.

If it is the school's responsibility to not permit harassment or to stop harassment, and if the school has delegated the matter to mediation, the question may arise as to whether the mediator is an agent of the school with the responsibility of terminating the harassment. Where there is no legislated confidentiality, mediators may cause both parties to agree that neither will subpoena the mediator, should the matter go to court. This agreement may be overturned by the court, which would consider the following:

1. The communications must originate in a confidence that they will not be disclosed.
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
3. The relation must be one which in the opinion of the community ought to be sedulously fostered.

4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

If a mediator, during the course of a mediation learns that the respondent's behaviour could potentially bring litigation and liability upon the school, or cause harm to other students, is the mediator not obliged to advise the school if for no other reason than to prevent future harm that may be caused by the respondent? And, if this warning was NOT given, and harm resulted, would there not be possible litigation against the respondent, the school, and the mediator for failure of the duty to warn and, perhaps, for failure to take steps to prevent an illegal act?

In any case, if the mediator is being paid by the school for acting as a mediator, by virtue of that fee, he or she may be seen as an agent. The issue of the independence of the mediator needs to be addressed.

When the mediator is also the harassment advisor, the problem becomes more complex. Harassment advisors are usually either neutral or act as the advocate/supporter of the complainant (depending on the policy). If the position is neutral, then the advisor is usually seen as an advocate of the policy, i.e., the person charged with the responsibility to cause harassment to stop. If information is given to that person during the mediation which causes him or her to believe that the harassment will not stop and if he or she does nothing about it, the credibility of the advisor and of the policy will be undermined. If the advisor's role is to act as a support to the complainant, then that advisor has no business acting as mediator anyway, as the role of the mediator must be and must be perceived as being neutral.

All too often in sexual harassment cases, the matter is resolved by a

mediated settlement between the respondent and the school, whereby the respondent may acknowledge that he or she has been guilty of the alleged behaviour, and is allowed to change dorms or live off campus rather than leave the school. This approach is often satisfactory to all involved and may be arrived at as a result of mediation. Bad press is avoided, there is no need for an inquiry, and costs of litigation are avoided. The respondent is pleased not to have to be put to an inquiry and to not have the matter become public.

A problem may arise, however, if the respondent harasses someone else on campus. The new victim may sue, alleging that the school did not take proper care to assure that the campus would be safe. Needless to say, this issue raises concerns about defamation and about privacy. The school is not obliged to provide information about sexual harassers being on campus or about previous mediated settlements.

It should also be remembered that, since the complainant is not usually a party to these deliberations, he or she may still sue either the respondent or the school or both. Even if the lawsuit is unsuccessful, the fact of the litigation may act to bring the matter to the public eye. In that case, a school which is represented as having tried to "buy" itself out of an uncomfortable situation through mediation may get the bad press they tried to avoid by using mediation, and the respondent may also find that the silence he or she thought was negotiated cannot be guaranteed.

Does this suggest, then, that mediation should never be attempted for the resolution of sexual harassment complaints? Not necessarily. In many situations, particularly when the alleged behaviour is "low level," and when the disputants have to continue working together, some forum should be used to allow them to come together. It may

be that other forms of ADR may serve better, e.g., "shuttle mediation, or conciliation.

Does this also suggest that mediation should be excluded in policies? No. Mediation, particularly "shuttle mediation," can be a valuable tool, but should be considered as an option, rather than as a requirement.

Although there are many mediators who are experienced and qualified, it is essential that they be knowledgeable in the areas of harassment law and related legislation. It must be remembered that the resolution of harassment disputes is not the province simply of the disputants; liabilities are, of necessity, a component to be considered. A mediator who is unaware of the potential for litigation and of the obligation to satisfy legislated requirements may allow a resolution which would be open for challenge in the courts.

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