

## Mediating Employment Disputes Ethically: Ensuring Quality and Fairness in the #MeToo, #BLM, #COVID-19 Era

By CHRIS M. KWOK

### A Mediator Is on Everybody's Side

Mediators operate as independent, unbiased third parties negotiating with all parties to a dispute. As such, they have an ethical obligation to ensure that mediations are conducted fairly.

As humans, we are inherently opinionated. We have backgrounds, biases (both conscious and unconscious), predilections and patterns. We are currently dealing with many critical employment-related concerns, including how to protect employees' health and safety during the coronavirus pandemic, how to address systemic discrimination issues in support of the Black Lives Matter movement and the rise in anti-Asian sentiment and how to continue to investigate and adjudicate waves of workplace #MeToo allegations. To make things even more stressful, each of these issues is playing out during a time of economic instability. According to a recent article<sup>1</sup> in the Wall Street Journal, the U.S. government is carrying debts at levels not seen since World War II. These are unique times.

As the employment bar advocates for employers and employees, mediators have the challenging duty to understand the

impacts of our current situation and help all parties find equitable solutions to their disputes. Mediators must provide a fair, professional and neutral process.

### Model Rules Provide Guidelines and Highlight Advantages of Mediation

The Model Standards of Conduct for Mediators, promulgated in 2005 by the American Arbitration Association, American Bar Association and Association for Conflict Resolution, helps guide mediators who encounter ethical quandaries. This Rule includes the following nine broad standards that carve out "fundamental ethical guidelines for persons mediating in all practice contexts": (1) self-determination of the parties, (2) impartiality of the mediator, (3) freedom from conflicts of interest or the appearance of conflicts of interest, (4) competence, (5) confidentiality, (6) quality of the process, (7) truthful advertising (8) clear and complete information about fees and charges, and (9) behavior that advances the practice of mediation.

The first standard, self-determination, is key to an ethical process. A big part of self-determination is the fact that mediation is a voluntary process. Even in instances where employees and employers may be compelled to engage in

good-faith mediation by contract, they are always free to walk away from negotiations or refuse a settlement. This includes parties having the flexibility to work with a mediator to customize a mediation by mutual agreement.

Research reveals that most mediations result in settlement, so there is hard science in support of encouraging disputing parties to work things out at the mediation table (or in the virtual mediation room). Initiatives like the New York State Unified Court System's 2019 "presumptive ADR" program automatically refer many cases to mediation. In these instances, parties must attempt to reach an amicable resolution; however, settlement is not mandatory.

### Real-World Complexities Raise Confidentiality Conundrums

Mediators see it all: the good, the bad and the head scratching. Some scenarios may challenge the limits of model rules and thus require a more thorough analysis.

### Hypothetical 1: Fairness in a Virtual Mediation

During a virtual mediation, one party begins experiencing



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connection issues, as their voice is cutting out and their image is pixelated, so it's nearly impossible to detect tone or see body language. There also seems to be another person lurking in the background.

Can you ensure a seamless process? Can confidentiality be guaranteed?

Although mediators are not expected to be technical wizards, keeping tabs on the quality of the process is a basic responsibility. While all types of scenarios may present themselves during virtual mediations, the duty to ensure a fair proceeding remains. As online platforms increase in sophistication and complexity, could technical savvy be included in the overarching requirement of competency? Insuring a stable and fast internet connection for all is still out of reach – and we will need to consider it more as a utility – like and water and electricity, as we increasingly rely on online dispute resolution.

The presence of an unidentified person in the hypothetical raises questions about protecting confidentiality. Should mediators go beyond the standard mediation agreement to keep matters confidential? Is the risk of breach increased? How can a mediator guarantee that documents shared electronically remain confidential? As virtual mediations become more common, we are working our way towards best practices in these circumstances.

### ***Hypothetical 2: Mediation and Criminal Activity***

During a mediation, it seems that an employee might be breaking the law.

Are mediators required to report potential criminal conduct?

Current analysis indicates that reporting is not required because

it would violate confidentiality obligations and it would require the mediator to “judge” the criminal nature of the conduct in question. A mediator is not a judge.

### ***Hypothetical 3: Honoring the “Harvey Weinstein Tax”***

During an unlawful separation mediation that includes, among other claims, an allegation of sexual harassment, counsel for the employer says it is close to a settlement agreement that the employee is happy with. However, counsel wants to avoid categorizing any of the damages as reparations for the harassment. Is this acceptable?

Influenced by the #MeToo movement that began in 2017, federal legislation eliminated the tax deduction for companies for any confidential settlement related to sexual harassment and/or sexual abuse. Sometimes referred to as the “Harvey Weinstein Tax,” confidential settlements are now discouraged in order to serve the public interest (“IRS Gives Tax Break to Sexual Harassment Victims,”). This reflects the legislative intent to deter confidential sexual harassment settlements. The status quo often kept harassers on the job, while victims had to either endure harassment or quit.

Many settlements have multiple bases for claims, so lawyers may be able to characterize a certain amount of a settlement as not related to sexual harassment and/or sexual abuse in order to preserve some of the tax deduction. The larger the settlement, the bigger the incentive to do this.

As a result, mischaracterizing settlements in order to avoid taxes has become an issue. For mediators, the duty of truthfulness could come into play. If you are

involved in the drafting of a settlement agreement, remind the parties that monetary apportionment must be consistent with the alleged facts of the case. Mediators working governmental agencies at all levels have less leeway here, as the disparate goals will impact the drafting of any agency settlement agreement.

### ***Serving Evolving Public Interest and the Greater Good***

It has been 15 years since the Model Standards of Conduct for Mediators was last revised. In 2005, preserving confidentiality and flexibility for mediators was paramount. The legal and social landscapes have changed dramatically since then.

Generally, we have not expected affirmative action from a mediator who has been confronted with an ethical dilemma. The standards have hewed closely to withdrawal and non-participation as paths for a mediator. Recently, social protests have sparked legislative changes in pursuit of policy goals.

Do mediators have a responsibility to help further these goals? The time to revisit the Model Standards of Conduct for Mediators has arrived. Could this reexamination herald a new era where mediators have broader ethical duties?

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