



A Case For Litigation Alternatives In #MeToo Movement

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Recently the nation has been riveted, horrified, bewildered and challenged by the cascade of sexual harassment and sexual abuse allegations leveled against high-profile personalities in the media, industry, the church, education and the arts.

Reactions vary widely, but the #MeToo movement is a powerful reminder that, for all the headline-grabbing cases, there are thousands (or perhaps millions) more examples of sexual harassment and abuse that have gone unreported, unaddressed and unresolved involving non-celebrities who are equally impacted by these experiences.

In this highly litigious society, many are asking why these cases languish, are not reported or not challenged through normal legal channels. Why do the complainants wait so long to report? When they are reported, why is there such an outcry over the failure to address the complaints? After all, legal causes of action and remedies are available under federal and most state laws.

The answers to these issues are complicated. One significant factor is that the adversarial legal system is ill-equipped to address the complex issues these cases raise.

Adversarial legal proceedings are highly public, exposing both alleged perpetrators and victims to the plethora of inevitable effects on their personal and professional lives. Thus, complaints often result in rapid settlements with nondisclosure agreements. These settlements may address the economic issues, but rarely reach the much more intractable issues of self-esteem, protection of society, differences in perspective and culture, and, most importantly, truth-sharing and listening to the stories of all the parties. When these matters do make it to the courtroom, many of these same shortcomings persist because of the constraints of litigation.

Something is very wrong when people who believe they have been wronged feel they cannot seek legal redress. The reason for the silence resounds in the statements of those victims who do come forward: There are very personal, emotional and powerful impediments and disincentives to seeking legal redress. These include embarrassment, threats to future career

opportunities, powerlessness, the risk of bringing shame to family and friends, marriages in jeopardy, the potential economic impact as well as the impact on children, and the risk of public scrutiny.

There simply must be a way to provide meaningful legal responses that take into account the complex dynamics of a sexual harassment or abuse case.

I spent 25 years as a federal appellate judge. However, I now realize I saw very few sexual harassment or abuse cases — particularly at the appellate level. No doubt the issues mentioned above had an impact on that aspect of the caseload.

I then had the privilege of serving as dean of the Pepperdine University Law School, where I was entrusted with administrative responsibility over the premier dispute resolution program in the nation, the Straus Institute for Dispute Resolution. There I learned from gifted lawyers that litigation may not be the best alternative in all situations even if there is clearly a legal claim. Sometimes the individually crafted and confidential terms of arbitration and mediation can account for human and legal complexities that elude parties in litigation. I learned about the importance of trust, neutrality, listening, mutual respect for all the voices, open communication, candor and even sometimes an apology.

As I have watched the #MeToo movement unfold, I have become convinced there is an important and powerful role for alternative dispute resolution in these cases.

ADR principles can constructively inform and build the framework for effective avenues of achieving a complaint processes within institutions. One of the first responses of impacted institutions is to provide sexual harassment training. That is a good start, but training is not the full answer. Building a culture of trust and mutual respect requires far more than identifying what is and what is not sexual harassment. It is more than just identifying one or more individuals out of the chain of command as the point of complaint. These are the easy responses. The far more difficult response is one that all of society and each institution must take seriously. To move forward, it is essential that the institution create a climate where employees, students and all affected persons know they will not be penalized for asserting their perceived concerns. Additionally, alleged perpetrators must have a chance to respond effectively and appropriately.

Alternative dispute resolution also is tailor-made for sexual harassment claims. The values of confidentiality, listening, neutrality and mutual respect are underpinnings of ADR. Although economic remedies are important, other tailored remedies can respond to the individual interests at stake. Sexual harassment and abuse claims are, by their very nature, fact-intensive. In each situation there must be a determination of what constitutes harassment, what consent is, what each party's understandings are, and what matters to the parties.

Context matters. Culture matters. Neither is an excuse nor is either a defense, but both play powerful roles in trying to move toward a fair, reconstructive and forward-looking determination and remedy.

ADR provides an avenue for heretofore silenced victims and alleged perpetrators to try to reach such remedies without the attendant public consequences of litigation. Perhaps as a societal, institutional and individual case matter, we can begin to move beyond the tragedies represented by the #MeToo movement by employing the principles and processes of alternative dispute resolution. We must try to get to a better place than we find ourselves at this moment in history.

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