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COVER STORY

In #MeToo era, misconduct settlements stay confidential

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Benchmark Resolution Group mediator Louis Meisinger's services are often in demand for settlement discussions in matters involving accusations of sexual harassment or assault.

As skepticism grows and legislation tightens on the confidentiality agreements that kept accounts of sexual misconduct in Hollywood from coming to light, the only path remaining for both accusers and accused hoping to keep their dispute from the public's eye may be in the mediator's office.

Taking effect in January 2017, Section 1002 of the California Civil Codes of Procedure precludes parties in a civil action from reaching a confidentiality agreement as part of a settlement if the cause of action would be prosecutable as a sexual offense.

While parties can't block the facts of a case with a confidentiality agreement once a civil action's been filed, mediators in pre-litigation still can.

"Many lawyers and even some mediators are not yet aware of this section," said Michael Latin, a former superior court judge now serving as a mediator at Benchmark Resolution Group.

Many recent cases where high profile parties have sought to avoid the preclusion of a confidentiality agreement have ended up at Benchmark, a large portion of which are handled by either Latin or fellow former Los Angeles County Superior Court Judges Louis Meisinger and Enrique Romero.

These cases aren't easy to mediate, said Carney Shegerian, a plaintiff's attorney at Shegerian & Associates Inc. who has been active in the area of pre-litigation mediation. When a dispute needs to be resolved, Shegerian said Latin, Meisinger, and Romero have proven track records, making each a natural choice.

"They just happen to be the best of the mediators out there," Shegerian said. "I'm not surprised they've seen a majority of these cases. From a plaintiff's perspective, we don't see these retired judges as just another arm of the defense machine."

The mediators agreed in a discussion at Benchmark's downtown office last week that legal and societal changes have altered the dynamics of settlement discussions in cases involving accusations of sexual harassment or assault.

Meisinger noted, for example, Internal Revenue Code Section 162(q), which provides that in cases of sexual harassment or abuse, "payments, including attorney's fees, are no longer considered deductible."

The section change, signed into law as part of the Tax Cuts and Jobs Act of 2017 in December, isn't likely to deter parties from settling, Meisinger said. But "in higher-value cases, it's not an insignificant issue."

While he's not aware of any further changes to confidentiality agreements working their way through legislatures, Meisinger said, the topic remains a popular point of discussion publicly.

But likely more than any tax code alteration or statutory tweak, it's been the public's reaction to allegations of sexual harassment and sexual assault that's had the most significant impact on the leverage and bargaining power parties in these mediations have.

"The environment has changed in the last five or six years," Latin said. "Allegations of sexual misconduct are more highly charged now than they were previously — particu-

Even in #MeToo atmosphere, most harassment settlements remain confidential

larly in the entertainment industry — but this applies to other industries as well."

The #MeToo movement has brought positive changes by emboldening victims who may have previously been too afraid to come forward, Latin said, "the flip side of that, however, is it can present opportunities for abuse."

"In this highly charged environment, a false claim can have value — and ruin a career — just like a genuine one," Latin explained. "It's become dangerous territory — careers, and even lives — can be ruined on both sides in these cases."

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Disputes centered on "gray areas" are where pre-litigation mediation can really be effective, said Ivy Kagan Bierman, an entertainment partner at Loeb & Loeb LLP who has been an in-demand consultant for companies in Hollywood and the corporate world dealing with high-profile sexual harassment complaints. As acceptable norms for workplace conduct develop, an act once perceived as an innocent gesture could now end a career.

"Sexual harassment allegations can be so damaging to someone's career and personal life. It's critical that there not be a rush to judgment by companies or the public and that there be an investigation to determine whether they've done what's alleged," Bierman said.

"I've done enough of these over the years to know that there can be gray areas where something may not rise to the level of sexual harassment under the law but [still] make someone uncomfortable," Bierman added.

Shegerian said cases involving sexual harassment against an employer have been "traditionally super difficult to litigate on the plaintiff's side, where it's one person's voice under the economic thumb of an employer." But he agreed that within the last few years — before #MeToo entered the national conversation — the allegations have been taken much more seriously.

"It's opened up the door to a lot of cases that might not have been viable before," Shegerian said.

While dynamics overall have shifted, the mediations themselves remain relatively straightforward. Meisinger said that, unlike commercial cases he handles, parties don't spend as much time on the merits in a sexual harassment matter, "because the settlement value does not turn on who might ultimately prove right or wrong."

"It's not our job to tell somebody whether they're right or they're wrong," Romero added. "It's usually just to try and settle the case and look at it from the perspective of what's going to happen if it doesn't."

Romero said he's not aware of any case "involving someone up the food chain in the corporate world or Hollywood" settling without a confidentiality agreement. If a putative plaintiff were to fight confidentiality, Romero said, defendants aren't likely to budge on the issue.

There are prominent plaintiff's attorneys handling these cases who are opposed to blocking confidentiality agreements, Romero said, as they feel it would discourage plaintiffs from going forward. Accusers would be forced to litigate their case, potentially over the course of years, directly in the public eye.

"All their claims would be vetted and out in the open," Romero said. "If you're coming to me for a prospective job, and I find out you're the plaintiff — male or female — that had sued the head of whatever company, you may be exceptionally well-qualified, but they'd say, 'We'll get back to you.' And that's the last time you'll ever hear from them."

And as they would lose the leverage a confidentiality agreement provides, Meisinger said, further legislative changes to confidentiality agreements have "the potential to cut down the settlement value" for putative plaintiffs.

"Unless they change the law and decide to foreclose settlements with confidentiality agreements, this will continue to be a critical element," Meisinger said.

Asked whether he thought changes were necessary, Meisinger said "as a neutral mediator, that's not a judgment I'm prepared to weigh in on."

Bierman said legislative restrictions on confidential settlement agreements would attack the symptom rather than the disease. While confidentiality agreements may have stopped accusers from coming forward sooner in some situations, Bierman said accusers often want confidentiality, too.

"It's where you have these repeated settlements for people accused multiple times of sexual harassment that's the problem," Bierman said. "Thankfully, I think that's going away now."