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Mediation's role in tackling the surge of childhood abuse cases

By Keri Katz

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In 2019, Governor Newsom signed into law AB 218, creating a three-year revival window for adults subjected to sexual abuse as minors. This made it possible for victims to file civil lawsuits that would otherwise have been barred by the statute of limitations.

Last year, the legislature expanded the statute of limitations for sexual assault claims under Code of Civil Procedure Section 340.1, opening the door for survivors to file lawsuits for actions that occurred decades ago. The Justice for Survivors Act, AB 452, effective Jan. 1, 2024, removed the requirement that most plaintiffs file their claims before the age of 40, allowing survivors of long-ago trauma to come forward and seek justice. For civil actions arising on or after Jan. 1, 2024, the law effectively eliminates all time limits for recovery of damages suffered as a result of childhood sexual assault.

Now the volume of cases is starting to overwhelm courts. How can this many cases be managed and tried, so many years after the abuse occurred? How can plaintiffs have their day in court, given the almost insurmountable loss of records, witnesses, and memories?

The best solution, for most of these cases, may be mediation. Mediation offers claimants an avenue for resolving their claims in a safe, respectful and confidential manner while offering ways to address evidence, including privileged evidence, not generally available in the courtroom.

Importantly, some childhood sexual abuse cases should pursue court action before entering mediation. Court rulings in these cases can provide helpful resolution to many issues and can sharpen the focus of the meditation by determining the proper parties, causes of action and defenses.

Benefits of mediation

Unlike jury trials, which can take years to calendar, mediations can be scheduled and completed much sooner. But beyond timing, mediation offers important benefits not available in the courtroom. It can more flexibly address unavailable evidence while providing a much-needed level of confidentiality. Plaintiffs are empowered to tell their difficult stories, and defendants are able to be heard, in a confidential, controlled setting.

Importantly, mediation can protect alleged childhood sexual abuse victims from the secondary trauma of having to relive their abuse in front of a judge or jury in an open courtroom. Mediation of sexual assault cases can be a deeply emotional experience for both survivors and those accused. How much better to deal with these issues in a safe, trustworthy environment. Skilled mediators manage parties' emotions and expectations, enabling plaintiffs to tell their stories in an intimate, closed environment while providing defendants with a degree of confidentiality not available in the open courtroom.

Evidence

Time may heal all wounds, but it can also destroy all evidence. Many childhood sexual assault cases can be difficult, if not impossible, to prove and defend in court due to the loss of records, witnesses, and memories. In some instances, plaintiffs and defendants may be looking for evidence that is more than two decades old.

According to California Evidence Code Section 240, a witness may be "unavailable" because the "the court is unable to compel his or her attendance by its process" or because a party "has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." Parties may have to invest considerable effort to prove that a witness is unavailable. The mediation process is far less rule-bound; such effort may not be required.

Documents may also be challenging to track down. For childhood assault claims, records could be in the custody of schools, juvenile facilities, or daycare centers. Over time, they may have been lost or destroyed. If documents can be found, Evidence Code Section 1331 allows the introduction of "ancient writings" as an exception to the hearsay rule. But this exception only applies to writings more than 30 years old that were acted upon as if they were true. When witnesses are no longer available, this can be difficult to establish.

Evidence Code Section 1280 allows the introduction of records "made by and within the scope of duty of a public employee," "at or near the time of the act, condition, or event," and in such a way "as to indicate its trustworthiness." Be-

cause documents must have been maintained over the course of time, in many instances there is no way to establish that they still exist. Even if documents were maintained, it may be difficult to lay a foundation establishing that the record is trustworthy due to the passage of time.

Neither of these exceptions is thus likely to provide either party with sufficient evidence to establish their case in court. In mediation, however, there can be far greater latitude for dealing with older documents and allowing the introduction of seemingly credible oral statements without documentation to back up such statements.

Confidentiality

Confidentiality is perhaps the signature advantage of mediating childhood sexual assault claims, a critical benefit not available in court. Plaintiffs can comfortably and confidently tell their stories, and defendants can lay out their sides of the same stories, all without the imminent risk of public disclosure. Attorneys on both sides should, however, be mindful of legal restrictions that have been imposed on settlement agreements in childhood sexual assault cases.

The California legislature determined that it was against public policy to prevent victims from telling their stories. In 2021, it enacted SB 331, the "Silenced no More" Act, which bars confidentiality requirements in sexual abuse settlements. This restriction, which applies to claims for childhood sexual abuse under Code of Civil Procedure Section 1002, does not mean, however, that those claims will become public or that victims' identities will be disclosed. In most cases, claimants may request inclusion in their settlement agreements of a provision that shields the claimant's identity and medical information or any information revealing the nature of the relationship between the plaintiff and the defendant.

Assuming defendants may not want to go public, information about sexual assault claims should, therefore, not find its way into the public domain unless the plaintiff chooses to speak out. Although the law may prohibit confidentiality clauses in sexual assault settlement agreements, it should not prevent settling such cases.

Privilege

As noted above, the law imposes a strict obligation of confidentiality on all communications that take place at a mediation, including those between participants that happen outside the meditator's presence, as long as the communications are materially related to the mediation. This can provide significant comfort to parties who must relive their experiences during the mediation.

Evidence Code Section 1119 protects from discovery evidence of "anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation," as well as writings prepared "for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation." Most importantly, "all communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential."

Privilege also protects from disclosure other communications under Evidence Code Section 912, such as those between physician and patient (Section 994), sexual assault counselor and victim (Section 1035.8), and psychotherapist and patient (Section 1014). A party does not waive privilege unless he or she has, without coercion, "disclosed a significant part of the communication or has consented to disclosure made by anyone." The fact that a party attended a mediation does not, by itself, waive the privilege, and certain privileges, such as the psychotherapist-patient privilege, are generally construed in favor of the patient (See *Roberts v. Superior Court*, 9 Cal.3d 330 (1973).

Privilege can be waived if specific, significant parts of the protected communication are disclosed. (See *In re Marriage of Kieturakis*, 138 Cal.App.4th 56 (2006); *Fish v. Superior Court*, 42 Cal.App.5th 811 (2019)) Filing a childhood sexual assault claim can raise a question as to whether the physician-patient or psychotherapist-patient privilege is subject to the so-called "in-issue" doctrine, which creates an implied waiver "when [the privilege's holder] tenders an issue involving the substance or content of a protected communication." (*See* Evidence Code Section 1016.)

Insurance

Defendants – individuals, corporations and public institutions – may look to insurance carriers for coverage against the costs of settling childhood sexual assault claims. Because the alleged acts may have gone on for years, different policies may have covered different periods within a single claim. It is therefore crucial that parties analyze the scope and length of coverage prior to commencing mediation; without this knowledge, it will be difficult to evaluate settlement parameters.

A common thread may link defendants to multiple plaintiffs or claims. Bundling such cases together for mediation allows parties to control fees and costs, examine coverage, and understand the extent of funds available to settle the various matters. When claims are consolidated for mediation, however, the mediator must take steps to ensure that each plaintiff and defendant has an opportunity to be heard.

The Los Angeles Unified School District (LAUSD) recently filed a lawsuit against several Chubb units, alleging that the insurer improperly denied coverage for 61 sexual abuse claims against the district. The claims, according to the district, are part of more than 175 such lawsuits dating back to the 1950s that should have been covered under liability policies issued during that time. The lawsuit asserts that AB 218 "resulted in a flood of litigation against LAUSD" involving claims of "alleged childhood sexual assault, abuse and/or molestation." If the issue of insurance coverage becomes clear for these claims, plaintiffs and defendants should have a better chance of achieving settlement.

Conclusion

Every childhood sexual assault claim is unique; there is no magic formula for resolving such longstanding and complex issues. However, with preparation and an appreciation for the confidentiality and evidentiary protections provided in mediation, both plaintiffs and defendants can achieve closure with the help of a skilled mediator.

Mediation offers a safe forum for parties to work through often painful and emotional events. It allows both sides to structure a settlement that will help them move on, often through creative solutions unavailable in a court of law.

Keri Katz *is a neutral with Signature Resolution with almost four decades of experience as a litigator and a judge. She can be reached at kkatz@signatureresolution.com.*