9-2020

Reflections on Untethered Philosophy, Settlements, and Nondisclosure Agreements

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Alternatives
TO THE HIGH COST OF LITIGATION
The Newsletter of the International Institute for Conflict Prevention & Resolution
VOL. 38 NO. 8 SEPTEMBER 2020

Commentary

Reflections on Untethered Philosophy, Settlements, and Nondisclosure Agreements

BY MARJORIE CORMAN AARON

During the innocent '80s and '90s, when the alternative dispute resolution movement was younger, and I was too, I read some, though surely not all, of the articles opposing the ADR movement for its encouragement of settlements via court-based, community, and private dispute resolution processes (mainly mediation).

The most notable of these was Prof. Owen Fiss's *Against Settlement*, 93 *Yale L.J.* 1073 (1983-1984) (available at https://bit.ly/2OCJupg). It decries the ADR movement's impact on the public, the justice system, the polity, and sometimes the litigants.

I recall other ADR opposition writers primarily concerned that disadvantaged or disempowered litigants were settling for less in mediation than they might have received at trial. I encountered these writings after a number of years spent mediating legal disputes and, without uncertainty or angst, dismissed them as rooted in philosophy or narratives untethered to reality.

Because philosophy was then, and still is, far outside my zones of comfort or engagement, I made little or no effort to parse what I suspect were Fiss's and others' underlying objections to settlement. That quick rejection was based on their failure to describe what I knew to be litigants' realities.

Conscience untroubled, I kept mediating and advocating for well-designed dispute resolution processes, and eventually began teaching students, lawyers, and judges.

Thirtyish years later, the #MeToo movement, Stormy Daniels, Trump, Kavanaugh, Alabama, Mueller aftermath, economic and environmental regulatory and legislative debacles, with *Bush v. Gore* as harbinger, provoke me to reflect more carefully.

Are private mediated settlements doing harm? Should they be discouraged or not encouraged, as opposed to what mediators and institutionalized ADR do?

We mediate "in the shadow of the law." Thus mediators and participants imbue the legal and political system with some trust. Is that naïve? Does the law's shadow guide and protect us, or does it throw another type of shade?

My initial call to reflection—call it rumination—was the much-publicized revelations of settlements and nondisclosure agreements, best known as NDAs, in various Stormy Daniels-type affairs and #MeToo cases. So long ago. Not long after that, we read of former New York City Mayor Michael Bloomberg's NDAs.

I suspect these had a number of us mediators shifting uncomfortably in our chairs. Uninitiated friends and colleagues were surprised by the idea that wrongdoing would be shielded and offenders would be free to target

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Alternatives DOI: 10.1002/alt

The Master Mediator

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me to offer to my clients online—in-person and also a mixed mediation, partly in person and partly by zoom meetings.

* * *

Zoom is here to stay.

The virus has done in a few months what years of proselytizing has failed to do: normalize online mediation and other forms of dispute resolution as not only a viable option, but in many instances the first choice.

The widespread use of Zoom and other online technologies will expand and be integrated into the mainstream as just another tool on another day. Adaptive learning to deal with the impact that online forums have on humanization, compassion, empathy, emotions, trust, rapport, credibility will continue to evolve as humans adapt to the new normal or continue to Zoom on an ad hoc basis.

As with any new product or service, innovation will be quick and widely spread as mediators and participants learn from experimentation and experience on how to thrive in the new environment.

The first time I saw or thought of two-way electronic communications was on Star Trek. We may think of Zoom as the progeny of Nyota Uhura who, for so many of us baby boomers and beyond, was an integral part of the voyage where no one has gone before.

Go boldly, mediators. Go boldly.

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yet more victims, while continuing to enjoy outsized paychecks and professional influence.

Mediators and lawyers had to explain to family and friends that, yes, private settlements are normal. And settlement agreements that restrict public disclosure of their terms are a routine part of practice and process.

It felt shady, irresponsible, callous, immoral.

ABSOLUTION AND CAVEATS

So are mediator mea culpas required for private settlements and nondisclosure terms?

Much reading and reflection has led me mostly to absolution on the question of private mediated settlements and their NDAs, with some caveats and rough, tentative, no-doubt-doomed proposals for exceptions in the public interest.

Why? Because I strongly suspect that discouraging or dampening public or private ADR's encouragement of settlements would not necessarily lead to more trials, but rather, to more settlements negotiated privately, without mediator involvement.

Some theoretical work-arounds—requiring litigants to disclose mediated settlements or prohibiting NDAs in mediated settlements—would increase pressure for pre-suit, direct settlement, without mediated involvement. Though the laudable goal would be more public knowledge, a perverse consequence is likely to be greater pressure for pre-suit negotiation and settlement.

At least in the current regime, the public has access to the claims filed, even if not their resolution. Unless NDAs were prohibited for all legal claims, prohibiting them in mediated settlements would create greater incentives for pre-litigation direct settlements. The result would be less, not more, public awareness of (alleged) misdeeds.

The settlements between now-President Trump and Stormy Daniels and other "similarly situated" women were reached in lawyer-to-lawyer negotiations. No mediator was involved.

Obviously, privacy was at least one party's main goal—hence the punitive terms for breach of the NDA and the legal battle to enforce them. Had the case been mediated after a court filing, at least the allegations would have been subject to press and public scrutiny.

Thus, even an optimistic and unrealistic policy recommendation regarding NDAs would have to apply to *all* NDAs, not just to mediated or post filing settlements. In short, NDAs are not an ADR problem, they are a legal system problem. As a mediator within that system, I am absolved of personal guilt for the many nondisclosure provisions contained in all manner of settlements in my mediation room.

That personal absolution begs the question: When negotiating settlements where case facts make the lawyers, mediators, or (some) parties queasy about fear of future and/or repeated public harm, should there be a cure or prophylactic treatment for their nausea?

Remember, that sick feeling doesn't occur just in cases about sexual harassment or assault or politicians' sexual infidelities. Some may feel it when negotiating settlements of apparently legitimate and possibly endemic race, disability, gender, and religious discrimination, of product liability claims, of environmental hazards. The nausea comes from knowing that others may suffer serious harm in the future, harm that could have been avoided, if only the information were known.

Indeed, as Arizona State University Prof. Art Hinshaw reminded us in a 2011 piece on the *Indisputably* blog, the public interest is sometimes better served by litigation and results that include court-enforced orders to protect citizens' rights. Art Hinshaw, "Owen Fiss and Sheriff Joe Arpaio–'Against Settlement,'" *Indisputably* (Dec. 28, 2011) (available at https://bit.ly/2OGMcKt).

Using the well-covered dispute between the infamous Arizona Sheriff Arpaio and the U.S. Department of Justice Civil Rights Division, Hinshaw states his inarguably correct view—to my mind—that the people of Arizona were far better off with a fully litigated case and court order, and judicial supervision, than if the case had been settled in mediation.

Laws intended to protect citizens' rights must be applied and enforced. Imagine mediating that case and learning much of what was revealed in court. Wouldn't and shouldn't the mediator feel ill if the parties had been willing to settle for terms that failed to protect the public, covered up proof of civil right violations, and potentially improved Arpaio's or his buddies' political chances?

It seems clear that cases such as Arpaio's should be subject to the court's judgment and full public airing because of the wide and consequential public interest at stake.

It would seem that our current legal system would favor taking such cases to trial and reject private settlements. Or at least it should be.

State, municipal, and DOJ attorneys are referred to as "public interest lawyers" because they represent the public and are charged with acting in their client public's interests. Indeed, as Prof. Hinshaw suggests in the article cited above, when the Justice Department negotiates in such cases, it typically asks for "pure capitulation, which, according to the local paper, was the result the 20 other times when it has targeted law-enforcement agencies for similar violations." Ibid.

The same is true for lawyers representing more specialized citizens advocacy groups. When their clients' highest priorities are public awareness, bringing law and judicial power to bear against wrongdoers, or creating legal precedent, these lawyers are unlikely to entertain private dispute resolution at all.

And, even if they were to see potential benefit from participating in mediation, neither these lawyers nor their clients—the public agency or citizens advocacy groups—would countenance NDAs in any mediated settlement.

Even (and only if) we have some faith in ethical public interest lawyers to prevent private settlements and NDAs in the next Arpaio case, we still anticipate queasiness in cases between private parties where wider or future harm is predictable.

The plaintiff's lawyer in a products liability case and the manufacturer's inside counsel do not prioritize the interests of those not in the mediation room. Note that Rule 1.6 (b) of the Model Rules of Professional Conduct provides, in relevant part:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm.

Some state Model Rules require disclosure under these circumstances, rather than permitting it. Theoretically then, in a product liability case, or a case involving environmental claims, the Model Rules provide cover or create an obligation to disclose.

History, however, suggests these fail to operate to protect the public. It may not be intentional; corporate counsel may be subject to partisan perception bias and client protest, not to mention fear of termination. And while psychological and financial injuries are real in employment discrimination or harassment, these don't seem to be captured by the rule.

Always depending on the circumstances, here are some options for preventing or mitigating potential harm from settlements and NDAs in those cases:

- Legislation stating the NDAs are unenforceable as against public policy when the nondisclosure creates realistic danger of significant harm to other members of the public. (See the box above, "States Move to De-Enforce NDAs.")
- Legislation and amendment of mediator and attorney professional ethics rules to require disclosure of the danger of significant harm to others suggested by reliable information learned in connection with

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STATES MOVE TO DE-ENFORCE NDAS

Since Stormy Daniels' entry into public awareness, many state legislatures have taken up the issue of nondisclosure agreements.

Connecticut, District of Columbia, Florida, Hawaii, Indiana, Iowa, Kansas, Maine, Massachusetts, Pennsylvania, Rhode Island, and Texas have considered barring NDAs for employment-related sexual harassment and, in some instances, workplace discrimination claims.

Legislation has passed in New York (NY CLS Gen Oblig. § 5-336), Illinois (820 ILCS 96/1-25), California (Cal. Code Civ. Proc. § 1001), Maryland (Md. Code Ann., Lab. & Emp. § 3-715), New Jersey (N.J. Stat. §10:5-12.7), New Mexico (N.M. Stat. Ann. § 50-4-36), Tennessee (for Local Education Agencies, Tenn. Code Ann. § 49-2-131), Oregon (ORS § 659A.370), Vermont (Sec. 1. 21 V.S.A. § 495h), Virginia (Va. Code Ann. § 40.1-28.01), and Washington (Wash. Rev. Code Ann. § 49.44.210). Rhode Island's proposed bill S.B. 2563 is broader but still limited to the employment context.

Illinois' Workplace Transparency Act (820 ILCS 96/1-25) makes all unilateral employment-related NDAs void and states strong requirements for an employment-related NDA to be considered mutual and enforceable.

New York's NY CLS Gen Oblig. § 5-336 prohibits confidentiality clauses in contracts and agreements entered into by public agencies. It also prohibits any clause requiring parties to such a contract or agreement to refrain from disclosing, discussing, describing or commenting upon its terms. It exempts claims involving sexual harassment nondisclosure agreements if the condition of confidentiality is the complainant's preference.

Several states have enacted tax laws that bar income tax deductions for any settlement or payment related to sexual harassment or sexual abuse that is subject to a nondisclosure agreement.

Unfortunately, it's noteworthy and disturbing that the Arizona legislature's action was not to prohibit or limit NDAs in employment-related claims or in contracts with public agencies, but rather to affirmatively recognize their legality.

It created a narrow exception only for victims of sexual misconduct "responding to a peace officer's or a prosecutor's inquiry" and "making a statement not initiated by that party in a criminal proceeding." A.R.S. § 12-720(B).

While generally well-motivated—Arizona notwithstanding—most of the state legislative efforts are aimed at closing the employment barn door, and mostly target secrecy of sexual harassment claims. They entirely fail to address potential public harm from NDAs in a range of other legal actions.

Some courts have expressed public policy concerns about NDAs, but most have sought to balance interests in facilitating settlements against interests in public access to information. In general, courts apply basic contract principles to questions of NDA enforcement, with an ear to unconscionability, duress, and coercion. In the civil discovery arena and in criminal proceedings, however, some courts have refused to enforce NDAs that would interfere with other litigants' ability to obtain information in support of their litigated claims or defenses.

—Marjorie Aaron & Federica Romanelli

Aaron, a professor at the University of Cincinnati Law School, was assisted by Romanelli, a CPR Institute 2020 intern, who is of counsel and a foreign legal consultant to New York's Crystal, & Giannoni-Crystal LLC.

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the case. It's arguable that, notwithstanding mediator confidentiality obligations, a lawyer-mediator's professional responsibility rules would currently require disclosure to relevant authorities disclosure where the harm appears to be imminent and extreme. But any ambiguity on this point is better resolved.

- Creation of a registry for settlements of certain types of claims, whether or not suit was filed, akin to the registries set up in some states for medical malpractice settlements.
- Creation of an automatic release from nondisclosure obligations if and when the party or an attorney learns that the offender engaged in similar offenses against others prior to or after the settlement, unless previous offenses were disclosed only in settlement discussions. (For this purpose, confidentiality provisions protecting settlement discussions, including mediation discussions would be, sorry to state it, trumped.)
- Without waiting for legislative actions, mediators could include language that releases or even states the obligation to report behavior that predicts widespread or future harm in agreements to mediate, and mediation/dispute resolution organizations such as JAMS Inc.; *Alternatives*' publisher, the CPR Institute, and the American Arbitration Association could include it in their mediation and arbitration rules, and/or encourage their panelists to put it in their agreements.
- Waiver of nondisclosure provisions regarding a person seeking appointment or election to public office, or serving in public office. Such a provision would bar President Trump, for example, from invoking the NDAs which he favors as a business strategy. See Michael Kranish, "Trump long has relied on nondisclosure deals to prevent criticism. That strategy may be unraveling." *Washington Post* (Aug. 7, 2020) (available at https://bit.ly/3fDEOdW).
- Judicial approval of any case settlement that includes nondisclosure terms.

STEPS COULD BE TAKEN

Sigh. I offer these recognizing that they will neither come to pass, nor be seriously entertained—not in these times.

Before someone launches a full barrel attack on any of them, I hereby acknowledge that some may be flawed, lead to negative unintended consequences, or at minimum, would require careful refinement. As long as there's no risk of any becoming real, it seems pointless to undertake that exercise.

Having stated that, my gut suggests that, in the private sphere, neutrals and provider organizations could indeed take steps to permit, encourage, or even require disclosures where serious harm would otherwise occur. To make this happen, we would want thorough discussion among neutrals and provider organizations, perhaps involving (or convened by) the ABA Section on Dispute Resolution or the CPR Institute.

In the public sphere, the last one—judicial approval of settlements with nondisclosure language—merits serious consideration. That's the rule for class actions and, while judicial oversight is not a perfect remedy in practice, it offers some protection to class members. We are uncomfortable with nondisclosure terms in cases where they may hide current more widespread violations and lead to future harm. Our desire is to protect unknown and potential class members.

Even if this proposal were worth exploring, it still raises a series of practical questions: Would it only apply to cases in which a suit had been filed? Would it apply to claims subject to mandatory arbitration under pre-dispute agreement? If so, might the unhealthy consequence be that the ugliest, most troublesome cases are settled with nondisclosure language, but without any court or arbitration filing?

As a matter of professional responsibility, could lawyers be required to raise concerns about more widespread future harm to the public? To what body? Might judicial or extra-judicial panels be created to review even privately negotiated settlements of claims that were never filed, but lawyers were retained?

And: Even if this proposal could be imagined, would that encourage disputants to bypass lawyers altogether? Imagine Harvey Weinstein negotiating directly with an accuser, asking her to bury her claim—never to disclose it—in exchange for money or favors. Who would have more power? Who protects the others?

If the accuser breached the private agreement, negotiated without counsel, should its nondisclosure terms be enforceable? If the accuser was not represented by counsel when those terms were agreed to, how likely are they to be fair to her or palatable to the rest of us?

* * *

Leaving aside this digression into an optimist's proposals ("Here's a problem, can't we fix it?!"), I return to original arguments against settlements in litigated cases and reflections about mediator/ADR promoter discomfort prompted by Stormy-#MeToo NDAs.

In cases where privacy is paramount for at least one party, less ADR may not mean more public trials but rather, more directly negotiated pre-litigation settlements and thus less public access.

We cannot force people to file suit, but we surely don't want to render a decision to initiate litigation more difficult, given that pleadings—the names and allegations in the complaint—are public information.

The potentially harmful consequences of nondisclosure agreements in private settlements are troubling. They are a legal system problem, however, for which ADR is not to blame. As a mediator of legal disputes lo these many years, I am absolved of guilt for the many settlements, with or without nondisclosure terms, that have occurred in my mediation room.

CLARIFICATION

In the July/August 2020 article, "An Unquestionable Mediation Conflict of Interest—The MGM Mandalay Bay Shooting Settlement," by Art Hinshaw (38 *Alternatives* 102 (July/August 2020) (available at https://bit.ly/2PD706c)), a word was dropped in a sentence near the end. It should have read: "The mediator's role as a facilitator, compared to a decision-maker, has no impact on the issue of whether there is a conflict." *Alternatives* apologizes for the error.