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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 (continued on page 122)
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.

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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.

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.


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.

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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.
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.


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 eye 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 panels 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/3fDEQdW).

• 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?

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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.

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**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.