Careful Maneuvers: Mediating Sexual Harassment

Howard Gadlin

The rapid growth of mediation as a form of dispute resolution over the past decade is in large part the result of extending the techniques of mediation into new areas. As we know, mediation, which originated as a tool in the resolution of labor disputes, later emerged as an alternative or an adjunct to traditional means of handling neighborhood and community conflicts, environmental issues, and divorce and family disputes. As a result, the techniques of mediation have been elaborated, expanded, and transformed. Similarly, expanding the range of mediation has enhanced our understanding of the dynamics of conflict. At the same time, extending mediation to new areas has raised ethical and political questions about the impact of mediation within institutions, as well as about the conceptions of justice and fairness that inform decisions to employ mediation as a form of conflict resolution. One area in which deployment of mediation has been relatively limited to date is sexual harassment.

In recent years, sexual harassment has received considerable attention, both on campuses and in the workplace. Over the past eight years, I have incorporated mediation into the handling of grievances at the University of Massachusetts, Amherst, where I am the ombudsperson. Among my responsibilities has been working with sexual harassment grievances, especially those where the grievant prefers to work out a resolution to her complaint (95 percent of grievants have been women) without filing a formal charge. The procedure at the university allows for a complaint to be handled through either "formal" or "informal" channels. Filing a formal charge requires participating in a hearing, and most people who feel they have been sexually harassed prefer, for a variety of reasons, to avoid formal hearings. When a complaint is handled informally, the sexual harassment procedure at UMass relies heavily on mediation, usually conducted by the Ombuds Office. Because of the preference for informal resolutions, I have worked with roughly 85 percent of the 130 sexual

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harassment cases that have been pursued through the university's procedure since 1982. Of those 110 cases, I have used full mediation sessions in approximately one third, and mediation-like shuttle intervention in many of the remainder.

While I am convinced that mediation is enormously useful in reaching both effective and just resolutions to harassment grievances in many circumstances, certain problematic areas still remain that must be addressed. In turn, I have realized that mediating these cases has taught me a lot about the dynamics of sexual harassment. In thinking about what I have learned, it occurs to me that as practicing mediators we have not taken full advantage of the ways in which mediating a conflict can also be a form of inquiry. When we generalize from our mediation work, we tend to generalize about the processes of conflict intervention rather than about the conflict area in which we are intervening. It is almost as if we think that increasing the effectiveness of our techniques is, by itself, added justification for the application of those techniques to a particular realm of conflict. But, to the extent that we learn more about a conflict area through mediation, we ought also to think further about the nature of the conflict area and the appropriateness of using mediation.

Although I did not originally think of mediating sexual harassment cases as a means of researching the phenomenon of sexual harassment, I soon became aware that I was, as a mediator, in a rather privileged position with respect to the thinking, feelings, and interactions of the disputants in these cases. Consequently, I began to look more systematically at the cases with which I worked and to reflect in new ways about the dynamics of sexual harassment and the effects of disparities in power on the dynamics of conflict and conflict resolution. I also developed some ideas about the ways in which I believe the techniques of mediation should be adapted to handle the particular qualities of sexual harassment cases.

The Nature of Sexual Harassment

Sexual harassment is unwanted attention of a sexual nature, often with an underlying element of threat or coercion. Following federal law in this area, sexual harassment can be identified along three major dimensions: (1) when acceptance or rejection of sexual advances is a condition of education or employment; (2) when acceptance or rejection of sexual advances affects grades, performance evaluations, or any academic or personnel decisions that concern the student or employee; and/or (3) when unwelcome sexual actions interfere with work or create an intimidating, hostile, offensive, or humiliating environment. While it is less dramatic than the first two, the third category—often referred to as "the hostile environment"—is the most typical form of sexual harassment. It includes actions such as displaying pinups, making inappropriate suggestive or sexual jokes or comments, making unwanted physical contact, and offering compromising invitations or advances.

Most sexual harassment policies began to appear on American campuses and in corporations after 1980, when the Equal Employment Opportunity Commission issued guidelines that defined sexual harassment as a form of sex discrimination under Title VII of the 1964 Civil Rights Act. The guidelines applied to all companies that employed 15 or more persons. In 1982, the Department of Education issued its own guidelines as an interpretation of Title IX of the

1972 Educational Amendment to the Civil Rights Act. Prior to that time, sexual harassment was hardly recognized as a problem, and in many educational and employment settings the use of positions of power for purposes of sexual maneuvering was, for men, a tacitly accepted part of the culture. However, with the heightened sensitivity that accompanied the growth of the feminist movement and the increases in women's participation in the workplace, practices once taken for granted came under critical scrutiny and were challenged.

Because of often great disparities in age as well as in power, faculty harassment of students was especially alarming to some. At the same time, since the predominant cultural pattern is for older, more powerful men to be involved with younger, less powerful women, sexual harassment of women students by male faculty was often seen as a sort of logical extension of this "normal" pattern. While some teachers on campuses frowned on colleagues who exploited both their status and the relative naivete of their students, others considered sexual liaisons with young women among the perquisites of working in the academic world.

With the issuance of the guidelines derived from the Civil Rights Act, schools and businesses that had averted their institutional eyes were forced to take notice and to implement policies that allowed those who were being harassed some means of self-protection. While many of the more blatant instances of sexual harassment—for example, an explicit threat of loss of job or lower grade if the woman refused a sexual liaison with the teacher/employer/supervisor—were well-suited to formal hearings and rules of evidence within which it could easily be decided whether harassment had in fact taken place, many other examples of sexual harassment charges that were less easily dealt with abounded.

While all too many instances of faculty or employers who promise a trade of grades, promotion, or other advantage for sex occur, much sexual harassment is subtler than that. Furthermore, responses to what might be interpreted as offensive sexual actions are so widely divergent that people are often confused about what is appropriate and what is inappropriate. Sometimes harassment is defined more by a difference in how particular actions are understood than by the actions themselves. For example, a form of teasing acceptable between friends might feel cruel and invasive when initiated by someone who has not been given the tacit acceptance and cooperation of the person targeted.

Harassment is simply not defined by objective criteria. The key term in the definition is "unwelcome." It is when a person makes clear that the sexual advances or remarks are unwelcome that harassment can begin. At the workplace or on campus people are often exploring the boundaries of relationships; asking for dates for coffee, lunch, or dinner can be a way of extending a friendship or expanding a collegial relationship. In these kinds of informal negotiations of relationships, there is plenty of potential for misunderstanding and miscommunication.

One of the most common types of sexual harassment originates in what I have called the "infatuated professor syndrome." In the academic context, it is often the faculty member's misinterpretation of a student's interest and enthusiasm that initiates a chain of misunderstandings that culminate in sexual harassment. Quite frequently a professor, especially a male professor, interprets a woman student's responsiveness to his interests as a sexual and emotional

interest in him. Fueled by the professor's (not fully conscious) fantasies of a growing passion, the student-teacher relationship is broadened: they meet for coffee or lunch or drinks to discuss readings or joint projects, they set up an independent study course, the student becomes his research assistant. Along with developing a work relationship, the faculty member might pursue a more personal friendship: asking about her personal life, talking about his relationship(s), etc.

Frequently, circumstances occur where this scenario develops into sexual harassment. I am putting aside those situations where the faculty member's sexual/emotional response to the developing relationship is reciprocated and an affair develops. Student-faculty affairs may be objectionable but they are not sexual harassment. Sexual harassment is unwanted sexual attention. But it is around the definition of "unwanted" that the discrepancies in power between student and teacher become relevant, because it may not be academically wise (and it certainly will not be easy) for a student to tell a professor that his sexual attention is unwanted.

The signs of his interest are typically subtle and ambiguous; the student may be misinterpreting. A rebuff to a professor whom she respects, given differences in power between them, makes it unlikely that the student would feel that she could safely limit their relationship. With graduate students, a mentor is often the most important path to professional opportunity. If the student feels she must comply with the professor's personalization of the relationship, eventually the faculty member's sexual interest in the student will become explicit—he will attempt to kiss or fondle her, or he will proposition her, or ask her to attend a meeting with him and propose that they share a room. The student may feel trapped and get involved because no other alternative seems available or the student will say no and the professor will react angrily to being rebuffed. He may lose interest in her work, withdraw funding, or evaluate her as someone who has failed to live up to earlier expectations.

Typically, in those situations that become sexual harassment cases, a student reaches a point where she can no longer manage the relationship with the faculty member and she seeks assistance. Sometimes this occurs before the professor's sexual interest has been made unambiguously explicit, sometimes not until afterward. Often, she will talk with other students or a trusted faculty member or the ombudsman or the affirmative action officer, and only for the first time will the situation come to be understood as sexual harassment.

Of central importance for our consideration here is the discrepancy in the experience of the two parties and the degree of ambiguity in the situation. It is this ambiguity that calls for modes of intervention that can be sensitive to the perspective and concerns of both parties while also responding to the institution's needs for ways of controlling and eliminating sexual harassment.

The Applicability of Mediation to Sexual Harassment

It is this large area of ambiguity that led me to believe that mediation might be unusually useful in handling sexual harassment cases where a formal hearing might be a very unsatisfactory forum for resolving the issue. Lacking firm evidence, those on the hearing panel are limited to inferring about the character or integrity of the parties or surmising about their motives and intentions. In such circumstances, most hearing panels are most unlikely to conclude that

the sexual harassment policy has been violated. The hearing panel's reluctance to act might leave unattended a situation that cries out for thoughtful intervention.

These observations suggest three major reasons mediation can be usefully incorporated into procedures for dealing with sexual harassment grievances. First, mediation might be an ideal tool for handling the harassment grievance in a way that is consonant with the grievant's needs and preferences. Second, mediation might be better suited than a formal hearing procedure to achieving a successful resolution of an ambiguous situation. Finally, mediation might be a means of educating the alleged harasser, while still honoring his rights and interests.

A person who has been harassed might prefer to handle a charge of sexual harassment through mediation for many reasons. In a very large number of harassment situations the person harassed prefers not to bring charges through a procedure that requires a formal hearing. Most of the people who approach me with a complaint of sexual harassment make clear early on that they do not want to bring formal charges. Frequently, they also make clear that if their only option is a formal hearing, they will not proceed with the complaint. While in some instances this reluctance to proceed is the result of fear of retaliation, more often than not such reluctance is separate from any such fear. Nor, in my experience, is hesitation about following a formal complaint route related to the ambiguity of the situation giving rise to the charge of harassment. Often those who have been blatantly harassed are as wary of bringing a formal charge as those who are not even sure themselves that what they are experiencing is harassment. I am thoroughly convinced that a sexual harassment procedure that allows only for formal hearings of harassment charges would result in a situation where a great majority of potential harassment grievances would not be pursued.

In a recent article, Mary Rowe of MIT identified some of the concerns that appear frequently among people who believe they have been harassed (Rowe, 1990). Her observations overlap considerably with mine and help us to understand why many of these people are reluctant to bring formal charges.

The following concerns are the primary factors to keep in mind when thinking of the tactics needed to mediate sexual harassment cases successfully:

1. *The grievants want the harassment to stop.* Often this is most important among the desires of those who feel harassed.

2. *They want things to go back to normal.* While this is usually not a realistic aspiration, the experience of being harassed is typically as disruptive as other experiences of trauma and victimization. Those affected cannot help but indulge in some magical thinking—"If only everything was like it was before my mother's death, or the fire, or the accident . . ."

3. *Fear of retaliation.* Since harassment often occurs between people with discrepant power, the victim usually has genuine concerns about retaliation. Even if her harasser were to conduct himself in a perfectly proper manner with respect to written documents and formal actions, the threat of whispered conversations and well-placed phone calls always exists. In the professional and academic worlds all sorts of blacklisting is possible, without anything overtly improper ever being done.

4. *They do not want to get a reputation as a troublemaker.* This concern goes well beyond a fear of retaliation. Organizations do not always take well to people who lodge complaints, especially against respected people in positions of power. Even if the person bringing the charge is completely in the right and the situation is totally unambiguous, there is a risk that one's reputation will be poisoned simply for having lodged a complaint and for getting someone in trouble.

5. *They do not want to get the person who harassed them in trouble.* At first glance this seems contradictory, but I have come across this attitude often enough to consider it typical rather than aberrant. Since harassment often emerges in situations previously defined by a relation of trust and mutual support, this response seems less puzzling. Especially in circumstances where the more powerful harasser has been the teacher, boss, or mentor of the less powerful person, harassment sometimes develops as a result of the more powerful person misinterpreting a history of closeness and liking as sexual. Frequently, such relations carry strong residues of loyalty and the emergence of harassment is as much an occasion for sadness as anger. In addition, in many harassment situations, the experience of harassment leads the harassed person to a profound personal uncertainty. Often, the reluctance to get someone in trouble blends with concerns about retaliation thus creating a massive inhibition against acting on a complaint.

6. *They blame themselves.* In almost every case of sexual harassment I have handled, the person harassed has blamed herself for the harassment to some degree. Not totally, and not without recognition of the inaccuracy of self-blame, but in some way or another self-blame is present—if only in the form of wondering, "If I had done such and such or if only I hadn't . . ." This holds even in situations where the furthest stretch of the imagination would not allow an independent observer to blame the victim. Advocates for harassment victims are often dismayed to hear such talk, especially in circumstances where the advocates would like to hear expressions of outrage and anger, but self-blame is an important clue to the responses evoked when harassment occurs. In addition, a considerable body of social psychological research about victims of crimes and accidents demonstrates that experiencing self-blame is often an important component in helping people who have been victimized regain some sense of self-esteem and control over their own future. It is almost as if by blaming oneself, one is saying this did not have to happen, and if it did not have to happen, then it does not have to happen again in the future. Working with women who have been harassed, one has both to introduce an element of reality into their account and to hear the self-blame as an indicator of the needs that must be met in a process of intervention.

7. *They are concerned about the loss of privacy if they pursue their complaint.* Even when a woman has been treated outrageously and is clearly not responsible for what has happened to her, it is embarrassing to have been harassed. Often, if pursuing the matter means more people knowing about what happened, a woman will decide against further action. This concern with privacy is related as well to the following issue.

8. *They do not want to lose control of the complaint.* In many procedures for handling sexual harassment, once the person who feels harassed brings

a complaint, she loses control of it. There can be a fear that interests other than her own are foremost on the handling of the situation. This fear is not entirely unfounded, since considerations of institutional liability might require forms of intervention that conflict with the desires and concerns of the grievant.

9. *They feel they have no conclusive proof and that they have limited skills in establishing the truth.* Much harassment occurs out of the view of others. In many situations, we have only one person's word against another's. In an institution where the accused inherently has much more power than the accuser, it is reasonable for the person bringing the complaint to be concerned that she might not be believed, especially if the person whom she alleges harassed her is more facile verbally than she.

10. *They are often interested in an outcome that will prevent the same thing from happening to others.* In my experience, this concern more than any other leads people to overcome reluctance and pursue charges of harassment. It is also a central component of most of the mediated agreements in sexual harassment cases, as indicated by clauses that include promises not to repeat the offensive actions, clauses that include reference to educational workshops on sexual harassment, and clauses that create contingencies in the event another charge of sexual harassment should be brought against the same person. For the mediator, the concern to prevent a recurrence of harassment is a clear example of an interest for which there might be many possible satisfactory bargaining positions.

Given all of these concerns, it is easy to understand why mediation might be preferred by people who feel harassed and why it might be considered institutionally appropriate as one of the modes of responding to a charge of sexual harassment. From conversations with grievants and experience with both mediated and adjudicated cases of harassment, I can identify the following reasons a grievant might prefer mediation:

1. *To reach faster resolution.* Investigations and hearings take a long time. Most grievants want the matter to be over with as quickly as possible. Mediation can commence soon after the grievant indicates she wants to mediate, and the process need not go on for a long time.

2. *To preserve confidentiality.* Being harassed is often humiliating. Mediation promises a level of confidentiality that often cannot be matched in a hearing or during an investigation.

3. *To avoid the stress of a hearing.* By definition, hearings are formal and adversarial. Each party is impelled to present the other in the worst possible light and to attempt to prove the other wrong. The aim is to win, not to come to an understanding. Often the experience of the hearing is almost as disturbing as the harassment itself. While harassment mediation is not easy to endure, it is not typically as stressful as a hearing because it is not a totally adversarial situation.

4. *To focus on education rather than punishment.* As mentioned earlier, for a variety of reasons many victims of harassment do not want to get the person who harassed them in trouble. At the same time, they want the harasser to know what the impact of the harassment has been, and they want to keep it from happening again. Often, they will pursue a complaint only if they are

assured that the complaint will not lead directly to punishment. Mediation itself can be a means of educating the harasser, because it provides a setting in which relatively nondefensive communication can occur. To the extent that the mediator is successful in helping to create a setting in which each party can hear the other's perspective, mediation can help the person harassed accomplish one of her goals.

5. *To restore relations.* In some circumstances, the person harassed wishes to establish an understanding that will allow her to resume safely the working relationship with the harasser. Pursuing a formal charge through a hearing would make that unlikely. Mediation can provide a groundwork for rebuilding a working relationship as well as a resource for resolving further difficulties should they arise.

6. *To address ambiguity of evidence.* In many instances of allegations of harassment, the interactions and circumstances described are quite ambiguous. Even in some quid pro quo situations, a skilled harasser might be able to mask his intentions and claim miscommunication. Recall that harassment is not defined objectively in terms of the actions of the harasser but rather subjectively in terms of the reactions of the person who feels harassed. In terms of office banter and conversation, what one woman finds offensive and disruptive another might find acceptable or even enjoyable. In many of the hostile environment situations sufficient ambiguity surrounds the circumstances so that a hearing panel or investigator would be unlikely to conclude that the person charged had in fact violated the sexual harassment policy. Pursuing a formal charge of harassment in these cases can be a futile endeavor, only adding to the pain of the person who feels she has in fact been harassed. Mediation can be successful even when no clear cut evidence of harassment exists, because mediation is not directed toward ascertaining objective truths about past events.

While the discussion thus far has emphasized the ways in which mediation can be suited to the needs of those who feel harassed, it is noteworthy that mediation can also meet the concerns of those who have been accused of harassment. Indeed, many of the underlying interests of those accused of harassment are compatible with the interests of those who feel harassed; it is this overlap of interests that helps mediation succeed. On the basis of my experiences with sexual harassment cases, I can identify the following characteristics to usually be found in those accused of harassment:

1. *They want things to go back to normal.* Once a charge has been brought, even informally, the workplace becomes a source of constant tension. Considerable amounts of time are spent responding to the charge or preparing to respond, and it is difficult to concentrate on work. In addition the specter of possible punishment looms overhead. Most people who have been accused of harassment want to bring the matter to a close a quickly as possible.

2. *They are afraid of punishment.* Given that most harassment policies have provisions for punishment for those found in violation, this is a realistic concern for those accused. On the other hand, strict punishment for people in upper echelon positions is still quite rare. Nonetheless, a concern about sanctions is present in conversations with most people accused of harassment. Mediation puts them in a position of having some role in designing and approving of the sanctions for their situation. Many critics of mediation are concerned

that allowing harassers to mediate charges is simply a way of avoiding sanctions. However, nothing keeps sanctions from being included within a negotiated agreement. For example, in adjudicated cases, one of the most common sanctions for milder, first offense harassment is a letter in the personnel file of the harasser. But a letter in the personnel file can be and often is a common feature of mediated settlements in harassment cases as well. Very often, the sanctions in a mediated settlement appear fair to both parties—an outcome that is hard to achieve after a formal hearing.

3. *They are concerned about their reputation.* Perhaps even more than worrying about punishment, people accused of harassment fear that they will get a bad reputation and that their career will thereby be adversely affected. The climate on campuses has changed sufficiently in the past decade so that people accused of harassment cannot be cavalier about the effects of such accusations.

4. *They are concerned about confidentiality.* The interest in preserving one's reputation makes those accused especially concerned about confidentiality in the procedures by which the charge is handled. Many are suspicious of formal procedures because they do not trust in their confidentiality. In addition, many fear that even were they to be cleared of charges of wrongdoing, their reputation would, nevertheless, be affected. Many have expressed the concern that a charge of harassment tends to be believed no matter what the outcome of the procedures for dealing with it.

5. *They do not want to lose control of the complaint.* Here, even mediation is seen as a threat, because the conflict is no longer a matter between the person who feels harassed and the person accused of harassment. Especially in situations where the alleged harasser is the more powerful one keeping the matter private promises to keep the alleged harasser in control. The presence of a mediator threatens the imbalance of power, because the mediator is not likely to tolerate the intimidations and coercions by which domination is maintained. However, mediation still affords more control for the disputants than formal investigations or hearings because each person speaks for herself or himself, and because the outcomes are composed by the disputants rather than being imposed from without.

6. *They blame the accuser, not themselves.* Here is the one great divergence in the characteristics of the disputants in harassment cases. Whereas those who feel harassed are usually self-blaming and often concerned for the welfare of those they are accusing, those accused of harassment are neither so generous nor so self-critical. From the outset, they usually respond as if they are building a case, even in circumstances where no realistic threat of a possible hearing exists and where the aims of mediation have been clearly explained and understood. It is rare for a person accused of harassment to express concern that his actions may have caused pain and difficulty for the person accusing him. And it is equally uncommon for the alleged harasser to turn a critical eye on his own actions and to say "I can see why she might have interpreted my behavior as harassment," or, "If only I hadn't done such and such then she might have felt differently." In addition, it is fairly common for the alleged harasser to explain the complaint against him in terms of some qualities of the grievant—the lack of a sense of humor, hypersensitivity, vindictiveness for other

actions, being flirtatious or in some way asking for it, or just being different than other women. While it is easy to interpret such reactions cynically, the mere fact of being accused, even or especially if the accusation is accurate, seems to induce defensiveness. I am also convinced that, most typically, those accused of harassment really do believe their own accounts and explanations of how they come to be facing charges. However skeptical we may feel personally, it is necessary to conduct the mediation process with the same balance in crediting differing stories that we do with any other conflict that might come to mediation.

These characteristics of those accused of harassment are important to keep in mind when assessing the appropriateness of mediation for sexual harassment for two reasons. First, modes of intervention in harassment situations have to be fair to both parties, as well as being responsive to institutional needs in situations where legally specified liabilities are dictated. Second, the reputation of mediation is at stake. If mediation comes to be seen as a form of punishment, favoring the needs of those accusing over those accused, it will damage the effectiveness of mediation as a means of dispute resolution. In terms of procedures, it is essential that mediation be only one of the available means of resolving harassment charges, that there be no compulsion toward choosing mediation over other means of redressing a harassment grievance, and that formal mechanisms such as investigations and hearings be effectively administered and seriously considered.

Mediating Harassment—Modifications and Challenges

Assuming a general policy and procedure that meet the criteria just outlined, the challenges for mediators of sexual harassment disputes are formidable. Mediating such a case means dealing with a conflict that arises because the trust essential to a working relationship is felt to have been violated and the power involved in the working relationship has been exploited. Since one begins with a total failure of trust between the parties, it is absolutely essential to establish and build trust in the mediation process as well as in the mediator. More than with other kinds of disputes, it is my impression that trust, even faith in the mediator, is necessary if the process is to have a chance of success. It may or may not be possible to reestablish trust between the parties.

But more important than restoring that trust is knowing when it is inappropriate to even attempt to reestablish it. From the disputants' points of view, a mediator who moves prematurely to rebuild shattered trust in a harassment case is one who has not believed or understood the story of the dispute. To the degree that trust between the parties can be reestablished, it is usually a consequence of mediation rather than a prelude to it. Reestablishing trust depends mostly on how the mediator is able to handle the discrepancies in power between disputants (when they exist), the volatility of emotions that goes along with issues of sexuality and power, and the divergent orientations toward blame and responsibility that characterize one of the main differences between the accuser and the accused.

I have found two major modifications to traditional community and family mediation practices to be of enormous help. First, I hold individual sessions—often several individual sessions—before joint sessions. Typically, mediators do not meet separately with the disputants prior to the first mediation session.

Usually, both parties are present and each tells his or her story to the mediator in the presence of the other party. In sexual harassment mediations, I find it useful to meet first with each party separately, often over several separate sessions, before bringing the parties together. I developed this approach because of a concern that the mediation not become an extension of the harassment: individual sessions allow for the venting of the powerful emotions associated with harassment and for some assessment of the probability of reaching an agreement satisfactory to both parties.

By beginning with a sort of shuttle diplomacy, there is generally considerable movement away from positional posturing over the course of the individual sessions. Central to these sessions is helping the parties identify the underlying interests they hope to satisfy through mediation. Often, during these individual sessions I also work with each party in developing alternative ways of expressing their feelings about the dispute. When it seems that we have reached the point where joint sessions will be neither abusively volatile nor excessively hostile, and where there is some basis for beginning negotiations, I bring the parties together.

At that point, even though I have already heard the story from each disputant, I conduct the session as I would any other first session, beginning with each party telling his or her story in the presence of the other. (It is always interesting to note how different the stories are when told in the presence of the other disputant as compared to those told in the individual sessions with the mediator.) From there, I proceed to intersperse individual sessions with joint sessions as they may be required to further the negotiations.

Second, I encourage disputants to work with an adviser/support person throughout the mediation. For the most part, mediators prefer to exclude all but the disputants from the mediation. My preference for including advisers began because many of the people pursuing sexual harassment grievances had already formed strong working alliance with a counselor and were hesitant about proceeding without that person's presence and support. In many instances, the first time a person who felt harassed came to see me she was accompanied by her counselor. At the same time, most of the employees at the University of Massachusetts are unionized and many of them have preferred to be accompanied by their union grievance officer when dealing with an issue for which the potential for disciplinary sanctions existed.

Although reluctant at first to proceed with advisers present, I quickly found that advisers, in addition to providing support through a stressful procedure, could help the disputants to assess realistically the settlement options developed in the course of mediation. And, since many of the advisers are sensitive to the issue of sexual harassment, advisers have also been important in helping the person accused of sexual harassment understand the situation from the point of view of the person harassed. It is also my sense that the presence of advisers tends to balance out real and perceived disparities in power between the disputants. This affects both disputants positively.

For the person bringing the harassment charge, the presence of an adviser who has heard her story and has the responsibility to act as an advocate is often crucial in providing a sense of security that cannot be achieved merely by the presence of the mediator. In addition, if the adviser is someone with professional or academic standing in the institution, the impact of differences instatus

between the disputants seems to be diminished. From the perspective of the alleged harasser, no matter how much the mediator proclaims his or her neutrality, there is always an underlying suspicion that the mediator is in some way on the side of the person bringing the charge. After all, it is typically the person bringing the charge who has chosen mediation as the way to pursue it and the policies and procedures stipulate mediation as one means of achieving satisfaction when one feels harassed. The presence of an adviser/advocate for the alleged harasser eliminates the sense of standing alone against the institution. (I should note, ironically, that at least in my experience, a much greater proportion of those charged than those bringing charges prefer to go through the process without an adviser present.) Nonetheless, in the majority of cases I have mediated, both parties have been accompanied by advisers at almost every step of the process, and in balance, I have always found it beneficial to the process as well as to the parties.

One other benefit of the presence of advisers is in helping the mediator to deal with the problem of power imbalances. Perhaps more than with any other type of mediation I have conducted, imbalance of power is a crucial problem in sexual harassment. In many instances, it is an imbalance of power that helps define the situation as sexual harassment. In addition, the same disparities of status and power that contribute to the harassment situation would be present in a one-to-one negotiation session. (It is noteworthy how many people accused of harassment actually propose settling the issue by meeting alone with the person bringing the charge in order to work it out together.) Typically, significant disparities exist between the parties in their skills, experience, and intellectual or emotional abilities to negotiate. Very often, gender-based differences in orientation to conflict that incline women to settle for less than they would like and make men inclined to demand more than they are entitled to are also at work. Equally common is an uneven familiarity with or access to relevant information, rules, regulations, and procedures that pertain to the workings of the institution. Finally, there is also the presence or sense of mental or even physical intimidation (I always ensure that a table or some such physical barrier stands between the parties when conducting sexual harassment mediations).

It is not possible for a mediator to respond to or correct these imbalances without violating neutrality. However, by urging each of the parties to seek the help of an adviser, and by working in a system where the advisers are knowledgeable about sexual harassment and somewhat skilled in negotiation, it is possible for a mediator to ameliorate much of the power imbalance. Advisers can provide appropriate educational material, guidance about the negotiation process, and counsel about personal style and conduct throughout the mediation. Of course, the responsibility for handling power imbalance still rests with the mediator: techniques such as setting ground rules and governing the actual mediation process are absolutely essential to the creation of a process that is fair and nondestructive. The mediator must maintain a balance in the discourse that takes place between the two parties and ensure that the more articulate person does not take control of the process. The use of private sessions and frequent and active reframing so that major points raised are restated in the common voice of the mediator are crucial to maintaining a balance of power in the mediation.

Nonetheless, some people argue that the presence of a power imbalance between disputants automatically disqualifies mediation as a satisfactory means of resolution. These objections were discussed a few years ago by my colleague at UMass, Janet Rifkin:

> Although critics of mediation charge that it may keep the less powerful party from achieving equality and equal bargaining power, it is not so clear . . . how this operates in practice. These objections . . . are inextricably tied to the view that the formal legal system offers both a better alternative and a greater possibility of achieving a fair and just resolution to the conflict. The general assumption that the lawyer can "help" the client more meaningfully than a mediator is part of the problem . . . In many instances . . . patterns of domination are reinforced by the lawyer-client relationship, in which the client is a passive recipient of the lawyer's expertise. This is particularly true for women . . . for whom patterns of domination are at the heart of the problem . . . In these [mediation] situations, the women felt that the relationship of dominance had been altered and the hierarchy in the relationship had to some extent been altered. A transformation of the pattern of dominance will affect the power relationship as well. (Rifkin, 1984: 30-31)

My own experience mediating sexual harassment cases confirms Rifkin's analysis, and my observation of sexual harassment hearings gives me little reason to believe that formal hearing proceedings are more balanced than mediations.

Policy and Neutrality

While mediation has much to offer as one of the ways of handling sexual harassment grievances, cautionary notes are still necessary. To begin with, any mode of response to harassment has to be evaluated within the context of the overall policy and procedures for sexual harassment. On my campus, the effectiveness of mediation derives in part from it being one of the alternative paths for pursuing sexual harassment grievances. In the UMass policy, complaints can be "formal" or "informal." Formal grievances lead to hearings conducted by a three person board drawn from a panel of 25 trained members of the campus community. They are indeed formal affairs, modeled after trials and complete with cross examination, witnesses, and so on. Informal grievances may be pursued through mediation or even less structured negotiations.

While it is easy to extol the virtues of mediation by contrast with the stresses of formal hearings, both seem essential to an effective sexual harassment policy. It may well be that it is the existence of formal hearings that makes mediation an attractive alternative. In many of my cases, grievants would not have gone forward if a formal hearing was the only route open to them. Similarly, although not necessarily for the same reason, many respondents' preferences for mediation were grounded in their hesitance over the prospects of a formal hearing.

If we are honest, mediators must acknowledge that the desire to avoid formal proceedings provides much of the motivation that renders mediation effective. While some might argue that mediation is simply allowing harassers and their institutions to cover up the extent of the problem, it seems clear that if no informal channels for the pursuit of grievances existed, the great majority of sexual harassment situations would remain the private burden of those who

are victimized. But aside from its institutional justification, mediating sexual harassment cases raises several questions about mediation.

First there is the question of what it means to include mediation among the options available for the pursuit of a grievance that can lead to sanctions. Clearly, within the structure of a sexual harassment policy, mediation is a part of the administrative apparatus of an institution. While mediation is thus an alternative to institutionally administered formal hearings, it is not alternative dispute resolution in the sense of ADR as a movement counterpoised to the courts and other formal adversarial processes. Of course, this is not a problem unique to the incorporation of mediation into sexual harassment policies. All mediation programs affiliated with courts and other institutions have to face up to this dilemma. In most sexual harassment cases, we are a far cry from the situation of two mutually aggrieved parties seeking a beneficent alternative to proceedings they perceive as incompatible with or hostile to their underlying intentions.

This is not an argument against using mediation in sexual harassment cases. On balance, I am very much an advocate for this. But I do believe we need to rethink our understanding of what mediation is when it is conducted within the framework of disciplinary policies. One thing it is not is neutral, at least not in the ways in which mediation is typically promoted as being neutral with respect to outcomes as well as in its stance toward disputants.

Mediation is incorporated into some policies because it is believed to be an effective means of stopping sexual harassment as well as resolving particular charges. Again, this is not an argument against mediation, but it is a challenge to the way we think of ourselves as neutrals. No matter how effective an individual mediator may be in maintaining her or his neutrality in any particular dispute, in the context of a sexual harassment policy, mediation per se is not neutral. In addition, although I fully appreciate what it means to attempt to function as a neutral in dealing with a sexual harassment dispute, a retrospective analysis of the cases I have mediated reveals numerous deviations from textbook definitions of neutrality. Mind you, I am not talking about becoming a partisan for one or the other of the disputants, although at times it took every effort I could marshal to override my personal feelings, suspicions, and preferences and function in a balanced way vis-a-vis both parties. And I have no doubt that an independent observer would have noticed many ways in which my partiality seeped through the seams of professionalism, if not in terms of my blatantly taking one person's side, at least in terms of an imbalance of energy and effort devoted to clarifying, communicating, and persuading on behalf of one of the parties.

However, even in cases in which maintaining a balance was not at all problematic, I think mediator neutrality is not what we would like to think it is. Recent research by my colleagues Janet Rifkin and Sara Cobb highlights the fact that when thinking about their neutrality, mediators tend to underestimate their own role in what they term the disputant's story-telling processes (see Cobb and Rifkin, forthcoming). They point to the ways in which the mediator's questions and reframings structure the emergent understanding of the conflict and, hence, the possible resolutions to that conflict. Also underlined is the significance of the sequencing of story-telling in mediation and the overarching influence of the initial story.

In sexual harassment cases, the first story told is always a complaint against the second party, and the second story is always told in response to parameters defined in the first story. The first party is making a case, the second party is presenting a defense; and no matter how much we, the mediators, explain how mediation is different than adjudication, the theme of accusation and defense persists throughout the process. To accept the definition of the conflict as the disputants present it is itself a violation of one notion of neutrality because the mediator is going along with the disputants' understanding of the conflict, which is itself part of the conflict. Reframing the statements of the parties so that the accusation-defense form is eliminated is hardly a neutral act, nor is it always appropriate.

Again, the point here is not to argue against the use of mediation, but rather to highlight the ways in which extending mediation into new domains forces us to reconsider some of our most cherished notions about the process. The history of other disciplines is replete with stories of growth that emerged after a field extended itself into areas in which it did not "belong." In every instance progress followed when endeavors in the new domain were accompanied by a critical self-reflection that forced a reevaluation of basic concepts and techniques. Without that, there is only proselytizing. It is not yet clear what will happen with mediation and alternative dispute resolution, but the opportunity exists to reshape our thinking in positive ways that do not undermine the integrity of mediation itself.

REFERENCES

Rifkin, J. (1984). "Mediation from a feminist perspective: Promises and problems." *Law and Inequality: A Journal of Theory and Practice* 2 (February): 21-31.

Cobb, S. and Rifkin, J. (forthcoming). "Neutrality as a discursive practice: The construction and transformation of narratives in community mediation." In *Law, politics and society*, edited by Susan Silbey and Austin Sarat. Greenwich, Conn.: JAI Press.

Rowe, M. P. (1990). "People who feel harassed need a complaint system with both formal and informal options." *Negotiation Journal* 6 (April): 161-172.