**“EXPOSE YOUR PIG”: THE PROCEDURAL FAILURES OF SEXUAL HARASSMENT MEDIATION AND DANGER TO ABUSE VICTIMS**

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**INTRODUCTION**

Years of repressed rage and tension boiled over in October of 2017, as a seemingly never-ending stream of sexual harassment victims began to share their experiences of abuse.[[1]](#footnote-1) Charged by the Harvey Weinstein scandal, a shocking exposure of a systematic and calculating abuser who sexually preyed on young actresses while operating a campaign of fear and coercion, the “Me Too” movement rapidly grew.[[2]](#footnote-2) Women, both within the entertainment industry and outside, began to share their own traumatic sexual harassment experiences using the hash tag “Me Too”.[[3]](#footnote-3) The movement has surpassed the entertainment industry and gone international. The French branch on the “Me Too” movement is entitled “Balance Ton Porc” or “Expose Your Pig”.[[4]](#footnote-4) “Expose Your Pig” encourages women to open up about their own sexual harassment experiences in order to shame the men who committed these acts against them.[[5]](#footnote-5) This paper will explore the danger of the confidential mediation of sexual harassment cases, and propose a more justice-based approach to allow victims to “expose their pigs”.

The number of accusations and shared stories in the “Me Too” movement is not surprising, considering 54% of American women have experienced “unwanted and inappropriate sexual advances” at least once in their lives.[[6]](#footnote-6) More specifically, 30% of American women have been sexually harassed at work by male colleagues.[[7]](#footnote-7) This statistic represents the 33 million American women who have been sexually harassed on the job, a staggering number.[[8]](#footnote-8) Sexual harassment has unfortunately become a part of the workplace culture, and though not all women report their abusers, safeguards need to be put in place in the legal process to protect the women that do push forward and expose their harassment.

What processes are in place to protect these women from sexual harassment in the workplace? One contentious potentially problematic path is mediation. Mediation may seem like the ideal choice for these victims of abuse because of the emphasis on holistic solutions and party autonomy. Some feminist scholars have praised mediation for empowering victims and providing a forum of these victims’ choosing in order to resolve the process in the manner they see fit, rather than being forced into lengthy litigation.[[9]](#footnote-9) However, 25% of male on female sexual harassment cases in the workplace involve a male who holds power of the fate of the victim’s career.[[10]](#footnote-10) Sexual harassment mediations are in danger of perpetuating severe power imbalances. Feminist scholar Catharine MacKinnon theorizes that patriarchal societies have socially constructed gender, and that this construction of gender has placed men in a superior standing to women.[[11]](#footnote-11) In mediation, these power imbalances are caused by the mediator failing to observe and consider “gendered communications and behaviors” which may lead to a more dominate male presence in the mediation, with the female participant conceding more frequently.[[12]](#footnote-12) Further, “[u]nderstanding gender as a social construction with men in a superior position and women in an inferior position can create a power imbalance in mediation where men set the terms and women acquiesce”.[[13]](#footnote-13) Others have gone as far as comparing mandatory mediation being forced on women as synonymous to rape.[[14]](#footnote-14)

Harvey Weinstein is a prime and timely example of the danger of power imbalances both in a societal context and the mediation room. Weinstein used his direct power and influence in the entertainment industry to control the fate of the careers of many actresses and industry workers. Sexual harassment mediation protocol in the workplace needs to be re-evaluated in a post-Weinstein world.

The *New York Times* reports, “Harvey Weinstein built his complicity machine out of the witting, the unwitting and those in between. He commanded enablers, silencers and spies, warning others who discovered his secrets to say nothing. He courted those who could provide the money or prestige to enhance his reputation as well as his power to intimidate”.[[15]](#footnote-15) Harvey Weinstein victimized women by using his power to silence (and often times settle) sexual harassment claims.[[16]](#footnote-16) Herein lies the danger of alternative dispute resolution for sexual harassment claims. Like Harvey Weinstein’s victims, victims of sexual harassment in the workplace may be pressured into settlement in order to save their careers and avoid retaliation. Women in the workplace may even avoid reporting instances of sexual harassment if they believe that the avenues available to them internally involve a highly unbalanced dispute resolution process. The Financial Times reports, “As one Weinstein victim after another made clear, women are afraid to report harassment due to a power imbalance between an individual victim and her harasser. The situation is he said-she said, and he is much more able to insist on his version. At best, she might end up with a settlement and a non-disclosure agreement, but at the cost of her job”.[[17]](#footnote-17) Further, an importance must be placed on the assertion of rights of women who are involved in sexual harassment claims, with some scholars arguing that women discover greater self-preservation in collectivism.[[18]](#footnote-18)

The realization of the scope and intricacy of Weinstein’s abuse scheme has led to similar accusations of abuse of power throughout the industry and the workplace, proving that these situations are all too common.[[19]](#footnote-19) Mediators must combat power imbalances with stricter screening and intake procedures, or even make the determination that the case is inappropriate for mediation.

**BACKGROUND**

1. The Scope of Sexual Harassment in the Workplace

Sexual harassment is classified as a form of discrimination by the U.S. Equal Employment Opportunity Commission (“EEOC”) under Title VII of the Civil Rights Act of 1964.[[20]](#footnote-20) In 1986, the Supreme Court first recognized sexual harassment as a form of discrimination under Title VII in *Meritor Savings Bank v. Vinson*.[[21]](#footnote-21) Sexual harassment comes in many forms and can include “unwanted sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature”.[[22]](#footnote-22) The two main forms of sexual harassment in the workplace are the “quid pro quo” and the hostile work environment.[[23]](#footnote-23) Quid pro quo harassment occurs when the harasser holds power of the victim’s employment status and demands sexual favors in return for security.[[24]](#footnote-24) This is the clearest form of sexual harassment in the workplace because of the existence of a “tangible job benefit” between the supervisor and employee.[[25]](#footnote-25) The hostile work environment form occurs “when offensive conduct, usually by co-workers, creates a hostile work environment that changes the victim's terms and conditions of employment.”[[26]](#footnote-26)

Between 1990 and 1999, there were 36,500 reported sexual assault cases in the American workplace, and women are the victims of 80% of all workplace assaults.[[27]](#footnote-27) Sexual harassment cases are reported at a much higher rate, with 12,428 claims submitted to the EEOC in 2017 alone.[[28]](#footnote-28) This statistic does not include any state or local Fair Employment Practice claims.

A study by the EEOC explained that reporting incidences of harassment to employers can lead to company trivialization of claims.[[29]](#footnote-29) Often times victims find that the best course of action is to simply not act at all, and continue working as if the abuse had not occurred.[[30]](#footnote-30) In many cases, therefore, targets of harassment do not complain or confront the harasser… The least common response of either men or women to harassment is to take some formal action – either to report the harassment internally or file a formal legal complaint.”[[31]](#footnote-31) The majority of sexual harassment victims in the workplace will not discuss the harassment with a superior or file a formal complaint. [[32]](#footnote-32) One 2003 study found that 75% of employees who reported incidents of sexual harassment were retaliated against by their abuser or employer.[[33]](#footnote-33) The lack of formal complaints is understandable when considering the likelihood of employer retaliation.[[34]](#footnote-34)

Picture this scenario. Ann is a new employee at her company and has been experiencing harassment throughout her short time on the job. Her boss, Jim, visits her desk multiple times a day and makes disparaging sexual comments, repeatedly asks her to join him for lunch and insults her when she does not agree. He makes explicit comments about her appearance and hovers in her personal space. Ann has felt increasingly unsafe at work and fears that Jim’s behavior will just escalate. Ann has talked to other workers in the office who tell her to relax because “That’s just how Jim is”. Ann is dependent on position financially and professionally and is scared to approach Human Resources with a complaint because she does not want to be retaliated against.

When reading Ann’s story as an outsider it may be easy to judge her inaction and quickly recommend she contact her HR representative. It is often difficult to sympathize in these situations, but we must realize that it is impossible to know how one would react unless they have been in the same position. These scenarios, which Ann has suffered, happen often, resulting in the majority of these cases going unreported. Fear of retaliation is a major factor in the lack of reporting of workplace sexual harassment. Yet, when victims take the next step and report their harasser they are not free from power imbalances and retaliation is not the only concern that may affect a mediation session.

Now, picture that Ann has decided to formally report Jim because she believes his abuse is escalating. After speaking with her Human Resources representative, they may offer the opportunity to internalize the situation within the company and resolve the issue quickly and privately. Ann may be embarrassed by coming forward with allegations, especially her other co-workers seem unfazed by Jim’s behavior. She may even be grateful when the company offers her a mediation session with an unbiased mediator, and believe that she will have the opportunity to confront Jim and explain how his behavior makes her feel uncomfortable.

Ann enters the session nervous but thankful to express her discomfort to her boss and put this situation behind her. In mediation sessions, the mediator will give an opening statement and disclaim any bias, and explain that both parties will be given equal opportunity to express their views of the situation. The mediator will then ask Ann, the complainant, to explain her positions. Ann, in good faith, explains her discomfort, her concerns and the inappropriateness of Jim’s behavior and sexually explicit comments. She may feel relief upon reliving her experience and expressing her emotions. Now, it is Jim’s turn to speak.

Jim begins to gaslight Ann. Gaslighting is defined as a “colloquial term that describes a type of psychological abuse in which the abuser denies the victim’s reality, causing him/her to question him/herself, his/her memory, or his/her perceptions”.[[35]](#footnote-35) Jim recounts the same situations and conversations that Ann does, but with a twist on the scenario. Jim proclaims innocence to any ill intentions and claims that he has always joked this way with female employees. In fact, Ann had always seemed receptive to his quips and laughed along with him. Further, he takes all of his new employees out to lunch, male or female, in order to get to know them better. Jim may seem truly contrite by Ann’s discomfort and explains that this was all just one big misunderstanding. Jim promises that he values Ann’s contribution to the company and believes that she is an excellent worker. Jim wants to put this small misunderstanding behind them, and continue their professional relationship, with less personal interaction between the two. Jim monopolizes the conversation and counters every point Ann makes with a louder, longer seemingly innocent explanation.

Ann feels overwhelmed. Ann may begin to question these conversations that had previously made her so uncomfortable. Had she taken Jim’s comments too personally, and was she overreacting? Jim now seems so genuinely sorry that he must have never directly intended to harm her. Ann may believe that the session has been a success and end the mediation, thinking that their relationship has improved and they can move on.

Following the mediation Jim barely speaks to Ann. He does not assign her enough work and does not invite her to company events. Even though the mediation was supposed to be confidential, the rest of the office avoids Ann because they believe she is a troublemaker and she feels alienated from the office. Her lack of work product may even lead to a poor employee evaluation that could result in her termination.

What went wrong in this mediation? One theory is that sexual harassment mediation is inherently flawed because of gender construct and the existence of power imbalances in both the workplace and society.

1. Sexual Harassment Mediation

In the early 1980s, the alternative dispute resolution field began to work with employment discrimination claims.[[36]](#footnote-36) The ADR field’s involvement grew when “[f]ollowing success in applying ADR to collective bargaining and organized labor disputes, ADR advocates promoted mediation and arbitration as alternatives to litigation for employers seeking less costly methods for resolving the growing number of employee claims of workplace discrimination and sexual harassment.”[[37]](#footnote-37) Instead, author Susan K. Hippensteele argued that the rise of sexual harassment mediation was due to a combination of employer anxiety and the advocating of civil rights groups.[[38]](#footnote-38) First, a sudden increase of sexual harassment claims following a shift in public opinion in regards to sexual harassment led to the desire for employers to privatize the complaint process.[[39]](#footnote-39) Previously, female employees that had entered the workforce in the 1950s and 1960s saw sexual harassment in the workplace as an unavoidable part of their experience.[[40]](#footnote-40) Employers intended to avoid litigation and advocates sought to best represent their clients in a process they believed provided the most benefit.[[41]](#footnote-41) The overall goal was re-privatizing sexual harassment by employers and advocates alike.[[42]](#footnote-42) Two factors, “the legal profession's failure to understand the psychology of sexual harassment combined with renewed political backlash against sexual harassment victims provided the ADR industry a unique opportunity to move into the sexual harassment arena”.[[43]](#footnote-43)

1. Sexual Harassment Mediation: The EEOC Model

In 1992, the EEOC began a pilot ADR Program to internally mediate all discrimination to voluntary parties.[[44]](#footnote-44) This pilot program included sexual harassment discrimination cases brought to the EEOC.[[45]](#footnote-45) The program was reported to have “…an ultimate success rate of more than fifty percent, with ninety-two percent of the parties rating the mediation process as “very fair” or “fair.” The remedies varied from cash settlement and changes in employment status to apologies.”[[46]](#footnote-46) 77% of the victims were satisfied in mediation in comparison to a 45% satisfaction rate for arbitrated cases.[[47]](#footnote-47) This data does not separate sexual harassment cases to a separate category, making it impossible to determine the satisfaction rate in these situations.

One possible reason for a higher satisfaction in settlement is that monetary relief is not the sole end goal of mediation. Claimants have a wide avenue of possible solutions available to them in comparison to mediation, and may feel that they hold a greater measure of power in the mediation setting than in the course of litigation. Alternative solutions that are not focused on monetary settlement can include: “education rather than punishment; transfers, retraining, counseling, back pay; disciplining of the offender, separation of offender and victim, office-wide training, updated complaint processes; letters of reference, or job modifications…”, as well as a formal apology. [[48]](#footnote-48) Formal apologies in sexual harassment mediation arguably empower victims by recognizing the harm that was done to them, and relieve the claimant of future self-doubt about her trauma.[[49]](#footnote-49) Finally, employers are attracted to mediation for the substantially lower cost than a litigation would incur, and the often times confidential nature of settlements between employees.[[50]](#footnote-50)

In an interview with an EEOC Mediator, the importance of the voluntary nature of the process was made clear.[[51]](#footnote-51) The Mediator explained that while there is not a formal screening process before the mediation takes place, any sexual harassment case that is referred to the EEOC only takes place on a voluntary basis. The Mediator focuses on providing a comfortable environment for both parties and keeps them in separate caucuses so that a victim may not be forced to face her alleged abuser. The Mediator argued that giving victims the choice to mediate empowered victims to take control of their case and avoid length litigation. During the interview, the Mediator expressed the helpfulness for victims who are continuing to work in the company or organization to express their feelings about the harassment to her employer the mediation room, which the Mediator has designed to be a safe and inviting forum. Oftentimes, settlement is not solely focused on monetary relief, and the Mediator has helped draft new sexual harassment policies and stipulated sexual harassment training in the workplace in order for settlement to go forward. The Mediator believes that the point of mediation is resolution and settlement whether monetary or not, and victims have the opportunity to draft creative solutions that may not be available in a litigation context that may be time consuming and emotionally devastating. The opportunity is important for both sides to try to resolve the matter before a long litigation. The Mediator believes that the confidential nature of settlement does not protect just the abuser, but the victim who may not want her case publicized.

On the other hand, the confidentiality of settlements in mediation is a component of the process dangers for sexual harassment victims in mediations. Confidential settlements prevent public awareness and shaming of abusers, which may lead the victim to feel powerless, or allow the abuser to continue the cycle of harassment.

**DISCUSSION**

1. Power Imbalances and the Dangers for Female Victims in Mediation

While not referencing the appropriateness of sexual harassment mediation, author Trina Grillo criticized the idea that mediation presented a safer legal avenue for women who wanted to avoid the more “patriarchal” litigation process in her seminal article.[[52]](#footnote-52) Grillo explains that because mediation involves trading interests in the desire to compromise and reach a resolution, there is less focus or importance on the values of the parties present.[[53]](#footnote-53) Oftentimes focus on the morality of an issue can halt agreement and a mediator may push to focus instead of the practical in order to have both parties come to some form of an agreement.[[54]](#footnote-54) The danger is found in the idea that “all agreements are not equal. It may be important, from both a societal and an individual standpoint, to have an agreement that reflects cultural notions of justice and not merely one to which there has been mutual assent. Many see the courts as a place where they can obtain vindication and a ruling by a higher authority.”[[55]](#footnote-55)

Another component of the power imbalance is the societal expectation that women are expected to appear cool and collected, displaying no hint of anger, in order to not be seen as hysterical or “unfeminine”.[[56]](#footnote-56) Grillo explains that Western culture views women who hide their anger as the “nice woman” and those who assert and express their anger as “the bitch”.[[57]](#footnote-57) Female victims in mediation may struggle to contain their anger in order to come across as the “nice woman” so that they are not viewed as expressing anger solely to be difficult and unconstructive, displaying aggression that others may judge them for and result in the victim not being taken seriously.[[58]](#footnote-58)

Gender differences in conversational styles also can affect the mediation process. Research suggests that female conversational styles tend to be more “personal, relational, and focused on understanding” while male conversational style focuses more on information, power and status.[[59]](#footnote-59) It must be said that “the norms of one gender are [not] ‘better’ than the other's (quite the opposite)— instead, their point was that these differences, if not identified, become sources of misunderstanding, judgment, and blame…these differences are not surprising, because boys and girls grow up in different “cultures” with differing expectations about how to behave and how they will be treated”.[[60]](#footnote-60) Finally, gender may affect negotiation styles. Academia has acknowledged a (possibly stereotyped) theory that women are more “risk averse” in negotiation and may behave differently in competitive settings.[[61]](#footnote-61) Whether these negotiation differences are reality or stereotype, they may influence a negotiation or mediation.[[62]](#footnote-62)

Author Andrea Schneider argues that these perceptions of negotiation differences are a narrative used to blame women for societal issues and constructs, such as the gender wage gap.[[63]](#footnote-63) Studies present results that show women are at a disadvantage in the negotiating rule, but only because the studies are designed to “focus on what are traditionally seen as masculine characteristics of negotiation—aggressiveness and confidence (or overconfidence…[s]ince these characteristics are the variables that are being measured, the games themselves are rigged to show men as more effective.”[[64]](#footnote-64) Yet, when women do attempt to engage in more “masculine” styles of negotiation they are subject to new challenges. By taking a hard stance during a negotiation or mediation, “[women] may lose both social and economic capital, as in not being liked at work nor being hired or promoted…if a woman successfully negotiates a higher wage, she risks alienating her colleagues, which in turn jeopardizes her long-term earnings.”[[65]](#footnote-65)

Whether these differences in negotiation styles are reality or simply perception, female victims who engage in mediation to resolve sexual harassment issues may find themselves at an inherent disadvantage. Societal constructs have indoctrinated women to certain conversational and negotiation norms, which can contribute to greater power imbalances in the mediation room.

1. A Comparison of Sexual Harassment Mediations to Cases Involving Domestic Violence

Sexual harassment mediation holds similar power imbalance concerns as domestic violence and assault claims.[[66]](#footnote-66) Author Mori Irvine explains, “In [these] cases there is more than a simple dispute over money or property. Instead, there is a dynamic present that involves power, fear, and coercion”.[[67]](#footnote-67) Mediation of sexual harassment cases risks trivializing workplace harassment by maintaining a dangerous and unsustainable workplace not just for the victim, but also for the female workplace as a whole in society.[[68]](#footnote-68) Arguably, “pressure for the victim to accept at least partial responsibility for this illegal conduct can only be eliminated by using the law to protect her rights and to punish the transgressor”.[[69]](#footnote-69) The mediator, working for the ideals of impartiality and compromise, cannot impose a message of legal recourse on the abuser without displaying bias.[[70]](#footnote-70)

The first existing dynamic that is present in both domestic violence and sexual harassment cases is unequal bargaining power.[[71]](#footnote-71) The benefit of mediation is the concept that parties hold equal power to negotiate and reach a conclusion that is mutually beneficial in comparison to litigation.[[72]](#footnote-72) However, “[i]n an abusive relationship…mutual participation may be very difficult for a victim because the abuser may have consistently silenced him/her throughout the relationship and the victim may fear retribution if true needs are expressed. If one party fears the other, it is unlikely that party can mediate on equal bargaining ground.”[[73]](#footnote-73) Advocates for domestic violence victims believe that there is a fundamental inequity in power and control in abusive relationships, and the argument can be made that sexual harassment constitutes a similar type of relationship.[[74]](#footnote-74) The existence of “psychological terrorism” that abusers may employ in mediations can be any look, action, or statement made in an attempt to intimidate an a victim, who may fear further consequences in the future for asserting their feelings and acting in a positional manner in a mediation.[[75]](#footnote-75)

Victim advocates further argue that it is impossible for mediation to guarantee that victims of domestic violence will not be abused again. Author Alexandria Zylstra explains:

Further, some argue that mediation cannot overcome the long-standing effects of an abusive relationship within the context of such a brief encounter. Regardless of the power- balancing techniques the mediator uses, critics argue that believing such techniques will actually reduce the power imbalance and ensure a safe and fair settlement is absurd because it presumes that mediators, in a brief amount of time, are able to accomplish what takes trained psychologists years to accomplish working with violent offenders, and with abuse victims. Not only is this transformation unlikely, critics argue that such false assumptions may, in fact, greatly increase the risk of danger to the victim with this type of intervention by an untrained mediator.[[76]](#footnote-76)

Similarly, a mediator cannot guarantee that a sexual harassment victim in the workplace will not be victimized again, or that the abuser will not go on to harm other employees. The mediation may instead make the abuser feel as if he has been absolved of past wrongdoing because a settlement or agreement was reached and continue abusive behaviors while never truly accepting responsibility for problematic actions.[[77]](#footnote-77)

III. Screening Processes

Screening processes can aid in excluding cases that are inappropriate for mediation. Arguably, screening processes are often inadequate and fail to prevent cases with domestic violence from being mediated.[[78]](#footnote-78) For example, in divorce cases referred to court-annexed mediation, fifty to eighty percent of cases may involve domestic violence.[[79]](#footnote-79) Even though screening procedure may exempt battered women victims from being forced into mandatory mediation, only five percent of cases are actually excluded.[[80]](#footnote-80) One failure of the screening process and court-annexed mediation programs is the weak good-faith requirement standard.[[81]](#footnote-81) Good-faith standards in mediation are generally implemented to ensure some degree of well-intentioned and active participation in mediation.[[82]](#footnote-82) Good-faith standards intend to prevent the mediation process from being purely discovery before a case and a stepping-stone to litigation.[[83]](#footnote-83)

Good-faith standards are intentionally vague to deal with a range of misbehavior by parties, which leads to the total lack of relevance for domestic abusers.[[84]](#footnote-84) Current standards need to be adapted because:

[i]n large part, the failure to include the needs of battered women in good-faith participation standards has to do with the nature of domestic violence. Domestic violence is often manifested through inconspicuous behaviors, such as a nonverbal signal by the batterer that the victim interprets as a threat, but that someone outside the relationship might not notice. In contrast, existing good-faith participation standards focus on the parties' conspicuous behaviors, such as attending required mediation sessions. Unlike battering behaviors, such conspicuous behaviors are readily apparent.[[85]](#footnote-85)

Mediations involving family issues often employ rigorous screening processes that could be beneficial to the workplace sexual harassment mediation. Family mediators use screening processes to determine the appropriateness of a case for the mediation room and attempt to identify potentially dangerous situations prior to the mediation through an intake process.[[86]](#footnote-86) Mediators must meet confidentially with each party separately prior to the mediation to explain the goals of the mediation and identify party concerns that may deem a mediation inappropriate.[[87]](#footnote-87) In a situation where a mediator, “feels that a case is inappropriate for mediation… because one party is afraid or other power imbalances that cannot be addressed through adaptations in the process, the mediator…should simply decline the case as being inappropriate. To disclose any more could put a victim of coercive controlling violence at risk of retaliatory harm.”[[88]](#footnote-88)

If the mediator decides to continue with the process, she must design a safety plan and make important decisions about which individuals should be players in the mediation.[[89]](#footnote-89) A mediator can decide whether joint sessions or caucuses are beneficial to the mediation, and decide which individuals may be better kept out of the mediation room.[[90]](#footnote-90) In the case of a sexual harassment, caucus format should arguably always be the norm and a victim should not be forced to face her abuser.

A power imbalance exists in sexual harassment claims in which an abuser may dominate the mediation with a mediator sitting by unknowingly. In workplace harassment situations, abusers that hold power over the fate of a victim’s career may intimidate a victim through nonverbal cues that can be seen as a threat, similar to how battered women are treated. Further, screening processes are determinedly unsuccessful in exempting domestic violence cases that are inappropriate for mediation, which leads to the assumption that sexual harassment screening processes may be similarly ineffective in exempting cases in which a power imbalance may threaten the integrity of the mediation.

**PROPOSAL**

This paper proposes that in an ideal scenario, mediation or dispute resolution processes should not be used as the prime avenue to resolve sexual harassment claims in the workplace. Company internal human resource procedures should modify existing policies that allow for internal dispute resolution processes to be the first and preferred step taken in sexual harassment cases. This would avoid further victimization of employees, particularly female employees. Human Resources departments should instead work with victims who believe they have been sexually harassed by gathering evidence and building a case file. HR should also provide a channel to proper legal guidance for victims if they believe litigation is necessary for a civil resolution. Companies should avoid confidential settlement of sexual harassment claims in the workplace. By taking a public and hard stance on inappropriate behavior, workplaces may see a possible reduction of harassment incidents. If abusers realize that their actions have actual legal and employment ramifications, rather than relying on private settlement, they may refrain from beginning abusive actions.

Though the initial stance of companies should be to publicly condemn abusers, there must be some form of private resolution available in order to not alienate certain victims. Victims may feel that publicly airing their personal business may hurt their careers and lead to humiliation and possible retaliation. If victims who report to human resources truly feel that the best way to resolve the dispute would be through mediation, their wishes should be respected. For those victims who request mediation, a strict intake procedure modeled after domestic violence intake must occur before mediation is deemed appropriate.

Screening processes should be focused on “ [the] use of separate and private interviews to screen prior to mediation; reliance on more than one method of identification; eliciting information in a neutral, safe atmosphere; and making assessments that lead to the conduct of mediation as usual, the conduct of mediation with special conditions, or case referral for alternative treatments”.[[91]](#footnote-91) These screenings were proposed for cases involving domestic violence, but as evidenced earlier in the two issues can be dealt with in similar ways. Overall, the main focus should be on the safety of the victims and their ensured comfort level at all times throughout the process.

If a company or organization decides to employ sexual harassment mediation as a dispute resolution process, the process must be voluntary. The process should follow the EEOC model described in the Mediator Interview.[[92]](#footnote-92) Victims must willingly agree to a mediation that has been designed for their safety through the use of caucuses. Though not ideal, this process may empower victims to control their case outcomes and freely decide that mediation is their best legal path.

Therefore, mandatory mediation in cases involving sexual harassment is never appropriate. The Southern District of New York is an example of a court that mandates mediation in all sexual harassment work cases. Employers should never implement an internal dispute resolution policy that mandates mediation for sexual harassment claims. Advocates of sexual harassment victims worry that mandatory mediation is a hurdle to victims who may need a legal remedy and also downplays the severity of sexual harassment as a crime.[[93]](#footnote-93) Further, mandatory mediation presents the following issues:

(1) victims feel coerced into participating even if given the option to opt out,

(2) the procedure has inherent risks since the adequacy of screening procedures and use of safe mediation practices vary with individual mediators,

(3) its cooperative and compromise-oriented focus is inappropriate for victims, and

(4) it assumes that abusive individuals will bargain in good faith.[[94]](#footnote-94)

These issues present major safety and emotionally traumatic concerns for victims of sexual harassment in the workplace and therefore its use is never appropriate.

**CONCLUSION**

In conclusion, sexual harassment cases in the workplace need to be monitored under the strictest of guidelines. Victims of harassment should not be forced into dispute resolution processes that may be structurally biased against them. If the victim prefers and actively chooses a dispute resolution process such as mediation, screening processes must be adhered to that monitor for power imbalances that may make an appropriate mediation impossible. Preferably, supervisor-subordinate relationships with sexual harassment claims should never be mediated because of the difference in bargaining power and possibility for retaliation on the part of the employer. It is the duty of employers to ensure the safety of their workers and provide them with secure channels to proper resolution, whether through litigation or ADR. Employers must avoid enabling future Harvey Weinsteins and aid in healing the years of abuse the female workforce has endured. Victims should feel empowered to expose their pigs both in the workforce and in the greater society.

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5. *Id*. [↑](#footnote-ref-5)
6. Claire Zillman, *A New Poll on Sexual Harassment Suggests Why 'Me Too' Went So Insanely Viral*, Fortune, Oct. 17, 2017, http://fortune.com/2017/10/17/me-too-hashtag-sexual-harassment-at-work-stats/. [↑](#footnote-ref-6)
7. *Id*. [↑](#footnote-ref-7)
8. *Id*. [↑](#footnote-ref-8)
9. Carrie A. Bond, *Shattering the Myth: Mediating Sexual Harassment Disputes in the Workplace*, 65 Fordham L. Rev. 2489 (1997). [↑](#footnote-ref-9)
10. *See supra* note 6. [↑](#footnote-ref-10)
11. Deborah Rubin, *Re-Feminizing Mediation Globally*, 12 N.Y. City L. Rev. 355 (2009). [↑](#footnote-ref-11)
12. *Id*. [↑](#footnote-ref-12)
13. *Id*. [↑](#footnote-ref-13)
14. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L. J. (1991). (Grillo goes on to explain that this comparison can also be made in regards to the traditional adversarial process, which is also rooted, in patriarchal values.) [↑](#footnote-ref-14)
15. *Supra* note 2. [↑](#footnote-ref-15)
16. *Id*. [↑](#footnote-ref-16)
17. Anne-Marie Slaughter, *Sexual Harassment is Rooted in Power Imbalances*, The Financial Times, Oct. 26, 2017, <https://www.ft.com/content/1d624ee0-b8af-11e7-bff8-f9946607a6ba>. (The article goes on to explain that victims often find power in numbers, resulting in phenomenon such as increased reporting about a particular abuser after that abuser has already been accused. Oftentimes joining in on a public claim is easier and less intimidating than being the first to accuse, displaying the importance of public shaming and ridicule of abusers in order to let other cases come to light and prevent future cases). [↑](#footnote-ref-17)
18. *See* note 14. (Grillo writes, “For example, Elizabeth Schneider has demonstrated that assertion of rights can aid in the development of individual and group consciousness among women. She notes that Carol Gilligan describes the developmental challenges of maturity as very different for men and for women. Men must learn connection and care for others; women must learn to care for themselves. The assertion of rights can aid women in this development, as “ the essential notion of rights is that the interests of the self can be considered legitimate.’ Thus, assertion of rights can help women distinguish self from other, and ultimately give them a sense of collective identity.”) [↑](#footnote-ref-18)
19. *See* Katie Rife, *An incomplete, depressingly long list of celebrities’ sexual assault and harassment stories,* AV Club, Nov. 22, 2017, <https://www.avclub.com/an-incomplete-depressingly-long-list-of-celebrities-se-1819628519>. (Describing multiple abuse stories from entertainment industry professionals as well as explaining the scope of the “Me Too” movement and its growth due to social media) [↑](#footnote-ref-19)
20. *Facts About Sexual Harassment*, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> (last accessed May 23, 2018). [↑](#footnote-ref-20)
21. 477 U.S. 57 (1986). [↑](#footnote-ref-21)
22. *See supra* note 16. [↑](#footnote-ref-22)
23. Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?*, Ohio State Journal on Dispute Resolution, Vol 9:1 (1993). [↑](#footnote-ref-23)
24. *Id*. [↑](#footnote-ref-24)
25. *Id*. [↑](#footnote-ref-25)
26. *Id*. (Explaining that this can be perceived as an environmental issue in which the victim’s workplace is transformed by an air of intimidation. Hostile work environments often consist of numerous “minor” offensive issues that combine to form the offensive workplace. In these workplace situations harmful intent is not required to categorize it as true harassment.) [↑](#footnote-ref-26)
27. *Sexual Violence & the Workplace*, National Sexual Violence Research Center, 2013, <https://www.nsvrc.org/sites/default/files/publications_nsvrc_overview_sexual-violence-workplace.pdf>. [↑](#footnote-ref-27)
28. *Charges Alleging Sex-Based Harassment (Charges filed with EEOC)FY 2010 - FY 2017*, EEOC.GOV, <https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm>. (Last visited April 2nd, 2018). [↑](#footnote-ref-28)
29. Chai R. Feldblum & Victoria A. Lipnic, Select Task Force on the Study of Harassment in the Workplace, <https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf>. [↑](#footnote-ref-29)
30. *Id.* (The EEOC reports that “[c]ommon workplace-based responses by those who experience sex-based harassment are to avoid the harasser (33% to 75%); deny or downplay the gravity of the situation (54% to 73%); or attempt to ignore, forget or endure the behavior (44% to 70%).”) [↑](#footnote-ref-30)
31. *Id*. [↑](#footnote-ref-31)
32. *Id*. (Approximately 70% of victims did not even discuss the harassment with a superior, let alone file a formal complaint, a step only 6 to 13% of victims take.) [↑](#footnote-ref-32)
33. Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003). [↑](#footnote-ref-33)
34. *See* Feldblum *supra* note 25. [↑](#footnote-ref-34)
35. *Gaslighting*, GoodTherapy.org <https://www.goodtherapy.org/blog/psychpedia/gaslighting> (last visited April 12, 2018). [↑](#footnote-ref-35)
36. Susan K. Hippensteele, *Mediation Ideology: Navigating Space From Myth to Reality in Sexual Harassment Dispute Resolution*, 15 Am. U. J. Gender Soc. Pol'y & L. 43 (2006). [↑](#footnote-ref-36)
37. *Id*. [↑](#footnote-ref-37)
38. *Id*. [↑](#footnote-ref-38)
39. *Id*. [↑](#footnote-ref-39)
40. *Id*. [↑](#footnote-ref-40)
41. *Id*. [↑](#footnote-ref-41)
42. *Id*. [↑](#footnote-ref-42)
43. *Id*. [↑](#footnote-ref-43)
44. *See* Bond *supra* note 9. [↑](#footnote-ref-44)
45. *Id.*  [↑](#footnote-ref-45)
46. *Id* [↑](#footnote-ref-46)
47. *Id*. [↑](#footnote-ref-47)
48. *Id*. [↑](#footnote-ref-48)
49. *Id*. [↑](#footnote-ref-49)
50. *Id*. [↑](#footnote-ref-50)
51. Phone Interview with Anonymous EEOC Mediator (May 23, 2018). Author communicated with the Mediator in regard to the appropriateness of sexual harassment mediation and his experience mediating this category of cases. [↑](#footnote-ref-51)
52. *Supra* Grillo note 14. [↑](#footnote-ref-52)
53. *Id*. [↑](#footnote-ref-53)
54. *Id*. [↑](#footnote-ref-54)
55. *Id*. [↑](#footnote-ref-55)
56. *Id*. [↑](#footnote-ref-56)
57. *Id*. (Grillo writes, Neither of the alternatives traditionally available to women allows a woman to use her anger to clarify and strengthen herself and her relationships. Rather, both alternatives force her to deny, displace, internalize, or fear it.) [↑](#footnote-ref-57)
58. *Id*. [↑](#footnote-ref-58)
59. David A. Hoffman and Katherine Triantafillou, “Cultural and Diversity Issues in Mediation”, *Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals,* Massachusetts Continuing Legal Education, Inc., 2013. (Citing another study the authors present “Professor Linda Babcock performed experiments with men and women as advocates for themselves and others in salary negotiations, and found that women tend to be less forceful advocates for themselves, but are more forceful when advocating for others. For men, the pattern was the opposite—they were more assertive than women when advocating for themselves, and somewhat less so when advocating for others.”) [↑](#footnote-ref-59)
60. *Id*. (Explaining that these gender “culture” differences are enforced from infancy. Children’s books predominantly feature male heroes and seldom show women in leadership roles. Boys are expected to play different types of games, focused on competition while young girls are given dolls and encouraged to play house. Girls are taught to “be nice and get along” while boys are taught to win.) [↑](#footnote-ref-60)
61. Michelle R. Evans, *Women and Mediation: Toward a Formulation of an Interdisciplinary Empirical Model to Determine Equity in Dispute Resolution*, 17 Ohio St. J. on Disp. Resol. 145, (2001). [↑](#footnote-ref-61)
62. *Id*. (Quoting, “While stereotyped behavior such as this may have empirical support, in some cases, perceptual conjecture may be the sole basis of conclusions of gender disparity. Whether real or perceived, such gender differences may impact the parties in the setting of mediation. That is, even if the gender differences are merely perceived to exist, ‘they may influence the way in which men and women interact when they negotiate, because the participants expect these factors to affect their dealings.’ These gender differences may be subtle, unconscious.”) [↑](#footnote-ref-62)
63. Andrea Schneider, *Negotiating While Female*, 70 SMU LAW REVIEW 695, (2017). [↑](#footnote-ref-63)
64. *Id*. [↑](#footnote-ref-64)
65. *Id*. [↑](#footnote-ref-65)
66. Mori Irvine, *Mediation: Is it Appropriate for Sexual Harassment Grievances?*, Ohio State Journal on Dispute Resolution, Vol 9:1 (1993). [↑](#footnote-ref-66)
67. *Id*. [↑](#footnote-ref-67)
68. *Id*. (Explaining, “Sexual harassment grievances involve more than whether the discipline or discharge of the harasser is appropriate. Instead, how these matters are treated, and how harassers are disciplined is a reflection of how women in the workplace are faring”.) [↑](#footnote-ref-68)
69. *Id*. [↑](#footnote-ref-69)
70. *Id*. (Irvine argues that the litigation process or an arbitrator is more suited to promote sexual harassment law which will lead to fair and just punishments.) [↑](#footnote-ref-70)
71. Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, Journal of Dispute Resolution (2001). [↑](#footnote-ref-71)
72. *Id*. [↑](#footnote-ref-72)
73. *Id*. [↑](#footnote-ref-73)
74. *Id*. [↑](#footnote-ref-74)
75. *Id*. [↑](#footnote-ref-75)
76. *Id*. [↑](#footnote-ref-76)
77. *Id*. [↑](#footnote-ref-77)
78. Megan G. Thompson, *Mediating when domestic violence is a factor: Policies and practices in court‐based divorce mediation programs*, 86 Or. L. Rev. 599 (2007). [↑](#footnote-ref-78)
79. *Id*. [↑](#footnote-ref-79)
80. *Id*. [↑](#footnote-ref-80)
81. *Id*. [↑](#footnote-ref-81)
82. *Id*. [↑](#footnote-ref-82)
83. *Id*. [↑](#footnote-ref-83)
84. *Id*. [↑](#footnote-ref-84)
85. *Id*. [↑](#footnote-ref-85)
86. Hillary Linton, *Best Practices for Screening in Family Mediation-Arbitration*, Riverdale Mediation, Oct. 6, 2017, https://www.riverdalemediation.com/training/news/best-practices-in-screening-in-family-med-arb/. [↑](#footnote-ref-86)
87. *Id*. [↑](#footnote-ref-87)
88. *Id*. [↑](#footnote-ref-88)
89. *Id*. [↑](#footnote-ref-89)
90. *Id*. [↑](#footnote-ref-90)
91. Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, <https://onlinelibrary.wiley.com/doi/pdf/10.1002/crq.3900140406> (Last visited April 17, 2018). [↑](#footnote-ref-91)
92. Phone Interview with Anonymous EEOC Mediator, *supra* note 47. [↑](#footnote-ref-92)
93. *See supra* note 82. [↑](#footnote-ref-93)
94. *Id*. [↑](#footnote-ref-94)