

Mediator Liability: A Snapshot

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Virtually everything new comes with undesired side effects. Thus, as ADR, and mediation in particular, has become more prevalent, claims against mediators have become more frequent. In most cases, the claims are baseless. However, because one of the parties to the mediation may be dissatisfied with the result or the process, a claim may well follow.

When confronted with the specter of a potential claim, many in the mediation community invoke quasi-judicial immunity -- the kind of near-absolute immunity enjoyed by arbitrators -- as a basis to avoid liability. However, not all jurisdictions recognize immunity for mediators, and most that do restrict such immunity to court-annexed mediation. Moreover, the protection is typically not absolute even where immunity is available. The mediator may still be vulnerable to suit predicated upon a wide variety of causes of action that fall outside the scope of the immunity, inclusive of gross negligence, breach of contract and breach of confidentiality. In addition, other forms of redress that are not barred by immunity, such as state disciplinary or grievance procedures, may be pursued by a disgruntled party. Finally, it is critical to note that, even if mediator defendants ultimately escape liability, they can nevertheless incur significant defense bills.

The following survey of recent claims makes clear that mediators will continue to face challenges to their conduct.

Recent Developments in Mediator Liability

Family Law

One area where the use of mediation continues to proliferate is family law. Couples seeking a divorce can do so more quickly and inexpensively through mediation than via the traditional court process. When mediators do commit errors in the mediation process, they become vulnerable to attack. Moreover, the emotionally-charged context of a divorce produces situations in which, even where a mediator has seemingly done everything right and taken necessary precautions to protect both parties, he is still open to claims.

● **Post-Mediation Murder.** In California, a family mediator has been sued for the death of a wife stabbed by her husband in the building in which the mediation session occurred. The divorcing couple had met a week earlier at the mediator's office for an initial mediation session, which ended without incident. After the second meeting, held a week later and in the evening, the husband left the mediator's office. The wife remained for 20 minutes and spoke with the mediator. The wife then left and, on the first floor of the building, was fatally stabbed by her husband, who had gone to his car and returned to the building with a pair of scissors.

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The suit is still in its early stages, and factual information is being developed regarding issues whether the husband had a history of and/or propensity toward violence, and whether the mediator had reason to suspect anything. Issues concerning the mediator's legal duty, if any, to maintain a secure premises or take other safety precautions for her clients will be examined, perhaps as a matter of first impression. It also bears noting that many professional liability policies do not afford indemnity for bodily injury or death. (2006)

● ***Bias and Misstating Credentials.*** In one case in the Midwest, a family mediator was appointed by court as a "Parenting Time Expeditor and Custody Evaluator." In that capacity, the mediator directed the parties to participate in an evaluation with a psychologist. The plaintiff father alleged that, even though the psychological evaluation was never completed, the mediator issued a report to the court recommending that the children be moved from the father's home to the mother's. The psychologist allegedly disagreed, and the court declined to accept the mediator's recommendation. Subsequently, the mediator submitted a final report to the court, again recommending that the mother have sole legal and physical custody of the children. The presiding judge in the custody dispute found the mediator biased toward the mother. Ultimately, the court awarded custody to the plaintiff father. The mediator billed the father \$8,600 for her services, and a dispute arose regarding his alleged non-payment. The mediator initiated proceedings to collect her fee, and the father responded by suing the mediator. The father alleged bias and misrepresentation by the mediator. The latter claim was based on the father's allegation that the mediator did not qualify as a "Custody Evaluator" and misrepresented to the parties and the court her qualifications for that role. The father's bias allegations were based in part on the claim that the mediator had spent too much time with the mother and the children together, including a weekend getaway with them.

In October 2005, the trial court denied the mediator's motion to dismiss. The court agreed that statutory absolute immunity shielded the mediator for any liability in her capacity as Parenting Time Expediter, but held that she did not enjoy immunity for her role as Custody Evaluator. This ruling is currently on appeal. That fact alone suggests that this claim has already been an expensive one to defend. For good measure, the plaintiff father has also filed a disciplinary complaint against the mediator, which is also being defended. (2004)

● ***Faulty Settlement Agreement.*** A divorce case resulted in liability on the part of an organization providing family mediation services in New York. In connection with their divorce, a wife and her husband retained an attorney from the organization to prepare a Separation Agreement. After the divorce was final, the husband remarried and later passed away. The former wife asserted rights to her deceased ex-husband's pension but the Separation Agreement failed to address properly the distribution of the pension funds. The former wife sued the organization and multiple other defendants and sought compensatory damages plus interest and attorney fees. The organization ultimately settled the claims against it and incurred over \$25,000 in loss inclusive of defense costs. (2004)

Labor and Employment

Labor and employment is another area of law which frequently involves ADR. Mediators and arbitrators in these areas have witnessed an explosion of claims in the past several years.

- ***The Cost of Preserving Confidentiality.*** A heated (and expensive) discovery dispute arose out of a mediator's unsuccessful attempt to protect the integrity of the mediation process. The mediator was appointed as an independent third party in an administrative proceeding to address the propriety of an employee's termination. The termination decision was upheld and the former employee filed suit against her former employer for wrongful discharge. In the lawsuit, the former employee subpoenaed the mediator to testify about the administrative proceeding. The mediator declined to answer certain questions on grounds that a confidentiality statute pertaining to dispute resolution protected against the disclosure of such communications. The former employee filed a Motion to Compel based upon the inapplicability of the statute and sought sanctions against the mediator. The Trial Court declined to award sanctions but otherwise granted the Motion. The mediator appealed. The California Court of Appeal ultimately ruled that the administrative hearing did not constitute a dispute resolution proceeding subject to confidentiality under the statute. At the end of the day, the mediator incurred costs approaching \$10,000. (2004)

- ***The Cost of (Allegedly) Breaching Confidentiality.*** In contrast, another claim raised questions as to the mediator's potential breach of confidentiality in a labor matter. The employee was a lineman for the local power company who purportedly endured verbal abuse from his boss. When the employee reported the abuse, the company offered to mediate the dispute. Two days before the mediation, the company requested that the employee submit to a medical examination to be evaluated for his mental and physical fitness for his job duties. The employee authorized the doctor to furnish his medical records and reports to the mediator. The mediation was held, and the next day the company informed the employee of its preliminary decision that he was not fit to return to his job as a lineman. The company then requested the employee to submit to a psychological evaluation. Based upon the report from the psychologist, the company permanently removed the employee from his lineman duties. The employee challenged the company's determination, but was unsuccessful in his efforts to return to his former job. He then obtained a copy of the psychologist's report which made reference to confidential medical information derived from the examination held prior to the mediation. The employee contended that he had not authorized the release of this information to anyone other than the mediator and certainly not to the psychologist.

The employee filed a Complaint in state court against his employer, the mediator, and others in which he alleged breach of confidentiality as to his medical records, invasion of privacy, professional negligence, and intentional infliction of emotional distress. The employee claimed that the mediator improperly disclosed medical information at the mediation to his employer, and later disclosed it to the psychologist. The employee demanded \$100,000 to settle from the mediator and threatened to amend the Complaint to allege that the mediator maliciously failed to recuse himself when he possessed information adverse to the employee which was not disclosed to the employee. The case eventually settled for an undisclosed amount after a ten-hour mediation. Defense costs were substantial. (2002)

Commercial Law and Other Actions

Lawsuits against mediators arising from commercial law matters and other various types of disputes have proven to be just as dangerous as those which arise out of family law, employment law and personal injury.

- ***Conspiracy and Bias.*** A commercial law mediation involved a dispute among the plaintiff company, another company who asserted cross-claims against the plaintiff, and the plaintiff's insurer. The court appointed a mediator, who presided over a mediation. The Plaintiff left the mediation before it was concluded, after which the insurer and the other company reached a settlement of part of the dispute. The plaintiff then filed suit against the mediator, alleging that he improperly continued with the mediation and conspired with the other parties to prejudice the plaintiff's rights. The trial court granted the mediator's motion for summary judgment, holding that the court-appointed mediator enjoys quasi-judicial (i.e., virtually absolute) immunity. That ruling is on appeal, and the parties are in the briefing stage. This claim has been very costly to defend. (2005)

- ***Nondisclosure and Bias.*** A commercial law mediation involved a dispute over the creation of a popular television show. The plaintiff claimed the production company owed him compensation for his contribution to the creation of the show. The parties agreed to mediate. Unbeknownst to the plaintiff, the mediator had previously mediated a dispute between the production company and another party which involved the same attorneys. The case settled at mediation for \$200,000. The plaintiff later discovered the mediator's prior history with the other side and claimed that the mediator was biased against him. He further alleged that if the mediator had properly disclosed this information before the mediation, he would not have agreed to the selection of the mediator. The plaintiff filed a lawsuit, which alleged that the mediator's failure to disclose the prior mediation which involved the production company resulted in a settlement that was significantly lower than it should have been. The complaint alleged causes of action for conspiracy, fraud, breach of fiduciary duty and negligence. Although the lawsuit was eventually dismissed based on quasi-judicial immunity, the mediator incurred significant defense costs. (2002)

- ***Misrepresentation.*** Another potentially dangerous claim arose out of a judgment call by the mediator. A mediator was appointed by the court in an action brought by an attorney to recover unpaid legal fees from a former client. While the mediation was pending, the attorney filed a motion with the court to strike the former client's pleadings based on discovery violations in the civil suit. The attorney requested that the mediator ask the judge whether the client's pleadings would be stricken. The judge indicated that he would not strike the pleadings. The judge also requested that the conversation remain confidential. Despite the judge's request, the mediator informed the attorney of the judge's preliminary decision because he believed the attorney would not agree to a reasonable resolution if he thought his motion would succeed. Later that day, the attorney and his former client reached a settlement.

The attorney later spoke to the judge about his civil action. Thereafter, the attorney confronted the mediator and alleged that the mediator had misrepresented what the judge had said about his motion. The attorney indicated he would seek reimbursement from the mediator for the difference between the amount he received from the settlement and the amount of fees he had sought in the civil action. The attorney demanded \$57,500 in damages. In defense of the claim, the mediator obtained an affidavit from the judge stating that he had not intended to strike the former client's pleadings. The mediator also argued that he was protected by immunity. After the mediator threatened a counterclaim and the pursuit of sanctions, the attorney abandoned his claim. (2002)

- ***Coercive Settlement.*** In another case involving complaints over the mediator's conduct, a lawyer-mediator was appointed by the state in a lawsuit between a medical supply company and a group of doctors. The president of the supply company appeared *pro se* at the mediation after two separate attorneys withdrew from representation. The matter was settled, but nearly two years later, the president of the supply company filed suit against the mediator. The complaint alleged that the mediator violated the rules of mediation by "forcing" the supply company to settle. The company sought compensatory damages of \$48,000. The lawsuit was ultimately dismissed, but not before the mediator had incurred almost \$11,000 in defense costs. (2002)

- ***Unauthorized Practice of Law.*** In one case in California, the plaintiff (hereinafter the "Company") had been named as a defendant in an underlying commercial dispute. The Company alleged that the mediator firm had contacted it after becoming aware of the lawsuit against the Company. According to the Company, the mediator firm's business plan is to make contact with defendants named in suits filed in the local court, seek to be engaged to negotiate settlement with the adverse party, and recommend a defense attorney in the underlying suit. The Company alleged that the mediator firm recommended a defense attorney who did very little work on the case, while the mediator firm negotiated with the plaintiff's attorney. A settlement was achieved, but the Company later sued the mediator firm for damages because the settlement was allegedly necessitated by the appointed defense counsel's lack of preparation for trial. The Company further alleged that the mediator firm had violated state law by practicing law without a license. The suit is pending, with the mediator firm's general demurrer having been denied. The Company has sought discovery regarding the mediator firm's other clients. The discovery battles are ongoing. (2005)

Disciplinary Complaints

In addition to potential exposure to civil liability, mediators also face exposure to disciplinary proceedings which address potential misconduct. Although an adverse outcome will not result in payment of money damages, the imposition of disciplinary measures can be costly in other ways. And, of course, it costs money to respond to the disciplinary allegations.

- ***Unauthorized Practice of Law.*** A non-attorney family mediator on the East Coast was brought before a state bar committee to defend charges that she was practicing law without a license, by virtue of her alleged role in drafting memoranda of understanding in connection with dissolution proceedings. One point to remember in this connection is that insurance coverage for mediators may not extend to situations where no damages are being sought. A disciplinary proceeding is a good example of a situation where there may not be coverage unless disciplinary proceedings costs coverage has been purchased. (2005)

• *Heavy-handed Techniques.* Florida is one state that has adopted formal guidelines which govern mediator conduct and impose strict disciplinary procedures for the disposition of complaints involving alleged violations of the standards of conduct. The Florida Supreme Court adopted the Florida Rules for Certified and Court-Appointed Mediators with an effective date of May 28, 1992. One grievance involved improper attempts by the mediator to persuade the plaintiff to accept a settlement offer by the defendant. The mediator purportedly told the plaintiffs they were “too poor” to take their case to trial, addressed the plaintiffs as “spoiled brats” and declared that the plaintiffs were “poor slobs” who would never be recognized in court. The plaintiffs also alleged that the mediator advised that the settlement offer was acceptable and, when the plaintiffs stated they did not wish to settle, the mediator refused to terminate the mediation. The reviewing committee found probable cause existed to establish violations of several rules, including failure to remain impartial and failure to terminate mediation when requested. The mediator agreed to complete 20 hours of training and agreed to suspend mediations until training was completed. (2002)

Conclusion

As these cases demonstrate, with the growing number of ADRs, mediators are frequently exposed to situations with the potential to spark a variety of expensive claims. Although the defendants may avoid liability in many cases, defense costs can be significant. The magnitude of the problem may not be widely known because many of the cases involve confidential settlements entered into prior to trial. Given the current trend of increased use of ADR, these examples demonstrate that mediators cannot afford to be unprotected. These claims are often expensive to defend and sanctions can lead to other costs. In many jurisdictions, mediators cannot rely on strong immunity defenses, and thus must look to other safeguards to protect their business assets.