

Mediator Liability Claims: A Survey of Recent Developments

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Claims and lawsuits against mediators and other ADR professionals have become a commonplace. In most cases, the claims are baseless and they are ultimately defeated. Even so, defense costs can be considerable, and even staggering, and the distraction of defending a malpractice claim can work palpable wear on a mediator's business.

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 judges and arbitrators – as a basis to avoid liability. However, not all jurisdictions recognize immunity for mediators, and most states 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, such as 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 must be repeated, even if mediator defendants ultimately escape liability, they can nevertheless incur significant legal defense bills. Further, where mediators are faced with disciplinary proceedings, the imposition of disciplinary sanctions can be costly in other ways, such as the mediator's reputation. And, of course, it requires time and often money to respond to the disciplinary charges.

The following survey of fairly recent claims should underscore the fact that mediators will continue to face challenges to their conduct, even where the mediator did nothing wrong. In broad terms, the majority of claims against mediators result from a party not understanding the mediation process (many claimants allege that the mediator was biased against him or her for the simple reason that the mediator was doing what mediators often do – pointing out the potential weaknesses in the party's case to open the party's eyes to the prospect of losing the case if it proceeds to trial), or from a mediator not making it clear at the outset that he or she is not giving any legal advice to the parties, or from a mediator not disclosing his or her prior relationship with the parties or their counsel.

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Family Law

One area where the use of mediation continues to proliferate is family law. The emotionally-charged context of a divorce or a child custody battle produces situations in which, even where a mediator has seemingly done everything right and has taken necessary precautions to protect both parties, he or she is still open to claims.

• ***Post-Mediation Advice.*** In April 2011, a mediator was sued in Tennessee for allegedly giving legal advice to the divorcing husband a few days after a mediation session. In an e-mail, the husband made comments to the mediator about the wife's allegedly threatening conduct, and the mediator allegedly responded by e-mail that the husband should ask his attorney about pursuing a restraining order or order of protection. The mediator is also alleged to have advised the husband to take measures that could shame the wife into ceasing her conduct and to save e-mails to preserve an evidentiary record. Subsequently, the husband secured an order of protection against the wife.

The wife sued the mediator for \$15 million, under theories of malpractice, breach of contract, and intentional infliction of emotional distress. The wife claims that she lost her job as a result of the actions set in motion by the mediator. She also claims to have been arrested in January 2011 as a result of the order of protection set in motion by the mediator.

Prior to filing the lawsuit, the wife had filed a grievance with the Tennessee Supreme Court Alternative Dispute Resolution Commission. The Commission gave the mediator a private reprimand. The mediator has filed a motion to strike from the civil complaint references to the ADR Commission proceedings.

In September 2011, the court granted the mediator's motion for summary judgment and dismissed the entire lawsuit. The court reasoned that, if the mediator's statements to the husband had been made in her role as mediator, then immunity applied to bar the claim. If, on the other hand, the statements were made outside the ambit of her role as mediator, then she owed no legal duty to the plaintiff. Either way, the court concluded, the case should be dismissed. The plaintiff appealed, and in June 2012 the appeal was dismissed. The defense of the lawsuit cost more than \$20,000. (2011)

• ***Post-Mediation Murder.*** In California, a family mediator was 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.

The court dismissed the complaint in 2008 on the grounds that there was no evidence of prior violence by the murderer or safety concerns at the premises. The same day as the case was dismissed, the parties settled in order to avoid an appeal. The combined settlement amount and defense costs exceeded \$100,000. It also bears noting that many professional liability policies do not afford indemnity for bodily injury or death. (2006)

• ***Faulty Settlement Agreement.*** A California mediator participated in the drafting of a Marital Separation Agreement. The agreement confirms that the mediator was not rendering legal services or giving legal or tax advice. In any event, the ex-husband was later audited by the IRS, and faces possible tax liability in connection with the deductibility of certain support payments made under the agreement. The ex-husband has threatened suit against the mediator. To date no lawsuit has been filed. (2010)

Commercial Law and Other Contexts

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.

• ***Defamation.*** In a Western State, a mediator has been sued for alleged defamation arising from a construction defect dispute he mediated in 2010. The plaintiff in the defamation suit was one of the lawyers participating in the underlying construction defect mediation.

It is alleged that the mediator berated this lawyer, calling him a “horrible lawyer” and commenting, unflatteringly, on the size of the lawyer’s manhood. It is alleged that these comments were repeated by the mediator outside the confines of the mediation proceeding. At a social event shortly after the mediation, the wife of one of the other lawyers at the mediation said to the plaintiff: “You’re the guy with the little *****!”

The plaintiff filed suit against the mediator, alleging defamation, false light, intentional infliction of emotional distress, and so forth. In April 2013, the mediator filed a motion for summary judgment, seeking dismissal of all counts by reason of quasi-judicial immunity, privilege, and the fact that the mediator’s statements were opinions, not assertions of fact. The summary judgment motion is pending. (2012)

• ***Subpoena for Deposition.*** In Ohio, a plaintiff sued her former business partner, and the case was settled by mediation. The mediation occurred in several sessions over a period of years. The plaintiff then filed a malpractice lawsuit against the law firm who had represented her in the underlying business dispute. The defendant law firm subpoenaed the mediation records of the mediator, and sought to take the mediator’s deposition.

By way of further background, it appears that the plaintiff had several discussions with the mediator throughout the lengthy mediation process during which she expressed dissatisfaction with her lawyers. The plaintiff asked the mediator whether she had a viable malpractice claim against her lawyers, and whether the mediator could recommend another lawyer to replace her lawyers in the business dispute. The mediator apparently gave the plaintiff at least one name of a possible replacement counsel. Some of these discussions with the plaintiff occurred *after* the underlying business dispute was settled.

Through defense counsel appointed by the mediator's liability insurer, the mediator invoked mediation privilege as a basis to resist the subpoena. After an exchange with defense counsel in the malpractice suit, the mediator agreed to sit for a very brief deposition in which a very limited scope of questions would be allowed. The final disposition of the legal malpractice suit is not yet known, and to date neither party to that case has made any further demand that the mediator appear at trial.

This matter illustrates that mediators may gain so much trust and credibility that they become all-purpose sounding boards for the litigants who appear before them. This additional role comes with its own set of potential problems, and mediators should keep their roles straight when litigants confer with them outside the strict confines of the mediation setting. This matter also illustrates that mediators should ensure that their liability insurance policy protects them against a subpoena to produce files or give a deposition. Not all insurance policies will provide a defense to mere discovery demands, as opposed to lawsuits seeking damages. (2012)

● ***Another Subpoena for Deposition.*** In the Midwest, a sex abuse victim's claim against an archdiocese was settled several years ago via mediation. The archdiocese later went into bankruptcy. The victim made a claim in the bankruptcy proceeding to reopen his claim against the archdiocese, arguing that the prior settlement had been procured through fraud and undue influence. The bankruptcy court initially ruled that the new claim could go forward. The archdiocese then subpoenaed the mediator, presumably to give a deposition to confirm that the mediated settlement had proceeded in good faith and without fraud or undue influence. The mediator, whose liability insurance provided coverage for discovery demands, hired defense counsel to resist the subpoena. Through counsel's efforts and those of the archdiocese's own counsel, the bankruptcy court reversed its prior decision and disallowed the new claim by the abuse victim, which had the effect of rendering the subpoena moot. Again, this matter illustrates the importance of having insurance coverage against more than just lawsuits seeking damages. It is not unusual for a party to seek the records or testimony of a mediator after a settlement comes apart. Even though mediators usually defeat such subpoenas and demands, the attorney fees required to do so can be substantial. (2012)

● ***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., absolute) immunity. That ruling was affirmed on appeal, but the plaintiff filed a second lawsuit. That suit was also dismissed and was again appealed. The dismissal of the suit was affirmed again, and the plaintiff filed a petition for writ of certiorari with the U.S. Supreme Court. The Supreme Court denied that cert petition in early 2013. Despite the existence of immunity in California for court-annexed mediators, this claim went on on for years and was very costly to defend (more than \$560,000). (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 instant 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)

Conclusion

As the foregoing relatively recent cases demonstrate, mediators are often exposed to situations with the potential to spark a variety of expensive claims. Although the defendant mediators 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. In many jurisdictions, mediators cannot rely on strong immunity defenses, and thus must look to other safeguards to protect their business assets. Liability insurance is an obvious first step.