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Mediator Liability: A Survey

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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 or she is still open to claims.

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• ***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)

• ***Bias and Misstating Credentials.*** In Minnesota, 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 2005, the trial court denied the mediator's motion to dismiss. The court held that absolute immunity shielded the mediator from any liability in her capacity as Parenting Time Expeditor, but held that she did not enjoy immunity for her role as Custody Evaluator. The case settled in 2008, with the combined settlement and defense costs approaching \$40,000. (2004)

I • ***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 other defendants. The organization ultimately settled the claims against it, incurring more than \$25,000 in damages and defense costs. (2004)

• ***Faulty Settlement Agreement.*** In Montana, a mediator sued the ex-wife in a divorce case for payment of her mediation fees. The ex-wife counter-sued the mediator for negligence, arguing that the Marital Separation Agreement contained a loophole that permitted the ex-husband to avoid making mortgage payments. The case lawsuit was settled privately on unknown terms. (2005)

• ***Faulty Settlement Agreement.*** A California mediator participated in the drafting of a Marital Separation Agreement several years ago. The agreement confirms that the mediator was not rendering legal services or giving legal or tax advice. The ex-husband was recently 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. (2010)

• ***Ancillary Services.*** In Colorado, a mediator successfully mediated a marital dissolution. The parties then asked the mediator to act as receiver for purposes of selling the former couple's real estate. The mediator did so, but the ex-husband later alleged that the mediator had run up unnecessary fees and sold the property at a sub-market price. A lawsuit was threatened, but has not been filed. (2006)

Labor and Employment

Labor and employment is another area of law which frequently involves ADR. Mediators and arbitrators in these areas have witnessed an increase of claims.

• ***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. The mediator incurred costs approaching \$10,000. We note that liability insurance policies may not cover the costs of defending against a discovery demand or subpoena, as opposed to a lawsuit seeking damages. Additional "discovery demand defense costs" coverage may be available by endorsement. (2004)

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 was affirmed on appeal, but the plaintiff filed a second lawsuit. That suit was also dismissed and has now been appealed. This claim has been very costly to defend (more than \$400,000). (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 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)

• ***Coerced Settlement.*** In Florida, a defamation lawsuit was settled through mediation. Within weeks, however, one of the parties moved the court to set aside the settlement on the grounds that the mediator coerced him into settling the dispute. The court is now considering the request to vacate the settlement. (2010)

• ***Coerced Settlement.*** 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)

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)

- ***Bias.*** In Florida, a party to an unsuccessful mediation filed a grievance with the state bar alleging that the mediator was biased. In particular, she alleged that the mediator focused not on the merits of the underlying dispute, but on the merits of the opposing party's request for a fee award from the court. The disciplinary grievance was dismissed in 2008 following a written response from the mediator. (2007)

- ***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. 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 slob" 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. In many jurisdictions, mediators cannot rely on strong immunity defenses, and thus must look to other safeguards to protect their business assets.