On Professional Practice: Against Quasi-Judicial Immunity for Mediators

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Feb 14, 2024 6 min read

Summary

- Practitioners should be judicious in deciding when to apply quasi-judicial immunity and limited immunity.
- While judges render substantive decisions in cases, disputants can end mediation without a resolution.
- Mediators enjoy limited statutory immunity in many states, which protects them unless they act maliciously.



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Civil immunity is important—and is only rarely available. A blunt instrument, immunity limits injured parties' ability to hold individuals accountable for actions which result in harm. "Quasi-judicial immunity" bars any and all claims, from the outset, regardless of their underlying merits, while "limited immunity" typically requires a finding of intentional wrongdoing (as opposed to negligent wrongdoing) in order to find liability. Each form of immunity has an important role to play, and we should be judicious in deciding to apply either one broadly.

Immunity reflects a balance of competing, legitimate policy interests: We want to ensure accessibility and availability of important services. ("Nobody would do that job if they thought they'd be constantly sued.") We want to assure that practitioners are using their best judgment, rather than acting defensively all the time. ("I know the right thing to do in this case, but I know that if I do it, I'm likely to have to suffer through a lawsuit, and even though I know I'll win in the end, it's not worth it.") At the same time, we want to assure that those who have been harmed by wrongdoing have access to remedies. And we want to assure that the public and other practitioners learn from the examples of public litigation about alleged misconduct. Immunity makes sense, therefore, only in those circumstances in which the threat of litigation would prevent people from raising their hands to do important jobs or prevent people from doing their jobs well.



Against this backdrop, judges enjoy immunity from civil liability for their actions while performing their duties. By contrast, lawyers, doctors, plumbers, dentists, and professors do not enjoy immunity protections. Despite some calls to the contrary, mediators should not enjoy quasi-judicial immunity.

To be clear, we are not suggesting that mediators are not important. Both authors of this piece have bet their professional lives on the fundamental importance of mediation as a valuable part of not only a justice system, but of a society as a whole. Mediators' importance is not in question any more than the importance of doctors, electricians, lawyers, or a wide range of other service providers who enjoy no form of civil immunity. The question is whether mediators' practices have the characteristics of judges that warrant the extension of quasi-judicial immunity.

Put most plainly, mediators should not enjoy quasi-judicial immunity because mediators are not judges. Although both find themselves in the middle of legal disputes, judges and mediators perform fundamentally different functions. The most significant of these differences explains why it is inappropriate to extend immunity to mediators: Unlike judges, mediators do not exercise their judgment to render substantive decisions. Robust debate exists about the degree to which mediators ought to step into the substantive merits of disputants' cases, but under no model of mediation are mediators exercising the final, substantive discretion we vest in judges (or arbitrators for that matter). We want judges to make substantive judgments free of the fear of personal liability for their decisions, and we provide an alternative avenue (appeal) for those circumstances in which a disputant believes a judge has made an error. In mediation, disputants are free to end a mediation without a resolution. If a mediator has not made this clear to the parties or has impaired this choice, that is all the more reason to oppose extending quasi-judicial immunity to mediators.

It is true that courts in some jurisdictions have used language suggesting that mediators are similar enough to judges that they should enjoy quasi-judicial immunity. In *Howard v. Drapkin*, [1] for example, the California Court of Appeals extended immunity to a psychologist called upon to render an opinion in a custody dispute. Even though no mediator had any involvement in that lawsuit, the court's sweeping language suggested that immunity should also attach to a broad range of other third parties, including mediators. Similarly, in *Wagshal v. Foster,* [2] the D.C. Circuit Court extended quasi-judicial immunity to a case evaluator, again using broad language that would appear to include mediators. But none of these courts was faced with an actual mediator, performing a mediator's function. And we believe that a court examining the fundamental differences between mediators and sitting judges would (and should) arrive at the conclusion that quasi-judicial immunity for mediators is inappropriate.

To say that mediators should not enjoy quasi-judicial immunity does not mean that it should be open season on mediators. A disputant who believes they have been injured by a mediator's misconduct still faces an extraordinary number of hurdles to a successful, negligence-based claim against that mediator. In order to succeed in a malpractice action, the disputant would have to demonstrate that the mediator owed some particular duty to that disputant, and that the mediator breached that duty. In a practice as diverse and far-ranging as mediation, neither of these is likely to be easy in most circumstances. Even if the disputant were successful at demonstrating a breach, they would still have to demonstrate that it was the mediator's action that caused the injury. But the disputants (and often their lawyers) are the ones who make the eventual decision about whether to settle or not, making it challenging for a disputant to say that the mediation outcome would have been different but-for the mediator's alleged misconduct. Even if they could

establish *that*, courts would still look skeptically at a disputant's efforts to quantify the damage the mediators alleged misconduct caused. And, on top of all of this, in many jurisdictions, confidentiality rules would impede a plaintiff's ability to present admissible evidence to support their claim. [3]

As a practical matter, furthermore, in many states, mediators already enjoy limited statutory immunity – meaning that many mediators are protected unless they act maliciously and with intent to cause harm. Most of these statutes were adopted initially to protect community mediators who were acting as volunteers. States had an interest in assuring enough mediators to make mediation programs function properly. The landscape of mediation today still includes volunteer community mediators, of course. But it also includes many private providers, working on a broad range of civil cases, who charge significant professional fees. Under statutory immunity protections, all mediators in these jurisdictions are already shielded from suits alleging negligence, recklessness, and even bad faith. Are mediators at such risk of baseless lawsuits that we need to shield them even from claims that they stepped so far outside the norms of professional practice that they *intentionally* harmed one or more of the disputants under their care?

Given how hard it is to overcome the legal barriers we list above, it is not surprising that virtually no mediators have ever been sued successfully for malpractice. Every year, in jurisdictions without quasi-judicial immunity for mediators, thousands of cases are resolved through mediation and thousands more go through mediation and reach no settlement. Even when quasi-judicial immunity does not bar claims, as an empirical matter, lawsuits against mediators are extraordinarily rare.

The decision whether to extend quasi-judicial immunity is, as we said above, a question of policy tradeoffs. And some piece of that policy tradeoff involves prediction. None of us can know with absolute certainty what the effect of providing broad-scale quasi-judicial immunity would be. We do, however, have the concrete experience of recent decades. We see most mediators operating without quasi-judicial immunity. We see no evident shortage of people attracted to serving as mediators. We have heard no stories of mediators who would be practicing more or better, but for the threat of litigation. And we have seen very little litigation of any flavor against mediators.

We do not imagine that mediation, as it is currently practiced, is perfect. There are undoubtedly contexts in which mediators fear the prospect of post-mediation complaint from unhappy disputants. And in at least some of those contexts, the complaints might not be meritorious. But there are also undoubtedly mediators out there engaged in imperfect practices in ways that harm their clients. That is true of every kind of practitioner, and we cannot imagine why that would not also be true of mediators. The legal hurdles are already extraordinarily high for any plaintiff who wishes to bring a claim

against a mediator. There is no persuasive reason for mediators to enjoy quasi-judicial immunity.

Endnotes

1. *Howard v. Drapkin*, 271 Cal. Rptr. 893 (Cal. Ct. App. 1990).

2. *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994).

3. For more, see Michael Moffitt, Suing Mediators, 83 B.U. L. Rev. 147 (2003); Michael Moffitt, Ten Ways to Get Sued: A Guide for Mediators, 8 Harv. Negot. L. Rev. 81 (2003); Michael Moffitt, The Four Ways to Assure Mediator Quality (and why none of them work), 24 Ohio St. J. Disp. Resol. 191 (2009); Cassondra Joseph, The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity, 12 Ohio St. J. Disp. Resol. 629 (1997); Art Hinshaw, Regulating Mediators, 21 Harv. Negot. L. Rev. 163 (2016).

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