Can Divorce Mediators Be Sued?

By Frank Garfield
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Mediators may believe that they have absolute quasi-judicial immunity from liability to their clients. However, that protection is probably limited to mediation services and does not extend to legal services. Mediators should not assume that they are shielded from liability for anything and everything they do merely because they have been hired as a mediator.

In *Howard v. Drapkin* (1990) 222 Cal.App.3d 843, the California Court of Appeal concluded that a psychologist who performed an evaluation of the plaintiff and her family was entitled to quasi-judicial immunity. The Court stated: "We believe that absolute quasi-judicial immunity is properly extended to neutral third persons who are engaged in mediation, conciliation, evaluation or similar dispute resolution efforts."

The Court rejected plaintiff's argument that the evaluator was not a public official and held that the determining factor was not the status of the defendant as a public official, but rather "the connection between the defendant's activity and the judicial process." The primary rationale for the Court's willingness to accept the approach of the federal courts in extending immunity to those who serve functions integral to the judicial process was "attracting to an overburdened judicial system the independent and impartial services and expertise upon which that system necessarily depends." *Id.* at 857.

> Thus, we believe it appropriate that these 'nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process' [citation omitted] should be given absolute quasi-judicial immunity for damage claims arising from their performance of duties in connection with the judicial process. Without such immunity, such persons will be reluctant to accept court appointments or provide work product for the courts' use. Additionally, the threat of civil liability may affect the manner in which they perform their jobs. *Id.*

Based on its finding that alternative dispute resolution options were critical to the proper functioning of an increasingly congested trial court, the Court concluded that the rationale for quasi-judicial immunity applied with equal force to "neutral persons who attempt to resolve disputes." The bottom line: "The job of third parties such as mediators, conciliators, and evaluators involves impartiality and neutrality as does that of a judge, commissioner or referee; hence, there should be entitlement to the same immunity given others who function as neutrals in an attempt to resolve disputes."

The rationale for extending quasi-judicial immunity to mediators is compelling. Unlike a judge or a game warden or a probation officer or a custody evaluator or the dozens of others to whom quasi-judicial immunity has been extended, a mediator does not make decisions or impose penalties or file reports or even offer recommendations. A mediator's job is to help the parties make a deal. The Court made it clear that a mediator's immunity is not a mere defense to liability:

> If such protection is to be meaningful, it must be effective to prevent suits such as this one from going beyond demurrer. Avoiding the expense and burden of having to defend an action such as this one is precisely the goal which the principles of absolute immunity and privilege were intended to achieve. In order to best protect the ability of neutral third parties to aggressively mediate or resolve disputes, a dismissal at the very earliest stage of the proceedings is critical to the proper functioning and continued availability of these services. *Id.*

Moreover, the process is voluntary from beginning to end. The parties may elect to mediate or not in their discretion. Even in those situations where mediation is mandated, the parties are under no obligation to make a deal, or to negotiate in good faith. All written or oral communications in the course of a mediation are confidential and inadmissible into evidence in any civil proceeding; the mediator is prohibited by law from testifying with respect to any aspect of the process. *California Evidence Code* section 703.5.

Over the past two decades, millions of parties have benefitted from the mediated resolution of their disputes. There has been no outcry over the quasi-judicial immunity that protects mediators from liability. It is a salutary rule.

No one can deny the possibility that under certain circumstances, mediators should be held accountable for their actions, but the occasional injustice is the price of any rule. With quasi-judicial immunity, mediators may be insulated from a small number of meritorious claims; without quasi-judicial immunity, mediators would be exposed to a potential lawsuit in every case they handle. Another way to put it: Mediators are not being unjustly immunized from responsibility for their actions. They are being justly relieved of the burden of defending (and settling or trying) lawsuits that are without merit in virtually every instance.

Based on the foregoing, mediators may believe that they are shielded from all liability. However, certain mediators – particularly divorce mediators – may prepare pleadings, stipulations, and judgments on behalf of the parties. Performing those functions arguably constitutes the practice of law.

Almost always, the documents prepared by a mediator are filed in the names of the parties *in propria persona*. A mediator who is a member of the California bar should not purport to act as an attorney for either party, even nominally. But documenting the parties' deal goes beyond helping them resolve disputed issues. Preparing pleadings, stipulations, and judgments is what lawyers do. When mediators do it, they are functioning for all practical purposes as lawyers.

This raises the question: Is a mediator immune from liability if he or she is negligent in preparing a pleading, stipulation, or judgment? What about interspousal transfer deeds? Or qualified domestic relations orders? Or estate plans? All of these documents are typically prepared by attorneys; some of them are routinely prepared by specialists. *Drapkin* does not foreclose the possibility that a mediator may be liable for negligence in documenting the parties' deal or preparing ancillary documents merely because he or she also served the parties as a neutral. While no reported California case has upheld a finding of negligence against a divorce mediator on any theory, that possibility cannot be entirely ruled out on the authority of *Drapkin.*

It may be unlikely that a divorce mediator could successfully be sued for preparing a settlement agreement (whether in the form of a stipulation or a judgment) for the parties' review. After all, it is for the parties to decide whether a settlement agreement accurately and completely sets forth their deal and otherwise serves their purposes and meets their needs. This is particularly true if the parties are represented by independent counsel, or at least have the opportunity to consult independent counsel. A certain measure of protection from malpractice claims is provided by the mediation confidentiality statutes: No evidence of any written or oral statement "for the purpose of, in the course of, or pursuant to" a mediation is admissible in any subsequent civil proceeding. *California Evidence Code* section 1119.

However, assume the following situation: In the course of a mediation, a divorce mediator helps the parties resolve all disputed issues, prepares a judgment of dissolution of marriage, a co-tenancy agreement to govern the use of a vacation home, a partnership agreement for their business, a qualified domestic relations order to divide a pension, or a family trust and an estate plan. Under those circumstances, it would not be prudent for the mediator to assume that he or she has no liability for professional negligence in drafting those documents.

In assessing their exposure to lawsuits, divorce mediators in particular should bear in mind several principles that are at odds with the notion of absolute quasi-judicial immunity:

First, divorce mediators who prepare pleadings, stipulations and judgments on behalf of their mediation clients are arguably engaged in the practice of law.

Second, for this reason, divorce mediators should obtain conflict waivers. The gist of those waivers: The mediator is not representing both parties or either party against the other as a lawyer. To the contrary, the mediator is acting as a scrivener in undertaking to document the parties' agreements. This is a variation on the concept of "unbundling" legal services. So long as a lawyer does not purport to represent both parties (or either party against the other), it is permissible for a lawyer to prepare a stipulation or a judgment that conforms to the parties' joint instructions.

Third, divorce mediators in California do not violate any law, rule of professional conduct or ethical prohibition by documenting a deal between their clients. However, mediators should not assume that the quasi-judicial immunity conferred on them by *Drapkin* extends to those services. To the extent that mediators are practicing law by performing legal services (even if they are not representing both parties or either party against the other), they probably have the same liability for professional negligence as other lawyers. This is the main reason why mediators should pay the additional premium that covers them for errors and omissions as lawyers, not merely the reduced premium that covers them for errors and omissions as mediators.

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