

Quasi-Judicial Immunity Protects Mediation Without Any Discernable Cost

By Tyler Meade



A number of jurisdictions have granted immunity from suit to mediators, both court-appointed and private.¹ This is the same immunity that protects other professionals “closely associated with the judicial process.”² The list of protected professions includes arbitrators, who are neither public officials nor court-appointed but nonetheless are essential to the administration of justice.³ Should this doctrine, known as quasi-judicial immunity, be extended to mediators of litigated cases nationwide? The answer is “Yes.”

Mediation is a rare case in which immunity provides a significant benefit—it short-circuits unmeritorious but nonetheless costly claims against mediators—with no real cost. Or with costs sufficiently minimal that the benefits of this grant of immunity outweigh the downside. More specifically, the apparent absence of successful suits against mediators suggests that extending quasi-judicial immunity to mediators does not deprive litigants of meritorious claims, with the possible exception of a rare edge case.

The Rationale for Extending Immunity to Mediators

The underlying reason that immunity has been extended to judges, arbitrators, and others closely associated with the judicial process is the following well-known dynamic: The loser in one forum will frequently seek a second forum to assert allegations against participants in the first.⁴ This dynamic undermines the proper functioning of our courts. Because it impacts mediation and mediators,⁵ numerous courts have extended quasi-judicial immunity to mediators to safeguard the vital function that mediation plays in our system of justice.

The application of this immunity does not depend on whether a given professional is a public official, court-appointed, or private. Nor does it depend on whether the professional performs a judge-like function. Rather, quasi-judicial immunity is extended to a professional where a determination is made that the professional performs a vital function that would be jeopardized without a grant of immunity.⁶ Ultimately, decisions granting immunity to mediators rest on the premise that mediation is vital to the proper functioning of our courts in this era of clogged dockets and delayed justice.⁷

Is this Immunity Actually Needed?

Perhaps the best argument against extending quasi-judicial immunity to mediators is that it is not actually necessary to preserve the vital function of mediation.⁸ Litigation against mediators is rare. Successful suits are either non-existent or almost non-existent. Insurance premiums are manageable. The ranks of aspiring mediators are legion notwithstanding the fact that immunity for mediators has not been uniformly adopted. But this argument rests on an untested premise—namely that a wholesale rejection of this protection for mediators would not lead to a problematic flood of litigation. It is difficult to assess the salutary effect of *Wagshal*, *Vedatech*,⁹ and other early quasi-judicial immunity cases in terms of deterring lawsuits against mediators. As with all counterfactual scenarios, we do not know what would have happened if those courts had ruled otherwise.

Even a mere “drift towards claims against mediators,” as was observed by some commentators around the time of *Wagshal* and *Vedatech*, would have a corrosive impact on mediation and, thus, the efficient administration of justice.¹⁰ There is a long history

of mediators expressing concern about being sued for their work. Professor Michael Moffitt is a leading commentator on mediator liability. He concluded as follows in 2003, "[d]espite the historical rarity of suits against mediators, many within the mediation community are demonstrating concern about the prospect of mediators being sued.... A recent journal article described 'a gathering storm' of liability."¹¹

Few mediators would want to endure the experience that one prominent mediator suffered in *Vedatech, Inc. v. St. Paul Fire & Marine Ins. Co.*¹² The underlying dispute in that case arose after the plaintiffs were fired by two Japanese firms that had contracted with them to develop software. This spawned multiple claims, counterclaims, and an insurance coverage dispute. An apparently exasperated California judge ordered the parties to mediate before a highly respected mediator suggested by the insurer. Towards the end of a day-long mediation, the plaintiffs abruptly departed. Their insurance policy allowed the insurer to settle claims, and so the insurer and the Japanese companies continued to negotiate and ultimately reached a settlement of all claims *against the plaintiffs*. Notably, the settlement allowed the plaintiffs to continue to pursue the claims they had *against the Japanese companies*, so it is difficult to understand how the plaintiffs could feel prejudiced.

As it turned out, the plaintiffs were infuriated by the settlement, apparently based on their implausible assertion that the insurer had a duty to fund their affirmative claims against the Japanese companies. They sued the insurer, the Japanese companies, and the mediator, alleging that this group conspired to obtain the plaintiffs' consent to mediate, and then colluded to impose an unfair settlement. The federal court that ultimately resolved the case described the plaintiffs' complaint as "a frightful piece of legal work" with "dozens of unintelligible factual assertions."¹³ Had the federal court not applied quasi-judicial immunity to dismiss this lawsuit, the case was likely to involve years of contentious and costly litigation.

Vedatech underscores that the real purpose of extending quasi-judicial immunity to mediators is not to provide immunity for otherwise cognizable legal claims but rather to short circuit costly suits that are not likely to succeed even if allowed to proceed. The questions to be asked are: What would happen to

the practice of mediation if *Vedatech* and other cases like it were allowed to proceed? Should we wait for a flood of unmeritorious litigation against mediators to hit before addressing the problem? Clearly not—especially given the limited downside of extending immunity to mediators.

Are There Any Real Costs?

There is no denying that immunities—however justified as a matter of policy—generally run contrary to the objectives of tort law (namely, the deterrence of wrongdoing and compensation for those proximately injured thereby) as well as contract law (generally, protection of the reasonable expectations of the parties).¹⁴ On the other hand, the same cannot be said where immunity is extended in a setting where, as a practical matter, no contractual or tort liability actually exists. Mediation is a perfect example.

Instances of mediator wrongdoing appear to be relatively rare. Rarer still are legally cognizable claims of mediator wrongdoing. As Professor Moffitt noted two decades ago, "[d]espite the thousands, if not millions, of disputants who have received mediation services, instances of legal complaints against mediators are extraordinarily rare."¹⁵ This remains true today.

The low frequency of claims may be a function of our adversarial system of justice in which it is counsel's responsibility to protect their client's interests at all stages of litigation, including during settlement talks. Say, for example, a mediator misstates a point of law during settlement dialogue. It is counsel's responsibility to identify and correct the error.

The law correctly disfavors successive cases arising out of the same set of operative facts, and strongly favors the enforcement of settlements.¹⁶ Settlement dialogues are often contentious affairs with lots of posturing. Sometimes there are claims of misrepresentation. Yet the resulting settlements are frequently enforced. As the Ninth Circuit stated in one notable case in which litigants sought to unwind a settlement based on a claim of misrepresentation during mediation, "[t]here are also very important policies that favor giving effect to agreements that put an end to the expensive and disruptive process of litigation."¹⁷

In the rare instances in which a litigant does complain about mediator misconduct, the hurdles to establishing tort liability are daunting,¹⁸ particularly

with respect to causation and damages.¹⁹ The same is true with contract actions against mediators, mostly because few mediation agreements contain specific contractual promises upon which a plausible claim of breach can be premised.²⁰ There are no known cases in which a litigant has obtained a judgment against a mediator.²¹

In short, the empirical evidence strongly suggests that extending quasi-judicial immunity to mediators does not, as a practical matter, deprive litigants of otherwise cognizable claims.

The Edge Cases

There may be edge cases in which it is not appropriate to apply quasi-judicial immunity,²² but that theoretical possibility does not detract from the logic of applying this immunity in all but the exceptional case. Rather, it is up to the courts to identify edge cases not covered by quasi-judicial immunity, something they are more than qualified to do. For example, it is not likely that the doctrine would be applied to a battery committed during a mediation,²³ or to a fraudster who collects mediation fees and then absconds.

Conclusion

Many courts would grind to a halt without both court-affiliated and purely private mediation, and so it makes sense to proactively safeguard mediation. Extending quasi-judicial immunity to mediators is a logical and prudent step. Most courts operating court-sponsored mediation programs apparently agree; provisions extending immunity to court-affiliated mediators are common.²⁴ Finally, in the absence of proof that this extension of immunity forecloses otherwise meritorious litigation, we should assume the extension comes with no real cost. ■

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Endnotes

1 See, e.g., *Vedatech, Inc. v. St. Paul Fire & Marine Ins. Co.*, Nos. C 04-1249, 04-1818, 04-1403 VRW, 2005 WL 1513130, at *13-14 (N.D. Cal. June 22, 2005), *aff'd sub nom. St. Paul Fire & Marine Ins. Co. v. Vedatech Int'l, Inc.*, 245 F. App'x 588 (9th Cir. 2007); *Wagshal v. Foster*, 28 F.3d 1249, 1253 (D.C. Cir. 1994); *Mills v. Killebrew*, 765 F.2d 69, 71 (6th Cir. 1985); *Dennis v. Monmouth Cty. Civil Div.*, Civ. A. No. 19-19165 (MAS) (DEA), 2022 WL 298272, at *2 (D.N.J. Jan. 31, 2022); *Desouza v. Kennedy*, No. 3:16-cv-01126, 2017 WL 3431393, at *5 (D. Conn. Aug. 9, 2017); *Yee v. Michigan Supreme Court*, No. 06-CV-15142-DT, 2007 WL 118931, at *4 (E.D. Mich. Jan. 10, 2007); *Joynes v. Meconi*, Civ. A. No. 05-332 GMS, 2006 WL 2819762, at *6-7 (D. Del. Sept. 30, 2006); see also *Holt v. Brock*, 301 Cal. Rptr. 3d 412, 420-21 (Cal. Ct. App. 2022), *review denied* (Mar. 15, 2023) ("That neutral dispute resolution providers are retained privately and have duties to their clients does not preclude quasi-judicial immunity from protecting them.").

2 *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985); *Howard v. Drapkin*, 271 Cal. Rptr. 893, 899 (Cal. Ct. App. 1990).

3 See, e.g., *Austern v. Chicago Bd. Options Exch., Inc.*, 716 F. Supp. 121, 123-24 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 882 (2d Cir. 1990); see also Revised Unif. Arbitration Act § 14 (Unif. Law Comm'n 2000).

4 *Butz v. Economou*, 438 U.S. 478, 512 (1978).

5 *Wagshal*, 28 F.3d at 1253.

6 *Butz*, 438 U.S. at 511-12.

7 *In re Teligent, Inc.*, 417 B.R. 197, 205 (Bankr. S.D.N.Y. 2009).

8 *N.Y. Prac., Com. Litig. in New York State Courts* § 68:16 (4th Ed.).

9 *Wagshal v. Foster*, 28 F.3d 1249; *Vedatech*, 2005 WL 1513130.

10 David Bristow & Jesmond Parke, *The Gathering Storm of Mediator & Arbitrator Liability*, 55 Disp. Resol. J. 14, Aug./Oct. 2000; see also Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 Harv. Negot. L. Rev. 81, n. 7 (2003).

11 Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, at p. 83.

12 *Vedatech*, 2005 WL 1513130, *3, 12-14 (N.D. Cal. June 22, 2005).

13 *Id.* at *12-14.

14 *Vitale v. Schering-Plough Corp.*, 174 A.3d 973, 981 (N.J. 2017); *Airgo, Inc. v. Horizon Cargo Transp., Inc.*, 670 P.2d 1277, 1281 (Haw. 1983).

15 Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, at pp. 81-82 & n. 2.

16 See, e.g., *Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034 (9th Cir. 2011).

17 *Id.* at 1039.

18 Art Hinshaw, *Regulating Mediators*, 21 Harv. Negot. L. Rev. 163, 175-76 (2016); Michael Moffitt, *Suing Mediators*, 83 B.U. L. Rev. 147, 149-83 (2003).

19 Hinshaw, *Regulating Mediators*, at p. 176.

20 Moffit, *Suing Mediators*, at pp. 163-67 & n. 59, citing, *inter alia*, Arthur Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 Cinc. L. Rev. 731, 737 (1984).

21 Moffit, *Suing Mediators*, at pp. 150-151; *see also* Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, at p. 83.

22 See Hinshaw, *Regulating Mediators*, at pp. 164-67, 185-86.

23 *Simpson v. JAMS/Endispute, LLC*, No. A110634, 2006 WL 2076028, at *3 (Cal. Ct. App. 2006) (unpublished).

24 See, e.g., Joint Local Rules, S.D.N.Y. and E.D.N.Y. 83.8(g).