On Professional Practice *By Sharon Press and Paul M. Lurie*

Neutral Immunity

In this feature, Sharon Press and Paul M. Lurie raise issues of professionalism and their practical applications.

Recently on an e-mail discussion list for legal educators, someone posted a request for "mediator horror stories." This was promptly followed by numerous vivid accounts of mediators who were biased, threatened *ex parte* communication with the presiding judge, communicated the terms of a settlement inaccurately, coerced the parties, or committed some other violation of ethical rules. As the initial request stated, many of these stories are undocumented. Why aren't the bad acts of mediators and other neutrals more widely known?

When professionals provide a service, consumers expect that the service will be provided competently and that they will not be harmed by the provider. When a member of a profession breaches a standard of care or a standard of conduct and that breach causes injury or damage to a client or patient, malpractice has occurred. The purpose of recognizing civil liability is to provide compensation for the harm. While we are all familiar with medical and attorney malpractice claims, one rarely hears about mediator, arbitrator, or other "neutral" malpractice. Is this because neutrals never breach standards of care or conduct? Of course the answer is no — as the quick responses to the "mediator horror stories" request indicate. There are a host of reasons why breaches of neutral standards of conduct are not pursued. In this article, we will explore one. We will analyze immunity statutes for neutrals and discuss whether the rationale for them still applies.

Immunity is generally granted when the law recognizes that a particular activity has such importance that those who offer it should be protected from the threat of civil suit (think "Good Samaritan" immunity). A review of the US state statutes reveals that only five states (Alabama, Idaho, Louisiana, Massachusetts, and Mississippi) do not have any immunity statutes for neutrals. Of those states that have adopted immunity statutes, the statutes vary as to **what** processes are covered (mediation, arbitration, etc.); **who** is covered (volunteers, organizations, or others); and the **scope** of the immunity (limited or absolute).

Limited immunity statutes typically provide immunity "except in cases of willful or wanton misconduct" or "unless the act or omission was done in bad faith or malicious intent." The Uniform Arbitration Act provision is a good example of an "absolute" immunity statute: "[a]n arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity." A neutral covered only by a limited immunity statute might need to prove that an act was not "willful," done in bad faith, or done maliciously, whereas someone covered by an absolute immunity statute need prove only that she was acting within the scope of her authority.

Arbitrator Immunity

More than half the states recognize some form of arbitral immunity — 18 states providing absolute immunity, and 12 providing limited immunity. Ten of the 18 states with absolute immunity have adopted the UAA provision described above. Judicial immunity has been supported both as an effort to conserve judicial resources (sparing judges from having to defend themselves in frivolous suits) and to prevent judges from intimidation and potential loss of independence.[1] And unhappy litigants have an alternative: appellate review. Rather than attacking the decision-maker, litigants can appeal the case. The rationale for extending absolute immunity to arbitrators is that arbitrators are decision-makers, like judicial officers, and should similarly be protected to conserve resources, prevent intimidation, and preserve their independence. However, unlike those in traditional litigation, the grounds for vacating an award in arbitration are extremely limited, rendering an appeal less likely to result in relief.[2]

Mediator Immunity

Thirty states have adopted a mediator immunity statute. Thirteen states have adopted absolute immunity statutes, and another 17 have adopted limited immunity statutes. Florida, for example, has an absolute immunity statute for arbitrators and mediators who serve pursuant to a court-ordered process and a limited immunity

statute for mediators of "non-court-ordered mediations" if certain criteria are met. [3]

Why should mediators have immunity? Mediators, by definition, are not decision-makers. Therefore, they do not need to have their independence as decision-makers protected. One argument advanced in support of mediator immunity is that neutrals are "replacing" judges and therefore should get the immunity extended to the judge, and only extremely gross abuses should trigger liability for the practitioner. But while this may be true in court-ordered mediations, most immunity statutes are not limited to processes ordered by the court. Another argument is that a mediator's role is unique, given the focus in mediation on party self-determination. If the parties are in control of any agreement reached, such reasoning goes, then the mediator cannot be held responsible for things that go awry during the mediation. Unfortunately, this argument leaves parties without any recourse. According to the unique-role argument, mediators are responsible for honoring self-determination and thus should not be liable for what happens in a mediation. But if they fail to honor self-determination, they cannot be held accountable because they are immune.

Absent immunity statutes, suing a mediator for civil damages is difficult. First, the complaining party would need to overcome confidentiality issues. While the Uniform Mediation Act, which establishes a privilege of confidentiality for mediators and participants, provides an explicit exception for malpractice or misconduct of the mediator, states such as California would prohibit such disclosures.[4] Assuming a party was able to introduce evidence about the mediator's behavior during the mediation, the party would need to show that the mediator had a duty to the party and that the mediator breached that duty. (Presumably, the party could look to the Model Standards of Conduct for Mediators to find an articulation of mediator duties that are considered to be the community standard.[5]) Next the party would have to show causation, that the mediator breach *caused* the harm, and that there are actual damages.[6] Actual damages are typically the most difficult element for a party to prove since cases resolved in mediation, by definition, will have no court determination with which to compare the settlement. And, for those cases that did not resolve in mediation, parties will have a difficult time quantifying the harm a mediator's action may have caused.

The rationale for providing immunity to arbitrators is clear. In contrast, the reasons for providing immunity for mediators are not. As the profession of mediation grows, as mediators charge significant fees, and as mediation becomes more pervasive, we must consider whether the immunity statutes are protecting the process — or simply protecting practitioners. ■

Endnotes

1 *See* Bradley v. Fisher, 80 U.S. 646, 13 Wall 335 (1872); *see also* Stump v. Sparkman, 435 U.S. 349 (1978).

2 Under the Unif. Arb. Act (2000) § 23, 7 Part 1A U.L.A. 77 (2009), grounds for vacating an arbitration award are limited to: "the award was procured by corruption, fraud, or other undue means; there was evident partiality by a [neutral] arbitrator …; corruption by an arbitrator; or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceedings; an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise … prejudice[d] substantially the rights of a party to the arbitration proceeding; an arbitrator exceeded the arbitrator's powers; there was no agreement to arbitrate …, the arbitration was conducted without proper notice … "

3 Fla. Stat. §44.107.

4 Cal. Evid. Code § 1115-1128 (West 2009) (including a very comprehensive definition of what is covered: no evidence of anything said or any admission made for the purpose or, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery and disclosure cannot be compelled); *see also* Cassel v. Superior Court, 51 Cal. 4th 113 (2011).

5 Some have argued that the Model Standards are too broad to provide practical instruction to mediators. *See* Jamie Henikoff & Michael Moffitt, *Practitioner's Corner: Remodeling the Model Standards of Conduct for Mediators*, 2 Harv. Negot. L. Rev. 87 (1997).

6 In 1986, Arthur Chaykin identified nine theories of liability that could apply to mediators: false advertising, breach of contract, tortuous interference with contract or business relations, fraud, invasion of privacy, defamation, outrageous conduct, breach of fiduciary duty, and malpractice or professional negligence. *See* Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 Ohio St. J. on Disp. Resol. 47 (1986).

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