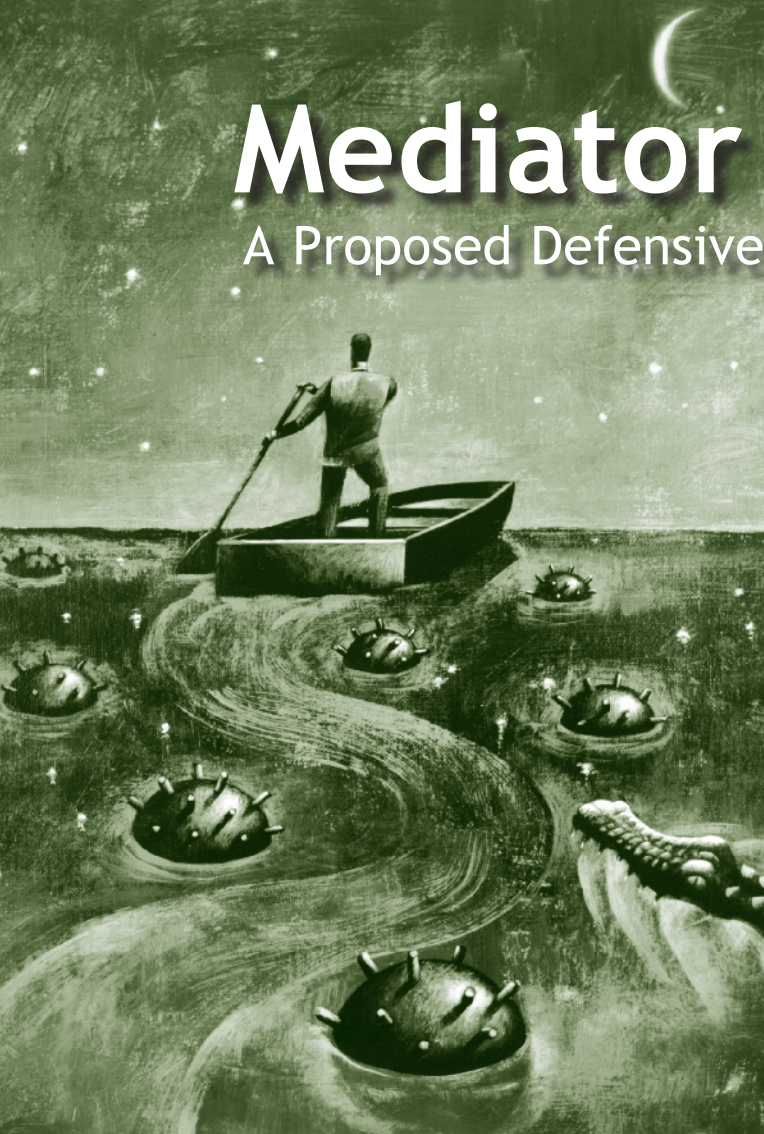


# Mediator Malpractice

## A Proposed Defensive Path Through the Minefield

By Melvin A. Rubin



of remedies requirement before taking the next step, if even necessary. Because of this motion practice, malpractice cases are usually never filed. Instead, some resolution is reached either during, or as a consequence of, the ruling on that motion. If the motion is granted, then, in general, the malpractice action will become moot. If, on the other hand, the motion to set aside is denied, it contributes in some way to the measure of damages the plaintiff will be seeking relief, including more attorneys' fees.

One could easily anticipate the mediator or the first attorney would argue that the client would have to exhaust all available remedies, including the opportunity to change the agreement itself or set the agreement aside. If the agreement is not set aside, the client must then make the decision whether to pursue further action against the mediator and the attorney, jointly or separately.

The client must now make the decision whether to sue the mediator *as* the mediator or something else! That something else may be the profession that mediator otherwise practices, for example, attorney, accountant, or mental health professional. Why? For several reasons: deeper financial pockets, insurance coverage, and more jury appeal. Recovery against an attorney may be easier than against the alleged neutral and impartial mediator.

Moreover, given the personality, character, and predictability of mediators, it is not astonishing to find that many cases filed against mediators are settled. The mediators/clients settle in order to avoid all the stress and strain of litigation, which the mediator preaches and uses as his or her own mantra, aside from the consequences of any malpractice action.

The recoverable damages may indeed include the prior fees and expenses of the original mediation as well as those in seeking to set aside the agreement. The much

“Let me understand clearly why on earth you think this fine upstanding mediator should be accountable for the damages you are seeking. You think that just because you were in a mediation for 14 hours; you told the mediator you were exhausted and just wanted to get it over with; you had recently gotten out of the hospital for depression; you were on medication and your lawyer threatened to withdraw if you didn't accept the offer—you think that's sufficient grounds?!”

The above statements reflect a prior relationship between the client and the prior attorney for that client. The client is now seeking to set aside the marital settlement agreement and has alleged the above grounds.

Does any part of the above statements raise concerns? More importantly, what have we done as mediators to protect the process and the parties as well as ourselves?

Many suggest that there is no need for concern because there are few negligence or malpractice suits against mediators. What may be overlooked, however, is what I have noticed to be a growing number of “motions to set aside agreements.”

I believe that “motions to set aside agreement” are in reality the malpractice action and fulfill the exhaustion

Image: Getty Images



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harder measure will be proving the connection between the outcome versus what occurred in the mediation—not taking the offered settlement and the failure to recover subsequently.

By alleging that the mediator's role was exceeded, the client would argue that the mediator is subject to liability not as a mediator, but in the function of providing other professional services, legal or other professional malpractice. Allegations of giving legal advice, creating an attorney-client relationship, and drafting the final settlement agreement are some examples of how the complaint might read.

Changing the character of the defendant accomplishes several things for the plaintiff. First, if the jurisdiction provides any statutory immunity or similar protection to

or practices, another profession. As an example, mediators who are lawyers, therapists, former judges, or other professionals should make clear that the role of the mediator is distinct, different, and not to be confused with any other roles that the parties could perceive the mediator performing. This role distinction is important enough to warrant repetitive comments during the course of the mediation and again, certainly, at the conclusion of the mediation when an agreement is being executed.

2. Any actions or behaviors that could be possibly construed as creating liability should be immediately addressed by the mediator. As an example, references to the mediator as “judge,” “lawyer,” “therapist,” or any other professional designation

## What are we to do to ensure that the process of mediation, the parties, and the mediator are protected?

the mediator, it denies that protection to the mediator and survives the motion to dismiss that would clearly result from the assertion of that immunity protection. Secondly, as importantly, it may also provide the plaintiff with a “deeper pocket” for recovery of damages. The analysis would probably indicate that insurance for the practicing lawyer, accountants, mental health professionals, or whatever, has greater coverage than that for the mediator if any insurance is available to that mediator for his or her negligence. Thirdly, it disrupts the usual public perception of the innocence of the third-party mediator and slaps the defendant with the perhaps less attractive character of that of the “lawyer.”

### Preventions and Cures

To prevent and cure this situation from even developing, it is imperative that the mediator in the opening statement and periodically during the mediation establish and reaffirm throughout the mediation the role that the mediator performs and avoid any confusion with that role with any other professional services.

So what are we to do to ensure that the process of mediation, the parties, and the mediator are protected? Below are some of the preventive as well as the curative measures. First, the preventive acts:

1. One of the most important things that mediators must do is define, distinguish, and clarify their role, preferably both in writing and in their opening statement. To accomplish this, mediators should have a thoughtful and well-worded opening statement and a letter to the participants in the mediation. The role of the mediator should be clearly stated, especially in contrast to any other roles that the mediator could be misconstrued as performing. This is especially true if the mediator comes from,

should be clearly and immediately corrected.

Requests for guidance or even more direct questions must be addressed, for example, “What would you do if you were I?”

3. This corrective language can be made either in joint session or in caucus. However, from a preemptive strike perspective, the more witnesses to the statement, the better.
4. Marathon mediations should be carefully watched, and the “pulse” of the participants, especially the clients, be taken regularly. “We have been here now for more than five hours: is everybody willing to continue?” or a variation of this question, should be asked by the mediator on a regular basis during marathon mediations. Equally important, those questions should be asked either in a joint session or with as many other parties/lawyers witnessing the question and the answer to verify everyone's consent to the continuation.
5. The execution of the agreement should be conducted in such a manner as to dissuade any would-be later objector from filing any motions to challenge the agreement. This can take a variety of forms. This author has practiced a procedure of an oral *voir dire* in combination with the execution of the settlement agreement. Assuming the parties have reached an agreement and can be in the same room together for the execution of the agreement, a joint session should be called at which time the mediator asks the following series of questions of each client as they sign:
  - a. Have you read the agreement?
  - b. Do you understand the agreement?
  - c. Do you understand by signing such an agreement you are entering into a fully enforceable contract?

- d. Are you signing this agreement voluntarily?
- e. Have you asked your attorney any and all questions you might have and has she answered those satisfactorily?
- f. Is there anything physical, psychological, or emotional that would have prevented you from understanding what we did here today? And, finally,
- g. Do you understand that I have performed the function of a mediator solely and exclusively and no other role and that you have made your own decision?

From personal experience, this author can narrate to you a variety of times that mediators have been called to testify where agreements have been sought to be set aside and where this voir dire has denied any accusations of negligence against the mediator. From both a confidentiality and evidentiary standpoint, the voir dire has been allowed by the courts on the basis that they are conducted by the mediator as a regular course of conduct in all of their mediations.

- 6. Undertake pro se cases with care and caution. Legal representation provides a buffer for the mediator. Without any attorneys (or worse, with only one attorney) present, the dynamics and burdens change dramatically. The opportunity and challenge to the mediator of giving advice, and exceeding one's role to compensate for the perceived imbalance of power. Again, clarification and repetition of one's role is essential.
- 7. Be extremely careful in reference to confidentiality in multiparty cases. An innocent mistake of conveying an offer to the wrong party, or mistaken disclosure to another party, can result in serious harm. Loss of those clients for future business, compounded by a grievance or threatened suit, produces serious health problems for the mediator.

From a curative nature, certain defenses would be fundamental should a mediator be faced with a malpractice suit or motion to set aside agreement.

- 1. Assert any immunity provisions of your state or court.
- 2. Mediators, as professionals, should carry professional malpractice insurance, whether separate or included within one's other professional policy.
- 3. Whether to keep copious notes is a debate within the profession. Those who want to keep notes in order to remember particularly difficult cases expose themselves to the accusation that the mediators knew that those cases were already questionable. Those who shred their notes immediately or suffer from severe cases of amnesia leave themselves open to uncontroverted claims. That decision must be made on an individual basis by the individual mediator.

## Grievances and Violation of Other Professional Standards

Be aware that while this article discusses mediator malpractice, it does not address the growing number of grievances filed against mediators. The creative plaintiff may also find a way to bring an action against the mediator framed in the manner of another professional negligent act. By alleging that the mediator did not act as a mediator but rather as a lawyer giving legal advice, the action may be for legal malpractice. The additional bonus for the plaintiff may be a deeper pocket.

Other ADR professionals should not consider this article as limited in scope to only mediators. It will be only a short time before other ADR specialists are included within the scope of possible malpractice. Some insurance carriers now have various riders for additional exposures that ADR professionals may have. Other areas include trainers, facilitators, arbitrators, ADR system designers, ADR program administrators, and others yet to be discovered and perhaps yet to be created.

As professional mediators, we should come to grips with whether we are willing to accept the same responsibility associated with any professional. This responsibility must include ethical standards, with enforceability, and grievance procedures and accepting liability for our own negligence. The people we serve professionally deserve, and need to be aware of, our obligations to them and to understand those remedies that are available. It is time that what we aspire becomes a reality with meaning within the practice of mediation. ♦

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## From the Chair

*(continued from page 2)*

year will be promotion of mediation to the general public, the business community, and to lawyers and judges. Our first ever National Mediation Month activities, developed under the able leadership of our Mediation Committee, took place in October in Washington, DC, and at least seven other cities (Atlanta, Honolulu, Missoula, Nashville, Richmond, San Francisco, and Nassau, Bahamas), in concert with other bar and professional organizations. These programs have been designed to promote mediation and to educate students, potential parties, and attorneys about the mediation process. In addition, a National Mediation Month toolkit has been created to provide resources and sample materials for practitioners, organizations and bar associations to use to celebrate National Mediation Month in their geographic area. Please go to the web to learn more about the toolkit and activities: [www.abanet.org/dispute/mediationmonth.html](http://www.abanet.org/dispute/mediationmonth.html). ♦