The Case for Mediator Immunity in New York

By Tyler Meade

Lawsuits against mediators are few and far between, but not so rare that they can be ignored. Some practitioners attempt to mitigate the risk with an exculpatory provision in their engagement letter, a somewhat controversial practice likely permissible in some jurisdictions but not others.[1] Mediators can invoke quasi-judicial immunity in some courts, but the extension of that common law doctrine to mediators is not universally recognized. This article outlines the rationale for extending this immunity to mediators in New York, something only one New York trial court has done so far.[2]

Origins of Quasi-Judicial Immunity

Most are familiar with the principle that judges enjoy absolute immunity for acts committed "within their judicial jurisdiction," however erroneous or injurious those acts may be. Immunity is not granted because judges hold public office. Rather, it is granted because our courts could not function properly without it.[3] Courts recognize a similar immunity for others performing duties "closely associated with the judicial process."[4]

Arbitrators are an obvious example. In New York and elsewhere, it is well accepted that arbitrators are protected by quasi-judicial immunity as a matter of common law.[5] As with judges, this is an immunity of necessity. The U.S. Supreme Court has observed, "The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus."[6] The ranks of arbitrators would thin if those dissatisfied with the outcome could successfully bring suit against them. The arbitration process itself could wither.

The Same Underlying Considerations Extend to Mediation

In an era of clogged dockets and delayed justice, there is broad recognition that mediation, like arbitration, is critical to the proper functioning of our judicial system. In the words of a New York bankruptcy court, "Mediation plays a critical role in the resolution of lawsuits by fostering settlement and preserving personal and judicial resources."[7] The similarity to arbitration does not end there. As the District of Columbia Circuit Court of Appeals has observed, "mediation also seems likely to inspire efforts by disappointed litigants to recoup their losses, or at any rate harass the mediator, in a second forum."[8]

Tyler Meade is the founder of Presidio ADR, which mediates complex cases nationwide. tyler@presidioADR.com

Statutory Immunity for Mediators

It is not surprising then that a majority of states provide for some form of statutory immunity for mediators. What is surprising is that most of these statutes are limited to specific contexts—some quite narrow.[9] California, for example, provides statutory immunity in just two narrow contexts—in certain mediations of attorney's fee disputes and in "international commercial … conciliation."[10] Florida is a notable outlier, extending judicial immunity to mediators conducting court-ordered mediations and somewhat more narrow immunity to private mediators as long as certain requirements are met.[11] Some courts also grant immunity to court-appointed mediators pursuant to local rule.[12]

The Uniform Law Commission, whose mission is to provide states with non-partisan, well-conceived and well-drafted legislation, has drafted model legislation for mediation. The Uniform Mediation Act, adopted by a dozen states, suggests that broader statutory immunity will not arrive any time soon, as it does not include an immunity provision for mediators.

New York does not provide statutory immunity for mediators.

Quasi-Judicial Immunity for Mediators

The common law doctrine of quasi-judicial immunity overlays this patchwork of statutes. *Vedatech, Inc. v. St. Paul Fire & Marine Ins. Co.* is illustrative.[13] There, the underlying dispute 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. Toward 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 alleged against the plaintiffs. Notably, the settlement allowed the plaintiffs to continue to pursue the claims they had alleged against the

Japanese companies, so it is difficult to understand how the plaintiffs could feel prejudiced.

The plaintiffs were infuriated by the settlement, apparently based on their implausible claim 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 before the mediator, 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."[14]

The mediator wisely invoked quasi-judicial immunity in a motion to dismiss based on *Howard v. Drapkin*, the leading California case on this issue.[15] While *Howard* involved claims filed against a psychologist in a custody dispute, the California Court of Appeals used the case to issue the following broad pronouncement: "We therefore hold that absolute quasi-judicial immunity is properly extended to these neutral third-parties for their conduct in performing . . . the arbitration, mediation, conciliation, evaluation or other similar resolution of pending disputes."[16] One treatise concludes that the language in *Howard* extending immunity to mediators is mere dicta.[17] However, another disagrees, citing *Howard* for the proposition that this immunity extends even to purely private mediation.[18] The court in *Vedatech* rejected the dicta argument and found that quasi-judicial immunity extended to the mediator.[19]

Vedatech thus illustrates the case for extending quasi-judicial immunity to mediators. The patchwork of statutes providing for some degree of immunity in some contexts is not sufficient. Without quasi-judicial immunity, suits like *Vedatech* could become more common, with a concomitant reduction in the efficacy of mediation. Mediators might shy away from the most contentious disputes—arguably the very disputes where mediators are most needed. Insurance costs may increase, raising the cost of this vital method of dispute resolution. Individuals might be dissuaded from becoming mediators.[20]

These are the factors that have motivated courts around the country to extend quasi-judicial immunity to court-appointed mediators. Most of these decisions are from California,[21] but a few other jurisdictions are represented as well.[22] A single New York trial court decision from 2020 so holds, with only the following brief discussion of the issue: "Other courts have recognized that mediators are entitled to immunity for their actions performed in their judge-like roles . . . This court agrees."[23]

Purely Private Mediations

A more interesting question is whether quasi-judicial immunity should extend to mediations conducted without any court involvement, namely private, ad hoc mediations. At least one court has answered that question in the negative.[24] But it is hard to deny that purely private mediation plays an equally vital role in preserving judicial resources and thus the efficient functioning of our judicial system. Further, if it were true that only publicly appointed officials enjoyed quasi-judicial immunity, then arbitrators would not be protected by such immunity.[25] The court in *Vedatech* applied quasi-judicial immunity to mediators based on the general considerations discussed in this article, not on the incidental fact that the trial court happened to order the parties to mediation. The same is true of the District of Columbia Circuit's leading decision on this issue.[26]

Relevant here is the following statement by the U.S. Supreme Court about judicial immunity: "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities."[27] Quasi-judicial immunity should extend to mediators not because they have a connection to a particular judicial proceeding via a court order, but because of the vital role they play in the efficient administration of justice.

Conclusion

Time will tell how New York appellate courts decide this issue. The case for rejecting immunity for mediators cannot be rejected out of hand. For example, one might argue that mediation works fine in jurisdictions where this immunity has not been extended to mediators.[28] There is no denying the tension between immunity and the aims underlying tort law, including the "deterrence of careless behavior and compensation by the wrongdoer for injuries sustained by victims."[29] But this has not stopped courts from extending quasi-judicial immunity to a broad range of professionals involved in the judicial process.[30] The same concern exists with exculpatory clauses enforced by New York courts.[31] The question boils down to a balancing of policy interests. That balancing should be conducted with the following in mind: "the general process of encouraging settlement is a natural, almost inevitable, concomitant of adjudication."[32]

Endnotes

1. *See* Bill Quatman, *Mediator Ethics: Should You Ask for a Waiver of Liability?,* Mediate.com, August 24, 2021. https://mediate.com/mediator-ethics-should-you-ask-for-a-waiver-of-liability/; *see also* 4B *N.Y. Prac., Com. Litig. in New York State Courts* § 68:16 (5th ed.) ("mediators may insist on an agreement that they will have immunity as a condition of service"); *Batshever v. Okin*, 13 Misc. 3d 814, 816, 827 N.Y.S.2d 545, 547 (Civ. Ct. 2006) (enforcing such a provision).
2. *Shevetz, M.D. v. Fensterman*, 2020 WL 254649, *2 (N.Y. Sup. Jan. 13, 2020); *c.f.* 4B *N.Y. Prac., Com. Litig. in New York State Courts* § 68:16 (stating New York courts have not addressed the issue).
3. *Young v. Selsky*, 41 F.3d 47, 51 (2d Cir. 1994); *Gans v. Callaghan*, 135 Misc. 881, 883, 238 N.Y.S. 599, 600 (Sup. Ct.), *aff'd*, 231 A.D. 735, 245 N.Y.S. 744 (App. Div. 1930).
4. *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985).
5. *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); *Babylon Milk & Cream Co. v. Horvitz*, 151 N.Y.S.2d 221, 224 (Sup. Ct. 1956), *aff'd*, 4 A.D.2d 777, 165 N.Y.S.2d 717 (1957); *see also* Revised Uniform Arbitration Act, § 14 (immunity for arbitrators).
6. *Butz v. Economou*, 438 U.S. 478, 512 (1978).
7. *In re Teligent, Inc.*, 417 B.R. 197, 205 (Bankr. S.D.N.Y. 2009).
8. *Wagshal v. Foste*r, 28 F.3d 1249, 1253 (D.C. Cir. 1994).
9. *See generally,* 1 *Mediation: Law, Policy and Practice* § 11:11 at n. 5 (Nov. 2022 update).
10. Cal. Bus. and Prof. Code § 6200(f); Cal. Civ. Proc. Code §§ 1297.13, 1297.432.
11. Fla. Stat. Ann. § 44.107.
12. *See, e.g.,* Joint Local Rules, S.D.N.Y. and E.D.N.Y., Rule 83.8(g).
13. *Vedatech, Inc. v. St. Paul Fire & Marine Ins. Co.,* 2005 WL 1513130, *3, 12-14 (N.D. Cal. June 22, 2005), *aff'd sub nom. St. Paul Fire & Marine Ins. Co. v. Vedatech Intl, Inc.*, 245 F. App'x 588 (9th Cir. 2007).
14. *Id*. at *12.
15. *Howard v. Drapkin*, 222 Cal.App.3d 843, 271 Cal.Rptr. 893 (Cal. App. 1990).
16. 222 Cal.App.3d at 858, 271 Cal.Rptr. at 903.
17. 1 *Mediation: Law, Policy and Practice* § 11:12 at n. 28.
18. *Cal. Prac. Guide Alt. Disp. Res.* ¶ 3:4 (Dec. 2022 update).
19. *Vedatech*, 2005 WL 1513130 at *12-14.
20. *Id.* at *13.
21. *See, e.g., Secress v. Ullman*, 147 Fed. Appx. 636, 638 (9th Cir. 2005) (unpublished); *Hutchinson v. San Diego Superior Court*, 2019 WL 211979, *3 (S.D. Cal. Jan. 16, 2019); *Simpson v. JAMS/Endispute, LLC*, 2006 WL 2076028, *3 (Cal. App. 2006).
22. *See*, *e.g.*, *Wagshal*, 28 F.3d at 1254; *Mills v. Killebrew*, 765 F.2d 69, 71 (6th Cir. 1985); *Desouza v. Kennedy*, 2017 WL 3431393, *5 (D. Conn. Aug. 9, 2017); *Dennis v. Monmouth County Civil Division*, 2022 WL 298272, *2 (D.N.J. 2022); *Yee v. Michigan Supreme Court*, 2007 WL 118931, *4 (E.D. Mich. Jan. 10, 2007); *Joynes v. Meconi*, 2006 WL 2819762, at *6–7 (D. Del. Sept. 30, 2006).
23. *Shevetz*, 2020 WL 254649, at *2 (citations omitted).
24. *DiGiuseppe v. Talbot*, 2017 WL 2324303, *2 (Conn. Super. May 4, 2017) (unpublished).
25. *Vedatech*, 2005 WL 1513130 at *13.
26. *Wagshal*, 28 F.3d 1249.
27. *Butz*, 438 U.S. at 511.
28. 4B *N.Y. Prac., Com. Litig. in New York State Courts* § 68:16.
29. *Vitale v. Schering-Plough Corp.*, 231 N.J. 234, 247, 174 A.3d 973, 981 (2017).
30. *Wagshal*, 28 F.3d at 1252.
31. *Matter of Part 60 Put-Back Litig.*, 36 N.Y.3d 342, 352, 165 N.E.3d 180, 186 (2020).
32. *Wagshal*, 28 F.3d at 1252.

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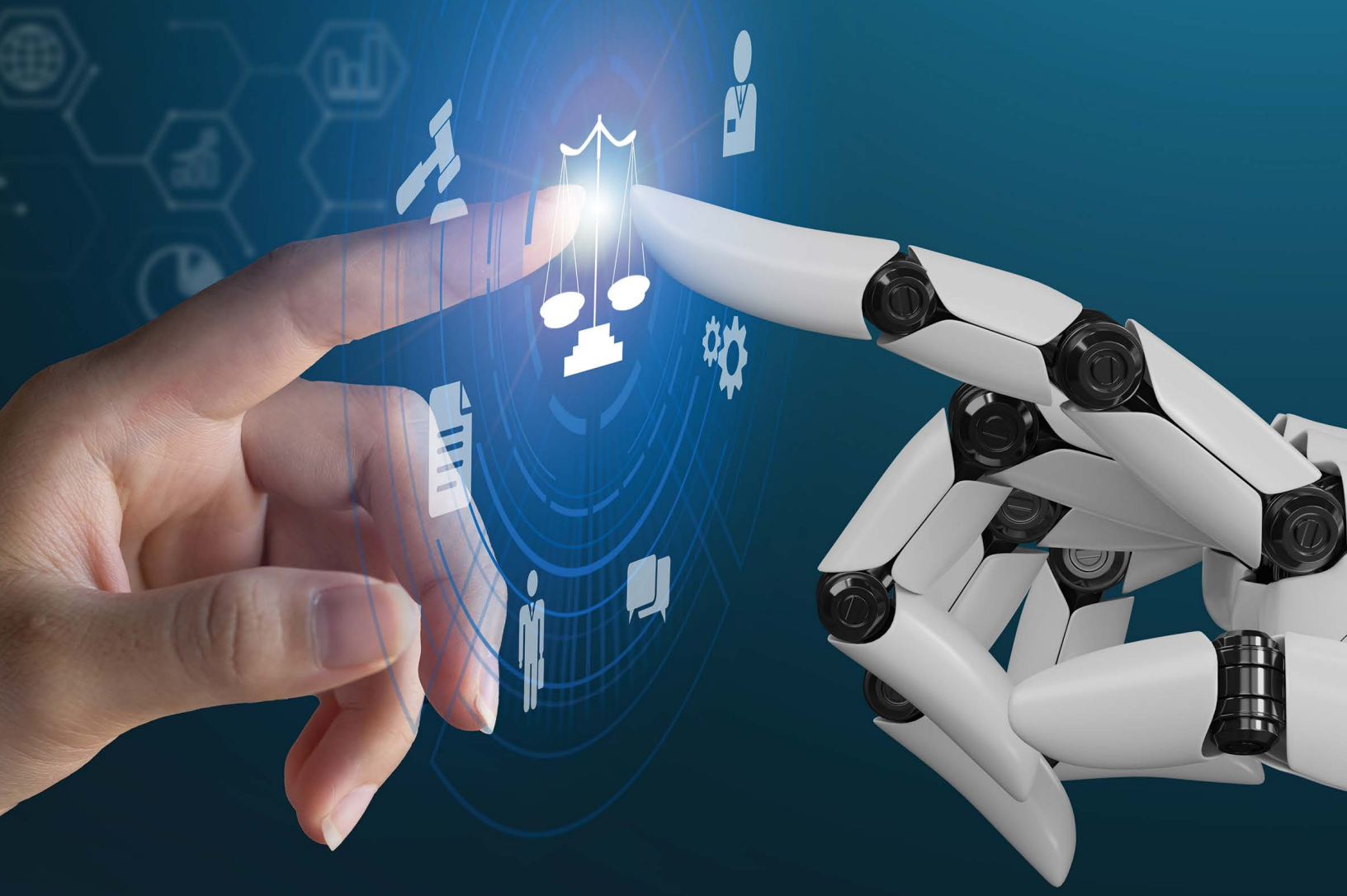

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