Mediator Immunity

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I. INTRODUCTION

Professor Chaykin supports an approach to the issue of mediator liability that holds a mediator liable for his conduct in a limited number of circumstances.[1] Such an approach assumes a particular conception of the mediator's role and, hence, what constitutes "mediating acts." I disagree with Professor Chaykin's assumptions regarding the mediator's role, and consequently, find his conclusions regarding mediator liability unpersuasive.

I have previously offered a more fully developed conception of the mediation process and the mediator's role.[2] As an extension of these writings, this Article sets forth a thesis for mediator immunity and proposes that legislation be drafted holding a mediator completely immune from legal liability for all actions undertaken in his role as mediator. I shall defend this thesis by examining three paradigm settings in which considerations of mediator liability conventionally arise. These settings involve occasions when (1) a mediated settlement does not reflect the optimal possible outcome and the mediator fails to oppose its adoption, or, in fact, encourages the particular settlement terms; (2) some person or party to a mediation session is harmed by another party and arguably the mediator could have prevented the harm from occurring; and (3) the mediation process is used to promote or camouflage illegal conduct of which the mediator could have alerted the appropriate authorities.

II. NON-OPTIMAL OUTCOMES

No mediator should be held liable if parties agree to settlement terms that do not optimize their interests or fully capitalize on their rights. This principle is not only desirable but also well established. For example, a mediator cannot be held legally liable for allowing a union to accept a wage proposal that is less favorable relative to other recently negotiated settlements, or that is less favorable in comparison to the cost of living rate or some other comparable standard. The union has its reasons for acting as it does and it is not normally viewed as the mediator's role to stop the union from accepting an offer it deems adequate.[3] If the

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1. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. DIS. RES. 47 (1986).

2. *See* Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981). A more detailed explication appears in my TAKING CHARGE/ MANAGING CONFLICT (to be published in 1987 by Lexington Books).

3. *See* E. ROBINS & T. DENENBERG, A GUIDE FOR LABOR MEDIATORS (1976).

employer's strategy of "starting low" deters union representatives from asking for more, the mediator should not be legally liable for permitting the union to accept that offer. The same analysis applies to parties negotiating the settlement of employment discrimination claims, and maintenance and support disputes in divorce proceedings.

People feel less confident about granting immunity to a mediator who permits a "power imbalance" among the negotiating parties.[4] Some proponents argue that a mediator has a duty to realign such imbalances and that his failure to take action to redress the imbalance should result in a liability claim. This position reflects a fundamental misconception of the mediator's role.

Parties to a dispute almost invariably have unequal positions of power. The negotiators of the parties may have "unequal" analytical or linguistic skills or the resources may be skewed in one party's favor. The argument that a mediator has a duty to redistribute the power or, at a minimum, has a duty not to permit the mediation process to reinforce this power disparity in the settlement terms has two significant analytical defects. First, if it is the mediator's responsibility to redistribute power resources, then his job no longer is that of promoting settlement. Instead, the mediator assumes the role of a mini-legislator charged with promoting the social welfare. Whether this role is a useful social service that deserves support and protection is a separate issue. Notwithstanding this issue, such a role certainly differs from our conventional image of a mediator's responsibilities. Second, persons who claim that a mediator has a duty to realign the power imbalance falsely assume that it is possible to identify the various sources of power and assess the power dynamics in a given situation. Even if it were possible to identify and assess the power structure, no common standard enables us to determine if the power is "balanced." To construct mediator liability claims on the basis of the mediator's mismanagement of power imbalances is building on intellectual quicksand.

Mediator liability can also arise when parties operate under an erroneous assumption that a mediator "should have" recognized and corrected erroneous information, or when a mediator provides such information to the parties. In this context, some proponents argue that a mediator should be held liable for his negligent behavior or malpractice. The appeal of holding a mediator liable under such circumstances is very strong, but it rests upon a misunderstanding of how a mediator interacts with the parties.

For example, we can envision a divorce mediator providing the parties

4. A typical example that expresses such ambivalence and concern can be found in *The Life of the Mediator: To Be or Not to Be (Accountable).* S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION, 108-13 (1985).

with erroneous information (deliberately or not) regarding the tax consequences of certain financial arrangements. Such an example represents the image of disputants using the mediator as an expert resource. However, this view is at odds with the dynamics of most mediation conferences in which the negotiating parties, with or without representation, assert their priorities and identify their interests. The disputants use the mediator to forge a common ground so they can secure their goals. The mediator's success in helping the parties reach acceptable settlement terms is enhanced if he is knowledgeable in the field because that knowledge enriches his ability to envision options and possible settlement formats. The mediator uses that information to develop an agreement not to "advise" or "counsel" the parties on how to proceed. The mediator does not simply dispense information to the parties, rather he uses it strategically to fashion an accord. He blends that information into a tactical approach to persuade the parties to reach settlement. The image of a client approaching a lawyer for advice cannot be transferred to the situation in which parties request a mediator to help them resolve their dispute. The compelling attraction of holding a mediator liable for negligence, however, derives from viewing the mediator-client relationship as akin to the attorney-client relationship. No one endorses inept behavior by a mediator. If he gives incorrect advice, there should be devices for relieving the parties of their obligations. However, that issue can be addressed without requiring the mediator to be held liable for damages.

A different situation is presented when the mediator deliberately provides incorrect information so that one party's position is improved at the expense of the other. A compelling argument can be made that such conduct violates a mediator's duty to the parties and, as such, is not a "mediating act" warranting immunity. This situation is a variation of the matters discussed in Section C for which a mediator should be held liable. Although liability might properly attach as an analytical matter, there would be, as Professor Chaykin details, a significant proof problem in sustaining such a claim.[5]

For all the situations addressed in this category, mediator immunity from legal liability should be explicitly available.

III. HARM TO PARTIES

It seems odd to claim that a mediator should be immune from suit in those instances in which a party suffered harm because the mediator did not take affirmative steps to prevent the harm when in a position to do so. In order to understand why such protection to a mediator is

5. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation,* 2 OHIO ST. J. DIS. RES. 47, 52-53 (1986).

important, we must examine precisely why we think the mediation process is valuable as a dispute resolution procedure.

As a preliminary matter, we must gain an understanding of the concept of "harm." If what is meant by "harm" is simply that one or more negotiating parties did not obtain the optimum outcome, then the comments of the previous section apply. More typically, the term "harm" refers to physical, psychological, or severe financial damage sustained by one or more parties. For instance, if a mediator has been told by one party in confidence that she plans to attack physically her negotiating counterpart, then the issue arises whether the mediator has a duty to inform someone in order to avert the harm. It is an unrealistic response for a mediator to construe such a threat as a "negotiating" tactic. However, sometimes a party, in an attempt to demonstrate how serious she is about securing her proposal, may inform the mediator regarding her plans to harm the other side if no concessions are made. No mediator endorses such behavior and most mediators would attempt to persuade the person from taking such action. The issue of liability focuses upon whether the mediator has a duty to warn the potential victim of the impending disaster.

It is important to examine the consequences of such a scenario to appreciate how our biases affect our liability analysis. Suppose the mediator warns Party A that Party B plans to assault her. After receiving this information Party A immediately goes to a store to purchase a pistol, and proceeds to Party B's home and shoots her. Under this scenario should the mediator be liable to Party B or her estate? Although it is argued that the mediator must reveal the impending danger to Party A or be held liable, it has not been proposed that a mediator should be liable for anything that might happen following his revelation of the information. This position reflects an arbitrary bias in favor of the first potential victim. There is also no moral basis for holding the mediator liable in the first instance (preventing harm) that cannot apply with equal force to holding her liable to Party B as well. The preferred solution, as a matter of policy and practice, seems straightforward: the mediator has no obligation to block such conduct once the mediation conference has concluded and the mediator's duty is to incorporate knowledge of such threats of harmful conduct into her aggressive efforts to generate a settlement. Under this approach the mediator's knowledge that one party might physically harm the other is no different in kind than a mediator in a labor-management dispute who has knowledge that a group of employees will spearhead an attack to destroy some of the employer's machinery if the contract deadline expires without a settlement.

The apparent inconsistency discussed above may not be sufficient to satisfy the advocate of mediator liability. To satisfy the advocate, it may be necessary to probe more deeply and address whether there is

any value in having a dispute settlement procedure that allows an actor not to be liable for failing to prevent a serious harm that she had good reason to believe would occur. At this level, the distinction between harm inflicted on an individual who is a party to the mediation and harm inflicted on individiuals who are affected by the behavior of negotiating parties collapses. The argument in support of sustaining mediator immunity at this level can be brought into sharper focus by considering the mediator's duty when parties contemplate engaging in illegal conduct.

IV. Conduct Contrary to Public Standards

Another concern is the extent of the mediator's duty upon learning in a mediation conference that one or both of the parties is engaging in, or plans to engage in conduct that is contrary to public standards. For example, what should a mediator do if both parties agree to an arrangement whereby one person hires the other but only on the condition that the person works "off the books?"

In this analysis of mediator liability two separate considerations arise. A mediator, particularly one who is paid with public funds, should not encourage, permit, or assist parties to develop settlement terms that are illegal. A contract containing illegal settlement terms is not enforceable, and one should make no apologies for insisting that a mediator under similar circumstances prevent the parties from consummating the deal with his imprimatur. Even more obvious, an agreement to commit a serious felony now implicates the mediator as an individual. Liability should attach to all harms suffered by innocent parties as a result of such conduct. While it is plausible to assert that a person can properly claim to be mediating under such circumstances, no justification exists for endorsing the process of mediation as a social institution in such circumstances.

A distinction should be drawn between a mediator who jointly participates in the development of an illegal scheme, and a mediator, who while trying to develop an agreement, learns that a party has committed or plans to commit an illegal act. No social utility exists in protecting the first type of mediator behavior. However, there is significant value in allowing the dispute settlement process to proceed even when the parties who are embroiled in a controversy make threats or admit wrongdoings in the mediator's presence. The mediator should be permitted to use that information as an element in the settlement process rather than using the information to stop all discussions. Examples will illustrate this distinction.

Suppose that a female employee is a victim of a sexual assault and she identifies her co-worker as the perpetrator. Assume further that the co-worker publicly denies the charge but reveals to the mediator in

caucus that he in fact committed the assault. If neither of the parties wants to leave the work station, then how should the mediator proceed? The mediator can assist the workers to develop settlement terms that minimize the possibility of any future incidents by focusing the discussion on such matters as desk location, supervisory review, staggered work hours, and independent work assignments. Given the particular facts, perhaps there is no viable way in which to structure an arrangement that minimizes the probability of the act occurring again. Ultimately, this is something that the participants must decide, not the mediator. What the mediator should do is to insist upon a consideration of settlement terms that reflects the fact (though not publicly admitted) that the incident occurred. There should not be any additional responsibility imposed on the mediator either to report that fact to the authorities in the event that no settlement is reached or to advise the supervisor or female victim of the admission in the event the matter is not resolved.

This view should be accepted because there is value in having a dispute settlement process that focuses on shaping and structuring the future relationship among the parties. This does not mean that what has happened in the past is irrelevant. The gathering of information about what has happened, through written documents or admissions, is essential to making certain that the future is tempered by what has occurred in the past. The mediation process does not require a formal determination that ascribes responsibility and blame for past conduct as a condition precedent to shaping the future. Similarly, the mediation process is not compatible with imposing a legal duty on the mediator to reveal a party's improper past conduct or threats of future harm, for that converts the mediator from his role as a trusted intermediary between the parties into an informant. Consider the mediator who intervenes to stop a gang war in an urban area, the mediator who attempts to develop an accord between civil authorities and prisoners holding civilian hostages, or the mediator trying to resolve a dispute between a school principal and a student regarding the student's suspension for allegedly carrying weapons or drugs inside the school building. It is a practical certainty that the mediator will learn that at least one party has engaged in improper conduct or threatens future misconduct. If the mediator is denied access to that information because the party refuses to reveal it to him for fear of being "reported," then we are handicapping him in his effort to help parties fashion a viable solution to the problem that is predicated upon an accurate assessment of what has happened in the past. If one believes that there is value in trying to resolve such situations without relying exclusively upon the use of force or the application of institutional rules in a formalized, adjudicatory setting, then permitting a mediator to operate without exposure to legal

liability is necessary.

V. CONCLUSION

To argue that a mediator should be protected legislatively from legal liability is not to license any behavior by the person acting as a mediator. Developing a proper conception of the mediator's role is essential in assessing what constitutes "mediating" and "mediating acts" so that immunity may attach to an individual performing such acts.