Rhode Island Mediators Association

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MEDIATOR LIABILITY AND MEDIATOR'S LIABILITY INSURANCE

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Scope Note:

Mediators like to think that we are engaged in a low risk profession – after all, we are not giving the parties legal advice and it is up to them whether they are willing to reach an agreed resolution. But, in fact, mediators do get sued on occasion for errors, omissions and other alleged failures. This presentation will briefly identify areas of potential exposure and review what liability coverages are available and the approximate cost.

I. Basis of Mediator Liability

A Mediator as a professional is expected to possess and utilize specialized skills and knowledge from training and experience sufficient to effectively assist parties in conflict to participate in a fair and neutral process through which they may (or may not) reach a resolution of their differences.

As professionals, mediators will be held to reasonable standards of diligence, care and competence. Failure to meet those standards may result in subjecting the mediator to claims founded in either contract or tort law theory.

- The underlying idea of a **breach of contract** claim is that the mediator has either expressly or impliedly promised the parties that he or she will do or not do certain things in the conduct of the mediation; that the mediator breached that promise or those promises; and that the party or parties have sustained some harm or loss as a result of that breach of contract.
    - For example, most mediators in their opening explanation to the parties present themselves as neutral facilitators and this statement may be the basis of a breach of contract claim against a mediator who thereafter is perceived to have become biased.
- The underlying idea of a **tort claim** is that the mediator has acted either negligently or intentionally in violation of applicable standards or care or conduct; that the wrongful behavior of the mediator was the cause of harm or loss to the party or parties; and that the mediator could or should have foreseen that her or his behavior would be harmful to the party or parties.
    - For example, a mediator who learns in a mediation that a party is contemplating taking advantage of a particular business opportunity and who later appropriates that opportunity for himself may be accused of tortious interference with contractual or business relations.

II. Liability for Breach of Fiduciary Duties

Another basis of mediator liability could be founded on viewing the mediator as a fiduciary who, by virtue of undertaking a confidential relationship with the parties who come to mediation, has impliedly agreed to be bound to a range of duties of fidelity and loyalty to the parties even above the mediator's own self-interest. As a fiduciary, the mediator would be prohibited from engaging in conflicts of interest and would be required to candidly keep the party or parties informed of relevant information about the mediation and its progress. The mediator would be expected to advance the interests of all of the parties at all times. This may be a particular challenge when the parties in the dispute have interests that substantially diverge which is what brought them to mediation in the first place.

- Many of the claims that might be brought against a mediator might be styled as either breach of contract, a tort, or as a breach of fiduciary duty. For example, a party who believes that a mediator has, without permission from the party or parties, disclosed sensitive information imparted to the mediator in confidence might frame that complaint as either a breach of the promise to keep the contents of the mediation confidential or as a breach of fiduciary duty.

- Conflicts of interest claims might also arise as a result of failure on the part of the mediator to disclose her or his prior dealings with one or more of the parties. Where a mediator has had undisclosed prior dealings with one of the parties which the other party only learns of subsequently, then it is entirely possible for that party to believe that mediator has breached a fiduciary duty to be loyal and candid with both parties. This circumstance might also furnish that party with a basis to bring a breach of contract claim for an alleged breach of the express promise to conduct the mediation in neutral fashion.

    - Best mediation practices would dictate that the mediator disclose any substantial dealings that he or she has had with any of the parties or any of their legal counsel in advance or at the outset of the mediation. The parties should then be asked if they have any concerns about proceeding with this mediator leading the mediation and if objections are raised, the mediator should decline to proceed.

III. Types of Claims That Have Been Brought Against Mediators

- Unauthorized Disclosure or Appropriation of Confidential Information
- Miscommunicating Information that made the conflict worse
- Defamation or Libel
- Invasion of Privacy
- Fraud or Misrepresentation
- Breach of Neutrality, Impartiality or Objectivity
- Breach of Contract
- Malpractice or Professional Negligence
- Failures Associated with Imbalances of Power
- Coercing or "forcing" a party to settle
- Bias in favor of a party or conspiring with a party
- Non-disclosure of prior dealings with and potential bias in favor of a party
- Failure to disclose threats of violence where later assault occurred
- Violating applicable standards of mediator conduct – (disciplinary complaint in jurisdiction that more formally regulates mediators - Florida)

IV. Unauthorized or Unintended Practice of Law

Some mediators are licensed attorneys, but a legal background is not a pre-requisite to become a mediator. Many other professions, occupations or life experiences can also be a foundation for effective conflict resolution work as a mediator. However, many conflicts that arise between parties have the potential to involve the legal rights and obligations of the parties. This is as true in family or divorce mediation as it is in neighbor disputes or commercial disputes. When parties disagree about matters that they regard as important, it is always possible that the disagreement may have to be resolved in a court of law.

Whether or not the dispute is already court docketed, the issues outstanding between the parties to a mediation may be legal issues or may have legal consequences. Non-lawyer mediators are trained to be clear about what the role of the mediator is and is not. Specifically, non-lawyer mediators should be trained to be clear with the parties that the mediator cannot and will not offer legal advice to the parties - to do so would constitute the unauthorized practice of law and may well incur the attention and wrath of the local bar association. The organized bar may initiate court action to secure an injunction restraining a mediator from engaging in the practice of law. The cost of defending against that action may be substantial even if the mediator prevails.

V. Lawyer-Mediator Concerns

For lawyer-mediators, the role that they will fulfill for the parties should also be clear. Lawyers who agree to serve as mediators are not functioning in the traditional lawyer-client representation and advisor role. That traditional role consists of a lawyer serving the interests of a single client or perhaps multiple clients who do not presently have conflicting interests; and the lawyer can devote her or his loyalty to that client or those clients in their dealings with others. A lawyer-mediator serving as a mediator is not the lawyer or advocate for either party. Instead, she or he must be neutral and must so inform both of the parties.

The ABA Model Rules of Professional Conduct, which have been adopted in Rhode Island, address the role of a lawyer serving as a "Third Party Neutral" in R.I.R.P.C. Rule 2.4. That Rule recognizes that "[a]lternative dispute resolution has become a substantial part of the civil justice system" and provides:

RULE 2.4 LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

The Comments to Rule 2.4 explain: "Unlike non-lawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are

unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them."

Whether the mediators is a lawyer or not, there may be instances where the subject of the mediation involves legal rights and obligations. For example, in divorce mediations there are many issues that the parties could discuss that have both a practical family concern and a legal content. Among these topics are child support, custody, visitation, property division and alimony. Frequently the parties will ask the mediators to explain how these issues will or might get resolved if they went to court. If the mediator analyzes the specific circumstances of the parties and offers a prediction as to how a court might rule, that very likely constitutes the practice of law – or at least the local bar association may so believe.

A mediator when faced with this type of request should remind the parties that they have the opportunity to craft an agreement of their own choosing that, in most instances, will be approved by the court. Many mediators will inform the parties of normative or typical outcomes on common areas of concern while cautioning the parties that this is not meant to be a prediction of what a judge might do in their particular circumstances. It may also be helpful and safer for the mediator to remind the parties that they are free to have any tentative agreements they reach in mediation reviewed by separate legal counsel before the agreement becomes binding.

If a non-lawyer mediator attempts to offer legal advice, then he or she might be opening him or herself up to professional negligence claims from parties who rely on that advice and then later come to believe that they were disadvantaged thereby. In addition, the mediator may have to defend herself or himself against proceedings brought by the local bar association to enjoin the mediator from engaging in the unauthorized practice of law.

VI. Defense Costs versus Damages

While there certainly have been claims raised against mediators for alleged errors, omissions or other failures, very few of these claims have resulted in the award by a judge or jury of damages against a mediator. This may be because some of the claims have been settled without going to verdict, but it is also the case that many have been dismissed by courts before trial. In either event, there are legal fees and other costs that a mediator could incur defending him or herself against the claim. It is not unusual for defense costs and legal fees to run into the tens of thousands of dollars. These defense costs could be the best reason to consider mediator's liability insurance.

VII. Mediator Liability Insurance

It does not appear that any state has yet adopted a broad mandate that mediators practicing in that jurisdiction must obtain and carry professional liability insurance. Some court systems and mediation referral systems do require proof of mediator professional liability insurance before being eligible to receive referrals. This is the case in West Virginia Family Court-Ordered Mediation; in Cuyahoga County Common Pleas, Domestic Relations Division mediation referral list requirements; and to be included in the Indiana Association of Mediators Referral Program. There does not appear to be any such requirement in Rhode Island. However, both the Community Mediation Center of Rhode Island and the Roger Williams University mediation Clinic do carry mediator professional liability insurance on their staff and volunteer mediators.

Mediators who engage in another profession, such as lawyers, counselors or psychologists, may have coverage against claims arising out of their mediation activities if their underlying other professional liability insurance is broad enough. For example, the Rhode Island Bar Association offers legal professional liability through a company called AON. AON representatives explained that attorneys covered through them can indicate that mediation is one of their practice areas and are then covered upon payment of a $25 mediation endorsement charge.

There are at least two major sources of Mediator Liability Insurance that is specifically offered just for dispute resolution practitioners. Both programs require the mediator to hold membership in a partner professional organization such as the Association for Conflict Resolution (ACR); the ABA Section of Dispute Resolution; or Mediate.com. The two providers are:

Complete Equity Markets (Lloyds of London)	**and**	**Columbia Casualty (CNA)**
CEM Betsy Thomas Lake Zurich, IL 800-323-6234 bthomas@cemins.com		Pinkham Agency Mark Berg Long Island, NY 516-931-1414 ext. 27 mberg@pinkhamagency.com

Both provide coverage on a **"Claims Made Basis"** as opposed to on an **"Occurrence Basis."**

Coverage definitions relate to both **"Damages"** arising from claims made against the Insured Mediator and for **"Claim Expenses."** Although there are minor differences between the two companies definitions of each of these critical policy terms, they generally cover:

"Damages" arising from claims made against the insured mediator for any acts, omissions, breach of duty, or personal injury committed or alleged to have been committed by the insured mediator in rendering or failing to render mediation or dispute resolution services. Dispute Resolution Services are defined to cover arbitration, mediation, dispute resolution consulting, and dispute resolution training.

"Claim Expenses" includes reasonable and necessary attorneys' fees, costs, expenses, investigation and other costs incurred in investigating, adjusting, defending or appealing any covered claim against the insured mediator.

Some differences that were discerned between the two companies' policies were:

1. CNA policy does not charge defense costs against the liability coverage whereas CEM (Lloyds) appears to have combined coverage limits for both damages and claim expenses.
2. Punitive damages may not be covered on CEM (Lloyds), but are specifically included in CNA's coverage.
3. Defense against charges of unauthorized practice of law is a covered claim on CNA (up to $25,000), but is an extra cost rider in CEM (Lloyds).

Cost of Mediator Professional Liability Insurance

The basic premium charge is calculated on a per mediator basis and depends upon coverage levels and deductibles. Coverage limits are available from both companies in the following packages:

$100,000 per claim/$300,000 aggregate

$250,000 per claim/$500,000 aggregate

$500,000 per claim/$1,000,000 aggregate

$1,000,000 single limit

Deductibles can range from as low as $0 at CNA to as high as $500 or $1,000 with CEM(Lloyds). Like other insurance, higher deductibles can reduce the annual premium.

Premiums for RI from $231/year for a PT mediator at 100/300 up to $540+/year for FT at 1 million.