

The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity

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I. INTRODUCTION

Mediation, an alternative dispute resolution (ADR) technique, uses a neutral third party to facilitate dispute resolution. Mediators provide disputants with a nonbinding assessment of their case to explore and promote settlement options.¹ In the United States, mediation has been implemented at both the federal² and state³ levels, either as an adjunct to court proceedings or by contract outside of judicial supervision.

As courts increasingly turn to mediators,⁴ the need to protect participants in the mediation process has become evident. How to protect such participants has raised many issues,⁵ including the nature and scope of

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¹ For articles discussing the range of functions increasingly being assumed by mediators, see Note, *The Sultans of Swap: Defining the Duties and Liabilities of American Mediators*, 99 HARV. L. REV. 1876 (1986); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 248-249 (1993).

² See *infra* notes 20-25 and accompanying text.

³ See *infra* notes 183-187 and accompanying text. See also *infra* Appendix E.

⁴ See Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1090-1095 (1990).

⁵ See generally Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1; John B. Lewis & Lois J. Cole, *Defamation Actions Arising from Arbitration and Related Dispute Resolution Procedures—Preemption, Collateral Estoppel and Privilege: Why the Absolute Privilege Should be Expanded*, 45 DEPAUL L. REV. 677 (1996).

confidentiality protections for the participants⁶ and immunity for the neutrals before whom these disputes are presented. Perhaps none is so vexing as the evolving area of whether mediators should be granted some degree of immunity for the services they render, particularly if the mediator is compensated.⁷

Possible claims⁸ against a mediator include the following: violations of constitutional rights, tort actions alleging the negligent performance of duties, intentional tortious interference with contractual relationships, breach of contract, conflicts of interest, breach of fiduciary duty, actions asserting defamation claims,⁹ violations of the Deceptive Trade and Practices Act (DTPA) and civil rights violations under 42 U.S.C. section 1983. Imposing liability on mediators under traditional tort notions would focus on the elements of proximate causation and harm. In the case of compensated mediators, who have been selected because they are professionals and have charged their usual rates, harm can be measured by the amount of the fee.¹⁰ One commentator suggests that consumers of compensated mediator services can assert claims for breach of contract or for violation of the DTPA.¹¹ Another possible remedy for mediator

⁶ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS, NO. V (American Bar Association, Sections on Litigation and Dispute Resolution; American Arbitration Association; and Society of Professionals in Dispute Resolution) [hereinafter MODEL STANDARD]; Brian Dorini, Case Comment, *Institutionalizing ADR: Wagshal v. Foster and Mediator Immunity*, 1 HARV. NEGOTIATION L. REV. 185, 180-191 (1996) (discussing confidentiality standards applicable to court-annexed mediations in various federal courts); Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 SETON HALL L. REV. 1 (1995); Kirtley, *supra* note 5, at 8-9; Irene S. Said, *The Mediator's Dilemma: The Legal Requirements Exception to Confidentiality under the Texas ADR Statute*, 36 S. TEX. L. REV. 579 (1995); Eric R. Max, *Confidentiality in Environmental Mediation*, 2 N.Y.U. ENVTL. L. J. 210 (1993); Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25; Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984).

⁷ MODEL STANDARD, NO. VIII sets forth factors to guide mediators in setting fees for mediation services. See MODEL STANDARD NO. VIII.

⁸ Even when liability can be established, damages may be difficult to measure, particularly when the claim is premised on noncompliance with mediation procedures. At the very least, the plaintiff must establish proximate causation between the alleged injury and the mediator's conduct. See generally NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* § 11.03 (1989); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 219-220 (1994).

⁹ See Lewis & Cole, *supra* note 5, at 678-679.

¹⁰ See Note, *supra* note 1, at 1891-1894.

¹¹ See KOVACH, *supra* note 8, at 219.

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misconduct is rescission of the resulting settlement agreement because the parties' assent was not properly obtained.¹²

This Article assesses the availability and scope of mediator immunity and whether immunity is needed to protect the mediation process. Paramount is the need to determine whether mediators can invoke immunity from claims for acts or omissions incident to their service. If mediators could invoke immunity, such immunity would extend to claims sounding in contract and tort;¹³ but would it also encompass intentional torts or criminal conduct by the mediator, such as fraud or extortion? Do mediators need the protections provided by absolute judicial or quasi-judicial immunity or is qualified immunity sufficient? Given the implementation of mediation programs by courts around the country that authorize private individuals to serve as compensated mediators, a related issue is whether different standards for assessing mediator conduct should be applied to compensated mediators.¹⁴

Commentators disagree on whether court-appointed mediators should be entitled to judicial¹⁵ immunity or qualified immunity. Proponents of immunity maintain that it must be provided to mediators to encourage the availability of third party neutrals and to control costs.¹⁶ Opponents assert that granting immunity to mediators denies litigants adequate recourse when

¹² See Note, *supra* note 1, at 1895.

¹³ See Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927, 980-982 (1994).

¹⁴ If compensated, another issue is whether a court-appointed mediator should be paid according to a standard for mediators generally or according to their nonmediation professional levels, for example, as an attorney, accountant or investment banker. This issue is not addressed further in this article because it has not yet been addressed by the courts, but the author believes that courts will have to address it as fee applications are presented by compensated mediators to courts which have approved their retention. This issue will unquestionably be raised in the bankruptcy courts, which are required by statute to approve all fee applications of professionals rendering services to the bankruptcy estate. See 11 U.S.C. § 330 (1994). See also *infra* note 24 and accompanying text.

¹⁵ Judicial immunity is also called "absolute" immunity. See *infra* notes 32-61 and accompanying text. When extended to participants in the judicial process who are not judges, it is described as "quasi-judicial" immunity.

¹⁶ See generally Joseph B. Stulberg, *Mediator Immunity*, 2 OHIO ST. J. ON DISP. RESOL. 85 (1986); D. Alan Rudlin & Kelly L. Faglioni, *Mediator Immunity Promotes ADR Access, Keeps Cost Low*, NAT'L L.J., Apr. 11, 1994, at C12. Additional mechanisms available to protect the public from incompetent mediators include qualification standards, ethical standards, particularly if accompanied by enforcement mechanisms, and court supervision in court-connected mediation. See *id.*

incompetent services have been rendered.¹⁷ As an alternative to granting immunity, the dissenters argue that the same goals can be achieved by providing insurance to mediators through either the mediation program's sponsor or a group rate made available to individual mediators.¹⁸

To illustrate the role of court-appointed mediators, this Article discusses the order providing for mediation promulgated by the United States Bankruptcy Court for the Southern District of New York.¹⁹ Using the Order as a paradigm, this Article will analyze the availability and scope of immunity for mediators. It will survey the case law evolution of immunity doctrines and the scope of protection they provide. Next, this Article will discuss federal and state statutes and administrative regulations that authorize the use of mediation as an ADR option and the extent to which, if at all, they provide for mediator immunity. This Article will assess the scope of protection current for mediators who serve under the Order, particularly when the mediators are compensated for their services. The Author concludes that both compensated and noncompensated mediators serving in court-sponsored mediation programs should be granted absolute quasi-judicial immunity for services rendered within the scope of their engagement.

¹⁷ The most significant institutional dissenter is the Center of Dispute Settlement and the Institute of Judicial Administration. See NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION PROGRAMS (Center of Dispute Settlement and the Institute of Judicial Administration) (1992). Other commentators also espouse mediator liability. See, e.g., Note, *supra* note 4, at 1099; J. Sue Richardson, *Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators*, 17 FLA. ST. U. L. REV. 623, 628 (1990); Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47 (1986); Linda R. Singer, *Immunity Imperils the Public and Mediator Professionalism*, NAT'L L.J., Apr. 11, 1994, at C12.

¹⁸ Kimberlee Kovach Comments:

At the end of 1993, a primary insurer of arbitrators and mediators [Complete Equity Markets, Inc.] reported that the current number of claims against mediators and arbitrators averages five per year. The majority of these involved either general negligence, conflicts of interest, or breaches of confidentiality. The remaining were divided among other theories of liability [based on telephone interview in early 1994]."

KOVACH, *supra* note 8, at 219.

¹⁹ See *In re Adoption of Procedures Governing Mediation of Matters in Bankruptcy Cases and Advisory Proceedings*, General Order N-117 of the Court (S.D.N.Y. Nov.10, 1993.) [hereinafter Order]. See *infra* Appendix A.

II. MEDIATION PROGRAM OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Bankruptcy courts are increasingly appointing compensated mediators to facilitate and expedite the bankruptcy process.²⁰ In 1993, a mediation program was instituted by the United States Bankruptcy Court for the Southern District of New York by General Order 117 of the Court (Order). The Order established an out-of-court mediation program in bankruptcy cases and adversary proceedings before the court, excluding matters involving a governmental unit. It also provided procedural guidance for the court's Program.

Pursuant to the Order, a matter may be assigned to the Program by the court upon its own motion or upon a motion by any party in interest or the Trustee in Bankruptcy.²¹ The mediator to whom the matter is assigned must meet certain qualifications and be registered with the Clerk of the Court.²² Although the Order authorizes compensation for mediators, terms are to be negotiated between the parties and the mediator.²³ Mediator fees to be paid by a bankruptcy estate require court approval.²⁴ The Order does not make clear what protections, if any, are available to mediators, whether compensated or not, sued for actions taken in that capacity. Possible solutions to this issue include the following: (1) an amendment to the Order clarifying the right to legal representation for mediators acting within the scope of their authority and stating that mediator immunity exists, and (2) a court-sponsored insurance program.²⁵

²⁰ See Hon. Nancy F. Atlas, *Mediation in Bankruptcy Cases*, Part 1, 6 PRAC. LAW 39 (1995); Hon. Nancy F. Atlas, *Mediation in Bankruptcy Cases*, Part 2, 7 PRAC. LAW 63 (1995); Ralph R. Mabey et al., *Symposium on Bankruptcy, Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and the Other Forms of ADR*, 46 S. C. L. REV. 1259 (1995); Robert E. Nies, *ADR Fosters Kinder, Gentler Bankruptcies*, 139 N.J.L.J. 182 (January 16, 1995).

²¹ See Order, § 1.1.

²² See Order, § 2.1(A).

²³ See Order, § 4.0.

²⁴ See *id.*

²⁵ This solution was proposed by the New Jersey Supreme Court Task Force on Dispute Resolution as part of its report, which concluded that mediators should not be granted immunity. Task Force Report, New Jersey Supreme Court Task Force on Complementary Dispute Resolution, 124 N.J.L.J. 90, 96 (July 13, 1989); Final Report 23-24 (1990).

III. SOURCES OF PROTECTION

Courts, legislatures and administrative bodies have recognized mediator immunity, premised on doctrines of either judicial or quasi-judicial absolute immunity for judicial acts. Interestingly, although some commentators argue that qualified immunity sufficiently protects mediators,²⁶ all the courts that have considered the issue to date have insulated mediators from liability on the basis of absolute immunity. This section reviews the theories used to establish the availability and scope of that immunity.

A. Immunity Doctrines in the Courts

Doctrines of immunity initially evolved in the federal courts through a large number of Supreme Court decisions that established either judicial or quasi-judicial absolute immunity for judicial acts.²⁷ More contemporary decisions on immunity have been rendered by the circuit courts. A recent decision of the Court of Appeals for the District of Columbia ruled expressly that mediators serving without compensation in a court-sponsored program have judicial immunity.²⁸ In a case involving arbitrators, the Second Circuit granted immunity to participants in judicial and quasi-judicial proceedings.²⁹ Decisions in other circuits have been similarly helpful.³⁰ This Article will analyze these decisions and their historic

²⁶See *supra* notes 16–18 and accompanying text.

²⁷See *infra* notes 32–114 and accompanying text.

²⁸See *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 1314 (1995). The *Wagshal* case is discussed *infra* at notes 116–128 and accompanying text.

²⁹See *Austern v. Chicago Bd. Options Exch.*, 898 F.2d 882, 886 (2d Cir. 1990). The *Austern* case is discussed *infra* at notes 129–133 and accompanying text.

³⁰See *e.g.*, *Downs v. Sawtelle*, 574 F.2d 1, 11 (1st Cir. 1978); *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (1st Cir. 1980); *Bettencourt v. Board of Registration*, 904 F.2d 772, 781–785 (1st Cir. 1990); *Williams v. Wood*, 612 F. 2d 982, 985 (5th Cir. 1980) (*per curiam*); *Tarter v. Hury*, 646 F.2d 1010, 1012–1013 (5th Cir. 1981); *Folsom Inv. Co. v. Moore*, 681 F.2d 1032, 1097–1098 (5th Cir. 1982); *Austin Mun. Sec. v. National Ass'n of Sec. Dealers*, 757 F.2d 676, 679 (5th Cir. 1985); *Denman v. Leedy*, 479 F. 2d 1097, 1098 (6th Cir. 1973) (*per curiam*); *UAW v. Greyhound Lines*, 701 F.2d 1181, 1185–1188 (6th Cir. 1983); *Duncan v. Peck*, 844 F.2d 1261, 1263–1264 (6th Cir. 1988); *Bush v. Rauch*, 38 F.3d 842, 844 (6th Cir. 1994); *Del's Big Saver Foods v. Carpenter Cook, Inc.*, 795 F.2d 1344, 1351 (7th Cir. 1986); *Kincaid v. Vail*, 969 F.2d 594, 600–601 (7th Cir. 1992); *Buller v. Buechler*, 706 F.2d 844, 850–851 (8th Cir. 1983); *Watertown Equip. Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1489–1496 (8th Cir. 1987); *Patterson v. Von Riesen*, 999 F.2d 1235, 1236 (8th Cir. 1993); *Howerton v. Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983); *Sharma v. Stevas*, 790 F.2d 1486, 1486 (9th Cir. 1986); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1138–1140

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underpinnings.

In state court actions, quasi-judicial immunity has been extended to mediators, conciliators and other neutrals who conduct ADR procedures voluntarily and not in a court-mandated situation. State court decisions have upheld the immunity of such ADR neutrals, even if selected and compensated by the disputants and not supervised in any way by the court. In so doing, one court focused on the role that the mediators played in the adjudicative process. It reasoned that granting mediators quasi-judicial immunity supported the further implementation of ADR services as an adjunct to judicial procedures.³¹

1. *Judicial and Quasi-judicial Common Law Immunity*

At common law,³² absolute immunity was granted to participants in the judicial process to protect that process from the harassment and intimidation associated with litigation. The defense of judicial immunity is available based on a functional analysis of the conduct challenged. Judicial officers are granted absolute immunity for acts within their judicial capacity and subject matter jurisdiction, even if erroneous.³³ In contrast, violations of ministerial or administrative duties are not protected.³⁴ Whether an act is

(9th Cir. 1986); *Mullis v. United States Bankruptcy Court*, 828 F.2d 1385, 1394 (9th Cir. 1987); *Coverdell v. Department of Social & Health Servs.*, 834 F.2d 758, 762-765 (9th Cir. 1987); *Horwitz v. Board of Medical Examiners*, 822 F.2d 1508, 1509 (10th Cir. 1987); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 716 (10th Cir. 1988); *Gregory v. United States*, 942 F.2d 1498, 1500 (10th Cir. 1991); *Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1440, *vacated in part on other grounds*, 822 F.2d 998, 1000, *opinion vacated and reh'g en banc granted*, 833 F.2d 1436 (11th Cir. 1987); *Roland v. Phillips*, 19 F.3d 552, 557 (11th Cir. 1994). For additional discussion of decisions involving quasi-judicial immunity, see *infra* notes 39-47, 81 and accompanying text.

³¹ See *Howard v. Drapkin*, 271 Cal. Rptr. 893, 894 (Cal. Ct. App. 1990) (psychologist performing dispute resolution services in connection with a lawsuit over custody and visitation rights). Cf. *Lange v. Marshall*, 622 S.W.2d 237, 238 (Mo. Ct. App. 1981) (decision not based on immunity; court held that plaintiff did not establish damages proximately caused by mediator's alleged negligence).

³² See generally J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879. For a discussion of *Stump*, see *infra* notes 45, 49, 51, 57 and 136 and accompanying text.

³³ See *infra* notes 45-46, 57 and accompanying text.

³⁴ See *infra* notes 55-56 and accompanying text; *Forrester v. White*, 484 U.S. 219, 229 (1988) (regarding administrative acts). Judicial immunity does not protect executive and legislative acts. See *id.* at 227; see also *Mitchell v. Forsythe*, 472 U.S. 511 (1985). The Court explicitly excluded the promulgation of a code of conduct for attorneys, citing *Supreme Court*

judicial or ministerial is determined by the nature of that act and the expectations of the parties.³⁵

In 1872, the United States Supreme Court in *Bradley v. Fisher*³⁶ extended the common law absolute immunity of state judges to federal judges.³⁷ Such immunity is not limited to judges because "immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches."³⁸ In *Yaselli v. Goff*,³⁹ absolute common law immunity was extended to participants in the judicial process, including judges, grand jurors, petit jurors, advocates and witnesses. Pretrial court appearances by a prosecutor in a criminal action are also granted absolute immunity.⁴⁰

The Supreme Court has also granted quasi-judicial immunity to a variety of persons who function in a manner comparable to judges or in an adversarial context. A three-pronged test, first articulated in *Butz v. Economou*,⁴¹ is applied to make that determination. First, the person claiming immunity must function in a manner comparable to those traditionally granted absolute immunity at common law. Second, it is determined whether there is there a likelihood of harassment or intimidation for performing those functions. Third, procedural safeguards must be in

of *Virginia v. Consumers Union of United States*, 446 U.S. 719 (1980). See *Forrester*, 484 U.S. at 228.

³⁵ See *Smith v. Martin*, 542 F.2d 688, 690 (6th Cir. 1976) (providing absolute judicial immunity for judge conducting settlement conference because the parties were under the expectation that the judge dealt with them in a judicial capacity). See also *infra* notes 48-56 and accompanying text.

³⁶ 80 U.S. (13 Wall.) 335 (1872). According to one commentator, *Bradley* was the first case to establish judicial immunity. See KOVACH, *supra* note 8, at 220 n.52.

³⁷ Based on *Bradley*, such immunity was extended to arbitrators a few years later in a state court decision because of the similarity of their functions. See *Jones v. Brown*, 6 N.W. 140, 143 (Iowa 1880).

³⁸ *Forrester v. White*, 484 U.S. 219, 227 (1988). For cases granting quasi-judicial immunity to persons other than judges, see *Butz v. Economou*, 438 U.S. 478, 509-512 (1978) (granting immunity to executive branch officials performing administrative adjudication); *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976) (granting immunity to prosecutors and grand jurors); *Austin Municipal Secretary v. National Association of Securities Dealers*, 757 F.2d 676, 697 (5th Cir. 1985) (granting immunity to registered national securities association, its disciplinary officers and staff when functioning as prosecutors); and *UAW v. Greyhound Lines*, 701 F.2d 1181, 1186 (6th Cir. 1983) (granting immunity to arbitrators).

³⁹ 12 F.2d 396, 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

⁴⁰ See *Burns v. Reed*, 500 U.S. 478, 492 (1991). See also *Imbler*, 424 U.S. at 431. *Imbler v. Pachtman* is discussed *infra* at note 87.

⁴¹ 438 U.S. 478, 513-517 (1978).

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place to protect against unconstitutional conduct.⁴²

The scope of the immunity provided is broad. False or defamatory statements made in the course of or related to judicial proceedings are entitled to absolute immunity.⁴³ Charges of malice or corruption are protected by judicial immunity because they can be easily asserted, making judges subject to vexatious litigation if they had to justify their motives.⁴⁴ Such litigation is fact-intensive. Because discovery is the only way to obtain such facts, immunity is necessary to shield judges and the court system from undue burden. Public policy requires that judges exercise their functions with independence and without fear of consequences; errors should be corrected through the appeals process.⁴⁵ As the Supreme Court stated in *Pierson v. Ray*:

Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine in *Bradley v. Fisher* This immunity applies even when the judge is accused of acting maliciously and corruptly, and it "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.⁴⁶

⁴² For cases applying the three-pronged *Butz* test, see *Simons v. Bellinger*, 643 F.2d 774, 778 (D.C. Cir. 1980); *Horwitz v. Board of Medical Examiners*, 822 F.2d 1508, 1513 (10th Cir. 1987); *Bettencourt v. Board of Registration*, 904 F.2d 772, 783 (1st Cir. 1990); *Wagshal v. Foster*, 28 F.3d 1249, 1252-1253 (D.C. Cir. 1994).

⁴³ See *Burns*, 500 U.S. at 489.

⁴⁴ See, e.g., *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354 (1872); *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *Stump v. Sparkman*, 435 U.S. 349, 356-357 (1978).

⁴⁵ See *Pierson*, 386 U.S. at 553-554; *Stump*, 435 U.S. at 349; *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (per curiam).

⁴⁶ *Pierson*, 386 U.S. at 553-554 (citations omitted).

Absolute judicial immunity also serves the goal of judicial efficiency by protecting the finality of judgments.⁴⁷

Immunity can be either absolute or qualified. Absolute judicial immunity evolved to protect discretionary decisionmaking by judges.⁴⁸ A two-tiered test is used based on the nature of the act and the expectations of the parties.⁴⁹ An act is judicial if it is a function normally performed by a judge, within the scope of her jurisdiction and requires the exercise of judgment and discretion or is committed under a court's directive to assist in the performance of a judicial act.⁵⁰ The plaintiff has the burden of establishing that the judge knowingly acted without subject matter jurisdiction.⁵¹ That test is balanced by assessing the expectations of the parties to determine whether they dealt with the judge in her judicial capacity.⁵² What is critical is "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights."⁵³

⁴⁷ See Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. REV. 201, 266 (1980); Richardson, *supra* note 17, at 628.

⁴⁸ See, e.g., Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1872); Pierson, 386 U.S. at 553-554; *Imbler*, 424 U.S. at 427-428; *Butz*, 438 U.S. at 508.

⁴⁹ See *Mireles*, 502 U.S. at 12 (per curiam); *Stump*, 435 U.S. at 362 ("[W]hether an act by a judge is a 'judicial' one relate[s] to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties. i.e., whether they dealt with the judge in his judicial capacity.").

⁵⁰ See, e.g., *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-436 (1993) (holding court reporters not entitled to absolute quasi-judicial immunity); *Butz*, 438 U.S. at 511-513 (1978) (holding adjudicatory functions within a federal agency entitled to immunity); *Mullis v. U.S. Bankruptcy Court for the District of Nevada*, 828 F.2d 1385, 1388-1391 (9th Cir. 1987) (granting judicial or quasi-judicial immunity to bankruptcy judges, clerks and Chapter 7 trustees); *Sharma v. Stevas*, 790 F.2d 1486, 1486 (9th Cir. 1986) (finding absolute quasi-judicial immunity for Clerk of the United States Supreme Court under FTCA because his acts were an integral part of the judicial process); *Williams v. Wood*, 612 F. 2d 982, 985 (5th Cir. 1980) (per curiam) (granting absolute judicial immunity for conduct ordered by judicial decree or instructions); *Denman v. Leedy*, 479 F. 2d 1097, 1098 (6th Cir. 1973) (per curiam) (granting immunity to clerk fixing bail because such conduct is within the scope of official quasi-judicial duties).

⁵¹ See *Stump*, 435 U.S. at 356-357.

⁵² See *Mireless*, 502 U.S. at 12; *Stump*, 435 U.S. at 349.

⁵³ *Burns v. Reed*, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in part and dissenting in part), *quoted with approval in Antoine*, 508 U.S. at 433-434 n.8. See also *Smith v. Martin*, 542 F.2d 688, 690 (6th Cir. 1976) (providing absolute judicial immunity for judge conducting settlement conference because the parties were under the expectation that the judge dealt with them in a judicial capacity).

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The conduct must be "closely associated with the judicial process."⁵⁴ Conduct meeting those tests is judicial or quasi-judicial and entitled to absolute immunity. By comparison, an act is ministerial where the law defines and prescribes the duties to be performed with such precision and certainty as to eliminate the exercise of discretion or judgment.⁵⁵ In *Antoine v. Byers & Anderson*,⁵⁶ a recent Supreme Court decision, court reporters were held not to be entitled to absolute quasi-judicial immunity because they exercise no discretion.

Absolute judicial immunity shields against all litigation alleging misconduct, even against claims of malice or error.⁵⁷ Criminal liability is not protected.⁵⁸ Injunctive relief can also be obtained.⁵⁹ But judicial immunity does not vitiate the constitutional doctrine of separation of powers. In *Pulliam v. Allen*,⁶⁰ the Supreme Court held that judicial immunity does not insulate a judge from liability for attorney's fees authorized by statute.⁶¹

Qualified immunity evolved as courts sought to circumscribe the availability of judicial immunity. The presumption is that qualified immunity sufficiently protects government officials exercising their duties.⁶²

⁵⁴ *Burns*, 500 U.S. at 495 (allowing for prosecutorial immunity); see also *Butz*, 438 U.S. at 511-513 (adjudicatory functions within a federal agency).

⁵⁵ See *Forrester v. White*, 484 U.S. 219, 229 (1988) (holding that state court judge acted in administrative capacity when he demoted and discharged a female probation officer); *Mireless v. Waco*, 502 U.S. 9, 12-13 (1991) (per curiam) (granting absolute immunity to judge who committed judicial error by directing police officers forcibly to bring counsel in a pending case before the court because the nature of the order was judicial).

⁵⁶ 508 U.S. at 436. *Antoine* was the basis for the decision by the Court of Appeals for the District of Columbia in *Wagshal v. Foster*, 28 F.3d. 1249 (D.C. Cir. 1994), in which the court granted absolute immunity to a mediator. See *infra* notes 116-127 and accompanying text.

⁵⁷ See, e.g., *Mireless*, 502 U.S. at 13; *Stump*, 435 U.S. at 356; *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

⁵⁸ See *Ex parte Virginia*, 100 U.S. 339, 348-349 (1880).

⁵⁹ See *Pulliam v. Allen*, 466 U.S. 522, 536-543 (1984).

⁶⁰ *Id.*

⁶¹ See *id.* at 543-544. The statute was 42 U.S.C. § 1983. *Pulliam* was a five to four decision and provoked a strong dissent from Justice Powell, who was concerned about the impact of the majority's holding on judicial immunity. Although *Pulliam* can be read narrowly as a statutory exception to common law judicial immunity, given the reliance of recent immunity decisions on §1983, it carves out a powerful exception. For a discussion of the case law on immunity under §1983, see *infra* notes 75-110 and accompanying text.

⁶² "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. We have been 'quite sparing' in

In *Scheuer v. Rhodes*,⁶³ the Supreme Court defined qualified immunity in terms of a subjective standard: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."⁶⁴ Such immunity extends to erroneous acts or acts in excess of authority.⁶⁵ Unlike absolute judicial immunity, it does not protect against bad faith, malice or corruption.⁶⁶ Nor does it shield officials from plenary litigation to determine whether they had, in fact, acted in good faith.⁶⁷

In *Harlow v. Fitzgerald*,⁶⁸ the Supreme Court reassessed the standards applicable to the qualified immunity defense. The common law subjective standard was replaced with an objective one which imposed liability on officials who violate "clearly established statutory or constitutional rights of which a reasonable person would have known."⁶⁹ Thus, in *Mitchell v. Forsyth*,⁷⁰ the Supreme Court applied *Butz v. Economou*⁷¹ and held that the Attorney General was only entitled to qualified immunity when performing national security functions.⁷²

Reliance on the objective standard defined in *Harlow* allows insubstantial claims to be dismissed by way of summary judgment motion.⁷³

our recognition of absolute immunity." *Forrester v. White*, 484 U.S. 219, 224 (1988). But the Court has refused to extend it any "further than its justification would warrant." *Harlow v. Fitzgerald*, 457 U.S. 800, 811 (1982). *See also Burns v. Reed*, 500 U.S. 478, 487 (1991).

⁶³ 416 U.S. 232 (1974).

⁶⁴ *Id.* at 247-248.

⁶⁵ *See id.* at 242.

⁶⁶ *See Harlow*, 457 U.S. at 800; *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993), *cert. granted*, 115 S. Ct. 929 (1995) (holding that qualified immunity is available to the Directors of the Bureau of Prisons and Public Affairs at the Department of Justice against allegations by prison inmate that they denied him access to the press and due process of law).

⁶⁷ *See Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976). *But see Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

⁶⁸ 457 U.S. 800 (1982).

⁶⁹ *Id.* at 818.

⁷⁰ 472 U.S. 511 (1985).

⁷¹ 438 U.S. 478 (1978). *See supra* notes 41-42 and accompanying text.

⁷² Other cases also granted qualified immunity based on functions performed. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (granting immunity to prosecutor performing investigative functions); *Cleavinger v. Saxner*, 474 U.S. 193 (1985) (granting immunity to prison discipline committee functioning as hearing officers); *Wood v. Strickland*, 420 U.S. 308 (1975) (granting immunity to school board members performing legislative and adjudicative functions).

⁷³ *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). *See also Mitchell v. Forsyth*, 472

The Court stated in *Imbler*:

The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.⁷⁴

2. Cases under 42 U.S.C. Section 1983

Recent Supreme Court precedents have made section 1983⁷⁵ the primary source of litigation against governmental or quasi-governmental officials. This section grants jurisdiction to federal courts to hear claims against state officials for alleged violations of constitutional rights, and by virtue of the *Bivens* doctrine, employees and agents of the federal government.⁷⁶ Due to the Supreme Court's holdings in *Dennis v. Sparks*⁷⁷ and *Lugar v. Edmondson Oil Co.*,⁷⁸ actions against mediators under the program mediation instituted by the Bankruptcy Court for the Southern District of New York will most likely be based on section 1983. How and why the Supreme Court's position evolved to favor granting immunity on the basis of section 1983 is discussed in this subsection.

Nothing in the language of section 1983 indicates that governmental employees or private parties can invoke immunity doctrines.⁷⁹ Nonetheless, the Supreme Court has recognized substantive doctrines of privilege and immunity in a wide variety of cases brought under section 1983.⁸⁰ Immunity from section 1983 liability is premised on two mutually dependent rationales: (1) the need to protect the exercise of discretion by officials in the performance of their duties; and (2) the benefit to the public of having officials exercise their judgment in good faith and act decisively without fear of personal liability.⁸¹

U.S. 511, 526 (1985).

⁷⁴ *Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976).

⁷⁵ 42 U.S.C. § 1983 (1994).

⁷⁶ For purposes of immunity, courts do not have to distinguish between § 1983 actions brought against state officials and *Bivens* actions brought against federal officials. This doctrine is derived from *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Butz*, 438 U.S. at 503-504.

⁷⁷ 449 U.S. 24, 29 (1980). For discussion of this case, see *infra* notes 94-98 and accompanying text.

⁷⁸ 457 U.S. 922 (1982). See discussion *infra* notes 99-100 and accompanying text.

⁷⁹ Section 1983 "creates a species of tort liability that on its face admits of no

Asserting a section 1983 claim does not constitute an election of remedies. Such claims coexist with relief based on common law immunities because the latter were not abrogated or abolished by the enactment of section 1983.⁸² Courts faced with this issue have consistently held that Congress did not state a clear intention to abolish the well-established common law doctrines of judicial and legislative immunity.⁸³

Immunity under section 1983 can be either absolute or qualified, using the same functional criteria as under the common law.⁸⁴ The analysis starts with an inquiry into whether the particular actor engaging in the conduct complained of was insulated at common law.⁸⁵ Absolute immunity under section 1983 has been recognized for legislators and judges acting in their official capacity⁸⁶ and has been extended to prosecutors and witnesses.⁸⁷ Public defenders, on the other hand, have not been granted absolute immunity from section 1983 claims.⁸⁸ Nor are judicial officers shielded from liability for either attorney's fees awarded to a successful litigant under section 1983 or from injunctive relief.⁸⁹

immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). *See also Malley v. Briggs*, 475 U.S. 342, 342 (1986) (stating that § 1983, on its face, creates no immunity).

⁸⁰ Section 1983 claims have been permitted against municipalities for the commission of constitutional torts pursuant to official municipal policy. *See Monell v. Department of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978), *overruling Monroe v. Pape*, 365 U.S. 167 (1961). *See also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (holding that a municipality is immune from punitive damages for the bad faith of its officials).

⁸¹ *See, e.g., Bush v. Rauch*, 38 F.3d 842 (6th Cir. 1994); *Roland v. Phillips*, 19 F.3d 552 (11th Cir. 1994); *Patterson v. Von Riesen*, 999 F.2d 1235 (8th Cir. 1993); *Kincaid v. Vail*, 969 F.2d 594 (7th Cir. 1992); *Gregory v. United States*, 942 F.2d 1498 (10th Cir. 1991); *Coverdell v. Department of Soc. & Health Servs.*, 834 F.2d 758 (9th Cir. 1987); *Tarter v. Hury*, 646 F.2d 1010 (5th Cir. 1981); *Slotnick v. Garfinkle*, 632 F.2d 163 (1st Cir. 1980).

⁸² 42 U.S.C. § 1983 (1994). *See Dennis v. Spark*, 449 U.S. 24, 29 (1980); *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

⁸³ *See, e.g., Pierson v. Ray*, 386 U.S. 547 (1967).

⁸⁴ *See discussion supra* notes 48-61 and accompanying text. *See generally Mireles v. Waco*, 502 U.S. 9 (1991); *Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Briscoe v. LaHue*, 460 U.S. 325 (1983); *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980); *Stump v. Sparkman*, 435 U.S. 349 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Pierson v. Ray*, 386 U.S. 547 (1967).

⁸⁵ *See Burns v. Reed*, 500 U.S. 478, 493 (1991); *Malley v. Briggs*, 475 U.S. 335, 339-340 (1986); *Imbler*, 424 U.S. at 421.

⁸⁶ *See Thompson v. Safety Council of S.W. La.*, 891 F. Supp. 306 (W.D. La. 1995), and cases cited therein.

⁸⁷ *See Briscoe*, 460 U.S. at 325 (granting immunity to police officer and lay witnesses);

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There are also procedural advantages to the assertion of a section 1983 claim. In a section 1983 suit, from a procedural perspective, absolute immunity operates to defeat a claim at its outset. In contrast, qualified immunity operates as an affirmative defense. It is sometimes also referred to as the "good faith" defense.⁹⁰

In *Harlow v. Fitzgerald*,⁹¹ the Supreme Court redefined the standard applicable to a public official's right to qualified immunity to one of objective good faith.⁹² Since *Harlow*, a public official does not have immunity from suit under section 1983 if the court determines from objectively derived criteria that the official knew or reasonably should have known that his conduct violated clearly established statutory or

424 U.S. at 409 (granting immunity to prosecutors); *Pierson*, 386 U.S. at 547 (granting immunity to judges); *Tenney*, 341 U.S. at 367 (granting immunity to legislators). Such immunity does not extend to the investigative and administrative functions performed by a public official. See *Burns*, 500 U.S. 478 (1991) (holding that state prosecutor had absolute immunity from § 1983 liability for participating in probable cause hearing but not for giving legal advice to police).

In *Imbler*, the Supreme Court stated that prosecutors who violate the civil rights of an individual under color of law are subject to professional discipline or disbarment. See *Imbler*, 424 U.S. at 431 n.34. In contrast, performing investigative or administrative functions does not invoke the checks and safeguards inherent in the judicial process. See *id.* at 431 n.33 (1976). *Imbler* has been extended to grant absolute prosecutorial immunity to individuals appointed as special prosecutors in criminal cases. See *Taylor v. Nichols*, 558 F.2d 561 (10th Cir. 1977); *Voytko v. Ramada Inn of Atlantic City*, 445 F. Supp. 315 (D.N.J. 1978).

⁸⁸ See *Tower v. Glover*, 467 U.S. 914 (1984) (holding that public defenders are not immune from liability under § 1983 for intentional misconduct allegedly resulting from conspiratorial action with state officials to deprive the plaintiff of constitutional rights); *John v. Hurt*, 489 F.2d 786 (7th Cir. 1973) (stating that qualified immunity is granted to public defenders acting within the scope of their duties).

⁸⁹ See *Pulliam v. Allen*, 466 U.S. 522, 536-544 (1984). See *supra* notes 60-61 and accompanying text.

⁹⁰ See *infra* cases cited at notes 91-110 and accompanying text.

⁹¹ 457 U.S. 800 (1982). See *supra* notes 68-74 and accompanying text.

⁹² See *id.* at 818 (granting immunity to White House aides); *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (granting immunity to former U.S. Attorney General); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (granting immunity to FBI agent); *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (granting immunity to police officer). Cf. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (granting absolute immunity to former President of the United States).

Prior to *Harlow*, courts had construed "good faith" as containing both objective and subjective elements. See *Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1974); *Wood v. Strickland*, 420 U.S. 308, 321-322 (1975). See also *supra* notes 63-67 and accompanying text.

constitutional rights. Earlier cases had used either this objective test or imposed liability for actions taken with malicious intent, using a subjective good faith standard. In *Harlow*, the Supreme Court held that this latter test did not protect public officials from insubstantial claims.⁹³

Of more importance to the issue of mediator immunity is the evolution of the Supreme Court's position on the availability of qualified immunity to private parties. In 1980, the Supreme Court determined that a private party could be sued for liability under section 1983 in *Dennis v. Sparks*.⁹⁴ That case involved an alleged conspiracy between a state judge and private persons where the judge accepted a bribe to issue an injunction.⁹⁵ The Court construed the "under color of" state law requirement of section 1983 as not requiring that the defendant be an officer of the state.⁹⁶

From the perspective of determining the availability of immunity to court-appointed mediators, what is perhaps more significant about the *Dennis* case was that it rejected the notion of derivative immunity. The Court specifically held that in a section 1983 action, a private party could not derive immunity from the absolute immunity of the co-conspiring judge, whose conduct was protected.⁹⁷ Nor was there a constitutionally based privilege to immunize judges testifying about their conduct in third-party litigation.⁹⁸ Therefore, one must conclude that in an action claiming damage due to a mediator's acts in accordance with the Order, a mediator is not cloaked with the judicial immunity of the Southern District of New York bankruptcy judges simply by following the provisions of the Order.

Subsequently, in *Lugar v. Edmondson Oil Co.*, the Supreme Court held that acting in concert with a government official is not necessary to impose liability on a private person under section 1983.⁹⁹ The Court in *Lugar*, in a

⁹³ See *Harlow*, 457 U.S. at 816-818. Qualified immunity was afforded to local police officers who had acted "with good faith and probable cause" in making what was subsequently determined to be a false arrest and imprisonment. See *Pierson v. Ray*, 386 U.S. 547 (1967). The test was refined in *Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1974), where the Supreme Court held that qualified immunity protected officers of the executive branch who had reasonable grounds for, and a good faith belief in, their discretion to act. A qualified "good faith" immunity was applied to school officials in *Wood v. Strickland*, 420 U.S. 308, 322 (1975).

⁹⁴ 449 U.S. 24, 27 (1980).

⁹⁵ See *id.* at 25-26.

⁹⁶ See *id.* at 27.

⁹⁷ See *id.* at 28-29.

⁹⁸ See *id.* at 30.

⁹⁹ 457 U.S. 922, 942 (1982) (holding that private party's joint participation with state officials in seizure of disputed property pursuant to a procedurally defective state statute constituted a § 1983 violation).

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footnote, explicitly chose not to rule on whether the qualified immunity defense was available to private parties under section 1983.¹⁰⁰ However, in *Wyatt v. Cole*,¹⁰¹ the Supreme Court imposed limits on *Lugar* by holding that private parties could not assert section 1983 *Harlow* immunity from suits when acting under a state replevin, garnishment or attachment statute subsequently declared unconstitutional.¹⁰² In those limited circumstances, "private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good."¹⁰³ Mediators under the Program presumably would meet the two tests articulated in *Wyatt* because they are appointed to exercise discretion for the public good. What remains unresolved is whether the *Wyatt* tests would also protect compensated mediators under the Program. A court might find that such mediators act principally to earn fees and only indirectly to enhance the public good.

Wyatt was remanded to determine whether the respondents "in invoking the replevin statute, acted under color of state law within the meaning of *Lugar*."¹⁰⁴ The possibility that a good faith or probable cause defense may be available to private parties was left open:

[W]e do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar v. Edmondson Oil Co.*, could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens. Because those issues are not fairly before us, however, we leave them for another day.¹⁰⁵

The court in *Wyatt* reasoned: (1) qualified immunity for private parties had no analogue at common law, and (2) the policy considerations of encouraging the forthright execution of public responsibilities were not present in private disputes.¹⁰⁶

In cases subsequent to *Lugar*, lower federal courts have split on whether the qualified, good faith immunity defense is available to private parties.¹⁰⁷ Essentially, these cases have reasoned that the policy concerns

¹⁰⁰ See *Lugar*, 457 U.S. at 942 n.23.

¹⁰¹ 504 U.S. 158 (1992).

¹⁰² See *id.* at 168-169.

¹⁰³ *Id.* at 168.

¹⁰⁴ *Id.* at 169.

¹⁰⁵ *Id.* (citations omitted).

¹⁰⁶ See *id.* at 163-168.

¹⁰⁷ Compare *Folsom Invest. Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982) (holding that

that justify immunity for government officials do not apply to private individuals. To circumvent *Lugar*, courts that have found good faith immunity for private parties distinguish good faith immunity *per se* from immunity determined by the interposition of a good faith defense. *Per se* good faith immunity is based on an objective analysis and claims can often be resolved at the pleading stage in an action. In contrast, a good faith defense is based on subjective factors that, in turn, are based largely on the facts of a particular case.¹⁰⁸

In *De Vargas v. Mason & Hanger-Silas Mason Co.*,¹⁰⁹ a job applicant with a disability was twice denied employment with a government contractor based on government regulations then in effect. The applicant sued the corporation and certain of its employees, all of whom asserted a qualified immunity defense. The Tenth Circuit held that private parties were entitled to qualified immunity under section 1983, applying three tests:

- (1) the private party must act in accordance with the duties imposed by a contract with the governmental body;
- (2) the private party must perform a governmental function; and
- (3) the private party must be sued solely on the basis of those acts performed pursuant to the contract.¹¹⁰

qualified immunity defense from monetary liability to private party who did not know and should not reasonably have known that state attachment statute which it had invoked was unconstitutional) and *De Vargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988) and *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983) and *Jones v. Preuit & Mauldin*, 808 F.2d 1435 (11th Cir. 1987), *vacated in part on other grounds*, 822 F.2d 998 (11th Cir. 1987) (en banc), *opinion vacated and reh.'g granted*, 833 F.2d 1436 (11th Cir. 1987) with *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988) and *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978) and *Juncker v. Tinney*, 549 F. Supp. 574 (D. Md. 1982).

¹⁰⁸ See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (holding that subjective good faith is generally a question of fact that cannot be resolved by motion for summary judgment); *Buller*, 706 F.2d at 844.

¹⁰⁹ 844 F.2d 714 (10th Cir. 1988).

¹¹⁰ See *id.* Other courts have extended qualified immunity to private individuals using the *De Vargas* criteria. Lower courts have denied private parties qualified immunity when they allegedly conspired with public officials to deny plaintiffs their constitutional rights. See *Howerton v. Gabica*, 708 F.2d 380, 385 n.10 (9th Cir. 1983); *Downs*, 574 F.2d at 15. However, the qualified immunity defense has been held available to private party defendants receiving the aid of public officials pursuant to attachment or garnishment statutes that may be unconstitutional. See *Jones*, 808 F.2d at 1440-1442, *vacated in part on other grounds*, 822 F.2d 998 (11th Cir. 1987), *opinion vacated and rehearing granted en banc*, 833 F.2d 1436 (11th Cir. 1987); *Watertown Equip. Co. v. Norwest Bank*, 830 F.2d 1487 (8th Cir. 1987); *Buller v. Buechler*, 706 F.2d 844, 850-852 (8th Cir. 1983) (holding that private individual who relies upon unconstitutional state garnishment procedure may assert qualified immunity

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Under this doctrine, qualified immunity should be granted when the functions of a private party are comparable to those functions a governmental employee would perform in the absence of a contract with that private party.

Mediators under the Program would likely be sued under section 1983, given the well-developed body of case law in this area and the statutory authorization for an award of attorneys' fees to the prevailing party in most circumstances. What is clear from the cases discussed in this section is that mediators at the least will be able to use a good faith defense, even if good faith immunity is not available. If the Order is viewed as being equivalent to a "contract" with a governmental body, mediators appointed by the court would then be able to assert at least qualified immunity for rendering mediation services thereunder. Support comes from *De Vargas* because the private parties who enter into government contracts similar to those described in that case are presumably compensated. The three criteria articulated in *De Vargas* should also protect court-appointed but privately compensated mediators under the Order. The rebuttal position, however, would (1) note that mediation is not part of the existing dispute resolution process provided for by the Constitution or Congress¹¹¹ and (2) analyze the extent of discretion a mediator has in formulating his settlement recommendation. From that perspective, it can be argued that the duties of such mediators are not sufficiently controlled by a governmental entity despite being trained and supervised by the court.

defense); *Folsom Inv. Co.*, 681 F.2d at 1037-1038 (holding that private party who relies on presumptively valid state attachment statute may claim qualified immunity); see also *Carman v. City of Eden Prairie*, 622 F. Supp. 963, 965-966 (D. Minn. 1985) (holding that private defendant acting pursuant to state detoxification statute may claim qualified immunity defense); cf. *Del's Big Saver Foods Inc. v. Carpenter Cook, Inc.*, 795 F.2d 1344, 1351 (7th Cir. 1986) (recognizing but declining to resolve issue); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986) (recognizing but declining to resolve issue in case involving independent contractor defendant).

¹¹¹ The services rendered by mediators are not comparable to those rendered by tribunals recognized under Article I or Article III of the Constitution. Historically, federal mediators have only been utilized with the consent of all parties.

Application of the reasoning articulated in these cases would extend immunity to mediators under the Program. The pretrial activities of a mediator in assisting the litigants to evaluate the merits of their respective claims and reach a settlement merit protection because they are part of the judicial process. The contrary argument is that mediators are not actually deciding cases but merely making recommendations that the parties are free to reject. Under the Program, rectification of errors is available through judicial review of the settlement terms arrived at through mediation under Bankruptcy Rule 9019(a).¹¹² Given the nature of the services they perform, the availability of immunity to shield mediators should not be affected by whether a particular mediator is compensated, as authorized under the Program.¹¹³ In other contexts, if a mediation is successful, the dispute is never before a court. Other than through the vigilance of the parties and their counsel, if represented at all, there are no means to protect the constitutional rights of the disputants. What remains unclear is whether such immunity should be absolute or qualified.¹¹⁴

3. *Recent Decisions Involving Immunity for Rendering ADR Services*

Several recent decisions support the proposition that mediators and others rendering ADR services are entitled to quasi-judicial absolute immunity when acting within the scope of their official duties. Yet none of these cases applied the three-prong *Butz* test.¹¹⁵ In no case to date has entitlement to immunity been based on whether a particular mediator has been compensated for the services rendered.

a. *Wagshal v. Foster*

The recent decision by the Court of Appeals for the District of Columbia in *Wagshal v. Foster*¹¹⁶ supports the likelihood that compensated

¹¹² FED. R. BANKR. P. 9019(a).

¹¹³ This is particularly true for mediators assisting bankruptcy courts, such as those under the Program, because their fee applications are reviewed by the court that authorized their retention. *See supra* note 24 and accompanying text.

¹¹⁴ *See supra* notes 16-18 and accompanying text discussion of the *Wagshal* decision; *infra* notes 116-127 and accompanying text.

¹¹⁵ *See supra* notes 41-42 and accompanying text.

¹¹⁶ 28 F.3d 1249 (D.C. Cir. 1994). Commentators discussing the *Wagshal* decision include Caroline Turner English, Note, *Stretching the Doctrine of Absolute Quasi-Judicial Immunity: Wagshal v. Foster*, 63 GEO. WASH. L. REV. 759 (1995); Dorini, *supra* note 6; Kevin C. Gray, Case Comment, *Torts - Wagshal v. Foster: Mediators, Case Evaluators, and*

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mediators under the Program will be protected by quasi-judicial immunity for conduct within the scope of their official duties. It affirmed the case below, in which the District Court for the District of Columbia in *Wagshal v. Foster*¹¹⁷ broadly cloaked all court-appointed mediators, case evaluators, arbitrators and others directly involved in ADR programs with full judicial immunity when acting in their official capacities.¹¹⁸

In the state court action, the plaintiff, Wagshal, was required to submit his dispute to a nonbinding, mandatory ADR procedure before a mediator who received no compensation for his services. Wagshal objected to the appointment of the first evaluator and questioned the second evaluator's neutrality. In a letter to the judge, the second evaluator recused himself, advised the judge that the alleged conflicts were "attenuated" and implied that the plaintiff's attitude was the principal impediment to the evaluation process. After appointing a third evaluator, the case was eventually settled. Thereafter, the plaintiff sued the second mediator in federal court, seeking damages based on various constitutional deficiencies and tort theories.¹¹⁹

In upholding neutral party immunity, the district court in *Wagshal* relied on precedent granting immunity to other agents assisting the judicial process and acting in their official capacities. This included court-appointed psychiatrists, prosecutors, probation officers and conciliators in custody disputes.¹²⁰ The district court reasoned that because judges have absolute immunity, such "immunity may be extended to other officials when their activities are integrally related to the judicial process and when they perform a judicial function as an officer of the court."¹²¹

Other Neutrals—Should They Be Absolutely Immune?, 26 U. MEM. L. REV. 1229 (1996); *Mediators' Immunity*, 12 ALTERNATIVES TO HIGH COST LITIG. 139 (1994); *Court-Appointed Case Evaluator Entitled to Judicial Immunity*, 9 FED. LITIGATOR 273 (1994); *Court-Appointed Neutral Ruled Immune from Suit by D.C. Court*, 1995 J. DISP. RESOL. 86.

¹¹⁷ No. 92-2072 (TPJ), 1993 U.S. Dist. LEXIS 4073 (D.D.C. Feb. 5, 1993).

¹¹⁸ *See id.* at *6-8.

¹¹⁹ *See id.* at *2-5.

¹²⁰ *See id.* at *7 n.4. Among the cases cited by the district court were *Schinner v. Strathmann*, 711 F. Supp. 1143 (D.D.C. 1989) (granting immunity to psychiatrist who interviewed a criminal defendant to assist a trial judge); *Simons v. Bellinger*, 643 F.2d 774, 779-782 (D.C. Cir. 1980) (granting immunity to court-appointed committee monitoring the unauthorized practice of law); *Howard v. Drapkin*, 271 Cal. Rptr. 893, 903 (1990) (granting immunity to extending absolute immunity to neutral third persons who are engaged in mediation, conciliation, evaluation or similar dispute resolution efforts); *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886-887 (2d Cir. 1990) (granting immunity to arbitrators).

¹²¹ *Wagshal v. Foster*, 1993 U.S. Dist. LEXIS 4073, at *7 n.4 (D.D.C. 1994).

The Court of Appeals for the District of Columbia affirmed *Wagshal* and held that a court-appointed volunteer mediator performing tasks within the scope of her official duties had absolute quasi-judicial immunity.¹²² "The official claiming the immunity 'bears the burden of showing that such immunity is justified for the function in question.'"¹²³ To meet that burden, the Court of Appeals in *Wagshal* applied the three factors articulated in the Supreme Court's decisions in *Butz v. Economou*¹²⁴ and *Antoine v. Byers & Anderson, Inc.*:¹²⁵

(1) whether the functions of the official in question are comparable to those of a judge; (2) whether the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect; and (3) whether the system contains safeguards which are adequate to justify dispensing with private damage suits to control unconstitutional conduct.¹²⁶

Applying these criteria to the Program, the first factor appears to be directly satisfied because the Order provides for court-appointed mediators to function in a judicial capacity. The mediators in the Program have an obligation to report bad faith by the participants to the court, which is more responsibility than in other ADR programs where they only report whether a settlement has been reached. However, mediators under the Program lack the arbitral and rulemaking powers of the judiciary. Nevertheless, the district court in *Wagshal* found that the District of Columbia mediators performed a judicial function,¹²⁷ and given that they were mediators rather than arbitrators, it is safe to assume that they had no greater judicial function than mediators in the Program. The second factor, whether the nature of the controversy at issue could generate a challenge to the mediator

¹²² See *Wagshal v. Foster*, 28 F.3d 1249, 1254 (D.C. Cir. 1994). The term "absolute" may be somewhat misleading because the quasi-judicial immunity is limited to actions taken within the scope of employment.

¹²³ *Id.* at 1252 (citing *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 433 n.4 (1993), quoting with approval from *Burns v. Reed*, 500 U.S. 478, 486 (1991)).

¹²⁴ 438 U.S. 478, 513-517 (1978).

¹²⁵ 508 U.S. 429, 434-437 (1993) (rejecting absolute immunity for court reporters).

¹²⁶ *Wagshal*, 28 F.3d at 1252 (citing *Simons v. Bellinger*, 643 F.2d 774, 778 (1980)). Consistent with *Wagshal*, courts have extended immunity, either qualified or absolute, to a wide range of individuals participating in the judicial process. See *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990) (granting immunity to persons performing binding arbitration); *Butz v. Economou*, 438 U.S. 478 (1978) (extending absolute immunity for judicial acts to those performing adjudicatory functions within a federal agency).

¹²⁷ *Wagshal v. Foster*, 1993 U.S. Dist. LEXIS 4073, at *7-8 (D.D.C. 1994).

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by a litigant, is highly fact- and litigant-dependent, but presumably, no different than in other areas. The third factor also appears to be met because the Order provides safeguards for the following: disqualification of a mediator (section 2.3), withdrawal from mediation (section 3.6), confidentiality (sections 5.0 to 5.2), consensual modification of mediation procedures (section 6.0) and compliance with all other relevant statutes (section 7.0).

It is noteworthy that the cases cited in *Wagshal* did not limit the extension of quasi-judicial immunity to official court employees.¹²⁸ Accordingly, if there is compliance with the three criteria enumerated in *Wagshal*, in conjunction with *Antoine*, it appears likely that mediators in the Program would be protected by quasi-judicial immunity for actions taken within the scope of their official duties, irrespective of whether they receive compensation.

b. *Austern v. Chicago Board Options Exchange, Inc.*

The Second Circuit, in *Austern v. Chicago Board Options Exchange, Inc.*,¹²⁹ held that arbitrators and the private organization which sponsored the arbitration were entitled to absolute immunity "for all acts within the scope of the arbitral process."¹³⁰ The plaintiffs had alleged that the notice of the arbitration was defective and that the panel had been selected in violation of the sponsor's own rules.¹³¹ Despite the deficiencies, the court held that "the acts complained of here . . . were sufficiently associated with the adjudicative phase of the arbitration to justify immunity."¹³²

In reaching its result, the Second Circuit emphasized that the nature of the functions performed by arbitrators was sufficiently analogous to that of judges to merit the same protections.¹³³ Presumably, such reasoning would extend to mediators under the Program.

¹²⁸ Note that neither *Antoine* nor *Wagshal* discusses *Lugar*. Presumably, then, *Lugar* can be disregarded outside the § 1983 context, which is another reason that actions are likely to be brought under § 1983 rather than under common tort theories.

¹²⁹ 898 F. 2d 882 (2d Cir. 1990).

¹³⁰ *Id.* at 886.

¹³¹ *See id.* at 884.

¹³² *Id.*

¹³³ In contrast, in *In re Gorski*, 766 F.2d 723, 727 (2d Cir. 1985), the Second Circuit held that a trustee in bankruptcy was personally liable for a breach of his fiduciary duties arising out of either negligent or intentional conduct or omissions.

c. Mills v. Killebrew

In *Mills v. Killebrew*,¹³⁴ the plaintiffs, who had won in a mandatory state court mediation procedure, brought federal civil rights claims against the three lawyers who had served on the mediation panel. Alleging that their Fourteenth Amendment Equal Protection and Due Process rights had been violated by the mediation process, the plaintiffs sought damages for their alleged injuries.¹³⁵ They asserted that the use of mediation panels in Michigan was unconstitutional under the Michigan statute and that this unconstitutionality deprived the mediators of jurisdiction and, consequently, their immunity under *Stump v. Sparkman*.¹³⁶

The district court in *Mills* dismissed the civil rights claims and held that the mediators served a quasi-judicial function and were entitled to absolute immunity.¹³⁷ The Sixth Circuit Court of Appeals affirmed. It held that so long as there were no clear Michigan statutory or constitutional proscriptions against mediation, the mediators had jurisdiction over the matter.¹³⁸ To substantiate that a mediator had acted in the clear absence of all jurisdiction, the Sixth Circuit reasoned that the plaintiffs were required to prove that the mediator either knew he lacked jurisdiction or acted despite a clearly valid statute or case law expressly depriving him of such jurisdiction.¹³⁹ The plaintiffs could not meet this burden of proof because the Michigan mediation rules had been adopted as a local rule, pursuant to a provision of the Michigan Constitution authorizing the Michigan Supreme Court to establish procedures for the courts of Michigan.¹⁴⁰ Accordingly, the complaint was dismissed.

¹³⁴ 765 F.2d 69, 70-71 (6th Cir. 1985).

¹³⁵ See *id.* at 71.

¹³⁶ See *id.* In *Stump v. Sparkman*, 435 U.S. 349 (1978), an action essentially under 42 U.S.C. § 1983, the Supreme Court held that a judge loses his absolute immunity if "he has acted in the 'clear absence of all jurisdiction.'" *Id.* at 356-357 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)). *Stump* involved a state judge who had authorized the sterilization of a fifteen year-old girl on the strength of her mother's assertion that her daughter was "somewhat retarded." *Id.* at 351. When the girl subsequently married, she tried to have children and then learned about the sterilization order. See *id.* at 353. She sued the judge, alleging he had acted without authority and with malice, but the Supreme Court held his conduct was protected by absolute judicial immunity. See *id.* at 364.

¹³⁷ See *Mills*, 765 F.2d at 70.

¹³⁸ See *id.* at 70. In reaching its holding, the only precedent squarely relied on by the Sixth Circuit was *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980).

¹³⁹ See *Mills*, 765 F.2d at 71.

¹⁴⁰ See *id.* at 72.

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What these recent cases demonstrate is that courts are applying two of the three tests articulated in *Butz*.¹⁴¹ By focusing on the adjudicative functions performed by mediators, recent case law shielded them under the doctrine of quasi-judicial immunity. In each, the mediator arguably faced attempts at harassment and intimidation by disappointed disputants. But because none of these cases raised federal constitutional challenges to the mediator's conduct, the third facet of the *Butz* case has not been resolved in the mediation context.

B. *Statutory and Administrative Authorization for Mediator Immunity*

1. *Background*

The enactment of the Civil Justice Reform Act of 1990 (CJRA)¹⁴² spurred the implementation of ADR options by requiring every federal district to promulgate plans to reduce costs and delays in the judicial system.¹⁴³ In the District of Columbia Circuit and the Southern District of New York, compliance with CJRA included the implementation of mediation programs.¹⁴⁴

2. *Advisory Pronouncements*

Official pronouncements of the District of Columbia Circuit and the Southern District of New York have provided guidance and comfort to mediators in their jurisdictions. Although less authoritative than formal opinions or rulings, they are instructive.

¹⁴¹ See *supra* notes 41-42 and accompanying text.

¹⁴² 28 U.S.C. §§ 471-482 (1994).

¹⁴³ Previously, in 1974, the Second Circuit Court of Appeals had promulgated a settlement program known as the Civil Appeals Management Plan (CAMP). See Civil Appeals Management Plan, 2d Cir. R. App. Pt. C., at 487-491 (West 1980), (amended effective January 1, 1993), reprinted in 28 U.S.C.A. (West Supp. 1996); see also Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755, 756 (1986).

CAMP "has the force and effect of a local rule . . ." *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 929 (2d Cir. 1979). A recently implemented mediation program of the District Court of the Southern District of New York reported a settlement rate exceeding seventy-five percent. See Margaret L. Shaw, *Courts Point Justice in a New Direction*, NAT'L L.J., Apr. 11, 1994, at C1, C16.

¹⁴⁴ The Program instituted by the Bankruptcy Court for the Southern District of New York is discussed in detail *supra* at notes 21-25 and accompanying text.

To understand the conclusions reached by the District of Columbia Circuit and the Southern District of New York, one must first consider whether the Federal Tort Claims Act (FTCA)¹⁴⁵ provides a statutory basis to protect court-appointed mediators in the federal courts. FTCA shields government employees from claims when acting within the scope of their employment.

a. *FTCA Immunity*

Under the FTCA, exclusive jurisdiction is granted to the federal district courts for actions against the United States¹⁴⁶ arising out of negligent or wrongful acts or omissions by federal employees acting within the scope of their employment.¹⁴⁷ FTCA provides a general waiver of immunity from suits for torts and protects federal employees from liability for injury or loss of property and personal injury or death. Upon certification by the Attorney General that an employee was acting within the scope of employment, the United States "shall be substituted as the party defendant" and become exclusively liable for any money judgment.¹⁴⁸

In 1988, by amendment to the FTCA,¹⁴⁹ the term "Federal agency" was expanded to include explicitly judicial and legislative branch employees.¹⁵⁰ The FTCA definition of "[e]mployee of the government" includes . . . persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."¹⁵¹ Courts have construed the term "employee of the government" to include persons not officially on the federal payroll. However, to trigger the usual rules of respondeat superior, what is critical is that the employee be under the direct, daily control and supervision of the United States.¹⁵² Because court-appointed mediators are trained and supervised by the courts, it has been suggested that the FTCA would provide immunity to such mediators.

¹⁴⁵ 28 U.S.C. §§ 1346(b), 2671 (1994).

¹⁴⁶ See 28 U.S.C. § 1346(b) (1994).

¹⁴⁷ The Attorney General is required to defend such a suit against a federal employee. See 28 U.S.C. § 2679(c) (1994).

¹⁴⁸ 28 U.S.C. § 2679(d) (1994). The Attorney General has delegated to the United States attorneys the authority to make such certifications in civil actions and proceedings brought against federal employees in their respective districts. See 28 C.F.R. § 15.3 (1996).

¹⁴⁹ Federal Employees Liability Reform and Tort Compensation Act, Pub. L. No. 100-694, § 3, 102 Stat. 4563-4564 (1988) [hereinafter Westfall Act]. See also William T. Cornell, Note, *An Evaluation of the Federal Employees' Liability Reform and Tort Compensation Act: Congress' Response to Westfall v. Erwin*, 26 SAN DIEGO L. REV. 137 (1989).

¹⁵⁰ Prior to the 1988 Amendment, courts had held that "employee of the government"

b. *Circuit Court of Appeals for the District of Columbia*

In response to the enactment of the CJRA, the United States Court of Appeals and the District Court for the District of Columbia established a mediation program. Under the District of Columbia's program, volunteer mediators are assigned by the Circuit Executive but are not appointed as officers or employees of the courts.¹⁵³

did not include members of the judicial or legislative branches of the government for FTCA purposes. *See, e.g.*, *United States v. LePatourel*, 571 F.2d 405, 408 (8th Cir. 1978), *on remand*, 463 F.Supp. 264, 274 (D. Neb. 1978), *and on reh.'g.*, 593 F.2d 827, 830 (8th Cir. 1979) (discussing immunity of federal judge for official but nonjudicial act); *Foster v. MacBride*, 521 F.2d 1304, 1305 (9th Cir. 1975); *Tomalewski v. United States*, 493 F. Supp. 673, 675 (W.D. Pa. 1980); *Albright v. R.J. Reynolds Tobacco Co.*, 463 F. Supp. 1220, 1230 (W.D. Pa. 1979); *Vorhauer v. United States*, 426 F. Supp. 839, 844 (E.D. Pa. 1976); *cf. Cromelin v. United States*, 177 F.2d 275, 277-278 (5th Cir. 1949).

¹⁵¹ 28 U.S.C. § 2671 (1994).

¹⁵² *See Martarano v. United States*, 231 F. Supp. 805, 807-808 (D. Nev. 1964); *see also Witt v. United States*, 462 F.2d 1261, 1263-1264 (2d Cir. 1972) (finding private civilian without employment contract to be acting on behalf of a federal agency).

¹⁵³ *See* Letter from William R. Burchill, Jr., General Counsel, Administrative Office of the United States Courts, to Linda Finkelstein, Circuit Executive, United States Court of Appeals 1 (Nov. 15, 1990) (*reprinted infra* at Appendix B) [hereinafter Letter to Finkelstein]. This letter also states that the services rendered by these mediators are not accepted by the Director of the Administrative Office in accordance with the *Guide to Judiciary Policies and Procedures* [hereinafter *Guide*], Vol. I, Chap. X, Subchap. 1308.2, Sec. E. That subsection of the *Guide*, "Procedures for Accepting Gratuitous and Uncompensated Services," sets forth the procedures governing volunteer services to the courts of the United States. The *Guide* notes that such volunteers are generally students "who wish to volunteer their services in return for the educational experience of working within the court." *Id.* at 95. According to the *Guide*, "The Judicial Branch approach is to render the volunteer an employee, albeit an uncompensated one." *Id.* Prior to commencing any work for the court, such employees must sign an "Acknowledgement of Gratuitous Services and Waiver for Uncompensated Employees." Significantly, the employee does not waive rights arising from personal injuries suffered while in government employ. The *Guide* indicates that such employees are covered either under the Federal Employees' Compensation Act, 5 U.S.C. § 8.01(1)(B), or the Federal Torts Claims Act (FTCA). The *Guide* characterizes the former act as "provid[ing] relief for individuals serving the government without pay or for nominal pay" and the latter as "predicated on the theory of negligence by the Government or its employees." *Id.* at 95-96. For further discussion of the FTCA, see *infra* notes 177-180 and accompanying text.

In 1990, the General Counsel (General Counsel) of the Administrative Office of the United States Courts (Administrative Office) responded to a request by Linda Finkelstein, the Circuit Executive of the United States Court of Appeals for the District of Columbia, for advice regarding legal representation and immunity for mediators and early neutral evaluators.¹⁵⁴ In discussing mediator immunity, the General Counsel considered whether the FTCA and indemnification by the judiciary could protect volunteer mediators assigned under the District of Columbia's program. The General Counsel asserted that volunteer mediators come within the ambit of 28 U.S.C. section 2679 of the FTCA,¹⁵⁵ and recommended two options for providing legal protection to unpaid mediators: legal representation and immunity.¹⁵⁶

A few months later, the United States Department of Justice, Civil Division (DOJ) sent a letter to the Honorable Abner J. Mikva, Chief Judge, United States Court of Appeals for the District of Columbia Circuit, concerning possible DOJ representation for private attorneys who serve as mediators for the court.¹⁵⁷ In that letter, the DOJ took the position that a court-appointed mediator would not satisfy the supervision requirement for qualifying as an "employee of the Government" under the FTCA. Neither the General Counsel nor the DOJ discussed mediator immunity under the common law or 42 U.S.C. section 1983.

¹⁵⁴ See Letter to Finkelstein, *supra* note 153, at 1.

¹⁵⁵ See *id.* at 3; see also Westfall Act at 4563-4564 (overriding Westfall v. Erwin, 484 U.S. 292 (1988)). Congress, in this amendment, knowingly overrode a federal court interpretation of a federal statute. *Westfall* had imposed personal liability for common law torts on government employees acting within the scope of their employment if they did not also exercise governmental discretion when performing their duties. See *Westfall*, 484 U.S. 292, 300 (1988). In overriding *Westfall*, Congress granted absolute immunity to all employees of the government acting within the scope of their employment, eliminating the requirement that the employee must also exercise discretion. This was done by amending the FTCA and was premised on the doctrine of sovereign immunity. See H.R. REP. NO. 700 at 5 (1988), 100th Cong., 2d Sess. 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5948.

¹⁵⁶ See Letter to Finkelstein, *supra* note 153, at 2-4.

¹⁵⁷ See Letter from Stephen C. Bransdorfer, Deputy Assistant Attorney General, United States Department of Justice, Civil Division, to Hon. Abner J. Mikva, Chief Judge, United States Court of Appeals for the District of Columbia Circuit (Mar. 13, 1991) (*reprinted infra* at Appendix C) [hereinafter Letter to Mikva]. The Letter to Mikva referred to the Letter to Finkelstein and was signed by Stephen C. Bransdorfer, Deputy Assistant Attorney General, Civil Division. See *id.* at 1, 2.

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c. District Court for the Southern District of New York

The United States District Court for the Southern District of New York (SDNY) has instituted a mediation program staffed by volunteer mediators. Relying on recent court decisions, the Letter to Finkelstein of November 15, 1990 and the Letter to Mikva of March 13, 1991, an advisory group to the SDNY (Advisory Group) appointed under the CJRA has taken the position that a person serving as a volunteer mediator and acting under an order of a United States District Court Judge of the SDNY would be entitled to absolute quasi-judicial immunity.¹⁵⁸ Mediators assist “the courts in the performance of an official function” and “play an integral part in the implementation of the judicial function.”¹⁵⁹

An analysis of the decisions on which the Advisory Group’s position is based reveals an extension of the doctrine of judicial immunity developed under 42 U.S.C. section 1983.¹⁶⁰ Those cases justify immunity as a function of “the characteristics of the judicial process”¹⁶¹ It is significant that the Advisory Group accepted the recommendation of the DOJ and did not rely on the protections afforded by the FTCA, even though FTCA protections now ostensibly extend to the judicial branch.

¹⁵⁸ See Memorandum from Hon. Robert W. Sweet to Volunteer Court Mediators 1 (July 17, 1992) (reprinted *infra* at Appendix D) [hereinafter Sweet Memorandum]. The Advisory Group confirmed that the positions stated in the Finkelstein and Mikva letters remained in effect when the Memorandum was issued and thus would provide a basis for mediator protection from defending suits arising out of their conduct. *See id.*

¹⁵⁹ *Id.* at 1, 2.

¹⁶⁰ See *supra* notes 75–110 and accompanying text.

¹⁶¹ *Butz v. Economou*, 438 U.S. 478, 512 (1978) (granting absolute immunity to administrative law judges within a federal administrative agency, even though they are members of the Executive Branch, because they are functionally comparable to judges). The other cases listed in the Sweet Memorandum are the following: *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976) (extending absolute common law immunity of state prosecutors to actions under 42 U.S.C. § 1983); *Barr v. Matteo*, 360 U.S. 564, 574–575 (1959) (granting immunity against defamation for acting director of an agency acting within the outer limits of his duties, even if acting in malice); *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1474–1475 (9th Cir. 1991), *overruled by* 508 U.S. 429, 434–438 (1993) (holding that court reporters are not entitled to absolute quasi-judicial immunity); *Mullis v. U.S. Bankruptcy Court for the District of Nevada*, 828 F.2d 1385, 1388–1391 (9th Cir. 1987) (granting judicial or quasi-judicial immunity to bankruptcy judges, clerks and Chapter 7 trustee); *Sharma v. Stevas*, 790 F.2d 1486, 1486 (9th Cir. 1986) (granting absolute quasi-judicial immunity for clerk of the United States Supreme Court under FTCA because his acts were an integral part of the judicial process); *Internationall Union, United Auto, Aerospace, and Agriculture Implement Workers of American and Local 656 and 985 v. Greyhound Lines, Inc.*, 701 F.2d 1181, 1185 (6th Cir.

d. *Legal Representation Under 28 U.S.C. Sections 516 to 519*

Both the General Counsel and the DOJ agree that legal representation, in the form of services or payments, is available to a mediator sued for acts arising out of his or her appointment as a mediator. What is critical is that the mediator's services be in the "interest of the United States."¹⁶²

"[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."¹⁶³ The General Counsel has asserted that the DOJ "would be receptive to the argument that mediators . . . serve to further a Federal interest."¹⁶⁴ Such service constitutes a United States interest "within the meaning of 28 U.S.C. section 516 to 519" and "would be consistent with the provision of representation to special masters and jurors"¹⁶⁵ However, unlike the court's mediators under the Order, special masters and jurors are either not compensated or minimally compensated for their services. Although mediators serving under the Order are not compensated by the federal government, the court still exercises control over their compensation.¹⁶⁶

1983) (granting immunity to arbitrators); *Mercedes v. Barrett*, 453 F.2d 391, 392 (3d Cir. 1971) (granting immunity to judges and court employees); *Henig v. Odorioso*, 385 F.2d 491, 493-494 (3d Cir. 1967) (granting immunity to judges and court employees); *Bauers v. Heisel*, 361 F.2d 581, 591 (3d Cir. 1966) (en banc) (granting immunity for county prosecutor prosecuting a minor, even though state jurisdictional statute specifically excluded minors from prosecutor's responsibility); *Raitport v. Provident National Bank*, 451 F. Supp. 522, 527-529 (E.D. Pa. 1978) (granting immunity to various state court staff).

¹⁶² 28 U.S.C. § 517 (1994).

¹⁶³ 28 U.S.C. § 516 (1994). This section of the United States Code sets forth the powers and scope of authority of the DOJ, with Chapter 31, which includes 28 U.S.C. §§ 516-519 (1994), specifically discussing the role of the Attorney General. Representation by the United States Attorney's Office requires DOJ approval. *See* 28 C.F.R. § 50.15 (1996).

¹⁶⁴ *See* Letter to Finkelstein, *supra* note 153, at 2.

¹⁶⁵ *Id.*

¹⁶⁶ This is done through Bankruptcy Court review of fee applications submitted by professionals. *See* 11 U.S.C. § 330 (1994).

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The DOJ's position is that it reserves the right "to review the nature of the suit and the mediator's involvement in order to assure that representation is indeed in the interest of the United States."¹⁶⁷ Such representation, according to the DOJ, would be premised on 28 U.S.C. sections 516 to 518, which delegate to the Attorney General responsibility for attending to the interests of the United States in court proceedings. This includes the interests of the judicial branch of the federal government.¹⁶⁸ Mediators assist "the Court in performing its official functions" because they are assigned cases after being selected, trained and supervised by the court.¹⁶⁹ Under those circumstances, "representation of such persons would be in the interests of the United States if they are sued concerning their work for the Court."¹⁷⁰

Although federal employment is not a prerequisite for the DOJ to provide legal representation, such representation is rarely provided to nonemployees.¹⁷¹ Furthermore, the DOJ is generally unwilling to commit in advance to the defense of private persons rendering services to the courts.¹⁷² However, as noted above, the DOJ has approved legal representation for nonemployees in cases involving special masters and jurors, who arguably render services similar to those of mediators.¹⁷³

The compensation factor also raises the issue of whether mediators in the Program qualify as federal employees. That status is pivotal in situations where the DOJ cannot provide direct legal representation. In such circumstances, the judiciary has access to funds to pay litigation costs "in

¹⁶⁷ Letter to Mikva, *supra* note 157, at 2. DOJ representation is generally not available if the matter involves a federal criminal investigation or prosecution. *See id.* Note that the DOJ relies on authorization set forth in 28 U.S.C. §§ 516-518, whereas the General Counsel asserts that 28 U.S.C. § 519 would also be available. 28 U.S.C. § 519 requires the Attorney General to "supervise all litigation to which the United States, an agency, or officer thereof is a party . . ." 28 U.S.C. § 519 (1994).

¹⁶⁸ *See* United States v. Providence Journal Co., 485 U.S. 693, 707-708 (1988). *Providence Journal* construed 28 U.S.C. § 518(a) as prohibiting a special prosecutor, appointed by a district court judge to prosecute the violation of a restraining order, from representing the interests of the United States before the Supreme Court without the authorization of the Solicitor General. *See id.* Cases construing 28 U.S.C. §§ 516-519 are distinct from the two-lines of cases granting absolute immunity to judges for their judicial acts and other participants in the judicial process, even for conduct beyond the scope of their jurisdiction.

¹⁶⁹ Letter to Mikva, *supra* note 157, at 1.

¹⁷⁰ *Id.* at 1-2.

¹⁷¹ *See* Letter to Finkelstein, *supra* note 153, at 2.

¹⁷² *See id.*; *see also* Letter to Mikva, *supra* note 157, at 2.

¹⁷³ *See supra* note 157 and accompanying text.

those cases where it is determined that it is in the best interest of the United States and necessary to carry out the purposes of the Federal Judiciary's appropriations for the judicial officer or body to be defended or represented."¹⁷⁴ Where a DOJ attorney is not reasonably available, 28 U.S.C. section 463 authorizes the Administrative Office to pay the costs of defending United States judges and court employees sued in their official capacities.¹⁷⁵ However, the authorizing language of section 463 limits its availability to court employees only. Nonetheless, the General Counsel stated "that my office would be sensitive to the equities in favor of defending mediators and evaluators, who are assisting the courts in the performance of an official function *without compensation*."¹⁷⁶

e. FTCA Immunity

In discussing mediator immunity, the General Counsel suggested two potential theories for protection: the Federal Tort Claims Act¹⁷⁷ and indemnification by the judiciary. The General Counsel believes that volunteer mediators come within the ambit of 28 U.S.C. section 2679 of the FTCA.¹⁷⁸ The DOJ, however, disagrees on the ground that an individual is not considered an "employee" under the FTCA unless the government supervises and controls the day-to-day physical performance of that individual's work. Thus, while the Attorney General will consider representation of a court-appointed mediator under 28 U.S.C. sections 516 to 518 in an appropriate case, "we cannot provide assurance that the Attorney General would seek to invoke the Westfall Act in any suit against a mediator."¹⁷⁹

Accordingly, it would appear that the FTCA does not apply to independent contractors because they are not subject to the detailed physical control of the United States in the performance of their duties. Independent contractors for the United States are specifically excluded from the definition of a "federal employee."¹⁸⁰ Thus, if mediators were classified as

¹⁷⁴ Letter to Finkelstein, *supra* note 153, at 2 (quoting Letter to Rowland F. Kirks, 53 Comp. Gen. 301 (1973)).

¹⁷⁵ See 28 U.S.C. §§ 516-519 (1994).

¹⁷⁶ Letter to Finkelstein, *supra* note 153, at 3 (emphasis added).

¹⁷⁷ See 28 U.S.C. §§ 1346(b), 2671 (1994).

¹⁷⁸ See Letter to Finkelstein, *supra* note 153, at 3. See also Westfall Act, at 4563; *supra* note 155 and accompanying text.

¹⁷⁹ Letter to Mikva, *supra* note 157, at 2.

¹⁸⁰ See *Strangi v. United States*, 211 F.2d 305 (5th Cir. 1954); *Fries v. United States*, 170 F.2d 726 (6th Cir. 1948); *White v. United States*, 472 F. Supp. 259 (W.D. Pa. 1979); *Hopson v. United States*, 136 F. Supp. 804 (D. Ark. 1956).

independent contractors, they would not be protected under the FTCA.

Whether a mediator could satisfy the FTCA test of being under the day-to-day physical direction of the government remains an open issue. Given the conflict between the positions of the Attorney General and the General Counsel, the better course would appear to be to seek representation for court-appointed mediators under 28 U.S.C. sections 516 to 518 and assert either common law immunity or immunity premised on 42 U.S.C. section 1983, as appropriate, rather than rely on the FTCA. Further amendments may be needed to the FTCA to clarify that mediators assist the judicial process and are sufficiently supervised by the court, through its training program, to qualify for FTCA protection.

f. *Indemnification by the Judiciary*

The second proposal by the General Counsel and the Attorney General was judiciary indemnification. The major disadvantage of this form of protection is that, according to the Attorney General, in the absence of exceptional circumstances, requests for indemnification will not be considered before entry of an adverse judgment or award. Procedurally, a court-appointed mediator held liable for damages based on the performance of official services could submit a request for indemnification to the Judicial Conference for consideration.¹⁸¹ The DOJ, however, asserts "that there is considerable question that a mediator could be indemnified."¹⁸²

3. *State Statutory Protections*

State immunity statutes grant either full or qualified immunity to all mediators or to mediators participating in designated matters referred by the courts. Florida, uniquely, grants all court-appointed mediators full judicial immunity in the same manner and to the same extent as a judge.¹⁸³ Most state statutes qualify the immunity granted to mediators to certain practice areas and to actions taken within the scope of their employment.¹⁸⁴ The specific work areas include farm-lender and agricultural mediation services in Minnesota, Mississippi, North Dakota, Wisconsin and Wyoming and medical malpractice and medical-related mediation services in Montana,

¹⁸¹ See Letter to Finkelstein, *supra* note 153, at 3 (indicating that an indemnification policy, adopted by the Judicial Conference and set forth in the *Guide*, Volume I, Chapter XI, Part E, Section V, extends only to officers and employees of the judiciary).

¹⁸² Letter to Mikva, *supra* note 157, at 2.

¹⁸³ This approach is criticized in Richardson, *supra* note 17, at 628.

¹⁸⁴ These states are: California, Connecticut, Louisiana, Maine, Minnesota, Mississippi, Montana, Nebraska, Utah, Washington, Wisconsin and Wyoming. See *infra* Appendix E.

Nebraska, Nevada and Utah. Other states have opted to limit liability to bad faith, willful or wanton misconduct or similar conduct.¹⁸⁵ A few states have applied both qualifications, granting mediators immunity within the scope of their employment but imposing liability for willful or wanton or similar conduct.¹⁸⁶

Although the issue is not entirely free from doubt, state immunity statutes presumably would not protect mediators in the Program. What is instructive, however, is the fact that at least twenty-two states¹⁸⁷ have enacted statutes addressing the issue of mediator immunity and do not rely on doctrines of judicial immunity which have evolved in the courts.

State legislative solutions to the mediator immunity issue are, by and large, limited to very fact-specific situations. In part, this can be explained by the comparative newness of mediation as an ADR technique. Most of the challenges to mediator conduct have been made in the federal courts. As resort to mediation under state legislation increases, the Author believes that reliance on federal precedents will increase, and cause many state legislatures to reexamine the scope of their mediation statutes.

IV. CONCLUSIONS

Generally, mediation provides a comparatively economical and practical alternative to judicial proceedings. Based on a functional analysis, the primary role of mediators is similar to what judges do when they preside at settlement conferences. Judicial, administrative and statutory protections available under both federal and state law all favor some level of immunity for mediators.

From a mediator's perspective, the availability of absolute quasi-judicial immunity would make his participation in the process most attractive. Such immunity shields a mediator from the burdens of litigation in all but the most limited situations.¹⁸⁸ This solution works when mediation is sponsored by a court which presumably could review allegations that the constitutional rights of the participants had been impaired, as required by the Supreme Court in *Butz*.¹⁸⁹

¹⁸⁵ These states include Colorado, Iowa, Nevada, New Jersey, Oklahoma and Virginia.

See *infra* Appendix E.

¹⁸⁶ These states include Connecticut and Virginia. See *infra* Appendix E.

¹⁸⁷ See *infra* Appendix E.

¹⁸⁸ See *supra* notes 32-61 and accompanying text.

¹⁸⁹ See *supra* notes 41-42 and accompanying text.

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Application of quasi-judicial immunity is far more troubling when private mediation is used outside of a court setting. The constitutional safeguards required under the third test of *Butz* may not be met due to the lack of judicial review of the settlement reached through mediation. In those circumstances, the parties are presumably free to ignore the mediated settlement terms and pursue other remedies. For privately arranged mediation, the Author believes that qualified immunity provides the best balance between promoting the mediation process and protecting the participants in that process. Qualified immunity would protect a mediator acting within the scope of his authority, unless he violated clearly established law.¹⁹⁰ But because vindication generally requires litigation, the transaction costs are quite high. Presumably, such mediators protect themselves by charging rates sufficiently high to allow the purchase of malpractice insurance. That may, as a practical matter, limit the resort to private mediation.

Applying these conclusions to the Program, the Author believes that mediators under the Program should be granted quasi-judicial immunity. In the performance of her duties, the safeguards imposed by *Butz* are met because such mediators exercise discretion and judgment, face the threat of harassment and intimidation and operate under the directive of the court, which can ensure that the constitutional rights of the participants are protected. Mediators under the Order, even if compensated, likely have immunity against tort claims based on actions or omissions taken incident to their service to the court.¹⁹¹ Intentional torts or criminal conduct, if proven, are not immunized because such conduct is not within the scope of employment.¹⁹²

Compensation paid to a mediator should not affect the availability of the protection afforded by either quasi-judicial or qualified immunity. However, all of the significant case law as well as advisory positions taken by the Administrative Office and the DOJ involved volunteer mediators. Accordingly, due to the lack of judicial, statutory and administrative

¹⁹⁰ See *supra* notes 62-110 and accompanying text.

¹⁹¹ Note that this Article does not address the Article I and Article III Constitutional or Due Process issues raised by the appointment of a mediator to settle a case or controversy actually commenced in a United States District or Bankruptcy Court.

¹⁹² See, e.g., 28 U.S.C. §§ 1346(b), 2680(h) (1994). As the Supreme Court stated in dicta in *Imbler v. Pachtman*, "This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242 (1994), the criminal analog of § 1983." *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (footnote omitted). See also *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974).

authority on compensated, as distinct from voluntary, *pro bono*, court-appointed mediators, it cannot be stated conclusively that mediators under the Program have such immunity.

One means to resolve the problem for mediators serving in the Program is for the court to amend the Order and declare that absolute quasi-judicial immunity extends to court-appointed mediators for acts within the scope of their official duties. Such a rule would comport with the standards for absolute quasi-judicial immunity set forth by the Supreme Court in *Butz v. Economou*¹⁹³ and *Antoine v. Byers & Anderson*.¹⁹⁴ At least one court, the Court of Appeals for the District of Columbia in *Wagshal v. Foster*,¹⁹⁵ based its holding that mediators serve a judicial function and are engaged in judicial conduct on those two decisions. Support can also be found in the three lines of cases granting absolute, qualified or defamation immunity to participants in the judicial process or to those rendering services functionally comparable to those performed by a judge.¹⁹⁶ Those cases either rely on rules of common law immunity or doctrines derived from the common law in cases brought under 42 U.S.C. section 1983.¹⁹⁷

Alternatively, at least three options exist for providing court-appointed mediators with legal protection at both the federal and state levels: (1) government-paid legal representation to assert various theories of immunity; (2) government-paid insurance; and (3) indemnification. Under the Program, the circumstances under which paid legal representation will be provided to mediators could be articulated in an amendment to the Order, or perhaps preferably, in a ruling from the Administrative Office. As the sponsoring organization of the Program, the court could obtain an appropriate insurance policy paid for from either general bankruptcy filing fees or solely by motion fees paid by those seeking approval to retain a mediator. The third option, providing indemnification rights, would, at the very least, require approval by the Administrative Office, which the Author believes is highly unlikely. However, the costs of these solutions may limit the accessibility and feasibility of mediation, particularly in smaller cases—an undesirable result.

¹⁹³ 438 U.S. 478 (1978). See *supra* notes 41–42 and accompanying text.

¹⁹⁴ 528 U.S. 429 (1993) (holding court reporters not entitled to absolute quasi-judicial immunity). See *supra* notes 32–61 and accompanying text.

¹⁹⁵ 28 F.3d 1249 (D.C. Cir. 1994). See *supra* notes 116–128 and accompanying text.

¹⁹⁶ See *Burns v. Reed*, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in part and dissenting in part). *Burns v. Reed* is discussed *supra* at notes 40, 43, 53–54 and accompanying text. Defamation immunity protects the absolute privilege of statements made in the course of a court proceeding; no cases to date have raised this issue in connection with mediators performing within the scope of their duties.

¹⁹⁷ See *supra* notes 27–110 and accompanying text.

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Case law to date establishes that there is a high likelihood that mediators can successfully defend actions using doctrines of judicial immunity. The Author proposes granting quasi-judicial immunity to mediators serving in court-annexed mediation programs because the option of judicial review safeguards the constitutional rights of the participants. The long-term success of mediation as an ADR technique hinges on judicial or statutory clarification of the availability of immunity defenses to make participation in the process more attractive to skilled mediators.

APPENDIX A

APPENDIX D [OF THE LOCAL BANKRUPTCY RULES OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK]. IN RE ADOPTION OF PROCEDURES GOVERNING MEDIATION OF MATTERS IN BANKRUPTCY CASES AND ADVISORY PROCEEDINGS, GENERAL ORDER N-117

IT IS ORDERED that a court mediation program for matters not involving a governmental unit is established under the following Rules:

1.0 Assignment of Matters to Mediation.

1.1 By Court Order. The court may order assignment of a matter to mediation upon its own motion, or upon a motion by any party in interest or the U.S. Trustee. The motion by a party in interest must be filed promptly after filing the initial document in the matter. Notwithstanding assignment of a matter or proceeding to mediation, it shall be set for the next appropriate hearing on the court docket in the normal course of setting required for such a matter.

1.2 Stipulation of Counsel. Any matter may be referred to mediation upon stipulated order submitted by counsel of record or by a party appearing pro se.

1.3 Types of Matters Subject to Mediation. Unless otherwise ordered by the presiding judge, any adversary proceeding, contested matter or other dispute may be referred by the court to mediation.

1.4 Mediation Procedures. Upon assignment of a matter to mediation, this General Order shall become binding on all parties subject to such mediation.

2.0 The Mediator.

2.1 Mediation Register. The Clerk of the U.S. Bankruptcy Court for the Southern District of N.Y. shall establish and maintain a Register of persons qualifying under paragraph 2.1.A.

A. Application and Qualification Procedures for Mediation Register. To qualify for the Mediation Register of this court, a person must apply and meet the following minimum qualifications:

(1) For General Services as a Mediator. A person must have been a

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member of the Bar in any state or the District of Columbia for at least five years; currently be a member of the Bar in good standing of any state or the District of Columbia; be admitted to practice in the Southern District of N.Y.; and be certified by the Chief Judge to be competent to perform the duties of a mediator. Each person certified as a mediator should take the oath or affirmation prescribed by 28 U.S.C. section 453 before serving as a mediator.

(2) For Services as a Mediator Where the Court Has Determined the Need for Special Skills.

(a) A person must have been authorized to practice for at least four years under the laws of the State of New York as a professional, including but not limited to, an accountant, real estate broker, appraiser, engineer or other professional. Notwithstanding the requirement for authorization to practice under the laws of the State of N.Y., an investment banker professional who has been practicing for a period of at least four years shall be eligible to serve as a mediator; and

(b) Be an active member in good standing, or if retired, have been a member in good standing, of any applicable professional organization; and

(c) Not have:

(1) Been suspended, or have had a professional license revoked, or have pending any proceeding to suspend or revoke such license; or

(2) Resigned from applicable professional organization while an investigation into allegations of misconduct which would warrant suspension, disbarment or professional license revocation was pending; or

(3) Have been convicted of a felony.

B. Removal from Mediation Register. A person shall be removed from the Mediation Register either at the person's request or by court order. If removed from the Register by court order, the person shall not be returned to the Register absent a court order obtained upon motion to the Chief Judge and affidavit sufficiently explaining the circumstances of such removal and reasons justifying the return of the person to the Register.

2.2 Appointment of the Mediator.

A. The parties will choose a mediator from the Register. If the parties cannot agree upon a mediator within seven (7) days of assignment to mediation, the court shall appoint a mediator and alternate mediator.

B. If the mediator is unable to serve, the mediator shall file, within seven (7) days after receipt of the notice of appointment, a notice of

inability to accept an appointment and immediately serve a copy upon the appointed alternate mediator. The alternate mediator shall become the mediator for the matter if such person fails to file a notice of inability to accept appointment within seven (7) days after filing of the original mediator's notice of inability. If neither can serve, the court will appoint another mediator and alternate mediator.

2.3 Disqualification of a Mediator. Any person selected as a mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. section 144 or if not disinterested, under 11 U.S.C. section 101. Any party selected as a mediator shall be disqualified in any matter where 28 U.S.C. section 455 would require disqualification if that person were a justice, judge or magistrate.

3.0 The Mediation.

3.1 Time and Place of Mediation. Upon consultation with all attorneys and pro se parties subject to the mediation, the mediator shall fix a reasonable time and place for the initial mediation conference of the parties with the mediator and promptly shall give the attorneys and pro se parties advance written notice of the conference. The conference shall be set as soon after the entry of the mediation order and as long in advance of the court's final evidentiary hearing as practicable. To ensure prompt dispute resolution, the mediator shall have the duty and authority to establish the time for all mediation activities, including private meetings between the mediator and parties and the submission of relevant documents. The mediator shall have the authority to establish a deadline for the parties to act upon a proposed settlement or upon a settlement recommendation from the mediator.

3.2 Mediation Conference. A representative of each party shall attend the mediation conference, and must have complete authority to negotiate all disputed amounts and issues. The mediator shall control all procedural aspects of the mediation. The mediator shall also have the discretion to require that the party representative or a non-attorney principal of the party with settlement authority be present at any conference. The mediator shall also determine when the parties are to be present in the conference room. The mediator shall report any willful failure to attend or participate in good faith in the mediation process or conference. Such failure may result in the imposition of sanctions by the court.

3.3 Recommendations of the Mediator. The mediator shall have no obligation to make written comments or recommendations; provided, however, that the mediator may furnish the attorneys for the parties and any

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pro se party with a written settlement recommendation. Any such recommendation shall not be filed with the court.

3.4 Post-Mediation Procedures. Promptly upon conclusion of the mediation conference, and in any event no later than 3 P.M. two (2) business days prior to the date fixed for hearing referred to in paragraph 1.1, the mediator shall file a final report showing compliance or noncompliance with the requirements of this General Order by the parties and the mediation results. If in the mediation the parties reach an agreement regarding the disposition of the matter, they shall determine who shall prepare and submit to the court a stipulated order or judgment, or joint motion for approval of compromise of controversy (as appropriate), within twenty (20) days of the conference. Failure to timely file such a stipulated order or judgment or motion when agreement is reached shall be a basis for the court to impose appropriate sanctions. Absent such a stipulated order or judgment or motion, no party shall be bound by any statement made or action taken during the mediation process. If the mediation ends in an impasse, the matter will be heard or tried as scheduled.

3.5 Termination of Mediation. Upon receipt of the mediator's final report, the mediation will be deemed terminated, and the mediator excused, and relieved from further responsibilities in the matter without further court order.

3.6 Withdrawal From Mediation. Any matter referred pursuant to this General Order may be withdrawn from mediation by the judge assigned to the matter at any time upon determination for any reason the matter is not suitable for mediation. Nothing in this General Order shall prohibit or prevent any party in interest, the U.S. Trustee or the mediator from filing a motion to withdraw a matter from mediation for cause.

4.0 Compensation of Mediators. The mediator's compensation shall be on such terms as are satisfactory to the mediator and the parties, and subject to court approval if the estate is to be charged with such expense.

5.0 Confidentiality.

5.1 Confidentiality as to the Court and Third Parties. Any statements made by the mediator, by the parties or by others during the mediation process shall not be divulged by any of the participants in the mediation (or their agents) or by the mediator to the court or to any third party. All records, reports, or other documents received or made by a mediator while serving in such capacity shall be confidential and shall not be provided to the court,

unless they would be otherwise admissible. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in connection with any arbitral, judicial or other proceeding, including any hearing held by the court in connection with the referred matter. Nothing in this section, however, precludes the mediator from reporting the status (though not content) of the mediation effort to the court orally or in writing, or from complying with the obligation set forth in 3.2 to report failures to attend or to participate in good faith.

5.2 Confidentiality of Mediation Effort. Rule 408 of the Federal Rules of Evidence shall apply to mediation proceedings. Except as permitted by Rule 408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, including any hearing held by this court in connection with the referred matter, any aspect of the mediation effort, including, but not limited to:

- A. Views expressed or suggestions made by any party with respect to a possible settlement of the dispute;
- B. Admissions made by the other party in the course of the mediation proceedings;
- C. Proposals made or views expressed by the mediator.

6.0 Consensual Modification of Mediation Procedures. Additional rules and procedures for the mediation may be negotiated and agreed upon by the mediator and the parties at any time during the mediation process.

7.0 Compliance With the U.S. Code, Federal Rules of Bankruptcy Procedure, and Court Rules and Orders. Nothing in this General Order shall relieve any debtor, party in interest, or the U.S. Trustee from complying with any other court orders, U.S. Code, the Federal Rules of Bankruptcy Procedure, or this court's Local Rules, including times fixed for discovery or preparation for any court hearing pending on the matter.

Dated: Nov. 10, 1993, New York, N.Y.

BURTON R. LIFLAND
Chief U.S. Bankruptcy Judge

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APPENDIX B

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
L. RALPH MECHAM
DIRECTOR

WILLIAM R. BURCHILL JR.
GENERAL COUNSEL

JAMES L MACKLIN, JR WASHINGTON. D.C 20544
DEPUTY DIRECTOR

November 15, 1990

Ms. Linda Finkelstein
Circuit Executive
United States Court of Appeals
United States Courthouse
3rd & Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Ms. Finkelstein:

I am writing in further response to your recent request for written advice about the availability of legal representation for mediators and early neutral evaluators who perform services for the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia. This letter summarizes the legal protection available to mediators or evaluators who are sued for actions taken incident to their service for these courts.

According to the information you provided, mediation in the circuit and district courts, and early neutral evaluation in the district court;¹⁹⁸ are programs established by the courts to facilitate early settlement or resolution of cases. Cases are designated for mediation or evaluation in accordance with applicable court procedures; in the district court, designation must be with the consent of the parties. Mediators and evaluators are assigned to the designated cases by the Circuit Executive. Mediators and evaluators serve as volunteers and are not compensated for their services (except that the circuit court allows reimbursement for minor out-of-pocket expenses). Mediators and evaluators are not appointed as officers or employees of the courts, nor are their services accepted by the Director of the Administrative Office in accordance with the Guide to

¹⁹⁸ Although there are some similarities, the early neutral evaluation program in the district court is not an arbitration program under 28 U.S.C. §§ 651 to 658 (1994).

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Judiciary Policies and Procedures, Volume I, Chapter X, Subchapter 1308.2, section E.

Addressing first the question of legal representation, 28 U.S.C. sections 516 to 519 authorize the Department of Justice to conduct and defend litigation in which officers of the United States are parties and otherwise to attend to the interests of the United States in court proceedings. Representation by the United States Attorney's office must be approved by the Department of Justice in accordance with their regulations, set forth at 28 C.F.R. section 50.15. The fact of Federal employment is not a prerequisite for the Department to provide legal representation to an individual but representation is only rarely provided in the absence of Federal employment. The Department has provided representation to persons who were not employed by the Judicial Branch in at least two situations: where the persons who were sued had served as special masters or as jurors.

Generally speaking, the Department of Justice is unwilling to commit in advance to the defense of private persons rendering services to the courts. If a lawsuit were filed against a mediator or evaluator for actions incident to service for the courts, this agency would make a recommendation to the Department of Justice concerning the provision of legal representation. We believe the Department would be receptive to the arguments that mediators and evaluators serve to further a Federal interest and that a lawsuit against them arising from that service is a case in which the United States has an interest within the meaning of 28 U.S.C. section 516 to 519. Providing legal representation in these situations would be consistent with the provision of representation to special masters and jurors who also are not employees but who provide valuable services to the court.

In instances where the Department of Justice is unavailable to provide representation, the Comptroller General has ruled that the Judiciary may use appropriated funds to pay the costs of litigation "in those cases where it is determined that it is in the best interest of the United States and necessary to carry out the purposes of the Federal Judiciary's appropriations for the judicial officer or body to be defended or represented." See Letter to Rowland F. Kirks, 53 Comp. Gen. 302 (1973). In addition, 29 U.S.C. section 463 authorizes the Administrative Office to pay the costs of defending judicial officers and employees sued in their official capacities where a Department of Justice attorney is not reasonably available under 28 U.S.C. sections 516 to 519, as described above. Because the authorizing

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language of section 463 is limited to justices, judges, officers, Ms. Linda and employees of any court of the United States, this section would not appear to allow the agency to pay defense costs for mediators or evaluators who are not court employees. The Administrative Office regulations governing legal representation of judicial officers and employees are set forth in the Guide to Judiciary Policies and Procedures, Volume I, Chapter XI, Part E, to which the above-cited Comptroller General opinion is attached.

Should a situation arise where the Department of Justice is unavailable to represent a mediator or evaluator, this agency would then determine whether, under the circumstances of the case, appropriations provided to the agency are available to pay the costs of defense. This determination would be made based on the facts of the case, the language of the applicable appropriations act, and relevant Comptroller General decisions. Although I cannot offer any blanket assurances in this regard, I can assure you that my office would be sensitive to the equities in favor of defending mediators and evaluators, who are assisting the courts in the performance of an official function without compensation.

A second consideration relating to possible lawsuits against mediators and evaluators is their potential liability should any adverse judgment for monetary damages be entered against them. It is unclear what protection would ultimately be available to mediators or evaluators, but two possibilities exist: the protections afforded by the Federal Tort Claims Act, and the possibility of indemnification by the Judiciary.

Under the Federal Tort Claims Act, 28 U.S.C. sections 2671 et seq., Federal employees are protected from liability for injury or loss of property or personal injury or death resulting from negligent acts or omissions within the scope of employment. The Attorney General is required to defend any suit against a Federal employee for such damage or injury. See 28 U.S.C. section 2679(c). Further, upon certification that an employee was acting within the scope of employment, the United States "shall be substituted as the party defendant" and thus becomes exclusively liable for any resulting judgment for monetary damages. See id. section 2679(d).

For purposes of the Federal Tort Claims Act, the term employee includes "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." I have been unable to find any case law confirming that this definition would apply to individuals serving the courts in the capacity of mediators or evaluators. At least one court has concluded that prospective Federal jurors are not employees within the

Linda Finkelstein

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meaning of the Federal Tort Claims Act. See Sellers v. United States, 672 F. Supp. 446 (D. Id. 1987). However, the discussion in Sellers of factors leading to that conclusion would appear to support an argument that Federal mediators or evaluators - who are selected to serve and generally supervised by the court in the performance of their duties - fall within the act's definition of employee and therefore enjoy the protections of the act.

The Judicial Conference has also adopted an indemnification policy, set forth in the Guide to Judiciary Policies and Procedures, Volume I, Chapter XI, Part E, section V. In the absence of exceptional circumstances, requests for indemnification will not be considered before entry of an adverse judgment or award. The policy states that it extends only to officers and employees of the Judiciary, and it thus would not appear to be applicable to mediators or evaluators who are not court employees. However, a mediator or evaluator who is held liable for damages based on the performance of official services for the court could submit a request for indemnification to the Judicial Conference for consideration or could request that the policy be amended to allow consideration of such requests.

I hope the foregoing discussion is helpful to you. Should you have any further questions, you may wish to contact Marilyn J. Holmes, Assistant General Counsel.

Sincerely,

/s/

William R. Burchill, Jr.
General Counsel

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APPENDIX C

U.S. Department of Justice
Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530
March 13, 1991

Honorable Abner J. Mikva
Chief Judge
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, D.C. 20001-2866

Re: Possible Representation for D.C. Circuit
Mediators by the Department of Justice

Dear Chief Judge Mikva:

Several weeks ago, Nancy Stanley from the Circuit Executive's Office contacted Douglas Letter of the Civil Division concerning the question of possible Department of Justice representation for private attorneys who serve as mediators for the Court. It is our understanding that Ms. Stanley contacted Mr. Letter at your behest and that of former Chief Judge Wald. In addition, Ms. Stanley provided us with a copy of a letter dated November 15, 1990 from the General Counsel of the Administrative Office of the United States Courts, William Burchill, Jr., to Linda Finkelstein regarding this issue.

In response to Ms. Stanley's recent inquiry, it appears that the Department of Justice would be able to provide representation to the Court's mediators if they are sued concerning their conduct or service as mediators. Such representation would be based on the fact that, pursuant to 26 U.S.C. 516 through 518, the Attorney General is responsible for attending to the interests of the United States in court. The Supreme Court made clear in *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), that this responsibility includes the interests of the Judicial Branch of the Federal Government.

We understand that the D.C. Circuit mediators carry out their functions pursuant to a program established by Court order and that their primary purpose is to make the Circuit more efficient by facilitating

settlement of cases within the Court's jurisdiction. We also understand that the mediators are selected by the Court, trained by its personnel, and generally supervised by it, as well as that the Court assigns the cases that will be handled by the mediators. Under these circumstances, it appears to us that the mediators are assisting the Court in performing its official functions, and that representation of such persons would be in the interests of the United States if they are sued concerning their work for the Court.

While it appears that representation generally would be available, it cannot actually be authorized until such time as a suit arises and we are able to review the nature of the suit and the mediator's involvement in order to assure that representation is indeed in the interest of the United States. Additionally, as is true for judges' and other federal officers, representation by the Department of Justice is generally not available if the matter involves a federal criminal investigation or prosecution.

Although it appears that representation would be provided for mediators, I wish to reiterate the statements in Mr. Burchill's November 15 letter concerning indemnification should a judgment actually be entered. (Since we think that there may be a strong argument that the Court's mediators would be covered by the protection of absolute immunity, we would hope that this situation will not occur.) Mr. Burchill pointed out that possible indemnification from government funds is not considered in advance of a judgment or award, and that there is considerable question that a mediator could be indemnified.

Mr. Burchill's letter also mentions that the Court's mediators might be covered by the "Westfall Act" (see 28 U.S.C. 2679), under which the United States is substituted as the party defendant for claims of negligent acts or omissions of "any employee of the Government" acting within the scope of his office or employment. At this point, we are not willing to take the position that the Westfall Act was intended to include as "employees" individuals such as those serving as mediators in the Court's current program. As a general rule, in order to be considered a government employee for purposes of the Federal Tort Claims Act, the Government must control the day-to-day physical performance of the individual's work. Therefore, although we will appropriately provide representation, we cannot provide assurances that the Attorney General would seek to invoke the Westfall Act in any suit against a mediator.

I hope that this letter responds to the Court's concerns. I and other representatives from the Civil Division would be pleased to discuss this matter further with you and/or the Circuit Executive if you think it would be helpful.

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Sincerely,

/s/

STEPHEN C. BRANSDORFER
Deputy Assistant Attorney General
Civil Division

cc: Linda Finkelstein
Circuit Executive
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., NW
Washington, DC 20001-2866

William R. Burchill, Jr.
General Counsel
Administrative Office of the
United States Courts
Washington, DC 20544

APPENDIX D

Memorandum

DATE: July 17, 1992
TO: Volunteer Court Mediators
FROM: Hon. Robert W. Sweet
SUBJECT: Mediator Protection

During the Mediator training sessions of June 22nd and 23rd 1992, direction was sought from the Court as to individual volunteer mediator protection: What protection does a volunteer mediator have if sued for actions which have taken place during the mediation process?

As you may be aware, other Appeals and District Courts have and will be implementing mediation programs similar to our program. Prior to establishment of a mediation program by the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia advice and guidance was sought from the General Counsel of the Administrative Office of the United States Courts and the United States Department of Justice Attorney General Civil Division as to the availability of legal representation and protection for volunteer mediators. Attached you will find letters dated November 15, 1990 from William R. Burchill, Jr. General Counsel Administrative Office of the United States Courts and March 13, 1991 from Stephen C. Bransdorfer, Deputy Assistant Attorney General Civil Division addressing the issue of mediator representation and protection.

While each letter speaks for itself, I believe that it would be fair to state that each office would be sensitive to the equities in favor of defending mediators who are assisting the courts in the performance of an official function. While it appears that representation generally would be available, it cannot actually be authorized until such time as suit arises and each office is able to review the nature of the suit and the mediator's involvement.

Court staff has been in recent contact with each office and confirmed that the positions stated in the letters remain in force and effect.

The advisory group appointed by the Court under the Civil Justice Reform Act of 1990 takes the position that a person serving as a volunteer mediator and acting under an order of a Judge of this Court would be entitled to absolute quasi-judicial immunity as are other governmental officials who play an integral part in the implementation of the judicial function. While there is no authority directly on point granting a Mediator

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absolute quasi-judicial immunity the advisory group believes there are sufficient decisions covering other officials to support its position. The advisory group directs your attention to the following cases.

Butz et al. v. Economou et al., 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978).

Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976).

Barr v. Matteo et al., 360 U.S. 564, 79 S. Ct. 1335, 3 L. Ed. 2d 1434 (1959).

Antoine v. Byers & Anderson. Inc. et al., 950 F. 2d 1471 (9th Cir. 1991).

Mullis v. U.S. Bankruptcy Court for the District of Nevada et al., 828 F. 2d 1385 (9th Cir. 1987), cert. denied, 486 U.S. 1040, 100 L. Ed. 2d 616, 108 S. Ct. 2031 (1988).

Sharma v. Stevas, 790 F. 2d 1486 (9th Cir. 1986).

International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America and its Local 656 and 985, et al., Greyhound Lines, Inc., et al., 701 F. 2d 1181 (6th Cir. 1983).

Mercedes v. Barrett, 453 F. 2d 391 (3d Cir. 1971).

Henig v. Odorioso, 385 F. 2d 491, (3d Cir. 1967) cert. denied, 390 U.S. 1016, 88 S. Ct. 1269, 20 L. Ed. 2d 166 (1968).

Bavers v. Heisel, 361 F. 2d 581, (3d Cir. 1966) (en banc) (collecting cases), cert. denied, 386 U.S. 1021, 87 S. Ct. 1367, 18 L. Ed. 2d 457 (1967).

Raitport v. Provident National Bank, 451 F. Supp. 522 (E.D. Pa. 1978).

This Court hopes that this memorandum answers the question raised in regard to volunteer mediator's protection. We again thank you for your participation. In the near future you will receive your initial assignment. We look forward to working with each of you.

APPENDIX E

State Statutes or Court Rules Addressing Mediator Immunity and/or Compensation¹⁹⁹

Alabama. ALA. CIV. CT. MEDIATION R. 15(b) (mediators set their own fees). Mediation standards for court-annexed programs are under consideration. Ala. Order 96-1, Adoption of the Alabama Code of Ethics for Mediators, Dec. 14, 1995 (Alabama Supreme Court's Commission on Dispute Resolution).

Alaska. ALASKA STAT. section 25.20.080(e) (mediators are paid by the parties, although pro-bono services are available).

Arizona. ARIZ. REV. STAT. section 12-223.08 deals with mediator liability under community punishment program. Arizona Dispute Resolution Association is preparing mediator selection and training standards for adoption by the Arizona Supreme Court. Peter S. Chantilis, "Mediation U.S.A.," 26 *U. Memphis L. Rev.* 1031, 1037-38 (1996).

California. CAL. CODE section 1297.432 (West Supp. 1994), provides mediators with immunity within the scope of their duties.

Colorado. COLO. REV. STAT. section 13-22-305(6) (Supp. 1993), limits liability to willful or wanton misconduct. Compensated mediators are hired by the Office of Dispute Resolution, which administers ADR programs statewide. COLO. REV. STAT. section 13-22-303 (1989 & Supp. 1995).

Connecticut. CONN. GEN. STAT. section. 5.141(d) (1988), provides for no liability within the scope of employment, except for reckless or malicious conduct.

Florida. FLA. STAT. ANN. section 44.107 (West Supp. 1995), grants mediators immunity equivalent to judicial immunity. Fla. Stat. Ann., section 44.201(6) (West Supp. 1995) provides mediator immunity when as mediator at citizen dispute settlement centers. Fla. Stat. Ann., section 627.7015(5) (West Supp. 1995) provides mediator immunity in insurance mediation. Mediators are either paid a salary, an hourly rate set by the court

¹⁹⁹ See generally NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* App. B (2d ed. 1994); American Bar Association, Standing Committee on Dispute Resolution, *STATE LEGISLATION ON DISPUTE RESOLUTION* (1988).

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or by the parties. Peter S. Chantillis, *Mediation U.S.A.*, 26 U. MEMPHIS L. REV. 1031, 1047 (1996). See generally J. Sue Richardson, *Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators*, 17 FLA. ST. U. L. REV. 623 (1990).

Georgia. SUPREME COURT OF GEORGIA, ALTERNATIVE DISPUTE RESOLUTION RULES Rule 6.2 (March 9, 1993) established by court order immunity for all neutrals participating in a court-annexed or court-referred program. Courts may set hourly rates to compensate non-volunteer mediators. GA. CODE ANN. section 15-23-11 (1994).

Hawaii. HAW. REV. STAT. section 672-9 (1985), protects against liability for libel, slander or other defamation of character for members of the design professional conciliation panel, a special mediation panel. A sliding scale based on the disputants' ability to pay fixes compensation for mediators. Haw. R. Cir. Ct., Exh. A.

Idaho. IDAHO R. CIV. P. 507 provides mediator privilege for confidential communications made during the course of mediation.

Illinois. ILL. REV. STAT. 20/6 section 6 (1992). Confidentiality for all memoranda, work products and case files for mediation pursuant to the Not-for-Profit Dispute Resolution Center Act.

Indiana. IND. R. A.D.R. Rule 7 (1995) prohibits contingency or result fees to mediators.

Iowa. IOWA CODE section 679.13 (West 1987), provides immunity to mediators. IOWA CODE section 13.16(1) (West 1994), protects against civil damages in farmer-lender mediation. Excluded under both statutes are acts in bad faith, with malicious purpose or demonstrating willful and wanton disregard of human rights, safety or property. Mediators in civil cases are compensated. IOWA CODE section 679A.10 (West 1987).

Kansas. KAN. STAT. section 5-513 deals with mediator liability. Bill is pending concerning mediator confidentiality to implement the Dispute Resolution Act. Peter S. Chantillis, *Mediation U.S.A.*, 26 U. MEMPHIS L. REV. 1031, 1055 (1996).

Kentucky. KY. REV. STAT. section 64.310 (Baldwin 1993); Ky. Rev. Stat. section 417.140 (Baldwin 1993). Non-volunteer mediators are compensated based on the adjusted gross income of the parties.

Louisiana. LA. REV. STAT. ANN. Tit. 40, section 1299.47(H) (West Supp. 1993), provides immunity for members of medical-claim conciliation panels within the scope of their duties.

Maine. ME. REV. STAT. ANN. tit.4, section 18(2-A) (West 1988), provides mediators, within the scope of their duties, with immunity equivalent to that of other governmental employees. Me. Rev. Stat. Ann., tit.19, section 1752(4) (West 1964 & Supp. 1995) authorizes use of compensated mediators.

Minnesota. MINN. STAT. ANN. section 583.26(7) (West 1988), repealed 7/1/95, formerly provided immunity within the scope of farm-lender mediation services. MINN. GEN. R. PRAC. 114.11, mediators negotiate the amount of their compensation with the disputants.

Mississippi. MISS. CODE ANN. section 69-2-49 (Supp. 1988), provides immunity within the scope of farm-debt mediation services. The Mississippi Center for Dispute Resolution was established as a program for voluntary mediation under the auspices of the New Orleans Office of the American Arbitration Association. When used, a mediator fee of \$100 per hour is divided among the parties. Peter S. Chantillis, *Mediation U.S.A.*, 26 U. MEMPHIS L. REV. 1031, 1062 (1996).

Montana. MONT. CODE ANN. section 27-6-106 (1987), provides absolute immunity for medical malpractice mediators within the scope of their duties.

Nebraska. NEB. REV. STAT. section 44-2844(3), provides absolute immunity for members of medical-claim conciliation panels within the scope of their duties. Neb. Rev. Stat., section 25-2913, the Dispute Resolution Act established the Office of Dispute Resolution, which compensates non-volunteer mediators. Neb. Rev. Stat., section 48-168 deals with mediator liability.

Nevada. NEV. REV. STAT. section 630.364 (1993), provides immunity, absent malicious intent, for medical panel members. Nev. Arb. R. 24 provides for the compensation of mediators at \$75 per hour, capping fees at \$500 per case.

New Jersey. N.J. STAT. ANN. section 2A:23A-9(c)(d) (West 1987), provides immunity for dispute resolution umpires, absent specified wrongful conduct.

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New York. N.Y. PUBLIC HEALTH LAW section 2974 (McKinney's 1996) deals with mediator liability.

North Carolina. N.C. GEN. STAT. section 7A-38(j) (Supp. 1994), provides absolute judicial immunity to mediators; N.C. Gen. Stat., Secs. 1-539.10 to 1-539.11 (Supp. 1988), provide qualified immunity for uninsured volunteer mediators serving with uninsured nonprofit charitable organizations. N.C. Gen. Stat., section 150B-23.1 (Supp. 1994), provides absolute judicial immunity to mediators assisting administrative agency mediation.

North Dakota. N.D. CENT. CODE section 6-09.10-04.1 (1993), provides immunity for mediators in farmers debt mediation services.

Ohio. OHIO MUN. CT. SUP. R. Rule 15, provides for court-annexed mediation, primarily in small claims courts with cases involving \$5,000 or less, in which mediators are compensated by the parties.

Oklahoma. OKLA. STAT. ANN. tit. 12, section 1805(E) (West Supp. 1989), provides immunity, absent willful conduct. Okla. Stat. Ann., tit. 59, section 328.63 (West Supp. 1989), provides immunity under dental mediation program.

Oregon. OR. REV. STAT. section 36.210 (Supp. 1994), provides qualified immunity to mediators.

Rhode Island. R.I. GEN. LAWS section 9-19-44 (Supp. 1995), protects the confidentiality and nondisclosure of mediator work product.

South Carolina. S.C. CODE ANN. section 20-7-420(39) (Law. Co-op. Supp. 1995). Mediators set their own fees under the family mediation statute.

South Dakota. S.D. CODE ANN. section 54-13-20 provides immunity for mediators assisting Farm Mediation Board.

Tennessee. TENN. CODE ANN. section 16-20-105 (1994), provides qualified immunity to mediators in court-annexed mediation programs.

Texas. TEX. CIV. PRAC. & REM. CODE ANN. sections 154.002-154.003 (West Supp. 1996), provides court-annexed mediation in all courts and for all cases and addresses mediator liability. Mediators are paid by the parties and the payments are taxable court costs.

Utah. UTAH CODE ANN. section 78-14-15 (1992), provides immunity,

absent willful conduct; UTAH ADMIN. R. 4.510(12), provides for payment of mediators by the parties except in cases where such payment results in financial hardship.

Vermont. VT. STAT ANN. Tit. 16 section 2007(e)(1982), provides for shared payment to mediators in teacher labor disputes by the parties.

Virginia. VA. CODE ANN. section 8.01-581.23 (Michie Supp. 1988), provides mediators serving in court-annexed mediation programs with qualified immunity within the scope of their duties, absent bad faith or willful conduct. Mediators in private disputes set their own fees. Minimal per-case fees are fixed by contract with the court system; court service units and departments of social services set fees on a sliding scale. Peter S. Chantillis, "Mediation U.S.A.," 26 U. MEMPHIS L. REV. 1031, 1078-79 (1996).

Washington. WASH. REV. CODE ANN. section 7.75.100 (West Supp. 1989), provides qualified immunity to dispute resolution center directors, employees and mediators acting in good faith, except in cases of willful or wanton misconduct. Mediation of family law issues at the community level is publicly funded. Peter S. Chantillis, *Mediation U.S.A.*, 26 U. MEMPHIS L. REV. 1031, 1080 (1996).

West Virginia. W.V. CODE section 23-5-1 provides immunity for mediators resolving disputes over medical treatment.

Wisconsin. WIS. STAT. ANN. section 93.50(2)(c) (West Supp. 1988), provides qualified immunity to dispute resolution center directors and mediators acting in good faith to resolve disputes over farm debts. Wis. Stat. Ann., section 665.42-.68 (West 1985) authorizes the use of mediation panels to resolve medical malpractice disputes and provides mediator immunity from civil liability. Wis. Stat. Ann., section 218.01(71) (West Supp. 1988) grants immunity to mediators resolving motor vehicle finance disputes. *See generally* Daniel A. Noonan & Judith M. Bostetter, *Alternative Dispute Resolution in Wisconsin: A Court Referral System*, 78 MARQ. L. REV. 609 (1995).

Wyoming. WYO. STAT. section 11-41-105 (Supp. 1993), provides mediators within the Agriculture Mediation Service immunity for good-faith acts or omissions within the scope of their duties. Wyo. R. Civ. P. 40(D), authorizes a minimum payment of \$50 per hour for mediators from state funds.