

MEDIATOR IMMUNITY IN OHIO

Are court-connected mediators immune from liability?

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A. INTRODUCTION

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I. INTRODUCTION

As a general rule, Ohio's state, county and municipal employees, including judges and employees of courts, are immune from liability. They cannot be sued for damages by people who are displeased with the manner in which they have carried out their job responsibilities. If public employees are sued, they are generally entitled to a legal defense provided by the Ohio Attorney General or the county or city prosecutor's office and they are typically covered under the state or political subdivision's liability insurance policy.

Although the majority of Ohio's courts offer some type of mediation program to their litigants, the Ohio Supreme Court has not, to date, been presented with a case against a mediator which would definitively determine whether court-connected

mediators come within the class of public employees entitled to claim either sovereign or judicial immunity.

Since mediators' immunity has not been definitively addressed in Ohio, this paper is intended to provide guidance to Ohio courts, political subdivisions and mediators who are concerned about whether court-connected mediators are immune from liability.

This paper covers only mediators employed by, appointed by or to whom parties are referred by an Ohio state, county, municipal or appellate court. In other words, it does not attempt to address the potential liability of completely private mediation services or private mediators when they are not conducting mediations for an Ohio court. It also does not apply to federal court mediators nor does it address mediator confidentiality.

Section II addresses quasi-judicial immunity by discussing first Ohio cases (including decisions of the federal courts with jurisdiction in Ohio) and then, in Section II (B), cases from other jurisdictions.

Section III discusses, in a more cursory fashion, sovereign immunity. Although both quasi-judicial immunity and sovereign immunity (as discussed here) are absolute immunities, meaning they defeat the suit at its outset rather than requiring the presentation of evidence at trial concerning circumstances and motivations (see *Imbler v. Pachtman* (1976), 424 U.S. 409, 419 n. 13, 96 S.Ct. 984, 47 L.Ed.2d 128), quasi-judicial immunity is utilized in connection with mediators more frequently than sovereign immunity. Sovereign immunity is typically used as a defense by employees of the legislative and executive branches of state, county or municipal government

who would not qualify for judicial or quasi-judicial immunity. Nothing precludes the application of a sovereign immunity defense to judicial employees or mediators, however, so this alternative immunity theory is briefly discussed in Section III.

Relatively few court decisions discuss true mediators and their potential immunity. At least two commentators have noted they could find no successful cases against mediators. See Moffitt, *Suing Mediators* (2003), 83 Boston Univ. Law Rev. 147, reporting his research having located no reported or unreported successful cases against mediators in U.S. federal courts, state courts, or in Canada, England, Australia or New Zealand, and Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity* (1997), 12 Ohio St. J. on Disp. Resol. 629, 634 (“all courts that have considered the issue to date have insulated mediators from liability on the basis of absolute immunity.”)

Because there are so few cases addressing the immunity of mediators, cases ruling on the immunity of other court employees, court appointees and persons carrying out courts’ orders are included here since they may shed light, by analogy, on mediators’ immunity. We have tried to include every relevant resource we could locate so this paper could serve as a starting point for Ohio courts, attorneys and mediators briefing or considering a claim of mediator immunity. If you are aware of newer or additional cases, please e-mail us at: mediate@sconet.state.oh.us.

II. QUASI-JUDICIAL IMMUNITY

“It is well-settled that a judge is immune from civil liability for actions taken in his judicial capacity....” *Kelly v. Whiting* (1985), 17 Ohio St.3d 91, 94, 447 N.E.2d 1123.

This doctrine “originated in the English common law and clearly rests upon public policy considerations. The purpose of the doctrine is to preserve the integrity and independence of the judiciary and to insure that judges will act upon their convictions free from the apprehensions of possible consequences.” *Wilson v. Neu* (1984), 12 Ohio St.3d 102, 103, 465 N.E.2d 854. Judges have absolute, as opposed to qualified, immunity. *Loyer v. Turner* (6th Dist. 1988), 129 Ohio App.3d 33, citing *Kelly v. Whiting* (1985), 17 Ohio St.3d. 91, 93, 447 N.E.2d 1123, citing *Stump v. Sparkman* (1978), 435 U.S. 349, 356-357, 98 S.Ct. 1099, 55 L.Ed.2d 331.

Court employees who are not judges are traditionally protected by quasi-judicial immunity to the extent that their acts are "so integral or intertwined with the judicial process that these persons are considered to be figurative arms of the judge who is immune." *Shelton v. Wallace* (S.D. Ohio 1995), 886 F.Supp. 1365, 1371, citing, inter alia, *Bush v. Rauch* (6th Cir. 1994), 38 F.2d 842, 847, *Joseph v. Patterson* (6th Cir. 1986), 795 F.2d 549, 550, certiorari denied (1987), 481 U.S. 1023, 107 S.Ct. 1910, 95 L. Ed. 516 and *Johnson v. Granholm* (6th Cir. 1981), 662 F.2d 449, 450, certiorari denied (1982), 457 U.S. 1120, 102 S.Ct. 2933, 73 L.Ed. 1332.

The issue concerning mediators is whether, in conducting mediations, they are acting in a judicial capacity so as to be entitled to quasi-judicial immunity.

A. OHIO CASES

No controlling case law from the Ohio Supreme Court addresses the quasi-judicial immunity of mediators. Extensive research for this paper revealed no reported or unreported Ohio cases addressing mediator immunity. No mediator immunity

decisions issued by the federal courts sitting in Ohio were located either. See also Moffitt, *Suing Mediators* (2003), 83 Boston Univ. Law Rev. 147, and Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity* (1997), 12 Ohio St. J. on Disp. Resol. 629, 634, both finding no successful cases against mediators.

Although the availability of quasi-judicial immunity is determined by examining the function and acts of the person claiming immunity and not by the person's title (*Shelton v. Wallace*, (S.D. Ohio 1995), 886 F.Supp. 1365, 1371, citing *Forrester v. White* (1988), 484 U.S. 219, 225, 108 S.Ct. 538, 98 L.Ed.2d 555; see also *Foster v. Walsh* (6th Cir. 1988), 864 F.2d 416, 417), courts' discussions of whether various categories of persons are entitled to immunity can shed light on how Ohio courts might view mediators' claims of immunity. Analogous cases decided in Ohio and in the federal courts with jurisdiction in Ohio indicate that Ohio courts would likely include mediators in the class of court employees and others directed by, assisting, or connected with the courts who are entitled to quasi-judicial immunity.

1. ARBITRATORS

Arbitrators have been around longer than mediators. They have immunity by statute in Ohio: "No person who serves as an arbitrator shall be liable in an action for damages resulting from any act or omission in the performance of his duties as an arbitrator in any proceedings." Ohio R.C. 2712.68.

Although this protection was not codified until 1994, courts in Ohio had previously granted arbitrators quasi-judicial immunity. “An arbitrator is a quasi-judicial officer, under our laws, exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and we are of opinion that the same immunity extends to him.” *Hill v. Aro Corp.* (N.D. Ohio 1967), 263 F.Supp. 324, 325, 9 Ohio Misc. 217, quoting *Hoosac Tunnel Dock & Elevator Co. v. O'Brien* (1884), 137 Mass. 424, 426, quoting *Jones v. Brown* (1880), 54 Iowa 74, 6 N.W. 140.

More recently, courts have echoed the clear precedent that arbitrators are to be accorded judicial immunity: “It is ... necessary and within the doctrine of quasi-judicial immunity, that arbitrators be immune from suits for acts performed within their capacity as arbitrators and performed within their assigned duties and authority.” *Buyer’s First Realty, Inc. v. Cleveland Area Bd. of Realtors* (8th Dist. 2000), 139 Ohio App.3d 772, 787, 745 N.E.2d. 1069, quoting *Wolfe v. Columbia Gas Transmission Co.* (March 30, 1982), Knox App. No. 81-CA-19, unreported, 1982 Ohio App. LEXIS 13787.

The desire to ensure mediators’ impartiality would seem to make the reasoning of this case apply to mediators who are assisting a court with cases on its docket.

2. PERSONS CARRYING OUT JUDGES' ORDERS

In considering a case alleging civil rights violations by law enforcement officers and county commissioners who implemented a judge's temporary restraining order and shut down a business, a federal court in Ohio found these government employees were entitled to quasi-judicial immunity. "Quasi-judicial immunity extends to those persons performing tasks so integral or intertwined with the judicial process that these persons are considered to be figurative arms of the very commanding judge who is immune." *Shelton v. Wallace* (S.D. Ohio 1995), 886 F.Supp. 1365, 1371. To hold otherwise would require defendants charged with implementing a court order "to second-guess, overrule and defy facially-valid court orders to avoid ... liability." *Id.* at 1373. See also *Bush v. Rauch* (1994), 38 F.2d 842, 848; *Doe v. McFaul* (N.D. Ohio 1984), 599 F.Supp. 1421, 1431; *Wholesale Electric & Supply, Inc., v. Robusky* (1970), 22 Ohio St.2d. 181, 183-184, 258 N.E.2d 432; and *Smith v. Martin* (6th Cir. 1976), 542 F.2d 688, 690, citation omitted (judge does not "doff [] his robe of judicial immunity ... by conducting a settlement conference in a place other than his courtroom.... [O]ther state governmental officers whose duties are related to the judicial process also should be insulated from personal liability when they, without malice or corrupt motive, carry out orders of a court.")

A mediator would seem to fall within this reasoning as a figurative arm of the court and as a person who should not have to second-guess a court's referral orders.

3. COURT REPORTERS

In *Loyer v. Turner* (6th Dist. 1998), 129 Ohio App.3d 33, 716 N.E.2d 1193, a court reporter was sued for allegedly omitting portions of the trial from her transcript. Relying on two unreported Ohio appellate cases which grant court reporters quasi-judicial immunity (*Fahrig v. Greer* (May 1, 1980), Montgomery App. No. 6596, unreported, 1980 Ohio App. LEXIS 12867, and *Richard v. Schaefer* (June 18, 1992), Cuyahoga App. No. 63069, unreported, 1980 Ohio App. LEXIS 3151), the court reporter claimed absolute judicial immunity. Relying on a United States Supreme Court case decided after the two unreported Ohio cases (*Antoine v. Byers & Anderson, Inc.* (1993), 508 U.S. 429, 113 S.Ct. 2167, 124 L.Ed.2d 391), the litigant who sued the court reporter argued that a court reporter's duty to record court proceedings "accurately" (Ohio statute) or "verbatim" (federal statute) is not a function which requires any discretion and, because of the lack of discretion, the court reporter was not entitled to judicial immunity.

The Ohio Sixth District Court of Appeals, while noting that "[a]gents of the court performing discretionary acts have absolute immunity against suits arising from acts that are judicial or quasi-judicial" (*Loyer v. Turner* (1998), 129 Ohio App.3d 33, 36, 716 N.E.2d 1193), held that Ohio R.C. 2301.20, requiring an accurate record, does not provide the court reporter with any "leeway in decision making or acting in a judicial capacity during a legal proceeding." *Id.* at 38. Due to this lack of discretion, the appellate court affirmed the trial court's denial of the court reporter's motion to dismiss. *Id.*

Although this Ohio court denied the absolute quasi-judicial immunity claimed by the court reporter (the same immunity allowed by the Second and Eighth Ohio District Courts of Appeals in the opinions cited by the court reporter), the distinction between a court reporter with no discretion and a mediator, who has complete discretion to schedule, set procedural rules, caucus, suggest courses of action and opine, is obvious. The functions performed by a mediator seem more analogous to the discretionary functions performed by a judge than to the ministerial function performed by a court reporter.

Aside from this distinction between mediators and court reporters, reliance on the distinction between ministerial and discretionary functions has been rejected by the Sixth Circuit U.S. Court of Appeals. In *Foster v. Walsh* (6th Cir. 1988), 864 F.2d. 416, 417-418, the court held that the appropriate inquiry is whether the function in question is a “truly judicial act,” citing *Sparks v. Character & Fitness Committee of Kentucky* (6th Cir. 1988), 859 F.2d 428, quoting *Forrester v. White*, 484 U.S. 219, 228, 108 S. Ct. 538, 98 L.Ed.2d 555.

In addition, the Ohio Supreme Court, while characterizing a sheriff executing a writ of possession as a “ministerial officer of a court” (*Wholesale Electric & Supply, Inc. v. Robusky* (1970), 22 Ohio St.2d 181, 258 N.E.2d 432, syllabus), granted the sheriff immunity noting that “the law ... should throw its protecting mantle around those executing its mandates and hold them harmless so long as they do only what they are commanded to do, without requiring them

to determine whether it is rightly and properly commanded or not.” *Id.* at 184, quoting *Fawcett v. Linthecum* (1893), 7 C.C. 141, 143.

Thus, strict reliance on a distinction between ministerial and discretionary functions may be misplaced as future Ohio decisions may not follow the route suggested in *Loyer v. Turner*, 129 Ohio App.3d. 33.

4. CLERKS OF COURT

The Ohio Supreme Court has held that a clerk of court was immune from liability when he was acting pursuant to court directive. *Kelly v. Whiting* (1985), 17 Ohio St.3d 91, 93-94, 477 N.E.2d 1123. Since the judge who was sued had judicial immunity, the other governmental employees who were carrying out the court’s order, including the Cuyahoga County Clerk of Courts (and a court referee, the Director of the County Bureau of Support, and the Ohio Attorney General), “enjoy a similar immunity.” *Id.* at 94, citing *Wholesale Electric & Supply v. Robusky* (1970), 22 Ohio St.2d. 181, 258 N.E.2d 432, and *Mennel Mining Co. v. Slosser* (1942), 140 Ohio St.2d 445, 45 N.E.2d 306. See also *Foster v. Walsh* (6th Cir. 1988), 864 F.2d 416 (granting immunity to a clerk who erroneously issued a bench warrant on a traffic fine).

The Cuyahoga County Court of Appeals rather summarily held that clerks of court are entitled to claim absolute quasi-judicial immunity even for negligent performance of ministerial duties. “[Judicial] immunity extends to the clerks of a court for actions taken in performance of the courts’ functions.” *Baker v. Court of Common Pleas of Cuyahoga County* (8th Dist. 1989), 61 Ohio

App.3d 59, 64, 572 N.E.2d 155. The opinion focused on clerks' actions in fulfilling their judicially-mandated tasks and reasoned that, as long as the clerks were faithfully executing their positions, they should enjoy absolute immunity: "R.C. 2303.26 provides that in the performance of his duties, a clerk shall be under direction of the court. Accordingly, the clerks were entitled to immunity from the plaintiffs' common-law claim against them." *Id.* at 65. Cases finding clerks negligent for their poor performance of ministerial functions were disregarded as inconsistent with *Kelly*. This holding is consistent with *Wholesale Electric & Supply, Inc. v. Robusky*, 22 Ohio St.2d 181, which granted immunity to a sheriff executing a writ.

5. GUARDIANS AD LITEM

At least one Ohio court has held guardians ad litem enjoy absolute immunity from liability for their actions. In *Penn v. McMonagle* (6th Dist. 1990), 60 Ohio App.3d 149, 152, 573 N.E.2d 1234, the court focused on the need of guardians ad litem to exercise their discretion in order to accomplish their judicially-created goal to promote the best interests of children under their care. In *Penn*, the Court reasoned that: "[a] guardian ad litem must act in the best interest of the child he represents. Such a position clearly places him squarely within the judicial process to accomplish that goal. Consequently, a grant of absolute immunity would be appropriate." *Id.* quoting *Kurzawa v. Mueller* (6th Cir. 1984), 732 F.2d 1456, 1458.

6. MICHIGAN MEDIATORS

Although it was not considering an Ohio case, the U.S. Court of Appeals for the Sixth Circuit has made one of the most encouraging statements for mediators facing suit in Ohio or for prosecutors charged with defending a mediator who is sued. In a case on appeal from a federal district court in Michigan, the Sixth Circuit noted that: “The [U.S.] district court found that the mediators serve a quasi-judicial function and were absolutely immune from damages ... [t]he appellants do not *nor can they* contest that the mediators serve a quasi-judicial function and should normally be entitled to immunity.” *Mills v. Killebrew* (6th Cir. 1985), 765 F.2d 69, 71 (emphasis added). Although this case involved forced mediation under a Michigan state court rule (which is more similar to arbitration than to traditional mediation), the U.S. District Court held that, because the mediators were performing a quasi-judicial function, they were absolutely immune from damages. *Id.*

7. OHIO COUNTY PROSECUTORS’ OPINIONS

No Ohio Attorney General Opinions have discussed the immunity of court-connected mediators. However, at least two Ohio Prosecuting Attorneys (who also represent county employees when they are sued) have issued opinion letters protecting mediators from liability.

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a. Tuscarawas County

In an Opinion Letter dated October 6, 1999, the Tuscarawas County Prosecutor relied on a letter from the county's liability insurer in opining that common pleas court mediators were county employees covered under the county's liability policy. The insurer noted the county's obligation to "defend, indemnify and hold harmless its employees at the County's expense," if the employees were acting in good faith and not manifestly outside the scope of their duties.

b. Lucas County

In Opinion 94-14, July 28, 1994, the Lucas County Prosecutor relied on R.C. Chapter 2744 in recognizing mediators as court employees entitled to immunity. The Lucas County Opinion finds, in the alternative, that if R.C. Chapter 2744 does not provide immunity, the county's general liability policy (and workers' compensation policy) would cover the mediators.

The Lucas County Prosecutor relied on cases holding guardians ad litem to be quasi-judicial officers (*Penn v. McMonagle* (1990), 60 Ohio App.3d 149, 573 N.E.2d 1234, and *Lovejoy v. Cuyahoga County Dept. of Human Services* (8th Dist. 1991), 76 Ohio App.3d 514, 602 N.E.2d 405, motion to certify overruled (1992), 63 Ohio St.3d 1456, 590 N.E.2d 750) and noted that, while having the court directly appoint the mediators "would do no harm ... it is the substance of the function, not the form,"

which determines whether mediators are performing a quasi-judicial function. Noting the lack of Ohio case law dealing with mediation as a quasi-judicial function, the Lucas County Prosecutor concluded that mediation services comprise a quasi-judicial function.

B. OTHER JURISDICTIONS

Courts outside Ohio have acknowledged the immunity of other court employees with language that seems applicable to mediators or have ruled in favor of mediator immunity. No contrary case law was discovered.

1. DISTRICT OF COLUMBIA—CASE EVALUATOR/MEDIATOR

Since the District of Columbia implemented a mediation program in response to the requirement in the Civil Justice Reform Act of 1990 that federal districts develop plans to reduce court costs and delays (Joseph (1997), *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity*, 12 Ohio St. J. on Disp. Resol. 629, 653), case law in the D.C. Circuit is relatively well-established and is relied on by courts across the U.S.

Wagshal v. Foster (D.C. Cir. 1994), 28 F.3d 1249 is often cited as the foremost case allowing absolute quasi-judicial immunity to mediators. In this case, the U.S. Court of Appeals for the D.C. Circuit held that a grant of judicial immunity should be based on whether the *functions* of the official in question are comparable to those of a judge. This is somewhat consistent with the Ohio cases that consider whether a court employee's function is discretionary, and

therefore more similar to a judge's role, or administrative/ministerial/non-discretionary in nature and therefore not entitled to judicial immunity.

In *Wagshal*, the trial court's case evaluator, also referred to as a mediator, wrote to the judge seeking to recuse himself and expressed an opinion regarding the advisability of further mediation, including which party should pay the costs of mediation. The plaintiff sued the mediator and the mediator's law firm seeking damages. *Id.* at 1250. The district court granted the mediator absolute immunity like that of judges and the appellate court affirmed, holding that "absolute quasi-judicial immunity extends to mediators and case evaluators." *Id.* at 1254.

The Court of Appeals applied three factors: "(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." *Id.* at 1252 (citing *Simons v. Bellinger* (D.C. Cir. 1980), 643 F.2d 774, 778, citing *Butz v. Economou* (1978), 438 U.S. 478, 512, 98 S.Ct. 2894, 57 L.Ed.2d 895).

The D. C. Court of Appeals found the first prong was met because the mediator's tasks included "identifying factual and legal issues, scheduling discovery and motions with the parties, and coordinating settlement efforts" and these tasks are identical to those performed by judges when adjudicating and managing cases. *Wagshal v. Foster*, 28 F.3d. 1249, 1252.

Secondly, conducting “pre-trial case evaluation and mediation also seems likely to inspire efforts by disappointed litigants to recoup their losses, or at any rate harass the mediator, in the second forum.” *Id.* at 1253. Mediation thus met the court’s second prong because a mediator’s work involves intense controversies which could lead to possible future litigation against mediators since judicial immunity would prevent the parties from suing the judge. *Id.*

Finally, the appellate court ruled that appropriate safeguards were in place to deter unconstitutional conduct if immunity were granted since the plaintiff could have approached the judge and complained of the mediator’s conduct or asked the judge to recuse himself. *Id.*

In another D.C. case which involved an arbitrator who, at the parties’ request, also served as a mediator in the time period between the case’s two arbitrations, the U.S. District Court for the District of Columbia Circuit reiterated the holding in *Wagshal* that “quasi-judicial immunity ... applies to arbitrators and mediators.” *National Football League Players Association v. Office and Professional Employees International Union, Local 2* (D. D.C. 1996), 947 F.Supp. 540, citing *Wagshal* at 1252-1254.

Thus, the courts in D.C. allow absolute immunity to mediators on several grounds: because the nature of their work is considered to be quasi-judicial; because mediators might be sued whereas the judge cannot; and because safeguards other than suits against mediators are in place to deter mediator misconduct.

2. DISTRICT OF COLUMBIA—CLERKS OF COURT

The D.C. Court of Appeals has also granted immunity to clerks of court, holding that “immunity applies to all acts of auxiliary court personnel that are ‘basic and integral parts of the judicial function....’” *Sindram v. Suda* (D.C. Cir. 1993), 986 F.2d 1459, 1461, quoting *Mullis v. U.S. Bankruptcy Court, District of Nevada* (9th Cir. 1987), 828 F.2d 1385, 1390. The D.C. court noted that “if immunity were not extended to clerks, courts would face the ‘danger that disappointed litigants, blocked by the doctrine of absolute immunity from suing the judge directly, [would] vent their wrath on clerks, court reporters, and other judicial adjuncts.’” *Sindram* at 1461, citing, inter alia, *Buckley v. Fitzsimmons* (7th Cir. 1990), 919 F. 2d 1230, 1241, quoting *Butz v. Economou* (1978), 438 U.S. 478, 512, 98 S.Ct. 2894, 57 L.Ed.2d 895.

3. DISTRICT OF COLUMBIA—PROBATION OFFICERS

The D.C. Court of Appeals has also granted absolute quasi-judicial immunity to probation officers because their “presentence report is an integral part of the judicial function of sentencing.” *Turner v. Barry* (D.C. Cir. 1988), 856 F.2d 1539, 1540. The court noted probation officers’ duty to serve as *impartial* fact finders for the court (*id.*) and probation officers “would serve as a ‘lightning rod for harassing litigation.’” *Id.* at 1541, quoting *Crosbey-Bey v. Jansson* (D. D.C. 1984), 586 F.Supp. 96, 99, (quoting *Ashbrook v. Hoffman* (7th Cir. 1980), 617 F.2d 474, 476.

The following test was set out by the U.S. D.C. Court of Appeals for granting absolute judicial immunity: “[W]hen (1) their activities are integrally related to the judicial process, and (2) they must exercise discretion comparable to that exercised by a judge,” officials should be immune. *Turner* at 1540, citing *Imbler v. Pachtman* (1976), 424 U.S. 404, 96 S.Ct. 984, 47 L.Ed.2d 128 and *Simons v. Bellinger* (D.C. Cir. 1980), 643 F.2d 774.

4. CALIFORNIA—CASE EVALUATOR/MEDIATOR

California’s Court of Appeals looked at the functions performed by mediators and held that “absolute quasi-judicial immunity is properly extended to neutral third persons who are engaged in mediation, conciliation, evaluation or similar dispute resolution efforts.” *Howard v. Drapkin* (2nd Dist. 1990), 222 Cal.App. 3d 843, 851, 271 Cal.Rptr. 893.

In this case, the plaintiff sued the psychologist who performed an evaluation in a child custody dispute, making three alternative arguments. She claimed absolute quasi-judicial immunity should be granted only to public officials, to those who owe a “duty to public” as opposed to a “duty to client,” or to those who are appointed by court order as opposed to being hired by an agreement of the parties which is ultimately memorialized in a court order. *Id.* at 853 and 902. Relying on *Forrester v. White* (1988), 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 and other federal case law, the California Court of Appeals rejected these arguments, holding that, in these times of increasing reliance on less-traditional and less-formal alternative dispute resolution processes

(*Howard* at 858), the proper analysis focuses on “the importance to the judicial system” of the person’s actions (*Id.* at 855, emphasis deleted), whether the actions are “functions normally performed by judges” (*Id.* at 854), and whether the person is an advocate or a non-advocate. *Id.* at 859.

The court’s lengthy discussion of prior cases and the reasoning process by which it extends immunity based, not on title nor on the existence of a court order, but on whether the person is a neutral performing a function “intimately related to the judicial process,” (*Id.* at 857-860) is more compelling than the court’s bald description of the psychologist/case evaluator as “a psychologist who is mediating.” *Id.* at 859. The dissenting judge criticized the decision as judicial legislation. *Id.* at 865.

5. MINNESOTA—MEDIATORS

The Minnesota Court of Appeals found it unnecessary to determine whether mediators are protected by common law quasi-judicial immunity because mediator immunity is provided by Minn. Stat. 583.26. The Court of Appeals agreed with the trial court’s interpretation “that a mediator is immune from civil liability for actions within the scope of the position as mediator.” *Schaffer v. Agribank*, 1997 Minn. App. LEXIS 139, *5.

This case involved farmers whose land had been foreclosed upon. After several mediations conducted under the Minnesota Farmer-Lender Mediation Act, the farmers lost their land. They sued the mediator, claiming he was negligent in failing to have memorialized in writing an alleged agreement

between the farmers and the lender. When the trial court granted immunity to the mediator under Minnesota's Mediator Immunity Act, Minn. Stat. §583.26, the farmers argued on appeal that the mediator's failure to memorialize the alleged agreement was a ministerial, non-discretionary act outside the scope of the Mediator Immunity Act. The appellate court held that "*even if* the recording of an actual agreement were considered a ministerial task, the mediator used his independent judgment within the scope of his duties as a mediator.... As such, [his] ... determination was a discretionary matter subject to the provisions of section 583.26." *Id.* at 6, emphasis added.

Determining the terms of the parties' agreement (and, in this case, even determining whether an agreement existed) hardly seems ministerial (i.e., characterized by a lack of discretion). The significance of this unpublished case is that the Minnesota Court of Appeals halted an appellant's efforts to circumvent Minnesota's mediator immunity statute by claiming the mediator acted only in a ministerial capacity and was therefore outside the protection of the state immunity statute.

6. MASSACHUSETTS—PSYCHIATRIST/CASE EVALUATOR

The Massachusetts Supreme Court has granted quasi-judicial immunity to a psychiatrist appointed pursuant to a court order directing the probation department to conduct a visitation investigation and report back to the court. *LaLonde v. Eissner* (1989), 405 Mass. 207, 539 N.E.2d 538. Even though the court did not choose or appoint the psychiatrist, the court granted immunity

relying on numerous cases finding that “experts would be reluctant to accept court appointments if they thereby opened themselves to liability for their actions in their official capacity.... [C]ourt-appointed experts, faced with the threat of personal liability, will be less likely to offer the disinterested objective opinion that the court seeks.” *Id.* at 211-212, citations omitted.

Seeking to enhance, rather than limit, the pool of persons willing to accept court appointments, the Massachusetts Supreme Court upheld the trial court’s ruling granting the psychiatrist absolute quasi-judicial immunity. This reasoning seems equally applicable to mediators.

7. STATE MEDIATOR IMMUNITY STATUTES

Since Ohio does not have a statute granting mediators immunity, the case law from states with mediator immunity statutes is less relevant in Ohio. Nonetheless, it is interesting to note that, according to one commentator, “at least twenty-two states have enacted statutes addressing the issue of mediator immunity and do not rely on doctrines of judicial immunity which have evolved in the courts.” Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity* (1997), 12 Ohio St. J. on Disp. Resol. 629, 662 and App. E. (Not all of the statutes cited in the article deal with immunity—some address confidentiality, mediator compensation or mediation only in certain types of cases or courts.) See also Esquibel, *The Case of the Conflicted Mediator: An Argument for Liability and Against Immunity* (1999), 31 Rutgers L.J. 131, 145, listing other states’ statutory immunity provisions.

The State of Florida is noteworthy. When the Florida legislature enacted a set of laws creating a mandatory mediation program for the Florida courts, it specifically provided mediators with judicial immunity “in the same manner and to the same extent as a judge.” Fla. Stat. 44.107.

C. VOLUNTEERS / PART-TIME EMPLOYEES

None of the Ohio cases or the cases from other jurisdictions indicated that volunteer mediators (such as Settlement Week mediators) or part-time court employees would be treated any differently than fulltime court employees or appointees. See also Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity* (1997), 12 Ohio St. J. on Disp. Resol. 629, (acknowledging immunity not dependent on whether the mediator is a court employee (*id.* at 632 & 651) and suggesting that compensated federal court mediators may even be less likely to qualify for immunity or legal representation than volunteers since they may be acting more for fees and less for the public good. *Id.* at 645 & 658-661).

D. CONCLUSION—JUDICIAL IMMUNITY

A mediator exercises discretion in a manner similar to a judge, an arbitrator, a court reporter, a clerk of courts, a guardian ad litem, a case evaluator, a probation officer or any of the other types of court employees or appointees discussed in these cases. The parties are in front of the mediator either because of a judicial order or because the parties voluntarily submitted their pending case to mediation. Either way, mediators more and more frequently function as part of the overall array of options

presented as part of the judicial process. The decisions emphasizing mediators' disinterest in the outcome of the litigation, their neutrality and the non-adversarial nature of their actions make an important point and highlight the similarity between the actions of mediators and of judges. It makes sense that all of the courts who have considered the issue have found the act of mediating similar enough to the function of a judge to extend mediators absolute quasi-judicial immunity.

At least two commentators concur with this conclusion. See Stulberg, *Mediator Immunity* (1986), 2 Ohio St. J. on Disp. Resol. 85 and Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity* (1997), 12 Ohio St. J. on Disp. Resol. 629 ("Case law to date establishes that there is a high likelihood that mediators can successfully defend actions using doctrines of judicial immunity." Joseph, *supra* at 665).

III. SOVEREIGN IMMUNITY

A. INTRODUCTION

In addition to the judicial immunity enjoyed by judges and the quasi-judicial immunity extended to persons who assist judges in resolving their dockets, non-judicial government employees have sovereign immunity for acts taken in their official capacity as government employees. Mediators may also be able to rely on sovereign immunity as a defense. Because quasi-judicial immunity seems more apposite to cases against mediators, this paper includes only an abbreviated discussion of sovereign immunity.

Today's sovereign immunity doctrine descends from the English common-law rule that the king could do no wrong. Since the king could do no wrong, he could not be sued; thus he was immune from liability. *Palumbo v. Industrial Comm.* (1942), 140 Ohio St. 54, 55, 42 N.E.2d 766, citing *State v. Franklin Bank* (1840), 10 Ohio 91 and *Miers v. Turnpike Co.* (1842), 11 Ohio 273; see also *Hass v. Hayslip* (1977), 51 Ohio St. 2d 135, 140, 364 N.E.2d 1376 (1977), Brown, J., dissenting.

B. STATE EMPLOYEES

The State of Ohio is considered sovereign like a king and may not be sued without its consent. *Scot Lad Foods v. Secretary of State* (1981), 66 Ohio St.2d 1, 6, 418 N.E.2d 1368.

The State of Ohio has consented by its Constitution to be sued, but only "in such manner as may be provided by law." Ohio Const., Art. 1, Sec. 16. Ohio's laws contain a limited waiver of its sovereign immunity and a consent to be sued in the Ohio Court of Claims. Ohio R.C. 2743.03; see *State ex rel. Moritz v. Troop* (1975), 44 Ohio St.2d 90, 95, 338 N.E.2d 526.

A case against a state government employee acting in his official capacity is treated as a case against the State of Ohio since the government can act only through its employees. *Scot Lad Foods* at 7, quoting *State ex rel. Williams v. Glander* (1947), 148 Ohio St. 188, 193, 74 N.E.2d 1368, and *Morgan v. Canary* (10th Dist. 1975), 44 Ohio App.2d 29, 335 N.E.2d 883. See also Ohio R.C. 9.86 (immunity); Ohio R.C. 9.87 (indemnity); and Ohio R.C. 109.36.1 (representation by the Ohio Attorney General).

The most significant exception to the general grant of sovereign immunity to state employees concerns employees who act manifestly outside the scope of their responsibilities, with malicious purpose, in bad faith or in a wanton or reckless manner. Ohio R.C. 9.86. These employees are deemed not to be furthering a governmental purpose and they are consequently not entitled to claim the State's sovereign immunity. See, e.g., *Scot Lad Foods* at 9.

There are too many cases and statutes addressing the immunity of various types of state employees and various exceptions to the general policy providing immunity to state employees to discuss each of them here. No cases specifically discuss mediators. As pertinent to mediators, it is important to note that a mediator who is employed by a state court is a governmental employee who may be able to claim sovereign immunity in addition to judicial immunity. The whole line of cases applying Ohio R.C. 9.86 and 2743.03 and granting sovereign immunity protection to state employees who act in furtherance of the State's interests should apply to state court mediators.

C. POLITICAL SUBDIVISION EMPLOYEES

Similar sovereign immunity-type protections apply to employees of political subdivisions of the state such as counties and municipalities, typically when they are performing governmental, as opposed to administrative or proprietary, functions. E.g., Ohio R.C. Chapter 2744; *Hass v. Hayslip* (1977), 51 Ohio St.2d 135, 136, 364 N.E.2d 1376, citing *Broughton v. Cleveland* (1957), 167 Ohio St. 29, 146 N.E.2d 301; *Green County Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d. 551, 556-557, 733 N.E.2d

1141; Ohio R.C. 305.12 and other sections in Title 3 granting immunity to various county employees including prosecutors, coroners and county recorders; *Schaffer v. Bd. of Trustees* (1960), 171 Ohio St. 228, 168 N.E.2d 547, syllabus (counties); *Enghauser Mfg. Co. v. Eriksson Engineering Ltd.* (1983), 6 Ohio St.3d 31, 451 N.E.2d 228, paragraph 2 of the syllabus (municipalities and their employees are immune if performing legislative or judicial (as opposed to proprietary or administrative) functions or if the act involves "...the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion."); see also various sections of Title 7 of the Ohio Revised Code granting immunity to municipal employees including public safety officers, planning and building commissions, and utilities, and *C & D Partnership v. Gahanna* (1984), 15 Ohio St.3d 359, 474 N.E.2d 303.