



Attorney Acting as Mediator May Be Liable for Malpractice

Many mediators in the Commonwealth of Massachusetts are also attorneys. The Superior Court recently issued a decision that demonstrates that such mediators are not insulated from a legal malpractice claim if they cross the line from providing mediation services to providing legal advice.

In *Reid v. Kroll, et al.*, Plaintiff and his then-wife had mediated their divorce dispute with Defendant Stanley Kroll ("Kroll"), an attorney. In connection with that mediation, Kroll drafted a detailed separation agreement. Plaintiff alleged that this separation agreement was poorly drafted and ultimately allowed his ex-wife to collect alimony, in contravention of the parties' intent when executing the agreement. Kroll moved to dismiss, arguing that he had drafted the agreement in his role as a mediator and could not be held liable for malpractice.

The court denied the motion to dismiss. Although a mediator is not deemed to be practicing law simply by developing a settlement agreement, the court found that Kroll had engaged in the practice of law by developing a complex separation agreement that all parties understood would be relied on to secure rights during a Probate Court action. The court found that the separation agreement at issue involved "concepts and legalese that must be explained by a lawyer familiar with this area of practice." Therefore, the complaint sufficiently alleged that Kroll provided legal advice to both spouses in producing the agreement.

The court was not persuaded by Kroll's argument that Plaintiff waived any malpractice claim as a result of limitation of liability provisions in the mediation agreement and separation agreement. As to the mediation agreement, the court found that its limitations only applied to Kroll's role as a mediator and did not extend to the unwritten attorney-client agreement. The court also found that the liability limitations in the separation agreement had no legal effect where Kroll had engaged in joint representation in a divorce action..

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