

Virginia Mediator Certification and Civil Immunity

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Section 8.01-581.23 of the Virginia Code entitled “Civil Immunity” states:

“When a mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, **or** who is trained and serves as a mediator through the statewide mediation program established pursuant to Section 2.2-1202.1, then that mediator, mediation programs for which that mediator is providing services, and a mediator co-mediating with that mediator, shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or conduct a mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. This language is not intended to abrogate any other immunity that may be applicable to a mediator.”

Many attorneys and mediators overlook the “or” in the second line, reading it as “and.” This leads to the erroneous conclusion that certified mediators enjoy civil immunity only in connection with court referred mediations. Section 2.2-1202.1, referenced in the statute, pertains to the state agencies’ internal employment dispute resolution program. The “or” makes it clear that a mediator certified by guidelines promulgated by the Judicial Council of Virginia – a Virginia certified mediator – is accorded the same immunity benefit as mediators trained to provide services in the State’s administrative programs. Further, a close reading of the statute finds nothing to restrict the immunity to court-referred cases.

Still other lawyers and non-certified mediators are unaware that the civil immunity statute exists. Among mediators familiar with it, few (certified or non-certified) understand that the immunity extends to the mediation program under which the certified mediator provides services, as well as

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any co-mediator of the certified mediator. While a non-certified mediator can contract for immunity to a limited extent, it is easy to imagine circumstances where a dissatisfied client might be inclined to attack the mediation contract. A mediation client might feel a lawyer-mediator violated neutrality because of the way he or she discussed applicable law in the mediation; or that the lawyer-mediator gave the other party legal advice if the law favored the other party. If the very contract that established the mediator’s immunity is called into

question, so might be the provision imparting immunity in that particular circumstance.

Civil immunity under law affords the certified mediator greater protection than contractual immunity. Professional liability insurers consider civil immunity under law in underwriting the risk. It reduces the likelihood that the insurer will be called upon to defend an action against the mediator by one of the mediation clients; much less pay out even a small amount for liability. Since it only takes one case to cause problems and if that one can be avoided, in addition to establishing a new, complimentary skill set for one’s legal practice, why not? Extra protection for the lawyer-mediator, protection extended to a co-mediator (who may be a subject matter expert that could assist in particular cases), and protection for any program in which a lawyer-mediator might want to participate as a paid mediator or pro bono, are all good reasons to go the extra mile to obtain and retain mediator certification.

Virginia mediator certification benefits lawyer-mediators in other ways. As a long time mediator mentor, I have often observed how difficult it is for lawyers to get out of “acting like a lawyer” when they are initially trained in mediation. They believe they are demonstrating neutrality, and only facilitating the parties’ communications to enable them to arrive at resolution. However, they are often much more directive than facilitative, display behavior that is subtly authoritarian and have difficulty discerning the difference between giving legal information and legal advice. These actions can ap-

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pear anything but neutral. For the most part, lawyer mentees are genuinely unaware that they have not altered their behavior until the mentor points it out. The mentor works with them to develop actions and behaviors more conducive to maintaining the appearance of neutrality and facilitating resolution. The certification process provides the mentee one-on-one practical guidance from a seasoned mediator mentor, which supports development of strong facilitation skills. When the mentor is satisfied the mentee is ready to mediate independently and provides evaluation information to substantiate this to the Division of Dispute Resolution Services,¹ the mentee achieves mediator certification.

As a form of credentialing, certification lends a degree of confidence to the public and potential clients. It demonstrates that the professional has completed a minimum amount of training and is bound by mediation standards of practice and ethics *in addition to* the lawyers' Rules of Professional Conduct. There is a movement both nationally and internationally to have standards for mediators. Opting for the non-certification path as a professional mediator could impair the perception of professionalism in the mediation field going forward.

1. Dispute Resolution Services is a division of the Office of the Executive Secretary of the Supreme Court of Virginia. Among other things, it administers the mediator certification guidelines promulgated by the Judicial Council of Virginia.

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