

## Judge: mediator performing legal task in drafting divorce settlement

*Husband's claims of malpractice, negligence survive motion to dismiss*

By: Kris Olson    December 16, 2021



Lawyer for plaintiff

A mediator was acting as a lawyer when he drafted a divorce agreement and should not be shielded from legal malpractice and negligence claims over alleged drafting defects, a Superior Court judge has decided.

The mediator had offered the divorcing couple what has become a customary service as the process concludes: the drafting of a settlement agreement that they could then file in Probate & Family Court.

The mediator informed the couple that each might want to have an attorney review the draft separation agreement before filing it.

He also included, both in the mediation agreement and in the separation agreement itself, language purporting to get the parties' assent to hold him harmless for any damages they suffered from the provision of his services.

But so far, neither of those steps has saved the mediator-attorney from having to defend a lawsuit over the husband's allegations that the separation agreement included a drafting error that opened the door for his ex-wife to seek and ultimately receive alimony, contrary to the understanding that the couple had reached through mediation.

In weighing whether the husband's claims should be dismissed, Judge James H. Budreau noted that Rule 9(c)(iv) of the Uniform Rules of Dispute Resolution prohibits mediators from providing legal advice or other professional services in connection with the dispute resolution process, even if they are a lawyer.

Budreau noted that the Supreme Judicial Court held in the 2012 case *In re Bott* that simply "developing a settlement agreement" does not constitute the practice of law.

But that begged the question of when the process of "developing a settlement agreement" crosses over the line to the practice of law.

"Are mediators limited to simply creating a memorandum of understanding between the parties and encouraging them to secure independent counsel to draft the actual settlement agreement, or can they, with the parties' consent, draft the actual settlement agreement that the parties will depend upon and use in Court?" Budreau asked rhetorically.

Language in the Uniform Rules of Dispute Resolution does not provide a clear answer to that question, he added. But the fact that nonlawyer mediators are not permitted to draft a legal separation agreement to be used in court may be "one source of guidance," Budreau noted.

The judge concluded that the drafting of the settlement agreement constituted the practice of law.

"The Separation Agreement at issue here is not a document that [a] nonlawyer mediator could or should produce," Budreau wrote. "It involves concepts and legalese that must be explained by a lawyer familiar with this area of practice."

As for the "hold harmless" language in the mediation agreement, Budreau found that it applied solely to the attorney's role as mediator and did not extend to the additional, unwritten attorney-client agreement that the plaintiff had plausibly alleged existed and under which the separation agreement had been drafted.

The five-page decision in *Reid v. Kroll, et al.* is Lawyers Weekly No. 12-054-21. The full text of the ruling can be found [here](#).

### **Dramatic change?**

The plaintiff's attorney, Roshan D. Jain of Boston, welcomed the decision, first for his client, who was ill-equipped to appreciate the issues with the separation agreement, given his lack of legal training, he said.

But the decision also highlights the "potential pitfalls" for family law practitioners who draft separation agreements as part of their service as mediators, Jain said, adding that it was important that Budreau rejected the mediator's attempt to limit his liability prospectively for providing legal services.

"Hopefully, it's something that can improve practice for divorce mediators," he said.

Boston mediator and arbitrator David A. Hoffman noted that most states permit divorce mediators to draft agreements.

If the mediator is not a lawyer, the written agreement is usually just a bullet-point terms sheet, he said. But if the mediator is a lawyer, most states approve of the mediator drafting a detailed agreement, ready for submission to the court.

"In my view, this has significantly reduced the cost and acrimony for people who choose to mediate their divorce," Hoffman said.

Fortunately, *Reid* does not go so far as to suggest that there is anything wrong, per se, with divorce mediators who are also lawyers drafting agreements, Hoffman said.

He noted that opinions from the American, Boston and Massachusetts Bar associations state that there is nothing inherently unethical about a mediator writing a detailed divorce agreement with all the "typical bells and whistles," even if it does involve the practice of law.

Lawyers who mediate divorces need to do three things if they are going to draft separation agreements, Hoffman said.

First, they should encourage the parties to get their own separate attorneys to review the agreement or get pro bono assistance if they cannot afford a lawyer, he said.

Second, the mediator must get informed consent from the parties to do the drafting.

"Third, the mediator must determine, before drafting, that the parties are truly in agreement on all material terms, so that the drafting amounts to simply implementing what the parties want," Hoffman said.

But Wellesley Hills family law attorney Jonathan E. Fields said that Budreau's decision has prompted him to reconsider drafting separation agreements, at least until the Appeals Court or SJC offers more definitive guidance.

At the very least, a mediator will want the parties in a divorce case to have independent counsel, which Fields said is the case in most of the matters he oversees.

the rule became that the most a mediator could do is draft a memorandum memorializing the "deal points" while leaving the drafting to independent counsel, that would change the practice of divorce mediation dramatically, he added.

Topsfield family law attorney Clinton Dalton agreed.

"To find an attorney-client relationship on all similar sets of facts [to *Reid*] would necessitate substantial change in the divorce mediation process without updated guidance from the URDR," Dalton said.

Dalton likened the drafting of a mediated separation agreement to limited assistance representation rather than an act creating a full and potentially dual attorney-client relationship.



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He added that most mediation agreements make it clear — and most mediators iterate throughout the mediation process itself — that each party should retain independent representation to review the separation agreement with them.

Efforts to reach the defendants' attorney, Aaron R. White of Boston, were unsuccessful.

### **Contradictory clauses**

When John and Kellie Reid decided in 2013 to separate after more than 16 years of marriage, they agreed to resolve their divorce through mediation.

They hired attorney Stanley G. Kroll, principal and owner of the Massachusetts Divorce Mediation Group in Norwell, to serve as their mediator, signing an agreement in which they pledged to "hold the mediator harmless against errors, omissions, or future negative consequences stemming from the mediation process or the preparation of any document."

The agreement further stated: "We have been advised that we each have the right and option to consult our own, individual counsel at any time."

By early fall 2013, John and Kellie had come to an agreement in which they both agreed to mutual waivers of past, present and future alimony that would be forever binding, according to John's complaint.

But the separation agreement that Kroll drafted included two contradictory provisions.

In one section, the mutual waivers of past, present and future alimony appear. But in another section, there is language that seemingly both protects Kellie's right to seek a modification for future alimony and overrides the alimony waivers.

Based on that language, Kellie filed for a modification in the divorce case on May 7, 2018, seeking future alimony, among other

#### **Reid v. Kroll, et al.**

**THE ISSUE:** Was a mediator serving as an attorney when drafting a divorce agreement, such that he could be sued for negligence and



relief.

Believing that the language in the separation agreement would be construed in his ex-wife's favor, John agreed to modify the divorce judgment and provide weekly alimony for 379 weeks, at a total cost of over \$211,000.

He then filed suit in Middlesex Superior Court against Kroll and the Divorce Mediation Group on April 16, 2021, asserting claims of legal malpractice and negligence.

The defendants moved to dismiss the complaint on Sept. 1, and Budreau heard arguments on that motion on Nov. 5.

### Joint representation alleged

In addition to the "hold harmless" language in the mediation agreement, the separation agreement Kroll drafted for the Reids also contained a "general understanding and disclosure" section, which read in part: "At no time has the attorney/mediator acted as an attorney for either of them individually and they agree not to request him to testify or produce evidence in any hearing in connection with the parties' mediation process."

The section also reiterated, "The attorney/mediator has made it clear to both parties that they are each entitled to consult with their own independent legal advisor."

But Budreau found that Kroll had contradicted that language with his conduct, "where he clearly provided legal advice and services" by drafting the separation agreement.

Moreover, divorce is adversarial by nature, Budreau noted. By providing legal services to both Kellie and John, Kroll had engaged in joint representation, triggering Rule 1.8(h)(1) of the Rules of Professional Conduct.

That rule prohibits lawyers from making agreements prospectively limiting their liability to jointly represented clients for malpractice unless those clients have independent representation.

"There are also questions about whether the mediator compromises his appearance of independence upon switching to the lawyer role as Defendant Kroll purportedly did here," Budreau wrote.

Because the plaintiff had sufficiently pleaded that Kroll had engaged in dual or joint representation in the divorce action, Budreau ruled that the language purporting to limit Kroll's liability in the separation agreement had "no legal effect."

malpractice for an alleged mistake in preparing that agreement?

**DECISION:** Yes (Superior Court)

**LAWYERS:** Roshan D. Jain of Burns & Jain, Boston (plaintiff)  
Aaron R. White and Meghan E. Huggan, of Boyle Shaughnessy, Boston (defense)

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