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Mediation Ethics

Cases and Commentaries

Excerpts: Pages 113-125 and 135-153

CHAPTER FIVE

Tensions Between Disputant Autonomy and Substantive Fairness

The Misinformed Disputant

Supporting disputant autonomy seems to be the obviously ethical thing to do when disputants make good choices. It's natural to want to respect and affirm decisions that are thoughtful, well informed, and productive of positive outcomes.

But what happens when disputants are inclined toward agreements that appear not to serve their long-term best interests? More complicated still, what happens when disputants are making those decisions based on incomplete or inaccurate information? In these circumstances, the mandate to honor party self-determination intersects awkwardly with the mediator's interest in facilitating fully informed decision making. In addition, if a party's haphazardly conceived choices yield unjust or inequitable outcomes, this raises questions as to whether a mediator bears any responsibility for the substantive fairness of the mediated outcome.

These are difficult questions that continue to inspire spirited debate. No consensus has emerged regarding how to honor these fundamental—and competing—values. Mediators who think party autonomy commands absolute fealty will be reluctant to challenge disputant deals on account of injustice. Mediators who see their role

disputants often lack a realistic understanding of their options if they reject settlement and decide to try their luck in court. They may be overly optimistic or (though considerably less frequently) overly pessimistic when assessing their chances in litigation. They may misunderstand the mechanics of staging a trial, misperceive the remedial power of a court, and mistake the money, time, and trauma involved. A mediator may seek to perfect disputants' understanding by offering her own sense of the legal rules involved and how they might be applied to the disputants' situation.

But supplying legal information and discussing how that information affects the merit or validity of a legal position falls within the standard job description of an attorney. The Standards are careful to point out that the mediator role differs "substantially from other professional roles" and that mixing roles is "problematic."

Other provisos and qualifications follow. Mediators are allowed to provide information—but only if the content "falls within their training or experience" and only if doing so is consistent with other provisions—including the expectation of impartiality set out in Standard II. In addition, if providing information overlaps with an attorney's educational function, then Standard VI serves as a reminder that "a mediator who undertakes such [a] role assumes different duties and responsibilities that may be governed by other standards."

The Standards do not flat out forbid mediators from talking with disputants about the strength or weakness of their legal arguments, but they do freight the role with significance. They point out that mediators who supply information regarding the legal merits may be viewed as assuming a counselor role and will then be held to the standard of a reasonable "legal counselor." Because moving into this role significantly changes the dynamics, the Standards advise mediators to explain the shift in function to the parties and obtain explicit consent.[2]

Substantive Fairness in the Model Standards

The Standards are silent on the matter of substantive fairness. This is astonishing when one reflects that mediators are, after all, in the business of helping bring disputes to closure and that one fairly uncontroversial goal a society might hold for its dispute resolvers is to work toward agreements that are fair and just.

In absolving mediators from attending to substantive justice issues in their work, the Model Standards take one side of a debate that has brewed in the mediation community for years. In the early 1980s, a celebrated exploration of these issues took place in the *Vermont Law Review* in which scholars Lawrence Susskind and Josh Stulberg battled over the question of mediator accountability. Pursuing the question in the context of environmental mediation, Susskind argued that it is not enough for mediators to guarantee full party participation, capacity, and balanced exchange.[7] Susskind claimed that "the success of a mediation effort must also be judged in terms of the fairness and stability of agreements that are reached."[8] Environmental mediation treats resources—air, water, land—that affect communities at large, not simply the parties at the table. Susskind was concerned that private negotiations over these public goods might yield wasteful and damaging outcomes. What if a powerful development company were able to bulldoze its way over representatives from an agency charged with protecting endangered animals, fragile ecosystems, or precious river rights? Valuable public spaces might be lost or compromised.[9] To prevent this, Susskind asserted, environmental mediation needed to accept responsibility for ensuring "1) that the interests of parties not directly involved in negotiations, but with a stake in the outcome, are adequately represented and protected; 2) that agreements are as fair and stable as possible; and 3) that agreements reached are interpreted as intended by the community-at-large and set constructive precedents."[10]

Stulberg forcefully demurred, objecting that nothing in the mediator's "obligations of office" equips or entitles him to assume the role of "social conscience, environmental policeman or social critic."[11] Stulberg argued that parties will reveal deal-enabling information—"statement[s] of ... priorities, acceptable trade-offs ... desired timing for demonstrating movement and flexibility"[12]—only if they know that the mediator has no stake in the outcome. Mediators can choose to end their involvement in a negotiation that they feel is leading to an unfair outcome, but "that judgment is one for the mediator qua moral agent, not mediator [qua mediator] to make."[13] In other words, for Stulberg, assuming responsibility for the fairness of the agreement represents a tragic abandonment of the neutral stance and an unwarranted expansion of the mediator's proper role.

which seems fundamentally unfair to one party,"[19] while North Carolina permits withdrawal in cases of bargaining inequality, fraud, or "any other circumstance likely to lead to a grossly unjust result."[20]

Note that these code provisions allow, and in some instances require, the mediator to pass judgment on the quality of the disputant's agreement. To be sure, the ambit of discretion is severely constrained. In a court of law, unconscionability is difficult to establish. An unconscionable agreement is so unfair and unbalanced that it "shocks the conscience." It is an agreement that "no man in his senses, not under delusion, would make" and "which no fair and honest man would accept."[21] In borrowing this draconian legal vocabulary, the codes signal that a mediator shouldn't reject the parties' agreed-on resolution unless it is seriously skewed and corrupt. Still, in identifying conditions where the ethical mediator could withdraw her imprimatur from the parties' desired outcome, the codes reflect an abiding concern with fairness and position the mediator as a final check against abuse or exploitation.

Concern for Informed Consent in State Codes

Consistent with the concern for fairness of state codes is a concern with the quality of party decision making. Spurred by the prospect of better party decision making, some states grant mediators considerable latitude in educating disputants regarding the risks and benefits of settlement. But the encouragement is always tempered by worry that a mediator might go too far. Even the most permissive codes imply that any opinions expressed should be carefully worded to avoid appearing as a command or directive. At every point, the desire for informed decision making is counterbalanced by an equally strong focus on the primacy of party views and preferences. Mediators can educate and opine, but their views regarding the law and the strength or weakness of a party's case should be presented as information, not deployed as persuasion in support of a particular outcome.

Although the intent animating the codes seems clear, sometimes the distinctions drawn are not. For example, Florida's Rules for Court-Appointed Mediators allow mediators to "point out possible outcomes of the case and discuss the merits of a claim or defense" while drawing the line at predictions "as to how the court in which the case has been filed will resolve the dispute."[22] Court-appointed

adjudicative process[,] offer a personal evaluation of or opinion on a set of facts as presented, ... or ... communicate the mediator's opinion or view of what the law is or how it applies to the subject of the mediation." A mediator can apply the law to the parties' set of facts as long as the mediator stops short of telling disputants what to do with the proffered analysis.[29] Thus, under the California Code, a mediator could say, "In my opinion, your claims on causation are weak. Despite damages of $500,000, I would estimate that your chances of succeeding at trial are less than 25 percent. Consequently, the maximum value I would assign your case is in a range between $75,000 to $125,000." What is forbidden is to follow the statement with, "So I'd take his offer of $135,000."

Although it is easy to see what the authors of the code were getting at, the actual line drawn between permitted and nonpermitted activity seems nonsensical. Wouldn't any disputant holding a $135,000 offer from the other side be heavily influenced to accept the offer if the mediator told her that her likely court recovery wouldn't exceed $125,000? Does allowing mediator opinions on the law while prohibiting prescriptive statements about the particular decision at hand successfully meet the twin goals of encouraging informed decision making while avoiding undue mediator influence?

If it seems that the California Code's parsing of the legal information-versus-advice line leads to odd conceptual gerrymandering, it is important to remember that the trade-offs being managed are difficult and no clear balance can be struck that will work in all cases. Mediator discretion must be enlisted to determine when concrete applications of law to fact are called for, when they threaten to usurp disputant judgment, and how to tell the difference.

FACTORS INFLUENCING ATTITUDES TOWARD INFORMED CONSENT AND SUBSTANTIVE FAIRNESS

Ambiguity in the codes feeds confusion regarding how much and what sort of information mediators can or should ethically provide disputants. The issue remains knotty. Although we are probably a long way from reaching broad consensus on how much information is enough, insufficient, or too much, we are now at the stage where we can identify the factors that shape our deliberations.

facilitative mediators do not set themselves up as arbiters of the fairness of what the parties decide. Rather, working with the conviction that parties know best what works for them, facilitative mediators equate justice with the parties' own choices.

Evaluative mediators are more comfortable talking to the parties about how they read the relevant law and what they think a judge or jury might do if the case ends up in court. Typically they are more concerned with the information base that parties are working with and more comfortable passing judgment on the equity of the parties' proposed outcome.

Tranformative mediators, focused as they are on encouraging shifts toward greater empowerment and recognition, steer clear of giving information about legal rights. Indeed, Bush and Folger explicitly caution against overenthusiastically pursuing informed consent. They call this problem the danger of "overprotection" and write:

> Because transformative mediation emphasizes party choice based on full consideration of options, mediators may think they have a special obligation to ensure that parties have adequate information before making decisions. After all, if a party lacks information—factual, legal or otherwise—how can that party make an informed choice about what to do? ... However, this view overlooks the point that party choice includes the choice of how much information to consider an adequate basis for decision making. While mediators can and should call parties' attention to the question of whether they think their information is adequate, it is possible to go too far on this point, as on others. When mediators do so, they can wind up discouraging decisions the parties themselves feel prepared to make. In effect, the mediator falls into the pitfall of "protecting parties from themselves," shifting from pursuing empowerment into protection—and disempowerment.[30]

Narrative mediators take a skeptical but inclusive view of the role of legal information in mediation. The principal architects of this model, Gerald Monk and John Winslade, are deeply concerned with fairness and equity, but they don't believe that judges have any special monopoly on divining what those concepts require. Indeed, they opine, "The concept of the courtroom as a place where truth is shared and a fair and just outcome attained is not borne out in most courts."[31] They describe legal discourse as potentially oppressive, as

Although there may be case or statutory law relevant to the parties' dispute, the mediator would not view that information as crucial to the parties' deliberations. Norm-generating mediators emphasize the potential of mediation for realigning power between disputants and the state. In traditional legal settings, parties give over their disputes to outsiders who look at it with an outsider's eye and bring external rules and standards to bear on the most intimate of issues. In mediation, party interpretation, value, and judgment remain paramount. Norm-generating mediators don't wish to bring external social norms into the conversation for fear of chipping away at the parties' unfettered elaboration of their own beliefs and priorities. Talking about what judges or arbitrators might say distracts parties from the creative and empowering task of forging their own norms according to their own values. Bringing legal information into the conversation is not something a norm-generating mediator would be tempted to do.

Norm-Educating Model

Like the norm-generating model, norm-educating mediation is also committed to party autonomy, but it holds a different understanding of how such autonomy is best achieved. For these mediators, parties cannot be fully self-determining unless they are positioned to make informed judgments. Making an informed judgment means knowing the risks and benefits of settling, as well as the risks and benefits of not settling and perhaps going to court. What judges and legislators have said on the topic, then, becomes important, not only so disputants can have a better understanding as to how well their views mesh with larger social judgments, but also so they can better assess the likely outcome if their case ends up in court.

Social norms can include legal, psychological, and other forms of information. An injured plaintiff struggling with a fractured knee might benefit from knowing how judges and juries value and seek to compensate such injuries. Quarreling ex-spouses may benefit from psychological data analyzing the impact of various custody arrangements on child development and well-being. Such information gives parties a broader perspective on their stated demands and helps them better assess the value of continued disputing versus settling on other terms.

Importantly, mediators in this model do not urge parties to adopt the social or legal norms presented. Rather, they present the

legal norms and attends instead to the parties' idiosyncratic feelings and needs. Ensuring that these parties know the local rules governing adverse possession before they reach an agreement is less important than making sure they come away from the discussion with a clearer sense of what they need from each other as neighbors and helpmates.

A mediator with an evaluative or norm-educating bent might raise the ambiguities in the law to suggest that pursuing the matter in court would be a risky strategy for both Frank and Irma. But it is likely that even the most evaluative sort would minimize discussion of technical legalities in favor of strategies that focused on relationship repair and mutual expectations for harmonious coexistence.

Who can say what is fair with regard to Irma's clothesline and compost? Has she "earned" the right to keep these fixtures on Frank's land. Do the fixtures' longevity and Frank's past forbearance mean that Frank is forever consigned to a view of Irma's gray socks and the fragrance of rotting coffee grounds? It's not clear that the local law, or any other law, can answer that question. Does society, in the form of legislative enactments and judicial opinions, have anything more sensible to say than Frank and Irma do? Justice here does not seem to reside in a close parsing of adverse possession law; rather it seems to inhere in the opportunity Frank and Irma have to consider for themselves the relevance of past practice and to think about what they wish to change and what they wish to remain the same.

CASES 5.3 AND 5.4: ILL-INFORMED CLAIMANTS

The harder disputes that follow raise questions surrounding the interplay of informed consent, substantive justice, and disputant autonomy. Counsel are involved in these cases, but they are misinformed. What should the mediator do when she believes that the parties are operating under serious misconceptions of their legal entitlements? Two commentators take on this difficult question.

Case 5.3: Tongan Slip and Fall

You are mediating a slip-and-fall personal injury case. The plaintiff, a newly arrived immigrant from Tonga, was injured when he stopped into the defendant's convenience store to use the facilities on the way to a job interview. The defendant's cleaning crew had mopped the restroom area in the back of the store, but neglected

outcomes are substantively "fair" as long as the rules or norms were impartially applied to arrive at the outcome and the parties had a chance to present all relevant evidence.

In mediation, substantive fairness is quite different. The parties are the arbiters of the relevant facts. A fair outcome is one that parties believe is acceptable and fair—not an outcome, necessarily, that would mirror what a court would do. It is certainly not the outcome that is in keeping with what the particular mediator would find legally or morally acceptable. Rather, the mediated outcome must rest easy with parties' values, principles, and interests, addressing their needs—psychological, moral, and practical—as they judge those needs to be. Even in hard cases, this principle seems relatively straightforward and easy to apply where the party knows about rights that society would grant, and the party chooses to ignore those rights or entitlements to pursue their own ends.[37]

For example, a woman in the process of a mediated divorce decides she cannot stand to fight with her spouse any longer. She wants a fresh start in life. She is willing to abandon what a court might give her. In fact, she sees any money coming from her spouse as tainted, as interfering with her intention to be wholly independent. If she knows what she might obtain in court, a mediator would say she is entitled to choose to accept something less than what she is due. Would a mediator press her to consider whether she would regret this decision at a later time? Yes. But if the woman persisted, her sense of fairness would be honored.

Or imagine someone has suffered from medical negligence: the doctor operated on the wrong knee. The doctor apologizes, and the patient chooses not to pursue the remedy a court would most likely give. The patient believes that mistakes happen, and in his calculus, the doctor has done the morally correct thing in apologizing. The patient is represented by competent counsel who urges the patient to demand a large settlement. The patient agrees to accept something less than what he is due. Would a mediator press him to consider the advice of his counsel? Perhaps. But if the patient persisted, his sense of fairness would be honored.

Even these are not easy cases for many people. Society approves of its own measures of a substantively fair outcome. Nonetheless, the mediator appropriately bows to the spouse who wants an entirely fresh start. The mediator accepts the patient's decision when he accepts an apology instead of a large sum of money. Fairness is

and prevent the remorse that would accompany learning of possible foregone benefits too late. The Model Standards of Conduct for Mediators articulate a preference for informed party choice, defining *self-determination* as "the act of coming to a voluntary, uncoerced decision in which each party makes free and *informed* choices as to . . . outcome [emphasis added]."

A premise of good practice for mediators is to ensure decisions are as thoughtful as they can be. A mediator—as a component of good practice—develops and expands the information base on which decisions are premised. She calls for the parties to uncover assumptions and refine evaluations—both practical and legal—in light of what the other side is saying and by further reflection and sometimes research. She may urge unrepresented parties to get legal counsel. She may ask lawyers to rethink their analysis.

In the Tongan case, she may ask the Tongan lawyer whether he may have overlooked arguments for recovery. She may also ask the lawyer for the convenience store whether there may be other legal theories under which the store would be liable to a potential customer, like the Tongan, who used the restroom or whether the lawyer would be comfortable making his legal argument to the judge. The mediator would properly explore with the Tongan client what costs the client foresees—in both the past and the future—given an injury of this nature. She may ask the Tongan lawyer (perhaps in a caucus so as not to embarrass him) whether he has checked with lawyers specializing in the area about the case's value and whether he has reviewed relevant guides regarding the value of the particular injuries. This urging of the mediator for the parties to inform themselves about the likely court outcome is a prompting toward informed consent. If a party, after being urged to inform himself, chooses not to do that, then regardless of the outcome agreed to by the party, the choice itself is informed by the decision not to seek further information. If, for a variety of possible reasons, the Tongan client prefers $20,000 now rather than making any further effort to research more thoroughly or rather than the possibility of $200,000 later, that is a choice that many might make.

To summarize, the preference for informed consent would mean that the mediator would properly:

- Urge an unrepresented party to get professional advice (but then accept the party's choice not to do that).

The Mediator Must Remain Impartial. The preference for informed consent does not authorize the mediator to serve as the source of legal (or other) counsel that could direct a decision. Mediator impartiality is central to the mediation process. The Model Standards of Conduct for Mediators in Standard II, Impartiality, mandates not only that the mediator be impartial but also that the mediator appear impartial.

Any advice the mediator would give about the value of the case would favor one party over the other. If the mediator tells the Tongan that the case is worth $200,000, then the $20,000 offer is degraded in the eyes of the Tongans. Conversely, the mediator has handed the Tongans a bargaining chip worth (arguably) $180,000. Assuming that the defendants value the case far differently, the mediator may have succeeded in shutting bargaining down altogether. That shift from neutral to partisan is a shift that jeopardizes not only the mediator's actual neutrality, but also her perception of being neutral in the eyes of the parties. The mediator has done what a neutral expert would do and, in the shift in role, has lost her impartiality as a mediator.

So the mediator should not provide the evaluation, though she should urge the parties to seek it themselves—if they want to do that.

Of course, the mediator who urges parties to consider further legal counsel cannot escape the fact that such a suggestion in itself may be perceived as an evaluation that the proposed settlement figure is or may be out of line with the likely court outcome. The mediator response, however, is that she, in an even-handed way, urges all parties to consider making more informed decisions. Asking questions is central to the mediator's job. Answering questions is not.

A Concern About Power Imbalance. The Tongan hypothetical is poignant because the plaintiff does not understand English (much less the nuances of a foreign country's law) and the plaintiff's lawyer appears inept. One imagines, with these facts, a weak plaintiff with a weak lawyer up against a corporate giant (the convenience store parent) with top-notch (and perhaps unscrupulous, given the legal theory advanced) counsel—a strong defendant with strong counsel. Does fairness demand that the mediator correct this power imbalance?

First, it is worth noting that a judge, jury, or arbitrator in an adversarial system cannot correct the power imbalance. Neither can—or should—the mediator equalize the power balance by becoming an advocate for the plaintiff or by supplying the legal counsel that the Tongan attorney seemingly fails to supply.[39]

If all parties requested that the mediator provide legal analysis, then the mediator might consider switching roles. However, her analysis is only as good as the process producing it. Did the mediator look at all the evidence the way an arbitrator would? Did the mediator go (metaphorically) to the library or seek advice from expert colleagues as a lawyer or expert would? Can the mediator screen out information learned in caucus that another neutral would never hear? The challenge with switching roles is being sure that the job is done—whatever the role requires—at the highest level.

THE WRONGFUL DEATH CASE. In the Tongan hypothetical, there is considerable latitude about what the plaintiff should know because of speculation about what a particular decision maker would do and because of the inevitable difference in opinion about the value of a particular case. How about a situation, like the wrongful death case, where clear standing rules appear to dictate—in a more cut-and-dried manner—the litigation outcome?

The analysis again starts with noting the preference for informed decision making. Here, both parties have attorneys who could and should supply information about the standing requirements. Consequently, a mediator should be able to relax as other professionals bear the responsibility of providing legal information as a base for informed decisions. The mediator might ask both attorneys whether they see any potential weaknesses or land mines in their case. If neither points out the potential standing problem and if the bargaining proceeds to a settlement, the mediator has done her job.

These facts do not present a problem of a power imbalance, as both attorneys seem (equally) inept without either having any noted handicap (like the Tongan lawyer). While the mediator would prefer that both sides fully understood the law (here, on standing), the mediator should not become a legal counselor, as such a move exceeds the limits of her job and, in this case, would grossly favor the defendant. It should be some solace to the mediator that perhaps case law has carved out some exceptions to the standing rule, and consequently the mediator may be wrong about the law. The principle of unknowability also suggests that there may be reasons, unknown to the mediator, explaining why the defendant is so ready to pay for the wrongful death. So the mediator should allow the bargaining to continue to its natural conclusion.

acceptable settlement range or being more forthcoming on the standing issue in the wrongful death case.[40] Norm-educating mediators would freely share with the parties what the public norms were, and norm-advocating mediators would require that parties settle in keeping with public norms.[41] Mediators in these schools might be willing to tell the Tongans that the case is worth approximately $200,000 and they might be willing to raise the standing question with both plaintiff and defendant. Some mediators would be highly uncomfortable "allowing" a settlement that was too far out of the range they felt was appropriate or that differed significantly from the likely court outcome. If the parties affirmatively chose a model of mediation where the neutral was expected to provide such evaluative input, then its provision could arguably further self-determination.

I practice a facilitative approach to mediation, one that values the parties' sense of fairness in the mediation context over fairness embodied in public legal norms. So while informed consent is important, I must view it in the context that parties are informed by many things beyond legal norms, and that they are free to choose how much information they need to make a decision. By the principle of unknowability, I must be very humble about what I "know," preferring instead to charge the parties with learning more—if they choose to do that—and making their own decisions about what's fair, as well as about the sources of information that they choose to pursue.

CONCLUSION. Albert Einstein once said, "Whoever undertakes to set himself up as a judge in the field of truth or knowledge is shipwrecked by the laughter of the gods." Mediators do not share the power of judges and arbiters, who, in the context of resolving disputes, are charged with being godlike. Mediators do not have a final say, as an expert advisor would. In their more humble role of asking questions and letting the parties determine both the facts and the principles that will govern their decisions, mediators urge parties to be wiser and more careful. An advertisement for Ditech (which provides home financing) says: "You've Got a Brain. So We'll Treat You That Way." Like Ditech, mediators assume "People Are Smart" (the Ditech logo).

In the hypotheticals, neither the Tongan client nor the parties in the wrongful death action get what a client hiring an attorney bargains for: competent legal advice. However, they are not hiring the mediator to provide that service. They will hear the mediator asking questions.

cases, there should be greater fairness interventions with the Tongan plaintiff's attorney, who is unfamiliar with U.S. legal doctrine and local settlement culture, than with the attorneys in the wrongful death car crash case, who simply failed to read the relevant court rules.

THE PROBLEM OF INFORMED CONSENT. These cases trigger difficult issues related to informed consent, a fundamental principle of authentic mediation that requires parties to understand what they are doing when they agree to participate, while they participate, and when they reach a settlement in mediation. The principle of informed consent is not an end in itself but a means of achieving fairness, a basic goal in any dispute resolution system, and one that requires substantive as well as procedural justice.[43]

Contemporary mediation discourse reinforces the centrality of consent in mediation. The Model Standards require that the mediator conduct the process based on the principle of self-determination, "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."[44] Similarly, the European Code of Conduct for Mediators requires that the mediator take "all appropriate measures to ensure that any understanding is reached by all parties through knowing and informed consent."[45]

There are two aspects of consent in mediation, one relating to participation and the other to outcome. Participation consent requires that parties make a conscious, knowledgeable decision to enter into the mediation process and to continue participating in good faith.[46] Outcome consent requires that an agreement be reached with an understanding of its content, its consequences, and what entitlements may be waived by giving consent.[47] The critical concern in these cases is the quality, and perhaps even the potential validity, of outcome consent. No doubt the Tongan plaintiff, suffering permanent nerve damage, incurring substantial debt, without a job and medical insurance, is "consenting" to the proposed outcome of $20,000 based on his obvious financial needs. But if the mediator is correct in her assessment that the case is worth about $200,000, how likely is it that this plaintiff is making an informed settlement choice? Likewise, in the car crash case, if the mediator knows for certain that the plaintiff has no standing to sue for wrongful death, then the defendant is probably bargaining in the dark, and any agreement reached will be suspect.

may have legal recourse against their attorneys. Although this course of action sounds logical, reasonable, and legally defensible, it is not clear whether it would achieve justice. Would it be fair to a party and attorney who are unfamiliar with our legal system? Suppose the defendant in the slip-and-fall case is a repeat player who has settled similar cases with other unknowing immigrants? What happens to public confidence in the justice system and the Model Standards' goal to promote public confidence in mediation as a process for resolving disputes?[50]

Alternatively, the mediators could rely on the Standard VI requirement to promote honesty and candor and the caveat against misrepresentation of material facts. From this perspective, the mediator's silence in both cases might amount to misrepresentation of a material fact or circumstance, and she would be required "to take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation."[51]

WHAT SHOULD THE MEDIATORS DO?. These mediators need to work within the framework of the Model Standards, principles of substantive and procedural justice, and common sense. The Model Standards must be understood in context, not as absolutes.[52] Fairness principles of procedural and substantive justice should resolve any internal tensions between party self-determination and mediator neutrality. The mediator is more than a self-determination cheerleader for the parties' deal making or an impartial potted plant. She is involved in a trust relationship with the parties.[53] This relationship assumes that the mediator will be sensitive to substantive fairness issues and be concerned that parties do not unwittingly get a raw deal. While the principle of informed consent does not require that mediators offer parties and their attorneys specific legal evaluations (a risky proposition if done without party consent), it does require some mediator nudging in the interests of substantive fairness.[54] In both of these cases, mediator nudging is directed toward moving parties away from their proposed settlements.

The Slip-and-Fall Case. Fairness requires an explicit acknowledgment of the Tongan plaintiff's predicament, namely, that both he and his attorney are unfamiliar with the U.S. legal system and the local settlement culture in slip-and-fall cases. Presumably the defendant's attorney is familiar with both. This obvious power imbalance should

GOING FORWARD. Given the pervasiveness of judicially sponsored mediation programs, problems of substantive fairness are not going away. Going forward, we are challenged to develop new frameworks for safeguarding the integrity of mediation when it takes place in the civil justice system.

While mediated negotiations are not in any way akin to plea bargaining, it may be worth looking at what happens in the criminal justice system before parties give up their legal rights. In criminal cases involving plea negotiations, the judge is required to satisfy himself that the defendant's plea is voluntary and that the defendant understands the nature of the charges. To accomplish this, the judge engages in a colloquy with the defendant and asks a series of questions designed to inform the defendant of his rights and probe his state of mind. A sentence cannot be imposed until the judge is satisfied that the plea is voluntary and made with an understanding of its consequences.

In the civil justice system, in situations where the mediator knows for sure that one of the parties is unwittingly getting a raw deal, perhaps we should begin to imagine and construct a colloquy with the mediator and that party, and think about the kinds of questions that mediators should ask before a party agrees to a settlement. The end product could turn out to be a standardized process for safeguarding the substantive fairness of agreements reached in mediation.

Editor's Thoughts on Cases 5.3 and 5.4 and Comments

Philosophically our two commentators begin at different points and emphasize different values. But when it comes to practical interventions in the cases provided, they do not end up so very far apart. Their preferred responses highlight what some say is the difference between evaluative and facilitative approaches: questions versus statements. Love would nudge the disputants toward information sources with a series of questions, Nolan-Haley with declarative statements.

But note that Love would defer to disputants who determine their information base is sufficient for decision, even if the mediator believes more information is warranted. Deciding how much information one needs to decide is, she states, part of self-determination. Nolan-Haley is not so sure, suggesting, in her coda, that perhaps in

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Both would press the plaintiff, his attorney, or both, to rethink their approach to the case. Love would ask questions—"If you thought the case were worth more, would you ask for more?" Nolan-Haley would speak to the Tongan attorney alone and "suggest" he consult with local personal injury lawyers or review relevant legal doctrine. Both would challenge the plaintiff attorney's legal analysis and push toward a reevalaution—with varying degrees of assertiveness and persistence.

Paradoxically, in the wrongful death case, Love's proposed intervention appears more forceful. She would speak specifically to plaintiff's counsel on the standing question, especially if plaintiff were in an obstreperous cast of mind. Nolan-Haley, feeling that interventions in this case are less called for, would simply remind counsel on both sides to read the local rules. If the parties continued to move toward a six-figure resolution, she would continue to assist on the grounds that defendant may have other good reasons, apart from the threat of litigation, to offer a sizable settlement amount.

It is easy to focus on the differences, but the commentators' shared common ground is more notable. In the Tongan slip and fall, both would work to expand the plaintiff's understanding of situation but would avoid coaching him to ask for a specific sum of money. Both are sensitive to the dangers implicit in remaining passive in the face of the plaintiff's confusion, but they are also wary of assuming an advisory or overly paternalistic role. Both deliberate deeply about the meaning of justice in mediation and strive to mold their practice to that vision. Both acknowledge that there are no magic solutions to the tensions implicit in pursuing informed consent and disputant autonomy, but nevertheless forge reasonable and thoughtful compromises that accord with their individual value preferences.