

# Codes and the Commercial Mediator

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Do the Assumptions Underlying  
Ethical Codes and Commercial  
Mediation Practice Align?

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- The Nature of Disputant Capacity
- The Importance of Disputant Informed Consent
- The Validity of Mediator Case-Assessment
- The Propriety of Mediators' "Therapeutic Interventions" to Combat Disputants' Overly Optimistic or Pessimistic Assessments

# Underlying Assumptions of Model Standards-Capacity

- Ability to Take in Information
- Ability to Appreciate Relevance of Information to Own Situation
- Ability to Weigh Risks and Benefits of Options
- Ability to Apply Personal Values to Risks and Benefits and Make Choices

# Model Standards Assumptions

- Disputants are mentally and emotionally healthy and capable of resolving their disputes
- Primary ethical imperatives are to enhance party autonomy and self-determination
- Mediators bring value-added by helping parties better tap into their own capacities for listening, reasoning, empathizing, strategizing and inventing

# Model Standards Take on “Informed Consent”

- Standard I- Mediation is based on self-determination which means “coming to a voluntary, uncoerced decision in which each party makes free and **informed** decisions
- Qualification in Comment 2- “A mediator cannot personally ensure that each party has made free and **informed** choices ...a mediator should make parties aware of the importance of consulting other professionals

# The Validity of Mediator Case-Assessment

- Standard VI- Quality of the Process
- Case Assessment Viewed as Role Best Suited to “Other Professionals”
- Section 5- The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is **problematic** and thus, a mediator should distinguish between the roles.

# Goals for Commercial Mediators

- The case settles.
- Both sides believe that the agreement was better than their alternatives.
- The process is as fair as possible.
- Both sides view the mediator favorably, and would consider selecting her again.

# Some Implications of These Goals

- Settlement is the primary goal.
- Quality of process is to be “fair as possible.”
- Self-determination is assumed, but not explicitly mentioned.
- The mediator has a personal interest in a good process *and* a certain outcome.

# Assumptions regarding disputant capacity in commercial mediation

- Disputants are often “impaired” by emotion, self-serving bias, and other cognitive heuristics that lead them to make poor choices.
- They may need “therapeutic” advocacy/manipulation by a mediator to make choices that are in their long-term interest.

# The Propriety of Using Therapeutic Manipulation

- Nothing in the Standards Appears to Allow Such Manipulation
- Standard II (Impartiality) Proscribes “acting with partiality....based on...any participant’s performance....at a mediation”
- Pushing a disputant to adopt a more modest (or inflated) view of her legal claims is in tension with impartiality requirement

# The Case of the Misled Disputant: When Legal Counsel Thwarts Informed Consent

- Plaintiff, a recent immigrant from Tonga, is about to settle what appears to be a strong \$200,000 claim for \$15,000. Plaintiff currently has no job, no health insurance, and is in debt to his health-care providers.
- His deliberations are (mis)informed by his attorney's misread of relevant landowner liability doctrine.

# Model Standards as Applied to Tongan Plaintiff

- Ethically permissible to proceed (mediator not required to ensure informed consent)
- May question attorney's (and disputant's?) understanding of case
- May seek additional "adjustments" under Standard VI. Quality of the Process (10)
- May enhance parties' understanding of issues, settlement options

# Conflicting Norms in Commercial Practice?

- Where erroneous understanding of legal entitlements *encourages* settlement, mediators stay out of the way.
- Rationale: Correcting disputant understanding when misperception undervalues legal entitlement is “not my job”; disputant exercised autonomy when choosing attorney.
- But what if an erroneous interpretation *discourages* settlement?

# A Wrongful Death Case

- Couple sues over death of baby in carriage.
- After long day of mediation, defendant's CFO offers only \$50K, although future defense costs alone will exceed \$100K+.
- Plaintiffs are at \$500K but are flexible.
- Mediator estimates 30% chance of plaintiff win, with potential verdict in mid-six figures.
- Defense counsel asks mediator privately to "bring the hammer down" on her CFO..., "make it sound like we'll lose."

# How “good“ hammering works

- Two of the most powerful and effective of human fears are the fear of failure and the fear of success
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# Manipulation vs. “Reality Testing”

- Giving a slanted opinion—overstating risks—is manipulation.
- What if mediator gives accurate info—but intentionally focuses on a sensitive issue?
- What if disputant wants to settle to avoid a risk that mediator views as unlikely? Is silence OK?

# Special Dangers.....

- Due to stress on settlement, mediator:
- May see “impairment” where a disputant is simply applying personal values
- May manipulate disputants to achieve settlement.
- Even if this is acceptable, mediator may err, mis-estimating how much is needed and continuing to push until she gets a settlement.

# Other Issues

- Manipulation is not necessarily intentional. Often mediator feels that she is working and advocating fruitlessly to stubborn, sophisticated and impaired people.
- Manipulation may not be conscious: Thoughts and words may be neutral, but pressure is exerted through tone and body language.

# Conflicts of Interest?

- Commercial mediators are hired almost exclusively by lawyers, not clients, and must keep them content or lose business
- In many cases the party is an organization represented by an executive and attorney.
- What if the lawyer thinks that the executive's judgment is "impaired"?
- Codes are clear, practice is not

# Suggestions-Teachers should sensitize students to....

- The conflicts of interest inherent in commercial mediators' practice
- The tension between the strong interest in settlement and self-determination and impartiality
- Issues that arise when representatives of a single party disagree

# Global Teaching Point

- Hypos Sharpened to Highlight Tensions in Code More Useful in Teaching Ethics Than Taking Codes at Face Value
- Tensions and Contradictions in Codes (and with Practice) Best Illuminated Through Cases