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Session Four: Special Issues in Assisted Settlement, A Symposium: Ethical Issues in Settlement Negotiations

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A SYMPOSIUM: Ethical Issues in Settlement Negotiations

Session Four: Special Issues in Assisted Settlement

A Transcript *Featuring* The Honorable S. Philip Brown, Ronald Jay Cohen, Esq., Professor Ellen Yaroshefsky, and Associate Dean James Elliott, *Moderator*

PROFESSOR LONGAN: The last panel deals with a set of issues that has been addressed by at least a couple of the other panels. Particularly, one was touched on by the other panel this morning. This panel deals with special issues that arise in the context of assisted settlement, by which we mean judicial settlement conferences and mediation.

To moderate the panel this morning we have Jim Elliott, the Associate Dean for External Affairs at Emory University. We have the Honorable Phil Brown of the Superior Court here in Macon, Professor Ellen Yaroshefsky of the Cardozo Law School in New York, and Ron Cohen, a special guest for us, as the current Chair of the Section of Litigation of the ABA, and in large measure responsible for this entire project. He

made a very special effort to be here this morning. Ron, we appreciate that. We look forward to hearing from you. Jim, it's all yours.

DEAN ELLIOTT: Great. Well, what we're doing now is introducing a new element in the sense of a neutral, a judge or a mediator. We're going to be looking at some hypotheticals where the lawyer is still going to be acting as an advocate, albeit before a mediator. And some where the lawyer is going to be acting as the mediator itself. There are a number of the rules that we're going to be touching on, many of which have been dealt with by earlier panels. Just to jot them down: 2.1; comment to 3.2.2; 3.2.3 and 4 dealing with silence and the duty to disclose; and 4.1.2; 4.3.1; 4.3.6 and 5.1.1. As to the issues that are going to be dealt with, disclosures to the court or the mediator; assistance with the recalcitrant client, which has already been touched on a little bit; assistance in the form of legal advice; case valuation in mediation; and the mediator and reporting misconduct. So let's go to hypothetical number one.

You have spent the morning mediating an age discrimination case. Over lunch your client tells you for the first time that he deleted several e-mails from the company's system. These e-mails described the plaintiff as a "geezer," who had to go. Your client forbids you to disclose the existence of this evidence to the mediator or to the opposing party. May you return to the negotiations and settle the case without disclosing the e-mails?

Fortunately, the mediation is taking place in our office and there is a partners' luncheon that's going on, so I have the option now of getting some help. And I've just come into the partners' lunch and I need a vote. Partners, may I return to the negotiations and settle the case without disclosing the e-mail? How many think yes? How many think no? Thank you. All right. Out of the decisive group of partners, we have a vote of about six to two at this point, but fortunately I also have access to a panel of experts, so I can get some additional help to figure out what in the world do I do with this situation.

Ron, bail me out. May I go back in and continue the negotiations?

MR. COHEN: Well, the hypothetical obviously has a myriad of layers. Each layer uncovered raises another issue to resolve, so let me raise some of the layers about which I have some concern, and perhaps if we had more information we would have more definity in the vote of our partners.

First, as Ellis and I, with whom I was riding today, chatted, what is the predicate to the disclosure requirements in the discovery problems here? Have we had obligations as we would in my state on document

retention, have full disclosure so that this issue would have been raised long before mediation absent a very virginal mediation? What kind of discovery requirements do we have to disclose the existence of e-mails, to answer interrogatories about what we've done to produce documents, and to look for documents?

So at least preliminarily to me, as a lawyer, I have to answer the very difficult question, and that is what kind of problem do I have that transcends the one that is immediate to mediation.

So, first of all, Dean, before I would get to the issue of can I go back and mediate this case, I need to take a long pause, take a restroom break and decide what kinds of problems I have. And what I'd like to do is come back before I answer it and not take more time and hear from the other panelists and then give you the answer because I'm not sure several of my colleagues and I would agree.

DEAN ELLIOTT: Good. Actually that may be just as well. But we have a professor who surely is going to be able to give me the direction I need. What do I do?

PROFESSOR YAROSHEFSKY: There's a lot more information we need before I can give you any advice. Following up on Ron's comments, we need facts to determine how to characterize the act of deletion of the e-mails. Was it permissible? Illegal? Potentially fraudulent? Criminal? Potential false statement of material facts? What are the specific discovery requests? To give you good advice, I need more factual information.

I also want you to remember that you probably have signed an agreement as part of this mediation and a standard clause in such an agreement is full disclosure. Maybe you have or will violate this provision. You should be aware that many in the field argue that good mediation practice requires greater disclosure than other forms of settlement resolution. So I need to remind you that the mediation agreement could be set aside by virtue of this nondisclosure. We need more facts.

I want to know what information you have from your client who deleted the e-mails. Who is your client? What do you know about both the content of the e-mails and the process of deletion? What did it mean? Was it deleted unintentionally? Who did it? When? We need to find out the facts in much greater detail.

At some point, I think you should talk to your client about disclosing the existence of deleted e-mails during the mediation. Aside from the ethical questions, there is the practical consequence that the revelation of these e-mails may expedite the settlement process. You may have a

plaintiff whose underlying interest is acknowledgement of poor treatment at the company and an apology for such behavior. Maybe the plaintiff has been called names throughout the course of employment and needs some validation that such behavior is wrong. Perhaps this plaintiff would settle the case if the existence of those e-mails was revealed. A long way of saying that client counseling is critical. So let's get additional facts to help you determine the consequences of the deleted e-mails.

DEAN ELLIOTT: Well, unfortunately this is part of discovery. And when we were having lunch with the client, the client first smiled in telling me about this. "You know, look what a great job I've done. I've helped you out, right? I've gotten rid of all of this damaging evidence."

Now, of course, I lectured the client about what bad conduct this was, which didn't seem to go over particularly well with the client, by the way, who explained to me that, "Gee, I thought you were my lawyer. I could tell you anything in confidence and you couldn't reveal it to anyone." Well, maybe it was a mistake to destroy evidence, but he did it anyway. Where do I go from here?

PROFESSOR YAROSHEFSKY: You're in trouble.

DEAN ELLIOTT: I'm in real trouble.

PROFESSOR YAROSHEFSKY: You're in trouble now because you have determined that it is a violation of the discovery rules, that it constitutes destruction of evidence, so now you need to consider a whole host of issues: state discovery rules, state statutes, ethics rules. You need to talk to your client about your obligation. Apparently, you have not done a very good job of counseling if the client is not aware of the fact that if there was some unlawful action on his or her part that you might have obligations to a court. Some people would argue that you should give your client some sort of Miranda-type warning regarding your obligations.

But your first duty now, having determined the character of the act of deleting the e-mails is to remonstrate with the client and try to get the client to come clean. You start there and we can then talk about your options if that does not work.

DEAN ELLIOTT: All right. What are my options? Go back to the client, obviously, and talk to him. Unfortunately, this client, says, "It's confidential. You can't talk about it. I probably shouldn't have done it,

but I did, and I'm glad." What are my options now? Things seem to be narrowing here a bit.

PROFESSOR YAROSHEFSKY: They are getting slimmer and slimmer.

DEAN ELLIOTT: Ron, do I have many options left at this point?

MR. COHEN: Well, I think maybe you do. I want to take a different viewpoint, not because I necessarily embrace it, but I think oftentimes as advocates we are judges and jurors as well. We take a look at the very plain words and we see the words, "geezer who has got to go," and we come to a conclusion, as a juror or as a judge that those are the most damaging, most god awful documents in the world, and that is a premise upon which we are having this discussion. But one of the dialogues that perhaps we should have with our client is what did he mean? Why did he say it? When was it written, before the lawsuit was filed or after? Did he follow-up with other e-mails explaining what he meant? I'm not suggesting any of this is explainable, but I am saying in the laundry list of advocacy, we ought to be giving our client a chance to say what she or he means. So before we run to unethical behavior and to the attorney general and the United States attorney, perhaps we ought to listen to our client.

PROFESSOR YAROSHEFSKY: I would agree with you but from the facts as they spin out, it appears that we have an independent obligation to the court under the discovery rules. It sounds as if, no matter what the client says, our research tells us that there's a violation of those rules. Arguably, it could even be a crime. If we were not in those circumstances, I would sit back and ask whether this is even a material fact. Have you misstated a material fact? It sounds like we are far beyond that point.

DEAN ELLIOTT: Does the fact that we are before a mediator change anything from what it would be if it were just the two lawyers or the lawyers and clients sitting there?

PROFESSOR YAROSHEFSKY: It depends on the jurisdiction. The question we ask is whether mediation constitute a "tribunal." In Rules jurisdictions, there is a duty of candor to a tribunal that trumps client confidentiality where there is an ongoing failure to disclose material facts or where there has been a false statement of material facts of the offering of false evidence. That duty of disclosure does not exist in

relation to your obligation to other lawyers when the facts are a client confidence and you are not before the tribunal. So one of the questions I will ask you is whether this is court ordered mediation.

DEAN ELLIOTT: Court ordered mediation.

PROFESSOR YAROSHEFSKY: Arguably, you are before a tribunal, so you first need to determine whether mediation is considered a tribunal in your jurisdiction. In such case, you have duties to the tribunal that trump your duties to your client.

DEAN ELLIOTT: When we're trying to decide what a tribunal is, do the Model Rules give us much guidance?

PROFESSOR YAROSHEFSKY: The guidance is provided primarily by case law and the Code which tells us that the determination hinges upon whether it is an "adjudicative body." If so, it constitutes a tribunal. Some jurisdictions have moved in the direction of determining that certain mediations and negotiations are "tribunals," particularly when court ordered, so we could argue that one should err in that direction.

DEAN ELLIOTT: Well, one state, Texas, for instance, has even taken the extra step in their Model Rules of defining tribunal, and it would clearly include mediation, even if not court ordered, as part of that tribunal. All right, but here I am, still struggling. The time for us to reconvene is minutes away. My client is still being recalcitrant. May I go back in the negotiations and continue without disclosing to the mediator or the other side the existence of those e-mails?

JUDGE BROWN: I think you'd have to look at the context closer than we're talked about. We've assumed that the deletion of e-mails violated some rules of discovery or the failure to disclose, but they may not have. The hypothetical doesn't say that. I think you have to pull out your dictionary and see what all is included in the word, "geezer." I mean we know some things have more than one meaning. Had they asked a particular question that would have required disclosure? But I just don't think we can assume that with this.

And frequently it's the case that, you can ask your client, "Well, what was your relationship with the person who called you a geezer?" "Well, they saw me winking at them one time or something like that." And you look at the interrogatories and maybe that's not required. You know, if somebody's just got a personal grudge or something, there may be an ethical way out of the dilemma.

But if you get to the point where there's a direct conflict between what was asked on the interrogatories and what he did, I mean did he guard evidence, didn't disclose evidence that should have been disclosed, I think you've got to deal with that problem. And I don't think you can go directly back into the mediation at that point with a client who has made certain representations that are false and you've learned they are false.

I mean at this point it's similar to the question can you put your client on the stand in a criminal case knowing they're going to lie? And the answer is clearly no. The question is very similar to that. Can you go into a mediation relying on testimony that has already been given that's a lie? Because the settlement process is in the future at that point. You have not settled the case.

If you settle the case in negotiations after that, you will have relied on false testimony. I have a hard time distinguishing between that and putting your client on the stand to lie the first time. You don't have to disclose the lie, because that would destroy the confidentiality, but you, I think, ethically have a responsibility not to rely on a material misrepresentation of the facts. You have to deal with it.

I don't know how you would end up dealing with it. But you talk with your client and you see if he will disclose or do you have to go to the court or somebody. But I think it's improper to rely on something that is a false misrepresentation.

DEAN ELLIOTT: It's clearly an omission, and let's assume that it is going to be something deemed to be material. This is an omission of material information, and I now have only 30 seconds before I have to be back in the room. Any further help?

JUDGE BROWN: Your discovery is not only for what happened but for what might lead to the discovery of information, and if this person who wrote such an e-mail, you know, their testimony might lead to the discovery of information, I think you just have to deal with it. I can't say how, but it's got to be overcome.

DEAN ELLIOTT: Are you going to bail me out? Here I've got to go back in?

MR. COHEN: I'm not sure I can bail you out, or any of us can bail you out because the wealth of this hypothetical provides for no one to be able to be certain, because it lacks so many facts, and that's what makes great hypotheticals. If we have the discovery problems about which Ellen speaks, we probably are going to end up in a conflict with our

client, because I don't see how we can go back and participate when we have ethical issues and conflicts.

On the other hand, in the hypothetical, if the case has not yet been filed, or if it's been filed and it's a week old, and given the circumstances where disclosure requirements haven't come up, there's been no discovery, we have Rule 1.6 that requires us to maintain confidences, we have in Ed's rules, 4.1.1 that says, wait a minute, only under certain circumstances can you possibly give client confidences out, then perhaps you would have a different answer.

Bail you out, I've never bailed a dean out in my life.

DEAN ELLIOTT: Students don't either, so that's all right.

PROFESSOR YAROSHEFSKY: Ron squarely raises the 3.3, candor to the tribunal, issue. If the mediator is not considered a tribunal, confidentiality would trump your duty to the mediator. But you're in a position where you might have to lose some money because you may have to withdraw from this case. In fact, you should withdraw from this case.

DEAN ELLIOTT: Oh, my goodness. That is serious. Withdraw from the case?

PROFESSOR YAROSHEFSKY: Before you contemplate that, you ought to go back in and postpone this mediation. I would advise you to make a literally true statement as to the reason for postponing this mediation such as a "matter came up during lunch." You would tell the mediator that you would like this to be postponed in the hope that over the course of time you will be able to remonstrate with your client.

I believe that the remonstration requirement, both in ethics rules and in practice, is probably one of the most important lawyering tasks. Most clients will take the advice of the lawyer to whom they've entrusted their matter, so hopefully you will be able to avoid this problem.

DEAN ELLIOTT: But it certainly seems to be moving towards the consensus that I can't just go back in and roll on through this mediation and hopefully settle?

JUDGE BROWN: I would say that I would carefully examine the elements of fraud. You know, fraud is a statement made that's false, known to be false at the time it's made, made for the purpose of inducing reliance, it does induce reliance and damages. I would say if you proceeded forward, you would have met all of those elements of fraud,

every one of them. There's a duty to disclose. I mean you're not making a false statement going forward, but you have made a false statement in the past if you've got sworn interrogatories that say that there are now witnesses who have knowledge and this kind of thing. I would say that you would be an active participant in fraud if you proceeded. Where that leads you, who knows.

DEAN ELLIOTT: Well, it was identified — yes?

AUDIENCE: Jim, I think we've changed the hypothetical and gave it an easy answer when you told us later to assume that this was a material fact.

But I'd like to go back to what Professor Moliterno reminded us of earlier this morning and that's how substantive law and context make a difference. The way the hypo is actually written, we can't tell whose e-mail it was that was deleted, whether it was deleted before litigation or during. And under the age discrimination, the substantive law, it makes an enormous difference whether this was written by someone who had any active role or effective decision-making, recommending, role in the discipline the plaintiff is complaining of. And the more remote in time the statement was made from when the adverse action took place, the less likely it is to be material, and it may not even be admissible.

But I think once you ask us to assume all that and say that this is a material fact, then we're right in the heart of the rule and we can't just go back.

DEAN ELLIOTT: Well, the e-mail was written by the head of the human relations department, but at my age I couldn't remember that when we were doing the hypothetical to begin with. Yes?

AUDIENCE: That was the point that I was going to raise is that you need to know who the e-mails were written by and who the client is. If the client is the company, or the client is the president of the company, or whatever, and these e-mails were written by persons with no discretion in the company, just co-employees writing e-mails back and forth, that may make a difference in terms of liability.

DEAN ELLIOTT: Well, we've uncovered another one of the layers, that we are representing a corporate entity. Does that make any difference? This is not just an individual defendant, this is, in fact, the head of human resources in a corporate client. Have we introduced some new problems now that we didn't have just a minute ago?

PROFESSOR YAROSHEFSKY: Now your client is likely to bind the company because the deletions appear to be authorized by those in a position to do so. There may be independent discovery obligations that you violated. That's one issue. Following the comments from the audience, I thought that we were presuming that the deletions were made by your client—a high level company official—and that they were material. But now, this is now an evidentiary issue as well as one potentially affecting liability.

DEAN ELLIOTT: Does it give me any other options? This was not the CEO that I was having lunch with. This was the head of human resources, and we're assuming for the moment, at least, that person clearly has some authority in this area. If I'm able to postpone the mediation, do I have a new alternative without yet resigning from the representation? Ron?

MR. COHEN: Sure. Of course you do. If you're representing a corporate entity and you have decisionmakers whose decision is more significant than the witness, or potential witness, who has just made disclosure, you obviously can go get some authority. Consent is an answer here, and disclosure is an answer here. And it might change the cards. It might change the results of your mediation, but it would at least permit you, I think, to avoid the 1.1.6 problems about which Ellen talks.

DEAN ELLIOTT: Judge, if this were before you, and you were having the settlement conference, and I compound my client's bad judgment by my own, and I do show up again after lunch and continue talking, surely we've got a tribunal issue at this point. Do I have a higher obligation to the tribunal than I had to the other lawyer?

JUDGE BROWN: I can't see that it's higher. I don't know. There may be some rule that destroys that comment. I think taking money from a client is every bit as bad as taking away the opportunity for a court to do justice. I don't know that I would rank those wrongs in any order. I think the duty to disclose is in both places. I don't see where one is more intense than the other.

DEAN ELLIOTT: Well, as I say, my client has bad judgment, we've already determined that. We've determined that I have equally bad judgment because I've come back in. And we have, in fact, settled without disclosing the e-mail. But to show that my client's bad

judgment is worse than my bad judgment, my client has been bragging about this.

Now, over lunch several other lawyers have heard this and have reported it to the plaintiff's lawyer, who felt obligated to report it to the judge. Judge, is this going to in any way affect our dealings when I'm back in front of you in your court?

JUDGE BROWN: No, I don't think so, as long — I may have missed some of your hypothetical. If you come to me and tell me your client just told you something and you report it to me, that certainly doesn't harm our future relations. But if you tell me you knew about it and went forward with the negotiations, I would say that it may. I mean, you know, it may. I'd have to look at it like anybody who makes a mistake and later down the road you look back and say, "Well, that person made a mistake, but I can deal with you fresh this time."

DEAN ELLIOTT: I'm going to get a big sign that says "1.6," and I'm going to wear it wherever I go from now on and say, "Confidentiality, that's what made me do this."

PROFESSOR YAROSHEFSKY: I want him as a judge in all of my cases.

DEAN ELLIOTT: Absolutely.

JUDGE BROWN: Where do you live?

DEAN ELLIOTT: One of the, I guess, disturbing things I heard about someone who had become a new judge was that they had to learn to do a triage. And I thought, I can understand in an emergency room what that is, but what about in a courtroom. And this person said you learn very quickly that there are three groups of lawyers. There is one group that you can't rely on anything they say. There is as larger group where you are skeptical. And there is a group where you know that that lawyer can be relied on absolutely. If they cite a case to you, the case is appropriate. If they make a comment to you, the comment is accurate. I frankly was shocked by that, and shouldn't have been. I think what we're trying to do is get me back into that category three where when I appear in this court, the court is going to feel that it can rely on what I say.

Now, we've already touched a little bit on this, but would it have mattered if the geezer were unrepresented, or pro se in this case? Does that change any of my obligation? Does that make them any higher?

Or have I still got all the same problems I needed to deal with before? Ellen?

PROFESSOR YAROSHEFSKY: Rule 4.3, the Rule regarding Dealing with Unrepresented People, imposes an obligation not to give advice to such persons. The Rule only focuses on the unfair influence that a lawyer may have over the pro se person regarding a misunderstanding of the lawyer's *position* in the matter. However, the practical effect of the Rule may be even a higher level of practice to insure that you do not mislead or misrepresent facts. We talked about that yesterday. But the fact that the person is pro se does not affect whether the deletion constitutes a fraud, a crime, whether it is otherwise illegal or a misstatement of material fact and therefore imposes a duty upon you to take action.

I want to go back to the Judge's comments. New York is a code state where the duty of confidentiality trumps—unlike the Rules jurisdictions. The Judge's comments are in accordance with the New York perspective. I think most judges would be very disturbed to find out that you haven't been forthright when arguably, you're talking about a crime or a fraud. Once you get past all of the layers of e-mail issues, if we decide it's a crime or a fraud, it's much more troublesome.

DEAN ELLIOTT: Any questions on this? Yes.

AUDIENCE: I just want to make a technology comment. If you have e-mail, if you have any kind of large client of substance, they run tapes on all their e-mails. And, so, if I was opposing counsel, I would ask for copies of the tapes, so no matter what you might have deleted it's still on the tape. And you need to explain to your client that just because he deleted it, that doesn't mean it's really gone.

DEAN ELLIOTT: The comment is that in dealing with your client you've got an extra piece of information to bring forward, and that is the client thought he deleted the e-mails, but he probably didn't. There is still evidence of that e-mail. Yes, the plaintiff probably made a mistake in not asking more specifically for information concerning the e-mails, but it's there. The information is there. And you're now instructing your client not to go try to figure out how to destroy the rest of it.

AUDIENCE: I'm curious about the panel's view, sort of taking off on what Hal said. I'm curious about the panel's view of a situation where it's post-discovery and clear questions were asked and it should have been revealed. The lawyer, though, thinks that perhaps the court would

not admit the evidence and the evidence is not material. And, so, it's discoverable, but you have some reasonable argument that it's not material or it's not admissible. Does that affect your decision to go forward with negotiations or your ability to settle, your opinion concerning materiality or admissibility?

MR. COHEN: No is my answer.

DEAN ELLIOTT: Any disagreement? Other questions?

JUDGE BROWN: I would say it would make a difference on how I treated the lawyer in the comment that you had.

DEAN ELLIOTT: Sure.

JUDGE BROWN: I mean when I thought they made a good faith judgment in considering it. If they come in and say, "Listen, I think I made the wrong decision. I'm sort of baring my heart to you." I'm not going to hold that against a lawyer forever. I mean, you know, these questions are hard, and to expect some lawyer to go through his whole career and never make a mistake is unrealistic.

AUDIENCE: And there needs to be a fourth group of lawyers. You've got one group that's perfect, but as the judge said that's pretty unrealistic.

DEAN ELLIOTT: All right, any other questions or comments on this one? Let's go on to hypothetical two.

Now, this may begin to sound a little familiar to you. You represent a plaintiff in a breach of contract case. The client has rejected your advice to accept the defendant's settlement offer. You believe the client is being unreasonable. May you enlist the assistance of the judge in an upcoming settlement conference to talk some sense to your client? Panel three did an excellent job of introducing this one for us, which we thank you. Panel, is it appropriate? We're not going to spend a lot of time on this, by the way, as it already has been touched on. Is it appropriate?

JUDGE BROWN: It's very common. I don't know whether it's appropriate or not.

DEAN ELLIOTT: That's important to hear. So it is usual, or at least does happen fairly regularly, for a lawyer to come to you, Judge, and say to you, "Look, I've got this problem."

JUDGE BROWN: They don't ask you to talk to their client in private. But they'll come to you and tell you their position is unreasonable. They do it sort of in defense of the lawyer. "Listen, Judge, I don't want you to think I'm stupid, you know. I see the handwriting on the wall. But I've got a client that it would be nice if you could do something to help me out." And we don't talk to the client privately, but it's frequent in the case that we'll get in a conference, a pre-trial conference, with the parties there and this sort of thing and talk around it until it becomes obvious to everybody that the client's position is unreasonable. And frequently that jars the case.

DEAN ELLIOTT: Ron, do you have any problem with doing this?

MR. COHEN: I think a lot of this depends upon one's philosophy of mediation; and, so, let me digress for a moment. My own view, mediating six to eight very large commercial cases a year, as an advocate rather than as a mediator, is that we need to prepare our clients for mediation. And one of the ways we prepare our clients for mediation is to teach our clients how a mediator succeeds.

A mediator is not there to determine the merits of your case. A mediator succeeds if he or she leads you to a settlement. So the responsibility, in my view, of an advocate in preparing a client for a mediation is to prepare the client to persuade the mediator that the client won't settle unless he or she gets X, because the mediator won't succeed unless there's a resolution.

So, part of the problem I have with this hypothetical is that very much what Nancy said in the prior panel. You are taking your client in the eyes of the mediator and you are compromising the client. The goals of assistance from the judge are salient. I don't reject them. I adopt them. The question is how does one get assistance. And I would oppose saying to a judge, "You know, my client won't listen. He or she is unreasonable." Because the end result of that it seems to me dilutes your obligation to your client.

PROFESSOR YAROSHEFSKY: That was covered well in the last panel. I would add one other argument. Some lawyers argue that you should not go to the judge at all because it is the client's ultimate authority to decide whether to settle and all that has occurred is that your view of reasonableness is different from your client's. Obviously, that will depend on a variety of factors, including who the client is, their level of sophistication, the type of case, the locale, the nature of the difference about what constitutes "reasonableness" and other factors. It may be that you should not exert any additional pressure on your client.

In many cases, I think you can enlist the assistance of the court. You were hired as the lawyer because you have expertise, judgment, and years of experience. If you conclude that that client is unreasonable, it is your considered judgment and you can go forward and carefully enlist the help of the judge. Oftentimes, it could be argued that it is your obligation to do so.

This issue is often raised within the debate about the meaning and scope of "client centered counseling" and lawyers may differ depending upon their view of the lawyer's role.

DEAN ELLIOTT: Any questions on this one? Judge?

JUDGE BROWN: I need to clarify one thing.

DEAN ELLIOTT: Sure.

JUDGE BROWN: When I say people frequently say this to me, it's not ex parte at all. Usually when this comment comes up is at a pre-trial conference or some hearing, and both lawyers are there. And they'll say, "Judge, you know," in the presence of the other lawyer, "I'm having trouble with my client and we know that. And, you know, I agree with what you're saying. I agree with what you ruled. But my client just won't go along with it. Can you do anything?" I didn't mean to imply lawyers come to me ex parte.

DEAN ELLIOTT: Okay. Any questions on that one? Yes?

AUDIENCE: How does 3.4.2 relate to this?

DEAN ELLIOTT: Panel, how does 3.4.2 relate to this?

PROFESSOR YAROSHEFSKY: There is a continuum. On one end there's suggestion, and on the other end there's coercion. Somewhere between those posts is what is appropriate for the lawyer. Coercion is when you've gone so far that you've overcome the client's will and it's no longer their decision.

What you want to do is insure that the client is making an informed judgment, and that informed judgment is based on thorough counseling.

MR. COHEN: I totally agree with that. I think there's a tension here that often comes up in relationships with the client, and that is the responsibility to provide good guidance, good counseling, as the lawyer for your client. And if you have a very firm belief that your client is

being not just unreasonable but is not looking at what is in his or her best interests, then it's your obligation to try and guide that client to good advice. And if, in fact, you can appropriately, without damaging that client before the judge, before the moderator, before anybody, to assist that client to get better, more reasonable information then it seems to me that's what you want to do in your obligation as the client's advocate and counselor.

DEAN ELLIOTT: Other questions? Well, Ron has given us a good lead-in to the next hypothetical where we're going to move from being advocate to being mediator and to try to determine what is the appropriate role of the mediator.

You are the mediator in a personal injury case. You realize after talking with the plaintiff's lawyer that the lawyer has negligently failed to include an alternative cause of action. The value of the case would change dramatically if this claim were added. May you, should you, advise the plaintiff's lawyer of your observation?

PROFESSOR YAROSHEFSKY: Well, it depends on how you look at mediation. A mediator is a neutral person. A mediator is there to insure that the parties themselves understand their underlying interests, not just their legal position, and that they come to some resolution. Most people would say that mediators should not be giving legal advice but that they may give legal information. The distinction is very subtle, and I'm not sure that it is often understandable.

What you might want to do as a mediator, because your goal is to insure fairness based upon a full consideration of the parties' interest, is to state that "Perhaps the parties should re-think the causes of action that have been raised in this case. There may be issues that have not been fully considered, and you might want to go back and reconsider those." You would not specifically point to a cause of action that should be included.

Some mediators would suggest going further and artfully using language such as, "This is just my personal opinion, this is not legal advice, however, it may be that there is a cause of action that has been left out." The mediator would then name that cause of action that has been left out. I think that's much too close to the line of legal advice as opposed to legal information. But some mediators do that.

Mediators play very different roles. Remember, in this case we have lawyers as mediators. There are often community mediators and other, non-lawyer mediators. Mediation often operates quite differently depending on the context.

DEAN ELLIOTT: Ron?

MR. COHEN: Pat, you did a wonderful job of creating some very interesting issues, because to me this is a great issue in the practical world because it involves both sides.

Let's assume you were the mediator, and you had determined in your own mind that there was a heck of a cause of action here to be asserted. That is a powerful tool in the defense room as well. And can you, and should you, go into the defense counsel's room and say, "You know what, I need to say to you this claim hasn't been asserted yet. But we have very very liberal rules for amendment, including under Rule 14, at trial. And as you evaluate this case, I'm curious, have you considered the potential of this claim?"

And you might rewind and go back to plaintiff, leading from Ellen's viewpoint, and say, "I'm curious, just curious, as I viscerally look at your case you haven't asserted this claim. Share with me why not." That might be one thing. Because we're assuming here that a thoughtful decision wasn't made. There may have been a reason why this claim wasn't asserted. My own view is that I'd like to think of my sisters and brothers in the profession as being capable. And before I decide that this person just ignored a claim and blew a cause, I might want to at least raise the issue with them. But I think there's power in both ends for bringing this case to conclusion with this hypothetical.

AUDIENCE: Just a statement about that last comment. Could the mediator do one but not the other? That is, could the mediator in a private session with defense counsel raise the issue but not in the private session with plaintiff's counsel on the theory that the mediator's role is to try and promote settlement, and if you give this information to defense counsel you are likely to bring the parties closer together if they're apart on their valuations of the case? But if you give the information to the plaintiff's counsel that's likely to drive the parties farther apart and reduce the likelihood of settlement. I mean would it be proper for the mediator to discuss with one but not the other?

MR. COHEN: I think that's a great question, and I think it regularly happens, where a mediator will try and bring a resolution by coming up with a theory, or an attitude, or a philosophy to float in one room to try and bring some religion to their thought process on the valuation of a case. Whether it's proper ethically, a mediator under all of the ethical rules about which I'm aware is a neutral, and this line between neutrality and advocacy is very, very blurred in my view.

DEAN ELLIOTT: And have you ceased being a neutral when you talk with only one side?

AUDIENCE: Well, the problem that I have with that scenario is that when the mediator, who is supposed to be impartial, tells plaintiff's counsel why, or asks plaintiff's counsel why haven't you asserted X, Y, Z cause of action, and if it was just, you know, a flub-up, is that really being impartial now, because then I go, "Oh, my gosh, we've got to do that. Oh, this is great." You know, as the defense counsel, who is sharing the cost of this mediation, I've got a real problem with that. I don't think that's impartial. I don't think it's the mediator's role to educate the lawyer on the other side.

Now, I can see it being used as a negotiating tool with defense counsel. You know, I'm sure you've considered the fact that there may be additional causes of action out there. But as far as the mediator advising the plaintiff's counsel, I think that crosses the line of impartiality.

DEAN ELLIOTT: Judge, what if this were a divorce case instead of a personal injury case, and there are now some unrepresented parties here in the sense of minor children. Does that change the role of the mediator?

JUDGE BROWN: Well, it does in my opinion. That was the comment I wanted to make. I appreciate you leading me into it. Because it depends on, to some extent, whether the goal of the mediation process is to reach a settlement or whether the goal includes the concept of justice somehow. And in a divorce situation all sorts of things happen.

Let me just say this. The largest number of cases we mediate in our courts are domestic cases, so I hate to get a rule that's in the abstract out here that's going to deal with a personal injury claim or some two corporations that have knowledgeable people and how they're going to deal and let that rule tell us how we're going to do cases in divorce, because in the real world out there, in divorce cases you have men and women going to mediation with non-lawyer mediators and neither lawyer for either party is present. I want the rule to be able to take that into account, whatever rule we decide is appropriate.

Women come out of there not knowing that they have the right to equitable division of property, not knowing that they have the right to guideline support for their children, not knowing that they can get equitable division of property even if there's been misconduct on her part, things of this sort.

In the context that we see this, I think it's appropriate for somebody to come in and lay out the elements of what it takes to get a just result. If there are children involved, that child let's assume is a young child, or children, is completely unrepresented. They're depending on the custodial, future custodial parent to represent them. It's important that the children's welfare be represented there. If it's not being represented, if there's a real strong male presence and a woman who's frightened slap to death and who doesn't know anything and is scared to represent herself, I want somebody, if it has to be the mediator, let it be the mediator, to come in and do what it takes to get the just result.

And I don't know whether the rules provide for that. I'm just telling you what I want. We had this argument come up in deciding whether or not non-lawyers should be mediators in such cases. The issue was should we allow the lawyers, or should we encourage the lawyers for the parties to go to mediation? Some mediators say the lawyers act as a hinderance to the mediation process. We can do it a lot easier without the lawyers. Well, you can see why.

These are important questions. And I want a just result. If you don't, it's a problem to the parties, to the children and to the courts because they're going to be coming back and coming back and coming back, and we've got to get justice done at some point. I don't want the rules to be set so that we can't get that.

DEAN ELLIOTT: So that we've come before you for this conference, and the wife, who I represent, has said, "If I have $2,000 a month that will be sufficient." The husband's lawyer had said, "Fine. We'll offer you $2,000 a month as alimony." And I said, "Great, $2,000 is $2,000." And you're sitting there thinking, after taxes $2,000 is not $2,000, and the wife and the children can't exist on that. Is that when you come in and see that justice is done here?

JUDGE BROWN: Well, I don't mediate so I have a hard time saying what goes on. I'm just saying that I had this discussion with the counsel that assign the mediators. They want non-lawyer mediators. They want untrained mediators. They want mediators for a divorce case being lawyers who have never handled divorce cases. They don't want the lawyers there. I'm just saying it's a problem that I want to be addressed in an intelligent way. I don't come here with all the answers.

PROFESSOR YAROSHEFSKY: That raises a number of questions, not the least of which is the unauthorized practice of law—you have non-lawyer mediators giving legal advice. They're practicing law. That's one of the many issues about lawyer mediators versus non-lawyer mediators.

Someone in this situation should give the parties advice. Perhaps the mediator's role is to tell the parties that they might or should seek legal advice. The court should have a panel of lawyers available to give that advice. We certainly do not have lawyers available for such assistance in most cases, so the party is not going to get the advice needed. It's troublesome.

Then we turn to the lawyer/mediator. Many will argue as Judge Brown said, that the mediator's role is not just to settle the case, but to settle it fairly. Part of the mediator's role might be to help the parties evaluate the case. There's a school of thought that says that mediators can be evaluative and an equally large school that says absolutely not, it's a facilitative role only.

DEAN ELLIOTT: Any questions? Yes.

AUDIENCE: In a divorce case if they come back with a report that they have settled it, does that have to be approved by the court?

JUDGE BROWN: Yes, it does, but I mean we don't normally know the facts, except for the income that they base child support guidelines on. Other than that, we really don't know the facts. We don't know whether it's fair. We don't know whether the woman has been brow beaten because we just don't know any of these things.

AUDIENCE: Well, in many instances the court goes over the agreement of the parties and you can just see the settlement going out the window because the lady says I didn't understand it this way and I didn't understand it that way and there it goes.

JUDGE BROWN: Settlement is important, but it's not the ultimate goal. That's my rationale.

DEAN ELLIOTT: Yes?

AUDIENCE: Again I think we've got a couple of important issues and distinctions here. Judge Brown is talking about, say, in domestic cases where at least we have there some judicial control or approval over a settlement agreement supposedly reached by the parties in mediation, at least as to the issue of child support to determine whether or not it's within the guidelines. And if it's not, why it's not. So the parties don't have absolute and complete control in an agreement situation here.

The second issue I think that's very important to determine is to what we're talking about. If we're talking about ethical guidelines for

attorneys, whether or not the attorney is being judged as an attorney or as a mediator, I think is a real concern here because if they're supposed to be, "giving legal advice when they're acting as a mediator," which I think it's been brought out already that this is a neutral position, I think we've defeated the whole issue here in saying you're expected to do something as an attorney mediator that a non-attorney mediator wouldn't do.

So if we're only looking at it as a mediator and not as an attorney, I don't think the ethical guidelines apply necessarily at all, except there are separate ones, I understand, for mediators but not the ethical guidelines for an attorney. We're not supposed to be giving legal advice and certainly we're supposed to remain neutral as a mediator.

If there is a problem with the parties being represented otherwise, if you don't want their attorneys to come to the mediation, that's fine. You understand that you're authorized to have them come, and while that may, "impede the mediation process," then part of the problem again falls back on the attorneys as to properly advising their clients or preparing them for the mediation to give that information.

I think an attorney who fails to advise a client, assuming the client is represented, who fails to advise the client, especially a woman, but in any event to advise them that they may be entitled to equitable division regardless of fault, or for that client not to be properly advised before the mediation is a failure of the attorney to perform his or her duties beforehand.

But to put the attorney, as a mediator, in a position that's different from a non-attorney mediator by expecting him to give legal advice I think is jumping way out of the whole context of what we should be talking about.

DEAN ELLIOTT: Any other comments? Anything else, panel, on this one before we go to hypothetical four?

Again you're a mediator, this time in a personal injury case, in which the plaintiff will make a sympathetic witness but will face significant, though not necessarily insurmountable, legal barriers to recovery. In the caucus sessions, may you emphasize the legal obstacles to the plaintiff and the sympathies to the defendant? Ron?

MR. COHEN: My view of impartiality is that that's an issue in which each side is treated fairly and the mediator doesn't impose his or her biases on those parties, that the mediator is there to facilitate justice, a just result. And to me, part of what a party buys into in agreeing to a mediation, or participating even by court order, is to learn something about his or her case from the viewpoint of a neutral.

We don't need to accept what the mediator says. It is not a ruling. The mediator is not going to decide the merits of our case, and that's why I will not mediate a case through a judge who is presiding over my trial eventually. But I can listen to a mediator and accept or reject what she or he thinks about my case. I'm not required to accept what they think. But I want to know what they think and then make an evaluative thoughtful analysis as I continue to learn about my case.

So, to me, when I sit in mediations I want to hear the viewpoints of a mediator, whether he or she truly, genuinely, sincerely believes the other side is sympathetic or there are very difficult obstacles. So I think you retain your neutrality still by telling your own visceral reaction, and that is a buy-in when you agree to mediate.

PROFESSOR YAROSHEFSKY: It seems to me one of the issues this raises is disclosure of your view of the role of mediator. It is one thing if when you start the mediation you explain to the parties that there are different ways in which a case could be mediated. You're of the view that you will assist them in evaluating and have them understand that from the beginning. Maybe some clients don't want that and want a total facilitator who will help the parties talk to one another and will not make any statements regarding an evaluation of the case. I mean that doesn't work in all cases, obviously. There are some cases where people just don't know what the appropriate role of the mediator might be in that case, but certainly it would help in some cases.

DEAN ELLIOTT: Well, this may certainly be one of those cases where you have the recalcitrant client, knowing the approach of that mediator and going through mediation before you got it closer to trial may have been the opportunity for the neutral to say to your client, "Aren't you perhaps being a little unrealistic or unreasonable or whatever," and may actually hasten the process. Any other comments on this?

PROFESSOR YAROSHEFSKY: There are many mediators, though, who will tell you that one of the reasons that's not an appropriate role for them is it doesn't encourage settlement. That because the role of mediation is to look at people's underlying interests and not necessarily legal positions that if you, because you are a lawyer, understand their legal positions and can point that out to them, that in effect you're undermining their ability to settle for their true interests.

DEAN ELLIOTT: Yes?

AUDIENCE: I think there's maybe something you ought to discuss with opposing counsel first. How do you and opposing counsel see the mediation session? Do you want a mediator who is going to be an absolute neutral or do you want a mediator who is going to give an evaluation to the other side? I think you set the ground rules before you go into the mediation.

DEAN ELLIOTT: And you should. Other questions? Comments?

AUDIENCE: I think that's the whole point, though, is that you know your mediator ahead of time and know what the role of the mediator is. And, so, a lot of times what you would do is you would pick a mediator you want that would fulfill what you would expect of that particular mediator.

DEAN ELLIOTT: Other comments?

JUDGE BROWN: I've got a question.

DEAN ELLIOTT: Sure, Judge.

JUDGE BROWN: I'm not actively involved day-to-day in mediations, but I would ask the question, what can a mediator do if a mediator cannot discuss with parties the pluses and minuses of their case? I mean the goal is, I think, of a mediation to get the parties to realize themselves what is their desire out of the case, what their needs are in the case, not just their position. How would you get to that in an intelligent way and change it from the way the party came into the room without discussing the pluses and minuses of the case and the relative strengths and weaknesses of the opposing case? I just can't imagine this being a problem for the mediator to say, "Listen, you know, you cut your little finger, but it's not worth $1,000,000."

DEAN ELLIOTT: And it's a nice little finger, but not a million dollar little finger.

JUDGE BROWN: I mean I just don't know what else a mediator would do besides discuss the relative strengths and weaknesses of both sides.

DEAN ELLIOTT: Other comments? Yes.

AUDIENCE: Say, if you don't do that, or say you don't ask it at some point, it's almost going to be like trying to buy a car. He writes down a number on a piece of paper and slides it over to you and you write down a number. I don't think you really want to have a conference like that where you're just transferring numbers. But you do have to have some insight from the other side.

DEAN ELLIOTT: And one of the real benefits, I think, of having mediation is that you can have a neutral who is in that posture. Other comments or questions?

AUDIENCE: Ron, the description you gave of preparing your client for mediation I assume was one that based upon your experience that many mediators do exactly what is suggested in this hypothetical. They'll go into plaintiff, and what they'll do is talk about how great the defendant's case is. They'll go into the defendant and talk about how great the plaintiff's case is. The idea being that the mediator just wants to settle this thing. And, so, you see your role as a lawyer, in part, to protect your client from that kind of tactic and the influence of that kind of tactic. Am I right about that?

MR. COHEN: You are a hundred percent right.

AUDIENCE: I guess if you prepare your clients like that, do you find that your cases don't settle quite as much as other cases do? And do you also think that the mediator, and you anticipate that the mediators are going to act like that, do you think that these mediators are acting inappropriately by doing that?

MR. COHEN: I believe there are mediators in this country with whom I have worked who are over-zealous to get a settlement. I think they violate the judge's well-stated rule, and that is settlement is not as important as justice. In commercial litigation cases, which is what I do, justice sometimes is very hard to define. So I don't often put my right to decide the umbrella of justice when we're talking a whole lot of dollars. But I think mediators do overstep their bounds. I don't totally disagree with what Nancy says. I think we have to use good judgment.

And in answer to your direct question, it's interesting because sometimes the cases that I handle take two mediations, or three, and don't get settled on the first mediation in part for the reason you well-articulated.

DEAN ELLIOTT: Other questions? Let's go to hypothetical five. Again, we're touching on something that has been touched on before in terms of the lawyer on the other side, but in this case it's the mediator who learns that one of the lawyers has a conflict of interest. The lawyer refuses to divulge the conflict to his client or the court. May you report this misconduct to the court? Should you report this misconduct to the court?

PROFESSOR YAROSHEFSKY: Well, probably it depends where you are. There are numbers of statutes. There are now 300 statutes that talk about confidentiality within the scope of mediation. And there is a uniform code for mediators that's being proposed with some people arguing that because the mediator is in such a significant role that the mediator has the privilege of confidentiality that's akin to attorney/client privilege, which is to say everything that's in that mediation stays within the mediation and shouldn't go outside of it. Now, the uniform standards don't say this. The uniform standards have a number of exceptions to that. And that would include, as it does in some states, an exception for professional misconduct.

So, number one, you have to look at your confidentiality statute and see what it says. Lawyers, obviously have an independent role to report lawyers whose behavior lends a substantial question as to their fitness or trustworthiness in terms of the practice of law. And it seems to me that mediators are bound by that no matter what.

The question is, does this rise to that level? I mean, are you going to tell me more about this conflict of interest before I'm going to be able to tell you whether it should be reported? What it raises is the question of how confidential is this process and do we believe, do mediators believe that they are going to be able to fairly resolve cases if they have an obligation like this. And another question, if so, should they tell the parties up front?

DEAN ELLIOTT: Well, and it does also raise the question, when you have started the mediation and you as a lawyer have been a part of this three-party confidentiality agreement, which is not unusual for a mediation, have you now eliminated your requirements under the Model Rules for making the report? Now, as Ron Ellington pointed out yesterday, in Georgia we can solve that problem very easily because you do have a clear obligation to report, but if you don't there is absolutely no sanction whatsoever. So that makes it a lot easier to deal with. But in other jurisdictions where there is no requirement of reporting, doesn't this mediator still have the obligation of reporting the conflict, assuming the conflict raises, is of significant import in the case? Ron?

MR. COHEN: I think the 8.3 obligation is critical. I see in every mediation in which I participate a contract that I have to sign, my client has to sign, and all the parties have to sign as to confidentiality, but I believe the law is clear, at least in my jurisdiction, Arizona, and that is one cannot contract away his or her obligations. And, in fact, I wonder just introspectively whether I can sign that contract ethically which attempts to get me to contract away my ethical obligations. So, to me, 8.3 trumps everything. You have those obligations, and if it's a serious conflict you've got a responsibility.

PROFESSOR YAROSHEFSKY: Now, in the case that comes out of the court out of Washington, D.C., there was a confidentiality agreement and during the course of the mediation the mediator found out about a significant conflict of interest and told one of the parties he's going to report it. The mediator went to the court and the court essentially decided what was the correct course of action.

DEAN ELLIOTT: Judge?

JUDGE BROWN: I would hate to leave with the idea that we only have a choice, report or not report. And this may be seen as a way to weasel out of this hard question. I assume that you've given the correct answer if you limit your options to report or not report. But any two people in a relationship, like mediator to counsel and this sort of thing, have influence on each other. There are other options in some situations. There may not be in the one that you envisioned here. But one way would be to impress upon the lawyer, and especially if it's a young lawyer, who is just winding her way through the process. And you can say, "Listen, you've got this obligation to report. Now how are we going to deal with it? You have the conflict. You may not have realized you had it. But what are we going to do in the situation now that we both recognize that there's a conflict?" You know, one thing you can do with a conflict is completely divulge it and see if the other parties agree that you can continue anyway. All I'm saying is I think it has to be dealt with. I don't say that you have to report this, but it needs to be dealt with in an appropriate way.

DEAN ELLIOTT: Questions or comments from the audience? Yes.

AUDIENCE: Just, as a matter of interest with respect to what you said about the Georgia rules, it would affect lawyers but not judges. If the judge becomes aware of it, the judge must report it under State law.

JUDGE BROWN: You say if the judge learns it he must report —

AUDIENCE: If the judge is aware that a lawyer is operating improperly, he must report it to the State Bar or it's a violation of his contract.

JUDGE BROWN: I think so, unless it's cured. I mean I think you're right.

DEAN ELLIOTT: Other comments or questions?

PROFESSOR YAROSHEFSKY: Let me just say, one of the arguments that a mediator made to me is wait a minute. Under attorney/client privilege if your client tells you don't report that other lawyer, you can't do it because it's privileged. Why shouldn't we be subject to a similar kind of rule? Which is to say, in the context of mediation, we all agree that it shouldn't be reported. That's part and parcel of the mediation. Why shouldn't we be able to do that? And I have my answer, but they look at 1.6 and think that the exception there ought to apply to mediators as well.

AUDIENCE: The hypothetical didn't indicate if this mediator is an attorney or a non-attorney mediator.

DEAN ELLIOTT: The mediator is an attorney.

AUDIENCE: So that you may have a different answer depending on whether the mediator also works as an attorney the rest of the time?

DEAN ELLIOTT: The comment is, does it make a difference as to whether the mediator is an attorney or not in that the attorney works as an attorney the rest of the time, but does that change the role when this person who happens to be an attorney is the mediator?

PROFESSOR YAROSHEFSKY: Well, you're reporting the misconduct of the lawyer, right?

DEAN ELLIOTT: Right.

PROFESSOR YAROSHEFSKY: Lawyers have the obligation to report lawyers. It's not everybody in the public. It's our code that binds lawyers. I'm not sure I understand the question.

JUDGE BROWN: I think that's an appropriate answer. You know, lawyers do have obligations under the law and rules and regulations that non-attorneys don't have. And, so, we have to honor those if we are lawyer mediators.

DEAN ELLIOTT: And when you put your mediating hat on, it doesn't take your lawyer hat off.

JUDGE BROWN: That's right.

MR. FOX: I just wanted to say, we've been talking about mediation a lot. Ethics 2000 proposals have treated mediation as a non-tribunal event. We came down on that side. There are a lot of smart people in this room who deal a lot with these issues. If you think we've got it wrong, please let us know because it makes for an important decision.

Our view was mediation was closer to settlement discussions. It's not an adjudicative process that's going to result in a finding, final and binding decision. But reasonable minds can differ, so I just urge those who think we have it wrong, or haven't thought about and now are thinking about it, to let us know.

DEAN ELLIOTT: And if it is a tribunal, it does bring some new issues back in it. So please feel free to let Larry be our mediator in a sense of getting the information back to Ethics 2000, if you think that that role should be different. There was a question back here. Yes.

AUDIENCE: I'm a student so maybe I don't understand, but I thought that the attorney/client privilege would not allow an attorney to continue to help a client perpetrate a fraud or a crime, so why should the mediator have a privilege, a confidentiality privilege, that would allow him to help this attorney perpetuate this conflict of interest?

PROFESSOR YAROSHEFSKY: Maybe we should not but we make distinctions between crimes, frauds, and other kinds of conduct. Sometimes we discuss inclusion of illegal conduct or other conduct that violates the ethics rules as exception to confidentiality. In general, crimes and frauds are treated more seriously and are well recognized exceptions. There are policy reasons that exclusion and inclusion of other actions that do not rise to that level.

DEAN ELLIOTT: Yes.

AUDIENCE: As a mediator in Florida we're subject to the rules of the Center for Dispute Resolution, which are approved by the Supreme Court of Florida the same way that the rules governing the professional conduct of attorneys are approved. If you divulge anything outside the mediation, including, I would think, this, you are subject to a complaint to the Center for Dispute Resolution and you can lose your certification as a mediator. I would have to think that when the law set up the procedure for mediation and qualifies mediators, partly upon the fact that they are lawyers, then puts the rules overlaying confidentiality of mediation absolutely, that's an absolute rule, then it would have to trump the duty to report.

DEAN ELLIOTT: Otherwise you're in a bit of a bind, right? If you don't report, you could get disbarred. And if you do report, you could be decertified.

AUDIENCE: Right.

DEAN ELLIOTT: All right. On that happy note, any other comments? Thank you.

PROFESSOR LONGAN: I should have mentioned before we began that panel one thing in connection with the guidelines. At this point the task force has made the tentative decision not to include in the guidelines special rules relating to assisted settlement, although that issue remains open. So if you have been looking in your notebook for the guidelines on assisted settlement, you are not missing something. They're not there. And that's by choice.

We're going to break for lunch, but first I want to again thank the panel, and I want to give Ron Cohen our final word, since it is, after all, the ABA Litigation Section project that we have been examining. It's only fitting that the Chair of the Section have the last word.

MR. COHEN: Thank you very much. Thank you all so much for letting me come, first of all. I did want to take a moment just to say thank you to this great law school for hosting this issue and for not only targeting it but letting us learn so much today, for sure, and I understand yesterday as well. So thank you very very much.

And to say that Pat assembled a star-studded group is the ultimate understatement. I don't know that I've ever seen a group on issues which are as important as this as qualified. And, so, congratulations. And to Ed Waller, who you've met, who has spent a year of his life

devoted to this project, we all will at the end owe a huge debt of gratitude to Ed and to his group.

So I am thrilled to be here, and Pat, congratulations. Thank you all so really very much.