Mediation: Common Practices and Ethical Boundaries

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Abstract: This true story of a mediation in a personal injury lawsuit describes a sequence of events and fairly common practices that raise significant questions about mediation ethics as well as attorney ethics.

The following story is true, other than alteration of names and other non-consequential details to protect privacy. "Schmidt," the Plaintiff in a personal injury litigation, shared many details with this article's author, including emails and texts, on which this account is based. He offered these in the hope that his experience might spark conversation and insights into ethical issues that can arise when a lawsuit is addressed via mediation.

The Crash

Schmidt, as I'll call him, is a law school professor, a licensed attorney, and also a mediator who provides occasional *pro bono* mediation and legal counsel as community service outside his professorial responsibilities. Schmidt is also a long-time motorcycle enthusiast, often riding on excursions with fellow bikers.

One fine day Schmidt was enroute to join some biker friends for a pleasant springtime ride. Traffic was almost nonexistent, as this was early during the Covid-19 pandemic. As he approached an intersection the light was green, but an oncoming driver made a left turn just in front of Schmidt. The resulting crash left the car undrivable and the bike totaled. Schmidt sustained various injuries requiring orthopedic surgery with six months' rehab. A good overall outcome nevertheless also brought some long-term sequalae with a somewhat uncertain future.

Schmidt engaged an attorney who then filed suit against the driver. Fault was not in question, given the car driver's failure to yield as she made a left turn in front of oncoming traffic. Three insurers were involved: the car driver's minimal liability insurance, Schmidt's own un/underinsured coverage, and a separate umbrella policy Schmidt had purchased

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for additional coverage. Subsequently the first two of these agreed to pay policy limits, hence the only party remaining was the umbrella carrier, which was then named as defendant. Not long thereafter the court sent the case to early mediation, as was this court's standard practice.

Mediation Day

Mediation, briefly, is a process by which disputing parties identify a third person whose purpose is not to hear information and decide, or even recommend, what the outcome should be — that would be arbitration — but rather to facilitate parties' negotiation with each other.[1] As such, mediation's core values include *neutrality* (the mediator must be impartial to the parties and neutral as to the outcome), *confidentiality* (negotiations can proceed more freely if they know that what is said in mediation will remain private), and *self-determination* (the parties themselves, not the mediator or the attorneys, decide the outcome).

Mediation was conducted virtually on a Monday morning. As fault was uncontested and two of the insurers had settled, the only question concerned what amount the umbrella carrier would pay.

In private caucus the mediator asked Schmidt "tell me what's important to you," Schmidt described a broad array of information the other side did not yet have. No depositions had yet been conducted, nor interrogatories. Thus far only Schmidt's medical records and an Independent Medical Evaluation (IME) had been made available to the defendant insurer. The medical records were incomplete in various respects and, because the IME had been conducted rather early, it did not account for an additional injury that was diagnosed later. Defendant also was unaware that Schmidt's surgeon had said "all these people [with this type of injury] do terribly."

Partly the dearth of discovery was because the court standardly orders early mediation and also because, as Schmidt later learned, both sides' counsel had agreed not to conduct discovery yet, hoping instead the matter might resolve in mediation.

Mediation concluded without a settlement and without the defendant hearing much if any of the missing information Schmidt had described. Schmidt's attorney asked whether it would be okay to continue negotiations.

Two Days after the Mediation

During a phone conversation two days later, perhaps feeling the general pressure and hurry surrounding the whole situation, Schmidt told his attorney "If they'll pay $X, I'll sign." The mediator relayed the offer to the defendant, who counter-offered $Y two days later. Schmidt rejected $Y that same day, a Friday.

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As any first-year law student learns during Contracts course, this left no offers on the table. A counter-offer takes the original offer off the table, and the refusal of that counter leaves no offers in play. Per Schmidt's attorney, "I told them 'we'll see you in deposition'." Schmidt was relieved, having entertained regrets almost immediately after suggesting $X. After all, considerable potentially important information was not yet in defendant's hands.

The following Monday morning Schmidt received an email from his attorney:

> The defense attorney and carrier, upon reflection, have agreed to pay you [$X] in new money which was what we told them would settle the case last week when they instead chose to offer you [$Y] in new money. They have also agreed to pay all of the mediation fee. I am working on the remaining aspect of the property damage claim and will be in touch soon.

Schmidt was shocked. A dead offer — one he'd regretted making — had been placed on the table without his knowledge or consent. And then his own attorney incorrectly presented defendant's response as a done

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deal. Schmidt phoned to express concern to his attorney, who responded that if Schmidt wanted to reject the deal — reject his own offer! — the opposing party would wonder what on earth might have changed Schmidt's mind in such a short time … what sort of irrationality might be going on.

The next day Schmidt sent his attorney this email:

> At 2 this morning I figured out what was bothering me yesterday.
>
> It looks like the mediator overstepped his bounds. Once my offer was rejected, it was off the table. When we rejected [insurer's] counter-offer, that left nothing whatever on the table. Period. Contracts 1L.
>
> But then it appears the mediator unilaterally took it on himself to place my earlier offer back on the table. Without consulting me. He assumed, without asking, that my offer had been given with some measure of enthusiasm, that I had not regretted ever putting it on the table. … And so he pressed [the insurer/attorney] and got them to agree to what *he* decided ought to happen.
>
> The result, of course, is now that I am effectively boxed in. "What on earth could have changed from last Friday to this Monday?" "Schmidt is irrational!!" If I refuse this "settlement" I am now marked as obstinate, while everyone else is being more than reasonable. …
>
> As an experienced mediator, I have long been concerned about two prevalent features of mediation these days:
>
> First: the standard approach commonly exerts a strong drive toward a settlement, too often whether or not the parties really endorse its particulars, on the assumption that surely the parties are better off if the matter is settled, so long as the terms are within the parameters of what the attorneys deem reasonable.
>
> Second: a major, largely unrecognized and assuredly undisclosed conflict of interest permeates the process. Mediators are selected by the lawyers, and mediators cater to lawyers to win additional business from them. They commonly contact each other, choose a date, then hand that date to the Parties. In just that way I was marginalized at the outset of this process. Out of the blue I received your associate's letter telling me to appear for mediation on a specific date and time. Until then I had no idea that mediation was afoot, nor was I asked whether the chosen date would work for me. That marginalization reappeared yesterday.
>
> Our mediator apparently smelled Settlement in the waters and dove for it. Carve another notch in his gun belt. Maybe not consciously, but the incentive is so insidious and the conflict of interest is so powerfully built into the system, it's difficult to avoid. Lawyers prefer mediators with higher settlement rates. And in the case of [this court's] early mediation mandate, any settlement is a huge win.
>
> When this mediator placed a rejected offer back on the table, with neither the Party's knowledge nor permission, I think he overstepped an ethics line.
>
> For right now, I think I'd like to chill for a while.

Schmidt's attorney responded by email:

> Great points and I don't disagree with most of them. I do disagree with your assessment of [the mediator] though. He just kept pushing to get you a number that he thought you would accept. He does like to claim victory, but he also knows the benefit of a settlement over prolonged litigation.

Notwithstanding "I think I'd like to chill for a while," later that day Schmidt's attorney phoned, requesting an answer within the hour: would Schmidt accept or reject $X. She insisted that $X was just an offer made by the defendant insurer, and that Schmidt would not have to accept it. Later that day Schmidt acquiesced to $X, though he held off signing final settlement documents until he could resolve some outstanding issues with his attorney's behavior.

Schmidt soon obtained access to several rapid-fire emails between the two attorneys. Shortly after the mediator "nudged" defendant and counsel to accept $X, counsel then directly emailed Schmidt's attorney:

> [T]his will confirm my client agrees to pay the [$X]. We are settled for that amount.

Clearly, the Defendant had been falsely presented with $X as a *bona fide* new offer from Plaintiff — which

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they then accepted — just as Schmidt was then falsely told that a final deal had been consummated.

Schmidt's attorney, having been caught in a sleight-of-hand, then undertook a hasty, post-hoc re-frame of the whole process, describing the resurrected $X as simply a nice new offer the defendant insurer made to the plaintiff. She emailed the mediator, citing defendant counsel's email that "[w]e are settled for that amount."

> Please see the [above message] from [defendant counsel]. I do not have authority to accept this offer or reject it at this time but hope to get some guidance from [Schmidt] later today. We gave [opposing counsel] the opportunity to settle for $X and his client rejected that offer and made a counter proposal of $Y. **He then, with your nudging, made a new offer to pay $X** in new money which has not been accepted or rejected yet. You confirmed for me earlier this week that you never told [opposing counsel] that you had authority from us to accept the $X in new money after he initially rejected our proposal but [opposing counsel] nonetheless sent me the below email. I may very well get authority to accept the offer later today but wanted to let you know promptly after receiving his email. Please call to discuss before you call or email [opposing counsel]. [emphasis added]

In contrast to this re-frame, we recall the email Schmidt's attorney initially sent him:

> The defense attorney and carrier, upon reflection, have agreed to pay you [$X] in new money (total of $Z) which was what we told them would settle the case last week when they instead chose to offer you [$Y] in new money.

The reader is invited to consider whether this message merely articulates a new offer from the defendant, or whether instead it describes the insurer's acceptance of a figure that somehow was either still on the table, or had been re-offered by Schmidt.

In the end Schmidt "agreed" to $X. Although depositions and other discovery could in theory be conducted, he believed that, once the insurer had been arm-twisted into accepting a figure they had vehemently rejected earlier, it would be highly unlikely the company would increase the amount it was willing to pay. Schmidt concluded he had effectively been boxed in.

Consulting the ADR Board's Ethics Committee

Schmidt decided to seek an opinion from the state ADR board's ethics committee. He promised both his attorney and the mediator that no names would be used and that any identifying information would be masked. This would just be an effort to ask the committee whether events surrounding the mediation comported with the board's ethics standards. Of note, the mediator was also a licensed attorney and, in his state, mediators who are also attorneys must abide by the rules of attorney ethics as well as those of mediator ethics.

Schmidt's letter described the relevant events, framed as a hypothetical and including the fact that the case had been removal to federal court prior to mediation. The letter then posed three questions, centered particularly on mediation's core value emphasizing parties' self-determination:

> **Question, version 1**: *Assume Mediator has acted unilaterally.*
> Does Mediator overstep ethically appropriate boundaries by not expressly seeking Plaintiff's permission to resurrect an earlier, rejected offer?
>
> **Question, version 2**: *Suppose Mediator did contact Plaintiff's counsel about resurrecting Plaintiff's defunct offer of $X but did not ask counsel to elicit Plaintiff's permission to do so.*
> In this scenario, would Mediator's failure to secure Plaintiff's consent overstep ethical bounds?
>
> **Question, version 3**: *Suppose that, instead of version 2, Plaintiff's attorney initiated outreach to Mediator: "I don't know if my client/Plaintiff will accept this or not, but why don't you ask Defendant again whether they would accept $X?" With this phrasing, it is clear to mediator that counsel has not secured Plaintiff's permission to resurrect $X.*
> If Mediator fails to ask counsel: "please check with your client first," does this violate mediation ethics?

Four months later the ethics committee responded that, because the (hypothetical) mediation was conducted in federal rather than state court, opining on Schmidt's questions would fall outside the parameters of its authority.

Two weeks later Schmidt submitted the same hypothetical scenario to the ethics committee, but

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described the scenario as situated in state rather than federal court.

Nearly 5 months later the ethics committee responded:

> … Because the factual scenario in your second submission involves a hypothetical [state-governed] mediation, the Committee does not believe the issuance of an advisory opinion would be proper. …

In other words, the committee first declined to render an opinion because it deemed a case in federal court to be outside the scope of its purview. The second time it declined to opine because the case was a hypothetical mediation (notwithstanding that many of the ethics questions on which it is asked to opine will be framed as hypothetical mediations).[2]

Some time later Schmidt spoke informally with one of the ethics committee members — a person who was a friend as well as a member of the local mediation community. In an affable conversation they agreed on three things:

- [1] Resurrecting a dead offer without party consent was clearly unethical, regardless of whether it was done by the mediator, by Schmidt's own attorney, or by both in collaboration.
- [2] Schmidt's own attorney was likewise unethical in presenting defendant's acceptance of (resurrected) $X as a done deal.
- [3] These sorts of practices are quite common among attorneys and mediators. If the committee had openly labeled such actions as unethical, the committee's credibility — and its weight to influence other matters of mediation ethics — would almost certainly suffer a significant blow. The committee's major if not only power is the extent to which people are willing to honor its decisions. The politics of the situation had carried the day, which was in some sense understandable, and understood by both.

Given his concerns about ethically dubious actions, Schmidt attempted to negotiate a reduction in his attorney's contingency fee of one-third. During those conversations Schmidt learned about an additional problem. In her motion to ask the court to extend its usual deadline for mediation his attorney had stated: "The parties attempted to schedule this mediation within the current deadline and have also worked to expedite party depositions prior to the mediation. The parties are working to move this matter forward in discovery." This, Schmidt now knew, was false. Counsel had mutually agreed to not to undertake any depositions until after mediation. Deceiving the court was obviously wrong even if also not particularly rare in such circumstances.

Schmidt shared his experiences with a close confidant who, as an attorney and mediator herself, offered to mediate informally between the two. The attorney agreed to reduce her fee, and the litigation was finally settled.

Broader Reflections: Ethics

As noted above, self-determination is a core value of mediation: the parties, not the mediators or the attorneys, are to decide the outcome. To Schmidt, mediation appears to have strayed from that value, into a process largely dominated by the needs and expectations of mediators and lawyers — not just in his own case, but more broadly as well.

Although this is not the setting for extensive exploration, it may be useful to reflect on how mediators address self-determination. In an approach dubbed *facilitative* mediation, the mediator emphasizes exploring parties' deeper interests, abjuring any attempt to steer them in any particular direction.[3] Facilitation is clearly geared toward honoring parties' autonomy.

In *evaluative* mediation mediators are more likely to express opinions, including to assess the merits of various options and predict what might happen if the parties return to court instead of settling.[4] That said, even evaluative mediators must stop short of deciding the outcome or, shy of that, rendering legal advice or otherwise unduly pressuring a party. While evaluative mediation thus carries somewhat greater risk of infringing self-determination, that outcome is not inevitable. Indeed, where parties labor under mistaken beliefs or unrealistic expectations, the mediator as a trusted neutral can enhance autonomy by enriching a person's understanding. Thus, if the plaintiff in a personal injury suit is now fully healed after two broken ribs, her demand for $2 million, based on the other driver's failure to apologize after the accident, will almost certainly fail if the case returns to court. Improved understanding about the costs and uncertainties of trial may help her conclude an agreement that she might well find superior to returning to court.

The important question is: what counts as overstepping the ethical line? Our response first requires philosophical analysis. It is one thing to broaden parties' understanding, and quite another to manipulate or, beyond that, effectively preempt a party's decision, e.g. through coercion. Thereafter, we will consult more formal ethics rules for both law and mediation.

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Philosophical Concepts: Coercion

Coercion need not threaten physical violence. Rather, coercion occurs when someone is required to choose between illegitimate options. That is, coercion might be best understood as either having no choice or as having no acceptable choice.[5]

Here Schmidt did, technically, have a choice: acquiesce to $X or reject it and head into further discovery. The next question is whether the options themselves, particularly $X, were illegitimate.

On one hand, as Schmidt concedes, $X was not an outrageously bad number; rather, it was incrementally short of the number that would likely emerged, had parties gone into discovery that provided defendant with the array of information they did not yet possess, as Schmidt had emphasized during mediation. In this sense it was not illegitimate.

On the other hand it could be argued that $X was not legitimately on the table, given that [a] Schmidt did not consent to resurrecting $X, that [b] the defendant was apparently misled into thinking Schmidt had voluntarily re-offered it, and that [c] Schmidt was then improperly presented with $X as a done deal. Because the resurrected $X was the product of behind-the-scenes maneuvering and in some sense was not legitimately on the table, the situation smacks of coercion. Still, if we believe that coercion seems a bit extreme here, perhaps *manipulation* better describes what occurred.

Philosophical Concepts: Manipulation

Manipulation comes in three basic forms: deception, pressuring, and exploiting emotional vulnerability or character defects.[6] Schmidt's case particularly invokes the first two.

Pressuring

Informally, the first problem was the attorney's failure to tell Schmidt that mediation was afoot and to consult him about dates, thereby effectively marginalizing him as his needs were subordinated to the mediator's and attorneys' schedules.[7] And then during mediation, as Schmidt recounted the extensive array of information the defendant lacked, his attorney texted to him:

> Remember LESS IS MORE…Stop talking.

Marginalizing Schmidt may not entirely have been an oversight. As Schmidt noted in the "morning-after" email to his attorney, mediators are under significant conflicts of interest as they earn their livelihood by earning attorneys' repeat business. The more settlements a mediator can achieve, the better. Manipulating the parties can easily become a component of that success — here, perhaps, from the very outset.[8]

Attorneys can face analogous conflicts of interest, particularly those whose fee is a percentage of the final settlement. At a certain point, where further effort is unlikely to yield large additional gains, it becomes attractive to minimize the additional time one spends — hence attractive to pressure clients toward settlement. For both, then, marginalizing the clients' voices can be strategically useful.

Deception

Following the post-mediation offer, counteroffer and refusal, and then after the arm-twisted insurer agreed to pay $X, Schmidt was told the insurer had agreed to $X after all — as though $X had still been on the table.[9] This was directly deceitful: per standard contract law, $X had been removed via the counter-offer of $Y. Additionally, the insurance attorney's subsequent email to Schmidt's lawyer, "[w]e are settled for that amount," indicates that they too appear to have been deceived into thinking Schmidt had voluntarily re-offered $X. It is not clear whether these deceits came mainly from the mediator, or whether attorney and mediator collaborated on it. Either way, plaintiff and defendant were both were deceived.

Additional Pressuring

The whole situation left Schmidt essentially "boxed in." He could acquiesce to $X, but that number was likely smaller than it would have been, had a normal discovery process shown the defendant insurer all the missing information. Alternatively, Schmidt could reject $X, knowing that the defendant almost certainly would not move higher from a number that it had earlier rejected vehemently. Indeed, their number might well have moved lower. This was not the normal pressure of negotiation. Rather, the pressure was artificially augmented because the context of the choice had been altered behind the scenes.

From the foregoing pressuring, deception, and additional pressuring, we conclude that Schmidt was manipulated if not outright coerced. That said, all this may or may not amount to transgressing the specific ethics rules governing mediators and attorneys. We turn to those now.

Ethics Rules Governing Mediators and Attorneys

Some of the relevant rules come from American Bar Association (ABA) Model Rules of Professional Conduct,[10] which serve as a template for many states' rules for attorney ethics. Additionally, states issue

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their own rules governing attorneys, mediators, and attorneys who serve as mediators. To preserve parties' privacy in this Article, rules from Schmidt's state will be described but not precisely cited. We will consider ethics for both the attorney and the mediator. The goal is not to determine, definitively, whether anyone violated ethics canons, but rather to provide readers with the basis for a thoughtful consideration.

table. Most laypeople, in contrast, would have believed that the defendant simply reconsidered and accepted $X after all. They would therefore have been duped into accepting a "settlement" that bypassed their consent — clearly an ethics violation.

Here, a related question is whether this was still an ethics violation, given that Schmidt caught the deception before the deal was finalized. We leave that question here, but note that the ABA Rules do not suggest ethics rules should somehow be applied more leniently if the client happens to be an attorney or is otherwise well-enough informed to spot and stop an unethical action. That is, it would be difficult to argue that otherwise-unethical actions suddenly become ethically acceptable simply because they got caught before the damage was done.

Mediation is a delicate, often difficult dance. A broad spectrum lies between, at one end, abstaining from all forms of influence (a highly facilitative approach), to completely usurping someone's decision at the other (not the case here). In between lies broad space for manipulation. The intent behind such manipulation need not be malicious.

We first cite ABA ethics rule 1.2:

> ABA Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer
> a) ... a lawyer shall abide by a client's decisions concerning the objectives of representation.

Per Rule 1.2's Comment [1]:

> Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation ... The decisions specified in paragraph (a), such as whether to settle a civil matter, also must be made by the client. ...

And per Rule 1.4's Comment [2]:

> ... a lawyer who receives from opposing counsel an offer of settlement in a civil controversy ... must promptly inform the client of its substance ...

In sum, the client, not the attorney, makes the decision whether to settle. To Schmidt, by resurrecting a dead offer without his knowledge or consent, then presenting it to defendant as a new offer, then describing defendant's response as a completed agreement,[11] his attorney and arguably also the mediator appear to have attempted to settle the matter without his consent. The only reason they did not succeed was because Schmidt, as an attorney/law professor himself, knew that defendant's counter-offer of $Y took $X off the table, and then his rejection of $Y left nothing on the

A second ABA rule is 1.4:

> Rule 1.4: Communications
> (a) A lawyer shall: ... (2) reasonably consult with the client about the **means by which** the client's objectives are to be accomplished ... [12] [emphasis added]

Here, Schmidt argues that placing $X back on the table constituted a "means" by which settlement might be achieved. To Schmidt, it would have been easy for his attorney simply to ask "is it okay if we place $X back on the table?" The primary, likely only, reason for failing to do so, in his estimation, is that he might have said no. Had Schmidt said no, counsel would then need to spend considerable additional time in discovery. Particularly for his own attorney, paid via a one-third contingency fee, the added time would not likely bring a hefty additional compensation.

In a third relevant rule, Schmidt's state requires that attorneys who act as neutrals (as was the mediator in this case) shall:

> not seek to coerce or unfairly influence a party to accept a proposal for resolution of a matter in

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> dispute and shall not make any substantive decisions on behalf of a party.

Here a key empirical question concerns the extent to which the mediator knew that Schmidt had not been consulted about whether to place $X back on the table. If he knew that Schmidt had not been consulted, he may well have crossed this ethical line. If he even failed to ask Schmidt's attorney about it, arguably that too would be an ethical failure, because this was a substantive decision being made on Schmidt's behalf. If in contrast the mediator had a reasonable basis to believe Schmidt agreed to resurrecting $X, then the mediator would arguably be ethically clear.

In a fourth state- as well as ABA-based nest of rules, mediators must disclose any relationships with attorneys or parties (past/present/future), and must not use the ADR process to solicit or encourage future business with any party. They likewise must disclose personal, not just financial, conflicts of interest.

Here the mediator's conflict, described above, was to earn more business by maximizing the number of settlements he achieves. The attorney's personal interest was to minimize the additional time s/he spends on the case, once a reasonable resolution appears to be in sight. Admittedly, these particular kinds of conflict are rarely if ever disclosed. Yet here it appears that they may have actively functioned to limit Schmidt's options in settlement.[13]

Conclusion

Mediation is a delicate, often difficult dance. A broad spectrum lies between, at one end, abstaining from all forms of influence (a highly facilitative approach), to completely usurping someone's decision at the other (not the case here). In between lies broad space for manipulation. The intent behind such manipulation need not be malicious. As Schmidt's attorney suggested, after the mediator elicited defendant's "reconsideration" of $X:

> He just kept pushing to get you a number that he thought you would accept. He does like to claim victory, but he also knows the benefit of a settlement over prolonged litigation.

Nevertheless, even benignly motivated paternalism can be an offense against self-determination. The question of what counts as crossing the line will not likely be resolved definitively, any time soon. Nevertheless, it is hoped that Schmidt's experience will enlighten the conversation.

Note

The author has no conflicts of interest to disclose.

References

1. For a more extensive discussion of mediation, *see*, *e.g.*: R. Fisher and W. Ury, *Getting to Yes: Negotiating Agreement without Giving In* (New York: Penguin Books, 1991); C. W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 4th ed. (San Francisco: Jossey-Bass, 2014); K.I Kovach, *Mediation in a Nutshell*, 3d ed. (St. Paul: LEG, Inc. d/b/a/ West Academic, 2014).
2. As a state-approved mediator, Schmidt reviewed his state's rules governing mediation and believed that the ethics committee was probably incorrect in declining to opine on his first, federal court, version. Per those rules, the state's ADR board governs any mediation conducted by a state-approved mediator, for any civil action in a court that has continuing jurisdiction over the matter. Although exemptions are identified, the rule does not exclude actions in a federal court. On further study, Schmidt also could not locate any provision that would restrict the committee from opining on hypothetical litigation. Hence the committee's response to the second, state-based, version of the scenario was also arguably incorrect.
3. K. Shonk, *Types of Mediation: Choose the Type Best Suited to Your Conflict*, Daily Blog, Harvard Program on Negotiation, February 27, 2024, *available at* <https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/#:~:text=In%20facilitative%20mediation%20or%20traditional,exploring%20each%20other's%20deeper%20interests> (last visited March 28, 2024).
4. See Shonk, *supra* note 3.
5. W. Wood, "Coercion, Manipulation, Exploitation" (Chapter 1) in C. Coons and M. Weber eds., *Manipulation: Theory and Practice* (New York: Oxford University Press, 2014): at 21.
6. *Id*., at 31-32, 35 (citing: M. Baron, "Manipulativeness," *Proceedings and Addresses of the American Philosophical Association* 77, no. 2. (2003)). Deception includes not just outright lying, but also misrepresentation such as encouraging false beliefs. *Id*., at 31-32. Pressuring "can involve browbeating, wearing down the other's resistance, and making someone agree to something just to avoid further discomfort or embarrassment." *Id*., at 32. Both are designed to induce people to make decisions they would not otherwise have made, if left unencumbered. *Id*., at 31-32, 35.
7. Much of the responsibility here lay on his attorney, but as a mediator himself, Schmidt believed the mediator also had a responsibility. In his own experience, when attorneys would say "give us a date," his standard response was always "let's find several dates that work for us; then run them by your clients and we'll get one that works for everyone." That said, Schmidt could have responded that the date did not work for him. But that would make saying "No" his very first act in mediation — hardly conducive to optimism for achieving agreement.
8. In some cases, manipulation may especially fall on the Plaintiff. In personal injury suits, for instance, the Plaintiff is typically an "average Joe" from a car crash or slip-and-fall, unschooled in law and mostly or entirely reliant on the attorney for help and guidance. The opposing party is typically an insurer with a wealth of savvy and power. Although the Plaintiff always has the right to say yes or no to a proposal, manipulation involving pressure and circumscribed information can be used to short-circuit self-determination.
9. From counsel's email to Schmidt: "The defense attorney and carrier, upon reflection, have agreed to pay you [$X] in new money (total of $Z) which was what we told them would settle the case last week … "
10. *See* American Bar Association (ABA), "Model Rules of Professional Conduct," *available at* <https://www.americanbar.org/groups/professional_responsibility/publications/model_

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rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/> (last visited March 28, 2024).

11. From the defendant's counsel: "[w]e are settled for that amount." Then per Schmidt's attorney: "The defense attorney and carrier, upon reflection, have agreed to pay you [$X] in new money (total of $Z) which was what we told them would settle the case last week when they instead chose to offer you [$Y] in new money."
12. *See* American Bar Association (ABA), "Model Rules of Professional Conduct," *available at* <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/> (last visited March 28, 2024).
    a. Per Rule 1.4's Comment [2]: " … a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance …" (*available at* <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_4_communications/comment_on_rule_1_4/> (last visited March 28, 2024)).
    b. Similarly, per ABA Rule 1.0(e): "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct" (*available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_0_terminology/)> (last visited March 28, 2024). Here, too, "adequate information" about "reasonably available alternatives" during negotiation would suggest a conversation about re-offering $X versus continuing with discovery.
13. Another likely ethical breach deserves mention. Per ABA Rule 3.3(a)(1): "A lawyer shall not knowingly … make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." *See* ABA Rules, *supra* note 12, *available at* <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/> (last visited March 28, 2024). This one rests on both sides' attorneys. Early on, both agreed that they would not yet conduct depositions, but rather would see whether they could resolve the case in mediation. However, in her court-filed motion to extend the court's ADR deadline Schmidt's attorney stated: "The parties attempted to schedule this mediation within the current deadline and have also worked to expedite party depositions prior to the mediation. The parties are working to move this matter forward in discovery." This was false, and presumably it was material to the court's decision whether to extend the deadline, else Schmidt would not have mentioned it in his motion.

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