On Professional Practice

By Paul M. Lurie and Sharon Press

When a mediator knows something the parties do not, what's the obligation?

In this feature, Paul M. Lurie and Sharon Press raise issues of professionalism and their practical applications.

Doctors Jones and Green are engaged in a bitter dispute over the assets of their medical partnership. On the first day of a mediation between the parties, the mediator learns from his own research that Dr. Green's attorney has grossly overestimated the value of Dr. Green's future income from a medical device Dr. Green recently patented. The mediator, who is also a patent attorney, knows that US Patents are presumed to be valid, but he also knows that such presumptions are rebuttable. In this case, the mediator believes rudimentary research would show that the validity of the patent is questionable. The mediator does not know if Dr. Green or Dr. Jones is aware of this.

What are the mediator's obligations in connection with the issue of the patent's validity?

First, let's look at disclosure. Is the mediator obligated to inform Dr. Green, whose attorney made the miscalculation? Is the mediator obligated to inform Dr. Jones, whose estimate of the practice's assets presumably includes the patent income? Both doctors?

What about influencing the parties or the process without disclosing the information about the patent validity? Should the mediator try to convince Dr. Green to reduce his settlement offer, without specific reference to the patent issue? If he does not disclose, should the mediator proceed to allow the parties to negotiate a settlement and do nothing with this information?

What if Dr. Green refuses to settle and the case goes to trial, with unfavorable results to her? What if Dr. Jones pays more than the case is really worth and later discovers the patent invalidity problem? Are these situations that can be prevented by ethical rules?

There do not appear to be any binding or commonly accepted ethical standards to resolve these questions. If the mediator is an attorney, the mediator can look to the Model Rules of Professional Conduct for some guidance. Model Rule 2.4 applies to lawyers serving as mediators, but there is no responsibility for truthfulness. For lawyer-mediators and non-lawyer mediators alike, the Standard VI A of the AAA/ABA/ACR Model Standards of Conduct for Mediators provides the following broad guidance: "A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of mediation." Though this is a valuable rule, it doesn't really help tell the mediator-lawyer whether not disclosing what he knows about the patent's probable invalidity is acceptable.

Factors Contributing to the Complexity

Several problems contribute to the complexity of understanding the mediator's ethical obligations in this scenario.

The Mediator's Duty of Confidentiality

To whom is the mediator's duty of confidentiality owed, and what is its scope? Standard V(A) of the Model Standards of Conduct for Mediators provides some guidance: "A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law." Let's assume the mediator did not learn from Dr. Green or his attorney

about the problem with the patent's validity. But if the mediator raises this problem first with Dr. Green, can the mediator then raise the issue with Dr. Jones without violating the confidentiality duty? Probably not. If there has been no formal discovery, however, perhaps the mediator can propose to both parties a list of background questions to be exchanged.

On the other hand, what if Dr. Jones tells the mediator that she knows Dr. Green's patent may not be valid, but she does not want the mediator to discuss the patent validity issue? (Dr. Jones may be making a strategic decision to stick to a low offer that she believes Dr. Green will eventually accept.) Once again, discussing the patent validity with Dr. Green after talking with Dr. Jones would violate confidentiality.

The Attorney's Duty to Investigate and Discover before Negotiating

Have the parties engaged in an investigation and adverse pre-trial discovery, and what has been disclosed?

Mediation is often promoted as a way to avoid the expense and delay associated with trials and arbitrations, especially the money and time needed for discovery. What if Dr. Green's attorneys did not do any investigation of patent validity? What if Dr. Jones' attorney did no pre-trial discovery? Who should bear responsibility for this omission? Does the mediator have an obligation to overcome these process deficiencies by informing the parties of the patent invalidity issue?

In general, mediators should be careful about how they respond to party's questions such as "So, what do *you* think I should do?" and should usually avoid making any answer. If, however, the mediator chooses to answer, he or she should first be familiar (and comfortable) with the extent to which the questioning party has done a thorough investigation. In this scenario, a thorough investigation would certainly include research on the patent's validity.

Is Deception in Mediation Avoidable?

At the fall meeting of the ABA Forum on Construction Law last October, John H. "Buzz" Tarlow and Charles M. Sink presented a paper called "In Defense of Lying: The Ethics of Deception in Mediation." In that paper, Tarlow and Sink argue that even when parties are truthful in a mediation, there is an unavoidable element of deception and the negotiations (particularly when lawyers are present) often involve gamesmanship and elements of misrepresentation.

With this idea in mind, should we clarify and strengthen the ethical rules to facilitate truth-telling in mediation? If we presume that honest interactions within the mediation setting improve the chances of an agreement being reached, the ethical rules for mediators should certainly promote truth-telling.

Tarlow and Sink, however, conclude that misrepresentations, whether intentional or not, are endemic to the mediation process and that most mediations may not need the restraint of stronger rules. They argue that the current ethical rules (which, they note, lawyers and mediators are already familiar with) are sufficient to protect parties within mediation. Gamesmanship and misrepresentations, they write, may actually enhance settlement opportunities.

Perhaps the mediator can avoid all the tricky questions prompted by this scenario with careful preparation before the settlement negotiations actually start. In determining whether the parties are really ready to proceed to settlement discussion, well before that stage, the mediator could check in with the attorneys involved and confidentially discuss what went into establishing the basis for their client's position. If that investigation was cursory, perhaps the mediator could note this without mentioning any specific problems, which would allow the attorneys to do some more research. ■

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