The Importance of Trust and Reputation

Mediating with Integrity

By Ian A. Stewart and Alex Bruno

Mediation has become an invaluable device in the modern litigator's arsenal. It is now so widespread that many jurisdictions mandate its use. Most ethical rules involving mediation are directed toward the neutral, not the participants or attorneys. Although attorneys are held to strict ethical standards when communicating to a court or other tribunal, and even when communicating directly with opposing counsel, misrepresentations made during mediation generally do not lead to sanctions because almost all jurisdictions have statutes that bar the admissibility of communications made during mediation. Some attorneys use these statutes that shield confidentiality to make patent misrepresentations to effectuate settlement during mediation.

The ABA has determined that the ethical principles governing lawyer truthfulness do not permit distinction between mediation and other negotiation settings, such as a settlement conference before a judge. In April 2006, the ABA issued a Formal Opinion (06-439) on the subject of "Lawyer's Obligation of Truthfulness When Representing a Client in Negotiation: Application to Caucused Mediation," It concluded,

> Under Model Rule 4.1, in the context of a negotiation, including a caucused mediation, a lawyer representing a party may not make a false statement of material fact to a third person. However, statements regarding a party's negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation "puffing," are ordinarily not considered "false statements of material fact" within the meaning of the Model Rules.

The ABA emphasized that attorneys should take care not to make statements regarding a client's position in a manner that will convert them into false statements of fact, providing this illustration:

> For example, even though a client's Board of Directors has authorized a higher settlement figure, a lawyer may state in a negotiation that the client does not wish to settle for more than $50. However, it would not be permissible for the lawyer to state that the Board of Directors had formally disapproved any settlement in excess of $50, when authority had in fact been granted to settle for a higher sum.

Id.

Despite these rules of conduct, in most jurisdictions neither a mediator nor an attorney can report misconduct concerning statements made at mediation to a court. *See, e.g., Foxgate Homeowners Association, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1 (Cal. 2001). Although some types of mediation-related conduct can be reported, such as the failure to appear or participate, misconduct based on a communication is confidential. Most commentators agree that this is desirable, despite the potential for abuse. In fact, mediators have objected to being required to report bad faith because it undermines their role as the neutral, as well as confidence in the process. The California Supreme Court has also addressed this difficult conflict between maintaining confidentiality to encourage dispute resolution and "enforcing professional responsibility to protect the integrity of the judiciary," but has concluded that "any resolution of the competing policies is a matter for legislative, not judicial, action." *Id.* at 17.

If an attorney's misconduct becomes an issue during mediation, exercise caution. An agreement not to report the misconduct is unenforceable pursuant to ABA Guideline 4.2.3, which provides: "A lawyer must not agree to refrain from reporting opposing counsel's misconduct as a condition of a settlement in contravention of the lawyer's reporting obligation under the applicable ethics rules."

Further, while all negotiations include some bluffing, exaggeration, posturing and "puffery" as an inherent part of negotiation strategy, attorneys must distinguish these statements from false statements of material fact. Topics that particularly lend themselves to misrepresentation during mediation include available insurance, the amount of settlement authority, the existence of liens, prior claims, criminal history, corporate history, and the existence or nonexistence of an incriminating document.

Although some abuse of statutes that shield mediation confidentiality may be inevitable, you can minimize its impact on your case by using certain safeguards. First,

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recognize that potential misrepresentation is particularly problematic when mediation is conducted early in litigation, before you have conducted substantial discovery. Being well prepared for mediation will not only reduce your reliance on an opponent's possible misrepresentation, it can also decrease the chance that you will make a misstatement of your own because attorneys sometimes make misstatements when caught off guard by an unexpected development in a negotiation.

In addition, if you receive a settlement offer based on a specific material representation, make sure that the agreement is contingent on the truthfulness of that representation. Further, include all suspect representations in the written agreement to provide a basis for rescission if a representation turns out to be false. Another option is to provide for a brief period of time before a mediation agreement becomes binding to permit investigation of a suspect representation of a material fact.

In the final analysis, it pays to remember that first, trust is an essential element of any successful negotiation, and second, reputation is extremely valuable. Deciding how best to simultaneously protect a client's interests and our own personal integrity does create difficulties that ultimately each individual attorney must wrestle with during mediation. FD