To Disclose or Not to Disclose?

By Amy Lieberman

In mediation, whether, how and when to share potentially harmful information are critical questions. Is there an ethical obligation to disclose that information? If not, what are some of the strategic considerations? And what potential adverse consequences might arise if damaging facts are withheld?

Ethical Considerations

I know that lawyers and their clients are not always completely candid in mediation. But what do the ethical rules require?

Must you disclose every potentially relevant fact? After all, isn't one of the points of mediation not only to save the time and expense of litigation, but to avoid the risk of a bad result when negative information is revealed?

The ABA's Model Rule of Professional Conduct 4.1 provides that, in the course of representing a client, a lawyer shall not knowingly:

A. Make a false statement of material fact or law to a third person, or

B. Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, unless disclosure is prohibited by Rule1.6 (confidentiality).

The comments to Rule 4.1 state that estimates of price or value, or a party's intentions as to an acceptable settlement, are not "material," but are silent on other aspects.

In a recent article called, "Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics," 2011 Harvard Negotiation Law Review, ASU Professors Art Hinshaw and Jess K. Alberts examined attorneys' likelihood to withhold critical facts in negotiation when asked to do so by a hypothetical client. Thirty percent of lawyers surveyed stated they would engage in blatantly fraudulent negotiations. Twenty percent indicated they were "not sure" if they would do so.

The authors concluded that there were several reasons for withholding information:

1. Confusion over what is a "material" fact;
2. Failure to recognize an "omission" as a misrepresentation;
3. Belief that maintaining client confidences or the need for zealous advocacy take precedence; and
4. Lawyers are competitive, and believe opposing counsel do the same.

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Strategic Considerations

Assuming disclosure is not mandatory, strategic decisions on disclosure come early. Should you exchange pre-mediation memos, or submit them confidentially to the mediator? If exchanged, should you be candid about negative information, save the "bad stuff" for the mediator only, or simply withhold it and hope it never surfaces?

Many factors enter into a client's decision whether and how to resolve a case. Your client will base his or her decision on what is known at the time of mediation. Short of requiring written confirmation of specific information in a settlement agreement, your client will be basing their settlement decision on the hope that all relevant information was disclosed.

In my observation, when faced with the strategic decision of "to disclose or not to disclose," attorneys base their decision on three things: (1) personal ethics; (2) trust in the mediator to ensure the information will be shared only if necessary and as appropriate; and (3) perceived integrity of opposing counsel, providing confidence the information will not be misused outside the context of mediation.

Consequences of Non-Disclosure

When making strategic choices about whether to be collaborative or competitive in terms of disclosure, remember that there are two things most people do not want to happen:

1. They don't settle. Later, at trial, information is revealed which causes this thought: "They knew that at the time we mediated two years ago! If they had only disclosed this, we could have settled it then and there and not had to go through all this aggravation and expense!"
2. They settle. Later, they learn of information that is so critically important that, had they known, they never would have settled. They may seek to undo the agreement based on misrepresentation.

Another possible consequence of non-disclosure: Perceived "bad faith" of counsel can impact the lawyer's credibility and ability to settle cases in the future.

The Mediator's Goal

Mediators are guided by the principle of helping parties to reach "informed decisions." *See* Standard 1, Self-Determination, Model Standards of Conduct for Mediators. Mediators are not obligated to reveal information shared with them in confidence, though, and will take direction from the parties.

It is my hope that parties will be as forthcoming as possible, not only about the facts that they deem material to their case, but about anything they feel is important. Mediator focus is less on what is "material," and more on a broader concept of what is relevant to resolution. This includes financial constraints, business interests and emotional considerations.

Conclusion

So, should you disclose? Ask yourself, or the mediator, whether the information is "material" to the decision to settle, or whether, if later revealed, the opposing party would feel defrauded. And, be mindful that the more information you share, the more tools you give the mediator to facilitate resolution.

When in doubt, disclose.