When "Don't Tell the Other Side" Creates an Ethical Problem

MEDIATION

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I recently sat on a panel of mediators discussing ethics and mediations. As mediators, we all know that when a party says "don't tell the other side" of such and such, we can't and we don't. But are there situations where the non-disclosure is so fundamental that the mediator should withdraw from the mediation?

Take a simple example. Counsel acts for the plaintiff on a wrongful dismissal. By the time of the mediation, his client has not found employment. In caucus, she says: "But I do have an offer – my lawyer told me not to accept it until after the mediation." Counsel pipes up: "You can't tell them that!"

The mediators on the panel discussed variations of this theme. To my surprise, some of my colleagues were strongly of the view that the failure to disclose amounted, effectively, to a misrepresentation by omission which, if not corrected, would force them to withdraw from the mediation. Since most mediators are lawyers, the argument went, we are officers of the court and obliged not to assist one party to enter into a fraudulent settlement.

I completely agree with that proposition, although a more nuanced analysis raises serious questions about the role of the mediator and the danger of taking what goes on in caucus at face value. Terminating a mediation without explanation can be highly prejudicial and cannot be done lightly.

Back to our example. Would the settlement really be tainted if the defendant employer paid 8 months' notice, when in fact the claim might actually be worth only 4 months' notice? Yes, there may be an *overpayment*, but is the plaintiff and her counsel behaving unethically in not disclosing the job offer?

In an adversarial judicial process, it is up to the parties to dig up the details of the other side's case, subject to the discovery requirements under the rules pertaining to documentary disclosure, the obligation to correct answers, not misrepresent facts, and so forth. If affidavits of documents have been exchanged, and the job offer is in writing, the plaintiff has an obligation to produce it. If asked on discovery, "Will you advise us if you receive a job offer", she must comply with that undertaking. A settlement entered into where a party is in breach of disclosure obligations may well be voidable, and a mediator should properly refuse to facilitate

such a settlement.

But what if the offer was oral? What if the employer never asked about offers at discovery? What if the case hasn't even gone to discovery? What if there is nothing in the mediation brief that could be construed as a misrepresentation? Is the mediator under an ethical obligation to ask these questions? Is it my job to ferret out whether counsel is engaged in sharp practice, or worse? Isn't it the job of defence counsel to make sure that the plaintiff is boxed in on the issue of mitigation by asking the right questions, through discovery or otherwise, prior to the mediation?

There may be some cases where it is obvious that a party has a duty to disclose. There may be others where the mediator has no reason to believe a duty exists. But what about the cases in between, the ones that make the hair on one's neck stand up a bit? At a minimum, the mediator should take a "time out" and carefully review the brief, to make sure that the plaintiff has not used the mediation process itself to actively misrepresent such a fundamental fact. I would also remind counsel of the continuing obligation to make disclosure, and ask if he or she is comfortable that the plaintiff has complied. If the answer is yes, and I have no reason to doubt counsel's integrity, I would not terminate the mediation.

At the same time, I would not in any way attempt to persuade the defendant to settle, or try to sell the plaintiff's number. At this point, I would do what I never do in other cases – act as a messenger only. You might then ask "why *not* just terminate – they don't need a mediator anymore", and my answer would be this: mediation is the parties' process, and as long as they are talking I will be there – unless one of them has crossed the line.

Valerie Edwards is a partner of Torkin Manes and is a highly respected member of the litigation bar. In addition to her extensive experience as trial counsel, she has appeared as lead appellate counsel in both the Ontario Court of Appeal and the Supreme Court of Canada.

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