

Lying for the Sake of the Deal: What 'Zeal for the Deal' Might Cause Mediators, Counsel & Parties to do at Mediation

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Overview

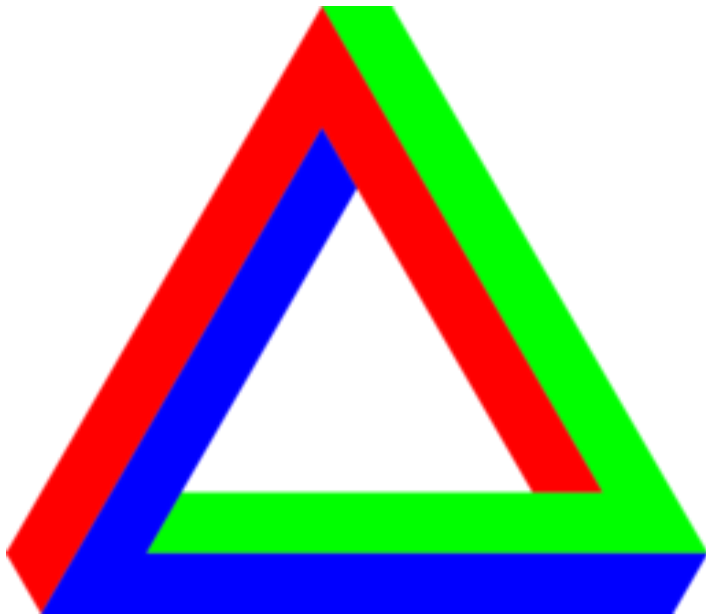
- ❑ Panel Introductions, Audience Survey
- ❑ Contextual Quotes, Definitions
- ❑ ABA Model Standards of Conduct for Mediators
- ❑ ABA Model Rules of Professional Conduct and ABA Formal Opinion 06-439
- ❑ ABA Litigation Section Guidelines for Settlement Negotiations
- ❑ Case Hypotheticals



“Satisfaction Triangle”:

Successful mediation occurs where participants are satisfied on three levels:

- **Expectations** (about process)
- **Process** (treated fairly and respectfully)
- **Result** (outcome met primary interests)



Quotes

- ❑ *“Truth is such a precious quantity, it should be used sparingly!”* - Mark Twain
- ❑ *“Everyone is entitled to his own opinion, but not his own facts.”* - Daniel Patrick Moynihan
- ❑ *“I’m not upset that you lied to me; I’m upset that from now on I can’t believe you.”* - Friedrich Nietzsche
- ❑ *“One good thing about truth is that you don’t have to remember it!”* - Anonymous





**Who among us does not lie
and engage in deception
.... at least a little?**

Definitions

What is a “lie?”

- ❑ Untruth deliberately told for purpose of deceiving
- ❑ Untrue statement known not to be the whole truth

What is “deception?”

- ❑ Giving a false impression
- ❑ Intentionally tricking, misleading, hiding of truth

What qualifies as objectionable untruthfulness?

- Only affirmative misstatements?
- What about concealment or silence?
- What about exaggeration or under-statement?
- What about partial truth?
- Does context matter?

What qualifies as objectionable untruthfulness?

- What about intent, reliance?
- What if there's no harm done?
- Are there times when it's OK to lie?
- Are “white lies” / noble lies OK?
- Where is the line drawn, when is it crossed?



If you were to define a standard of truthfulness, what might it look like?

- Is it an affirmative duty to tell / disclose all that you know about a certain subject?
- Is it a 'standard of conduct,' meaning one that requires honesty?
- Is it a duty to correct the other side if they are mistaken or missing information?





Isn't part of the problem one of defining a duty owed by one for the level of knowledge held by another?

Can we impose a broad duty of being our brother's keeper in an adversarial situation? Is it realistic / reasonable to expect anyone to answer to two masters?

Legal Parameters

Any legal standards that endorse, tolerate or prohibit lying in negotiating settlements?

- ABA *Model Rules of Professional Conduct*, Rule 4.1 on “material facts”
- Is Rule 4.1 consistent with ABA ethical guidelines for settlement negotiations?
- How about *Model Standards of Conduct for Mediators* (e.g., Standard VI (A) (4) on “honesty and candor”)?

Model Standards of Conduct for Mediators

- ❑ Promulgated by ABA, AAA, ACR in 1995
- ❑ Revised in 2005, adopted in many court-connected mediation programs nationwide
- ❑ Apply in all mediation practice contexts
- ❑ Explicit, threefold purpose:
 - *Guide conduct of mediators*
 - *Inform mediating parties*
 - *Promote public confidence in mediation*



Legal Parameters

ABA Model Standards of Conduct for Mediators suggest that mediators have an affirmative obligation to enforce some level of truthfulness in our mediations.

- ❑ **Standard I** requires mediators to conduct mediations in a way that facilitates each party making free, informed and uncoerced decisions about both process and outcome, and specifically prohibits mediators from doing anything that would undermine party self-determination.

- **Standard VI (A)(4)** requires mediators to “promote honesty and candor between and among all participants” and states that a mediator “shall not knowingly misrepresent any material fact or circumstance.”

- **Standard VI (A)(9)** requires a mediator to postpone, withdraw or terminate the mediation if he/she **believes** the mediation is “being used to further criminal conduct.”

Legal Parameters

ABA Model Standards of Conduct for Mediators also say that we have an affirmative obligation to keep the parties' secrets when working in caucus mediation!

- ❑ **Standard V (B)** requires mediators to keep secret – to withhold from the other side – any information obtained in private session that the disclosing party does not consent to being disclosed to the other.
- ❑ **Standard V (D)** allows the parties to “make their own rules with respect to confidentiality” that we must respect and follow.

Legal Parameters

Here's the problem: The ABA Model Rules for Professional Conduct do not impose obligations of truthfulness on lawyers in representation at mediation:

- ❑ While [Model Rule 4.1](#) provides that a lawyer may not make a false statement of material fact to a third person, [ABA Formal Opinion 06-439](#) holds the Model Rule 4.1 does not impose an obligation of truthfulness on a lawyer when negotiating on behalf of a client in mediation caucus and that statements characterized as puffing, posturing and opinion are not “false statements of material fact” under 4.1.

Legal Parameters

- ❑ While [Model Rule 3.3](#) prohibits a lawyer from knowingly making untrue statements of fact to a “tribunal,” that rule does not apply to statements made in the context of a mediation unless the (court) tribunal is participating (e.g., a court-sponsored mediation conducted by a sitting judge).

- **Formal Opinion 06-439** expressly sanctions deceit so long as it is in the form of “puffery” and it allows attorneys to make misrepresentations to the mediator – so long as those representations do not rise to the level of “fraud” - seeing no reason to differentiate between face-to-face negotiations between counsel and those facilitated through a third-party neutral.





The ABA Opinion is premised on the apparent assumption that mediation is nothing more than a structured negotiation...

... despite the fact that mediation has clearly evolved beyond the legal paradigm of adversarial / win-lose / distributive bargaining scenario.

The question for us mediators is:

What we can or should we do:



- 1. To facilitate honesty and candor by attorneys and their clients?*
- 2. To discourage dishonesty and deception by attorneys and their clients?*
- 3. To define a standard of truthfulness for ourselves and the mediation participants?*



Is it alright for the Mediator to...

- #1.1: Hidden Information
- #1.2 Bending the Truth
- #1.3 “Puffing by the Mediator”

Hypotheticals

What do you do if the client/party lies?

- #2.1: The Baseball Player
- #2.2 The Poor Widow
- #2.3 “Puffing by the Mediator”

What do you do if the attorney lies?

- #3. Early, pre-discovery mediation of litigated business dispute



3 Cardinal Reasons for Deception by Mediators:

- Ego
- “Favored Client”
- Politics (concern for branding, settlement rates)

Worth Reading/Considering

- ❑ *“Lies, Damn Lies, and Negotiation: An Interdisciplinary Analysis of the Nature and Consequences of Deception at the Bargaining Table”* (Barry, Rehel)
- ❑ *“Deception is Still King”* (Young)
- ❑ *“The Truth About Deception in Mediation”* (Krivis)
- ❑ *“How to Protect Yourself Against Biased and Deceptive Mediators”* (Kichaven)

Thank You!

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