

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

SOUTHERN CALIFORNIA MEDIATION ASSOCIATION

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**Course Overview**

- Panel Introductions and 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



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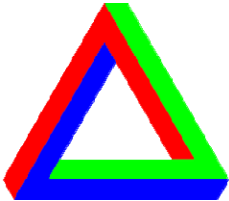
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**Setting the Stage for Effective Mediation**

**"Satisfaction Triangle"**



A successful mediation is one where the participants are satisfied on three levels:

- ▶ **Expectations** (about the process)
- ▶ **Process** (treated fairly and with respect)
- ▶ **Result** (outcome met their primary interests)

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**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

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

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**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

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**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?

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**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?

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

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- 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?
- Does it apply to opinions, meaning can we only express "honest" opinions? No puffing or bluffing?

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**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?*

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**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”)

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**Model Standards of Conduct for Mediators**

- Promulgated by ABA, AAA, ACR in 1995
- Revised in 2005, adopted in many court-connected mediation programs nationwide and the AAA Mediation Panel
- Apply in all mediation practice contexts
- Explicit threefold purpose:
  - Guide the conduct of mediators
  - Inform mediating parties
  - Promote public confidence in mediation
- An additional purpose: promote *integrity* in the process

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**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.”

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**Legal Parameters**

- ❑ 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.”

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**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 side.
- ❑ Standard V(D) allows the parties to “make their own rules with respect to confidentiality” that we must respect and follow.

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**Legal Parameters**

*Here's the problem: The ABA Model Rules for Professional Conduct do not impose upon lawyers an obligation of truthfulness when representing a client 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 upon a lawyer when negotiating on behalf of a client in caucus mediation and that statements that can fairly be characterized as puffing, posturing and opinion are not “false statements of material fact” for purposes of defining a violation of ethics.

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**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).

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**Legal Parameters**

- ❑ [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.

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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.*

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**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?*

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**Hypotheticals**

*Is it alright for the Mediator to...*

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

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**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

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**Kichaven Theory**

**3 Cardinal Reasons for Deception by Mediators:**

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

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**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)

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