The Full Pinocchio: Is it ever OK to lie in mediation?

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The Full Pinocchio: Is it ever OK to lie in mediation?

But here's the problem when negotiating in mediation …

There is no "official" guidance for us mediators and what is out there unofficially is conflicting and ambiguous!

ABA Model Standards of Conduct for Mediators suggest that we 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."

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.

And 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.
- 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).

The ABA's Formal Opinion 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?

Before answering these questions, let's look first at some "real life" hypotheticals to see if we can all agree on where to draw the line in terms of what we expect in the way of honesty and candor by the attorneys who come to our mediations.

Hypothetical No. 1

Defendants have told their attorney that he/she has authority to settle up to $750,000.

Defendants' attorney offers $650,000, to which plaintiff's attorney asks him/her point blank whether he/she has authority to go up to $750,000.

Is it OK for Defendants' attorney to respond: "No, I do not."

Hypothetical No. 1

Defendants have told their attorney that he/she has authority to settle up to $750,000.

Defendants' attorney offers $650,000, to which plaintiff's attorney asks him/her point blank whether he/she has authority to go up to $750,000.

Is it OK for Defendants' attorney to respond: "No, I do not."

Survey responses:
Yes - 46% No - 41% Qualified – 13%

Hypothetical No. 2

Attorney represents Plaintiff in a personal injury case in which Plaintiff is seeking damages for an alleged permanent disability resulting from a knee injury.

In settlement negotiations, can Plaintiff's Attorney state, represent or claim in any way to Defendant's Attorney that Plaintiff is "disabled" when he/she knows that Plaintiff has just returned from 10 days of skiing in Colorado?

Hypothetical No. 2

Attorney represents Plaintiff in a personal injury case in which Plaintiff is seeking damages for an alleged permanent disability resulting from a knee injury.

In settlement negotiations, can Plaintiff's Attorney state, represent or claim in any way to Defendant's Attorney that Plaintiff is "disabled" when he/she knows that Plaintiff has just returned from 10 days of skiing in Colorado?

Survey responses:
Yes - 7% No - 93% Qualified – 0%

Hypothetical No. 3

Attorney 1 represents a mom-and-pop business who have sued their bank, alleging that they wrongfully pulled their loan and ruined their business. Plaintiffs' alleged damages include a claim for intentional infliction of emotion distress. Plaintiffs have both moved on since the close of their business. Both have found good jobs and things are good in their personal lives. They have expressly told Attorney 1 that they have not suffered any emotional distress.

In settlement negotiations, can Attorney 1 state, represent or claim in any way to Attorney 2 that Plaintiffs have suffered severe emotional distress?

Hypothetical No. 3

Attorney 1 represents a mom-and-pop business who have sued their bank, alleging that they wrongfully pulled their loan and ruined their business. Plaintiffs' alleged damages include a claim for intentional infliction of emotion distress. Plaintiffs have both moved on since the close of their business. Both have found good jobs and things are good in their personal lives. They have expressly told Attorney 1 that they have not suffered any emotional distress.

In settlement negotiations, can Attorney 1 state, represent or claim in any way to Attorney 2 that Plaintiffs have suffered severe emotional distress?

Survey responses:
Yes - 33% No - 54% Qualified – 13%

Hypothetical No. 4

During settlement negotiations in a lender liability case, the bank's attorney makes comments to the effect that he thinks plaintiff has gone out of business – although plaintiff's attorney has never made such a representation, claim or statement. In fact, plaintiff is in business and has several important contracts in the offing.

Can plaintiff's attorney proceed with the settlement negotiations without correcting the bank's attorney with regard to his/her mis-assumption that plaintiff is out of business?

Hypothetical No. 4

During settlement negotiations in a lender liability case, the bank's attorney makes comments to the effect that he thinks plaintiff has gone out of business – although plaintiff's attorney has never made such a representation, claim or statement. In fact, plaintiff is in business and has several important contracts in the offing.

Can plaintiff's attorney proceed with the settlement negotiations without correcting the bank's attorney with regard to his/her mis-assumption that plaintiff is out of business?

Survey responses:
Yes - 60% No - 27% Qualified – 13%

So, what this tells us is…

There is confusion and disagreement about the appropriate level of truthfulness between attorneys negotiating privately….

The negotiation orientation is what is going to come to our mediations …

… with the added "complication" of caucus mediation where telling secrets and withholding information is accepted and agreed to as part of the process.

So let's do this, let's look at some "real life" hypotheticals involving mediators to see if we can all agree on where to draw the line in terms of what we expect in the way of honesty and candor by us as we work in caucus mediation.

Mediator Hypothetical No. 1 – Hidden Information

In private caucus with the defendant's attorney and the representative from the defendant's insurer, the mediator is told that the representative has authority to settle for policy limits, but would like the mediator to "work" the other side to get plaintiff's demand below policy limits – with the implicit promise (wink of the eye) that the insurance company uses mediators who help it save money on settled claims.

Is it OK for the mediator to cross the hall to the plaintiff's room and say the following:

"Defendant is so angry about your charge of fraudulent concealment that he is prepared to spend his entire self-liquidating policy of $250,000 on defense unless you drop the fraud charge, publicly apologize for attacking his character and give him a demand that is less than policy limits. Defendant is here to settle the case, but there is some business on his end that needs to be taken care of in the process. It's your choice whether you leave here with a check in hand. What do you want to do? Defendant insists that you make a better offer than the one you put on the table and it should be less than the policy."

Do you feel differently if the mediator says the following instead:

"I've met with the other side, and what I'm authorized to tell you is that defendant's carrier does not wish to pay more than $200,000.

The ball is in your court.

What do you want to do?"

Mediator Hypothetical No. 2 – Bending the Truth

In private caucus and with the admonition that the information is "confidential" and will not be shared with the other side, the plaintiff's attorney told the mediator that a key, third-party, impeachment witness is wavering about testifying for fear of losing his/her job. Plaintiff's attorney also tells the mediator that the other side is not aware of this development and is probably under the impression that this witness is on board to testify for plaintiff.

Is it OK for the mediator to cross the hall to the defendant's room and say the following:

"I am authorized by plaintiff to tell you that I spoke with _____ (the key third-party witness) during caucus. In my evaluation, if _____ testifies as he/she did during our conference call, I believe that your credibility will be impeached on several issues key to your defense and you could lose on all counts.

Plaintiff tell me that he/she is here to settle the case today, but your offer is a non-starter. If you want to avoid the risk of testing credibility at trial – which is highly risky if you lose – you need to up your offer. What do you want to do?"

Do you feel differently if the mediator says the following instead:

"I'm not at liberty to share with you what I've discussed with the other side, but in my estimation there is considerable risk for you – as well as the other side – in proceeding to trial. Only one side is going to win, which means the other side will lose.

It seems to me that this case could turn on who the judge or jury thinks is more credible. That's impossible for anyone to predict, but if the other side is viewed as more credible than you, then you could lose on all counts.

Plaintiff says your last offer is a non-starter. What do you want to do?"

Mediator Hypothetical No. 3 – Puffing by the Mediator

In private caucus with plaintiff, the mediator has had a very nice, even-toned discussion with the plaintiff in which plaintiff has said that he carries no grudge against the defendant, that he understands that his attorney thinks he has a very good case and should recover at least "X" at trial, but he really is not interested in vindication or being right or recovering all that might be available under the law; that he would really like to get the dispute resolved and is willing to talk about a settlement in the range of half of "X" – which is about what each side will each pay to their attorneys to take the case to trial. That being said, plaintiff wants defendant to make the first offer and to do so at a number that signals his willingness to get up to the "half of X" range.

Is it OK for the mediator to cross the hall to the defendant's room and say the following:

"As you know, I've just spent some time meeting with plaintiff. I believe that plaintiff is so emotionally outraged that he will carry out a program of adverse public attacks on you and your company's business practices. If you want to get this matter resolved, I suggest that you get serious and signal that to plaintiff and soon. Plaintiff has insisted that you make the first offer. Plaintiff may walk out the door if you do not open in a range that at least comes close to what you're each going to spend to take this case to trial. Plaintiff is here to settle the case today. What do you want to do?"

Do you feel differently if the mediator says the following instead:

"I'm not at liberty to share with you what I've discussed with the other side, but in my estimation plaintiff appears to be reasonable and willing to engage in a good faith negotiation with you here today.

If you want to get this matter resolved, I suggest that you get serious and signal that to plaintiff and soon. Plaintiff has insisted that you make the first offer. Plaintiff may walk out the door if you do not open in a range that at least comes close to what you're each going to spend to take this case to trial. Plaintiff is here to settle the case today. What do you want to do?"

Mediator Hypothetical No. 4 – Maybe a Lie in Progress

In private caucus with plaintiff, plaintiff's counsel has shared with the mediator a file containing copies of emails and memos that he/she says plaintiff had in his personal files before he was wrongfully terminated and that the documents show that he was specifically targeted for termination because of his age.

Mediator reads the documents and agrees that they are quite damning, and then asks if the other side is aware that Plaintiff has these documents. Plaintiff's counsel says no.

Mediator then asks if he/she can share them with the other side. Plaintiff's counsel says no; that they are plaintiff's "smoking gun" and they're saving them for trial.

Is it OK for the mediator to cross the hall to the defendant's room and say the following:

"I'm not at liberty to share with you what I've discussed with the other side, but in my estimation there is considerable risk for you in proceeding to trial.

Have you given that circumstance due consideration?

What are you willing to offer Plaintiff to avoid a potentially high-dollar risk at trial, especially if the jury finds that you terminated Plaintiff and others because of their age and awards punitive damages?

Mediator Hypothetical No. 5 – Flat Out Lie in Progress

It's September 2015. Major League Baseball Player ("MLBP") is in mediation with soon-to-be ex-wife negotiating a property settlement and spousal support. A settlement is negotiated based upon MLBP's current base salary, based on the assumption that it had a 3-year term and who knew if he would be healthy or receive an equal or better contract in the future. An agreement is written up providing for spousal support of $X for 3 years (50% of assumed base salary). Wife and her attorney sign. When the mediator takes the agreement across the hall for MLBP and his attorney to sign, MLBP laughs and says: "What a fool she is! I just re-negotiated my contract so that starting next year my base salary will be potentially three times $X, with the bonus incentives. But that won't be announced until the start of the season next year."

Is it OK for the mediator to stay silent and allow the signing of the settlement to proceed?

Can the mediator say anything to the other side about these newly discovered, material facts?

Does the mediator have an ethical obligation to recuse himself/herself from any further involvement in the mediation? If so, how should he/she do that?

What do you think happens if the mediator is not in the room at the time MLBP and his attorney review and sign the settlement agreement?

And what happens *when* the wife later finds out about MLBP's re-negotiated contract?

Where does that leave us in terms of defining conduct by attorneys and parties that will qualify as that which is "honest" and "candid" such that it will lead to an "informed" decision relative to settlement?

Where does that leave us in terms of defining a standard of truthfulness for ourselves as mediators?

No real answers, but a few concluding thoughts…

"Everyone is entitled to his own opinion, but not his own facts."

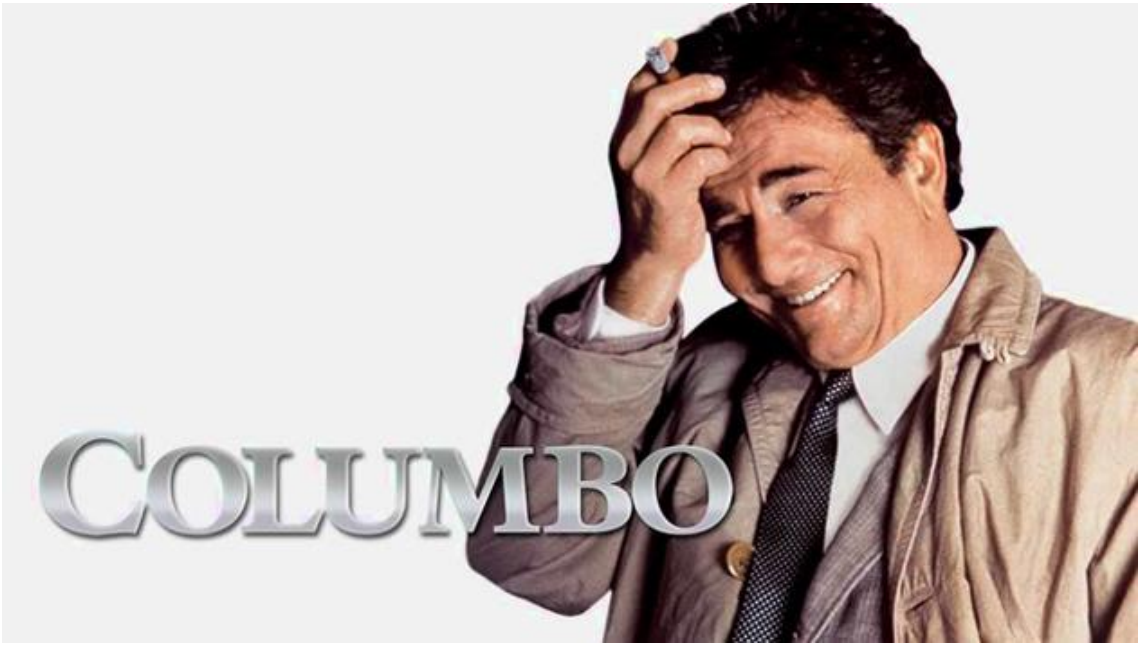
- Daniel Patrick Moynihan

"Lying is wrong, except in three things: the lie of a man to his wife to make her content with him; a lie to an enemy, for war is deception; or a lie to settle trouble between people."

- Muhammad (Ahmad, 6.459)

I'm not upset that you lied to me, I'm upset that from now I can't believe you.

- Friedrich Nietzsche

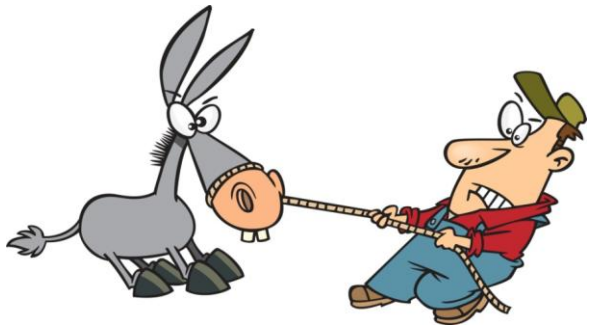


Just one more thing …

We want to facilitate durable settlements. We don't want our settlements to end up in reported case decisions where clients sue their attorneys for "settlement malpractice."

Cases Where Clients Settled with Their Adversary and Then Sued Their Lawyer

Cassel v. Superior Court, 51 Cal. 4th 113, 124 (2011)
Filbin v. Fitzgerald, 211 Cal. App. 4th 154 (2012)
Roldan v. Callahan & Blaine, 219 Cal. App. 4th 87 (2013)
Syers Properties III, Inc. v. Rankin, 2014 1761923 (1st Dist., May 5, 2014)
Amis v. Greenberg Taurig LLP, 2015 WL 1245902 (2d Dist., Mar. 18, 2015)



Cases Where Clients Did Not Settle / Did Not Like the Result at Trial and Then Sued Their Lawyer

Moua v. Pittullo Howington Barker Abernathy LLP, 228 Cal. App. 4th 107 (2014)
Playboy, Inc. v. Sheppard Mullin, as reported in the LA Daily Journal on May 6, 2015