

2-1-2004

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Recommended Citation

Jeffrey Krivis, *The Truth about Deception in Mediation*, 4 Pepp. Disp. Resol. L.J. Iss. 2 (2004)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol4/iss2/6>

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The Truth About Deception in Mediation

Jeffrey Kravis*

INTRODUCTION

Now that the court system has institutionalized the use of mediation in virtually all civil proceedings, trial lawyers are paying closer attention to their negotiation skills. While those skills involve less structured behavior than presenting a case to a jury, they nonetheless involve one common strategy that even the most skilled practitioners refuse to acknowledge: deception.

SOCIETY TOLERATES LIMITED USES OF DECEPTION

Deception can best be described as the raw material which drives negotiation of litigated cases. It allows barriers to be overcome and concessions to occur. It can mean anything from mild exaggeration to lying and outright fraud. The spectrum of possibilities appears below:

- Honesty
- Exaggeration
- White Lies
- Partial Disclosure
- Silence as to Other Party's Mistake
- False Excuses
- Fraud

Deception is part of the human condition and it would be a mistake to dismiss it as improper, particularly when resolving litigated disputes. The exception of course would be outright fraud, which is by necessity illegal and unethical in all contexts. While candor and honesty are preferred when parties are concerned about ongoing relationships, it is unrealistic to expect litigators to be candid when the goal is to get as much as they can for their client.

In other contexts, white lies and exaggerations have actually become a part of our social framework and are not only considered acceptable in certain situations but are expected when they result in righting a human wrong, maintaining

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fairness or avoiding harm. For example, the government uses spies and undercover agents, which is a form of deception, yet it is morally acceptable because it is necessary to stop crime, catch criminals and protect the country. Politicians often exaggerate or make promises that they can't keep, yet they will be re-elected for the next term. Parents tell very tall tales to their children about the tooth fairy, Santa Claus, the Easter bunny and other childhood fantasies because our society does not see this form of deception as destructive. When a family pet dies, parents often give their children fabricated explanations to protect them from having to deal with the difficult challenges of death.

Most people are guilty of some form of deception every day. How often do we turn down a dinner invitation and give a false excuse? Or answer "fine" when a co-worker asks, "how are you doing?" when in fact we are having a tough day. How about telling someone that an outfit looks good when it doesn't or offering thanks for a gift that you really don't want? These are all considered acceptable forms of deception. Our culture reinforces the idea that telling a white lie is better than hurting someone's feelings, if it results in a positive outcome or makes the situation less difficult. Deception is tolerated in negotiations because there too, it can be used constructively and productively to develop concessions that lead to agreement.

DECEPTION EXISTS AS PART OF THE COMPETITIVE MARKET

One of the central reasons why the occasional white lie is tolerated is that competition in our society promotes an atmosphere of freedom of choice and enables buyers and sellers to define the limits of acceptability. The foundation upon which this environment exists is the age old principle that the "buyer should beware." Competition will reward those individuals who seek to get the best deal often at the expense of the other party. In trying to get the best deal for a client, some forms of deception are tolerated within the marketplace of ideas, as long as individuals are not being fraudulent. There is no law against stretching the spectrum of deception in order to get a good deal.

An individual who utilizes competitive strategies is often believed to be using "shrewd business tactics" or referred to as a "good businessman." A car buyer shopping at the dealership hardly expects the salesman to be straightforward about his true selling price of a new vehicle. The buyer and the seller engage in a series of maneuvers designed to benefit the one who exploits the weakness in the other. It is not surprising that the dealer will inflate the sticker price and the seller will underestimate his willingness or ability to pay. Both parties maneuver closer to each other in a series of moves in order to meet somewhere in the middle. Whoever is the best negotiator will be rewarded with a larger piece of the remaining prize. As long as the negotiation moves are not fraudulent, deceptive techniques tend to be the engine that drives the motor of litigated negotiations. Our culture has established civil liabilities and criminal

punishment for those who cross the limits of acceptability, but where the laws are silent, parties have a license to engage in these competitive strategies.

LAWYERS USE DECEPTION TO GET THE MOST FOR THEIR CLIENT

The litigated case is much like a game of cards. It is not necessary to have the best hand to win but simply to be a better player of the game. Technique and skill are often more important than a great hand. A good card player can improve his winnings if the other player overestimates his hand. Similarly, a negotiation can be more profitable to an attorney if the other party overestimates his case. One who tricks his opponent is sometimes able to capture more value for his client as part of the bargaining process, provided the trick is not a material misrepresentation. Of course, the risk of misleading an opponent is both shame to the lawyer's reputation, and possibly an ethical violation.

DECEPTIVE TECHNIQUES USED BY ATTORNEYS IN NEGOTIATION

Within the typical negotiation process there are various forms of deception that attorneys have come to rely on. Some examples include: concealing the willingness to settle and/or the bottom line, making inflated demands, exaggerating strengths and weaknesses, concealing client intentions, claiming a lack of authority, and failing to volunteer relevant facts.

1. Concealing the willingness to settle/bottom line

The most common technique for an experienced negotiator is to conceal the bottom line as long as possible. By keeping the other party in the dark about the bottom line price, a negotiator maintains an element of doubt and uncertainty in the mind of the opponent. An attorney may state that his client will not accept less than one number, yet be perfectly happy leaving with significantly less at the end of the day. By positioning himself at a certain high price level, he is engaging the other side in a competitive match of numbers.

2. Making inflated demands

In this scenario, the negotiation often starts with both parties giving inflated demands which are implicitly understood to change over the course of the negotiation. Concessions are usually calculated prior to the negotiation, designed to reach a settlement price at which they are comfortable. If a party is seeking a \$50,000 settlement they may only offer \$20,000 at the opening because they

know the opposition is demanding \$100,000. By conducting a negotiation involving a series of concessions they can hope to reach their \$50,000 limit by strategically moving their numbers in correlation to their opponents. Both parties rise and fall never really knowing the other side's true number.

3. Exaggerating strengths and weaknesses

By making a case appear stronger, a negotiator puts pressure on the other side to make another concession. If one party overestimates the strengths of the opponent's case then they are more likely to accept less or offer more. An inaccurate assessment of the other party's strengths will lead to more cooperative behavior and larger concessions. The exaggeration technique is successful when used primarily on issues of speculation and opinion of value which are often unknown. Lawyers typically understand that exaggeration at some level will exist on any case because it is based in large part on the perceptions of the parties.

4. Concealing client intentions

When a party is uncertain what is important to the other side, it can be difficult to place a value on the case. Many times the clients place a higher value on certain non-monetary items, and reaching this important goal is the primary concern. When a party hides the importance of a goal, the other side does not know its true value. Concealing the client's true intentions is a game of hide and seek, where each side is attempting to find out what is most important to the other. At some point the client's intentions must be revealed in order to test the probability of acceptance by the other side.

5. Claiming a lack of authority

A useful technique often found within litigated negotiations is the claim that the negotiator lacks full settlement authority. The attorney may state that she is still analyzing the case before the client is able to move past a specific number. The negotiator claims that anything more than the "authorized" number requires approval from higher-ups. This technique is used to force the opponent to lose confidence in himself so that he or she will settle for less than they otherwise would. It is used to improve bargaining position without having to make another concession. Some attorneys have been clever enough to tell their clients not to give them authority to accept a specific amount until the negotiation is nearing its end.

6. Failing to volunteer relevant facts

The professional rules of ethics require parties to disclose certain information to the other side but when the parties are not required to disclose relevant facts, many attorneys will not give up information they are not required to reveal. If a party has a right to withhold certain information most will not disclose it to the other party. While this is not being fully honest, it is generally not considered unacceptable.

THE CONFIDENTIAL NATURE OF MEDIATION ELIMINATES FEAR

The deception that exists in negotiation is amplified when the structure of the negotiation is cloaked in confidentiality, such as in a mediation setting. This confidential environment allows parties to make disclosures and responses to the mediator without the other party present. The confidential nature of mediation prevents the mediator from disclosing, without consent, what has been said. Neither party knows what the other side has revealed or kept secret. Caucused mediation provides a breeding ground for deceptive techniques because the risk of being caught are substantially reduced. There is generally an inverse relationship between the risk of being caught and the frequency of deception. When there is a lower risk of being caught, the use of deceptive techniques becomes increasingly tempting.

WHAT DO MEDIATORS DO TO AFFECT AN OUTCOME

Like the main character in the Woody Allen movie *Zelig*, the mediator becomes a chameleon that models behavior after the litigants and transforms his thinking patterns after theirs.¹ When in private caucuses, the mediator begins to take the form of each party to get in harmony with their goals and aspirations. By engaging the parties like this the mediator begins to develop trust and rap-

1. Woody Allen's comic pseudo-documentary about a fictional 1920s media sensation named Leonard Zelig (Allen), a human chameleon who develops the ability to takes on the characteristics of anyone he happens to be with at the time. A gentle jab at America's obsession with fame and celebrity, as well as a parody of the documentary form, *Zelig* uses an updated version of the fake newsreel technique from *Citizen Kane* to depict its hero magically at the side of almost every major personality of the early 20th century, from Eugene O'Neill to Adolf Hitler. Enriched by "commentary" from a variety of contemporary intellectuals including Irving Howe, Susan Sontag, and Bruno Bettelheim, the film traces *Zelig's* bizarre career as a tabloid hero and side-show freak who finds true compassion only in the arms of his psychiatrist, the renowned Dr. Eudora Fletcher (Mia Farrow).

port. He listens and becomes a library of information. Because the mediator has no stake in the agreement parties are able to communicate concessions in a way that prevents them from being vulnerable. Parties are free from consequence to communicate truthfully or deceptively. They can signal to the non-adversarial third-party their willingness to participate in the negotiation dance.

Mediators also become time managers by maintaining the proper pace and flow of information. Mediators use information, time and instinct to orchestrate the negotiation movement. By moving in a series of steps with each other, the parties feel encouraged to gravitate toward the central theme or bargaining range adopted by the mediator. One party makes a concession and the other party follows in turn. If the steps are rushed, the mediation can fall apart and one of the parties may feel that they left something on the table. If a party makes too large of a concession early on, they could end up paying for it later. When one party attempts to short circuit the dance by making too drastic of a jump the mediator often intervenes to keep the flow smooth.

Once trust and rapport have been established, the mediator might use the FUD factor (Fear, Uncertainty & Doubt) to gradually challenge the beliefs of the parties. The mediator will confront unrealistic beliefs and stimulate the parties to reevaluate their positions. A party who is realistic is able to make better value judgments and more acceptable offers. Their opinions about the truth may change several times throughout the mediation process, while the mediator is repeatedly challenging them to interpret new information. This causes all parties to negotiate with more reasonable demands and offers, making settlement more attainable.

The mediator also acts as a filter receiving information from all parties, then processing that information in a way that will lead to a deal. The mediator might soften a threat or bolster an argument when delivering it to the opposing side. While she makes sure not to materially change what was said, it is generally acceptable for the mediator to change the delivery in order to position the parties in the best place for agreement.

ETHICAL CONSIDERATIONS IN NEGOTIATION AND MEDIATION

The ethical challenge in negotiating litigated cases is that the professional rules of ethics simply require negotiators to abide by the morality of the marketplace, as opposed to the rules of law. Rules are an attorney's lifeblood. They clearly impose limitations that allow us to understand how to behave towards each other. They provide visible boundaries for the conduct of our affairs. This is not so in the negotiation of litigated cases. The only visible boundaries are set forth in the aspirational ethical guidelines in our professional rules of conduct. While these rules set some parameters of appropriateness, they don't provide clear guidelines. In fact they provide more questions than answers. Consider

the American Bar Association's Model Rule of Professional Conduct 4.1, which states that 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 a client, unless disclosure is prohibited by confidentiality requirements.²

Rule 4.1 does not prohibit all deception, it only prohibits an attorney from lying about material facts or law. There is little guidance as to what constitutes materiality. The Comment 1 to Rule 4.1 requires a lawyer to be "truthful" when acting on a client's behalf, but notes that an attorney generally has no "affirmative duty to inform an opposing party of relevant facts."³ Unacceptable deception only occurs if the lawyer affirms a statement known to be false or fails to act where required. Comment 2 explains that estimates of price or value as well as party intentions are not material.⁴ Beyond this the standards are vague.

Against this backdrop, consider the role of an attorney-turned-mediator. Does he have an affirmative duty as a person who must follow Rule 4.1 to inform the parties of relevant facts learned in mediation? How does this concept reconcile itself with the requirement that a mediator maintain confidentiality of all information provided to him? The lack of guidance by the professional rules has created a self-policing standard. Deception is tolerated and used, but at what cost? While deceptive techniques might initially bring in greater settlement dollars, there are severe consequences to being untruthful while negotiating a litigated case. Damage to one's reputation is first in line, making it difficult to conduct business in the future. A negotiator who has been identified in the marketplace as dishonest has every claim closely scrutinized by his opponents and

2. MODEL CODE OF PROF'L RESPONSIBILITY R. 4.1(a)-(b) (2004).

3. MODEL CODE OF PROF'L RESPONSIBILITY R. 4.1 cmt 1. Comment 1 states in full: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4." *Id.*

4. MODEL CODE OF PROF'L RESPONSIBILITY R. 4.1 cmt 2. Comment 2 states in full: "This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation." *Id.*

often wastes valuable time proving each fact and contention. On the other hand, negotiators who have a history of being truthful and trustworthy often are given the benefit of the doubt on questions of fact and law. Indeed parties can save time, money and profits by negotiating with an attorney who puts truth before deception.

Simply because the rules are silent as to standards of truthfulness, it does not mean deception is acceptable in every situation. Ambiguity does not always carry a license. The truth is that while deception can provide a bargaining advantage, it often comes at a cost.