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Defining The Ethical Limits of Acceptable Deception in Mediation*

John W. Cooley**

In a recent law review article I authored for the Loyola University of Chicago Law Review, *Mediation Magic: Its Use and Abuse*,¹ I addressed the perplexing problem of the current lack of ethical guidance available to mediators and mediation advocates on the question of permissible uses of deception in mediation generally and in caucused mediation, in particular.²

This article is a sequel to that publication, offering the reader a condensation of some of the ideas contained in that article and some additional thoughts on criteria that might be appropriate to consider when designing a truthfulness standard for mediation.

I. INTRODUCTION

Deception has been defined generally as “the business of persuasion aided by the art of selective display,” and it is affected by two principal behaviors: hiding the real and showing the false.³ Deception of various types is generally

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1. John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1 (1997).

2. Caucused mediation is a commonly employed type of mediation procedure in which the mediator conducts separate and private discussions with the parties and their counsel. See generally, DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES* 68 (Little, Brown and Co., 1996).

3. See DAVID NYBERG, *THE VARNISHED TRUTH: TRUTH TELLING AND DECEIVING IN ORDINARY LIFE* 66-67 (1992); J. BARTON BOWYER, *CHEATING: DECEPTION IN WAR & MAGIC*,

accepted as integral to the American way of life.⁴ “White lies” permeate all aspects of social practice: “How nice to see you!” — when it is not; giving false excuses in response to invitations or requests in order to avoid hurt feelings; flattering the ordinary; bestowing a cheerful interpretation on depressing circumstances; showing gratitude for unwanted gifts; teachers giving inflated grades; employers preparing inflated evaluations or recommendations.⁵

Modern society tolerates outright lying in a variety of circumstances. In some circles, lying is justified when it avoids harm, produces an overriding benefit, maintains fairness, or preserves confidence or reputation.⁶ Widely acceptable deceptive behaviors in our society include: lying to protect oneself or someone else from physical harm, the government using undercover agents, lawyers manipulating facts in arguments before juries, physicians withholding information from dying patients to spare them fear and anxiety, and parents concealing from children for years that there really isn’t an Easter Bunny or a Santa Claus — at least one that rides in an airborne sleigh and comes down the chimney.

The point is that both society, in general, and, as will be made clearer *infra*, the legal profession in particular, consider many types of deception acceptable. The purpose of this article is to explore what the ethical limits of acceptable deception in mediation, and by inclusion negotiation, should be.

II. THE PROBLEM

This article proceeds from the premise that *consensual* deception is the essence of caucused mediation. This statement should not come as a shock to the reader when it is considered in the context of the nature and purpose of caucusing. Actually, it is quite rare that caucused mediation, a type of informational game, occurs without the use of deception by the parties, by their lawyers, and/or by the mediator in some form.⁷ This is so for several reasons.

First, a basic ground rule of the information system operating in any mediated case in which there is caucusing is that *confidential* information conveyed to the mediator by any party cannot be disclosed by the mediator to anyone

GAMES & SPORTS, SEX & RELIGION, BUSINESS & CON GAMES, POLITICS & ESPIONAGE, ART & SCIENCE 48-49 (1982).

4. See NYBERG, *supra* note 3, at 66. See also LYING AND DECEPTION IN EVERYDAY LIFE (Michael Lewis & Carolyn Saarni eds., 1993); DECEPTION: PERSPECTIVES ON HUMAN AND NONHUMAN DECEIT (Robert W. Mitchell & Nicholas S. Thompson eds., 1988).

5. See SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 58-59 (1989).

6. *Id.* at 76.

7. HOWARD RAIFFA, THE ART & SCIENCE OF NEGOTIATION 128-29, 359-60 (Cambridge, Mass.: Harvard University Press, 1982).

(with narrowly limited exceptions).⁸ This means that: (1) each party in mediation rarely, if ever, knows whether another party has disclosed confidential information to the mediator; and (2) if confidential information has been disclosed, the non-disclosing party never knows the specific content of that confidential information and whether and/or to what extent that confidential information has colored or otherwise affected communications coming to the non-disclosing party from the mediator. In this respect, each party in a mediation is an actual or potential victim of constant deception regarding confidential information — granted, agreed deception — but nonetheless deception. This is the central paradox of the caucused mediation process. The parties, and indeed even the mediator, agree to be deceived as a condition of participating in it in order to find a solution that the parties will find “valid” for their purposes.⁹

Second, mediation rarely occurs absent deception because the parties (and their counsel) are normally engaged in the strategies and tactics of competitive bargaining during all or part of the mediation conference, and the goal of each party is to get the best deal for himself or herself.¹⁰

These competitive bargaining strategies and tactics are layered and interlaced with the mediator’s own strategies and tactics to get the best resolution possible for the parties — or at least a resolution that they can accept. The confluence of these, initially anyway, unaligned strategies, tactics, and goals creates an environment rich in gamesmanship and intrigue, naturally conducive to the use of deceptive behaviors by the parties and their counsel, and yes, even by mediators. Actually, even more so by mediators because they are the conductors — the *orchestrators* — of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations, undefined disclosure rules in which the mediator is the Chief Information Officer who has near-absolute control over what nonconfidential information, critical or otherwise, is *developed*, what is *withheld*, what is *disclosed*, and *when it is disclosed*. As mediation pioneer Christopher Moore has noted: “The ability to control, manipulate, suppress, or enhance data, or to initiate entirely new information, gives the mediator an inordinate level of influence over the parties.”¹¹

8. See JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 263-80 (San Francisco: Jossey-Bass Publishers, 1984).

9. See Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 *MEDIATION Q.* 3, 15-16 (1995).

10. See CHRISTOPHER M. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 35-43 (San Francisco: Jossey Bass Publishers, 1986).

11. *Id.* at 269.

Third, the information system manipulated by the mediator in any dispute context is itself imperfect. Parties, rarely, if ever, share with the mediator all the information relevant, or even necessary, to the achievement of the mediator's goal — an agreed resolution of conflict.¹² The parties' deceptive behavior in this regard — jointly understood by the parties and the mediator in any mediation to fall within the agreed "rules of the game" — sometimes causes mediations to fail or prevents optimal solutions from being achieved.¹³

Thus, if agreed deception is a central ingredient in caucused mediation, the question then becomes what types of deception should be considered constructive, within the rules of the mediation game, and ethically acceptable and what types should be considered destructive, beyond the bounds of fair play, and ethically unacceptable. Or, perhaps more simply, in the words of mediator Robert Benjamin, in mediation what are the characteristics of the "noble lie" — deception "designed to shift and reconfigure the thinking of disputing parties, especially in the conflict and confusion, and to foster and further their cooperation, tolerance, and survival?"¹⁴ Because formal mediation is generally viewed as "nothing more than a three-party or multiple-party negotiation,"¹⁵ we can begin to formulate an answer to this question by examining the current limits of acceptable deception as employed by lawyer-negotiators.

III. ACCEPTABLE DECEPTION BY LAWYER-NEGOTIATORS

The launch point for our exploration of the ethical norms governing the extent to which a lawyer must be truthful in negotiations is Rule 4.1 of the ABA Model Rules of Professional Conduct. Rule 4.1 provides:

· Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client 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 Rule 1.6.

In relation to lawyers *representing* clients in *negotiation*, there is a wide chasm dividing expert opinion on the applicable standard of truthfulness.¹⁶ At one extreme on the "truthfulness spectrum," Judge Alvin B. Rubin of the United States Court of Appeals for the Fifth Circuit, writing in the mid-1970s, proposed

12. *Id.* at 187-98.

13. *Id.* at 189.

14. Benjamin, *supra* note 9, at 17.

15. *Id.* at 12.

16. See generally Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiation*, 8 REV. LITIG. 173 (1989). See also Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U.L. Rev. 493 (1989).

two “precepts” to guide a lawyer’s conduct in negotiations: (1) “The lawyer must act honestly and in good faith,” and (2) “The lawyer may not accept a result that is unconscionably unfair to the other party.”¹⁷ In 1980, Professor James J. White published an article in which he asserted his belief that misleading the other side is the very “essence of negotiation” and is all part of the game.¹⁸ White observed that truth is a relative concept that depends on the definition one chooses and the circumstances of the negotiator.¹⁹ He further pointed out that lawyers hunt “for the rules of the game as the game is played in the particular circumstance.”²⁰ He identified the paradox of the lawyer’s goal in negotiation — how to “be fair but also mislead.”²¹ In 1981, Yale Law Professor Geoffrey C. Hazard, Jr., principal draftsman of the Model Rules of Professional Conduct, after reviewing Judge Rubin’s and Professor White’s articles and other pertinent literature of the day concluded that “legal regulation of trustworthiness cannot go much further than to proscribe fraud.”²² In 1982, Professor Thomas F. Guernsey sought a middle-ground solution. He suggested that conventions regarding truthfulness dilemmas be formulated to guide those lawyers aspiring to be ethical, but that the default standard in all negotiations should be “caveat lawyer.”²³ More recently, other commentators have advocated various truthfulness standards for lawyers in negotiation in terms of “total candor”;²⁴ of avoiding “creating an unreasonable risk of harm”;²⁵ of forbidding all deception;²⁶ of “permissible conventions of untruthfulness”;²⁷ of allowing “advantageous results . . . consistent with honest dealings with others”;²⁸ of “the golden rule” — recip-

17. Alvin Rubin, *A Causerie on Lawyers’ Ethics in Negotiation*, 35 LA. L. REV. 577, 589 (1975).

18. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 928.

19. *Id.* at 929-31.

20. *Id.* at 929.

21. *Id.* at 928.

22. Geoffrey C. Hazard, Jr., *The Lawyer’s Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 196 (1981).

23. Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 103 (1982).

24. Professor Walter W. Steele, *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1403 (1986).

25. Rex R. Perschbacher, *Regulating Lawyers’ Negotiations*, 27 ARIZ. L. REV. 75, 133-34 (1985).

26. Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 50 (1987).

27. Dahl, *supra* note 16, at 199.

28. Ruth Fleet Thurman, *Chipping Away at Lawyer Veracity: The ABA’s Turn Toward Situation Ethics in Negotiations*, 1990 J. OF DISPUTE RESOL. 103, 115 (1990).

rocal candor;²⁹ of defining “what is not a lie is and what lies are ethically permissible.”³⁰

These varying perceptions of what standards of truthfulness *should* guide lawyers’ conduct in representing a client in negotiation offer little by way of identifying the standards that *do currently* guide them. Under Model Rule 4.1 (a), what exactly is a false statement of material fact in negotiation? What is a false statement of law? And, under subparagraph (b) of that rule, when is a lawyer’s disclosure of a material fact necessary to avoid a client’s fraudulent act in negotiation? Pertinent Comments of Model Rule 4.1 provide little help in answering these questions.

The Comments actually complicate the search for answers to the questions presented by the text of Model Rule 4.1 and the formal and informal *Recent Ethics Opinions* published by the ABA similarly offer little assistance in interpreting Model Rule 4.1’s application to a lawyer’s permissible conduct in negotiation.

Determining what constitutes unethical conduct is also difficult because of numerous excuses and justification lawyers typically marshal for lying in negotiation³¹ and the plethora of well-recognized negotiation strategies and tactics that have developed in recent years. Such strategies and tactics are widely considered to be within the rules of the negotiation game. Lawyers have names for them; law books describe them in detail, law professors teach them to students in law school.³² Many of these strategies and tactics rely for the effectiveness on techniques of timed disclosure, partial disclosure, nondisclosure, and overstated and understated disclosures of information — all of which involve degrees of deception.³³ Their effectiveness is also dependent on lawyer’s avoidance techniques and on subtle distinctions between what information consists of *facts* as opposed to what is lawyer’s *opinion*.³⁴ “Puffing” — a type of deception — is generally thought to be within the permissible limits of a lawyer’s ethical conduct in negotiation,³⁵ yet even with puffing, at some mysterious, undefined point the line may be crossed and “the lack of competing inferences makes the statement a lie.”³⁶

29. Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 782 (1990).

30. Gerald B. Wetlauffer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1272 (1990).

31. *Id.* at 1236 to end.

32. See TED A. DONNER & BRIAN L. CROWE, ATTORNEY’S PRACTICE GUIDE TO NEGOTIATIONS Chs. 11 and 12 (2d ed., 1995).

33. See *id.*

34. Guernsey, *supra* note 23, at 105-127.

35. Wetlauffer, *supra* note 30, at 1244-45.

36. Guernsey, *supra* note 23, at 107-08.

An article published in 1988 poignantly illustrates the differences of opinion and confusion among the experts regarding truthfulness standards in negotiation.³⁷ Using four hypothetical negotiation situations, the author conducted a survey of fifteen participants, which included eight law professors who had written on ethics and negotiation, or both; five experienced litigators, a federal circuit court judge, and a U.S. Magistrate. The chart below contains the four situations and shows how the fifteen experts answered the ethical question posed by each of the situations.

Situation 1 Your clients, the defendants, have told you that you are authorized to pay \$750,000 to settle the case. In settlement negotiations after your offer of \$650,000, the plaintiffs' attorney asks, "Are you authorized to settle for \$750,000?" Can you say, "No I'm not?"

Yes: Seven No: Six Qualified: Two

Situation 2 You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is "disabled" when you know she is out skiing?"

Yes: One No: Fourteen Qualified: None

Situation 3 You are trying to negotiate a settlement on behalf of a couple who charge that the bank pulled their loan, ruining their business. Your clients are quite up-beat and deny suffering particularly severe emotional distress. Can you tell your opponent, nonetheless, that they did?

Yes: Five No: Eight Qualified: Two

Situation 4 In settlement talks over the couple's lender liability case, your opponent's comments make it clear that he thinks plaintiffs have gone out of business, although you didn't say that. In fact, the business is continuing and several important contracts are in the offing. You are on the verge of settlement; can you go ahead and settle without correcting your opponent's misimpression?

Yes: Nine No: Four Qualified: Two

In the midst of all this confusion and disagreement about the appropriate truthfulness standard, one could reasonably conclude, as apparently did Professor Hazard, that with respect to negotiation, the present ethical norms for lawyers do little more than proscribe fraud in negotiation — or, at most, they proscribe only very serious, harmful misrepresentations of material fact made

37. See Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?* 2 INSIDE LITIGATION 1 (1988).

through a lawyer's false verbal or written statement, affirmation, or silence. Assuming that this is the current standard of truthfulness for lawyers who are advocates in negotiation, the question then becomes: does this same standard of truthfulness apply to lawyers who are advocates in mediation, as opposed to negotiation? To that topic, we now turn.

IV. ACCEPTABLE DECEPTION BY MEDIATION ADVOCATES

Very little has been written about the ethical standards for lawyers who represent clients in mediation, much less the standards of truthfulness which should guide them.³⁸ Nothing in the ABA Model Rules of Professional Conduct for lawyers addresses lawyer truthfulness in mediation. In mediation, of course, the advocate's duty of truthfulness has to be measured not only in relation to "others" but also a special kind of "other" — a neutral who is sometimes a judge or a former judge. Thus, two questions emerge: (1) do the ethical standards for truthfulness in negotiation described in the immediately preceding section also govern the advocate's truthfulness behavior vis-à-vis the opponents in mediation; and (2) do those ethical standards also govern the advocate's truthfulness behavior vis-à-vis a neutral (lawyer, nonlawyer, or judge) in mediation?

First, since the Model Rules are silent on the truthfulness standards for mediation advocates vis-à-vis their opponents, one would seemingly be safe in concluding that the rules regarding truthfulness in negotiation apply. However, one could make a persuasive argument that a heightened standard of truthfulness by advocates in mediation should apply because of the "deception synergy" syndrome resulting from a third-party neutral's involvement. We know from practical experience that the accuracy of communication deteriorates on successive transmissions between and among individuals. Distortions also have a tendency to become magnified on continued transmissions. Also, we know from the available behavioral research concerning mediator strategies and tactics that mediators tend to embellish information, translate it, and sometimes distort it to meet the momentary needs of their efforts to achieve a settlement. To help protect against "deception synergy" perhaps we should require more truthfulness from mediation advocates and commensurately require more truthfulness of mediators. But the practicality of such a proposal is questionable. Can we reasonably expect advocates to behave any differently in mediation than they do in negotiation? Would such truthfulness distinctions be impossible to define and even less possible to enforce? It seems very likely. Thus, it appears that the standards governing advocates' truthfulness in negotiation vis-à-vis each other would also govern their conduct in mediation. Second, with respect to truthfulness standards for mediation advocates vis-à-vis the mediator, apparently the

38. See JOHN W. COOLEY, *MEDIATION ADVOCACY* (NITA, 1996); ERIC GALTON, *REPRESENTING CLIENTS IN MEDIATION*, (Dallas, Tex. Texas Lawyer Press, 1994).

only available guidance having even a modicum of applicability appears to be Model Rule 3.3, “Candor Toward the Tribunal.” It is arguable, of course, that Rule 3.3 applies only to court tribunals which adjudicate matters in a public forum — and not to mediators, special masters, part-time judges, or former judges, and the like, who conduct settlement conferences. If that is the intent of this rule, the Model Rules do not specifically say so. Nowhere do they define “tribunal.” It is not even clear whether Rule 3.3 applies to a lawyer’s conduct before a *private* tribunal consisting of an arbitrator or arbitrators, although it reasonably could be. If they do apply in arbitration, would they also apply in hybrid ADR processes, such as med-arb or binding mediation? While it is true that the Comments to the above-quoted Rule 3.3 make no reference to settlement conference or mediation, it is also true that they do not explicitly exclude settlement conferences and/or mediation from its coverage.

Other Model Rules further obfuscate the scope of the coverage of Model Rule 3.3. For example, Comments to Rule 3.9, “Advocate in Nonadjudicative Proceedings,” refers to “court” and not “tribunal,” except *administrative* tribunal. So the question becomes: is “court” different in meaning than the unmodified term “tribunal”? Comment [1] to Rule 1.12, “Former Judge or Arbitrator,” defines “adjudicative officer” as including such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges.” Is the term “tribunal” then broader than “adjudicative officer”? That is, does the unmodified term “tribunal” include both “adjudicative” and “nonadjudicative” officers? If so, would mediators or settlement officers fall within the scope of “nonadjudicative” officers, thus making Rule 3.3 applicable to mediators? For those readers who believe this analysis is an exercise in tautology, you may be correct. The objective of all this is to make two important points: (1) the current Model Rules are currently thoroughly deficient in providing guidance to mediation advocates on what their truthfulness behavior should be vis-a-vis mediators (whether or not the mediators are judges, former judges, or court-appointed neutrals); and (2) if Model Rule 3.3 were deemed to apply to mediation advocates, it would significantly enhance the standards of advocates’ truthfulness-to-mediator responsibilities, most probably to the point that no advocate would find it sensible to participate in the mediation process. This describes the current state of affairs regarding mediation advocates, but what about mediators?

V. ACCEPTABLE DECEPTION BY MEDIATORS

Neither the Ethical Standards of Professional Responsibility of the Society of Professionals in Dispute Resolution (“Ethical Standards” nor the Model Stan-

dards of Conduct for Mediators (“Model Standards”) prepared by a joint committee of the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution addresses the question of how truthful a mediator must be in conducting a mediation. The Ethical Standards merely make a passing reference to a duty they owe to the parties, to the profession, and to themselves and state that mediators “should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of their parties.”³⁹ The Ethical Standards contain no explanation of what “honest” means.

The Model Standards are similarly void of any specific guidance to the mediator regarding standards for truthfulness. They do, however, provide general guidance to the mediator in handling confidential information. Thus, while the Model Standards come closer than the Ethical Standards toward the topic of mediator truthfulness, the Model Standards fail to address this crucial topic directly, opting, perhaps wisely for the time being, to keep standards regarding the matter vague and ambiguous. Although the Model Standards recognize that the parties and the mediator may have their “own rules” regarding confidentiality and that the mediator should discuss the nature of private sessions and confidentiality with the parties, they do not identify any specific information or types of information that must, *at a minimum*, be communicated regarding confidentiality rules or the private session procedure in order to be in ethical compliance with the Model Standards. And perhaps just as importantly, the Model Standards, unlike the ABA’s Model Rules of Professional Conduct for lawyers (as discussed *infra*), do not identify or define any specific type or types of mediator untruthfulness that is intended to be ethically proscribed.

Thus, mediators — lawyers and nonlawyers — currently have no specific formal guidance regarding how truthful they must be in conducting mediations. Put another way, they do not know exactly what kinds of mediator deception is acceptable, ethically, and what kinds are not. This is an important realization. The role of mediator which is quickly becoming an adjunct or full-time practice area for thousands of lawyers across the United States currently has no uniform, ethical standards officially sanctioned by the American Bar Association.

Despite this serious lack of guidance, even if lawyer-mediators were to look to the ABA Model Code of Judicial Conduct (August, 1990) to find analogous guidance for themselves as to required standards of truthfulness to guide their specific behavior in conducting mediations, they would be disappointed to find that there are none.⁴⁰ Remarkably, no canon or commentary of the ABA’s Model Code of Judicial Conduct offers any specific guidance regarding a

39. Ethical Standards of Professional Responsibility, Society of Professionals in Dispute Resolution (Adopted June 1986), “General Responsibilities.”

40. See generally, JEFFREY M. SHAMAN, STEVEN LUBET, & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS (2d. ed. 1995).

judge's duty to be truthful to others, although such requirement might be presumed from Canon 1 which states that "a judge shall uphold the integrity and independence of the judiciary." But that requirement is so general as to be of no utility whatsoever to our inquiry here.

VI. SOME SPECIFIC QUESTIONS CONFRONTING THE LEGAL PROFESSION REGARDING REQUIRED STANDARDS OF TRUTHFULNESS IN MEDIATION

The above discussion of the legal profession's minimal regulation of the use of deception in mediation triggers some very important questions about what standards of truthfulness should be developed to guide mediators and mediation advocates in performing their functions. Here is a short list that immediately comes to mind:

To what standards of truthfulness should a mediator be held?

What types of deception are constructive, within the bounds of fair play, and acceptable?

What types of deception are destructive, outside the bounds of fair play, and unacceptable?

Should there be different standards of truthfulness in mediation for lawyers and nonlawyers?

Should the standards of truthfulness be any different for the lawyer-mediator than the lawyer-advocate in either negotiation or mediation?

Should there be different standards of truthfulness for a mediator when parties are unrepresented by legal counsel?

To what standards of truth and honesty should a judge who conducts a settlement conference be held?

Should the standards be higher than the non-judge mediator -- lawyer or lay person?

Should a judge who conducts a caucused settlement conference in a case be ethically precluded from deciding a case on the merits?

Should mediators be held to a higher level of truth or honesty when they are appointed by a judge to conduct the mediation?

Should lawyer-advocates be held to a higher level of truth and honesty when representing a client in a mediation where the mediator is court-appointed?

Should mediators (lawyers, nonlawyers, or judges) be required to explain certain "rules of the mediation game" before the mediation begins?

If "game rules" should be explained, of what would they consist?

Would the "game rules" vary depending on the sophistication of the parties?

Would the “game rules” vary depending on whether the parties were represented by legal counsel?

VII. SOME PRELIMINARY THOUGHTS REGARDING THE SEARCH FOR ANSWERS TO THESE QUESTIONS

If you set about to define rules of a game, you must take care to ensure that those rules:

- are compatible with the game’s nature and its purpose;
- do not significantly interfere with the means by which the players can accomplish the game’s purpose;
- are comprehensible, reasonable, and fair; and
- are capable of compliance by all of the game’s players in all situations.

Otherwise — depending on the degree of inappropriateness of the rules — the game will not be played, the rules will be ignored, they will not be enforced, or their application and enforcement will result in unfair treatment of some of the players. For example, if you prescribed a new rule in basketball that all shots at the basket must be taken from a point behind the centerline of the court, many players might decide not to play the game anymore. They might opt for some other sport. Or, if you required that the basketball be dribbled no more than ten times between passes, players and the referees might have trouble keeping track of the dribble count and the rule might not be enforced. Or, if it were enforced, it might be enforced nonuniformly, leading to player discontentment and possibly to abandonment of the game.

Similarly, when designing rules to govern ethical conduct in mediation (and by inclusion, negotiation), one must be careful to balance the rigor of an imposed duty, on the one hand, against the reasonable likelihood of compliance in the context in which the duty is to be fulfilled, on the other. To impose an ethical rule in negotiation and mediation that charges lawyers (and non-lawyers) with a duty antithetical to the nature and purpose of these processes, that is incomprehensible, unreasonable, or unfair, and/or that is incapable of compliance by many of the people it is designed to regulate would be a futile act. People would not comply with it, and if such rule or rules were enforced, people would not play the mediation game. They would litigate in court as much as possible. So, our goal should be to find the described balance as derivable from the four rule-making criteria appearing at the outset of this section.

A. Rules must be compatible with the game’s nature and purpose

Let’s first consider the nature and purpose of mediation. The nature of mediation is an information management process and its purpose is to resolve con-

flict. The process is not static; rather it is dynamic in the sense that, in it, parties continuously develop and share information face-to-face or through the mediator. Infusion of new information may cause the parties to rethink what, at any particular moment, their risks are and what they really desire in the settlement. In some situations, these changes may literally occur minute-to-minute. Truth may likewise change from minute-to-minute. What is true for a party in mediation now, may not be true for a party 15 minutes from now in the same mediation. So, in designing ethical rules, we must keep clearly in mind that truth, in the context of an ongoing mediation session, is also dynamic — not static in nature. A party may start a mediation stating that he will not accept less than \$50,000 to settle the case; yet he walks out happily embracing a \$37,500 settlement. Thus, whatever truthfulness standard is adopted for mediators and mediation advocates, it must be able to accommodate the mediation process's integral and unalterable truth-mutating nature and it must not interfere in any significant way with mediation's conflict resolution purpose.

B. Rules must not significantly interfere with the means by which the players can accomplish the game's purpose

That mediation's purpose is to resolve conflict says nothing of the means that may be used to accomplish resolution. And that brings into focus the second criteria for ethical rule design: the rule should not interfere in any significant way with the means by which the mediator or the mediation advocate can accomplish the purpose of mediation. The question that must be addressed here is: may a good end justify any means? May truth be bent, colored, tinted, veneered, or hidden by a mediator or mediation advocate if the result is achieving a satisfactory resolution, or better yet, a win-win solution without harm to any party? In short, is there such a thing as a noble lie? Our immediate instincts beckon us to answer "no"; but the reality is that many of us lied to our children so long about Santa Claus — with no catastrophic results and no tinge of shame — that deep down we know that something like a "noble lie" exists and it's okay. Thus, whatever truthfulness standard is adopted, it must accommodate, or at least acknowledge, the concept of the "noble lie."

C. Rules must be comprehensible, reasonable, and fair

The third criteria for ethical rule design is that any imposed rule should be comprehensible, and it should be reasonable and fair, both in its content and its application. As to comprehensibility, an ethical rule must be stated clearly and

unambiguously. A rule that is capable of various interpretations can produce unfair, unwanted, and even nefarious results.

As to content, this third criterion stimulates inquiry into what types of communication (written, verbal, or nonverbal) or withholding of information should be prescribed or proscribed by the ethical rule; or whether there should be any prescriptions or proscriptions at all. My own personal reaction to this question currently is that it would make much more sense for the rules to proscribe certain specifically defined types of untruthful statements, behavior, conduct, or omissions rather than use vague blanket terms like “false statement of material fact or law.” In this regard, a review of some of the literature on development of conventions of truthfulness,⁴¹ untruthfulness,⁴² and good faith⁴³ may be of some help to the designers of the truthfulness standard for mediation.

As to the reasonable and fair *application* of an ethical rule, the third criterion forces consideration of whether the same standard of truthfulness should apply across the board to all participants in mediation whether they be lawyer or nonlawyer mediators, lawyer-advocates, judges, or former judges. My intuitive response is that the standard of truthfulness should be the same for all, unless some exception can be identified and justified. Conceptually, there should be no separate rules for judge-mediated cases as compared to non-lawyer or lawyer mediated cases. The key is selecting a truthfulness standard that is capable of both comprehension and compliance, and therefore respect. And this leads us to the discussion of the fourth criteria for ethical rule design — the rules must be capable of compliance by all persons whom they intend to regulate.

D. Rules must be capable of compliance by all of the game’s players in all situations

Whatever truthfulness standard is selected, there must be a final check to determine whether all persons that the standard is designed to regulate can reasonably be expected to comply with it in all predictable situations. This requires a type of “troubleshooter” thinking to imagine the variety of ways that the truthfulness standard might come into play. There might be certain types of situations, party configurations, or claims or defense types in which the standard needs to be modified by making it more or less rigorous or by limiting its application in some way. By this process, it may be concluded that certain specific exceptions to the truthfulness standards need to be provided and specifically explained in the text of the rule or its accompanying comments. This criterion also requires the designers to consider whether the mediator, for example,

41. See Guernsey, *supra* note 23, at 103.

42. Dahl, *supra* note 16, at 199.

43. Kimberly K. Kovach, *Good Faith in Mediation -- Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 622 (1997).

should be required to explain the “rules of the game” and truthfulness expectations at the beginning of the mediation, and if so, what the content of that explanation should be.

VIII. CONCLUSION

In July, 1997 the American Bar Association established the Commission on Evaluation of the Rules of Professional Conduct, commonly known as “Ethics 2000” whose work is currently underway. Its purpose is to examine and consider updating the ABA’s Model Rules of Professional Conduct in light of changes in the legal profession, being brought about by new and developing practice areas and by the impact of rapid innovations in global communications and technology. The Chair of the Commission hopes to report to the ABA House of Delegates at the Association’s annual Meeting in July, 2000 — an ambitious challenge, indeed, considering the breadth of the task and the comprehensiveness of the analysis that will be required. Some of the issues this Commission will most likely be addressing will include complex ethical questions relating to the field of alternative dispute resolution — both mediation and arbitration.⁴⁴ It is hoped that this article and the *Mediation Magic* article from which it derives will offer the Commission some useful insights into the tasks of defining the limits of acceptable deception by lawyers engaged in mediation and of determining an appropriate truthfulness standard for lawyers in the practice of law, generally.

44. Ethics of *advocacy* in mediation and arbitration seems to be a proper topic for the Commission’s work in revising the Model Rules of Professional Conduct. Whether *mediator* and *arbitrator* ethics fall within the charge of this Commission is not altogether clear. It would seem more appropriate to include consideration of the ethics of these two neutral functions — not currently categorized as the practice of law — in connection with a revision of the ABA Model Code of Judicial Conduct — which regulates another neutral, non-practice function of lawyers. It further seems advisable, if not imperative, that a study and evaluation of the Model Rules and the Model Code occur simultaneously so that any overlapping considerations can be fully developed, addressed, and coordinated.

