



Use A Mediator, Get Disbarred

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Can your mediator expose you to the risk of professional discipline for ethical misconduct?
Yes.

Can you protect yourself from that risk? Yes.

You are at risk because so many mediators are liars. Yes, liars. When you know that a mediator will even lie to your own client to bag a settlement, that lying is imputed to you, and lying to your own client can get you disbarred.

Fortunately, lying to your own client really isn't necessary to get cases settled. Honest mediators get cases settled too, and without exposing you to the risk of professional discipline. It takes only two questions to ferret out the liars and protect yourself from these risks.

Strange though it sounds, lying is a virtue in much of the mediation community. Its chief proponent is the late Judge John Cooley. He wrote an influential article in 2000, "Defining the Ethical Limits of Acceptable Deception in Mediation,"

<http://www.mediate.com/articles/cooley1.cfm>. Here's what he said:

"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.'"

Thus ennobled, mediators believe they have the license to, well, to ... lie to your clients! As early as 2003, Max Factor III Esq. catalogued some of the flat-outs which have become "accepted deception" to many mediators:

1) "Defendant is so angry about your charge of Fraudulent Concealment, which he is prepared to spend on defense costs his entire self-liquidating insurance policy of \$250,000, unless you drop the Fraud charge and publicly apologize for attacking his character!" [When — in fact — the defendant carrier has authorized the mediator to settle within policy limits, but implicitly promised the mediator that the insurance carrier uses mediators who can save it money.]

2) "I am authorized by plaintiff to give you my evaluation of the impeachment testimony I heard in a telephone call during the private caucus. I believe that, if true, defendant will not be found credible at trial! [When — in fact — the plaintiff's counsel has advised the mediator that plaintiff had just spoken to her strong impeachment witness, who now was wavering about testifying for fear of losing his job.]

3) "I believe the plaintiff is so emotionally outraged that unless he wins Big, he will carry on a dreadful program of adverse public attacks on your company's business practices! [When — in fact — plaintiff has advised the mediator in private caucus that he carries no grudge and will agree to make a confidentiality agreement in exchange for the defendant making a settlement offer in the dollar range the mediator has indicated privately is a reasonable compromise.]

Factor, "Thirty FAQ's for California Mediators on Ethical Minefields Involving Business, Construction, Employment and Real Estate Mediations,"
<http://www.mediate.com/articles/factorM2.cfm>

A decorative graphic on the left side of the page consisting of a vertical column of five circles. From top to bottom, the colors are red, black, grey, grey, and grey.

Many mediators aggressively hold themselves out as providing just this service. A simple Internet search will disclose just how many positively brag about it.

Here's the problem: A lawyer is not allowed to lie to her own client. California Business and Professions Code section 6106 provides: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Dishonesty with your own client is a fundamental violation of the duty of loyalty and extreme moral turpitude. No asterisk carves out dishonesty which is "noble."

When you know that a mediator will lie to your client to "close the deal," the mediator's lies become yours, too. The standard tort definition of "intent" includes both "purpose" and "knowing that the consequence is substantially certain to result." When you know that the mediator will lie and you select a mediator for the purpose of having that skill available, guess what happens when that mediator performs as advertised? You have just, through the agency of the mediator, intentionally lied to your own client.

From an ethical perspective, it is no different than hiring an investigator to interview an opposing party who is represented by counsel. You can't contact the opposing party yourself. Rule 2-100, California Rules of Professional Conduct. You can't hire somebody to do it for you, either. Rule 1-120.

This deception strips resulting settlements of their integrity. Settlements are supposed to be based on the parties' honest assessments of the strengths and weaknesses of their claims and defenses; the risks and opportunities of litigation; and their interests, needs and values. You settle only if the available deal is superior to your Best Alternative to Negotiated Agreement (BATNA), as Roger Fisher and William Ury described in their 1981 landmark, "Getting to Yes." This is the benefit that mediation promises.

When a mediator lies in order to make you settle, you lose that benefit. There can be no honest assessment of a BATNA, no legitimate determination of whether an available deal is desirable. The lying mediator is neither facilitative nor evaluative. He is a despot, soviet, deceiving parties into settling on his terms, not yours. According to his view of fairness, not



yours. His interests, needs and values. Not yours.



Can this seriously be described as a “win-win solution without harm to any party”? If the mediator was truly peddling incense and peppermints, why would he have to lie to get people to agree? Test this against your common sense: "This deal is so good, so right, so obviously wise, that we have to lie to you in order to get you to see its wisdom."

Clients have a constitutional right to a jury trial. Are we really satisfied with mediation that makes them forfeit that right through deception?

Do we really want mediators to make their own subjective judgments about settlements that are “right,” “fair” or “good,” and then lie, lie, lie to make those settlements happen?

Outcomes will become arbitrary and unpredictable, and there won't be a thing you can do about it. After all, if your advice might stand in the way of closing the deal on the mediator's preferred terms, why shouldn't the mediator lie to you, too?

Fortunately, there is a better way. If a deal really is in a client's best interests, then we ought to be able to persuade the client by telling the truth. This is familiar terrain to litigating lawyers. You don't win a trial by lying to the jury. You win a trial by telling the jury the truth, and telling it in a way that makes sense and feels right to them. It's hard work, but lawyers do it all the time.

So it is with clients in mediation. If a deal really is in their interests, then we ought to be smart and insightful enough to figure out how to make the point honestly. Deceiving your own client is as practically unnecessary as it is ethically wrong.

How can you tell if you are at risk? It takes only two questions. Ask the mediator “Who is your client?” and “Do you use caucus-only mediation?”

“Who is your client?” If a mediator tells you that “his client is the deal,” watch out. When the “ends” are an abstract idea such as “the deal,” there is no limit on the “means” the mediator can use to achieve those ends. How could a lie, any lie, be taboo, if it helps seal the deal? In this perverse world, lying is not a betrayal, it is actually honorable.



It's far better if the mediator tells you that his clients are the lawyers, individuals, business entities and insurance companies who bring him their conflicts. In this world, it would be a profound betrayal of trust for a mediator to deceive people into making a deal.

“Do you use caucus-only mediation?” In caucus-only mediation, the sides never see each other. The mediator parks you at opposite ends of the hall and shuttles back and forth. When you never get to double-check things with the other side, it is much easier for the mediator to lie. While caucusing is one available and often helpful tool, the “caucus-only” model takes you from caucus to quarantine. That spells trouble.

The better approach is for the mediator to facilitate direct communications whenever possible, either through joint sessions with all hands present, or attorneys-only caucuses where you and opposing counsel can look into the whites of each other's eyes and make your own judgments about who is bluffing, who is telling the truth.

The quest to maintain ethical standards requires constant vigilance. Now is the time for lawyers to take a closer look at mediation, and make sure that what happens there starts to make them proud.

--By Jeff Kichaven

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