Misrepresentations in mediation: Efficacy, expectations, and ethical norms

James R. Coben, J.D.

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At a recent meeting of the American Bar Association's Dispute Resolution Section in San Francisco, I listened to a distinguished group of mediators discuss misrepresentation in mediation. One panelist catalogued a list of things negotiators frequently lie about in mediations, including bottom lines, what a witness will or will not say, the cost of defense or prosecution, the willingness of a client to settle, and threats about consequences of non-settlement. Another panelist wryly noted that "it's human nature to act like a rug merchant." While the panel was unanimous that misrepresentation is widespread, they also concurred that candor is what gets cases settled. This dynamic tension highlights a unique aspect of many mediations: it is a process where the negotiator's propensity to lie is frequently confronted by a neutral's active encouragement of candor.

What compels negotiators to lie? Negotiators lie for a variety of reasons and do so in mediation just as readily as in unassisted negotiation. First, there is a widespread belief that lies are effective. To the extent that many conceive of negotiation as a purely zero sum game, with a winner and a loser, it is easy to adopt a Machiavellian approach to bargaining. In the words of James J. White, "[t]o conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation."[1] Second, most negotiators assume that lies are expected and routinely match inflated initial demands with false assertions of bottom lines. Third, well established ethical norms (for example, the self-regulatory scheme governing lawyers' work), condone and even encourage certain forms of prevarication by drawing distinctions between misrepresentations of material fact and other forms of assertions. Add in such additional pressures as lack of preparation, client control problems, a lack of trust in the mediator (or, conversely, a desire to overly

James Coben is a Clinical Professor at the Hamline University School of Law in St. Paul, Minnesota. He began mediating professionally in 1989 and currently serves on the Minnesota Supreme Court ADR Review Board.

impress a mediator), and you have a nice recipe for a misrepresentation stew.

What are the general principles governing truthfulness in negotiation? So long as lawyers are at the table, the scheme of self-regulation framed up by the Model Rules of Professional Conduct sets some clear limits for truthfulness in negotiation, including:

(a) a prohibition on misleading statements of material fact; and
(b) the obligation to correct misapprehensions if you or your client have induced them.[2]

However, the same rules make clear that there is no obligation to volunteer factual information.[3]

In effect, these rules codify the proposition that a lie is not a lie if the listener should not reasonably rely on what was said.

Moreover, there is wide latitude for statements of opinion. According to rule commentary:

> [w]hether 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 in this category.[4]

In effect, these rules codify the proposition that a lie is not a lie if the listener should not reasonably rely on what was said. No doubt we would be reluctant to float such a proposition to our grade school children, but keep in mind that the lawyer's rules were driven, at least in part, by the desire not to lose all negotiating business to the unregulated professions.

Of course there are consequences for lying in negotiations that go beyond the wrath of a licensing board. For one thing, even in today's increasingly anonymous business/legal world, a negotiator's reputation for straight talk is a powerful asset. Unless it is your last negotiation, deception may come back to haunt you in subsequent disputes. Additionally, misrepresentation of material facts (including nondisclosure in certain situations) may leave a negotiated agreement void or unenforceable under a variety of contract law theories. Moreover, such deception can leave the negotiators and the parties they represent vulnerable to tort actions for fraud and misrepresentation.

How do these general principles apply when a mediator is present at negotiations? The mere presence of a mediator to assist negotiations does not fundamentally alter the ethical obligations of the participants. Complicating matters somewhat is that fact that many mediators require participants to sign agreements to mediate "in good faith." Do such promises ratchet up expectations of candor or consequences for misrepresentation? At best, such statements are aspirational (and perhaps inspirational), but no developed body of court decisions suggests stronger consequences. For now at least, the judicial notion of good faith probably means showing up and bringing with you those people and documents that the court has ordered you to bring.[5]

The use of a mediator does, however, influence truthfulness in two distinct ways:

(1) the mediator's mere presence is a passive form of deterrence against misrepresentation; and
(2) mediators often are active proponents of candor.

Passive deterrence. With respect to deterrence, there is at least the theoretical possibility that the mediator may be called as a witness (reluctant or otherwise) to testify concerning a negotiator's misrepresentations. Furthermore, the mediator acting independently may expose misrepresentations. This is particularly possible in caucused mediation, where the mediator might learn confidential information from one party in confidence and then may hear a different version from the same party in joint session. In this respect, the mediator's presence changes one fundamental characteristic of unassisted negotiation: without a mediator, deception occurs in private with less opportunity for discovery.

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The practical consequences of mediator discovery of material misrepresentation are actually fairly minimal. For one thing, most mediation ethics codes would not permit, yet alone require, voluntary disclosure by the neutral of discovered fraud. Additionally, most evidentiary rules and statutes governing mediation, at least if interpreted literally, would preclude testimony from mediators on contract or fraud claims arising from the mediated dispute. Indeed, even the most recent version of the proposed Uniform Mediation Act, which codifies an exception to privilege and nondisclosure when fraud, duress, or incapacity is an issue in proceedings regarding the validity or enforceability of an agreement, permits the exception "only if evidence is provided by persons *other than the mediator of the dispute at issue*"[6] (italics added). Of course, notwithstanding statute or rule protection, the parties always will risk a judicial tendency to get the "best evidence" available, especially when issues of vulnerability such as fraud, duress, coercion or incapacity are at issue.[7]

Advocates for candor. Far more important than the possible deterrent effect that mere presence provides is the fact that mediators are often advocates for candor. Parties often turn to mediators precisely because the informational poverty caused at least in part by the traditional negotiator's propensity to lie presents a significant barrier to settlement.

The advocacy for candor is sometimes symbolic. For example, many mediators utilize clauses in their agreements to mediate by which parties promise not to divulge false information. The advocacy for candor is inspirational. Mediators simply share the message that their experience tells them that truth-telling, and especially the frank admission of weaknesses in one's case, is helpful to ending disputes. The advocacy for candor is educational. Many mediators

actively promote the notion of collaboration and the search for Pareto-optimal outcomes, rather than the winner-take-all Machiavellian approach to dispute resolution.

The mediator's advocacy for candor also is strategic and imminently practical. For example, mediators actively encourage parties to share interests that might otherwise not be disclosed. Mediators help parties to fully explore the consequences of non-disclosure of critical information. They coach parties on the timing of disclosures. And, when faced with material misrepresentations, mediators are an additional conscience at the table, one more likely than the conscience of some disputants to encourage consideration of a full panoply of interests, from legal to social to moral to practical.

So in the end, the unanimous conclusion of the panel at the conference in San Francisco merely reflects some very common sense notions. Candor gets cases settled. Lying often has less utility than you might think (if for no other reason than the fact that liars usually get caught). Simple lessons, but worth reaffirming. ◆

Endnotes

1. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM.B. FOUND. RES. J. 926, 929 (1980).
2. Model Rule of Professional Conduct 4.1, *Truthfulness in Statements to Others*, provides: "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."
3. The Model Rule of Professional Conduct 4.1 Comment notes that "[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."
4. *Id.*
5. *See e.g. Environmental Contractors, LLC, v. Moon*, 983 P.2d 390 (Mont. 1999); *Texas Parks and Wildlife Department v. Davis*, 988 S.W.2d 370 (Tex. App. 1999).
6. Uniform Mediation Act, Section 8(b)(2), National Conference of Commissioners on Uniform State Laws (March 2000 Draft). Full text of Current Draft with Reporter's Notes at *http://www.law.upenn.edu/library/ulc/ulc.htm*.
7. *See e.g. Foxgate Homeowners' Association, Inc. v. Bramalea California, Inc.*, 78 Cal. App. 4th 653, 92 Cal. Rptr.2d 916 (Cal. Ct. App. 2000), review granted and opinion superceded (May 17, 2000); *Olam v. Congress Mortgage Company*, 68 F.Supp.2d 1110 (N.D. Cal. 1999).