BY JAN FRANKEL SCHAU

Six Examples to Counter the Allegation That Mediators Lie

GIVEN THE SECRECY that surrounds the mediation process, it may be no surprise that some suggest that mediators lie in mediation. On that issue, it is time to reveal some truths. First, secrets are not lies. For example, consider a plaintiff's attorney who confides to me that he has yet to discover any corroborating evidence to substantiate the allegation of his client that she was teased at work due to her temporary disability. The attorney asks me expressly not to reveal the lack of evidence supporting the plaintiff's discrimination claim. It would be a lie to advise the employer that the mediator has seen evidence supporting the plaintiff's case, but it would not be a lie to suggest that evidence may be revealed. The stock in trade of mediators is the uncertainty of litigation. Keeping a secret is not lying.

As I once heard Professor Hal Abramson put it, a trial is performed under the full lights of transparency, with direct examination, cross-examination and written, documentary evidence, while a mediation is done in the darkness cloaked by confidentiality and the parties are at liberty to decide just how much light they are willing to let in. The slow drip of information that regularly takes place during a mediation hearing is not deception but nuance.

Second, assuring the parties of the confidentiality of the mediation process is not a lie. It is the duty of the advocates, not the mediator, to be explicit about those harmful facts that cannot be revealed to the adversary during the mediation process. Most professional mediators know that they cannot promise strict confidentiality on all communications. What they can promise is confidentiality on those issues that an attorney wants not to be disclosed. Mediators do not lie about their promise to maintain the confidential communications made to them, but if they are going to have sufficient latitude to reconcile two diverse versions of the same conflict, they need to be given a green light to reveal some of the evidence and legal theories that each side holds.

Third, mediators are not lying when they predict a particular response to an offer or demand. A mediator's hunch or guess about an anticipated response or reaction to an initial offer that is just that: a hunch or guess, expressed as opinion, not fact. When a mediator tells an attorney about the other side's attitude or concerns, that is also not a lie. Within the confines of confidential communication, the mediator's own impression of the triggers and motivators of the parties waiting in the other room is perhaps the greatest truth an attorney may obtain once each side is in separate caucus.

Consider, in the same discrimination disability case described above, that the plaintiff wants to make an initial demand of $2 million, although her lawyer reveals confidentially that he values this case at something in the low to mid-six figures. Consider that the defense attorney, who has been hired through the employer's EPLI carrier, confides to the mediator that there is a $1 million policy of insurance and no excess coverage. If the mediator returns to the plaintiff and expresses concern that by making an opening demand of over $1 million the demand may trigger coverage issues, but that if the opening demand was something under $1 million, the defendant had assured the mediator that a meaningful initial offer would be made, that is not a lie. That is simply coaching towards successful negotiation based upon information presented.

Fourth, mediators do not lie when they predict the outcome of a dispute. Occasionally, a trusting advocate will admit what his or her "top authority" or "bottom line" is to a mediator in confidence and encourage the mediator to negotiate within that number. Failing to accomplish a particular outcome is not a lie. Experienced mediators can often predict the outcome of a negotiation after a certain point, but as Daniel Ariely points out in his bestselling book, human behavior is predictably irrational, and some outliers will not conform to predictions. It is not a lie to be wrong about the outcome of the dispute.

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Fifth, encouraging each side to agree to a mediator's proposal is not a lie. By the time a mediator makes a proposal, he or she usually has a good idea that at least one side will agree. The more reluctant party should accept that encouragement. It is not a lie to express the likelihood of success of a mediator's proposal.

Finally, mediators are not lying when they recommend—but do not insist—that the parties take the time to document the agreement before leaving the mediation session. The mediator is entitled to rely upon counsel to make sure that all terms of a settlement are fully documented in order to bind all of the parties. If the parties and their counsel elect to rely on a handshake, it is not the mediator's role to stop them.

While some advocates question the conduct of some mediators and express concern that some bad experiences mean that all mediators lie, that is simply untrue. Real mediators do not lie. They persuade. They may withhold some facts or evidence in favor of crafting a deal that can be enforced without feeling the need to turn over every stone and show all of the good, bad, and the ugly that lead the disputants into the conflict. It is in the name of peacemaking, diplomacy, and nuance that mediators do not lie. They use whatever means are permissible within the bounds of ethical practice to aid the parties to reach an enforceable resolution of a conflict that the parties were unable to resolve on their own. Most mediators are ever vigilant to be honest brokers of lasting agreements between conflicting parties. ■

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