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Truth in mediation

Everybody lies, right?

By Rebecca Grey

I was using a well-respected mediator in a long-term disability benefits case against an insurance carrier that denied disability benefits on the grounds that my client could still work as an electrician. The mediator had invited a bright and shiny college student to shadow him during the mediation for a paper the student was doing on the mediation process. My client was disabled as a result of being electrocuted when he grabbed a live wire during a construction job. There were extensive medical records demonstrating severe injuries from the electrocution, resulting from the electrical current running from his hand, through his torso and internal organs, and exiting like a roman candle through his leg. The current blew a hole in his calf the size of a silver dollar.

In mediation, my client pulled up his pant leg to show our mediator the large faded pink scar on his calf from where the current had exited his body years earlier. Our mediator was clearly skeptical.

During the usual shuttle diplomacy, it was my turn to speak with the mediator who had decamped in his own conference room with his shiny college shadow. As I entered the room, he was saying to the student, "Basically everyone just spends the whole day lying to you and you just have to figure out what is really going on." It was awkward. Without thinking, I blurted out, "I don't lie! I really don't!"

It's never a good sign when you have to say "I don't lie" to your mediator.

My professional pique at the mediator's assumption was diluted by self-doubt. I wondered whether I *should* be lying. Was that what I was supposed to do? I know litigation is like poker, where bluffing is necessary, where protecting bad facts against disclosure is key, but affirmatively lying? Should I be making things up to protect my client? What if I just said what I hoped was true but knew it wasn't? Should I be pretending that an old scar was the scar caused by an electrocution? Is that what everyone else was doing?

Credibility is power

As a lawyer, my early legal training had reinforced what I had been taught as a basic ethic growing up: Your credibility is one of the most important things you have; to lose it is to lose power and effectiveness. Not only would I professionally suffer if I lied, but worse, my lack of credibility would be a hindrance to my clients.

Lawyers spend millions of hours (and dollars) to earn the chops to be a lawyer. Why undermine that investment? It's not only a matter of moral teaching; lying is much harder than sticking with the truth – you have to remember the stories and stick with them. With so much fighting, strategy and mind games in litigation, the truth is just easier. And yet, our mediator assumed everyone lied.

Short-term vs. long-term thinking

The best lawyers play the long game. Sure, advocates are tempted to lie in the context of the mediation process. They think, *this will get the case settled, this will help my client, there are no rules of evidence here, maybe the misstatement is not too bad*. Undeniably, some misrepresentations would advance the case if believed by the mediator or opposing counsel. But anecdotally, this rarely works and usually backfires. If the lie is discovered, the lawyer is exposed to the mediator, the other lawyers and sometimes the parties. Depending on the severity of the misrepresentation, the damage to the lawyer's credibility can be mild or catastrophic.

My first job out of law school was as law clerk for a judge who had been a litigator before his judicial appointment. A high stakes matter came before the court, driven by an accomplished lawyer from a large, respected law firm. As I discussed the case with the judge, he admonished me to take care in relying on representations by this lawyer, because as a lawyer he had litigated cases against him and caught him lying on important matters more than once. He did not say so, but the judge would not credit representation by the attorney without direct documentary backup. Every assertion went through an unconscious and rigorous filter in this judge's mind. This is a terrible position for any lawyer to be in, and worse for that lawyer's clients.

There are lies and there are lies

When I refer to lying, I'm not being subtle. I don't mean strategic omissions. I don't mean spinning facts, cherry-picking or forcefully arguing an argument that is probably a loser. I don't mean statements about what you hope your expert will say. I mean affirmative, material falsehoods.

Although sworn witnesses are admonished to "tell the truth, the whole truth and nothing but the truth," taken literally, that is neither a realistic nor appropriate instruction. Tell the truth? Yes. Nothing but the truth? Okay, sure. The whole truth? Absolutely not. Deponents need not expand on an answer to provide the *whole* truth. Witnesses need not offer adverse context to facts or offer information that is not called for by the question. It's part of good lawyering to counsel witnesses to answer the questions, and only the question, truthfully. Withholding information from mediators may be entirely appropriate as well.

Is lying ever justifiable?

Lawyers lie in mediation for a lot of reasons. They lie to make the client's case stronger, to hide bad facts, and as a weapon against the other side. They lie thinking mediation is the window of opportunity to get what the client is due. They lie to give the mediator unearned ammunition to use with the other side. These are largely ego-driven motivations that risk future believability. The short-

term gain of possibly strengthening one's bargaining position is far outweighed by the loss of credibility in the long term.

In one of the first plaintiff depositions I defended, my client failed to appear at our pre-deposition meeting spot. We had prepared for days. We had discussed the big picture, the little picture, what she would wear, what I would wear, and had unpacked silly and irrelevant skeletons, lurking unseen. I believed that with extensive preparation I could control this process and help my desperate, scared and broken client get through this test. We literally planned every step, where I would pick her up, how she would position herself, and when she would take her medication to get through the day with a terrible, chronically painful spine injury.

On the morning of the deposition, I went to get her at her apartment and she did not answer the bell. She did not answer her phone. I was panicked, worried about her and mortified at the impression this would make. I was a baby lawyer, this was *my* failure. I went back to the office to regroup and contact opposing counsel, whom I pictured sitting at the conference table seething. Before calling defense counsel, I went to a senior partner at my firm, and in a flurry of words explained the situation and my proposed solution: I would tell opposing counsel it was my fault; that I got into a car accident or got suddenly sick or had a family emergency. Calmly, and without judgment, the partner said, "No. You're not going to say that because it's a lie."

That was one of those moments in a career that sticks. I wanted to lie, and rationalized it as a service to the client, indeed as a badge of my devotion to her case. And when this senior lawyer said what he said, I was flooded with relief. Lying is so much harder. I called counsel and explained we would get there as soon as we could. And we did.

Mediators and lying

Naked deception on material issues interferes with the mediation process. When any mediation participant discovers an intentionally misleading assertion by a lawyer or a party, everything else they say is discounted. The gain perceived by making stuff up or denying the true but terrible facts is outweighed by ricochet and shrapnel that the lie causes. It is much more difficult to compromise when you don't know which arguments and claims are true and which are not.

This goes for mediators as well.

A neutral's effectiveness relies upon the parties' willingness to consider positions articulated by the mediator. If one side believes a mediator is intentionally or carelessly misleading, the message and opinions of the mediator are also discounted, if not completely rejected. A neutral's stock in trade is the ability to convey the other side's position accurately and without spin or bias; to share her own view as a legal professional of the facts, the law, the optics, the strategy and goals. A party/lawyer is less likely to credit an assertion from an antagonist than they would from a neutral party, a phenomenon called reactive devaluation. Mediators become antagonists if they are not honest. Not only should the mediator avoid making intentional misrepresentations, but the mediator ought to avoid ratifying one side's misrepresentation with her own authority. When a mediator shares the other party's positions that are more puffery than proven, the smart neutral qualifies the source of questionable claims as the lawyer's, taking care to avoid the appearance of espousing those claims themselves.

When clients lie

Parties lie, too. Lawyers easily understand the destructive effect of dishonesty when presented with a client who lies. When the client lies – to lawyers, to the mediator, or to finder of fact – it rarely works out well. Mediators have a short time to connect with the parties. Part of what mediators do is assess how credible the party is. Even a harmless lie can undermine the intended narrative. Worse, it hampers the mediator's ability to support the client's effectiveness as a witness in the other room.

Neither the parties nor their counsel are obligated to share "the whole truth" in the mediation process. They need not volunteer bad facts. They may assert as-yet-unproven legal claims, aspirational future discovery and suppositions as long as they are identified as such.

In general, attorneys seek and appreciate a neutral's frank impression about the strengths and weaknesses of their case. This helps attorneys see their case from outside the inevitable myopia of one-sided warfare. The credibility of that message is lost if the mediator is loose with the truth or conveys assertions she knows are not true as if they are her own.

One of the fun and effective things about mediation is the suspension of the usual bright line rules. Without the tedium of the formal submission of evidence, the competing narratives grow and change through the mediation process. Lawyers often – consciously or not – rehearse trial themes, test theories, perform for their clients, and cast their own clients in varying roles of a fluid story. This is an appropriate use of the mediation process. But, the relaxation of legal rules is not an invitation to make stuff up. As the M.C. of the ADR process, the mediator sets the tone and creates the culture of authenticity and trust in the process.

I recently attended a presentation by a panel of distinguished mediators who had transitioned from the bench to ADR work. An audience member asked the panel for the most important advice they would give to lawyers today, knowing what they know now after years as judges, and now, mediators. The panel had discussed gender inequality, learning to be a judge, mentoring, recent legal decisions, the Supreme Court, the Trump administration, and a hundred other big-picture topics.

But with two words, a former appellate judge answered for the whole panel: "Don't lie." Everyone nodded.

Rebecca Grey, Esq. is a mediator working throughout the Bay Area and California. After over 20 years practicing as a plaintiff's attorney specializing in employment, insurance coverage, bad faith and ERISA, she transitioned into fulltime neutral work, founding Grey Resolution, a Mediation Practice. Since 2012, Rebecca has acted as a neutral in life, health and disability insurance, employment, personal injury and landlord tenant disputes. She is joining Judicate West in the Fall.


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