

# Kluwer Mediation Blog

## Lying and Mediation

Rick Weiler (Weiler ADR Inc.) · Thursday, October 24th, 2013

It's interesting to me that when you Google "lying" and "mediation" you are redirected to "lying" (as in lying down) and "meditation".

Recently my attention was drawn back to the old issue of **deception in mediation**. It's an issue that mediators, lawyers and parties engaged in mediation or negotiation do well to reflect on from time to time.

Some time ago I conducted an employment-related mediation. The case did not settle on the day of the mediation and, as is usually my practice, I followed up with a "double-blind" mediator proposal following the mediation. The "double-blind" proposal is a mediator tool whereby the mediator makes a settlement proposal, asking each side to consider the proposed terms on an "all things considered" basis and simply respond "Yes" or "No" with the assurance that "Yes" answers will be kept confidential unless both sides have said "Yes" in which case the matter is resolved on the proposed terms.

In this particular case the plaintiff (former employee) responded "Yes" while the defendant employer did not respond at all. The rules of the proposal provide that a non-response will be considered a "No".

Even when the double-blind doesn't work I follow up with the parties. In this case I advised plaintiff of the defendant's "No" response but suggested that we carry on to try to ascertain the maximum amount the defendant would pay to settle the action. I suggested a number of options. Plaintiff's counsel rejected my suggestions noting that there was no point to carrying on as he was simply negotiating with himself. In my follow up with defence counsel I also urged that we try to keep the process going. I couldn't disclose the plaintiff's "Yes" response to my proposal so I elected to tell the defendant's lawyer that the plaintiff had failed to respond. This was the lie (because that's exactly what it was) that led to some difficulty.

The defendant, firm in its position, also declined to continue the mediation process and I terminated the mediation. Recently the litigation has heated up again as the parties slowly work their way towards trial. In the midst of a heated email exchange defence counsel wrote, "*The fact that you did not even respond to Mr. Weiler's final attempt to resolve the matter, simply says a lot of your client's intent at finding a reasonable solution.*" To which plaintiff counsel responded (copying me), "*I did indeed respond to Ricks final attempt. ... My client instructed me to accept the resolution suggested by the mediator.*"

Always one to see silver linings, I used this as an opportunity to jump back into the fray as mediator and am again working with both counsel to see if settlement discussions can be advanced. Nonetheless, as I said at the outset, this case has drawn my attention back to “deception” (which is simply a more sophisticated way of saying, “lying”).

I say, “old issue” because it has been well and fully canvassed by a variety of learned authors. I urge readers to look at John Cooley’s, *Defining The Ethical Limits Of Acceptable Deception In Mediation*, or Peter Reilly’s, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, or two excellent articles by fellow blogger Jeff Krivis, *The Truth About Deception In Mediation*, and *Hunting for Deception in Mediation – Winning Cases by Understanding Body Language*.

Essentially these articles (and others) take the view that deception is a natural and necessary part of mediation. Nothing to see here. Move along, please.

While I have accepted this position and acted in accordance with it over 22 years of my mediation career I have never really been comfortable with it and I continue to wonder if there isn’t a better way.

Consider the following:

1. Mediation Agreements often contain a provision similar to the following: “The signing of this document is evidence of the agreement of the Parties to conduct this mediation process in an **honest and forthright manner** and to make a serious attempt to resolve the outstanding matters.” (At the same time, most Codes of Mediator Conduct are perhaps unsurprisingly silent regarding a mediator’s duty of honesty – see for example the Ontario Bar Association Model Code, adopted by the Ontario Mandatory Mediation Plan, [here](#)).
2. The definition of “deceive”: “deliberately cause (someone) to believe something that is not true, especially for personal gain.”
3. The definition of “fraud”: “wrongful or criminal deception intended to result in financial or personal gain.”
4. The definition of “wrongful”: “(of an act) not fair, just, or legal”.
5. The definition of “lying”: not telling the truth”.
6. The Law Society of Upper Canada Rules of Professional Conduct provides that “when acting as an advocate a lawyer shall not...knowingly assist or permit the client to do anything that the lawyer considers to be *dishonest or dishonourable*.”
7. Contracts (including mediated settlement agreements) induced by misrepresentation or fraud are generally considered voidable.

I leave you with this Quixotic question to contemplate. *What would mediation look like if a mediator decided not to lie and decided not to tolerate apparent lying by participants?*

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