

Kluwer Mediation Blog

When Good Faith is Missing in Action

Alan Limbury (Strategic Resolution) · Tuesday, June 22nd, 2021



[Picture credit: creative commons]

Good Faith is part of the Mediator's mantra. Our opening addresses are full of it and it is something we regularly remind parties and their lawyers is an important element in rebuilding fractured relationships and achieving durable resolution.

But sometimes it becomes obvious that Good Faith is missing in action.

A very useful new article "[Legal Lying?](#)" by Robert Angyal SC and Nicholas Saady takes a fresh look at how professional standards regulate the truthfulness of lawyers' advocacy during mediation in Australia and the United States and suggest some measures that might be taken by regulators to control lawyers' advocacy in mediation more effectively.

The article notes that in Australia lawyers have a duty not to deceive or knowingly or recklessly mislead the "court" – defined to include the mediator. The opposing lawyer, opposing client and third parties are owed different, less stringent obligations so the required level of honesty depends on whether the mediator is in the room.

Rule 4(a) of the American Bar Association Model Rules of Professional Conduct prohibits a lawyer from knowingly making false statements of material fact or law. So U.S. lawyers representing a client at a mediation may knowingly make false statements about nonmaterial facts. Hence "small lies are legal, while large lies are not".

The article suggests that the difficulty in distinguishing between impermissible lying and permissible puffing or posturing may be overcome by writing to the other side, before the start of the mediation something to the following effect:

“First, I understand that Model Rule 4.1(a) permits you to lie during our negotiations about nonmaterial facts. We are putting you on notice that, throughout our negotiations, we will assume that all statements you make to us concern material facts and, therefore, that you are obliged to be truthful in making them. Second, if you wish to make any statements of non-material facts, we require you to state in advance that you are about to do this, and we are informing you now that we will not believe those statements because you are permitted to lie when making them. Third, if you disagree with these rules of engagement, please let us know before we start negotiating. In the absence of any articulated disagreement, we will assume that you have agreed to be bound by these rules. If you are not prepared to agree to these rules of engagement, we will assume that you are lying throughout the mediation and will not believe anything you say”.

I would add that, apart from the difficulty in determining whether lawyers’ lies in mediation are permissible, there is the added difficulty in determining whether evidence of alleged lies may be given in court.

In Australia, in order to encourage parties to attempt to resolve their disputes, the common law “without prejudice” privilege makes evidence of communications made in the course of settlement negotiations inadmissible in court. However, there are numerous exceptions which allow such evidence to be given. These are designed to enable justice to be done and to avoid mediation and bilateral settlement negotiation becoming an evidentiary “black hole”. One example is where a party seeks to have a settlement agreement set aside on the basis that it was induced by a lie on which the party relied, whether the lie was told by the other party or by the other party’s lawyer.

Where the mediation is voluntary, the exception applies so as to allow such evidence to be given. Where the mediation is ordered by a Federal or State court, pursuant to applicable legislation, the evidence is inadmissible.

In California, the Supreme Court held in *Cassel v Superior Court* (2011) 51 Cal 4th 113 (2011) that such evidence is inadmissible whether the mediation is voluntary or court-ordered. *The Facebook case* comes to mind.

So until the legislation is changed to embody the exceptions to the “without prejudice” rule in all mediations, whether voluntary or court-ordered, lawyers and their clients wishing to tell lies should ensure that they do so in California or in Australian court-ordered mediations.

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This entry was posted on Tuesday, June 22nd, 2021 at 5:00 am and is filed under [lawyers in mediation](#), [Mediation Lawyering](#), [Mediation Reforms \(Legislation, etc.\)](#), [Reform](#), [Regulation](#), [Set Aside a Mediated Agreement](#), [Settlement Agreements](#), [United States](#)

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