

The truth about deception in mediation

Minimize your risk of being exploited in a negotiation where the other party is lying.

This story is for you if . . .
- You're not sure how to respond to deceptive information used in negotiations.
- You get frustrated when it appears the other side is lying about the facts of the case.


Krivis

JEFFREY KRIVIS

The situation

You're in a negotiation in which your adversary presents information through the mediator that severely alters the truth.

The solution

First, let's look at the background of the problem. Deception is part of the human condition, and it would be a mistake to dismiss it as improper, particularly when resolving litigated disputes. The exception of course would be outright fraud, which by necessity is illegal and unethical in all contexts. Deception is particularly widespread in the mediation process because people realistically do not feel they will get caught or pay a price in court based on the so-called confidentiality of the process. While this is tempered by internal morality and reputational issues, it is unrealistic to expect litigators to be candid when the goal is to get as much as they can for their client.

The classic legal negotiation involves a "fixed pie" meaning it cannot be enlarged. These are sometimes known as "zero sum" negotiations. In this type of negotiation, when something is given away such as money, the other side receives more of it. This classic way of approaching settlement is the foundation of most of our deal making. With it come various maneuvers to get as much of the pie or give up as little of the pie as possible. These maneuvers involve deceptive tactics and sometimes outright lies. When this occurs, there is an inherent tension with those negotiators that prefer to cooperate during a negotiation in order to create a bigger pie or more value to the parties. The issue for settlement is how to manage that tension yet still be committed to fairness and ethics and avoiding exploitation by one's adversary.

Here is some advice for minimizing your risk of being exploited in a negotiation where the other party is lying. The key is to gather as much information as possible both before and during the negotiation as information is the raw material by which one can defend one's self against lying and deception.

- **Do a Google search** – Before the mediation occurs, do some background Internet research on your adversary, their client and other parties to the case in order to learn more about their reputations.
- **Prequalify your adversary** – To the extent possible, discuss with your negotiation counterpart what their expectations are for the mediation as well as the best use of your time. Do your best to ensure that your counterpart is someone with whom you have worked and have built up a rapport so that feelings of good will can be further developed. This will reduce exploitative conduct such as lying.
- **Consider the "yes, and" alternative** – There is a simple technique in improvisational theatre entitled "yes, and". In this technique, the goal is to keep the scene moving forward by not denying the other person's statement. This requires a willingness to build a strong rapport with your adversary and asking for elaboration on certain topics that are discussed. When parties are asked to elaborate on the facts, they tend to minimize their willingness to commit a lie in the negotiation. In other words, you can neutralize the potentially deceptive nature of your adversary by building rapport in using the "yes, and" technique. There is more information on this technique in the written works of Keith Johnstone, Charna Halpern and Del Close.
- **Always look for fair market value** – When discussing negotiation numbers, enter that discussion with the idea that the case should settle for fair market value. This means using objective standards will be sought as well as outside resources. For example, previous settlements and jury verdicts based on similar fact scenarios are obvious sources of information. Discussing your own personal experience, such as an injury you had earlier in life that remedied itself will serve no useful purpose except to distract from the negotiation.
- **Consider the "slow drip" process** – This is a process in which you slowly reveal information at critical points in the negotiation when you believe that it would help move things along. Dumping your

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entire case in front of the other side in an opening session is not the best tactic to lead to a healthy negotiation and avoid exploitation.

• **Ask them to come clean** – As the negotiation proceeds forward and you notice that there are certain behaviors that seem deceptive, ask the other side if there is anything known to them that needs to be revealed at that point in the negotiation. Notice their body language as the question is asked or ask the mediator to give you a sense of how they react.

The goal here is simply to minimize the risk of being exploited so that you have a better understanding of why your counterpart has made certain moves in the negotiation. Keep in mind that litigation practice is a marathon and you will probably run into other lawyers whose paths you have crossed many times. While that alone will not eliminate deceptive behavior, the possibility of having ongoing negotiations over different disputes with the same people should cause some pause or neutralization in your own deceptive behavior.

Jeffrey Krivis has mediated complex disputes in Northern and Southern California for 20 years. He teaches at Pepperdine Law School/Straus Institute for Dispute Resolution and has been named one of the Top Neutrals in the state by the Daily Journal.

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