



Protect Yourself From Biased, Deceptive Mediators: Part 1

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Mediators are human beings and, as such, have biases. If left unconstrained, those biases will ripen into deception of you and your clients. That deception will poison, not facilitate, your negotiations. It will lead you and your clients into bad deals, deals which gratify the mediator's biases but do not serve your clients' best interests. Remarkably, and in my view sadly, much of the mediation establishment thinks this is just fine.


You need to protect yourself from mediators who refuse to constrain their biases. The outcomes of mediations must reflect your clients' interests and their interests only. Mediator bias should have no role to play in your clients' decisions.

Part one of this article describes the background of the problem and its severity. Part two, which will be published next week, describes what you can do about it.

The Background of the Problem

On July 26, 2011, Law360 published my article, "[Use a Mediator, Get Disbarred.](#)" The article described the pedigreed tradition in the mediation establishment that it is OK to lie to people in order to get them to make deals, as long as the mediator believes that the deal is in your clients' best interests.

This creates a serious ethical problem for lawyers. Lawyers can't lie to their own clients. (See, e.g., Cal. Bus & Prof. Code 6106.) Lying to your own client is extreme moral turpitude and grounds for professional discipline. And, you cannot hire someone to do indirectly what you cannot do directly. (See, e.g., Cal. Rules of Prof. Conduct, Rule 1-120.) So, if a lawyer knows that a mediator is likely to lie to her clients in order to induce a deal, it is an ethical trap.



The article gave some tips on how to detect these unconstrained mediators, and advised lawyers to avoid them. The article advocated higher standards for mediators, and urged lawyers to police those higher standards, since so many mediators seem unwilling to do so voluntarily.

When Law360 published this article, lawyers liked it a lot. I got far more emails in response to “Use a Mediator, Get Disbarred” than I usually get when I publish an article. The emails were complimentary. I felt good.

Then, last March, the article came to the attention of elite mediation listservs. As described above — [and you can still read the article on Law360](#) — the article advocated honesty, transparency and integrity in mediation. But from the way much of the mediation establishment reacted, you would have thought that I had advocated broken glass at a beach party.

One after another, the emails rolled in: How dare you say such things! How dare you accuse us, criticize our practices, call for a different standard of ethics! For days, the damnation was unrelenting.

Then, a single brave soul wrote that, instead of complaining, it would be easier — and better — to acknowledge the existence of a higher standard, and adhere to it.

In response, an eminence grise of the mediation establishment wrote once and for all: He said that deception is natural to all animal species, and that it was important to distinguish between constructive and destructive deception. His essential point was that, if your deception seemed to you to be constructive, don't sweat it.

With that, the listservs acted as if they had been reassured that it was all a bad dream. They went back to their slumbers; the chatter largely stopped.


The lesson from all this? The mediation establishment is largely not motivated to change. They don't see it as wrong to deceive you — as long as they subjectively deem the deception “constructive.” Whatever that means. So now the issue must be put before the legal community. You lawyers must make us mediators feel the heat, even when we cannot



see the light.



The Severity of the Problem




Deception has only one purpose: to induce reliance, and get you and your clients to do what you otherwise would not do.

How should you view a mediator who is willing to supplant your clients' own views of her best interests with his own biased views? Well, to paraphrase one of the most memorable lines from this year's presidential primary campaign, from Rick Santorum, "what snobs." Your clients are entitled to their own views of their best interests, with your good counsel and your duty of undivided loyalty to them. The stated purpose and highest value of mediation is "informed self-determination." This is completely inconsistent with a mediator's effort to engineer his own preferred outcome through deception.

How serious a problem is this, really? In my view, quite serious. While almost all voluntary mediations should and do end in settlements, a few don't, and shouldn't. Mediator efforts to get your clients to make a bad deal — just to get any deal — fly in the face of negotiation theory. Consider the wisdom of "Getting to Yes," one of the foremost negotiation books of our time:

When you are trying to catch an airplane your goal may seem tremendously important; looking back on it, you see you could have caught the next plane. Negotiation will often present you with a similar situation. You will worry, for instance, about failing to reach agreement on an important business deal in which you have invested a great deal of yourself. Under these conditions, a major danger is that you will be too accommodating to the views of the other side — too quick to go along. The siren song of 'Let's all agree and put an end to this' becomes persuasive. You may end up with a deal you should have rejected.

Fisher, Ury & Patton, *Getting to Yes*, 2d Ed., p. 50.



A mediator's biases can be conscious or unconscious. We all have such biases, and mediators are no exception. Unconscious biases are strong. To deny their power is to deny human nature. See generally, the work of Harvard psychology professor [Mazarin Banaji](#). Take her online test for unconscious biases, and you will be persuaded. (<https://implicit.harvard.edu/implicit/demo/>)

Why might a mediator sing that siren song, of which "Getting to Yes" warns? Mediators can have at least three biases that motivate us to induce your clients to make bad deals. They are worth exploring in detail. They are (1) ego, (2) the favored client, and (3) politics.


Ego

Mediators all want to be able to say that they mediated the big case, and it settled. It's not much of a bragging right to say that while you were selected to mediate something special, it didn't settle. We all want to "look good," and we are all willing to deceive to do so. Consider Hon. James Ware, formerly chief judge of the Northern District of California. He's now a mediator, and his situation is worth studying:

"[President Bill] Clinton sought to elevate him to the 9th Circuit in 1997 but the nomination collapsed with the disclosure that Ware, who is black, had for years lied about a childhood bicycle ride in his native Birmingham, Ala., that ended when white youths shouted racial epithets and shot to death his brother Virgil, who was seated on the handlebars.

"Virgil died in a ditch in Ware's arms, he told hushed audiences on many occasions. 'I came out of that ditch with a hunger for justice,' he would conclude.

"The startling revelation that Ware had stolen the history of a different James Ware and his brother and retold it as his own forced the judge to withdraw his candidacy. The Northern District Judicial Council reprimanded him. Ware flew to Alabama to deliver a personal, tearful apology to the authentically bereaved James Ware.



“In my zeal to educate others about black history, I made the mistake of making myself a part of the story,’ he said in a December 2010 interview. ‘I shouldn’t have. One of my regrets is that I didn’t do it better. I apologized and tried to move on.’”

(Northern District Chief is Stepping Down, Los Angeles Daily Journal, May 1, 2012, p.7.)

The point is not that Judge Ware is worse than any of us. The point is that none of us is any better. Considering what a “zeal to educate” led Judge Ware to do in public, just imagine what a “zeal for the deal” might lead him (or any of us) to do in private, under the dark cloak of mediation confidentiality — all based on ego, the need to look like a hero.

The Favored Client


Who among you has never vetoed opposing counsel’s choice of a mediator on the theory that, “If they want her, she must be their stooge, their foil, their puppet?”

As mediators, we swear that we are not biased in favor of repeat clients, big clients, glamorous clients. But, maybe we are, at least unconsciously. Familiarity might breed undue trust. Maybe some clients leave us starstruck. Bias toward clients who we favor for whatever reason may lead mediators to deceive in order to create results that favor those clients.

Politics

Everyone has political biases. These biases may manifest themselves unconsciously. Or sometimes, consciously. For example, in April 2012, a mediation outfit called the Ventura Center for Dispute Settlement called its conference “Occupy Camarillo.” Seriously. (<http://www.vcds.bz/newsandevents/conference.html>.)

What if a mediator believes that a business defendant should pay more, despite strong defenses, because it is a “corporate fat-cat,” and, as Carol Channing put it in “Hello, Dolly!,” “Money, pardon the expression, is like manure. It’s not worth a thing unless it’s spread around.” What if another mediator believes that a plaintiff should not recover, despite strong



claims, because he is “an opportunist whose exaggerated claims drive employers out of our state”? Yes, unconsciously if not consciously, political biases may motivate mediators to deceive in order to get results consistent with their beliefs.

All of these are bad. If mediators are unconstrained to deceive and let their biases run roughshod over parties’ rights to informed self-determination, businesses, lawyers and the public will lose confidence in mediators as honest brokers of deals.

Part two of this article will describe what you as lawyers can do to curb mediator bias and deception, and preserve the benefits that good mediation provides.

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