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Protect Yourself From Biased, Deceptive Mediators: Part 2

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The first part of this article, published last week, described the problem of bias and deception by mediators, its background and severity. This part describes what you can do about it.

What You Can Do To Curb Mediator Bias and Deception

When Eminence Grise defended “constructive deception” by mediators, he proclaimed that the impulse to deceive inheres in human nature, and so concluded that we shouldn’t worry about it.

This proclamation was hardly news. In Catholic teaching, the inclination to sin has existed since the fall. In Judaism, Yetzer Ha’ra is the name given to mankind’s evil inclination, present from birth, and overcome only through learning. The idea that “evil impulses are natural” also has a distinguished provenance in secular philosophy. Consider Plato, speaking through the voice of his brother, Glaucon, in "The Republic," about the Ring of Gyges, which makes its wearer invisible:

Suppose that there were two such magic rings, and the just put on one of them and the unjust the other; no man can be imagined to be of such an iron nature that he would stand fast in justice. No man would keep his hands off what was not his own when he could safely take what he liked out of the market, or go into houses and lie with anyone at his pleasure, or kill or release from prison whom he would, and in all respects be like a god among men.

Plato’s Republic, 360b-d (Jowett trans.)

Fortunately, there is a system of rules and laws to control the natural impulses toward deception and other evils. The name of that system? “Western Civilization.”

Indeed, the impulse to deceive is so strong that the rules and laws designed to constrain it made it all the way into the 10 Commandments. (It’s number nine, “You shall not bear false witness against your neighbor.”)

The need for rules and laws to control these impulses is also reflected in what may be the single most profound statement in all of American civilization, from James Madison in Federalist 51:

“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”

Mediation is a system for governing a dispute and its resolution. As mediators, we control the process. We are also obliged to control ourselves. Mediators, though, seem unwilling to do so. So you, the lawyers who hire us, must do the job. Here are two easy ways to control bias and deception in mediators.

1) Make Sure the Mediator Thinks You Are Her Client

Many mediators say that “their client is the deal.” It’s silly. Worse, it is dangerous to you.

It’s silly because an abstract idea like a “deal” cannot possibly be a “client.” “Clients” hire you, pay you and refer their colleagues if you do a good job. No “deal” has ever called a mediator to inquire about availability to handle a case, no “deal” has ever signed a check to pay a mediator’s fees, and no “deal” has ever been asked by a colleague whether a mediator is any good.

It’s dangerous because it makes you and your client expendable. The immorality of it goes back at least as far as Immanuel Kant’s second categorical imperative: “Act so that you treat humanity, whether in your own person or that of another, always as an end and never as a means only.” When “the client is the deal,” you are reduced to a means to that end. To put it in a more common vernacular, if the “deal” is the omelet, you are the egg. You can be cracked through manipulation, deception and lies. And, why not? There is no duty of loyalty to you. You are not the client.

Instead, make sure that the mediator understands that her “clients” are the participants in the mediation. Helping you achieve “informed self-determination” is her goal. Almost all of the time, settlements will be the natural result of this less coercive process. Once in a while, settlement will not result — as sometimes it shouldn’t.

2) Minimize Caucuses and Hearsay

A “caucus-only” model of mediation increases the likelihood of deception based on mediator bias. In a caucus-only model, the mediator keeps the parties isolated to the extent possible and repeats to each side what the other side told her outside of that side’s presence.

This is dangerous. In law-talk, we have a word for “a person’s repetition of what another person told them outside of your presence.” Yes, that word is “hearsay.” We know it is disfavored, and it is disfavored because it is inherently unreliable. See generally, Williamson v. U.S., 512 U.S. 594, 598 (1994). At one time, the law liberally allowed hearsay if it had “particularized guarantees of trustworthiness.” Ohio v. Roberts, 448 U.S. 56, 66 (1980). But no more. “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.” Crawford v. Washington, 541 U.S. 36, 62 (2004).

Even under Ohio v. Roberts-style thinking, mediator hearsay offers no guarantees of trustworthiness. Mediators may be powerfully motivated to dupe you into a settlement to gratify their own egos; to benefit a favored client; or to vindicate their political beliefs. Don’t assume that any mediator, even the most prestigious, is “obviously reliable.” Remember James Ware.

What can you do? Minimize hearsay by minimizing caucuses. Insist on as much direct communication as possible. Here are three specific ways you can do it:

- Learn to do effective opening joint sessions. Work with the mediator before the mediation day to learn what might, and might not, be effective in an opening joint session. Most lawyers have learned, some the hard way, that the kind of “opening statement” you might give in court generally doesn’t work in a meditation. Your mediator can coach you in advance as to what might work better. Then you can coach your client in advance as to what to expect.

- Engage in attorney-only caucuses. Sometimes, lawyers should meet with the mediator, outside the presence of all clients, to plan simultaneous moves in the negotiations or determine what’s needed to make further progress. Advise your clients in advance that this might happen, and that it is a normal part of the mediation process. Lawyers have well-developed rules and cultures regarding just how “aggressive” they can be with the facts and law in negotiations. Mediators do not. When you hear things from opposing counsel, you are much better able to assess its truthfulness than you are when you hear things from a mediator.

- Anticipate more than one joint session. Neither the Bible nor the Constitution requires the sides, once they separate after an opening joint session, never to lay eyes on each other again. The beauty of mediation is its flexibility. Sometimes, later in the day, the sides have to look into each others’ eyes once more when things need to be said and things need to be heard. Be open to the possibility.

Mediation has costs, and all of you are interested in cutting costs. If mediation risks settlements which reflect the mediator’s values, not your and your clients’ values, then mediation will become a very cuttable cost.

Mediation will flourish if we mediators adhere more closely to our stated value of “informed self-determination.” To do that, we mediators must adopt disciplines and practices that constrain our ability to let our biases infect your negotiations. We must remember that our clients are actual people and the entities they represent, not some abstract idea. Then we must eliminate as much hearsay as we can. It’s up to you, the lawyers who hire us, to insist on those standards.

We mediators are here to help you and your clients make the best decisions possible. When we do our jobs, almost all cases will settle. And, when we do our jobs properly, they will settle with integrity.

--By Jeff Kichaven

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