

MEDIATING WITH A LIAR - LOOK IN THE MIRROR?

By Leigh Wilco

Ok, no one likes to be called a liar. But we all “fudge” some in negotiations. Not you? How about when the mediator says that he suspects that you are getting near your bottom line and, if that is true, he thinks he can get the other side close to your last number? Do you tell the mediator that you still have another couple of hundred thousand dollars left to negotiate? Do you say that in front of your incredulous soon-to-be former client who hears you give away a lot of her money unnecessarily? No, you “fudge” and say that the mediator is shrewd at reading your side and if it can get done with only a little more movement on your part, you’ll see what you can do.

So, despite what your mother may have told you, there are different kinds of lies. There are little lies – “we are at the end of our authority.” Then there are medium lies – “we are prepared to go all the way with this case and we have the funds to do it.” And then there are the bigger lies – “our expert will say that we have no fault at all in this matter.” But this is mediation and negotiation. No one expects us to tell the truth, right?

Not so fast. In fact, the Bar recognizes that there can be “fudging” or “puffing” that is acceptable. You are not required to be completely forthright in disclosing your true negotiating position or your actual bottom line. Saying this is our last number when you have more room can be acceptable “puffing.” There can be problems even with these kinds of little lies, however; if you are found out (i.e. you continue to negotiate past your “final” number) you can lose credibility. Even worse, if you “puff” about evidence or the law and the other side finds out, it can cause them to believe that you are not trustworthy and not negotiating in good faith and can cause them to end the mediation.



But beyond that, you have an ethical obligation not to lie in mediation. Georgia has adopted the ABA Model Rules of Professional Conduct. Both the ABA Rule and the Georgia Rules of Professional Conduct, state:

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- a. make a false statement of material fact or law to a third person; or
- b. fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure prohibited by Rule 1.6.

Note that as a lawyer, you cannot make a false statement of material fact to a third party. That would include a mediator or the other side in a negotiation. You also cannot fail to disclose a material fact if you are deemed to be assisting a client in a fraudulent act ("I have no other assets and if you don't take this offer I will file for bankruptcy."). The comment to Rule 4.1 goes on to state it somewhat more strongly:

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. **A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.** (emphasis added)

By saying "misrepresentation" it appears that this is broader than assisting a client in a fraudulent act. The "misrepresentation" by affirming a statement of a client or not acting, presumably sitting silent when the client makes a false statement to a mediator, would be a violation of Rule 4.1(a).

Think this is just counting the angels on the head of a pin and doesn't apply to a savvy negotiator like you? Maybe you would reconsider if you knew how the Bar views this. The maximum sanction for violating Rule 4.1 is disbarment.

And that's no lie.

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