

# Mediation's dirty little secret: Straight talk about mediator manipulation and deception

By James R. Coben, J.D.



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**I**n my last ethics column for this Journal, I asserted that mediation is often “a process where the negotiator’s propensity to lie is frequently confronted by a neutral’s active encouragement of candor.”<sup>1</sup> Frankly, I was being too kind to the mediators. In fact, mediation’s dirty little secret is the degree to which mediators themselves routinely and unabashedly engage in manipulation and deception to foster settlements, albeit under the rationale of fostering self-determination. Sophisticated consumers have come to know and expect it. Unsophisticated consumers are not so lucky.

This is not simply a matter of mediator style — the distinction between facilitative and evaluative approaches about which much ink has been already spilled. Regardless of the paradigm and claims of mediator purity, close examination of predominant training methodologies and some experience with

actual mediator interventions in the field confirms a distinct hollowness in the rhetoric of self-determination.

Think back on your last few employment mediations. You may have heard a mediator reframe a plaintiff’s demand for \$100,000 as a request for substantial compensation. The plaintiff’s ultimatum that an alleged harasser be fired was transformed into recognition that there be “consequences for unacceptable workplace behavior.” The mediator most likely brought a box of Kleenex to the table and strategically used empathy to connect with an injured worker. At some point, the mediator may have orchestrated an awkward period of silence to help encourage options generation. Perhaps the mediator used neuro-linguistic programming to mirror the speech patterns of the company’s human resource manager in a way that maximized that person’s comfort.

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In an early caucus, the mediator may have enthusiastically over-reported the extent of progress being made to encourage you to press on. Conversely, in a later caucus, the mediator pessimistically reported the threat of stalemate precisely when settlement was close at hand to encourage you to make the final necessary compromises. How many times has a mediator agreed to take a proposal to the other side as his or her own in order to help you save face? The list could go on and on.<sup>2</sup>

**How do I influence thee? Let me count the ways.** All of these mediator techniques are consistent with the basic observation from one oft-cited mediation treatise that "mediators, although neutral in relationship to the parties and generally impartial toward the substantive outcome, *are directly involved in influencing disputants toward settlement*" (emphasis added).<sup>3</sup> The same text, paraphrased below, goes on to catalog the myriad number of ways that mediators exercise pressure and persuasion, including:

- managing the negotiation process (agenda control);
- managing communication between and within parties (active listening; reframing; use of caucus);
- control of physical setting and negotiations (seating arrangements; table shape; room size);
- timing decisions (imposition or removal of deadlines for settlement;

- when to convey offers and responses);
- managing the information exchange (packaging information so it will be heard);
- engineering associational influence (choosing who is at the table with settlement in mind);
- use of authority (the mediator's own, as an expert or respected elder, or that of outsiders);
- managing doubt (encouraging doubt as a way to moderate a party's position);
- rewarding behavior (the offer of friendship, respect, or interest in a parties' well-being).<sup>4</sup>

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Sounds innocent enough. But shouldn't we be troubled that these tools of the trade are used by mediators working with consumers who are often unaware that a technique is being used at all? Such "control or play upon by artful, unfair, or insidious means so as to serve one's purpose"<sup>5</sup> is the very definition of manipulation.

The fact that mediators justify their interventions as necessary to foster parties' self-determination

does not mean the interventions are no longer manipulative. Surely one must question if a settlement is ever truly self-determined when it is the product of manipulative tactics (no matter how well intentioned).

Moreover, mediator manipulation/deception is not always so benign. At a continuing education event last March sponsored by the Minnesota State Bar As-

sociation, I was stunned by the high percentage of mediators who answered "yes" when asked if strongly encouraging parties to skip lunch (to keep the pressure on) was a good tactic. Furthermore, how do you react to the following two examples? Taken from John Cooley's entertaining "encyclopedia" of mediator magic, consider:

- (1) the mediator who conveys a false demand to a side which can be dropped at any time to obtain closure; or
- (2) the mediator who implies to a proposing side that a proposal was communicated to the other side when it was not.<sup>6</sup>

Wait a minute, you might ask, surely these mediator techniques (or perhaps you would pejoratively label them ploys) cross the line of permissible behavior?

**What is permissible behavior?** You are wrong to assume there is a clear line to cross. First of all, always keep in mind that in most contexts mediation remains a wholly unregulated profession. Second, even to the extent that aspirational codes of ethics have been promulgated and influence mediator behavior either through the tie of voluntary association or membership conditions, these codes rarely provide clear guidance to help define the actual limits of acceptable mediator activity. Instead, the codes more generally state prohibitions against coerced settlements and promote the penultimate principle of self-determination. Moreover, none of the ethics codes address the more practical question of

what the sanction might be for a mediator's failure to measure up.

For example, the Model Standards of Conduct for Mediators adopted by the American Bar Association (ABA), the American Arbitration Association (AAA), and the Society of Professionals in Dispute Resolution (SPIDR) skirts the issue entirely by merely committing the mediator to "diligence and procedural fairness."<sup>7</sup> The Standards of Practice for Lawyer Mediators in Family Disputes, crafted by the Family Law Section of the ABA, states that "the mediator has a duty to assure a balanced dialogue and must attempt to diffuse any manipulative or intimidating ne-

gotiation techniques *by either of the participants*" (emphasis added).<sup>8</sup> Likewise, the Academy of Family Mediators Standards of Practice for Family and Divorce Mediation prohibits manipulative or intimidating negotiation techniques between the parties, but is silent about the mediator.<sup>9</sup> The Ethical Standards of Professional Responsibility adopted by SPIDR at least requires that neutrals "should be honest and unbiased [and] act in good faith."<sup>10</sup>

**Is legislation warranted?** Is legislating a higher standard of neutral behavior the answer? Some state courts believe so. For example, Florida's court-annexed mediation rules prohibit mediator misrepresentation of *material* facts.<sup>11</sup> In my home state of Minnesota, district court rules forbid

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neutrals from making false statements of fact or law, material or not.<sup>12</sup>

I am not convinced that legislation is the answer. Surely, clear standards articulating the limits of overt mediator misrepresentation will help deter the most extreme forms of mediator deception. But the vast majority of the manipulation that occurs at the mediation table is far too nuanced and subtle to actually be caught up in the radar of regulation. So consumers will continue to rely on mediators' self-imposed restraint to temper the efficacy of manipu-

lation and deception with the over-arching principle of self-determination. With pressure to settle being what it is, this self-restraint is a fragile safety net. Better for the profession of mediation, and all who use it, that we admit that all sorts of magic (to borrow John Cooley's term) is used at the mediator table. Identifying and anticipating the behavior does not necessarily limit its effectiveness. Indeed, coming to the table with eyes open and expecting to be manipulated may in fact be the best path to ensure self-determination (not to mention enjoyment of the show)! ♦

## Endnotes

<sup>1</sup> James Coben, *Misrepresentations in Mediation: Efficacy, Expectations, and Ethical Norms*, Volume 2, No. 3, JOURNAL OF ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT 4 (Fall 2000).

<sup>2</sup> See e.g. John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOYOLA UNIVERSITY OF CHICAGO SCHOOL OF LAW 1 (Fall 1997); Robert Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, Vol. 13, No. 1, MEDIATION QUARTERLY 3 (Fall 1995).

<sup>3</sup> Christopher Moore, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT*, 2D. EDITION at 327 (1996

Jossey-Bass Publishers).

<sup>4</sup> *Id.* at 327-333.

<sup>5</sup> Webster's Ninth New Collegiate Dictionary (1983).

<sup>6</sup> Cooley, *supra* note 2, at 106.

<sup>7</sup> Model Standards of Conduct for Mediators, Rule VI (1994).

<sup>8</sup> Standards of Practice for Lawyer Mediators in Family Disputes, Family Law Section of the American Bar Association, Rule V.C (1984).

<sup>9</sup> Academy of Family Mediators Standards of Practice for Family and Divorce Mediation, Section IX.A (1985) ("The mediator has a duty to ensure balanced negotiations and should not permit ma-

nipulative or intimidating negotiation techniques").

<sup>10</sup> Ethical Standards of Professional Responsibility, Society of Professionals in Dispute Resolution (1986) (section on General Responsibilities).

<sup>11</sup> Florida Rules for Certified and Court-Appointed Mediators, Rule 10.310(c) (revised February 2000) ("A mediator shall not intentionally or knowingly misrepresent any material fact or circumstance in the course of conducting a mediation").

<sup>12</sup> Minnesota General Rules of Practice, Rule 114 Appendix: Code of Ethics, Rule V (1997) ("A neutral shall not knowingly make false statements of fact or law").