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PERSPECTIVE

Truth be told: why honesty is the best policy

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I forget how or when I learned it was important to tell the truth. Perhaps as with you, the importance of honesty was drilled into me at an early age. We all heard the story of George Washington's cherry tree, and we learned there was such a thing as "scout's honor." It is part of our culture, and most people recoil at any suggestion it is acceptable to lie.

Lying is venal. The dictionary even acknowledges our reluctance to call someone a liar, because it imposes a stain. Instead, we employ euphemisms, such as "story-telling" or "stretching the truth." Rather than branding someone a liar and a cheat, the words "fib," "untruth" and "falsehood" come more easily to the tongue. Our aversion comes from the notion that lying suggests deceit, which is a form of cheating, and how could we ever countenance that?

Our culture notwithstanding, research in 1996 led to a conclusion that on average, everyone lies at least once, if not twice, each day. So, what about lawyers? The legal profession is sworn to uphold the rule of law, and we tell the world we expect "the truth and the whole truth." But in December 2021, the Gallup Organization asked respondents to rate the honesty and ethical standards of people in different vocations. Only 19% rated lawyers above average in truthfulness. Despite the popular point of view about the legal profession, most of the lawyers I know express disbelief when asked if it is acceptable to lie. After all, do not the American Bar Association (ABA) Model Rules of Professional Conduct abhor false statements?

According to Merriam-Webster, "to lie" is "to make an untrue statement with an intent to deceive." Lying involves saying something a speaker knows to be untruthful in order to create a false or misleading impression. While that may seem simple enough, whenever regulators of lawyer conduct have addressed the issue, the most they have been able to agree upon is a rule that lawyers not knowingly misstate a material fact to a third person (ABA Model Rule 4.1). This is a bare minimum standard. Lots of room remains for "immaterial" statements that shade the truth.

In day-to-day living, we have grown to accept certain knowing misstatements. We all know about noble lies. Were it not so, there would be no Santa Claus, no sleigh and no Rudolph leading the way. So it is with commonly accepted social conventions. Are you really happy to see your adversary, even though the words "good to see you" flow naturally as a courtesy greeting? Are your "thoughts and prayers" actually focused on the victims of a tragedy? Was the dinner all that exceptional? When one says, "Everything's fine, dear," is that accurate? These so-called "white lies" serve as lubricants for a peaceable society, and we employ them, in part, because we believe them unlikely to deceive regarding matters of any moment.

When law enforcement deals with a kidnapper, we justify misrepresentations to induce a surrender. Are the Marquess of Queensberry Rules required when negotiating with terrorists? Are undercover police permitted to deceive? To avoid unnecessary anxiety, we accept physicians telling the family of a terminally ill patient that recent tests were encouraging. The fact is, our society does not demand absolute truth-telling.

Is there a place for lying by lawyers? The spirit of fairness in ABA Rule 3.4 reflects a desire for lawyers to rise above deceitful, misleading conduct. ABA Rule 4.1 proscribes false, material statements to third parties. It requires disclosure of material facts under specified circumstances. Comments to the rule absolve lawyers from any obligation to inform an opposing party about all relevant facts, but if one chooses to speak, then care is required to avoid selective omissions that mislead (see ABA Rules 4.2 and 8.4(c)).

Notably, ABA Rule 3.3 only forbids material misstatements to a "tribunal," which is defined as "a court, an arbitrator in a binding proceeding, or a legislative body, administrative agency or other body acting in an adjudicative capacity" (ABA Rule 1). Perhaps a special master or other person to whom a court refers one or more issues may be covered by the rules (see, e.g., California Rule of Professional Conduct 1.01). Though a mediator is not a tribunal, the third-party protections of ABA Rule 4.1 provide some assurance that statements to a mediator should be correct. In the end, however, minimum standards of the disciplinary system leave plenty of opportunity for misleading statements in mediation.

One may lament of the inability to promulgate bright-line rules for truth-telling by lawyers, but

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the inability to articulate absolute guidelines should not excuse aspiring to the higher standards of professionalism. Just because a deceptive statement cannot sustain a civil claim for fraud does not mean we should regard the conduct as proper. A lawyer who honors the profession should not have difficulty championing the sense of fair play that suffuses ABA Rule 3.4.

Mediation is an informal process designed to facilitate a consensual resolution of disputes. The process is cloaked in confidentiality, and the mediator is not "legally competent" to provide evidence of statements or conduct occurring during mediation. This makes the process opaque: Who will ever know whether a lawyer-advocate has made false statements, let alone recited material falsehoods during mediation? The low probability of disciplinary action allows for lawyer deception, and that may explain the experience of some who assume lawyers regularly lie in mediation.

Honesty in the mediation is critical to the process, and expecting no more than minimal compliance with a regulatory requirement, such as ABA Rule 4.1, falls short of what is needed to make mediation a success. Viewing the matter from the perspective of a mediator, truth-telling helps achieve mediation's purpose: resolving a controversy in lieu of allowing the dispute to fester. If the effort to mediate is worthwhile, candor should be less a consequence of discipline and more a matter of professionalism.

The paradox of truth-telling in mediation derives from the very essence of the process. University of Michigan Law School Professor James White sparked debate when he said, "To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation," ("Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," 1980 Am. Bar Fdn. Res. J. 926, 928). White is not alone in observing that lawyers regularly misstate their position while negotiating, and the legal literature is full of support for the notion that subterfuge is part of the negotiation game (See J. Ogden, "When Do Negotiation Tactics Become Unethical?" 10 So. J. Bus. & Ethics 98, 99 (2018)).

In his seminal work on the subject, Professor Gerald Wetlaufer defined "lying" to include "all means by which one might attempt to create in some audience a belief at variance with one's own [beliefs]" (G. Wetlaufer, "The Ethics of Lying in Negotiations," 76 Iowa L. Rev. 1218, 1223 (1990)). Wetlaufer's definition is overly broad; it includes intentional communications, omissions and concealments. There is a difference between affirmatively deceiving one's opponent and using silence to leave listeners in the dark. A mediator is unlikely to expect a lawyer will disclose all the client's plans, hopes or settlement motives. A party's real reservation price – the point at which walking away is more preferable – will be presumed a secret.

There also is a difference between exaggerations that reasonable people dismiss as hyperbole. When a lawyer aggressively asserts the case is ready for trial or every jury will view this as an "eight-figure case," such embellishments often bespeak incredulity and are not deceptive. People are not expected to believe the rug salesman who describes the carpet as a priceless heirloom (see G.M. Peters, "The Use of Lies in Negotiation," 48 Ohio St .L. Rev. 7, 11 (1987)). Further, expressions of opinion, such as "our expert will walk circles around their hired gun," are not statements of fact. Opinions, especially valuations of injuries, cannot be lies if the speaker believes the utterance is true. For these reasons, puffery in advertising and sales work is taken for granted, and a mediator is likely to discount a lawyer's overstatements very quickly.

Two forms of deception in mediation are more problematic. While mediators are unlikely to regard boastful statements as serious expressions, "half-truths" may be more difficult to discern. Lawyers will likely make selective disclosures, but statements that tell less than the whole story can be deceptive. When a mediator asks counsel if an expert witness has been consulted about a pivotal matter and the lawyer says, "Of course," it remains unclear whether the expert actually supports the lawyer's statements in mediation. And it is even less clear what facts the expert was given as a basis for the opinion. When a lawyer says, "The dog viciously bit my client," we have not been told what the client may have done to provoke the attack.

Paltering – using bits of truth to mislead – is another troublesome form of deception. A listener is invited to draw an unwarranted inference from a true statement. To palter is to tell the literal truth while avoiding answering the question. Since it is not an outright lie, the technique is justified by some, but truthful though the statements may be, they still are intended to mislead.

A Harvard Business School study asked 184 mid-and senior-level managers whether they had paltered in negotiations, and more than half said yes. We have grown accustomed to politicians answering the question they want to address rather than responding to the question asked. And when asked if a child's homework is complete, a parent can be misled by a statement "I completed revisions to the paper on Hemingway." When a professional athlete states he has been "immunized," it is reasonable to conclude he has been vaccinated.

In mediation, paltering can be an impediment to understanding the operative facts of a dispute, and we should expect a higher measure of candor. When counsel is asked if the real estate has been appraised, it is paltering to say, "We have thoroughly discussed the property values with our principal lenders." If a corporate party is asked what sales are expected to be for the next fiscal year, it would be paltering to say, "As you know, sales over the past 10 years have grown consistently by 5%." When asked what condition a classic automobile was in before it was damaged, a palterer might say, "I drove it all last year, and it ran fine."

A mediator's concern is with deliberate acts or omissions designed to create false perceptions and skew the negotiations. This concern stems from knowing the real, tangible cost of deception. Allowing an opponent to misread one's true position frequently leads to unnecessary delays in the settlement process. A settlement at the eve of trial often could have been negotiated more fruitfully before the expense of trial preparation. Then, there is the real prospect that deception may cause the parties to walk away from negotiations entirely, forfeiting the chance for a mutually beneficial deal.

Experienced counsel know that the true cost of litigation includes more than the fees and out-of-pocket costs. There is a destructive anxiety experienced by people whose interests are affected by the dispute. Management is distracted and personal schedules are disrupted. The psychic cost of depositions and other pretrial obligations is real.

Another cost of deception: If a deal ultimately is reached, it may be less beneficial that it could have been. Mediation of some matters does involve a zero sum game, and in that case, the process is designed to distribute finite resources. But there often are opportunities for the mediation to produce a positive result for both sides, and the possibility of making the pie bigger may be lost if the mediator and the counterparty fail to understand what are the true interests at stake.

For their own sake, lawyers should be especially sensitive to the long-term consequences of practicing deception in mediation. Lies run the risk of failing to deceive, and once they are discovered, reputations are sullied. Future negotiations will be impaired by opponents overreacting or sensing the need to overcompensate as they approach negotiating with a lawyer known to play fast and loose with the truth.

An attorney in mediation is charged with advancing the client's interests, and some have argued "zealous advocacy" justifies doing or saying whatever is needed to strike the best bargain for one's client. Yet diligent devotion to a client's interests does not warrant doing what one otherwise knows is wrong or misguided. Loyalty to a client is not a license to dissemble. There will be a cost associated with others misreading your client's intentions. Simply put, the ends do not justify the means.

Lawyers in mediation should focus on more than minimal compliance with disciplinary standards. One still may negotiate in good faith by holding cards close to the breast, but mediation is the time for persuasion with candor. Rather than trying to get away with as much deception as possible, advocates should provide a mediator the information needed to achieve the best possible resolution of the matter. When all is said and done, honesty will prove to be the better policy.