

Deception and ethics in mediation

[Sociology](#), [Ethics](#)



One of the basic tenets of the mediation process is that, as far as possible, everything that is said is truthful. Under this assumption, the mediation process will be an attempt to resolve two different views of the truth. However, what happens when there is intent to deceive on the part of one of the participants, or worse yet on the part of the mediator? This is a complex issue that cannot be determined solely by considering the foundations of ethics or of the practice of mediation. Instead, the issue must be understood from a dual perspective of the ethical appropriateness of deception and its potential usefulness within mediation.

Ethically, there can be no question – neither a Kantian nor a utilitarian ethical approach allow for the use of commonplace lies in mediation. However, from the perspective of human relationships, it must be accounted for that people do deceive, and that it is part of our communications and social fabric. Thus, there is a dual ethical position for deception in the mediation process – while morally it is wrong, pragmatically it is commonly used and may be useful for helping negotiating parties to come to a decision.

In order to clearly understand this argument, it is important to understand what deception is. A naive understanding of deception is that it is simply lying, which is certainly included. However, there are a number of other elements of deception, as well. One formal definition of deception that could be used is “ a successful or unsuccessful deliberate attempt, without forewarning, to create in another a belief that the communicator considers to be untrue in order to increase the communicator’s payoff at the expense of the other side (Gneezy 386).

This definition is useful because it includes a number of key characteristics for understanding deception. First, it is deliberate – that is, the deceiver is not simply misinformed or lacking in information. Second, is an attempt to create a belief in the other person; without this intent, it is difficult to say whether something is truly an expense at deception. Third, it is an attempt to influence the outcomes of the decision, rather than simply being for no purpose or for some other purpose.

Finally, the attempt at deception may be either successful or unsuccessful, and thus even if the negotiation partner figures out what information is being withheld, it is still incorrect. This definition can be extended by common knowledge examples of deception, such as lying actively; lying by omission; and manipulation of data and statistics. Krivis (1) identified a spectrum of deceptive practices that can be further used to understand this concept, including: “ Honesty, Exaggeration, White lies, Partial Disclosure, Silence As to Other Party’s Mistake, False Excuses, [and] Fraud. These types of deception are of course not mutually exclusive, but may be seen in combination with each other.

Also, as Krivis (1) noted, many of these behaviors are common within our society and do not even pose a significant moral quandary for the majority of those that undertake them. There are also distinct philosophical approaches to deception that address the ethical approaches and considerations. The two main ethical approaches to deception can be characterized as Kantian, or virtue-based, and utilitarian.

In the Kantian view, lying is always wrong, because it violates the moral imperative (Alexander and Sherwin 396-397). That is, “ lying is an offense to all humanity, and, most importantly, to the liar himself (Alexander and Sherwin 397)” because it promotes falsehood and uses the liar’s intellect in a debased manner. The utilitarian view is not as absolute, but it still does not cede that lying is an acceptable moral choice most of the time (Alexander and Sherwin 398).

Specifically, the potential gain from the lie must be greater than the harm caused to society from the lie in order to be morally defensible. However, given that lies “ degrade the background trust that supports human interaction (Alexander and Sherwin 398),” this is a very high bar for the benefits of lying to overcome its consequences, even under the utilitarian ethical structure. Thus, it is clear from a pure ethical analysis that the use of deception in negotiation is wrong.

However, it should be noted “ professional rules of ethics simply require negotiators to abide by the morality of the marketplace, rather than the rules of law (Krivis 3). ” Thus, neither a strictly legalistic nor a strictly legalistic approach to deception is demanded. It should be noted that not all fields of study take an ethical approach to deception, but sometimes use a more pragmatic approach. For example, in classical economics deception is often seen as an attempt to increase the payout from an economic transaction, in which individuals will engage if the incentive is high enough to do so (Gneezy 384).

This approach could best be described as a utilitarian or consequentialist approach, in which what is most important is the outcome, rather than the intent of the lie (Gneezy 384). This approach is similar to many such approaches used in mediation analysis, in which rather than taking a normative view regarding what people should do, theoretical and pragmatic approaches to deception deal with what people do – that is, they use deception routinely (Krivis 1).

The use of deception is highly context-dependent and may not always occur, but it should always be considered in the range of possibilities for how a negotiation will occur (Krivis 2). The question of whether deception is ethical in a mediation context should be asked not only within the context of a philosophical framework that is applied generally, but also within the framework of mediation itself. Given the nature of mediation, it is natural that considerable research has been done into the area of deception and its effects.

There is no question that deception is a commonly used tactic in mediation, and that it works. One study compared the uses of deception in negotiating dyads, comparing its use in competitive and less competitive negotiation frames (Schweitzer, DeChurch and Gibson 2123). The researchers found that competitive negotiators, or those that engaged in highly aggressive tactics intended to promote their own point of view, used both deceptive and non-deceptive negotiating tactics in order to achieve their goals.

In particular, they were found to use deception both more aggressively and to a greater degree than cooperative negotiators (Schweitzer, DeChurch and

Gibson 2137). Thus, this cannot be questioned. However, this finding does not make a clear statement regarding why this would be undesirable; there is nothing inherently wrong with one side or another prevailing in a mediation discussion, and so the evidence against deception must be stronger than it simply being a path to winning a negotiation. This evidence can be found in the effects of the deceptive behavior on perceptions and outcomes also found by this study.

The study found evidence that the use of deception influenced the other party's beliefs about the negotiating situation, leading to an estimation of the deceiver's situation that was significantly different from reality (Schweitzer, DeChurch and Gibson 2137-38). Significantly, the researchers found that even though the negotiators paired with a competitive negotiator were disbelieving regarding the claims made, they still were not able to determine what the actual situation of the negotiation was. Finally, the use of deception on the part of one negotiator resulted in a less positive outcome for the other participant.

Specifically, it resulted in a change in the ultimate decision of the non-deceiving negotiator, a transfer in the surplus received from the non-deceiving negotiator to the deceiving negotiator, and an increase in the amount of profit received by deceivers as compared to those that did not use a deceptive strategy (Schweitzer, DeChurch and Gibson 2139). This clearly demonstrates the shift in value that is seen in cases where mediation and negotiation is accompanied by deception. While one party has benefited, the

other party, which has been exposed to deception without warning beforehand, has been harmed.

Thus, there is a distinctly negative outcome that can be seen from the use of negotiation in this context. There are certainly problems in implementing an ethical prohibition against lying in the mediation context. This is not unique to mediation, however. In the legal context, deception is not treated as strictly as it could be. It is generally considered under a utilitarian ethic, rather than a Kantian ethic (Alexander and Sherwin 394); that is, there may be considered to be some justification for lying if the greater number of people is served.

However, as Alexander and Sherwin (394) noted, the penalties for lying in a legal context are not commonly as strict as those that would be promoted by a pure utilitarian philosophy. Although there are a number of potential reasons for this, such as the cost and infeasibility of enforcement, Alexander and Sherwin (394) posited that this might also be because of the recognition that lying may at times be beneficial in a legal context. However, this does not mean that in an ethical sense, this position has to be accepted in mediation.

In fact, if it is accepted that one of the purposes of mediation is to come to effective solutions without involvement of the legal system, and then this calls for a noticeably different approach to the use of deception. However, the legal approach to deception is actually highly relevant to mediation, because of the frequent use of lawyers by parties in the mediation process. As Krivis (2) notes, there are a number of specific approaches that lawyers

use in order to achieve their negotiation goals, although these approaches need to be carefully managed in order not to venture into fraud.

Some of the potential deceptions that may be found in this context include exaggeration (for example, exaggerating the strength of the case); being deceptive about intent to settle; and inflating the settlement expectation in order to achieve a better outcome (Krivis 2). It is clear that currently mediation practices and ethics do not prohibit the use of deception, as long as it does not venture into specific areas such as fraud. However, should this be prohibited?

Evidence discussed above indicates that deception can be used to unfairly rich one party at the expense of another, offering one reason why this should be the case. Another reason for a stronger prohibition against deception is the cross-professional nature of many mediators, who also play roles as lawyers, social workers, and other professions (Laflin 479). Given that these professions have vastly different ethical standards and practices, it would be to the benefit of the mediation profession to have a specific set of ethical expectations that could be promoted.

Laflin (480) notes that lawyer-mediators may have particular difficulty with the ethical concerns inherent in mediation, given the relative focus on adversarial rather than cooperative outcomes. The implementation of stronger prohibition against deception would certainly be one way in which the norms of mediation, rather than the norms of courtroom argumentation, could be enforced. However, this does raise the question of how this prohibition against deception could be implemented and enforced.

Given the relatively accepted nature of deception in many of its more subtle forms, it would be difficult to determine how this could be implemented with any great degree of success. Deception, commonly understood as lying, can be understood as a range of more subtle behaviors that reflect a range of potential manipulations of implementation. Deception is commonly accepted from an economic point of view and routinely engaged in, even though using a strict ethical evaluation it cannot be defended except under very severe circumstances.

However, the mediation environment must deal not only with the philosophical question of correctness, but in the outcomes of mediation and the effects that are seen from deception. Research has shown that the use of deception in negotiation leads to a transfer of surplus from the non-deceptive party to the deceptive party, which provides a clear rationale for why, under a pragmatic viewpoint, deception would also be a negative activity. However, in practice deception is commonly accepted both within the legal system and within mediation practices, as long as this deception does not venture into fraud.

There are a number of potential reasons for this, including the acceptability of deceptive practices such as exaggeration and white lies within the wider society and the requirement that lawyers should protect the interests of their client. There is certainly justification for reform of mediation norms and ethics in order to prevent the use of deception. However, given the difficulty that is involved in detecting fraud, this may be a very difficult reform to make. Deception is not acceptable in every situation. Deception in

negotiation can provide a bargaining advantage. Deception in negotiation can also come at a cost.