

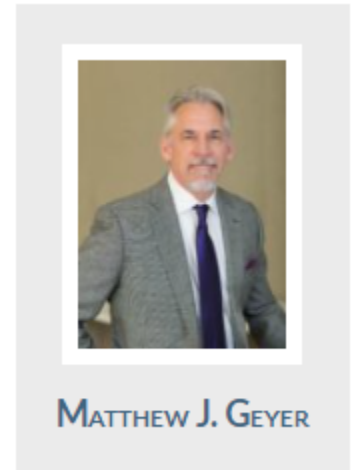
# DON'T LIE IN MEDIATION, EVEN WHEN THEY ASK YOU TO

By Matthew J. Geyer

I don't lie to clients in mediation. I don't tell both rooms they're going to lose, or anything like that. I won't even do it when they ask me to do it.

*"You're beating them up in the other room, aren't you?"*

We've all heard it, right? Some clients in mediation—not very often the lawyers anymore, but their clients—think that's your job. This is probably because their counsel said something like this when describing the process. But it's not *our* job to beat people up, or to lie to them along the way. It's their adversaries' job, right? You're the neutral. You're not against anybody, or everybody.



I have to say I've seen it done this way, back in the 20<sup>th</sup> Century. Usually by trial judges trying to clear a case from their calendar, or retired judges conducting private settlement conferences they were starting to call mediations. I never liked it as counsel then; and frankly nobody could pay me enough to lie to them in mediation now.

Or perhaps I should say to *act* for them. To put on a face like I believe everyone has some real flaws in their case, and I need to save you all from the litigation or arbitration you're facing. That's not mediating, that's acting. I once worked for some years in Hollywood, and even had a union card, but it wasn't from the Screen Actors Guild.

Instead, I leave it to the parties and their counsel to do the work—and take them through it if they haven't already—using the twin towers of rational settlement analysis, BATNA and WATNA (their Best Alternative To a Negotiated Agreement, and their Worst).

"Tell me your best case scenario in court," I say. Parties are good at that. But they haven't always thought even this scenario all the way through, so there may be helpful work yet to do here, assisting them in their thinking every step of the way.

"Now tell me your worst case scenario." They're not so good at this. But again a neutral is, *and the people in the other room* are, too—because it's *their* best case, their dream

outcome. And they'll almost always authorize you to share their views on *this* with the other side.

The mediator's role in all this is *not* to lie about likely outcomes in an effort to move everybody. It's simply to test each side's description of their best and worst case scenarios. That just takes good analysis on the part of the mediator, and good listening to the people in both rooms.

Then comes a discussion of the odds. "What are your chances, the real probability, of getting that best case outcome?" "How about the worst case outcome?" Get specifics about how they arrived at their numbers—whether by "reverse engineering" or doing a real decision analysis. Often the answers to this pair of questions will add up to one hundred percent, or something very close to it. But this is almost never true. In most cases, the range of various outcomes *between* each side's best and worst case scenarios is fifty percent or more. That is, the chance that *nobody* is going to hit the home run they seek in their pleadings, and even that both are going to go home disappointed with the overall outcome in court or arbitration, is significant. Litigation is *not* necessarily a zero-sum game. And all things considered (like attorney fees and business disruption), it's very often a no-win proposition.

*This* is the reason parties should negotiate. And it's not based on a lie, but on the honest truth. All the lawyers know this, even if their clients don't. Mediation is an opportunity to ensure the clients know it before they leave. It provides an opportunity to help the client understand why they must change their position to protect themselves and their business from that worst case scenario, and why that best alternative to a negotiated settlement is so elusive.

**Matt Geyer** was a commercial litigation partner with Landels Ripley & Diamond and later Rogers Joseph O'Donnell, from 1985-2002. He has been a AAA arbitrator since 1991, and a solo neutral since 2003, when he began mediating. He is on the AAA's Mediation Panel and its Large Complex Case, Commercial and Securities Panels.