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Mediation Magic: Its Use and Abuse

John W. Cooley

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Mediation Magic: Its Use and Abuse

John W. Cooley*

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I. INTRODUCTION

Readers turning to this article¹ thinking it to concern mediators' use of the secrets of black magic, astrology, the paranormal, witchcraft, voodoo and the like, will be sadly disappointed.² Also, those who are seeking an article extolling solely the virtues of mediation probably had in mind an elegant piece with a title similar to the one above.³ This article will not meet such expectations. The present article is about only one thing—deception. More specifically, it discusses types of deception and addresses whether they are acceptable or unacceptable forms of persuasion in mediation. Further, it analyzes in detail how to recognize types of deception, how to deal with them, and how to use acceptable types of deception considered from both the perspectives of an advocate in mediation and of a mediator. Perhaps this article is about anything the reader wants it to be. After all, it is about what magicians do.

Why magicians? Because one can learn more about deception and illusions in mediation by examining magic and the role of the magician than by studying any other single field of endeavor.⁴ One commentator, Robert Benjamin, agrees. Robert Benjamin, a nationally recognized mediator and teacher of mediation, negotiation, and conflict management theory and skills wrote:

Mediators, like trickster figures, are in some measure illusionists Their use of deception and strategic intervention is calculated not for self-gain at the expense of conflicting parties but rather for the parties' benefit. As a result, ideally, the parties learn, but at the very least they survive the conflict. All human

1. This is the sixth in a series of articles published by the author that describes a new approach to interpersonal problem solving called "Pracademics"—the application of classical methods to achieve practical solutions in negotiation and mediation. The five previous articles are: *Mediation and Joke Design: Resolving the Incongruities*, 1992 J. DISP. RESOL. 249 [hereinafter *Mediation and Joke Design*]; *A Classical Approach to Mediation—Part I: Classical Rhetoric and the Art of Persuasion in Mediation*, 19 U. DAYTON L. REV. 83 (1993) [hereinafter *A Classical Approach to Mediation—Part I*]; *A Classical Approach to Mediation—Part II: The Socratic Method and Conflict Reframing in Mediation*, 19 U. DAYTON L. REV. 589 (1994); *Descartes' Analytic Method and the Art of Geometric Imagineering in Negotiation and Mediation*, 28 VAL. U. L. REV. 83 (1993); *The Geometries of Situation and Emotions and the Calculus of Change in Negotiation and Mediation*, 29 VAL. U. L. REV. 1 (1994).

2. A leading text on these subjects is ALEISTER CROWLEY, *MAGIC IN THEORY AND PRACTICE* (Dover Publications, Inc. 1976).

3. See Albie M. Davis, *The Logic Behind the Magic of Mediation*, 5 NEGOTIATION JOURNAL 17 (Jan. 1989).

4. See J. BARTON BOWYER, *CHEATING: DECEPTION IN WAR & MAGIC, GAMES & SPORTS, SEX & RELIGION, BUSINESS & CON GAMES, POLITICS & ESPIONAGE, ART & SCIENCE* 230 (1982).

*beings, and especially mediators, deceive, manipulate, and even sometimes lie. That is a given. It is the purpose of the deceit that must be examined If . . . the deception is designed to shift and reconfigure the thinking of disputing parties, especially in the midst of conflict and confusion, and to foster and further their cooperation, tolerance, and survival, then the deception may well be a "noble lie."*⁵

Purists may be perturbed ethically by what they are reading, and may wonder how deception could possibly have any appropriate place in a serious discussion about mediation. They may even consider closing this volume and not reading further, or, heaven forbid, ripping out the pages and trashing them. They should refrain from doing so and continue reading. Readers should not be offended or shocked by the contents of this article. Suspension of disbelief is required.

Consensual deception is the essence of caucused mediation. It is rare that caucused mediation, a type of informational game,⁶ occurs without the use of deception by the parties, by their lawyers, and/or by mediators in some form. This is so for several reasons.

First, a basic ground rule of the information system operating in any caucused mediation is that confidential information conveyed to the mediator by any party cannot be disclosed by the mediator to anyone, with narrowly limited exceptions.⁷ Mediators' duty not to disclose confidential information has two important consequences. One consequence is that each party in mediation rarely, if ever, knows whether another party has disclosed confidential information to the mediator.⁸ A second consequence is that if confidential information has been disclosed, the nondisclosing party never knows the specific content of that confidential information and whether and to what extent that confidential information has colored communications coming to the nondisclosing party from the mediator.⁹ In this respect, each party in a mediation is an actual or potential victim of constant deception regarding confidential information—granted, agreed deception—but

5. Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 *MEDIATION Q.* 3, 17 (1995) (emphasis added) (quoting LOYAL RUE, *BY THE GRACE OF GUILF: THE ROLE OF DECEPTION IN NATURAL HISTORY AND HUMAN AFFAIRS* (1994) (defining noble lie)) [hereinafter *The Constructive Uses of Deception*].

6. See generally HOWARD RAIFFA, *THE ART & SCIENCE OF NEGOTIATION* 128-29, 359-60 (1982).

7. See JAY FOLBER & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 100-129 (1984) (discussing methods for enhancing communication).

8. See generally *The Constructive Uses of Deception*, *supra* note 5.

9. See generally *id.*

nonetheless deception.¹⁰

A second reason that caucused mediation necessarily includes deception is that the parties and their counsel normally are engaged in the strategies and tactics of competitive bargaining during all or part of the mediation conference.¹¹ That is, the goal of each party is to get the best deal for themselves. These competitive bargaining strategies and tactics are layered and interlaced with the mediator's own strategies and tactics to get the best resolution possible for the parties—or at least a resolution that they can accept.¹² The confluence of these initially unaligned strategies, tactics, and goals creates an environment rich in gamesmanship and intrigue. Such an environment is naturally conducive to the use of deceptive behaviors by the parties, their counsel, and even the mediators. Actually, mediators are more likely to use deceptive behaviors because they are the conductors—the *orchestrators*—of an information system specially designed for each dispute, a system with ambiguously defined or, in some situations undefined, disclosure rules in which mediators are the chief information officers with near-absolute control. Mediators' control extends to what nonconfidential information, critical or otherwise, is *developed*, to what is *withheld*, to what is *disclosed*, and to *when disclosure occurs*.¹³

A third reason for the presence of deception in mediation is that the information system manipulated by mediators in any dispute context is itself imperfect. Parties, rarely, if ever, share with the mediator all the information relevant, or even necessary, to the achievement of the mediator's goal—an agreed resolution of conflict.¹⁴ The parties' deceptive behavior in this regard—jointly understood by the parties and the mediator in any mediation to fall within the agreed “rules of the game”—sometimes causes mediations to fail or prevents optimal

10. This is the central paradox of the mediation process. The parties, and indeed even the mediator, agree to be deceived as a condition of participating in the mediation in order to find a solution that the parties will find “valid” for their purposes. *See id.* at 15-16.

11. *See* CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 35-43 (1986).

12. *See id.*

13. Christopher W. Moore has noted: “The ability to control, manipulate, suppress, or enhance data, or to initiate entirely new information, gives the mediator an inordinate level of influence over the parties. The ethics of such control and the proper role of the intermediary are hotly debated topics among mediators” *Id.* at 269 (citing CARL M. STEVENS, *STRATEGY IN COLLECTIVE BARGAINING NEGOTIATIONS* 122-46 (1963) (discussing functions of a mediator and tactics employed by them in mediation)).

14. *See id.* at 187-98.

solutions from being achieved.¹⁵

The purpose of this article is quite simple—it is to expose and explain the *true* magic of caucused mediation. Its separate objectives are: (1) to assist lawyers in identifying and classifying deceptive strategies and tactics in the layered processes of negotiation and mediation, be they serving as advocates or as mediators in mediation; and (2) to generate interest among scholars and practitioners to begin exploring and identifying the ethical limits of acceptable deception as practiced by mediators and mediation advocates. To accomplish these objectives, this article will first explore some general aspects of “magic in mediation,” including truth, deception, and the magicians as problem solvers.¹⁶ This article next examines the “Secrets of Blackstone”¹⁷ and employs them as a metaphorical model for dissecting, identifying, and classifying the effects, methods, and showmanship aspects of classical magic.¹⁸ Finally, in the “Grand Finale”¹⁹ the article draws on the results of the prior analysis in Part III to distill the critical issues relating to the ethical limits of acceptable deception in mediation.

Before going further, it is appropriate to define some terms used throughout the article. The term “deception” in its broadest sense, extends from “mild exaggeration” on one end of the deception spectrum to “lying,” “intentional misrepresentation,” and “fraud” on the other. Magic, as used here, means the same as Magician Harry Blackstone’s version: “pure psychology—applied in the right place” with misdirection, a type of deceptive stratagem, being its “fundamental principle.”²⁰ The terms “magic” and “deception” are interchangeable throughout this article. Acceptable or constructive deception will refer to the kind of deception that currently appears to be within the “rules of the game” in mediation. This article makes no

15. *See id.* at 189.

16. *See infra* Part II.

17. *See* HARRY BLACKSTONE, BLACKSTONE’S SECRETS OF MAGIC (1958) [hereinafter BLACKSTONE’S SECRETS OF MAGIC].

18. *See infra* Part III.

19. *See infra* Part IV.

20. J. BARTON BOWYER, *supra* note 4, at 230 (attributing this quote to Magician Harry Blackstone). This quotation should not be confused with one attributed to Sir William Blackstone who is reported to have once described this *illusion*: “By marriage, the husband and wife are one person in law; that is, the very being . . . of the woman is suspended . . . or . . . incorporated . . . into that of the husband; under whose . . . cover, she performs everything.” LAW: A TREASURY OF ART AND LITERATURE 120 (Sara Robbins, ed., 1990) (emphasis added). Needless to say, Sir William Blackstone, distinguished jurist or not, would be judged a male chauvinist under modern social and legal standards.

definitive judgment, however, as to whether such deception types should be deemed ethical behaviors.²¹ Difference of opinion among readers on the ethical propriety of some of these deceptive behaviors, although not all of them, probably exist.²² Unacceptable or destructive deception will refer to the types of deception that most, if not all, readers will agree are outside the game rules for mediation and unquestionably unethical, although there may be some disagreement among readers.

II. MAGIC IN MEDIATION—BACKGROUND AND OVERVIEW

A. *Truth, Deception, and Magic*

In classical philosophy, Aristotle defined truth as follows: “to say of *what is* that it is, and of *what is not* that it is not, is true.”²³ Francis Bacon defined truth as “the sovereign good of human nature.”²⁴ Keats equated what is true with what is “divine” and “melodious.”²⁵ Gandhi went even further stating, “Truthfulness is the master-key. Do not lie under any circumstances whatsoever, keep nothing secret.”²⁶

Modern writers have drawn a line between truth and truthfulness, maintaining that while truthfulness can be required, “the whole truth” is unattainable.²⁷ Moreover, philosophers have categorized the various theories of truth under four headings: coherence, correspondence, pragmatic, and performative.²⁸ Under coherence theory, every true statement is a member of a system of other true statements and all of them are tied together logically. This is the view of truth in metaphysics, mathematics, and physics. Coherence theory purports to give the reasons for the truth or falsity of statements in relation to other statements. It does not assist in determining the truth of facts or experience.²⁹

21. See *infra* Part IV; see also *infra* chart, at Part IV.E (offering a list of some forms of deception commonly employed by mediators and arranging it from the most ethically suspect to the most ethically acceptable).

22. See Larry Lempert, *In Settlement Talks, Does Telling the Truth Have Its Limits?* 2 *INSIDE LITIG.* 1 (1988).

23. Aristotle *quoted in* BARRY ALLEN, *TRUTH IN PHILOSOPHY* 9 (1993) (emphasis added).

24. Bacon *quoted in* F. G. BAILEY, *THE PREVALENCE OF DECEIT* 2-3 (1991).

25. *Id.* (quoting Keats).

26. *Id.* at 3 (quoting Mahatma Gandhi).

27. See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 13 (1989).

28. See DAVID NYBERG, *THE VARNISHED TRUTH: TRUTH TELLING AND DECEIVING IN ORDINARY LIFE* 33-41 (1992).

29. *Id.* at 33-35.

Correspondence theory holds that truth exists where there is correspondence between belief and fact.³⁰ Unlike coherence theory, which defines truth in terms of *statements* linking beliefs and facts, correspondence theory is not dependent on statements at all.³¹ There is a difference between a fact and a statement about a fact.³² It is a fact that fire consumes oxygen and if in experience people come to believe the fact to be so, then they have arrived at truth by the correspondence theory.³³

For those who subscribe to pragmatist theory, however, truth is what works.³⁴ For them, “the search for truth is really a search for belief.”³⁵ To explain pragmatist theory, John Dewey used the example of a man lost in the woods who comes up with an idea of how to get home.³⁶ After the man finds his way home, he can say that his idea “agrees with reality” and is therefore true.³⁷ For the pragmatists, truth “is a variable associated with successful confirmation of an idea.”³⁸

Finally, performative theory proposes that truth derives from a way of speaking rather than from objects or facts.³⁹ Thus, people say “I promise,” they are not simply describing something, they are performing an action—they are *making* a promise.⁴⁰ Similarly, under this theory, when people say “That’s true,” they are “performing an act of agreeing with, endorsing, admitting, emphasizing, or granting a statement.”⁴¹ They are performing; however, their performance does not *correspond* to any fact because, indeed, it *is* a fact.⁴² There are no absolutes, and this principle applies as equally to the definition of truth as it does to “this principle.”⁴³

30. *Id.* at 35.

31. *See id.* at 36.

32. *See id.*

33. *See id.*

34. *See id.* at 37.

35. *Id.*

36. *See id.*

37. *Id.* at 37.

38. *Id.*

39. *Id.* at 38.

40. *See id.*

41. *Id.*

42. *See id.* at 38-39.

43. Eubulides, a Greek scholar, criticized Aristotle’s views with the “paradox of the liar,” in which he challenged the truth of a statement such as: “All generalizations are false.” *See id.* at 35. Under Aristotle’s interpretation of the correspondence theory, the statement (itself a generalization) is “true only if it is itself false, and false only if it is true.” *Id.* This paradox continues to frustrate philosophers and remains an obstacle to a consensus on the definition of truth. *See id.*

One of the problems with trying to define truth is that in day-to-day professional and personal lives, people deal with numerous shades of truth, never knowing exactly what truth really is. Montaigne summed up the dilemma, stating: "If, like truth, the lie had but one face, we would be on better terms. For we would accept as certain the opposite of what the liar would say. But the reverse of truth has a hundred thousand faces and an infinite field."⁴⁴

Deceptions of various types are generally accepted as integral to our way of life.⁴⁵ "White lies" permeate all aspects of social practice.⁴⁶ Modern society tolerates outright lying in a variety of circumstances. In some circles, lying is justified when it avoids harm, produces an overriding benefit, maintains fairness, or preserves confidence or reputation.⁴⁷

Some commentators make a distinction between lies, which are intentionally deceptive statements, and all other forms of deception that might be described as less direct ways to "manage information."⁴⁸ Viewed in this manner, "deceiving is the business of persuasion aided by the art of selective display," and it is effected by two principal behaviors: hiding the real and showing the false.⁴⁹

For now, it is important to understand the difference between active deception and passive deception. There are four ways that people may deceive through active or passive verbal persuasion: by either causing or permitting (1) the acquisition of a false belief; (2) the continuation of a false belief; (3) the cessation of believing something true; or (4) the

44. BOK, *supra* note 27, at 3 (quoting MICHEL DE MONTAIGNE, *THE ESSAYS OF MONTAIGNE* 27 (E.J. Trechmann trans., 1946)).

45. See NYBERG, *supra* note 27, at 66; see also LYING AND DECEPTION IN EVERYDAY LIFE (Michael Lewis & Carolyn Saarni, eds., 1993); DECEPTION: PERSPECTIVES ON HUMAN AND NONHUMAN DECEIT (Robert V. Mitchell & Nicholas S. Thompson, eds., 1986). Some commentators offer guidance for detecting deception in human interaction. See LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 39-40 (1998). See BOK, *supra* note 27, at 58.

46. Some examples of common white lies are saying, "How nice to see you!"—when it is not; giving false excuses in response to invitations or requests in order to avoid hurt feelings; flattering the ordinary; bestowing a cheerful interpretation on depressing circumstances; showing gratitude for unwanted gifts; giving inflated grades; and, preparing inflated evaluations or recommendations. See BOK, *supra* note 27, at 58-59.

47. See *id.* at 76. Some examples of deceptive behaviors widely accepted in our society are: people lying to protect themselves or others from physical harm; the government using undercover agents; physicians withholding information from dying patients to spare them fear and anxiety; parents concealing from children for years the fact that they were adopted; and, lawyers manipulating facts in arguments before juries.

48. See BOK, *supra* note 27, at 13-14; NYBERG, *supra* note 28, at 66.

49. See NYBERG, *supra* note 28, at 67; BOWYER, *supra* note 4, at 48-49. These two principal behaviors have various subcategories of behaviors related directly to magic. See *infra* Part III B.2.a (discussing these subcategories of behavior).

inability to believe something that is true.⁵⁰

Unique among all deceivers is the magician (and by analogy the mediator and mediation advocate).⁵¹ “The magician proclaims before all those he is about to deceive that he is going to do so.”⁵² Members of the audience know in advance that magicians will be trying to trick them.⁵³ Despite the audience’s knowledge of the deception and its ardent efforts to detect magicians’ methods, magicians are consistently effective in deceiving the audience.⁵⁴

To keep their methods secret, magicians employ the following tools. Magicians encourage the audience’s acceptance of myths about how to perform magic; thus, the audience will miss the slow moves if they are looking for fast ones.⁵⁵ Magicians also distract and confuse the audience with irrelevancies or “noise.” Performing magicians do not reveal to the audience precisely what they are going to do because without this knowledge, the audience will not know where to look to discover how magicians achieve deception.⁵⁶ Using the one-ahead technique is another way to keep methods secret because if the audience does not perceive the beginning of a trick, it will not discern the significance of certain key moves being made in plain view.⁵⁷ Finally, magicians use the principle of multiple causation; that is, magicians simulate an alternative method or dissimulate the one actually used, and “divert[] the audience from settling on the correct hypothesis.”⁵⁸ The art of magic is at the core of many human endeavors. As one commentator observed:

From time to time . . . writers noticed relationships between magic and military camouflage or between magic and theater. In 1948 Raymond Chandler noted an analogy between sleight of hand and plotting a mystery story. Actually, . . . Roman philosopher Seneca wrote of the similarity between magicians’ tricks and the art of rhetoric. Those who saw a relationship between the uses of deception in sports and in war never really got around to recognizing that deception is a universal, a branch of applied psychology that transcends time and culture.⁵⁹

50. NYBERG, *supra* note 28, at 74.

51. *See* BOWYER, *supra* note 4, at 229.

52. *Id.*

53. *See id.*

54. *See id.*

55. *See id.* at 265.

56. *See id.*

57. *See id.*

58. *Id.* at 265-67.

59. *Id.* at 47.

In truth, magic is a form of problem solving and magicians serve as problem solvers.

B. Magicians as Problem Solvers

As explained in a prior article in this pracademic series,⁶⁰ problems are principally of two principal types: presented problems and discovered problems.⁶¹ Performing tricks and illusions largely entails solving presented problems, whereas designing new tricks and illusions primarily involves solving discovered problems. Tricks are usually too brief to have complex structures.⁶² Illusions are different. All illusions have five basic elements: “the phenomenon, the effect, the device(s), the prop(s), and the magician’s characterization.”⁶³ Illusions also follow a standard pattern: interest catcher, introduction, statement of theme, kickoff point, preliminaries, instructions, action, presenting the effect, and ending.⁶⁴ How effective magicians are at solving either type of problem depends on how completely they understand the psychology of magic.

Alfred Binet, the creator of the first IQ test, penned one of the earliest books about the psychology of magic entitled *Psychology of Prestidigitation*.⁶⁵ Since then, many books have been written on the topic of the psychology of magic.⁶⁶ Before beginning to understand how magicians employ psychology in solving the problem of effecting deception, familiarity with some of the basic terminology of magic and the psychology of sensory illusions is necessary.

60. See COOLEY, *A Classical Approach to Mediation—Part II: The Socratic Method and Conflict Reframing in Mediation*, *supra* note 1, at 590-92.

61. See *id.*

62. See HENNING NELMS, *MAGIC AND SHOWMANSHIP: A HANDBOOK FOR CONJURERS* 221 (1969).

63. *Id.* at 210.

64. *Id.* at 221-23.

65. See ALFRED BINET, *PSYCHOLOGY OF PRESTIDIGITATION* (1894); Bowyer, *supra* note 4, at 46.

66. Books about the psychology of magic include a widely recognized trilogy on the fundamentals of the practice of magic, authored by Dariel Fitzkee and first published in the 1940s. The trilogy consists of the following: DARIEL FITZKEE, *SHOWMANSHIP FOR MAGICIANS* (4th ed., 1988) [hereinafter *SHOWMANSHIP FOR MAGICIANS*]; DARIEL FITZKEE, *THE TRICK BRAIN* (4th ed., 1989) [hereinafter *THE TRICK BRAIN*]; DARIEL FITZKEE, *MAGIC BY MISDIRECTION* (4th ed., 1987) [hereinafter *MAGIC BY MISDIRECTION*]. Other sources used in developing the subject of magic in this article include: NELMS, *supra* note 62 and PETER ELDIN, *THE MAGIC HANDBOOK* (Vanessa Clark, ed., Aladdin, 1985).

1. Basic Terminology

A magic show usually consists of three acts that build to a climax during the performance of several routines.⁶⁷ A routine is a trick, an illusion, or a series of either.⁶⁸ More specifically, it is “a method of procedure, induced by the circumstances, worked out with particularity, item by item, to be regularly followed until it becomes habitual, in the performance of entertainment.”⁶⁹ A trick is any feat by a magician that challenges an audience “to discover how it was worked.”⁷⁰ Illusion is a word used to describe “feats which actually convince the audience.”⁷¹ A load is an “[o]bject or objects to be produced” and “to load” means to introduce such object or objects into a piece of apparatus.⁷² Patter is “[t]he storyline, jokes, or other talk used by a magician.”⁷³ A magic effect is the “[t]rick as it appears to the spectators.”⁷⁴ The effect is distinguished from the method, which is the procedure that produces the effect.⁷⁵

Approximately seventy-five percent of all routines are demonstrations, whereas most other routines are experiments.⁷⁶ Magicians who perform demonstrations “know[], or believe[] [they] know[], exactly what the result will be.”⁷⁷ Experiments give the impression that they are “trying to learn what will happen.”⁷⁸ Experimenters are skeptical, and may turn out to be wrong, as in the situation where they attempt to prove a telepath to be a fake, and to their “surprise” the telepath proves her own legitimacy.⁷⁹ When magicians perform experiments, the audience members feel that they are involved in the performance.⁸⁰ Consequently, experiments are usually more entertaining than demonstrations.⁸¹ Because experiments have an element of uncertainty in them, they produce a dramatic

67. SHOWMANSHIP FOR MAGICIANS, *supra* note 66, at 124-28.

68. See NELMS, *supra* note 62, at 4-5.

69. SHOWMANSHIP FOR MAGICIANS, *supra* note 66, at 127.

70. See NELMS, *supra* note 62, at 4.

71. See *id.*

72. ELDIN, *supra* note 66, at 185.

73. *Id.* at 186.

74. *Id.* at 184.

75. See generally, THE TRICK BRAIN, *supra* note 66, at 35-48.

76. See NELMS, *supra* note 62, at 40.

77. *Id.*

78. *Id.*

79. See *id.*

80. See *id.*

81. See *id.*

effect.⁸² “An experiment that fails may still be interesting to spectators,” whereas “a demonstration that fails simply falls flat.”⁸³ Generally, experiments are more convincing than demonstrations because they permit greater use of suggestion and weaken the perception that the magicians are merely doing tricks.⁸⁴

Many people find tricks to be dull. When magicians perform a trick, often the trick makes little impression on the audience because it has no significance.⁸⁵ An illusion is different.⁸⁶ Usually, when performing an illusion, magicians make a claim of some specific, supernormal power as impressively as possible.⁸⁷ They then state that the purpose of their performance is to demonstrate that power.⁸⁸ Therefore, spectators have a definite idea on which to focus: whether the magician can substantiate the incredible claim. Thus, the success of an illusion is embedded in the meaning it holds for the audience. As one magician observed:

The degree of interest that spectators take in any performance is in direct proportion to its meaning for them. The more meaning you can pack into a presentation, the more interest it will excite. An illusion creates interest because the [magician] gives it meaning by proposing to demonstrate some remarkable power. A typical trick has no meaning beyond the fact that it presents a puzzle and challenges the audience to find a solution.⁸⁹

When magicians supply a meaning, they eliminate the challenge for the spectators, and the puzzle becomes secondary. When the illusion is completed, the spectators may sometimes wonder how it was achieved, but only fleetingly. More often, if magicians have made the meaning strong enough, “spectators may not realize that there is any puzzle to solve;” rather, they will have witnessed some remarkable outcome or result.⁹⁰

At the turn of the twentieth century, spectators may have considered magicians’ ability or power a mystery, or they may have attributed it to

82. *See id.*

83. *Id.*

84. *See id.*

85. *See id.* at 6.

86. *See id.* at 4.

87. *See id.* at 6.

88. *See id.*

89. *Id.*

90. *Id.* at 7. This is a result of the magician’s knowledge and use of three special psychological techniques discussed *infra*. *See infra* notes 94-111, and accompanying text.

some supernatural source.⁹¹ However, as the turn of the twenty-first century approached, spectators became less gullible.⁹² Most people now know that “the magician is merely creating an impression of real magic” through imitation magic.⁹³ As the great Blackstone explained, “[t]he magician is playing a game with his audience; he knows the game the audience does not.”⁹⁴ The audience actually agrees to be deceived by the imitation magic. In fact, many people take delight in the deception as they try to determine how the magicians achieve their effects. People are rarely successful in discerning magicians’ methods because those methods are striated by indirect, psychology-based techniques.⁹⁵ Three of these psychology-based techniques are interpretation, suggestion, and implication.⁹⁶

In magic parlance, interpretation is the “explanation, construction or sense *given by the performer to the spectator*, in light of the magician’s individual interests, purposes and objectives.”⁹⁷ As one commentator stated:

[Interpretation] . . . is probably the most potent individual weapon at the disposal of the magician. Through it, it becomes possible for him to justify and explain an action that is suspicious or even revealing. It diverts suspicion. Interpretation makes it possible to convert an operative action into a mere gesture. It causes the significant to become insignificant.⁹⁸

Thus, when a magician takes a specific action during a routine, often he interprets this action “for the benefit of the spectator, as a mere bit of comedy by-play.”⁹⁹ Secret to the magician however, it is an operation vital to achieving an effect.¹⁰⁰

Another psychological technique is suggestion. Through suggestion, an indirect technique, the magician “puts an idea into the spectator’s mind as the result of an association of ideas or the awakening of a train of thought.”¹⁰¹ The idea is stimulated by something less than a formal statement.¹⁰² Usually a suggestion is

91. See MAGIC BY MISDIRECTION, *supra* note 66, at 99.

92. See *id.*

93. See *id.*

94. BLACKSTONE’S SECRETS OF MAGIC, *supra* note 17, at 9.

95. See MAGIC BY MISDIRECTION, *supra* note 66, at 98.

96. See *id.* at 70.

97. *Id.*

98. *Id.*

99. *Id.* at 71.

100. See *id.*

101. *Id.* at 72.

102. See *id.*

made through “a partial statement, an incidental allusion, an illustration,” or a question.¹⁰³

An implication is similar to a suggestion, “but it is a bit more direct.”¹⁰⁴ It arises as a direct result of a statement, a situation, a word, significant act, gesture, or the like.¹⁰⁵ Sometimes an implication becomes part of the suggestion and it often connotes the need for an inference, providing the “ground for a conclusion to be drawn from the facts or evidence presented.”¹⁰⁶ For example, consider these three ways for magicians to say that their top hat is empty: (1) by direct statement: “The hat is empty”; (2) by suggestion: “We have plenty of room in the hat”; and (3) by implication: “We must find something to put in the hat.”¹⁰⁷ Actually, the direct statement could destroy the trick because it initiates a train of distrustful thought in the mind of the spectator. The following serves as an example:

Since you bring up the subject, is it empty? Had you not found it necessary to say that the hat was empty, I would have assumed that to be the case. Certainly, if it were empty, really, you wouldn't have thought it necessary to emphasize the fact. And if you desire to emphasize it, why don't you actually show the hat to be empty. Probably because you don't dare. I believe there is something still in the hat.¹⁰⁸

The use of suggestion or implication is much more effective for the magician than direct statement because spectators believe that they have made their own decisions.¹⁰⁹ Magicians achieve persuasion through inducement; that is, they elicit a decision made by choice rather than by force.¹¹⁰ Magicians know and take advantage of the simple truth that neither deductive nor inductive reasoning results in a correct conclusion. In fact, magicians materially assist spectators in reaching an incorrect conclusion by suggesting or implying false clues.¹¹¹

103. *Id.*

104. *Id.*

105. *See id.*

106. *Id.*

107. *Id.* at 74.

108. *Id.* at 73.

109. *See id.* at 74.

110. *See id.*

111. *See id.* at 76. A spectator's deductive (general to the particular) chain of reasoning might proceed as follows: All hats used by magicians have false tops. This is a hat used by a magician. Therefore, it has a false top. Of course, the first premise may be false, making the syllogism invalid. Similarly, a spectator's inductive (particular to the general) chain of reasoning might be: I saw a magician with a black top hat and I later discovered that it had a false top; a magician once told me that his black top hat had a false top; I saw a black top hat with a false top listed in a magician's catalogue;

Actually, digital dexterity or the so-called “hand is quicker than the eye” principle has nothing to do with magicians’ skill.¹¹² That skill lies solely in magicians’ ability to influence spectators’ minds. In achieving magic effects a magician:

cleverly, skillfully and dexterously mixes true with the false. With equal facility he convincingly interprets matters to accomplish his own ends. He contrives to so influence the things the spectator perceives that the latter is aware of them *as the magician desires*. All is built upon an unshakable foundation of naturalness, plausibility and conviction.¹¹³

To more clearly understand the magician’s power to deceive, we must acquire a deeper understanding of the psychology of sensory illusion—the neural mechanics of how deception occurs.

2. Magic and the Psychology of Sensory Illusion

The human mind is a factory of illusions.¹¹⁴ Magicians, sometimes unwittingly, capitalize on this truth of psychology when perpetrating deception. Psychologists regard perception as a field of study that lies between the study of sensation¹¹⁵ and the study of cognition.¹¹⁶ On the one hand, psychologists contend that *interactive* deception involves some sort of error on the part of a perceiver and that it usually occurs when one person’s perception of a discrepancy between appearance and reality can be attributed in part to the causal influence of another person. *Self*-deception, on the other hand, involves some sort of error on the part of a perceiver caused by sensory and cognitive limitations of the perceiver. When either form of deception occurs, or when they occur in combination, they do so by defeating the designs of structural (receptor) or strategic (habituating) components of perception, or both.¹¹⁷ This results in an “inadequation of appearance to reality.”¹¹⁸

therefore, I conclude that all black top hats used by magicians have false tops. This last conclusion, reached through inductive reasoning, is not necessarily true. The magician takes advantage of such typical faulty reasoning in designing tricks and illusions. *See id.* at 76.

112. *See id.* at 32-33.

113. *Id.* at 34.

114. LOYAL RUE, *BY THE GRACE OF GUILF: THE ROLE OF DECEPTION IN NATURAL HISTORY AND HUMAN AFFAIRS* 97-99 (1994).

115. Sensation is “[a] perception associated with stimulation of a sense organ or with a specific body condition.” *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1643 (3d ed. 1992).

116. Cognition is reasoning and problem solving. *See id.* at 368; *see also* RUE, *supra* note 114, at 84-107.

117. *See* RUE, *supra* note 114, at 91.

118. *Id.* at 93.

The strategic components of perception can be best understood in terms of their relationship to the concept of *schemas*.¹¹⁹ Simply defined, schemas are “assemblages of nerve cells that function as strategic units both to encode information and to direct behavior.”¹²⁰ Through schemas, the human mind encodes a stock of information called “appearance.”¹²¹ There are different types of schemas. The most basic schemas are “feature detectors.”¹²² These schemas “respond only to highly specific features [or information] in the environment.”¹²³ Some feature detectors are keyed to detect edges; others are used to discern vertical, horizontal, or oblique lines; and still others are used to detect complicated patterns, such as contour, motion, and spatial frequencies.¹²⁴ Also, certain types of low-level schema respond to auditory information. The human mind uses “stacks” of these low-level feature detecting schemas interactively to recognize and associate both physical and abstract, visual and auditory information, such as “objects, faces, . . . expression[s], letters, words, phrases, [and] ideas.”¹²⁵

Schemas execute all human perceptual and conceptual acts, including the interpretation of facts and the formulating of opinions.¹²⁶ Not only do they constitute the substance of learning and memory, their design is also influenced by heredity and environment.¹²⁷ Humans are predisposed to discern the relevance of features in the environment to their needs.¹²⁸ If there are no interpretive schemas available, the presenting information will place humans in a state of arousal while they “figure” for the meaning of the stimuli.¹²⁹ “When the meaning is discovered (new schema constructed) or recognized (existing schema activated),” the human mind assimilates the data and restores it to a state of equilibrium.¹³⁰ This process of schematizing gives rise to meaning.¹³¹

119. *See id.*

120. *Id.*

121. *See id.* at 93.

122. *See id.*

123. *Id.*

124. *See id.*

125. *Id.*

126. *See id.*

127. *See id.* at 93-94.

128. *See RUE, supra* note 114, at 96-97.

129. *See id.* at 94.

130. *Id.* at 94-95.

131. *See id.* at 95.

It is important to note that “[s]chemas provide a basis for *inferences* about what is actually perceived,” both in the absence of sensory data and sometimes even in spite of it.¹³² Such inferences provide missing data or alter the data that are given.¹³³ Thus schemas are capable of constructing perceptions, some of which are sensory illusions. One of the most familiar sensory illusions is the visual or optical illusion.¹³⁴ A prior article in this pracademic series explored visual illusions as a basis for understanding how illusion plays a role in precipitating or prolonging a state of conflict between or among individuals.¹³⁵ This article delves deeper into the essence of the visual illusion in an attempt to understand how the mind is actually deceived by these informational constructs. This should provide clues as to how magicians achieve deception and how mediators and mediation advocates can be the victims of deception (caused by themselves and others) in mediation.

Visual illusions mock one’s trust in one’s own senses. Indeed, the Latin root of the word illusion is *illudere*, which means to mock.¹³⁶ Plato advised that people “should talk of perceiving objects *through* [their] senses but *with* the mind, since the senses give only an imperfect copy of the world.”¹³⁷ Aristotle noted that each sense may err, for example, as to what object is colored or where it is, or what is sounding or where it is.¹³⁸ Descartes much later argued that illusion intruded at either the registration stage or the interpretation stage of the perceptual process.¹³⁹ Modern-day psychologists explain illusions in

132. *Id.* at 97.

133. *See id.*

134. Apart from static visual illusions, there are also motion visual illusions. For example, spoked wheels may appear to be rotating backward when they are actually rotating forward. Another example is the visual illusion of watching a movie whereby one perceives a “rapid succession of slightly different stills on a flat screen” as a scene with “three-dimensional perspective in which people move.” 4 THE ENCYCLOPEDIA OF PHILOSOPHY 131 (Paul Edwards ed., 1967). There are also illusions relating to other senses: “the same water may feel cool to one person and warm to another;” pain may be felt in the toes of a non-existent, amputated leg. *Id.* Other illusions also have their source in known scientific principles: the sound of the whistle of a passing train may pitch downward as it passes (Doppler effect); the underwater portion of a stick appears to be bent in relation to the out-of-water portion because “the refraction of light through water is different from that through air.” HARRY BLACKSTONE, JR., THE BLACKSTONE BOOK OF MAGIC & ILLUSION 138 (1985) [hereinafter THE BLACKSTONE BOOK OF MAGIC & ILLUSION].

135. *See Mediation and Joke Design, supra* note 1, at 287-93.

136. *See* WEBSTER’S NEW WORLD DICTIONARY 700 (2d College ed. 1986).

137. *See* STANLEY COREN & JOAN STERN GIRGUS, SEEING IS DECEIVING: THE PSYCHOLOGY OF VISUAL ILLUSIONS 4 (Lawrence Elbaum Associates, 1978) (quoting Plato).

138. *See id.*

139. *See id.* at 7.

terms of schemas.¹⁴⁰ For example, observers viewing the static illusion in Figure 1 below will report seeing a white triangle superimposed on a lined triangle and three black squares despite the fact that no sides of either triangle actually exist.¹⁴¹

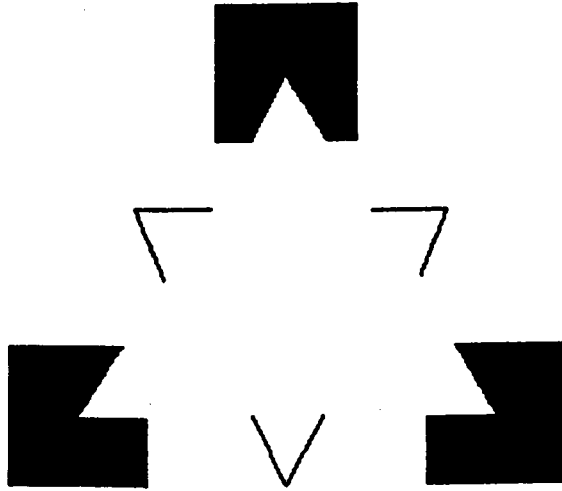


Figure 1¹⁴²

Observers see the visual *effect*—the triangles—because they activate a “triangle” schema in their minds to simplify an otherwise complicated array of information.¹⁴³ The inferences from the schema convince them that something exists which, in fact, does not. The triangles “appear” because of schemas. This phenomenon—seeing something that does not exist—is called a positive illusion and corresponds to magicians refraining from defeating a particular schema to produce a desired magic effect—appearance.¹⁴⁴ In such cases, the observers are allowed to rely on their false assumptions and false premises regarding the data to form judgments about the meaning of the information. On

140. See *supra* notes 119-35 and accompanying text.

141. See RUE, *supra* note 114, at 98 (appearing with the permission of Oxford University Press).

142. LOYAL RUE, *BY THE GRACE OF GUILF: THE ROLE OF DECEPTION IN NATURAL HISTORY AND HUMAN AFFAIRS* 98, fig. 2.2 (Oxford University Press 1994) (appearing with the permission of Oxford University Press, 198 Madison Avenue, New York, NY 10016).

143. See *id.* at 97.

144. THE BLACKSTONE BOOK OF MAGIC & ILLUSION, *supra* note 134, at 138 (relating to the positive and negative illusions to schemas in the correlation).

the other hand, when observers' inferences from the schemas are defeated (demonstrated to be false), the triangles quickly "disappear." This phenomenon, approximates a magician defeating a schema to produce a desired magic effect—disappearance.¹⁴⁵ There are certain static illusions that arise from perceptual schemas and are much more difficult to defeat. In this type of illusion, schemas and their inferences are erroneous and are so constant and embedded that observers will not see the truth unless they compare certain data by measurement or superimposition. In such situations, observers rely on false assumptions or false premises about the data based on their heredity or experience in forming judgments about the nature, quantity, or quality of the perceived information.¹⁴⁶ For example, in Figure 2, *infra*, perceptual schemas create the belief that line B is much longer than A.¹⁴⁷ Yet, when the two lines are measured or placed one on the other, observers are amazed to find that they are exactly the same length.

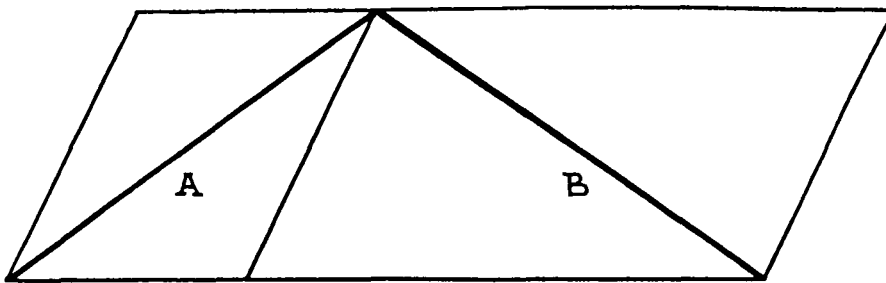


Figure 2¹⁴⁸

145. The magic effects of appearance and disappearance are discussed *infra* in Parts III.A.1, A.2. As one commentator on magic notes:

Spectators are deceived not because their thinking violates the laws of logic, but because they begin their reasoning process with false premises. If one proceeds from a mistaken premise, then even the most impeccable logical reasoning cannot protect him from arriving at a false conclusion In short, the magician is able to deceive spectators precisely because their thinking adheres to the dictates of logic.

EARLE J. COLEMAN, *MAGIC: A REFERENCE GUIDE* 18 (1987). The sources of mistaken premises are arguably the perceptual schemas of the deceived person and the inferences the deceived person draws from those individualized schemas. See RUE, *supra* note 114, at 96-97.

146. See *supra* notes 119-31, and accompanying text (discussing the role of schemas in perception).

147. THE BLACKSTONE BOOK OF MAGIC & ILLUSION, *supra* note 134, at 139 (appearing with the permission of Newmarket Press).

148. HARRY BLACKSTONE, JR. WITH CHARLES & REGINA REYNOLDS, THE BLACKSTONE

This phenomenon—not seeing something that does exist—is called a negative illusion.¹⁴⁹ Magicians use this perceptual distortion of reality to their advantage by *not defeating* the distorted perception (allowing the observer to continue to believe that A is not equivalent to B) or by *defeating* the distorted perception in a flourish of showmanship (by showing that A and B are equivalent) which makes observers believe that A has somehow been transformed. By not defeating a distorted perception, magicians hide the truth; by defeating such perception, magicians, although presenting the truth, in fact show the false by implying that a transformation has occurred.

Thus, “the way things really are” can never be more than a contingent caricature of the world—a caricature because the structures and strategies of any perceiver can process only a highly selective fraction of potential information, and contingent because any particular embodiment of this fragmentary information is necessarily affected by the peculiar heredity and individualized history of the perceiver.¹⁵⁰ “Deception occurs when the designs embedded in the morphology and/or behavior of one [person] can defeat the designs embedded in the perceptual structures and/or strategies of another [person] The study of deception is an attempt to explain which particular designs of the deceiver are responsible for defeating the particular designs of the [person deceived].”¹⁵¹

Deceptive interaction may be analyzed under a three-part template: the *types of defeat*, the *means of defeat*, and the *deceiver’s objectives*.¹⁵² These three analytical headings roughly correspond to the analytical framework of Part III of this article: the effects of magic, the methods of magic, and magicians’ ultimate objective—successful showmanship.¹⁵³

III. THE SECRETS OF BLACKSTONE: EFFECTS, METHODS, AND SHOWMANSHIP IN MEDIATION

Harry Blackstone, Sr., once billed as “the Greatest Magician the World Has Ever Known,” was born in Chicago in 1885 to parents of modest means.¹⁵⁴ He was the third of seven children and his father

BOOK OF MAGIC & ILLUSION 139 (1985) (appearing with the permission of Newmarket Press, 18 East 48th Street, New York, NY 10017).

149. See THE BLACKSTONE BOOK OF MAGIC & ILLUSION, *supra* note 134, at 138.

150. See RUE, *supra* note 114, at 99.

151. *Id.*

152. See *id.* at 105.

153. See *supra* Part III.

154. See THE BLACKSTONE BOOK OF MAGIC & ILLUSION, *supra* note 134, at 38, 88.

operated a flower shop. Being a spectator initially sparked his interest in magic. When he was twelve years old, he spent days watching the world-renowned magician, Harry Kellar, perform sleight of hand and levitations at McVicker's Theater. By age seventeen, Blackstone became convinced that magic was his calling. In the ensuing years, he went from playing dates at local lodge halls, churches, schools, and small theaters in the early 1900s, to performing by mid-century in all the leading theaters of the United States and Canada with his "Show of 1001 Wonders."¹⁵⁵ He was a contemporary of Harry Houdini whom he considered "a friendly enemy," although he was a much more versatile performer than Houdini, who concentrated mostly on escape artistry.¹⁵⁶ Blackstone died in 1965 and left a legacy of high stature in the entertainment field that inspired his son, Harry Blackstone, Jr., to carry on in his footsteps and to perpetuate the secrets of his magic.¹⁵⁷ These secrets, in the form of "*Blackstone's Commentaries*," will serve as both a framework and as points of departure for exploring the various types and methods of deception that are likely to occur in mediation.¹⁵⁸

A. *Effects of Magic*

As stated *supra*, a magic "effect" is the trick as it appears to the spectators.¹⁵⁹ There are six principal types of magic effects: appearance (or production), disappearance (or vanish), transformation, transposition, defiance of natural laws, and mental phenomena.¹⁶⁰ In the discussions which follow, in the analogies to caucused mediation, the term "magician" or "magicians" encompass both advocates in mediation and mediators; "magician advocate" refers both to parties and their counsel; and "magician mediator" refers to a mediator. Because it is difficult, if not impossible, to explain the effects of magic without collaterally illustrating the methods which produce them, the discussion which follows in this section necessarily addresses some of

155. *See id.* at 42. *See also* Walter B. Gibson, *Biographical Note to BLACKSTONE'S SECRETS OF MAGIC*, *supra* note 17, at 13.

156. *THE BLACKSTONE BOOK OF MAGIC & ILLUSION*, *supra* note 134, at 42-60.

157. *See id.* at 96-97.

158. The "*Blackstone Commentaries*," which occur throughout this article, are based on the writings of both Harry Blackstone Sr. and Jr. as supplemented by other of their contemporaries in the field of magic.

159. *See Eldin*, *supra* note 66, at 184.

160. *THE TRICK BRAIN*, *supra* note 66, at 23-24 (*quoting* S. H. SHARPE, *NEO MAGIC* (1932)). Fitzkee identified nineteen basic effects, but all of these can be catalogued under one of Sharpe's six headings. *See id.* at 25-31.

the methods used by magicians to produce the six effects.¹⁶¹

1. Appearance

Blackstone's Commentary: An appearance, or a production, is an effect in which the result is the materialization of something or someone.¹⁶² The materialization may be gradual or instantaneous. It may occur in the open, in back of, within, or beneath something. It must be accomplished without apparent reasonable physical causation.¹⁶³ In creating the effect, magicians secure the object to be produced from a secret hiding place and bring it into position for revelation while the spectators' attention is directed elsewhere.¹⁶⁴ Secret hiding places may exist in the clothing of or in an article carried by the magician,¹⁶⁵ in secret compartments of containers (box, tube, cabinet, etc.),¹⁶⁶ and in secret passageways.¹⁶⁷ Expansibility is an important attribute for the production of an object, because the object is usually collapsed within a secret hiding place in an accessory prior to production.¹⁶⁸

In mediation, magicians sometimes use statistical data and graphs to lure other mediation participants (audience members) into believing that they should draw certain conclusions from a given set of data. Thus, through a demonstration, magicians create a materialization of something—an appearance—that is often not fully supported by the

161. See *infra* Part III.B for a deeper exploration of the various methods of magic and their mediation counterparts.

162. THE BLACKSTONE BOOK OF MAGIC AND ILLUSION, *supra* note 134, at 118-121.

163. THE TRICK BRAIN, *supra* note 66, at 36.

164. See *id.* at 37.

165. See *id.* at 38, 44. A quick tug on a piece of thread or clear fishing line can be used to produce a silk, flower, or other object concealed beneath a vest, coat, or within a pocket. In some productions, elastic cord can be used instead of thread. In *The Card Sword* routine, for example, a piece of elastic extends through the hollow blade of the sword and emerges at the tip. A card is attached to the end of the elastic and then stretched the length of the sword behind the blade to be concealed within a secret hiding place in the handle. When the elastic is released, the card springs into view at the tip of the blade. The difference between the thread and elastic devices is that with elastic, the power can be applied by the performer *before the performance*, and it remains stored up until needed. In some routines, power can be pre-stored by a tension spring or coil spring. See *id.* at 44-45.

166. See *id.* at 49. Mirrors can be used to conceal secret compartments in boxes. They can be installed to bisect the angles made by each side and the back of the box. They meet in the center of the box, and when viewed from the front, the box appears to be quite empty. See *id.* at 50.

167. See *id.* at 69. An example of a production using a secret passageway is the appearance of a rabbit or bouquet of flowers from a top hat sitting on a table. The hat is equipped with a trap door in the crown and the load is concealed in a repository beneath the table top prior to production. See *id.*

168. See *id.* at 57.

data or is not the most relevant portion of several possible aspects of the data.¹⁶⁹

a. Selective Use of Data

To create the appearance of reliability for the statistical data, magicians first ensure that the statistics come from a highly regarded and independent source. They “set up” the trick by securing this data in their files and not disclosing it to the audience until they are ready to produce the desired appearance effect at the mediation conference. At the appropriate moment in the mediation conference, they show only the portion of the statistical data which supports their case. They hide the real data. For example, a national survey on how people feel about disposing of toxic wastes in underground bunkers may indicate that the majority is opposed to it. When the statistics are broken down by states, it may be that the majority of people in a particular state favor it. Thus, if magicians wish to convince the audience that underground bunkers are the appropriate solution for disposal of toxic wastes, they would quote the statistics of the particular state. Although the state statistics are true, they would not tell the *whole* truth. The audience would be left with the impression that there is no other relevant data—which would give rise to a false premise on which to base a conclusion.¹⁷⁰

b. The Silent Majority

If magicians cannot locate statistics confirming that the majority support their position, they might be inclined to resort to another stratagem—the “more people” trick to achieve the appearance of a majority. In this trick, magicians show the false by saying “more people” and hides the real through silence. For example, magicians attempting to convince their audience that a commuter rail system should receive a majority share of the state’s transportation budget might say “more people in this state use the rail system to get to and from work than any other form of transportation.” This could mean that as many as 51% of the people use the rail system to get to work or it could mean as few as 24%. How is that possible? Because there are six other forms of transportation whose related departments are competing for the funds: highways, 23%; subways, 22%; ferries, 21%; monorail, 6%; cycles, 3%; commuter air, 1%.¹⁷¹

169. See NICHOLAS CAPALDI, *THE ART OF DECEPTION* 30-42 (2d ed. 1979).

170. See *id.* at 31.

171. See *id.* at 32.

c. Expansibility

The trick of using *big numbers* instead of percentages, in certain circumstances, can create the appearance of enhanced size. This lends the attribute of expansibility to the data. Magicians might say in mediation: “the subsidiary was responsible for a total of \$8 million in sales” when in fact that figure represents a paltry 1% of the company’s total sales. On the other hand, the use of percentages instead of numbers can expand or contract the appearance of data, depending on the magician’s particular need at the time. Magician advocates in mediation attempting to show that a company has a bad safety record would say that there was a 100% increase in employee injuries instead of saying that there was one injury last year and this year there have been two injuries. To contrast the appearance of an unsafe workplace, the company’s magician advocate would present the numbers and steer clear of percentages.

Also, the concept of average is both ambiguous and expansible and can be used to magicians’ advantage to create a desired appearance from given statistics. In a particular context, “average” may have one of three very different meanings. If magicians use the word to describe the arithmetic mean, “average” represents the total divided by the number of people or entities involved.¹⁷² If magicians use the word to describe the median, then “average” represents the halfway point between the number of people or entities involved.¹⁷³ If “average” describes the mode, it represents the point on the scale where more people or entities are found than at any other point.¹⁷⁴ For example, the following data accurately reflect the number of students reading at the listed grade level in a seventh-grade teacher’s class of thirty students:¹⁷⁵

Grade Level	Number of Students
12	4
11	4
10	3

172. *See id.* at 36.

173. *See id.*

174. *See id.*

175. *Id.* at 37.

9	2
---	---

8	1
---	---

7	1
---	---

(arithmetic mean)

6	0
---	---

5	1
---	---

(median, 15 above, 15 at or below)

4	2
---	---

3	12
---	----

(mode)

Using this data, a magician who uses the arithmetical mean as the average could argue on behalf of the teacher that the class is reading at or above its grade level.¹⁷⁶ This would create the appearance of adequacy of performance while hiding the reality that nearly half the class (twelve seventh-grade students) is reading at the third-grade level (the mode).¹⁷⁷ Conversely, a magician using the mode as the “average” could argue on behalf of the school district that nearly half the seventh-grade class is reading at the third-grade level.¹⁷⁸ This would create the appearance of the teacher’s serious incompetence, while hiding the reality that nearly half of the students (i.e. thirteen) are reading at the high school level and four are reading at the level of a senior in high school.¹⁷⁹

Another way magicians lend expansibility to data is by using statistical graphs.¹⁸⁰ Magicians can exaggerate increases or decreases in statistical information by either showing a graph with a missing

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.* at 39.

legend or by enlarging a portion of the graph.¹⁸¹ For example, during mediation concerning the issue of the competence of a city's police chief, a graph of the true data may appear as shown in Figure 3 below.¹⁸²

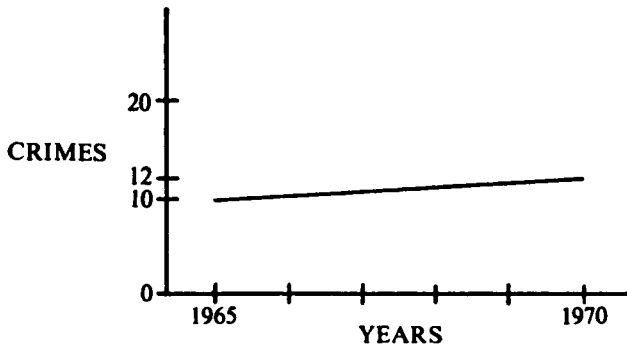


Figure 3¹⁸³

If the legend were to be removed by a magician, the graph might be redrawn as shown below in Figure 4 and the actual numbers might be verbalized at the conference.

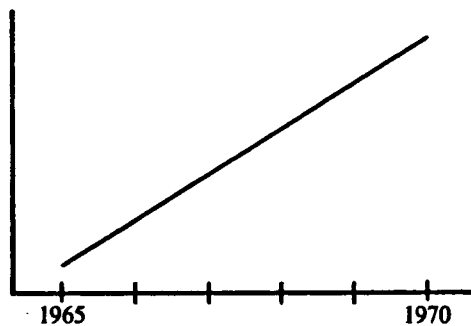


Figure 4¹⁸⁴

181. *See id.*

182. *Id.* at 39 (appearing with the permission of Prometheus Books).

183. NICHOLAS CAPALDI, *THE ART OF DECEPTION* 39 (2d ed. 1979) (appearing with the permission of Prometheus Books, 59 John Glenn Drive, Amherst, NY 14228).

184. NICHOLAS CAPALDI, *THE ART OF DECEPTION* 39 (2d ed. 1979) (appearing with the

The magician might exaggerate the increase in crime by using a blow-up of the graph as shown below in Figure 5.¹⁸⁵

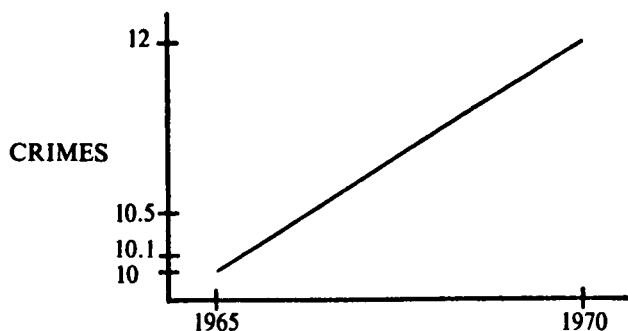


Figure 5¹⁸⁶

d. Frame of Reference

The concept of frame of reference is often a crucial ingredient in deception employed to produce a desired appearance (or a disappearance¹⁸⁷). Assume that each of the following statements accurately describes the *earnings* of a particular subsidiary and is available to a magician in mediation:¹⁸⁸ “one percent of sales”; “one percent on a dollar”; “twelve percent on investment”; “five million dollars in profit”; “forty percent increase in profits over 1990”; “sixty percent decrease in profits over last year.” These statements together reflect that the corporation has large gross revenues, but actual net receipts after expenses are very small. Magicians in mediation might use the data to their advantage by selecting an appropriate frame of reference and applying it to the data to create the desired appearance. To show that product price was overly-controlled by the parent company, magicians would use the frame of reference of percent of sales. To show the financial health of the subsidiary, magicians would use as frames of reference the profit figure and the increase in profits over 1990. To show the subsidiary’s unstable financial condition,

permission of Prometheus Books, 59 John Glenn Drive, Amherst, NY 14228).

185. *See id.* at 32-33, 36-40.

186. NICHOLAS CAPALDI, *THE ART OF DECEPTION* 40 (2d ed. 1979) (appearing with the permission of Prometheus Books, 59 John Glenn Drive, Amherst, NY 14228).

187. *See infra* Part III.A.2 (discussing the effect of disappearance and various ways to produce the effect).

188. *See id.* at 34-35.

magicians would use the frame of reference of decrease in profits over the last year.¹⁸⁹

2. Disappearance

Blackstone's Commentary: The disappearance, or vanish, is simply the reverse of an appearance or production.¹⁹⁰ It may be accomplished with an object, a person or a thing, and the effect seemingly created is that the performer has caused the subject of the effect to cease to exist, either gradually or instantaneously.¹⁹¹ A hiding is key to achieving this effect. The subject of the effect must be hidden in a secret place at the location where the disappearance occurs, or it must be secretly conveyed away from the place of disappearance and disposed of in a hiding place at some other location.¹⁹² The effect of disappearance can be achieved also with the assistance of light. With light glaring into their eyes, spectators are unable to distinguish varying shades of black of a background.¹⁹³ Thus, if a black cover is thrown over an object to vanish in such situation, the cover blends with the black background, becomes invisible, and makes the object seem to disappear.¹⁹⁴ Another method of creating the disappearance effect is the spiriting away of the object while it is hidden behind or within some covering or accessory.¹⁹⁵

a. Producing the Effect of Disappearance Through Use of Statistical Data and Graphs

Magicians cause conclusions drawn from statistics to disappear by deceptive refutation. Types of such refutation include alleging the sample is not random; using the statistics deceptively in the same way as described *supra* for creating an appearance, and by using counter-statistics and graphs.¹⁹⁶ Even if they are unsure of the truth of their declaration, magicians can declare that presented statistics are not based on a random sample.¹⁹⁷ They can declare, for example, that a

189. *See id.*

190. *See* THE BLACKSTONE BOOK OF MAGIC & ILLUSION, *supra* note 134, at 121-23; THE TRICK BRAIN, *supra* note 66, at 77.

191. *See* THE TRICK BRAIN, *supra* note 66, at 77.

192. *See id.*

193. *See id.* at 85.

194. *See id.*

195. *See id.* Typical of this type of disappearance is the routine in which water is poured from a water pitcher into a paper cone and the cone is later burned. A celluloid container actually contains the water and the performer carries away the water-filled celluloid container behind the water pitcher. *See id.* at 85-86.

196. *See* CAPALDI, *supra* note 169, at 87-94. *See supra* Part III.A.1 (discussing the use of statistics in the effect of appearance).

197. *See id.* at 88.

sample is not representative in time, space, economics, geography, or on the basis of sex or age, regardless of whether the particular defect is even important.¹⁹⁸ Such declaration, whether or not true, can undermine the validity of statistics and make their significance or relevance disappear. Also, if the presenter of statistics uses a frame of reference that is unfavorable to the magician, the magician can shift the frame of reference to a favorable one—without disclosing several other frames of reference unfavorable to the magician. Finally, to achieve disappearance, magicians not only use counter-statistics which contradict the originally presented statistics, but they also use those which supplement the original set in such a way that a different conclusion must be drawn.¹⁹⁹ In a labor case, for example, management might present statistics showing that employees' wages have risen at a dramatic rate.²⁰⁰ The magician advocate for the union might present statistics in response showing that the cost of living has risen at a staggering rate—but without showing that increases in certain employee benefits and non-monetary concessions (“comp time” and “flex time”) increased the value of employee compensation to a level paralleling the cost of living increase.²⁰¹

b. Magicians Using Persuasive But False Counter-Arguments

Magicians use the device of persuasive but false counter-arguments to make certain facts and conclusions disappear.²⁰² These devices include: the red herring; the choice between heaven and hell; old and new; “where there’s smoke, there’s fire”; “if it ain’t broke, don’t fix it”; the end justifies the means; and, the grass is always greener.²⁰³

i. The Red Herring

Magicians make a solid argument disappear by drawing the audience’s exclusive attention to a side issue. In doing so, they employ a type of misdirection.²⁰⁴ To be effective in causing another issue or contention to vanish, the red herring: “must be related at least indirectly to the issue” under discussion; it “must have sufficient emotional appeal to catch” the audience’s attention immediately; it must be so strong that the magician can work it as long as he desires; and, it

198. *See id.*

199. *See id.* at 89.

200. *See id.* at 89-90.

201. *See id.* at 90.

202. *See generally id.* at 128; 148-151.

203. *See id.* at 148-51.

204. *See infra* in Part III.B.2.c (discussing misdirection).

must be presented in such a way that the target audience becomes convinced that the alternative argument has little or no substance.²⁰⁵ For example, assume that a magician in a mediation offers proposal X to solve the problem of housing the mentally ill. Another party responds with solid criticism that proposal X is too costly and has been tried before unsuccessfully. Without addressing the criticism related to the housing program, the magician then launches into an extensive discussion of the types of mental illnesses, the harmful side-effects of normally prescribed medications, and the horrific plight of the mentally ill and their families in coping with the disease. The magician's highly-emotional red herring might capture the attention of the target audience and succeed in causing the other party's solid criticism to vanish.²⁰⁶

ii. The Choice Between Heaven and Hell

When employing the "choice between heaven and hell" device, the magician places an incomparable, often imperceptibly unrealistic, but very desirable alternative alongside an originally presented proposal, implying that the audience's choice is limited to either the alternative or the apparent much less desirable original proposal.²⁰⁷ The attractiveness of the original proposal disappears completely, permitting the magician to produce the appearance of a new alternative that the magician favors but hid from view from the beginning.²⁰⁸

iii. Old and New

To make a proposal for a traditional solution disappear, a magician might appeal to a spirit of experimentation in a young audience.²⁰⁹ To make a proposal for an innovative solution disappear, a magician might appeal to a spirit of tradition in an older audience.²¹⁰ These appeals are, of course, immaterial to the actual merits of the proposals.²¹¹

iv. "Where There's Smoke There's Fire"

In order to distract the audience's attention from an original unpalatable proposal, the magician may create a feeling of alarm in the

205. See CAPALDI, *supra* note 169, at 51.

206. See *id.* at 128-29.

207. See *id.* at 149-50.

208. See *id.*

209. See *id.* at 150-51.

210. See *id.*

211. See *id.*

audience by directing its attention to a situation which may erupt into a much larger problem.²¹² The magician achieves a vanish of the original proposal by greatly exaggerating the seriousness of the speculative problem.²¹³

v. “If It Ain’t Broke, Don’t Fix It”

To make a solid, innovative proposal for improvement disappear, magicians may misdirect the audience’s attention to the apparent security of the status quo, despite knowing that such security will be of brief duration.²¹⁴ Magicians thereby buy time to produce an alternative more favorable to them at a more convenient time.²¹⁵

vi. The End Justifies the Means

Magicians defeat an original proposal or suggestion by leading the audience to believe that the goal of their proposal is so overwhelmingly important that all attention needs to be directed to the means of obtaining it, and that even very costly means are justified.²¹⁶ The original proposal loses substance and disappears into the background.²¹⁷

vii. The Grass Is Always Greener

To make an original proposal decompose, magicians may scoff at it as being too imaginative, unrealistic, or illusional despite knowing a practical and efficient way to effectuate it. Then, magicians present their own illusion.²¹⁸

viii. Other Deceptive Counter-Arguments

Other types of persuasive but usually false counter-arguments used by magicians in mediation include the hasty generalization (drawing a conclusion from insufficient evidence), composition (arguing from individual cases to a general case or whole), division (arguing that the property of a whole is a property of every part of the whole) and accident (applying a general principle to a specific case without disclosing that the circumstances—accidents—of the individual case

212. *See id.* at 151.

213. *See id.*

214. *See id.* at 129-31.

215. *See id.*

216. *See id.* at 150.

217. *See id.*

218. *See id.* at 151.

make the general principle inapplicable).²¹⁹

c. Magician Mediators Making Themselves Disappear

In her landmark book on mediator strategies and tactics, Deborah M. Kolb quotes a mediator explaining the device of disappearing from the mediation site: "You know, there's a story people tell in mediation [when] [n]obody can find the mediator. Both sides think that [the mediator has] been with the opposite side But in the meantime, both sides have been working, and when he comes back they have reached a settlement."²²⁰ In such situations, the mediator allows the parties to persist in a misbelief in their own best interests.²²¹

d. Magician Mediators Eliminating Issues or People from the Discussion

Mediators control the mediation process in part by eliminating issues and people from the discussion.²²² They do this through the device of selection. Mediators, sensing an evidentiary mode of discourse as legalistic or irrelevant, might shift to a discussion of the parties' feelings, morality, or future relations.²²³ Thus, the significance of the evidence disappears. To make people disappear from a dispute or from a mediation session, the mediator might tell certain attendees privately that the only relevant parties are the complainant and the accused person.²²⁴ In the eyes of those in whom the mediator has confided, the contributions of these "irrelevant" parties become unimportant, effectively making them disappear.²²⁵

219. *See id.* at 101-05; *see also A Classical Approach to Mediation—Part I, supra* note 1, at 115-16 (providing a descriptive chart of nine fallacies employed by speakers and common examples of their use).

220. DEBORAH M. KOLB, *THE MEDIATORS* 43 (1983) [hereinafter *THE MEDIATORS*].

221. This is an extreme example of what some behavioral researchers might refer to as "nondirective tactics . . . 'attempts at increasing the probability that the parties themselves, with a minimum of manipulation or suggestion from the mediator, will hit upon a mutually acceptable solution to the dispute.'" Peter J.D. Carnevale & Richard Peggnetter, *The Selection of Mediation Tactics in Public Sector Disputes: A Contingency Analysis*, 41 *J. OF SOC. ISSUES* 65, 67 (1985) (*quoting* Kressel, *LABOR MEDIATION: AN EXPLORATORY SURVEY* 13 (1972)).

222. *See* Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 *LAW & POL'Y* 7, 16-17 (1986).

223. *See id.*

224. *See id.* at 17.

225. *See id.*

3. Transposition

Blackstone's Commentary: The transposition effect is merely the vanishing of something at one place and its reappearance at another location.²²⁶ The effect can occur in two ways: either two apparently identical objects are used, the first vanishing and the second appearing; or, the subject itself is secretly conveyed from one place to the other.²²⁷ These are simple transpositions. A familiar example of a simple transposition effect is *The Three Shell Game*.²²⁸ In that routine a magician asks a spectator to select the walnut shell under which has been placed a pea.²²⁹ After the magician moves the shells around, the spectator must guess under which shell is the pea. The spectator is unsuccessful at guessing because the magician conveys the pea from shell to shell, secretly, by means of sleight of hand.²³⁰ Compound transpositions are those in which two different objects are each in two different locations and they seem to trade places in some unexplainable manner.²³¹ Achieving the effect of transposition requires the application of many basic magic stratagems including the use of shells, duplicates, the stratagem of carrying away an object under a container, and disguises.²³²

a. Magician Mediators Postponing Discussion of or Juxtaposing Matters in Conflict

Magician mediators effect simple transposition through the device of postponement. In some situations, when problems seem to mediators to be unresolvable, mediators make the problems disappear temporarily by tacitly postponing consideration or discussion of them.²³³ Mediators then cause the issues to reappear later in their routines when it is more convenient or when it better suits their purposes. All the while, mediators allow the parties to assume that they have no say in controlling the direction of the discussion.²³⁴ In other situations, mediators allow the parties to believe that a particular issue relates to one aspect of a problem (is under a particular shell), but later mediators raise the issue unexpectedly in connection with another aspect of the problem (under another shell), presenting a trade-off.

226. See THE BLACKSTONE BOOK OF MAGIC & ILLUSION, *supra* note 134, at 123-24; THE TRICK BRAIN, *supra* note 66, at 93.

227. See THE TRICK BRAIN, *supra* note 66, at 93.

228. See *id.* at 174.

229. See *id.*

230. See *id.* at 99, 174.

231. See *id.*

232. See *id.* at 98.

233. See SILBEY AND MERRY, *supra* note 222, at 17.

234. See *id.* at 14-15.

Mediators then use the audience's surprise to help reframe their perception of the relative status or substance of the issue.²³⁵

b. Magicians Using Analogies

In mediation, magicians effect compound transpositions by asserting that two things similar in one or more respects will be similar in another or future respect.²³⁶ Magicians know that similarity is not identity and that any analogy is deceptive because in some respect—perhaps a very important respect—it does not hold true.²³⁷ There are essentially two kinds of analogies magicians use: literal and figurative.²³⁸ Magicians use literal analogies to show that two things are similar in structure, function, or both. Magicians may show the similarities of two things while hiding a serious incompatibility between the two in their structure or function. For example, in a wrongful discharge case, a magician advocate might propose that the discharged employee receive reinstatement to the same “freight dispatcher” position in the company, but at a different location. The magician advocate hides the fact that the discharged employee, if reinstated, would have to periodically rotate workshifts at that particular company location.

Magicians do not use figurative analogies, however, to show such literal similarities in structures or functions.²³⁹ Rather, figurative analogies are literary devices which magicians use to explain a point in a dramatic way.²⁴⁰ These analogies are sympathy-appealing devices used to influence an audience already predisposed emotionally.²⁴¹ For example, in a dispute among members of a company's board of directors regarding the inappropriate usurping of the board's authority by one member, that member's lawyer, after urging his client's honorable motives, might analogize: “Mr. Smith is not a mutinous sailor who has seized the helm of the company to deliver it to pirates; on the contrary, he is merely the captain of a tiny tugboat who sees a need to guide this gigantic tanker to safety through a narrow, ice-bound strait in rough seas.” Of course, the magician advocate knows that his client would do anything to undermine the power of the board

235. An example of postponement of issues appears in *THE MEDIATORS*, *supra* note 220, at 27-28.

236. See *CAPALDI*, *supra* note 169, at 51.

237. See *id.*

238. See *id.*

239. See *id.* at 52.

240. See *id.*

241. See *id.* at 53.

and to set himself up as its next chairman.

4. Transformation

Blackstone's Commentary: Transformation is an effect in which a person or thing changes radically in appearance or nature.²⁴² The change is not intended to be perceived as one of location or position, and it may consist of a conversion in identity, color, size, shape, character, or meaning of a person or thing, so long as a distinguishable difference is effected.²⁴³ To create this effect, the performer must use two different objects, substituting one for the other (the first vanishing, the second appearing in its place); or the object must be capable of assuming two or more different aspects.²⁴⁴ For example, for substitution, a magician may wrap a yellow billiard ball in a handkerchief and then remove the handkerchief, to show that the yellow billiard ball has transformed into a red billiard ball.²⁴⁵ What really occurs is that the magician has a red ball concealed within his hand, and in the act of wrapping the yellow ball, it is exchanged for the red one and the yellow one is carried away.²⁴⁶

As to transformations of objects having two or more different aspects, the routine involving changing a cigarette into a wand provides an example.²⁴⁷ In that routine, the device is a sheet of celluloid, about 2 3/4 inches wide and 12 inches long, rolled tightly into a tube, one-half inch in diameter, and decorated to appear to be a wand with white tips. The natural set of the plastic causes it to form itself lengthwise into the wand appearance. The celluloid sheet is then rolled widthwise—across the narrow width of the sheet—into a cigarette-appearing object. Pressure is then applied to hold it in the cigarette shape. When tossed in the air after first being shown as a cigarette, the natural set of the celluloid causes the cigarette to unroll instantaneously and present the wand shape. To the spectators, the cigarette seems to transform into a wand before their very eyes.²⁴⁸

242. See THE TRICK BRAIN, *supra* note 66, at 110.

243. See *id.*

244. See *id.*

245. See *id.* at 112.

246. See *id.* A shell (a hollow object) giving the appearance of being some other object can be used in achieving transformations. See *id.* For example, Blackstone used the shell to transform a woman into a flower bush. See *id.* He built a flower bush upon a six-foot cone and placed within a large cylinder. When the cylinder was lowered over a woman and then suddenly taken away, the cone was left covering the woman. Thus, spectators perceived the effect as the woman being transformed into a flower bush. The opposite effect could also be achieved by taking the cone away and disclosing the woman. See *id.*

247. See *id.* at 110-11.

248. See *id.* at 111.

One can also achieve a transformation by changing relative surroundings in order to gain an illusion of change.²⁴⁹ An example of this transformation effect is the ball and tube trick where a small metal ball seems to change size and sink into a tube. The ball of course does not change size. The effect is achieved by allowing the ball to gradually sink with an inner unsuspected shell tube controlling the movement and eventually being shown as the original tube.²⁵⁰

a. Magicians Using Statistical Data and Graphs
to Transform Meaning

Magicians can transform meaning of data by manipulating the dimensions of the data, the medium of it, or both.²⁵¹ If a magician advocate, for example, wishes to exaggerate the size of the increase in benefits that an employer has bestowed on his employees, the magician advocate could show a picture of two employees each sitting on a pile of coins representing employee benefits before and after the bestowing of benefits.²⁵² Assuming the benefits have doubled, an accurate depiction of the facts would show the pile of coins on the right to be twice as high as the pile on the left. The pile on the right would only be increased in the vertical dimension. If the magician advocate wished to exaggerate the effect of the increase, the advocate could also double the width dimension of the coins, transforming the visual meaning of the data into a quadrupling of benefits.²⁵³

Magicians can also transform meaning of data by translating the data from one medium to another.²⁵⁴ A common example of this effect occurs through the device of a map by which magicians imply the equivalence of population and geography.²⁵⁵ There is no uniform relation between the size of an area and the population density of the area. Despite the lack of relationship between size and density, magicians may present a map of the United States showing more than half the map area shaded a different color. The shading is to signify the states whose populations favor using product X. Although much more than fifty percent of the map appears shaded, the implication would be deceiving if only the small-population states (despite their

249. *See id.* at 120.

250. *See id.*

251. *See* CAPALDI, *supra* note 169, at 40.

252. *See id.* at 40-41 (providing the example in the text describing the exaggeration of the size of an employer's increase in benefits).

253. *See id.* at 41.

254. *See id.*

255. *See id.*

large size) favored using product X.²⁵⁶

b. Magician Mediators Transforming Themselves

Magician mediators consider their primary task as helping parties to achieve an agreed solution.²⁵⁷ In order to do this effectively, magician mediators must transform their appearance into a “less threatening, camouflaged form.”²⁵⁸ They must “assume the construction of reality of each party,”²⁵⁹ gain the trust and respect of each party, and understand the hopes, desires, fears, and needs of each party.²⁶⁰ “Once the intervenor-mediator is in sync, by the management and manipulation of verbal and non-verbal cues and language, he or she can then move to alter the party’s construction of reality by modifying the language and metaphors in use.”²⁶¹ However, the mediator’s transformation of self must come first.²⁶²

c. Magician Mediators Transforming and Broadening the Context of the Dispute

Upon entering the parties’ construction of reality, magician mediators must pierce the parties’ respective operative rules and “transform the context of [the] dispute so that it is susceptible to resolution.”²⁶³ One commentator has explained mediators’ tasks in this manner:

The context is the framing or understanding of the dispute, how a party views what the fight is about and presents it Most people approach problem solving in dichotomous, dualistic terms; something is either right or wrong, healthy or unhealthy, a personal issue or business issue, and so on. The categories are, by the logic of dichotomous thinking, taken to be mutually exclusive. Mediators, like trickster figures, must blur or confuse false dichotomies or polarities for settlement to occur or even to be considered.²⁶⁴

256. *See id.* (providing an example similar to the one in the text to show the translation of data from one medium to another).

257. *C.f. The Constructive Uses of Deception, supra* note 5, at 5-7 (explaining the role of the mediator).

258. *The Constructive Uses of Deception, supra* note 5, at 5.

259. *Id.*

260. *See id.*

261. *Id.* at 7.

262. *See infra* Part III.C (relating transformation to the magician’s showmanship).

263. *The Constructive Uses of Deception, supra* note 5, at 7.

264. *Id.* at 7.

Without telling the audience exactly what they are doing and why they are doing it, magician mediators routinely shape and reshape the data of a dispute “by interpretation and reinterpretation of disputants’ statements, [by] determinations of relevance and irrelevance of statements, and [by] styles of discourse.”²⁶⁵ They normally begin by asking the disputants open-ended questions to expand on the disputants’ simple conclusory statements, such as “my partner is a thief.”²⁶⁶ The answers to these open-ended questions naturally “broaden the discussion to encompass other events and circumstances”²⁶⁷ Once this occurs, mediators search out “areas of agreement, shared values, and shared experiences”²⁶⁸ that can be manipulated to reach a settlement.²⁶⁹

d. Magician Mediators Transforming the General into the Specific and Concretizing Issues

After the data of a dispute has been broadened through the use of open-ended questions, magician mediators methodically “reshape general complaints and demands into specific behavioral requests.”²⁷⁰ The mediators accomplish this through the device of posing narrow topic-specific questions which isolate the disputants’ central issues and concerns.²⁷¹ Once mediators finalize these issues and concerns, they search for resources to satisfy the disputants’ concerns by asking additional questions. This process is manipulative in that mediators redefine and reshape problems, causing solutions to appear before the disputants’ eyes sometimes without the disputants knowing that the transformation is occurring.²⁷²

e. Magician Mediators Transforming Proposals of Disputants

Magician mediators may transform the meaning of a party’s proposal by altering it, embellishing it, and recommunicating it to the other party in a caucus. This may occur several times in succession. Although the parties may assume that they are effecting the transformations in the proposals, it is actually the mediator who is

265. SILBEY AND MERRY, *supra* note 222, at 15-16.

266. *See id.* at 16.

267. *Id.*

268. *Id.*

269. *See id.*

270. *See id.* at 17.

271. *See id.*

272. *See also id.* (stating that “mediators will rephrase demands and accounts in order to eliminate emotionally loaded language which might connote moral blame or liability”).

doing the reshaping. One commentator has described this effect as follows:

Reshaping tactics . . . are more extreme. When a mediator uses such a tactic, he knowingly alters or embellishes the positions he carries [between caucuses] as a way to inject his own ideas. In this way, he uses the basic proposal mechanism as an occasion to “try on” his own formulation of how the issue(s) might be resolved. The parties may be aware of this tactic or not.²⁷³

f. Magician Mediators Shaping Solutions Through Value Conversion

Magician mediators often achieve a solution by persuading the parties to transform their perception of value.²⁷⁴ An employee seeking a substantial raise from her employer may see a solution only in terms of increased salary.²⁷⁵ Mediators may help employees see that the value of the substantial raise has an equivalent value in a redefined solution consisting of a modest raise coupled with an increase in health care or other benefits. Although this transformation or conversion of value is beneficial to employees’ understanding of the available solutions, the magician mediators have been manipulative nevertheless because the employees may not realize that the mediators’ strategic goal is to restructure their thinking. Also, as part of the “set up” to reaching this more rational value conversion stage of the mediation, the magician mediators may have intentionally rephrased demands and narrative accounts of the situation “in order to eliminate emotionally loaded language” and to make an equivalent solution more enticing to the employee.²⁷⁶

5. Defiance of Natural Laws

Blackstone’s Commentary: There are several types of magic effects which fall under the heading of defiance of natural laws. They include penetration, restoration, animation of inanimate objects, levitation, and demonstrations of human immunity to injury when exposed to fire, poisons, mutilating mechanisms, asphyxiation, etc.²⁷⁷ There are several ways of achieving the penetration effect: the penetrating object (penetrator) goes around or through the object to be penetrated;²⁷⁸ the penetrator vanishes and is

273. THE MEDIATORS, *supra* note 220, at 97 (italics omitted).

274. See SILBEY AND MERRY, *supra* note 222, at 17.

275. See *id.*

276. See *id.*

277. See THE BLACKSTONE BOOK OF MAGIC & ILLUSION, *supra* note 134, at 126-35; THE TRICK BRAIN, *supra* note 66, at 123, 134, 167.

278. Many versions of the penetration effect are achieved by means of optical

replaced with a substitute duplicate appearing in its place on the opposite side; "the penetrator [is] collapsible in some manner to give the effect of . . . penetration from one side;" or the penetrator [is] separable in parts, "in which event the separated part must go through or around the obstacle—or a duplicate to the separated part is substituted."²⁷⁹ In one version of the guillotine illusion, for example, the chopper blade is vanished automatically as the duplicate penetrator comes into view simultaneously on the other side of the obstacle.²⁸⁰ Two conditions considerably affect the possible methods by which a restoration of a destroyed object may be achieved: (1) "whether or not the entire object is destroyed; and (2) whether or not an identifying mark is placed on the object."²⁸¹ The three primary stratagems of achieving the restoration effect are: pretense, substitution, and disguise. Magicians may pretend to destroy the object or pretend to restore it. In either case, what magicians seem to do, they do not do.²⁸² Magicians also may substitute a duplicate object (whole or portion) before or after the destruction.²⁸³ By substituting before destruction, the premarked original may ultimately be shown as the restored object.²⁸⁴ Finally, the magicians can either disguise the damage in such a way that the object seems to be restored, or disguise the location of the damage so that the object appears whole and unbroken, while the damaged portion is concealed.²⁸⁵

illusions. For example, the routine called *Seeing Through the Middle* involves "a tube which seems to penetrate straight through the middle of a person." Actually, the tube goes around the body and employs an arrangement of mirrors like a periscope. See THE TRICK BRAIN, *supra* note 66, at 129.

279. *Id.* at 123.

280. *See id.* at 132.

281. *Id.* at 134.

282. *See id.* at 135. Magicians use rope that "consists of a double casing woven over the usual core." *Id.* at 139. The double casing is turned back on itself, so that when a length of this rope is cut in two, an apparent restoration is achieved. Magicians accomplish this "by sliding the outer casing back over the inner casing until a rope of approximately the original length is" produced. *Id.* "[T]he cut off half is destroyed or otherwise disposed of." *Id.*

283. *See id.* at 135. In the *Torn and Restored Newspapers* routine, the magician uses two duplicate copies of a sheet of newspaper. The duplicate sheet is "folded into a small flat packet affixed to the back of the original sheet. After the original is torn and return repeatedly, the pieces are folded into a small parcel similar to the duplicate in size . . . [The magician then] holds a parcel consisting of two packets back to back—the torn one in front and the whole . . . [duplicate] in back. The parcels are reversed and the whole sheet is unfolded," the torn parcel being obscured behind the spread out duplicate. *Id.* at 136.

284. *See id.* at 135.

285. *See id.* at 135. Magicians can use cement or glue when disguising the location of the damage in rope restorations. Prior to a performance, the magician applies cement to the two ends of a continuous cord. When the string is cut during the performance, the cement prepared ends are substituted for the two ends created when the cord was severed. After rolling the two treated ends together out of sight of the spectators, the magician then presents a continuous cord, apparently restored. *See id.* at 138.

a. Magician Mediators Achieving Penetration by Going Around
Solid Resistance

Often parties on one side in a mediation marvel at how mediators are able to penetrate the other side's resistance to settlement. Actually, mediators normally do not penetrate the resistance at all; rather, they go around it or cause part or all of the resistant behavior to collapse voluntarily. In certain cases, mediators physically "go around" the resistant party representative—usually with, but sometimes without, the representative's permission—and communicate with someone in a higher position of authority. This can serve to destabilize the representative's position of power, particularly if the representative is already insecure in the bureaucracy and if mediators share with representatives little or no information obtained in the discussion with a superior. Sometimes representatives will become less resistant as soon as they have been informed that a mediator intends to converse with the representatives' superior or has had a conversation with the superior. If mediators play their cards right, and a superior favors compromise to obtain resolution, a representative may become quite flexible and a solution to the conflict may be quickly achieved. The other side may have no knowledge of the method the mediators used to achieve the apparent penetration of a representative's resistance.

Parties may commit themselves to an unacceptable position for one or more of the following reasons: the parties believe (1) the position meets intangible psychological needs; (2) it is the best solution; (3) other parties do not know what is best for them; (4) they can weaken resistance if they continue to argue their position; (5) they have the power to force their solution on the other parties.²⁸⁶

Magician mediators use psychological, procedural, and leverage means to reduce or eliminate a party's commitment to positions.²⁸⁷ By using leverage means, mediators figuratively "go around" a party's resistant position and "poke holes in it" through the use of strategic questioning techniques. Mediators use such techniques to collapse parties' resistance to resolution.²⁸⁸ Mediators may ask a party a series of questions which causes the party to realize the risks involved in continuing to maintain a resistant attitude.²⁸⁹ For example, mediators may ask questions, eliciting answers which convince a party that: it has underestimated the cost of maintaining its position; it has

286. MOORE, *supra* note 11, at 201.

287. *See id.* at 201-02.

288. *See id.* at 202-03.

289. *See id.*

overestimated the cost to the other party of maintaining its position; the other party's interests are more important than initially realized; or its interests are not as important as originally believed.²⁹⁰

b. Magician Mediators Achieving Restoration of
Potential Solutions

Magician mediators use three primary stratagems when restoring potential solutions. The stratagems are pretense, substitution and disguise. For example, in an employment dispute involving a wrongful discharge claim, the parties might agree in the initial joint session that reinstatement of the employee is not a desired solution of the case. Mediators may pretend to go along with the parties and destroy reinstatement as a realistic element of the settlement. However, mediators intentionally retain reinstatement on the list of potential solutions. Thus, what mediators seem to do, they do not do. Mediators know that later, after disclosure of all the facts and release of all emotions, reinstatement may be a realistic solution that neither party feels comfortable suggesting because of its prior statements. At that point mediators can restore the potential solution of reinstatement, allowing the parties to view its contours in a wholly different light. Mediators also may substitute a duplicate object by suggesting that the employer restore the employee to a comparable position of identical pay. Mediators can disguise or conceal the previously damaged employment relationship by suggesting that the former employee either: (1) be reinstated to a similar position at the company at a different location; or, (2) that the former employee be engaged as a full-time consultant.

c. Magician Mediators Using Party's Own Resistance to Effect a
Break-Through

Occasionally, with the hope of breaking a deadlock and encouraging the parties to focus on options that might work, magician mediators suggest extreme, unrealistic options that both resistant parties reject.²⁹¹ This approach allows an intransigent party's energy to be redirected constructively toward settlement.²⁹²

290. See *id.* at 202-03.

291. See *The Constructive Uses of Deception*, *supra* note 5, at 10. "The mediator's use of a party's resistance in this manner is not unlike the use of an opponent's own force to throw him or her off balance in the martial art of Aikido." *Id.*

292. See *id.*

6. Mental Phenomena

Blackstone's Commentary: The primary illusions which achieve magic effects through apparent mental phenomena include: identification, mind reading, thought transference, prediction, and extra-sensory perception ("ESP").²⁹³ Identification, considered by some to be the most important effect in magic, describes those effects in which the magician, "usually through some implied special power, selects the identical object [(card, color, a hiding place, word, etc.)] previously selected by a spectator or a group of spectators."²⁹⁴ Stratagems for achieving identification include: marking the object;²⁹⁵ using a key (a known card, a codeword,²⁹⁶ gesture, etc.); using a mathematical arrangement, formula, or the natural properties of numbers and mathematical operations; spying personally or through a confederate; forcing a selection; and delaying commitment until the spectator's choice is made known and then adopting it.²⁹⁷ Mind reading, also called mental telepathy, is the effect in which the magicians "perceive[] the thought of someone else, apparently through unnatural means There is no effort on the part of the spectator to assist [magicians] except that [they] concentrate on the particular idea [they] seem[] to be divining."²⁹⁸ One of the oldest techniques for

293. THE BLACKSTONE BOOK OF MAGIC & ILLUSION, *supra* note 134, at 136.

294. THE TRICK BRAIN, *supra* note 66, at 183.

295. One familiar routine involving marking is simple, but baffling. Prior to the performance, the magician prepares five envelopes by placing an inconspicuous pencil dot on each one. Each dot is in a different position on the envelope and known only to the magician. In his mind, the magician codes the dots, respectively, 1, 2, 3, 4, 5. During the performance, the magician chooses five members of the audience and hands each a post card, a pencil, and one of the five (premarked) envelopes. As he does so, the magician numbers each person mentally, making sure that the numbers of the persons correspond to the mentally designated numbers of the envelopes. The magician asks each of the five spectators to write his or her name on the postcard and place it in the envelope provided. After that occurs, the magician asks another spectator to collect the five envelopes and to mix them up before handing them to him. The magician holds the envelopes, one by one, to his head and divines the name of the person on the card in the envelope. He, of course, glances at the secret mark on the envelope before placing it to his head. The magician correctly identifies each signature and hands the signature card back to the appropriate person after removing it from the envelope. Each person confirms that the signature is his or hers. See ELDIN, *supra* note 66, at 76.

296. The use of a codeword occurs, for example, when a magician leaves the room and his assistant asks the spectators to give him a word. When the magician returns, the assistant begins asking him questions such as, "Is it a book? Is it a movie? Is it a movie star?" to which the magician answers "no." Eventually the magician answers "yes." This occurs after the assistant asks a pre-agreed question, such as is it an "animal." When that question is asked the magician answers no, but knows that he will answer "yes" to the next question. THE TRICK BRAIN, *supra* note 66, at 191.

297. See *id.* at 183.

298. *Id.* at 194. See generally, MARVIN KAYE, THE HANDBOOK OF MENTAL MAGIC 82-111 (Stein & Day, 2d ed., 1985) (providing further discussion of mental telepathy).

divining the contents of written messages contained inside envelopes is called "one ahead."²⁹⁹ Unlike the mind reading effect where a magician seems to take a thought from the participant, the thought transference effect is one "in which the mental activity of one person is apparently projected to another."³⁰⁰ In transference, there must be two operators; one to transmit, the other to receive. Most of the transference effects are made possible through some type of subtle code signaling based on sound, sight, feel, or movement, not likely to be recognized by spectators.³⁰¹

A prediction effect is the accurate foretelling of an event which occurs subsequently.³⁰² This is achieved by using a "force, timing the prediction so that it is made after the event occurs, or using a confederate whose actions subsequent to the prediction have been prearranged."³⁰³ Thus, magicians can predict the first word on any page of a book they ask a spectator to open because every page of the book has the same first word.³⁰⁴

Extra-sensory perception effects include those in which magicians see with their fingertips, identifying cards by their weight, by feeling their spots, or by smelling or tasting them.³⁰⁵ Magicians using this effect give the impression that a particular sense is developed to a superlative degree. Actually, the methods of secret identification discussed *supra* supply the means by which the magician achieves these effects—including secret marking, glimpsing, mirrors, or physical impressions.³⁰⁶

a. Magicians Interpreting Body Language to Understand What People Are Thinking

The body has a language of its own. In addition to the words they utter, people's postures, gestures, facial expressions, or their way of holding their arms can communicate messages. Sometimes the nonverbal message is opposite to the verbal message.³⁰⁷ Magicians are aware of this phenomenon and they carefully watch parties' and advocates' body movements and facial gestures to gain insight into what they are thinking.³⁰⁸

299. See ELDIN, *supra* note 66, at 77.

300. THE TRICK BRAIN, *supra* note 66, at 194, 202.

301. See *id.* at 202.

302. See *id.* at 206. See generally KAYE, *supra* note 298, at 158-91 (providing further discussion of predictions).

303. See THE TRICK BRAIN, *supra* note 66, at 206.

304. See *id.* at 207.

305. See *id.* at 210.

306. See *id.* at 211.

307. JOHN W. COOLEY, APPELLATE ADVOCACY MANUAL § 11:08, at 42-44 (1989) [hereinafter APPELLATE ADVOCACY MANUAL].

308. See *id.*

b. Magicians Using Neurolinguistic Programming Techniques
("NLP")

Without disclosing what they are doing, some magicians in mediation routinely use neurolinguistic programming techniques to access another person's construction of reality with a goal of altering that reality.³⁰⁹ They accomplish this by analyzing, imitating, and approximating another party's speech and language patterns.³¹⁰ "[B]y pacing or gently mirroring the party's style, gestures, body language, voice tone, timbre, volume, and the use of similar words and metaphors,"³¹¹ magicians can build rapport and begin to influence and modify that party's thinking and decision making.³¹²

c. Magician Mediators Predicting the Outcome of a Dispute in Court

It is common for magician mediators conducting evaluative mediations to predict the outcome of a case based on their own court experience, jury verdicts, or decisions in similar cases.³¹³

In fact, such magician mediators would have to admit that their predictions are highly speculative. Juries are highly unpredictable in their decision making and the decisions of many appellate courts with judges of diverse political and philosophical orientations are equally unpredictable. Appellate court decisions often depend on the composition of particular panel of judges randomly assigned to hear and decide a case. Judges may rely on insignificant—even inconspicuous—differences to distinguish a case from legal precedent. Thus, in many cases, the magician mediator's prediction is a "best guess" that is accepted by the parties as valid. If the parties settle their case, the truth of the mediator's prediction is never tested and the parties deem the prediction true for that particular dispute.³¹⁴

B. The Methods of Magic

In the broadest sense, magicians achieve magical effects by two actions: hiding and showing; that is, by "hiding the real and showing

309. See *infra* Part III.B.2.b (discussing Neurolinguistic Programming Techniques "NLP" in more detail).

310. See *The Constructive Uses of Deception*, *supra* note 5, at 6-7.

311. *Id.* at 7.

312. See *id.* at 6-7 (citing R. BANDLER & J. GRINDER, *THE STRUCTURE OF MAGIC* (1975)).

313. See Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 701, 715 (1994).

314. Some standards for lawyer mediators specifically prohibit mediators from offering a personal or professional opinion as to how the court will resolve the dispute. See *id.* (citing FLA. R. FOR CERTIFIED & CT.-APPOINTED MEDIATORS 10.090(d)).

the false."³¹⁵ There are two principal means by which magicians hide and show to achieve a deceptive effect. One means relates to the physical and the other means relates to the psychological.³¹⁶ Standard deceptive techniques—tricks—using the hands or other physical objects are called devices.³¹⁷ The rest of the deceptive techniques are psychological. Any effective method or sequence of steps (a routine) yielding a magic effect usually combines both devices and psychological techniques.³¹⁸

1. Devices

Blackstone's Commentary: A device is only a means to an end because its sole function is to produce the magic effect. Generally speaking, it has no value in its own right. Effective devices usually have qualities of simplicity, ingenuity, and fine workmanship. Such devices are more often undetectable, reliable, and foolproof. There are four basic types of devices for deception: sleights, prearrangement, secret apparatus, and arcana.³¹⁹

Sleights are secret moves made by the magician.³²⁰ A magician who knows approximately a dozen sleights can perform ninety percent of all card effects.³²¹ To be effective, magicians must practice sleights until their performance becomes second nature. Just as pianists who think about their fingering rarely give a good performance, neither do magicians who think about their sleights.³²² A break is a type of card sleight that permits the magician to identify a card in the middle of the deck without arousing the audience's suspicion.³²³ Magicians accomplish this by placing the little finger of their left hands into the break after a spectator has withdrawn a card and returned it to the deck.³²⁴ If the magician holds the deck at a particular angle in relation to the spectator, neither the break nor the finger can be detected.³²⁵

Another card sleight, called the *pass*, is a secret cut in which "the part of the deck below the break is brought to the top without the knowledge of the

315. See BOWYER, *supra* note 4, at 48-49.

316. See MAGIC BY MISDIRECTION, *supra* note 66, at 211 (discussing physical and psychological elements to performing a magic trick).

317. See NELMS, *supra* note 62, at 116.

318. See MAGIC BY MISDIRECTION, *supra* note 66, at 209.

319. See NELMS, *supra* note 62, at 118.

320. See *id.* at 118.

321. See *id.* at 118.

322. See *id.* at 119.

323. See *id.*

324. See *id.*

325. See *id.*

audience."³²⁶ This sleight is more difficult to perform because the performer must divert the audience's attention at the crucial moment.³²⁷ Finally, the force is a sleight requiring a spectator to choose a particular playing card (or any other object) of the magician's choice, yet the spectator is convinced that the selected playing card (or other object) is his or her own choice.³²⁸ There are literally dozens of good card forces.³²⁹

Prearrangement is a device in which magicians place "the apparatus (usually cards) in some order which [they] knows but keeps secret."³³⁰ This device "covers everything from simply noting one or two key cards" to stacking the entire deck.³³¹ The device of *secret apparatus* refers to duplicates (objects identical to those initially shown to the audience), gimmicks (an object that the audience never notices, and "so secret that its existence is never suspected"), and fakes (objects which seem legitimate but which are "doctored to permit results that would be impossible if they were innocent").³³² Finally, *arcana* is a term used to describe a wide variety of devices "that work by secret knowledge alone, without the aid of sleights, prearrangement, or apparatus."³³³ Examples are (1) singletons (e.g. only one card of a suit in a

326. *Id.* at 119.

327. *See id.* at 119-20.

328. *See id.* at 123.

329. *Id.* at 124. Some forces involve magicians' giving ambiguous instructions to spectators. *See* J. BARTON BOWYER, *supra* note 4, at 246. The oldest form of a force is the "right or left" force in which a magician presents the audience with two objects on a table. *See id.* The magician asks a spectator to choose the right or left object. If the spectator says "left," and that is not the one the magician wanted, the magician "picks up the other object in *his* left hand while . . . declaring (and thereby redefining) it to be the 'left' one." *Id.*

Another version of the magician's choice is the "take-it-or-leave-it" force. *See* BOWYER, *supra* note 4, at 246. In this force, magicians ask a spectator to touch one of the objects. If the spectator touches the object the magician desired to be forced, the magician simply uses that object. *See id.* If, however, the spectator touches the object undesired by the magician, the magician says, "OK, we'll put that one aside," and then picks up the desired object and uses it in his routine. *See id.* Magicians accomplish this "heads I win tails you lose" result by manipulating the verbal ambiguity they have built into the instructions to their advantage. *See id.* at 246-47.

Another type of force "relies on certain common cultural or physiological predispositions" of the audience. BOWYER, *supra* note 4, at 247. "For example, most persons when standing at one end of a row of five objects will normally choose the second one from their end." *Id.* at 248. Similarly, most people will choose the number 7 when presented with numbers from 5 to 10 and will choose 15 when offered numbers from 10 to 20. *See id.*

330. NELMS, *supra* note 62, at 124.

331. *Id.* at 124.

332. *Id.* at 128.

333. *See id.* at 128.

deal of thirteen which common sense would suggest are rare but which "occur in five deals out of six; the cutting of the deck does not disturb the order of the cards) [and (2)] the tearing of a folded scrap of paper both ways leaves the center intact."³³⁴

The "sleights" of the magician can be analogized to the "moves" of the mediator. As Christopher Moore has explained:

Mediators . . . initiate moves. A *move* for a mediator is a specific act of intervention or "influence technique" focused on the people in the dispute that encourages the selection of positive actions and inhibits the selection of negative actions relative to the issues in conflict The mediator, a specialized negotiator, does not *directly* effect changes in the disputants by initiating moves; he or she is more of a catalyst. Changes are the result of a combination of the intervenor's moves with the moves of the negotiators.³³⁵

Mediators use both noncontingent and contingent moves.³³⁶ Noncontingent moves consist of "general interventions initiated by mediator[s] in all disputes," including identifying important issues, building an agenda, and identifying interests.³³⁷ Contingent moves consist of "responses to special or idiosyncratic problems that occur in some mediations," such as mediators' management of the parties' intense anger, bluffing, bargaining in bad faith, mistrust, and miscommunication.³³⁸ Caucuses are contingent strategies that "provide mediators with the greatest opportunity to manipulate parties into an agreement because disputants do not have the advantage of face-to-face communication to test the accuracy of the information exchanged."³³⁹

Mediators use the device of prearrangement to structure the settlement process so that it has "the optimum chance for success."³⁴⁰ From the time of appointment or selection by the parties, mediators characteristically look for ways to "stack the deck" in favor of settlement by turning to their advantage: the timing and location of the conference; the parties attending the conference; the number and types

334. *Id.* at 20, 128-29.

335. MOORE, *supra* note 11, at 24 (citations omitted).

336. *See id.* at 25.

337. *Id.*

338. *Id.* at 26-25. *See generally* Louise Smart, *Mediator Strategies for Dealing with Dirty Tricks*, 16 *MEDIATION Q.* 53 (1987).

339. MOORE *supra* note 11, at 269.

340. Joseph B. Stulberg & Ruth B. Montgomery, *Design Requirements for Mediator Development Programs*, 15 *HOFSTRA L. REV.* 499, 504 (1987).

of premediation conferences; and, the sequence of premediation caucuses.³⁴¹ For strategic reasons, mediators want control of these premediation decisions. Once the mediation conference begins, mediators establish themselves firmly as controllers of the process and managers of the information exchange.³⁴² As Stulberg and Montgomery observed:

Once the mediator has helped the negotiating parties distinguish and frame the negotiating issues, he takes charge of establishing the order in which the issues are discussed The mediator must know the strengths and weaknesses of competing frameworks, evaluate the negotiating issues against those standards, and then select the starting point that bears the greatest likelihood for catapulting the discussions in a favorable direction [T]he mediator must instantaneously frame the issues, evaluate them against alternative discussion frameworks, select a strategic discussion context, and proceed without any pause in the dialogue.³⁴³

Secret apparatuses used by magician mediators include pre-planning the physical set-up of the meeting room, regulating the lighting, color, and temperature environment of caucus rooms, and the placing of specialized gimmicks, such as meditational music, creative thinking reading material, selected video or audiotapes, puzzles, and Rubik's Cubes in caucus rooms. Arcana devices, which work because of mediators' secret knowledge, include effective listening,³⁴⁴ effective questioning,³⁴⁵ using of intended and unintended mistakes,³⁴⁶ instilling fear,³⁴⁷ inciting anger,³⁴⁸ and manipulating power between mediator and disputant.³⁴⁹

341. See generally *id.* at 504-07 (discussing the functions and characteristics of a mediator).

342. See *id.* at 507.

343. *Id.*

344. See *The Constructive Uses of Deception*, *supra* note 5, at 12.

345. See *id.* at 10-11. See generally, FOLBERG AND TAYLOR, *supra* note 7, at 109-112 (discussing different question formats for achieving certain goals).

346. See *The Constructive Uses of Deception*, *supra* note 5, at 11-12.

347. THE MEDIATORS, *supra* note 220, at 37-38 (describing actions taken by two mediators as the consequence a negotiation break-down in order to keep parties at the bargaining table).

348. See *id.* at 37.

349. See Gary L. Welton and Dean G. Pruitt, *The Mediation Process: The Effects of Mediator Bias and Disputant Power* 13 PERSONALITY AND SOC. PSYCHOL. BULL. 123, 131 (1987).

2. Psychological Methods

Disguise and misdirection, or “controlling the spectator’s attention,” are the two basic psychological methods for achieving magic effects.³⁵⁰

a. Physical Disguise

Blackstone’s Commentary: Disguises are of two types: physical and psychological.³⁵¹ The “effectiveness of the [physical] disguise [depends to a large extent on] the spectator’s lack of knowledge of when it is being employed.”³⁵² When magicians mix the genuine with imitation, spectators receive no clues to demarcate where reality ends and pretense begins.³⁵³ For example, a “diagonal mirror in [a] . . . box [physically] disguises the load space as empty space [G]uillotines disguise the substitution of the cutting blade for a duplicate which has passed the obstacle. [T]he most common version” of the “sawing [an assistant] in half” routine “disguises two [assistants] as two separate parts of one [assistant].”³⁵⁴

Magician mediators use physical disguise by assuming various roles and adapting their behavior to meet the needs of changing situations during the course of a mediation.³⁵⁵ To elicit certain types of information, mediators might appear naive; to “sell” a particular proposal, mediators might appear compassionate and appeal to the potential “buyer’s” emotions; to gain leverage after a party has been caught providing misleading information, she might appear indignant or momentarily angry; to spare a party embarrassment for a mistake or misstatement, mediators might accept responsibility and serve as a scapegoat; to obtain closure in the final stages of bargaining, mediators might channel their persuasive power and actively advocate one side’s position in a caucus. Deborah Kolb provides an example of a mediator’s physical disguise in a school-teachers’ union mediation:

350. See MAGIC BY MISDIRECTION, *supra* note 66, at 114.

351. See *id.* at 118

352. *Id.* (emphasis omitted).

353. See *id.* at 118-19.

354. *Id.* at 118.

355. Researchers describe this phenomenon as “reflexive tactics”—“behaviors by which the mediator attempts to orient himself to the dispute and to establish the groundwork upon which his later activities will be built.” Carnevale & Pegnetter *supra* note 221, at 67 (quoting KEN KRESSEL, LABOR MEDIATION: AN EXPLORATORY SURVEY 13 (1972)). See also Mary E. McLaughlin, et al., *Professional Mediators’ Judgments of Mediation Tactics: Multidimensional Scaling and Cluster Analyses*, 76 J. OF APPLIED PSYCHOL. 465 (1991).

In the hallway, while the union caucused, the mediator discussed what he was trying to accomplish—a deal to bail out the union. “I want to bail them out. I’m not often in the role of an impartial mediator. There are times when one side needs my help more than another *I come on like a gentleman*. I use all the logic and argument. Then I convince them by persuasion, *and then I take them and bang their heads*. Today, if I’m not persuasive enough to get a settlement, there isn’t one there.”

....

The union was unsure whether the aides, if discharged, were covered under the grievance procedure. The mediator was sure that they were but agreed to ask. “*I’ll ask very naively*. ‘If a person is fired, does she have the right to grieve?’”³⁵⁶

b. Physical Disguise Through Neurolinguistic Programming (“NLP”)

Another way magician mediators use physical disguise is by employing neurolinguistic programming (“NLP”).³⁵⁷ The concepts underlying NLP are simple. The “neuro” component of neurolinguistic programming represents the idea that people’s behavior results from the neurological processes of seeing, hearing, smelling, tasting and touching.³⁵⁸ People experience the world through these senses, store the information they experience, and then act upon that information.³⁵⁹ The “linguistic” component represents people’s use of language to communicate with others and the “programming” component refers to the way people choose to convey ideas so as to get optimal results.³⁶⁰ In short, “NLP is the ability to respond effectively to others” through a process of building rapport and to understand the way people think based on their own model of the world.³⁶¹

356. THE MEDIATORS, *supra* note 220, at 27 (emphasis added).

357. See *infra* notes 361–415 for a discussion of NLP. The discussion at hand of NLP is an adaptation from a similar discussion. See APPELLATE ADVOCACY MANUAL, *supra* note 307, at 33–34 (Supp. 1995).

358. JOSEPH. O’CONNOR & JOHN. SEYMOUR, INTRODUCING NEURO-LINGUISTIC PROGRAMMING: PSYCHOLOGICAL SKILLS FOR UNDERSTANDING AND INFLUENCING PEOPLE 3 (1990).

359. See *id.*

360. See *id.*

361. See *id.* at 18–23.

i. Mirroring and Matching

One way mediators achieve rapport is by “matching and mirroring” their communication partner.³⁶² By taking this process of imitating movements and gestures into conscious thought, they are usually able to achieve rapport quickly and encourage free flow of information early in the mediation.³⁶³ Mirroring and matching is the way people subtly respond to the movements of others with similar movements and gestures of their own.³⁶⁴ Most people begin to mirror and match another person’s activities unconsciously, but successful communicators can consciously create rapport, which will lead to trust and confidence.³⁶⁵ Mirroring and matching is innate and appears across cultures.³⁶⁶ “Research has shown that in the first day of life, a baby moves in precise synchrony with the mother’s speech [and later] will synchronize with the voice of other people speaking any language.”³⁶⁷ This research also indicates that humans desire this type of synchrony or rapport.³⁶⁸ Simple examples of mirroring by a mediator include making the same amount of eye contact that a person makes, slowing down or speeding up the pace of his words to speak more like the person, or using the same expressions as the person when dealing with emotional issues.³⁶⁹ Mediators skilled in NLP also match hand and arm movements, posture, and even breathing rates, depending on the level of rapport they have with another person.³⁷⁰

ii. Pacing and Leading

Pacing and leading in NLP is the way the mediator checks her rapport level with whomever she is communicating.³⁷¹ “Pacing” means establishing a common ground with a person that will lead to trust and respect.³⁷² By pacing, mediators ensure that their communications are understood by the receiver and that they have

362. *See generally id.* at 19-21 (noting that one sign of good communication between parties consists of “matching and mirroring” one another’s movements).

363. *See id.* at 19-23.

364. *See id.* at 19.

365. *See id.* at 19-20.

366. Jonn L. Barkai, *Nonverbal Communication From the Other Side: Speaking Body Language*, 27 SAN DIEGO L. REV. 101, 120 (1990).

367. *See id.* at 120.

368. *See id.* at 122.

369. *See O’CONNOR & SEYMOUR, supra* note 358, at 19-21.

370. *See id.*

371. *See id.* at 21-22.

372. *See id.*

brought each new concept or idea down to common symbols.³⁷³ By leading, mediators “chang[e] [their] behaviour so the other person follows.”³⁷⁴ Through leading, mediators strengthen rapport and establish the non-verbal aspect of communication.³⁷⁵ Mediators use pacing and leading to help others better understand their message or to lead people in a different direction than they originally considered.

iii. Representational Systems

People assess communication and assign personal meaning to it based on their internal “representational systems.”³⁷⁶ This term encompasses the methods by which people “take in, store and code information in [their] minds.”³⁷⁷ People record their experiences by remembering the sight, sound, taste, touch and smell, of their experiences.³⁷⁸ People predominantly store visual pictures, auditory sounds and kinesthetic feelings.³⁷⁹ Everyone uses each of these three representational systems at various times and most people switch instinctively from one system to the next when it is beneficial to do so.³⁸⁰

When people recall information, their memory is usually dominated by a favored form of representation and their memories and experiences reflect this sense more than the others.³⁸¹ By age eleven or twelve, most people tend to use one internal sense habitually.³⁸² They use their dominant representational system to encode and recall experiences in their memory and they are “able to make finer distinctions in this system than in the others.”³⁸³ NLP techniques teach that some people prefer to think in mental images or pictures, rather than sounds or feelings.³⁸⁴ These visual-based people describe events and recall information through pictures that are triggered in their

373. See generally *id.* at 21-23 (discussing how pacing can put the receiver at ease).

374. See *id.* at 22.

375. See generally *id.* at 22-23 (illustrating leading through use of tone and behavior).

376. See *id.* at 27 (explaining “representational systems” to mean various conscious and unconscious methods employed to recall past experiences).

377. See *id.*

378. See *id.*

379. See *id.* at 27-28.

380. See *id.* at 29 (illustrating how the representational systems are not “mutually exclusive”).

381. See *id.* at 29-30.

382. See *id.* at 29.

383. See *id.* at 30.

384. See *id.*

minds.³⁸⁵ Other people prefer to think in relation to sounds. These auditory-based people will talk themselves through information, or will process information through words.³⁸⁶ Still other people will “base their actions mostly on their feel for a situation,” or on kinesthetics, rather than on what they see or hear.³⁸⁷ Kinesthetic-based people rely on gut reactions and emotion to describe and recall experiences. They convert external information into feelings and then convert their feelings into terms that they can communicate to others.³⁸⁸ Knowing how people think, or what representational systems a person is using, helps mediators tailor their communication to achieve maximum effectiveness.

To determine the representational system that other people rely on most, mediators who use NLP begin by analyzing language and the specific words people use to communicate their thoughts.³⁸⁹ They then try to “speak [that person’s] language” or try to match the predominant system. To illustrate a representational system’s link to language, the table below sets forth some common sensory based words and phrases that help to identify the system a person is using.³⁹⁰

385. *See id.* at 27, 29 (noting that “[m]any people can make clear mental images and think mainly in pictures”).

386. *See id.* at 28 (noting that “many people have an inner voice that runs in the auditory system creating an internal dialogue”).

387. *See id.* at 27, 29-30.

388. *See* PAUL MICHAEL LISNEK, *LAWYER’S HANDBOOK FOR INTERVIEWING AND COUNSELING* § 2.9 (Continuing Legal Education (“CLE”) ed. West 1991).

389. *See* O’CONNOR & SEYMOUR, *supra* note 358, at 39-41 (discussing “accessing cues” for determining an individual’s representation system).

390. *See id.* at 46-48 (providing table entitled “Language Identifying Representational Systems”).

Language Identifying Representational Systems³⁹¹

Visual

Look, picture, clarify, insight, focus, perspective, shine,
notice, outlook, reveal, see, show, colorful, hazy, bright, crystal
clear, appearance

Visual Phrases

I see what you mean.
We see eye to eye.
You'll look back at this and laugh.
Beyond a shadow of a doubt
Show me what you mean.

Auditory

Say, rhythm, tone, load, clear, tell, silence, speechless, vocal,
harmonious, dumb, ring, listen, make music, tune in, deaf ears,
be heard, question.

Auditory Phrases

On the same wavelength
It's all Greek to me.
In a manner of speaking
Loud and clear
Hold your tongue

Another way magician mediators determine the representational systems people are using is by observing the direction people's eyes move during a conversation or when they are talking about certain subjects.³⁹² People's eye accessing cues give information about the way a person chooses to store and access information.³⁹³ People move their eyes in different directions and in systematic ways according to how they are thinking.³⁹⁴ By understanding these cues, magician mediators determine which representational system a person

391. *See id.*

392. *See id.* at 35-39.

393. *See id.* at 35.

394. *See id.*

relies on most and then systematically tailors communication to that system so that it will be as effective as possible.³⁹⁵ The eye accessing cues appear in the chart below.³⁹⁶

Visual Remembered:³⁹⁷ Eyes move up and to the left, visualizing something from the past in the way the person saw it before.

Visual Constructed: Eyes move up and to the right, constructing a picture or image of something the person has never seen before.

Auditory Remembered: Eyes move across and to the left, remembering sounds that the person has heard before.

Auditory Constructed: Eyes move across and to the right, constructing sounds that the person has never heard before.

Auditory Digital: Eyes move down and to the left, creating an internal dialogue or talking to oneself.

Kinesthetic: Eyes move down and to the right, accessing feelings or emotions.

If the receiver of the communication is left-handed, the cues of the person will be opposite those illustrated in the above chart.³⁹⁸ Also, eye accessing cues are thought to be most useful if the information being solicited or the responses being analyzed are responses to open questions.³⁹⁹ For example, if the question asked is, "What color was the car?" the response is likely to be strictly visual.⁴⁰⁰ However, if the question is, "What would you like to be the result of this mediation session today?" the person can answer in any number of ways and most likely will answer based on their preferred representational

395. *See id.* at 37-39

396. *See LISNEK, supra* note 388, § 2.13.

397. *See O'CONNOR & SEYMOUR, supra* note at 358, at 36-41 (providing the information contained within this chart).

398. *See id.* at 37.

399. *See Lisnek, supra* note 388, §§ 2.19-2.20.

400. *See id.* at 2-8.

system with either visual, auditory, or kinesthetic cues.

Although eye accessing cues are the easiest cues to notice, there are other forms of body language that can help to determine a person's preferred mode of communication.⁴⁰¹ Voice cues, breathing patterns, gestures, and posture can also indicate a preferred representational system.⁴⁰²

According to NLP precepts, a person who relies on visual representations will often speak faster and in a higher pitch than someone who relies on auditory or kinesthetic representations.⁴⁰³ This is because the images relied on enters the brain quickly, causing people to attempt to convey the content of the image before it disappears.⁴⁰⁴ Usually, visually oriented people speak with their heads up and breathe shallowly.⁴⁰⁵

People that are thinking in sounds, or with an auditory system, will breathe evenly and will speak in a clear, expressive tone.⁴⁰⁶ There will usually be minimal inflection in the voice and a very constant voice pattern.⁴⁰⁷ The head may be slightly angled as if they were actually listening to something,⁴⁰⁸ and their gestures will be small and rhythmic.⁴⁰⁹

If people are thinking based on feelings, kinesthetic accessing can be recognized by deep breathing and relaxed muscles.⁴¹⁰ These people usually speak slowly and in a deep tone, with frequent pauses or words such as "ah" or "um" between sentences.⁴¹¹ Their gestures will be small and close to the body, and they will also keep their head down, as if deep in thought, when they are trying to access important information.⁴¹²

Thus, by disguising their modified physical behavior as their normal behavior and by paying close attention to the physical behavior of their audience, some magician mediators believe they can develop rapport and move their audience to agreement.

401. See LISNEK, *supra* note 388, § 2.10.

402. See O'CONNOR & SEYMOUR, *supra* note 358, at 39-41.

403. See *id.* at 39.

404. See *id.*

405. See *id.*

406. See *id.*

407. See *id.*

408. See *id.*

409. See *id.*

410. See *id.* at 40.

411. See *id.*

412. See *id.*

c. Psychological Disguise

i. Simulation

Blackstone's Commentary: As a psychological disguise, "simulation is the act of presenting an imitation . . . a counterfeit appearance . . . to the spectator's perceptive senses."⁴¹³ Spectators become convinced as to what they perceive based principally on the way that a magician acts.⁴¹⁴ In the *French Drop* sleight, when the magician's right hand pretends to take the ball from the left, the right hand physically simulates containing the ball. The right hand presents the imitation of a hand that contains a ball.⁴¹⁵ Simulation can also help create the drama surrounding the magic effect. For example, when a magician simulates plucking a cigarette out of the air:

[f]irst, he sees the object. Then he indicates where it is, with an expression of happiness that it is there. Then he goes through the physical simulation of reaching for it. When it is revealed, he eyes it, with some astonishment that it was actually there. Then he expresses joy that he succeeded in getting it. And having gotten it, he looks for more. Everything he says and does conveys the idea that the cigarettes are invisibly floating about in the air. Nothing he says or does conveys that the cigarettes are actually somewhere about his person.⁴¹⁶

Simulation relies on natural gestures and movements on behalf of the magician; that is, ordinary, expected responses to occurrences. Peculiar facial expressions, eccentric waving of the arms, or other gestures of exaggerated grace are counterproductive to simulation.⁴¹⁷

It has been argued quite persuasively that mediators, through sequential caucusing, "create value by controlling the flow of private information between the parties (variously eliminating, translating, or creating it) in order to mitigate adverse selection and moral hazard."⁴¹⁸ "Adverse selection refers to the kind of pre-contractual opportunism that arises when one party to a bargain" possesses private information about a topic "that affects the other's net benefit from the contract."⁴¹⁹

413. MAGIC BY MISDIRECTION, *supra* note 66, at 125.

414. *See id.* at 125.

415. *See id.* at 126.

416. *Id.* at 127.

417. *See id.* at 65.

418. Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 327 (1994).

419. *Id.* at 372 n.122 (quoting PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION, AND MANAGEMENT* 595, 601 (1992)).

Moral hazard refers to “the form of post-contractual opportunism that arises when actions required or desired under the contract are not freely observable.”⁴²⁰

Adverse selection, on the one hand, results from hidden information held by a party prior to an agreement that “distorts” the terms of an executed contract.⁴²¹ For example, “unhealthy people are more likely than healthy people to opt for life insurance.”⁴²² Moral hazard, on the other hand, results from hidden conduct of a party after the party enters into a contract.⁴²³ Thus, under the moral hazard principle, “insured people are more likely than uninsured people to take risks.”⁴²⁴ “Adverse selection can create inefficiency in mediation when parties hide information about valuation or other characteristics.”⁴²⁵ Similarly, “moral hazard can create inefficiency when one or both parties take hidden actions after [they reach] an agreement.”⁴²⁶ Mediators mitigate the inefficiencies of adverse selection and moral hazard through psychological disguise—particularly through simulation and dissimulation.

It is common knowledge that when parties “have private knowledge of their own reservation prices” (bottom lines), claimants will have an “incentive to overstate their valuations” and respondents “will have an incentive to understate their valuations.”⁴²⁷ In negotiating a settlement, parties will make “strategic misrepresentations” based on this private information.⁴²⁸ These strategic misrepresentations are examples of adverse selection—they “can induce parties to waste time bargaining when there are no gains” to be made or “to bargain to impasse at times when there are possible gains.”⁴²⁹ Mediators mitigate this type of adverse selection through simulation by sending noisy or intentionally imprecise translations of information or by conveying precise, but false probabilistic information.⁴³⁰

Assume, for example, that counsel for an insurance company in a personal injury case tells the mediator in caucus that \$125,000 is the insurance company’s “absolute final offer” to settle the case. He

420. *Id.* at 372 n.121.

421. *See id.* at 327.

422. *Id.* at 328.

423. *See id.*

424. *See id.*

425. *Id.*

426. *Id.*

427. *See id.* at 333.

428. *See id.*

429. *See id.*

430. *See id.* at 364.

further tells the mediator to convey that information to the plaintiff and to tell the plaintiff that if the plaintiff does not accept that figure that day, the insurance company is “going to withdraw all offers and pack its bags and go home.” Before the mediator leaves the room, counsel for the insurance company winks at the mediator and says, “that’s the limit of my *present* authority.” The mediator now has noisy information from the insurance company. The mediator believes that the insurance company lawyer, if pressed, would call the supervising adjuster and obtain additional authority to settle the case that day. In such a situation, the mediator might do at least one of two things. The mediator may tell plaintiff and his counsel that the insurance company’s “absolute final offer” is \$125,000—a precise and probabilistic false ultimatum figure; or, the mediator may convey an intentionally imprecise translation—“the insurance company is very near its limit and is offering \$125,000 to settle the case today.” Depending on the mediator’s evaluation of the plaintiff’s inclination to accept the \$125,000 figure, the mediator will simulate the “\$125,000” figure as the “absolute final offer.” If the plaintiff accepts the simulated figure, a settlement results. If the plaintiff rejects that ultimatum figure with or without a counter-offer, the mediator will ask the plaintiff to “sit tight” while the mediator returns to the insurance company and attempts to obtain additional settlement authority.

ii. Dissimulation

Blackstone’s Commentary: Dissimulation is opposite to simulation.⁴³¹ It is the “act of concealing the real fact by pretense.”⁴³² When dissimulating, magicians conceal that which is true. “It is an act of hiding something, of covering up, of withholding knowledge” or information.⁴³³ In the *French Drop* routine, *supra*,⁴³⁴ dissimulation is the act of hiding “the presence of the ball in the left hand.”⁴³⁵ The distinction between simulation and dissimulation highlights the two primary methods of deception used by magicians—showing and hiding:

Simulation is a positive act. It *shows* a false picture.
Dissimulation is a negative act. It *hides* a true picture. One reveals.
The other conceals. What the first reveals is false. What the second

431. See MAGIC BY MISDIRECTION, *supra* note 66, at 65.

432. *Id.* at 65.

433. *Id.*

434. See *supra* text accompanying note 415.

435. See *id.*

conceals is true *Simulation is a pretense of what is not, and dissimulation is a concealment of what is.*⁴³⁶

“Dissimulation is [conceivably] the most often used deceptive stratagem.”⁴³⁷

“There is hardly a trick in magic that does not somewhere during its performance, require something to be disguised as dissimilar to what it truly is.”⁴³⁸

In the preceding example, the mediator used simulation, as opposed to dissimulation, because of a belief that the insurance company would actually obtain additional authority to settle the case that day. By representing the \$125,000 as the insurance company’s “absolute final offer” the mediator showed a false picture—a picture which contradicted the mediator’s own beliefs and idea of truth. If, on the other hand, the mediator truly believes that the insurance company would walk out of the mediation if the plaintiff rejects the \$125,000, and yet conveys to plaintiff that the insurance company has more than \$125,000 for settlement in order to elicit an enticing counter-offer from plaintiff, the mediator has engaged in dissimulation by concealing the picture believed to be true.

The distinction between simulation and dissimulation is not merely a distinction without a difference. It is important to realize that what the mediator believes to be true is in constant flux throughout the course of a particular mediation. What the mediator believes to be true one moment in a mediation may be different five minutes later. Deception, however subtle, at any instant in a mediation, has to be measured by what the mediator *believes to be true* at that instant.

The above examples demonstrate simulation and dissimulation by commission. Mediators also employ them by omission.⁴³⁹ An example of dissimulation—concealing the truth—by omission is as follows. Assume that in the mediation of a personal injury claim, plaintiff’s counsel discloses to the mediator in caucus that one of two critical eye witnesses to the accident has left the jurisdiction and cannot currently be located. Plaintiff’s counsel tells the mediator not to disclose this fact to counsel for the insurance company. In final caucuses with the other side, counsel for the insurance company recites a long list of reasons why he is going along with a substantial figure for settling the case—a list which includes reference to two

436. *Id.* at 65-66.

437. *Id.* at 144.

438. *Id.*

439. BROWN & AYRES, *supra* note 418, at 358-63.

witnesses who will testify in the case. The mediator says nothing and the case settles at the substantial figure. The mediator's silence constitutes dissimulation because her omission hides the true picture.⁴⁴⁰

Deborah Kolb has reported several real-life examples of a mediators' use of dissimulation.⁴⁴¹ In describing the behavior of a federal mediator, she notes that when conveying proposals in sequential caucusing, the mediator "explicitly omitted the justification and arguments that stood behind the messages, hoping that the parties would get 'mad enough' about the limited amount of information he conveyed to revert to communicating across the table rather than through an intermediary."⁴⁴² Although the federal mediator's purpose was noble, his behavior still involved the use of dissimulation by omission. In another situation, Kolb describes the behavior of a state labor mediator who:

met with the union, presented the first proposal, and left the union with its attorney to caucus. The attorney, in an off-the-record meeting, gave the mediator a counterproposal, which the mediator took to a "mock" meeting with the town. After a believable interval elapsed, he returned to the union with the next installment of the [scripted] proposal, got one in return from the union, which he took to the town committee.⁴⁴³

By engaging in mock caucusing, the state mediator engaged in dissimulation by hiding the fact that the information exchange had been perverted by a format "scripted" by counsel and the mediator.

iii. Maneuver

Blackstone's Commentary: In magic, a maneuver is "the management and manipulation of circumstances and actions . . . [a] contrivance of situations and affairs [which] is planned with skill and unerring surety."⁴⁴⁴ It involves "a series of movements, all interrelated, executed with skill and a sure predictability of the reactions of the spectators. It is [usually] planned [with the definite purpose of overcoming] . . . difficult and dangerous situations."⁴⁴⁵ In the *You-Do-As-I-Do* card routine, a magician and a

440. See Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiation*, 8 REV. LITIG. 173, 190-91 (1989), for an analysis of the ethics of a similar omission by counsel in a negotiation.

441. See THE MEDIATORS, *supra* note 220, at 37.

442. *Id.*

443. *Id.* at 50.

444. MAGIC BY MISDIRECTION, *supra* note 66, at 145.

445. *Id.*

spectator each selects a card from the deck of cards each holds.⁴⁴⁶ Each person then replaces the card on top of the respective deck and cuts the deck to the center.⁴⁴⁷ The decks are exchanged and each person finds his own card in the deck just used by the other.⁴⁴⁸ When the cards are turned over, they are identical.⁴⁴⁹ This deception is achieved through a maneuver.⁴⁵⁰

The key to this trick is that the magician knows the card on the bottom of the spectator's deck before the routine begins.⁴⁵¹ Thus, when the spectator selects a card from the deck and replaces it on top, the act of cutting the deck brings the bottom card immediately above the spectator's card. When the decks are exchanged, the magician merely locates the known card and takes out the card immediately below it.⁴⁵² This card, of course, is the spectator-selected card. In the meantime, the spectator has located the chosen card in the magician's deck and when the cards from the two decks are exposed, they are identical. The spectator believes that the trick is one of "sympathy, not one of an identity of discovery."⁴⁵³

The maneuver is a whole series of essential actions, integrated as a unit because: (1) the magician can neither eliminate looking at the first card nor place both cards on top of the deck and cut them to the center without destroying the deception, and (2) the essential acts of exchanging the decks and allowing each person to find a card make possible the "deception of sympathetic discovery."⁴⁵⁴

According to Christopher Moore, in a caucused labor mediation, mediators separate the parties and establish themselves as the "principal channel of communication" between management and the union.⁴⁵⁵ In a caucus session with the company, mediators—regardless of their actual evaluation of a proposal—"express[] doubts that the offer which [they are] asked to carry to the union will be accepted," thus leading the company to believe that the possibility of acceptance is minimal.⁴⁵⁶ Shortly thereafter, the mediators caucus with the union. With the use of argument and embellishment, the mediators maximize the desirability of acceptance of the proposal.⁴⁵⁷ With this

446. *See id.* at 147.

447. *See id.*

448. *See id.*

449. *See id.*

450. *See id.* at 148.

451. *See id.*

452. *See id.*

453. *Id.*

454. *See id.* at 149.

455. *See* MOORE, *supra* note 11, at 269.

456. *Id.*

457. *See id.*

maneuver—a type of psychological disguise—mediators enhance their own ability to bring the “parties closer together toward an area of agreement.”⁴⁵⁸

Lawrence Susskind and Jeffrey Cruikshank have described a mediator’s maneuver that very closely approximates aspects of the *You-Do-As-I-Do* card routine:

A skilled intermediary can, in private meetings with the other participants, explore whether they would be willing to give up Y and Z in exchange for X. This might be phrased, “What if I could get them to give up X? Would you trade Y and Z?” Of course, the neutral already knows that such a trade is possible. He or she must phrase the question, though, in a what-if format to protect the confidentiality of the information secured earlier.⁴⁵⁹

Perhaps Deborah Kolb, however, provided the most instructive description of an elaborate maneuver “scripted” by a mediator.⁴⁶⁰ Kolb described labor mediation involving a town and a firefighters’ union during which the mediator met with the town committee and presented the union’s proposal.⁴⁶¹ The town committee made certain concessions. The mediator then spoke privately with the town attorney in the hall to determine whether the town would make any further concessions; however, the town’s attorney refused. Before the mediator could relay the town’s concessions to the union, the union’s attorney requested a private meeting with the mediator to inform the mediator of the union’s disappointment in the town’s bargaining behavior.⁴⁶² The mediator then “pulled” the town attorney into a meeting with himself and the union attorney. During that attorney-only caucus, the town’s attorney agreed to some of the union’s positions but contended that they would require considerable selling on his part to the town committee.⁴⁶³ The mediator, in concert with the attorneys, scripted a strategy to “ease the union into a settlement” as follows:

Why not this. I’ll come back with 4 percent/3 percent, clothing, and the rewrite on manning. Then we let them counterpropose as close as possible. They’ll want more than this, and then I’ll

458. MOORE, *supra* note 11, at 269.

459. Brown & Ayres, *supra* note 418, at 327 n.11. (citing LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 146 (1987)).

460. See *THE MEDIATORS*, *supra* note 220, at 50.

461. See *id.*

462. See *id.*

463. See *id.*

come back with less. Then they may hit it the next time. I'll tell them the other issues are silly, and if this isn't settled in mediation, they'll lose the manning. Then you [union attorney] send me out and lay it on them and call me back when the package is ready.⁴⁶⁴

In this real-life example, the mediator created an intricate routine consisting of several deceptive maneuvers. In an unusually bold stroke, the mediator enlisted the parties' attorneys to serve as the mediator's assistant in performing magic tricks on the attorneys' own clients. In the actual case, the mediator and the attorneys acted out the scripted maneuver and successfully achieved a settlement.⁴⁶⁵

iv. Ruse

Blackstone's Commentary: A ruse is a special type of disguise that "supplies a false reason for doing something . . . , thus conceal[ing] the true purpose of the action."⁴⁶⁶ The familiar "one-ahead" message-reading trick owes its effectiveness to the ruse.⁴⁶⁷ In the "one-ahead" routine the magician holds up a post card with three horizontal lines beneath one another and numbered 1, 2, and 3.⁴⁶⁸ A spectator is asked to think of a town anywhere in the world.⁴⁶⁹ The magician says he knows the name of the town the spectator is thinking of and writes it down (presumably on line number 1). Actually, the magician writes down "Six of Clubs" on the number 3 line.⁴⁷⁰ The magician then asks the spectator what town he was thinking of, and when the spectator responds, the magician says "Good" or something similar to imply that the magician predicted correctly.⁴⁷¹

The magician then asks another spectator to think of any four-digit number.⁴⁷² While the spectator is thinking, the magician says he is writing the four-digit number on the number 2 line, but instead he writes down the name of the town that the first person said on line number 1.⁴⁷³ The magician asks what number the spectator was thinking of, and when the spectator responds, the magician says "Fine." Then the magician says that he is going to divine what card a third spectator is going to pick from a deck.

464. THE MEDIATORS, *supra* note 220, at 50.

465. *See id.*

466. MAGIC BY MISDIRECTION, *supra* note 66, at 152.

467. *See id.* at 156.

468. *See* ELDIN, *supra* note 66, at 77.

469. *See id.*

470. *See id.*

471. *See id.*

472. *See id.*

473. *See id.*

The magician states that he is writing the identity of the card on line number 3, but in fact, he writes the four digit number previously announced on line number 2 (line three being already filled by "Six of Clubs"). He then turns the post card face-down on the table, takes a deck of cards, and forces another spectator to select a Six of Clubs. The magician then hands the post card with the "divined" information to another spectator and, to the audience's surprise, all three correspond to the audience's selections.⁴⁷⁴

Mediators, particularly in labor disputes, often use the ruse of false demands to increase the attractiveness (or disguise the unattractiveness) of their settlement positions or proposals.⁴⁷⁵ False demands are very similar to the "one-ahead" technique described *supra* in that the recipient of the demand accepts the magician's action (making the demand) as real when in fact the magician figuratively records the real demand first and presents a fake demand with the hope of forcing acceptance of the real demand in the end.⁴⁷⁶ For example,⁴⁷⁷ suppose a Union representative tells a mediator that the Union is "not all that concerned" about extending morning and afternoon breaks. Further, assume that in communicating the Union's position to management, the mediator includes a demand regarding the extension of morning and afternoon breaks along with some other Union demands. The mediator knows that Management will, in all probability, reject the extension-of-break demand, but by making it, the mediator, several caucuses later, will be able to drop the extension-of-break demand—even without consulting the Union—and "force" a management concession on an issue more important to the Union.

In summary, by using disguise a magician in mediation influences external appearances by: (1) actions or objects which show a false picture;⁴⁷⁸ (2) actions or objects which conceal a true state of affairs;⁴⁷⁹ (3) substitution of false reasons in order to conceal the magician's true purposes;⁴⁸⁰ (4) preparation and execution of a course of action toward a definite objective, artfully and skillfully.⁴⁸¹ By using disguises, magicians in mediation influence the spectators' perception and discernment through the manipulation of external appearances of

474. *See id.*

475. Dahl, *supra* note 440, at 192.

476. *See supra* Part III.B.2.

477. This example is adapted from Dahl, *supra* note 440, at 191-92.

478. *See supra* Part III.B.2.

479. *See supra* Part III.B.2.

480. *See supra* Part III.B.2.

481. *See supra* Part III.B.2.

actions or objects. The next topic, misdirection, allows magicians to achieve deception through control of the spectator's attention.

d. Misdirection (Attention Control)

Misdirection in magic may be defined as "the act of deliberately misguiding from cause to an erroneous effect, to serve an ulterior purpose."⁴⁸² There are seven types of misdirection which will be discussed.

i. Anticipation

Blackstone's Commentary: One of the primary goals of magicians in employing misdirection is to defeat the spectator's logic.⁴⁸³ Magicians use the spectator's own logical thought to lead the spectator to conclusions which the spectator believes to be true, but which are, in actuality, false. Then, when a magician creates an effect which the spectator would believe impossible in light of the believed conclusions, the spectator is baffled because his or her logic is defeated. The secret of the magician's achievement is in the simple truth: "logic requires a frame of reference or context."⁴⁸⁴ By providing the spectator a *false* frame of reference, the spectator is unable to find a logical explanation for the effect. For example, anticipation is a type of misdirection in which a magician first anticipates that the spectator's attention will be fixed on a critical thing.⁴⁸⁵ The magician then creates a false frame of reference for the spectator by a "loading" conducted outside the presence of the spectator, usually prior to the beginning of the performance.⁴⁸⁶ Thus, in *The Cards to the Pocket* trick, the magician loads six cards in his pocket prior to the performance, out of sight of the audience and long before the audience thinks the trick has begun.⁴⁸⁷

Magician mediators may employ the psychological method of anticipation both before and during a mediation. When employing it before the conference, mediators may "load" the mediation by doing intensive investigation and research. For example, they may perform preparatory statistical survey or legal research beyond that provided by counsel for the parties. They also may make inquiries to understand

482. MAGIC BY MISDIRECTION, *supra* note 66, at 164.

483. See THE BLACKSTONE BOOK OF MAGIC & ILLUSION, *supra* note 134, at 139-151; BLACKSTONE'S SECRETS OF MAGIC, *supra* note 17, at 10; see also NELMS, *supra* note 62, at 196.

484. NELMS, *supra* note 62, at 196.

485. See *id.* at 165.

486. See *id.* at 165-67.

487. *Id.* at 167.

the nature and history of the parties' relationships and the history and results of any prior disputes between them. Through this process, they may form initial impressions as to what the parties' true needs and interests are and what resources are available to satisfy them. Figuratively, the magician mediators load these "cards" into their pockets before mediation. At the conference itself, they may use the "cards" selectively and pocket other "cards" that present themselves during the conference. That is, one side may never know what information has been developed or when the information was used by a mediator.

In other situations, mediators may never reveal that they have this pre-acquired information and that they have used it in achieving settlement. Initially, mediators allow the parties to focus on a false frame of reference—their positions, "cards" so to speak of their own selection. As the performance unfolds, mediators produce "cards" at various intervals during the questioning of the parties in caucus. Parties are sometimes baffled that the "cards" produced in the end appear to be functionally identical to the "cards" of their own selection.

Other ways magician mediators use anticipation is by creating a false frame of reference to induce fear in a party for the purpose of achieving movement toward settlement. In a dispute between a large television manufacturer and a small supplier for example, a mediator might create a sense of instability by asking the small supplier: "What if I told you that the manufacturer is planning not to renew your contract if you persist in your demand for full payment on these shipments in dispute?" Assume that this statement is pure speculation on the part of the mediator and that the manufacturer made no such assertion. The mediator's question constitutes misdirection by creating a false frame of reference—namely the instability of a continuing business relationship. Out of fear, the supplier makes a minor concession which the mediator knew would satisfy the manufacturer's needs. The case settles, leaving the supplier baffled and astonished that the mediator preserved its lucrative business relationship with the manufacturer.⁴⁸⁸

488. See Dahl, *supra* note 440, at 183-84 for an analysis of a similar example of anticipation in a negotiation context.

ii. Premature Consummation

Blackstone's Commentary: Using premature consummation, magician gets spectators to relax attention prior to the magician making a necessary move.⁴⁸⁹ "[T]he spectator is misled to believe[, prematurely,] that the [magician] has accomplished his objective."⁴⁹⁰ "Since the deception has been accomplished, [from the viewpoint] of the spectator, vigilance is no longer required."⁴⁹¹ It is at that point the magician makes the significant move.⁴⁹² In the *Vanishing Bird Cage* routine, for example, the magician causes a bird cage to vanish by using an arm pull.⁴⁹³ The cage folds and goes up the magician's right sleeve.⁴⁹⁴ Immediately, the magician turns away from the audience, reaches both arms into his deep magician's bag and pulls out the props for his next trick.⁴⁹⁵ While doing so the magician releases the armpull, and with this left hand pulls the cage and the pull cord from his sleeve and deposits them into the bag.⁴⁹⁶ This is accomplished so quickly that the audience does not suspect the move as a deposit of props.⁴⁹⁷ The audience believes that the bird cage trick has been concluded when the bird cage vanishes.⁴⁹⁸ It therefore relaxes its attention.⁴⁹⁹ Premature consummation is achieved.⁵⁰⁰ When the magician turns around with the props for the next trick, the audience presumes that the bird cage is still somewhere on the magician's person.⁵⁰¹ Inevitably, a spectator will yell out (or the magician will pretend to hear a spectator say) that the bird cage is up the magician's sleeve.⁵⁰² The magician responds by removing his coat and throwing it into the audience; then his vest; then his tie; then his shirt.⁵⁰³ Eventually, the magician stands center stage dressed in nothing but his shorts, shoes, and socks. The audience is baffled; a false frame of reference—the magician's clothing—defeats the audience's logic.⁵⁰⁴

489. See MAGIC BY MISDIRECTION, *supra* note 66, at 165; see also NELMS, *supra* note 62, at 201.

490. MAGIC BY MISDIRECTION, *supra* note 66, at 165; see also NELMS, *supra* note 62, at 201.

491. MAGIC BY MISDIRECTION, *supra* note 66, at 165.

492. See MAGIC BY MISDIRECTION, *supra* note 66, at 165.

493. See *id.* at 180-81.

494. See *id.* at 181.

495. See *id.*

496. See *id.*

497. See *id.*

498. See *id.*

499. See *id.*

500. See *id.* at 182.

501. See *id.* at 181.

502. See *id.*

503. See *id.*

504. See *id.* at 181-82. See also NELMS, *supra* note 62, at 201.

Magician mediators use premature consummation to convey settlement proposals. For example, in a landlord-tenant dispute, a landlord communicates to the mediator in the first caucus several of its concerns that will need to be satisfied before agreeing to dismiss the eviction lawsuit. One “non-negotiable demand” of the landlord is that the tenant refrain from working on his sports car out on the street in front of the apartment building. Several other tenants have complained about the noise and the “unsightly appearance” it creates in the otherwise “classy” neighborhood. The mediator looks over the list of the landlord’s concerns and realizes that the non-negotiable demand is one that might stymie settlement. Thus, when conveying the landlord’s concerns to the tenant, the mediator intentionally refrains from saying anything about the issue. When the tenant says, “I know the landlord doesn’t like me working on my car,” the mediator says “I wouldn’t worry about it” and directs the discussion to other matters. The tenant assumes that his working on the car is not an issue and he relaxes his attention, ready now to discuss settlement issues earnestly. After several subsequent caucuses, during which the mediator has made several moves to masterfully build rapport with the tenant by eliciting several significant concessions from the landlord, the mediator tells the tenant that the settlement is a “cinch” except for one “minor” loose end—working on the car.

What the mediator does not tell the tenant is that he has been using his persuasive efforts with the landlord in several caucuses to get a concession on the car. The mediator tells the tenant that the case will settle if the tenant agrees to work on his car in the empty garage behind the apartment building. The tenant agrees. Here the mediator has used “all the other issues” as the false frame of reference vis-a-vis the tenant while he found a solution to what he sensed to be the critical settlement-blocking issue of the dispute.

iii. Monotony

Blackstone's Commentary: Another type of misdirection, monotony, is effective because of its simple premise that the audience's attention becomes dulled after vigilance of a repetitive act of some duration.⁵⁰⁵ Monotony is the misdirection sometimes used to produce a rabbit from a top hat. Magicians take several silk scarves from a top hat and deliberately allow them, repetitiously, to fall to the floor.⁵⁰⁶ Consequently, the audience's attention wanders. Magicians take advantage of the attention loss by sneaking a rabbit into the pile of scarves. Then, they produce many more scarves in a sweeping gesture again and again, as if they are multiplying uncontrollably, and then scoop the whole pile, rabbit and all, into the hat.⁵⁰⁷ To the audience, the multiplying scarves seem too bulky to go into the hat. While trying to press the scarves down into the hat, magicians "discover" a rabbit and hold it up for all to see. The appearance effect surprises the audience.⁵⁰⁸ The routine is successful because the magicians manage to get the audience to focus on a false frame of reference—the multiplying scarves—and then cause the audience to lose interest with monotony, before making the necessary move of loading the rabbit.⁵⁰⁹

Magician mediators use the monotony misdirection stratagem in the same way negotiators use the "crossroads" or "tangled web" tactic in negotiation.⁵¹⁰ In a dispute involving a professional actor's employment contract with a theatrical producer, where the producer's financial situation is shaky, a mediator using the monotony stratagem focuses the parties' attention on a plethora of incidental, non-salary issues. These issues might include wardrobe, travel accommodations, meals, support staff, public appearances, rights of publicity, name size or placement on the marquee or playbills, and a host of other matters of personal interest to the actor. The mediator will work hard to induce the producer to make minor concessions which are identical in nature and type. The actor may even sense boredom with the process, pleased that the producer is "caving in." Near the close of the mediation, the mediator will pull the salary issue "out of the hat," will note the "substantial" monetary and promotional value to the actor of all of the producer's multiple concessions, and will seek to convince

505. See MAGIC BY MISDIRECTION, *supra* note 66, at 165.

506. See NELMS, *supra* note 62, at 204.

507. See *id.*

508. See *id.*

509. See *id.*

510. TED A. DONNER & BRIAN L. CROWE, ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS, § 11:12, at 9 (2d ed. 1995).

the actor to accept a salary that the producer can pay. The routine is successful because the mediator manages to get the actor to focus on a false frame of reference—the multiplying concessions—and then causes the actor to lose interest through monotony, before making the necessary move of loading the salary issue.

iv. Confusion

Blackstone's Commentary: By using confusion, the magicians present so many varied individual interests for the spectators' observation that it is impossible for the spectators, in the limited time available, to differentiate the significant from the insignificant.⁵¹¹ Spectators must make a "desperate and hurried attempt to inspect and weigh the multiple interests presented, [thus they are] able to give only superficial, hasty attention to the individual things before [them]."⁵¹² Thus, the spectators' attentions become scattered.⁵¹³ Confusion is different from the monotony stratagem in that in using monotony, all the details are identical and success depends on tiresome sameness, whereas in using confusion, the individual details need not be the same and success depends on "disarray, turmoil and disorder."⁵¹⁴ Any magician knows that "[a]ny complex series of handlings brings confusion."⁵¹⁵ Thus, a spectator having selected a card and having returned it to a deck soon becomes confused and lost in "multiple shuffles, multiple piles and multiple cuts."⁵¹⁶ The spectator may be able to follow the card's position for awhile, but eventually the spectator is buried in confusion by the "avalanche of details."⁵¹⁷ Similarly, a spectator watching the *Linking Rings* routine becomes "confused by the number of apparently similar rings, [and] loses the identity of the individual rings he has examined . . ."⁵¹⁸ Because of confusion, the magician can easily switch rings and make seemingly continuous circular rings link with each other.⁵¹⁹

As Robert Benjamin has observed, "[a] mediator, by definition, must have a high tolerance for ambiguity and be capable of operating less formally and often in the middle of great confusion."⁵²⁰ He has

511. See *MAGIC BY MISDIRECTION*, *supra* note 66, at 165-66.

512. *Id.* at 166.

513. *See id.*

514. *Id.* at 185.

515. *Id.* at 188.

516. *Id.*

517. *Id.*

518. *Id.*

519. *See id.*

520. Robert D. Benjamin, *The Mediator as Trickster: The Folkloric Figure as Professional Role Model*, 13 *MEDIATION QUARTERLY* 131, 133 (1995) [hereinafter *The*

further noted that, for settlement to occur, mediators “must blur or confuse [the parties’] false dichotomies or polarities . . . [and] creat[e] dissonance in [the] thinking of each party.”⁵²¹ In a multiple issue case, mediators might use the misdirection stratagem of confusion to accomplish their ends by spending most of the mediation session on one or two tough issues. Near the end of the session, when they have achieved agreement on one or both of the tough issues, they then calls the parties’ attention to the twelve or so incidental issues that were not previously addressed and say something such as “we’d better work these out now or you’ll have to work them out on your own without me.” Fearing that deadlocks on the small issues might scuttle the overall settlement, and not wanting to spend more money to take another day in mediation, the parties begin resolving the multiple small issues with a mediator’s assistance. The mediator makes little effort to sort or organize the issues, which induces the parties in their state of “disarray, turmoil, and disorder,”⁵²² to deal with the issues hastily, to make reasonable concessions, and to consent quickly to tradeoffs. The mediator keeps the pressure of time against the parties. Usually, the parties manage to settle all the small issues in a matter of minutes. Those issues that do not settle normally can be dealt with in post-mediation negotiation.

v. Diversion

Blackstone’s Commentary: Diversion is the misdirection stratagem which guides attention away “from significant things by substitution of a new and stronger interest.”⁵²³ Diversion occurs when magicians achieve a lack of spectator attention at the proper point in a routine by directing spectator attention from the proper course and toward a false course.⁵²⁴ Magicians may address a remark or a joke to an assistant or a spectator to divert attention from a critical operation while making a pass.⁵²⁵ Another example would be a magician’s rubbing the hand on the elbow, apparently to rub a coin into it, while the other hand is secretly dropping the coin into a pocket.⁵²⁶

Mediator as Trickster].

521. *The Constructive Uses of Deception*, *supra* note 5, at 7.

522. *MAGIC BY MISDIRECTION*, *supra* note 66, at 185.

523. *MAGIC BY MISDIRECTION*, *supra* note 66, at 166.

524. *See id.* at 166.

525. *See id.* at 193.

526. *See id.*

Magician mediators opt for discussing law when it is helpful or convenient to their settlement goals.⁵²⁷ If the legal discussion becomes too positional and argumentative, mediators may methodically disintegrate the legal discussion, and direct the parties towards focusing on their needs and interests.⁵²⁸ Conversely, if the discourse becomes emotional or otherwise troublesome, a mediator, through a series of calculated questions, may divert the discussion from the facts and focus instead on procedural or legal principles.⁵²⁹ Mediators eventually bring parties back to the topic on which they want to focus, and sometimes the parties are unaware that a mediator has intentionally caused the diversion.

Magician mediators also use metaphors and stories as diversion stratagems. As Robert Benjamin observed:

The telling of stories about other people's circumstances normalizes a difficult experience. Hearing a metaphor conjures up in the listener's mind a picture of his or her own situation For instance, [a] divorce can be compared to a serious illness that may not be curable but is manageable. The mediator can present himself or herself as an oncologist aiding in the treatment of the cancer. To follow the metaphor, the doctor (mediator) may not be able to cure the cancer (stop the divorce) but he or she can help the patient (party) actively participate in the treatment (have some measure of choice and control over his or her life).⁵³⁰

By using this metaphor, mediators divert a party's attention away from the bitterness and pain of an impending divorce, ensconce themselves in the healer role, and prepare the party for a rational discussion of his or her needs and interests in the situation.

527. See SILBEY AND MERRY, *supra* note 222, at 16-17.

528. See *id.* at 16.

529. See *id.*

530. *The Constructive Uses of Deception*, *supra* note 5, at 9.

vi. Distraction

Blackstone's Commentary: On the one hand, "[t]he fundamental secret of diversion is a natural, gradual approach, quietly done, which catches the spectator off guard."⁵³¹ On the other hand, however, surprise and unexpectedness paired with unsuspecting reasons create distraction.⁵³² Distraction "implies [the] inability on the part of a spectator to think properly about anything."⁵³³ If a magician is about to make a pass and an assistant fires a revolver, the pass can be made unnoticed.⁵³⁴ Another example occurs when a magician prepares to make the pass when a spectator selects a card.⁵³⁵ The magician takes the deck as usual, and steps back a pace.⁵³⁶ As the magician steps back, however, the foot slips and the magician looks down quickly to see on what his foot rests.⁵³⁷ Right after the slip, the magician looks down and so do the spectators. At that time, the magician makes the pass.⁵³⁸

Magician mediators employ the misdirection stratagem of distraction when they use the paradox, "an effective technique to transform the context of a dispute."⁵³⁹ The paradox "uses the force of a party's resistance to allow shifts in his or her thinking."⁵⁴⁰ Thus, a mediator who wants parties to consider their needs and interests might not go directly to that topic at the outset of the mediation. Instead, the mediator may use the paradox to distract the parties' attention from his true goal. It is well known that an "entrenched party thwarts any perceived challenge to his or her position."⁵⁴¹ Armed with this knowledge, an experienced mediator, instead of challenging the party's position, initially encourages the party to pursue the course of action compelled by that party's position and to do "everything necessary to obtain the result on which [that party] is fixed."⁵⁴² Thus, the paradox—intensifying a party's commitment to a stated course of

531. MAGIC BY MISDIRECTION, *supra* note 66, at 193.

532. *See id.*

533. *Id.* at 166.

534. *See id.* at 196.

535. *See id.*

536. *See id.*

537. *See id.*

538. *See id.* at 196.

539. *The Constructive Uses of Deception*, *supra* note 5, at 9.

540. *Id.* at 10.

541. *Id.*

542. *Id.*

action—results in the lessening of that commitment.⁵⁴³ The mediator might initially distract the entrenched party, skeptical of mediation, in the following way: “You certainly have every opportunity and right to go to court. Far be it from me to try to keep you here in mediation and convince you of something against your will.”⁵⁴⁴ As Benjamin points out, “giving parties permission to do what they say they must or want to do may allow them to not feel as compelled to pursue their stated courses of action.”⁵⁴⁵

Another distraction stratagem is the suggestion of extreme unrealistic choices for a party to get the party’s cooperation in discussing reasonable alternatives for solving a problem.⁵⁴⁶ In a landlord-tenant dispute, for example, where the landlord is petty about the tenant being \$25.00 in arrears, the mediator might suggest that the landlord “contact the governor and have him send out the national guard on the first day of every month to collect the rent.” The humorous suggestion may cause the landlord to rethink his demands. Thus, with the use of distraction, the mediator has accomplished the purpose of bringing some reasonableness to bear without directly accusing the landlord of pettiness.

vii. Specific Direction

Blackstone’s Commentary: The final type of misdirection, specific direction, “is a bald, undisguised act of definite direction.”⁵⁴⁷ Specific direction can be an act, a verbal direction, or a gesture that “frankly tells the spectator to swing his attention to a specific place.”⁵⁴⁸ For example, a magician dematerializes a ball, and then seemingly retrieves it from behind his knee.⁵⁴⁹ This is not the original ball, however, but rather a second ball which has been hidden in a small pocket in the magician’s trousers leg.⁵⁵⁰ The magician “specifically directs the attention to the apparent recovery of the original ball. While the attention is upon the second ball, the original ball is surreptitiously deposited in another pocket,” in preparation, perhaps, for another trick.⁵⁵¹

543. *See id.*

544. *See id.* (providing an example of mediator distraction).

545. *Id.*

546. *See id.*

547. MAGIC BY MISDIRECTION, *supra* note 66, at 166.

548. *Id.*

549. *See id.* at 171.

550. *See id.*

551. *Id.*

The most common specific direction stratagem used by magician mediators is issue selection.⁵⁵² Through discussions in the initial joint sessions and through caucusing separately with the parties, mediators uncover a broad range of issues. Commonly, mediators then consciously select the issues most likely to be settled, despite excluding some issues on which one or more of the parties wish to focus. Silbey and Merry describe a mediation involving a lovers' quarrel where the man allegedly damaged a woman's apartment in a fit of jealous rage.⁵⁵³ The mediators initially directed the disputants' attention to the history of their relationship, their desire in maintaining it, and "the prospects for a future together."⁵⁵⁴ With this stratagem, the mediators allowed the parties to explore their own feelings and to vent their emotions privately. When this direction of the discussion showed that reconciliation was unfeasible, the mediators redirected the parties' attention to a discussion of the specific damages and losses suffered in the quarrel.⁵⁵⁵

Kolb has reported the phenomenon of mediators specifically directing parties' attention to mediators' credentials and activities in the mediation as a way of taking credit for success or progress toward resolution.⁵⁵⁶ In this way, mediators establish their own legitimacy and influence the parties' dependency on them for guidance and direction.⁵⁵⁷ As Kolb observed:

Mediators spend a considerable portion of their time transmitting proposals, questions, and information from one committee to another. In conveying substantive information, mediators tend to embellish these "messages" by reporting their own part in fashioning them. Because the preparation of these proposals is not observed by the recipients, mediators have license to dramatize the parts they played. In so doing, they

552. Directive tactics of mediators involve "strategies by which the mediator actively promotes a specific solution or attempts to pressure or manipulate the parties directly into ending the dispute." Carnevale & Peggnetter, *supra* note 221, at 67 (quoting K. Kressel, *Labor Mediation: An Exploratory Survey* 13 (1972)). This behavior phenomenon has also been studied in the context of mediators' "pressing" tactics. See Peter J.D. Carnevale & Rebecca A. Henry, *Determinants of Mediator Behavior: A Test of the Strategic Choice Model*, 19 J. APPLIED SOC. PSYCHOL. 481, 482-84 (1989). See also Debra Shapiro et al., *Mediator Behavior and the Outcome of Mediation*, 41 J. SOC. ISSUES 101, 111-14 (1985) (discussing mediation through pressure as well as other techniques).

553. See SILBEY & MERRY, *supra* note 222, at 16.

554. *Id.*

555. See *id.*

556. See Deborah M. Kolb, *To Be a Mediator: Expressive Tactics in Mediation*, 41 J. SOC. ISSUES 11, 20-23 (1985) [hereinafter *To Be a Mediator*].

557. See *id.* at 21.

emphasize the difficulty of their task and the diligence with which they pursue it.⁵⁵⁸

Kolb reported an example of labor case mediation in which a mediator communicated a management committee's proposal to the union committee, while directing the union's attention to the mediator's influence in creating the proposal, despite the mediator's absence from the room when the management committee formulated the proposal.⁵⁵⁹ After they establish their legitimacy, some mediators will use the acquired power to specifically direct the parties to take certain courses of action that may be markedly detrimental to the interests of the other side without the other side knowing it.⁵⁶⁰ Kolb described one labor mediation in which the mediator believed that the union had changed its priorities of issues in the middle of the mediation.⁵⁶¹ The mediator concluded that the union committee was "unstable and irrational."⁵⁶² As a result, in a caucus with the school committee, the mediator specifically advised the school committee to offer "less wages in the final settlement than the school committee had been willing to give."⁵⁶³ Thus, the union received less wages despite the school committee's willingness to concede to two of the union's priority issues.⁵⁶⁴ "The mediator justified his actions, with the claim that by saving the school committee money, he had improved his 'rapport' with it."⁵⁶⁵

3. A Sample Mediation Magic Routine

Normally, a single magic routine involves a method which integrates several of the physical and psychological stratagems. A typical example is the routine called *The Diebox*.⁵⁶⁶ The left side of the chart below describes *The Diebox* routine in terms of its effect and its method.⁵⁶⁷ The right side of the chart describes the analogous effect achieved and the analogous methods employed by a mediator in a mediation routine regarding a construction dispute, labeled *The Linchpin* routine.

558. *Id.* at 21-22.

559. *See id.* at 22.

560. *See* THE MEDIATORS, *supra* note 220, at 140.

561. *See id.* at 139-40.

562. *Id.* at 140.

563. *Id.*

564. *See id.*

565. *Id.*

566. *See* MAGIC BY MISDIRECTION, *supra* note 66, at 40-50, 61-62.

567. *See id.*

<p style="text-align: center;"><i>The Diebox Routine</i></p> <p style="text-align: center;">EFFECT:</p> <p>A. TRANSPOSITION</p> <p>The magician places a large wooden die in a box with two compartments.⁵⁶⁸ The magician conveys the impression that he has caused the die to disappear.⁵⁶⁹ "The spectators have good cause to believe that he has merely allowed the die to slide from one compartment to the other, alternatively as he shows the opposite section empty."⁵⁷⁰ After the spectators insist that the magician open all doors of the box at once, he does just that.⁵⁷¹ The die seems to have vanished completely.⁵⁷² The magician then pulls it out of a previously empty hat.⁵⁷³</p>	<p style="text-align: center;"><i>The Linchpin Routine</i></p> <p style="text-align: center;">EFFECT:</p> <p>A. TRANSPOSITION</p> <p>A mediator is hired to resolve a pre-suit construction dispute between the owner of a just-completed building as plaintiff against the general contractor who built the structure and the architect who designed it as defendants. Prior to the mediation the mediator met separately with the three parties for approximately an hour each. In the first joint session, the mediator identifies the two primary issues as liability and damages. He then conveys the impression that the damages issue is simpler and more clear, causing the liability issue to disappear from the conversation. When the architect refuses to contribute any money toward a settlement, the plaintiff and general contractor insist that the mediator open the discussion to liability as well as damages. The architect maintains that there is no liability issue because he did nothing wrong. The mediator then pulls the linchpin liability evidence from the general contractor's files and settles the case.</p>
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568. See MAGIC BY MISDIRECTION, *supra* note 66, at 40.

569. See *id.*

570. *Id.*

571. See *id.*

572. See *id.*

573. See *id.*

<i>The Diebox Routine</i>	<i>The Linchpin Routine</i>
<p>B. METHOD</p> <p>1. The die which the magician exhibits to the spectators is actually a nested die and a shell.⁵⁷⁴ The magician therefore “<i>dissembles</i> when he <i>disguises</i> the nested die and shell as a die only.”⁵⁷⁵</p> <p>2. “[The magicians] <i>simulates</i> handling a simple die,” when actually he is handling the more complex combination.⁵⁷⁶</p>	<p>B. METHOD</p> <p>1. In a premediation meeting with the mediator, the general contractor informs the mediator that it has a file memorandum in which the architect admitted that the design specifications steel beams which failed were in error. A former employee of the architect passed the inculpatory memo on to the general contractor instead of destroying it as directed by the architect. The general contractor tells the mediator not to disclose anything about the memo. The general contractor wants to surprise the architect with this “linchpin evidence” during a forthcoming arbitration. Thus, in the first joint session, the mediator <i>disguises</i> the linchpin evidence when he identifies the primary issues as liability and damages and <i>misdirects</i> the parties exclusively to the damages issue.</p> <p>2. The mediators <i>simulates</i> handling an ordinary liability issue when actually he is coping to handle a more complex combination involving linchpin evidence .</p>

574. *See id.* at 61.

575. *Id.*

576. *Id.*

3. “[The magicians] *dissimulates* when he handles the diebox, *pretending* to be handling a simple container instead of the specially prepared device it is.”⁵⁷⁷ The diebox actually has a false bottom containing sliding weights, which, when the box is tilted, give the impression that the die is sliding back and forth.⁵⁷⁸

4. “To get the solid die into the hat, [the magician] resorts to a ruse. Or he may use a *maneuver*, coupled with *misdirection*, to accomplish the same result. If he elects to utilize the ruse, he must *simulate* taking out the real die in the act of removing the shell.”⁵⁷⁹ Thus, the nested die is in the hat from near the beginning of the routine.

3. The mediators *dissimulates* when he handles the damages issue, pretending to be handling the simpler problem.

4. In caucus with the architect and his lawyer (who is not aware of the file memo), the mediator hides any knowledge of the file memo and feigns naivete as to beam specifications. The mediator employs the *ruse* by *simulating* the uncovering of the file memo. The mediator does this by asking many detailed questions about the specifications. The architect squirms in his chair and admits that the beam specifications “might be a little off” but forbids the mediator from conveying these conclusions to the general contractor or the plaintiff. The architect still refuses to contribute anything to the settlement, still contending that the structural failure was not a result of the beam specifications.

577. *Id.*

578. *See id.* at 40-41.

579. *Id.* at 61.

5. "[The magician] must again resort to a ruse as an excuse for turning the back of the diebox toward the audience during the act of inserting the shell."⁵⁸⁰ When he does this, the shell "corresponds to the contours of the solid sides, bottom, and back of one compartment of the box;" the diebox has a movable flap that, when in the down position, gives the spectators the impression that the solid die is in one of the compartments.⁵⁸¹

6. "With the shell in the box, the magician must pretend it contains the die itself. He must pretend to shift the die from side to side during the business of opening the doors. He must pretend to misunderstand the demands of the spectators. He must pretend to be in trouble" just before pulling the die out of the previously empty hat.⁵⁸²

5. In a caucus with the general contractor, the mediator uses a ruse as an excuse for obtaining the general contractor's permission to disclose the existence of the linchpin evidence. The mediator tells the general contractor that revealing that evidence in mediation will be as beneficial to the general contractor in settlement as it would be as surprise evidence at the arbitration. Of course, the mediator has no idea of the truth of that statement. After much cajoling by the mediator, the general contractor ultimately authorizes disclosure to the architect.

6. On disclosure in caucus, the architect shrinks in embarrassment, initially is angry, and ultimately consents to contribute substantially to the settlement. Through an agreed maneuver, the plaintiff settles without knowledge of the linchpin evidence.

C. Showmanship of Magicians

"Drama, like conjuring, is an art of illusion."⁵⁸³ As one magician-author has pointed out:

A play does not take place on the stage but in the minds of the spectators. What really happens is that a troupe of actors repeats a carefully rehearsed routine before an obviously artificial setting. The audience, however, misinterprets this as a series of exciting events in the lives of the characters. Forcing spectators to interpret what they see and hear in ways which they know are false comes as close to genuine magic as we are likely to get.

580. *Id.* at 62.

581. *Id.* at 41.

582. *Id.* at 62.

583. NELMS, *supra* note 62, at 2.

The everyday illusions of the legitimate stage put all but the best conjuring performances to shame. Even a second-rate play convinces spectators of “facts” which they know are not true. It can go further and use these imaginary “facts” to wring real tears from the eyes of the audience.⁵⁸⁴

The above illustrates a basic principle: “*What occurs on the stage is of no consequence except as it affects the thinking of the spectators. All that matters is what they think and see and hear.*”⁵⁸⁵ “[G]ood deception is entirely a matter of acting,” and vice versa.⁵⁸⁶ They are both dependent on good showmanship which, for magicians, entails both fundamental principles and a set of general rules for performances.⁵⁸⁷

On the subject of drama and showmanship, what is true of magic and the magician is also true of mediation and mediators. Mediators develop a “settlement scenario or drama in which both parties play a role.”⁵⁸⁸ As Benjamin pointed out:

Disputing parties usually enter a conflict with scripts written in their own minds where oneself is the hero and the other person is the villain. The mediator needs to rewrite the scripts so that the disputants can see themselves as characters who exchange lines on stage and complete the play constructively. The mediator must necessarily be producer, director, script editor, actor, and narrator in the conflict management performance.⁵⁸⁹

Kolb would apparently agree with this interpretation stating, “[d]ramaturgical analysis, with its metaphor of the theatre, provides a framework for considering the expressive domain of mediation.”⁵⁹⁰ She analyzes a mediator’s function in terms of an actor setting the scene, acquiring knowledge of props, engendering dramatic intimacy, building impressions of rapport, creating impressions of legitimacy, and making efforts to highlight the plot.⁵⁹¹ Thus, it is appropriate to consider briefly the fundamental principles of magician showmanship and the general rules for magic performances.

584. *Id.*

585. *Id.* at 4.

586. See *MAGIC BY MISDIRECTION*, *supra* note 66, at 220.

587. See *infra* Part III.C.1 (describing five fundamental principles); *infra* Part III.C.2 (describing general rules for performances).

588. *The Constructive Uses of Deception*, *supra* note 5, at 13.

589. *Id.*

590. *To Be a Mediator*, *supra* note 556, at 13.

591. See *id.* at 14-23 (offering a detailed discussion of each of these tactics as applied to mediation).

1. Five Fundamental Principles of Magician Showmanship

Principle No. 1: “No trick is worth performing if the secret of how it is done is more important than the impression it makes on the audience.”⁵⁹²

Successful magicians are not interested in protecting the secrets of their tricks.⁵⁹³ They know that one who hoards the secrets of tricks is not a magician, and never will be one.⁵⁹⁴ Because most tricks can be reasoned out by a person of ordinary analytical ability, it is of no value for the performer to keep the techniques secret.⁵⁹⁵ The most important aspect of a trick is not its secret, but rather the ways in which magicians create a “favorable impression upon the majority of spectators.”⁵⁹⁶ Successful magicians study the showmanship of magic by watching the methods other magicians use when performing. Top magicians “make it a point to attend performances of several first-class [magic] productions.”⁵⁹⁷ They watch for the ways, varied and unexpected, that magicians make favorable impressions on the audience.⁵⁹⁸ They watch how magicians respond to the music, how they delivers their lines, and how they use pointing and timing.⁵⁹⁹ The secrets are easily discoverable, and not as important as the favorable impression the magician creates.⁶⁰⁰

Principle No. 2: “[P]eople are more interested in people than in any other single thing.”⁶⁰¹

Successful magicians know that the audience is interested in them as people, and that their personality must appeal to a wide range of audience tastes, preferences, and attitudes.⁶⁰² There are six primary ways that magicians can ensure that their personalities are appealing to

592. SHOWMANSHIP FOR MAGICIANS, *supra* note 66, at 14.

593. *See id.*

594. *See id.* at 15.

595. *See id.*

596. *Id.*

597. *Id.*

598. *See also infra* text accompanying notes 460-65.

599. *See* SHOWMANSHIP FOR MAGICIANS, *supra* note 66, at 15.

600. *See id.*

601. *Id.* at 42.

602. *See id.*

an audience: “(1) [b]ecome genuinely interested in other people; (2) [s]mile; (3) [r]emember people’s names; (4) [b]e a good listener . . . ; (5) [t]alk in terms of the other person’s interests; and (6) [s]incerely make the other person feel important.”⁶⁰³

*Principle No. 3: “Pleasing the spectator is indispensable.”*⁶⁰⁴

The successful magician’s personal identity must be individual—something different from the ordinary.⁶⁰⁵ This individuality can be achieved through visual enhancement, such as distinctive clothing, personal effects, jewelry, etc. Magicians also can achieve individuality with attention to the audible aspects of personality, such as voice, “volume, pitch, quality, articulation, delivery, modulation, tempo, [and] interpretation.”⁶⁰⁶

*Principle No. 4: The material is secondary—you must sell yourself.*⁶⁰⁷

The successful magician knows that the material is secondary to a tremendously magnetic personality.⁶⁰⁸ Although the routines must be rehearsed until they are automatic, they are merely what the magician does in front of the audience.⁶⁰⁹ In order to be a success with the audience, the magician must sell himself or herself every second he or she is on stage.⁶¹⁰ As one magician-author stated:

Make them like you better than your magic. Make them like you so much they would even pay to hear you sing, or tell stories. Make them want to witness your entertainment, regardless of what you do.

. . . .

Or the next time they won’t ask for you. They won’t want you. They’ll want the tricks. And if they want the tricks, any

603. *Id.* at 44 (quoting DALE CARNEGIE, HOW TO WIN FRIENDS AND INFLUENCE PEOPLE (1937)).

604. *Id.* at 46 (capitalization omitted).

605. *See id.* at 45.

606. *Id.* at 45-46. *See also* BLACKSTONE’S SECRETS OF MAGIC, *supra* note 17, at 10, 11 (discussing style and humor in a magician’s act).

607. *See* SHOWMANSHIP FOR MAGICIANS, *supra* note 66, at 47.

608. *See id.*

609. *See id.*

610. *See id.*

magician will do—just any one.⁶¹¹

Principle No. 5: “Learn from other magicians.”⁶¹²

Magicians become experts by listening to and watching other successful magicians. Magicians find formulas for success by studying all aspects of successful acts or shows and finding common elements which they can replicate.⁶¹³ For example, they study the following elements: “(1) [t]ype of act; (2) [l]ength of act; (3) [t]ype of material used; (4) [t]ype of appeal; (5) [a]ngle of presentation; (6) [d]ress; (7) [p]erformer’s . . . character as shown to [the] audience; (8) [t]empo of presentation; (9) [s]tyle of presentation; (10) [i]ncidental support, like music score; (11) [use of silence and patter]; (12) . . . what intrigued the audience; (13) [h]ow [the intrigue developed].”⁶¹⁴

2. General Rules for Performances of Magic

RULES	APPLICATION OF RULES
Make the Performance Unique	Magicians should attempt to use their own lines and effects as much as possible. ⁶¹⁵ Some aspect of the material and delivery must be unique. ⁶¹⁶

611. *Id.* (emphasis omitted).

612. *Id.* at 168.

613. *See id.*

614. *Id.*

615. *See id.* at 45.

616. *See id.*

<p>Be Confident and Stay in Character</p>	<p>Magicians should know the routine and lines well, as well as rehearse extensively.⁶¹⁷ A dozen slow, deep breaths just before performing helps to calm nerves.⁶¹⁸ Magicians should project a particular character and stay aligned with the character's "mannerisms, dress, conduct, beliefs, attitudes, manner of talking, manner of walking, grooming, personal appearance, reaction under stress, etc."⁶¹⁹</p>
<p>Get the Audience's Interest and Retain It</p>	<p>"Use small things within the common experience of . . . spectators, situations familiar to them, problems they encounter, language as they are accustomed to hearing it . . ."⁶²⁰ Appearance of difficulty, uncertainty, danger, and demonstrations and experiments all increase spectator interest.⁶²¹</p>
<p>Ensure Unity in the Act</p>	<p>To achieve unity in the act, magicians should perform a series of tricks that use different objects but have the same result. For example, the magician can perform tricks involving the disappearance of objects picked up by the performer. Further, a series of acts can be done which use the same material or objects but create different effects. For instance, magicians can do the following to the same handkerchief: burn and restore it, stretch it out, dye it, make the handkerchief vanish, or multiply the handkerchief.⁶²²</p>

617. *See id.* at 76.

618. *See id.* at 77.

619. *Id.* at 67.

620. *Id.* at 111 (emphasis omitted).

621. *See NELMS, supra* note 62, at 257-58.

622. *SHOWMANSHIP FOR MAGICIANS, supra* note 66, at 65.

Use Tools of Pointing and Timing	Magicians should utilize the tools of pointing and timing. "Pointing tells [the audience that], 'This is it.' Timing says, 'Look how important it is.'" ⁶²³ Pointing indicates a particular effect by word and action through delivery of lines, facial expression, and gestures. ⁶²⁴ Timing regulates the tempo "to add surprise, to develop punch, to add meaning, to build up to a climax, suspense, [or to] provoke anticipation." ⁶²⁵
Economize Talking and Movement	Magicians should "[f]it the [patter] to the tricks and the tricks to the [patter] so that both coordinate . . . [Cut out] any dead spots or moments when the action does [not] seem to lift" ⁶²⁶ An act should "go forward towards its ultimate punch", and "elevate the interest of the audience." ⁶²⁷
Use Humor	Magicians should use humor to achieve the following: "to (1) [t]urn [] an adverse comment back on the speaker; (2) [t]o seize . . . a meaning different from that intended; (3) [t]o make a remark which may be interpreted two opposite ways; (4) [t]o cause harmless discomfort intentionally; and (5) [t]o point out a weakness in a person's armor." ⁶²⁸

623. *Id.* at 55.

624. *See id.* at 58.

625. *Id.* at 55.

626. *Id.* at 81.

627. *Id.*

628. *Id.* at 107.

Build the Act to a Climax	Magicians should appeal to audience's instincts related to: "rhythm, beauty, skill, sex appeal, coordinated effort, physical action, harmony, melody, comedy, movement, youth, personality, romance, sentiment, nostalgia, surprise, situation, character, [and] conflict." ⁶²⁹
Always Leave the Audience Wanting More	Magicians should make their act slightly shorter than the length of time necessary to hold the audience's attention. ⁶³⁰

IV. THE GRAND FINALE: ACCEPTABLE DECEPTION AND THE IMPLICATIONS FOR MODEL STANDARDS OF CONDUCT FOR MEDIATORS

A. *The Issues*

The above detailed description of the nature and type of deception that occurs routinely in caucused mediation triggers some very important questions about ethical limitations on the use of deception by mediators and mediation advocates. The following is a short list of questions regarding ethical limitations:

To what standards of truthfulness should mediators be held?

- What types of deception are constructive and acceptable?
- What types of deception are destructive and unacceptable?

Should there be different standards of truthfulness in mediation for lawyers and non-lawyers?

Should the standards of truthfulness be any different for lawyer-mediators than lawyer-advocates in either negotiation or mediation?

Should there be different standards of truthfulness for mediators when parties are unrepresented by legal counsel?

To what standards of truth and honesty should judges who conduct a settlement conference be held?

- Should the standards be higher than non-judge mediators—lawyers or lay people?
- Should judges who conduct a caucused settlement conference be ethically precluded from deciding cases on the merits?

629. *Id.* at 93.

630. *See id.* at 78.

Should mediators be held to a higher level of truth or honesty when they are appointed by judges to conduct the mediation?

Should lawyer-advocates be held to a higher level of truth and honesty when representing a client in a mediation where the mediator is a judge or is court-appointed?

Should mediators (lawyers, non-lawyers, or judges) be required to explain certain “rules of the mediation game” before the mediation begins?

- If “game rules” should be explained, what would such game rules be?
- Would the “game rules” vary depending on the sophistication of the parties?
- Would the “game rules” vary depending on whether the parties are represented by legal counsel?⁶³¹

It is not the intent of this article to provide answers to any of these questions. However, the discussion which follows may provide a basis for beginning a dialogue to find appropriate answers in the future.

B. The Search for Solutions

Neither the Ethical Standards of Professional Responsibility prepared by the Society of Professionals in Dispute Resolution,⁶³² (“Ethical Standards”) nor the Model Standards of Conduct for Mediators⁶³³ (“Model Standards”) prepared by a joint committee of the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution, address the question of how truthful a mediator must be in conducting mediation. The Ethical Standards merely make a passing reference to a duty mediators owe to parties, to the profession, and to themselves, stating that mediators “should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of their parties.”⁶³⁴ The Ethical Standards even fail to define the term honest.⁶³⁵ As to confidentiality, the Ethical Standards merely state in relevant part:

Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration

631. *See infra* Parts IV.B-E (discussing the issues raised by these questions).

632. ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY (1986).

633. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard V (1995).

634. ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY.

635. *See id.*

of the issues, and a neutral's acceptability. There may be some types of cases, however, in which confidentiality is not protected A commitment by the neutral to hold information in confidence within the process also must be honored.⁶³⁶

The Model Standards are similarly void of any specific guidance to the mediator regarding standards for truthfulness.⁶³⁷ They do, however, provide general guidance to the mediator in handling confidential information. Standard V, entitled "Confidentiality: A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality," provides in relevant part:

The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by law or other public policy.⁶³⁸

Further, the comments to this section provide in relevant part:

The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties. If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.

. . . .

Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.⁶³⁹

Thus, while the Model Standards come closer than the Ethical Standards to addressing mediator truthfulness, the Model Standards fail to address mediators' truthfulness directly, opting, perhaps wisely for the time being, to keep standards regarding the matter vague and ambiguous.⁶⁴⁰ Although the Model Standards recognize that the parties and the mediators may have their "own rules" regarding

636. *Id.*

637. *See* MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *supra* note 633, Standards I-IX.

638. *See id.* Standard V.

639. *Id.*

640. *See id.* Standards I-IX.

confidentiality and that the mediators should discuss the nature of private sessions and confidentiality with the parties, the Model Standards do not identify any specific information or types of information that must, *at a minimum*, be communicated regarding confidentiality rules or the private session procedure in order to be in ethical compliance with the Model Standards.⁶⁴¹ Further, the Model Standards, unlike the ABA's Model Rules of Professional Conduct for lawyers, do not identify or define any specific type or types of mediator untruthfulness that is intended to be ethically proscribed.⁶⁴²

Thus, mediators—lawyers and non-lawyers—currently have no specific formal guidance regarding how truthful they must be in conducting mediations. It is unclear what kinds of mediator deception are ethically acceptable. Because formal mediation has been viewed as “nothing more than a three-party or multiple-party negotiation,”⁶⁴³ a reasonable starting point for analyzing this issue is to explore the truthfulness requirements placed on lawyer-negotiators by the ABA's Model Rules of Professional Conduct.⁶⁴⁴ Next, because of the “deception synergy” effect caused by successive advocate and mediator deceptions in mediation,⁶⁴⁵ it is advisable to briefly examine what kinds of deception might be used ethically by advocates in mediation. These two analysis will then serve as a basis for offering a tentative suggestion as to the types of deception mediators might be ethically permitted to use in mediation.

C. *Acceptable Deception by Lawyer-Negotiators*

The launch point for exploring the ethical norms governing the extent to which a lawyer must be truthful in negotiations is Rule 4.1 of the ABA Model Rules of Professional Conduct.⁶⁴⁶ Rule 4.1 provides:

641. *See id.* Standard V cmt. 1.

642. *See id.* Standards I-IX; *see also infra* Part IV.C (discussing how the ABA's Model Rules of Professional Conduct address the issue of untruthfulness by mediators).

643. *The Constructive Uses of Deception*, *supra* note 5, at 12. Benjamin subscribes to the theory that:

The mediator negotiates his or her authority with each participant and facilitates their negotiation with each other. Negotiation is the primary operative activity of mediation; the mediation process is merely a particular format for structured negotiation that employs the services of a third party. Therefore, how the mediator understands and presents negotiation, and, in some instances, actually teaches the parties the ways of negotiation, is critical to the success of the mediation process.

Id.

644. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1.

645. *See supra* Parts II-III (discussing deception techniques).

646. *Id.* Rule 4.1.

In the course of representing a client a lawyer shall not knowingly:⁶⁴⁷ (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 is prohibited by Rule 1.6.⁶⁴⁸

In relation to lawyers *representing* clients in *negotiation*, there is a wide chasm dividing expert opinion on the applicable standard of truthfulness.⁶⁴⁹ At one extreme on the "truthfulness spectrum," is Judge Alvin B. Rubin of the United States Court of Appeals for the Fifth Circuit. Writing in the mid-1970s, Judge Rubin proposed two "precepts" to guide a lawyer's conduct in negotiations: (1) "The lawyer must act honestly and in good faith," and (2) "The lawyer may not

647. The Preamble to the Model Rules of Professional Conduct defines "knowingly" as denoting "actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances." *Id.* pmbl.

648. *Id.* Rule 4.1. Model Rule 1.6 states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes is necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;
or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id. Rule 1.6.

Comment 7 to Rule 1.6 provides in part:

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Id. Rule 1.6 cmt. 7 (emphasis added).

Comment 12 to Model Rule 1.7, addressing a lawyer's conflict of interest, states that, "a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them." *Id.* Rule 1.7 cmt. 12.

649. See, Dahl, *supra* note 440, at 174; see also Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493 (1989) (contrasting the universalist and the traditionalist perspectives on honesty in negotiation).

accept a result that is unconscionably unfair to the other party.”⁶⁵⁰ In 1980, Professor James J. White published an article in which he asserted his belief that misleading the other side is the very “essence of negotiation” and is all part of the game.⁶⁵¹ White observed that truth is a relative concept that depends on the definition one chooses and the circumstances of the negotiator.⁶⁵² He further noted that lawyers hunt “for the rules of the game as the game is played in the particular circumstance.”⁶⁵³ He identified the paradox of lawyers’ goals in negotiation—how to “be ‘fair’ but also mislead.”⁶⁵⁴ In 1981, Yale Law Professor Geoffrey C. Hazard, Jr., principal draftsman of the Model Rules of Professional Conduct, after reviewing Judge Rubin’s and Professor White’s articles and other pertinent literature of the day concluded that “legal regulation of trustworthiness [could not] go much further than to proscribe fraud.”⁶⁵⁵

In 1982, Professor Thomas F. Guernsey sought a middle-ground solution. He suggested that conventions regarding truthfulness dilemmas be formulated to guide those lawyers aspiring to be ethical, but that the default standard in all negotiations should be “caveat lawyer.”⁶⁵⁶ More recently, other commentators have advocated various truthfulness standards for lawyers in negotiation in terms of maintaining “total candor,”⁶⁵⁷ minimizing “an unreasonable risk of harm,”⁶⁵⁸ forbidding all deception,⁶⁵⁹ permitting “conventions of untruthfulness,”⁶⁶⁰ seeking “advantageous results . . . consistent with honest dealings with others,”⁶⁶¹ practicing “the golden rule”—

650. Alvin Rubin, *A Causerie on Lawyers’ Ethics in Negotiation*, 35 LA. L. REV. 577, 589-91 (1975).

651. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 928.

652. *See id.* at 929-31.

653. *Id.* at 929.

654. *Id.* at 928.

655. Geoffrey C. Hazard, Jr., *The Lawyer’s Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. REV. 181, 196 (1981).

656. Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 103 (1982).

657. Walter W. Steele, *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1403 (1986).

658. Rex R. Perschbacher, *Regulating Lawyers’ Negotiations*, 27 ARIZ. L. REV. 75, 133-34 (1985).

659. *See* Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO STATE L.J. 1, 50 (1987).

660. Dahl, *supra* note 440, at 199.

661. Ruth Fleet Thurman, *Chipping Away at Lawyer Veracity: The ABA’s Turn Toward Situation Ethics in Negotiations*, 1990 J. DISP. RESOL. 103, 115 (1990) (quoting MODEL RULES OF PROFESSIONAL CONDUCT pmb. (1988 revision)).

reciprocal candor,⁶⁶² and scrutinizing “what is not a lie and what lies are ethically permissible.”⁶⁶³

These varying perceptions of what standards of truthfulness *should* guide lawyers’ conduct in representing a client in negotiation offer little by way of identifying the standards that *do currently* guide them. Under Model Rule 4.1 (a), what exactly is a false statement of material fact in negotiation? What is a false statement of law?⁶⁶⁴ Under subparagraph (b) of that rule, when is a lawyer’s disclosure of a material fact necessary to avoid a client’s fraudulent act in negotiation?⁶⁶⁵ Pertinent Comments of Model Rule 4.1, presented below, provide little help in answering these questions:

Misrepresentation: [1] 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.⁶⁶⁶

Statements of Fact: [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.⁶⁶⁷

The above Comments actually complicate the search for answers to the questions presented by the text of Model Rule 4.1.⁶⁶⁸ A review of the formal and informal *Recent Ethics Opinions* published by the ABA offer little assistance in interpreting Model Rule 4.1’s application to lawyers’ permissible conduct in negotiation.⁶⁶⁹ Nothing in the

662. Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 782 (1990).

663. Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1272 (1990).

664. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1(a).

665. See *id.* Rule 4.1(b).

666. *Id.* Rule 4.1(b) cmt. 1.

667. *Id.* Rule 4.1(b) cmt. 2.

668. *Id.*

669. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 84-350 (1995); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 83-1502 (1983).

Comments specifically defines or even attempts to specifically define “material fact”; nor do the comments define or attempt to define what a “fraudulent act” on the part of a client might be.⁶⁷⁰ Giving examples of three types of facts in negotiation deemed *nonmaterial* is of marginal guidance to lawyer-negotiators attempting to behave ethically.⁶⁷¹ Is a “false statement of material fact”—as used in the text of Model Rule 4.1—the same as “misrepresentation” in Comment [1]?⁶⁷² For a violation of the Rule, does a “misrepresentation,” a word not used in the Rule’s text, have to be material or just false?⁶⁷³

The Comments also offer little guidance.⁶⁷⁴ The Comments state that the lawyer “generally has no affirmative duty to inform an opposing party of relevant facts”;⁶⁷⁵ yet, the lawyer may not affirm a statement of another person that the lawyer knows is false.⁶⁷⁶ What if the falsity of another person’s statement is caused by that person’s lack of knowledge of relevant facts? In order to satisfy Model Rule 4.1, must the lawyer disclose the relevant facts or not?⁶⁷⁷ The definition of “fraud” and “fraudulent” in the preamble to the Model Rules thoroughly befuddles Rule 4.1 and its comments.⁶⁷⁸ According to the preamble, those terms denote “conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.”⁶⁷⁹ Does this mean that any conduct of a lawyer in negotiation which has the *purpose to deceive* is to be deemed unethical? Most likely not, however, there is no clear answer. Subparagraph (c) to Model Rule 8.4, “Misconduct” states that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”⁶⁸⁰ Does Rule 8.4(c) apply to lawyers conducting negotiations?⁶⁸¹ Are the truthfulness standards for negotiations only covered by Model Rule 4.1?⁶⁸² Most

670. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1.

671. See *id.* Rule 4.1 cmts. 1-3. See *id.* Rule 4.1(a).

672. See *id.* Rule 4.1 cmt. 1.

673. See *id.* Rule 4.1.

674. See *id.* Rule 4.1 cmts. 1-3.

675. *Id.* Rule 4.1 cmt. 1.

676. See *id.* Rule 4.1 cmt. 1.

677. See *id.* Rule 4.1. The lawyer’s quandry is further complicated by comment 1 in Rule 4.1 because if the lawyer does nothing, that is to say neither informs of relevant facts nor affirms a false statement, the lawyer may have violated Rule 4.1 because “a failure to act” can constitute misrepresentation. *Id.* Rule 4.1 cmt. 1.

678. Compare *id.* pmb. with *id.* Rule 4.1.

679. *Id.* pmb.

680. *Id.* Rule 8.4(c).

681. See *id.*

682. See *id.* Rule 4.1.

likely they are, but that it is not clear from reading the Model Rules' text or comments.⁶⁸³

Determining what constitutes unethical conduct is also difficult because of the numerous excuses and justification lawyers typically marshal for lying in negotiation⁶⁸⁴ and the plethora of well-recognized negotiation strategies and tactics that have developed in recent years. Such strategies and tactics are widely considered to be within the rules of the negotiation game. Lawyers have names for them; law books describe them in detail, law professors teach them to students in law school.⁶⁸⁵ For effectiveness, many of these strategies and tactics rely on techniques of timed disclosure, partial disclosure, nondisclosure, and overstated and understated disclosures of information—all of which involve degrees of deception.⁶⁸⁶ Their effectiveness also depends on lawyers' avoidance techniques and on subtle distinctions between what information consists of *facts* as opposed to what information is merely a lawyer's *opinion*.⁶⁸⁷ "Puffing," a type of deception, is generally thought to be within the permissible limits of a lawyer's ethical conduct in negotiation;⁶⁸⁸ yet, even with puffing, at some mysterious, undefined point, the line may be crossed and "the lack of competing inferences makes the statement a lie."⁶⁸⁹

An article published in 1988 poignantly illustrates the differences of opinion and confusion among the experts regarding truthfulness standards in negotiation.⁶⁹⁰ Using four hypothetical negotiation situations, the author conducted a survey of fifteen participants which included eight law professors who had written about ethics, negotiation, or both, five experienced litigators, a federal circuit court judge, and a U.S. Magistrate.⁶⁹¹ The chart below contains the four situations and shows how the fifteen experts answered the ethical question posed by each of the situations.

683. *See id.*

684. *See* Wetlaufer, *supra* note 663, at 1236-55.

685. *See* DONNER & CROWE, *supra* note 510, chs. 11-12.

686. *See id.*

687. *See* Guernsey, *supra* note 656, at 105-12.

688. *See* Wetlaufer, *supra* note 663, at 1244-45.

689. Guernsey, *supra* note 656, at 108.

690. *See* Lempert, *supra* note 22, at 1.

691. *See id.* at 15.

Situation 1: Your clients, the defendants, have told you that you are authorized to pay \$750,000 to settle the case. In settlement negotiations after your offer of \$650,000, the plaintiffs' attorney asks, "Are you authorized to settle for \$750,000?" Can you say, "No I'm not?"		
Yes: Seven	No: Six	Qualified: Two
Situation 2: You represent a plaintiff who claims to have suffered a serious knee injury. In settlement negotiations, can you say your client is "disabled" when you know he is out skiing?"		
Yes: One	No: Fourteen	Qualified: None
Situation 3: You are trying to negotiate a settlement on behalf of a couple who charge that the bank pulled their loan, ruining their business. Your clients are quite upbeat and deny suffering particularly severe emotional distress. Can you tell your opponent, nonetheless, that they did?		
Yes: Five	No: Eight	Qualified: Two
Situation 4: In settlement talks over the couple's lender liability case, your opponent's comments make it clear that he thinks the plaintiffs have gone out of business, although you didn't say that. In fact, the business is continuing and several important contracts are in the offing. You are on the verge of settlement; can you go ahead and settle without correcting your opponent's misimpression?		
Yes: Nine	No: Four	Qualified: Two

In the midst of all this confusion and definitional imprecision, like Professor Hazard, one could reasonably conclude that the present ethical norms for lawyers do little more than proscribe fraud in negotiation—or, at most, they proscribe only very serious, harmful misrepresentations of material fact made through lawyers' false verbal or written statement, affirmation, or silence.⁶⁹² Assuming, for discussion purposes, that this is the current standard of truthfulness for lawyers who are advocates in negotiation, the question then becomes whether this same standard of truthfulness applies to lawyers who are advocates in mediation, as opposed to negotiation.

692. See Hazard, *supra* note 655, at 196.

D. Acceptable Deception by Mediation Advocates

Very little has been written about the ethical standards for lawyers who represent clients in mediation, much less the standards of truthfulness which should guide them.⁶⁹³ Nothing in the ABA Model Rules of Professional Conduct specifically addresses lawyer truthfulness in mediation.⁶⁹⁴ In mediation, of course, the advocate's duty of truthfulness has to be measured not only in relation to "others" but also to a special kind of "other"—a neutral who is sometimes a judge or a former judge. Thus, two questions emerge: (1) Do the ethical standards for truthfulness in negotiation described in the immediately preceding section also govern the advocate's truthfulness vis-a-vis the opponents in mediation? and (2) Do those ethical standards also govern the advocate's truthfulness vis-a-vis a neutral (lawyer, nonlawyer, or judge) in mediation?

First, because the Model Rules are silent on the truthfulness standards for mediation advocates vis-a-vis their opponents, one would seem to be safe in concluding that the rules regarding truthfulness in negotiation apply.⁶⁹⁵ However, one could make a persuasive argument that a heightened standard of truthfulness by advocates in mediation should apply because of the "deception synergy" syndrome resulting from a third-party neutral's involvement. Practical experience shows that the accuracy of communication deteriorates on successive transmissions between and among individuals. Distortions tend to become magnified on continued transmissions. Also, available behavioral research concerning mediator's strategies and tactics reveals that mediators tend to embellish information, translate it, and sometimes distort it to meet the momentary needs of their efforts to achieve a settlement.⁶⁹⁶ To help protect against "deception synergy" perhaps more truthfulness should be required from mediation advocates and mediators. The practicality of such a proposal, however, is questionable. Can one reasonably expect advocates to behave any differently in mediation than they do in negotiation? Would such distinctions of truthfulness be impossible to define and even less possible to enforce? It seems likely. Thus, it

693. See JOHN W. COOLEY, *MEDIATION ADVOCACY* (1996); Eric Galton, *REPRESENTING CLIENTS IN MEDIATION* (1994) for discussions of the ethical standards for lawyers in mediation.

694. See MODEL RULES OF PROFESSIONAL CONDUCT (1995) which provide no specific guidelines about lawyers' truthfulness in mediation.

695. See *id.*

696. See Brown and Ayres, *Economic Rationales for Mediation*, *supra* note 418, at 327-28.

appears that the standards governing advocates' truthfulness in negotiation vis-a-vis each other would also govern their conduct in mediation.

Second, with respect to truthfulness standards for mediation advocates vis-a-vis the mediator, apparently the only available guidance having even a modicum of applicability appears to be Model Rule 3.3, "Candor Toward the Tribunal."⁶⁹⁷ That Rule provides in relevant part:

(a) A lawyer shall not knowingly:⁶⁹⁸ (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.⁶⁹⁹

It is arguable, of course, that Rule 3.3 applies only to court tribunals which adjudicate matters in a public forum—and not to mediators, special masters, part-time judges, former judges, or others who conduct settlement conferences. If that is the intent of this rule, the Model Rules do not specifically say so.⁷⁰⁰ Nowhere do they define "tribunal."⁷⁰¹ It is not even clear whether Rule 3.3 applies to a lawyer's conduct before a *private* tribunal consisting of an arbitrator or arbitrators, although it reasonably could.⁷⁰² If such rules apply in arbitration, would they also apply in a med-arb or binding

697. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3.

698. See *supra* note 292 (defining "knowingly").

699. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3.

700. See *id.* Rule 3.3.

701. See *id.*

702. See *id.* Rule 3.3.

mediation?⁷⁰³ Although it is true that the Comments to the above-quoted Rule 3.3 make no reference to settlement conference or mediation, it is also true that they do not explicitly exclude settlement either conferences or mediation from its coverage.⁷⁰⁴

Other Model Rules further obfuscate the scope of the coverage of Model Rule 3.3. For example, Comments to Rule 3.9, "Advocate in Nonadjudicative Proceedings," make reference to courts and not tribunals, but for *administrative* tribunal.⁷⁰⁵ Thus, the question becomes: is "court" different in meaning than the unmodified term "tribunal"?⁷⁰⁶ Comment [1] to Rule 1.12, "Former Judge or Arbitrator," defines "adjudicative officer" as including "such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges."⁷⁰⁷ Is the term "tribunal" then broader than "adjudicative officer"?⁷⁰⁸ That is, does the unmodified term "tribunal" include both "adjudicative" and "nonadjudicative" officers?⁷⁰⁹ If so, would mediators or settlement officers fall within the scope of "nonadjudicative" officers, thus making Rule 3.3 applicable to mediators?⁷¹⁰ For those readers who believe this analysis is an exercise in tautology, they may be correct. The objective of this analysis is to make two important points: (1) the current Model Rules are currently thoroughly deficient in providing guidance to mediation advocates on what their truthfulness behavior should be vis-a-vis mediators (whether or not the mediators are judges, former judges, or court-appointed neutrals); and (2) if Model Rule 3.3 were deemed to apply to mediation advocates, it would significantly enhance the standards of advocates' truthfulness-to-mediator responsibilities, most probably to the point that no advocate would find it sensible to participate in the mediation process.⁷¹¹

703. Med-arb is a dispute resolution process in which the neutral, by agreement of the parties, "first conducts a mediation to settle the entire dispute or part of it, after which the neutral arbitrates any unresolved issues." J. COOLEY, *MEDIATION ADVOCACY* 3 (1996). In binding mediation, "the mediator makes a binding decision at a figure within the mediated bracket." *See id.* at 161.

704. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt.

705. *See id.* Rule 3.9 cmt.

706. *See id.*

707. *Id.* Rule 1.12 cmt. 1.

708. *See id.* Rules 3.3, 1.12 cmt. 1.

709. *See id.* Rule 1.12 cmt. 1.

710. *See id.* Rule 3.3 (referring to "tribunal" and suggesting that "tribunal" includes "nonadjudicative" officers as well as suggesting that it includes mediators). Thus, Rule 3.3 applies to lawyers vis-a-vis mediators.

711. *See* MODEL RULES OF PROFESSIONAL CONDUCT (1995).

E. Acceptable Deception by Mediators

The current ABA Model Rules of Professional Conduct, apparently by design, offer absolutely no ethical guidance to lawyers who serve as private or court appointed neutral on any ethical aspect of the neutral function, but in particular on their responsibilities relating to truthfulness.⁷¹² In fact, the Comment [2] to the Model Rule which comes closest to and nearly touches the neutral function—Rule 2.2, “Intermediary”—specifically states:

The rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.⁷¹³

Of course, the Code of Ethics for Arbitration in Commercial Disputes, approved by the House of Delegates of the ABA in 1977, only applies to *arbitration*, and not to mediation.⁷¹⁴ Similarly, the Standards of Practice for Lawyer Mediators in Family Disputes, approved by the ABA and published in June of 1984, do not address the issue of the mediator’s duty of truthfulness.⁷¹⁵ In addition, the American Bar Association (“ABA”) House of Delegates has not considered, much less adopted the Model Standards of Conduct for Mediators⁷¹⁶ that the ABA developed in conjunction with the American Arbitration Association (“AAA”) and Society for Professionals in Dispute Resolution (“SPIDR”).⁷¹⁷ Since no other written standards exist, the ABA has no approved standards currently in effect

712. See Model Rules of Professional Conduct.

713. *Id.* Rule 2.2 cmt. 2.

714. See CODE OF ETHICS FOR ARBITRATION IN COMMERCIAL DISPUTES pmb. (1977). See JOHN COOLEY AND STEVEN LUBET, ARBITRATION ADVOCACY 44-49, I-1 (1997).

715. See STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES (1984).

716. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1990). On February 3, 1997, the ABA approved a “Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship” (dated May 9, 1995). Telephone Interview with Anita M. Connolly, Assistant Staff Director for the ABA, (Sept. 17, 1997) (verifying the ABA’s approval of the Due Process Protocol); see Christopher A. Barreca, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 1995 A.B.A. SEC. LABOR & EMPLOYMENT L. 1-5 [hereinafter *Due Process Protocol*]. The protocol did not address the issue of truthfulness in mediation or arbitration.

717. Telephone Interview with Anita M. Connolly, Assistant Staff Director for the ABA, (Sept. 17, 1997) (verifying the ABA’s approval of the Due Process Protocol).

governing truthfulness in mediation. This is an important realization. The role of mediator which is quickly becoming an adjunct or full-time practice area for thousands of lawyers across the United States currently has no uniform, ethical standards officially sanctioned by the American Bar Association. Despite this serious lack of guidance, even if lawyer-mediators were to look to the ABA Model Code of Judicial Conduct⁷¹⁸ to find analogous guidance as to required standards of truthfulness to guide their specific behavior in conducting mediations, they would be disappointed to find that there are none.⁷¹⁹ Remarkably, no canon or commentary of the ABA's Model Code of Judicial Conduct deals specifically with a judge's duty to be truthful to others. However, such requirement might be presumed from Canon 1 which states that "a judge shall uphold the integrity and independence of the judiciary."⁷²⁰ Apparently, the only references to a judge's conduct in mediation appear in two canons.⁷²¹ Canon 4F cautions that "[a] judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law."⁷²² Canon 3B(7)(d) provides that "[a] judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge."⁷²³ There is no guidance regarding what standards of truthfulness apply when a judge conducts a settlement conference or participates as a neutral in caucused mediation.⁷²⁴

With no guidance on truthfulness being provided by any of the pertinent professional organizations, lawyer-mediators currently have no norms to guide them in determining which types of deception are acceptable in caucused mediations and which are not. The chart below is an attempt to list some of the types of mediator-employed deception (magic),⁷²⁵ along a spectrum from the least acceptable at the top of the chart to the most acceptable at the bottom of the chart. Where relevant, the chart identifies the related magic method by which the deception may occur in caucused mediation. Some readers may disagree with these classifications. Disagreement and accompanying discourse are

718. See MODEL CODE OF JUDICIAL CONDUCT (1990).

719. See JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS (2d Ed. 1995).

720. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990).

721. See *id.* Cannons 3(B)(7)(d), 4(F).

722. *Id.* Canon 4(f).

723. *Id.* Canon 3(b)(7).

724. See *id.*

725. See *supra* Part III.

welcomed. The purpose of this chart is to serve as a catalyst for discussion.

Mediator Magic	Magic Method
Conveying false demands to a side which can be dropped at any time to obtain closure	Ruse
Implying to proposing side that a proposal was communicated to the other side when it was not	Simulation
Specifically recommending one side to take a position on settlement adverse to the interests of the other side	Specific Direction
Intentionally using statistical data or graphs in a misleading way to obtain settlement	Device
Using mock caucusing and "scripted" proposals to induce settlement	Dissimulation
Altering or embellishing positions or proposals without authorization	Simulation
Using false frames of reference to induce fear and promote settlement	Misdirection by Anticipation
Conveying precise, but probabilistic false information	Simulation
Using "what if" proposals when the mediator knows they are not hypothetical	Maneuver
Assuming roles to meet needs of situation	Physical Disguise
Selecting issues for discussion	Specific Direction
Making prearrangements to structure mediation for best results	Device

V. CONCLUSION

This article, which began as an exposé of the types of deception that mediators and mediation advocates use in mediation, is now seen to be transformed into something quite different—a plea to the legal profession to clarify its ethical rules regarding truthfulness standards to govern lawyers' conduct in negotiation and mediation. As long as

there are no uniform ethical standards defining truthfulness in mediation, lawyer-mediators, and mediation advocates will have the unfettered capacity to practice their showmanship and to produce their "magic" effects by any method they wish. The profession has a duty to the public to take a close look at the mediation process generally and determine whether there really is something that Robert Benjamin calls the "noble lie" in mediation, and if so, how its scope should be defined as well as determining the limits of its permissible use in mediation.⁷²⁶ Some commentators have suggested that the rules of the mediation game should be spelled out clearly before the mediation begins. For example, Brown and Ayres suggest:

that it may be necessary for mediators to give the disputants more specific information about how the mediator intends to use caucus information. Credibly describing how the information will be used may be necessary to induce the disputants to disclose accurate information. The common practice of claiming confidentiality and then indirectly disclosing may undermine the individual parties confidence that their disclosures will not be used against them.⁷²⁷

Others have suggested the development of conventions of truthfulness,⁷²⁸ untruthfulness,⁷²⁹ and good faith.⁷³⁰ The legal profession can no longer be content to sweep these difficult truthfulness issues under the rug with a wink and a nod. In this regard, it is perhaps fitting to close with this thought:

Abbra Cadabra, Hocus Pocus, darkness, smoke and mirrors
Mediation Magic arouses primal fears
Simulation, maneuver, dissimulation, ruse
If we fail to set standards, we're all bound to lose.

726. See *The Constructive Uses of Deception*, *supra* note 5, at 17. Benjamin defines the "noble lie" as deception "designed to shift and reconfigure the thinking of disputing parties, especially in the conflict and confusion, and to foster and further their cooperation, tolerance, and survival." *Id.*

727. Brown and Ayres, *supra* note 418, at 389-90.

728. See Guernsey, *supra* note 656, at 103.

729. See Dahl, *supra* note 440, at 199.

730. See Kimberly K Kovach, *Good Faith in Mediation—Requested, Recommended, or Required?* *A New Ethic*, 38 S. TEX. L. REV. 575, 622 (1997).