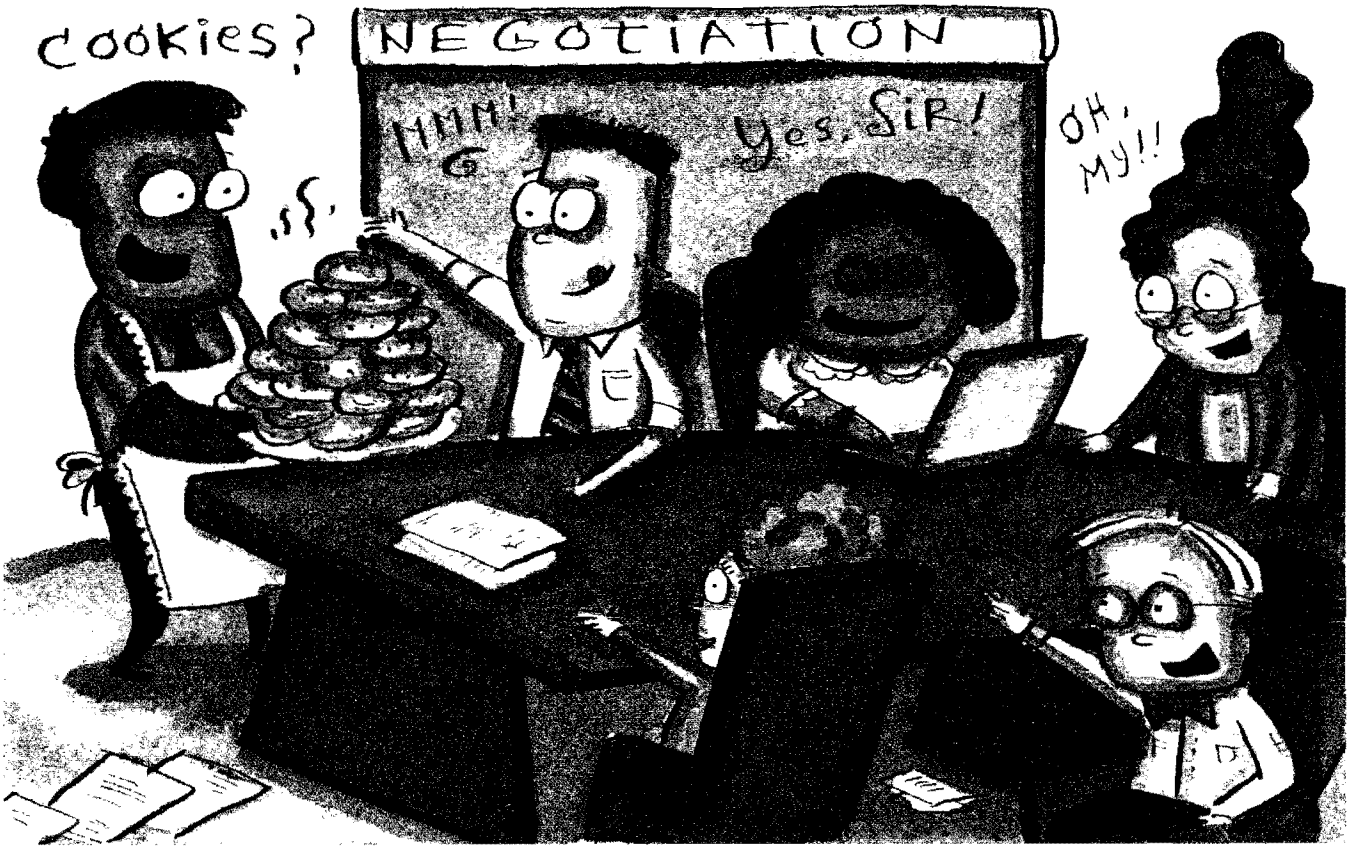

TRICK or Treat?

The Ethics of Mediator Manipulation

By Jim Coben and Lela P. Love

And the last temptation is the greatest treason
To do the right thing for the wrong reason[1]

Mediators have no shortage of opportunities to do the right thing for wrong, or unethical, reasons—or the wrong thing too, and again for the wrong reasons. In this reflection on mediator motives and manipulations, consider the following examples:

Warm Drinks and Cookies

Having read a study that warm drinks inspire warm thoughts, a mediator serves coffee and tea so that participants will regularly be feeling the heat of their cups. Another mediator, believing that the smell of freshly baked cookies inspires collaboration and friendliness, regularly ensures that such a smell permeates the mediation room by both serving such cookies and warming them in the room right before the session so the smell is particularly strong.

Comfy Chairs and Zen Design

Knowing that comfortable chairs make parties more relaxed, a mediator does research on the most comfortable, cushy chairs for her mediation suite, to ensure that participants are feeling as relaxed and hence receptive and creative as possible. Another mediator, believing that Feng Shui[2] is critical to creating positive energy, carefully places the wastebasket and positions the furniture to create the most auspicious room arrangement.

Strategic Images

A mediator positions pictures of his happy family at strategic spots to remind parties of important human connections. Another mediator, using an electronic picture frame on the wall, runs a continuous looping slide show of calm seascapes and bubbling brooks, with an embedded half-second subliminal message urging generosity and peace showing every 30 seconds.

Image: Charles Stubbs Illustration

Food and Scheduling

Understanding the importance of hunger and food to optimism and energy, a mediator is thoughtful about what food is available at particular intervals and routinely limits the duration of mediation to avoid undue pressure. Another mediator, believing that helpful compromises are often motivated by hunger and prolonged negotiation, typically schedules day-long, rather than half-day, mediation sessions and regularly delays lunch as long as possible.

Countering Judgmental Biases

Knowing the importance of framing to generate collaboration, a mediator labels the issues of who will have custody and what visitation rights will be granted to each spouse as "parenting arrangements." Another mediator, understanding that parties in conflict often act irrationally, systematically reframes proposals as gains, rather than losses (knowing that doing so increases the likelihood that the exact same proposal, initially rejected, becomes acceptable). A third mediator, fully aware that parties tend to discount the value of an offer that comes directly from the other side (reactive devaluation), decides to "float" a proposal as her own, even though the opposing party suggested it during a caucus.

Psychological Diagnostics

On the advice of a well-known mediator trainer, an aspiring mediator studies how to use the Thomas-Kilmann Conflict Mode Instrument[3] as a diagnostic tool to aid in deciding her mediator interventions. Another mediator, a student of neurolinguistic programming,[4] carefully chooses her metaphors in a calculated effort to change participants' emotional and mental behavior.

Orchestrating Silence

Knowing parties are uncomfortable with silence, a mediator purposely uses long periods of silence to increase the likelihood that they will generate options. Another mediator, discovering that one party (the "stubborn one" in the negotiations to date) is uncomfortable with silence, purposely orchestrates prolonged periods of silence to increase the likelihood the stubborn party will generate options.

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Using Empathy and Optimism

Knowing that parties have a strong desire to feel they have been heard, the mediator strategically uses empathy to set the stage for asking a party to substantially reduce a demand. Another mediator, understanding that parties often feel "remorse" at accepting a deal ("Could I have done better?"), privately congratulates each side on the deal they struck, hoping to prevent buyer's remorse (even though the mediator believes that only one side actually got a good deal, relative to what the other side was willing to offer).

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Are these mediator moves ethically OK? For some, we conclude they are appropriate—and perhaps obligatory—exercises of mediator influence. For others, they may be tricky mediator manipulations toward ends that the parties would not otherwise choose.

Before looking at the introductory examples posed for their ethical implications, we would like to acknowledge that there are some mediator moves that we would criticize a mediator for failing to make. For example, we consider siting the mediation an appropriate function of the mediator. Is the table configuration optimal to reinforce mediator neutrality and maximize party communication? Is the room sufficiently comfortable for the anticipated length of the meeting? Are there breakout rooms, computers, telephones—the necessary equipment for decision making and agreement drafting? We expect a thoughtful opening statement that explains the mediation process so that everyone is appropriately informed about what to expect. We hope that the mediator will protect the space for each party to voice her concerns. We look to the mediator to ensure that an agenda is created that will maximize an efficient and constructive use of time. Furthermore, we expect mediators to generate movement, rather than throwing their hands in the air at the first sign of impasse.

In other words, much of what good mediators do can be characterized as "helpful interventions" that assist the parties toward legitimate goals such as a better understanding, a platform for developing options, and (where the parties choose) an agreement or settlement. In those senses, "helpful interventions" are both wanted and failure to make certain interventions would be poor practice.

The problem, of course, is that all such "helpful interventions" are inevitably manipulative, in the sense that the mediator is, often unilaterally, making "moves" with profound impact on the parties' bargaining. In choosing the word "manipulative," we note two very different common meanings:

- Definition One: "handle, especially with (physical or mental) dexterity"
- Definition Two: "manage by (especially unfair) dexterous contrivance or influence"[5]

We need to consider both definitions in order to properly classify mediator moves on a continuum from ethical ("OK") to unethical (not "OK"). Thus, while we would hope that the mediator's "helpful interventions" are implemented with dexterity (definition one), the use of clever or tricky contrivances to unfairly influence the parties and the outcome (definition two) is unethically manipulative. To evaluate the ethics of any individual move, we propose asking two questions.

First, to be "OK," a move should further or *help* a legitimate party or process goal and be in keeping with the Model Standards of Conduct for Mediators that advance party self-determination in decision making.

FROM THE "HELPFUL INTERVENTION" FRAME	
• encouragement	• belittlement
• support	• false empathy
• perspective-generating devices	• authoritarian pronouncements

Following this logic, we would ask of the "move": *Does it* help *a party to understand what is at stake for them, what is being said by the other side, the range of options they may have, and the relation of a proposal to their self-interests? In other words, does the move support party self-determination?*

Second, a move should not be manipulative in such a way that it disadvantages one side or undermines the integrity of the mediator or the mediation process. The more "secret" or hidden the intervention, the more problematic it becomes. Lying, an "intervention" that one should not expect from a professional bound by a code of conduct, is covered here. Likewise, interventions that a one-time player in mediation might perceive differently than a repeat player[6] are more ethically problematic than ones that both parties would perceive or experience in a similar manner. Moves that, if discovered, would be considered "tricky" and underhanded would not pass the test we propose.

FROM THE "MANIPULATION" FRAME	
• transparent moves	• "secret" moves
• interventions that one-shot players and repeat players experience in the same way	• mediator lies
	• interventions that one-timers might not suspect will influence their decision making

Following this logic, we would ask of the move: *Is it consistent with mediator and mediation process integrity (i.e., not "tricky" or devious)?*

If we can respond "yes" to the two questions, then the mediator move is more likely to be ethically sound.

Of course, different mediator goals will drive different practices. For example, the mediator who believes the goal of the process is settlement only might have a different repertoire of moves than the mediator who aims for understanding, option development, and agreement, or one who aims for party empowerment and recognition or the creation of a jointly endorsed narrative about the past.

So, for example, a settlement-driven mediator might call for party proposals quickly without an extensive joint session where parties share their perspective. He or she might use caucus more frequently than a mediator who has the goal of party understanding and problem solving.

Despite differences in strategies, we believe all mediator interventions should be both helpful to a legitimate party goal and to party self-determination. Interventions should also be nondevious so that mediator and mediation integrity remains intact.

Applying the Model

Certain mediator moves are clearly unethical. For example, the mediator undermines self-determination by pocketing the key to the mediation room, or denying parties food until they capitulate, or berating them for their unyielding stupidity. These moves are not helpful to encouraging thoughtful party decision making and can be rejected on that basis. Additionally, by beating the parties into a corner where they are stuck, hungry, and insecure, the moves are counterproductive manipulations aimed at a settlement that might promote the mediator's settlement rate but not a durable agreement endorsed by parties who are strong and acting without coercion.

In contrast, the eight examples of mediator interventions described at the beginning of this article are not clearly unethical. By addressing the two aforementioned questions—*Does the intervention support party self-determination, and is it consistent with process integrity?*—mediators can better navigate the line between OK and not-OK behavior.

Warm Drinks and Cookies

This is OK because it arguably makes the parties feel good (which might equate with stronger); it is visible, hence transparent; and it doesn't give the repeat player any inside advantage. One might argue that the repeat player knows about mediator "feel good" moves and hence can take advantage of their effects on his negotiating counterpart, but on the whole, the moves nonetheless seem benign and constructive. To the extent, however, the smell of freshly baked cookies is secretly injected into the room, then the "move" leans toward deviously manipulative and not OK.

Seating and Room Arrangements and Photo Placement

Similarly, comfort—or freedom from pain caused by cramped furniture—can be central to progress. Virginia

Woolf, in *A Room of One's Own*, pointed out how women who were relegated to the kitchen or crowded areas of a house could not think the same lofty thoughts as men in their private spaces and comfortable dens. Lighting and furniture arrangements, elements of Feng Shui, are probably also OK because they are visible to all. Most, even a repeat player, probably would not notice, and the attempt at influence is not toward agreement but toward a more positive state of mind.

Pretty pictures on the wall, or pictures of the mediator's family, seem similarly benign. They do not press the parties toward agreement, so much as they induce a more capacious frame of mind (if they have any effect). However, not OK is a flashing subliminal message. Whether or not the subliminal message works, it falls into the category of being tricky and undermines integrity of the process.

Breaks, Food, and Scheduling

Supplying food or breaks to keep the energy level high can be critical for the stamina needed to understand what's going on and maintain creativity. This move is OK and even necessary.

With respect to denying food to get a deal closed, one has to weigh whether the parties themselves want to use the deadline caused by hunger to make a final push. If the mediator is sufficiently transparent and the move is party endorsed, it is probably OK. However, if the mediator asserts process control to purposefully weaken the parties' resolve through hunger or prolonged negotiating, the move is not OK. And, of course, food or drink that in some way alters consciousness and weakens self-determination would be improperly manipulative.

Interventions to Counter Judgmental Biases

On one level, careful word choice in reframing issues or proposals seems totally benign, at least so far as the mediator uses these "manipulations" with both sides. After all, they are utilized by the mediator to promote rationality as a response to the well-documented phenomena that judgmental biases lead people in conflict to process information poorly.[7] Equally powerful, and ethically unquestionable in our view, is asking parties to consider proposals from a different perspective.

For example, well-known mediator Margaret Shaw tells a story about a commercial mediation that was not going well. During a break, the plaintiff shared the difficulty he was having paying his mortgage. When the mediation was later threatened by a seemingly unbridgeable impasse, Margaret reminded the plaintiff that the amount of money being offered could retire the burdensome mortgage. This shift in perspective allowed the plaintiff to look differently at the proposed resolution. Margaret did not "pressure" the plaintiff; she threw a different light on a proposal, which made it seem attractive.

However, reframing "manipulations" are not without risk. A major concern is the possibility that sophisticated mediation consumers are more "immune" to these types of mediator moves than are one-time participants. To get them out of a category where we might consider them devious or tricky, mediators could be transparent in describing the moves. Don't make the mistake of assuming that transparency negatively impacts efficacy. Consider our example's proposed solution to reactive devaluation. Rather than falsely claiming to offer an option as your own, ask a party to directly consider whether he or she would value the proposal differently if it came from you, rather than the other side. Or, simply float the proposal as a hypothetical without any attribution at all.

Psychological Diagnostics

Putting aside the obvious "competency" questions (e.g., is neurolinguistic programming credible? Is there any evidence that interventions based on Thomas-Kilmann categories are more or less effective?), these are ethically suspect to the extent they are secret. If the mediator were transparent about the diagnostics—and honest about the degree to which anyone could consider them reliable—then the use of the diagnostics might be educationally beneficial for the parties and hence promote their thoughtfulness about the complexities of conflict resolution and the approaches available.

Orchestrating Silence

The "strategic use of silence" gambit can be very powerful but might have more impact on the naive one-time player than on the well-counseled repeat player participant. Particularly where silence is being used with the intent to influence a particular party to make a specific move, it can become a devious move, interfering both with self-determination and mediator integrity. How many times have we blurted out something we regretted a moment later in the face of silence?

Using Empathy and Optimism

Genuine empathy can support self-determination by making parties feel stronger. Such empathy also comports with mediator integrity. However, the strategic use of (false) empathy does not comport with integrity and could backfire in terms of its helpfulness because of our ability to "smell out" insincerity.

Thus, the false statement that you believe a party got a good deal is particularly problematic. For one thing, a mediator can never know for sure the motivation leading people to settle and whether a deal is "good" for them or not. Indeed, rather than focusing on your perspective of the merits of the deal relative to what each side might have been willing to offer, better to focus

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Rev. 290, 318, n.142 (2008).

7. *See, e.g.*, American Bar Association Formal Op. 07-447 *Ethical Considerations in Collaborative Law Practice* (2007); Advisory Comm. of the Supreme Court of Missouri, Formal Op. 124 (2008), "Collaborative Law," *available at* www.mobar.org/data/esq08/aug22/formal-opinion.htm; N. J. Advisory Comm. on Prof'l Ethics. Op. 699 (2005), "Collaborative Law," *available at* http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp699_1.html.

8. *See* Cal. Fam. Code § 2013 (2007); N.C. Gen. Stat. §§ 50-70 to -79 (2006); Tex. Fam. Code §§ 6.603, 153.0072 (2006).

9. *See* Minn. R. Gen. Prac. 111.05 & 304.05 (2008); Super. Ct. Contra Costa County, Local Rules, Rule 12.8, (2007); L.A. County Superior Court Rule 14.26 (2005); LRSF 11.17 (2009); Sonoma County Local Rule 9.25 (2005); Utah Code of Judicial Administration, Rule 4-510 (2006); La. Code R. tit. IV, § 3 (2005).

10. State of Utah, H.B. 284 Substitute Uniform Collaborative Law Act. *available at* http://le.utah.gov/~2010/htmdoc/hbillhtm/hb0284s01.htm (last visited May 25, 2010).

11. State of Ohio, H.B. No. 467 *available at* www.legislature.state.oh.us/bills.cfm?ID=128_HB_467 (last visited May 25, 2010).

12. State of Oklahoma, HB3102 *available at* http://webserver1.lsb.state.ok.us/CF/2009-10%20SUPPORT%20DOCUMENTS/BILLSUM/House/HB3102%20INT%20BILLSUM.doc (last visited May 25, 2010).

13. Tennessee General Assembly SB 3531 *available at* http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB3531 (last visited May 25, 2010).

14. Bill 18-829 *available at* www.dccouncil.washington.dc.us/lims/searchbylegislation.aspx (last visited June 15, 2010).

15. Draft of Proposed Amendments to Uniform Collaborative Law Act, April 2010 *available at* www.law.upenn.edu/bll/archives/ulc/ucla/2010april_amends.htm (last visited May 24, 2010).

16. *See* Attorney Gen. v. Waldron, 426 A.2d 929, 932 (Md. 1981) (striking down as unconstitutional a statute that in the court's view was designed to "[prescribe] for certain otherwise qualified practitioners additional prerequisites to the continued pursuit of their chosen vocation"); Wisconsin *ex rel.* Fiedler v. Wis. Senate, 454 N.W.2d 770, 772 (Wis. 1990) (concluding that the state legislature may share authority with the judiciary to set forth minimum requirements regarding persons' eligibility to enter the bar, but the judiciary ultimately has the authority to regulate training requirements for those admitted to practice). *See also* Restatement (Third) of the Law Governing Lawyers § 1 cmt. c (2000).

17. Model Rules of Prof'l Conduct R. 1.2(c), 1.7(b).

18. Abraham Lincoln, *Notes for a Law Lecture* (1846), in Life and Writings of Abraham Lincoln 328 (Philip V. D. Stern ed. 1940).

19. Julie MacFarlane, The New Lawyer: How Settlement Is Transforming the Practice of Law 81–84 (2007).

Trick or Treat

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the parties on a clear understanding of consequences: Does the deal meet articulated needs? Is it realistic and implementable (classic "reality testing")? As for "insulation" against buyer's remorse, the ethical approach is to compliment parties for their hard work and acknowledge the difficulties they confronted and overcame.

So, what's the bottom line? Well, to quote democratic politician Helen Gahagan Douglas from the 1950 U.S. Senate race in California, don't be a "tricky Dick" (a reference to her then-adversary Richard Nixon's exploitation of her alleged left-wing sympathies). The next time you decide to offer warm coffee instead of ice water, be careful that your goal is in sync with the parties' aspirations, comports with your own integrity, and does not unfairly impact any party. Err on the side of transparency and be skeptical of any "covert" move that if examined postmediation would lead a party to conclude that you were a trickster, rather than someone who helped them make wise decisions. ◆

Endnotes

1. T.S. Eliot, Murder in the Cathedral (1935).

2. "In Chinese thought, a system of laws considered to govern spatial arrangement and orientation in relation to the flow of energy (chi), and whose favorable or unfavorable effects are taken into account when siting and designing buildings." Shorter Oxford English Dictionary 5th ed. (2002) at 942.

3. The Thomas-Kilmann Conflict Mode Instrument (TKI) is a self-scoring exercise designed to measure a person's behavior in conflict situations. Created by Kenneth W. Thomas and Ralph Kilmann in 1974, the instrument identifies five different styles of conflict: Competing (assertive, uncooperative), Avoiding (unassertive, uncooperative), Accommodating (unassertive, cooperative), Collaborating (assertive, cooperative), and Compromising (intermediate assertiveness and cooperativeness). See www.kilmann.com/conflict.html, where you can obtain additional information and complete the TKI online (last accessed Aug. 2, 2010).

4. "A system of alternative therapy intended to educate people in self-awareness and effective communication, and to model and change their patterns of mental and emotional behavior." Shorter Oxford English Dictionary 5th ed. 2002 at 1911.

5. Taken from Shorter Oxford English Dictionary 5th ed. 2002 at 1691.

6. *See, e.g.*, Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 Ohio St. J. on Disp. Resol. 19, 26 (1999).

7. *See, e.g.*, Richard Birke, *Neuroscience and Settlement: An Examination of Scientific Innovations and Practical Applications*, 25 Ohio St. J. on Disp. Resol. 477 (2010).