



Mediation: Learn to speak your adversary's language

Speaking and hearing the same "language" goes a long way to promote favorable settlements.



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Parties come to mediation with different objectives. Some want closure, confidentiality, or free discovery, while others were referred by the court and attend by obligation. Most however, participate because they want to maximize their recovery dollars.

Our research has confirmed that a basic understanding in the discipline of Neuro-Linguistic Programming ("NLP") will provide the foundation for speaking your adversary's language and achieving higher settlement results.

There are four primary communication styles that have been identified within the field of NLP: Visual (seeing); Auditory (hearing); Kinesthetic (emotional); and Audiodigital (logical). While this might sound a bit theoretical, in practice it makes a lot of sense and really does work. When one person communicates in one style and the other communicates in another style, the two people might as well be speaking different languages because while each can hear what the other is saying, both will find it very difficult to understand the meaning behind their respective messages. The first thing to do is identify the person's primary communication style by listening to his or her choice of words and speech patterns and then speak in that style. By tailoring one's speech pattern to more closely match that of the person we're speaking to, we inherently increase rapport and the effectiveness of the communication.

While nothing is foolproof, understanding and *effectively* applying these principles in settlement negotiations can dramatically increase the likelihood of a productive negotiation and lead to higher settlement figures at the bargaining table.

In order to *effectively* apply these principles and get great settlement results, the message received must be the message intended. Surprisingly, this does not occur often because the parties are basically speaking different languages.

Here, then, are some guidelines to achieving a positive result when working toward a settlement.

Ask for help

From a strictly logical approach, how the plaintiff intends to spend the settlement proceeds is irrelevant to the evaluation of the case and not any business of the defense. However, from a humanistic approach, even insurance people want to feel needed. Being needed and asked for help, makes one feel important and part of a larger, more noble purpose. If the plaintiff intends to use the settlement proceeds for a worthwhile purpose such as keeping their home out of foreclosure or tending to their special-needs child, make a leap of faith and share this information with the defense. The key is to do so *at the right time* after the defense has offered most of what appears to be their settlement authority. Sharing this type of sensitive personal information, invites the defense to make a contribution and *feel* heroic ... and who doesn't want to feel heroic? This doesn't mean that the defense will pay out \$120,000 if they evaluated the case for \$80,000, just to make themselves feel good and help your client. Rather, what this strategy does is provide positive encouragement to the defense to pay the \$80,000 when they were willing to leave the mediation having only offered \$70,000.

Using the four communication styles to ask for help:

- **Visual** – Show a picture of the child who needs assistance
- **Auditory** – Describe how the funds will help get needed assistance for the child
- **Kinesthetic** – Share an emotional story that involves the child and their needs
- **Audiodigital** – Explain why the child needs these funds to get proper care

Reduce unknown variables

Ambiguity arises from three main sources: novelty, complexity and insolubility. When presented with unknown variables in an ambiguous situation, one's natural tendency is to overestimate the likelihood of positive versus negative outcomes. This finding has



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been corroborated by dozens of studies. In one straightforward experiment, all other things being equal, participants assigned a higher probability to picking a card that had a smiling face on its reverse side than one which had a frowning face. Similarly, when the defense is faced with making a decision in mediation without adequate information, unknowns will be assessed in their own favor even though there is no supporting evidence to substantiate that finding.

Consider the following situation: Defense counsel performs a verdict and settlement search on plaintiff's counsel, whom he has never encountered before. The search does not produce any results and counsel therefore assumes that the plaintiff attorney does not try cases and has not had any settlements that were large enough to report. Defense counsel concludes, based on this assumption, that the settlement value should be reduced since plaintiff's attorney is a minor player who will settle sooner or later. Amazingly, this situation presents itself with relative frequency.

Identifying the unknown variables confronting the defense and addressing each one in the order of relative importance requires proactivity and a sense of wanting to know all the information that is being used by the defense to evaluate the case. In the case of the lawyer who is perceived as not being prepared to go to trial, having identified through the mediator that he may not receive full value because of how he is perceived by the defense, he should be prepared at the mediation to either demonstrate that he intends to try the case himself and is a worthy opponent or name trial counsel who will substitute into the case at trial.

Using the four communication styles to reduce unknown variables:

- **Visual** – Prepare and show a “day in the life” video to the defense
- **Auditory** – Articulate a sample of plaintiff's opening argument at trial
- **Kinesthetic** – Express why you believe in this case and plaintiff's cause
- **Audiodigital** – Distinguish this case from the others you have settled in the past

Accentuate the positive

There is something to be said for the lyrics of the 1945 hit song, “Accentuate the Positive,” by artist Johnny Mercer, which brought hope to listeners in the midst of the turmoil and devastation of WWII. In the chorus, Mercer sings, “You’ve got to accentuate the positive. Eliminate the negative. And latch on to the affirmative. Don’t mess with Mister In-Between.”

Infusing positive energy into *any* negative situation automatically changes the dynamics and direction of the elements at work. In the mediation setting, the more we focus on the positive, the longer we can retain the spirit of inquiry and cooperation within the negotiation. Start by finding ways to show the defense that the plaintiff is a responsible, likeable, presentable and credible individual. By doing so, the plaintiff will be removed from the status of a “file” to that of a “person” and will *appear* to be more deserving. If the defense is aware or likely to become aware of negative information about the plaintiff, diffuse its impact by presenting it first yourself and addressing how it will be kept out of evidence or explained away at trial.

Using the four communication styles to accentuate the positive:

- **Visual** – Show pictures depicting plaintiff as a family person with strong values
- **Auditory** – Allow plaintiff to describe himself or herself in their own words
- **Kinesthetic** – Humanize plaintiff by sharing a heartfelt story
- **Audiodigital** – Explain why plaintiff's past indiscretion is inadmissible at trial

Address monetary barriers

Conspicuous and inconspicuous barriers exist that, if ignored, are likely to prevent the plaintiff from maximizing his or her settlement in mediation. The more monetary barriers that can be identified and addressed early on in the case, the greater the success in settlement.

Here are a few examples of the type of defense gorthink that should be ad-

dressed if the case is to have a chance at settling for its true value in mediation:

- “If we pay on this case, we’ll be setting a precedent with this plaintiff’s attorney and will be flooded with similar cases because he/she knows we will settle.”
- “If we continue to take a hard-line position on these types of injuries, the plaintiff’s bar will get the signal and eventually stop bringing these lawsuits.”
- “By paying more than nuisance on this case, we are conceding that we did something wrong.”

At times there are also personal motivations driving the negotiation, which are not shared by everyone on the defense team. These motives are generally not easily recognizable but will continue to serve as a monetary barrier if left unaddressed. Consider the defense attorney, who wants to settle the case below his or her authority to look good in front of the client, or the insurance adjuster who set the reserves too low at the beginning of the case and now doesn’t have a way out to settle and save face. Picture also the adjuster who is concerned that if he or she settles the case without proper documentation, it will be held against them by their manager when the case is reviewed or audited. And, of course, recall the situation where the case would and should have settled but did not because it had become a personal battle between counsel and representatives for both sides.

Using the four communication styles to address monetary barriers:

- **Visual** – Illustrate a way for the defense to save face and settle for higher dollars
- **Auditory** – Dialogue with defense to expose factors driving the negotiation
- **Kinesthetic** – Acknowledge and mend any hard feelings between both sides
- **Audiodigital** – Justify why settling for X dollars is the right business decision

Manage your reputation

Warren Buffet once said, “It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you’ll do things differently.” It is critical



in this day and age with the rise of the Internet, blogs, professional networks and message boards, to actively manage one's reputation. Whether good or bad, a plaintiff attorney's reputation as a litigator and negotiator is a critical factor in how the defense values a case both for trial and at the mediation. If you want to find out how you're perceived, ask someone you can trust and listen carefully to their comments, without taking offense. Being honest with oneself is often much harder than being honest with others. Generally speaking, cases are valued higher when the defense has an adversary who is known to try (or substitute in trial counsel) rather than settle cases, maintain a cordial rather than hostile working relationship, and is more of a risk taker than

risk averse. Keep in mind that each mediation is an opportunity for reputation management and that how one handles this negotiation will have a direct impact on all future negotiations with that party.

Using the four communication styles to manage your reputation:

- **Visual** – Show printouts of your reported verdicts to the defense
- **Auditory** – Read the amounts of your reported verdicts to the defense
- **Kinesthetic** – Connect with your adversary on a personal level
- **Audiodigital** – Disclose your mediation brief to the defense

Conclusion

Getting a fix on the four communication styles presented by Neuro-Linguistic

Programming will provide powerful tools for navigating the challenges of bargaining with defendants who speak a different language. Begin to speak their language and the results for your clients will be immeasurable.

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