

Alternatives

TO THE HIGH COST OF LITIGATION

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ADR Techniques/Part 2 of 3

One to One: Moving Forward While Facing Deep Differences

BY ANDREA KUPFER SCHNEIDER AND CHRIS HONEYMAN

Twelve years ago in these pages we wrote about our “Negotiator’s Field-book” (ABA 2006). That book stood for more than a decade as the most comprehensive reference available on negotiation.

Yet the negotiation field has moved forward, in compelling and sometimes surprising ways. We now have a more comprehensive understanding of what our field really is—and what it can yet become.

In last month’s *Alternatives* we reviewed the reasons why, including, for example, our overall 15-year, multi-product Canon of Negotiation Initiative. See Chris Honeyman and Andrea Kupfer Schneider, “A Canon Is Revised: Has the Negotiation Field Come of Age?” 36 *Alternatives* 147 (November 2018)(available at altnewsletter.com).

With the 108-contributor, 101-chapter, two-volume “Negotiator’s Desk Reference,” we have tried to provide the most up-to-date negotiation writings possible from as many disciplines as possible. We are both honored and humbled by the array of talented and wise colleagues who have joined in this effort.

As explained last month, the new *NDR* tries to do the translational work of taking great theory and research and showing how both impact practical negotiations. It also tries to summarize each theory or line of research into usable “bite-size” chunks, so that scholars and teachers can efficiently distinguish what they already know, what they

would like to know more about, and what they might want to include in their next course.

This month and next month, we will offer some short excerpts from a selection of chapters. We begin here with selections that address negotiators as individuals, who must relate to other (and sometimes very different) individuals in order to get something done.

Among the exciting new concepts that have attracted our attention in this area are ideas on how best to think about trust when there isn’t any, and there isn’t going to be, at any time soon; how to *really* listen, and understand what you’re hearing; how to choose the right tool for the moment among a dizzying array of communication methods; and how to deal with the likelihood that what you’re thinking so carefully about communicating addresses about 7% of your total communication, while the 93% that’s not verbal also may not be considered—and may carry a message dissonant from the one you thought you were transmitting.

This article omits all of the references in the original Negotiator’s Desk Reference chapters excerpted; the full references, which run throughout each of these excerpts, can be found at www.ndrweb.com.

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The authors are the editors of *The Negotiator’s Desk Reference*, which is described and excerpted in this three-part series. It is available at www.ndrweb.com and on Amazon and other booksellers. Honeyman is Managing Partner of Convenor Conflict Management, a Washington, D.C., consulting firm (www.convenor.com). Schneider is a Professor of Law and Director of the Dispute Resolution Program at Marquette University Law School in Milwaukee.

the moral of the humor—its point—teaches us about the benefits of the positive virtues and the value of honorable character traits. Self-deprecating humor can make us more human, build rapport, and allow us to bond with others.” For more, see “The Benefits and Pitfalls of Humor in the Bargaining Room,” 36 *Alternatives* 6 (January 2018)(available at <https://bit.ly/2QjCBsj>).

And for now, here is a brief checklist and guidelines for the mediator:


1. Don't force humor. Effective humor is ad-libbed and flows from the situation.
2. Be extremely confident that no one present

or any other stakeholder could take offense at your remarks. When in doubt, don't.

3. If anyone's humor offends a participant, deal with it privately in caucus mode, including addressing it with those offended; use acknowledgement or apology as appropriate, but sparingly.
4. Deprecate only yourself, not others.
5. First-person stories are better than structured jokes, especially if you are repeating a joke you have heard.
6. Acknowledge or laugh at the humor of others only if sincere. A fake grin may suffice. Try to avoid eye contact!
7. It's really, really not about you the media-

- tor, especially your settlement rate, an apparent favorite light-remark subject of neutrals along the lines of attorneys fees jokes.
8. Respect that mediators serve at the privilege of the participants.
9. Effective humor may correlate inversely to the severity of the loss or trauma.
10. You are not as funny as you think you are!

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The final word on emotions in mediation in the long-running Master Mediator series will appear next month, summarizing positive emotions during the bargaining process. January will look at gratitude, humility, kindness, hope, joy, and serenity. 

ADR Techniques

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NEGOTIATING IN A LOW-TO-NO TRUST ENVIRONMENT

BY MOTY CRISTAL

An Alternative Paradigm

If not trust, then what? If parties' pasts and presents do not allow establishing trust, what [can] the negotiation process ... be built on?

The alternative paradigm that we offer includes three elements which constantly intertwine. First, allowing for the emotional component of “freedom to hate.” Second, replacing *trust* with *respect*, a significantly different value structure, and third, building *trust* in the process, rather than trusting the other side. This involves trust in a process which both parties, directly, or with a mediator's assistance, jointly build.

The Psychological Dimension:

The Freedom To Hate

Classic negotiation literature emphasizes the need to show empathy to the other side. Empathy is defined as the cognitive awareness of another person's internal state (his thoughts, feelings, perceptions and intentions) and most important, the ability to share someone else's feelings.

Showing empathy, or bringing an offended party to demonstrate empathy, or creating this sense of “understanding your counterpart's emotions,” let alone those of a person you do not trust,

is probably one of the most challenging phases, or tasks, in any conflict negotiation. [Having been “forced” by custom, social or professional norms

How We Relate

The study: The science and the practice of negotiating.

The context: In this Part 2 of 3, the authors introduce excerpts from their massive work updating a seminal negotiation treatise with expertise for modern times. This month, the focus is on negotiating as individuals. Next month, organizational strategies are under examination.

Hot topic: ‘The deep level of mutual distrust does not allow true resolution; but if the process is led in the right direction, a stable conflict management might be achieved.’

to pursue trust-building, mediators report continuous failures to “establish trust” between disputants, which then results in mediation failures. ...] And it goes deep to the core of negotiation psychology and negotiation processes.

Empathy, together with assertiveness, is essential in order to figure out and acknowledge the interests of the other side, to allow a

smoother process and, mainly in deal-making negotiations, to strengthen relationships.

However, psychological research shows the strong need of individuals, let alone groups, to define their own selves through distinguishing themselves from others, and they tend to define the “other” as an enemy.

Demonizing the other is a strong catalyst of building personal identity as well as group (national or organizational) identity. Complex conflict negotiations constantly encounter the gap between the fundamental psychological need to demonize the other and the traditional call to show empathy to your untrustworthy counterpart.

Differently from the work of O'Shea on Compassion [in this volume of the Negotiator's Desk Reference], another way of reconciling this gap is to rely on the difference between two related yet distinct social competencies—perspective-taking (the cognitive capacity to consider the world from another individual's viewpoint) and empathy (the ability to connect emotionally with another individual).

One line of research suggests that perspective-taking increased individuals' ability to discover hidden agreements, and to both create and claim resources at the bargaining table. Meanwhile, empathy did not prove nearly as advantageous, and at times was detrimental to discovering a possible deal and achieving individual profit.

In other words, although empathy is considered an essential tool in many aspects of social life, perspective-taking appears to be a more significant ability in negotiations.

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The conceptual, let alone the operational, challenge that these findings surface in conflict negotiations is whether one can separate her rational (perspective-taking) behavior from her emotional behavior, in particular in a low-to-no trust environment.

Experience shows that people in conflict negotiations are flooded with emotions. They can hardly “talk logic,” and most of the time they will reject any attempt to show empathy. [In both cases, rejection of empathy is a phase in the negotiation not a breakdown.]

Therefore they ought to be allowed to “hate” the other side: i.e., maintain their negative emotions toward the other side. This is not as an obstacle, but as the opposite—an enabling mechanism for a parallel “rational” thinking.

Legitimizing the “freedom to hate” is essential in conflict-management oriented negotiations, as distinguished from conflict-resolution oriented ones. The distinction between conflict management and conflict resolution is a well-established paradigm in negotiation literature.

While conflict management deals with the symptoms, conflict resolution addresses the root causes. The need to differentiate between these outcomes is imperative when addressing conflicts, since this distinction directs the process manager or the mediator toward different process designs.

By its nature, negotiation in a low-to-no trust environment seeks conflict management, rather than resolution. The deep level of mutual distrust does not allow true *resolution*; but if the process is led in the right direction, a stable conflict *management* might be achieved.

Under these circumstances, “allowing” parties to hate each other and maintain their reciprocal negative feelings toward the other side will allow them to keep the emotional level still in their “conflict comfort zone,” while on the rational level agreeing to certain tangible and feasible steps—such as cessation of hostilities, mutual withdrawal of lawsuits, or visitation rights for their kids.

By doing so, by legitimizing the parties’ negative emotions toward the other side, the process manager or mediator assists the parties to overcome the existing dissonance between “How can I make peace with the person who hurt me so much?” and the rational understanding that this fight must be stopped.

By emphasizing the conflicting parties that they are not seeking “peace,” that they are not engaged in a process for turning their enemy into a friend, that they neither forget nor forgive, the process manager reconciles their internal emotional and psychological dissonance, and increases the likelihood of the parties accepting logical arguments regarding the high cost-of-no-deal.

Allowing the parties to continue feeling strongly about the other side, while taking steps toward reducing violence or minimizing other unconstructive behaviors, is—as practice shows—an essential element in any conflict management process. It can lead to a workable agreement, even without completing a reconciliatory process.

* * *

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LISTENING WITH UNDERSTANDING IN NEGOTIATION AND CONFLICT RESOLUTION

BY GUY ITZCHAKOV &
AVRAHAM N. KLUGER

Listening-with-Understanding

Good listening was found to have beneficial outcomes for the speaker.

To assess evidence of the power of good listening, co-author Avraham Kluger has meta-analyzed all listening-related-quantitative studies published between 2000 and 2014. The evidence stemming from experimental works suggests that listening shapes the behaviors of speakers both in terms of quality (more interesting) and quantity (longer).

The correlational evidence suggests that listening is strongly associated with speakers’ perceptions of people—leadership, job satisfaction, trust, psychological safety, and organizational commitment.

However, although empirical research has shed some light on the importance of good listening, we argue that there are many more benefits to this process than what has been thus far exam-

ined. This is because the spectrum of listening goes beyond the bad-regular-good spectrum.

Indeed, Carl Rogers in his work on Client-Centered Therapy (1980) recommended a unique type of listening, which he labeled as *listening-with-understanding*.

Listening-with-understanding is going beyond mere good and attentive listening by trying to understand the other person’s point of view and achieving the other person’s reference point. Listening-with-understanding means not only paying attention, and comprehension of the speaker’s message, but also a certain type of relating to the speaker that includes being non-judgmental, empathic, authentic, and respectful.

According to Rogers, listening-with-understanding is not common because people have a natural tendency to judge and evaluate statements that they hear. This tendency prevents them from achieving real communication with the other person.

However, when listening-with-understanding occurs, it can resolve internal communication failure within the speaker, which results in emotional and cognitive changes within her. The process of listening-with-understanding and its outcomes was explained by Rogers as follows:

In this atmosphere of safety, protection, and acceptance, the firm boundaries of self-organization relax. There is no longer the firm, tight gestalt, which is characteristic of every organization under threat, but a looser, more uncertain configuration. He begins to explore his perceptual field more and more fully. He discovers faulty generalizations, but his self-structure is now sufficiently relaxed so that he can consider the complex and contradictory experiences upon which they are based. He discovers experiences of which he has never been aware, which are deeply contradictory to the perception he has had of himself. ...

Listening-with-Understanding And Attitude Change

According to Rogers, the non-judgmental nature of listening-with-understanding creates a sense of psychological safety and reduced anxiety. In this state, people may become aware of various aspects of themselves which were previously suppressed due to psychological defense-mechanisms.

Specifically, Rogers’ theory implies that

contradictory experiences, which push attitudes in two divergent directions, are more likely to become accessible when people experience listening-with-understanding.

Rogers' hypothesis is congruent with theories that describe the existence of opposite inner-voices within the self. The "dialogical-self theory" proposes that the self is composed of many autonomous I-positions which communicate among themselves and build a society within the self.

Some I-positions are more powerful and dominant than other voices and as a result are more influential. The I-positions can create supportive, encouraging, cooperative relationships, and even form coalitions. However, they can also create a relationship of dominance, criticism, intimidation and battling oppositions.

In addition, [one commenter] describes the self as an internal society which is characterized by hierarchical and political dynamics. The political dynamics in the internal society may range from dictatorship to democracy. The political organization of the self, determines the individual's emotions and cognitions.

For example, a dictatorship self is strict, ordered and controlled (albeit, it can dictate that only love is important in life; that is, the part of the self might be noble, but it oppresses other voices so that the individual cannot really listen to others). This self-structure forces the individual to follow the dominant parts of the self.

A democratic self is open to diversity and uncertainty, and characterizes an individual who acknowledges that there are multiple possible directions and solutions to situations.

Acknowledging multiplicity is exactly the consequence Rogers predicted when a speaker experiences listening-with-understanding. Moreover, a safe psychological atmosphere for the speaker was theorized to facilitate the emergence of contradictions and paradoxes without the need to resolve them.

Also consistent with Rogers' hypothesis is Easterbrook's cue-utilization theory [written in 1959; see www.ndrweb.com], according to which reduction in arousal, as is associated with anxiety, allows more elaborate thinking.

According to the theories described above, we propose that the autonomy to think and relax while experiencing listening-with-understanding creates the required cognitive capacity to become aware of the new cognitions, which will result in more complex, less extreme attitudes.

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CHOOSING AMONG MODES OF COMMUNICATION

BY ANDREA KUPFER SCHNEIDER &
SEAN A. MCCARTHY

*Why the Differences
In Modes*

Matter for Negotiation

Negotiation experts regularly discuss the importance of building trust and a relationship in a negotiation.

Much of your ability to create rapport comes from the ability to see or at least hear the other party. Our mirroring skills in body language, the level of eye contact, even nodding, are all impossible via email. And so when we send and receive email messages, there is much less context for the content of the email.

Is the other party joking when they say that they are crushed not to receive a draft of the report today? How about their disappointment at our missing a meeting?

In face-to-face communication, we would immediately know if someone was sad or happy, joking or snarky. Over email, we have to make guesses.

In work situations, in more formal contexts, or when dealing with superiors, we are more likely to assume bad intentions or worry that something is wrong. Our reading of the emails is more analytical and literal, since that is the only information in front of us.

The content of the information exchange is also different. Without the ability to explain in real time, ask questions, and clarify ambiguities, we often make assumptions about the content of the email. Even when we ask questions, these might not be answered directly. Or we ask several questions and the response might only cover one or two of the questions.

Finally, developing relationships and trust over email is more challenging. Several studies have shown that parties are more adversarial

with each other via email (and even over the phone) compared to face-to-face negotiations.

Parties tend to share less information and cooperate less in the process of negotiation via email, resulting in lower levels of trust and higher potential for deceptive practices. And without the facial and verbal cues of face-to-face communication, we have higher levels of negative attribution.

In other words, we assume the worst and are more likely to attribute poor motives to our counterpart.

*How Differences Matter
In Negotiation
(Or, the Pros
And Cons
Of Different Modes)*

Given these differences in communication, it is useful to think about how these differences might play out in a negotiation.

On the one hand, email communication is often more contentious than face to face because, as described above, we misread cues. On the other hand, in an antagonistic relationship or with a topic that might be difficult to raise, the distance of email might help the conversation move forward without that emotion.

Similarly, cooperation could become problematic on email. But email could also be better in reducing unconscious bias and in permitting more participation by "lower status" people. In a group setting, senior leaders typically dominate the conversation and less-experienced members tend to go along once that person has expressed a preference.

On email, however, where a free-flowing conversation has already started, lower status people participate more. Once one person expresses doubts, others feel freer to chime in with their concerns.

Finally, in some email negotiations, we might worry about less integrative solutions when there is less rapport between the parties. On the other hand, a longer information exchange, where parties have outlined their thoughts more fully in writing, might demonstrate opportunities for log-rolling and trade-offs.

As the above examples demonstrate, there is no one "right" way to communicate during negotiation. Furthermore, many negotiations will consist of more than one mode. We need to think carefully about the pros and cons of

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each mode throughout the communication. The question is which mode of communication, in what context, and when.

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NONVERBAL COMMUNICATION: MORE THAN YOU THOUGHT

BY JEFF THOMPSON, NOAM EBNER & JEFF GIDDINGS

Nonverbal communication is often perceived as being somewhat synonymous with “body language.” This association, however, limits the scope of what nonverbal communication actually comprises: a wide range of cues and elements, some of which have to do with the human body and many which do not. These will be detailed below.

Remaining mindful of so many subtle cues and elements is a huge challenge, one that can create cognitive overload. This is compounded by the stress involved in negotiation situations, and the need to focus on verbal elements in order to follow the wealth of research- and practice-based maxims regarding verbal communication.

It is possible to attend to some of the numerous nonverbal cues and elements at the expense of others, and this information overload can negatively impact our capacity to interpret verbal aspects of communication as well.

Considering the numerous cues and elements that can be sent but not received, or sent but misread, we offer a conceptual framework—dubbed METTA—not only to help raise awareness of each, but also to help avoid cogni-

tive overload, by making the process of decoding the barrage of cues and elements a more manageable task. ... [T]he METTA model of nonverbal communication ... was developed as part of the first author's doctoral research on the impact of nonverbal communication on mediator effectiveness.

METTA was designed to provide a systematic framework to assist in making the role and impact of numerous nonverbal communication cues and elements more understandable. By mapping out the nonverbal landscape and providing a helpful acronym as a navigation tool, the model aims to make the nonverbal environment more visible and salient, and to help practitioners gradually increase their skills in accessing and utilizing this aspect of communication in order to become more effective negotiators.

The METTA model is mapped out in accompanying tables one to six below and at right.

The METTA Model of Nonverbal Communication

METTA represents movement, environment, touch, tone, and appearance.

Together, these five dimensions comprise all the potential cues and elements of nonverbal communication in any given interaction. Using the METTA model, negotiators can be more aware of their nonverbal communication

Table 1: Introducing METTA, and Demonstrating the Issues

Movement	Gestures, posture, body orientation, eye movement and contact, facial expressions, head nodding, head shaking and head angling
Environment	Location, distance between people, time, layout of the room
Touch	Handshaking, leakage (adaptors and object-adaptors: touching self, such as twirling hair; touching objects, such as clicking a pen or playing with a drinking straw)
Tone	Clarity, pauses, “umms” and “ahs”, volume, tone, pitch, rises and falls (and other near-musical cues used to convey punctuation, turn-taking, etc.).
Appearance	Clothing, accessories, and adornments

Table 2: Movement: Specific Actions for Negotiators to Consider

1	Use eye contact/gaze appropriately, especially when the other person is talking
2	Smile appropriately
3	Use open-handed gestures
4	Use head nodding to acknowledge listening
5	Use facial expressions to display engagement
6	Mirror & match your counterpart's body movement when appropriate
7	Lean forward to display engagement
8	Maintain a relaxed posture (neither too stiff nor slouching); keep your hands visible

Table 3: Environmental Factors to Consider

1	If multiple parties are involved, try to sit equally distant
2	Have writing materials available
3	Have refreshments available
4	Reduce or remove distractions & interruptions
5	Use appropriate furniture

Table 4: Considerations with Respect to Touch

1	Shake hands with everyone, or with no one
2	Be aware of cultural concerns
3	Be mindful of “leakage”—your own, and your counterpart's
4	Avoid self-adaptors
5	Avoid object-adaptors

Table 5: Considerations Related to Tone

1	In general, use a calming voice
2	Change to a more assertive tone of voice when making points that are important to you
3	Avoid aggressive tone—unless you intentionally desire to take one.
4	Reduce disfluencies (“umms,” “ahhs”)
5	Use “minimal encouragers” (“mmms” and “uh-huhs” in American English)
6	Adopt an empathetic tone—particularly, while delivering empathetic verbal messages

Table 6: Considerations with Respect to Appearance

1	Outfit suitable to the context of the negotiation
2	Outfit connotes professionalism
3	Appropriate adornments and accessories
4	Practical and comfortable clothing—to avoid causing squirming or fussing that might be misconstrued by your counterpart

as well as that of their counterparts, to increase their effectiveness in achieving their goals.

... METTA ... can be intentionally and genuinely used in a gestalt manner to build rapport and support active listening.

* * *

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tion and Conflict Resolution program at Creighton University's Department of Interdisciplinary Studies in Omaha, Neb. Giddings is a law professor at Monash University, Melbourne, Australia.

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Next month, the final article in this series looks forward, with a selection of excerpts that will focus on another level in negotiation entirely: groups and firms.

Court ADR

Special Masters: A Consensus Proposal For a New Approach to Civil Litigation

BY MERRIL HIRSH

There is an ADR tool courts should consider that could significantly help them handle and resolve cases faster and less expensively.

That is the consensus reached over the past year by a working group of representatives from the American Bar Association's Judicial Division (including the National Conference of Federal Trial Judges, the National Conference of State Trial Judges and Lawyers Conference), the Standing Committee on the American Judicial System and Business Law, Litigation, Dispute Resolution, Intellectual Property Law, Antitrust and Tort Trial and Insurance Practice Sections that has collectively devoted easily more than 1,000 hours to creating guidelines for changing the way we look at special masters in civil litigation.

Each of these Divisions, Sections and forums have co-sponsored a resolution in which they have asked the ABA House of Delegates to approve these guidelines at its midyear meeting next month.

The resolution asks the House of Delegates to approve nine guidelines—the American Bar Association Guidelines on the Appointment

and Use of Special Masters in Federal and State Civil Litigation (available at <https://bit.ly/2Fa2Q3r>). The guidelines appear in full in the box on the next page.



The 28-member working group's draft urges that the guidelines should be an accepted part of judicial administration in complex litigation and in other cases that create particular needs that a special master might satisfy.

The guidelines have their roots in a 2016 move by the Lawyers Conference of the ABA Judicial Division, which formed a Committee on Special Masters. The Committee concluded that "one of the difficulties faced

by both courts and practitioners is the lack of a methodical and consistent approach to the appointment and use of special masters," which are authorized under a variety of names by statutes or rules in 49 states—all except Illinois.

The draft ABA guidelines are for courts and the parties to consider using a special master, and to consider the move not only after particular issues have developed, but at the outset of litigation.

The guidelines describe the factors courts and parties should consider in appointing special masters; urge that courts weigh the benefits against potential costs; outline and support increased awareness of the wide-range of functions special masters can perform; emphasize selection in a manner that promotes confidence in the process and the choice of a special master; discuss the elements the referral order should and can include; recommend the development of local rules for selecting, training and evaluating special masters, including rules designed to facilitate the selection of special masters from a diverse pool of potential candidates; urge the creation of educational programs on the use of special masters, and recommend the consideration of modifications of laws, rules or practices necessary to achieve these ends, including amending Bankruptcy Rule 9031 to permit courts responsible for cases under the Bankruptcy Code to use special masters in the same way as they are used in other federal cases. See the accompanying box.

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A Resolution to Support Resolution

The ADR tool: Special masters.

The project: A set of guidelines that will change the way we view special masters in civil litigation.

The details: The undertaking is described here, along with the text of a resolution expected to be approved next month by the American Bar Association's House of Delegates.

The author, a Washington, D.C., neutral (see <https://www.merrilhirsh.com>), is the convener of the working group that drafted the special masters' guidelines discussed in this article. He addressed the subject in these pages at "Special Masters: How to Help Judges Extend their Reach ... and Exceed Their Grasp," *Alternatives* (June 2017)(available at <https://bit.ly/2qxIAhV>).