

# Alternatives



TO THE HIGH COST OF LITIGATION

INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION

VOL. 26 NO. 2 FEBRUARY 2008



**Publishers:**  
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International Institute for  
Conflict Prevention and Resolution  
  
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John Wiley & Sons, Inc.

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*Alternatives to the High Cost of Litigation* (Print ISSN 1549-4373, Online ISSN 1549-4381) is a newsletter published 11 times a year by the International Institute for Conflict Prevention & Resolution and Wiley Periodicals, Inc., a Wiley Company, at Jossey-Bass. Jossey-Bass is a registered trademark of John Wiley & Sons, Inc.

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The annual subscription price is \$190.00 for individuals and \$253.00 for institutions. International Institute for Conflict Prevention & Resolution members receive *Alternatives to the High Cost of Litigation* as a benefit of membership. Members' changes in address should be sent to Membership and Administration, International Institute for Conflict Prevention & Resolution, 575 Lexington Avenue, 21st Floor, New York, NY 10022. Tel: 212.949.6490, fax: 212.949.8859; e-mail: [info@cpradr.org](mailto:info@cpradr.org). To order, please contact Customer Service at the address below, tel: 888.378.2537, or fax: 888.481.2665; E-mail: [jbsubs@josseybass.com](mailto:jbsubs@josseybass.com). POSTMASTER: Send address changes to *Alternatives to the High Cost of Litigation*, Jossey-Bass, 989 Market Street, 5th Floor, San Francisco, CA 94103-1741.

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# Alternatives

TO THE HIGH COST OF LITIGATION

## DIGEST

### MEDIATION ADVOCACY

**Jeffrey Krivis** and **Mariam Zadeh**, of Los Angeles, focus on communication styles in order to improve settlements. The authors provide four tables of keywords that identify the way people get their points across. These signals allow negotiators to meet their adversaries on their opponents' terms, and provide improved results for their own clients. ....Page 17

### CPR NEWS

A full report on last month's CPR Awards for Excellence in ADR, along with Los Angeles and New York training dates for spring. ....Page 18

### ADR BRIEFS

A Brooklyn, N.Y. federal court judge presides over a claims resolution facility that he had ordered to retrieve nearly \$60 million in misdirected payments. A negotiation-style conference in the middle of the courtroom retraced the steps of the missing money—and how most of it had been returned in less than a month. Also: Italian law officially changes to allow class actions, providing for an "ADR Chamber of Reconciliation" to hash out payments. ....Page 19

### ANNUAL INDEX

A subject and author listing of all the articles that appeared in these pages in calendar year 2007, including a separate list of *Alternatives* authors who work at CPR member organizations. ....Page 29

### DEPARTMENTS

CPR News .....Page 18  
Subscription Info .....Pages 18 and 56  
Index Info .....Page 51  
ADR Briefs .....Page 19  
Cartoon by Chase .....Page 19

IN THIS ISSUE: PAGE 29

**Alternatives**

ANNUAL INDEX • VOL. 25 • 2007

CPR MEMBER AUTHORS: PAGE 41



INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION

VOL. 26 NO. 2 FEBRUARY 2008

## Five Steps to Maximizing Dollars When the Objective Is Money

BY JEFFREY KRIVIS AND MARIAM ZADEH

Parties come to mediation with different objectives. Some want closure, confidentiality, or free discovery. Others were referred by the court and attend by obligation. Most, however, participate because they want to maximize their recovery dollars. If you fall into this category, read on.

In the second edition of "David Ball on Damages—The Essential Update" (National Institute for Trial Advocacy (2005)), the author presents 10 basic principles that shape a juror's decision-making process on awarding money to the plaintiff. Like the Ball approach, this article synthesizes into Five Steps the intangible elements that factor into the defense perspective when arriving at a settlement.

This is important. A key to settlement is having your adversary be your biggest advocate with their client. Once this occurs, you are on the road to success.

While nothing is foolproof, understanding and effectively applying these

principles in settlement negotiations can increase greatly the likelihood of a productive negotiation and lead to higher settlement figures at the bargaining table.

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

Unsuccessful attorney-negotiators impose systems with only two outcomes, right and wrong. Reality contains an infinite number of possibilities.

This is why the process of mediating litigated cases is so profound. The process allows parties to consider all those possibilities.

In other words, to ensure understanding when communicating, we must do so in the language that makes the most sense to the person with whom we are speaking. For example, we are not likely to be effective if we negotiate in English with someone who primarily speaks French. Similarly, every individual has an internal language that they subconsciously employ when communicating with another. By identifying your adversary's internal language and negotiating using their "communication style," you will be able to take full advantage of this five-step process when mediating to maximize your results.

### PRIMARY COMMUNICATION STYLES

Speaking your adversary's language is no easy

(continued on page 24)



The authors mediate complex disputes including class action, toxic tort, entertainment, insurance and business matters at First Mediation Corp., in Encino, Calif. Krivis is the author of the 2006 CPR Institute for Conflict Prevention Book Award winner, "Improvisational Negotiation" (Jossey-Bass 2006). [CPR and Jossey-Bass jointly publish this newsletter.] He teaches at the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and is an *Alternatives* editorial board member. Zadeh completed an LL.M. in ADR at the school, and joined First Mediation, which Krivis heads, in 2005.

## Maximizing Dollars

(continued from page 17)

task. Volumes have been written by scholars on how to connect with people and persuade them that your position is worthy of consideration. Our research has confirmed that a basic understanding in the discipline of neuro-linguistic programming, referred to here as 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 NLP field: (1) Visual; (2) Auditory; (3) Kinesthetic, and (4) Audiodigital. While this may seem a bit theoretical, in practice it makes a lot of sense. It 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. While each can hear what the other is saying, both will find it 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 their choice of words and speech patterns, and then speak in their 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 communication's effectiveness.

### CLUES TO IDENTIFYING VISUALS

About 50% of the population is made up of Visuals—that is, they are in the NLP category of Visual communicator. When speaking to someone whose primary representational system is Visual, they will tend to use words that depict a picture or an image and use phrases like, "I don't see the benefit of negotiating further," or "The plaintiff looks like he's ready to settle." For more Visual words and phrases see Tables 1(A) and 1(B) opposite.

People who are primarily visual tend to be relatively fast talkers, and may be impatient when interrupted because they need to talk as fast as the film show running in their mind. Visuals often use their hands freely, in a way that complements what they are saying. For these reasons, the Visual person generally has a keen ability to see the big picture yet quickly zoom in on detail when necessary.

In mediation, this means that a Visual person is more likely to be comfortable discussing the bottom line than getting stuck in the details of the negotiation dance.

### CLUES TO IDENTIFYING AUDITORIES

People with an auditory preference make up about 25% of the population.

Auditories habitually talk to themselves, especially when they are concentrating really hard and use phrases like, "I hear what you're saying, sounds good to me, tell me more." Additional examples of typical Auditory words and phrases are noted in Tables 2(A) and 2(B) on page 26. Auditories tend to be somewhat assertive and

#### Talking, Listening and Understanding

**The issue:** Choosing your words carefully isn't enough.

**The problem:** Sure, you're hearing the other side. And they appear to be hearing you. But are either of the parties understanding the other?

**The techniques:** Identify the communicator style on the other side, and then follow the five steps to a better settlement.

domineering in group settings because they need to verbalize their thoughts in order to clarify their own ideas. They respond best to instructions and information delivered primarily in words and at a tempo roughly equivalent to their own normal rate of speech. Because of these characteristics, Auditories are more prone to ask questions and seek verbal clarification after being presented with a settlement proposal.

### CLUES TO IDENTIFYING KINESTHETICS

Kinesthetics make up about 20% of the

population. The Kinesthetic person receives and organizes information primarily based on body sense and feeling. Kinesthetics will react and respond on an emotional level, often making statements like, "This just doesn't feel right to me," "I think I've got a handle on it," or "I'm wounded by their response."

Once a Kinesthetic has been identified, communication with them can be improved by incorporating more of the words and phrases in Tables 3(A) and 3(B), on page 27, into the conversation.

Kinesthetics generally move and speak extremely slowly, causing those they converse with to get frustrated. Unfortunately, telling a Kinesthetic to hurry up and get to the point will only serve to throw them off. It will cause the conversation to linger even longer as the person tries to reconnect with his or her feelings. The way to convince a Kinesthetic to take a particular path is not through logical discussion, but by reaching them at an emotional level.

### CLUES TO IDENTIFYING AUDIODIGITALS

This last group represents a small, five-percent portion of the population. Audiodigitals are characterized as individuals who often have conversations with themselves inside their heads. They use words like think and understand, talk more than the average person, and respond well when presented with logical arguments. For additional examples of Audiodigital words and phrases, refer to Tables 4(A) and 4(B), on page 28.

Since Audiodigitals tend to spend a lot of time talking to themselves, they are generally slow in answering questions. They need that additional time to internally repeat the question to themselves and internally rehearse the answer before audibly verbalizing their response.

Audiodigitals are harder to identify because they exhibit characteristics from the other three major representational systems; this is only because they take the time in advance to rehearse how they will respond. The main difference between the other groups—the Visuals, the Auditories, and the Kinesthetics—and an Audiodigital is that their behavior is generally instinctive and automatic whereas with an Audiodigital, their reaction regardless of the characteristics displayed, is practiced.

**TABLE 1(A) – VISUAL WORDS**

See	Look	Hazy	Observe	Flash
View	Picture	Misty	Image	Show
Vision	Focus	Glimpse	Glowing	Sparkle
Colorful	Scan	Gaze	Brilliant	Highlight
Outlook	Perspective	Glitter	Vivid	Bright
Insight	Dawn	Illuminating	Shine	Transparent
Reflect	Murky	Go blank	Scene	Opaque
Watch	Appear	Envision	Lackluster	Mirror
Show	Reveal	Crystal clear	Dim	Snapshot
Aim	Appearance	Behold	Blind	Ugly
Blush	Sunny	Spotless	Cloudy	Dark
Visible	Draw	Dull	Portray	Examine
Faded	Foggy	Luster	Glance at	Glare
Gleam	Notice	Glisten	Vista	Spy
Likeness	Illustrate	Oversight	Inspect	Light
Study	Viewpoint	Stain	Pretty	Neat
Pattern	Stare	Sight	Panorama	Shimmer

**TABLE 1(B) – VISUAL PHRASES**

Look at this	Paint a picture	Glowing review
Visualize the idea	Show me	Shed light on the issue
See it	Envision the following	Obscure the view
Picture this scenario	Gaze at that	Colorful presentation
Focus on this	Preview the outline	Brighter prospect
What is the perspective?	Draw conclusions	Light at the end of the tunnel
Watch this	The picture is cloudy	Observe that
A strategic vision	Look into it	Illustrate my point
Dark side	Imagine the possibilities	Bleak future

Mediations with Audiodigitals tend to take longer because of the time needed to analyze the negotiation at each step of the way. Audiodigital people need to talk through the task or decision-making process and feel like they've been heard and understood before they can move on or commit to a decision.

When dealing with an Audiodigital, the best approach is to engage in a principled negotiation such that the offers and demands are supported with reasons justifying the basis for the figures contemplated. When approached in this manner, the

Audiodigital person will be more open to hearing what the other side has to say and to the possibility of settlement.

Below, the five steps.

### STEP #1—ASK FOR HELP

From a strictly logical approach, how the plaintiff intends to spend the settlement proceeds is irrelevant to the evaluation—and not any business of the defense. But 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 a home out of foreclosure or tending to a 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, usually after the defense has offered most of what appears to be its authorized settlement. 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 it has evaluated the case for \$80,000, just to feel good and help your client. Rather, this strategy provides positive encouragement to the defense to pay the \$80,000 when it was willing to leave the mediation having only offered \$70,000.

*Using the Four Communication Styles to Ask for Help:*

- Visual (seeing)—Show a picture of the child who needs assistance.
- Auditory (hearing)—Describe how the funds will help get needed assistance for the child.
- Kinesthetic (emotional)—Share an emotional story that involves the child and his or her needs.
- Audiodigital (logical)—Explain why the child needs these funds to get proper care.

### STEP #2—REDUCE UNKNOWN VARIABLES

Ambiguity arises from three main sources: novelty, complexity, and insolubility.

When presented with unknown variables in an ambiguous situation, a natural tendency is to overestimate the likelihood of positive outcomes versus negative outcomes. This finding has been corroborated by dozens of studies.

In one straightforward experiment, participants assigned a higher probability to picking a card that had a smiling face on its reverse side than one with a frowning face. Similarly, when the defense is faced with making a mediation decision without

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adequate information, unknowns will be assessed in its favor, even though there is no supporting evidence to substantiate that finding.

Consider the following situation: The defense counsel performs a verdict-and-settlement search on the plaintiff's counsel, whom it has not encountered before. The

search doesn't produce any results. The defense therefore assumes that the plaintiff's attorney doesn't try cases, and hasn't had any settlements that were large enough to report.

Based on this assumption, the defense concludes that the settlement value should be reduced, because the plaintiff's attorney is a minor player who will settle sooner or later. Amazingly, this situation presents it-

self with relative frequency.

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

*Using the Four Communication Styles to Reduce Unknown Variables:*

- Visual (seeing)—Prepare and show a day-in-the-life video to the defense.
- Auditory (hearing)—Articulate a sample of the plaintiff's opening argument at trial.
- Kinesthetic (emotional)—Express why you believe in this case and the plaintiff's cause.
- Audiodigital (logical)—Distinguish this case from the others you have settled in the past.

### STEP #3 - ACCENTUATE THE POSITIVE

There is something to be said for the lyrics of the 1945 hit song, "Accentuate the Positive," by Johnny Mercer, which brought hope to listeners in the midst of World War II's turmoil and devastation. In the chorus, Mercer sings, "You've got to accentuate the positive. Eliminate the negative. And latch onto 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.

**TABLE 2(A) – AUDITORY WORDS**

Hear	Say	Speak	Shrill	Loud
Listen	Click	Talk	Cacophony	Whisper
Sound	Resonate	Amplify	Noise	Discordant
Tone	Rhythm	Screech	Quiet	Cadence
Accent	Harmony	Dialogue	Melody	Symphony
Musical	Tune in	Raucous	Buzz	Tell
Call	Clash	Ring	Shout	Echo
Tune out	Be all ears	Chime	Announce	Babble
Jingle	Mellifluous	Discord	Mute	Sniff
Articulate	Aloud	Voice	Vocalize	Argue
Assert	Told	Blaring	Boom	Shriek
Chat	Chatter	Speech	Clatter	Command
Comment	Conversation	Converse	Cry out	Declare
Describe	Squawk	Discuss	Dissonance	Eavesdrop
Express	Groan	Grumble	Utter	Verbalize
Hiss	Lecture	Lend an ear	Speak	Thunderous
Mention	Moan	Mutter	Narrate	Shrill
Sing	Orchestrate	Order	Praise	Purr
Silence	Remark	Resound	Scream	Rumor

**TABLE 2(B) – AUDITORY PHRASES**

Sounds good	Don't give me static	Echo their sentiments
I hear you	I'm in tune with that	Scream to be heard
Let's talk about it	Tone of conversation	Amplify that point
Orchestrate that	Voice your opinion	It purred like a kitten
Call me	Ask them	The silent treatment
Let me tell you	We are in harmony	Chime in
Lend an ear	It rings true	Debate the issue
It's a whisper	Sing their praises	Don't grumble
Loud and clear	They are turning out	Argue the point

**TABLE 3(A) – KINESTHETIC WORDS**

Feel	Touch	Smooth	Solid	Rough
Grab	Pressure	Gritty	Tight	Uptight
Pull	Handle	Pushy	Soft	Move
Grasp	Texture	Sting	Tough	Thrust
Rub	Heavy	Contact	Sharp	Tickle
Sticky	Firm	Itchy	Bounce	Mime
Sturdy	Support	Concrete	Stumble	Impression
Tackle	Slimy	Wobble	Hit	Dig
Warm	Catch	Snag	Dump	Impact
Absorb	Attach	Attack	Backing	Balance
Bend	Shake up	Cold	Compress	Shocking
Connect	Cool	Cram	Cut	Cutting
Electric	Exhale	Extend	Fall	Fasten
Fear	Worry	Weigh	Unite	Flat
Flush	Fumble	Unbalance	Uncomfortable	Hard
Hot	Hurt	Inhale	Tender	Link
Manipulate	Massage	Merge	Nervous	Point
Tremble	Probe	Push	Ragged	Reach
Relaxed	Resist	Twist	Rugged	Seize
Sense	Tension	Throw	Shuffle	Take
Stable	Steady	Stiff	Stir	Stretch

**TABLE 3(B) – KINESTHETIC PHRASES**

Get a feel for	I'm not comfortable	Manipulate the data
Too hot to handle	It worries me	A solid base
Kick it upstairs	A concrete idea	Tough to deal with
Ill-at-ease	Go for it	Merge our ideas
It scares me	It irritates me	Make a connection
Point it out	Make it tangible	Stop talking ... do it
Stir it up	What is the impact	Back up your claim
Toss this around	Tickle it out	Get hold of
Get a grip	Slip through the cracks	Rubs the wrong way
I feel it in my bones	Firm foundation	Heated argument
I'm not following	Going to pieces	Hold on a second

If the defense is aware or likely to become aware of negative information about the plaintiff, then 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 (seeing)—Show pictures depicting the plaintiff as a family person with strong values.

- Auditory (hearing)—Allow the plaintiff to describe himself or herself in their own words.
- Kinesthetic (emotional)—Humanize the plaintiff by sharing a heartfelt story.
- Audiological (logical)—Explain why the plaintiff's past indiscretion is inadmissible at trial.

#### STEP #4 - ADDRESS MONETARY BARRIERS

There exists conspicuous and inconspicuous barriers that, if ignored, are likely to prevent a plaintiff from maximizing mediation settlements. 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 group-think that should be addressed 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 the plaintiff's attorney knows we will settle."
- "If we continue to take a hardline position on these types of injuries, the plaintiff's bar will get the signal and eventually stop bringing these suits."
- "By paying more than nuisance on this case, we are conceding that we did something wrong."

At times there also are 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 the case is settled without proper documentation, it will be held against the adjuster by his or her manager when the case is reviewed or audited. And,

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of course, readers can probably recall a situation in which a 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 (seeing)—Illustrate a way for the defense to save face and settle for higher dollars.
- Auditory (hearing)—Dialogue with the defense to expose factors driving the negotiation.
- Kinesthetic (emotional)—Acknowledge and mend any hard feelings between both sides.
- Audiodigital (logical)—Justify why settling for \$XX is the right business decision.

## STEP #5 - 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 Web, blogs, professional networks and message boards, to actively manage one's reputation. Whether good or bad, a plaintiff attorney's litigating and negotiating reputation are critical factors in how the defense values a case, both for trial and at the mediation.

If you want to find out how you are perceived, ask someone you can trust and listen carefully to their comments, without taking offense. Being honest with yourself often is much harder than being honest with others.

Generally speaking, cases are valued higher when the defense has an adversary who is known to try cases (or refer to trial counsel), rather than settle cases. The defense also is encouraged to settle where it has maintained 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

**TABLE 4(A) – AUDIODIGITAL WORDS**

Accommodate	Analyze	Believe	Benefit	Capability
Change	Circumstances	Comprehend	Conjecture	Consider
Contemplate	Convey	Credibility	Decide	Deem
Deliberate	Engage	Engross	Estimate	Establish
Evaluate	Experience	Facilitate	Fascinate	Guess
Hypothesize	Ideas	Identify	Imagine	Intellectualize
Interest	Inquiry	Judge	Know	Learn
Materialize	Motivate	Need	Negotiate	Ponder
Pretend	Process	Professional	Produce	Qualify
Quality	Recognize	Regard	Remember	Respond
Results	Service	Think	Understand	Utilize
Basic	Specific	Procedure	Interesting	Integrated
Interactive	Modular	Tendency	Obvious	Incremental
Balanced	Virtual	Knowledge	Random	Enhanced
Variable	Value-added	Model	Special	Systematic
Ecological	Applications	Theory	Typical	Optimal
Boundary	Flexibility	Principle	Usual	Compatible
Reciprocal	Concept	Meaning	Excellent	Paradigm
Transitional	Framework	Contingency	Logical	Thoughts

**TABLE 4(B) – AUDIODIGITAL PHRASES**

In regard to your concern	Considering the possibilities	An interesting dilemma
A viable solution	Analyze the potential	Consider the options
Value quality	Promote a philosophy	Take a balanced approach


handles this negotiation will have a direct effect on all future negotiations with that party.

*Using the Four Communication Styles to Manage Your Reputation:*

- Visual (seeing)—Show printouts of your reported verdicts to the defense.
- Auditory (hearing)—Read the amounts of your reported verdicts to the defense.
- Kinesthetic (emotional)—Connect with your adversary on a personal level.
- Audiodigital (logical)—Disclose your

mediation brief to the defense.

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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. 

DOI 10.1002/alt.20209  
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