

## **Language and the Law:**

*Beyond the Pitfalls in Common ADR Best Communication Practices*

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*This paper was first presented at a 2015 Texas State Bar Conference*

The historic, adversarial legal system was designed as a process in which the prosecutor, representing the government, and a defense attorney, representing the accused, each presented their case to an impartial judge and/or jury. The adversarial system was considered to be an improvement over the inquisitorial system, where courts participate in the inquisition of the accused. It was deemed to be more likely to give the defendant an opportunity for justice.

In recent decades, we have been witnessing an evolution in the law that offers alternatives to adversarial court hearings. They include a range of alternative dispute resolution processes, including arbitration, mediation, collaborative law, and other forms of negotiation that resolve legal issues outside the context of the courtroom.

Attorneys and judges in the field of family law have been among the leaders in this evolution. Now retired, Judge Lawrence Kaplan was a pioneer in the movement to take divorce and custody issues out of the courts. He was appointed in 1978. By 1981, after seeing a notice for a mediation class in the newspaper, he became the first judge in Pennsylvania to actually take mediation training.

In 1988, New Jersey divorce attorney, Curtis J. Romanowski introduced what he called "Collaborative Dispute Resolution (CDR)." In 1990, Stu Webb sent a letter to Honorable A.M. (Sandy) Keith, proposing a form of collaborative law wherein attorneys could work *only* outside the realm of the courtroom. The "Collaborative Law Movement" he named and inspired has reached global proportions the last quarter century.

Working in collaboration with both parties in a divorce, along with other professionals, such as psychologists and financial advisers, requires, in essence, a whole different language than that used in winning court arguments.

### **Shifting From an Adversarial Model of Communication to a Collaborative One**

The difficulties in shifting how language is used from a process involving argument and persuasion to more effective methods of conflict resolution are not limited to attorneys in the courtroom. The roots of this dilemma are deep and form a complex web. According to Dr. Martin Jacobi, past Chair of the English Department at Clemson University, "For centuries, Aristotle's model for communication has been taught in Western culture as the art of winning arguments."

Dr. Jacobi went on to say that we are teaching our students how to win arguments and reinforcing the idea that one person is right and the other is wrong. Then we are sending them out into diverse communities and expecting them to get along.

Aristotle's model of communication is built on a system that involves verbally defending one's own position and attacking the other party's position. Ultimately, this involves using the "rules of war" as much more than a metaphor. The structure of our conversations is essentially a "war model," in which people respond defensively as a self-protective mechanism and often engage in power struggle to achieve their goals.

I believe that all of us, regardless of our profession, have been profoundly impacted by this historic model of communication. Unfortunately, creating new communication techniques in order to maximize our potential for constructive conflict resolution is no easy task. There are a number of key reasons for this. I'll mention the two most relevant for the purpose of this paper.

## **The Physiology of Defensiveness**

First, defensiveness is a "hardwired" self-protective response.

Dr. Joseph LeDeux, a neuroscientist at the Center for Neural Science at New York University, discovered a pathway that acts as a supersonic express route to the brain's emotional centers. This neural back alley, which appears to be reserved for emotional emergencies, bypasses the neocortex entirely, routing information from the thalamus directly to the amygdala, a tiny, almond-shaped structure in the limbic system that has recently been identified as the brain's emotional alarm center . . . which in turn [can] trigger a cascade of physiological responses—from a speeded-up heart rate to jacked-up blood pressure to mobilized muscles to the release of the 'fight or flight' hormones, adrenaline and noradrenaline.<sup>1</sup>

In other words, any time we get defensive, we instantly lose our capacity for complex problem solving. Have you ever walked out of a collaborative meeting—or any room—where there was a tense situation going on, and later thought, "Why didn't I just ask this or say that?"

Once reacting defensively, most people are still so upset by the interaction that it often takes at least 20 minutes to an hour for the adrenalin to dissipate—if no one else in the room says anything that keeps it going. In essence, as long as one or more people are reacting defensively, the odds of productive, creative problem-

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<sup>1</sup> Networker, July/August 1999, "The Emotional Imperative Psychotherapists Cannot Afford to Ignore," by Brent Atkinson, Ph.D., Director of the Family Therapy Program at Northern Illinois University, p. 26.

solving occurring are close to zero.

Dr. LeDeux suggests that it takes very little for us to get defensive—a frown, a raised eyebrow, or a certain tone of voice is often all it takes. I think this means that the ability to defuse defensiveness is the number one job for collaborative law professionals or anyone who wants to deal with conflict with great effectiveness.

## **Our Knowledge of Human Functioning**

Second, the field of psychology as we know it today is very new. The limited degree to which we have understood human nature has not provided a solid foundation for our efforts to create a more functional system of communication.

While the history of psychology dates back to the ancient Greeks, it was subsumed as a branch of philosophy until shortly before the 20<sup>th</sup> century, a mere 136 years ago. In 1879, Wilhelm Wundt, regarded as the “*father of experimental psychology*,” founded the first laboratory dedicated exclusively to psychological research. Sigmund Freud, considered to be the “*father of psychoanalysis*,” lived in the 20<sup>th</sup> century and died in 1939.

Virginia Satir, who developed what is commonly known as “*family systems therapy*,” lived from 1916 to 1988. She is credited with looking at each person in the family as a part of a *system*, rather than focusing on what is known as the “identified patient.” This focus on family systems is essential, I believe, for the collaborative family law process to work most effectively.

Throughout the 20<sup>th</sup> century, our understanding of human nature has evolved more quickly—supported most recently by some extraordinary results from current scientific research. One outgrowth of the evolution of our understanding has been that more effort has been directed *specifically* toward creating new methods of communication. The goal has been to design techniques that facilitate collaborative rather than adversarial interactions.

Despite the progress we’ve made, many of the new techniques being used are falling short of the desired results. I see a number of reasons for difficulty in creating an integrated, highly effective, “language for conflict resolution.”

## **Historic Uses of Three Communication Formats**

In the historic adversarial model, each of our three basic forms of communication—questions, statements, and predictions—has been used as a tool or “weapon” for manipulation and control. Most of us still have many deeply engrained habits that drive us to continue to communicate in ways that—however unconsciously—still prompt defensive reactions. I believe this is true for all of us, with clients and other professionals, as well as family members and friends. The influence may be subtle, but it is profound.

*Each of our three basic forms of communication has been used in very specific ways to judge, manipulate, control, and/or punish others.*

### **Questions**

First, the word “question” is rooted in words like “inquisition.” This dates back to a pre-adversarial court system, an inquisitorial system, where questions involved interrogation and torture. Asking questions in the context of the current adversarial model include not only using questions to interrogate, but also using them to send convert messages of judgment or criticism. The intention is to lead the person to the answer we want to hear and/or entrap the person by asking a question with two no-win answers.

### **Statements**

We make statements either about (1) what the other person thinks, believes, feels, or does in any situation and/or (2) about our own thoughts, beliefs, feelings and behavior with regard to any issue or situation. The first format for making statements is what we often call giving “feedback” to others—perhaps when we let another person know our viewpoint about their attitude or choices. Historically such feedback has often been labeled as “giving advise.” In the adversarial model, giving feedback is most often delivered as criticism or judgment, even if delivered with an overly sweet smile. The second format, which involves stating our own position on any topic, is often traditionally used to convince others to agree with us, whether through subtle manipulation or badgering. Whether our statements focus on others or our own position, while we can coat them with honey or use them as a bully stick, they have been traditionally use as a tool for persuasion and/or or more significant degrees of domination.

### **Predictions**

Traditionally, predictions, commonly known as “limit-setting” has been use as a tool for control and punishment. Limit-setting is often referred to as “an ultimatum”—do it or else suffer the punishment.

## **Shifting from Adversarial to Collaborative Communication**

In our effort to change how we gather information, give feedback, state our own position, and make predictions, we have been focused on eliminating specific problems.

For example, as conflict resolution professionals became more conscious of how people often resisted to being asked questions, they came to the logical conclusion that people were feeling interrogated. In order to solve the problem, people tried to think of other ways to gather information. One solution was to use active listening instead of asking questions. Another related solution involved the creation of a process called “Empathetic Listening.” While the process is used in many aspects of

communication, one of its functions is to make questions more palatable by infusing them with empathy.

Unfortunately, a significant number of newer communication techniques have been built on a foundation of assumptions inherent in the adversarial model for communication. Thus, they are likely to result in some similarly adversarial problems as well as to create new ones. It's like the parent who vows not to be harsh and authoritarian like his own parents, but swings the pendulum so far that he becomes very permissive. Such permissiveness is simply authoritarianism in a relationship where the roles have reversed. Now it's the child who becomes demanding and gives orders and the parent tries to accommodate.

First, I'll outline more than a dozen common communication practices that still are likely to damage our ability to defuse defensiveness. Second, I'll briefly describe how I believe these pitfalls came to exist in practices that were designed to be constructive methods of problem solving. Third, I'll propose how I believe we can avoid creating practices that are still rooted in the old adversarial philosophy. Finally, I'll present a model for a systemic, highly integrated practice of non-defensive communication that has the power to prompt people to drop their defenses—often instantly even in high-conflict situations.

## **Pitfalls in Current Best Practices**

These practices have become so common and widespread that people get in the habit of responding, to some degree, normally, or at least without reacting in overtly defensive ways. However, the underlying pitfalls remain, and have an impact on the success of the collaborative process. I refer to them as “best practices” because they have, for the most part, been specifically developed as alternatives to adversarial communication techniques. In some cases, however, they may be new habits that are offshoots from other newer intentionally created techniques. In yet other cases, they are an unconscious misuse of effective techniques due to deeply ingrained adversarial habits of interacting.

## **Pitfalls in Asking Questions**

### **Communication Form I**

#### **1. Using Active Listening in Place of a Question**

One of the primary techniques frequently used to avoid making clients feel interrogated by a professional's questions is to use active listening as an alternative to asking questions.

***Intention:*** The motivation can involve three parts: to soften the approach, help the person feel heard and understood, and so encourage the person to give more information.

For example, a client in a collaborative divorce might be expressing intense anger during a one-to-one meeting with a coach. The coach might respond by saying, gently, “It sounds like you are feeling very frustrated and angry.”

The problem I see here is that, in essence, the baby has been thrown out with the bath water. In order to get rid of the potential for a client feeling interrogated and/or resistant, any question that might have been asked has simply been *eliminated*.

A client with whom you have a good relationship may feel supported and tell you more, in response to an active listening statement. However, if we examine the linguistic structure, responding by paraphrasing as a means to gather information is a dead end. It calls for no answer at all. *The impact is multi-faceted.*

**Impact:** First of all, using active listening as a means to gather information instead of asking questions increases the likelihood of missing out on crucial information. At a minimum, a client might respond with, “Yes, I am upset,” which would probably seem obvious, or “No, I’m not,” which might seem like denial.

Second, if the person is “on a roll,” she might say, “Yes” to your statement about how upset she seems, and continue on a defensive, blaming tirade. So while you are getting “more information” it is not likely to be the kind of information that will move the process along in a helpful way.

In addition, I have seen many people respond defensively when someone uses active listening in place of a question. I’ve often heard people refer to it as “a technique” they don’t like because they see it as being “used on people” to get information. People also frequently refer to it as being condescending, or say, “You’re not my therapist.” While clients are less likely to feel comfortable making such comments to a professional than to someone in their personal life, the reaction is often the same. Many people see this particular use of active listening as one more revised form of manipulation to get information they may not want to give. Even if clients do not directly associate the process with “interrogating,” these common responses indicated to me that clients are at least experiencing it as adversarial.

## 2. Using Directives Instead of a Question

When a client gives you information or starts on a story and then pauses or seems to be finished, a common response now, in an effort to get more information, is to say, “Tell me more.”

**Intention:** The intention here is essentially the same as when using active listening—to draw out information without using a question. Again, it is based on the perception that people often react defensively to questions.

**Impact:** When regarded linguistically, “Tell me more,” is actually a directive, an order. It is in the same structural format as “Take out the garbage.” Or, “Tell me why you haven’t started your homework.” Again, the question has been eliminated.

Even if done gently, directives are still orders, which historically are given by a person in authority to someone lower in a hierarchy. As such, they can prompt physiological protective responses that may block the client from sharing of significant information. I think this also means that in a conversation with anyone who tends to be control avoidant, it can cause immediate, more overt resistance. The response might be a shrug, or anger, or an overtly polite, “That’s about it, there’s really no more to tell.”

### 3. Asking Questions that Put the Client in the Role of Expert

It is not uncommon to hear collaborative professionals, mediators, and/or other ADR professionals ask a client, “Can you help me out here?” Another variation is, “I’m confused. Can you help me out? In this case, the professional first professes to be confused, then follows the statement by asking for help.

**Intention:** I see this question used most often when the client has made a statement that doesn’t seem to make sense. Thus, since a primary intention here is wanting to be careful not to say or ask something that makes the client feel dismissed or disrespected, the professional tries to phrase the question so that it seems that he or she is the one needing help in order to understand an issues—or at least is asking out of respect for the person’s opinion.

An additional motivation often at play here is that this question is frequently used when we think a client is holding an untenable position and we want her/him to think it through more carefully. It functions as a means to get clients to try to explain more fully and thus, hopefully, come to realize that their reasoning is flawed.

The pendulum swings here from seeing the other person as the one who is confused or unrealistic about options to treating her or him as the knowledgeable one. Using this type of question can be both self-effacing and/or entrapping.

**Impact:** The first impact can be that it can feed the person’s ego and encourage her or him to feel reinforced in the idea that he or she knows more than others in the room. The potential for this impact is exacerbated if the person already has a sense of superiority.

Second, it can often make other parties in the room experience you as deferring to the person they are already in conflict with and thereby lose trust in the process. Finally, the person (or anyone else in the room) may see through the “I’m confused, can you help me out here?” and experience you as condescending.

### 4. Asking Primarily Open-Ended Questions

First, I believe that open-ended questions can draw out extremely valuable information that we might not otherwise have gotten. At the same time, I believe there are serious pitfalls to using open-ended questions fairly exclusively—outside the routine questions about scheduling and other details that must be asked.

**Intention:** One intention in sticking with open-ended questions is that closed-ended questions are often seen as leading only to non-productive “yes” or “no” answers. A second intention is based on a desire to avoid asking leading questions. In keeping with this, open-ended questions are also designed to give the client maximum freedom and control over sharing whatever information he or she wants to about crucial issues, needs, and interests.

In other cases, using open-ended questions can have a self-protective purpose. For example, perhaps your client is cooler toward you than usual and you think that he or she might be upset about something you said in an email or your last phone conversation. You ask, “How are you doing?” If the client says, still in a withdrawn tone, “I’m fine,” you may follow the first question with “Is everything OK?”

The intention here is to ask a more *indirect, general question* so that if the client *isn’t* upset about what you said, you can avoid bringing the issue up again.

**Impact:** When using open-ended questions, I’ve seen that people can more easily avoid answering honestly. This is especially true if they are trying to hide something. It might be as simple as having been irritated by something you said. Even small irritations, not aired and resolved, can impact a relationship and the process of resolution.

A second impact is that it can prevent us from asking specific questions that we would like to have answered. There are countless questions that can get at the heart of an issue quickly that are *not* open-ended, so if we avoid them, we risk missing out on valuable information.

## 5. Empathetic Listening When Asking Questions

Empathetic listening is applied to the question-asking process by conveying an attitude of concern while asking the question. It may be conveyed through a tone of voice, facial expressions and/or other body language.

**Intention:** The intention is two-fold. The first is to make sure the client does not hear the question as judgmental or cold and close down. The second, conversely, is to make the person feel cared about and heard, so trust can develop and he or she will be willing to commit to a cooperative process of conflict resolution.

**Impact:** When asking a question with the intention of showing empathy, most professionals (or anyone else) I’ve observed tend to lean forward toward the other person with a frown of concern or worry on their face. While I think their intention is to make sure that concern and caring is conveyed to the client, the body language actually mirrors the frown, squinted eyes, and forward-leaning posture of the

interrogator. As I mentioned earlier, we know now that such facial expressions can instantly prompt defensive reactions, regardless of what the speaker is actually feeling or saying.

In addition, attempting to send a message of concern or care when asking a question violates the nature of the question. The purpose of a question is to gather information, not give it. Even though it is intended as a compassionate message, the other person will start reacting to however he/she interprets your message rather than focusing on the question.

## 6. The Neutral Question

*The three pitfalls in the practice of asking a neutral question result from common unconscious misuses of this otherwise highly effective technique.*

**Intention:** The purpose of asking questions in a neutral tone is to make sure that the other person doesn't read in covert messages and react to those instead of being focused on the question asked. Asking questions in a neutral tone, without any covert messages of any kind *is* clearly essential.

At the same time, I think we must be cautious about some hidden pitfalls.

**Pitfall 1—Covert Messages:** In the effort to be neutral, if we are having *any* personal reaction to what is going on in the room, our effort to ask a neutral question will be in jeopardy. It will then convey our stress or irritation. What we are feeling might not be irritation at our client; it might be an urge to support her or him that is overprotective.

Even if we think our internal reactions are well-hidden, others usually know. How often have you sensed another professional saying something with a pleasant smile while you clearly sense their frustration radiating through the room.

**Pitfall 2—Leading Questions:** When our intention is to get the client or another professional to see our point, we may ask a question that sounds quite neutral, but is actually leading. We may only be semi-conscious or even unconscious that we are doing it.

Perhaps one client in the room continually brings up issues not on the agenda. In our effort to be neutral, we might ask, "Would you like to finish the work we're doing on visitation and pick this issue up in the next session?" If you are feeling frustration, the client may pick that up in your tone. However, it only offers one option, the one you prefer. Therefore, no matter how neutrally it is asked, its purpose is to fulfill your agenda, and it is leading.

In another situation, you might be surprised to find out that a client is moving to a neighboring state despite a time-share agreement with the other parent involving 2 children. You might ask, for example, "How are you planning to make the finances

work if you move and have frequent travel expenses in order to keep the time-share schedule?”

If you believe that the person may well have a viable plan, then this is an excellent, appropriate question. However, if you already know finances are limited and it's not feasible to think she can afford to send the kids back and forth regularly, then it is an attempt to lead her to the conclusion that, at the very least, there are daunting problems with her plan to move. It's a more subtle question than the one in the last example. It doesn't offer a single option, but can be equally leading.

***Pitfall 3—Hiding Our Own Reaction by Directing a Question to Someone Else:***

If we feel upset, for example, when one client makes a jarring side-bar, sarcastic remark about the other client, we might first hide our reaction. Then, not knowing what to say, we might turn to the an attorney or coach in the meeting and ask a question about whatever was being discussed prior to the remark being made. Here, to hide our own distress over the sarcastic remark by we have diverted by asking one of the other professionals a “neutral” question.

If I don't want to lose my neutrality, but am having a reaction to the client's sarcasm, I might also turn to the other client and ask, “How do you feel about what he is saying?” In the first case, my question involved changing the subject; in the second case, I put the other client on the spot to deal with the comment, which leaves her unprotected.

Whether we are sending covert messages, asking leading questions, and/or escaping from an uncomfortable situation, we are so used to being agenda-driven that it's easy to slip into contaminating the neutrality of our questions. And for all of us, the process is often unconscious or barely semi-conscious.

## **Pitfalls in Making Statements**

### Communication Form II

#### A. Giving Feedback to Others

***Core Issue:*** *When making statements: (a) giving feedback has historically been done in a critical manner, and (b) stating one's own thoughts, feelings and beliefs has been done with the intention to convince others to agree.*

#### A. Pitfalls When Using Active Listening

Active listening is the process by which we tell a person what we “hear” them saying. Active listening is a crucial part of non-defensive communication. The pitfalls all have to do with a combination of (a) how active listening has been structured and (b) how easy it is to slip into a misuse of it.

***Intention:*** The first intention is to make sure that we understand the other person correctly regarding what the other person has said about her or his thoughts,

feelings, beliefs, and or actions. The second, underlying intention is often to convey that we care about the person's feelings, ideas and beliefs.

**Pitfall 1—Identifying Covert Messages Instead of Focusing on the Words the Person Used:** We often hear a client say something in a tone or with accompanying body language that **sends** a message far different from the words alone—perhaps even completely contradicting them. In such cases, when we use active listening, we are very likely to address the covert message instead of the overt, verbal message. Perhaps a client says, in a tone that sounds sarcastic or angry, “Never mind, it doesn’t matter!” What I have seen is that many, if not most people, including ADR professionals, are likely to say, “It sounds like it’s upsetting you.” If the person is in denial, giving feedback about the covert message will simply make the person more upset.

### **Pitfall 2—Adding Emotion into Active Listening**

Sometimes people also want to infuse active listening with some kind of empathetic emotion. I don’t believe it works to try to add in an emotional tone, even empathy, because the person is then likely to react to my underlying message instead of using my active listening feedback to make sure I understood her. If I say, with emotion, perhaps paraphrasing a little “Oh, it sounds like what your ex said was really upsetting to you,” she might say, “Oh, don’t worry, I’ll be alright. I’m used to it.” Here, active listening has failed **its** purpose and taken the conversation in a completely different direction.

### **Pitfall 3—Repeating Verbatim and/or Paraphrasing Closely**

*When we do focus on words rather than covert messages, we can run into another problem.*

During training sessions in active listening, most of us are taught to repeat what the person said by restating it or paraphrasing it. Some practitioners advocate repeating verbatim, especially with highly defensive people who might pick at any discrepancy. Others suggest paraphrasing, often “as closely as possible,” what the person said.

#### **Impact:**

(1) *Repeating Verbatim:* If my client says, “I’m *really* upset about what my ex said to me,” and I respond in a neutral tone, “It sounds like you are really upset about what your ex said,” it can fall flat. It can have a kind of deflating or distancing effect, almost as if I am answering in a robotic way. Many people react the same way to hearing what they said, fed back verbatim, as they do when people use active listening instead of asking a question.

(2) *Close Paraphrasing:* Changing the words but trying to keep them close to what the person said can have the same kind of effect as repeating verbatim. Also, it’s hard to think of words sometimes that are similar. If someone says, “I’m really upset,” how quickly can we think of another word that is a close match to “upset?”

We might say “I hear you saying you are having a hard time, but is that close enough?” What I see happen is that most people slide into just repeating verbatim, with the same pitfalls mentioned above.

(3) *Creating Misunderstandings*: Ultimately, another major impact is that neither repeating verbatim or close paraphrasing will necessarily ensure that we understand what the person *meant* by what he said. In fact, it can actually create misunderstanding. In one conversation that was reported to me, an administrator said to another person, “Most administrators wear masks.” If I were in that conversation with the administrator and trying not to repeat verbatim, it would be hard to think of a word that is a close paraphrase to “mask.” The only one I thought of using was to say, “I hear you saying that administrators have a facade.”

However, even if I have used a different word, and the administrator says, “Yes, they definitely have facades,” does that tell me what either “mask” or “facade” actually means to the administrator? Wearing a mask might mean being dishonest, or divisive, or politically astute, or even “neutral” as a means to being “fair.” Or it might simply be a way to describe wearing many different hats. All of these answers, and more, have been given to me by audience members when I ask what the word “mask” *means to them*.

If I had coffee with the administrator a week or so later, I might say, in reference to our previous conversation, “Well, you know how dishonest most administrators are.” I might be surprised when he responds, “I don’t agree.” I might likely respond by saying, “That’s what you said a week ago.” He says, “No, I didn’t.” By paraphrasing so closely, I failed to understand what he meant. Such interactions often lead to conflict, because people remember what they meant more than they remember what they *said*. Ultimately, we are often left with misunderstandings that can go *either way*. We might *think* we understand or agree, but we don’t. Or, we might think we *don’t agree*, when we do.

### **Using “I” Messages Instead of “You” Messages:**

#### **B. Statements—Stating Our Own Perspective**

What is referred to as “I” messages include any statement we make that is given about ourselves—what we feel, think, believe, and/or do. What is referred to as “You” messages are those that focus on our perspective and feedback about what the other person feels, thinks, believes, and does.

***Intention***: The movement to use “I” messages as opposed to “You” messages is intended to help solve the problem of having feedback so often be critical and judgmental. The underlying assumption is, I believe, that if we speak only about our own experience, others will *not* feel judged or criticized by what we say.

The main tenet is to avoid escalating conflict by saying “I felt let down,” Instead of “You let me down.” That can be very valuable, because my feeling let down doesn’t necessarily mean that you either intentionally or unintentionally *did* let me down.

There might be a misunderstanding to uncover here. Or I might be expecting something unreasonable of you. Starting with a statement about what *I* experienced, can thus be very valuable in resolving the issue.

**Impact:** While this trend of using *I* messages can be very helpful, it also damages our ability to communicate effectively. The source of the problem is not simply the use of *I* messages. It is that *I* messages are being advocated as a *replacement* for *You* messages, as reflected in the catch-phrase, “Use “*I*” messages, not *You* messages.” Linguistically, this phrase is an objectified statement that becomes a blanket mandate. This leads many people try to avoid using *You* messages at all, which can impact us crucially in 4 ways.

**(1) Passive-Aggressive Blame:** We now hear people saying things like, I feel frustrated . . . manipulated . . . abandoned . . . used . . . disrespected . . . judged, and so on. In many cases the person’s intention is still to accuse and the accusation has simply been leveled in a passive-aggressive format. Therapists and ADR professionals are recognizing this issue and making it clear that “*I*” messages can and are being used in manipulative ways to make others responsible for how we feel.

**(2) No Option for Giving Direct Feedback to Others:** As with questions, there is a danger of throwing the baby out with the bath water. Any tendency to use *I* messages to the exclusion of *You* messages eliminates the option of giving another person direct feedback about any aspect of her or his attitudes and behavior. This prevents us from being honest about discrepancies we see between what a person says and does, broken commitments, ways the person is acting disrespectfully or abusively, and more.

Using *I* messages also prevents us from stating our assumptions or conclusions about what we think is going on with another person, which is a vital part of sharing our own observations and wisdom. Most of us have had those moments in life where such feedback has been vital to the development of our character.

**(3) Being Blocked From Giving Feedback Limits Our Ability for Constructive Problem Solving:** One attorney told me that her efforts to use *I* messages with her teenage daughter were “not going well.” She had asked her daughter to please wipe the table well when she cleared it so she could work on a pending case after dinner. When she sat down and put her papers on the table, she didn’t pay close attention and got something sticky on one of the papers.

She said to her daughter, “I feel frustrated when I ask you to make sure the table is clean and then my papers get dirty.” Her daughter said, with a little laugh, “Oh, I’m sorry you’re frustrated, *Mom*.” She grimaced and said, “Where do you go in a conversation like that?”

First, her daughter may well have reacted defensively because it was pretty clear that *Mom*’s frustration was about the daughter not doing her job thoroughly. Second,

Mom felt like she had nowhere to go when limited to *I* messages. I believe we lose not only our problem-solving ability, but also respect and trust when we don't deal directly with another person who is not keeping commitments or functioning competently. The ability to give direct feedback is essential to high functioning collaborative teams.

*(4) We Lose the Power of Our Own I Message:* Ultimately, When we use *I* messages to the exclusion of *You* messages, we undermine the power of our own *I* message. We waste our time and energy on covert messages about the other person's attitude or behavior.

When I say "I believe we need to stick to the agenda," sending a covert message to the one person in the room who is constantly bringing up other issues, the message may be lost on the disruptive person, while others in the room may feel unjustly blamed. Further, I lost my chance to say clearly and cleanly what it means to me to stay on the agenda in terms of the kind of impact it can have on respect, cohesiveness, and productivity.

## **Pitfalls in Predicting Consequences**

Communication Form IV

***Core Issue:*** *Predicting consequences has historically been done, first, as a means to control other people's decisions, attitudes, and behaviors. Second, it involves meting out punishment if the person doesn't make the choice desired by the person making the prediction.*

### **1. Perceiving a Cooperative Discussion as More Appropriate than Setting Limits in a Collaborative Setting**

***Intention:*** The idea that predicting consequences, i.e., limit setting, is not appropriate to a collaborative process often stems from deeply embedded associations most people have about limit setting being punitive. The intention is to honor the essential "collaboration" at the core of the process.

***Impact:*** The efforts to get resolution through cooperative discussion any time one party continually attempts to undermine or manipulate the process is like trying to reason with a child in the midst of a temper tantrum. When someone is disrupting the process, they are not in a cooperative mind state. Others end up either putting up with it and allowing the process to get bogged down, or trying to get resolution with impotent reminders. Everyone is left frustrated, and it violates the integrity of the process.

### **2. Using a Statement in Place of a Prediction with a Stated Consequence**

If you want to let a client (or other professional) know that you are not willing to continue to accept certain attitudes or behaviors that are disrupting the collaborative process, you may still avoid making a prediction with a clear consequence. Instead,

you might try to make a firm statement about the problem you see and the changes you think need to happen.

**Intention:** Many professionals avoid making predictions as part of an effort to be respectful. In such cases, they often end up making a statement using the *royal we*, saying something like, “I think it would be helpful for all of us to stick to the agenda so we can accomplish more in each session.”

**Impact:** When there is need for a clear boundary and it is expressed only as a desire for a change, as likely as not, little will change. Making a firm, direct statement about a desire for change is no more effective than trying to have a less direct, “cooperative” conversation. Not having clear boundaries and prescribed consequences when one person disrupts the process or acts in divisive ways will always be tantamount to a failure to create a safe space for all parties in the collaborative process. While creating a safe space for clients is primary, it is also needed for the professionals involved. One professional who is violating the collaborative guidelines can also create great stress for other professionals as well as the clients.

## **What Causes so Many Pitfalls in Our Efforts to Create More Effective Methods of Communication And Conflict Resolution?**

So much care and effort has been dedicated to changing our ways of communicating from the adversarial model that creates and accelerates defensiveness and power struggle to one that gives us the ability to resolve conflict constructively. How is it, then, that there are so many pitfalls in these new techniques?

I see two primary reasons. First, I think that we have been deeply impacted by the adversarial model of communication. Certain assumptions rooted in that traditional paradigm were accepted as a given in the process of developing new methods of communication. For example, even current definitions for the word *question* include: interrogate, cross-examine, grill, pump, doubt, dispute, and torture. Thus, even if we *consciously* believe in the constructive power of questions, we still have assumptions deeply embedded in our collective psyche that *equate* asking questions with a harsh negative interrogation process.

In my article, *New Roots for Social and Institutional Change*, published in the Winter, 2105 Edition of the *Collaborative Law Journal*, I reference the research done by Carol Travis and Elliot Aronson, presented in their book, *Mistakes Were Made (but not by me)*. While they have methods for moving past our limitations, they do suggest that it is human nature to respond negatively to hearing *feedback* about anything that suggests we have made “mistakes.”

“When we make mistakes, we must calm the cognitive dissonance that jars our feelings of self-worth. Most people find it difficult, if not impossible, to say, ‘I was wrong.’” They also suggest that we persist in our denial even when confronted with

irrefutable facts by creating a narrative that absolves us of responsibility, remembering our version as truth, blaming others for harm we have caused, and seeing ourselves as victims. It's no wonder that giving any direct feedback other than a compliment has been considered tantamount to judgment and harsh criticism.

The key problem of trying to convince others to agree when we state our own thoughts, feelings, and beliefs has also been identified as causing problems. However, the *I* message is in keeping with the essential function of the statement, so no *alternatives* to the part of the statement in which we express our own perspective were developed. The emphasis on the "I statement" highlights the need to avoid making *You* statements. This, of course, doesn't mean that we don't still misuse our *I* statements by overtly or subtly trying to convince others to see things from our point of view.

At the last conference where I was a speaker, one man said to me, "When I work with parents, they are so resistance to *setting limits*. They see it as punishment." The *quality and character* of punishment has been so associated with limit-setting that even for many highly educated parents, limit setting is still synonymous with punishment. Therefore parents often try to avoid setting limits and look for alternate ways to teach respect, enhance competence and inspire a spirit of cooperation in their children. While there is great power in modeling the characteristics we want to instill in our children, without clear boundaries we are likely to find our children being, to varying degrees, demanding and unappreciative. Adults often have even more resistance to setting limits with each other, both in professional and personal environments.

In summary, our traditional view of asking questions is commonly associated with interrogation, giving feedback is with criticism, and predicting consequence (setting limits) with being punitive. It's no wonder that our updated communication techniques focus so much on limiting the use of questions, feedback and predicting consequences, while greatly expanding the use statements that simply express our own position.

In the changes we've been making, the focus has been localized, primarily on the key issues of how to "fix" the problems of questions making people feel interrogated, feedback making them feel criticized, personal statements being used to convince others to agree, and predicting consequences being controlling and punitive. Also, because many of the assumptions used in making the changes came from the adversarial model, the newer communication techniques still cause many of the same old problems.

Finally, these deeply ingrained assumptions have shaped our habits. They are with us, and so we are often unconsciously prompting other people's defenses. Our tone can sound accusatory or send covert messages when we think we are just being curious. We can convey judgment while giving feedback when we think we are just being supportive. We can overtly or subtly try to convince others to agree when we think we are just expressing our own thoughts or feelings. We can be trying to get

others to make the choices we want them to make when we think we are just creating clear boundaries and have no agenda about what others choose to do. We often see this in other professionals, but it's harder to see in ourselves.

## Moving Beyond the Pitfalls

Philosophers down through the ages have studied various aspects of the functioning of the natural world, from a systemic point of view —everything from how the planets orbit to the process of evolution. Virginia Satir's groundbreaking work demonstrated that *human interactions* also *always* involve a "system" in which every person plays a significant, defined role. I think this family systems philosophy can be translated into the need for any effective change in our interactions to be made at a systemic level. Our methods of communication need more than a series of specific new techniques to fix our problems. We need to have an entirely different *system* of communication.

In order to accomplish that goal, I believe we need to reclaim the positive power of all four communication tools and revision their functioning. I started, years ago, by asking myself some essential questions about each of our four key formats for communication, including:

- 1. Questions:** How would a question function, if instead of making people feel interrogated, it was more likely to make them feel safe and want to open up and answer.
- 2. Statements—A. Feedback to Others:** How would giving feedback function, if instead of making people feel criticized, it was more likely to make them feel respected and want to listen?
- 3. Statements—B. Our own Position:** How would talking about our own perspective and viewpoint function, if instead alienating others by trying to convince them to agree, it was more likely that to create understanding across lines of difference?
- 4. Predicting Consequences (Limit Setting):** How would predicting consequences function, if instead of making people feel controlled and punished, it was more likely to motivated them to become more competent and reciprocal.

## A System for Collaborative Conflict Resolution:

I came to the conclusion that four aspects are involved in making comprehensive systems changes in how each of our four, core communication tools function: *intention, voice tone, body language, and some aspects of phrasing.*

The changes I made are part of the *Powerful Non-Defensive Communication™* (PNDC) paradigm I outline in my book, *Taking the War Out of Our Words*. I'll first describe four key changes for each communication form. Finally, I'll clarify how and

why this kind of systemic change can give us the ability to exponentially enhance our skill in defusing defensiveness and inspiring people's commitment to a collaborative conflict-resolution process.

## **PNDC Questions**

### Communication Form I

**1. Intention—Pure Curiosity:** In order to ask non-adversarial questions, my intention must be simply to understand your experience. Any question I ask must not be driven by personal agenda. I call it the *purely curious question*. The character of the question is curious, *open, innocent, neutral and inviting*.

**2. Voice Tone—Comes Down at the End:** When asking the question, it has a natural rhythm. You might say it starts in a middle range tone, goes softly up just a bit in the middle of the sentence and then comes down and rests firmly, but gently at the end. It's said in the same basic tone as a calm sentence, such as, "The sky is blue."

**3. Body Language—Relaxed:** The goal here is to be very present with the other person. My facial expression is not flat, or neutral in a disconnected way; it is open, receptive and relaxed. I cannot use the question to convey any information, even compassion. If I do, I turn it into a covert message.

**4. Phrasing—Neutral:** The question must be asked from the position of assuming you may not have all the answers and may get some surprises. It also must be asked using phrasing that is honest. If I don't think it will be feasible for a parent to keep his child in a private school after the divorce, I don't want to ask, "Do you it will be feasible to keep your child in a private school after the divorce?" I might ask instead, "How stressful do you think it will be if you can't afford to keep your child in a private school?" Or, "Do you have any options for keeping your child in the school that I don't know about?" Hearing questions that are real and do not carry covert messages prompts others to feel trust and be more willing to work on "the hard stuff."

## **PNDC Statements—A. Giving Feedback to Others**

### Communication Form II

**1. Intention-Descriptive:** When we give feedback without judgment, it is descriptive, not prescriptive. It is like simply like holding a mirror up for the person so he or she can see how we understood what they said. Instead of repeating verbatim, we can tell the person *what her or his words meant to us*—our interpretation of what he or she said. In the case of the administrator who said, "Most administrators wear masks," the other person said, "I hear you saying most administrators are not honest." The administrator responded immediately by saying, "Oh, no. I meant they are hiding." He was not at all offended, and this short interchange cleared up any

possibility of misunderstanding. If we tell the other person what we think his or her words mean, and we are wrong, he or she will usually quickly tell us what they actually meant.

In other cases, there is more risk of someone being offended by direct feedback, so it requires that we be meticulously conscious of any judgment we have. If we have a judgment, it needs to be transparent, named. For example, if you want to give feedback to someone who just said something very sarcastic, you might need to start first by saying, "I felt jarred by what you said. It seemed to me to be sarcastic at a time when Carson was being pretty open and vulnerable." You may find out that something you missed in Carson's statement was a trigger from past interactions he and his partner had.

The reason such a direct statement can work so well is because it's said "descriptively," like telling a story. You are simply describing your reactions and how you got to your conclusion, so the other person knows how you got there. It's subjective. You are not saying, with judgment, "That seems like a pretty harsh thing to say."

I once saw a couple that was considering divorce and during the first session, the woman said to her husband, Mark, "You are always SO angry!" He looked back at her with an intense scowl and said, "NO, I AM NOT ANGRY!!!" In the world as we know it, it would be very difficult to give him any feedback about the intensely angry look I saw on his face. This is especially true since it was their first session. In addition, I'm a woman, as was the accusing wife. One would think he would see me as "siding" with her.

I did, in fact, give him the feedback, saying, "What I see is that your face has lines that look almost like a mask of anger." He sat silent for a moment, then asked, "Do you have a mirror?" I said, "Yes, just down the hall in the bathroom." He came back a few moments later and said, "My god, you're right." He not only heard the feedback, he responded with insight and acceptance. He also did so in front of his wife—with regard to an issue they had clearly been in a power struggle over for some time. He showed no hint of feeling criticized.

How could this happen? I believe it's because when we give feedback as a gentle, neutral observer, the tone of criticism vanishes and the person can instantly become open to learning. When we are defending, we can't learn. When we feel safe, not under attack, learning can come instantly and naturally.

**2. Voice Tone—Comes Down at the End:** The voice tone is also relaxed and has a deeper tone, rather than coming up at various points in the sentence or at the end of it. The upward tone can add either an element of insecurity or a quality of urgency. If I'd said, "What I NotICED . . . it would have prompted his defensive reaction as quickly as my raised eyebrow; and he would not have been able to accept my observation.

**3. Body Language—Relaxed:** As with questions, the body language when making statements must be comfortably present, without urgency. If I'd so much as raised an eyebrow or shrugged (in an aborted attempt to soften my feedback), it would have pretty much guaranteed that Mark would have responded defensively.

**4. Phrasing—Neutrally Descriptive:** My words need to be descriptive in the sense that I might describe a scene, "It had just stopped raining, and all the clouds were gone and there was a rainbow in the sky. The sun was out and the water drops on the pines were sparkling like a thousand diamonds." This is very different from saying, "We'd had a terrible storm, which always scares me, so I was thankful when it was over and the sun came out. There was a rainbow too, but my dad used to always react to my goals by saying that I was chasing the non-existent pot of gold at the end of the rainbow, so that put me back into a bad mood."

In the second scenario, the listener will be reacting to my various emotions rather than focusing on the scene. Had I said to Mark, "I think you have an angry expression on your face," he would probably have gotten defensive. "I think," in contrast to "What I see," is all it takes to make the difference between judgment and observation.

## **PNDC Statements**

### **B. Talking About Our Own Experience and Perspectives**

#### Communication Form II

**1. Intention—Open Expression of Thoughts, Feelings & Beliefs:** Mixing emotion into the ways we ask questions, give feedback, or set limits will contaminate them and prompt defensive reactions. However, when we express ourselves in what we've referred to as the *I* Message, we can show emotion, even passion, openly. This form of statement is specifically designed for the purpose of fully expressing ourselves. The only qualifier is that we if we cross the line even a fraction, into trying to convince others to agree, we'll be back in the position of attempting to exert control over someone else.

Saying to a client, "I believe you have the ability to bring this topic up in a workable way in the meeting," can be an open statement of my own viewpoint, said with genuine feeling. If my client hears me, she may respond by feeling more confidence, but it must be *her* spontaneous response to what I said. If I have *any* intention of trying to get the client to feel more confident, I have crossed the line between a statement that expresses my own belief and one designed to convince the other person to agree.

**2. Voice Tone—Fully Animated:** My voice tone can be fully expressive of any feeling I have from joy, to sorrow, to anger, to excitement. It is, however, expressed from the inside-out and does not have that kind of urgency that we associate with someone who is overdramatic. That kind of intense expression is more like what I

think of as a false front, bad acting. If I express, for example, anger, when I push it out hard, it is likely to cross that line again and have an underlying agenda of getting someone else to respond in a specific way.

**3. Body Language—Relaxed:** Our body language can also be expressive of whatever we are feeling.

**4. Phrasing—Keep the Content Restricted to Our own Experience and Viewpoint:** While a conversation can go back and forth, I want to keep my feedback for someone else *separate* from my expression of my own perspectives. It keeps it much cleaner and people receive the information in both cases much more willingly.

## **PNDC Predictions**

### Communication Form III

**1. Intention—Create Security Through Predictability:** The purpose of predicting consequences is to give others the security of being able to anticipate what will happen depending on what choice they make in any given situation. Any investment in “which choice” a person makes will turn the prediction into an effort to control the other person.

**2. Voice Tone—Come Down at the End:** Again, as with asking questions and giving feedback, with a prediction the voice tone needs to be relaxed and smooth, coming down firmly at the end, but without “push.”

**3. Body Language—Relaxed:** If we add in any body language when we are making a prediction, it will have the same high probability of prompting defensive responses as when asking questions or giving feedback.

**4. Phrasing—If—Then:** There is only one form of phrasing for a prediction. *If* the person makes one choice, *then* a specific consequence is predicted. *If* the person makes a different choice (often the opposite of the first choice), *then* a second, difference consequence will be predicted. Every consequence is inherently two-sided. The word “If” is always before a choice, and the word “then” before a consequence on each side of the prediction.

*If* + Choice 1 = *Then* + Consequence X.

*If* + Choice 2 = *Then* + Consequence Y.

There are two kinds of predictions. One is a *Limit-Setting* prediction and the other is a *Challenge-Choice* prediction. The *If-Then* phrasing is identical for both types of prediction. It is also the same whether our intention is to control and punish or to create security through predictability. The difference would only be in intention, tone, and body language.

When we make a *Limit-Setting* prediction, we are firm but not punitive. You might

say to a client, (1) “If you continue to bring up issues that aren’t on the agenda, then I’ll ask you to make a note for the next time rather than diverting to the issue immediately.” (2) “If you want an issue on the agenda and let me know ahead of time, then I’ll do my best to get it on for the next meeting.”

You might also say to a client, (1) “if you don’t ask for enough child support to make sure the children’s needs are met, then you may be under a lot of stress later and not be able to meet their needs as well as you would like.” (2) If you do ask for and get what you need, then I think you’ll have less stress and be able to give your children more security.”

Here, the professional uses a *Challenge-Choice* prediction because she has no part in creating the consequence. It is what she anticipates life’s *natural consequence* would be for each of the choices the client might make in that situation. *Challenge-Choice* predictions are very effective in collaborative practice and can be used more regularly even than *Limit-Setting* predictions.

Janice, a collaborative family law psychologist and coach send me the following story about making a *Challenge-Choice* prediction for her granddaughter.

“I picked up Betsy, who is now 3 years old, from the house where she had been playing with her neighborhood best buddy, Kelly. She did not want to leave Kelly because they had been having a great time. We go to violin lessons every Monday (which is where we were headed) and Betsy is usually excited about going. As she came down the steps, she was protesting quietly at first, and then with each step the protest got a bit louder and she began to cry. As I buckled her into her car seat, she began to cry in earnest and then to wail. I took a deep breath and got into the car and started down the street, thinking *this is not going to go well*.

Meanwhile the wailing continued. Any other time I would have said, “Betsy, calm down. You love going to violin. Miss June will be very happy to see you. Please stop crying.” Or something like that. Then, I thought, why not try making a prediction? I must say that I was not expecting much as the crying had reached a fevered pitch. I took a deep breath and said, “Betsy, if you continue to cry, then you will just feel worse; if you take a deep breath, then you will feel better.” The backseat went dead quiet IMMEDIATELY. I was shocked! When I started breathing again, a smile crept across my face. Betsy was quiet for the rest of the ride and actually had a good violin lesson.”

The only point I’d add here is that Janice made this prediction absolute, “You *will* feel worse” and “You *will* feel better.” I recommend making *Challenge-Choice* predictions more subjective and tentative because we are not implementing the consequence ourselves and can’t be sure if the person will have the kind of consequential experience we anticipate they will have for either choice. For example, on one side of the prediction, I’d say, “I think you will probably (or might) feel worse if you keep crying,”

In the story above, Janice moved from her usual habit of just using statements designed to reassure Betsy that everything would be OK and trying to convince her to calm down. Instead, she made a simple *Challenge-Choice* prediction and three-year-old Betsy was able to process the prediction in the middle of a tantrum and make a decision that did make her feel better.

## **The Physiological Shift That Makes it Possible to So Quickly Defuse Defensiveness**

For decades, I've listened in awe to story after story from people about how they transformed interactions and relationships in professional and/or personal lives with a single question, statement, or prediction. Stories that have run the gamut of issues: out of control children and teens; difficult divorces; bullying at school; harassment in the workplace; demanding, critical clients; divisive employees; harsh managers. I've seen people come out of a state of impending psychosis in less than 60 seconds.

Of course there are always times when no matter what we do, someone we know will take a path that is painful to witness. At the same time, the rate of spontaneous change I have seen personally and have had reported to me goes far beyond what we would normally expect.

Over the years, I have come to trust how much impact changing our intention, tone, body language and phrasing can have. However, for a long time, I still didn't understand what was happening at a physiological level to make people, virtually instantly, able to transform an adrenaline rush that was already going full force, into a state of calm and openness—into a willingness to make wiser decisions and take accountability.

*Even if we have changed intention, voice tone, body language and phrasing, how can our physiology change so fast?*

A few years ago, I finally got an answer that satisfied me. Dr. Joseph LeDeux and other neuro-biology researchers have discovered that, first, we can't talk others out of being defensive. However, research on the amygdala has now proven that everything changes if we communicate with another person in a way that prompts her or him to move into a feeling state *outside of the realm of defensiveness*. While some people will never feel safe enough to drop their defenses, for most people that fight or flight adrenaline rush can dissipate as instantaneously as it flooded the person to begin with when she or he got triggered. The potential for eliminating defensiveness in any interaction is tremendous.

I want to go back once more to Virginia Satir's systemic understanding that every person in a family plays a role in the dysfunction and/or the health of the family. Every group we are in will quickly create its own system of interaction and

relationships, whether we are with family or friends or participating in a collaborative process.

I believe our understanding that every person plays a crucial role in shaping group interactions calls on us to become ever more conscious of our own part in the dynamics during meetings with clients and other professionals. We can focus on every molecule of our intention when we speak, notice a slight up-tone at the end of a question, a tiny twitch in our facial expressions, any hint of a covert messages in our phrasing that is contributing to defensiveness and power struggle. Of course, none of us can concentrate all the time, but we can work to enhance how we observe ourselves and make the changes needed to reclaim the natural, *constructive* power inherent in all three of our core communication tools. We have what we need to start taking quantum leaps in achieving a level of conflict-resolution skill that can consistently transform lives, including our own.