

**Alabama Education Association's
Network Attorneys' Seminar**

**Riverside Hilton
New Orleans, Louisiana
July 26, 2018 through July 28, 2018**

Presenters:

Brian Austin Oakes, Esq.
Alabama Registered Mediator
White & Oakes, LLC
601 Johnston Street, Southeast
Decatur, Alabama 35602
Firm (256) 355-1100
Fax (256) 355-0025

Victoria Relf, Esq.
The Relf Law Firm, LLC
60 Commerce Street, Ste. 325
Montgomery, Alabama 36104
Firm (334) 595-9779
Fax (334) 460-9921

Of Counsel:

The Gardner Firm, P.C.
1117 22nd Street South
Birmingham, Alabama 35213
Firm (205) 552-6801
Fax (205) 933-9063

Strategies to De-Escalate Conflicts:

Living to Hunt Again.....

Alabama's Students First Act, §16-24C-1, *et seq.* ("Act") and key appellate cases interpreting the Act, have substantially altered the ability of education workers in challenging an adverse employment decision, whether that be a transfer or a termination. Of note, *Chilton County Board of Education v. Cahalane*, 117 So.3d 363 (Ala.Civ.App. 2012), in which the Alabama Court of Civil Appeals zeroed in on an extremely narrow definition of "great deference" when weighing the employment actions of school boards, opened the door to almost *carte blanche* rule by school boards in termination cases. Under *Chilton County v. Cahalane*, Alabama appellate courts have almost gleefully refused to second guess local school boards' "judgment" in termination cases, even when that "judgment" from the most casual, non-legally trained individual, appears horrendously flawed.

Subsequent cases have continued to tighten the proverbial screw on questioning the substantive decision of school boards to terminate resulting in fundamentally unfair and illogical collateral decisions further frustrating an education worker's ability to even obtain historically recognized due process in termination proceedings. For example, in *Huntsville City Board of Education v. Jacobs*, 194 So.3d 761 (Ala.Civ.App. 2014), the Court of Civil Appeals overturned a retired circuit judge's decision reinstating a terminated teacher for, *inter alia*, the local board's refusal to provide the teacher with documents that were in the school board's possession that would have refuted one or more of the allegations for termination. In its opinion, the Appeal's Court went

so far as to rule, without legal precedence and contrary to most all notions of fair play, that boards only had to provide educators facing termination proceedings with documents and items that the school board intended on utilizing at the hearing, thereby relieving school boards of any duty to supply workers with documentation in the possession of boards that would directly refute the stated reason for termination.

In fact, since the passage of the Act in 2011 there have only been two cases where an educator prevailed before our appellate courts in a termination hearing. In *Shirley Taylor v. Huntsville City Board of Education*, 143 So.3d 219, (Ala.Civ.App. 2013), cert. denied, *Ex parte Huntsville City Board of Education*, 1121389 (Ala. 2014), the Court of Civil appeals overturned the Madison County circuit judge's order vacating an administrative law judge's finding that the Huntsville Board had violated the teacher's due process rights by not affording her a hearing when the teacher rebutted the presumption of delivery of the termination notice under §16-24C-6(k), Alabama Code 1975, as amended. In the only other case wherein the teacher prevailed, Civil Appeals set aside a termination where the local board failed to issue a written decision of the termination within the time prescribed by the Act. See *Dailey v. Monroe County Board of Education*, No. 2150965, (Ala. Civ. App. February 17, 2017).

Understanding the current difficulties in overcoming substantive decisions by boards to terminate employees, finding alternative resolution options suitable to a members immediate and long-term goals becomes imperative. Coupled with the substantial probability that most boards will not contradict a superintendent, reaching resolve that enables a member facing termination to keep employment or be able to seek employment with other school systems becomes priority number one, especially for those members without alternative means of income such as retirement or other sources of revenue. In such an environment, attorneys representing teachers,

or public workers in Alabama generally, must become creative and orient representation strategies to include alternative settlement options. A major aspect of focusing on alternatives to trying the ultimate issue in an employment termination case includes the ability to de-escalate the inherently adversarial nature associated with the termination process. As a means to assist attorneys in creating a negotiation environment more conducive to alternative resolution within the public education worker context, the following provides tips and recommendations for de-escalating conflict when dealing with clients, opposing parties, and opposing counsel:

I. De-Escalating Conflict: Clients, Parties, Opposing Counsel

A. Listening

When considering conflict, conflict de-escalation, and the communication process, few individuals begin by considering the concept of listening. However, listening remains a key aspect of the communication process (Mavandadi, Bieling, & Madsen, 2016). While there are various types of listening recognized by communication literature, active listening enables individuals to identify root causes of conflict and work towards de-escalation and eventual resolve.

Active listening is the process of listening to the substance and emotions of a message (verbal and nonverbal) and demonstrating to the one communicating the message that the message has been heard and understood (Bao, Zhu, Hu, & Cui, 2016). Active listening requires the listener to engage in the message being received and actively decipher the communicator's purpose and intent, which may not always be represented by the words being used in the message (Bao et al., 2016). Active listening encompasses both verbal and nonverbal messaging and builds trust between the communicator and the recipient (Bao et al., 2016).

Active listeners give undivided attention to the speaker in a genuine effort to understand his or her point of view. In conversation, active listeners do not interrupt the speaker or finish his or her sentences. When listening to a message, active listeners do not allow themselves to be distracted by internal or external interference, and they do not prejudge the speaker. Active listeners take listening seriously and do the best they can to stay focused on the speaker and his or her message (Bodie, Vickery, Cannava, & Jones, 2015). To increase active listening skills, listeners should use appropriate nonverbal cues including body language and eye contact. Repetition of key facts being relayed shows that the listener understands the substance of the message. Listeners should verbally acknowledge emotions being evidenced by the communicator. Recognition of the emotions of the communicator indicates that the listener appreciates or understands the importance of the message being communicated (Bodie et al., 2015).

When engaging in active listening, there are "hazards" to avoid. Because active listening focuses on recognizing the emotionality that may be attached to the message, it is easier for the listener to become emotionally attached or provoked in relation to either the message or the speaker (Cartwright & Solloway, 2017). Focusing solely on facts being relayed or solely on the emotionality of the message tends to increase conflict. Active listeners "blend" both facts and emotion to glean the communicator's true message (Cartwright & Solloway, 2017). Lastly, active listeners sometimes "over-think," and in the process begin to assume what the communicator is going to say next, thereby missing more of the communicator's intended message (Bodie et al., 2015).

Most people are poor listeners. However, with focus, one can overcome poor listening habits by taking several steps. First, one should take listening seriously and commit to becoming

a better listener. Second, one must work at being an active listener. One should give undivided attention to the speaker in a genuine effort to understand her or his ideas. Third, one must resist distractions by making a conscious effort to keep focus on what the communicator is saying. Fourth, one should not be diverted by appearance or delivery and set aside preconceived judgments based on a person's looks or manner of speech. Fifth, one should suspend judgment until having heard the speaker's entire message.

B. Questioning & Neutral Language

When trying to actively listen in a conflict setting, appropriate questioning techniques and use of neutral language redirect conversational tones from those of higher conflict or aggression to neutral, more cooperative tones (Folger, Poole, & Stutman, 2017). Generally, when attempting to discern factual allegations or specific acts, close-ended questions remain appropriate. Likewise, open-ended questions seek information concerning general acts. But when attempting to identify a person's interest or emotions "why" and "how" questions best engage people in the underlying reasons for positions or demands (Folger et al., 2017).

Often, the use of "why" or "how" questions spark negative or inflammatory messages. Reframing refers to the skill of taking a message that is inflammatory or destructive and restating it in a neutral or more positive way. Effective counselors utilize reframing throughout the dispute process. When attempting to reach resolve on behalf of a client, one should constantly listen for statements by others, including witnesses, school administrators, or the opposing attorney, that are inflammatory and restate them in a more neutral way. Reframing may be larger in scope than merely restating a phrase. It can also be used to reformulate the entire dispute into neutral, non-blaming language which the parties can then confront as a team, rather than as adversaries.

In most disputed matters, parties must learn to look at the situation from a different perspective. Reframing is the process which enables this to occur. It keeps the process moving by taking negative energy and turning it into something more productive in order to keep the process neutral and less confrontational (Helms & Oliver, 2015).

C. Non-verbal Communication

Often times, attorneys forget the connection between non-verbal communication and the interpretation of a message by the recipient. Overlooking this connection can lead to unintended conflict and hamper negotiations (McCann, 2017). Individuals do not simply rely on the verbal aspect of messaging, the various aspects of nonverbal communication influence the recipient's likelihood of either embracing or rejecting a persuasive message (Guerrero, Andersen, & Afifi, 2017).

The perception of threat is the primary cause for conflict escalation. The most important word in the previous sentence is "perception." If an individual has no intention of causing the other person harm (either physically or emotionally) and the other perceives that harm is intended, real intentions do not matter. With regard to the affect your actions have on the conflict, it only matters that they perceive you to be a threat. The leverage point for de-escalating the conflict remains others' perceptions, and the strongest impact one will likely have on people's perceptions is vocal tone and body language.

One commonly referenced study on the impact of non-verbal cues in the communication process comes from Albert Mehrabian (Mehrabian, 2017). In this study, Mehrabian found that when people communicate about feelings and attitudes the received message (the receiver's perception and interpretation of the message) is based on a combination of word choice, vocal

tone, and facial expression. Mehrabian expressed this observation with his “Liking Formula” that says: Total Liking = 7% Verbal Liking + 38% Vocal Liking + 55% Facial Liking.

Mehrabian's study has been misquoted, misapplied, and misconstrued by many people to say that 93% of every message conveyed to others comes from vocal tone and body language. That interpretation is simply not true. What is true is that in ambiguous situations where messages of like-dislike and other emotional context messages to others are being conveyed, people place more emphasis on the tone and body language than they do to the words. The practical implication of this observation is this, if words do not match tone and body language, people will believe tone and body language before they will believe words. Accordingly, it is imperative that when trying to de-escalate conflict, one be mindful that vocal tone and body language be free from inconsistencies between the words used and the non-verbal messages attempting to be conveyed (Mehrabian, 2017).

De-escalation of conflict requires one to be a good listener, actively listening to opposing views in a manner capable of building trust. Communication trust is bolstered with appropriate use of both verbal and nonverbal communication cues. These same skills, along with specific others, aid attorneys when working in teams to represent member clients.

II. De-Escalating Conflict: Team Representation

In more complicated matters or matters of first impression, AEA Network attorneys are periodically called upon to represent members in teams. Team representation provides AEA and its members multiple benefits including a varied division of labor and collective synergism capable of promoting innovative ideas and theories to aid in the advancement of a client's position (Alexander, Havercome, & Mujtaba, 2015). The following includes a best pointers

checklist for those working in teams on behalf of AEA members based upon the principles of conflict de-escalation discussed:

A. Listening Critically

Just as it is important to listen to clients and opposing counsel actively, attorneys working in successful teams listen critically to co-counsel accepting criticism and suggestions regarding strategies and approaches in representing clients. Being receptive to criticism from the team increases team rapport and strategy development (Körner, Wirtz, Bengel, & Göritz, 2015). Accepting critical communication enables team members to build a cohesive approach to problem solving and enables a unified front to be presented to the client (Körner et al., 2015). Working together at the outset to examine avenues and ideas, allows attorneys working in teams to prepare a joint strategy that would best serve the client and enable attorneys to discuss the strategy and options as a single advisory unit.

B. Labor Division

Network attorneys working in teams representing AEA members accept a division of labor that best maximizes AEA's efforts in affording members competent representation. A part of working within a team so as to avoid internal conflict and de-escalate existing conflict includes team members working on tasks and in areas best suited for the individual members, while providing support to other team members as may be appropriate. Successful team members avoid dominating discussions, opting instead, to facilitate team discussion and listen actively to other team members' input (Larivière, Desrochers, Macaluso, Mongeon, Paul-Hus, & Sugimoto, 2016).

C. Communication

Communication among team members is essential to the success of a joint task (Brewer, & Holmes, 2016). AEA Network attorneys must maintain appropriate, positive communication with other team members throughout the representation process. Positive communication lacks arrogance and is designed to communicate information in a respectful and informative manner (Mikkelsen, Sloan, & Hesse, 2017). Timeliness is of most importance when communicating with team members (Mikkelsen et al., 2017). Ignoring communication from team members or failing to return communication in an appropriate amount of time weakens team rapport and can lead to unintended interpretations and misrepresentations of information (Hughes, Griffin, & Worthington, 2017). Successful team members speak respectfully with team members, do not exhibit arrogance, and communicate timely with team members.

Conclusion

Conflict is inherent in the employment litigation process. This is especially true in the education employment world, understanding the significant difficulties in challenging adverse employment action. AEA Network attorneys must take every practical measure with which to de-escalate conflict within member's matters.

By practicing active listening skills, making appropriate use of questions and neutral language, and being mindful of non-verbal communication cues, AEA Network attorneys may decrease conflict capable of inhibiting alternative resolution to pending employment actions. These same skills, when utilized within AEA Network litigation teams, provide the best opportunity for conflict de-escalation thereby increasing the likelihood of positive resolve.

References

- Alexander, V., Havercome, C., & Mujtaba, B. G. (2015). Effectively managing employees to get results in a diverse workplace such as American Express. *Journal of Business Studies Quarterly*, 7(1), 13.
- Bao, Y., Zhu, F., Hu, Y., & Cui, N. (2016). The research of interpersonal conflict and solution strategies. *Psychology*, 7(04), 541.
- Bodie, G. D., Vickery, A. J., Cannava, K., & Jones, S. M. (2015). The role of “active listening” in informal helping conversations: Impact on perceptions of listener helpfulness, sensitivity, and supportiveness and discloser emotional improvement. *Western Journal of Communication*, 79(2), 151-173.
- Brewer, E. C., & Holmes, T. L. (2016). Better communication= better teams: a communication exercise to improve team performance. *IEEE Transactions on Professional Communication*, 59(3), 288-298.
- Cartwright, A., & Solloway, A. (2017). *Emotional Intelligence: Activities for developing you and your business*. London, UK: Routledge.
- Guerrero, L. K., Andersen, P. A., & Afifi, W. A. (2017). *Close encounters: Communication in relationships*. Los Angeles, CA: Sage Publications.
- Helms, W. S., & Oliver, C. (2015). Radical settlements to conflict: Conflict management and its implications for institutional change. *Journal of Management & Organization*, 21(4), 471-494.

- Hughes, C. M., Griffin, B. J., & Worthington Jr, E. L. (2017). A measure of social behavior in team-based, multiplayer online games: The Sociality in Multiplayer Online Games (SMOG) scale. *Computers in Human Behavior*, 69, 386-395.
- Körner, M., Wirtz, M. A., Bengel, J., & Göritz, A. S. (2015). Relationship of organizational culture, teamwork and job satisfaction in interprofessional teams. *BMC Health Services research*, 15(1), 243.
- Folger, J., Poole, M. S., & Stutman, R. K. (2017). *Working through conflict: Strategies for relationships, groups, and organizations*. London, UK: Routledge.
- Larivière, V., Desrochers, N., Macaluso, B., Mongeon, P., Paul-Hus, A., & Sugimoto, C. R. (2016). Contributorship and division of labor in knowledge production. *Social Studies of Science*, 46(3), 417-435.
- Mavandadi, V., Bieling, P. J., & Madsen, V. (2016). Effective ingredients of verbal de-escalation: validating an English modified version of the 'De-Escalating Aggressive Behavior Scale'. *Journal of Psychiatric and Mental Health Nursing*, 23(6-7), 357-368.
- McCann, V. (2017). *Human relations: The art and science of building effective relationships*. New York, NY: Pearson.
- Mehrabian, A. (2017). *Nonverbal communication*. London, UK: Routledge.
- Mikkelsen, A. C., Sloan, D., & Hesse, C. (2017). Relational communication messages and leadership styles in supervisor/employee relationships. *International Journal of Business Communication*, 2329488416687267. <https://doi.org/10.1177/2329488416687267>