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A New Model for Legal Communication: Sensory Experience and Representational Systems

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A NEW MODEL FOR LEGAL COMMUNICATION: SENSORY EXPERIENCE AND REPRESENTATIONAL SYSTEMS

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LAWYERS ARE PROFESSIONAL COMMUNICATORS.[1] Language is their principal tool.[2] From the first day of law school to the last day of legal practice, lawyers receive information about the law and human problems, internally organize and think about that information, and assimilate and communicate that information to others. Few professions are engaged so constantly in communication.

Two critical communication functions cut across all types of legal practice: (1) gathering information and (2) conveying information.[3] A lawyer performs these informational functions through both oral and written communication. In oral communication, the effectiveness of these functions is often dependent on the lawyer's ability to establish a rapport with the other person. In fact, the informational and rapport functions of communication are often considered to be inseparable. The better a lawyer is at these skills, the better the reputation the lawyer is likely to achieve.

Despite the central importance of communication to lawyering activity, no explicit model of communication has ever been developed for the legal profession. Although considerable attention has been directed towards legal communication,[4] most of the emphasis has been placed

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[1] *See* Allen, *The Dynamics of Interpersonal Communication and the Law*, 3 WASHBURN L.J. 135 (1964).

[2] *See* D. MELLINKOFF, THE LANGUAGE OF THE LAW vii (1963); Probert, *Why Not Teach "Semantics" in Law School?*, 10 J. LEGAL EDUC. 208 (1957).

[3] These same two communication functions also are important in psychotherapy. *See* V. SATIR, CONJOINT FAMILY THERAPY 63-74 (1964). Lawyers interested in legal communication can learn a great deal from models of psychotherapeutic communication.

[4] *See* N. BRAND & J. WHITE, LEGAL WRITING (1976); F. COOPER, WRITING IN LAW PRACTICE (1963); R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING (1965); I. MEHLER, EFFECTIVE LEGAL COMMUNICATION (1975); D. MELLINKOFF, THE LANGUAGE OF THE LAW (1963); W. PROBERT, LAW, LANGUAGE AND COMMUNICA-

upon written communication.[5] Lawyers must, however, gather and convey much information orally. A large part of a lawyer's daily activity consists of conversations with clients, witnesses, judges and other lawyers.[6]

This article will present a model for improving oral legal communication. The discussion will demonstrate how human beings create sensory-based models of the parts of the world they experience[7] and how these models affect the communication process. The three principal sensory-based channels of communication will be described, and the article will explain how both knowledge and use of these channels can improve the rapport and informational functions of communication. Emphasis will be placed on the lawyer's ability to recognize the world model of the people with whom he communicates and to adapt his own process of communication to insure that he is communicating clearly with all parties involved. It will become apparent how the process of a lawyer's communication should vary depending upon whether the communication is with an individual or with a group. Finally, the article will show how these principles of communication may be used in the preparation and trial of a case.

I. A PERSONAL MAP OF THE WORLD

A difference exists between the physical world and the world as perceived by any living creature. Each species has sense-receptor struc-

TION (1972); W. STATSKY & J. WERNET, CASE ANALYSIS AND FUNDAMENTALS OF LEGAL WRITING (1977); H. WEIHOFEN, LEGAL WRITING STYLE (1961); Symposium, *Language of Law*, 9 W. RES. L. REV. 115 (1958); Probert, *Law, Language, and Communication*, 23 CASE W. RES. L. REV. 307 (1972). There are countless law review articles on drafting and legal writing programs in the law school curriculum.

[5] A few notable exceptions are: D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH (1977); H. FREEMAN & H. WEIHOFEN, CASES AND TEXT ON CLINICAL LAW TRAINING (1972); T. SCHAFFER, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (1976); A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS (1976). Professor Walter Probert has done considerable writing about oral legal communication. *See* W. PROBERT, LAW, LANGUAGE AND COMMUNICATION (1972); Probert, *Causation in the Negligence Jargon: A Plea for Balanced "Realism"*, 18 U. FLA. L. REV. 369 (1965); Probert, *Communication at Trial*, 35 TENN. L. REV. 591 (1968); Probert, *Law and Persuasion: The Language Behavior of Lawyers*, 108 U. PA. L. REV. 35 (1959); Probert, *Law, Logic, and Communication*, 9 W. RES. L. REV. 129 (1958); Probert, *Law, Science, and Communication: Some New Facets to Empiricism*, 10 JURIMETRICS J. 51 (1969); Probert, *Law Through the Looking Glass of Language and Communicative Behavior*, 20 J. LEGAL EDUC. 253 (1963); Probert, *The Psycho-Semantics of Judicial Inquiry*, 34 TEMP. L.Q. 235 (1961); Probert, *Word Consciousness: Law and the Control of Language*, 23 CASE W. RES. L. REV. 374 (1972); 5 AM. JUR. TRIAL, *Courtroom Semantics*, §§ 1-121 (1966).

[6] *See* Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME LAW. 231 (1979).

[7] P. NATHAN, THE NERVOUS SYSTEM 278-79 (1969).

tures and mechanisms which have evolved to meet its informational needs.[8] Human beings, for example, can only detect certain categories of information from their physical environment.[9] This information must exceed certain threshold values to be detectable.[10] Even with these limitations, at any moment an almost infinite amount of perceivable information is available to the sensory apparatus of each person. To be attentive to all of this data is an impossible task. People pay attention, consciously and unconsciously, to only a few experiences from within the vast array of stimuli in the physical world made available to them at any one time.[11]

No person knows the true reality. Although that statement sounds as if it was made by a guru, scientists posit that some aspects of the world are necessarily deleted and distorted as each person constructs his own model of the world.[12] Hence, human beings never *exactly* know what is going on in the world around them. Too much is happening for the human mind to fully comprehend. People, of course, do have a sense of what is going on about them. If asked, they might even be so naive as to say that they know exactly what is happening.[13] What they are doing is extracting some of the almost unlimited number of sensory experiences constantly taking place around them and organizing these bits of information into a model for their whole world. These selected bits are represented in the person's view of the world as a continuous whole.[14] This is the process of human modeling[15] which allows people to create "maps" of the world in which they live.[16] In one sense it may be said that people are not living directly in the actual world, but rather through

[8] H. SCHIFFMAN, SENSATION AND PERCEPTION: AN INTERGRATED APPROACH 4 (1976).

[9] M. ALPERN, SENSORY PROCESS 5 (1967).

[10] E. GALANTER, NEW DIRECTIONS IN PSYCHOLOGY 97 (1962).

[11] M. ALPERN, *supra* note 9, at 5; I. MEHLER, *supra* note 4, at 18.

[12] Deletion, distortion and generalization are the three processes of human modeling which allow each person to construct a functional model of the world from the almost infinite amount of available information. R. BANDLER & J. GRINDER, PATTERNS OF THE HYPNOTIC TECHNIQUES OF MILTON H. ERICKSON, M.D. I 7-8 (1975) [hereinafter cited as PATTERNS I].

[13] The naive theory is that the human senses represent the world as it really is; the empiricist theory is that people construct personal views of the world from sense data. *See* G. TAYLOR, THE NATURAL HISTORY OF THE MIND (1979); Pines, *A Guided Tour of Inner Space* in N.Y. TIMES BOOK REVIEW 12 (January 13, 1980).

[14] "The cerebral hemispheres [of the mind] provide us with a mental representation of the environment within which we live." P. NATHAN, *supra* note 7, at 252.

[15] Models are required when the object to be studied is too complex to be studied directly or in its entirety. *See* Bohigan, *What Is a Model?* in MODELING THE CRIMINAL JUSTICE SYSTEM 16 (1977). *See also* S. NAGEL & M. NEFF, THE LEGAL PROCESS: MODELING THE SYSTEM (1977).

[16] *See* Glucksberg, *Thinking: A Phylogenetic Perspective* in HUMAN DEVELOPMENT AND COGNITIVE PROCESS 459, 462 (J. Elliott ed. 1971).

their "map" or personal representation of the world.[17] Such representation is an essential human activity.[18]

Each person creates his own map, or model, of the world. Every one of these maps is to some degree unique because each person has had different experiences in the physical world, and each person has selected different bits of these experiences to represent his map.

A striking truism for all these maps is that "the map is not the territory."[19] Maps differ from the reality of the physical world and each person has a different map for the same territory.[20] The usefulness of these maps is derived from their relationship to the territory. The more similar the map is to the territory, the more useful the map is to the person who uses it. Furthermore, the greater the similarity between maps of different people, the greater the shared understanding can be between those people. An understanding of the map-territory distinction suggests that determining reality is impossible and often not a useful pursuit.[21]

If a person's map of the world differs greatly from the real territory of the world, an alteration of the map might be in order. The use of a professional cartographer to alter the map is in the province of psychotherapy.[22] This article accepts the map-territory distinction and allows for the fact that there are many maps for the same territory. Lawyers should be concerned with reading maps, not with altering

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[17] *See* J. GRINDER & R. BANDLER, THE STRUCTURE OF MAGIC II 3 (1976) [hereinafter cited as MAGIC II].

[18] J. ROSENBERG, LINGUISTIC REPRESENTATION 1 (1974). The word "representation" is used both to describe the process by which the senses take in external stimuli and the form in which a person's knowledge or model of the world is stored in the mind. The word frequently occurs in scientific literature. *See, e.g.*, Smith and Nielsen, *Representations and Retrieval Processes in Short-Term Memory: Recognition and Recall of Faces*, 85 J. EXPER. PSYCH. 397 (1970); Nielsen and Smith, *Imaginal and Verbal Representations in Short-Term Recognition of Visual Forms*, 101 J. EXPER. PSYCH. 375 (1973); Weisberg, *Short-Term Representation of Sentences*, 101 J. EXPER. PSYCH. 381 (1973). For a history of the word representation, see Furth, *Piaget's Theory of Knowledge: The Nature of Representation and Interiorization*, in HUMAN DEVELOPMENT AND COGNITIVE PROCESS 283 (J. Elliott ed. 1971). For another view of representation, see M. FOUCAULT, THE ORDER OF THINGS (1970).

[19] *See* A. KORZYBSKI, SCIENCE & SANITY 58-60 (1958).

[20] MAGIC II, *supra* note 17, at 9.

[21] Yet one view of the legal system is that the trial seeks to disclose the truth, with the obvious underlying assumption that reality can be determined. This assumption appears to be unwarranted. At best, a trial can only determine similar reports on a shared experience; at worst, perceptions vary widely. Duffy, *Practicing Law and General Semantics*, 9 W. RES. L. REV. 119, 124 (1958).

[22] The use of the ideas discussed in this article in the area of psychotherapy can be found in the writings of Richard Bandler, John Grinder and Leslie Cameron-Bandler, which are found in the footnotes to this article. They call their work the Neuro Linguistic Programming, or NLP.

them. In the legal communication process, lawyers should be able to use a variety of maps for traversing the same territory.

II. COMMUNICATION: A SENSORY-BASED PROCESS

A communication theory should recognize that all human experiences are sensory-based. The physical world has a vast number of qualities which can be detected by human beings through their sensory systems.[23] Human beings experience the world through the channels of their five senses: sight, sound, touch, taste and smell.[24] These senses are used to create their maps of experience. Each sense provides the basis for a separate component of these maps.

As stated, these maps are never complete and never totally accurate. Even though all of the senses operate continuously, most information goes undetected.[25] Usually, a person ignores most sensory input and focuses attention on the sense receiving the information most important at the moment.[26] For example, one concentrating his awareness on the words printed on this page, is probably not as aware of the feeling in his right leg, the sounds around him, the smell in the air, or the taste in his mouth—at least not until his attention is directed to these experiences. Furthermore, these sensory-based maps, or representations of the world, are not identical for everyone. Scientific studies show that each person has a different set of sense receptors and that each person reacts differently to stimuli.[27] In addition to the people, places and things that each person experiences directly, each person's sense receptors are also externally stimulated through spoken and printed words.[28]

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[23] J. GIBSON, THE SENSES CONSIDERED AS PERCEPTUAL SYSTEMS 7 (1968).

[24] *Aristotle recognized these five senses,* L. & M. MILE, THE SENSES OF ANIMALS AND MEN 3 (1962), but the senses are not limited to these five. Others include a sense of temperature, muscular sense, a sense of distance, and a sense of balance. S. CHASE, POWER OF WORDS 29 (1954). Perhaps twenty-two different kinds of biological senses exist. R. WESCOTT, THE DEVINE ANIMAL (1969). For the purposes of the model for legal communicaton developed in this article, the five standard senses are adequate.

[25] D. GORDON, THERAPEUTIC METAPHORS 90 (1978) [hereinafter cited as METAPHORS]; J. GRINDER, J. DELOZIER & R. BANDLER, PATTERNS OF THE HYPNOTIC TECHNIQUES OF MILTON H. ERICKSON, M.D. II 3 (1977) [hereinafter cited as PATTERNS II].

[26] It is said that the human consciousness can only process a small number of bits of information at one time. *See* Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information,* 63 PSYCHOLOGICAL REV. 81 (1956).

[27] *See* L. KAUFMAN, PERCEPTION: THE WORLD TRANSFORMED (1979); H. SCHIFFMAN, *supra* note 8.

[28] MAGIC II, *supra* note 17, at 25. One commentator refers to the information that each person receives through their own personal experience as the extensional world, and information received through words from other people as the verbal world. S. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 26 (1949).

The external world, however, is only part of the map created by each person. The external world provides experiences for the senses to take in; the internal mind generates internal experiences which seem to be based upon previous sensory experiences. All people can "see" images in their mind's eye which are *presently* not caused by external stimulation. Likewise, a person can internally generate sounds, feelings, tastes and smells which are not taking place in the external world. Some of these internal experiences are memories of past experiences; some are the creation of sensations never previously experienced. The combination of these internal and external worlds is the sum total of a person's experience.[29]

A communication theory should recognize that all human experiences are sensory-based. No matter how abstract and intangible a word may appear to be, its meaning always relates back to information acquired through the senses.[30] The physical senses and language are the key elements of the human communication system. Not long after birth, people begin to learn a shared language system which allows them to represent, in a form that can be used to communicate with others verbally, the information they have acquired from the external world.[31] Because each person has had different sensory experiences throughout his life, words have slightly different meanings to each person and, hence, all words are metaphors.[32] But since words have sufficiently similar meanings to most people, human communication can take place. The most important aspect of this communication is not that every word has a slightly different meaning for each person, but rather that people use sensory experience to represent or to create a model for their world map.

As people interact with the world in which they live, they constantly use the representations of experience they have acquired. They use the maps they have built for themselves. Imagine how much easier communication could be, especially with clients, if a lawyer could read the maps people create. It seems reasonable, however, that these maps are buried deep within a person, perhaps even within one's subconscious mind, and are virtually inaccessible to any other person. Although this assumption appears reasonable, it also seems incorrect. The personal maps of individuals are visible. More accurately, these maps can be heard.

Listening to another person's speech can provide the lawyer with

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[29] L. CAMERON-BANDLER, THEY LIVED HAPPILY EVER AFTER 21 (1978) [hereinafter cited as L. CAMERON-BANDLER].

[30] "No proposition, however abstract its intent, is humanly possible without a tying on at the concrete world of sense." E. SAPIR, LANGUAGE: AN INTRODUCTION TO THE STUDY OF SPEECH 93 (1949).

[31] For an explanation of the language system, see generally P. WATZLAWICK, J. BEAVIN, & D. JACKSON, PRAGMATICS OF HUMAN COMMUNICATION 60-67 (1967).

[32] METAPHORS, *supra* note 25, at 9.

very detailed information about the speaker's personalized map of the world. "Reading the map" is simply a matter of specially directed listening skills.[33] Lawyers who cannot recognize other peoples' maps of the world are not listening correctly. The question, of course, is: "For what should the lawyer listen?"

To better understand the following analysis, a simplistic conceptualization of the communication process may be useful. First, a person has a sensory experience. Second, he thinks about the experience; the thoughts may be either contemporaneous with the experience or follow the experience in varying amounts of time. Finally, words are used to express the thoughts.

Thinking is an extension of the sensory process. When thinking, people have images, feelings and sounds (usually words) going on inside their heads.[34] They see pictures in their heads; they talk to themselves and hear other people; they have internal feelings.

It makes sense that if people are creating pictures, making sounds and experiencing feelings internally, they would select words that represent these internal processes. After generating internal representations, people speak in their language system, and the words used actually represent sensory-based information and thinking.[35] Within this communication process, the speaker's language reflects the mode of sensory-based thinking in which the speaker is engaged.[36] By recognizing this mode and directing his communication toward it, the lawyer can improve his communication with the speaker. Special listening skills will enable the lawyer to classify the speaker's thought process among the five sensory modes.

Implicit in this model for communication is the fact that communication is partially conscious, and partially unconscious. The content is usually conscious; the process is largely unconscious.[37] When speaking, people select (usually unconsciously) a set of words which allows the listener to detect the sensory system in which the speaker is verbally representing his experience. In other words, the portions of experience and thinking process which are represented consciously can be detected because of the choice of words selected at the unconscious level.[38] These sensory modes of expression—with one mode for each sense—are called "representational systems."

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[33] Unfortunately, listening skills do not seem to be highly valued in the American culture. S. CHASE, POWER OF WORDS 167-76 (1954). Certainly lawyers are not noted for their listening skills. D. BINDER & S. PRICE, *supra* note 5, at 20.

[34] L. CAMERON-BANDLER, *supra* note 29, at 21.

[35] Stored, past experiences are used as the basis for understanding present experiences. PATTERNS II, *supra* note 25, at 14.

[36] A visual aspect of communication is discussed in Begg, Upfold, and Wilton, *Imagery In Verbal Communication*, 2 J. MENTAL IMAGERY 165 (1978).

[37] MAGIC II, *supra* note 17, at 9; PATTERNS I, *supra* note 12, at 34.

[38] L. CAMERON-BANDLER, *supra* note 29, at 34-35.

It is, therefore, imperative to listen for the process, not just the content. The nouns of a sentence reveal the speaker's content. The predicates reveal the speaker's process. Predicates, verbs, adverbs and predicate adjectives, define the relationship between the subjects and objects (noun parts) of the sentence.

Normally, lawyers listen to other people for *content*. Unfortunately, lawyers typically neglect the *process*. Additional information could be gathered from speakers if lawyers could tune in to the process of communication.[39] The communication process reveals how the speaker created or arrived at his beliefs.[40] Understanding another person's thinking process can be extremely useful for gathering additional information from the speaker or in effectively conveying information to the speaker.

Some examples of sensory-based predicates are in order.

Visual Speaker:	I *clearly* get the *picture* of your *brilliant* idea.
Auditory Speaker:	I *hear* what you are *saying* and it *rings* true to me.
Kinesthetic Speaker:[41]	I do get the *point* of it. It is not *hard*.
Olfactory Speaker:	This is a *fresh*, pleasantly *fragrant* concept.
Taste Speaker:	It is a *sweet* thought.

The overwhelming majority of communication is limited to three sense modalities:[42] visual, auditory and kinesthetic. The remainder of this article will concentrate on these three main representational systems. The gustatory and olfactory systems are used too infrequently in speech (with the corresponding assumption that they are used

[39] The suggestion is to pay attention to two levels of the communication at the same time because there is important information to be learned at both levels. "[I]n actual human communication a single and simple message never occurs, but that communication always and necessarily involves a multiplicity of messages, of different levels, at once." Jackson and Weakland, *Conjoint Family Therapy: Some Considerations on Theory, Technique, and Results*, in THERAPY, COMMUNICATION, AND CHANGE: HUMAN COMMUNICATION 225 (D. Jackson 3d ed. 1968). "[C]ommunication takes place on more than one levels [*sic*] *simultaneously*." W. PROBERT, LAW, LANGUAGE AND COMMUNICATION xxvii (1972).

[40] L. CAMERON-BANDLER, *supra* note 29, at 34.

[41] In this article, kinesthetics will refer to all body sensations. Physical scientists are usually more precise, using the term kinesthetic sensitivity to refer to "spatial position and movement information occuring from mechanical stimulation of the mobile joints and muscles," and using the term cutaneous sensitivity to refer to "skin sensitivity to touch or pressure, temperature, and pain." H. SCHIFFMAN, *supra* note 8, at 92.

[42] MAGIC II, *supra* note 17, at 4.

relatively infrequently in the thinking process) to merit further study. Some readers, of course, might think that this characterization "stinks" or leaves a "bitter taste" in their mouths.

Not all predicates, however, reflect sensory-based representational systems. The following list[43] may be an aid to recognition of the three major representational systems in speech.[44]

Visual	Auditory	Kinesthetic
see	hear	feel
picture	listen	point
flash	shout	smooth
glimmer	loud	push
envision	tell	cold
clearly	whisper	grasp
scene	talk	firm
blank	sounding board	contact
dark	screech	hard
look	amplify	reach
blue	tune	warm
watch	tone	soft
appear	scream	touch
dull	harmonize	tight
perspective	discord	rough
imagine	silent	handle
bright	orchestrate	solid
show	rustling	stuck
focus	rings	cemented
vague	bell	get in touch with
disappear	purr	tired
illustrate	squeal	heavy
colors	crackle	pull
shapes	converse	tickle
viewpoint	say	turn
obvious	remark	knock
transparent	rattle	hold

[43] A smaller list can be found in E. ABERNATHY, THE ADVOCATE: A MANUAL OF PERSUASION 248 (1964). That same list is reproduced in G. BELLOW & B. MOULTON, THE LAWYERING PROCESS 932 (1978).

[44] Some words could reflect two representational systems. "Clapping of hands," for instance, could be visual or auditory depending on whether it is seen or heard.

Visual	Auditory	Kinesthetic
vigilant	quiet	brush
make a scene	in other words	strike you
eye-to-eye	voices	comfortable
ray of light	quiet down	insensitive
attract attention	ask yourself	callous
watch out	clap	over-powering
set the stage	hum	tied up
fantasy	tap	seized
muddy	pitter-patter	effort
vision	snap	cover
	drip	beat
	slam	hang

Every "normal" person is capable of receiving worldly input and organizing it in any of the representational systems.[45] A person's speech, however, is not normally found to be equally divided among words reflecting the three representational systems. Often, only a single representational system will be used by the speaker. The particular representational system used depends upon the context of the communication.[46] People use different representational system predicates when describing different parts of their experience.[47] The representational system predicates occurring most frequently in a speaker's verbalizations identify the most consciously significant sensory mode for that particular context.

Lawyer (visual in the legal context):	I *look* at my legal career as having a *rosy* future. It *appears* that if I can continue to *see eye-to-eye* with my employer, my job will never be *dull*. In fact, I *clearly envision* becoming a legal *star*.
Lawyer (kinesthetic in the jogging context):	Although it was *hard* starting *up*, my jogging now *strikes* me as deserving my *solid effort*. I *feel* I can *handle* it now. It really helps me to keep my life *flowing smoothly*.

[45] MAGIC II, *supra* note 17, at 8.

[46] METAPHORS, *supra* note 25, at 96.

Usually, no one representational system is better than any other system for understanding the world and creating maps. Some activities, however, are typically found to be discussed through utilization of a particular sensory mode.[48]

Most people use all representational systems at *some* time, and a few people will consistently use all representational systems.[49] These few are adept in all systems and choose whichever system they find to be most appropriate to the situation.[50] Most people, however, have a most-highly-valued representational system.[51] It is the primary way in which these people process their worldly experience.[52] In their most-highly-valued representational system, people are the most sensitive and can make the finest distinctions between experiences within their environment.[53] Typically, by habit and during times of stress, people rely on their favored sense mode.[54]

Which of the three major representational systems is chosen as the speaker's most-highly-valued representational system is irrelevant for the purposes of legal communication. For the lawyer, the importance is to be able to recognize which representational system is the most-highly-valued to the speaker.

Before a lawyer attempts to determine a person's most-highly-valued representational system, two caveats about the language system should be raised. First, certain process words are unspecific with respect to any representational system. The following are examples:

bad	change	understand
good	intuit	experience
nice	trust	remember
learn	consider	respectful

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[47] *Id.* at 93.

[48] People who have sexual dysfunction frequently are visual, rather than kinesthetic, when thinking about sex. L. CAMERON-BANDLER, *supra* note 29, at 46-47.

[49] Each person can receive input through one sense channel and store it in another. For example, a person can see an image and store it as a word (auditory). Likewise, people make pictures from words they hear. MAGIC II, *supra* note 17, at 5.

[50] Goleman, *People Who Read People*, 13 PSYCH. TODAY 66, 69 (July 1979) [hereinafter cited as Goleman].

[51] PATTERNS I, *supra* note 12, at 10.

[52] Generally, a person's most-highly-valued representational system will be in the sensory mode which they are most aware of in the external world. PATTERNS II, *supra* note 25, at 22.

[53] R. BANDLER & J. GRINDER, FROGS INTO PRINCES 34 (1979) [hereinafter cited as FROGS].

[54] Goleman, *supra* note 50, at 69-71.

sense	realize	be aware of
know	believe	
think	indicate	

These predicates do not reveal any sensory process in the surface structure.[55] Even though all thinking requires sensory processing, these words are merely masks which cover the sensory thinking process employed. The underlying representational system can be uncovered by asking, "How, specifically do you [think, know, understand] that?"[56]

Second, certain trained or learned responses used by professional communicators or by people with special training do not necessarily reflect that representational system that the words utilized would normally represent. For example, people who have had special listening skills training frequently say things like, "It *sounds* to me like . . ." or "I *hear* you saying . . ." or "so the way you *see* it is. . . ."[57] These statements may indeed reflect the external (and perhaps internal) sensory system of which they are most aware *or* may simply indicate a learned response. Suffice it to say that a more accurate gauge of a person's true representational system can be gained when he is answering questions. In these circumstances, people must "look within" to their stored experiences and use their representational systems to verbalize the information required for the answer.

III. REPRESENTATIONAL SYSTEMS AND LAWYERING

Given the knowledge that people use three primary sensory modes for receiving input, organizing, thinking and producing output, the question arises as to what implications exist and what actions can be taken by a lawyer or any other communicator utilizing this information. Knowledge of representational systems directly relates to the principal lawyering tasks of gathering and conveying information, and to the subsidiary tasks of building trust and establishing rapport—each of which can improve the informational functions. The lawyer, as a professional communicator, strives to understand other people and to be understood. Skilled use of representational systems will facilitate the performance of these tasks and functions.

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[55] Linguist Noam Chomsky uses the term "surface structure" to refer to the way a word sounds to a listener and deep structure to reflect its meaning. N. CHOMSKY, LANGUAGE AND RESPONSIBILITY 165-79 (1977).

[56] L. CAMERON-BANDLER, *supra* note 29, at 38. A complete system which can be used to reconnect speech to the experience represented by the language is set forth in R. BANDLER & J. GRINDER, THE STRUCTURE OF MAGIC I (1975).

[57] Examples of learned listening skills phrases which may not reflect the representational systems can be found in R. CARKHUFF, THE ART OF HELPING (1977); T. GORDON, LEADER EFFECTIVENESS TRAINING (1977); T. GORDON, PARENT EFFECTIVENESS TRAINING (1970); D. HAMMOND, IMPROVING THERAPEUTIC COMMUNICATION (1978).

Since each person creates his own model of the world and uses his most-highly-valued representational system when interacting with the world, it is logical to assume that if a lawyer could communicate with a client in the client's most-highly-valued terms, it would give the client a sense that he was being understood.[58] This would facilitate information transfer.[59] In addition, by giving the appearance that the two people were sharing the same reality,[60] it would provide a common ground on which a trusting relationship could be based.

Lawyers can best speak the same language as the client by matching representational predicates with those of the client. Mismatching creates confusion—an appropriate technique if the lawyer does not want to create rapport or facilitate information transfer.[61] If a person's thinking process requires "feeling" (kinesthetic), then seeing "pictures" (visual) is almost a different language. If a person is hearing words (auditory), then having "feelings" (kinesthetic) is completely different. For example:

Client Kinesthetic:	I *feel* so pleased that I could *catch* you in today. This new legal problem has me *depressed*, really *down in the dumps*. It's just so *tough*, I can't get a *handle* on it.
Lawyer Visual:	I can *see* that you *look unclear*. Give me your *perspective* of this *dark* problem. As soon as we *see eye-to-eye* we will *picture* a *bright* solution.
Client:	Huh? (with confusion)

A lawyer wants to understand and to be understood. He wants to get messages across to other people in a manner that makes it most likely

[58] Goleman, *supra* note 50, at 71.

[59] MAGIC II, *supra* note 17, at 16.

[60] *Id.* at 25. A similar concept is discussed at G. BELLOW & B. MOULTON, *supra* note 43, at 918.

[61] Visual, auditory, and kinesthetic people may find communication confusing and frustrating with a person using a different representational system:

> Typically, kinesthetics complain that auditory and visual people are insensitive. Visuals complain that auditories don't pay attention to them because they don't make eye contact during the conversation. Auditory people complain that kinesthetics don't listen, etc. The outcome is usually that one group comes to consider the other deliberately bad or mischievous or pathological.

MAGIC II, *supra* note 17, at 17.

that he will be understood. Being "clear" (visual) might not be the best strategy. Perhaps it might be best if the message would "ring" true (auditory). Or, perhaps the need is to make "contact" (kinesthetic) with the listener.

The lawyer, as well as each person with whom he communicates, has his own most-highly-valued representational system. The lawyer, as the professional communicator, should accept the primary responsibility for the communication; hence, he has an obligation to notice and use the most-highly-valued representational system of the people with whom he communicates. This is so even if it means abandoning his own most-highly-valued representational system.

Representational systems can be utilized in any communication. Although the use of the concept may have the most impact when used in verbal communication, it can also serve to aid written communication. The major approaches to the utilization of representational systems depend upon the number of people and the type of feedback the lawyer is receiving in the communication. The lawyer is concerned with the most-highly-valued representational system of the other people with whom he is communicating and with how many most-highly-valued representational systems are present. For purposes of application, the communication can be broken down and analyzed as communication with groups or with individuals.

A. Communications With Groups

In most communication with groups, the lawyer receives little, if any, immediate feedback from the group. Thus, he is not able to determine the most-highly-valued representational system of each group member.[62] This difficulty of inadequate feedback applies to communication with six and twelve person juries,[63] with three to nine person panels of judges, with boards of directors, with Continuing Legal Education audiences, with law school classes, with public service groups or with any other groups the lawyer may be addressing. In fact, the feedback even in one-on-one discussions may be insufficient, especially if the dialogue is really a monologue.

A further problem with group communications is that even if the lawyer could ascertain the most-highly-valued representational system of each individual member of the group, he would no doubt discover that some group members are primarily visual, some primarily auditory and some primarily kinesthetic.[64] Each type of person may be present, and,

[62] The professional communicator makes significant use of feedback. Goleman, *supra* note 50, at 69.

[63] 5 AM. JUR. TRIALS, *Courtroom Semantics* § 14 (1966).

[64] Personal experience indicates that most people are primarily either visual or kinesthetic and most lawyers and law students seem to be primarily visual in the context of law.

absent special considerations, each person should be made to feel that the lawyer understands that person's model of the world. The task requires that the lawyer be tri-lingual, that is, he should be able to speak in all three representational systems. He should consciously mix his representational system predicates so as to include something for everyone. His words should create images for the visuals, provide sounds for the auditories, and evoke feelings for the kinesthetics. This is not to say that a person whose most-highly-valued representational system is not represented in communication will not understand the communication. It merely says that for a person whose most-highly-valued representational system is included in the communication, then this person is more likely to understand, have greater rapport with, and confidence in, this particular lawyer.[65] Another representational system may be used not only in the choice of sensory-based words, but also in the selection of the transmittal mode. The most common form of communication used by lawyers is the auditory mode, which is provided primarily through spoken words. Lawyers and law professors infrequently use visual aids. Ironically, their transmittal mode (auditory words) seems to neglect their own most-highly-valued representational system (visual), although the words are frequently composed of many visual predicates. Much more visual input could be produced by using gestures, visual aids, or even words on a blackboard.[66]

B. Communication With Individuals

When communication is with a single person, the lawyer can learn that person's most-highly-valued representational system by listening to his predicates. This takes a little practice and careful attention.

Effective use of representational systems is a two-step process. First the lawyer must detect and categorize the most-highly-valued representational system used by the other person. Second, the lawyer must use the person's most-highly-valued representational system in his own communication.

The lawyer must be fluent in all three representational system languages even though he would typically use only his own most-highly-valued representational system in his normal speech. For example, the lawyer's inquiry into a client's problem would differ depending on which representational system was being used:

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[65] Another approach would be to speak using unspecified predicates, not indicating any particular representational system. Such word patterns allow each listener to select an internal representation consistent with his most-highly-valued representational system. The difficulty with this approach, however, is that unspecified predicates are more limited and not as rich and varied as those of other systems. The lawyer in this case would have fewer words with which to work.

[66] AM. JUR. TRIALS, *Courtroom Semantics* § 14 (1966).

Lawyer (to visual client):	How do you *see* your problem?
Lawyer (to auditory client):	What would you like to *tell* me about your problem?
Lawyer (to kinesthetic client):	How do you *feel* about your problem?

Lawyers could keep a list on the representational systems of people they frequently encounter so they will not have to rediscover the most-highly-valued representational system each time they engage that person in conversation. This suggestion would apply equally to clients, other lawyers and judges.

It should also be recognized that although many people have a most-highly-valued representational system which they constantly use in all contexts, some people use different representational systems in different contexts,[67] and other people may frequently use two, or even all of the representational systems. The key concept to be aware of is that the representational systems used most often by the other person should be matched to increase rapport and improve information transfer.

IV. EYE MOVEMENTS—DISCOVERING REPRESENTATIONAL SYSTEMS WITHOUT USING WORDS

In conversations about legal problems, people generally talk about their past experiences.[68] For example, they may describe a commercial transaction or a crime situation in which they were involved. Naturally, these past experiences are no longer directly available to the speakers through their sensory receptors,[69] and therefore the speakers must rely on their memories to recall the experience. Through a mental process, speakers gain access to these stored experiences and bring them into consciousness. Although predicates offer explicit auditory information about the sensory channels in which these experiences are stored, words are not the only source of such information. Non-verbal behavior, which is recognized as another form of communication, also indicates which representational system a speaker is using. Some people can even detect representational systems by paying attention to tonal qualities of the voice, tempo of speech, breathing and skin color changes.[70]

[67] Goleman, *supra* note 50, at 96.

[68] The relationship between legal and psychotherapeutic communication can be more clearly understood when it is considered that clients in therapy also are talking about their past experiences (and their internal experience as well). L. CAMERON-BANDLER, *supra* note 29, at 39. Both professions are concerned with client rapport and information transfer, although the emphasis varies.

[69] People also may, of course, be having present feelings about these past experiences.

[70] *See* PATTERNS II, *supra* note 25, at 35.

The human eye has always been considered important in communication.[71] Movements of the eye, or scanning patterns, are one way of categorizing eye communication. Eye scanning patterns have been studied in attempts to determine how a person recalls his stored experience.[72] A recent theory asserts that eye movements literally show from which representational system the information is derived. Each major sense (visual, auditory and kinesthetic) is linked to a distinctive eye movement.[73]

Comparing the spoken predicates to eye movements corroborates the theory that each sense is linked to certain eye movements. A notable example is the common situation where a person is asked a question and before he answers he says, "Oh, let's see," as his eyes move upwards (and sometimes his head tilts backwards). The speaker is literally looking at a visual image to find the answer even though he has little conscious awareness of this process. This is just one example of what is constantly taking place in front of every listener. A little more attention to the speaker can provide the listener with much more information about the speaker's thinking process and personal view of the world.

Because the eye movement patterns are systematically organized, a model for reading these eye movements can be constructed. A movement may be only a mere flicker or may last for several seconds.[74] For purposes of reading this form of nonverbal behavior, eye movements can be said to be limited to only vertical (up, middle and down) and horizontal (right and left) positions.[75] The typical eye movement pat-

[71] "Look into a person's pupils, he cannot hide himself." Confucius, 551-478 B.C. During the 1960's, Eckhard Hess, a psychologist at the University of Chicago, demonstrated that the pupil dilates and contracts depending on whether the person likes or dislikes the object viewed. "There is probably no part of the human body other than the human eye where I feel so intuitively that we have access to the innermost workings of the mind." E. HESS, THE TELL-TALE EYE 3 (1975). The Arabs have known about the pupil response for hundreds, if not thousands, of years. *See* Friedman, *Learning the Arab's Silent Language*, 13 PSYCH. TODAY 45, 47 (1979) (interview with Edwan T. Hall).

[72] Eye movements have been the subject of numerous scientific studies. *See, e.g.*, J. SENDERS, EYE MOVEMENTS AND THE HIGHER PSYCHOLOGICAL FUNCTIONS (1978). Disagreement exists among researchers as to the link between eye movements and the brain's sensory processing mechanism. *See* Goleman, *supra* note 50, at 71.

[73] Goleman, *supra* note 50, at 71. The linkage proposed by Bandler and Grinder, and the one advanced in this article, is based upon observations of people. *See* FROGS, *supra* note 53.

[74] Goleman, *supra* note 50, at 71.

[75] In research which may bear some relationship to the concepts set forth in this article, Day found that people rather consistently avert their eyes to the right or left when reflecting upon a difficult problem. Day, *An Eye Movement Phenomenon Relating to Attention, Thought and Anxiety*, 19 PERCEPTUAL AND MOTOR SKILLS 443 (1964). Additional lateral eye movement research is summarized in Van Nuys, *Lateral Eye Movements and Dream Recall*, 5 J. ALTERED STATES OF CONSCIOUSNESS 147 (1979).

terns for right-handed people[76] and the corresponding link to the sensory process are as follows:

Eye Movement	Representational System
Up, right[77] or left	Visual[78]
Straight ahead, unfocused,[79] or dilated pupils	Visual[80]
Middle, right or left	Auditory[81]
Down, left[82]	Auditory[83]
Down, right	Kinesthetic[84]

Furthermore, eye movement to the right or the left has special significance. Movement to the left side of the head indicates remembered experiences; to the right side indicates constructed experiences.[85] Remembered experiences are those that the speaker has personally experienced; constructed experiences are those which are imagined or built from other experiences. For example, in the visual mode, seeing the classroom where you had your first law class is a visually remembered experience. To see yourself sitting in that classroom is a visually constructed image because you have never had the experience of seeing yourself (without the aid of mechanical devices or mirrors). Constructed experiences can also have either not yet taken place (seeing tomorrow's dinner table) or are unlikely or impossible (seeing your first law professor with green hair). A similar analysis could be done for the auditory and kinesthetic modes.

The following chart indicates the patterns of access for a normally organized right-handed person.

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[76] The typical eye movement patterns for left-handed people are reverse. Read right for left, and vice versa. The up, horizontal, and down positions remain the same. *See* FROGS, *supra* note 53, at 21.

[77] Right and left refers to the speaker's right and left.

[78] *See* L. CAMERON-BANDLER, *supra* note 29, at 40; FROGS, *supra* note 53, at 25.

[79] Some people who are very fast at visualizing, simply defocus their eyes slightly in position and do not move their eyes upward. PATTERNS II, *supra* note 25, at 37.

[80] *See* FROGS, *supra* note 53, at 25.

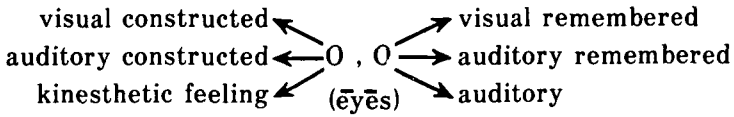
[81] *Id.*; L. CAMERON-BANDLER, *supra* note 29, at 41.

[82] Other signals of recalling auditory information are touching a hand to the side of the head (as if placing a telephone receiver there) or cocking the head (as though presenting an ear). PATTERNS II, *supra* note 25, at 37.

[83] *See* FROGS, *supra* note 53, at 25.

[84] *Id.*

[85] *Id.*



One caveat should be noted. The organization above is valid for most right-handed people. Left-handed people have their right and left positions reversed. However, some people have a different eye movement pattern for the sensory experiences. For example, one person may gain access to visually constructed images down and to the left. Regardless, people are consistently organized;[86] certain eye movements will consistently indicate the same sensory experience for each person.[87] By comparing verbal predicates with eye movements, or by specific questioning of the client and observing the eye movement patterns, the lawyer can determine if the person is typical or atypical in his eye movements.

An understanding of eye movement patterns has several uses to a lawyer. First, eye patterns can be used to determine the other person's representational systems in the same manner as that of listening to predicates. The eye movement can confirm the verbal predicates. In addition, eye movements can be used to assist the lawyer in the selection of words which will help the other person retrieve information stored in his mind but not presently in his consciousness. The lawyer's words should correspond to the other person's representational system as indicated by the eye movements. For example,

Lawyer: What else do you remember about the accident?
Client: Nothing really (eyes up to the left, indicating visual).
Lawyer: Could you give me a little better picture? What image do you remember?

A final benefit from examining eye movements is that when a person is searching his sensory experiences internally, he is likely to miss external sensory input.[88] When the client's eyes are moving, the client may possibly not hear, at least not consciously, what the lawyer is saying.[89] This suggests that a lawyer may want to pause when the client's eyes are moving rapidly or to repeat what he has just said.

V. REPRESENTATIONAL SYSTEMS AND CLIENT REPRESENTATION

From the moment a lawyer first meets a client, representational systems can be used to improve lawyering activities.

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[86] *Id.* at 27.

[87] These eye movement patterns hold true for all peoples and cultures except the Basques of Spain and Southern France. *Id.* at 35.

[88] L. CAMERON-BANDLER, *supra* note 29, at 42.

[89] For example, when the "listener" is recalling internal auditory experiences as evidenced by horizontal eye movements, the listener will not hear the speaker.

As the client walks into the lawyer's office, he is usually thinking about either his legal problem[90] or about the experience of meeting with the lawyer. Typically, the client is under stress and is using his most-highly-valued representational system. A lawyer able to read eye movements can learn important information about the representational system of this client even before a single word has been spoken.[91] If a lawyer can determine a client's thinking pattern, he can respond with words that are likely to match the client's representational system. For example:

Representational System	Response
Client (eyes scanning up)	Lawyer: Hello. How do things look to you today?
Client (eyes scanning in middle)	Lawyer: Hello. What have you been telling yourself that you would like to talk with me about today?
Client (eyes down to the right)	Lawyer: Hello. How are you feeling today?

These lawyer responses may appear direct, sound forward, or feel awkward to some readers because they fail to include the more traditional "ice-breakers."[92] But, these responses are entirely appropriate and are more likely to build rapport.

Reading eye movements may be difficult for some lawyers, hence they will find it easier to use the spoken predicates to determine the client's representational system. The process for discovering the client's representational system is rather simple. The lawyer asks a question and then pays careful attention to the content and process of the response.[93] An initial open-ended question by the lawyer allows the client to select the first topic:[94]

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[90] FROGS, *supra* note 53, at 18.

[91] In addition, other nonverbal behavior, such as personal appearance and dress, can provide information about the client to the attentive lawyer.

[92] Ice breakers are phrases designed to put the client at ease. Examples are: "Did you have any trouble finding the office?" "It certainly has been rainy lately, hasn't it?" Ironically, such phrases may actually make the client less at ease because the client is ready to talk about his problem and the lawyer appears to want to make small talk.

[93] Many types of questions exist. One text suggests that there are four types: open-ended, leading, yes/no, and narrow. D. BINDER & S. PRICE, *supra* note 5, at 38-40. Another categorization of questions is found in A. BENJAMIN, THE HELPING INTERVIEW 65-90 (2d ed. 1974).

[94] D. BINDER & S. PRICE, *supra* note 5, at 42.

Lawyer:	Hello, how can I help you?
Client (visual):	It looks like my wife and I need a divorce. I just don't see how our relationship will work any more.
Client (auditory):	I think I need a new will. My family tells me it's that time and I hear the sound of old age about me.
Client (kinesthetic):	The cops are trying to stick this bogus case on me and I didn't do it. They can't touch me.

Using unspecified language in the initial question makes discovering the client's representational system easier. Clients have a marked tendency to reply to lawyers by parroting back some of the lawyer's own words. If the lawyer includes within his question a word indicating a particular representational system, the client also may use that word. For example,

> Lawyer: Can you tell me what you see as the problem?
> Client: I see my problem as this depressing relationship I am in with my husband (eyes down right). I want out.

If the client parrots back the words of the question, the lawyer's task is more difficult and the response is more confusing either because the introduced predicates do not represent the client's internal thinking process or because two or more representational system predicates are used, one of which does not truly indicate the client's process. The lawyer will need to listen for additional predicates to determine the representational system which actually reflects the client's process. When these contaminated predicates are used, the eye movements will become increasingly important for they may point to an incongruity between the predicates which suggest one representational system and eye movements which suggest another.

Gathering additional information later in the interview may be facilitated by another use of representational systems. A client's most-highly-valued representational system suggests a direction for a question when a client seems to have exhausted the information he can present.

Lawyer:	What happened next?
Client:	That's really all. I don't remember any more.
Lawyer (to visual):	Well, what did it look like after that? I don't really see what you mean.

Lawyer (to auditory):	Can you remember the next sound you heard?
Lawyer (to kinesthetic):	What did it feel like then?
The client may respond—	
Client (visual):	Oh, it appears to me that . . . .
Client (auditory):	Well, what rings in my ears is . . . .
Client (kinesthetic):	I just felt that . . . .

Another method, rather than simply directing the client's attention to his most-highly-valued representational system, would require the lawyer to review all the representational systems:

> Lawyer: What happened next?
>
> Client: That's really all. I don't remember any more.
>
> Lawyer: Well, let's try this. Remember back to when you were in that room. You might even want to close your eyes.[95] Picture yourself back there . . . . Remember what they are saying[96] and the other sounds in the room . . . . You have that certain feeling in you.[97]

When using all three representational systems, the best results are usually obtained by starting with the client's most-highly-valued representational system because the client is most adept at using it. Once the client has been able to recreate one portion of an experience he can be led to other portions which may not be remembered as well.[98]

During counseling, or at other times when the lawyer is conveying information, using the client's most-highly-valued representational system will lead to an easier and better understanding by the client:

Lawyer (to visual):	I see three options for you.

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[95] Eye closure will cut off all the visual stimulus which may be distracting the client.

[96] Speaking to the client in the present tense even though the client is re-experiencing a past event helps the client to recreate the prior event and relive it.

[97] The phrase "certain feelings" fails to lead the client to a specific feeling, and leaves the client free to recall without direction whatever type of feeling he did have at the time. Such phrases are said to have no referential index. PATTERNS I, *supra* note 12, at 19-20. Although lawyers usually place a premium on being verbally precise, great advantages may accrue to the lawyer who can purposely be ambiguous in the appropriate context. *Contra*, E. ANDERSCH, COMMUNICATION IN EVERYDAY USE 128 (3d ed. 1969).

[98] One theory is that every experience is stored within the person and the experience can be fully recalled if properly accessed. "A sensation once experienced is never forgotten. It is recorded forever. We have the ability to recall a sensation in its entirety but we seldom utilize this potential." W. KROGER, HYPNOSIS AND BEHAVIOR MODIFICATION: IMAGERY CONDITIONING 38 (1976).

Lawyer (to auditory):	It sounds like there are three possible options.
Lawyer (to kinesthetic):	I feel you have three options.

These uses of representational systems will work equally well with witnesses and even opposing counsel. The techniques may be employed during witness interviews, depositions, witness examination in court and during negotiations with opposing counsel. Matching your representational system with that of other people will improve the information transfer and enhance rapport. At certain times, however, the lawyer may purposely want to mismatch representational system predicates in hopes of creating confusion or a negative personal dynamic. Such techniques, for example, might be employed during cross-examination of a witness.

In a courtroom, most of the attention directed towards representational systems should be aimed at matching the representational system of the decision-maker, not the witnesses. The number of decision-makers is the most important consideration. A single judge will present fewer difficulties than a jury. Furthermore, the opportunities to study the decision-makers vary significantly. Judges can be studied prior to the lawyer's court appearance by paying careful attention to the judge's behavior during other proceedings. Sufficient study by the lawyer may reveal the most-highly-valued representational system for each judge, even on a three or nine judge panel.

Far greater difficulty is involved in determining representational systems for juries. The major problem is that the lawyer has had no prior opportunity to observe the behavior of the jurors. Conversation with them is limited to *voir dire* and opening and closing arguments. To be useful during the trial, the representational system of the jurors must be determined as soon as possible. The fact that the *voir dire* is the only time jurors are allowed to say anything, means that *voir dire* offers the only meaningful opportunity to determine the representational system of the jurors. The suggestion that *voir dire* be used for any purpose other than eliciting information to select a fair and impartial jury[99] is certain to feed the continuing controversy as to the purposes and limits of the *voir dire* procedure.[100] Yet if the trial is to be viewed as a process for the reconstruction of legally significant events so that a decision-maker can determine the facts and subsequently apply the law, it is essential that the lawyer understand in what terms the jurors best understand the world.

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[99] B. BONORA & E. KRAUSS, JURY WORK: SYSTEMATIC TECHNIQUES 151 (1979).

[100] *Id.*

[101] For a discussion of open-ended and closed-ended questions in *voir dire*, see *id.* at 155.

While recognition of representational system predicates should not require additional time during *voir dire*, this recognition does require additional skill. In most respects, it will not matter whether the judge or the lawyers ask questions of the prospective jurors. The only difference between attorney or judge-conducted *voir dire* may be in the form of the questions. Closed or leading questions will generally make the determination of the representational system more difficult (unless eye movement cues are used effectively).[101] Judges seem to ask these types of questions more frequently than lawyers. Lawyers whose personal *voir dire* style is tight and controlled, and do not solicit viewpoints and feelings of prospective jurors[102] will probably have greater difficulty determining the jurors' representational systems.

Even if the lawyer can recognize the representational system of the individual juror, the essential problem of group communication is still present. Within a large group, a complete mix of the three major representational systems is likely to be present. The question thus arises: In which representational system or systems should the lawyer speak to satisfy the most-highly-valued system of the whole jury, especially during opening and closing arguments? Several possibilities exist. During opening and closing arguments, lawyers speak directly to the jurors. At these times the lawyer could 1) choose to use unspecified predicates, 2) choose to speak to just certain members of the jury in their representational system, or 3) choose to use all three representational systems.

In theory, the unspecified predicates may be the most effective because each person will think in their own most-highly-valued representational system. As a result, each juror will "think" the lawyer is speaking in that person's own language. Unfortunately, the unspecified mode is the most limited with fewer word choices. Hence, although some use of the unspecified mode should be attempted, it will probably not be a frequent conscious choice for the lawyer.

The second approach is for the lawyer to speak exclusively in the representational system of certain jurors. After *voir dire*, the lawyer might conclude that the majority of the jurors share one representational system as their most-highly-valued.[103] Thus, the lawyer would speak in predicates reflecting that system. Another alternative is for

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[102] An important movement in lawyering is the recognition of client feelings. D. BINDER & S. PRICE, *supra* note 5, at 20-37; B. BONORA & E. KRAUSS, *supra* note 99, at 152. Feelings, indeed are important and have been neglected for too long in the law. However, asking a person "how do you feel about x?" may provide for less information about the internal experience of the person than asking, "how does x look to you?" or "what do you tell yourself about x?" A further critique of the feeling vocabulary can be found in R. ROSEN, PSYCHOBABBLE (1977).

[103] From personal experience it seems that more people are visual than kinesthetic and that auditories are definitely a minority.

the lawyer to determine which individual juror appears to be the most persuasive and influential among the jurors. In this case, the lawyer would speak in that particular juror's representational system. Usually the most persuasive and influential person is the one who will be elected foreman by the jury.[104] The most difficult method for this approach focusing on individual jurors, is for the lawyer to switch representational systems depending upon with which juror he is making eye contact. That is, while speaking and looking directly at individuals, he must change his vocabulary to the representational system of the person to whom he is speaking. This approach probably requires memory and flexibility during trial beyond the capability of most lawyers.

The final, "something-for-everybody" approach, is the easiest because the lawyer can prepare his choice of words even before he sees and hears the jurors for the first time. The lawyer consciously mixes his predicates and uses words reflecting all representational systems. This mixed approach is beneficial in that not only do all the jurors sense that the lawyer speaks their language at some time during the proceeding, but it also enables the lawyer to encompass all of the sensory modes. This approach can make the case come to life,[105] an important tactic since the trial is one or more steps away from the experience. For example:

> Ladies and gentlemen of the jury. I will try to create a picture of the events of that day for you. A picture that will allow you to hear what those people heard and to feel what they felt on July 11th of last year. The evidence will show that the bright, hot sun beat down on the men straining their every muscle on the construction site while the children laughed and shouted in the nearby park. . . .

VI. DOES IT REALLY WORK?

Representational systems is a model for analyzing and improving communications. Although it works most of the time, it is still a model. Perhaps, rather than ask the lawyerly question, "Is the model accurate every time?" it would be better to ask, "Is the model useful?"

Lawyers live by general black-letter law rules that sometimes break down in specific circumstances, yet these rules are not abandoned when an exception is found. Law professors have riddled the black-letter law with numerous exceptions, but lawyers do a fantastic job of finding

[104] Lawyers can often accurately predict which juror will ultimately be the foreman. The prediction can be very accurate even for the inexperienced. For example, recently, two clinical students, in their first jury trial, correctly predicted the jury foreman. Chang v. Tataipu, No. H78-4088 (Honolulu Cir. Ct., 1st Div. 1980).

[105] "Sensory images tend to stimulate listeners to experience vicariously." C. ARNOLD, CRITICISM OF ORAL RHETORIC 168 (1974).

where general rules apply and where they break down.[106] Many lawyers who hear about representational systems immediately set out to determine when the model will break down, concentrating on the exceptions. It seems a more useful approach to utilizing representational systems would be for lawyers to spend some time trying to discover when the model *will* work. This time spent thinking about the model would undoubtedly improve their typically underexercised communication ability. Thus, even if the model does not work every time, it is still useful and beneficial.

VII. IS IT MANIPULATIVE?

Is the use of representational systems in legal communication manipulative? It may beg the question to say that the answer depends upon what sensory experiences the lawyer has associated with the word manipulation. Certainly, the use of representational systems implies that lawyers use specific techniques (which do not necessarily occur naturally to them) in order to get specific responses from people with whom they are communicating. Furthermore, the lawyer is not informing the other people of what he is doing.

This type of conduct by a lawyer is perfectly appropriate. Far from being unethical, this conduct might even be required if a lawyer seeks to competently and zealously represent his client. A client wants to be understood and to receive information, advice, counseling, and ultimately, results from the lawyer. The client does not need to know how the lawyer is performing his lawyering tasks or what techniques are being employed. The client does not need to know everything the lawyer learned during each day of law school and law practice. The client does not want to relive the lawyer's life or listen while the lawyer recounts it. In the same fashion, any person with whom the lawyer is communicating does not need to know about representational systems. Not only is there no need to know, but such information about representational systems would probably cause diversion and confusion in the client's mind.

The term "manipulate" also means to handle or to control skillfully. Representational systems can help a lawyer be a more skillful communicator. A language analogy seems most appropriate. Assume the lawyer and the client each speak several languages. The client speaks Italian very well, and speaks it every day. He can also converse in English, Hungarian and Chinese, but not as well as in Italian. The lawyer generally speaks English, but is equally fluent in all four languages. Is the lawyer manipulating the client if he speaks Italian to

[106] Noam Chomsky provides an apt description of the Socratic method even though talking in another context. "By pushing a precise but inadequate formulation to an unacceptable conclusion, we can often expose the exact source of this inadequacy." N. CHOMSKY, SYNTACTIC STRUCTURES 5 (1957).

the client? In order to zealously represent his client, he may even have a duty to speak the client's primary language so long as both parties can understand one another in that language. The same holds true for the lawyer's use of the client's most-highly-valued representational system. Using this system is like speaking in the client's primary language, Italian.

VIII. CONCLUSION

This article has presented a sensory-based model for legal communication. Specific techniques were described which may be utilized to improve a lawyer's ability to gather and convey information and to build rapport.

Effective use of the model requires a lawyer's attention to the process as well as the content of communication. Close scrutiny of how things are said, in addition to what is said, is essential. These ideas may necessitate that lawyers develop some new communication skills. Lawyers have never been accused of listening too much; quite the contrary, they have been accused of not listening enough. Yet, central to the model presented is the premise that lawyers improve their listening skills in order to improve their communication.

Lawyers would do well to listen not just to the people with whom they interact in the legal system, but also to professionals in other disciplines. Even though the first formal connections between law and psychology were made early in this century,[107] many lawyers still cling to the belief that the practice of law is an art form unaffected by advances in the political, social and behavioral sciences.[108] Incorporated into the concept of law as an art form is the idea that the skills of a lawyer are in many respects undefinable and, hence, unteachable. Further reasoning along this line leads one to the conclusion that a person either intuitively has the qualities to be a good lawyer or he does not. Recently, however, other disciplines have taken to studying lawyers, the legal system and lawyering skills. Unfortunately, despite the wealth of material from other disciplines related either directly or indirectly to law, very little of this information has been made available to, or used by, lawyers and legal education.

Even the use of psychology in law has revolved around the courtroom, though it is clear that most cases do not end up in trial.[109] This is

[107] *See* H. MUNSTERBERG, ON THE WITNESS STAND (1980).

[108] The titles of several books convey the impression of law as an art: M. BLOCK, THE ART OF SUMMATION (1964); H. HARDWICKE, THE ART OF WINNING CASES (1899); J. REED & R. NEEDHAM, THE ART OF PERSUASION IN LITIGATION HANDBOOK (1966); F. WELLMAN, THE ART OF CROSS-EXAMINATION (1962).

[109] *See* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 1-2 (App. Draft 1968); R. FIGG, CIVIL TRIAL MANUAL 319 (1974); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

true even though law and psychology are closely tied. For example, the mental state of a party or witness may be at issue. Frequently, the perceptual abilities of witnesses, particularly those of an eye witness, are in question. The presentation of evidence in court has been studied, as have the consequences of changes in jury size, the jury decision-making process and the use of videotape evidence. Within the last decade, sociological and psychological methods of jury selection have become important topics.

The present article presents yet another direction for the law and psychology movement—the use of some of the principles and knowledge developed by mental health workers which, with some adaptions, can be used by lawyers to improve their own effectiveness. No outside expert is necessarily brought in to assist the lawyer, but with practice the lawyer himself can become expert enough to apply the necesary techniques.