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THE MISSING LINK: ENHANCING MEDIATION SUCCESS
USING NEURO-LINGUISTIC PROGRAMMING

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The Missing Link: Enhancing Mediation Success Using Neuro-Linguistic Programming

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I. INTRODUCTION

A. The Difference that Makes the Difference

What is it that separates the best from the rest? Generally speaking, the highly coveted litigators and mediators draw people to them over and over again because of that something extra they possess. In Neuro-Linguistic Programming (NLP), that something extra is often referred to as “the difference that makes the difference.”¹ Outstanding performers in any field instinctively know the “difference that makes the difference.” Successful trial lawyers, for example, have a keen knack for connecting with the jury and persuading them to follow their lead in support of the client’s case. Similarly, parties prefer some mediators over others in large part because they are able to move people away from their entrenched positions and toward a more flexible mindset needed to settle cases. Although litigating and mediating require quite different skill sets, a review of those who demonstrate excellence in either of these fields will yield certain common denominators, which can be identified using NLP.

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1. SUE KNIGHT, NLP SOLUTIONS: HOW TO MODEL WHAT WORKS IN BUSINESS TO MAKE IT WORK FOR YOU 20 (1999).

Maps and models are the two primary components that makeup NLP.² Maps serve as a blueprint for the brain.³ No two minds think alike because every person is programmed differently.⁴ NLP acknowledges this and prompts people to communicate with their audience in a way that specifically caters to how the individuals in that audience think, process information, perceive the world and relate to others.⁵ Since no two individuals possess the same map of the world, to communicate effectively, one must be able to identify the map of another and then operate within its framework.⁶ NLP provides the tools for working within another individual's map, by teaching how to quickly build rapport and alter the communication so that it matches the way the other person thinks and processes information.⁷ Whether an advocate or a mediator, being able to recognize how someone manages information, be it auditory, visually, kinesthetically, or audiodigitally, will greatly improve the chances of fruitful communication.

Models represent the structure of our actions and can be used to replicate the key elements of excellence displayed by another in a particular activity.⁸ The purpose of modeling is to identify that something extra in another person that allows them to achieve remarkable results consistently.⁹ Once identified, these traits can be passed on to others who can then learn to perform the same activity with a similar level of skill and excellence.¹⁰ This does not mean that NLP will make an Albert Einstein out of every physicist.¹¹ It goes without saying that the person learning the skill must have the necessary aptitude, and be willing to carry out the necessary self-development in order to reach the level of excellence they seek to achieve. Another caveat is that modeling requires the model, whether advocate or mediator, to agree to give of themselves, their time, their expertise, and to

2. See JOSEPH O'CONNER & JOHN SEYMOUR, INTRODUCING NEUROLINGUISTIC PROGRAMMING: PSYCHOLOGICAL SKILLS FOR UNDERSTANDING AND INFLUENCING PEOPLE 4, 181 (2d ed. 1995).

3. See *id.* at 4.

4. See *id.* at 2-3.

5. See, e.g., TAD JAMES & DAVID SHEPHARD, PRESENTING MAGICALLY: TRANSFORMING YOUR STAGE PRESENCE WITH NLP (2001); see also Vincent A. Sandoval & Susan H. Adams, *Subtle Skills for Building Rapport: Using Neuro-linguistic Programming in the Interview Room*, 70 FBI LAW ENFORCEMENT BULLETIN 1 (2001).

6. See O'CONNER & SEYMOUR, *supra* note 2, at 15-20.

7. See *id.* at 19.

8. See *id.* at 181.

9. *Id.* at 182.

10. *Id.*

11. *Id.*

open their internal map of the world to another,¹² all of which many ideal models may be reluctant to do.

Through the use of maps and models, NLP paves the path for discovering and unfolding one's own personal genius and provides the means for bringing out the best in each person.¹³ There is a great deal that NLP has to offer, much more than can be covered within the scope of this article. The objective of this piece is to acquaint the reader with NLP's underlying premises and highlight some of the possible uses for the advocate and mediator within the mediation context.

B. Neuro-Linguistic Programming . . . What's in a Name?

Neuro-Linguistic Programming was brought to life in the early 1970s through the work of John Grinder (assistant professor of linguistics at the University of California, Santa Cruz) and Richard Bandler (a psychology student at UCSC).¹⁴ Bandler was particularly interested in psychotherapy and how certain therapists consistently achieved excellent results.¹⁵ This interest led Bandler to become involved in studying the work of Fritz Perls (the influential founder of the Gestalt School of Psychotherapy) and Virginia Satir (famed family therapist).¹⁶ Along the way, Bandler found himself acquiring language patterns and communication mannerisms that were almost identical to that of Perls and Satir.¹⁷ It was around this time that Bandler became acquainted with Grinder and the two collaborated on the development of a behavioral and linguistic model based on the patterns observed in Perls, Satir and Milton Erickson (renowned hypnotherapist).¹⁸ Their intention was not to establish a new school of therapy but rather, "to identify patterns used by outstanding therapists, and pass them on to others."¹⁹ Together Bandler and Grinder found that the underlying

12. See O'CONNER & SEYMOUR, *supra* note 2, at 15-20.

13. See *id.* at 4-23; see also JAMES & SHEPHARD, *supra* note 5, at 12.

14. Joanne Walter & Ardeshir Bayat, *Neurolinguistic Programming: Verbal Communication*, 11 STUDENT BMJ 163 (2003).

15. *Id.*

16. O'CONNER & SEYMOUR, *supra* note 2, at 2.

17. *Id.*

18. *Id.*

19. *Id.*

techniques that enabled these three therapists to achieve excellent results consistently could be applied more broadly, giving rise to NLP.²⁰

Although NLP's origins are in psychotherapy, it is a discipline that can be applied to model excellence in almost any field. Sports coaches use NLP to model the correct technique and help athletes visualize winning.²¹ All the world's top politicians undergo some form of NLP training to use non-verbal communication to subliminally increase their likeability factor.²² NLP is used rampantly in sales and advertising as an effective way of communicating with the consumer about the quality of a product and why people should buy it.²³ Police officers and FBI detectives are taught NLP techniques so they can build rapport and communicate more effectively when interviewing witnesses and increase the chances that an exchange of information will follow.²⁴ NLP is even used by actors and comedians to enhance their ability to connect with the audience and transform their stage presence.²⁵ At its core, NLP is all about process, not about content, making it universally adaptable to nearly all fields, including conflict resolution.²⁶

The name "Neuro-Linguistic Programming" was created to reflect the integration of three different scientific fields.²⁷ "*Neuro* refers to the nervous system" and includes all of the senses: "seeing, hearing, touching, smelling, and tasting."²⁸ "Every second approximately two million bits of information are flooding into [the] nervous system," comprising "our model of the world."²⁹ It is through these senses, and the information produced, that people communicate with themselves and others and explain what things mean.³⁰ "The language . . . use[d] affects [these] internal representations, and the meaning of [the] internal representations determines how [one] behaves."³¹

Linguistic refers to the application of language as a means of affecting another's behavior.³² People generally speak with the intention to get across

20. Walter & Bayat, *supra* note 14.

21. *Id.*

22. *Id.*

23. DUANE LAKIN, THE UNFAIR ADVANTAGE – SELL WITH NLP! (2000).

24. Sandoval & Adams, *supra* note 5.

25. JAMES & SHEPHARD, *supra* note 5.

26. See, e.g., O'CONNER & SEYMOUR, *supra* note 2.

27. See JAMES & SHEPHARD, *supra* note 5, at 12-14.

28. *Id.* at 12.

29. *Id.* at 12-13.

30. *Id.* at 13.

31. *Id.*

32. *Id.*

a particular message.³³ What is said, and how it is said, will determine the reaction of the person receiving the message.³⁴ Therefore, to communicate a message effectively, it needs to be structured so that the person spoken to hears the message as it was intended.³⁵ Often what is said and what is heard are two very different things. The only way to get the desired response to a message is to first ensure that it has been heard correctly.³⁶

Programming in the NLP context refers to our habits and “repeating patterns of thinking and behaving.”³⁷ Everyone has programs that run unconsciously and reside outside their sphere of awareness.³⁸ For example, individuals run programs for getting excited, getting motivated, making decisions, learning, being creative, being persuasive, and remembering.³⁹ “Some of [these programs] work effectively, while others may be less than effective.”⁴⁰ A person on “autopilot” is a perfect example of someone who is unconsciously running an internal program. The power of programming can be harnessed by discovering and using the programs that consistently work well,⁴¹ while distancing oneself from programs that are ineffective and inefficient.

So what’s in a name? Neuro-Linguistic Programming constructs an approach using maps and models to understand and reproduce “effective behaviors and the cognitive processes behind them.”⁴² The NLP “process involves finding out about how the brain (“neuro”) operates by analyzing language patterns (“linguistic”) and non-verbal communication.”⁴³ “The results of this analysis are then put into step-by-step strategies or programs (“programming”) that may be used to transfer the skill to other people and areas of application.”⁴⁴

33. See JAMES & SHEPHARD, *supra* note 5, at 14.

34. *Id.*

35. *Id.*

36. See *id.*

37. *Id.*

38. *Id.*

39. See JAMES & SHEPHARD, *supra* note 5, at 14.

40. *Id.*

41. *Id.*

42. ROBERT B. DILTS, MODELING WITH NLP 3 (1998).

43. *Id.* at 3-4.

44. *Id.*

II. MAPS

A. *I'll Show You My Map, if You Show Me Yours . . .*

Think of a rose. What comes to mind . . . a visual of a rose in full bloom; the feeling of a rose being held in the hand with its soft petals and prickly thorns; or the smell of its warm sweet fragrance after being freshly picked from the vine? The task at hand is a simple one, yet there is a myriad of variations between one person's response and another's.⁴⁵ This is because we each perceive the world differently through our highly individualized senses.⁴⁶ "NLP operates from the [basic] assumption that the map is not the territory."⁴⁷ From this perspective, there is no one correct map of the world or concept of a rose.⁴⁸ Each person will have their own world-view and constructed recollection of the exemplified rose based upon the sort of neuro-linguistic maps that have been formed.⁴⁹ These maps "determine how we interpret and how we react to the world around us."⁵⁰

This concept applies equally to the individuals taking part in mediation. Each person attends the mediation with their own reality and concept of what is appropriate, acceptable, or a fair resolution of their case. It is well known that mediation works as often as it does because that sense of reality or world view is constantly being altered or, dare it be said, manipulated, by the mediator to one that is more likely to lead to settlement. The mediators most successful in this endeavor are those who take the time to appreciate and respect that individual's reality and map of the world before gently guiding them toward a map more closely aligned with settlement.⁵¹

At the heart of NLP is the belief that people make the best choices available to them at the time based upon their internal map of the world.⁵² If someone does not behave in line with expectations, whether an attorney, party to the case, or mediator, realize that they are behaving in the best way they can under the circumstances. The behavior being exhibited by the person is the limit of that individual's capability in that moment because he or she is working within the confines of their map.⁵³

45. See DILTS, *supra* note 43, at 7.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. See DILTS, *supra* note 43, at 7.

52. KNIGHT, *supra* note 1, at 54.

53. *Id.*

B. Dealing with Generalization, Deletion, & Distortion

Every individual is susceptible to perceptual overload, and although bandwidths differ, each has a maximum capacity beyond which any additional information will cause malfunction and internal incongruence. As a safety mechanism, our minds are preprogrammed with the ability to unconsciously generalize, delete, and distort information as needed to prevent perceptual overload.⁵⁴

“Generalization is the process by which elements or pieces of a person’s model become detached from their original experience and come to represent the entire category of which the experience is an example.”⁵⁵ Generalization reduces the amount of information that needs to be processed so the mind can cope with all the surrounding stimuli.⁵⁶ The human mind is proficient at noticing patterns and regularities from which it unconsciously creates abstract principles and rules to guide behavior.⁵⁷ For example, plaintiffs may generalize that “most insurance companies are cheap” while defendants generalize that “most plaintiffs are frauds.” Consequently, people often attend mediation with preconceived notions about the other side’s intentions, causing excessive skepticism and suspicion, which hinder the mediation process.⁵⁸ To break through this spiral and make way for settlement, it is necessary for the parties to recognize that these generalizations are misplaced and should be set aside, at least for the purpose of mediation.

“Deletion is a process by which we selectively pay attention to certain dimensions of our experience and exclude others.”⁵⁹ Deletion allows the mind the freedom to selectively pay attention to certain parts of incoming information, while filtering out everything else.⁶⁰ Information is unconsciously “deleted” for a whole host of reasons, but more often than not, it is because the mind determines that the information is unimportant or hurtful.⁶¹ Deletion is the reason that people hear what they want to hear and

54. See DILTS, *supra* note 43, at 11-12.

55. *Id.* at 12.

56. *See id.*

57. *See id.*

58. *Id.*

59. DILTS, *supra* note 43, at 12.

60. *Id.*

61. *Id.*

are able to “filter out or exclude all other sound[s] in a room full of people talking in order to listen to one particular person’s voice.”⁶²

“Deletion reduces the world to proportions” the mind can handle, which is undoubtedly helpful in some contexts.⁶³ However, as advocates and mediators, deletion poses the risk of losing valuable information that may provide clues on how to unlock and cross impenetrable settlement barriers. Similarly, parties often unconsciously delete information received from the mediator or the adversary that they find harmful to their case.⁶⁴ Mediators should be cognizant of this effect so they can find ways to ensure that the entire intended message is getting through, rather than selective bits and pieces.

“Distortion is the process” that enables the mind “to make shifts in our experience of sensory data.”⁶⁵ Information is distorted by making connections between what is perceived, what it might mean, and “what might happen as a result.”⁶⁶ The mind distorts information by labeling individual experiences, interpreting them, making meaning of them, drawing inferences from them, and then coming to conclusions.⁶⁷

For example, consider a bottom-line discussion near the end of a mediation where the plaintiff’s counsel adamantly states, “There’s no way I’ll take less than \$100,000 to settle this case” and defense counsel insists, “There’s no way I’ll pay more than \$60,000 to settle this case.” These statements, taken at face value, would lead most to conclude that the case is unlikely to settle based on counsels’ representations, and that if it did, the attorneys were posturing and being necessarily deceptive to get the best deal for their clients.

According to NLP, however, the statements of the lawyers in this example were not motivated by deceit but rather by their best evaluation of the case under the circumstances. These attorneys, by NLP standards, truly believe when making their representations that the case shouldn’t settle for more or less than the amounts stated. This fundamental difference in the way NLP frames the situation is critical because it makes settlement possible so long as the parties communicate with each other and remain open to reevaluating their position until the moment of trial. By falling victim to distortion and drawing immediate conclusions, we siphon any opportunity of

62. *Id.*

63. *Id.*

64. *Id.*

65. DILTS, *supra* note 43, at 12.

66. JAMES & SHEPHARD, *supra* note 5, at 18-19.

67. *See id.*

altering that portion of the map that speaks to what constitutes an appropriate settlement.

Although these inherent protective mechanisms, deletion, generalization, and distortion serve us well in everyday life, they can impede the ability to mediate effectively if left to get in the way. Before behavior can be changed its existence must first be identified. Understanding these concepts and how they affect the way we, and others, perceive the world is the first step to NLP success.

C. Building Rapport

Individuals are unique in their thoughts, behaviors, and perceptions. Accepting that each person's perception is valid transports us to a position of rapport, where we can influence and be influenced by those around us. Being in this position does not require agreement with everyone all of the time. Rather, it provides an understanding of the situation from another's vantage point, clarifying the reasons for his or her choices or particular behaviors.

Before rapport can be built with others, it must be established in oneself. People who are successful generally have solid intrapersonal rapport and are in harmony with themselves. Take a moment to consider your life's choices and ask yourself these five questions:⁶⁸

1. Are you doing work that is in line with what you believe to be important?
2. Are you taking actions day by day to further your purpose in life?
3. Are you consistently true to yourself in what you do and what you say?
4. Are you realizing your true potential in the way that you are using your core talents and skills?
5. Do your surroundings communicate messages about yourself that you feel are an accurate expression of who you are and what you stand for?

If the answer to all of these questions was yes, then you have personal rapport and are aligned with yourself. If you answered no to two or more of these questions, then it would be wise to reconsider your chosen career path

68. KNIGHT, *supra* note 1, at 88.

in hopes of finding one that is more in tune with your true purpose, identity, values, and skills.

Rapport is the ability to join people where they are in order to build a climate of trust and respect.⁶⁹ It is difficult to influence another without being open to being influenced. Having rapport with someone presumes the ability to see eye to eye, be on the same wavelength as them, and connect with them mentally and emotionally; understanding where the other person is coming from so that one appreciates and respects what that person thinks and feels, even if it is at odds with one's own thoughts and feelings.⁷⁰

The success of any person-to-person communication is directly connected to the amount of rapport that exists between the people involved.⁷¹ Rapport resembles a wireless antenna that controls how clearly a message gets through to another.⁷² The quality of the signal or communication is measured by the results it achieves.⁷³ When communicating with another, it is important to speak in terms they can understand and to which they can relate.⁷⁴ A classic study by Professor Albert Mehrabian showed that despite great efforts to communicate effectively, only 7% of the meaning in a message was carried in the actual words used while 38% was in the way the words were communicated.⁷⁵ The remaining 55% of the impact of the message was determined by the speaker's body language—posture, gestures, and eye contact.⁷⁶ By creating rapport, we exponentially increase the likelihood that the communication is understood as it was intended.⁷⁷

Advocates and mediators work hard at selling a settlement when mediating. The successful salesman knows that making a sale requires flexibility and adaptability.⁷⁸ Similarly, there is no one sales script in mediation that will get all sides to agree to a settlement. Every mediation is different, and each moment within a single mediation is unique—constantly changing and evolving just as a living organism.⁷⁹ Once the mediation starts, the successful advocate or mediator, like the low-handicap golfer,

69. See JAMES & SHEPHARD, *supra* note 5, at 63.

70. KNIGHT, *supra* note 1, at 131.

71. See JAMES & SHEPHARD, *supra* note 5, at 63.

72. KNIGHT, *supra* note 1, at 155.

73. *Id.*

74. See JAMES & SHEPHARD, *supra* note 5, at 64.

75. *Id.*

76. *Id.*; see also Albert Mehrabian & Susan Ferris, *Inference of Attitudes from Nonverbal Communication in Two Channels*, 31 J. CONSULTING PSYCHOL. 248, 251-52 (1967).

77. See JAMES & SHEPHARD, *supra* note 5, at 64-66.

78. *Id.*

79. See LAKIN, *supra* note 23.

must play the ball as it lies, not as he or she wishes it had landed.⁸⁰ Swings and clubs, techniques and skills, are changed depending on where the ball rests.⁸¹ That is, to influence others, the approach must be adapted until it fits the particular situation, while continuing to maintain rapport.⁸²

Rapport can be quickly built with others by finding shared experiences, matching their ways of communicating, using the actual words they use or their preferred terms, matching their tonality, and by adopting their postures and gestures to mirror their physiology.⁸³ The point here is to synchronize with or pace someone so that person develops trust and believes that you view the world as he or she sees it.⁸⁴ Similarity leads to trust because of the simple issue of comfort. People are most comfortable with that which is familiar and with others who resemble them.⁸⁵

Pacing someone requires subtlety to go unnoticed.⁸⁶ The key to pacing is observing the other person and becoming that person at some unconscious level.⁸⁷ Pacing establishes rapport and is the groundwork for trust and persuasion.⁸⁸ Once rapport is gained through pacing, the person can be led toward the decision or action desired of them.⁸⁹ As an example, walk with someone carefully matching their pace and rhythm.⁹⁰ Maintain this "pacing" for a few minutes.⁹¹ Then gradually increase or decrease the pace, and watch what happens.⁹² The other person will begin following and unconsciously matching the leader's walk.⁹³

Like trust, rapport can easily be broken. One surefire way of chipping away at rapport is by using the word *but*. *But* communicates disagreement with what is being said and lets the person know that objections to what they have said are about to follow. For example: "I totally agree with what you are saying, *but* . . ." The *but* negates everything that preceded it. As an

80. LAKIN, *supra* note 23 at 12.

81. *Id.*

82. *Id.*

83. JAMES & SHEPHARD, *supra* note 5, at 65.

84. *Id.* at 63-65.

85. LAKIN, *supra* note 23, at 14.

86. See ANDREW BRADBURY, DEVELOP YOUR NLP SKILLS, 57 (2000).

87. *Id.*

88. LAKIN, *supra* note 23, at 15.

89. BRADBURY, *supra* note 87, at 57-58.

90. LAKIN, *supra* note 23, at 16.

91. *Id.*

92. *Id.*

93. *Id.*

alternative to tacking on these *but* afterthoughts, use the word *and* instead or just add a new sentence that addresses the concerns. Although this may require the occasional rearranging of sentence structure, the benefit is maintained rapport that can be accessed when most needed to achieve closure.⁹⁴

D. Representational Systems

NLP identifies four major sublanguages or representational systems that people use when verbally communicating.⁹⁵ When a person tends to use one internal sense habitually, that becomes their preferred system or sublanguage.⁹⁶ Two people may speak English to each other without fully comprehending what the other has to say because they are not speaking the same sublanguage.⁹⁷ When a conversation between two people is based on different preferred representational systems, they might as well be speaking different languages; each can hear what the other person is saying but will find it very difficult to understand what the other person means.⁹⁸

E. Identifying Your Sublanguage . . .

The representational systems can be divided into four major groups: visual, auditory, kinesthetic, and audiodigital.⁹⁹ To improve communication and establish rapport, one must be able to recognize these representational systems within speech patterns, "determine [their] own individual [preferred] language pattern, and learn how to speak the other sublanguages as necessary."¹⁰⁰ Take a moment to think of a memory from a recent vacation. What came to mind first: a picture, sound, feeling or experience about the vacation? Whichever it is, this is your preferred representational system; the internal sense used to bring thoughts back into consciousness.¹⁰¹ Another way to determine one's preferred style is to take a formal test,¹⁰² such as the one below.

94. *Id.*

95. *Walter & Bayat, supra* note 14, at 163.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 163; *see also* JAMES & SHEPHARD, *supra* note 5, at 135-40.

100. *Walter & Bayat, supra* note 14, at 163.

101. *Id.*

102. JAMES & SHEPHARD, *supra* note 5, at 132-44.