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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

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

Mariam Zadeh\*

## 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.”<sup>1</sup> 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.<sup>2</sup> Maps serve as a blueprint for the brain.<sup>3</sup> No two minds think alike because every person is programmed differently.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> The purpose of modeling is to identify that something extra in another person that allows them to achieve remarkable results consistently.<sup>9</sup> 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.<sup>10</sup> This does not mean that NLP will make an Albert Einstein out of every physicist.<sup>11</sup> 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

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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.*

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open their internal map of the world to another,<sup>12</sup> 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.<sup>13</sup> 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).<sup>14</sup> Bandler was particularly interested in psychotherapy and how certain therapists consistently achieved excellent results.<sup>15</sup> 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).<sup>16</sup> Along the way, Bandler found himself acquiring language patterns and communication mannerisms that were almost identical to that of Perls and Satir.<sup>17</sup> 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).<sup>18</sup> 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."<sup>19</sup> Together Bandler and Grinder found that the underlying

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12. See O'CONNOR & 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'CONNOR & 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.<sup>20</sup>

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.<sup>21</sup> All the world's top politicians undergo some form of NLP training to use non-verbal communication to subliminally increase their likeability factor.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> NLP is even used by actors and comedians to enhance their ability to connect with the audience and transform their stage presence.<sup>25</sup> At its core, NLP is all about process, not about content, making it universally adaptable to nearly all fields, including conflict resolution.<sup>26</sup>

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

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

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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'CONNOR & 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.*

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a particular message.<sup>33</sup> What is said, and how it is said, will determine the reaction of the person receiving the message.<sup>34</sup> Therefore, to communicate a message effectively, it needs to be structured so that the person spoken to hears the message as it was intended.<sup>35</sup> 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.<sup>36</sup>

*Programming* in the NLP context refers to our habits and “repeating patterns of thinking and behaving.”<sup>37</sup> Everyone has programs that run unconsciously and reside outside their sphere of awareness.<sup>38</sup> For example, individuals run programs for getting excited, getting motivated, making decisions, learning, being creative, being persuasive, and remembering.<sup>39</sup> “Some of [these programs] work effectively, while others may be less than effective.”<sup>40</sup> 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,<sup>41</sup> 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.”<sup>42</sup> The NLP “process involves finding out about how the brain (“neuro”) operates by analyzing language patterns (“linguistic”) and non-verbal communication.”<sup>43</sup> “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.”<sup>44</sup>

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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.<sup>45</sup> This is because we each perceive the world differently through our highly individualized senses.<sup>46</sup> "NLP operates from the [basic] assumption that the map is not the territory."<sup>47</sup> From this perspective, there is no one correct map of the world or concept of a rose.<sup>48</sup> 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.<sup>49</sup> These maps "determine how we interpret and how we react to the world around us."<sup>50</sup>

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.<sup>51</sup>

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.<sup>52</sup> 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.<sup>53</sup>

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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.<sup>54</sup>

“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.”<sup>55</sup> Generalization reduces the amount of information that needs to be processed so the mind can cope with the all the surrounding stimuli.<sup>56</sup> The human mind is proficient at noticing patterns and regularities from which it unconsciously creates abstract principles and rules to guide behavior.<sup>57</sup> 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.<sup>58</sup> 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.”<sup>59</sup> Deletion allows the mind the freedom to selectively pay attention to certain parts of incoming information, while filtering out everything else.<sup>60</sup> 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.<sup>61</sup> Deletion is the reason that people hear what they want to hear and

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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.”<sup>62</sup>

“Deletion reduces the world to proportions” the mind can handle, which is undoubtedly helpful in some contexts.<sup>63</sup> 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.<sup>64</sup> 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.”<sup>65</sup> Information is distorted by making connections between what is perceived, what it might mean, and “what might happen as a result.”<sup>66</sup> The mind distorts information by labeling individual experiences, interpreting them, making meaning of them, drawing inferences from them, and then coming to conclusions.<sup>67</sup>

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

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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.*

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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:<sup>68</sup>

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

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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.<sup>69</sup> 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.<sup>70</sup>

The success of any person-to-person communication is directly connected to the amount of rapport that exists between the people involved.<sup>71</sup> Rapport resembles a wireless antenna that controls how clearly a message gets through to another.<sup>72</sup> The quality of the signal or communication is measured by the results it achieves.<sup>73</sup> When communicating with another, it is important to speak in terms they can understand and to which they can relate.<sup>74</sup> 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.<sup>75</sup> The remaining 55% of the impact of the message was determined by the speaker's body language—posture, gestures, and eye contact.<sup>76</sup> By creating rapport, we exponentially increase the likelihood that the communication is understood as it was intended.<sup>77</sup>

Advocates and mediators work hard at selling a settlement when mediating. The successful salesman knows that making a sale requires flexibility and adaptability.<sup>78</sup> 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.<sup>79</sup> Once the mediation starts, the successful advocate or mediator, like the low-handicap golfer,

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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.<sup>80</sup> Swings and clubs, techniques and skills, are changed depending on where the ball rests.<sup>81</sup> That is, to influence others, the approach must be adapted until it fits the particular situation, while continuing to maintain rapport.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup>

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

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.<sup>94</sup>

#### *D. Representational Systems*

NLP identifies four major sublanguages or representational systems that people use when verbally communicating.<sup>95</sup> When a person tends to use one internal sense habitually, that becomes their preferred system or sublanguage.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup>

#### *E. Identifying Your Sublanguage . . .*

The representational systems can be divided into four major groups: visual, auditory, kinesthetic, and audiodigital.<sup>99</sup> 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.”<sup>100</sup> 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.<sup>101</sup> Another way to determine one’s preferred style is to take a formal test,<sup>102</sup> such as the one below.

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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.

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### **Sublanguage Preference Test<sup>103</sup>**

For each of the following statements, place a number next to every phrase using the following system to indicate your preferences.

4 = closest to describing you

3 = next best description

2 = next best

1 = least descriptive of you

(1) I make important decisions based on:

Gut level feelings

Which way sounds best

What looks best to me

Precise review and study of the issues

(2) During an argument I am most likely to be influenced by:

The other person's tone of voice

Whether or not I can see the other person's point of view

The logic of the other person's argument

Whether or not I am in touch with the other person's true feelings

(3) I most easily communicate what is going on with me by:

The way I dress and look

The feelings I share

The words I choose

My tone of voice

(4) It is easiest for me to:

Find the ideal volume and tuning on a stereo

Select the most intellectually relevant point in an interesting subject

Select the most comfortable furniture

Select attractive color combinations

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103. *Walter & Bayat, supra* note 14, at 163-64.

(5) Which best describes you:

I am very attuned to the sounds of my surroundings

I am very adept at making sense of new facts and data

I am very sensitive to the way articles of clothing feel on my body

I have a strong response to colors and the way a room looks

To find out how you scored, complete the scoring system table below.

*Scoring System*

**Step One:** Copy your answers into the boxes for each respective question.

Question 1	Question 2	Question 3	Question 4	Question 5
_____K	_____K	_____K	_____K	_____K
_____A	_____A	_____A	_____A	_____A
_____V	_____V	_____V	_____V	_____V
_____Ad	_____Ad	_____Ad	_____Ad	_____Ad

**Step Two:** Add the numbers associated with each letter. There are five entries for each letter.

	V	A	K	Ad
1				
2				
3				
4				
5				
Total				

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**Step Three:** The comparison of the total scores in each column will give the relative preference for each of the four major representational systems.<sup>104</sup>

#### F. Can We Speak the Same Language?

Identifying one's own sublanguage or preferred representational system is far easier than identifying someone else's. This is because people cannot go around asking others to complete a test, like the one above, before engaging in conversation. To do that would surely be awkward and would hardly serve as an icebreaker to the conversation. Instead, more subtle ways of identifying another's preferred representational system need to be used, such as words and speech patterns, body posture, and eye accessing cues, which typify each of the four major systems.<sup>105</sup>

##### i. Clues to Identifying Visuals

Approximately 50% of the business population is made up of visuals.<sup>106</sup> When speaking to people whose primary representational system is visual, they will tend to use words that depict a picture or an image<sup>107</sup> and use phrases like, "I don't *see* the benefit of negotiating further," or "The plaintiff *looks* like he's ready to settle." For more visual words and phrases, see Tables 1(a) and 1(b) below. A visual person can also be identified by watching their eye movements.<sup>108</sup> Visual people will often look upwards or straight ahead when contemplating and will think, talk, and behave as though their entire mental processes are held on film.<sup>109</sup>

People who are primarily visual tend to be relatively fast talkers, and may be impatient when interrupted because they need to talk as fast as the film show running in their mind.<sup>110</sup> Visuals often use their hands freely and in a way that complements what they are saying.<sup>111</sup> For these reasons, the visual person generally has a keen ability to see the big picture yet quickly

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104. Walter & Bayat, *supra* note 14, at 163-64.

105. See JAMES & SHEPHARD, *supra* note 5, at 126-29.

106. *Id.*

107. See Walter & Bayat, *supra* note 14, at 164.

108. See *infra* note 116 and Diagram 1.

109. See Walter & Bayat, *supra* note 14, at 164.

110. JAMES & SHEPHARD, *supra* note 5, at 137.

111. *Id.*



zooms in on detail when necessary.<sup>112</sup> In mediation, this means that a visual person is more likely to be comfortable discussing the bottom line than getting stuck in the details of the negotiation dance.<sup>113</sup>

**Table 1(a) – Visual Words<sup>114</sup>**

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

**Table 1(b) – Visual Phrases<sup>115</sup>**

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

112. *Id.*

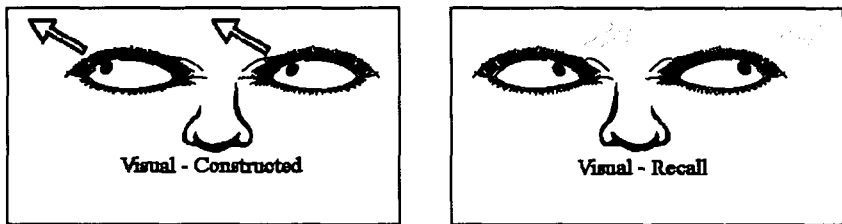
113. *Id.*

114. *Id.* at 127; see also LAKIN, *supra* note 23, at 39.

115. LAKIN, *supra* note 23, at 39.

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**Diagram 1 – Visual Eye Accessing Cues<sup>116</sup>**

When someone is in the visual constructed mode, their eyes look up to the left, signifying that they are mentally picturing something imagined rather than real (i.e. a pig flying with wings).<sup>117</sup> In contrast, when someone is in the visual recall mode, their eyes look up to the right, indicating that they are mentally picturing something they have previously seen.<sup>118</sup> Regardless of the direction, when people repeatedly look up, this is a signal that their preferred representational system is visual.<sup>119</sup> Knowing this information about them allows speech patterns to be tailored to more closely match theirs, increasing rapport and the effectiveness of the communication.

Advocates may choose to use this tool differently, for example, as a way to determine whether a witness or party is accurately representing what they have seen. If the person looks up to the left when asked to recount what they saw at the scene of the accident, it's probable that what he or she is describing is different from what was actually seen. On the other hand, if the person looks up to the right when describing the scene, it's more likely that the description is an accurate representation of what the person recalls. The defense may seek to take advantage of this tool at mediation if the plaintiff has yet to be deposed by requesting a joint session so they can observe the plaintiff's eye movements and gather information about the validity of the claim. For the same reasons, plaintiff's counsel is apt to decline a joint session if their client finds it generally difficult to provide an accurate history of events.

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116. See BRADBURY, *supra* note 87, at 33. The eye cues are depicted as if you are looking at another person.

117. See *id.*

118. See *id.*

119. See JAMES & SHEPHARD, *supra* note 5, at 127.

ii. Clues to Identifying Auditories

People with an auditory preference make up about 25% of the workforce.<sup>120</sup> Auditories habitually talk to themselves, especially when they are concentrating really hard and use phrases like, “I hear what you’re saying, sounds good to me, tell me more.”<sup>121</sup> Additional examples of typical auditory words and phrases are noted below in Tables 2(a) and 2(b).<sup>122</sup> Auditory eye movements are left and right at eye level as if the person is trying to look at one of their ears.<sup>123</sup> Auditories tend to be somewhat assertive and domineering in group settings because they need to verbalize their thoughts in order to clarify their own ideas.<sup>124</sup> They respond best to instructions and information delivered primarily in words and at a tempo roughly equivalent to their own normal rate of speech.<sup>125</sup> Because of these characteristics, auditories are more prone to ask questions and seek verbal clarification after being presented with a settlement proposal.<sup>126</sup>

**Table 2(a) – Auditory Words**<sup>127</sup>

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

120. *Id.*

121. *Id.*

122. *See id.*; *see also* LAKIN, *supra* note 23, at 40.

123. *See infra* note 134 and Diagram 2; *see also* JAMES & SHEPHARD, *supra* note 5, at 138.

124. JAMES & SHEPHARD, *supra* note 5, at 138.

125. *Id.*

126. *Id.*

127. *Id.* at 127; *see also* LAKIN, *supra* note 23, at 40.

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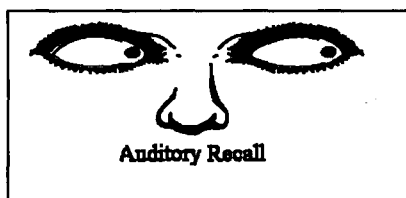
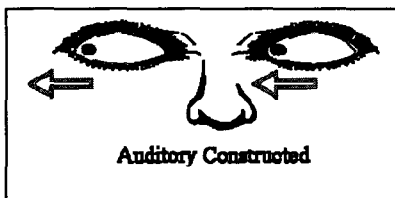
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Mention	Moan	Mutter	Narrate	Shrill
Sing	Orchestrate	Order	Praise	Purr
Silence	Remark	Resound	Scream	Rumor

**Table 2(b) – Auditory Phrases**<sup>128</sup>

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

**Diagram 2 – Auditory Eye Accessing Cues**<sup>129</sup>



When someone is in the auditory constructed mode, their eyes are at eye level looking toward the left, signifying that they are mentally constructing a sound that is new to them (i.e. the sound of a telephone ringing under water).<sup>130</sup> In contrast, when someone is in the auditory recall mode, their eyes are at eye level looking toward the right, indicating that they are remembering a sound they have previously heard.<sup>131</sup> Regardless of whether the person is looking to the left or the right, as long as the eye movement is at ear level, they can accurately be identified as auditory.<sup>132</sup> Speech patterns

128. LAKIN, *supra* note 23, at 40.

129. See BRADBURY, *supra* note 87, at 34. The eye cues are depicted as if you are looking at another person.

130. *See id.*

131. *See id.*

132. See JAMES & SHEPHARD, *supra* note 5, at 138.

should be tailored using auditory words and phrases to increase rapport and the effectiveness of the communication.

Similar to visual eye cues, this auditory tool can be used to assess whether someone is accurately representing what they've heard. If a party or witness is asked what he or she overheard at the scene and in response looks to the left, then it's likely that what is being described is an altered version of the conversation that was heard. If on the other hand, the person recounts parts of the conversation, and in doing so, looks to the right, it's more probable that the description is an accurate representation of what was recalled.

Mediators can also use this tool when being told by one side or the other that they have reached their bottom line and do not have room to negotiate any further. A typical scenario is one where plaintiff's counsel insists that their client has told them not to take any less than "X" dollars while the defense attorney is resolute that their insurance carrier has told them to try the case if it cannot settle for less than "Y" dollars. The savvy mediator can inquire about each side's respective settlement authority in caucus while carefully observing the eye movements as the response is given.

If the attorney for either plaintiff or defense looks to the left when answering, then it's likely that he or she is "constructing" or making-up what they have been told about their authority to settle. In this case, the mediator will have learned that some additional pressure may result in further movement by that side. Conversely, if the attorney responds and simultaneously looks to the right, the person is probably serious about where the negotiation needs to end. For these reasons, advocates will be well served to remain conscious of their eye movements when discussing sensitive issues with the mediator or their adversary; otherwise, they risk unintentionally disclosing more than they would like.

### iii. Clues to Identifying Kinesthetics

Kinesthetics make up about 20% of the working population.<sup>133</sup> The kinesthetic person receives and organizes information primarily on the basis of body sense and feeling.<sup>134</sup> Kinesthetics will react and respond on an emotional level, often making statements like, "this just doesn't feel right to me," "I think I've got a handle on it," or "I'm wounded by their response."<sup>135</sup> Once a kinesthetic has been identified, communication with

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133. See BRADBURY, *supra* note 87, at 34.

134. See Walter & Bayat, *supra* note 14, at 164.

135. See JAMES & SHEPHARD, *supra* note 5, at 138.

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them can be improved by incorporating more of the words and phrases in Tables 3(a) and 3(b) into the conversation.

When speaking, kinesthetics tend to look down and to the left.<sup>136</sup> They generally move and talk extremely slowly causing those they converse with to get frustrated.<sup>137</sup> Unfortunately, telling a kinesthetic to hurry up and get to the point will only serve to throw them off and cause the conversation to linger even longer as the person tries to reconnect with his or her feelings. The way to convince kinesthetics to take a particular path is not through logical discussion, but by reaching them at an emotional level.<sup>138</sup>

**Table 3(a) – Kinesthetic Words<sup>139</sup>**

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

136. See *infra* note 146 and Diagram 3.

137. Walter & Bayat, *supra* note 14, at 164.

138. See *id.*

139. JAMES & SHEPHARD, *supra* note 5, at 128; see also LAKIN, *supra* note 23, at 41.

**Table 3(b) – Kinesthetic Phrases<sup>140</sup>**

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

**Diagram 3 – Kinesthetic Eye Accessing Cues<sup>141</sup>**



When people are in the kinesthetic recall mode, their eyes look down to the left.<sup>142</sup> In this mode, the person can access an internal feeling in response to some external stimuli.<sup>143</sup> For example, the plaintiff may display this eye cue after being asked, “How did the defendant make you feel when you had that discussion?” The eyes react in this way because the person first has to access internal feelings experienced before being able to convey his or her sentiments in words.<sup>144</sup> If a person is in this mode for an extended period while responding to the question, the person is probably taking the time to sort through his or her feelings and may benefit from some assistance.<sup>145</sup> In this scenario, a discussion about the person’s feelings may

140. LAKIN, *supra* note 23, at 41.

141. See BRADBURY, *supra* note 87, at 34. This eye cue is depicted as if you are looking at another person.

142. *See id.*

143. *Id.*

144. See JAMES & SHEPHARD, *supra* note 5, at 138.

145. *Id.*

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help uncover the hidden layers that need to be addressed before a breakthrough can be made.

#### iv. Clues to Identifying Audiodigitals

This last group represents a small 5% portion of the population.<sup>146</sup> Audiodigitals are characterized as individuals who often have conversations with themselves inside their heads.<sup>147</sup> Audiodigitals use words like *think* and *understand*, talk more than the average person, and respond well when presented with logical arguments.<sup>148</sup> For additional examples of audiodigital words and phrases, refer to Tables 4(a) and 4(b). Since audiodigitals tend to spend a lot of time talking to themselves, they are generally slow in answering questions.<sup>149</sup> They need additional time to internally repeat the question to themselves and internally rehearse the answer before audibly verbalizing their response.<sup>150</sup> As they conduct this internal dialogue, their eyes move down to the right.<sup>151</sup>

Audiodigitals are harder to identify because they demonstrate characteristics of the other three major representational systems. They take the time in advance to rehearse how they will respond.<sup>152</sup> The main difference between the other groups (visuals, auditorys, and kinesthetics) and audiodigitals is that their behavior is generally instinctive and automatic, whereas an audiodigital's reaction, regardless of the characteristics displayed, is practiced.<sup>153</sup> Mediations with audiodigitals tend to take longer because of the time needed to analyze the negotiation at each step of the way. When dealing with an audiodigital, the best approach is to engage in a principled negotiation such that the offers and demands are supported with reasons justifying the basis for the figures contemplated. When approached in this manner, the audiodigital person will be more open to hearing what the other side has to say and to the possibility of settlement.

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

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 164; *see infra* note 154 and Diagram 4.

152. Walter & Bayat, *supra* note 14, at 164.

153. *Id.*



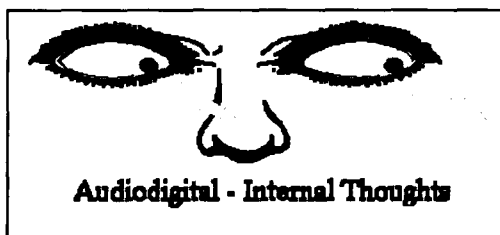
**Table 4(a) – Audiodigital Words<sup>154</sup>**

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

**Table 4(b) – Audiodigital Phrases<sup>155</sup>**

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

**Diagram 4 – Audiodigital Eye Accessing Cues<sup>156</sup>**



154. JAMES & SHEPHARD, *supra* note 5, at 129; *see also* LAKIN, *supra* note 23, at 42.

155. LAKIN, *supra* note 23, at 42.

156. Walter & Bayat, *supra* note 14, at 164. This eye cue is depicted as if you are looking at another person.

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When people are in the audiodigital mode, their eyes look down to the right, signifying that the person is having an internal conversation with himself or herself.<sup>157</sup> If they verbalized their thoughts, it might sound something like, "I should have been more firm when I said I wouldn't accept the offer; No one understands what I'm going through; I hope I told them that I still have a lot of pain in my back." Information is best obtained from an audiodigital when they are caught in the midst of one of these internal conversations with themselves. Take advantage of the opportunity by first pointing out that they appear deep in thought and then asking them to open up and share those thoughts so the problem can be addressed together. Audiodigital people need to talk through the task or decision-making process and feel like they've been heard and understood before they can move on or commit to a decision.

### III. MODELING

#### *A. Modeling What Works in Mediation*

In every field of work, there is an elite group that excels in what they do because of their innate ability to know what constitutes the difference between the good and the superb. Modeling is the process of observing, analyzing and reproducing the structure of those particular abilities that comprise excellence. Do not be misled to believe that through modeling, years of experience and fine tuning can be transferred and absorbed overnight. Modeling will not instantaneously turn an apprentice into a first rate advocate or a superior mediator. What it will do is provide a framework for rapidly gathering information from another about the structure of what they do that makes them as successful as they are and serve as a vehicle for absorbing that excellence.

NLP posits that success depends on the number of choices of operations or responses available in a particular situation.<sup>158</sup> In other words, an advocate or mediator has a greater chance of success if their repertoire is diverse and their behavior flexible. If the response given to each and every situation is the same, then the response has become automated and habitual. To extract from this pattern of behavior requires openness to learning and

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157. *Id.*

158. See O'CONNOR & SEYMOUR, *supra* note 2, at 71.

experimenting with new techniques; only then will there be the mindset needed to achieve the maximum benefits that modeling has to offer.

Behavior modeling involves observing and mapping the successful processes that underlie another's approach when working on settling cases. "The goal is . . . to identify the essential elements of thought and action required [for that person] to produce the desired response or outcome."<sup>159</sup> To start, ask the model to agree to commit the time necessary to participate in the modeling process. Once the model has agreed, arrange a time where he or she can be observed in action during a mediation. If this opportunity can be secured, take advantage of it fully by watching and listening to everything the person does including: his or her eye movements, mannerisms and gestures, tone of voice, word choice, posture, and timing of techniques.<sup>160</sup> NLP refers to this first phase of modeling as "unconscious uptake."<sup>161</sup>

This phase begins with a state of "not knowing" so that all pre-existing assumptions of why the model is engaging in a certain behavior are dispelled. This phase is an opportunity to get a fresh and unbiased view of what mediation is all about from the model's perspective. While in this phase, spend time noticing all the details of the model's environment, what it says about them, and how they use it while working through a case. At the heart of modeling is the ability to identify and appreciate the details and, most importantly, make sense of them.

Once sufficient data has been gathered from the observations in phase one and a solid set of intuitions is developed about what it is like to mediate from the model's perspective, phase two of modeling can begin. In this second phase, the mediation skills are tried out "as if" in the shoes of the person being modeled.<sup>162</sup> While in their shoes, attempt to get the kind of results that the model would achieve had he or she been presented with the same situation. If successful, it is time to move to the third and final phase.

In this last phase, the objective is to fine tune what worked in phase two while achieving the same result being oneself; step out of the shoes of the model and back into your own for this phase. This fine-tuning process will begin by systematically leaving out pieces of behaviors or strategies identified while observing the model to see what really makes a difference in the results being achieved.<sup>163</sup> Anything that is left out, that does not make a difference to the results, is not essential to the model. Conversely, if

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159. DILTS, *supra* note 43, at 29.

160. KNIGHT, *supra* note 1, at 39.

161. DILTS, *supra* note 43, at 55.

162. *Id.*

163. *Id.* at 56.

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something is taken out that alters the results then a crucial part of the model has been identified.<sup>164</sup> Using this “subtraction process,”<sup>165</sup> the steps modeled can be reduced to their simplest and most elegant form, which can then be accessed by anyone to replicate the desired behavior.

#### IV. CONCLUSION

##### *A. Getting the Most Out of NLP*

The NLP principles and guidance offered in this article provide the groundwork for modeling excellence, improving communication and rapport, and developing a greater understanding of the internal representations that guide human behavior. NLP lends itself well to mediation because of the degree of psychological overlay that inherently exists in every conflict. Everyone involved in a mediation, from the parties and their attorneys, to even the mediator, is culpable of engaging in some form of psychological gamesmanship in the quest for settlement. Deception, seduction, influence, and persuasion are just a few of the many psychological techniques that participants use in mediation to steer the case in the direction that most suits them. NLP offers a unique insight into the mind of others and illuminates the tactics being employed to gain the negotiation edge. Whether an advocate or a mediator, understanding how individuals communicate, why people generalize, delete, and distort information, and how these psychological facets affect one’s actions, is essential to enhancing the probability of success in mediation.

Since NLP, like advocacy or mediation, is not a discipline that can be mastered through reading alone, the only way to get the most out of it is by putting NLP to work in practice. Consider incorporating one or two NLP principles at a time and refrain from integrating any more until the ones already tried have been mastered. Given that the “map is not the territory,”<sup>166</sup> one’s map of the world is only limiting if allowed to be; by adding new features and dimensions to our internal map using NLP, we can

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164. *Id.*

165. *Id.*

166. DILTS, *supra* note 43, at 7.

continue to grow and expand our repertoire of available skills and behaviors<sup>167</sup> until excellence is achieved to our satisfaction.

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167. *Id.*