It seems so simple and yet a primary reason for a client to proceed with a malpractice claim against their lawyer is the failure of that lawyer to communicate effectively with the client. Sure, things may have gone wrong; perhaps an error in judgment or actual mistake. But in reality, many of these instances might not proceed to a malpractice action (and while we're at it, a complaint to the state disciplinary authority) if only the lawyer and client would have had a well established and effective communicative relationship.

Consider that in any claim, there are three sides to every story: your client's, the other side's, and, of course, the truth. Most lawyers recognize that "the truth" (defined as what really happened back then) lies somewhere between all the versions of events recounted after the fact. It is not that everyone or anyone involved is lying (necessarily), but rather, it is a reflection of the natural process called "slippage." Over time, certain details of our experiences get lost from memory, while others get reshaped within our minds such that they magically now support our theory and account of events in a very solid way.

Clients will, by definition, delete details from the first re-telling of events forward. The impact of this point for a subsequent lawsuit and possible trial is that lawyers need recognize that they will ultimately not be re-creating anything in the courtroom. Rather, the lawyer's role as a case develops will be to create a new reality, one that is consistent, complete, appealing and, ultimately, compelling in the judge's or jury's eyes. The process and the relationship begins in the client interview, extends through depositions and other discovery, and if necessary, must be executed without a flaw at trial.

To successfully step into the lawyer-client relationship in a malpractice (but for that matter, any) claim, there are certain underlying concepts one needs to understand about how communication functions most effectively. Also known as presuppositions, these fundamental principles of the science known as Neurolinguistic Programming (see Paul M. Lisnek and Eric Oliver, "Courtroom Power: Communication Strategies for Trial Lawyers," PESI Publications, 2001) serve us well in our legal environment:

First. Communication is redundant. We are always communicating and, in fact, cannot *not* communicate. In fact, we are communicating even when we are not speaking. Our words carry only about 7% of our total message. The remainder of our message is contained in the way we say things (38%) and in the visual components of what we say (55%). Do we not watch carefully the expressions, vocal cues, dress and other nonverbal cues that accompany each word and sentence said by another, such as our client? We certainly read emotion and intent beyond and into words.

Second, meaning lies within the client. That means that we often believe the impact of our message is in our words and our intent because we are the source of the message. The reality is that meaning lies in the recipient of the message and most relevant to us, meaning is in the response to our messages. After all, even a good intent can produce a negative response; therefore our messages must be prepared from (or perhaps for) the perspective of the recipient. Clients can respond negatively when their lawyer disagrees with the way in which they relate an event or fact. The emotion triggered may not be

related to the words themselves, but in the underlying message which might be that the client fears the lawyer thinks he or she is a liar or, deeper, a bad person.

Put differently, people act and respond to their map of reality, not to reality itself. Certainly, two people can experience the same events or set of data, yet react differently and relate the events as though they are very different. This is because people take their view of the world into each situation. They rely on their view of the world to relate what will be reality and truth to them. Language skills are going to be essential to unmask what is known first hand from what is assumed to be true simply because it fits the scenario.

Third, people make the best choice available to them at the time of decision. This is critical because our clients can sometimes only see one way to handle their concerns, or at best two alternative means. It is true that there may be other options, perhaps not known in the client's conscious, but known to the unconscious, people nevertheless do the best they can with what they perceive. When only one option for behavior is available, there is no choice situation. Rather, the decision maker is left in a robotic state. When there are but two options for action, then the person may think they have a choice, but the reality is that they find him or herself to be in a dilemma.

For true choice to exist, it is essential that a person have at least three alternatives available to him or her. Less than three options does not present a situation which can be considered choice. Clearly, having choice is better than <u>not</u> having choice and therefore people should always work to create choice even when and where it does not appear to exist. Think of the possible resolutions to problems or conflict that can result if only from the search for additional options!

Finally, there is no such thing as failure, only feedback. Too many people seek to tell others what is wrong or right with their attitudes or behavior. The result is a perception that the information is criticism or implies failure. In reality, each time something does not work, we are presented simply with feedback from which future courses of conduct can be derived. Thomas Edison once said that the first series of experiments regarding electricity did not produce a successful experiment, but were not failures; rather, they taught him what would <u>not</u> work as his efforts continued. Eventually, he came to the proper equations and resources. Similarly, people should study everything they do that does not produce desired results for the lessons learned and the new information that can be relied upon.

In addition, we can improve our communication by recognizing the differences in how different people process information differently. There are three primary processing modes: visual, auditory or sound, and kinesthetic or feeling. For example, many clients (as well as ourselves) are primarily visual processors. Their minds work like a Viewmaster, transforming input into pictures for interpretation. When a vision-based person describes events, he or she does so by describing the pictures that fly through their minds. Your interaction with clients, therefore, should tap into a use of visually-based words permitting that client to retrieve visual information.

Other people prefer naturally to think and process information in words or sounds. These hearing-based people have a constant discussion going on in their heads; they react primarily to the sounds or voices that occupy their minds. They listen to and for details and can locate the logical connections between ideas; asking them to envision a scene or feel emotions presents these jurors with difficulty. Your questions should guide them to process auditory information by concentrating on sounds, conversations and what was said.

Finally, people who think in terms of feelings operate on an emotional level, rather than responding to what they see or hear. They rely on gut reactions and feelings. People who think this way convert external information into a feeling, then sense the feeling, and finally transform their feelings into terms they can communicate.

People provide "clues" as to how they are thinking at any given point in time, so we as lawyers need to learn how to tap into them. Discussed extensively in Lisnek & Oliver's "Courtroom Power," (PESI Publications, 2001), these indicators include posture, gestures, breathing and many others. The easiest of all the indicators to describe are the words selected by the juror, and the ways in which they move their eyes.

Start testing this today. Vision-oriented people use visual words, including "clear," "picture," "focus," "see," "foggy." They use phrases such as "I see what you mean"; "Picture this for a moment"; "In my view…"; "Imagine, if you will"; "Don't look so blue in the face"; "He has a dark personality"; "He appears so transparent."

Hearing-oriented jurors select sound-based words to describe what is happening in their minds. They select words like "hear," "listen," "say," "talk" and "rings." They therefore use phrases such as "I hear what you mean"; "That sounds good to me"; "That rings a bell"; "Talk to me for a minute"; "I want you to explain…"; "That clicks for me"; "Everyone is clamoring for my attention."

Feeling-based persons select tactile words, which include "comfort," "feel," "grasp," and "handle." They use phrases such as "I'm uncomfortable with…"; "I want to grasp this situation"; "There's a hot idea"; "I just don't feel that…"; "That kind of talk is hard to handle."

Keep notes on the words and phrases used by clients. Structure your questions to permit the client to process in a way most comfortable for him or her. Ask a vision-based client to "describe" experiences, a hearing-based juror to "tell you about …" and a feeling-based juror for "their sense of …"

Ultimately, it is the lawyer's burden to insure the development of rapport with our clients; we can't put this burden on the layperson who relies on the lawyer for expertise and guidance. So, what is rapport? It is the commonality and alignment between lawyers and our clients, and it is grounded in conduct, not interpretations. The more behaviors we have in common with another person, the greater the likelihood for rapport. As a rule, people are comfortable with others who act similar to themselves. This is the evidence for

rapport. With awareness and some training in behavioral cues, lawyers can build rapport both consciously and subconsciously with clients.

Lawyers typically think that rapport is created through language. The truth is that rapport develops underneath our words and in the world of body movements and other factors. But before we get there, let's reflect on language. The reality is that clients (and all people) communicate at two levels. The "lower" level of action or behavior ("I want $50,000 to settle this claim") and a higher or upper level called value or need ("that money represents my future security and safety and that's what this lawsuit is all about"). Most people communicate initially (and for quite some time) at the behavior/action level. It's very easy to make demands or make our points in the form of an articulated concrete position. But getting to the level of value is not an easy task. We can get there by asking our client "What is important to you about that demand." Answers like "security," "loyalty," and "survival" are the kinds of upper level drives that propel people to make the demands they make. Once we understand what drives our client, we must recognize that the value is a part of them; not just underlying the particular position they have said to you, but it is an underlying value in their life. That value often explains other behaviors that you might otherwise be at a loss to explain if you did not know what that client's value is (or if you do what most of us do, which is to impose our own values onto our clients and explain their positions in accordance with our personal values. This is not what we should be doing).

Be careful. Do not ask the client "WHY" they demand whatever it is they demand. The use of the term "why" is an irrelevant inquiry about human behavior; it produces only fabrication and post-behavior explanation. There are always more explanations for any particular behavior. Perhaps the point is best illustrated through this all too real example: remember the juror who smiled and nodded in the affirmative toward you throughout an entire trial? You assumed that juror was on your side? The cues seemed clear enough. Then that juror turned out to be the one leading the charge to hang your client out to dry? What went wrong? When did that juror turn against you? Under the behavioral theory, the answer is quite simple. You were never able to rely on your interpretation of that juror's behavior in the first place. There were several other explanations for that same behavior, such as the juror's unconscious internal confirmation that your case affirmed their initial distaste for your case. So those nods were actually cues of your defeat. The interpretations were irrelevant. Only the juror's behavior mattered. And it was consistent. You just muddied the waters with the application of meaning.

In other words, don't assume you know what behaviors mean. Make the effort with your clients to ask them what is important to them. The word "what" does not put their demand into question. It simply acknowledges it and asks them to reflect on it. Once you have the connection between position and value, you can also use that value to explore other components of their position by asking, "in addition to $50,000, how else do you see our accomplishing the security you are seeking here."

Since we don't really know what a client's behavior means, can we ever understand when a client is in agreement with us, or not? Answer: yes. Every person has his or her own

cues for agreement and rejection. The cues vary from person to person, but each person will always use the same cues to signal agreement or disagreement. Lawyers need to learn what each client's cues are for agreement and disagreement. We learn this by asking simple "yes" and "no" questions at the start of our interaction with the client. Carefully observe the client's nonverbal cues, as minute as they may be, and learn them because they will be the same every time that client agrees or disagrees, in your office, at lunch and in every other setting.

In addition to understanding each client's agreement cues, lawyers can work to develop rapport on an other-than-conscious level. This is not as difficult as it may seem because much of what it takes is natural to all humans because we are primates first…and college educated second! (see Lisnek & Oliver, "Courtroom Power').

Subconscious rapport develops through the appropriate use of mirroring and matching of gestures, vocal tone and word type selection. This conduct creates sameness between lawyer and client. The technique of mirroring and matching operates at the subconscious level because it occurs naturally. It can be a conscious tool of the master communicator. Humans will automatically follow and mirror the behaviors of others (just observe the position of the person next to you on the airplane; it's just like yours). Lawyers can consciously match body positions and vocal cues.

Subtly matching the body position of your client as he or she sits in a chair is an extremely effective way of initiating a subconscious level or rapport. Master communicators also match the level of tension in the other person's body and the other person's breathing rate, both of which establish a subconscious bond of rapport. Try matching vocal tone, pitch, volume and speed. A person who speaks loudly is most comfortable with someone else who speaks loudly. If a lawyer speaks very slowly and the client speaks very quickly, all will experience discomfort with the dissimilarity. The master communicator matches voice, delivery and language style of others.

To test for rapport: 1) carefully observe each client's posture, body position, vocal tone, and breathing rate; 2) match the cues and observe the mirroring which naturally occurs anyway within 10 to 50 seconds 3) if the person mirrors back the new behavior, the lawyer will know that rapport has been established. If the person does not mirror back the shift, this is behavioral evidence that rapport does not yet exist.

This brief article has covered a lot of ground. But if I were to summarize the underlying message it is to accept the responsibility for establishing an effective communicative relationship with your clients; do not expect client's to see your point of view. Be the professional they have hired, not just in the law, but as the person who will be sure that your working interaction is clear and understood. The result of your efforts? Likely fewer malpractice claims and increased efforts to mend even broken relationships over unfortunate glitches in our cases that are bound to happen as our practices grow in number and complexity.

Dr. Paul M. Lisnek is the author of 13 books including "The Hidden Jury and Other Secret Tactics Lawyers Use to Win" and the upcoming "Art of Lawyering," to be published by Sourcebooks. He is CEO of Decision Analysis, a leading trial consulting firm (www.decision-analysis.com), host of "Newsmakers" on CNN Headline News on the Comcast Network in the Midwest, and a legal and political analyst for numerous television and radio stations including WGN-TV. Additional information and resources can be found on his home page www.paulmlisnek.com