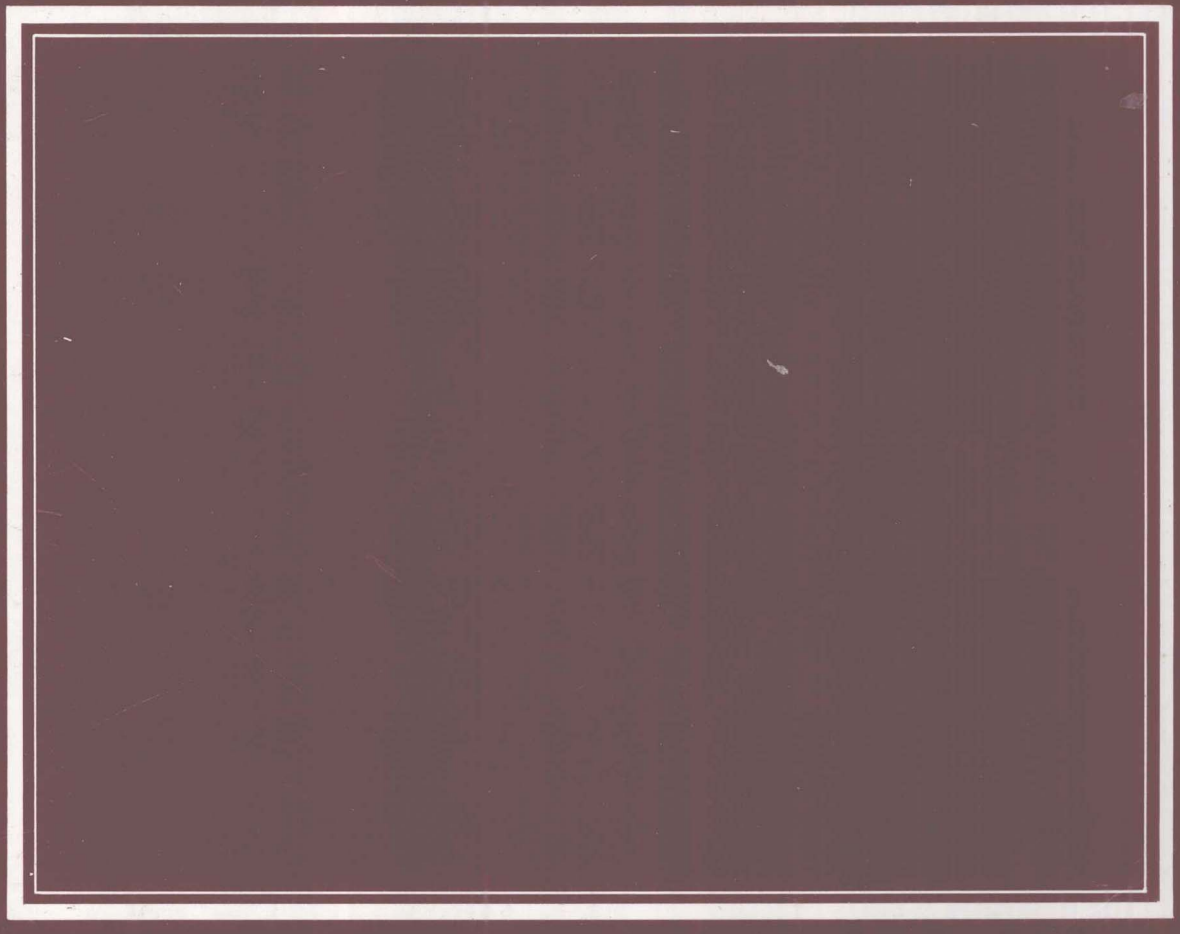
COMMUNICATION *in the* LEGAL PROCESS



RONALD J. MATLON

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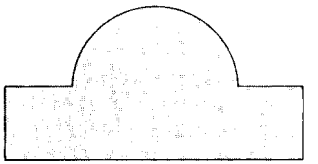

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COMMUNICATION IN THE LEGAL PROCESS

PREFACE

This book focuses on communication questions and communication skills which lawyers, judges, litigants, and jurors face in criminal and civil justice. Particular attention is given to a survey of research related to the verbal and nonverbal aspects of communication for the expressed purpose of noting the application of these to the legal concerns of interview, negotiation and pretrial maneuvers, and litigation. This research review is supplemented by applicable rhetorical and communication theory, as well as anecdotal documentation by experienced trial lawyers and legal educators.

Often referred to as counseling, the legal concern of *interview* involves a consideration of fact-gathering and advising. In studying the legal interview, readers will become aware of the verbal and nonverbal factors which play a role in the success or failure of the interaction. They will be exposed to the philosophy that the interview situation is a get-and-give situation; the lawyer's primary goal is to secure facts, interpretations, and opinions related to a case—both favorable and unfavorable. While doing so, however, lawyers—willfully or otherwise—are inevitably giving clients advice as well as various messages regarding their interpersonal relationship, professional competence, and integrity.

Since most cases never evolve into a courtroom experience (an estimated 90 percent are settled out of court), it is important that those trying to better understand communication in the legal process achieve some measure of understanding of the process of *negotiation and pretrial strategy*. With this in mind, readers will be exposed to the verbal and nonverbal aspects of conflict resolution, information management, and issue analysis. Attention is given to the nature and type of communication activity which contributes to the mosaic entitled negotiation. In addition, various pretrial strategies, such as investigation, pleadings, discovery, issue and theme development, motions practice, and pretrial conferences, are closely tied to the effectiveness of negotiation and trial preparation.

Without doubt the strongest beacon which interests people in the legal profession is their concept of *litigation*. It is, in the eyes of most people, the *sine qua non* of lawyering. Yet, even for many practicing lawyers, it remains an enigma, largely because they have failed to explore the various phases of litigation with an eye toward determining the precise role of

communication in each phase. What dominates the process (and/or its separate phases) is the dialogue: attorney-judge; attorney-attorney; attorney-client-witnesses; attorney-jury; jury-jury; judge-jury. In each instance, verbal and nonverbal factors interact to produce the final trial experience. Readers will be asked to attend to communication principles and strategies applied during the phases of jury selection, opening statements, examination of witnesses, summations, the judge's charges, and jury decision making.

The book is intended primarily for undergraduate upper-division students, although throughout this work I had in mind four categories of potential readers: communication majors who wish to know more about legal processes, pre-law students who wish to know more about communication studies, law and other graduate students, and practicing lawyers. The ideal reader is one who has had some prior knowledge of the fundamentals of communication and/or law.

In sum, the approach used in this book is to apply several subdisciplines of communication to the study, practice, and understanding of the legal process. The principal subdivisions that are adapted to the legal situation are argumentation, persuasion, dyadic communication, small group communication, and public speaking. This is not a book which will emphasize the law, although some understanding of the legal system is necessary to make the book meaningful to the reader. Rather, this book is designed for the purpose of better understanding how verbal and nonverbal communication skills and strategies of persuasion are used in a variety of legal settings.

Of particular help were the comments and suggestions of the following individuals: William L. Benoit, Bowling Green State University; Don Boileau, Director of Educational Services, Speech Communication Association; Wayne Callaway, University of Wyoming; Craig Dudczak, Syracuse University; Michael Fahs, California Polytechnic State University; Joan B. Kessler, California State University—Northridge; Bruce Landis, Kent State University; Nancy G. McDermid, San Francisco State University; Ruth McGaffey, University of Wisconsin at Milwaukee; Gerald Miller, Michigan State University; Scott Nobles, Macalester College; Richard D. Rieke, University of Utah; Rita James Simon, American University; David Smith, University of Southern Florida; Charles Stewart, Purdue University; Ralph Towne, Temple University; Ruth Walden, University of Utah; George Ziegelmueller, Wayne State University; and Gordon Zimmerman, University of Nevada at Reno. I would also like to express my appreciation to the fine staff at Holt, Rinehart and Winston.

R.J.M.

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This book analyzes communication designed to inform and persuade. Communication that informs enlightens the understanding; communication that persuades influences the beliefs, attitudes, and actions of a listener. The specific environment in which communication will be analyzed here is the legal setting—communication between and among lawyers, clients, witnesses, judges, and juries. The book is aimed at students of communication as well as students and practitioners of law who want to better understand how communication functions in the legal process. This is *not* a book about the law. However, since some knowledge of legal process is necessary in order to get the best possible understanding of communication strategies throughout the practice of law, we need to begin our analysis with an overview of the American legal system.

THE LAW, THE LEGAL PROFESSION, AND THE AMERICAN JUDICIAL SYSTEM

The United States has an extremely large legal system. On a per capita basis, our system is about three times as large as that found in Great Britain. In 1950, there were approximately 220,000 lawyers in America. That number grew to over 300,000 by the mid-1960s, and stood at nearly 650,000 in 1985.[1] That meant that there were 2.7 lawyers for every 1,000 persons in the United States. By 1995, the number of lawyers in the United States is expected to double, making law one of the fastest-growing professions.[2]

The number of students interested in law is on the rise as well. In the past decade, the number of individuals taking the Law School Aptitude Test (LSAT) has increased nearly three times, to roughly 100,000 per year. The 174 approved law schools in the United States receive about 65,000 applications annually but accept only 30,000 of the applicants. Nearly 130,000 students are currently enrolled in American law schools, and that figure is double the number of a decade ago.[3] Each year, approximately 35,000 persons graduate from law schools,[4] but only about two-thirds of them find jobs in law after they graduate.

Yet the growth continues. Why? One turning point came several years ago when the Supreme Court said that every citizen is entitled to an attorney. Since then, more and more Americans have gained easy access to legal counsel. Now, with advertising, legal clinics, and prepaid legal plans, millions of people each year consult attorneys. In addition, more and more disputes of all kinds that might have been settled within a family or community are becoming matters of legal concern. Going to court is a great indoor sport!

The legal profession is attractive to many. Although starting attorney salaries average only $25,000 a year,[5] senior partners in law firms earn incomes well into six figures. Being an attorney is also attractive because many see lawyering as the road to power. For instance, being a lawyer is an excellent springboard to political office. What often attracts prelaw students most is the thrill of someday being able to go to trial, probably the most exciting element of lawyering.

Becoming a Lawyer

After receiving an undergraduate degree, students spend three full years in law school to earn the J.D. (doctor of jurisprudence) degree. Certain common courses on the law and legal research are taken by all students, regardless of the law schools they attend. Required courses include civil procedure, criminal law and process, torts, contracts, property, and evidence. Some lawyering skills and communication techniques courses in trial advocacy, interviewing, and negotiation are offered at the upper level, but they are considered nontraditional and are almost always elective in nature.

The teaching method used in law schools

is Socratic, designed to get students "to think like lawyers." The Socratic method is an inductive approach to education in which the students have masses of raw data from court cases dumped in their laps. From these data, students are asked question after question about judicial opinions to lead them to an understanding of the legal principles involved, to a recognition of the complexity and ambiguity of the law, and eventually to an ability to think on their feet and defend their ideas.

Upon graduation from law school, an individual seeks admission to a state bar. Each state has its own bar examination, and one usually cannot get a license to practice law in a state without passing the examination. The bar examination is said to be more difficult than any examination a student takes while enrolled in law school, and the national pass rate is roughly 67 percent.[6]

Once the bar examination is passed, the new lawyer may try to join an established firm. One out of every three does so.[7] As a beginning associate in the firm, the lawyer performs much legal research and has little direct contact with clients. Rather, most of the communication in this job is with lawyers and staff in the firm. Middle-range and upper-range associates achieve increased responsibilities in consulting with clients, negotiating contracts, and so forth. A senior associate or junior (or middle) partner in a law firm is the one who is contacted directly by clients, assigns research to others, offers legal advice, and maybe does some trial work. Several years down the line, after setting an outstanding track record, a lawyer can become a senior partner in the firm. Senior partners are broad-based advisors and office managers. They counsel younger attorneys. They are called upon by bar associations to perform certain professional functions. And they serve as advocates in major trials.

Of course, not all graduates from law school follow these same career steps. One out of three sets up his or her own practice; one out of ten is employed by private industry; one out of ten becomes a district attorney or public defender; and others assist judges, teach, or work in law-related occupations.[8]

Whatever career paths lawyers choose, there are certain specific tasks common to all. Lawyers *read* a great deal. Much of this reading is legal research necessary to draft documents, advise clients, and try cases. Lawyers *negotiate* a great deal. They try to get people with other interests to accommodate their own views, and they attempt to manage conflict. Lawyers *write* a great deal, and they must deal with considerable detail carefully and clearly. Finally, lawyers *talk* a great deal. They spend considerable time informing and persuading clients, witnesses, experts in many fields, other lawyers, judges, and jurors. Reading, negotiating, writing, and speaking skills are essential to an attorney.

Lawyers specialize in criminal or civil law. In *criminal law,* the government (national, state, or local) brings charges against an individual or group for breaking a law. Representatives of the state in criminal law are the *prosecutors* or *district attorneys.* Sometimes they are elected to their positions; other times they are appointed. Prosecutors are full-time employees in most jurisdictions, although there are still some part-time district attorneys in rural areas. If a prosecutor is only part-time, he or she may also have a private practice but may not handle criminal cases for the defense. Many *defense attorneys* in criminal cases also work for the state. They are called *public defenders;* they represent individuals who cannot afford to hire their own attorneys. Of course, there are criminal defense attorneys in private practice too.

In *civil law,* where most attorneys practice, citizens file complaints against other citizens or groups for recovery of damages or property, or to compel certain conduct such as honoring a contract.[9] Attorneys who file complaints in civil litigation are called *plaintiff's lawyers.* Their opposition is once again called the defense counsel. Attorneys in civil law frequently specialize (e.g., contracts, wills and

trusts, medical negligence cases, tax law, patent law). In 1981, more than 13 million civil suits were filed in our courts. In contrast, Japan—a nation with a population one-half that of the United States—had only 282,000 such suits.[10]

The Legal System in America

Our system of justice is very much like that found in Great Britain. The rights, duties, liberties, and privileges of individual citizens are similar in both countries. Yet, our systems are also quite different. State autonomy has played an important part in United States history, so we have no national criminal law, no uniform law of torts and property, no nationwide divorce law, and so on. Furthermore, courts in one state are not bound by decisions of courts in other states.

In America, we have over 3,500 state courts of general jurisdiction. They are called circuit, district, or superior courts, depending on where you live. These state trial courts are empowered to hear and decide a large variety of civil and criminal cases. Also, there are several thousand courts of limited jurisdiction. These are courts that deal with particular matters, such as petty crime, probate (wills), small claims, domestic relations (divorces and child custody), and juvenile problems. Municipal courts and justice-of-the-peace courts are known as courts of limited jurisdiction. They have jurisdiction in matters arising out of city and town ordinances (e.g., traffic violations). In each state, there is a supreme tribunal to hear appeals from the decisions of courts inferior to them. Some larger states have intermediate appellate courts to better manage the case load and prevent every matter on appeal from going to the supreme courts.

Alongside these fifty state court systems there is another system at the federal level. Ninety-four district courts exist in the federal system. These courts deal with violations of federal and interstate crimes, such as narcotics violations, smuggling, income tax evasion, and treason and espionage. Many organized crime cases go through the federal district courts since they involve alleged violations in interstate commerce. Eleven federal appellate courts also exist. These courts cannot hear state court appeals, but only appeals from federal district courts. Decisions in one federal appellate court are not binding in other federal appellate courts. Finally, the United State Supreme Court is the highest and most powerful court in the country. The nine justices of the Supreme Court can review lower court decisions that involve questions of federal and constitutional law, but they choose which cases to review.

Next, let us examine the procedure that eventually leads to a trial. In *criminal law,* the typical situation is to have a suspected offender arrested and booked by the police. The suspect is advised of certain rights. The case is brought before a prosecutor who decides whether or not to *charge* the suspect with committing a crime and, if so, for which criminal offense. The act of charging involves the filing of a complaint (called an information) by the state. The charge is read to the suspect by a magistrate (judge). If the crime is especially serious,[11] the court takes steps to guarantee that the suspect will be present for a possible trial. Hence, the accused is detained in jail unless the necessary bail can be paid. Bail is a sum of money which must be paid by the accused to get out of jail. That money is returned to the suspect only if he or she is present throughout the course of trial. If the charge is not serious, the accused may be released with instructions not to leave the jurisdiction during the processing of the case.

Shortly after the arrest, the filing of the charge, and the setting of bail, a preliminary hearing is held to determine whether there is probable cause (sufficient reason) to believe the suspect might be guilty of the charge. If probable cause exists, the defendant is bound over to a proper court of trial jurisdiction.

Otherwise, the suspect is released. To establish probable cause, a prosecutor files a formal accusation called the *indictment.* Sometimes a defendant is bound over by a single judge; other times, a group of approximately 16 to 23 citizens issues indictments. This citizens' group is called the grand jury.[12] An indictment can be issued by a simple majority vote from the grand jurors. At the preliminary hearing to decide whether to indict, the defendant typically presents no evidence. The only evidence heard is that which comes from the prosecuting attorney.

After the indicted defendant is bound over to a proper court of trial jurisdiction, an *arraignment* is held. The purpose of the arraignment is to get a plea on the indictment. The charge is read aloud, and then counsel for the defense files a plea. The plea can be "guilty," in which case the judge sets a time for sentencing. The plea can be *"nolo contendere"* (no contest), which has the same effect as a guilty plea in the matter at hand but cannot be used as an admission for subsequent criminal or civil litigation. The plea can also be "not guilty"—or "not guilty by reason of insanity," a rarely used plea. If a not guilty plea is filed, a trial date is set. Between the arraignment and the trial, delicate negotiating takes place to see if an agreement can be reached between the prosecutor and the defense counsel to prevent the case from going to trial. This is called *plea bargaining.* Should no settlement be reached, a trial is held before a single judge or a petit jury. At trial, the prosecutor must prove guilt beyond a reasonable doubt. This requirement is known as the *burden of proof.* If the defendant is found not guilty (is acquitted) at trial, he or she walks away free. If the defendant is found guilty (is convicted), the presiding judge imposes an appropriate sentence.

Civil cases follow similar procedures. A civil case begins with a cause of action, an alleged wrongful act for which a lawsuit is brought. For instance, if you sign an agreement to buy a house and the seller refuses to go through with the deal, you have a cause of action: a breach of contract. So, working with a lawyer, you lay out the facts behind this cause of action in a document called the *complaint,* which is filed in court. The court, in turn, issues a summons to the defendant to answer the complaint. Negotiating between both sides follows, and should no settlement be reached, a trial occurs. At trial, the plaintiff must prove a case by the preponderance of the evidence. If the jury finds for the plaintiff, money damages will usually be awarded.

THE RELATIONSHIP OF LAW TO COMMUNICATION AND RHETORIC

All lawyers must be masters of communication. They must have interpersonal communication skills for interviewing, negotiation skills for bargaining, and public speaking skills for appearing in court. Several sources attest to the importance of communication in the practice of lawyering. Hunsaker writes, "Since law . . . is a communicative system, chiefly rhetorical in nature, . . . the lawyer [becomes] an agent of rhetorical change. . . . Through his skill in using linguistic tools, he shapes, alters, and restructures social reality."[13] Goodpaster claims that to be an effective lawyer requires "very high level abilities not only to communicate, but also to perceive the full range of what is being communicated by the parties; and . . . a good knowledge, intuitive or acquired, of the psychology of communication and persuasion and . . . a repertoire of specific communication and persuasion techniques which can be used in or adjusted to various situations."[14] Similar opinions are found in the following quotations:

> Ability to make use of the spoken word may be one of the lawyer's principal assets. Just a glance at some of the activities of today's attorney show that his effectiveness may be limited by his ability