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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Gaining Compliance Through Non-Verbal Communication

Pamela Peters*

I. INTRODUCTION

WHAT YOU SAY, HOW YOU SAY IT, WHEN YOU SAY IT, AND WHAT YOU LOOK LIKE WHEN YOU SAY IT

Law school and the practice of law place great importance on what is said. A lawyer is a wordsmith; words are his tools—and there is merit to this notion, but perhaps communication is more than merely what is said. For instance consider how the world of advertising persuades millions of consumers through the use of seductive images, or that look your mother gave which warned you that you were in trouble.

Communication is made up of more than words. One study found that appearances, movements, expressions, and body language make up 55% percent of our communications; tone, inflection, and sound another 38%, which leaves only 7% for content, our words.¹ For instance, the same words often have different meanings depending on the context, timing, tone, volume, and accompanying non-verbal signals.²

Nonverbal communication is comprised of “all the messages other than words that people exchange in interactive contexts.”³ Communication experts believe, and as general personal experience can attest, non-verbal communication is the most important element of making a good first impression.⁴ “Knowing what your natural body language says, and learning

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¹ See generally ALBERT MEHRABIAN, *SILENT MESSAGES* (1971); see also V. HALE STARR & MARK MCCORMICK, *JURY SELECTION* § 12.02 (2001) (finding that non-verbal communication accounts for 65-70% of total human communication).

² MEHRABIAN, *supra* note 1, at 47–50.

³ LAURA K. GUERRERO, JOSPEH A. DEVITO, & MICHAEL L. HECHT, *THE NONVERBAL COMMUNICATION READER: CLASSIC AND CONTEMPORARY READINGS* (2d ed. 1999).

⁴ KARE ANDERSON, *GETTING WHAT YOU WANT: HOW TO REACH AGREEMENT AND RESOLVE CONFLICT EVERY TIME* 74, 74-76 (1994) (stating that we “make judgment about people within the first seven to twenty seconds” and that our nonverbal communication is not only the most important component of making a good first impression, it’s one you can actually control).

to manage it so that it says what you want it to say, is a vital part of creating a good first impression.”⁵ Beyond first impressions, monitoring non-verbal communication—yours and your counterpart’s—can improve your bargaining position and make you a more effective communicator personally and professionally.⁶

Whether acting as a third party neutral, addressing a judge or jury, or prepping a witness, an understanding of unspoken communication is essential to establishing rapport and gaining credibility.⁷ “The sine qua non of a successful client interview is rapport.”⁸ A skilled attorney, negotiator, mediator, or arbitrator will “be able to effectively communicate across cultures, languages and legal systems.”⁹

This article will examine the often de-emphasized and overlooked non-verbal aspects of communication. A messenger’s communication is impacted by the effective use of non-verbal signals, allowing him to draw on the other 93% of communication to his advantage.¹⁰ Understanding the impact of non-verbal messages sharpens one’s ability to view seemingly superficial mannerisms and movements as potential cues. However, non-verbal signals are intangible and subjective, and should not be examined through a rigid lens. While there are general meanings assigned to specific movements, meanings may vary by context, culture, and communicator. Still, overall most movements are unconscious signals. Further, this article is designed to prompt individual assessment and increase awareness of one’s personal non-verbal mannerisms. This article is intended to encourage members of the ADR and legal communities to thoughtfully observe those around them and implement purposeful movements into their interactions, ultimately becoming more powerful and effective communicators and professionals.

A skilled communicator will take advantage of this “hidden” form of persuasion in order to gain compliance. This article will consider two methods of gaining compliance through non-verbal signals.. The first category examines persuading through liking, by establishing attraction and similarity. Its basic premise is that highlighting shared features, establishing favorable interpersonal relationships, building trust, and fostering credibility

⁵ *Id.* at 76.

⁶ *Id.* at 74-76.

⁷ See generally L. TIMOTHY PERRIN, HARRY M. CALDWELL, & CAROL A. CHASE, THE ART & SCIENCE OF TRIAL ADVOCACY, 14-30 (2005).

⁸ Norma C. Connolly & Marilyn R. Tayler, *Cross-Cultural Client Contact: Achieving Effective Communication*, 227-APR NEW JERSEY LAW. MAG. 45 (2004).

⁹ *Id.* at 45.

¹⁰ MEHRABIAN, *supra* note 1, at 75-79.

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through non-verbal behaviors increases a messenger's ability to persuade. "[T]he same behaviors that often signal attraction and similarity between a messenger and receiver will also enhance the effectiveness of persuasive appeals, perhaps by virtue of promoting the receiver's sense of self identification with the sender or creating a close personal relationship on which the sender can draw."¹¹ The second category considers the use of non-verbal signals to convey power, dominance, and status to increase compliance rates. Reward, threat, punishment, and social and organizational hierarchies are also discussed as means of establishing power, dominance, and status. The goal of this article is to persuade readers that behaviors which communicate attraction and power are the same behaviors that improve one's ability to influence others.

II. LIKING: ATTRACTION AND SIMILARITY

"THE MAIN WORK OF A TRIAL ATTORNEY IS TO MAKE A JURY LIKE HIS CLIENT" –CLARENCE DARROW

Legal research has found that jurors are more apt to accept and believe the arguments of attorneys who are attractive and similar to the jurors themselves.¹²

A. Defining Attraction

Attraction has been defined by researchers as "the positive temperament to respond to another in an agreeable way."¹³ Theorists have found that effectiveness of attraction rests on the premise that receivers desire to be "with and like" attractive messengers.¹⁴ The all-pervading sense that 'what is beautiful is good' is a stereotype triggered by physical beauty and attractive voices.¹⁵

¹¹ Judee K. Burgoon, Norah E. Dunbar, & Chris Segrin, *Nonverbal Communication*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 427, 448 (2002).

¹² See Daniel G. Linz & Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom*, 8 LAW & PSYCHOL. REV. 1 (1984).

¹³ Ellen Berscheid & Harry T. Reis, *Attraction and Close Relationships*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 193 (1998).

¹⁴ *Id.*

¹⁵ Kenneth Dion, Ellen Berscheid, & Elaine Walster, *What is Beautiful is Good*, J. PERS. & SOC. PSYCHOL. 285 (1972). One of the most widely cited conclusions from research on physical attractiveness is summarized by Dion, Berscheid, and Walster's claim that, in people's perceptions of others, "what is beautiful is good," (citing Alice H. Eagly, Richard D. Ashmore, Mona G. Makhijani, &

1. Beauty, Attraction, and Social Skills

Under the “halo effect,” when a receiver views a messenger as physically attractive, the receiver will also assign other positive characteristics to the messenger.¹⁶ Research has demonstrated that it is common to assign physically attractive people additional favorable traits, like talent, honesty, kindness, and intelligence.¹⁷ Further, researchers have found that “attractiveness enhances persuasion independent of argument quality, expertise, and trustworthiness.”¹⁸

Many other studies have shown and confirmed that persuasiveness is associated with attractiveness.¹⁹ Researchers have found that good-looking individuals received more offers for help,²⁰ earned higher salaries,²¹ and were better able to influence and change an audience’s attitudes than less attractive people.²² The researchers reasoned that the general likeability of attractive individuals predisposes receivers to agree with the attractive mes-

Laura C. Longo, *What is Beautiful is Good: A Meta-Analytic Review of Research on the Physical Attractiveness Stereotype*, 110 PSYCHOL. BULL. 109 (1991)); Miron Zuckerman, Holley S. Hodgins, & Kunitate Miyake, *The Vocal Attractiveness Stereotype: Replication and Elaboration*, 14 J. NONVERBAL BEHAV. 97, 97-100 (1990); see also Zuckerman & Miyake, *The Attractive Voice: What Makes it so?*, 17 J. NONVERBAL BEHAV. 119 (1993) (exploring the acoustic characteristics of attractive voices).

¹⁶ Dion, Berscheid & Walster, *supra* note 15, at 285 (stating that “beautiful is good and ugly is bad”).

¹⁷ Alice H. Eagly, Richard D. Ashmore, Mona G. Makhijani, & Laura C. Longo, *What is Beautiful is Good: A Meta-Analytic Review of Research on the Physical Attractiveness Stereotype*, 110 PSYCHOL. BULL. 109, 121-23 (1991).

¹⁸ See BURGOON, DUNBAR, & SEGRIN, *supra* note 11, at 446; see generally Ross Norman, *When What is Said is Important: A Comparison of Expert and Attractive Sources*, 12 J. SOC. PSYCHOL. 294 (1976) (exploring trustworthiness and argument quality); see also Shelly Chaiken, *Communicator Physical Attractiveness and Persuasion*, 37 J. PERS. & SOC. PSYCHOL. 1387 (1979) (exploring the relationship between expertise and source attractiveness).

¹⁹ See BURGOON, DUNBAR, & SEGRIN, *supra* note 11, at 446; see also K.K. Dion, *Physical Attractiveness and Evaluation of Children’s Transgressions*, J. PERS. & SOC. PSYCHOL. 207, 207-13 (1972) (identifying that the social benefits of attraction are not limited to the adult world by showing that adults view an attractive child’s misbehavior as less naughty); see generally Vicki Ritts, Miles L. Patterson & Mark E. Tubbs, *Expectations, Impressions, and Judgments of Physically Attractive Students: A Review*, 62 REV. EDUC. RES. 413 (1992) (showing that elementary teachers often presume good-looking kids as more intelligent).

²⁰ Peter Benson, Stuart A. Karabenic, & Richard M. Lerner, *Pretty Please: The Effects of Physical Attractiveness on Race, Sex, and Receiving Help*, 12 J. EXPERIMENTAL PSYCHOL. 409, 409-15 (1976).

²¹ Daniel S. Hamermesh & Jeff E. Biddle, *Beauty and the Labor Market*, 84 AM. ECON. REV. 1174, 1185-90 (1994) (finding that on average, good looking workers take home 12-14% more than their less attractiveness coworkers). See generally Biddle & Hamermesh, *Beauty, Productivity and Discrimination: Lawyers’ Looks and Lucre*, 16 J. OF LABOR ECON. 172 (1998).

²² See Chaiken, *supra* note 18, at 1390-93.

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senger's arguments and messages.²³ Likewise, experts have also found that physical beauty influences politics and voting.²⁴ One study reported that attractive political candidates received over two and a half times more votes than their unattractive counterparts.²⁵

Physical traits and attractiveness may also influence the outcomes in the justice system. Research indicates that the attractiveness of the victim and defendant has an effect on verdicts.²⁶ For instance, unattractive defendants are found guilty more often than attractive ones.²⁷ Defense attorneys with their client's best interest in mind will attempt to improve their client's physical appearance in an effort to minimize the negative correlation between unattractiveness and guilty verdicts.

One's social skills permeate a discussion of one's ability to persuade.²⁸ Researchers have found that attractive people usually possess better social skills which allow them to be more comfortable and effective in influential positions.²⁹ An understanding of unspoken influence and basic social skills are prerequisites for competent communication and persuasion.

B. Defining Similarity

Beyond attraction, liking can also be a result of perceived similarities between the messenger and the receiver.³⁰ Researchers have defined similarities as shared beliefs, experiences, knowledge, values, and communica-

²³ *Id.*

²⁴ Thomas Lee Budesheim & Stephen J. DePaola, *Beauty and the Beast? The Effects of Appearance, Personality, and Issue Information on the Evaluation of Political Candidates*, 20 *PERS. & SOC. PSYCHOL. BULL.* 339, 344-47 (1994).

²⁵ *Id.* Most of the voters denied that physical traits influenced their selection in any way, but research has confirmed the relationship between attractiveness and electability.

²⁶ See STARR & MCCORMICK, *supra* note 1, at 415-18 (§ 13.02).

²⁷ *Id.* at § 13.02.

²⁸ See Alice H. Eagly, Richard D. Ashmore, Mona G. Makhijani, & Laura C. Longo, *What is Beautiful is Good: A Meta-Analytic Review of Research on the Physical Attractiveness Stereotype*, 110 *PSYCHOL. BULL.* 109, 111-13 (1991) (finding that subject's perceived of attractive targets as more socially competent).

²⁹ See Chaiken, *supra* note 18; see also Debra Umberson & Michael Highes, *The Impact of Physical Attractiveness on Achievement and Psychological Well-Being*, 50 *SOC. PSYCH. Q.* 227 (1987) (finding that one's attractiveness impacts achievement and psychological well-being).

³⁰ See generally THEODORE M. NEWCOMB, *THE ACQUAINTANCE PROCESS* (1961); see also Robert A. Neimeyer & Kelly A. Mitchell, *Similarity and Attraction: A Longitudinal Study*, 5 *J. OF SOC. & PERS. REL.* 131 (1988) (exploring how similarity impacts attraction as a relationship develops).

tion styles or those perceived as shared.³¹ “Non-verbal cues that promote or signify . . . similarity have great potential to influence others.”³² Under this line of reasoning, a lawyer should “stress similarities between himself and the jury, particularly in beliefs, attitudes, values, and goals because people view those similar to themselves as credible.”³³

It is through non-verbal mannerisms that we communicate and identify similarities.³⁴ Duck’s “Similarity Theory” explains that “we never see the internal . . . attitudes of others directly [and] [b]ecause of this, the two peoples’ readings of each other’s non-verbal behavior will be critical to this inference process and highly significant.”³⁵ Duck clarifies that it is through both non-verbal behaviors and interactions that people infer similarities and consequently attraction, which increases a party’s power to persuade.³⁶

When a receiver identifies similarities between herself and a messenger, it reinforces her own self-concept; this phenomenon is known as “Heider’s Balance Theory.”³⁷ Heider reasoned that shared beliefs, qualities, experiences, characteristics, or behaviors validate the receiver.³⁸ In addition to reinforcing her personal self-concept, shared styles or behaviors allow the receiver to better predict and understand the messenger.³⁹ When a receiver views a speaker as similar to herself, the receiver perceives the speaker and his message as more attractive, and thus more persuasive.⁴⁰ Similarity can be established through subtly mirroring the other person’s movements, communication style, or through shared dress, artifacts, or culture.⁴¹

Further, if the receiver likes the messenger, the receiver is more likely to search out and identify shared qualities and beliefs because the receiver desires to hold attitudes and engage in behaviors similar to those of the attractive messenger.⁴² Byrne’s “Similarity Theory” explains the strong associa-

³¹ *Id.* See generally Timothy J. Curry & David A. Kenny, *The Effects of perceived and Actual Similarity in Values and Personality in the Process of Interpersonal Attraction*, 8 QUALITY & QUANTITY 27 (1974).

³² See BURGOON, DUNBAR, & SEGRIN, *supra* note 11, at 446.

³³ Thomas Sannito, *Psychological Courtroom Strategies*, TRIAL DIPL. J. 30, 34 (1981).

³⁴ See STEVE DUCK, *MEANINGFUL RELATIONSHIPS: TALKING, SENSE, AND RELATING* (1994).

³⁵ STEVE DUCK, *HUMAN RELATIONSHIPS* 72 (1998).

³⁶ *Id.* at 72-74.

³⁷ FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONSHIPS* 20-25 (1958) (noting that individuals are better able to predict and understand individuals similar to themselves).

³⁸ *Id.* at 21-24.

³⁹ *Id.*

⁴⁰ *Id.* at 295-98.

⁴¹ *Id.*

⁴² Donn Byrne, *Interpersonal Attraction and Attitude Similarity*, 62 J. ABNORMAL & SOC. PSYCHOL. 713, 713-16 (1961) “Any time another person offers us validation by indicating that his percepts and concepts are congruent with ours, it constitutes a rewarding interaction and, hence, one element of forming a positive relationship.” *Id.* at 713.

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tion between a receiver's attraction to a messenger and the receiver's subsequent recognition of shared similarities.⁴³ Byrne reasoned that associating with attractive people provides a social reward because the receiver desires to resemble and be perceived as similar to the attractive messenger.⁴⁴ It is through non-verbal behaviors that an attractive messenger can reinforce a receiver's attraction and predisposition to influence.⁴⁵

Receivers respond most positively to messengers using non-verbal behaviors and styles most like their own, according to Communication Accommodation Theory (CAT).⁴⁶ This positive response is a result of the receiver viewing behaviors similar to her own as pleasant and attractive.⁴⁷ Additionally, receivers still respond positively to non-verbal styles similar to their own when unaware of the messenger's adaptation.⁴⁸ Thus, under the "Communication Accommodation Theory," messengers who adjust their communications to mimic their receiver's style should be perceived as more attractive.⁴⁹

C. *Establishing Attractiveness and Similarity*

Non-verbal behaviors have the power to make the "sender appear more attractive, signal the sender's attraction for the receiver, or signify similarity between the sender and the receiver."⁵⁰ Physical appearance, body language, proximity, artifacts, eye contact, and other non-verbal actions may serve not only as behaviors that enhance attraction and similarity during an interaction, but also as pre-interactional elements in that they may draw peo-

⁴³ *Id.* (describing the "law of attraction").

⁴⁴ *Id.*

⁴⁵ See generally DONN BYRNE, *THE ATTRACTION PARADIGM* (1971).

⁴⁶ Howard Giles, Nikolas Coupland, & Justine Coupland, *Accommodation Theory: Communication, Context, and Consequence*, in *CONTEXTS OF ACCOMMODATION: DEVELOPMENTS IN APPLIED SOCIO-LINGUISTICS* 1, 14-19 (1991).

⁴⁷ *Id.* (finding that this phenomenon is particularly true when messenger adopts the receiver's vocal style).

⁴⁸ *Id.*

⁴⁹ *Id.* This mimicking behavior is often referred to as "mirroring." *Id.* In an effort to establish similarities, increase attractiveness, and consequently persuasiveness, a "big city" lawyer trying a case in the Deep South should adapt his style of dress, pace, and tone. He should take conscious steps to create more similarities between himself and his audience, the jury. He should leave his designer suits at home, slow down his rate of speech, and make an effort to establish more rapport with witnesses.

⁵⁰ See BURGOON, DUNBAR, & SEGRIN, *supra* note 11, at 448-49.

ple together. In this manner, non-verbal cues may predispose people to interact and be susceptible to influence even before the first word is uttered.”⁵¹

1. Pretty Please: Appearance and Liking

Physical characteristics, artifacts, and dress can be used to create a sense of identification and shared similarity between parties.⁵² Receivers are more likely to comply with messengers dressed similarly to them; like other similarities, shared dress increases the messenger’s attractiveness and ability to persuade the receiver.⁵³ One experiment proved this theory, finding well-dressed solicitors more successful with well-dressed receivers and casually dressed solicitors more successful with similarly dressed receivers.⁵⁴ The power of appearance is further demonstrated by reflecting on how social groups, work groups, gangs, and entire cultures all use clothing, symbols, and insignias to establish “in-group” status.⁵⁵

2. I Like the Way You Move: Kinesics and Liking

Kinesics, or body language, are expressive head, facial, eye, and other body movements.⁵⁶ Eye contact, or mutual gaze, can create, increase, and indicate attraction.⁵⁷ A mutual gaze with a woman across the bar may influence a man’s decision to approach her. Frequent eye contact is a sign of attraction and a positive relationship, while a lack of mutual gazes indicates relational distress or discomfort.⁵⁸ Eye contact is a reliable tool for increasing compliance.⁵⁹ Researchers have found more rides given when hitchhiking,⁶⁰ more coins given to make a phone call,⁶¹ and more charitable dona-

⁵¹ See *id.* at 449.

⁵² Angela Hein Cicca, Mary Step, & Lyn Turkstra, *Show Me What You Mean: Nonverbal Communication Theory and Application*. 34 ASHA LEADER 4, 4-5 (2003). ASHA is the acronym for the American Speech-Language-Hearing Association.

⁵³ Wayne E. Hensley, *The Effects of Attire, Location, and Sex on Aiding Behavior: A Similarity Explanation*, 6 J. NONVERBAL BEHAV. 3, 3-11 (1981).

⁵⁴ See *id.* at 8. The well-dressed solicitors were at the airport while the casually dressed solicitors were at the bus stop.

⁵⁵ See Burgoon, Dunbar, & Sergin, *supra* note 11, at 451.

⁵⁶ See *id.* at 449.

⁵⁷ *Id.*

⁵⁸ See GUERRERO, DEVITO, & HECHT, *supra* note 3, at 44-46.

⁵⁹ Chris Segrin, *The Effects of Nonverbal Behavior on Outcomes of Compliance Gaining Attempts*, 44 COMM. STUD. 169, 180-85 (1993).

⁶⁰ Mark Snyder, John Grether, & Kristine Keller, *Staring and Compliance: A Field Experiment on Hitchhiking*, 18 J. APPLIED. SOC. PSYCHOL. 247, 299-303 (1974).

⁶¹ Joel Brockner, Brian Pressman, Jill Cabitt, & Phillip Moran, *Nonverbal Intimacy, Sex, and Compliance: A Field Study*, 6 J. NONVERBAL BEHAV. 253, 253-58 (1982).

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tions given when the solicitors made eye contact.⁶² Researchers have found that when solicitors establish eye contact, drivers give more rides to hitchhikers, strangers give more coins to people trying to make phone calls, and even passerby's give more charitable donations to strangers.⁶³

3. Less is More: Proxemics and Liking

Beyond eye contact, other non-verbal behaviors, such as space and distancing, can increase a receiver's attraction to a messenger. Messages conveyed through the use of distance and space are called proxemics.⁶⁴ There is an inverse relationship between compliance and distance; compliance rates increase as the distance between parties decreases.⁶⁵ Research indicates solicitors interacting at closer distances (one to two feet) are more successful in gaining compliance to their requests than those interacting at greater distances (four to five feet).⁶⁶ However, a messenger should be careful not to come too close to a receiver and violate his personal space. Nonetheless, experts agree that physically attractive, well-dressed, upper-class messengers are better able to violate a receiver's personal space and still gain compliance.⁶⁷

Additionally, spacing sends messages regarding intimacy levels. Parties in a close relationship will use less personal space than strangers.⁶⁸ Receivers will select closer mingling distances when they perceive the messenger as attractive and likeable.⁶⁹ Attorneys should look for spatial clues in their

⁶² Ray Bull & Elizabeth Gibson-Robinson, *The Influences of Eye-gaze, Style of Dress, and Locality on the Amounts of Money Donated to Charity*, 14 J. NONVERBAL BEHAV. 51, 56-59 (1981).

⁶³ Judee K. Burgoon, Valerie Manusov, Paul Mineo, & Jerold L. Hale, *Effects of Eye Gaze on Hiring, Credibility, Attraction, and Relational Message Interpretation*, 9 J. NONVERBAL BEHAV. 133, 133-46 (1985).

⁶⁴ Stanley L. Brodsky et al., *Attorney Invasion of Witness Space*, 23 LAW & PSYCHOL. REV. 49, 50 (1999).

⁶⁵ See Segrin, *supra* note 59, at 175.

⁶⁶ *Id.* Decreased personal space led to receiving more volunteers to act as study participants. *See id.* Additionally, decreased personal space led to receiving more signatures for petition. *See id.*

⁶⁷ Judee K. Burgoon & Lynn Aho, *Three Field Experiments on the Effects of Conversational Distance*, 49 COMM. MONOGRAPHS 71, 84-87 (1982).

⁶⁸ See Jack Aiello, *Human Spatial Behavior*, in HANDBOOK OF ENVIRONMENTAL PSYCHOLOGY 389, 391-95 (1987); *see generally* Hayduk, *Personal Space: Where We Now Stand*, 94 PSYCHOL. BULL. 293 (1983).

⁶⁹ See Donn Byrne, Charles Ervin, John Lamberth, *Continuity Between the Experimental Study of Attraction and Real-life Computer Dating*, 16 J. PERSON. & SOC. PSYCHOL. 157 (1970); *see also* Robert Gifford, *Projected Interpersonal Distance and Orientation Choices: Personality, Sex, and Social Situation*, 45 SOC. PSYCHOL. 145 (1982).

interactions. Is the front row of the jury box leaning back in an effort to gain distance, or leaning forward to increase the connection and show interest?

4. Getting Physical: Haptics and Liking

The non-verbal messages of physical touching or contact are called haptics.⁷⁰ Touch within social interaction establishes and communicates liking, affiliation, comfort, and intimacy.⁷¹ Accordingly, touch is positively linked to a party's ability to influence.

Generally, receivers will hold a more positive attitude towards a messenger who touches them.⁷² For instance, patients expressed more positive attitudes towards nurses who engaged in physical interactions rather than only verbal.⁷³ Several other studies confirmed this positive response to touch.⁷⁴ Waiters who touched customers, greeters who touched shoppers, and librarians who touched patrons were all evaluated more positively by the participants than their non-touching counterparts.⁷⁵ This increased liking by recipients has been demonstrated even where the recipient was unaware of the touching.⁷⁶ It follows that researchers have found that the use of light touch increases compliance rates. Lightly touched receivers were more likely to volunteer their time for charity,⁷⁷ score questionnaires,⁷⁸ and sign petitions⁷⁹ than their untouched counterparts.

⁷⁰ See Burgoon, Dunbar, & Segrin, *supra* note 11, at 449-50.

⁷¹ See generally Heslin & Alper, *Touch: A Bonding Gesture*, NONVERBAL INTERACTION 47 (1983); see also JONES, THE RIGHT TOUCH (1994).

⁷² See generally Donna C. Aguilera, *Relationship Between Physical Contact and Verbal Interaction Between Nurses and Patients*, 5 J. PSYCHIATRIC NURSING 5 (1967). See also ANDERSON, *supra* note 4, at 81 (noting that touching can be a "double edge sword" and "can create connections or destroy them" depending on the context and comfort levels).

⁷³ See Aguilera, *supra* note 72.

⁷⁴ See Jacob Hornik, *Tactile Stimulation and Consumer Response*, 19 J. CONSUMER RES. 449, 449-58 (1992).

⁷⁵ Jeffrey D. Fisher, Marvin Rytting, & Richard Heslin, *Hands Touching Hands: Affective and Evaluative Effects of an Interpersonal Touch*, 39 SOCIOMETRY 416, 416-21 (1976). While the touched participants rated the library clerk more favorably only half were aware they had been touched by the library clerk. *Id.* at 420.

⁷⁶ See Fischer, Rytting, & Heslin, *supra* note 75.

⁷⁷ See Morton Goldman, Odette Kiyohara, & Dorothy A. Pfannensteil, *Interpersonal Touch, Social Labeling, and the Foot-in-the-Door Effect*, 125 J. SOC. PSYCHOL. 143 (1985).

⁷⁸ See Miles L. Patterson, Jack L. Powell, & Mary G. Lenihan, *Touch, Compliance, and Interpersonal Affect*, 10 J. NONVERBAL BEHAV. 41 (1986).

⁷⁹ See Frank N. Willis Jr. & Helen K. Hamm, *The Use of Interpersonal Touch in Securing Compliance*, 5 J. NONVERBAL BEHAV. 49 (1980).

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5. Sounds Good to Me: Vocalics & Liking

In addition to sight and touch, hearing is another important element of non-verbal communication.⁸⁰ Tone, pitch, vocal expressiveness, fluency, and rate of speech comprise vocalics.⁸¹ Vocalics affect the feeling of attraction between receivers and messengers.⁸² Messengers with a slower rate of speech are seen as less attractive than those who speak at a faster rate.⁸³ Thus, faster rates of speech are generally more successful in gaining compliance.⁸⁴ Pauses and hesitations in speech negatively affect the messenger's perceived attractiveness and ability to persuade.⁸⁵ Whether the speaker's tone of voice is considered pleasant, neutral, or hostile also affects receiver compliance rates.⁸⁶ Naturally, hostile tones are usually considered the least attractive.⁸⁷

D. Examples

If you are still not satisfied that liking is positively related to compliance, consider the "Tupperware party."⁸⁸ This is a classic compliance setting: "the real power of the Tupperware party comes from a particular arrangement that trades on the liking rule . . . [T]he Tupperware representative may physically ask for the each party-goer's order, all right; but the more psychologically compelling requester is sitting off to the side, smiling, chat-

⁸⁰ See GUERRERO, DEVITO, & HECHT, *supra* note 3.

⁸¹ *Id.*

⁸² See Cicca, Step, & Turkstra, *supra* note 52.

⁸³ Aaron W. Siegman, *The Telltale Voice: Nonverbal Messages of Verbal Communication*, 2 NONVERBAL BEHAVS. & COMM. 351 (1987).

⁸⁴ David B. Buller, et. al., *Social Perceptions as Mediators of the Effect of Speech Rate Similarity on Compliance*, 19 HUM. COMM. RES. 286 (1992).

⁸⁵ Benjamin Pope & Aaron W. Siegman, *Ambiguity and Verbal Fluency in the TAT*, 30 J. CONSULTING PSYCHOL. 239 (1966).

⁸⁶ David B. Buller & Judee K. Burgoon, *The Effects of Vocalics and Nonverbal Sensitivity on Compliance*, 13 HUM. COMM. RES. 126 (1986). "Participants classified as good decoders volunteered more hours of their time to requesters with a pleasant rather than neutral voice. On the other hand, participants classified as poor decoders volunteered more time to neutral decoders." *Id.*

⁸⁷ See Buller, et al., *supra* note 84.

⁸⁸ The same concept is used in other house party sales events for purses, candles, and jewelry. Generally, these are all items associated with females—it begs the question if liking and attractiveness are more powerful influencers on women than men.

ting, and serving refreshments.”⁸⁹ This arrangement brings the attraction, warmth, safety, and obligation of friendship into the sales setting.⁹⁰ One study found that the social bond or friendship makes the party-goer twice as likely to buy the item as preference for the actual product.⁹¹ Other companies have found great success based on referrals: “[E]ach new prospect is visited by a salesperson armed with the name of a friend ‘who suggested I call you.’”⁹² In this instance, turning away the stranger salesperson is like turning away your friend.⁹³ Finally, the Guinness Book of World Records “greatest car salesman”⁹⁴ admittedly using “liking” to sell cars, stating that it’s “the salesman you like, plus the price” that makes the deal.⁹⁵

III. DOMINANCE, POWER, AND STATUS

Like similarity and attractiveness, power and dominance are also tools that can be manipulated by the socially skilled.⁹⁶ Socially skilled individuals tend to engage in behaviors which convey confidence, friendliness, and poise; all of which are seen as dominant in interpersonal communications.⁹⁷ Dominant messengers “appear more socially skilled, and if socially skilled individuals are seen as more attractive than dominant non-verbal behavior combines power and attraction, making it a doubly effective way to influence others.”⁹⁸ Often, dominant individuals are perceived as more credible and competent than submissive individuals.⁹⁹ A messenger’s use of eye contact, touch, and friendly vocal tones increases his or her credibility by conveying poise and confidence.¹⁰⁰ A credible messenger has the ability to

⁸⁹ ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 143, 143-44 (4th ed. Allyn & Bacon 2001). “Tupperware sales now exceed 2.5 million dollars a day! . . . [L]ess than a quarter of Tupperware sales take place in North America.” *Id.*

⁹⁰ *Id.*; see also Rex Taylor, *Marilyn’s Friends and Rita’s Customers: A Study of Party Selling as Play and as Work*, 26 SOC. REV. 573, 600-07 (1978).

⁹¹ Jonathan K. Frenzen & Harry L. Davis, *Purchasing Behavior in Embedded Markets*, 17 J. CONS. RES. 1, 1-12 (1990).

⁹² See CIALDINI, *supra* note 89, at 146.

⁹³ *Id.*

⁹⁴ *Id.* at 147-48. Mr. Girard is a salesman in Detroit, MI. On average, Joe Girard sells more than 5 vehicles a day.

⁹⁵ *Id.* at 148.

⁹⁶ See BURGOON, DUNBAR, & SEGRIN, *supra* note 11, at 448.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Burgoon & Dunbar, *An Interactionist Perspective on Dominance-Submission: Interpersonal Dominance as a Dynamic, Situationally Contingent Social Skill*, 67 COMM. MONOGRAPHS 96, 115-19 (2000).

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instigate receiver compliance and attitudinal change.¹⁰¹ This dynamic enables dominant messengers to influence and even mislead their receivers.¹⁰²

A. Defining Power, Dominance, and Status

Scholars differentiate between dominance, power, and status.¹⁰³ Status is characterized as one's position on a mutually accepted social hierarchy.¹⁰⁴ Although status is a form of power and often linked to dominance, high status individuals will not necessarily exercise power or display dominance.¹⁰⁵ Power is defined as the ability to influence others and it can be hidden or latent.¹⁰⁶ Power can be asserted by using reward, coercion, status, reverence, or expertise.¹⁰⁷ 'Legitimate power' is a result of status and 'reverent power' is a result of receiver admiration.¹⁰⁸ Finally, within the communication discipline dominance is not seen as a personality trait, but is defined as a "dynamic state that reflects a combination of individual temperament and situational features that demand, release, or encourage dominant behavior."¹⁰⁹ Dominance is always patent and often asserted by high status, powerful individuals.¹¹⁰

Dependence is related to power, dominance, and status because the more dependent one party is on a relationship, the more power the other party holds.¹¹¹ "Social Exchange Theory" and "Bilateral Deterrence Theory" examine dependence as a means of gaining influence.¹¹² According to

¹⁰¹ *Id.*

¹⁰² See generally Ronald E. Riggio, Joan Tucker, & Barbara Throckmorton, *Social Skills and Deception Ability*, 13 PERSONALITY & SOC. PSYCHOL. BULL. 568 (1988).

¹⁰³ BURGOON, DUNBAR, & SEGRIN, *supra* note 11, at 451.

¹⁰⁴ HILARY M. LIPS, *WOMEN, MEN, AND POWER* (1991).

¹⁰⁵ JUDEE K. BURGOON, DAVID B. BULLER, & W. GILL WOODALL, *NONVERBAL COMMUNICATION: THE UNSPOKEN DIALOGUE* (1996).

¹⁰⁶ JOHN FRENCH & BERTRAM RAVEN, *THE BASES OF SOCIAL POWER*, IN *STUDIES IN SOCIAL POWER* 150, 150-55 (D. Cartwright Ed. 1959). Power within a relationship is shared between the parties, and its balance shifts and evolves over time. *Id.* Throughout a relationship, the power dynamic is negotiated through non-verbal cues and interactions like a handshake, a look, or tone of voice. *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Elizabeth J. Aries, Conrad Gold, & Russell H. Weigel, *Disposition and Situational Influences on Dominance Behavior in Small Groups*, 44 J. PERSONALITY & SOC. PSYCHOL. 779 (1983); see also Burgoon & Dunbar, *supra* note 95.

¹¹⁰ Cecilia Ridgeway, David Diekema, & Cathryn Johnson, *Legitimacy, Compliance, and Gender in Peer Groups*, 58 SOC. PSYCHOL. Q. 298 (1995).

¹¹¹ See BURGOON, BULLER, & WOODALL, *supra* note 105.

¹¹² PETER BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* (1964).

“Social Exchange Theory,” individuals intuitively strive to maximize interpersonal rewards and minimize interpersonal costs.¹¹³ “Bilateral Deterrence Theory” differentiates between “dependence power,” where the less dependent party gains control, and “punitive power” where the party more likely to inflict injury gains control.¹¹⁴

Expectation Theory states that expectations of power often translate into actual influence in group settings.¹¹⁵ Expectations of individual group member performance can be based on either specific or general characteristics.¹¹⁶ Expectations based on specific characteristics are limited to specific tasks like computers, math, or public speaking.¹¹⁷ But expectations based on general characteristics like race, age, gender, physical strength, beauty, intelligence, occupation, and education permeate expectations for overall competence.¹¹⁸ Both specific and general characteristics are signaled non-verbally, through demeanor and appearance.¹¹⁹ For instance, an older, gray-ing male with a strong build may create a positive, commanding expectation, whereas a visible handicap may create a negative or stigmatized expectation.¹²⁰ Based on these characteristics and other non-verbal signals, group members develop favorable or unfavorable performance expectations for each other.¹²¹

According to “Expectation Theory,” members with valued characteristics “are more likely (1) to have chances to perform, (2) to initiate problem-solving performances, (3) have their performances positively evaluated, and (4) are less likely to be influenced when there are disagreements.”¹²² Thus, when a person communicates valued traits through his non-verbal behaviors, he increases his ability to influence the group.¹²³

¹¹³ *Id.*

¹¹⁴ See BURGOON, DUNBAR, & SEGRIN, *supra* note 11.

¹¹⁵ See generally Cecilia Ridgeway & Henry Walker, *Status Structures*, in *SOCIOLOGICAL PERSPECTIVES ON SOCIAL PSYCHOLOGY* 281 (Cook, Fine, & House Eds. 1995) (discussing Expectation States Theory); see also JOSEPH BERGER, *STATUS CHARACTERISTICS AND SOCIAL INTERACTION* (1977).

¹¹⁶ See *id.*; see also Murray Webster, Jr. & Stuart J. Hysom, *Creating Status Characteristics*, 63 *AMER. SOC. REV.* 351, 351-54 (1998).

¹¹⁷ See *id.*

¹¹⁸ *Id.*; see also Jeffrey W. Lucas, *Status Processes and the Institutionalization of Women as Leaders*, 68 *AMER. SOC. REV.* 464, 464-66 (2003) (discussing status and expectations based on gender).

¹¹⁹ See *id.*

¹²⁰ See Ridgeway & Walker, *supra* note 115.

¹²¹ *Id.*

¹²² Joseph Berger, Cecilia Ridgeway, Hamit M. Fisek, & Robert Z. Norman, *The Legitimation and Deligitimation of Power and Prestige Orders*, 63 *AM. SOC. REV.* 379, 381-82 (1998).

¹²³ See Berger, Ridgeway, Fisek, & Norman, *supra* note 122, at 379-405.

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B. Conveying Power, Dominance, and Status

Non-verbal cues and behaviors have the potential to communicate power and influence across cultures.¹²⁴

1. Dress for Success: Physical Appearance and Power

Physical appearance and dress can communicate power. One study found that individuals with more mature faces were considered more persuasive experts than individuals with baby faces.¹²⁵ However, baby faced individuals were perceived as more trustworthy.¹²⁶ Further, individuals dressed in uniform, such as security officers, have an increased rate of gaining compliance, even for requests outside of the scope of their authority.¹²⁷ Additionally, high status clothing and formal attire are linked to attractiveness, intelligence, credibility, persuasion, and thus, compliance rates.¹²⁸

2. Look at Me when I'm Talking to You: Eye Contact and Power

In addition to creating a sense of attraction and intimacy, eye contact can convey status and dominance.¹²⁹ Dominance can be shown through staring, while a more submissive position is communicated by avoiding eye contact.¹³⁰ High powered individuals also convey visual dominance by making more eye contact while speaking and less while listening.¹³¹ Subordinates are expected to make better eye contact while listening to superiors than superiors are expected to make while listening to subordinates.¹³²

¹²⁴ See generally DONALD W. HENDON, REBECCA ANGELES HENDON, & PAUL HERBIG., *CROSS CULTURAL BUSINESS NEGOTIATIONS* (1996).

¹²⁵ Sheila Brownlow, *Seeing is Believing: Facial Appearance, Credibility, and Attitude Change*, 16 J. NONVERBAL BEHAV. 101, 101-15 (1992).

¹²⁶ *Id.* (Another study found that conservatively dressed, short-haired women with almond or triangular shaped eyes were considered the most competent political candidates).

¹²⁷ See generally Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCOL. 47 (1974).

¹²⁸ Behling & Williams, *Influence of Dress on Perceptions of Intelligence and Expectations of Scholastic Achievement*, 9 CLOTHING & TEXTILES J. 1, 1-7 (1991); see also Segrin, *supra* note 59.

¹²⁹ See LIPS, *supra* note 104. See also BERNARD A. RAMUNDO, *EFFECTIVE NEGOTIATION: A GUIDE TO DIALOGUE AND MANAGEMENT AND CONTROL* 96, 97 (1992).

¹³⁰ See LIPS, *supra* note 104, at 110-12.

¹³¹ *Id.* at 110-12.

¹³² *Id.* at 110-12.

3. Bigger is Better: Kinesics and Power

Body language and posture can also convey levels of power.¹³³ Powerful individuals tend to be more relaxed and may slump or lean back in their chair.¹³⁴ However, a person in a more submissive position is usually more self-conscious, and will sit up straight.¹³⁵

Hand movements and gestures may also establish and confirm power, dominance, and status.¹³⁶ For example, pointing and the use of large, directive gestures convey dominance.¹³⁷ A strong handshake can also demonstrate power.¹³⁸ Too soft of a handshake indicates a lack of confidence while a politician's handshake, placing the left hand over the right, may be seen as too forward.¹³⁹ A clammy palm or wiping the hands is often a sign of nervousness which reduces the person's power.¹⁴⁰

Researchers have also found that "[t]he fewer hand and body gestures you make, the more powerful, deliberate, credible, and intelligent you appear to be."¹⁴¹ Further, constant movement or gesturing can make an individual appear nervous and distract the receiver.¹⁴² The fewer movements a person makes, the more weight and significance his gestures and movements carry—so one should make every movement count.¹⁴³

4. Speak up: Vocalics and Power

Audible cues like tempo, volume, and pauses affect perceptions of power and dominance.¹⁴⁴ Confidence and authority, like attractiveness, are perceived in individuals who speak with a short pause, a quick tempo, and a

¹³³ See GUERRERO, DEVITO, & HECHT, *supra* note 3.

¹³⁴ Andersen & Bowman, *Positions of Power: Nonverbal Influence in Organization Communication*, in THE NONVERBAL COMMUNICATION READER CLASSIC & CONTEMPORARY READINGS 317, 330-34 (1999).

¹³⁵ *Id.*

¹³⁶ See GUERRERO, DEVITO, & HECHT, *supra* note 3.

¹³⁷ See Andersen & Bowman, *supra* note 135. Pointing with the index finger can also call attention to an important point. *Id.* Further, "steeppling" - touching the fingertips or thumbs together - conveys power and confidence. *Id.*

¹³⁸ See RAMUNDO, *supra* note 130, at 96-97.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See ANDERSON, *supra* note 4, at 76.

¹⁴² *Id.* at 76-77 (citing a study that found women make more than twice as many "major movements" as men when entering a room. Thus, women need to be especially conscience of gesturing too much or "hand dancing" movements from the elbows to the fingertips in order to make or emphasize points").

¹⁴³ *Id.* at 77.

¹⁴⁴ See generally Judee K. Burgoon, *Nonverbal Signals*, in HANDBOOK OF INTERPERSONAL COMMUNICATION 229 (2d ed. 1994).

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strong voice.¹⁴⁵ The amount of speaking time and number of interruptions a person makes in comparison to other group members also communicates dominance.¹⁴⁶ For instance, high-status people hold more “floor time” and interrupt others more than less dominant people.¹⁴⁷

Beyond what is heard, there is power in what is not heard, in silence. Use of the “silent treatment,” lack of acknowledgement, and waiting to be addressed before being able to speak are all ways that power, dominance, and status are manifested through silence.

5. Space Invasion: Proxemics and Power

Personal space is the buffer zone around the body which is adjusted according to the perceived threat.¹⁴⁸ Physical proximity can be intimidating; an individual feels uncomfortable when their personal space is violated.¹⁴⁹

High status or powerful individuals are awarded more personal space, bigger offices, better views, and may use larger gestures more freely.¹⁵⁰ One study found that elevation can create a perceived hierarchy.¹⁵¹ “Studies show that in a group, the person whose eye level is the highest is usually perceived as the leader.”¹⁵² For instance, standing in front conveys more dominance than standing behind, and standing conveys more dominance than sitting.¹⁵³ A teacher’s position of power is confirmed by standing in front of a seated classroom of students.¹⁵⁴

¹⁴⁵ *Id.*

¹⁴⁶ Theodore Lamb, *Nonverbal and Para-verbal Control in Dyads and Triads: Sex or Power Differences?*, 44 J. SOC. PSYCHOL. Q. 49, 50-53 (1981).

¹⁴⁷ *Id.*

¹⁴⁸ See Brodsky, *supra* note 64, at 50.

¹⁴⁹ JEFFERY L. KESTLER, QUESTIONING TECHNIQUES AND TACTICS § 3:37 (3d ed. 1999). Additionally, even without a threat, individuals may back up to create and maintain a “comfortable distance.” See generally Jansen Voss, *The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom*, 29 LAW & PSYCHOL. REV. 300 (2005).

¹⁵⁰ See LIPS, *supra* note 104; see also ANDERSON, *supra* note 3, at 78 (stating that “people who are perceived as powerful take up more space than others do . . . [b]y taking up more space, they appear to be taking charge”).

¹⁵¹ Schwartz, Tesser, & Powell, *Dominance Cues in Nonverbal Behavior*, 45 SOC. PSYCHOL. Q. 265, 265-72 (1982).

¹⁵² See ANDERSON, *supra* note 4, at 80 (explaining that “people usually turn to address this person first”). *Id.*

¹⁵³ See Schwartz, Tesser, & Powell, *supra* note 152; see also ANDERSON, *supra* note 3, at 79 (citing a study that showed asymmetrical poses are “more powerful than symmetrical ones” and “project a subtle confidence”).

¹⁵⁴ See Brodsky, *supra* note 64, at 59.

In courtrooms where advocates have “the liberty and latitude of movement to examine and cross-examine from various locations, proxemics can be brought to bear as a persuasive tool.”¹⁵⁵ For instance, attorneys can provoke stress, nervousness, or anger from a witness by impinging on their space.¹⁵⁶ When their personal space is violated, a “witness often becomes anxious and testimony may appear more hesitant and uncertain.”¹⁵⁷ More space often translates into more power.

6. Can't Touch This: Haptics and Power

While touching can convey attraction and similarity, it can also show power, dominance, and status, especially unreciprocated touching.¹⁵⁸ Those in equal positions reciprocate touching, but superiors touch subordinates more often with less reciprocation.¹⁵⁹ Less powerful individuals are less likely to touch more dominant individuals, especially without being touched first.¹⁶⁰ Additionally, physically aggressive touching can also convey power.¹⁶¹

7. Wait for Me: Timing and Power

Timing is another way power can be manifested. “In general, the longer people will wait for us, the more important we are, and the longer amount of time we spend with someone, the more important they are to us.”¹⁶² For instance, we are willing to wait for professionals, such as doctors; they even have entire rooms devoted to this endeavor.

¹⁵⁵ *Id.* Other courtrooms frustrate the full potential of proxemics by confining attorneys to a podium. *Id.* See also Voss, *supra* note 144.

¹⁵⁶ See Brodsky, *supra* note 64, at 59 (stating that attorneys may also gain the appearance of control by invading opposing counsel's space).

¹⁵⁷ See Voss, *supra* note 150, at 321. “[B]oth men and women allowed women to invade their space more than men . . . [O]ne must consider the gender of both the attorney and witness. Female attorneys will likely have less success in inducing stress and anxiety in witnesses than male attorneys, especially when a female attorney cross-examines a male witness.” *Id.*

¹⁵⁸ Dana R. Carney, Judith A. Hall, & Lavonia Smith LeBeau, *Beliefs about the Nonverbal Expression of Social Power*, 29 J. NONVERBAL BEHAV. 105, 117 (2005); see also Michael A. Goldberg & Barry Katz, *The Effect of Nonreciprocated and Reciprocated Touch on Power/Dominance Perception*, 5 J. SOC. BEHAV. & PERS. 379, 379-86 (1990).

¹⁵⁹ See BURGOON, BULLER, & WOODALL, *supra* note 105.

¹⁶⁰ *Id.*; see also JUDITH HALL, NONVERBAL SEX DIFFERENCES 117 (1990) (“People's beliefs, anecdote, self-report, [and] observational studies of socioeconomic status and age, and one true experiment favor either the power-privilege idea or the idea that relative dominance increases as a consequence of touch initiation.”).

¹⁶¹ Murray A. Straus, *Measuring Intrafamily Conflict and Violence: The Conflict Tactics Scale*, 41 J. MARRIAGE & FAM. 75, 85-88 (1979).

¹⁶² See BURGOON, DUNBAR, & SEGRIN, *supra* note 11, at 457.

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IV. NON-VERBAL SIGNALS IN THE LEGAL AND DISPUTE RESOLUTION SETTINGS

Controlling your non-verbal signals so that they convey messages consistent with your goals and reading your counterpart's movements for cues will benefit you personally and professionally.

A. Mediation

1. Set-up and Seating

Seating arrangements and spacing can affect the mediation's atmosphere.¹⁶³ For instance, the arrangement can help open lines of communication or balance power disparities.¹⁶⁴ In mediations where one side is noticeably larger in number, experts suggest it is best to arrange all parties in a circle, intermingling both sides.¹⁶⁵ This arrangement helps to reduce the rigidity of the discussion by disrupting the "your turn, my turn" back and forth.¹⁶⁶ Additionally, the personal differences of the individual members of the larger group will emerge because they will be speaking without first consulting with the entire group and as a result the larger group's power is reduced.¹⁶⁷

2. Confidentiality of Non-Verbal Signals

Some statutes explicitly identify and protect the confidentiality of non-verbal behaviors and mannerisms exchanged during a mediation session.¹⁶⁸ Further, even without express statutes there is a trend towards protecting any actions, verbal or non-verbal, intended as communication.¹⁶⁹ This trend demonstrates that non-verbal signals are a significant part of a mediation's communications.

¹⁶³ Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1 (2000).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See generally Rebecca H. Heirs, *Navigating Mediation's Uncharted Waters*, 57 RUTGERS L. REV. 531, at 548-49 (2005).

¹⁶⁹ *Id.*

B. In the Legal Setting

Trial advocates communicate with the jury through their words, voice, and body.¹⁷⁰ An advocate is constantly sending messages to the jury.¹⁷¹ Being alert to non-verbal messages, your own and otherwise, is one of the psychological components to persuasion and trial advocacy employed in the courtroom.¹⁷² From the moment the lawyer stands and faces the jury she is sending messages about herself.¹⁷³ One expert advises to “avoid awkward movement that distracts or disturbs. Strive for poise, graceful movement and erect posture.”¹⁷⁴ An advocate’s opportunity to persuade begins with jury selection.¹⁷⁵

1. Jury Selection

“[P]ersuasion in the courtroom starts with picking the right jury. Many attorneys begin the voir dire process with stereotypes and general assumptions about groups of people in an effort to distill the mountain of uncertainties posed by the jury pool.”¹⁷⁶ Most of the advocate’s stereotypes and assumptions are garnered from a prospective juror’s physical appearance. For example, an attorney may believe that a man with tattoos and long hair is probably politically liberal, politically liberal people tend to think a certain way, and that line of thinking will be beneficial/detrimental to my case.¹⁷⁷ This process heaps assumptions on top of generalizations in an effort to determine if this person will be susceptible to the lawyer’s influence or have biases in their client’s favor. Even the great trial lawyers employ these techniques—Clarence Darrow once said, “[i]f a Presbyterian enters the jury box, carefully rolls up his umbrella, and calmly and critically sits down, let him

¹⁷⁰ W. Ray Persons, *Preparing and Delivering the Defense Closing Argument*, 16:3 PRAC. LITIGATOR 55, 59-60 (2005).

¹⁷¹ *Id.* at 59.

¹⁷² *Id.*; see also Roberto Aron & Jonation L. Rosner, *How to Prepare Witnesses for Trial* § 3.17 (2d ed. 1998).

¹⁷³ Persons, *supra* note 171, at 59.

¹⁷⁴ *Id.*

¹⁷⁵ Steven Lubet, *Persuasion at Trial*, 21 AM. J. TRIAL ADVOC. 325, 337 (1997) (stating that a lawyer is on trial the moment she steps in front of the jury). “The judge and the jury will constantly evaluate and reevaluate [her] credibility as they assess your behavior, appearance, bearing and conduct.” *Id.*; see also STARR & MCCORMICK, *supra* note 1, at § 6.02.

¹⁷⁶ Voss, *supra* note 150, at 303.

¹⁷⁷ *Id.* One stereotype is that “more liberally minded people will tend to favor the plaintiff and more conservative minded people will tend to favor the defense. From the plaintiff’s perspective, attorneys generally do not consider middle to upper class white men and women, especially business owners, as “good” jurors for personal injury suits.” *Id.* See generally JAMES J. GOBERT & WALTER E. JORDAN, *JURY SELECTION: THE LAW, ART, AND SCIENCE OF SELECTING A JURY* (2005).

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go. He is as cold as the grave; he knows right from wrong, although he seldom finds anything right . . . Get rid of him . . . before he contaminates the others.”¹⁷⁸

2. Stereotyping

Stereotypes are not always negative, but may function as a method of processing information, with the caveat that individual differences must always be accounted for and properly substituted.¹⁷⁹ It is important for an advocate to acknowledge the stereotypes and biases they hold. Additionally, an effective communicator will also realize that while these may be helpful tools for categorizing, their utility and value comes from understanding that these are only preliminary assumptions and one must take the time to investigate their accuracy. These generalizations must remain extremely flexible and should be adapted as new information is encountered; otherwise they become myths that will lead to errors in judgment.¹⁸⁰

3. Argument and Credibility

Experts believe that the most important part of a lawyer’s argument is the overall impression she makes on the jury.¹⁸¹ With a displeasing delivery, an advocate will fight an uphill battle, even with the facts in her favor.¹⁸² Appearing sincere is vital to any case—an effective advocate will establish rapport and credibility with the jury.¹⁸³ In order to do this, a lawyer’s verbal and non-verbal communication “must convince the jury that [he or she] believe[s] that what [he or she is] saying is fair, right and honest, and that [he or she is] convinced of the justice of [his or her] client’s position.”¹⁸⁴

¹⁷⁸ See Clarence Darrow, *Selecting a Jury*, ESQUIRE MAG. (1936).

¹⁷⁹ R. BRISLIN, UNDERSTANDING CULTURE’S INFLUENCE ON BEHAVIOR 198 (1993). Stereotyping “is an initial and often accurate method of processing information, but should not [be] the basis for a decision.” *Id.* See generally Connolly & Tayler, *supra* note 6.

¹⁸⁰ See DONALD E. VINSON, JURY PERSUASION: PSYCHOLOGICAL STRATEGIES AND TRIAL TECHNIQUES 132-34 (1993).

¹⁸¹ See Persons, *supra* note 171, at 57.

¹⁸² *Id.*

¹⁸³ See Vinson, *supra* note 181; see also Persons, *supra* note 171.

¹⁸⁴ See Persons, *supra* note 171, at 58.

V. POTENTIAL PITFALLS

A. *Misunderstandings and Cultural Differences*

Interpreting non-verbal communication is not a rigid scientific process. While there are general and cultural meanings assigned to gestures, the same movement may convey different messages in different contexts and cultures.¹⁸⁵ As a result, discretion and good judgment must be used when decoding non-verbal messages.¹⁸⁶ The nature of non-verbal communication is subjective and non-tangible, thus, there is potential for misinterpretation and misunderstanding.¹⁸⁷

1. Non-Verbal Cultural Cues

In the film, *Fail-Safe*,¹⁸⁸ the U.S. President had to convince the Soviet leader that U.S. bombers were mistakenly sent to attack Moscow to avoid nuclear war.¹⁸⁹ The U.S. President said to his interpreter:

Sometimes, there's more in a man's voice than in his words. There are words in one language that don't carry the same weight in another . . . So, I want to know not only what he's saying, but what you think he's feeling—any inflection in his voice, any tone, any emotion that adds to his words—I want you to let me know.¹⁹⁰

In addition to language differences and verbal messages, culture impacts non-verbal communication.¹⁹¹ The values and ideas shared between people who usually speak the same language and live in close proximity comprise culture.¹⁹² Culture influences how people decode and understand the world

¹⁸⁵ NANCY J. ADLER, INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 58 (1997); Alexander Rainof, *How to Best Use an Interpreter in Court*, 55 CAL. ST. B.J. 196, 198 (1980); see also G. CLOTAIRE RAPAILLE, 7 SECRETS OF MARKETING IN A MULTI-CULTURAL WORLD 20 (2001).

¹⁸⁶ See generally HENDON, et al., *supra* note 124, at 76.

¹⁸⁷ See generally DALE G. LEATHERS, SUCCESSFUL NONVERBAL COMMUNICATION: PRINCIPLES AND APPLICATIONS (1986).

¹⁸⁸ *Fail-Safe* (CBS television broadcast Apr. 9, 2000) (based on 1962 bestseller where cold war tensions escalate after a U.S. bomber is accidentally ordered to drop a nuclear warhead on Moscow. Also, a 1964 film).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See generally Connolly & Tayler, *supra* note 8.

¹⁹² See Connolly & Tayler, *supra* note 8. "Culture has been compared to an iceberg. The smaller part . . . lies above the water, visible to all, while the larger part . . . lays underwater, invisible and quite substantial . . . [C]ultural factors . . . adversely affect the attorney-client relationship. With its

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around them—including words and behaviors.¹⁹³ Attorneys should be mindful of cultural differences which can affect non-verbal communication.¹⁹⁴ In addition to culture, “length of residence and level of assimilation in the United States” affect communication behaviors.¹⁹⁵

2. Cultural Factors

Views regarding age, reputation, change, emphasis on time, and body language vary by culture, and these factors should be considered during cross-cultural interactions.¹⁹⁶ “Behavioral patterns of a deponent from a foreign country may appear suspect to a native-born American attorney if they do not fall within the common cultural experience of that attorney.”¹⁹⁷ For example, the notion of “innocent until proven guilty” is not universal.¹⁹⁸ When an American attorney understands this, a foreign client’s defensiveness may become more understandable.¹⁹⁹

Further, while Americans associate change with progress, other cultures place great importance on predictability and certainty.²⁰⁰ Thus, change “alters the system upon which they have come to rely.”²⁰¹ A foreign client may be more resistant to change or take longer to accept it.²⁰²

impact on meaning, cultural issues, like the iceberg, remain below the visibility line.” *Id.* (citing E. STEWART & M. BENNETT, *AMERICAN CULTURAL PATTERNS* 39 (1991)).

¹⁹³ See Connolly & Tayler, *supra* note 8.

¹⁹⁴ *Id.* When interacting with a foreign or immigration client, American attorneys should be sensitive to how their messages will be interpreted and also that attached to their client’s behaviors may be different cultural meaning than the one used within the United States. *Id.* This is a relevant discussion, considering that a 2002 demographic study estimates that one in five Americans speak a language other than English at home. William H. Frey, *Multilingual America*, 24 *AM. DEMOGRAPHICS* 20 (July/Aug. 2002).

¹⁹⁵ Nina Ivanichvili, *A Lawyer’s Guide to Cross-Cultural Depositions*, 28 *CHAMPION* 38 (2004).

¹⁹⁶ *Id.* See generally ROBERT ROSENTHAL, *SKILL IN NONVERBAL COMMUNICATION: INDIVIDUAL DIFFERENCES* (1979).

¹⁹⁷ See Ivanichvili, *supra* note 196, at 40.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See Connolly & Tayler, *supra* note 8, at 47.

²⁰¹ See Ivanichvili, *supra* note 196, at 40. “For example, post 9/11 changes in the immigration laws that provide immigration benefits to the families of certain attack victims may be met with resistance from potential beneficiaries because change does not necessarily equate with a positive result.” *Id.*

²⁰² *Id.*

Body language norms and meanings also vary by culture.²⁰³ For instance, depending on culture, direct eye contact can communicate openness and honesty or disrespect.²⁰⁴ As a result, “some Asian deponents would rather stare at the table instead of looking at the deposing attorney, even when they have nothing to hide.”²⁰⁵

The British examine not only eye contact, but also blinking rates. “He’s a blinking liar” is a common British expression that has held the test of time. An increased blink rate usually shows that a party is tense, exaggerating, or lying. A decreased blink rate usually shows inattention and boredom.²⁰⁶

Generally, as the pace of the life increases so does the importance of punctuality.²⁰⁷ When members of cultures where “time is money” interact with more relaxed cultural groups it can lead to frustration and scheduling problems.²⁰⁸ “Sensitivity to this factor, flexibility and a frank discussion the first time this occurs can alleviate this potential cultural problem.”²⁰⁹

B. *Knowing Your Audience*

A skilled messenger will make her communications more effective by taking the time to know her audience and tailor her messages to them.²¹⁰ After all, it is the changes in an individual’s mannerisms and movements which are the most meaningful, not his ordinary, habitual ones.²¹¹ For instance, crossing one’s arms often symbolizes distance and avoidance.²¹² But be careful not to make premature assumptions about a woman sitting in this manner; she may not be uncomfortable, cold, or distant, but just resting comfortably. The more an attorney observes her clients, counterparts, and

²⁰³ See generally MARC MOGIL, *I KNOW WHAT YOU’RE REALLY THINKING: READING BODY LANGUAGE LIKE A TRIAL LAWYER* (2003).

²⁰⁴ *Id.*; see also Ramundo, *supra* note 124, at 97.

²⁰⁵ Ivanichvili, *supra* note 196, at 40.

²⁰⁶ See MOGIL, *supra* note 203.

²⁰⁷ See Connolly & Tayler, *supra* note 8, at 47.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See generally MARK L. KNAPP & JUDITH A. HALL, *NONVERBAL COMMUNICATION IN HUMAN INTERACTION* (6th ed. 2006).

²¹¹ See Ivanichvili, *supra* note 196, at 40; see also MOGIL, *supra* note 203.

²¹² Monica M. Moore, *Nonverbal Courtship Patterns in Women: Rejecting Signaling—An Empirical Investigation*, available at <http://www.webster.edu/depts/artsci/bass/faculty/mm1998.html> (describing the largely nonverbal world of signaling between members of the opposite sex—as a means of rejection or courtship).

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judges, the better able she will be able to identify their habitual motions and consequently the more insightful deviations.²¹³

C. Timing

Timing is another important element in communication where non-verbal signals can give insight.²¹⁴ Non-verbal signals help parties determine when to move from small talk into serious negotiations.²¹⁵ When acting as a third party neutral who wants the parties to begin negotiations with positive feelings, it is helpful to understand how to read non-verbal cues which indicate when parties are relaxed and at ease. For instance, contrary to the notion that smoking is a nervous habit, studies found that people tend to smoke when they are comfortable and relaxed.²¹⁶ Also, men generally keep their coat jackets buttoned until they feel comfortable; a man unbuttoning his jacket may signal he is ready to begin.²¹⁷ Finally, when surveyed, wedding guests were 80% accurate in identifying the wedding party's family merely by categorizing family members as the guests who appeared more comfortable than other guests, often by looking for unbuttoned jackets.²¹⁸

V. CONCLUSION

Attraction and dominance increase compliance and cues of such are often expressed non-verbally. Thus, understanding what makes a source appear attractive and dominant and learning how to send likeable and powerful nonverbal messages will increase a messenger's ability to persuade.

Further, the "rules" of non-verbal communication are helpful, yet flexible guidelines. Messengers must constantly stay alert to receivers' reactions, recognize when their approach is not working, and adapt accordingly.

²¹³ See Ivanichvili, *supra* note 196, at 40 (stating that it is best "to observe their personal style and 'baseline' body language in a context of a non-stressful conversation" as a point of individual reference and comparison).

²¹⁴ See generally Leathers, *supra* note 188.

²¹⁵ *Id.*

²¹⁶ ROGER DAWSON, YOU CAN GET ANYTHING YOU WANT, BUT YOU HAVE TO DO MORE THAN ASK (1985).

²¹⁷ *Id.*

²¹⁸ *Id.*

In the end, the most important element of communication is sincerity; be honest and let your communications reflect who you are and what you believe.²¹⁹

²¹⁹ Doug Stevenson, *Non-Verbal Communication: An Essential Speech Ingredient*, DENVER BUSINESS J. (Sept. 27, 2002). Doug ends the article with a few practical words of advice:

[Y]ou don't need to learn how to gesture — you gesture just fine already. You don't need to learn how to modulate your voice — you modulate just fine already. You don't need to learn how to speak more eloquently — you speak just fine already. If during the course of normal day, you speak with natural vocal inflection and gestures, you can do it when you're giving a speech . . . STOP trying to speak like a professor. Write a speech that sounds like you. STOP thinking about your hands. Let your gestures reflect what you're saying. STOP worrying about your voice. Inflection is connected to emotion. Feel something. STOP hiding behind the lectern. Walk and talk like you normally do. Use your body to communicate how you feel.