

SUBCONSCIOUS ADVOCACY — PART 1: NONVERBAL COMMUNICATION IN THE COURTROOM

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“He that has eyes to see and ears to hear
may convince himself that no mortal can keep a secret.
If his lips are silent, he chatters with his fingertips;
betrayal oozes out of him at every pore.”¹

1 Introduction

Reflecting upon his defeat in the 1960 United States presidential election, Richard Nixon said: “I believe that I spent too much time in the last campaign on substance and too little on appearance.”² Nixon’s comment was prompted by the startlingly disparate reaction of the audience to the televised debate between Nixon and John F Kennedy — the first United States presidential debate to be televised.³ The majority of people who *listened* to the debate on the radio judged Nixon to be the victor in the confrontation, or, at least, considered it a draw between the two candidates.⁴ However, the majority of people, including Nixon’s own supporters, who *watched* the debate on television, declared Kennedy to be the overwhelming winner.⁵

Social psychologists ascribe part of the reason for this incongruity to Nixon’s nonverbal cues during the debate.⁶ Nixon sat with a tense, narrow posture, whereas Kennedy sat with his legs crossed, his hands resting easy and his weight centred. Nixon could be seen gripping the lectern tightly, and not gesticulating for extended periods of time. He also displayed a “disastrous” pattern of hyper-blinking — not just abnormally frequent (more than one per second), but at times with such rapid flutters that his eyes momentarily closed.⁷

¹ S Freud *Dora: An Analysis of a Case of Hysteria* (1905) 96.

² As quoted in D Nimmo *The Political Persuaders* (1999) 184.

³ MJ Higdon “Oral Argument and Impression Management: Harnessing the Power of Nonverbal Persuasion for a Judicial Audience” (2008) 57 *Kansas L Rev* 631 631.

⁴ PF Boller Jr *Presidential Campaigns* (1984) 298-299.

⁵ 298-299.

⁶ M Davis “Presidential Body Politics: Movement Analysis of Debates and Press Conferences” (1995) 106 *Semiotica* 205 213. Another part of the reason for the incongruity was ascribed to Nixon’s physical appearance. During the debate, Nixon wore a grey suit that blended in with the background; he had a noticeable five o’clock shadow; and he was visibly sweating through much of the debate. ML Knapp & JA Hall *Nonverbal Communication in Human Interaction* (2006) 456.

⁷ Davis (1995) *Semiotica* 213.

This debate made it clear to politicians that visual presentation is an extremely powerful component of persuasion.⁸ As a result, politicians have become much more astute in using not only their words, but also other nonverbal means of communication to create favourable impressions among voters.⁹ Even for some time prior to this debate, social scientists have been studying the persuasive impact of nonverbal communication, and in the decades following, it has developed into one of the major fields of specialisation in experimental social psychology and other social science disciplines.¹⁰ This research has revealed a much deeper understanding of the power of the human body as a communicative tool.¹¹ As a result, many people (not just politicians) have become more conscious of their own nonverbal cues and what those cues might be communicating to others.¹²

Few would argue that persuasion is at the heart of the trial lawyer's¹³ craft. After all, success at trial depends on trial lawyers' ability to persuade fact-finders¹⁴ to make decisions and to take actions that they might not otherwise have chosen to make or to take, but for the trial lawyers' intervention.¹⁵ But what makes one trial lawyer more persuasive than another? To a great extent, the answer to this question lies in how well a trial lawyer communicates in the courtroom.¹⁶

Over the decades, many trial practice manuals, written primarily by trial lawyers, have offered advice on improving courtroom communication.¹⁷ Unfortunately, this "armchair psychology"¹⁸ has suffered from reliance on two pillars of wisdom: intuition and tradition.¹⁹ Not surprisingly, these "insights" have often been anecdotal,²⁰ speculative, contradictory and unscientific.²¹ Lawyers tend to believe in authority and argument.²² However, what works well for the development of doctrine does not transfer successfully to trial

⁸ Higdon (2008) *Kansas L Rev* 632.

⁹ 632.

¹⁰ WC Costopoulos "Persuasion in the Courtroom" (1971-1972) 10 *Duquesne L Rev* 384 384.

¹¹ Higdon (2008) *Kansas L Rev* 633.

¹² 633. In fact, because of the greater availability of information on nonverbal communication and the increasing interest in the subject, there exist today several "self-help" books to help readers harness the power of their nonverbal communication to achieve greater success in business, romantic relationships, and social situations in general.

¹³ I use the term "trial lawyer" to refer to legal practitioners "in the trenches of litigation," that is those who try cases in the High Court, Magistrates' Court, and those who appear on behalf of clients in alternative dispute resolution fora that rely on the adversarial system of justice.

¹⁴ The term "fact-finder" denotes judges, magistrates, arbitrators and any other presiding officers of alternative dispute resolution fora that rely on the adversarial system of justice.

¹⁵ K Stanchi "Persuasion: An Annotated Bibliography" (2009) 6 *J Ass'n Legal Writing Directors* 75 75.

¹⁶ JA Call "The Psychology of Courtroom Persuasion" (1987) 16 *Brief* 47 47.

¹⁷ 47.

¹⁸ KM Stanchi "The Science of Persuasion: An Initial Exploration" (2006) *Mich St L Rev* 411 412.

¹⁹ MJ Saks "Turning Practice into Progress: Better Lawyering Through Experimentation" (1990-1991) 66 *Notre Dame L Rev* 801 801.

²⁰ The anecdotes that veteran trial lawyers tell about their triumphs in the courtroom often become "war stories," passed down from one generation of trial lawyers to another, until they become accepted as the "right" way to try a case. HM Caldwell, LT Perrin, R Gabriel & SR Gross "Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination" (2000-2001) 76 *Notre Dame L Rev* 423 426.

²¹ DG Linz & S Penrod "Increasing Attorney Persuasiveness in the Courtroom" (1984) 8 *Law & Psychol Rev* 1 1.

²² Saks (1990-1991) *Notre Dame L Rev* 801.

practice. One cannot discover the most effective way to structure a case for presentation, to elicit testimony from a witness, or to argue persuasively to fact-finders, by relying on what trial lawyers have always done, by deferring to the pronouncements of leading trial practitioners, or by arguing about what ought to work.²³

What will persuade is an empirical question, not a legal or philosophical one.²⁴ Effective answers about principles of persuasion that “work” do not come from reflection or intuition, but from empirical enquiries. The aim of this article is to enhance trial lawyers’ knowledge of effective persuasive techniques by investigating findings about the phenomena of persuasion from social science disciplines that study persuasion empirically. Scholars in primarily social psychology,²⁵ but also in the fields of anthropology, linguistics, psychoanalysis, clinical psychology and sociology, have for years systematically explored the variables that influence whether a listener will attend to, comprehend, and be persuaded by a particular statement or argument.²⁶

Former United States Supreme Court Justice, Tom C Clark, has urged trial lawyers to pay attention to the research generated by communication scholars in order to improve the quality of justice, and to enable them adequately to represent their clients.²⁷ According to Justice Clark:

“Most trial attorneys are knowledgeable of the law. Many, however, don’t communicate well in the courtroom. They don’t know how to construct persuasive oral arguments and don’t know what kinds of techniques influence a judge . . . so they try all sorts of things and take up a lot of time sometimes getting both themselves and their clients in trouble.”²⁸

In Part 1 of this article, I limit the focus to an aspect of persuasive communication that most trial lawyers ignore or neglect — nonverbal communication.²⁹ The legal profession places great emphasis on oral and written communication.³⁰ Lawyers are wordsmiths by trade and thus we focus almost exclusively on *what* we say.³¹ Words, however, are simply one component of interpersonal communication. A nonverbal message accompanies every verbal message — how we say it and what we look like

²³ 801-802.

²⁴ 802. Saks argues that it is a matter of psychology, not jurisprudence.

²⁵ “[I]f there is anything social psychologists know about, it is the process of persuasion, which they have studied intensively for many years.” M Saks “Social Scientists Can’t Rig Juries” *Psychology Today* (January 1976) 57.

²⁶ JL Barkai “Nonverbal Communication from the Other Side: Speaking Body Language” (1990) 27 *San Diego L Rev* 101 101; Linz & Penrod (1984) *Law & Psychol Rev* 2.

²⁷ Linz & Penrod (1984) *Law & Psychol Rev* 2.

²⁸ 2.

²⁹ See description of the term “nonverbal communication” below.

³⁰ D Mellinkoff *The Language of the Law* (1963) vii. Some of the leading textbooks on oral advocacy advise trial lawyers that the keys to effective oral argument are to create a persuasive theme for their cases, select the strongest arguments, and, when making those arguments, to be careful with their word choice. See, eg, MR Fontham, M Vitiello & DW Miller *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* (2007); DC Frederick & RB Ginsburg *The Art of Oral Advocacy* (2003).

³¹ WH Gravett *The Fundamental Principles of Effective Trial Advocacy* (2009) 18. We rely on our verbal talents by using logical arguments, case law, evidentiary rules, and the facts of the case. EA LeVan “Nonverbal Communication in the Courtroom: Attorney Beware” (1984) 8 *Law & Psychol Rev* 83 83.

when we say it.³² Trial lawyers, witnesses and fact-finders all communicate nonverbally in the courtroom, whether they intend to or not. Although people can refrain from speaking, they simply cannot be silent nonverbally;³³ people “cannot not communicate.”³⁴ Indeed, nonverbal communication pervades human interaction.³⁵

There are several reasons why trial lawyers should heed the quote from Nixon above and not focus exclusively on substance, but also attempt to understand and use the knowledge of the ways in which nonverbal behaviours influence the shaping of fact-finders’ opinions, attitudes and beliefs. Firstly, nonverbal communication is a powerful tool of persuasion.³⁶ In fact, social science researchers widely recognise that the nonverbal mode of communication is at least as important as the verbal mode, if not significantly more important.³⁷ Some experiments suggest that nonverbal communication produces over 90% of the communicated meaning of a message.

The overwhelming impact of nonverbal behaviour upon interpersonal communication traces back to Albert Mehrabian’s “7-38-55” theorem which posits that: (i) 55% of a message is conveyed through body language (kinesics) — such as posture, body, hand and arm movements, facial gestures, eye contact and physical appearance generally; (ii) 38% of a message is conveyed by non-verbal delivery (paralinguistics) — such as tone of voice, volume and inflection; and (iii) the verbal component — the actual words used — accounts for only 7% of a message’s persuasiveness.³⁸ Another widely quoted expert, the linguist Noam Chomsky, weighs the nonverbal and verbal components of any message at 80% and 20% respectively.³⁹ Whatever the exact statistical breakdown might be, the essential point is that it is not so

³² Both message and messenger play critical roles in the communication process. Caldwell et al (2000-2001) *Notre Dame L Rev* 435.

³³ People *always* project nonverbal messages that say something about themselves and their relationship with others. Even when an individual consciously attempts not to send a nonverbal message to another, this behaviour in itself communicates a message. JM D’Esposito “The Role of Nonverbal Persuasion in Juror Decision-making and the Need to Regulate the Trial Consulting Industry” (2016) 30 *Notre Dame J L Ethics & Pub Pol’y* 143 143. Albert Mehrabian asserts that “any behavior is in principle communicative.” A Mehrabian *Nonverbal Communication* (1972) 8.

³⁴ Even when people are silent, communication takes place through nonverbal behaviours. P Watzlavick, J Beavin & D Jackson *Pragmatics of Human Communication* (1967) 49.

³⁵ Higdon (2008) *Kansas L Rev* 636.

³⁶ Research has, for example, demonstrated that a speaker can exert greater influence simply by leaning forward and using expansive gestures and animated facial expressions. WT James “A Study of the Expression of Bodily Posture” (1932) 7 *J Gen Psychol* 405, 409-417; Higdon (2008) *Kansas L Rev* 631 645, 642.

³⁷ RF Haase & DT Tepper “Nonverbal Components of Emphatic Communication” (1972) 19 *J Counseling Psychol* 417, 421 (nonverbal communication counted for twice as much variance as words did); A Mehrabian & SR Ferris “Inference from Attitude from Nonverbal Communication in Two Channels” (1967) 31 *J Consulting & Clinical Psychol* 248 248 (nonverbal behaviour accounted for one-and-a-half times as much variance in the message as did the words).

³⁸ Mehrabian *Nonverbal Communication* 3-4. Thus, according to Mehrabian, the non-verbal component accounts for 93% of a message’s overall persuasiveness. Other writers and researchers offer slightly different estimates for the impact of the nonverbal component on the persuasiveness of a communication. See, eg, K Evans *Common Sense Rules of Advocacy for Lawyers* (2004) 8-9 (90%). Specifically, in the context of oral argument before an appellate tribunal, where the focus is on substantive law, it is unlikely that the nonverbal component would account for 90% of a message’s persuasiveness. However, even if that number is only 60%, or even 50%, it merits the attention of the oral advocate.

³⁹ As quoted in PM Lisnek & E Oliver *Courtroom Power: Communication Strategies for Trial Lawyers* (2001) 60.

much *what* speakers say that counts, but *how* they say it and *what they look like* when they say it.

Secondly, receivers generally believe that speakers' nonverbal cues are more revealing than their actual words.⁴⁰ Receivers put more weight on information communicated through nonverbal cues, because they assume that nonverbal cues are more spontaneous, more difficult to disguise, and less likely to be manipulated.⁴¹

Thirdly, these strong impressions emanating from speakers' nonverbal cues extend not only to their message, but also to the speakers themselves. Studies have found that receivers are prone to ascribe durable character traits, such as credibility, likeability and competence, to a stranger simply based upon an initial and limited exposure to that stranger's nonverbal cues.⁴²

Fourthly, few contexts are as heavily dependent upon the use of both spoken and unspoken discourse than the courtroom environment.⁴³ In the courtroom, nonverbal communication subtly affects the entire trial process.⁴⁴ It is constantly present and being asserted, and it heavily influences the judgments of trial lawyers, clients, witnesses and fact-finders.⁴⁵ The guilt or innocence of an accused, the credibility of a witness, and the persuasiveness of the trial lawyer may hang in the balance.⁴⁶ Curiously, trial lawyers often act as if they are oblivious to the existence of nonverbal communication.

Lastly, modern trial advocacy requires that the trial lawyer engage in the practical application of psychological knowledge, that is, the use of psychology as an advocacy tool.⁴⁷ People constantly – most often at an unconscious level of awareness⁴⁸ – monitor and interpret each other's nonverbal behaviour, and all people use their nonverbal decoding skills whenever they interact with one another. Because nonverbal messages help

⁴⁰ Mullins & Da Silva also argue that the impact on the eye is, if anything, more important than that on the ear:

"The human animal ... is more video than he is audio ... human beings (judges, witnesses) rely both on what they *hear* and on what they *see* and that, to the extent that one overrides the other, it is the latter." J Mullins & C da Silva *Morris: Technique in Litigation* (2010) 195 196.

⁴¹ ML Knapp & JA Hall *Nonverbal Communication in Human Interaction* (2006) 14; Higdon (2008) *Kansas L Rev* 635; A Vrij & S Mann "Police Use of Nonverbal Behavior as Indicators of Deception" in RE Riggio & RS Feldman (eds) *Applications of Nonverbal Communication* (2005) 66.

⁴² See, eg, R Gifford "A Lens-mapping Framework for Understanding the Encoding and Decoding of Interpersonal Dispositions in Nonverbal Behavior" (1994) 66 *J Personality & Social Psychol* 398-412; JD Smith "The Advocate's Use of Social Science Research into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct?" (1991) 134 *Military L Rev* 173 174.

⁴³ MS Remland *The Importance of Nonverbal Communication in the Courtroom* (1993), paper presented at the 84th Annual Meeting of the *Eastern Communication Association* held in New Haven, Connecticut, 29-04-1993 to 02-05-1993, 1 4. Mullins Da Silva also remind us that:

"[C]ounsel should take care to ensure that his appearance, the way he acts when on his feet and the way he acts when in his chair listening to his opponent or to the witness, creates an impression which is consistent with the impression he wants to create in order to win his case."

Mullins & Da Silva *Morris: Technique in Litigation* 195.

⁴⁴ LeVan (1984) *Law & Psychol Rev* 83.

⁴⁵ 83; Remland *The Importance of Nonverbal Communication in the Courtroom* 4.

⁴⁶ 4.

⁴⁷ V Gold "Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom" (1986-1987) 65 *North Carolina L Rev* 481 483. Research from the fields of communication theory, learning theory, and social psychology should provide the grids and supports for effective trial advocacy. Caldwell et al (2000-2001) *Notre Dame L Rev* 433.

⁴⁸ Barkai (1990) *San Diego L Rev* 106.

promote affective meanings (that is, the receiver's feelings and attitudes towards the message),⁴⁹ being aware of one's nonverbal behaviours and learning how to effectively control them are essential to becoming a more effective communicator.⁵⁰ Trial lawyers would be well-served to imbibe the principles of nonverbal persuasion, not only to better assess their existing presentation skills, but also to actively improve them.⁵¹ The hypothesis of this article is, therefore, that social-scientific principles of nonverbal persuasion could give trial lawyers a competitive edge in the courtroom.⁵²

2 Nonverbal communication in the courtroom

Nonverbal communication is comprised of all the messages — other than the actual words used — that people exchange in interactive contexts.⁵³ Social scientists have divided nonverbal communication into seven basic channels: (i) kinesics (bodily actions, such as gestures, facial expressions, posture and eye contact); (ii) physical appearance (attractiveness, dress and grooming); (iii) paralinguistics (vocal behaviours apart from the words themselves, such as pitch, loudness and tempo); (iv) haptics (physical interaction with a receiver); (v) proxemics (the use of physical space); (vi) environment and artefacts (the use of surrounding furnishings and objects); and (vii) chronemics (time messages, such as pacing and giving undivided attention).⁵⁴

More than four decades of research on speaker credibility and nonverbal communication provides a wealth of information regarding the specific nonverbal behaviours that tend to increase or decrease receivers' judgments of a speaker's sincerity and competence.⁵⁵ Moreover, several studies in the courtroom context show that the lawyer's nonverbal communication influence trial lawyers' perceptions and judgments of guilt or innocence.⁵⁶

⁴⁹ Nonverbal cues are the most effective way to influence another person's opinions, attitudes and beliefs: "[V]erbal messages help promote cognitive meaning in receivers (ie, the substance of the message), while nonverbal messages help promote affective meanings (ie, the receiver's feelings and attitudes towards the message)." JC McCroskey, VP Richmond & LL McCroskey "Nonverbal Communication in Instructional Contexts" in V Manusov & ML Patterson (eds) *The SAGE Handbook of Nonverbal Communication* (2006) 424. Affective meaning — and thus nonverbal communication — is a key component of persuasion. 424.

⁵⁰ P Esposito (2016) *Notre Dame J L Ethics & Pub Pol'y* 146.

⁵¹ Studies have shown that effective nonverbal communication, although arguably more innate to some people than others, can be learned and improved. Knapp & Hall *Nonverbal Communication in Human Interaction* 66.

⁵² This contribution is limited to subconscious advocacy in trial courts. Although many, if not most, of the principles discussed here apply also to "non-trial advocacy" — appellate advocacy and oral argument in motions, for example — there are also noteworthy differences. Subconscious advocacy principles applicable specifically "non-trial advocacy" merit treatment in a separate article.

⁵³ P Peters "Gaining Compliance Through Non-Verbal Communication" (2007) 7 *Pepperdine Disp Resol L J* 87 87. Put somewhat differently, nonverbal communication is "communication effected by means other than words." Higdon (2008) *Kansas L Rev* 636. However, to explain nonverbal communication as "messages expressed by non-linguistic means," or as "actions as distinct from speech" is to view the term too narrowly, as these definitions do not fully capture the broader concept of nonverbal communication, which includes paralinguistic phenomena, such as speech rate, tone, pitch, volume, and pauses. D'Esposito (2016) *Notre Dame J L Ethics & Pub Pol'y* 146.

⁵⁴ 147; Higdon (2008) *Kansas L Rev* 636.

⁵⁵ For a review of this literature, see generally JK Burgoon, DB Buller & WG Woodall *Nonverbal Communication: The Unspoken Dialogue* (1996).

⁵⁶ Remland *The Importance of Nonverbal Communication in the Courtroom* 7.

In Part 1 of this article I focus on the first three of the nonverbal codes outlined above, namely kinesics, paralinguistics, and physical appearance. Not only do these three have the greatest impact on visual and auditory senses,⁵⁷ but they are also particularly germane to the strictures of the theatre of the courtroom.⁵⁸ I explore what social science generally has revealed about these nonverbal cues, and how the science might relate to trial lawyers' nonverbal skills as part of effective impression management techniques in the courtroom. It should be borne in mind that, in the courtroom, the dynamics of the presentation differ from that of many other social interactions. Firstly, the format, and therefore the presentation style, is much more formal and constrained. Secondly, the fact-finder holds a position of dominance over the trial lawyer. This greatly inhibits the acceptable range of nonverbal cues from which the trial lawyer can draw.

2 1 Kinesics

“A man stands inside a closed glass phone booth. You cannot hear a word he says, but you see his postures, gestures and facial expressions. You see his kinesics.”⁵⁹

In 1952, the anthropologist Ray Birdwhistell introduced the term “kinesics”⁶⁰ to refer to all aspects of “body language” — movement of the head, face, eyes, limbs and trunk — as a means of communication.⁶¹ In the 65 years since Birdwhistell coined the term, social scientists have found kinesics to be one of the single richest forms of communication.⁶² Moreover, humans are not only extremely adept at delivering kinesic messages, but also at receiving them.⁶³ Not surprisingly, then, when it comes to persuasive communication, social scientists have revealed that kinesic cues are integral to a speaker's

⁵⁷ Burgoon et al *Nonverbal Communication: Unspoken Dialogue* 32.

⁵⁸ D'Esposito (2016) *Notre Dame J L Ethics & Pub Pol'y* 146. In light of the formality of court procedure, South African trial lawyers would rarely, if ever, touch a third party in court; they have little control over their physical space given that they are generally expected to remain behind a podium; they would only rarely have the opportunity to manipulate their environment or employ instruments (“props”), save the occasional physical exhibit; and they are also not free to use time in a completely unregulated fashion. It should also be noted that analysis of the research suggests a number of important rules. Some of these rules of nonverbal behaviour might seem to be nothing more than common sense that accord with trial lawyers' intuitive experiences in the courtroom. Research findings often do confirm the obvious. However, science also accomplishes significantly more. For example, research often reveals which of several common-sense ideas is actually correct. Likewise, research sometimes shows how far a common-sense idea can be taken before it loses its utility and actually become counter-productive. Finally, scientific data can expose complexity in a common-sense idea that on the face of it seemed simple. Call (1987) *Brief* 47

⁵⁹ MF Vargas *Louder Than Words* (1986) 67.

⁶⁰ From the Greek “kinesis” for movement.

⁶¹ RL Birdwhistell *Introduction to Kinesics: An Annotation System for Analysis of Body Motion and Gesture* (1954) 3.

⁶² It is estimated that humans can produce up to 700 000 different signals simply by manipulating their bodies. Birdwhistell estimated that a human face alone can produce 250 000 expressions to help it display up to 200 000 different emotions. RL Birdwhistell *Kinesics and Context: Essays on Body Motion Communication* (1970) 8; Higdon (2008) *Kansas L Rev* 638.

⁶³ As one leading textbook on nonverbal communication points out: “[O]bservers can distinguish movements as short as 1/50 of a second.” Birdwhistell *Kinesics and Context* 8.

ability to influence a receiver.⁶⁴ Accordingly, any trial lawyer appearing before a fact-finder should at least have a rudimentary understanding of kinesics.

An in-depth analysis of every kinesic cue that could possibly influence a receiver is beyond the scope of this article. Instead I focus on those physical signals that social science has revealed to play the greatest part in speakers' ability to persuade. The most logical point of departure is the human face. Although we communicate nonverbally with our entire bodies, our faces are prodigious sources of nonverbal communication. In fact, many social scientists classify the human face as the primary source of communication, next to human speech.⁶⁵

2 1 1 Eye contact

One of the chief ways in which speakers can manipulate their faces to persuade another is through eye contact. The cliché "*the eyes are the mirrors of the soul*" hints at the fact that eye contact has an effect quite out of proportion to the physical effort exerted,⁶⁶ and is by far the most consciously noted aspect of nonverbal communication.⁶⁷ Almost everyone can recognise the blank, empty stare that indicates that the listener is not paying attention.

Studies in a variety of social contexts have all revealed a strong correlation between eye contact and persuasion.⁶⁸ Speakers may either look directly at receivers of their communications ("gaze maintenance"), or look slightly downward while speaking ("gaze aversion").⁶⁹ Researchers have used courtroom simulations to examine the effects of this looking behaviour on receivers' perceptions of the credibility of speakers. For example, one experiment sought to determine whether receivers would use an alibi witness's looking behaviour to make an inference concerning the speaker's (the alibi witness's) credibility.⁷⁰ The experiment also investigated whether the message recipients exhibited enough confidence in their judgments concerning the speaker's credibility, to apply those judgments to a subsequent decision.⁷¹

⁶⁴ "[T]here are a number of nonverbal behaviours that are consistently related to enhanced performance ratings in both public speaking and interview contexts." EP Bettinghaus & MJ Cody *Persuasive Communication* (1987) 124.

⁶⁵ Knapp & Hall *Nonverbal Communication in Human Interaction* 295. Receivers tend to put more weight on a person's face than any other form of nonverbal communication. This phenomenon is called "facial primacy".

⁶⁶ Costopoulos (1971-1972) *Duquesne L Rev* 408.

⁶⁷ Barkai (1990) *San Diego L Rev* 115.

⁶⁸ For example, studies have shown that individuals who make eye contact with a receiver are more successful in soliciting charitable donations (R Bull & E Gibson-Robinson "The Influences of Eye-Gaze, Style of Dress, and Locality on the Amounts of Money Donated to Charity" (1981) 34 *Human Relations* 51 56-59); getting passers-by to accept pamphlets (CL Kleinke & DA Singer "Influence of Gaze on Compliance With Demanding and Conciliatory Requests in a Field Setting" (1979) 5 *Personality & Soc Psychol Bull* 386 388); getting a lift while hitchhiking (M Snyder, J Grether & K Keller "Staring and Compliance: A Field Experiment on Hitchhiking" (1974) 4 *J Applied Soc Psychol* 165 168); and received more coins to make a telephone call (Peters (2007) *Pepperdine Disp Resol L J* 94).

⁶⁹ GN Hemsley & AN Doob "The Effect of Looking Behaviour on Perceptions of a Communicator's Credibility" (1978) 8 *J Applied Soc Psychol* 136 140.

⁷⁰ 137.

⁷¹ 140.

Receivers in the study rated the alibi witnesses who engaged in gaze aversion as less credible than witnesses who exhibited gaze maintenance.⁷² Moreover, receivers judged the accused on whose behalf the gaze averting alibi witnesses testified as more likely to be guilty than the accused on whose behalf the gaze maintaining alibi witnesses testified.⁷³ Thus, receivers used a witness's visual behaviour to make inferences concerning that witness's credibility *and* to make a subsequent evaluation of the defendant's guilt. These results provide empirical support for one of the time-honoured trial lawyer's folk wisdoms of body language — instructing one's witnesses to look at the fact-finder, rather than the enquiring lawyer, when answering questions in the witness box. Gaze maintenance contributes to nonverbal persuasion through two different avenues: attraction and dominance.⁷⁴ Firstly, with regard to attraction, social scientists have noted that receivers are more favourably predisposed to speakers whom they find attractive. And “[a]mong the most powerful indicators of attraction are eye contact and mutual gaze”.⁷⁵ Secondly, in the case of dominance, social scientists have shown that dominant individuals are deemed more credible than submissive individuals. Eye contact is an important way to communicate dominance, while averting gaze is likely to communicate submission.⁷⁶

Social science confirms that trial lawyers are perceived as more credible if they make frequent eye contact with fact-finders.⁷⁷ These findings accord with textbooks on trial advocacy, which routinely counsel on the importance of maintaining eye contact with the fact-finder.⁷⁸ For example, the late associate justice of the United States Supreme Court, Antonin Scalia, together with legal communication expert, Brian Garner, advise:

“Everyone who speaks in public has heard - and most have learned - that it is a blunder to bury your head in notes. You must look up. But that's not enough. Many speakers look up at some indeterminate spot on the back wall ... [E]specially when you're standing in court, look at the judge. In the eye. That's the only way to establish the relationship you want. You are advising the judge, not merely speaking in the same room.”⁷⁹

Trial lawyers who engage in gaze aversion commit three cardinal sins. They miss an opportunity to persuade, because fact-finders' reaction to a point can often be gleaned from facial reaction; they may be perceived as impolite by fact-finders who culturally hold the view that speaking to someone without making eye contact is impolite; and they risk having the court doubt their sincerity and tune out their presentations.⁸⁰

⁷² 141.

⁷³ 142.

⁷⁴ JK Burgoon, NE Dunbar & C Segrin “Nonverbal Influence” in JP Dillard & M Pfau (eds) *The Persuasion Handbook: Developments in Theory and Practice* (2002) 445, 449.

⁷⁵ 449.

⁷⁶ 455.

⁷⁷ SL Brodsky, NE Hooper, DG Tipper & SB Yates “Attorney Invasion of Witness Space” (1999) 23 *L & Psychol Rev* 49 68.

⁷⁸ Gravett *The Fundamental Principles of Effective Trial Advocacy* 20; Mullins & Da Silva *Morris: Technique in Litigation* 422.

⁷⁹ A Scalia & B Garner *Making Your Case: The Art of Persuading Judges* (2008) 178.

⁸⁰ Frederick & Ginsburg *The Art of Oral Advocacy* 186; Gravett *The Fundamental Principles of Effective Trial Advocacy* 20.

For trial lawyers, maintaining eye contact with fact-finders can be particularly significant when responding to questions from fact-finders. Some trial lawyers have the habit of always glancing downward each time that a fact-finder asks a question. To the fact-finder it might appear as if the trial lawyer is in search of the answer before the question is even asked, a mannerism unlikely to conjure an image of confidence.⁸¹ It is not uncommon for fact-finders whose gaze is not returned to look away from counsel in the universal sign of disinterest in what the speaker is saying.⁸²

With regard to eye contact, two *caveats* are in order. As with all nonverbal cues generally, eye contact has an optimal level of effectiveness. Too much eye contact — that is, staring — could undermine a speaker’s ability to persuade.⁸³ Part of the explanation for this phenomenon comes from studies that reveal the tendency of receivers to interpret prolonged eye contact by the speaker as threatening.⁸⁴ Humans generally react to such a threat with an impulse to flee.⁸⁵ To avoid the deleterious effects associated with staring, one body language expert encourages speakers to maintain eye contact with the receiver “for between 60 and 70 per cent of the time”.⁸⁶ Anything less is “liable to be interpreted as a sign of shiftiness, unease or lack of confidence”.⁸⁷

Moreover, although all attending behaviours vary cross-culturally, eye contact may vary more than other nonverbal behaviours.⁸⁸ In most Western cultures, it is generally considered appropriate to look at a person when speaking to them. In many Asian and African cultures, by contrast, it is a sign of disrespect for low status individuals to make direct, prolonged eye contact with elders or people of higher status.⁸⁹

In addition to eye contact, there are other ways in which speakers can manipulate their heads and faces in aid of persuasion. The most powerful of these other nonverbal facial-head cues to promote a favourable impression

⁸¹ C Berry *Effective Appellate Advocacy: Brief Writing and Oral Argument* (2003) 191. The late chief justice of the United States, William Rehnquist, once chastised a lawyer for looking down at his notes when the chief justice was asking him a question. Expecting the lawyer to look him in the eye, the chief justice expressed his disdain when the lawyer’s first motion was to look at his notes. Frederick & Ginsburg *The Art of Oral Advocacy* 186.

⁸² 186-187.

⁸³ In one study, for example, an actor dropped a big stack of papers on the floor, seemingly by accident, to see if someone would stop to assist. The results revealed that fewer individuals were willing to assist when the actor stared at them. Burgoon et al *Nonverbal Communication: The Unspoken Dialogue* 425.

⁸⁴ See generally PC Ellsworth & JM Carlsmith “Eye Contact and Gaze Aversion in an Aggressive Encounter (1972) 28 *J Personal & Soc Psychol* 280.

⁸⁵ In a study by Ellsworth et al, drivers who were stared at while stopped at a red light, drove much quicker through the intersection once the light turned green (PC Ellsworth JM Carlsmith & A Henson “The Stare as a Stimulus to Flight in Human Subjects: A Series of Field Experiments (1972) 21 *J Personal & Soc Psychol* 302 302).

⁸⁶ D Lewis *The Secret Language of Success: Using Body Language to Get What You Want* (1989) 140.

⁸⁷ 140.

⁸⁸ Barkai (1990) *San Diego L Rev* 116.

⁸⁹ 116-117. An obvious cultural conflict could come into play during criminal sentencing. A fact-finder might expect an accused to look at her when given the opportunity to speak prior to sentencing. She might interpret a failure on the part of accused to look at her while speaking to be a sign of disrespect. It is also quite possible, however, that the accused might be from a culture in which it is considered a sign of disrespect to look at someone of a higher status, especially when the accused is about to be disciplined.

are “wide smiles,”⁹⁰ “head nodding,”⁹¹ and “variable facial expressions,”⁹² particularly the raise of the eyebrow.⁹³

2 1 2 Body posture

The degree to which speakers appear relaxed has a direct positive bearing on their perceived dominance and status:

“In mixed-status groups, individuals with higher rank typically exhibit posture relaxation ..., but individuals with lower rank tend to show more postural restraint ... [L]ike soldiers standing at attention, low-status individuals must remain attentive and vigilant while the higher status individual is free to relax and has less need to be watchful of others.”⁹⁴

Given that receivers judge dominant individuals as more persuasive, an overly rigid posture might render it more difficult for speakers to influence receivers.⁹⁵ Indeed, postural tenseness conveys a lack of composure,⁹⁶ and is frequently associated with self-doubt and anger.⁹⁷ Postural relaxation, by contrast, improves impressions of credibility and power.⁹⁸ Therefore, notwithstanding the formal environment of the courtroom, trial lawyers should demonstrate some level of relaxation, lest they appear nervous or submissive.

Leaning slightly forward is an effective way in which speakers can relax their bodies in an attempt to persuade. Studies have revealed that leaning

⁹⁰ JK Burgoon & NE Dunbar “Nonverbal Expressions of Dominance in and Power in Human Relationships” in V Manusov & ML Patterson (eds) *The SAGE Handbook of Nonverbal Communication* 288.

⁹¹ 288. Several studies have found that, in addition to the head nod, the head tilt also plays a subtle part in impression formation. For example, one study found that that a head tilt by the speaker could change a receiver’s impression of the speaker from arrogant and unsociable, to kind and thoughtful. H-P Hirsbrunner, S Frey & R Crawford “Movement in Human Interaction” in AW Siegman & S Feldstein (eds) *Nonverbal Behavior and Communication* (1987) 99. Moreover, a 2007 study revealed that head tilting can increase a speaker’s perceived trustworthiness, but, interestingly, only if specifically tilted eight degrees to the right of vertical (as opposed to speakers who kept their heads upright or tilted to the left). E Krumhuber & ASR Manstead “Temporal Aspects of Facial Displays in Person and Expression Perception: The Effects of Smily Dynamics, Head-tilt, and Gender” (2007) 31 *J Nonverbal Behavior* 39 42.

⁹² Burgoon & Dunbar “Nonverbal Expressions of Dominance” in *The SAGE Handbook of Nonverbal Communication* 288. Lack of expressivity tends to convey disinterest, aloofness and coldness. CF Keating “Why and How the Silent Self Speaks Volumes: Functional Approaches to Nonverbal Impression Management” in V Manusov & ML Patterson (eds) *The SAGE Handbook of Nonverbal Communication* 323-324.

⁹³ Burgoon & Dunbar “Nonverbal Expressions of Dominance” in *The SAGE Handbook of Nonverbal Communication* 288; WG Woodall, JK Burgoon & NN Markel “The Effects of Facial-head Cue Combinations on Interpersonal Evaluations” (1980) 28 *Communication Q* 47 51-52. One study went so far as to examine the combined and separate impact of smiling, nodding and eyebrow raising. The study found that smiling and nodding, when combined, were the most effective two-cue combination. Woodall et al (1980) *Communication Q* 51-52.

⁹⁴ Burgoon et al “Nonverbal Influence” in *The Persuasion Handbook* 455; Knapp & Hall *Nonverbal Communication in Human Interaction* 354.

⁹⁵ Higdon (2008) *Kansas L Rev* 644.

⁹⁶ Burgoon et al *Nonverbal Communication: The Unspoken Dialogue* 383.

⁹⁷ Knapp & Hall *Nonverbal Communication in Human Interaction* 9.

⁹⁸ Burgoon et al *Nonverbal Communication: The Unspoken Dialogue* 383. However, this is not to suggest that one should slouch. Speakers should always maintain good posture, which receivers tend to interpret as confidence and security. T Reiman *The Power of Body Language: How to Succeed in Every Business and Social Encounter* (2007) 231-232. The point is merely that a speaker seeking to persuade another person should avoid a posture that is overly rigid. Higdon (2008) *Kansas L Rev* 644.

forward is an affiliative cue that is associated with greater persuasiveness.⁹⁹ In a seminal study on the relationship between posture and nonverbal communication, William James found that a backward-leaning or even an erect posture connotes a negative attitude in the speaker, specifically impressions of pride, conceit, arrogance and disdain.¹⁰⁰ Conversely, a forward-leaning posture evinces a positive attitude in the speaker, and leads to perceptions of higher engagement and greater liking of the task at hand.¹⁰¹

For trial lawyers, standing straight, with feet planted firmly and leaning slightly forward, is a stance that is perceived as positive and authoritative.¹⁰² However, moving around, rocking back and forth, shifting weight from one leg to the other, and leaning on the podium are mannerisms that tend to distract fact-finders.¹⁰³

2 1 3 Gestures

Many speakers mistakenly assume that, at least in a formal setting (such as a courtroom), gesturing is a bad habit that undermines the effectiveness of their delivery.¹⁰⁴ However, social science has proved, not only that gesturing is an indispensable component of effective communication,¹⁰⁵ but also, when done correctly, it could greatly enhance speakers' persuasive impact.¹⁰⁶ Just as a more expressive face is associated with greater persuasiveness, so, too, is a more expressive body using gestures.¹⁰⁷

However, only gestures that are "synchronized with and supporting the vocal/verbal stream" lead to increased perceptions of persuasiveness.¹⁰⁸ Conversely, receivers perceive gestures that are not synchronised with a speaker's verbal stream as nervous gestures, which, in turn, cause the speaker

⁹⁹ MB LaCrosse "Nonverbal Behavior and Perceived Counselor Attractiveness and Persuasiveness" (1975) 22 *J Counseling Psychol* 563-563.

¹⁰⁰ WT James "A Study of the Expression of Bodily Posture" (1932) 7 *J General Psychol* 405-409-417.

¹⁰¹ 409-417. Curiously, the forward lean at an angle of approximately twenty degrees generated the most consistent positive ratings of speakers by receivers. Barkai (1990) *San Diego L Rev* 115.

¹⁰² BG Clary, SR Paulsen & MJ Vanselow *Advocacy on Appeal* (2001) 116. See also Mullins & Da Silva *Morris: Technique in Litigation* 422.

¹⁰³ 116.

¹⁰⁴ Although the term "gestures" generally mean any movement of the body or some part of it, in the context of nonverbal communication, it specifically refers to movement of the arms and hands. Knapp & Hall *Nonverbal Communication in Human Interaction* 9.

¹⁰⁵ Research has shown that, without gestures, a person's ability to communicate is greatly compromised. A 1931 study requested participants to speak while eliminating all gestures of the head, hands, face and body. Firstly, none of the subjects were even able to carry out the exercise as instructed. Moreover, "the speech ... lost its intonation, stress and expressiveness; even the very selection of words needed for expression of content became labored; there was a jerkiness to the speech, and a reduction of the words used." Knapp & Hall *Nonverbal Communication in Human Interaction* 9, citing SM Dobrogaev "The Study of Reflex in Problems of Linguistics" in EA Marr (ed) 2 *Lazykovedenie I Materializm* (1931) 105. Gestures perform a variety of functions in human communication. Gestures "may replace speech ..., regulate the flow and rhythm of interaction, maintain attention, add emphasis and/or clarity of speech, help characterize and make memorable the content of speech, act as forecasters of forthcoming speech, and help speakers access and formulate speech." Knapp & Hall *Nonverbal Communication in Human Interaction* 225-226.

¹⁰⁶ Higdon (2008) *Kansas L Rev* 645.

¹⁰⁷ "As with other affiliative cues, more smiling, head nodding and gesturing are associated with greater persuasiveness ...". Burgoon et al *Nonverbal Communication: The Unspoken Dialogue* 408.

¹⁰⁸ Knapp & Hall *Nonverbal Communication in Human Interaction* 243.

to appear less relaxed and thus less persuasive.¹⁰⁹ The research suggests that a message in which the vocal and kinesic cues are not synchronised has a tendency to distract observers, causing them to be less attentive.¹¹⁰

Nervous or fidgeting gestures that have been identified by social scientists as undermining a speaker's dominance — and thus persuasiveness — include lip licking, postural sway, shifting gaze, blinking, clicking pen caps, tapping feet, lip chewing, pacing, picking at fingernails or lips, and finger tapping or drumming.¹¹¹ Generally, in court, gestures at shoulder level or above (for example, pointing, fidgeting with hair, waving a pen) and movement below waist level (for example, tapping feet, moving legs, jingling keys in pockets) distract the fact-finder from the trial lawyer's verbal delivery. The trial lawyer should concentrate on gestures that draw the fact-finder's attention to the trial lawyer's face, because that is where the words are emanating from. The trial lawyer's gestures should thus come from the upper body — facial expressions, head movement, and hand gestures above waist level.¹¹²

On the other hand, various gestures are associated with power, dominance and status, and, as such, with increased persuasiveness: expansive gestures,¹¹³ steeppling of the fingers,¹¹⁴ pointing at another person,¹¹⁵ and hand gestures involving a palms-down (as opposed to a palms-up) orientation.¹¹⁶

Although social science indicates that more expressive faces and gestures tend to portray speakers as more persuasive, the formality of the courtroom setting dictates a lower threshold of the appropriate level of expressivity.¹¹⁷ In *The Art of Oral Advocacy*,¹¹⁸ David C Frederick notes that, “[i]n most judicial forums, the more animated a speaker becomes, the more foolish he tends to look.” Thus, trial lawyers should limit themselves to relatively constrained gestures:

¹⁰⁹ PH Waxer “Nonverbal Cues for Anxiety: An Examination of Emotional Leakage” (1977) 86 *J Abnormal Psychol* 306-312.

¹¹⁰ WG Woodall & JK Burgoon “The Effects of Nonverbal Synchrony on Message Comprehension and Persuasiveness” (1981) 5 *J Nonverbal Behavior* 207 219-221; Knapp & Hall *Nonverbal Communication in Human Interaction* 225-226.

¹¹¹ RV Exline “Multichannel Transmission of Nonverbal Behavior and the Perception of Powerful Men: The Presidential Debates of 1976” in SL Ellyson & JF Dovidio (eds) *Power, Dominance, and Nonverbal Behavior* (1985) 187-188.

¹¹² Gravett *The Fundamental Principles of Effective Trial Advocacy* 170.

¹¹³ Receivers typically view expansive gestures as more persuasive than tightly constrained gestures. The reason for this result is simply that dominant individuals occupy more personal space than lower-status individuals. Burgoon et al *Nonverbal Communication: The Unspoken Dialogue* 315. Conversely, submissive individuals tend to be “tighter” in their behaviour. They appear to “shrink in,” using closed, symmetrical postures and small gestures or gestures that convey vulnerability.

¹¹⁴ “Steepling” refers to the gesture of “leaning the tips of the outstretched fingers of both hands against each other, creating an image reminiscent of a steeple.” MD Blum *The Silent Speech of Politicians: Body Language in Government* (1988) 3-13, 3-14-3-16. Steepling is widely considered a symbol of confidence and establishes the speaker as someone who is both evaluative and in control.

¹¹⁵ Burgoon et al *Nonverbal Communication: The Unspoken Dialogue* 455.

¹¹⁶ Speakers generally use palms-down gestures to communicate certainty, to assert their authority, and to demonstrate a level of control over a situation. Reiman *The Power of Body Language* 118. By contrast, palms-up gestures frequently accompany the shrug, signifying uncertainty or hesitancy. Burgoon et al *Nonverbal Communication: The Unspoken Dialogue* 234. Reiman goes so far as to characterise palms-down gestures as “a universal sign of supplication.” In fact, primatologists have found this gesture among chimpanzees who use it to beg for food. Reiman *The Power of Body Language* 117.

¹¹⁷ 658.

¹¹⁸ 187.

“[N]o pointing at the court or counsel, no pounding on the podium . . . Small hand gestures can be effective, such as showing the ‘broad’ scope of an argument or ‘weighing’ alternatives.”¹¹⁹

2.2 Attractiveness

“Through tattered clothes small vices do appear.
Robes and furred gowns hide all.”¹²⁰

Common wisdom warns that “you cannot judge a book by its cover.” However, social scientists have found that most people often do exactly that.¹²¹ Attractiveness is one of the most influential aspects of nonverbal communication, given that it is one of the first cues people receive when encountering a speaker.¹²² Social psychologists who study persuasion define attractiveness in two ways: (i) as the perceived physical attractiveness or the physical beauty of the source of the message; and (ii) as the receiver’s perceived similarity to the speaker.¹²³

Research reveals that physically attractive speakers are generally more able to change receivers’ attitudes than less attractive ones, even when the receivers have been forewarned of the speakers’ persuasive intent.¹²⁴ Attractive speakers’ enhanced persuasive power rests on the psychological process of identification.¹²⁵ Receivers more readily adopt the opinions of attractive speakers in order to enhance the receivers’ own self-concept. They believe that there is a social reward for associating with attractive people.¹²⁶ Receivers desire to resemble and be perceived as similar to attractive speakers and, consequently, are more likely to agree with what they say.¹²⁷

One of the most widely cited conclusions from research on physical attractiveness is expressed by the maxim, “what is beautiful is good.”¹²⁸ This stereotype leads to a “*halo effect*,” pursuant to which receivers will also automatically assign other positive characteristics to physically attractive speakers.¹²⁹ Thus, physically attractive speakers are also presumed to have more pleasant personalities,¹³⁰ to be more competent, intelligent, kind, and

¹¹⁹ MZ Johns *Professional Writing for Lawyers* (1998) 190.

¹²⁰ W Shakespeare *King Lear* act 4 scene 6.

¹²¹ J Voss “The Science of Persuasion: An Exploration of Advocacy and the Science Behind the Art of Persuasion in the Courtroom” (2005) 29 *Law & Psychol Rev* 301 316.

¹²² S Chaiken “Communicator Physical Attractiveness and Persuasion” (1979) 37 *J Personality & Soc Psychol* 1387 1390.

¹²³ Linz & Penrod (1984) *Law & Psychol Rev* 1 36.

¹²⁴ 36; J Mills & E Aronson “Opinion Change as a Function of the Communicator’s Attractiveness and Desire to Influence” (1965) 1 *Personality & Soc Psychol Rev* 173 177. Of course, many of the variables that determine a person’s general level of static physical attractiveness are attributes that speakers have little control over, for example, facial symmetry (K Grammer & R Thornhill “Human (Homo Sapiens) Facial Attractiveness and Sexual Selection: The Role of Symmetry and Averageness” (1994) 108 *J Comparative Psychol* 233 245), height (B Stabler “Social Judgments by Children of Short Stature” (1980) 46 *Psychol Rev* 743 743), skin colour (Knapp & Hall *Nonverbal Communication in Human Interaction* 195-196), and even body shape (WD Wells & B Siegel “Stereotyped Somatypes” (1961) 8 *Psychological Reports* 77 78).

¹²⁵ Linz & Penrod (1984) *Law & Psychol Rev* 39.

¹²⁶ Peters (2007) *Pepperdine Disp Resol L J* 93.

¹²⁷ Linz & Penrod (1984) *Law & Psychol Rev* 36; Peters (2007) *Pepperdine Disp Resol L J* 89.

¹²⁸ K Dion, ES Berscheid & E Walster “What is Beautiful is Good” (1972) 24 *J Personal & Soc Psychol* 285 285.

¹²⁹ Peters (2007) *Pepperdine Disp Resol L J* 89-90.

¹³⁰ Linz & Penrod (1984) *Law & Psychol Rev* 37.

honest,¹³¹ to be more successful in their occupations,¹³² to have more stable marriages,¹³³ and to have attitudes similar to those of the receivers.¹³⁴

To complicate matters, it is also the case that attractive individuals have probably learned many behaviours that make them appear more credible than unattractive individuals, even though both the attractive and unattractive speakers might be delivering essentially the same message.¹³⁵ In a field experiment, the psychologist Shelly Chaiken compared attractive and unattractive sources in actual interpersonal persuasion situations. She found that attractive speakers were better communicators, had achieved higher scores on indices of educational accomplishments, and were more confident than unattractive speakers.¹³⁶

Beyond physical appearance, perceived similarities — shared beliefs, experiences, knowledge, values and communication styles — between speakers and receivers also influence attractiveness and persuasive power.¹³⁷ The relationship is straightforward and one of the most consistent phenomena in social psychological research. The greater the similarities between speakers and receivers, the more attractive speakers and their messages become, and the more persuasive and influential the speakers will be.¹³⁸ When receivers identify similarities between themselves and speakers, it reinforces the receivers' self-concept. "Heider's balance theory" posits that shared beliefs, qualities, experiences, characteristics, or behaviour, validates the receivers and allow them to better predict and understand the speakers.¹³⁹

However, it is important to note that receivers are more easily persuaded by speakers whom they believe are similar to themselves, but only if the similarities relate to a dimension that is relevant to the message topic.¹⁴⁰ Thus, irrelevant similarities have little effect on persuasion.¹⁴¹

Generally, the attire of South African trial lawyers in court is much less of an issue than in the United States where trial lawyers do not robe for

¹³¹ AH Eagly, RD Ashmore, MG Makhijani & L Longo "What is Beautiful is Good: A Meta-Analytic Review of Research on the Physical Attractiveness Stereotype" (1991) 110 *Psychol Bull* 109 121-123.

¹³² DS Hamermesch & JE Biddle "Beauty and the Labor Market" (1994) 84 *Am Econ Rev* 1174 1185-1190.

¹³³ Linz & Penrod (1984) *Law & Psychol Rev* 37.

¹³⁴ 37.

¹³⁵ 42.

¹³⁶ Chaiken (1979) *J Personality & Soc Psychol* 1387. Chaiken suggests that many of the behavioural characteristics of attractive speakers make them appear to be credible and help facilitate internalisation of the speakers' positions, as well as produce persuasiveness through identification. This study makes clear that determining exactly how attractive speakers persuade receivers to their position is complicated. Part of the process may entail receiver identification with the speaker, and part of it may entail the behavioural characteristics of attractive speakers that render them more credible. Linz & Penrod (1984) *Law & Psychol Rev* 37.

¹³⁷ Peters (2007) *Pepperdine Disp Resol L J* 91.

¹³⁸ Linz & Penrod (1984) *Law & Psychol Rev* 38.

¹³⁹ F Heider *The Psychology of Interpersonal Relationships* (1958) 20-25.

¹⁴⁰ Call (1987) *Brief* 51.

¹⁴¹ Ellen Berscheid informed subjects that they would hear a message on a topic related to education from a communicator whose values were similar to theirs in the area of education, but dissimilar in the unrelated area of international affairs. Berscheid told another group of subjects that they would hear from a communicator with views similar to theirs on the unrelated topic, but dissimilar on the topic of education. The result of the experiment revealed that the communicator most similar to the listeners on values relevant to the topic was the more persuasive. ES Berscheid "Opinion Change and Communicator-Communicatee Similarity and Dissimilarity" (1966) 4 *J Personality & Soc Psychol* 650 670-680.

court. However, South African advocates appearing in the magistrates' court and any trial lawyer appearing before an arbitration tribunal, to name but two instances, also do not robe. Thus, a brief review of the social science surrounding dress and grooming is in order.

High-status dress could increase a lawyer's perceived attractiveness, credibility, and persuasiveness.¹⁴² Moreover, formal attire is linked to perceptions of dominance and intelligence, and thus to persuasive power.¹⁴³

Mode of dress is part of any lawyer's nonverbal arsenal of impression management techniques. One study confirmed what we all know: for both men and women, clothing is one of the first things people notice when meeting someone for the first time.¹⁴⁴ Thus, trial lawyers should bear in mind that fact-finders' evaluation of lawyers and their cases will commence before a single word is uttered.¹⁴⁵

2 3 Paralinguistics

“Now imagine you are on the other end of this telephone line.
You cannot see any nonverbal communication,
but you can hear more than his words.
You can hear his paralinguage.”¹⁴⁶

Paralinguistics, also referred to as “vocalics,” studies the sound of an oral communication by examining variables such as pitch, speech rate, vocal expressiveness (intensity), tone and volume of the voice.¹⁴⁷ Simply put, paralinguistics are the non-linguistic aspects of speech.¹⁴⁸ It is trite that much of what we as human beings communicate is a product, not so much of what we say, but *how* we say it.¹⁴⁹ As Burgoon et al explain:

“The voice is a rich channel in the nonverbal communication system. It contains many behaviors besides the spoken word that are used to complement, accent, emphasize, and contradict what is said ...”¹⁵⁰

For example, we signal a declarative sentence by lowering pitch at the end of sentence, and a question by raising pitch. A speaker can also completely alter the meaning of a sentence simply by stressing one word over the other.¹⁵¹

Apart from altering meaning, sociolinguists have also found that the way in which speakers use their voices could influence the speakers' persuasiveness. Specifically, the following paralinguistic variables have a marked impact on

¹⁴² DU Behling & EA Williams “Influence of Dress on Perceptions of Intelligence and Expectations of Scholastic Achievement” (1991) 94 *J Clothing & Textiles Research* 1 1-7.

¹⁴³ 1-7.

¹⁴⁴ Knapp & Hall *Nonverbal Communication in Human Interaction* 204.

¹⁴⁵ “[Y]ou are a professional, you are in court with a purpose, and that purpose is to bring all your abilities to bear in favour of your client. If you can *fill* the part, *dress* the part.” Mullins & Da Silva *Morris: Technique in Litigation* 196.

¹⁴⁶ Vargas *Louder Than Words* 67.

¹⁴⁷ Smith (1991) *Military L Rev* 175; Peters (2007) *Pepperdine Disp Resol L J* 97.

¹⁴⁸ Costopoulos (1971-1972) *Duquesne L Rev* 408.

¹⁴⁹ 402. In perhaps overly dramatic fashion, Costopoulos states that “[l]anguage is the medium. And voice - need it be said - is the most persuasive means of communication known. The hardest tears, the gayest laughter, and the deepest logic have been provoked by tone ...”.

¹⁵⁰ Burgoon et al *Nonverbal Communication: The Unspoken Dialogue* 58.

¹⁵¹ Higdon (2008) *Kansas L Rev* 649.

a speaker's perceived persuasiveness: rate of speech, hesitancy of speech and pitch variation.¹⁵²

2.3.1 Rate of speech

The cultural stereotype of the “fast talker” is not a favourable one. Many trial practice handbooks also advise lawyers that they should proceed at a slower pace during trial. For example, Morrill counsels the trial lawyer “[w]hen making a favorable point, [to] travel slowly so that it will ‘stick’”.¹⁵³ However, trial advocacy folk wisdom has largely missed the mark with regard to this one paralinguistic variable.

Rate of speech, as a contributor to persuasiveness, has received more attention from social scientists than any other paralinguistic cue.¹⁵⁴ The social psychological research has demonstrated overwhelmingly that speakers who speak at a faster rate are perceived to be more persuasive, and receivers learn more from faster speakers in a given period of time.¹⁵⁵ Norman Miller and his collaborators conducted an experiment in which they recorded a relatively complex message at speeds of 191, 140 (normal speaking rate),¹⁵⁶ and 111 words per minute.¹⁵⁷ The experimenters then approached people on the street at random and had them indicate their agreement with the message and evaluate the speaker in each of the three conditions. The results of the evaluation revealed that the fastest speech rate (191 words per minute) produced the most receiver agreement with the speaker's position.¹⁵⁸ Moreover, receivers rated the faster speaker as more intelligent, trustworthy, knowledgeable, and objective.¹⁵⁹ A subsequent series of experiments confirmed the results of the earlier study, finding that receivers judge slow speakers as less truthful, less fluent, and less persuasive.¹⁶⁰

Not only are fast speakers judged to be more credible, competent and persuasive, but social psychologists have also discovered that it is possible to

¹⁵² A Mehrabian & M Williams “Nonverbal Concomitants of Perceived and Intended Persuasiveness” (1969) 13 *J Personality & Soc Psychol* 37 54, 56.

¹⁵³ A Morrill *Trial Diplomacy* (1973) 42. Another advocacy text for lawyers advises: “High speed is your enemy. It is hard enough to be understood when explaining something orally, speeding up just a little can lose your audience a lot.” MD Murray & CH DeSanctis *Appellate Advocacy and Moot Court* (2006) 166. Mullins & Da Silva likewise counsels: “Do not speak too quickly. Speak in measured tones ... A person who speaks too quickly betrays nervousness and is less easily followed.” Mullins & Da Silva *Morris: Technique in Litigation* 421.

¹⁵⁴ Higdon (2008) *Kansas L Rev* 649.

¹⁵⁵ See, eg, AW Siegman “The Telltale Voice: Nonverbal Messages of Verbal Communication” in AW Siegman & S Feldstein (eds) *Nonverbal Behavior and Communication* (1987) 351 371.

¹⁵⁶ The average person speaks at a rate of 140-150 words per minute. Linz & Penrod (1984) *Law & Psychol Rev* 43.

¹⁵⁷ N Miller, G Maruyama, RJ Beaver & K Valone “Speed of Speech and Persuasion” (1976) *J Personality & Soc Psychol* 615 615.

¹⁵⁸ 615.

¹⁵⁹ 616. One of the possible explanations behind these receiver perceptions lies in the nonverbal code of chronemics, or how people perceive structure and use time as communication. Researchers have found that time management can be a powerful status cue and thus might explain the positive perception of faster speakers. The perception of faster speakers as maximising the efficient use of their time, and also that people in a hurry are important, might lead receivers to associate faster speakers with credibility. Burgoon et al “Nonverbal Influence” in *The Persuasion Handbook* 457

¹⁶⁰ W Apple, LA Streeter & R Krauss “Effects of Pitch and Speech Rate on Personal Attributions” (1979) 37 *J Personality & Soc Psychol* 715 723.

increase the speed of a message dramatically — to 282 words per minute, or more than twice the average speech rate of 140 words per minute — without any significant diminishment in receiver comprehension.¹⁶¹ Of course, most people cannot speak that rapidly. However, the point is that the average receiver can comprehend and retain a message much faster than a person could communicate the substance of the message at a normal rate.¹⁶²

Thus, especially when time-pressed, trial lawyers can confidently increase an already relatively fast rate of speech without having to fear loss of comprehension by the fact-finder.

2 3 2 Hesitancy of speech

Advice to trial lawyers to employ pauses strategically is not uncommon:

“At the beginning of the argument, [the pause] is an infallible method of getting the court’s attention. Similarly, a pause in the midst of argument will regain attention.”¹⁶³

However, the social science research would urge trial lawyers to be circumspect in their use of pauses. Miller and Hewgill report that, as the number of hesitations and non-fluencies (vocalised pauses such as “uh,” “um” and “well”) present in speakers’ delivery increase, the lower the rating was that they received on scales of credibility, dynamism and competence.¹⁶⁴ Generally, speech marked with excessive pauses is seen as less confident, and thus less persuasive.¹⁶⁵ Should the trial lawyer feel the need to pause, she should not punctuate the pause by filling it with meaningless utterances:

“[T]ry to consciously eliminate verbal fillers such as ‘uhhh,’ ‘ahhh,’ ‘ummm,’ and lackluster vernacular phrases, such as ‘uh-huh,’ ‘you know’ . . . These phrases are distracting and can make a judge tune you out. Worse yet, the judge might start a score card with how many ‘uhhh’s’ and ‘ummm’s’ you utter in the argument . . . that judge is not paying proper attention to the substance of your argument anymore.”¹⁶⁶

Also, speakers whose speech is punctuated with these filler pauses are rated as less credible, and even less attractive, and thus ultimately as less persuasive.¹⁶⁷

As further expounded upon in Part 2 of this article, the anthropologist William O’Barr and his colleagues also found that when speakers fall into the “powerless” style of speaking, receivers perceive them as less competent, attractive, trustworthy, dynamic and convincing.¹⁶⁸ “Powerless” modes of

¹⁶¹ J MacLachlan “What People Really Think About Fast Talkers” (1979) 113 *Psychol Today* 113 113.

¹⁶² 113.

¹⁶³ Fontham et al *Persuasive Written and Oral Advocacy* 205. Of course, in South African courts it is not uncommon for fact-finders to write down important portions of the argument. Often, therefore, trial lawyers are required to pause to allow the fact-finder to keep up with the argument. Mullins & Da Silva *Morris: Technique in Litigation* 421.

¹⁶⁴ GR Miller & MA Hewgill “The Effect of Variations on Nonfluency on Audience Ratings of Source Credibility” (1964) *Q J Speech* 36 40.

¹⁶⁵ Higdon (2008) *Kansas L Rev* 662.

¹⁶⁶ Murray & DeSanctis *Appellate Advocacy and Moot Court* 168. “Try to avoid the ‘ums,’ ‘ahs’ and other sounds which betray nervousness and detract from the force of your speech.” Mullins & Da Silva *Morris: Technique in Litigation* 421.

¹⁶⁷ Higdon (2008) *Kansas L Rev* 662.

¹⁶⁸ B Erickson, AE Lind, BC Johnson & WM O’Barr “Speech Style and Impression Formation in a Court Setting: The Effects of ‘Powerful’ and ‘Powerless’ Speech” (1978) 14 *J Experimental Soc Psychol* 266 266.

speech include, among other things, the frequent use of hedges (for example, “I think,” “I guess,” “you know,” “kind of,” “sort of”), intensifiers (for example, “very,” “definitely,” “clearly”), and questioning intonation (that is, rising intonation at the end of declarative sentences). By contrast, the speech of individuals of high social status and power in court — well-educated professionals and expert witnesses — were more forceful and direct, and exhibited relatively few of the features of the “powerless” speaking style.

2 3 3 *Pitch of voice*

Researchers have discovered that the pitch levels of speakers’ voices affect listeners’ perceptions of the speakers’ credibility and persuasiveness. In one study, subjects listened to recordings of male speakers answering interview questions, and then rated the speakers on a variety of characteristics.¹⁶⁹ The recordings were altered so that the pitch of the speakers’ voices was raised or lowered by 20% or left at their natural level. The subjects in the experiment rated the higher-pitched voices as being less truthful, less persuasive, and significantly more nervous than the lower-pitched voices.¹⁷⁰

That does not mean, however, that a speaker with a monotone deep pitch will be persuasive. Studies have also indicated that, in addition to avoiding a monotonous presentation and emphasising a point or argument, variations in pitch enhance speaker credibility.¹⁷¹ Even without knowing the social science behind it, the advice to trial lawyers in this regard is somewhat intuitive:

“A monotone is boring. Raise your voice at times and lower it at others. A particularly effective technique is to allow your voice to rise as the argument builds to a point, and drop it sharply for the climax.”¹⁷²

Equally problematic and closely related to the monotone, is the reading voice, because by definition reading is a monological form of speech.¹⁷³ Submissions to a fact-finder in court, when done correctly, should play out as a conversation between trial lawyer and fact-finder.¹⁷⁴

Also closely related to pitch is the volume (loudness) of a speaker’s voice. When speakers increase the volume of their voices to a moderately high level, their credibility increases concomitantly.¹⁷⁵ Studies reveal that a louder voice communicates a number of positive attributes, including dominance, competence, and even emotional stability.¹⁷⁶

For the trial lawyer, then, a louder voice is typically more effective. As one text phrases the conventional advocacy wisdom:

¹⁶⁹ Apple, Streeter & Krauss (1979) *J Personality & Soc Psychol* 717-718.

¹⁷⁰ 717-718; See also LeVan (1984) *Law & Psychol Rev* 88.

¹⁷¹ GW Addington “The Effect of Vocal Variations on Ratings of Source Credibility” (1971) 39 *Speech Monographs* 242-246.

¹⁷² Fontham et al *Persuasive Written and Oral Advocacy* 205.

¹⁷³ Berry *Effective Appellate Advocacy* 190.

¹⁷⁴ Higdon (2008) *Kansas L Rev* 663. However, when lawyers speak in a monotone or reading voice, either through nervousness or because they are in fact reading their arguments, it becomes increasingly difficult for a conversation to take place.

¹⁷⁵ Higdon (2008) *Kansas L Rev* 651.

¹⁷⁶ CD Aronovich “The Voice of Personality: Stereotyped Judgments and their Relation to Voice Quality and Sex of the Speaker” (1976) 33 *J Soc Psychol* 207-218.

“Do not yell, but your voice should be louder than that required for the judge to hear. A commanding voice allows you to project a ‘presence.’ In addition, it suggests you are in control, confident, and committed to your argument.”¹⁷⁷

Conversely, a voice that is too soft could be fatal:

“The tendency to be timid afflicts many advocates who appear before [fact-finders]. This must not occur, because counsel who cowers and is unable to be heard, undermines the argument from the beginning. Some judges simply will not strain to listen but rather choose to ignore what the advocate tries to say.”¹⁷⁸

As with other nonverbal cues, there is likely an upper limit of what constitutes an acceptable volume, beyond which trial lawyers are no longer benefiting their cause. Although the trial lawyer’s voice should fill the courtroom, it should not be so loud as to lose the conversational tone with the court that the trial lawyer strives for.¹⁷⁹

Although each of the paralinguistic cues discussed above could influence perceived credibility and persuasiveness, the greatest impact results when they are all incorporated into a speaker’s presentation. Thus, speakers who want to appear poised, competent and powerful should speak rapidly, fluently (without hesitations), loudly, and with deep and varied pitch.¹⁸⁰

3 Respecting the court’s dominance

In reviewing the insights from social science, it becomes apparent that trial lawyers would be wise to understand that their movements, voices and physical appearance all have the ability to either enhance or subvert their ability to persuade fact-finders. However, in applying the social science research in the context of the courtroom, trial lawyers should be mindful of the fact that the particular dynamics of a judicial audience requires some caution.¹⁸¹

Specifically, in the courtroom, unlike many other situations in which a speaker is seeking to persuade, the receiver (the fact-finder) not only occupies a position that is clearly dominant to that of the trial lawyer, but the receiver also expects the speaker to recognise and respect that dominance.¹⁸² Thus, trial lawyers must engage in a discreet balancing act between using nonverbal behaviour that connotes dominance (as dominant nonverbal cues are more likely to persuade), and simultaneously demonstrate both an awareness of, and respect for, fact-finders’ ultimate authority.

Thus, if trial lawyers project too much dominance towards fact-finders, they may actually undermine their ability to persuade. Similarly, a timid, squeaky delivery will likewise impair trial lawyers’ persuasiveness:

“A lawyer at argument is a professional doing an important job requiring intelligence and skill, not a peasant pleading for indulgence from the emperor.”¹⁸³

¹⁷⁷ Fontham et al *Persuasive Written and Oral Advocacy* 204.

¹⁷⁸ Berry *Effective Appellate Advocacy* 189.

¹⁷⁹ Frederick & Ginsburg *The Art of Oral Advocacy* 187.

¹⁸⁰ Burgoon et al *Nonverbal Communication: The Unspoken Dialogue* 382.

¹⁸¹ Higdon (2008) *Kansas L Rev* 655.

¹⁸² 664.

¹⁸³ U Bentele & E Cary *Appellate Advocacy: Principles and Practice* (2004) 510.

In navigating this territory, the trial lawyer would do well to remember the different roles of judge and trial lawyer. The trial lawyer's role is to present the client's case and advocate on the client's behalf. It is within this realm that the trial lawyer could safely project dominance. One advocacy text explains:

"Counsel is there to represent a client who has every right to have the court hear its case. The court's job is to decide it. Judges will not respect an advocate who is too submissive."¹⁸⁴

It is the judge's role to control how the trial or oral argument unfolds. As a result, the trial lawyer's nonverbal cues should acknowledge this understanding of the judge's role.¹⁸⁵ It is for this reason that trial lawyers generally adhere to courtroom conventions in this regard, such as that they must cease speaking the moment when interrupted by the fact-finder, that they must politely request additional time if their allotted time has run out, and that the fact-finder might limit what the lawyer is free to speak about during oral argument.¹⁸⁶ This understanding on the part of the trial lawyer conveys poise and respect for the fact-finder. Courtroom convention accords with social science, which reveals that one of the ways in which individuals communicate dominance in their interactions is by controlling conversations with other people.¹⁸⁷

Social science has also revealed what has become known as the "visual dominance ratio": Individuals are expected to make more eye contact when listening to someone who is dominant.¹⁸⁸ For this reason, fact-finders generally expect that trial lawyers should look at them when they address the lawyers. Trial lawyers do not have a reciprocal expectation. In fact, it is quite common for fact-finders to not look at the trial lawyers (by looking down to make notes, for example) when the latter are speaking.¹⁸⁹

In sum, the trial lawyer who successfully maintains this delicate dominance/submission balance in the courtroom essentially communicates to the fact-finder: I understand and recognise the court's dominance over these proceedings; however, when given the opportunity to do so, I will in turn display my dominance over the case that I am presenting and the argument that I am making.¹⁹⁰ Thus, trial lawyers should display nonverbal cues that would enable them to achieve "*an attitude of respectful intellectual equality.*"¹⁹¹

¹⁸⁴ Frederick & Ginsburg *The Art of Oral Advocacy* 185.

¹⁸⁵ Higdon (2008) *Kansas L Rev* 665.

¹⁸⁶ 665. Mullins & Da Silva *Morris: Technique in Litigation* 423 advise: "Be aware of not interrupting the judge. When the judge speaks, listen intently, make it plain through your body language and your eye contact that this is what you are doing and that you welcome the interruption as an opportunity for you to learn the judge's thinking, and wait for the judge to finish before you respond." Mullins & Da Silva *Morris: Technique in Litigation* 423.

¹⁸⁷ JM Wiemann "Power, Status and Dominance: Interpersonal Control and Regulation in Conversation" in RL Street & JN Cappella (eds) *Sequence and Pattern in Communicative Behavior* (1985) 85.

¹⁸⁸ JF Dovidio & SL Ellyson "Decoding Visual Dominance: Attributions of Power Based on Relative Percentages of Looking While Speaking and Looking While Listening" (1982) 45 *Soc Psychol Q* 106 110.

¹⁸⁹ Knapp and Hall explain that increasing gaze maintenance during speaking is perceived as dominant, while increasing gaze maintenance during listening is perceived as submissive. Knapp & Hall *Nonverbal Communication in Human Interaction* 313.

¹⁹⁰ Higdon (2008) *Kansas L Rev* 666.

¹⁹¹ Johns *Professional Writing for Lawyers* 190.

4 Conclusion

In Part 1 of this article I sought to demonstrate why trial lawyers should learn to “speak” body language. Social science researchers have overwhelmingly demonstrated that one of the most effective ways to influence another person’s attitudes, beliefs and opinions, is through nonverbal channels. Influencing attitude and opinion change is, after all, what trial work is all about. Thus, applying the social science research to the courtroom provides a means through which trial lawyers can increase the persuasiveness of their trial advocacy. Indeed, a strong verbal message complemented by equally strong nonverbal cues will result in the trial lawyer becoming a more complete, and hence more effective, trial lawyer.

In Part 2 I address the verbal aspects of subconscious advocacy and ethical issues pertaining to all aspects of subconscious advocacy.

SUMMARY

Social science has been used with increasing success in a wide variety of human endeavours. For example, marketing, human relations and the delivery of health services are among the widely expanding applications of the classic disciplines of psychology, sociology, anthropology and social psychology. More recently, trial lawyers have also shown increased interest in applying the research findings and theoretical insights of social science to litigation. After all, every law and legal institution is based upon assumptions about human nature and the manner in which human behaviour is determined. Although trial lawyers have been using subconscious nonverbal and verbal persuasion techniques for centuries, social science has recently provided empirical support for trial practice theories that heretofore have been based solely on folklore, intuition and experience. I aim to show that principles of human behaviour derived from social psychological laboratory and field research illuminate the behaviour of actors in the courtroom, equip trial lawyers to better represent their clients, and even suggest ways in which the trial system could be improved. Some scholars claim that the increasing body of psychological literature on the effects of subconscious verbal and nonverbal persuasion, has enabled trial lawyers to improve their courtroom effectiveness to the point where they can “covertly” control how fact-finders decide cases. It is true that social scientists have discovered a myriad of factors that affect judicial decision-making, but that have nothing to do with the merits of the case. However, by communicating this information to trial lawyers, the social scientists have actually decreased the likelihood that these extraneous influences will affect judicial decisions. They have identified *existing* barriers to rational decision-making, and have devised strategies to reduce their impact, and thereby improve the chances that fact-finders will render better, more informed, and more rational judgments.