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Body Language at the Bar

by Hanora O'Sullivan, Ph.D.
in Communication Theory

Analysts of courtroom communication have always assumed that Justice is not deaf. It is only within the last decade that they could prove the probability that Justice, clothed in the flesh of jorors, is not blind. What judicial decision makers see may convey a more meaningful message, with more impact on their decision, than what they hear. This assertion is supported by contemporary investigation which reveals that the verbal message only carries approximately thirty-five percent of the message meaning. The other sixty-five percent is the product of *nonverbal* communication elements involving ethos, body action language, object language and paralanguage.

Although nonverbal communication holds a prominent role in interviewing and negotiation, this discussion will focus on guidelines more applicable to litigation situations. Most of the conclusions summarize a growing body of experimental literature made available both electronic media and increased sophistication in simulating small group experiences. These tools have permitted researchers to observe and measure court room and jury room behaviors they were unable to analyze during actual trials.

ETHOS

Although Aristotle and other classical rhetoricians stressed the importance of the spoken word, the verbal message, they also defined the first nonverbal variable in ethos. The original Greek meaning of the word comes closer to our concept of "good character." Today ethos refers to an audience's perception of a speaker's competency, credibility, and

dynamism, whether the speaker is a lawyer, witness, defendant or plaintiff. Audience perception, objective or not, can significantly affect the comprehension or acceptance of testimony, arguments, single points or entire cases. An audience's assessment of speaker ethos can be influenced by their prior knowledge of the speaker's reputation, their attitude and value system and intense peer pressure. The most crucial factor can be the speaker's nonverbal behaviors displayed during the actual litigation of a case. Consider the information gathered on the three dimensions of ethos listed.

Competency

High competency evaluations often bear direct relationship to the absence of typical, overt stage fright symptoms. Although stage fright is a normal and healthy response to any situation which a speaker senses to be unpredictable or threatening, the myth persists the a "good" speaker does not experience stage fright. Thus nervous and awkward movements, perspiration, vocal tension, evasive eye contact, trembling and ritually worded self-effacing apologies can lower an audience's evaluation of competency. There is no logical, necessary correlation between stage fright and intellectual competency but we have failed to educate the public to that fact.

Credibility

Of the sixty-five percent of a message carried by nonverbal communication, it is estimated about fifty-five percent of that portion is conveyed by facial expressions. Audiences often search a person's face in judging credibility, i.e. trustworthiness, integrity and sincerity. They look for evidence of sincerity and check to see if a person "can look you in the eye." Sadly, experimental research has demonstrated that people are consistently poor judges of sincerity. Actors can successfully parody expressions of sincerity, while sincere speakers are often awarded low credibility ratings. The evidence also shows that audiences steadfastly believe that they are excellent judges of credibility. The layperson's self assured lack of skill in judging this dimension lends unpredictability to the final ethos score.

Dynamism

The dynamism dimension, although

difficult to define precisely, can be measured by scales such as "interesting-boring," and "active-passive." An extroverted personality, theatrical flair, or charisma is not needed to score high on dynamism. The only requirements are a moderate amount of assertiveness and animation which the use of reinforcing or directional gestures and purposeful non-random movement can convey. An audience need not like you but they should feel that they would rather approach than avoid you in a psychological sense, if a positive dynamism score is sought.

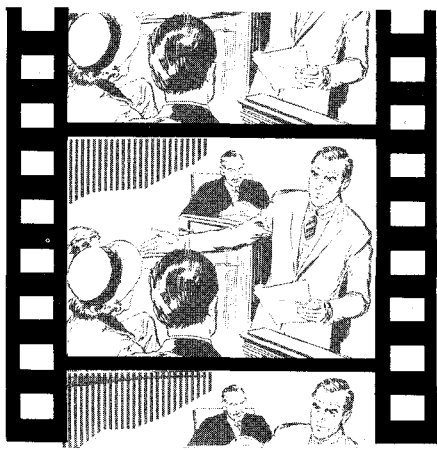
Together, competency, credibility and dynamism dimensions yield an ethos score. The score can vary from audience to audience and at any given time within a single communication event. Honest self assessment of ethos, thoughtful analysis of potential audiences, and critical judgements of prior ethos ratings can aid a lawyer's confidence so that neither his/her ethos, nor the client's ethos will be an unexpected negative factor in a jury's decision making.

The importance of high ethos can not be discounted. Leon Festinger's work on cognitive dissonance confirms that conclusion. He postulates that if a person is presented with information which is inconsistent with currently held ideas or attitudes, the first defense against accepting the conflicting information or opinion is to discredit the source of the information. If the audience can rationalize low competency or credibility scores for the speaker than the message can be rejected easily. Conversely, experiments suggest that a high ethos person, given a conducive environment, can convince a receptive audience that even the evidence of their own senses is faulty.

BODY ACTION LANGUAGE

The second variable of body action language can also influence audience attitudes and decisions. This claim may seem overstated but it is supported by valid quantitative data. Eye contact, gestures, posture, movement and facial expressions can help or hinder your efforts in pleading a case.

This is not a resurrection of the discredited and outdated elocutionary principles. No one is advising preplanned gestures, choreographed movements,



method acting or any artificial posturing. The guidelines are based in reality. For example, start with the premise that we establish eye contact with someone when we wish to initiate or sustain an interpersonal communication situation. It is culturally determined in the United States that an unblinking stare is unacceptable eye contact. Discontinuous, direct eye contact is the norm when reinforcing a message or in pleading for its acceptance. Such eye contact changes communication from encoding and decoding verbal bits of information into a person to person interaction. It can increase audience attention, facilitate comprehension (remember they should look, not just listen), improve or maintain credibility, and visually cue an audience to the fact that a particular point in the message carries special significance.

Additionally, spontaneous gestures can reinforce ideas or direct attention. Idiosyncratic gestures, or any redundant normal gesture, can distract an audience's attention from both an intended verbal and nonverbal message. Popularized exploration of elaborately combined movements and postures of the body and what they might communicate exist. There is also more "scholarly" literature available. The reader is directed to the latter for detailed information about body action language.

Despite recognition that options for nonverbal body action language in a courtroom may be limited, a lawyer can still communicate through movement if the theory of territoriality is accepted. That theory suggests that invisible self-determined boundaries surround each

person and govern the distances at which various communication exchanges — from formal to intimate — can occur comfortably. For example, our normal social talking distance is about two or three feet. To stand closer can generate tension for it presumes an intimacy which does not exist; or, it can imply that the parties in the conversation are of unequal authority/prestige. Consciously or not, a lawyer who closes the normal distance between his/her seat and that of a witness or the jury can deliberately assert intimacy and authority which will be sensed by the audience.

Questions of "communicating" distances, touching and manipulation of territory are all culture bound, and most of us have acquired an unexamined knowledge of cultural expectations and tolerances for body action language. We generally operate on that information effectively, but it would not hurt to study this variable more closely. Consider, that the average layperson has developed an image of expected physical behaviors of lawyers, judges, jurors and "guilty parties" from mass media and books. As much as a professional lawyer might criticize the depicted behaviors, failure to consider possible audience expectations can prove harmful. An extreme example allegedly occurred recently in a Baltimore Court. A juror in discussing why he had contributed to a hung jury declared that in "Perry Mason" the guilty party always stood up and confessed after the defense completed its case. Since the defendant in the Baltimore trial had not done so, the juror was convinced of their innocence and substantial evidence to the contrary could not sway his conclusion. In short, body action language is worth considering.

OBJECT LANGUAGE

The third variable is object language. It is the meaning conveyed by diverse material things, e.g. visual aids, artifacts, a communicator's clothing, accessories and even physical appearance.

Speakers in virtually every communication situation beside court room litigation have realized that audiences usually trust what they comprehend through sight more than what they comprehend through hearing. Many lawyers seem to

be less adept at supplementing or superceding oral communication with visual aids. Granted if there is great difficulty in setting up audio-visual equipment it can be more of a distraction than a benefit; but, equipment is increasingly streamlined, portable and less light sensitive. It should become a commonplace tool in courtroom litigation.

Problems posed by a physically unattractive client are less easily solved than audio-visual difficulties. The bulk of current research supports the assertion that physically attractive people have undue influence, and that less attractive people suffer in decision making situations. One of the most recent and disturbing experiments was a carefully controlled and well designed civil trial simulation. Mock juries listened to audio tapes of a re-enactment of a real case, using actual participants and skillful actors. Slides were shown to accompany the voices. These slides were manipulated with various juries so that some saw an attractive plaintiff and unattractive defendant and some saw the opposite. The facts of the case were held constant. The juries consistently decided for whichever of the principals in the case was shown to be attractive. In related experiments the severity of the recommended sentence decreased with the increased attractiveness of defendants and the amount of damages increased with the increasing attractiveness of plaintiffs. A lawyer with a physically unattractive client would be wise to be prepared by such unconscious prejudice.

Most of our commonsense understanding of the influence of prejudices on objective decision making has been verified by research. For example, evidence indicates that the "average jury" is predisposed to think of ethnic and minority figures as stereotypes and that middle aged, low to middle management, males are severe in judging both the poor and the wealthy. It also indicated that the hardest judgments against female defendants come from female jurors. Fortunately, attitudinal predispositions can be altered, often by verbal advocacy which will be discussed in the concluding section of this article.

PARALANGUAGE

While some people predict that style

of dress and appearance are reliable indications of social status, it is less likely that they would expect vocal cues to be the most reliable index of social status. Could Henry Higgins have been right? Yes. Audiences have a high degree of success in judging the socio-economic status of unseen speakers by vocal cues which go beyond simple measures of vocabulary. Often it is the tone, vocal quality, or dialect which triggers status images of people and the accompanying approval or disapproval.

More interestingly, it has been substantiated that the tone or inflection with which a verbal message is presented is crucial. If the tone contradicts the verbal message, audiences will believe the former and disregard the latter. Some of the most frustrating conversations have stemmed from a speaker who presents a message in a tone which clearly says, "I mean the opposite." and who then retreats to defining words when the audience accurately interprets the real message. No one is fooled by false verbal messages of this sort.

Must more be said to convince anyone who seeks to improve his/her communication that serious investigation of nonverbal messages is vital? Self assessment, audience analysis, and increased on-the-spot critiques of nonverbal skills should accompany the preparation of the verbal message.

VERBAL COMMUNICATION

Perhaps it is time to discuss the last thirty-five percent of the message: the words. Two basic guidelines can be glanced over quickly. The first is that the speaker's choice of vocabulary, images and analogies must be compatible with the comprehension and experience level of the audience. It must not, however, appear condescending or pedantic. The second is a reminder that all words have a dictionary meaning *plus* a subjective, personal connotative meaning which can differ from individual to individual. Although a dictionary would ate "house" and "home" as synonyms, the emotional associations, or connotations, can differ radically. An astute communicator should draw on a vocabulary that carried the desired positive or negative connotation. In this area studies have concluded that the choosing of

words for their connotative value in describing defendants and victims has had a consistent effect on jurors' verdicts and recommended punishments. It is unnecessary to belabor the point that all such language choices presuppose high ethical standards in communicating.

The reader is directed to the good deal of sound advice found in any current public speaking text book on preparing the verbal message. The remaining space in this article will be devoted to conclusions of experimental inquiry about strategies of advocacy.

One Side Versus Two-Sided Advocacy

Since two sides of a contested case will be presented in litigation it would appear there is no real choice except two-sided advocacy. However, it is the option of the prosecution lawyer whether or not to allude to possible opposition arguments in advance during opening statements. The question is, is it a wise move? Statistical analysis of variables advises that the presentation of both-side argument is effective when the audience 1) is initially opposed to the position of the speaker, 2) is relatively well educated and 3) is to be exposed to counter-advocacy. Both-side arguments are not advised when the audience 1) already agrees with the speaker or 2) is poorly educated. It is particularly ill advised when the audience is both poorly educated and opposed to the speaker's ideas.

One study indicated that among audiences with an average education, agreeing or otherwise, both-side presentation successfully inoculated them against the subsequent counter-advocacy. While only two percent of those hearing a one-sided presentation continued to support that initial position when presented with the opposing view, over sixty percent of those exposed to a both-side presentation maintained their initial conviction when exposed to opposing ideas.

It might be wise to note that if a both-side presentation is used, all types of audiences are more likely to note the omission of important arguments pro and con. Failure to make a comprehensive survey of major arguments could lead to the lowering of a speaker's competency and credibility ratings among the audi-

ence. There are many systems of reasoning which aid in the comprehensiveness of analysis but the reader is referred especially to the schema developed by a contemporary British philosopher, Stephen Toulmin. There is little sense in allowing nonverbally established credibility to slip because of improper verbal message preparation.

If the impression was given that ethos was created and maintained solely by nonverbal means it was unintentional. The verbal message's importance to ethos is highlighted in a recent study which suggested that a lawyer's eliciting of inadmissible evidence could affect the jurors' perception of the lawyer's credibility and the jury's decision making. It did not matter that the judge had cautioned them to disregard such evidence. The study compared jury decisions on the identical case when in one situation they heard inadmissible evidence, and in a second situation where a similar jury heard the same case without inadmissible evidence. The decisions conflicted. A similar test condition had both lawyers eliciting inadmissible evidence in a varying number of instances. The higher credibility scores went to the lawyer with fewer instances of eliciting inadmissible evidence. The authors of the study concluded that since the jurors see trials as highly rule bound, the eliciting of such evidence was a conscious attempt by the lawyer to violate those rules and those made him/her less trustworthy.

CONCLUSION

The process of rational decision making survives because people make the effort to think clearly and express their thoughts effectively. The expression of those thoughts occurs through words, in spite of words, in addition to words, and in lieu of words. Obtain a firm grounding in the preparation of verbal messages, but to become a skilled and effective communicator expand your studies into nonverbal communication. In the face of existing evidence, we can no longer assert that the only substantive impact of a lawyer on the case he/she is pleading is the successful transmission of verbal information.