

# Nonverbal Communication From The Other Side: Speaking Body Language

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Nonverbal communication has been noticed for centuries<sup>1</sup> and recently has become a major focus of attention for researchers and practitioners in many different fields.<sup>2</sup> Although nonverbal communication has been subjected to intensive scientific study for over twenty-five years,<sup>3</sup> lawyers have just begun to realize what others have long known: nonverbal behavior is extremely important in determining the nature of communication and the relationship between the communicators.<sup>4</sup>

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1. The Bible has many references to nonverbal communication, e.g., "A naughty person, a wicked man, walketh with a froward mouth. He winketh with his eyes, he speaketh with his feet, he teacheth with his fingers." *Proverbs* 6:12,13 (King James). Almost 100 years ago Charles Darwin published a book which is considered to be the first scholarly treatment of the subject of nonverbal behavior. C. DARWIN, *THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS* (1899).

2. Six different disciplines have contributed to research in nonverbal communication: anthropology, linguistics, psychoanalysis, clinical psychology, social psychology, and sociology. J. SPIEGEL & P. MACHOTKA, *MESSAGES OF THE BODY* 63 (1974).

3. Research into nonverbal communication became common starting in the early 1960s. See S. WEITZ, *NONVERBAL COMMUNICATION* (1979).

4. Although the terms nonverbal behavior and nonverbal communication are used interchangeably by some authors, the issue of what behavior can be labeled as communication has provoked a considerable degree of controversy. P. BULL, *POSTURE AND GESTURE* 3 (1987). One view, focusing on intention, is that only nonverbal behavior intended to be communicative should be referred to as nonverbal communication. See Ekman & Friesen, *Nonverbal Leakage and Clues to Deception*, 32 *PSYCHIATRY* 88 (1969). A second view considers intention to be irrelevant and treats all behavior as communication. P. WATZLAWICK, J. BEAVIN & D. JACKSON, *PRAGMATICS OF HUMAN COMMUNICATION* 49 (1967). Yet another view is that communication requires that information be transmitted through behavior and that the behavior be noticed by another person. Wiener, Devoe, Runbinow & Geller, *Nonverbal Behavior and Nonverbal Communication*, 79 *PSYCHOLOGICAL REV.* 185 (1972).

For the purposes of this article, nonverbal behavior will be defined as any behavior that

The legal profession places great emphasis on oral and written communication.<sup>5</sup> Lawyers are considered to be the masters of words. Words, however, are simply one part of the communication process.<sup>6</sup> When people talk to each other, they rarely trust words alone. The nonverbal aspects of communication are widely recognized to be at least as important as the words, if not more important.<sup>7</sup> Actually, some experiments suggest that over ninety percent of the communicated meaning of a message is produced by the nonverbal communication.<sup>8</sup> Even silence communicates. A common phrase associated with nonverbal communication—"You cannot not communicate"<sup>9</sup>—means that even when there is silence, communication is taking place through nonverbal behaviors.<sup>10</sup>

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has the potential to be a communicative message. Nonverbal behavior becomes communication when another person interprets the message and attributes meaning to the message, even if the message is incorrectly interpreted. V. RICHMOND, J. McCROSKEY & S. PAYNE, *NONVERBAL BEHAVIOR IN INTERPERSONAL RELATIONS* 4 (1987). Under this formulation, communication requires both the sending and receiving of a message. It should also be realized that a message can be sent but not received, and even if the message is received, the receiver might get it wrong. Furthermore, messages from senders are sometimes intentional and sometimes accidental.

The word "cue" is sometimes used in place of "behavior." Cue means a stimulus that elicits response. R. HARRISON, *BEYOND WORDS: AN INTRODUCTION TO NONVERBAL COMMUNICATION* 200 (1974). This article will use the word behavior.

5. D. MELLINKOFF, *THE LANGUAGE OF THE LAW* vii (1963).

6. Lawyers probably give too much attention to words during interviews and not enough attention to nonverbal behavior. A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS* 57 (1976).

7. Haase & Tepper, *Nonverbal Components of Empathic Communication*, 19 J. COUNSELING PSYCHOLOGY 417, 421 (1972) (the nonverbal behavior accounted for twice as much variance as did the words); Mehrabian & Ferris, *Inference of Attitude from Nonverbal Communication in Two Channels*, 31 J. CONSULTING & CLINICAL PSYCHOLOGY 248 (1967) (nonverbal behavior accounts for one and one-half times as much variance in the message as do the words).

8. In discussions of the importance of nonverbal communication, the most quoted statistic is that 93% of a message is from the nonverbal part of the communication. This statistic is usually traced to an article written by Albert Mehrabian. See Mehrabian, *Communication Without Words*, PSYCHOLOGY TODAY, Sept. 1968, at 52. Mehrabian's research showed only 7% from the verbal channel, 38% from the vocal channel, and 55% from the facial channel. To a degree, this statistic is an exaggeration. It is seldom mentioned that Mehrabian's research focused on how feelings were being communicated, not how the content of the message was communicated. For example, it is unlikely that at an appellate argument, where the focus is on the law, that such a high percentage of the message would be derived from the nonverbal channel.

Interestingly, Mehrabian never actually said in his article that 93% of a message is nonverbal. The 93% figure comes from articles and speeches by other people who quote Mehrabian's research when they discuss the importance of nonverbal communication. Ninety-three percent is the sum of the 38% vocal channel and the 55% facial channel.

Other writers and researchers offer different estimates for the percentage of nonverbal communication. See R. BIRDWHISTELL, *KINESICS AND CONTEXT* 157-58 (1970) (65-70% is nonverbal); J. TANFORD, *THE TRIAL PROCESS* 29 (1983) (at least 60% of all important messages are passed nonverbally); R. BOLTON, *PEOPLE SKILLS* 39 (1979).

9. V. RICHMOND, J. McCROSKEY & S. PAYNE, *supra* note 4, at 3; P. WATZLAWICK, J. BEAVIN & D. JACKSON, *supra* note 4, at 49.

10. A. IVEY & J. AUTHIER, *MICROCOUNSELING* 72 (2d ed. 1978).

Everyone has been informally trained since birth in the process of sending and receiving nonverbal communication. Most of the popular literature about nonverbal communication, and particularly the articles written for lawyers, have focused on the receiving skills. The popular writers refer to these skills of detecting and interpreting nonverbal behavior as reading "body language."<sup>11</sup> Researchers refer to the skill of reading nonverbal behavior as "decoding," and to the ability of sending nonverbal messages as "encoding."<sup>12</sup> It is generally agreed that the ability to read the body language of another person varies greatly among people<sup>13</sup> and between sexes.<sup>14</sup>

A search of legal literature suggests that in the legal profession, nonverbal communication has been the almost exclusive concern of trial lawyers.<sup>15</sup> Effective trial lawyers, no doubt, are skillful in both reading and sending nonverbal communication. Trial lawyers must read body language to ascertain how the judge and jury are responding to the case.

Most of the legal writing about reading nonverbal communication has concentrated upon the courtroom in general, and the jury selection process in particular.<sup>16</sup> Experts in nonverbal communication have been used to assist lawyers during jury selection.<sup>17</sup> The general

11. See J. FAST, *BODY LANGUAGE* (1970); J. FAST, *THE BODY LANGUAGE OF SEX, POWER AND AGGRESSION* (1977).

12. Lee, Hallberg & Kocsis, *Decoding Skills in Nonverbal Communication and Perceived Interviewer Effectiveness*, 27 J. COUNSELING PSYCHOLOGY 89 (1980) (the Profile of Nonverbal Sensitivity Test (PONS), is often used to measure decoding skills).

13. Many lawyers, especially trial lawyers, pride themselves on being good readers of nonverbal behavior. These lawyers probably assume that they also are accurate senders of nonverbal messages. However, accurate reading of nonverbal behavior does not necessarily mean the person has the ability to send clear nonverbal messages. Actually, researchers have found an inverse relationship exists between abilities to read (decode) and to send (encode) nonverbal behavior. *Id.*

14. See C. MAYO & N. HENLEY, *GENDER AND NONVERBAL BEHAVIOR* (1981); Rosenthal & DePaulo, *Sex Differences in Accommodation in Nonverbal Communication*, in SKILL IN NONVERBAL COMMUNICATION: INDIVIDUAL DIFFERENCES 68 (R. Rosenthal ed. 1979) (Women are superior to men in the decoding of nonverbal cues. However, women are more guarded in reading those cues that senders may be trying to hide.).

15. See, e.g., F. BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FROM CRIMINAL TRIALS* 209 (1985); Colley, *Friendly Persuasion: Gaining Attention, Comprehension, and Acceptance in Court*, TRIAL, Aug. 1981, at 42; Givens, *Posture is Power*, BAR- RISTER, Spring 1981, at 14; Gold, *Covert Advocacy, Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C.L. REV. 481 (1987); Sannito, *Nonverbal Communication in the Courtroom*, TRIAL DIPLOMACY J., Summer 1983, at 22.

16. See V. STARR & M. MCCORMICK, *JURY SELECTION: AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS* 319-420 (1985).

17. Most of the early work using jury selection experts was done in political crimi-

hypothesis is that by analyzing nonverbal behavior, the lawyer, sometimes working with a jury selection team, might be able to determine whether prospective jurors are receptive to the client, the client's case, and the lawyer.<sup>18</sup> In addition to voir dire uses, a skillful lawyer could use body language to influence jury decision-making.<sup>19</sup> Furthermore, a trial lawyer can make use of incongruity between verbal and nonverbal communication to detect deception.<sup>20</sup> The use of nonverbal behavior in lawyering skills other than during trials, however, is rarely mentioned in the literature.<sup>21</sup> This omission is particularly significant considering that lawyers spend so little of their time conducting trials.<sup>22</sup>

While the focus on reading nonverbal behavior is important, it is at the same time incomplete. Lawyers must be aware that nonverbal communication is a two-way street. If lawyers can read the nonverbal behavior of other people, those people can also read the nonverbal behavior of lawyers. Following this line of thinking, lawyers have become increasingly aware of how they look to the jury in the courtroom.<sup>23</sup> Certain research findings have convinced lawyers to try to modify their nonverbal behavior--and that of their clients--in order to present a more credible<sup>24</sup> and trustworthy image to the jury.<sup>25</sup>

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nal trials. See J. SINK, *POLITICAL CRIMINAL TRIALS* (1974). Major civil trials, however, are now also using jury selection experts.

18. If the lawyer could accurately "read" the body language of the listener, the lawyer would be able to learn how the listeners are reacting to and feeling about what the lawyer is saying. In a sense, the lawyer hopes to look inside the heads of the listeners and read their thoughts.

19. While interest in nonverbal communication has focused on jury persuasion, nonverbal communication can work equally well with judges during pretrial motions or during jury waived trials. Trial judges are unlikely to be any less susceptible to nonverbal communication than are lay jurors, and judges themselves can convey nonverbal messages to the jury. See Blanck, Rosenthal, & Cordell, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985).

20. See generally P. EKMAN, *TELLING LIES* (1985); Ekman & Friesen, *supra* note 4; Ekman & Friesen, *Detecting Deception the Body or Face*, 29 J. PERSONALITY & SOC. PSYCHOLOGY 288 (1974); Zuckerman, DeFrank, Hall, Larrance & Rosenthal, *Facial and Vocal Cues of Deception and Honesty*, 15 J. EXPERIMENTAL SOC. PSYCHOLOGY 378 (1979); Zuckerman, DePaulo & Rosenthal, *Verbal and Nonverbal Communication of Deception*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 1 (L. Berkowitz ed. 1981).

21. See R. MATLON, *COMMUNICATION IN THE LEGAL PROCESS* 20-21 (1988) (discussing interviewing); Rosenthal, *Interpersonal Expectancies, Nonverbal Communication, and Research on Negotiation*, 3 NEGOTIATION J. 267 (1987).

22. Perhaps it is for this reason that trial lawyers usually refer to themselves as litigators. Litigation, of course, encompasses both pretrial litigation work and trial work. Most lawyers spend much more time on pretrial work than trial work.

23. Stefano, *Body Language and Persuasion*, LITIGATION, Summer 1977, at 31.

24. Miller & Burgoon, *Factors Affecting Assessments of Witness Credibility*, in N. KERR & R. BRAY, *THE PSYCHOLOGY OF THE COURTROOM* 169, 171-80 (1982).

25. See generally W. O'BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM* (1982).

The goal of this Article is to define a broader and more universal role for conscious nonverbal communication in law. First, the Article focuses on the most neglected part of nonverbal communication—how to speak body language. Most legal writing about nonverbal communication has concerned decoding (reading body language) and has neglected encoding. Second, the Article shifts the focus of nonverbal communication from the courtroom to the law office and from jury selection to interviewing. Most lawyers never appear in court, and those who do seldom conduct trials. Therefore, the setting for this Article will not be the courtroom. Rather, it will be the law office where all lawyers, litigators and nonlitigators alike, meet with clients, witnesses, opponents, staff, and colleagues. Although this Article will emphasize the use of nonverbal communication during interviewing and counseling<sup>26</sup> the same principles apply to any face-to-face communication, as in depositions, negotiations, and courtroom advocacy.

All lawyers, whether they draft wills, arrange corporate takeovers, litigate construction disputes, or try criminal cases, begin each case by interviewing clients. This Article will draw heavily on social science research to advance a procedure to assist lawyers to consciously use their own body language more effectively during interviews. The Article will concentrate on how lawyers can use nonverbal behavior to speak body language and thereby build greater initial rapport and enhance communication. Better communication means better and more efficient preparation of cases.

The central hypothesis of this Article is that lawyers can consciously speak body language by adopting certain body postures during interviewing. By speaking body language, lawyers can improve their rapport and better represent their clients. This Article begins with an overview of nonverbal communication and then discusses the importance of rapport in interviewing. The Article then describes a particular nonverbal behavior known in counseling literature as attending behavior and explains how such behavior can be used by lawyers to create a rapport with their clients. Next, the Article describes the nonverbal phenomena of interactional synchrony and postural mirroring. Finally, the Article explains how lawyers can use the techniques derived from scientific research to create a rapport through their own body language.

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26. Interviewing and counseling are generally treated as a single lawyering skill. For an excellent distinction between the two skills, see D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING* (1977).

## I. NONVERBAL COMMUNICATION

People constantly monitor and interpret each other's nonverbal behavior. All people use their nonverbal decoding skills whenever they interact with other people. On rare occasions, the interpretation is conscious; more often the interpretation is performed at an unconscious level of awareness. The unconscious interpretation of another's nonverbal behaviors is often referred to as intuition.<sup>27</sup> We judge people on the basis of emotional constructs formed by our reading of their nonverbal behavior.<sup>28</sup>

The prime difficulty in interpreting nonverbal behavior is that, contrary to what is expressed in some popular books,<sup>29</sup> there is no single dictionary of body language.<sup>30</sup> Decoding, which is usually unconscious, results in very imprecise communication. Even conscious interpretation of nonverbal behavior has many pitfalls. When people consciously attempt to decode a specific nonverbal behavior of another person, they often will be incorrect. Nonverbal behavior can have multiple meanings;<sup>31</sup> the same behavior may have different meanings when exhibited by different people, and the same behavior may express different meanings for a single person in different contexts. Sometimes, the nonverbal behavior has no connotation at all.

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27. Most of the decoding of nonverbal behavior is done intuitively. See R. MACLEOD, CHINA, INC.: HOW TO DO BUSINESS WITH THE CHINESE 123 (1988). Thus, when people say to themselves "I don't know what it is about that guy, but I don't trust him," they are probably more precisely saying "I have just performed an analysis of that person's nonverbal behavior and I have concluded, based on my years of prior experience, that the nonverbal behavior I saw was consistent with behavior that I have found to be associated with untrustworthiness, deception, and other negative traits on prior occasions." The person could continue on to say, "Now, I am not exactly sure whether I have seen these nonverbal behaviors from people who I thought were lying or whether it is simply that for this person, right now, the nonverbal message is incongruent with the words spoken. However, the conclusion I draw from all my sense data is that I should not trust this person." On the other hand, if a different set of nonverbal behaviors had been observed, the intuitive analysis might have concluded "that person is open to me and my ideas" or "that person is telling the truth."

28. It is commonly said that we judge ourselves by our intentions, but we judge others by their behavior.

29. Many popular texts perpetuate the myth that a reader of body language can accurately read another person. See M. CULLIGAN, S. DEAKINS & A. YOUNG, BACK-TO-BASICS MANAGEMENT: THE LOST CRAFT OF LEADERSHIP 92 (1983) [hereinafter BACK-TO-BASICS] ("Some study of [body language] will enable you to read your own gestures and those of your employees like a book."); G. NIERENBERG & H. CALERO, HOW TO READ A PERSON LIKE A BOOK (1971).

30. "[W]e respond to gestures with extreme alertness and, one might almost say, in accordance with an elaborate secret code that is written nowhere, known by none, and understood by all." Sapir, *The Unconscious Patterning of Behavior in Society*, in SELECTED WRITINGS OF EDWARD SAPIR IN LANGUAGE, CULTURE AND PERSONALITY 566 (D. Mandelbaum ed. 1949).

31. Even gestures that are intended to be communications can vary in their meanings, especially in different countries. For a comprehensive analysis of twenty key gestures, analyzed in countries around the world, see D. MORRIS, P. COLLETT, P. MARCH & M. O'SHAUGHNESSY, GESTURES: THEIR ORIGINS AND DISTRIBUTION (1979).

Even the law of evidence recognizes the ambiguity of nonverbal behavior by classifying nonverbal conduct as nonhearsay unless the behavior was intended to be an assertion.<sup>32</sup> An isolated display of nonverbal behavior, especially from a stranger, should not be relied upon as communicating a specific message. Nonverbal communication must be read in context<sup>33</sup> and with a knowledge of the baseline behavior of the person being observed.<sup>34</sup>

The messages analyzed as nonverbal communication are often very different depending upon whether speaker or listener behavior is being examined. Listener behavior is usually associated with the degree of interest, liking, and receptivity; speaker behavior is more often linked to truth and deception. Listeners are watched by speakers to determine if the listener is actually listening and paying attention to the speaker. Lack of eye contact<sup>35</sup> and glazed-over or defocused eyes can indicate the listener's mind is elsewhere and not on the speaker's message. A sigh can mean impatience or boredom. Crossed arms or legs sometimes indicate lack of receptivity to the speaker's message.

The analysis of a speaker's nonverbal communication, on the other hand, tends to focus on the congruence of the verbal message with the nonverbal message. Congruence, as used in nonverbal communication, is a specific term of art. If the verbal and nonverbal channels are providing the same message, it is said that the speaker is being "congruent."<sup>36</sup> To be "incongruent" means that the messages from the verbal communication and nonverbal communication channels do not match.<sup>37</sup> Incongruence is one of the principal correlates of distrust and deception.

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32. See FED. R. EVID. 801; HAW. R. EVID. 801. In perhaps a similar vein, some social scientists believe that only nonverbal behaviors that are intended to be communicative should be called nonverbal communication. Ekman & Friesen, *The Repertoire of Nonverbal Behavior: Categories, Origins, Usage, and Coding* 1 SEMIOTICA 49 (1969).

33. See BACK-TO-BASICS, *supra* note 29, at 92.

34. Prior experience can help to develop a baseline of behavior against which present nonverbal behavior can be measured. For example, a person who is listening with arms crossed in front of the body may be resistant to what the lawyer is saying, or might simply find that arms crossed in front of the body is a comfortable listening position. For that person, crossed arms may mean relaxation, not rejection.

35. See A. WATSON, *supra* note 6, at 62.

36. W. CORMIER & L. CORMIER, *INTERVIEWING STRATEGIES FOR HELPERS* 41 (1985).

37. Because, as Mehrabian's studies indicate, the nonverbal part of a message is a much larger part of the total communication than is the verbal part, the nonverbal will be believed over the verbal when there is a conflict between the two.

## II. INTERVIEWING

Interviewing is perhaps the most common, the least developed, and yet most crucial of all lawyering skills. Every case begins with an interview, and most cases will include several. For this reason, the interview is the place where most lawyers have an opportunity to use body language to elicit information critical to the case. Interviews provide the facts which are the building blocks of cases.<sup>38</sup>

Considering how frequently lawyers must interview clients, it is rather remarkable how undeveloped the skill of legal interviewing is. Many lawyers had no training in interviewing in law school,<sup>39</sup> and few continuing legal education courses teach interviewing. Only recently have law schools begun to offer either a specific interviewing and counseling course or clinical courses that include the subject of interviewing. Even with these new courses, most law students do not have the opportunity to study interviewing techniques due to limited funding of clinical courses.<sup>40</sup> Moreover, many students do not consider interviewing to be an essential lawyering skill that they need to study.<sup>41</sup>

Compared to other practice skills, little has been written about legal interviewing. Most books and articles about legal interviewing offer only vague generalities and intellectual constructs. Often these materials are concerned with the substantive law and suggest a checklist of topics<sup>42</sup> to ask about during the interview. Only a few interviewing texts provide a detailed behavioral description of what to do during an interview.<sup>43</sup>

Despite the importance of nonverbal communication, even the better texts on legal interviewing barely touch the subject.<sup>44</sup> The one text that offers substantial coverage of nonverbal communication deals exclusively with the nonverbal behavior of the client and totally

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38. Barkai & Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U.L. REV. 505 (1983).

39. See Menkel-Meadow & Ntephe, *Clients Are People - Or Are They?* BARRISTER, Winter 1983, at 12. For most lawyers, interviewing is an art developed through practical experience. F. LANE, LANE'S GOLDSTEIN TRIAL TECHNIQUES, § 1.02, *The Art of Interviewing* (1984).

40. When judged by student-faculty ratios, clinical legal education is expensive compared to other law school courses. Often not all students are able to enroll in these limited enrollment classes.

41. Many students mistakenly assume that their experiences of being interviewed have given them a high level of skill to conduct interviews.

42. For an example of checklists, see M. KADISH & R. BROFMAN, CRIMINAL LAW ADVOCACY § 2.1 (1982).

43. The best exceptions are D. BINDER & S. PRICE, *supra* note 26, and T. SHAFFER & R. REDMOUNT, LEGAL INTERVIEWING AND COUNSELING (1980). Both of these sources include many sample transcripts.

44. See D. BINDER & S. PRICE, *supra* note 26; T. SHAFFER & J. ELKINS, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (2nd ed. 1987).



neglects the lawyer's nonverbal behavior.<sup>45</sup> Although the legal profession is seldom referred to as a helping profession,<sup>46</sup> it should be thought of as one. Because other helping professions consider the nonverbal behavior of the professional as critical in establishing a rapport with their clients,<sup>47</sup> there is good reason for lawyers to take a closer look at their own nonverbal behavior.

Although other professionals recognize the importance of establishing rapport in the early stages of an interview, lawyers often begin interviews by immediately asking about the facts. In the initial client interview, most lawyers pay little attention to establishing the client relationship and pay great attention to evaluating the case. At best, lawyers offer a cup of coffee to clients or make small talk to help the client relax. Most lawyers fail to realize that they can improve the lawyer-client relationship significantly with some minor nonverbal attention to the client.

Lawyers could be more effective during interviews if they were able to establish a cooperative working relationship in which the client was willing to divulge complete, accurate information. Although the best relationship will be one characterized by a high state of trust and rapport, most lawyers have no idea how to create such a rapport. Often, lawyers simply explain the lawyer-client privilege and expect this evidentiary rule to overcome the client's reluctance to speak freely.

Most of the literature about legal interviewing omits any discussion about the importance of developing a rapport and offers no discussion of how to establish it. However, extensive studies of rapport in other professions have shown that certain nonverbal behaviors in an interview can significantly affect the client's perception of the interviewer.<sup>48</sup> If lawyers knew and practiced certain techniques for building a rapport with their clients, they would be able to build stronger lawyer-client relationships and thereby better represent their clients.

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45. See A. WATSON, *supra* note 6, at 53-69.

46. See Barkai & Fine, *supra* note 38, at 511.

47. See P. WAXER, *NONVERBAL ASPECTS OF PSYCHOTHERAPY* 76-83 (1978).

48. Street & Buller, *Nonverbal Response Patterns in Physician-Patient Interactions: A Functional Analysis*, 11 J. NONVERBAL BEHAV. 234 (1987).

### III. ATTENDING BEHAVIOR

Although there are many aspects of nonverbal behavior,<sup>49</sup> the most critical nonverbal aspects of interviewing are those that scholars in the fields of communication, counseling, and psychotherapy refer to as "attending skills."<sup>50</sup> Attending behavior is a group of several specific verbal and nonverbal<sup>51</sup> behaviors that are referred to as listening skills. Essentially these behaviors show that the listener is "paying attention to" or "attending to" the client,<sup>52</sup> and hence the term "attending" skills. The most commonly noted attending behaviors<sup>53</sup> are verbal statements, and the nonverbal behaviors of posture and eye contact.<sup>54</sup> All successful professionals in the helping professions, such as counseling and psychotherapy, have basic attending skills.<sup>55</sup> Even in the helping professions, most of the material written about attending skills is directed towards the verbal attending skills. These include the use of open-ended questions, as well as the specific counseling techniques of passive listening,<sup>56</sup> active listening,<sup>57</sup> paraphrasing,<sup>58</sup> summarizing,<sup>59</sup> and clarifying.<sup>60</sup>

Attending behavior is useful for both inexperienced and experienced interviewers. Inexperienced interviewers can use attending behavior to take their minds off any pressures they may feel while conducting the interview<sup>61</sup> and to give themselves a feeling of

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49. Five major channels for nonverbal messages are (1) voice tone, (2) body movement and gestures, (3) management of personal space, (4) facial expression, and (5) the eyes. D. HAMACHEK, *ENCOUNTERS WITH OTHERS* (1982).

50. "The term *attending* refers to being receptively present, available, and involved with another person. Attending allows one to receive verbal and nonverbal messages, conveys respect and interest, and serves as a powerful reinforcer." D. HAMMOND, D. HEPWORTH & V. SMITH, *IMPROVING THERAPEUTIC COMMUNICATION* 110 (1978) [hereinafter *IMPROVING THERAPEUTIC COMMUNICATION*].

51. Nonverbal components of attending skills are: (1) A posture of involvement; (2) appropriate body motion; (3) eye contact; and (4) a nondistracting environment. R. BOLTON, *supra* note 8, at 38.

52. Attending has been called "listening with the whole body." *Id.* at 33.

53. Many variations of attending behavior are possible. See A. IVEY & J. AUTHIER, *supra* note 10, at 53:

54. Some attention is also given to proximity, facial expressions, and voice quality.

55. See *IMPROVING THERAPEUTIC COMMUNICATION*, *supra* note 50, at 110. See also, A. IVEY & J. AUTHIER, *supra* note 10, at 55.

56. D. BINDER & S. PRICE, *supra* note 26, at 23-24.

57. Barkai, *Active Listening*, *TRIAL*, Aug. 1984, at 66.

58. L. BRAMMER, *THE HELPING RELATIONSHIP* 71 (1979) ("Paraphrasing is a method of restating the helpee's basic message in similar, but usually fewer, words.").

59. Summarizing brings together several thoughts or feelings at the end of a unit of conversation or at the end of an interview. *Id.* at 81-82.

60. Clarifying goes further than paraphrasing and "brings vague material into sharper focus." *Id.* at 73.

61. When young psychotherapists in training begin to work with clients, they sometimes get so focused on themselves, that it becomes almost impossible for them to listen to the client. A. IVEY & J. AUTHIER, *supra* note 10, at 46. Young lawyers might also be afflicted with a similar preoccupation, especially if they have little interviewing experience.

competence.<sup>62</sup> Experienced interviewers will find that attending behavior increases the rapport with their clients. Like any new skill, attending behavior may feel unnatural for the lawyer, but research has shown that it works.<sup>63</sup> Clients respond favorably to it. The lawyer soon forgets about attending deliberately and begins attending naturally.<sup>64</sup>

The literature about legal interviewing has almost ignored both verbal and nonverbal attending skills. At most there will be mention of verbal attending skills such as open-ended questions and active listening. Nonverbal attending skills are simply never mentioned.<sup>65</sup> Yet nonverbal attending skills are critically important.

Although it may be surprising to lawyers, when clients evaluate a lawyer, the lawyer's skill in interpersonal relationships can be more important than the lawyer's legal competence.<sup>66</sup> Furthermore, extensive research in the fields of counseling and psychotherapy has shown that professionals who are attentive to clients are rated much higher by clients, and that positive attending behavior can significantly improve the relationship between the professional and the client. It has been proven repeatedly that nonverbal behavior that indicates interest in the client can determine how successfully the relationship will develop.<sup>67</sup>

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Attending behavior gives novices something to do when they do not know what else to do in the session. In such awkward moments, the interviewer can simply maintain eye contact, retain a relaxed, easy body posture, think back to something of interest in the client's earlier discussion, and make a comment about it. The interview then can proceed. *Id.* at 68.

"Apparently the act of attending carefully to another person is a difficult task for most people. They are usually thinking what they will say when the speaker stops." C. ROGERS, *CLIENT-CENTERED THERAPY* 349 (1951).

62. Novice interviewers tend to make many communication errors. See Matarazzo, Phillips, Wiens & Saslow, *Learning the Art of Interviewing: A Study of What Beginning Students Do and Their Patterns of Change*, 2 *PSYCHOTHERAPY: THEORY, RES. AND PRAC.* 49 (1965). Beginners frequently cut off their clients by asking closed-ended questions or by making long comments when the client is trying to talk. A. IVEY & J. AUTHIER, *supra* note 10, at 52.

63. A. IVEY & J. AUTHIER, *supra* note 10, at 59.

64. *Id.* at 52.

65. A review of the early literature regarding counseling also showed an inordinate amount of attention to the verbal parts of communication and an almost total exclusion of interest in the nonverbal channels. Haase & Tepper, *supra* note 7, at 417.

66. Feldman & Wilson, *The Value of Interpersonal Skills in Lawyering*, 5 *LAW & HUMAN BEHAV.* 311 (1981) (experimental evidence showing the importance of interpersonal skills). Interestingly, a lawyer adept at interpersonal skills but with a low level of legal competence was rated higher than a lawyer poor at interpersonal skills but with a high level of legal competence.

67. High levels of verbal empathy can be reduced to unempathic messages if the interviewer does not use appropriate nonverbal behavior. Haase & Tepper, *supra* note 7,

### A. Posture

The key to nonverbal attending skills is posture. Posture refers to bodily positions.<sup>68</sup> The human body can move into an almost unlimited number of different postures. Most lawyers probably give no thought to their posture, except perhaps if they are appearing in court before a jury.<sup>69</sup> Certainly, they would seldom give any thought to their posture when they are in their own office. Other professionals in the helping professions, however, consider office posture to be a critical part of their professional behavior because they recognize that posture is a method of communicating.<sup>70</sup>

### B. The "SOLER" Nonverbal Posture

Perhaps the best summation of appropriate nonverbal attending posture was suggested by Gerald Egan when he referred to the use of the SOLER position for interviewing.<sup>71</sup> SOLER is an acronym for:

SQUARELY facing the client,  
OPEN body position (arms or legs are not crossed),  
LEAN forward,  
EYE contact, and  
RELAXED body position.

The SOLER body orientation not only conveys that the lawyer is open to the client, but also places the lawyer in the best possible physical position both to observe the client and to screen out all other distractions.<sup>72</sup>

#### 1. SQUARELY Facing the Client

The first component of SOLER behavior focuses on the orientation of the lawyer's body to the client's body. The lawyer should be SQUARELY facing the client. This position best communicates receptivity.<sup>73</sup> The lawyer's shoulders should be parallel to the lawyer's hips and also parallel to the shoulders of the client. In other words,

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at 422.

68. Body posture is a comparatively static position; body movements are generally referred to as gestures. See P. BULL, *supra* note 4, at 3.

69. Usually the only negative thing lawyers ever hear about their posture is that they slouch when in court. In trial advocacy programs in which lawyers are video taped during simulation exercises, the critiquer often points out slouching.

70. "Each region of the body can be oriented in such a way that it invites, facilitates, or holds an interpersonal relation. Or, it can be oriented in order to break off, discourage, or avoid involvement." A. SCHEFLEN & N. ASHCRAFT, *HUMAN TERRITORIES: HOW WE BEHAVE IN SPACE-TIME* 42 (1976).

71. See G. EGAN, *THE SKILLED HELPER* (1975).

72. See *IMPROVING THERAPEUTIC COMMUNICATION*, *supra* note 50, at 111.

73. LaCrosse, *Nonverbal Behavior and Perceived Counselor Attractiveness and Persuasiveness*, 22 J. COUNSELING PSYCHOLOGY 563 (1975).

there should be no torso rotation.<sup>74</sup> Any angled position, especially between 45 and 90 degrees, is said to indicate a lack of interest. Turning to the side is considered lessened involvement.<sup>75</sup> To give someone a "cold shoulder" is an indication that there is a lack of interest.<sup>76</sup>

## 2. OPEN Body Position

When the term "body language" is used in everyday speech, the behavior that is most often observed and interpreted as a nonverbal communication is the position of the arms. Depending on whether the arms are crossed or uncrossed, the body posture can be described as closed or open. An open (uncrossed) posture is considered to be a signal that the interviewer is open to what the client has to say and is willing to communicate directly with the client.<sup>77</sup> The posture of arms crossed in front of the body is correlated with several negative mental attitudes including opposition, protection, defensiveness, and disinterest.<sup>78</sup> This crossed, negative posture is not limited to the arms; crossed legs carry the same meanings as crossed arms.<sup>79</sup> Open legs, like open arms, are associated with a nondefensive, accepting attitude.

Results of research studies that have examined how the positions of the interviewer's arms and legs affect the client's assessment of the interviewer have been consistent with the folk wisdom of body language. Arm and leg positions can affect the client's perception of the professional's accessibility. In the studies, professionals with open postures (uncrossed arms and legs) were judged to be warm, accepting, and empathic.<sup>80</sup> Professionals who had their arms resting on the arms of chairs and had both their feet on the floor<sup>81</sup> received the highest ratings for warmth and empathy.<sup>82</sup> In contrast, those who

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74. This posture is referred to as zero-degree torso rotation. *Id.*

75. See G. EGAN, *supra* note 71, at 65.

76. See R. BOLTON, *supra* note 8, at 35.

77. G. EGAN, *supra* note 71, at 65. See Mehrabian, *Inference of Attitudes from the Posture, Orientation, and Distance of a Communicator*, 32 J. CONSULTING & CLINICAL PSYCHOLOGY 296 (1968).

78. See G. EGAN, *supra* note 71, at 65.

79. See R. BOLTON, *supra* note 8, at 35.

80. Smith-Hanen, *Effects of Nonverbal Behaviors on Judged Levels of Counselor Warmth and Empathy*, 24 J. COUNSELING PSYCHOLOGY 87 (1977).

81. The phrase "with their feet on the ground" is generally used to describe a solid, trustable individual.

82. Actually, there is a significant variance between moderate and extreme open positions. Moderate positions were judged as warm and accepting; extreme positions were

held closed arm and leg positions were rated as cold and rejecting.<sup>83</sup>

How the legs were crossed also significantly affected the ratings of the interviewers. For example, if the legs were crossed so that the ankle of one leg rested on the knee of the other leg, thereby forming a triangle that offered a block to the client, that interviewer was considered cold and unempathic.<sup>84</sup> If, however, the legs are crossed at the knees, and therefore almost parallel to one another, the interviewers were not rated as cold.

In addition, the posture of arms akimbo (hands on hips and elbows bent outward), although appearing to be an open position, has consistently produced negative interpretations.<sup>85</sup> Encoders of nonverbal behavior used this position with people they disliked;<sup>86</sup> decoders thought the posture was "haughty."<sup>87</sup> Furthermore, an open, symmetrical posture is judged to be of higher rapport than an asymmetrical posture with one arm resting on a desk.<sup>88</sup> Since lawyers, unlike therapists, often have desks between them and their clients, they should consider avoiding putting only one arm on the desk.

### 3. *LEANING Forward*

Leaning toward the client in a slight forward lean is considered a natural sign of involvement,<sup>89</sup> interest,<sup>90</sup> and persuasiveness.<sup>91</sup> "He has them on the edge of their seats" is a common phrase indicating interest in a subject or speaker.<sup>92</sup> The forward lean posture is also very good for making observations. The close distance provides a better opportunity for the lawyer to observe minute changes in the client. The forward lean also narrows the field of view and therefore reduces other distractions. As long as a lawyer does not move in too close and invade the client's personal space, the forward lean should increase lawyer-client rapport.<sup>93</sup>

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judged as immodest and exhibitionistic. Smith-Hanen, *supra* note 80, at 87.

83. *Id.*

84. *Id.* at 91.

85. See P. BULL, *supra* note 4, at 25.

86. See Mehrabian, *supra* note 77, at 304.

87. *Id.*

88. Harrigan, Oxman & Rosenthal, *Rapport Expressed Through Nonverbal Behavior*, 9 J. NONVERBAL BEHAV. 95, 102-03 (1985).

89. See G. EGAN, *supra* note 71, at 65.

90. See A. IVEY & J. AUTHIER, *supra* note 10, at 51. In decoding studies using role plays, speakers would move forward with people they liked. Mehrabian, *Relationship of Attitude to Seated Posture, Orientation and Distance*, 10 J. PERSONALITY & SOC. PSYCHOLOGY 26 (1968); Mehrabian & Friar, *Encoding of Attitude by a Seated Communicator Via Posture and Position Cues*, 33 J. CONSULTING & CLINICAL PSYCHOLOGY 330 (1969).

91. See Mehrabian & Williams, *Nonverbal Concomitants of Perceived and Intended Persuasiveness*, 13 J. PERSONALITY & SOC. PSYCHOLOGY 37 (1969).

92. R. BOLTON, *supra* note 8, at 34.

93. Close distance is said to be part of the nonverbal behavior that demonstrates

The forward lean at approximately a twenty degree angle has been consistently shown to generate positive ratings of the interviewer.<sup>94</sup> The lawyer-client relationship can be equally positive with the more forward position of elbows on the knees.<sup>95</sup> Sitting erect or leaning backwards from the client can have a negative impact on the relationship and can inhibit the interview.<sup>96</sup>

#### 4. EYE Contact

Perhaps more has been written about eye contact<sup>97</sup> than any other channel of nonverbal communication.<sup>98</sup> The eyes have been called "the mirrors of the soul."<sup>99</sup> Eye contact is probably the most consciously noticed aspect of nonverbal communication. Virtually everyone can recognize the empty, blank stare that indicates the listener is not really listening; a body is present but the mind is on vacation.

Eye contact is one of the best indications of positive attending<sup>100</sup>

the highest degree of empathic understanding. See Haase & Tepper, *supra* note 7.

94. See Haase & Tepper, *supra* note 7, at 421. See also LaCrosse, *supra* note 73.

95. See Genthner & Moughan, *Introverts' and Extraverts' Responses to Nonverbal Attending Behavior*, 24 J. COUNSELING PSYCHOLOGY 144, 145 (1977).

96. See Haase & Tepper, *supra* note 7, at 421.

97. Eye contact is sometimes referred to as a gaze. Gaze refers to the interviewer's looking behavior which may or may not be at the client; mutual gaze refers to when the lawyer and client are looking at each other, usually eye to eye. Gazing provides at least four functions: (1) regulation of the flow of communication, (2) monitoring feedback, (3) expression of emotions, and (4) communication of the nature of the interpersonal relationship. See generally M. ARGYLE & M. COOK, *GAZE AND MUTUAL GAZE* (1976).

High rapport doctors looked at their charts and at patients when the patients were not looking back at them. Lower rapport doctors had higher rates of mutual gaze. Although mutual gaze findings in this study seemed to contradict the findings of other studies, the doctors were trying to diagnose the patient and often used a chart. Harrigan, Oxman & Rosenthal, *supra* note 88, at 106.

98. Speakers generally look at listeners less often than listeners look at speakers. Argyle & Ingham, *Gaze, Mutual Gaze and Proximity*, 6 SEMIOTICA 32 (1972). The eyes also have been discussed in relation to how people take turns speaking (turn-taking signals). Speakers glance at the listeners at grammatical breaks at the end of a thought unit or idea. These glances can signal that it is the other person's turn to speak. Kendon, *Some Functions of Gaze Direction in Social Interaction*, 26 ACTA PSYCHOLOGICA 22 (1967). See Duncan, *Some Signals and Rules for Taking Speaking Turns in Conversations*, 23 J. PERSONALITY & SOC. PSYCHOLOGY 283-92 (1972). See also Duncan & Niederehe, *On Signalling that It's Your Turn to Speak*, 10 J. EXPERIMENTAL SOC. PSYCHOLOGY 234 (1974). Furthermore, these glances give speakers feedback on how they are being received and whether the other person will allow them to continue. One source of confusion in cross-cultural communication is that turn-taking signals vary across cultures.

99. M. COLLINS, *COMMUNICATION IN HEALTH CARE* 76 (1983).

100. See M. KNAPP, *ESSENTIALS OF NONVERBAL COMMUNICATION* 186 (1980).

and appears to be essential for developing a good relationship.<sup>101</sup> A high degree of eye contact is correlated with generally positive attitudes between people.<sup>102</sup> Studies that tested nonverbal behavior usually found that interviewers who maintained a high degree of eye contact were rated positively by both clients and evaluators who observed the interviews.<sup>103</sup> Failure to make a sufficient amount of eye contact is seen as detrimental to forming a good relationship.

Eye contact during interviewing generally means that the interviewer is looking at the client's face or directly into their eyes.<sup>104</sup> The suggested eye contact is "softly" focused on the speaker, moving at times to other parts of the body.<sup>105</sup> The eye contact should not be constant or fixed,<sup>106</sup> nor should it be an intense stare. Intensity may be uncomfortable for the client. The eye contact should be a natural looking at the client,<sup>107</sup> being both relaxed and intermittent.

Sudden interruptions in eye contact can signal that certain topics are uncomfortable<sup>108</sup> or personally troubling<sup>109</sup> to the listener. During interviewing, such signals may be decoded by the client as meaning that the client should not speak about the topic that was mentioned when the lawyer stopped making eye contact. If the lawyer provides supportive eye contact only on certain topics, this behavior can unconsciously censor certain topics and selectively reinforce others.<sup>110</sup>

Although all attending behaviors vary cross-culturally,<sup>111</sup> eye contact may vary more than other nonverbal behaviors. Generally, it is considered appropriate to look at the person who is speaking.<sup>112</sup> Some cross-cultural factors, however, suggest that direct, prolonged

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101. See Haase & Tepper, *supra* note 7, at 422.

102. Exline, Gray & Schuette, *Affective Relations and Mutual Glances in Dyads*, in *AFFECT, COGNITION, AND PERSONALITY* (S. Tompkins & C. Izard eds. 1965).

103. Sometimes questions are raised about the validity of experiments in which the counselor-client interaction was rated by third-party observers and not by clients. Fretz, Corn & Tuemmler, *Counselor Nonverbal Behaviors and Client Evaluations*, 26 *J. COUNSELING PSYCHOLOGY* 304 (1979).

104. If beginning counselors find it uncomfortable to look directly into the client's eyes, they are told to focus on the client's nose or mouth. Using this technique, the interviewer will feel more comfortable, and the client will still have the feeling that the counselor is making eye contact.

105. R. BOLTON, *supra* note 8, at 36.

106. See *IMPROVING THERAPEUTIC COMMUNICATION*, *supra* note 50, at 110.

107. A. IVEY & J. AUTHIER, *supra* note 10, at 53.

108. *Id.* at 51.

109. *Id.* at 71.

110. *Id.*

111. See, e.g., R. BIRDWHISTELL, *KINESICS AND CONTEXT* 34 (1970); D. EVANS, M. HEARN, M. UHLEMANN & A. IVEY, *ESSENTIAL INTERVIEWING* 12 (1979); E. HALL, *THE SILENT LANGUAGE* (1959); A. IVEY & J. AUTHIER, *supra* note 10, at 47; R. MACLEOD, *supra* note 27, at 123; A. WATSON, *supra* note 6, at 53-54.

112. Most children raised in North America probably have heard their parents say, "Look me in the eye when I am talking to you."



eye contact should not be made by low status individuals. In some cultures it is a sign of disrespect if low status people look directly at elders or people of high status.<sup>113</sup> Since the lawyer usually will be the high-status person in the interview because of the professional role, cultural aspects of eye contact will probably be of little effect.

Lawyers often fail to make eye contact when they become distracted by things on their desks<sup>114</sup> or when reading documents from their files or brought into the office by the client. Lawyers should be careful to ensure that the client does not interpret such nonverbal behavior to mean that the lawyer is not interested in the client. The eyes are powerful enough to augment or contradict other facial non-verbal messages.<sup>115</sup>

### 5. *RELAXED Body Posture*

A relaxed body posture is the final aspect of nonverbal behavior considered essential for establishing a good lawyer-client relationship. A lawyer who is relaxed can focus on the client.<sup>116</sup> This relaxed position is harder to describe accurately than other aspects of the SOLER posture. Mehrabian described the posture as a bit less relaxed than in a social situation.<sup>117</sup> The posture also has been referred to as alert. Whatever the exact verbal description, it is clear that lawyers should seek to avoid the appearance of tension or tightness in their body while interviewing.

### C. *Other Nonverbal Indicators of Rapport*

Although the SOLER posture encompasses most of the key non-verbal elements, there are other nonverbal indicators of rapport. Clients prefer interviewers who smile,<sup>118</sup> gesture, and change pos-

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113. An obvious cultural conflict comes into play during criminal sentencing. The judge might expect a truly repentant defendant to look at the judge when the defendant gets to speak when being sentenced. Failure to look directly at the judge may be interpreted as a sign of disrespect. It is also quite possible, however, the defendant is from a culture that would consider it a sign of disrespect to look at someone of a higher status, especially when the defendant is about to be disciplined. See, D. MORRIS, *MANWATCHING: A FIELD GUIDE TO HUMAN BEHAVIOR* 74 (1977) (passive submission involves exaggerated looking away).

114. Executive toys on a desk can be especially distracting.

115. See J. MOURSUND, *THE PROCESS OF COUNSELING AND THERAPY* 16 (1985).

116. See A. IVEY & J. AUTHIER, *supra* note 10, at 53.

117. Mehrabian, *supra* note 77, at 297.

118. See Bayes, *Behavioral Cues on Interpersonal Warmth*, 39 J. COUNSELING PSYCHOLOGY 333 (1972) (smiling is the best single predictor of interviewer warmth).

tures.<sup>119</sup> Smiles are appropriate at the initial greeting, at the close of the interview, and sometimes during the interview. Clients also prefer interviewers who move and are not rigid.<sup>120</sup> Remaining still can be interpreted as a sign of being cold and aloof.<sup>121</sup> The lawyer and client should be a comfortable and appropriate distance apart. The propriety of the distance should be determined from the client's perspective. In different cultures, different distances are appropriate.<sup>122</sup>

#### D. Office Design

Posture is an intriguing consideration in legal interviewing because the seating arrangement in many law offices hides the lawyer's posture. Unlike counselors and therapists who usually do not use a desk when meeting clients,<sup>123</sup> lawyers often work from behind a desk which obstructs observations of nonverbal behavior and creates a physical barricade between the lawyer and the client. Lawyers seeking a better relationship with their clients should move out from behind their desks. Lawyers can seat clients alongside the desk or arrange the office furniture so that the desk is not between the lawyer's chair and the seats that visitors will use.

### IV. BODY SYNCHRONY

Over the past twenty-five years, scientific studies have repeatedly demonstrated that a close relationship exists between human oral communication and nonverbal behavior.<sup>124</sup> These studies show that human relationships are characterized by a synchrony between verbal communication and body motion.<sup>125</sup> Scientists have found that in relationships there is, in essence, a coordinated dance between the participants.<sup>126</sup> This dance of bodily movements can be observed if

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119. See Krumboltz, *Changing the Behavior of Behavior Changers*, 6 COUNS. EDUC. & SUPERVISION 222 (1967); Strong, Taylor, Bratton & Loper, *Nonverbal Behavior and Perceived Counselor Characteristics*, 18 J. COUNSELING PSYCHOLOGY 554 (1971).

120. C. TRUAX & R. CARKHUFF, *TOWARD EFFECTIVE COUNSELING AND PSYCHOTHERAPY* 361-62 (1967).

121. R. BOLTON, *supra* note 8, at 36.

122. E. HALL, *supra* note 111, at 150-58; O. WATSON, *PROXEMIC BEHAVIOR: A CROSS-CULTURAL STUDY* 33-46 (1970).

123. Desks are obstructions to attending. Professionals behind their desks are not considered to be "fully available" to their clients. G. EGAN, *supra* note 71, at 64-65.

124. An excellent survey of the research can be found in R. HARPER, A. WIENS & J. MATARAZZO, *NONVERBAL COMMUNICATION: THE STATE OF THE ART* (1978).

125. Kinesiology, the study of body movements, includes posture, facial expression, eye movements, and movements of the arms, hands, legs, and feet. Eye movements can be classified by the direction of stare, length of gage, and degree of pupil dilation. See M. KNAPP, *NONVERBAL COMMUNICATION IN HUMAN INTERACTION* 5 (1972).

126. The dance of body movements is but one aspect of how rhythm and time connect people together. See E. HALL, *THE DANCE OF LIFE* (1983).

the observer knows what to look for and how to look.

Like partners at a real dance, partners in communication can do several types of dances. They might dance slowly; they might dance fast. They may move around a lot, taking up a lot of space, or they might move only a little. But no matter how the dance is performed, the nonverbal dance between the communicators is a behavioral indicator of the quality of the relationship.

In the early 1960s, when the bodily dances of communication were first being observed by scientists, there were two schools of what may be called dance observers. Robert Condon was first to recognize a fast dance composed of small and rapid body movements that became known as "interactional synchrony."<sup>127</sup> Albert Schefflen studied the slow dance of body postures that became known as "postural echoing" or "mirroring."<sup>128</sup>

### A. Interactional Synchrony

Condon's research on interactional synchrony was done at the micro level<sup>129</sup> with a high speed camera. He closely examined the bodily movements that accompanied speech.<sup>130</sup> The research was ex-

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127. The first discussion of interactional synchrony was in Condon & Ogston, *Sound Film Analysis of Normal and Pathological Behavior Patterns*, 143 J. NERVOUS & MENTAL DISEASE 338 (1966).

128. See Schefflen, *The Significance of Posture in Communication Systems*, 27 PSYCHIATRY 316 (1964).

129. As used by Condon, a micro level was a level so small that it was not observable to the unaided eye.

130. Film analysis like the one Condon performed are described in Kendon, *Movement Coordination in Social Interaction*, 32 ACTA PSYCHOLOGICAL 101, 102-3 (1970).

The film is examined by means of a time-motion analyzer, a projector in which the film can be moved back and forth by hand at any speed. Small sequences may be examined repeatedly and then compared with immediately adjacent sequences. In analyzing movement, each body part is focused on separately, and a mark is made on a time chart at the point at which there is a minimally perceptible change in the direction of movement of the body part. Each division on the time chart corresponds to a frame on the film. With a film shot at the rate of twenty-four frames per second (the standard rate for sound film), measurements of time intervals are thus possible to the nearest twenty-fourth of a second. The result of such a plot is a flow chart showing the points at which changes in the direction of movement occur, in each body part examined. A phonetic segmentation of the speech sounds is then undertaken, and this is written in on the time chart so that the relationship between the speech and body motion may be examined.

If this procedure is followed for a stretch of behavior, it is found that the points of change in the movement for the separate body parts coincide. That is to say, the body parts change and sustain direction of movement together. This does not mean that all the parts of the body are moving in the same way. As the arms are lowered, the head may turn to the right, the trunk may bow

act and painstaking.<sup>131</sup>

Condon found two levels of synchrony in normal people. His research report described "synchronous organizations of change between body motion and speech in *both* intra-individual and interactional behavior."<sup>132</sup> This means that "the body of the speaker dances in time with his speech" and that "the body of the listener dances in rhythm with that of the speaker."<sup>133</sup> This coordination between a person's voice and body movement is what Condon called "self-synchrony."<sup>134</sup> One experiment detailed how the speaker's body changed three times for each of seven observable body parts, for a total of twenty-one movements, while merely speaking the word "around."<sup>135</sup>

The coordination of body movements of listeners with the words of the speaker is called "interactional synchrony."<sup>136</sup> When there were a number of listeners, Condon noted that they "looked like puppets being moved by the same set of strings."<sup>137</sup> This synchrony was only found in normal interactions. Condon found a marked dyssynchrony with people who exhibited pathological behavior.<sup>138</sup>

As people interact, their body positions change rapidly. The tendency to synchronize appears across cultures and has been characterized as innate.<sup>139</sup> Both Condon and scientist Edward Hall believe that synchrony begins with the myelination of the auditory nerve about six months after conception. Research has shown that in the first day of life, a baby moves in precise synchrony with the mother's speech.<sup>140</sup> Immediately after birth, babies will synchronize with the voice of other people speaking any language.<sup>141</sup> Interactional synchrony takes place even between total strangers.

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forward, the eyes shift left, the mouth open, the brows lift, the fingers flex, the feet flex from the ankles, and so on. It is further found that some body parts may sustain a given direction of movement over several changes in other body parts . . . .

*Id.*

131. In one project, Condon spent a year and one-half, four to five hours a day, studying four and one-half seconds of a family interaction. He wore out 130 copies of the four-and-one-half second sequence even though each copy lasted for 1,000 viewings. E. HALL, *supra* note 126, at 164.

132. Condon & Ogston, *supra* note 127, at 338.

133. *Id.*

134. *Id.* at 342.

135. Condon & Ogston, *A Segmentation of Behavior*, 5 J. PSYCHIATRIC RES. 221, 225 (1967).

136. Condon & Ogston, *supra* note 127, at 342.

137. Condon & Ogston, *supra* note 135, at 229.

138. Condon & Ogston, *supra* note 127, at 343-44.

139. See E. HALL, *supra* note 126, at 161.

140. See Condon & Sander, *Neonate Movement Is Synchronized with Adult Speech: Interactional Participation and Language Acquisition*, SCIENCE, Jan. 1974, at 99.

141. See E. HALL, *supra* note 126, at 161.

This dance of life, interactional synchrony, is not easy to see.<sup>142</sup> Although the existence of synchrony is widely accepted, no scientist ever sees it at the micro level with the unaided eye. Because the process is so quick, it functions outside of conscious awareness.<sup>143</sup> Obviously, lawyers cannot consciously create or control this interactional synchrony. Postural echo, however, is a similar phenomenon related to rapport that lawyers can control.

### B. Postural Echo

The synchronous dance changes dramatically when people are in rapport. Like lovers dancing the last dance of the night, people in rapport begin to dance slowly. At this level the dance is very observable. As described in the Harvard Business Review: "In moments of great rapport, a remarkable pattern of nonverbal communication can develop. Two people will mirror each other's movements—dropping a hand, shifting their body [sic] at *exactly* the same time."<sup>144</sup>

Researchers have not developed a standard of clear demarcation between the small and rapid synchronous movements of any two people studied by Condon, and the large, postural body mirroring of two people in rapport studied by Schefflen. At the micro level any two people can be in synchrony with their movements. However, at the macro level of more static body positions, the mirror image postures are only shared by people in rapport.<sup>145</sup>

Albert Schefflen's study was the first research into analyzing relationships from the perspective of the postures of the participants.<sup>146</sup> Schefflen was particularly intrigued when he noticed that people talking to each other often hold their heads and extremities in the same positions as each other. Schefflen called these similar body postures "congruence."<sup>147</sup> As people engaged in conversation, often they appeared as if they were carbon copies of each other;<sup>148</sup> other times, when facing each other in the vis-a-vis position, they presented mir-

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142. Condon also used the word "entrainment" to describe the synchronous movements. Condon, however, uses entrainment to specifically refer to the internal processes that makes synchronous movement possible - the nervous systems of the two people "drive each other." See E. HALL, *supra* note 126, at 206.

143. *Id.* at 141.

144. McCaskey, *The Hidden Messages Managers Send*, Har. Bus. Rev., Nov.-Dec. 1979, at 135, 147.

145. See A. SCHEFFLEN, *BODY LANGUAGE AND THE SOCIAL ORDER*, 53 (1980).

146. See generally SCHEFFLEN, *supra* note 128.

147. *Id.* at 327-28.

148. *Id.* at 328.

ror images<sup>149</sup> to each other,<sup>150</sup> i.e., the right side of one person was directly aligned with the left side of the other person. Sometimes only certain parts of the extremities were aligned, but Schefflen concluded that the congruence was not coincidental. He concluded that "[i]n a general way congruence in posture indicates similarity in views or roles . . . ." <sup>151</sup> Furthermore, "the subjective experience of rapport" was related to the posture of the participants.<sup>152</sup>

Later research confirmed the work of Schefflen relating mirrored posture to rapport in several different settings.<sup>153</sup> Other scientists found that "mirror congruent posture in the vis-a-vis position indicates a state of rapport."<sup>154</sup> Although there has never been a full explanation of why mirror images produce rapport,<sup>155</sup> it is clear that with mirror images the participants feel in rapport.<sup>156</sup> It has been suggested that the body mirroring heightens the bond between the participants and serves as a visual confirmation of relationship between the participants.<sup>157</sup>

It would seem that congruent body postures cannot be accidental. At any moment an individual's posture comes from constitutional

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149. Mirror image movements are described in a film analysis by Adam Kendon: As T leans back in his chair, B leans back and lifts his head; then B moves his right arm to the right, just as T moves his left arm to the left, and then he follows this with a headcock to the right, just as T cocks his head to the left. We might say that here B dances T's dance. Kendon, *supra* note 130, at 110.

150. See SCHEFFLEN, *supra* note 128, at 328.

151. *Id.* at 328.

152. *Id.* at 330.

153. See, e.g., D. MORRIS, *supra* note 113, at 83-85; Fraenkel, *The Relationship of Empathy in Movement to Synchrony, Echoing, and Empathy in Verbal Interactions*, 6 AM. J. DANCE THERAPY 31 (1983); LaFrance, *Nonverbal Synchrony and Rapport: Analysis by the Cross-Leg Panel Technique*, 42 SOC. PSYCHOLOGY Q. 66 (1979); LaFrance, *Postural Mirroring and Intergroup Relations*, 11 PERSONALITY & SOC. PSYCHOLOGY BULL. 207 (1985); LaFrance & Ickes, *Posture Mirroring and Interactional Involvement: Sex and Sex Typing Effects*, 5 J. NONVERBAL BEHAV. 139 (1981); Maurer & Tindall, *Effect of Postural Congruence on Client's Perception of Counselor Empathy*, 30 J. COUNSELING PSYCHOLOGY 158 (1983); Navarre, *Posture Sharing in Dyadic Interaction*, 5 AM. J. DANCE THERAPY 28 (1982); Trout & Rosenfeld, *The Effect of Postural Lean and Body Congruence on the Judgment of Psychotherapeutic Rapport*, 4 J. NONVERBAL BEHAV. 176 (1983).

154. Charney, *Psychosomatic Manifestations of Rapport in Psychotherapy*, 28 PSYCHOSOMATIC MED. 305 (1966).

155. The most accepted explanation is that synchronous movement tells the speaker that the listener is listening. F. DAVIS, *INSIDE INTUITION* 115 (1971). Synchronous movement is a nonverbal way for the listener to tell the speaker that the listener is attending, and it also provides information about the level of attending. W. Condon, *The Relation of Interactional Synchrony to Cognitive and Emotional Processes*, in *THE RELATIONSHIP OF VERBAL AND NONVERBAL COMMUNICATION* 49, 58 (M. Key ed. 1980). In the same manner, active listening is a verbal method for the listener to prove to the speaker that the listener is listening. Active listening, like synchronous movement, produces a subjective state of rapport. See Barkai & Fine, *supra* note 38, at 528; Barkai, *supra* note 57, at 66.

156. See F. Davis, *supra* note 155, at 105-06.

157. Kendon, *supra* note 130, at 113.

predisposition, learned patterns, cultural influences, states of health, occupation, sexual identity, and other factors.<sup>158</sup> While these factors limit the possible choices of posture, there are still a vast array of possibilities. The human body is capable of assuming approximately 1,000 steady postures.<sup>159</sup> It would be a most unlikely coincidence that two people would unrelatedly assume the same body posture. The immediate state of the relationship must be the decisive determinant of which particular posture a person will display.<sup>160</sup>

## V. LAWYERS CAN ASSUME A POSTURE OF RAPPORT

The research into attending behavior and postural echoing suggest that a lawyer can assume either the SOLER or mirrored posture when trying to establish rapport. No research results address the difference in effect between these two postures, nor do they even recognize that there is such a difference. Both postures appear to work equally well, and therefore the lawyer can choose according to personal preference, or can switch between the postures.

The SOLER posture is a natural, attentive posture that is unrelated to the posture of the client. The lawyer should (1) squarely face the client, (2) maintain an open body position by not crossing either the arms or the legs, (3) lean forward with feet on the floor, (4) make appropriate eye contact, and (5) maintain a relaxed body position. In this position the lawyer will appear open and receptive to the client and will be less distracted by other things in the office. The SOLER posture is best implemented if seating is arranged so that there is no desk separating the lawyer and the client.

The theory behind the technique of the postural echo or mirroring<sup>161</sup> is that people who share a common opinion or bonding often assume the mirrored body positions.<sup>162</sup> Knowing that fact, agreement can be communicated nonverbally by taking a mirrored position. This position depends entirely upon the posture of the client. Using this technique, the lawyer will assume a mirror image of the client's

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158. See, Charney, *supra* note 154, at 306.

159. Hewes, *The Anthropology of Posture*, SCI. AM., Feb. 1957, at 122-23.

160. Charney, *supra* note 154, at 306.

161. Mirroring has become a popular topic. See the discussions on mirroring in R. BANDLER & J. GRINDER, *FROGS INTO PRINCES* (1979); D. BONE, *THE BUSINESS OF LISTENING* 48 (1988); M. BROOKS, *INSTANT RAPPORT* (1989); A. PEASE, *SIGNALS, HOW TO USE BODY LANGUAGE FOR POWER, SUCCESS AND LOVE* 169-73 (1984); J. RICHARDSON & J. MARGULIS, *THE MAGIC OF RAPPORT* (1981).

162. See M. LAFRANCE & C. MAYO, *MOVING BODIES: NONVERBAL COMMUNICATION IN SOCIAL RELATIONSHIPS* 75 (1978).

posture.<sup>163</sup> One way to describe this process is that the lawyer should not only make eye contact, but also make mirrored body contact.<sup>164</sup>

It is important to not be detected when mirroring or else the client will question the lawyer's action. Therefore, the lawyer should subtly take on the same posture as the client, and the process should be kept out of awareness of the client. The lawyer can start by just mirroring from the neck up. Rather than making eye contact, make head contact. If the client's head and neck are oriented at an angle, the lawyer would orient his own head in the same direction, although at a lesser angle than the client's. Next, the client's torso lean, if any, can also be mirrored. When the client changes posture, the lawyer can also change posture, although it is best if the new mirrored posture is assumed after a period of some delay.<sup>165</sup> It is also possible to extend the mirroring from the torso to the arms and the legs. However, the more of the client's posture that is mirrored, the greater the possibility that the person being mirrored will detect the process. Furthermore, attempts to mirror arm movements, especially frequent and large arm movements, are more likely to be detected. It is usually helpful not to try to mirror the arm motions of a speaker because these are often exaggerated gestures, and would be both difficult to mimic and easy to detect.

## VI. BEYOND POSTURE

Posture is one way, but not the only method of mirroring. Ideas, breathing rates, and speech patterns can also be mirrored.<sup>166</sup> Active listening, a verbal attending skill, is really just a way of mirroring the content and feelings of what a client is saying. Some people advocate mirroring in other ways.<sup>167</sup> It is also possible to mirror by matching speech rates. Speak more quickly with the person who speaks rapidly, and speak more slowly with the person who speaks slowly.

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163. Mirroring to gain rapport is one of the foundational components of the ideas of neurolinguistic programming (NLP). See R. BANDLER & J. GRINDER, *supra* note 161; R. DILTS, J. GRINDER, R. BANDLER, J. DELOZIER & L. CAMERON-BANDLER, *NEUROLINGUISTIC PROGRAMMING I* (1979). NLP maintains that change comes easier after establishing rapport.

164. Obviously, true body contact is not made in legal interviewing. Although touching of a client may be appropriate in psychotherapy, it would probably be considered inappropriate for a legal interview.

165. See M. BROOKS, *supra* note 161, at 126.

166. Practitioners of NLP techniques refer to such mirroring as "pacing" behavior. They suggest that after pacing, you can begin to lead people. Most methods of hypnosis are based upon the principles of pacing and leading. Mirroring breathing rates is considered to be the best nonverbal rapport builder. Ideas and observations can also be mirrored. See Moine, *To Trust, Perchance to Buy*, *PSYCHOLOGY TODAY*, Aug. 1982, at 50.

167. G. LABORDE, *INFLUENCING WITH INTEGRITY* 30-35 (1984) (Mirroring by matching voice, tone, tempo, breathing rate, and movement rhythms).



With any of the methods of mirroring, the lawyer should start the mirroring process very gently. Start from the lawyer's own natural position, either body position or speech rate, and then slowly come into line with the client's. This is also true when attempting to pace the volume of the voice. Start with where your own natural volume is and then increase or decrease your volume so that it matches the other person's volume.

## VII. CONCLUSION

Most of the focus on nonverbal communication in law has been on reading body language in the courtroom. Lawyers, however, can also learn to speak body language in court and particularly in their offices while interviewing. Research evidence is overwhelming that nonverbal behavior can significantly affect the quality of a professional relationship. The nonverbal behaviors of attending skills and postural echoing can improve the law practice of any lawyer who is willing to learn and practice some relatively simple behaviors.

