



# Nonverbal Communication in Mediation

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## Introduction

Collectively, the attorneys of RATHOD | MOHAMEDBHAI LLC have mediated hundreds of cases involving the most sensitive of topics and the most difficult of conversations, including police shootings, sexual assault, and racism in the workplace, to name just a few. This wealth of experience suggests to us that effective communication is the single most important element of mediation. Without it, attorneys cannot identify issues of concern or navigate those issues to the benefit of their client.

As renowned author Malcolm Gladwell accurately states in *Blink: The Power of Thinking Without Thinking*, “great decision makers aren’t those who process the most information or spend the most time deliberating, but those who have perfected the art of ‘thin-slicing’ - filtering the very few factors that matter from an overwhelming number of variables.”<sup>1</sup> As such, effective attorneys must capture, interpret, and reciprocate both the conscious and subconscious messages being communicated by their clients, opposing counsel, opposing parties, and mediators.

Nonverbal communication, though, is a key piece of understanding the full message. It is one of the “very few factors that matter.”<sup>2</sup> Attorneys who understand nonverbal communication—and thus the full message—can tailor their strategies and communications far more effectively. And an added benefit, attorneys who do so can increase the degree of perceived psychological closeness and trust between themselves and others participating in the mediation. These attributes lend themselves well to better mediation outcomes.

In this article, we examine the benefits of understanding nonverbal communication in the mediation environment by providing a brief background of nonverbal communication and statistics on how we communicate; examining five of

the most important nonverbal signals; providing an overview on how understanding these signals promotes improved communication overall; and offering examples on how to use nonverbal communication effectively. We do not intend this article to be a comprehensive review of nonverbal communication but rather we intend to provide practicing attorneys with an introductory look to improve their skill-set in future mediations.

## Five Key Nonverbal Signals

Nonverbal communication, the process by which people exchange messages without using words, is one of the most important yet undervalued tools of mediation. In 1872, Charles Darwin in *The Expression of the Emotions in Man and Animals*, wrote what is probably the first scientific study of nonverbal communication.<sup>3</sup> Employing his theory of natural selection, Darwin highlighted the significance of nonverbal communication by exploring the involuntary physical signals that both animals and humans use to express emotions.<sup>4</sup> Since then, thousands of biologists, psychologists, linguists, and other researchers have identified and interpreted the meaning of nonverbal communications. This research suggests that between 65% and 93% of all face-to-face communication is conveyed through nonverbal means.<sup>5</sup> Face-to-face communication can be broken down into three elements: words, tone of voice, and body language.<sup>6</sup> According to Albert Mehrabian, Professor Emeritus of Psychology at the University of California Los Angeles, these elements account differently for the meaning of a given message: words account for 7% of the message; tone of voice for 38%; and body language for 55%.<sup>7</sup> Thus, according to Professor Mehrabian, the latter two categories constitute 93% of the message.<sup>8</sup>

Put another way, signals other than the words (*i.e.*, nonverbal communication) can be subdivided into two

groups: vocal and non-vocal communication.<sup>9</sup> Nonverbal, vocal communication is communication that utilizes sound or the absence of sound (but not words).<sup>10</sup> This may include an endless array of vocalizations such as tones, grunts, pauses, volume changes, speeds, and timbre.<sup>11</sup> Nonverbal, non-vocal communication is a message that contains neither vocalizations nor sound.<sup>12</sup> Examples include facial gestures, eye contact, physical proximity, touch, stance, clothing, and body gestures.<sup>13</sup> Professor Merhabian’s conclusions indicate that understanding both vocal and non-vocal nonverbal communication is imperative to understanding the full message.

But the spectrum of observable vocal and non-vocal nonverbal communication is nearly endless. Darwin found categorizing physical expressions to be onerous, as he continually revised his findings prior to publication.<sup>14</sup> A thorough understanding of all nonverbal communications is an invaluable asset, but it is also an undertaking that is beyond the scope of this article. As such, we focus on five of the most common of such signals that attorneys must learn to identify: tone, eye contact, facial expressions, touch, and posture.

**Tone** represents a myriad of vocal factors that distinguish words, including the use of quality, pitch, strength, and source.<sup>15</sup> Tone of voice is one of the most common and significant non-verbal-vocal communication signals and has a strong effect on mediation because its interpretation is subjective. “It is not the tone itself but the *meaning* of the tone to listeners that has the impact.”<sup>16</sup> As such, message interpretation is less dependent on word choice than it is on the tone attached to the words. A simple example illustrates the point: the word “run” can be stated plainly and invoke little

reaction or emotion in the listener; however, the word “RUN” spoken in a strong, high-pitched tone can invoke feelings of panic, caution, and flight. The listener is subjectively and often subconsciously interpreting the tone of the speaker to understand a meaning that is not encompassed within the plain dictionary definition of the word. Accordingly, attorneys must observe variations in tone to construct meanings that may belie the speaker’s words.

Tone can also be a useful tool in gaining and keeping a listener’s attention. Where an attorney uses a monotone voice listeners may perceive the speaker as boring and dull.<sup>17</sup> In contrast, a speaker can captivate the audience by varying quality, pitch, and strength of voice. Clearly, the tone of a speaker is capable of conveying more significance to a listener than the quality of the speaker’s word choice.

**Eye Contact**, or the meeting of the eyes, may arouse strong emotions among communicators and often conveys positive or negative messages. Eye contact can help regulate the flow of conversation, increase the speaker’s credibility, and convey interest, concern, warmth, and credibility.<sup>18</sup> Attorneys should maintain eye contact approximately 80% of the time, as maintaining eye contact more than that may be uncomfortable to both the speaker and listener.<sup>19</sup> Further, attorneys should not stare directly into listeners’ pupils as this may be received as intimidating.<sup>20</sup> Rather they should direct their gaze to an area three to four inches around the eyes.<sup>21</sup> This kind of detail may appear to be shallow advice for attorneys. However, in our experience, the manner in which one person looks at another is a strong indicator of honesty and other key attitudes.

**Facial Expressions** can include a variety of attributes from raising an eyebrow to squinting. Most attorneys have come to understand, through life experiences, what many facial expressions mean. However, most attorneys fail to consciously observe the facial expressions of others and control their own. By remembering a few simple rules, attorneys can better communicate in mediation.

First, it is imperative for attorneys to look at a person when they are talking. This will allow attorneys to see the speaker’s facial expressions, communicate to the speaker through their own facial expressions without interrupting, and demonstrate an interest in the communication, thereby increasing the bond between the two.

Relatedly, attorneys must not only see the speaker’s facial expressions but also learn from them. Mental snapshots of the speaker—smiling, frowning, or furrowing their brow—reveals whether the facial expression coincides with what the party is saying. This provides insight into the speaker’s thoughts. If the facial expressions match the words, then the statements are reinforced. If they do not, the speaker is letting everyone know that there is more that needs to be uncovered. Similar to tone and eye contact, our experience tells us that being aware of speakers’ expressions allows attorneys to better understand emotions that a speaker’s face cannot hide.

Finally, attorneys should remember to regulate their own facial gestures. This is nowhere more important than during introductions. Our experience also tells us that attorneys who are too focused on beginning the mediation, forgetting to smile, miss an opportunity to develop trust amongst listeners and start on the right foot.<sup>22</sup>

**Touch** in mediation is one of the most complicated, powerful, and misunderstood nonverbal, non-vocal communication signals. “Touch can display individuals’ levels of closeness or intimacy. Because touch necessitates physical connection, it delivers a powerful message.”<sup>23</sup> Touch communicates different nonverbal messages from person to person.<sup>24</sup> Touch is not only the sensory indication of contact with someone or something but includes sensations of pressure, weight, vibration, and temperature.<sup>25</sup> Each of these variations on touch carries a message that is unique to the receiver.

Touching by its very nature requires the attorney to invade the personal space of one or more of the parties. A touch conducted at the wrong time or in the wrong manner, while well intentioned, may be misinterpreted or unappreciated. “Often the intent or circumstance of a touch is the factor that determines the communicated message.”<sup>26</sup> The touched party may feel uncomfortable, thereby recoiling and invalidating other positive communication efforts. As such, unless an attorney is positive that physical contact is appropriate and will not be misunderstood, it should be avoided.

As well, attorneys should observe how the parties interact physically, noting who avoids physical contact and who engages in it. Such signals reveal may reveal the level of trust and closeness between or amongst the parties.

**Posture**, or how a person walks, stands, and sits communicates almost as much as what she says. “Standing erect, but not rigid, and leaning slightly forward communicates . . . that [the attorney is] approachable, receptive and friendly.”<sup>27</sup> Further, as discussed in the section on facial expressions, it is important to face the person or

persons you are communicating with. However, special attention should be paid to the attorney’s unique physical attributes. For example, an attorney who has broad shoulders and a large frame may choose not to square his shoulders and body to a smaller, more timid client or opposing party. Rather, this attorney may choose to slouch slightly, and face the party more with their head and less with their body. The physical presentation of the attorneys has just as much to do with the corresponding postures of the listeners as it has to do with the professionalization of the mediation environment.

### Receiving and Sending Messages

Proper understanding of nonverbal communication allows attorneys to receive and send constant and instantaneous feedback. Words spoken alone do not communicate the speaker’s state of mind or feelings; understanding tone, eye contact, facial expressions, touch, posture, and other nonverbal signals allows the attorney to receive the full message. However, this is a two-way street. Through nonverbal communication, both the speaker and listener are communicating. As such, by understanding nonverbal signals the attorney can better interpret the parties’ message and better manipulate how she is perceived. In the end, it is the mediating client (and opposing parties) who receive the ultimate benefit from an attorney’s knowledge of nonverbal communication. By being aware of nonverbal signals the attorney can predict how a listener is receiving a particular message. Body language can tell us if the mediator, for example, is interested, bored, confused, or in agreement or disagreement.<sup>28</sup> For example, a listener who leans forward in their chair, makes eye

contact with the speaker, and nods affirmatively is most likely actively listening. In contrast, a party who is looking down, yawning, or has their arms crossed may be sending a message of disinterest. Attorneys can use this feedback to change the subject, stop the conversation, or proceed to the next issue.

By tracking nonverbal communication, [attorneys] can focus on the component that needs adjustment and leave what is working alone. That way, they work on the troublesome issues and avoid the risk of neutralizing the elements that are leaning in their favor.<sup>29</sup>

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This form of constant feedback allows attorneys to tailor their communications with insight not only into what the listener is saying but what they are thinking.

Even the untrained observer picks up conscious and subconscious nonverbal signals. Attorneys can condition themselves to send nonverbal cues to listeners. This not only encourages positive dialogue, but also discourages disruptive or counterproductive communication. For example, an attorney who wants to encourage her client to continue on a line of thought can encourage them through nonverbal signals, such as nodding her head in the affirmative or leaning forward in her chair. In contrast, if the attorney feels the communication is counterproductive, she can send a message by leaning back or crossing her arms. While these signals are subtle, their affect can be dramatic and immediate. Further, the attorney's body language can help control the mediating parties' behavior. For example, if opposing counsel is being offensive during an introduction, the attorney can sit upright, square her body, and use an authoritative tone to let the speaker know that such behavior is inappropriate. This message can even be sent without a verbal message by making direct eye contact or shaking her head in the negative.

The use of nonverbal communication also allows the attorney to dictate how she is perceived by the negotiating parties. Smiling, nodding, and numerous other nonverbal signals can tell listeners that the attorney is open, trustworthy, and ready to work through the issues. Allowing such gestures to become second nature can only improve an attorney's interpersonal skills, which are imperative to the mediation environment.

### Using Nonverbal Communication

Developing a sense of trust between the attorney and all the other listeners is an important step in helping parties realistically deal with their issues and in achieving an outcome that satisfies everyone. Even before the mediation starts, attorneys should be working to develop trust and closeness with others. "When trust levels are high, parties are less defensive and more willing to share information with other parties at the mediation table and in private sessions with the mediator - information that may be crucial to finding a mutually acceptable solution."<sup>30</sup> Therefore, a mediator must focus on developing trust throughout the mediation process.

Recognizing nonverbal, vocal and nonverbal, non-vocal communication can be an invaluable tool in developing trust between the attorney, the mediator, and negotiating parties. However, understanding that nonverbal communication exists is not enough. To be an effective communicator and increase levels of trust, attorneys must engage in three actions:

First, communicators have to use their senses to identify one piece of nonverbal communication, one signal sent to them by another person. Then they need to acknowledge the sender's cue with their own nonverbal communication signal. Finally, they have to respond appropriately with a new piece of communication.<sup>31</sup>

As the previous sections have addressed how to identify and interpret nonverbal signals, this section discusses ways in which the mediator can project a complimentary nonverbal message.

**Timing** is critical when projecting and receiving nonverbal messages. By properly timing nonverbal communication the attorney is essentially waiting

for each speaker's nonverbal signal to continue.<sup>32</sup> Absent the nonverbal go-ahead sign, speakers in mediation may feel rushed or unprepared to move on.<sup>33</sup> Further, a verbal signal absent a nonverbal indicator may not be enough. As Barbara Madonik states in *I Hear What You Say, But What Are You Telling Me?*

If you receive a verbal signal to move ahead, that is a conscious message. A mediating party's conscious yes, however, might be like the answer of a prospective juror. It could be a socially acceptable response but not a reflection of the person's actual other-than-conscious belief.<sup>34</sup>

For example, an attorney should obtain both the verbal and nonverbal signals to begin their toughest arguments to the mediator.<sup>35</sup> This could consist of a mediator's verbal "yes" and an affirmative nod. The simultaneous verbal and nonverbal signals are imperative as the combination lets the attorney know that the mediator is truly ready to receive arguments on the difficult issues at hand. Absent either of these signals, the attorney should assume that the mediator needs more time and background information to acclimatize to the mediation process.<sup>36</sup> In this situation, the attorney may also choose to resend a verbal or nonverbal signal, welcoming the mediator into their client's world.<sup>37</sup>

**Mirroring** is a term used to describe the process of adopting other people's nonverbal signals and then sending those same signals back to the listener, projecting a mirror image.<sup>38</sup> Mirroring sends a subconscious message to the mirrored party and can also help develop trust and rapport between the attorney and the listener who subconsciously accepts

and internalizes the attorney image as a reflection of themselves.<sup>39</sup> When mirroring, the attorney should identify at least one nonverbal cue, acknowledge it, and respond.

For example, if you notice that [opposing counsel] raises an eyebrow, do that in response. If someone pulls his mouth into a taut position, reproduce that. If you can replicate a person's tone, do it briefly. The object is to create an environment in which you send separate, other-than-conscious cues to each [speaker]. Each signal says, "Welcome."<sup>40</sup>

Even greater results are possible where the attorney attempts to reproduce a sequence of two or more nonverbal signals.<sup>41</sup> It is important for the attorney to remember that only one speaker may be mirrored at a time (*i.e.*, their own client, the mediator, or opposing parties and counsel). As such, the attorney should be conscious not to ignore one speaker. Further, when mirroring, the attorney should make effort to send the correct message. Certainly, the attorney does not want to replicate potentially embarrassing traits such as a tick or a limp. Therefore, when selecting a physical trait to mirror, the attorney should consciously avoid sending a message that she is making fun of any speaker.<sup>42</sup>

Rhythm is also important to the mirroring process. For example, when the attorney shares a rhythm with the opposing counsel, communication flows more freely.<sup>43</sup> "When there is no shared rhythm among the parties, the [attorney] can attempt to mirror [the mediator's or the opposing counsel's] rhythm to develop rapport."<sup>44</sup> For example, when a speaker uses nonverbal signals to accent their words, such as a head nod, the attorney can

adopt the signal and match the speaker's beat.<sup>45</sup>

Mirroring can be used in almost any situation. For example, an attorney can engage an opposing counsel by identifying and responding to what Madonik calls their "unique meeting distances."<sup>46</sup> To determine a "meeting distance," the attorney should approach at the same pace the opposing counsel is approaching her, stopping when they stop.<sup>47</sup> Mirroring the opposing counsel's "unique meeting distance" creates a rapport between the attorney and opposing counsel that allows them to feel subconsciously confident that their own personal space is being respected and that their positions will be well-received as the day goes on.

Another form of physical mirroring that attorneys can use to develop trust when initially meeting someone is to mirror the way they shake hands. Handshaking is the most common and acceptable form of touch between strangers.<sup>48</sup> However, people often miscommunicate with their handshake.<sup>49</sup> "[Attorneys] who want to send friendly greetings through their handshake may not realize the message. If the receiver believes the grip is too tight or last too long, the handshake may seem inappropriate."<sup>50</sup> An effective way to communicate a sense of rapport is to mirror the other person's handshake. If the mediator shakes with two hands, the attorney should do the same. If they have a firm grip, the attorney should reciprocate. Similar to recognizing the unique meeting distance, mirroring handshakes creates an "other-than-conscious" sense of connection and ensures the attorney's trustworthiness.

**Anchoring** is a technique in which the speaker uses a stimulus so as to trigger a particular response.<sup>51</sup>

anchors can occur naturally or be set and stimulated deliberately.<sup>52</sup> An example of a natural occurring anchor would be if a person saw a bike with streamers and thought of their childhood. The visual stimulation of seeing the bike is the anchor for remembering the feeling, sounds, and sights of being a young child. An example of a set anchor is where a parent shakes her finger at a child as she tells the child not to do a particular act. After setting the anchor, the child stops inappropriate behavior whenever the mother shakes her finger at the child.<sup>53</sup>

Anchors are most effective in mediation when the attorney sets the anchor outside the conscious awareness of the responding party.<sup>54</sup> Madonik suggests setting subconscious anchors throughout the mediation process.<sup>55</sup> For example, she recommends using different tones during the mediation not only to keep the attention of the mediator and opposing counsel but to see how each respond to a particular tone.<sup>56</sup> If the attorney discovers that a particular tone has a useful effect on a listener, she recommends reserving that tone for when the attorney wants to trigger the desired effect on the listener.<sup>57</sup> For example, where a certain tone encourages an attorney's own client to more freely communicate, an attorney may choose to reserve

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that tone for times when she wants to elicit a more detailed response from the client.

**Conclusion**

Mediation, perhaps more than any area related to law, most fully illuminates the spectrum of human interaction and emotion. Unlike court, the purpose of mediation is to shed light on the issues and create amicable solutions through the open dialogue of the mediating parties. The attorney’s role is to be productive and trustworthy within this dialogue. Absent effective communication skills, the attorney will not be successful. As such, attorneys must understand how to identify, interpret, and reciprocate nonverbal communication. While some may consider the conscious use of nonverbal communication techniques such as mirroring and anchoring manipulative, **all** parties to the mediation ultimately benefit from the attorney’s knowledge of the nonverbal spectrum, given the attendant trust and cooperation that results. As such, understanding nonverbal communication is inexorably tied to success as an attorney. ▲▲▲

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**Endnotes:**

- <sup>1</sup> MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).
- <sup>2</sup> BARBARA G. MADONIK, *I HEAR WHAT YOU SAY, BUT WHAT ARE YOU TELLING ME?* 3 (2001).
- <sup>3</sup> CHARLES DARWIN, *THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS*, *passim* (1872) (Darwin’s book was incredibly popular in its time, selling over 5,000 copies).
- <sup>4</sup> *Id.*
- <sup>5</sup> MADONIK, *supra* note 2, at 3.
- <sup>6</sup> ALBERT MEHRABIAN, *SILENT MESSAGES*, *passim* (1971).
- <sup>7</sup> *Id.* (this has become known as the “7%-38%-55% Rule”).
- <sup>8</sup> It is important to remember that the 7%-38%-55% Rule does not mean that in any communication situation, the meaning of a message is transported mostly by non-verbal cues. Albert Mehrabian, “Silent Messages” - A Wealth of Information About Nonverbal Communication (Body Language) (2009), at <http://www.kaaj.com/psych/smorder.html> (“Please note that this and other equations regarding relative importance of verbal and nonverbal messages were derived from experiments dealing with communications of feelings and attitudes (i.e., like-dislike). Unless a communicator is talking about their feelings or attitudes, these equations are not applicable.”). Nonetheless, the importance of this rule is still significant here in mediation, where feelings and attitudes towards any incident play a significant role in potential resolution.

- <sup>9</sup> MADONIK, *supra* note 2, at 3.
- <sup>10</sup> *Id.*
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.*
- <sup>13</sup> Mohamed Elfatih and Dr. Mohamed Ouakrime, *The Role of Nonverbal Communication in Beginners’ EFL Classrooms*, *passim*, at <https://files.eric.ed.gov/fulltext/ED491813.pdf>.
- <sup>14</sup> DARWIN, *supra* note 3, *passim*.
- <sup>15</sup> CONCISE OXFORD DICTIONARY 1508 (10th Ed. 1999).
- <sup>16</sup> MADONIK, *supra* note 2, at 41.
- <sup>17</sup> Vicki Ritts & James R. Stein, *Six Ways to Improve Your Nonverbal Communication* (2006), at <https://paperap.com/paper-on-six-ways-to-improve-your-nonverbal-communications/> (“Students report that they learn less and lose interest more quickly when listening to teachers who have not learned to modulate their voices”).
- <sup>18</sup> *Id.*
- <sup>19</sup> See, e.g., Dr. Fahad Hanif Khan et al., *Patient Attitudes Towards Physician Nonverbal Behaviors During Consultancy: Result from a Developing Country*, at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4041264/#B14> (concluding that eye contact should be “brief but regular” because approximately a third of the examinees reported that “prolonged staring made them uncomfortable”).
- <sup>20</sup> *Id.*
- <sup>21</sup> *Id.*
- <sup>22</sup> This subsection cites to no sources as it is based on our own observations and techniques for understanding nonverbal communication.
- <sup>23</sup> MADONIK, *supra* note 2, at 44.
- <sup>24</sup> *Id.* at 20.
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.* at 44.
- <sup>27</sup> Ritts, *supra* note 17.
- <sup>28</sup> Marilyn K. Lesmeister, *Working with Others: Developing Trust and Cooperation*, FCS9212 Dep’t of Family, Youth & Cmty. SCIS. (Aug. 2005), <https://ufd-cimaging.uflib.ufl.edu/IR/00/00/33/47/0001/FY74800.pdf>.



<sup>29</sup> MADONIK, *supra* note 2, at xvi.  
<sup>30</sup> Richard Salem, *Trust in Mediation*, BEYOND INTRACTABILITY (July 2003), [http://www.beyondintractability.org/essay/trust\\_mediation/](http://www.beyondintractability.org/essay/trust_mediation/).  
<sup>31</sup> MADONIK, *supra* note 2, at 150.  
<sup>32</sup> *Id.* at 151.  
<sup>33</sup> *Id.* at 150-51.  
<sup>34</sup> *Id.* at 150.  
<sup>35</sup> *Id.*  
<sup>36</sup> *Id.* at 151.  
<sup>37</sup> *Id.*  
<sup>38</sup> MADONIK, *supra* note 2, at 60.

<sup>39</sup> *Id.* at 151.  
<sup>40</sup> *Id.* at 153.  
<sup>41</sup> *Id.* at 151.  
<sup>42</sup> *Id.*  
<sup>43</sup> *Id.* at 158.  
<sup>44</sup> *Id.*  
<sup>45</sup> *Id.*  
<sup>46</sup> *Id.* at 150 (“These distances depend on people’s culture, the occasion, and people’s preferred representational systems.”).  
<sup>47</sup> *Id.*  
<sup>48</sup> *Id.* at 44.  
<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 44-45.  
<sup>51</sup> *Id.* at 58-59.  
<sup>52</sup> *Id.*  
<sup>53</sup> Obviously, children do not always respond to nonverbal or verbal signals. Regardless of the child’s response the child is likely to understand what the nonverbal anchor means.  
<sup>54</sup> *Id.* at 59.  
<sup>55</sup> *Id.*  
<sup>56</sup> *Id.*  
<sup>57</sup> *Id.*



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