

*“Wordless Persuasion”:
The Neuroscience Based Skills that Provide the Key
to Connection with Jurors.*

Gestures are "an elaborate and secret code that is written nowhere, known to none, and understood by all." Edward Sapire¹

For most lawyers the practice of law and litigation is all about the use of written and spoken words to persuade jurors and judges to deliberate and return a favorable verdict. Connecting with jurors requires more than words.

Just as word choice and delivery are important, people are also affected by gestures, physical position, eye contact and facial expressions. These forms of persuasion are generally an unplanned part of a trial presentation. A studied reflection on the literature and neuroscience suggests that the use of the techniques of gesture, eye contact, and facial expression should not be left to chance. “Wordless Persuasion” has been used by many attorneys successfully (often unconsciously) for decades. Until recently, no one could do more than speculate about the connections that we now know exist between gesture, speech, facial expression and its effect and jurors.² As we will discuss, some of the accepted folklore about persuasion is wrong and counter-productive.

¹Sapir, E. (1949). The unconscious patterning of behavior in society. In D. Mandelbaum (Ed.), Selected writing of Edward Sapir in language, culture and personality (pp. 544-559). Berkeley: University of California Press.

² William C. Costopoulos, **Persuasion in the Courtroom**, 10 Duq. L. Rev. 384 (1972).

The skills and insights that allow some successful practitioners to consistently get large verdicts goes beyond their ability to talk, use exhibits or conduct jury research. .
“Wordless Persuasion” is what makes some “ordinary” lawyers extraordinarily effective. The “why and how” of creating connections with jurors is the subject of this study.

The classic quote from Howard Nations “Who played me?”³ illustrates the important principle that connection with a jury is not discussed or measured in opposition focus groups or surveys and is consistently underestimated by opposing counsel.

The key element that differentiates those of us who prepare and “check all the boxes” and those who consistently get remarkable results is this:

Connection with Jurors

[Insert 3 Quotes that connect large verdicts with juror connection - from large verdict attys (Dan picks), examples as follows]

“I don’t think I’m any better than other attorneys who work hard on their cases, other than I put a lot of emphasis on connecting with the jury and it makes a difference.”

- Big Verdict atty #1

“Once I learned how to connect with juries, everything changed.”

³ After Howard Nations received a substantial jury verdict in a hotly contested case, one of the lawyers on the defense team commented “Congratulations, but we don’t understand what happened. We focused this case 5 times and never lost.” Howard’s response was “Who played me?”

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Big Verdict atty #2

“Connecting with juries wasn’t natural for me, but I learned how and I practiced, it’s second nature to me now.”

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Big Verdict atty #3

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Mirroring Can Help Create/Reinforce Connections with Jurors.

After decades of research, neuroscience has established that speech and gesture are connected. When there are disruptions (injury) to parts of the brain that control hand movements, speech comprehension is affected.⁴ Gestures become strongly integrated into our understanding of a message because our brains process both gesture and speech as equally relevant and informative components of language.⁵ The neural relationship between speech and gesture was first confirmed with the discovery of “mirror neurons” in the brains of monkeys that showed a measurable activity in a particular part of the brain whenever a monkey would make some manual movement, and then reproduce the same neural spike when the monkey saw another monkey doing that same movement. The human brain has similar “mirror” properties. The brain regions that process speech also process actions made with the hands. When we interact

⁴ Kelly SD, Manning SM, and Rodak S **Gesture Gives a Hand to Language and Learning: Perspectives from Cognitive Neuroscience, Developmental Psychology and Education** *Language and Linguistics Compass* 2 (2008): 10.1111/j.1749-818x.2008.00067.x Journal Compilation © 2008 Blackwell Publishing Ltd

⁵ Supra, p.311

with others, we will unconsciously mirror their posture, their head position, their use of arms and gestures. In practice it is important that mirroring is not mimicry.

“ It is important for the learner to understand the difference between imitating and mirroring. In response to the patient who crosses his/her left leg over the right, the imitator will duplicate the patient’s movement by crossing his/her left leg over his/her right. However, the physician practicing physical mirroring will do the opposite by crossing the right leg over the left, as if the patient was looking in a mirror. In teaching learners to use physical mirroring techniques, office-based teachers should remind learners that a key aspect of physical mirroring is to be subtle and inexact since being obvious may decrease rapport. Therefore, the physician’s mirroring should lag behind the patient by a few seconds to several minutes.”⁶

Mirroring has been proven to build rapport in repeated studies⁷. When mirroring is observed among multiple members of a group (like those in a jury box) it only makes sense to adopt the same mirror. While physical mirroring had become a well known technique among lawyers, a more valuable tool for juror connection is emotional mirroring. Emotional mirroring suggests that we should not ignore the emotional state of jurors when we want to make a connection.⁸ During the early stages of trial when

⁶ Teaching Learners to Use Mirroring: Rapport Lessons From Neurolinguistic Programming John Clabby, PhD; Robert O’Connor, MD, *Family Medicine Vol. 36, No. 8 541 2004*

⁷ c LYN M. VAN SWOL The Effects of Nonverbal Mirroring on Perceived Persuasiveness, Agreement With an Imitator, and Reciprocity in a Group Discussion *COMMUNICATION RESEARCH*, Vol. 30 No. 4, August 2003 461-480 DOI: 10.1177/0093650203253318

Who Is Controlling the Interaction? The Effect of Nonverbal Mirroring on Teacher-Student Rapport, Zhou Jiang-yuan Binghamton University—State University of New York, Guo Wei Beijing University of Technology, Beijing, China, *US-China Education Review A 7 (2012) 662-669*

⁸ Fausto Caruana and Italo Testa, *Habits, Pragmatist Approaches from Cognitive Science, Neuroscience, and Social Theory*, Cambridge University Press, 2021, Chapter 3, page 79-80, Emotional Mirroring Promotes Social Bonding and Social Habits.

jurors may be anxious and tentative, creating a connection means mirroring their voices, their tentativeness rather than blowing into the voir dire exercise with “lights and sirens”.⁹

Not All Gestures Will Connect You With Jurors

For the purpose of this paper, we are not talking about the ordinary, conversational gestures made when we speak. These gestures are called “Batic gestures”. They are typically simple, brief, often repetitive, and are coordinated with the rhythm, stress, or intonation of speech. When gestures are unrelated to the conceptual content of speech, they may become a distraction affecting the comprehension of the speech and message.¹⁰

Lawyers Can Use Gesture to Improve Jurors’ Comprehension.

For persuasion we focus on the category of gestures are that are called “Lexical” (or representational) gestures. These gestures maybe more complex and more varied, but most importantly they are connected to the ideational content of the accompanying speech. When speakers talk, they gesture, and those gestures can have a positive effect on communication. Listeners are more likely to deduce a speaker’s intended message

⁹ Dan Ambrose is the first person I know who recommended the use emotional mirroring in jury selection.

¹⁰ Rauscher FH, Krauss RM, Chen Y. **Gesture, speech, and lexical access: The role of lexical movements in speech production.** Psychological Science. 1996; 7:226–31.

when speakers gesture than when they do not gesture.¹¹ There is strong evidence that gestures affect listeners' comprehension of speech. When gestures express information that is redundant with speech, they contribute to successful comprehension¹² Even when a gesture is completely redundant with the accompanying speech, listeners may attend to the gesture as an alternative source of information when they cannot understand the speech.¹³ Because of its global properties, gesture can provide an overarching framework that serves to organize ideas conveyed in speech, in effect chunking mental representations to reduce the load on working memory.¹⁴

Gesture Creates the Time and Reason to Connect with Jurors Individually

Courtroom opponents may not appreciate what a plaintiffs' attorney is doing non-verbally during trial. Speakers who gesture are rated as more competent and composed than speakers who do not gesture. Listeners may pay more attention to speakers who gesture than to speakers who do not gesture, and have better understanding of speech accompanied by gesture.¹⁵

Scripted Gestures have the same effects as Spontaneous Gestures

¹¹ Ping R, Goldin-Meadow S. Gesturing saves cognitive resources when talking about nonpresent objects. *Cognitive Science*. 2010; 34:602–19. [PubMed: 21564226]

¹² Goldwin-Meadow S. and Alibali Martha W. **Gesture's role in speaking, learning, and creating Language**, University of Chicago and University of Wisconsin at Madison *Annual Review Psychol.* 2013 ; 64: 257–283. doi:10.1146/annurev-psych-113011-143802.

¹³ Goldwin Supra, p. 299

¹⁴ Ping Ibid, p. 616

¹⁵ Marrichiolo F., Bonaluto M., Gnisci A, Gianluca F., **Effects of different types of hand gestures in persuasive speech on receivers' evaluations**, *Language and Cognitive Processes* 2009, 24 (2), 239-266

Some trial lawyers may want to be “authentic” or “natural” and just let things happen when it comes to the gestures they use. They may think the gestures are more effective when they are unscripted. From an observers (jurors) viewpoint this is not true. Studies find gesture has similar effects, regardless of whether the gestures are produced spontaneously or are scripted.¹⁶

The effects of gesture on communication appear to be long-lasting

Gestures not only aid immediate comprehension of a message but also strengthen the memory of the message over time. Gesture may improve conceptual understanding of the message to the point where the gesture can more effectively be applied in a new situation.¹⁷

Spontaneous “natural” gestures can be distracting and should be avoided.

Without training and practice, most of us will revert to whatever style of gesture we have learned and used repeatedly in our past, but many gesture and speaking habits used in casual conversation are not persuasive or appropriate when working with juries.

There are several “rules” to adopt as part of your gestures tool box.

First, unless you have a specific, planned use for your hands:

¹⁶ Hostetter AB. **When do gestures communicate? A meta-analysis.** Psychological Bulletin. 2011; 137:297–315. [PubMed: 21355631]

¹⁷ Supra, Hostetter p. 311

“...their job is to touch the sides of your pants or skirt.”¹⁸

When there is a time and reason to use your hands, use them but. don't cover your face, don't touch your face, don't fiddle with your hair, don't pick your nose etc.

Second, Unscripted use of the hands/gestures can interfere with your message, e.g. get jurors thinking about something other than your words. Here are some simple examples of what a gesture might prompt in the thoughts of a juror, taking them completely off the message you are trying to communicate:

The Fig leaf (“I have nothing to hide”, “I’m completely open”)

Crossed Arms for long stretches of time (“I’m listening”, “I agree”)

Tenting hands in prayer position (“I’m plotting..,waitng for you to stop talking”)

Clasping hands behind back (“Parade Rest”, “I’m going to bust loose...”)

Jangling change in pockets (“What you say is important to me”)

Pointing with index finger (accusation, scolding)

Third, hostile, threatening or aggressive language or gestures will distract jurors from your message. How long after that occurs until the jurors are listening as opposed to thinking about what just happened?

What Kinds of Gestures Can be Used to Connect with Jurors?

¹⁸ Ball, David Theater Tips and Strategies for Jury Trials, 2nd ed. NITA, 1997 p. 5-6

Here are some basic gestures that can be used for connection:

One extended open hand (“help me”) - extended toward the juror to whom the question is addressed.

One (open) hand sweeps across the entire venire to indicate “all of us”

One open hand (“me”, “help me”) palm down over but not covering your chest.

Two open hands, palms outward at waist level - please, begging, e.g. “Haven’t we all done this?” “Will your help me?”

Gestures Must be Combined with Eye Contact To Connect with Jurors

Gestures should always combined with eye contact in addition to words. The key is that the gesture and eye contact must be directed to a one juror at a time to create a connection, and with a group question accompanied by a slow scan of the entire group.

If we think of a gesture as a direct wired connector between a lawyer and a juror, then three things happen:

1. Gestures and the spoken message are directed to one juror at a time, even when parsing of the message into smaller chunks is required.
2. The gesture includes eye contact/ connection to 1 juror at a time.
3. The process of gesture and connection slows down speaking.

Practice Pointer: Use gesture to connect with each juror, and to slow down your speech.

***Broad smile = Warmth,
Smaller smiles = Competence***

Smiling affects judgments of both warmth and competence. People who express genuine smiles are perceived to be kinder, more sociable, more honest (Thornton 1943), more pleasant (Mueser et al. 1984), more carefree (Deutsch, LeBaron, and Fryer 1987), and more polite (Bugental 1986) than people who do not smile. Smiling increases judgments of credibility and trustworthiness.¹⁹

Findings provide consistent support for the hypothesis that individuals displaying broad smiles tend to be judged as warmer but less competent than those displaying slight smiles. These effects are robust across different sets of stimuli and different measurements of warmth and competence.²⁰

Practice Pointer: A warm smile (not exaggerated or ear to ear) will aid persuasion and your ability to make eye contact and connect with jurors.

¹⁹ Face Value and Cheap Talk: How Smiles Can Increase or Decrease the Credibility of Our Words
Lawrence Ian Reed, Rachel Stratton, and Jessica D. Rambeas
Evolutionary Psychology
October-December 2018: 1–9

²⁰ Ze Wang Hui Fang Mao Yexin Jessica Li Fan Liu, **Smile Big or Not? Effects of Smile Intensity on Perceptions of Warmth and Competence** Oxford University Press on behalf of Journal of Consumer Research, Inc. Vol. 43, 2017 DOI: 10.1093/jcr/ucw062

Using Eye Contact for Connection with Jurors

(Use Direct Eye Contact of 5 seconds or less)

“Jurors told us after [the trial] that they loved that we looked them each in the eye and spoke to them as people, while the D yelled at them and ‘wouldn’t look us in the eyes, like they were scared or hiding something’ ”. - Robert Collins, atty, commenting on a trucking case tried in El Paso, Texas in March 2023 that resulted in a \$10M verdict.

Effective eye contact is the most difficult skill to master with juries. Like the soup eaten by Goldilocks it’s likely to be “too hot” (too much), “too cold” (too little), and only occasionally is the eye contact used in trial “just right”.

Eye contact is one of the most effective forms of nonverbal communication and connection, *but it can be overdone*. Typically eye contact indicates interest and attraction and helps build rapport in social interactions.²¹ Past research and accepted folklore has suggested that more eye contact might be better and that a speaker who used more eye contact would be perceived as more persuasive. **It’s not true. Just the opposite.**

Direct eye contact is used across species in competitive or hostile interactions to assert dominance and intimidate others. Normal eye contact is intermittent and of varying duration²² That’s what jurors expect. Why would it be any different among jurors?

²¹Effects of Duration of Eye Contact on Judgments of Personality Characteristics, Charles I. Brooks, Michael A. Church, Lance Fraser, The Journal of Social Psychology, 126(1), 71-78

²² Supra. P. 2260 In the eye of the Beholder

When jurors are exposed to someone who attempts to force extended eye contact they become unreceptive.

Michael Ellsberg writes that good eye contact is based on the principle of “mutuality,” as he has said, “In order for eye contact to feel good, one person cannot impose his visual will on another; it is a shared experience.”²³

The amount of eye contact *decreases* the success of persuasion.

When tested on duration of eye contact, participants were less receptive to the message and less open to future exposure to the view presented when they maintained eye contact with the speaker over longer periods of time.²⁴ Intentionally maintaining direct eye contact led to less persuasion than did gazing at the mouth (or the knot of their tie, nape of the neck, etc.). These findings suggest that maintaining eye contact for periods longer than a few seconds may be counterproductive when working with jurors.²⁵

Limit direct eye contact 5 seconds at a time, break off and then return.

Unless someone is very comfortable with you, 5 seconds is a good limit for direct eye contact (that’s enough for a single sentence). Instead of constant staring it’s ok to look away and come back, but you can also maintain the connection by looking at one eye at

²³ The Power of Eye Contact, Michael Ellsberg, Harper Collins: New York, (2010)

²⁴ Supra. P. 2259

²⁵ In the Eye of the Beholder: Eye Contact Increases Resistance to Persuasion Frances S. Chen, Julia A. Minson, Maren Schöne, and Markus Heinrichs’ Psychological Science, 24(11) 2254–2261

a time, or looking at the mouth briefly and then one or both of the eyes again.²⁶ When there is any sign of discomfort, break off.

David Ball's Looking at the Jury²⁷

Caveat 1 - During openings, closings and testimony looking at one juror for more than a few seconds at a time can make the juror uncomfortable.

Caveat 2 - Jurors don't like to be stared at.

Caveat 3 - When a juror disagrees, your continued attempts to make eye contact will strengthen resolve against you.

Use Gaze Control to Give Jurors a Break From Direct Eye Contact

Using gesture to point to an exhibit, and moving your eyes to the portion of the exhibit you want jurors to see will generally result in the jurors doing the same. This is a good way to maintain connection with a juror without a risk of them becoming uncomfortable.

Gestures create the time for eye contact and juror connection

Practice Pointer: Connecting with jurors requires eye contact, but it must be mutual.

²⁶ <https://www.scienceofpeople.com/make-eye-contac/>

²⁷ Ball, David and Karon, Joshua Theater for Trial, Trial Guides: Portland: 2017, p. 88

Conclusion

Calm Hand Gestures, Smiling, and Moderate Eye Contact Increase Your Ability to Connect with Jurors

*"I use my eyes, I ask other jurors to share, I say 'thank you'. I go slowly"*²⁸

Nick Rowley, Trial by Human

Appropriate use of gestures, smiling, and eye contact, is the key to connecting with jurors. Unfortunately, trials are infrequent. Even when mastered one cannot maintain the level of skill required to connect with jurors in the next trial. Repeated practice before every trial is fundamental to connecting with jurors in a significant way.

***Practice Pointer: To Connect with Every Juror - Practice your
Gestures and Eye contact, and Force Yourself to Go Slow***

Script your Language, Gestures, and Eye Contact

The best, most persuasive speeches throughout history have been scripted, not spontaneous. Whether it is Lincoln, Churchill, or Cicero every persuasive speech given was written first As Cicero said "Eloquence comes from the written word."²⁹ Just as great speakers do not leave their volume, tone, speed, or rhythm to chance, neither should our "wordless persuasion" be random if our goal is to connect with jurors.

²⁸Rowley, Nicholas and Halteman, Steven Trial by Human, Trial Guides Publishing: Portland, 2013. p. 108

²⁹ Cicero, De Oratore

*Practice Pointer: Script your Gestures and Eye contact along with
your language*