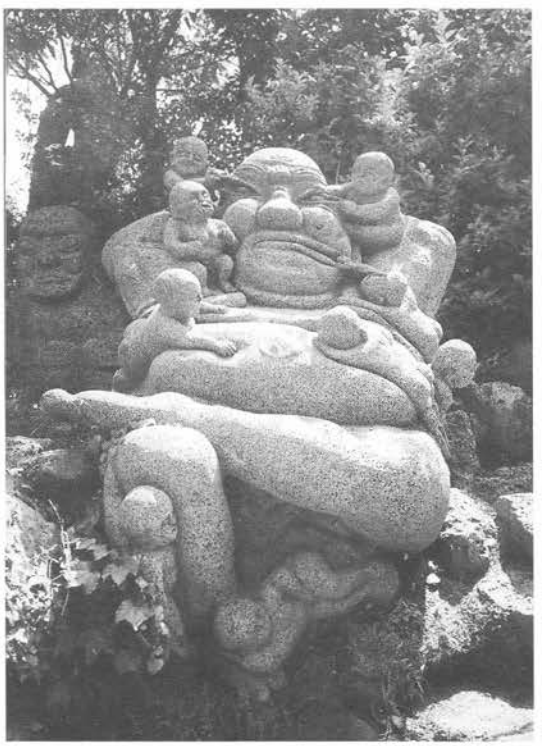
When Your Mouth Says Yes and Your Body Says No: Understanding Body Language in Mediations and Negotiations

by Danny Ciraco

the oldest language in the world

Before language, before writing, before any formalized communication process, there was, and continues to be, nonverbal communication. Nonverbal communication, more commonly referred to by its sexier name, body language, is something most people often overlook as a legitimate form of communication. This indifference is ironic since the act of conveying a message is more than 50 percent nonverbal, and some list the figure higher than 90 percent.[1] Most of us do not consciously use the power of observation. We focus so much on verbal and written communication that we engulf ourselves in verbal ballets, forgetting to give credit to our other ways of communicating.

The importance of body language is strengthened by scholars who believe that gestures and speech develop together.[2] Gestures may facilitate activation of words, concepts, ideas, and images that can be used in message construction. A simple illustration is to observe someone on the telephone who continues to use facial expressions and gestures, even though their listeners cannot see them. The reason for this practice is that gestures accompanying speech may assist speakers in retrieving lexical items from memory.[3]



Photograph by Susy Kim

Understanding body language can be especially helpful to negotiators and mediators. My goal for this piece is not to prove that body language can be used as a foolproof way of reading people. Instead, I hope to show the reader the advantages of understanding nonverbal communication. However, we will also learn that body language is limited as a guide for use in mediation, as messages may vary depending on gender, cultural background, and other more general external forces. I will escort the reader through two mediations that I conducted in the Ontario Small Claims Court. I will highlight the nonverbal communication that took place in the mediation sessions and compare them with the settlement rates. The mediation sessions will be used solely as case studies to help contextualize nonverbal communication. The piece will be a compilation of my observations during mediation and not a scientific attempt of quantifying the correlation between body language and settlement. Keeping this in mind it is worth pointing out that my observations are limited to my own personal lens. As an Italian Canadian male, who is studying law at a Canadian university, my observations my be subject to significantly different interpretations than someone from a different social position. Equipped with this awareness, I am encouraged to turn to other studies and sources in the hopes of providing the reader with a richer awareness of ever present nonverbal messages.

Before dissecting body language, it may be helpful to the reader to offer a brief explanation of mediation in the Ontario Small Claims Court. Generally, mediation can be defined as "...the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs."[4] The Small Claims Courts at College Park and North York, in Toronto, have adopted a project wherein students from Osgoode Hall Law School gain mediation experience by mediating disputants' cases. The process is voluntary, and while judges may encourage parties to mediate, the disputants have the option of refusing mediation in favour of litigation.

a successful negotiation dressed in positive body language

The first mediation involved a woman, I will call her Ms. D'Agostino, who sued a paving company. Please note that the names of the participants have been changed to protect their privacy. Ms. D'Agostino argued that her driveway was improperly constructed which caused rain to drain toward her side door and into her house. As a result of this imperfection she hired another company to rip out the recently constructed driveway and pave a new one. She sued the first paving company for the cost of replacing the driveway. The plaintiff's daughter accompanied her to court. The defendant, Mr. Jones, was the owner of the business and he represented the paving company on his own.

During the initial stages of the mediation there was a noticeable degree of tension. Before the mediation Ms. D'Agostino admitted to me that she was very nervous because she had never been in court. I explained that mediation is different from litigation and she seemed a little more at ease, however, she did emit a strong sense of discomfort at the beginning of the mediation process. Immediately following the introductions there was little verbal exchange. Ms. D'Agostino sat very erect with her hands folded on her lap. This posture, which included straightening the head from a leaning

position is often interpreted as an indication of disagreement, while a sideways leaning head is more closely associated with agreement.[5] She relaxed her posture once she began explaining what happened, growing more comfortable as we (the mediators) showed interest in her story. When Mr. Jones spoke, however, Ms. D'Agostino returned to her tense position. It was clear that the plaintiff was not comfortable and was not ready to listen to the defendant.

The most interesting aspect of the mediation for me was watching people's postures change, depending on who was speaking. As soon as the defendant began to explain his side of the story the plaintiff's daughter crossed her legs and avoided making eye contact with Mr. Jones. The act of crossing one's legs is often interpreted as a desire to shut someone out.[6] And looking around can indicate a desire to get away.[7] The daughter's action seemed like an obvious rejection of information; an external indication of the desire to shield oneself. The daughter crossed her legs at the knee; whereas crossing the legs above the knee could have been interpreted as a more determined outward show of resistance.

In order to analyze leg crossing, it will be helpful to highlight the different styles of carriage, because simply sitting with crossed legs does not necessarily constitute a closed posture; much of the way this is interpreted depends on how the legs are crossed, as only certain ways of crossing the legs are associated with disagreement. Legs might be crossed at the ankles, at the knee, above the knee, or with one ankle on the thigh. In particular those affectations where the legs are tightly crossed, and form the most "closed" leg position, are typically associated with disagreement.[8] In addition, clamping the crossed leg firmly into position by the hand, has been associated with obstinacy. This pose is the unconscious reaction of someone who is resisting persuasion in a discussion. The gesture says, "My ideas, like my body, are clamped firmly in position."[9] Ms. D'Agostino's legs were tightly crossed, and were indeed clamped firmly by her hands.

Mr. Jones, on the other hand, was more relaxed and sat comfortably in his chair when he told his story. Even though his comments were somewhat condescending, and may have been seen as dismissive of the plaintiff's concerns, his demeanor helped to ease the tension. Mr. Jones was displaying an open posture showing a physical openness that reflects a psychological openness. Open posture involves a lack of muscle tension; tension is often evident in eyebrows, mouth, shoulders, or hands. Connected to openness is the perception of power. Power and leadership are associated with an expansive, casual, and relaxed demeanor.[10] Adopting an open or "plus" face posture — slightly raised chin, raised brow, widened eyes, relaxed mouth — is highly predictive of success in conflict situations of people from ages 4 to 45.[11] The overall indication: Mr. Jones was much more comfortable than the plaintiff and her daughter.

As the mediation continued the tension decreased. The parties began to warm up to each other and Ms. D'Agostino, who was originally displaying notable negative body language, became more comfortable. The parties drew closer to a settlement. Mr. Jones explained that he was interested in settling in order to avoid going to trial. He leaned in toward Ms. D'Agostino and apologized.

Leaning itself can send messages about your feelings. A forward lean is seen as a more positive, empathic posture, while a backward lean is not. Mediators may want to note that in an experiment involving interviewers and body language, forward leaning interviewers were judged as more polite and "flexible" than backward leaning interviewers.[12] Leaning inward is a way to build trust and rapport as are other forms of nonverbal feedback such as nodding the head slowly and maintaining steady eye contact while listening. All seem to signal that you value the information that is being shared with you.[13]

Another form of nonverbal signal is touch. Coupled with his forward lean, Mr. Jones reached out to touch Ms. D'Agostino's hand as he apologized. At first I thought this gesture would create discomfort for the plaintiff, however she responded positively. That moment, I think, was the turning point in the mediation because it seemed to signal that the parties had built some rapport.

Certain studies in fact have confirmed that casual touching can create positive connections between people. For example, in one study male and female library clerks returned library cards to some students by placing their hand directly over the other's palm, making physical contact; other students were not touched. Outside the library, the students were approached by a researcher and asked questions about their feelings toward the library clerk and the library in general. Students who were touched, especially the females, evaluated the clerk and the library significantly more favourably than those who were not touched. This reaction was true both for students who were aware of being touched and those who were not.[14] Other studies of brief touches conclude with similar results; servers who touched diners, for example, earned better tips.[15]

This is not to say that everyone will feel comfortable with touch. According to a study at Oklahoma State University, researchers found that females are generally more comfortable than men with touch, perhaps because women are more likely to interpret touch in affectional rather than sexual terms.[16] The study also found that touch comfort is associated with satisfaction with life, with oneself, and with one's childhood, as well as with self-confidence, assertiveness, socially acceptable self-presentation, and active rather than passive modes of coping with problems. The danger with touching however, is that it may distance the parties in a mediation or a negotiation by creating a power imbalance. The reason for this discrepancy is that the initiator of the touch is seen as the person with greater power if the touch is nonreciprocated.[17] Often these touches are used to influence others and are referred to as compliance touches.[18] In our case study example Mr. Jones may have in fact strengthened the relationship with Ms. D'Agostino simply by touching her hand. Of course if Ms. D'Agostino did not feel comfortable with being touched, that same act may have destroyed the rapport, negatively affecting the negotiations.

Another way people build rapport is through "mirroring," a phenomena which emerged between the parties as the mediation continued. Mirroring involves adopting nonverbal behaviour patterns similar to those of the person with whom you are interacting. Put simply, mirroring does not mean the same posture, but rather a reflection of the posture. When you begin behaving in a way other people are comfortable with, their perception of your similarities tends to increase as well, which may be attributed to our tendency to like and trust people who are similar to us.[19] Also, by moving your body like someone else's you may be able to relate better to them.[20]

The parties eventually agreed to settle and the mediation concluded. In fact, a strong sense of comaraderie developed. An outsider who had not seen them come into the mediation might never have dreamed that these were people at odds. The parties were recreating a positive relationship and Ms. D'Agostino jokingly grabbed the arm of the defendant and told him that he now had to take her and her daughter out for lunch.

a less successful negotiation bruised with negative body language

The second mediation, involving three parties, was more complicated and was not as successful as the previous one. This case involved a private in-house nursing company who sued a ninety year old woman, Ms. Keil, for an unpaid bill. Ms. Keil in turn sued the hospital that she claimed hired the private nurse on her behalf without properly informing her that she would have to pay for the services.

It is worth noting that not all the parties were immediately interested in mediation. Prior to the mediation the lawyer for the nursing company, Mr. Chow, while waiting in the hall, said to the other parties (all of whom were represented by lawyers) that he did not believe in this "mediation stuff." I confronted Mr. Chow and explained that mediation was a voluntary process and that if he did not feel comfortable with it he could opt out and the case would simply be referred back to trial. The lawyer was taken aback by my forwardness, and replied by saying, "We might as well try it — the judge won't hear us for a while anyway." The lawyer's negative comment might be interpreted as "goal setting." Goal setting is defined as acting in a way so as to impress others with an image of who you are and how you can be expected to behave.[21] As it was explicitly made in listening distance of the other parties Mr. Chow's comment, rejecting mediation, may have been a goal setting strategy to convince the opposing parties that he was confident and ready to go to trial. This behaviour may have been intended to intimidate the other parties and encourage them to settle in his favour.

Although I cannot know for certain whether that was Mr. Chow's conscious intention I was fairly certain that this mediation would not reach an agreement. To begin with none of the participants displayed open posture; they were all very formal and rigid. This may have been partly a result of the lawyers' involvement in the mediation; lawyers who consistently steered the discussions towards legal issues and rights, as opposed to exploring a mutually satisfactory resolution. Rigidity was particularly evident in the parties' hands. At the mediation table, one of the lawyers held his hands together in a prayer like fashion, while the other two lawyers had their hands on their lap out of view of the other participants. Hands are often the part of the body that we tend to hide when we feel vulnerable. Showing an open palm is an especially appropriate way to express your trustworthiness. We often show our palm as a friendly gesture when we greet people, shake hands, and ask for understanding.[22] In the mediation the lawyers' body language seemed to be saying that they were either uncomfortable, had something to hide, or both.

When it became clear that the negotiations were not progressing we decided to meet with the parties separately where they confirmed what I had perceived. The parties all felt as though the others were withholding valuable information. One lawyer explained that the others were probably not being as open as one hopes in mediation because they were set on going to trial. In the lawyers' eyes, saying too much in the mediation may have strengthened their opponents' case in court, even though the information revealed in mediation is not supposed to be used in court.

The parties did not discuss whether each others' actions were intentional, nonetheless I thought it would be interesting to analyze their body language to see if they displayed behaviours typically associated with deceit. Ms. Keil's lawyer, Mr. Papadopoulos, argued that the hospital had ordered the private nurse without her realizing that she would have to pay for the service. Mr. Papadopoulos asked the lawyer for the hospital, Ms. Ledgerwood, whether she had any record of the nurse making the phone call to the private nursing company. Ms. Ledgerwood began to shuffle through her notes that sat in her lap, she periodically covered her mouth while speaking, generally appeared tense and stiff with an overall feeling of greater physical restraint, she experienced several awkward pauses in her speech, and often shook her head. Ms. Ledgerwood's actions were similar to those often observed during acts of deception.

It may help at this point to describe different affectations observed in people known to be participating in deception. For example, deceivers tend to be uncertain and vague, nonimmediate and reticent (i.e. they respond more slowly), display greater arousal and lack of composure, and generally make a poorer impression than truth-tellers. Their behaviours also tend to connote greater formality and submissiveness.[23]

With this in mind, let's return our attention to the case of Ms. Ledgerwood. Shuffling papers in the lap may be interpreted as a closed posture. We have natural tendencies to protect our soft, vulnerable organs located in the abdomen, especially when we are in stressful situations. This propensity closes us off to our audience and creates a psychological distance. Standing with your abdomen unobstructed is a more courageous posture, reflecting self-confidence, fearlessness, and a receptive mind.[24] Another obstruction, which Ms. Ledgerwood practised, is covering the mouth while speaking, which may indicate uncertainty, or that one is concealing something.[25]

Ms. Ledgerwood also displayed evidence of increased physical restraint. Commonly, people tend to inaccurately associate an increase in movement with deception.[26] For instance, most people assume lying to be signaled by agitation, fidgeting, and hyperactivity. However, this is not generally the case. Deception is actually more often associated with a decrease in subtle movements of hands, fingers, feet and legs.

When it comes to explaining the correspondence between decreased physical movement and deception, there are two schools of thought. According to one theory, referred to as the "attempted control framework," physical rigidity is caused by over consciousness of one's movements, leading to more calculated attempts to control them. On the other hand, the "cognitive load framework" attributes the decrease in physical movements to the preoccupation of the individual's mind in the cognitive process of lying.[27] The attempt to lie distracts the individual's attention, which results in a decrease in physical expression. Deceptive sources must be careful to produce responses that are not only believable but also consistent with known facts and previous statements, while truth-

ful messages require only that sources recall relevant information and convey it to others.[28] Such cognitive distraction has also been invoked to explain the kind of pauses in speech which accompanied Ms. Ledgerwood's physical restraint. Other frequently observed behaviours connected with physical restraint include: raised vocal pitch, tense vocal cues that signal heightened anxiety, micromentary unpleasant facial expressions, and head shaking. In particular, shaking the head may reveal underlying negative feelings, possibly due to guilt about deceiving or fear of being detected.[29]

Regardless of whether Ms. Ledgerwood was actually lying, the parties seem to have read these deception cues and sensed that she was not being entirely truthful. If deception was involved, the above interpretation of Ms. Ledgerwood's actions should not be taken to suggest that everyone deals with deception in the same way. For example, people who place a high value on honesty may exhibit different nonverbal behaviours during deception compared to those who do not abide by the principle of veracity. Practiced liars and those possessing alternate frameworks of morality—often referred to as Machiavellian personalities—may be more comfortable producing deceptive messages, more experienced with deception, and consequently less likely to hesitate when questioned.[30]

Another type of personality which might be misread by the criteria which have been applied in reading Ms. Ledgerwood's body language is the self-monitor. Self-monitoring refers to an individual's tendency to monitor and respond to social cues while interacting with others. High self-monitors are social chameleons who routinely adjust their communicative behaviour to meet the social protocols of particular situations—and therefore can make exceptional liars. Low self-monitors are less attentive to social cues, less concerned with social appropriateness, and more likely to maintain a constant pattern of interaction across various situations. In other words, self-monitoring affects the production of a control of nonverbal behaviour during deception; while someone with a weak degree of self monitoring may act rigid during deception, a self-monitor may be able to act more casual and relaxed.[31]

The parties in this mediation did not reach a settlement and so their case proceeded to court. Although most disputants in a mediation approach the mediation with uncertainty and sometimes even an unwillingness to negotiate, which is reflective in their body language, the parties in this dispute showed almost no change in attitude. Rapport did not develop and distrust fermented throughout the negotiations.

body language blemishes

Although awareness of body language may provide clues to the unstated dynamics operative in a negotiation this cannot be seen as a foolproof means of evaluating any communicative interaction. The reality is that we cannot create a body language dictionary to define nonverbal cues; there are just too many variables to be taken into account. Someone crossing their arms is not necessarily saying that they disagree, it may just be that the room is too cold for them.[32] We must also remember to consider the situatedness of the receiver's perception. What we as receivers see and interpret is dependent in part on our way of perceiving the world; not all of us have the same map of reality. In other words, body language must be analyzed in context.

Aside from individual differences in perception which arise between members of the same social situation, we must also keep in mind that geographic and cultural environment is a powerful force in determining nonverbal behaviour. By judging body language through our own particular lens we may arrive at a distorted understanding of someone's nonverbal messages. European males for example, typically cross their legs at the knee, stacking one knee above the other; a posture which may seem effeminate to some Americans. American males tend to rest the lower thigh or ankle of one leg on the knee of the other in what has been called the "figure 4 position". Even some American women assume this position when wearing slacks or jeans. Many Europeans consider the American way boorish for men and lesbian behaviour in women.[33] Another example of contextually-specific body language involves personal space. In the United States, most people are comfortable with a personal space of 2 feet, but this zone can be as close as 6 inches in Mediterranean countries, and as far as 3 or 4 feet in Scandinavian countries.[34] The issue of touch can also be contextually specific. For example, French-Canadians, Italians, and Latin Americans are generally more tactile in person than English-Canadians, Germans, and Americans.[35]

Some cultures place more emphasis than others on nonverbal communication. For instance, much Japanese custom incorporates a consciousness of body language to some degree. As an example, to avoid offending or embarrassing others in conversation, some Japanese people will often say what they feel the other person wants to hear (called tatemae) but send more subtle nonverbal cues which dictate their true feelings (called honne). A Japanese manager might politely address an employee's business proposal by saying: "I will think about that," while sending nonverbal signals that he or she is not really interested.[36]

These are only a few cultural and geographic differences, and the distinctions do not stop at culture; there is also the matter of gender. According to data from observational research, a number of nonverbal gender differences have been found. Women for example, tend to smile and laugh more than men. Women are also typically better nonverbal encoders and decoders, especially of facial expressions.[37] Besides these findings based on research, both men and women actually tend to believe that females are better communicators. Women are type-cast as more expressive and involved than men, and as more skilled at sending and receiving nonverbal messages. Men on the other hand are stereotyped as louder and more interruptive, and characterized by more nervous, dysfluent behaviours.[38]

While I feel that body language should always be viewed in context and with caution, and while the array of complications emerging in this discussion may appear daunting, I have not intentionally built a castle out of playing cards in order to blow it down. I do believe that attention to body language does have its merits when it comes to interpreting the dynamics of negotiations and mediation. The two case studies described in this essay help us contextualize the interpretation of nonverbal communication. Although the interpretations of these cases may seem somewhat oversimplified, they clearly serve as illustrations of the ways in which attention to body language may help us to understand the patterns of interactions and communication which emerge during negotiations and mediation. By tuning ourselves into nonverbal cues such as "forward leaning" or "mirroring", we also improve our reception to unstated signals. Of course, perhaps the most important thing to remember is that nonverbal communication is a two way street. While you may be focussed on analyzing someone's demeanor, they may be noting the way you shuffle paper nervously in your lap. So the next time you speak with someone and take a momentary pause to consider what it means when they touch their nose while crossing their legs, with a nervous tic on a Tuesday, remember that they are also receiving your nonverbal cues... and your distraction may be misunderstood.

Notes

1 Richard Klein, "Winning Cases with Body Language," Trial October 1993, at 56.

2 Birdwhistell, 1970; Freedman & Steingar, 1975; Kendon, 1980, 1983; McHeill, 1985, 1992; McNeil & Levy, 1982; Poyatos, 1983, 1992; Rime & Schiarature, 1991 as noted in Judee K. Burgoon, David B. Buller, and W. Gill Woodall, *Nonverbal Communication The Unspoken Dialogue*, Second Edition, (New York: McGraw-Hill, 1996) at 170.

3 Chawla & Krauss, 1994; Krauss et all., 1991 as noted in Ibid. at 171.

4 J. Folberg, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, (San Francisco: Jossey-Bass, 1984) at 7.

5 Peter E. Bull, *Posture and Gesture*, International Series in Experimental Social Psychology, Volume 16, (New York: Pergamon Press, 1987) at 65.

6 Herald Price Fahringer, "'Mirror, Mirror on the Wall...' Body Language, Intuition, and the Art of Jury Selection," American Journal of Trial Advocacy Vol. 17 at 202.

7 Supra note 1 at 57.

8 Supra note 5 at 67.

9 Desmond Morris, *Body Talk: The Meaning of Human Gestures*, (New York: Crown Trade Paperbacks, 1995) at 152.

10 Constance Berstein, "Winning Trials Nonverbally: Six Ways to Establish Control in the Courtroom," *Trial*, January 1994 at 62.

11 Mary E. Ryan, "Good Nonverbal Communication Skill Can Reduce Stress," *Trial*, January 1995, at 71

12 Haase and Tepper, 1972; *Shiraishi*, 1974 as noted in Supra note 5 at 24.

13 Supra note 11 at 73.

14 Fisher, Rytting & Heslin, 1976 as noted in Mark L. Knapp and Judith A. Hall, *Nonverbal Communication in Human Interaction*, Third Edition (Fort Worth: Holt Rinehart and Winston, Inc. 1992) at 229.

15 Crusco & Wetzel, 1984 in Ibid. at 230.

16 Andersen & Leibowitz, 1978; Larsen & LeRoux, 1984 in Donald K. Fromme, William E. Jaynes, Deborah k. Taylor, Elaine G. Hanold, Jennifer Daniell, J. Richard Rountree, and Marie L. Fromme, "Nonverbal Behavior and Attitudes Towards Touch," *Journal of Nonverbal Behavior* 13(1), Spring 1989, at 4-5.

17 Summerhayes & Suchner, 1978 as noted in Supra note 15 at 235.

18 Ibid. at 247.

19 Supra note 11 at 72-3.

20 Wayne R. Maes, *The Cognition/Affect Linkage and the Unconscious in Cognitive Therapy*, as noted in Supra note 11 at 73.

21 Supra note 11, at 70-1.

22 Supra note 10 at 61.

23 Judee K. Burgoon and David B. Buller, "Interpersonal Deception: III. Effects of Deceit on Perceived Communication and Nonverbal Behavior Dynamics," *Journal of Nonverbal Behavior* 18(2), Summer 1994 at 155-82.

24 Supra note 10 at 61.

25 Supra note 1 at 58.

26 Alcert Vrij, Gun R. Semin, and Ray Bull, "Insight Into Behavior Displayed During Deception," *Human Communication Research*, Vol. 22 No. 4, June 1996 at 544-562.

27 Ekman & Friesen, 1972, as noted in Alcert Vrij, Gun R. Semin, and Ray Bull, "Insight Into Behavior Displayed During Deception," *Human Communication Research*, Vol. 22 No. 4, June 1996 at 546.

28 Miller & Stiff, 1993, as noted in James Stiff, Steve Corman, Bob Krizek, and Eric Snider, "Individual Differences and Changes in Nonverbal Behavior: Unmasking the Changing Faces of Deception, *Communication Research*, Vol. 21 No. 5, October 1994 at 562.

29 Buller & Burgoon, 1994; Knapp et al., 1987; Miller & Burgoon, 1982; Zuckerman & Driver, 1985 as noted in Supra note 29 at 161.

30 Exline et. all., 1970 as noted in Supra note 28 at 562-63.

31 Lennox & Wolfe, 1984; Snyder, 1974 as noted in Ibid. at 563.

32 Eric Oliver, "'Body Language' Means Elbow Grease," *American Journal of Family Law*, Vol. 10, (1996) at 44-5.

33 Marjorie Fink VarGas, *Louder Than Words: An Introduction to Nonverbal Communication*, (The Iowa State University Press, 1986) at 49, also see Supra note 9 at 153.

34 Supra note 1 at 56.

35 Supra note 33 at 89.

36 Steven L. McShane, *Canadian Organizational Behaviour*, Second Edition, (Times Mirror Professional Publishing Limited: Toronto, 1995) at 173-74.

37 Hall, 1984; Hall, 1978, 1984; Rosenthal et al., 1979 as noted in Nancy J. Briton and Judith A. Hall, "Beliefs About Female and Male Nonverbal Communication," *Sex Roles*, Vol. 32, Nos. 1/2, 1995 at 81.

38 Ibid. at 81. Also see Supra note 15 at 251.