

## “READING” THE JURY AS EVIDENCE UNFOLDS AT TRIAL

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*"A blur of blinks, taps, jiggles, pivots and shifts ... the body language of a man wishing urgently to be elsewhere.."*  
Edward R. Murrow, Television and Radio Journalist, b.1908-d. 1965.

Once voir dire concludes, the jury may be restricted from speaking to counsel, however, they certainly communicate through their expressions and mannerisms. Whether favorable or unfavorable, their non-verbal behavior indicates how they react to what they are hearing and observing. Unfortunately, some counsel are so engrossed with putting forth their client's evidence that they lose sight of what the jurors are tacitly saying with their body language. Experienced counsel stays attuned to the jury by “reading” their body language throughout the entire trial, and may alter trial strategy if necessary.

This newsletter reviews the variety of body language displayed by jurors during the different stages of trial. All of these expressions discussed are captured from two actual trials—one involving financial fraud, and the other an employment matter. Both trials lasted over six weeks. The lawyers who were on the receiving end of the unfavorable communications described below received losing verdicts. Therefore, this newsletter addresses certain non-verbal behavior *In Jurors Own Words (albeit tacitly)* and provides suggestions to ensure that more positive body language emanates from the jury box.

### Body Language Reflects Gestures and Emotions

Paying attention to body language develops counsel's skill in recognizing how jurors express their feelings and emotions, brings about a heightened awareness of the way in which jurors interact with each other, and provides possible insight into how jurors may try to negotiate, dominate, or manipulate each other in deliberations.

### Stages of Reaction to the Opening Statement, Examination of Witnesses, and Closing Argument

#### Some Disconcerting Reactions To Opening Statement, And Perhaps, To Counsel

At this initial stage of trial all is not lost when unfavorable body language may appear. If counsel starts out with a plodding style and slow pace in the opening statement, juror boredom begins to surface, most evident with the corners of jurors' mouths turned down. This telegraphs their distress and disapproval. Another possible disconnect with counsel begins when one, two, or more jurors continually scan the courtroom audience, seeking out a distraction as their disinterest mounts. When counsel observes a long blink with eyelids delayed opening, this does not necessarily indicate dozing, but rather an attempt to close out the disturbing statement, photo, or exhibit from one's sensory pathway. This particular body language also represents sensory overload when counsel offers too many power point slides that over-explain a complicated matter.

An opening statement has continued on too long and fails to engage when there is a timekeeper in the group; that is, the juror who regularly looks at the clock seeking assurance that a break is approaching.

#### The Receptive Audience

A positive reaction of non-verbal behavior comes in the form of a juror raising their eyebrows to indicate interest and curiosity. Similarly, certain sideway glances signify interest when coupled with a slightly raised eyebrow or a faint smile. The juror's slow head nod during opening statement indicates that the listener is agreeing with counsel's point being made; whereas, the faster nod likely means “*enough said.*” Indeed, if there appears to be a head down and no nod, this may indicate that the presentation sounds unconvincing. Thus, the popularity of a concise power point presentation endures because it often keeps the jury attentive with visual engagement while keeping heads up, thus indicative of neutrality and open mindedness.

#### The Droning On of Witness Examination: The Sinkhole May Be Deepening

Counsel's persuasive use of voice during examination has the potential of being perceived as powerful, distinctive, and revealing. But an effective voice presentation, during all phases of trial, can quickly dissipate if counsel makes mistakes of speaking in low volume or with a monotone delivery. Additionally, the character of the voice, grating or pleasant, along with appropriate dramatic articulation can make the difference between an engaged and actively listening jury or one that seems to be slowly drifting away from attentiveness.

Expressions of jurors' frustrations are evident through their body language. A juror's body language reveals outright rejection of an incredible witness when the juror stares only straight ahead or at examining counsel. The catatonic stare forestalls any acknowledgment of the witness. Indeed, there appears to be no interest by the juror in developing any affinity to the witness.

Another silent denial of the witness testimony seems evident when jurors shake their heads in disagreement one or two times during the examination. Couple this with the posture of a juror leaning sideways with back turned away from the witness stand, while resting one's head in hand. This “side swipe” pose appears to be a decisive rejection of the witness. On the plus side, a sideways glance toward the witness with slightly raised eyebrow connotes interest in what is being said, although agreement remains to be determined.

Should the witness testimony be both boring and time consuming, then the common posture appears to be masking sleep as the juror leans forward in the seat, elbows resting on the thighs, with both hands positioned over the eyes in a faux thinking pose that in reality may mean that both eyes are shut. By contrast, the more energetic bored juror prefers to show off some physical prowess by twirling a pen like a baton to release energy. All the while, another juror checks out the healthy texture of her long mane of hair by searching for split ends. Equally disconcerting is the juror who slouches very low in his seat, with one hand shielding his line of sight to the witness in an attempt not be noticed that he has completely checked out from this witness, these counsel, and this trial.

For other jurors, sharing certain courtroom-acceptable foods, such as a banana, promotes silent socializing. In another manner, jurors sneak in a shared reaction to a piece of evidence by “speaking” to each other with their eyes. It seems that they are communicating with each other whether particular evidence seems worthy or not. Regardless, any reaction to this evidence should be addressed in the closing.

#### The Technology Curse

When counsel appears flummoxed by operating the technology or when introducing the proper exhibit to accompany a witness' testimony, the body language from jurors reflects this temporary confusion. Jurors are forgiving of some disorganization, but when it becomes a repetitive challenge for counsel, they cannot mask shaking their heads condescendingly, swallowing laughter within a smirk, or exchanging sideways glances with fellow jurors seeking validation of their disapproval.

#### The Comical and Emotional Moments

Every trial has its lighter moments with “off the cuff” quips by counsel, judge or court personnel. Everyone laughs and takes in the moment. But, sometimes a juror will not crack a smile or may not react during profound testimony when it may be a sorrowful or astonishing subject matter. A juror's blank stare in the lighthearted moments, or inability to mirror an emotion to something sad or incredible, may be a refusal to appear submissive or vulnerable. Accordingly, this could be the juror in the deliberation room who finds it difficult to negotiate and stubbornly holds on to a position. At several opportunities, counsel should try to speak directly to this person during the evidence presentation, for the petulant person may simply be one who feels isolated.

#### Positive, Neutral or Negative As Trial Wraps Up with Closing Argument

The engaged jurors present in two forms: the note takers (visual learners) and/or the attentive listeners (audible learners). Counsel knows who they are because their body language exudes a positive energy for absorbing the summary argument. They maintain eye contact with counsel while processing the credibility of the arguments. On the other hand, the undecided jurors express their ambivalence in various ways. For instance, a juror may take off their eyeglasses and put one side of the frame into their mouth as though processing what is being argued in the closing. Additionally, there is the juror who scratches his chin, and looks up at the ceiling, deep in thought. This behavior often demonstrates a neutral attitude. A more negative stance occurs with the juror leaning forward, looking down at their feet and then examining their fingers. This evokes boredom and likely rejection of what is being argued. Regardless, the head down signals a disapproving or judgmental attitude.

Jurors also send other cues. For instance, if counsel has made the key points of the argument and then notices that a juror or two stop taking notes, put down their pens, and fold their arms across their chests, they are telling counsel with discrete authority, “*wrap it up.*”

#### Conclusion

In some counties, jurors wear their juror badge around their neck tied to a long ribbon. The universal body language of doom conveyed by a juror happens when the juror holds the badge outward and pulls the ribbon up like a guillotine. The attorney can infer from this dramatic message that there may be brighter days ahead, but not with this case. Whether expressed inside or outside the courtroom, if words and gestures appear to be in conflict, trust the body language to divulge more truth. In the end, body language makes the safer bet of what embodies jurors' unspoken sentiments.

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