

# THE CRITICAL NATURE OF VERBAL LEAKS AND NONVERBAL SIGNALS DURING BARGAINING INTERACTIONS

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## I. INTRODUCTION

When individuals negotiate, they communicate with each other in person, over the telephone, or through e-mail and text exchanges. Proficient negotiators carefully prepare for such interactions, and they endeavor to choose their words carefully to convey the precise messages they intend to communicate. Despite these efforts, however, they frequently include inadvertent modifiers that undermine what they appear to be saying. Persons who listen carefully for such “verbal leaks” can gain a significant bargaining advantage.

During in-person negotiations, the various participants transmit messages through their nonverbal signals. Some of these may be deliberately employed to advance their bargaining interests by supporting their verbal representations, while others may be unintentional and convey more than they intended to convey. These nonverbal signs may even contradict what they are saying verbally. Certain nonverbal signals may also suggest to careful observers that the communicators are not being entirely truthful.

This article will initially explore “verbal leaks,” and emphasize how important it is for negotiators to listen intently to the precise words being articulated—both by themselves and the persons with whom they are interacting. It will then focus on nonverbal signals. What are the more common signals, and what do they usually mean? It will then consider nonverbal signals that are frequently associated with deceptive behavior. Individuals who are discernible may be able to differentiate between wholly trustworthy representations and statements that involve puffery or embellishment. Although Model Rule 4.1 provides that it is unethical for lawyers to “knowingly make a false statement of material fact or law to a third person,” Comment 2 acknowledges the fact that lawyers fre-

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quently employ deceptive tactics when they negotiate. “Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category . . . .”<sup>1</sup> Since statements concerning client values and settlement intentions are thus considered to pertain to non-material information, bargaining attorneys may ethically misrepresent such issues. They may not, however, misrepresent any other issues that are material to the interaction involved.

It can be helpful for negotiators to look for indications that persons on the other side are engaged in puffing or embellishment. When they embellish certain facts or over- or under-state their settlement intentions or values, they may exhibit nonverbal signs of deception. On those rare occasions when negotiators suspect that others might be actually misrepresenting other material information, nonverbal signals may be especially important.

## II. VERBAL LEAKS

Many individuals who negotiate on behalf of clients feel uncomfortable with the deception indigenous to such interactions. They have been raised to believe that lying is morally representable. They feel uncomfortable indicating that they do not value an item they really wish to obtain or do value something they are perfectly willing to concede. They also feel uncomfortable stating that they cannot offer more when they are actually authorized to do so.

When lawyers on the other side indicate that they especially value certain items or do not care about other terms, listeners must ask themselves whether such statements seem credible. As they prepared for the interaction, they should have initially sought to determine the various items valued by their own clients. They should thereafter have tried to place themselves in the shoes of the clients on the other side and asked themselves which items those individuals most likely consider important and which ones they probably do not particularly care about. If they do this accurately, they should be able to appreciate their true values. In addition, if they listen carefully to the manner in which representatives on the

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<sup>1</sup> See Charles B. Craver, *Negotiation Ethics for Real World Interactions*, 25 OHIO ST. J. DISP. RESOL. 299, 305–11 (2010).

other side initially articulate their interest in the different terms, they may be able to discern more “verbal leaks” that indicate the speakers’ actual values. For example, lawyers on the other side may say that they *have to have* Item 1, would *really like to get* Item 2, and *would like to obtain* Item 3. The modifiers associated with these items would clearly suggest that Item 1 is critical—they *have to have* it. Item 2 is important—they *really want it*—but it is not essential, since they do not *have to have* it. Item 3 is desirable—they would *like to get* it, but would presumably be willing to exchange it for anything more valuable. Listeners should compare the seeming priorities of these speakers with the priorities of their own clients. They should endeavor to trade the items they value less than the opposing side for the terms they seem to value more. This should enable the bargaining parties to maximize their joint returns by making sure they achieve mutually efficient agreements. The items they both value similarly are the “distributive” terms they are going to haggle over.

To avoid overt misstatements regarding their actual settlement intentions, negotiators frequently include modifiers that make their assertions more truthful. Instead of dishonestly stating that they *cannot* offer more, they indicate that they *do not want* to go higher, they are *not inclined* to do so, or cannot do so *at this time*. The persons with whom they are negotiating do not care whether they want or are inclined to offer more now; they only care about whether they will actually do so as the encounter develops.

Negotiators who discern such verbal leaks regarding the actual willingness of the speakers to move higher must be patient. The modifying phrases clearly indicate that further movement by such speakers is likely, but it may take some time before further concessions will be articulated. If the speakers are pushed too quickly, they may feel compelled to preserve their integrity by refusing to alter their current positions. They should thus be provided with the time they need to formulate face-saving explanations for the subsequent position changes they are prepared to make.

As negotiating parties move closer to mutual accords, one side may indicate that they are approaching their bottom line and cannot move further. If their current offers are acceptable to the other side and that side thinks no further movement is possible, they may accept that speaker’s “final offer.” Before they do so, however, they should ask some additional questions regarding that side’s true interests and listen carefully for possible “verbal leaks.” If that side indicates that it has *no more room*, it may truly be near its

bottom line. On the other hand, if it says it does not have *much more room* or has gone *about as far* as it can go, either statement would suggest that it has more room to move. The listener should suggest that the current offer is still not acceptable and patiently allow the original speaker to reconsider its options. If that side really does have more room, it would be likely to make additional position changes in an effort to achieve an agreement that would be preferable to its non-settlement alternatives.

Negotiators must not only listen carefully for the words being articulated by persons on the other side, they must similarly monitor their *own* language. During the critical stages of their bargaining transactions, they should employ more definitive terms that do not inadvertently include “verbal leaks.” For example, when the parties are exploring the terms they wish to obtain and the interests underlying those items, they should be prepared to state that they *have to have* or *really want* the items the opposing side values more than they do. They should alternatively indicate that they do not particularly care about terms they really wish to obtain but think the other side does not value. Such statements would enable them to obtain greater concessions for the items they agree to convey to the other side and give up less for the items they obtain for their own side.

As negotiating parties approach likely agreements, skilled bargainers should be careful not to simply say that they are *approaching* their bottom lines. They should instead state that they cannot make any further concessions. If the other side accepts these representations, it may simply give in. Even if those persons demand some final movement, this side should be able to avoid any significant position changes.

### III. NONVERBAL SIGNALS

Nonverbal communication is one of the most important sources of information when individuals negotiate in person or by phone, but such signals are frequently overlooked.<sup>2</sup> The participants tend to concentrate on what is being said verbally, and fail to discern most of the nonverbal signs. As a result, they are only aware of the most controlled communication being articulated by

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<sup>2</sup> See GAVIN KENNEDY, KENNEDY ON NEGOTIATION 153–54 (2009); ANNE E. BEALL, READING THE HIDDEN COMMUNICATIONS AROUND YOU 1–2 (2009).

persons on the other side.<sup>3</sup> They also fail to appreciate the various nonverbal signals emanating from themselves. It is thus critical for negotiators to train themselves to appreciate the subtle nonverbal signs that are a significant part of bargaining interactions.

Nonverbal signals are transmitted for different purposes.<sup>4</sup> Some are used as *illustrators* to punctuate what is being said verbally. For example, someone may point their finger to emphasize a point or nod their head to support an affirmative statement. *Regulators* are employed to control the speech of others, such as when someone holds up their hand to slow the speaker down, puts their fingers to their lips to ask for silence, or rotates their hand to encourage the speaker to proceed more quickly. *Adaptors* include behavior designed to relieve stress. These may include the wringing of hands or the rubbing of one's neck. *Barriers* are indications of discomfort. For example, listeners may cross their arms or turn sideways in a defensive manner.

Experienced negotiators can all recall situations in which they had the sense that the persons on the other side were being disingenuous. They have rejected "final offers" and "final last offers" being conveyed by individuals who were actually willing to move further. Their actions in this regard were most likely based upon their subconscious reading of nonverbal signals that were not congruent with what was being said verbally. For example, the "final offer" statements may have been articulated by persons sitting back in their chairs with their hands folded across their chests, which are not indications of true openness. Persons who are communicating sincere "final offers" are likely to lean slightly forward in their chairs with their arms extended and their palms facing upwards to demonstrate their openness and sincerity.

Negotiators must never ignore the tentative feelings they experience when they interact with others, since such feelings are usually based upon their subconscious readings of nonverbal signals that are consistent or inconsistent with what is being conveyed verbally.<sup>5</sup> When bargainers experience such feelings, they should endeavor to recall the nonverbal signs that may have generated their emotions. They must appreciate the fact that when they negotiate with others, they focus so much on what they and the persons on the other side are saying that they regularly miss most of

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<sup>3</sup> See SUSAN QUILLIAM, *BODY LANGUAGE* 9 (2004).

<sup>4</sup> See GREGORY HARTLEY & MARYANN KARINCH, *I CAN READ YOU LIKE A BOOK* 117–23 (2007).

<sup>5</sup> See BEALL, *supra* note 3, at 6.

the nonverbal signs emanating from both themselves and the others involved.

Some persons are more adept readers of nonverbal signals than others. People trained in psychology or counseling have usually been taught to look for such signs. Various empirical studies have found that women are typically more discerning of nonverbal messages than men.<sup>6</sup> Similar studies have also found that African-Americans are more attuned to nonverbal signals than Caucasians.<sup>7</sup> These gender and racial differences may reflect the fact that members of groups that have historically had less societal empowerment have learned to be more perceptive readers of nonverbal clues to counteract their power imbalances.

Individuals who conduct negotiations by phone often carelessly assume that no nonverbal signals can be transmitted by way of that medium, and they do not worry about such signs emanating from themselves. This is a wholly incorrect assumption. A substantial number of nonverbal clues are discernible during telephone interactions.<sup>8</sup> Careful listeners can hear subtle changes in the pitch, pace, tone, inflection, rhythm, and volume of speaker voices.<sup>9</sup> A short pause seems longer than it actually is, because the individual involved cannot play with his glasses or look at his notes to cover up the length of silence, as he could during in-person discussions. A pregnant pause may indicate that a particular offer is being seriously considered by a recipient who did not hesitate before rejecting previous proposals. A sigh in response to a new proposal may similarly indicate that the recipient is now confident that some agreement will be achieved. Voice inflection may provide similar information. People who respond to communicated offers with perceptibly increased levels of excitement may suggest that they are more pleased with the proposal than their verbal response might otherwise indicate. The pitch and/or volume may go up when persons are anxious, as they might be if they think that interactions are not progressing beneficially. As we explore below, individuals who engage in deception frequently speak more delib-

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<sup>6</sup> See, e.g., ALLAN PEASE & BARBARA PEASE, *THE DEFINITIVE BOOK OF BODY LANGUAGE* 13–14 (2006); NANCY HENLEY, *BODY POLITICS: POWER, SEX, AND NONVERBAL COMMUNICATION* 13–15 (1977).

<sup>7</sup> See HENLEY, *supra* note 6, at 14–15.

<sup>8</sup> See JUDEE K. BURGOON, DAVID B. BULLER & WILLIAM GILL WOODALL, *NONVERBAL COMMUNICATION: THE UNSPOKEN DIALOGUE* 4 (1996).

<sup>9</sup> See JAY FOLBERG & DWIGHT GOLANN, *LAWYER NEGOTIATION: THEORY, PRACTICE, AND LAW* 164 (2d ed. 2011).

erately and utter their misrepresentations with higher pitched voices.<sup>10</sup>

Persons who are not especially sensitive readers of nonverbal signals can easily correct this deficiency. There have been many good books written on this topic, and they should obtain several of these publications and read them carefully. They should then begin to focus on the nonverbal behavior of others in both business and social settings. They should observe the facial expressions, the hand movements, and body postures of those with whom they interact, and ask themselves what those movements might say about the individuals being watched.

### A. *Common Nonverbal Signals*

Facial expressions can convey significant information. A derisive smile or overt frown may suggest disdain for an unacceptable proposal, while a subtle smile or relaxation of the facial muscles in response to the other side's fourth or fifth proposal may indicate that the most recent offer is approaching acceptability. The acceptable nature of the most recent position statement may also be supported by the fact it was rejected more slowly than previous offers, which would suggest the offer recipient is giving it more serious consideration.

Negotiators must appreciate the fact that facial expressions are generally controlled more effectively than are less voluntary body movements. Contrived smiles or frowns may be carefully employed to convey deceptive messages, while less voluntary arm, leg, or upper body movements are more likely to communicate true feelings. It is thus imperative for bargaining participants to observe as many informative movements as they can. No one sign should be given a definitive interpretation. Individuals must look for *changes in behavior* and *patterns of behavior* that tend to be far more significant than individual signals.<sup>11</sup>

#### 1. Facial Expressions

A subtle smile or relaxed facial muscles when a new offer is being articulated may indicate that the terms involved may be approaching the other side's settlement range. The nonverbal indica-

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<sup>10</sup> See *infra* notes 83–84 and accompanying text.

<sup>11</sup> See JOE NAVARRO & MARVIN KARLINS, *WHAT EVERY BODY IS SAYING* 12–13 (2008).

tion of relief would suggest that a final accord is likely. On the other hand, taut lips or a subtle frown would probably indicate anxiety or frustration. Persons who observe such signs should ask themselves what is likely to be causing the other side problems.

## 2. Pursued Lips/Lips Rotate in Outward Manner

This is a classic sign that the person does not agree with what is being said.<sup>12</sup> This is a clear indication of resistance to proposals the other side considers unattractive.

## 3. Flinch/Pained Expression

Such behavior may be an uncontrolled response to a wholly inadequate opening offer. If the person making the offer believes the flinch is sincere, she should appreciate how far the parties are from any possible agreement. On the other hand, some negotiators use a disingenuous flinch to silently challenge opposing party opening offers without having to say anything verbally.<sup>13</sup> Such manipulative use of the flinch following opening offers or subsequent position changes may undermine opponent confidence in their own positions and induce them to modify their opening offers or increase their recent concessions without obtaining reciprocal position changes from the other side.

## 4. Raising of One Eyebrow

The involuntary raising of one eyebrow usually signals skepticism.<sup>14</sup> This nonverbal response may indicate that the actor is highly suspicious of what is occurring. It may alternatively be employed disingenuously by manipulative negotiators to undermine the confidence of the people with whom they are interacting.

## 5. Raising Both Eyebrows/Widening of Eyes

This is a clear indication of surprise.<sup>15</sup> It is frequently visible when someone's opening offer or subsequent concession is more generous than the recipient anticipated. It may similarly follow the disclosure of unanticipated information. When negotiators observe such signs, they should be concerned about possible errors on their part, and should reassess their present situations to see if they have made unintended tactical mistakes.

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<sup>12</sup> See DAVID GIVENS, *YOUR BODY AT WORK* 12–13 (2010).

<sup>13</sup> See ROGER DAWSON, *SECRETS OF POWER NEGOTIATING* 32–35 (3d ed. 2011).

<sup>14</sup> See HARTLEY & KARINCH, *supra* note 4, at 77–78.

<sup>15</sup> See GIVENS, *supra* note 12, at 42–43.

### 6. Beady Little Eyes/Snake Eyes

These are indications of disagreement or disapproval.<sup>16</sup> When exhibited during bargaining interactions, they suggest displeasure with what is occurring.

### 7. Eyes Wandering/Looking at Watch/Crossing & Uncrossing Legs/Doodling

These are signs of boredom and/or disinterest in the interaction developments.<sup>17</sup> Such behavior would suggest that the person involved is not interested in what is being said. To get this individual more actively involved in the discussions, it can be helpful to ask some questions designed to elicit their thoughts and concerns.

### 8. Gnashing of Teeth

This is a classic indication of anxiety or anger, and is evidenced by the contracting and relaxing of the jaw muscles on both sides of the face. Aggressive negotiators should carefully watch for the gnashing of teeth, the wringing of hands, and other similar reactions that may suggest that the person on the other side is experiencing substantial stress, in recognition of the fact that continued combative behavior may generate a cessation of the talks.

### 9. Direct Eye Contact

Persons who make regular eye contact with others are often perceived as being more personable and forthright than those who lack this trait.<sup>18</sup> Negotiators who can maintain nonthreatening eye contact with opposing parties can frequently enhance their perceived credibility. They are also likely to be more cognizant of the nonverbal messages emanating from their adversaries. On the other hand, intensive staring is likely to be perceived as intimidating and combative. Women tend to look at others during their interactions more frequently and for longer periods than men.<sup>19</sup>

### 10. Head Nodding

Casual head nodding is generally employed by active listeners to indicate their comprehension of what is being said.<sup>20</sup> Head nod-

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<sup>16</sup> See ELIZABETH KUHNKE, *BODY LANGUAGE FOR DUMMIES* 79 (2007).

<sup>17</sup> See JO-ELLAN DIMITRIUS & MARK MAZZARELLA, *READING PEOPLE* 62 (1998).

<sup>18</sup> See KUHNKE, *supra* note 16, at 76–77.

<sup>19</sup> *Id.* at 60.

<sup>20</sup> *Id.* at 51–52.

ding by listeners is occasionally misinterpreted by speakers as an indication of agreement. Rapid nods, however, may indicate a lack of interest or may be employed by impatient persons to encourage speakers to get to the point more expeditiously.

### 11. Tilted or Straight Head

When persons are paying close attention to what is being said to them, they often have a slight tilt in their heads.<sup>21</sup> On the other hand, when their head is perfectly straight, they are not usually as interested in what is being said.

### 12. Wrinkled Forehead

When someone raises their eyes and wrinkles their forehead with their mouth opened, this tends to be a clear sign of surprise.<sup>22</sup> On the other hand, when the forehead is wrinkled and the eyes are open widely, this suggests fear or apprehension. When the former sign is observed, negotiators must ask what has occurred to surprise the person on the other side. When the latter sign is visible, negotiators must ask what they think is frightening the person displaying it.

### 13. Scratching Head/Brushing Cheek with Hand

These are classic indications of puzzlement.<sup>23</sup> Such conduct would suggest that the actor is having difficulty understanding the other side's negotiating behavior. Their opponents should ask themselves what they might have done to create this misunderstanding.

### 14. Wringing of Hands

This is frequently a sign of frustration or nervousness.<sup>24</sup> Particularly distraught individuals may twist their hands into seemingly painful contortions. Such behavior is likely to emanate from persons unhappy with substantive developments or upset about the highly aggressive tactics being employed by the other side.

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<sup>21</sup> See DAWSON, *supra* note 13, at 245.

<sup>22</sup> See HARTLEY & KARINCH, *supra* note 4, at 71.

<sup>23</sup> Givens, *supra* note 12 at 60-61.

<sup>24</sup> See KUHNKE, *supra* note 16, at 147-48.

## 15. Drumming on Table

This is a classic sign of impatience or frustration.<sup>25</sup> The actor is clearly displeased with bargaining developments, either because they are unfolding too slowly or in a wholly unacceptable fashion.

## 16. Hands Neatly Folded in Lap

Such a posture frequently indicates contrite penitence and possibly even submissiveness.<sup>26</sup> This posture tends to be exhibited more by women than by men. If this posture is consistent with other signals of weakness emanating from the other side, the negotiators on this side should endeavor to encourage it and take advantage of it. Negotiators should normally try to avoid such a seemingly submissive posture, unless they are deliberately endeavoring to induce over-confident opponents to take them lightly.

## 17. Steepling Gesture (Hands Pressed Together with Fingers Uplifted or Hands Together with Interlocked Fingers also Uplifted, and with Elbows Out in Expansive Manner)

Such behavior is an indication of real confidence.<sup>27</sup> Negotiators who observe such conduct should be certain they are not conceding more than is necessary, since their opponents seem to be particularly pleased with developments.

## 18. Hands Touching Face/Stroking Chin/Playing With Glasses or Papers

These actions are often indications of meditative contemplation. Since people feel awkward regarding prolonged silence while they are thinking about how to respond to opposing side position changes, they often employ these techniques to camouflage their thinking. This behavior may suggest that their opponent's new proposal has finally induced them to think seriously about how they should reply to keep things moving forward. They plan to reject the new offer, but to do so in a more positive manner. It may take twenty or thirty seconds for them to formulate a revised rejection statement. To conceal the silent pause, they stroke their chin, play with their glasses, or look at their notes. If they did not employ these diversionary actions while considering the new offer,

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<sup>25</sup> *Id.* at 162.

<sup>26</sup> See JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPLETE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 122 (1984).

<sup>27</sup> See NAVARO & KARLINS, *supra* note 11, at 147–48; see PEASE & PEASE, *supra* note 6, at 131–35.

the obvious pause would indicate that they consider the instant proposal to be quite reasonable.

19. Biting Lower Lip or Fingernails/Running Fingers  
Through Hair/Rubbing Forehead

These are clear indications of stress or frustration. They tend to be exhibited by persons disappointed by the lack of bargaining progress or perceived opponent intransigence. As they become more frustrated, these signs tend to become more pronounced.

20. Placing One Hand Behind Head & Massaging  
Back of Neck

When someone uses one hand to clasp and rub the neck behind his or her ear, this is usually a sign of distress.<sup>28</sup> It is as if the person is psychologically giving himself a consoling hug to offset the negative consequences being experienced.<sup>29</sup> During bargaining interactions, such a posture is likely to indicate that the actor sees negative developments ahead. A similar indicator of stress involves the stroking and massaging of one's neck.<sup>30</sup>

21. Extending Hands Toward Opponent with Fingers Pointed  
Upward and Palms Out

This is common behavior by individuals who are being verbally assaulted by aggressive bargainers. It is a defensive posture used to symbolically—but ineffectively—protect the actors against the verbal onslaught emanating from the other side.<sup>31</sup>

22. Rubbing Hands Together in Anticipatory Manner

This behavior is frequently exhibited by anxious negotiators who anticipate beneficial new offers from the other side.<sup>32</sup> Such actions suggest an over-eagerness that may be satisfied with minimal position changes.

23. Placing Palm of Right Hand Over Heart

Some people voluntarily—or involuntarily—place the palm of their right hand over their heart when attempting to appear sincere or credible. If this behavior seems inadvertent, it may well be a

<sup>28</sup> See GIVENS, *supra* note 13, at 46–47; DESMOND MORRIS, *BODYTALK* 168 (1994).

<sup>29</sup> See KUHNKE, *supra* note 16, at 129.

<sup>30</sup> See NAVARO & KARLINS, *supra* note 11, at 42–43.

<sup>31</sup> See GIVENS, *supra* note 12, at 49–50.

<sup>32</sup> See KUHNKE, *supra* note 16, at 146; PEASE & PEASE, *supra* note 6, at 128–30.

sign of true sincerity. On the other hand, if this action seems to be deliberate, it is likely to be a disingenuous effort to mislead the persons on the other side.

#### 24. Open or Uplifted Hands with Palms Facing Outward

This display is generally employed to demonstrate openness and sincerity.<sup>33</sup> It is a posture one normally expects when the other side is articulating “final offers.” The posture may be quite open—with the hands far apart—or more subtle—with the hands closer together. If the gesture seems stilted, it probably represents a deliberate attempt to deceive the observer.

#### 25. Crossed Arms/Crossed Legs

This may represent an aggressive, adversarial posture, or a defensive position, depending on the particular position involved.<sup>34</sup> If the arms are folded high on the chest and the legs are crossed in a “figure-four” position (with the ankle of one leg placed on the knee of the other leg in a typically masculine fashion), this represents a competitive and/or combative posture. This is especially true if the arm-crosser’s fists are also in a closed position.<sup>35</sup> On the other hand, if the arms are folded low on the chest and one leg is draped across the other, this tends to be a defensive posture. The intimidated actor may also be leaning back in their chair in a subconscious effort to escape the verbal onslaught of the persons on the other side. Both of these crossed arms/crossed legs postures constitute unreceptive poses.<sup>36</sup>

If persons on the other side begin bargaining interactions with their arms folded and legs crossed, it is helpful to try to establish sufficient rapport with these people to soften their stance prior to the commencement of substantive discussions. True final offer should never be made with one’s arms folded and one’s legs crossed, since this does not present a credible appearance.

#### 26. Covering and Rubbing One Eye

It is not uncommon for individuals to casually cover and rub one eye when they find it difficult to accept something being ex-

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<sup>33</sup> See GIVENS, *supra* note 12, at 56–58; KUHNKE, *supra* note 17, at 140–42.

<sup>34</sup> See KUHNKE, *supra* note 16, at 126–28.

<sup>35</sup> See PEASE & PEASE, *supra* note 6, at 95–96.

<sup>36</sup> See *id.* at 91–94; HENRY CALERO, *THE POWER OF NONVERBAL COMMUNICATION* 84–85 (2005).

pressed to them.<sup>37</sup> This is the nonverbal equivalent of the expression “my eye” that may be uttered by someone who doubts the veracity of the speaker’s comments. Negotiators who encounter this signal when they are making crucial representations should recognize the substantial possibility that their statements are not being accorded any respect. They may wish to rephrase their comments in a more credible fashion.

### 27. Massaging the Pain Muscles Between the Eyes

This is an indication of substantial stress.<sup>38</sup> The actor is subconsciously endeavoring to alleviate the tension they are experiencing.

### 28. Rubbing Chin in an Inquisitive Manner

This is another nonverbal sign of disbelief.<sup>39</sup> Although the actor may be hesitant to express their disbelief verbally, this nonverbal behavior conveys a similar message.

### 29. Picking Imaginary Lint Off One’s Clothing

Individuals who disapprove of or are made particularly uncomfortable by shocking or outrageous statements being made by others may begin to pick imaginary lint from their clothing, especially when they are hesitant to express their disapproval or discomfort directly.<sup>40</sup>

### 30. Casual Touching (e.g., Prolonged Hand Shake; Hand or Arm on Opponent’s Shoulder or Forearm)

This approach can be effectively employed to indicate one’s sincerity and to establish some positive rapport.<sup>41</sup> A warm handshake at the commencement of bargaining interactions can often reduce the likelihood of needless interpersonal conflict. Even during negotiation sessions, casual touching of the other participant’s hand or forearm can be used as a “personal touch” to maintain harmonious relations and to encourage the other person to respond favorably to actor entreaties.<sup>42</sup> Even though Americans are

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<sup>37</sup> See MORRIS, *supra* note 28, at 49.

<sup>38</sup> See HARTLEY & KARINCH, *supra* note 4, at 72.

<sup>39</sup> See MORRIS, *supra* note 28, at 31.

<sup>40</sup> PEASE & PEASE, *supra* note 6, at 236.

<sup>41</sup> See BEALL, *supra* note 2, at 40–49; KUHNKE, *supra* note 16, at 133–38; PEASE & PEASE, *supra* note 6, at 104–06.

<sup>42</sup> See BEALL, *supra* note 2, at 46.

not as touching as some cultures, we tend to touch each other during interactions more frequently than most of us realize, even when talking with relative strangers. This is true whether we are communicating with persons of the same or the opposite gender. Women tend to engage in casual touching with others more frequently than men.<sup>43</sup>

On rare occasions, a negotiator may try to place an arm over the shoulder of the opposing party in a condescending manner to denote a superior-subordinate relationship. This tactic may be used by a larger individual toward a more diminutive person or by a male to a female. Since the speculative benefits that might be derived from such patronizing conduct would be minimal and this behavior could easily offend the recipient, the use of this approach is risky.

### 31. Chin Flick

This is where someone takes the back of their hand and flips it forward away from his or her chin. This is usually perceived as an indication of complete disinterest in what is going on.<sup>44</sup> When negotiators encounter such a signal, they should work to elicit the concerns and interests of the person displaying this sign.

### 32. Chin Stroke

When someone gently strokes their chin with the underside of their hand, this is generally a sign they are contemplating what to do.<sup>45</sup> On the other hand, when someone simply strokes their chin with their thumb and forefinger, this is an indication they are pleased with developments. This signal would be likely to occur when negotiators believe that an agreement is about to be achieved.

### 33. Shoulder Shrug

This is an indication that the person feels helpless or powerless.<sup>46</sup> When an opposing party says that she cannot accept something, a shoulder shrug might suggest that her position is not really final and that greater movement on her part is likely. Such behavior should be contrasted with someone who says “no” and main-

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<sup>43</sup> *Id.* at 46–48.

<sup>44</sup> See MORRIS, *supra* note 28, at 27–28.

<sup>45</sup> *Id.* at 32–33.

<sup>46</sup> See GIVENS, *supra* note 12, at 66–73.

tains rigid shoulders, whose conduct would suggest that they would be unlikely to alter their present position.<sup>47</sup>

#### 34. Sitting or Standing Face-to-Face or at an Angle

Persons sitting or standing face-to-face tend to like each other more and be more interested in their interaction than individuals sitting or standing at an angle to one another.<sup>48</sup> This phenomenon may be influenced by gender, since women are more likely to sit or stand face-to-face than men, with males being more likely to sit or stand at an angle.<sup>49</sup> If an opposing party moves from a face-to-face posture to a more distant posture, it can be beneficial to ask that person questions designed to induce them to become more involved in the discussions.

#### 35. Shifting Back and Forth in Chair/Tilting Head from Side to Side/Opening Mouth Without Speaking

These are clear indications of indecision.<sup>50</sup> The message sender is not sure how to proceed, and is contemplating what to do next. Individuals on the other side should be patient and silently give this person the time they need to decide what to do.

#### 36. Sitting on the Edge of One's Chair

When this posture seems to have occurred involuntarily following a recent proposal and the posture did not accompany the receipt of previous position changes, this would be likely to suggest real interest on the part of the actor.<sup>51</sup> If his interpretation is accurate, it might indicate that the offeror is approaching the offeree's settlement zone. Most persons do not sit literally on the front of their chair, but merely move slightly forward in their seat. A few individuals, however, are even more demonstrative. They lean so far forward that they place their elbows on the table in front of them. This gesture may also be made by individuals who are preparing to disclose important information or are planning to make a critical concession.<sup>52</sup>

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<sup>47</sup> *Id.* at 68–69.

<sup>48</sup> See BEALL, *supra* note 2, at 17–19.

<sup>49</sup> *Id.* at 19.

<sup>50</sup> See DIMITRIUS & MAZZERELLA, *supra* note 17, at 67–68.

<sup>51</sup> See KUHNKE, *supra* note 16, at 119–20.

<sup>52</sup> See CALERO, *supra* note 36, at 84–85.

## 37. Leaning Back in Chair with Hands on Back of Head

This posture is adopted more by males than by females, and is usually an indication of confidence and contentedness.<sup>53</sup> When men interacting with women adopt this posture, it is not only a sign of confidence, but also a clear indication of perceived domination. Female negotiators who observe this behavior in male opponents should be especially cautious, because those people may think things are going their way. This posture is also an indication of power and authority, and is frequently employed by superiors when they interact with subordinates.

## 38. Standing with Hands on Hips

This is a rather aggressive posture that tells others to stay away from the actor.<sup>54</sup> It is frequently exhibited by angry individuals who do not want to interact with those around them.<sup>55</sup> People who do not like to negotiate may greet others in this manner.

## 39. Turning Around in Chair and Looking Away From Other Side After Making New Offer

This behavior is often exhibited by individuals who hate to compromise. They cannot stand to look at the persons on the other side after they have made concessions. People interacting with such bargainers should not be personally offended by this seemingly disrespectful conduct, but should expect to see it again after future position changes.

## 40. Invading Space of Persons on Other Side

When Americans interact with others with whom they lack intimate relationships, they generally expect eighteen to twenty-four inch space between one another.<sup>56</sup> When someone inadvertently or deliberately gets closer to others, they are likely to feel both intimidated and uncomfortable. Some aggressive negotiators use this approach intentionally to intimidate others, especially those who are shorter than they are. Others occasionally invade the space of others unintentionally with no desire to offend them. Their error should become apparent quickly, as the other persons

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<sup>53</sup> See PEASE & PEASE, *supra* note 6, at 245–46.

<sup>54</sup> See *id.* at 237–39; MORRIS, *supra* note 28, at 4.

<sup>55</sup> See GIVENS, *supra* note 12, at 11.

<sup>56</sup> See PEASE & PEASE, *supra* note 6, at 202; PETER A. ANDERSEN, *THE COMPLETE IDIOT'S GUIDE TO BODY LANGUAGE* 118 (2004).

back away from them in a manner designed to reestablish a proper spatial distance between the parties.

### B. *Nonverbal Indications of Deception*

In his book *Telling Lies*,<sup>57</sup> Paul Ekman noted that most people are surprising inept at determining when they are being told lies. This phenomenon may be partially due to the fact that mendacity occurs in different forms ranging from mere “puffing” and “embellishment” to unabashed prevarication. It is also due to the fact that most persons do not know the nonverbal signals that frequently accompany deceptive statements.

It must be acknowledged that many of the stereotypically accepted indicia of deceit have little empirical support. This fact was eloquently recognized by a prominent and experienced labor arbitrator:

Anyone driven by the necessity of adjudging credibility, who has listened over a number of years to sworn testimony, knows that as much truth must have been uttered by shifty-eyed, perspiring, lip-licking, nail-biting, guilty-looking, ill at ease, fidgety witnesses as have lies issued from calm, collected, imperturbable, urbane, straight-in-the-eye perjurers.<sup>58</sup>

Nonetheless, despite the unreliability of many conventionally accepted indicia of dishonesty, there are actually some clues that can meaningfully assist people when they endeavor to assess the veracity of opposing negotiators.

Individuals who plan to articulate deliberate misrepresentations often emit nonverbal signals that should caution alert observers. Some of these nonverbal signs reflect the stress associated with deception, generated by fear of the truth combined with anxiety regarding the possibility of being caught lying.<sup>59</sup> Other nonverbal behavior is designed to enhance the credibility of the misrepresentations being made. If speakers are going to engage in mendacious conduct, they wish to increase the likelihood they will be believed.

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<sup>57</sup> PAUL EKMAN, *TELLING LIES* 86–87 (1992).

<sup>58</sup> Edgar Jones, Jr., *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes*, 13 *UCLA L. REV.* 1241, 1286 (1966).

<sup>59</sup> See DAVID J. LIEBERMAN, *NEVER BE LIED TO AGAIN* 46–47 (1998); EKMAN, *supra* note 57, at 49–64.

No one signal should be accepted as a definitive indication of deception. Observers must look for changes in the speaker's usual behavior and patterns of behavior that are consistent with dishonesty. The general anxiety associated with many bargaining encounters may cause participants to exhibit signs of stress, but these should be apparent throughout the critical stages of the interaction. On the other hand, if obvious signs of stress become apparent just before the utterance of questionable statements, listeners should be suspicious. To further complicate matters, individuals who are afraid that their truthful representations may not be believed may exhibit similar signs of stress.<sup>60</sup> Listeners should also be aware of *verbal leaks* or *signal words* (e.g., "to be candid"; "to be truthful"), which often indicate the presence of deception.<sup>61</sup> Such phrases are often employed by deceitful persons to induce others to listen more intently to the misrepresentations they plan to make.

When individuals begin to interact with one another in bargaining situations, it can be especially helpful for them to initially establish the baseline behavior of the others involved.<sup>62</sup> They should listen carefully for stemmers or pauses that might be natural parts of the speech patterns of those persons. How quickly do they express themselves, and what is their natural voice pitch? When the parties commence their interaction, they should ask the others some seemingly innocuous questions that require them to recall something from the past. While they are thinking, do they look up and to the left or up and to the right? Most right-handed persons tend to look up and to the left while they are trying to recall something they have previously experienced, while left-handed individuals tend to look up and to the right.<sup>63</sup> They should also ask them something which requires them to imagine something they have never seen before. Do they look up and to the right or up and to the left? Right-handed persons tend to look up and to the right when imagining something, while left-handed persons tend to look up and to the left. When others seem to be recalling some prior experience, are they looking up to the correct side, or to the side associated with efforts to imagine, rather than recall, something.

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<sup>60</sup> *Id.* at 94.

<sup>61</sup> DAWSON, *supra* note 13, at 263; PAMELA MEYER, LIE SPOTTING 94–95 (2010).

<sup>62</sup> See MEYER, *supra* note 61, at 112–15; HARTLEY & KARINCH, *supra* note 4, at 99–124.

<sup>63</sup> See HARTLEY & KARINCH, *supra* note 4, at 117; PEASE & PEASE, *supra* note 6, at 187.

### 1. Decrease or Increase in Specificity of Statements

When individuals tell the truth, they fill in the little details as they recall them, adding a substantial amount of incidental information. When individuals quickly fabricate, however, there are no details to remember. As a result, they tend to omit the usual amplifying information, providing only the bare details of their lie.<sup>64</sup> On the other hand, persons who have prepared elaborate lies ahead of time may provide an excessive amount of information in an effort to make their deceit more credible.<sup>65</sup> Their statements regarding these issues tend to be far more detailed than the other stories they have been discussing. When they get no response to their misstatement, they may nervously restate their lie.

Specific questions regarding particular facts can often help to discover whether explicit stories are credible.<sup>66</sup> Many persons find it more reprehensible to lie in response to direct questions, and they find it more difficult to provide believable fabrications in response to inquiries that seek specific information. By being thoroughly prepared for bargaining interactions and by having a thorough knowledge of the operative factual circumstances, bargainers can greatly enhance their ability to detect deception from persons who distort the truth.

### 2. Use of Blocking Techniques

When deceitful persons are asked questions regarding matters they have misrepresented, they often try to avoid answering the specific questions.<sup>67</sup> They may ignore the inquiry or only provide a partial response. Listeners should formulate additional questions designed to force them to reply more specifically.

### 3. More Frequent or Prolonged Pauses

As deceptive persons make false statements, they may have to think carefully about what they are making up to be sure their utterances seem credible. As they do this, they often have either an increased number of pauses or several extended pauses.<sup>68</sup>

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<sup>64</sup> See Bella DePaulo, et al., *Cues to Deception*, 129 *PSYCHOL. BULL.* 74, 91–91 (2003); ALBERT VRIJ, *DETECTING LIES AND DECEIT* 105 (2000).

<sup>65</sup> See MEYER, *supra* note 61, at 93–94; LIEBERMAN, *supra* note 59, at 31.

<sup>66</sup> See M Schweitzer & R Croson, *Curtailling Deception: The Impact of Direct Questions on Lies and Omissions*, 10 *INT'L J. CONFLICT MGT.* 225 (1999); see also MEYER, *supra* note 61, at 93–94.

<sup>67</sup> See LIEBERMAN, *supra* note 59, at 31–32.

<sup>68</sup> See EKMAN, *supra* note 57, at 92.

#### 4. Decrease in Number of Nonverbal Illustrators

When individuals speak, they generally move their hands, arms, and facial muscles to emphasize what is being communicated. When they tell lies, however, the number of such illustrators frequently declines.<sup>69</sup> Listeners should thus become suspicious when speakers cease exhibiting the hand, arm, and face movements they have been previously displaying.

#### 5. Partial Shrug

Individuals who shrug their shoulders usually indicate that they are ignorant or indifferent with respect to the matters involved. On the other hand, persons who are being deceptive often exhibit a partial shrug of one shoulder that is only briefly visible.<sup>70</sup>

#### 6. Increased or Reduced Gross Body Movement

When persons interact, they move their arms, legs, and torso on a fairly regular basis. Rarely do individuals sit or stand perfectly still. Under stressful circumstances, some persons become more fidgety and move their arms and legs at an increased rate.<sup>71</sup> Some openly fidget or shake. Deceitful individuals tend to exhibit this behavior as well. Other deceptive people exhibit completely opposite behavior when they resort to deceitful tactics. They know that fidgety speakers appear to be less credible. They endeavor to counteract this phenomenon by making a discernible effort to decrease their gross body movement to enhance the trustworthiness of their mendacious comments.<sup>72</sup> Deceitful people may also exhibit reduced gross body movement as they concentrate on the story they are fabricating.<sup>73</sup> Negotiators should thus be especially cautious when they evaluate the veracity of statements made by individuals who have obviously increased or decreased their gross body movement.

#### 7. Casual Placing of Hand Over Mouth

Most people have been raised to believe that prevarication is morally wrong. They suffer from a guilty conscience when they engage in deliberate deception. Psychologists have noticed that li-

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<sup>69</sup> See *id.* at 104–06.

<sup>70</sup> See MEYER, *supra* note 61, at 79; LIEBERMAN, *supra* note 59, at 16; EKMAN, *supra* note 57, at 102–03.

<sup>71</sup> See MEYER, *supra* note 61, at 83.

<sup>72</sup> See KUHNKE, *supra* note 16, at 269.

<sup>73</sup> See VRIJ, *supra* note 64, at 38.

ars often place their hand over their mouth when they speak, in a subconscious effort to hold in their morally reprehensible falsehoods.<sup>74</sup> I have frequently observed this behavior when mediating employment disputes and watching negotiators misstate their client values or settlement intentions.

#### 8. Unconscious Touching of Nose with Finger Tip or Back of Finger/Rubbing One Eye

These gestures are often considered a more subtle equivalent to the “covering of one’s mouth” as persons prepare to prevaricate.<sup>75</sup> Although these signals may appear in isolation, it is common for deceivers to initially cover their mouth and then quickly touch the side of their nose. Deceitful persons may alternatively rub one eye with one or two fingers.<sup>76</sup>

#### 9. Inconsistent Nodding or Shaking of Head

When individuals verbally lie, their heads occasionally give them away.<sup>77</sup> For example persons who say that they are unable to do something may casually nod their heads in an affirmative manner, or persons who state that they would like to do something may casually shake their heads in a negative fashion. Their subconscious head movements contradict their misrepresentations and likely indicate their true intentions.

#### 10. Dilated Pupils and More Frequent Blinking

When people experience stress, the pupils of their eyes become dilated and their rate of blinking usually increases.<sup>78</sup> Even though negotiators rarely interact in such close environments that they can observe pupil enlargement, increased blinking should be readily discernible.<sup>79</sup>

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<sup>74</sup> See MEYER, *supra* note 61, at 29; KUHNKE, *supra* note 16, at 267–68; PEASE & PEASE, *supra* note 6, at 148–49; LIEBERMAN, *supra* note 60, at 15.

<sup>75</sup> See HARTLEY & KARINCH, *supra* note 4, at 88–89; KUHNKE, *supra* note 16, at 269; PEASE & PEASE, *supra* note 6, at 150–51.

<sup>76</sup> See PEASE & PEASE, *supra* note 6, at 151–52; MORRIS, *supra* note 28, at 49.

<sup>77</sup> See MEYER, *supra* note 61, at 74.

<sup>78</sup> *Id.* at 66–67; CALERO, *supra* note 36, at 69–70; ANDERSEN, *supra* note 56, at 147; EKMAN, *supra* note 57, at 114, 142.

<sup>79</sup> See HARTLEY & KARINCH, *supra* note 4, at 86–87.

### 11. Involuntary Raising of Inner Portions of Eyebrows/Pulling Together of Eyebrows

Most individuals are unable to control the muscles that control the movement of their inner eyebrows. Under stressful conditions, however, many people experience an involuntary lifting of their *inner eyebrows* or the *raising and pulling together both eyebrows*.<sup>80</sup> These movements tend to be transient and are frequently overlooked, but may be noted by discerning observers.

### 12. Narrowing & Tightening of Red Margins of Lips

Stress is frequently manifested just before persons speak by the brief narrowing and tightening of the red margins of their lips.<sup>81</sup> Careful observers can see the lips of prospective speakers tighten into a narrow line across their lower face prior to their utterance of planned misrepresentations.

### 13. Licking Lips or Running Tongue Over Teeth

These are indications of stress and discomfort, and are often associated with deceptive behavior.<sup>82</sup>

### 14. Heightened Voice Pitch

People experiencing anxiety frequently raise their vocal pitch when they speak.<sup>83</sup> Even though intentional prevaricators attempt to control their voice when they talk, listeners can frequently discern their heightened pitch.

### 15. More Deliberate or More Rapid Speech

Individuals who resort to deliberate misrepresentations want to ensure a receptive audience. To accomplish this objective, they often utter their misstatements in a more deliberate manner to be certain their message is completely received. On the other hand, people experiencing greater stress may speak more rapidly.<sup>84</sup>

### 16. Increased Number of Speech Errors

Studies have found that people who are attempting to deceive others tend to have a greater number of speech errors. These may

<sup>80</sup> See EKMAN, *supra* note 57, at 134–13

<sup>81</sup> *Id.* at 136.

<sup>82</sup> See DIMITRIUS & MAZZARELLA, *supra* note 17, at 60.

<sup>83</sup> See MEYER, *supra* note 61, at 103; EKMAN, *supra* note 57, at 93.

<sup>84</sup> See DIMITRIUS & MAZZARELLA, *supra* note 17, at 60; EKMAN, *supra* note 57, at 93, 122.

manifest themselves as stuttering, the repeating of phrases, the increased presence of broken phrases, the failure to complete sentences, or the inclusion of nonsubstantive modifiers (e.g., “It is clear that . . .”; “you know”).<sup>85</sup> It is as if their consciences were disrupting the communications between their brains and their mouths to prevent issuance of their morally wrongful prevarications.

### 17. More Frequent Clearing of Throat

The tension associated with deceptive behavior often manifests itself in more frequent throat clearing. As speakers prepare to utter their knowingly false statements, they nervously clear their throats in a relatively apparent manner.

### 18. Change in Frequency of Looking at Listener

As some speakers experience stress associated with their deliberate deception, they become more nervous and look less frequently at their listeners (“gaze aversion”).<sup>86</sup> Other deceivers, however, exhibit the opposite behavior. They appreciate the fact that people who look others in the eye are perceived as being more credible. To enhance the likelihood their misrepresentations will be believed, they make an obvious effort to look at their listeners more intently while they are lying.<sup>87</sup>

### 19. Persons who Display Open Distrust of Others

People who lie regularly tend to exude a mistrust of others.<sup>88</sup> They think that most persons are dishonest and expect others to use the same deceptive tactics they employ. As a result, negotiators who encounter adversaries who exhibit distrustful predispositions should be circumspect regarding critical representations made by those individuals. They should endeavor to verify their important statements.

### 20. Duping Delight

Some individuals enjoy the challenge of successful deception. When they mislead their listeners, they exhibit a smug contempt

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<sup>85</sup> See ANDERSEN, *supra* note 56, at 146; VRIJ, *supra* note 64, at 26; EKMAN, *supra* note 57, at 121–22.

<sup>86</sup> See VRIJ, *supra* note 64, at 38; LIEBERMAN, *supra* note 67, at 13.

<sup>87</sup> See ANDERSEN, *supra* note 56, at 148.

<sup>88</sup> See LIEBERMAN, *supra* note 67, at 40.

toward their targets.<sup>89</sup> These deceivers may also exude signs of pleasure (*e.g.*, self-satisfied smile). Such signals are especially likely when these persons are misleading people they think are difficult to fool.

Negotiators should carefully monitor the nonverbal signals emanating from their opponents. They should be especially alert to signs of stress or increased behavior designed to enhance the credibility of questionable representations. While no single sign should be considered conclusive evidence of deception, observable changes in behavior and the presence of suspicious patterns of conduct should cause listeners to become more circumspect.

#### IV. CONCLUSION

When individuals negotiate, they communicate verbally and nonverbally. Participants should listen and read text messages carefully for verbal leaks that inadvertently disclose critical information. Such leaks may undermine what the communicators seem to be saying and expose their true needs and interests.

Negotiators involved with in-person interactions and telephone exchanges should look for nonverbal messages emanating inadvertently or intentionally from opposing parties. Some may undermine their overt messages, while others may suggest the possible issuance of false statements. Negotiators who are able to read such nonverbal signals proficiently can significantly enhance their ability to obtain beneficial terms for their own sides.

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<sup>89</sup> *Id.* at 150; EKMAN, *supra* note 57, at 76–79.

