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**NON-VERBAL COMMUNICATION AND  
MEDIATION**

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## Non Verbal Communication and Mediation\*

### Introduction

In the context of modern mediation practice, a mediator plays many roles. One of these roles is as a process manager where s/he manages the process and guides the parties to a settlement<sup>1</sup> of their dispute<sup>2</sup>. A separate but related role is the substantive one where the mediator assists the parties in charting through the content of their dispute and to explore substantive solutions to their problem<sup>3</sup>.

It is clear that implicit in the fulfillment of these roles is the indispensable communicative function. When a dispute goes for mediation, it generally means that communication between the parties has broken down. The mediator has the responsibility of opening the channels of communication and getting them to talk to him/her and one another<sup>4</sup>. This communication between the mediator and the parties is often done through the written and spoken word. I will refer to this type of communication as Verbal Communication.

However, Verbal Communication is only one way by which humans communicate and it is trite that Non-Verbal Communication<sup>5</sup> forms a significant component of the entire package of communication. While there is some disagreement as to the exact figures, the extent to which Non-Verbal Communication plays a role in communication ranges from a conservative estimate of 65%<sup>6</sup> to as high as 93%<sup>7</sup>. Taking the true contribution to lie somewhere within this range, it is clear that Non-Verbal Communication does play a significant role in the process of communication. Unfortunately, even though many are cursorily aware of this fact, few people consciously assess and apply Non-Verbal Communication. Instead, most people go through an unconscious process of trial and error which often leads to unreliable results.

This paper will first consider what Non-Verbal Communication is. It will then explore ways in which an understanding Non-Verbal Communication can assist a mediator to better fulfill his/her functions in a mediation. This paper **does not** pretend to provide an exhaustive exploration of Non-Verbal Communication or even suggest that the views expressed in this paper will

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<sup>1</sup> For the purposes of this paper, the writer presupposes that readers are familiar with the more common models of mediation like Evaluative and Facilitative mediation where there is a significant focus on settlement. For a discussion on different models of mediation, see "Trial or Therapy; Rights or Interests?" paper presented at the 2<sup>nd</sup> Asian Mediation Association Conference – Rediscovering Mediation in the 21<sup>st</sup> Century (24-25 February 2011, Kuala Lumpur).

<sup>2</sup> L T Lim & J Lee "A Lawyer's Introduction to Mediation" (1997) 9 SAcLJ 100, 112.

<sup>3</sup> L T Lim & J Lee "A Lawyer's Introduction to Mediation" (1997) 9 SAcLJ 100, 112-113.

<sup>4</sup> L T Lim & J Lee "A Lawyer's Introduction to Mediation" (1997) 9 SAcLJ 100, 112-113.

<sup>5</sup> This is sometimes more popularly referred to as Body Language. As will become evident, this term is not entirely accurate. For the purposes of this paper, the term Non-Verbal Communication will be used.

<sup>6</sup> M L Knapp & G R Miller (eds) "Handbook of Interpersonal Communication" (Sage Publications, 1994, 2nd ed), 235.

<sup>7</sup> A Mehrabian and S R Ferris "Inference of Attitudes from Non-Verbal Communication in Two Channels", (1967) 31 The Journal of Consulting Psychology, 248-252.

necessarily apply to all people. What it hopes to do is to provide is a map by which the reader may travass presently unfamiliar territory.

### **What is Non-Verbal Communication?**

As a starting point, let us briefly consider 2 distinctions between Verbal and Non-Verbal Communication.<sup>8</sup> The first distinction is that Verbal Communication relies on a shared arbitrary system of coding known as language. In contrast, Non-Verbal Communication does not rely on a shared arbitrary system of coding.<sup>9</sup> Although certain generalizations about the meanings of certain body movements or positions can be drawn, these do not have universal application. One must be careful not to mistake the map for the territory. The second distinction is that the meaning one derives from Verbal Communication necessarily comes from the language used. If spoken or written words are not used, there can be no Verbal Communication. Non-Verbal Communication on the other hand, is a continuous process because Non-Verbal Communication never stops. Even the absence of Verbal Communication has communicative potential.<sup>10</sup>

Traditional definitions of Non-Verbal Communication or Body Language encompass the idea that a non-reflexive or reflexive movement of a part or all of the body is used by a person to communicate a message to the outside world.<sup>11</sup>

There are a number of points about this traditional definition that should be noted. First, it should not be taken that this definition assumes that the respective body movement is *intentionally* used by a person to communicate a message. While it is true that sometimes, people can and do intentionally use a specific body movement to communicate a certain message, most of the time Non-Verbal Communication is subconscious and not consciously intended by the sender to be communicative. However, it would be fair to say that the Non-Verbal Communication manifested by the sender has *communicative potential*. This potential is realised when the observer receives and interprets the Non-Verbal Communication.

Second, implicit within the first point is that Non-Verbal Communication have both *receptive* and *affective* aspects. The *receptive* aspect of Non-Verbal Communication refers to how the the receiver of any piece of Non-Verbal Communication can, either consciously or unconsciously, attribute meaning to that Non-Verbal Communication (which can be consciously intended by the sender but is more likely to be subconscious). The *affective* aspect refers to how the sender of any piece of Non-Verbal Communication *consciously* intends that Non-Verbal

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<sup>8</sup> V P Richmond, J C McCroskey, Section K Payne Nonverbal Behaviour in Interpesronal Relations (Prentice Hall, 1991, 2nd Ed), 4.

<sup>9</sup> There are of course exceptions to this rule. For example, sign language and morse code are non-verbal but also based on a shared arbitrary system of coding. Symbols, emblems and insignia are other examples.

<sup>10</sup> One need only think of receiving the “Cold Shoulder” or “Silent Treatment” to illustrate this point.

<sup>11</sup> J Fast Body Language (Pan Books Ltd., London, 1971), 12.

Communication to *affect* the receiver. While it is tempting to conclude that the *receptive* and *affectative* aspects are two sides of the Non-Verbal Communication coin, this conclusion would be incorrect as the *affectative* aspect is one that is consciously engaged in.

Third, both these *receptive* and the *affectative* aspects of Non-Verbal Communication serve two functions. The first, and the more popularly understood function, is the *interpretative* function. Put simply, meaning is attributed to discrete pieces of Non-Verbal Communication in much the same way that meaning is drawn from words or sentences in Verbal Communication. It is this interpretative function that gives rise to terms for Non-Verbal Communication like “Body Language”. It is important to note that there is no guarantee that the meaning intended by the sender (*affectative*) will be attributed accurately by the receiver (*receptive*). Subject to opportunities to calibrate, this meaning is essentially an educated guess. As will be discussed later, it is also context and culture dependent. The other function is a *systemic* one. This is based on the idea that all human interaction establishes a systemic feedback loop. Put simply, each person responds to and affects the other person, not at the level of conscious meaning, but as part of the subconscious processes of communication. While not universal, it can be said that the *systemic* function is more cross-contextual or cross-cultural than the *interpretative* one as it relies on communication protocols which are arguably based on the nature of being human.

Fourthly, the traditional definition refers only to body movements and this may give the idea that Non-Verbal Communication is limited to just this. This is not so and the writer would expand the definition to include other categories of Non-Verbal Communication such as appearance, vocal behaviour, neurological cues and environment. Therefore, for the purposes of this paper, the writer would take Non-Verbal Communication to mean any behaviour, apart from words, which has communicative potential.

This paper will focus on 3 categories of Non-Verbal Communication. There are:

- Physiological Movements
- Vocal Behaviour
- Environment

For each of these categories, the writer will look at both the *interpretative* and *systemic* functions (when appropriate). The writer will then explore ideas as to how these categories can be applied in the context of a mediation.

### **Physiological Movements**

Physiological movements or signals can be condensed into the sometimes overlapping sub-categories of body movements, posture, facial expression, gaze and spatial behavior.

Looking at these sub-categories briefly, body movements involve head, hand, arm and leg movements and positions which are sometimes used alone or in conjunction with each other. Posture is a subset of body movements. It refers to how a person is sitting or standing and is made up by the various positions the body can take. Facial expression plays a large role in Non-Verbal Communication as a lot of the time, speakers look at each others' faces. This sub-category consists of eye, mouth, nose and brow movements which, like body movements, can occur singly or with each other. Gaze deals with the direction and intensity of a look at something or someone and also includes the perception of any pupil dilation. Finally, Spatial Behavior encompasses proximity, body contact or orientation of one's body in relation to another.

Physiological movements play a large role in the *interpretative* function of Non-Verbal Communication. The writer will not go into a listing of what certain physiological movements may mean. For this, one only need pick up a book on body language. Instead, the writer will explore some of the nuances of the *interpretative* function.

On a reading of books on the subject like "Body Language"<sup>12</sup>, one may very easily get the idea that all there is to the "reading" of body language is observing the movements of other people and giving those movements a meaning as set out by these books. This superficial approach ignores the nuances that every language, including body language, has. The underlying assumption is that every movement or set of movements has a meaning to it and that we just need to ascertain this meaning.

One must surely question the assumption that movements have a specific meaning. Are we to accept that in a creature as subjective, complex and individual as a human, a particular gesture or movement will mean the same thing? While some movements may be hard-wired, these speak more to the *systemic* function rather than the *interpretative* one.

One could also say that specific meanings are attached to certain movements often enough for broad generalizations to be drawn. But by definition, this means that there are exceptions. The difficulty is determining with any sort of accuracy whether the rule or the exception applies.

To minimize this difficulty, conventional literature on body language suggests a number of considerations to take into account. First, one is cautioned about the impact of culture. Different cultures may have different signals. For example, a nodding of the head may be taken to mean "yes" in many western cultures but may only indicate understanding in some eastern ones. Further, the message "yes" may be indicated by a shaking of the head in yet other cultures. Secondly, context has to be taken into account. An often-used example is that one may be

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<sup>12</sup> J Fast Body Language (Pan Books Ltd., London, 1971); A Pease Body Language (Camel Publishing Company, Sydney, 1981); A Pease & B Pease The Definitive Book of Body Language (Pease International, Queensland, 2007) A Pease & B Pease The Definitive Book of Body Language (Pease International, Queensland, 2007).

crossing his/her arms because of the cold and not because of one being defensive. Another example is that a person seated in a chair with no arms may cross their arms simply because it is a comfortable way to configure the body. Finally, one is reminded to interpret “gesture clusters” instead of individual gestures. This is because one movement may be a “hiccup” and out of sync with other movements. Presumably, this means that one should give that cluster the meaning supported by the majority of the movements in that cluster.

These considerations point to a more sophisticated analysis incorporating an anti-assumption control which requires one to check one’s interpretation before acting on it. This is important as human-beings are meaning making creatures and we often subconsciously fill in gaps in the communication package with our own assumptions.<sup>13</sup>

Thus far, we have been discussing the *interpretative* function of physiological movements. The *systemic* function draws largely from the field of Neuro-Linguistic Programming (NLP).<sup>14</sup> In relation to non-verbal signals, NLP starts from the assumption that all we know is what we can observe.<sup>15</sup> We do not really know what any movement or posture means. Unless one has had a chance to “calibrate” to the subject’s moods by associating these moods with certain non-verbal signals, any attempt at interpretation would still be a guess.<sup>16</sup> And even when one has calibrated to the non-verbal signals of a particular person, this calibration is not transferable to another. Therefore, rather than seeking an interpretation of the non-verbal signals, NLP uses these signals to *systemically* improve the process of communication by developing rapport.

It is commonly accepted that the notion of rapport forms the basis of good communication and relationship. Rapport is the instinctive closeness to others whom we perceive as similar. Jacobson suggests that it is due to the strong human drive to the familiar<sup>17</sup> or as the old proverb goes, “birds of a feather...” When one experiences rapport, there is a feeling of trust and perhaps even bonding with the other person. This is not an unfamiliar notion. Techniques such as active listening and empathy capitalize on this need for familiarity.

There are two ways in which one can create rapport through physiological movements. The first is through full body mirroring. This is the process by which you match<sup>18</sup> or mirror<sup>19</sup> some or all

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<sup>13</sup> J Lee “Overcoming Attribution Bias in Mediation: An NLP Perspective” (2004) 15 ADRJ 48, 49-52.

<sup>14</sup> This writer has explored the definitional and historical aspects of NLP elsewhere. See J Lee “Teaching NLP for Conflict Resolution” (2000) 34 The Law Teacher: The International Journal of Legal Education 58 and J Lee “Overcoming Attribution Bias in Mediation: An NLP Perspective” (2004) 15 ADRJ 48, 49-52. For good introductory texts to NLP, see J O’Connor & J Seymour Introducing NLP (Aquarian Press, London, 1993, Revised Edition) and J O’Connor & I McDermott Principles of NLP (Thorsons, London, 1996).

<sup>15</sup> D Bagley & E Reese Beyond Selling (Meta Publications, California, 1988), 50-51.

<sup>16</sup> This process of calibration does not only relate to the “large scale” body movements or gestures as discussed in most books on the subject, it deals with minute details like muscle tone, coloration of the skin and tensing of muscles.

<sup>17</sup> A point of discussion brought up in an NLP Intensive Training Workshop by Dr. Sid Jacobson, Singapore, March/April 1995. Indeed, he suggests that this drive is the strongest in humans.

<sup>18</sup> Matching the other person’s physiology involves positioning one’s posture and making the same gestures as if you were the other person.

of the other party's body movements.<sup>20</sup> This would include gestures, posture, facial expression and even breathing rates.<sup>21</sup> The second, more subtle way is through cross-over mirroring. This is where you match the other party's body movements with a pattern which is similar to their movement.<sup>22</sup> For example, one could match their rate of breathing or tapping foot with rhythmic sways of your finger. Either way, the message being conveyed to the other person's unconscious is that "we're cut from the same cloth". These processes of matching, mirroring and cross-over mirroring are generically referred to as "pacing". Once this "familiar-ness" is achieved, then one can lead the other party to what might be considered a more open posture by changing one's own body movements. If sufficient rapport has been achieved, the other party will begin to unconsciously mirror your movements.

It is important to note that the process of "pacing" and "leading" does not and should not seek to mimic the other person. It should be done subtly and with respect for the other person.<sup>23</sup>

Before leaving this category, it is useful to make one final point. Ironically, while saying that one cannot do more than guess at what someone else is thinking from her non-verbal signals, NLP maintains that certain signals have a specific meaning. NLP practitioners can tell from one's eye movements, posture and gestures which representational system one is accessing information in.<sup>24</sup> Simply put, representational systems are the ways we take in and store our experience of the world<sup>25</sup>. Not only do we experience our world through the five senses, we also re-present this experience to ourselves in terms of the same senses. Therefore, when we remember something, that memory can come in the form of a picture, sound, feeling, taste or smell.<sup>26</sup> Of course, NLP's claims in interpreting these signals is supported by neurological studies which have long known that we move our eyes in different ways depending on which part of the brain we are activating.<sup>27</sup> In effect, these signals are hard-wired to the way we access information in our brain. Therefore, this interpretive exercise is more objective than that suggested by NVC.

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<sup>19</sup> Mirroring involves positioning one's posture and making the same gestures as if you were a mirror image of the other person.

<sup>20</sup> J O'Connor & J Seymour Introducing NLP (Aquarian Press, London, 1993, Revised Edition), 20.

<sup>21</sup> L Cameron-Bandler Solutions (Real People Press, Utah, 1985), p 34.

<sup>22</sup> D Bagley & E Reese Beyond Selling (Meta Publications, California, 1988), 47.

<sup>23</sup> J O'Connor & I McDermott Principles of NLP (Thorsons, London, 1996), 10-16. For a fuller discussion of developing rapport and the subtleties of pacing, see J Lee "Teaching NLP for Conflict Resolution" (2000) 34 The Law Teacher: The International Journal of Legal Education 58, 70-72.

<sup>24</sup> J O'Connor & J Seymour Introducing NLP (Aquarian Press, London, 1993, Revised Edition), 35-41.

<sup>25</sup> J O'Connor & J Seymour Introducing NLP (Aquarian Press, London, 1993, Revised Edition), 27.

<sup>26</sup> Unfortunately, a thorough look at representational systems is outside the scope of this paper. For a discussion on this, see J Lee "Teaching NLP for Conflict Resolution" (2000) 34 The Law Teacher: The International Journal of Legal Education 58, 66-70 and B G Madonik I Hear What You Say, But What Are You Telling Me? : The Strategic Use of Nonverbal Communication in Mediation (Jossey Bass, San Francisco, 2001), 23-33.

<sup>27</sup> J O'Connor & J Seymour Introducing NLP (Aquarian Press, London, 1993, Revised Edition), 35.

## Vocal Behaviour

Vocal behaviour constitutes 38% of the communication package<sup>28</sup> and is comprised of, *inter alia*, pitch (ranging from high to low), volume (ranging from soft to loud), timbre (quality of voice), speed (ranging from slow to fast), pauses (whether appropriately placed or how long each pause is timed) and inflection (whether it goes upwards, downwards or remains even).

Like the Physiological Movements sub-category, Vocal Behaviour can play both *interpretative* and *systemic* functions. For the former, the discussion relating to Physiological Movements is relevant here and will not be repeated. Suffice it to say, the same pitfalls of attribution of meaning apply.

One can similarly use Vocal Behaviour to achieve rapport. Any of the components of pitch, volume, timbre, speed and pauses can be matched when speaking to another. The easiest to match initially is usually volume and speed. Matching pitch and timbre requires a certain amount of voice control and subtlety. Again, the key is not to mimic the other person but to convey the impression that you are similar to the other person. When successful, pacing voice elements can be very effective as most people are not consciously aware of or paying attention to voice shifts.

A common query is whether one should match the vocal behavior of someone who is angry or upset e.g. manifesting a high pitch, loud volume and fast speed. It would appear counter-intuitive to pace these characteristics as the concern would be whether this would aggravate the other party even more. The more intuitive response would be to maintain calm and measured vocal behavior in a bid to calm that person down. However, as any person facing an angered spouse or partner has learnt, remaining calm has the opposite effect of aggravating them. The subtlety suggested by NLP is to initially match the vocal behavior while using words of conciliation and calm. This sends separate messages to the subconscious and conscious minds respectively. After this is done, one should, as soon as possible, “lead” the other party by lowering the intensity on all of the vocal behavior being paced. The situation is therefore “de-escalated”. While this de-escalation may occur on the first go, it may be that one has to lower the intensity in chunks to achieve full de-escalation.

Turning to inflection, for our purposes, inflection can be defined as the rise and fall of voice pitch used for expression. Typically, this inflection occurs at the end of an utterance (whether word, phrase or sentence) and can go upwards, downwards or remain even. An upward inflection is associated with a question or doubt and a downward inflection with a stress or a command. An even inflection is generally taken to be neutral. In written language, these inflections are represented by the question mark, the exclamation mark and the period/full stop respectively.

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<sup>28</sup> A Mehrabian and S R Ferris “Inference of Attitudes from Non-Verbal Communication in Two Channels”, The Journal of Consulting Psychology Vol. 31, 1967, pp 248-252.

Inflections play a significant role in the *interpretative* function of communication. From a *receptative* aspect, we generally know that a response is expected of us when an upward inflection is used even if the content of the verbal communication is not structured as a question. For example, the phrase “This is an issue” when used with an upward inflection i.e. “This is an issue?” prompts a response from the receiver. An upward inflection can also be taken to indicate doubt on the part of the speaker if the content of the verbal communication is structured as a statement or an exclamation. The phrase “this is important to me” with an upward inflection i.e. “This is important to me?” can signal that the speaker doubts what is being said or is not congruent about saying it.

From an *affective* aspect, a speaker can use an upward inflection when reflecting to the parties their positions to get them to loosen their hold on those positions or to get them to rethink them. A downward inflection can be used to subconsciously communicate to the receiver to seriously consider or even accept what is being said.

Before leaving inflections, it is useful to make 2 points. It is not clear to the writer whether inflection suffers from the same problems of meaning attribution as physiological movements and vocal behavior. While the writer suspects that the meaning associated with upward and downward inflections are not universal, the writer has not in his experience encountered a language that does not conform to this generalization. Secondly, inflections are best used in conjunction with congruent physiological movements to support the meaning of the inflections.

## Environment

It has been said one cannot ask a fish what water is. When something so surrounds us, it is often invisible to us. The same thing can be said of our environment. It exists in the background and often by-passes our conscious attention. Yet, it affects us in subtle ways which can affect our feeling of power (or powerlessness) and desire to cooperate or compete. The category of Environment comprises of, *inter alia*, the room<sup>29</sup>, lighting<sup>30</sup>, sounds<sup>31</sup>, scent<sup>32</sup>, colour<sup>33</sup>,

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<sup>29</sup> B G Madonik *I Hear What You Say, But What Are You Telling Me? : The Strategic Use of Nonverbal Communication in Mediation* (Jossey Bass, San Francisco, 2001), 106-107.

<sup>30</sup> B G Madonik *I Hear What You Say, But What Are You Telling Me? : The Strategic Use of Nonverbal Communication in Mediation* (Jossey Bass, San Francisco, 2001), 107.

<sup>31</sup> B G Madonik *I Hear What You Say, But What Are You Telling Me? : The Strategic Use of Nonverbal Communication in Mediation* (Jossey Bass, San Francisco, 2001), 115.

<sup>32</sup> M Leong “Coloring and scenting your way to a more successful mediation” (Research Paper submitted for the Mediation Workshop, Faculty of Law, National University of Singapore, Academic Year 2008/2009).

<sup>33</sup> B G Madonik *I Hear What You Say, But What Are You Telling Me? : The Strategic Use of Nonverbal Communication in Mediation* (Jossey Bass, San Francisco, 2001), 106; M Leong “Coloring and scenting your way to a more successful mediation” (Research Paper submitted for the Mediation Workshop, Faculty of Law, National University of Singapore, Academic Year 2008/2009).

decoration, temperature<sup>34</sup>, shape of table and seating positions. For the purposes of this paper, the writer will focus on the sub-categories of the shape of the table and the related seating positions.

Unless one has the power to specify the shape of the table, one often has to live with what is available. There are fundamentally 4 shapes of tables one will encounter. Square, Rectangular, Oval or Round. Depending on how one arranges the seating positions, one can create different effects.

In the business context, for a square or rectangular table, seating positions directly opposite one another tend to create a sense of competition<sup>35</sup> whereas sitting next to one another on one side of the table fosters cooperation<sup>36</sup>. These same considerations apply to an oval-shaped table. A round table is ideal for fostering a sense of equality and cooperation<sup>37</sup>.

A rectangular and oval table has the position of power at the head of the table<sup>38</sup> whereas in a square or round table, there is no discernible position of power<sup>39</sup>. However, even for a square or round table, the power dynamics can be affected by the presence of someone with a high status<sup>40</sup> and the location of the seat in the most secure position in the room.

## **Utilizing Non-Verbal Communication in Mediation**

There are a number of ways in which a mediator can use the above understanding of non-verbal communication.

Starting with the environment, the application of what has been discussed is fairly straight forward. If one has the luxury of selecting the shape of the table, it is recommended that the table be round.<sup>41</sup> The mediator should be seated in the most secure position in the room usually with

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<sup>34</sup> B G Madonik I Hear What You Say, But What Are You Telling Me? : The Strategic Use of Nonverbal Communication in Mediation (Jossey Bass, San Francisco, 2001), 107.

<sup>35</sup> C W Moore The Mediation Process (Jossey Bass, San Francisco, 3<sup>rd</sup> Edition, 2003), 154; A Pease & B Pease The Definitive Book of Body Language (Pease International, Queensland, 2007), 334.

<sup>36</sup> C W Moore The Mediation Process (Jossey Bass, San Francisco, 3<sup>rd</sup> Edition, 2003), 154; A Pease & B Pease The Definitive Book of Body Language (Pease International, Queensland, 2007), 333.

<sup>37</sup> B G Madonik I Hear What You Say, But What Are You Telling Me? : The Strategic Use of Nonverbal Communication in Mediation (Jossey Bass, San Francisco, 2001), 109; A Pease & B Pease The Definitive Book of Body Language (Pease International, Queensland, 2007), 338.

<sup>38</sup> A Pease & B Pease The Definitive Book of Body Language (Pease International, Queensland, 2007), 338-339.

<sup>39</sup> A Pease & B Pease The Definitive Book of Body Language (Pease International, Queensland, 2007), 336-337.

<sup>40</sup> A Pease & B Pease The Definitive Book of Body Language (Pease International, Queensland, 2007), 337.

<sup>41</sup> B G Madonik I Hear What You Say, But What Are You Telling Me? : The Strategic Use of Nonverbal Communication in Mediation (Jossey Bass, San Francisco, 2001), 109.

his/her back to the wall and in a position where they can view the entry way.<sup>42</sup> The mediator should also be equidistant between the parties.

If one does not have the luxury of choice and has to work with a long table (either oval or rectangle), it is suggested that parties be seated next to one another on one long side of the table in order to foster a cooperative mindset. While this means that the mediator will sit opposite on the other long side and not at the traditionally accepted “head of the table” position, this can have the benefit of promoting informality and signaling that the mediator is not there to judge but to facilitate.<sup>43</sup> If it is necessary for the mediator to have more of the trappings of authority, this can be done by “power-dressing” or having a chair that is larger or higher than the parties. Needless to say, parties should be seated in chairs that are the same in all respects.

It is important to acknowledge these suggestions are not writ in stone. Circumstances may dictate the need for a different configuration. For example, if there are issues of personal safety involved, seating parties side by side would be contra-indicated. Some suggest that with a long table, the mediator should be at the head of the table with the parties on either long side of the table.<sup>44</sup> They also suggest that putting parties side by side is to “make naïve assumptions about ‘working together’”.<sup>45</sup>

A key way in which Non-Verbal Communication can be used in mediation is in the building of trust and rapport. The challenge of building rapport with the parties through matching and mirroring is that the mediator must, at all times, be or at the very least appear neutral and impartial. It would therefore not do if the mediator were to adopt very similar postures to one party or the other (unless of course, both parties are in the same posture). Hence, using physiological movements and vocal behavior to build rapport requires a bit more subtlety. This is achieved through pacing in 3 ways.

First, the mediator can pace a party by matching the gestures and breathing rate of the parties. Matching these elements are more transient and therefore less obvious than the matching of a body posture. Secondly, parties can be paced through vocal behavior. The easiest way to do this is to match the pace at which they speak. Since the mediation will involve direct communication between the mediator and the parties, it would be very easy for the mediator to utilize gestures and pace of speech when summarizing, paraphrasing, reflecting, reframing, etc. Thirdly, the

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<sup>42</sup> The writer notes that there is not unanimity about this. Some suggest that the position closest to the door symbolizes a position of leadership. See L Boule and Teh HH Mediation: Principles, Process, Practice (Singapore Edition) (Butterworths, Singapore, 2000), 152.

<sup>43</sup> B G Madonik I Hear What You Say, But What Are You Telling Me? : The Strategic Use of Nonverbal Communication in Mediation (Jossey Bass, San Francisco, 2001), 109.

<sup>44</sup> L Boule and Teh HH Mediation: Principles, Process, Practice (Singapore Edition) (Butterworths, Singapore, 2000), 153.

<sup>45</sup> L Boule and Teh HH Mediation: Principles, Process, Practice (Singapore Edition) (Butterworths, Singapore, 2000), 152. This is one valid view but not one the writer subscribes to.

mediator can and should make liberal use of the cross-over mirroring. As mentioned earlier, this involves matching the other party's body movements with a pattern which is similar to their movement. The easiest way to do this is to nod at the pace at which a party is speaking. Everyone speaks to an internal rhythm (which may vary) and it is a natural behavior to nod in acknowledgement. This process can also be reversed. People tend to nod when listening according to their preferred internal rhythm. One can time one's pace of speaking to the rate that the listening party is nodding.

Of course, the above discussion on being subtle in pacing so as to remain neutral and impartial to the parties applies to being at joint session. At a private session, the mediator can have access to all aspects of pacing including pacing of posture to build rapport with that party.

Despite all the interpretational pitfalls that surround the discernment of meaning, both verbal or otherwise, Non-Verbal Communication can also be used to enhance the meaning of communication. As long as we acknowledge the assumptions that will inevitably exist and build in a mechanism to deal with the, we can use Non-Verbal cues to ensure clarity of communication. At every point in the mediation process, parties will be communicating either to the mediator or to one another. Apart from sorting for cognitive content e.g. facts, positions and interests, from a Non-Verbal Communication perspective, it is also important for the mediator to look for incidences of incongruence and transition.

In terms of the former, it was mentioned earlier that one should attribute meaning to clusters of physiological movement rather than single movements. Looking for incidences of incongruence involves identifying incongruence within any cluster of communication, both Verbal and Non-Verbal. The idea is that where the sender is not fully comfortable with whatever is being communicated, there will be contradictory signals.<sup>46</sup> For example, in response to a possible deal, one party may say "That's great!" but his/her non-verbal signals may indicate unhappiness or another inconsistent message. The key, however, is not to assume that they are unhappy. We simply do not know. The key is to check whether the assumption being made is correct. In response to the above scenario, the mediator can ask the speaker an open-ended question like "Do you see any difficulties with this proposal" to give him/her an opportunity to express their unhappiness. An alternative and more specific approach would be for the mediator to directly ask "I get the sense you don't seem completely happy with that proposal. Is that correct? Would you be willing share with me why?"

Apart from looking for incidences of incongruence, one can also look for transitions. Instead of seeking to attribute meaning to any cluster of non-verbal signals, one is looking for shifts of non-verbal signals during the communication process. For example, as the mediator is talking to one party, s/he may shift from one cluster of non-verbal signals to another. Traditionally, one would

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<sup>46</sup> Some would suggest that looking for certain conflicting cues can alert us to when someone may be lying. See J Krivis & M Zadeh "Hunting for Deception in Mediation – Winning Cases by Understanding Body Language" ([http://www.negotiator magazine.com/article326\\_2.html](http://www.negotiator magazine.com/article326_2.html), last accessed 21 December 2010).

look at the cluster of non-verbal signals shifted and attribute meaning to it. If the second cluster constituted “negative body language”, then the assumption is that the listener is responding negatively to what is being said. This could well be true. However, it could equally be false. Again, the key is to notice the transition and to check with the listener either by way of an open-ended “How do you feel about what we’ve been discussing so far?” or a more specific query.

Inflections can also be used to enhance the meaning and clarity of one’s communication. As mentioned earlier in this paper, an upward inflection is associated with doubt or questioning while a downward inflection is associated with delivering emphasis or a command. We tend to use these inflections naturally in everyday communication. However, as with gesture clusters, instances of incongruency can occur when what is being communicated verbally and the inflection used mismatches. For example, if the party says something with an upward inflection when it should have been a downward inflection, then this may signal that the party doubts what is being said. An astute mediator may then look for either supporting or contradictory evidence from the physiological movements before strategically deciding to check with the speaker.

Mediators should also be careful of the inflections they use when communicating. The rule of thumb is to ensure one’s package of communication, verbal and non-verbal, is congruent. For example, when making an opening statement where one establishes one’s authority, credibility and sets the tone for the mediation, using neutral or downward inflections is recommended. When asking questions or trying to encourage a party to be open and to share information and feelings, an upward inflection is prescribed.

Mediators can also deliberately seed their communication with incongruent inflection to convey specific messages to the subconscious of the listener. Repeating to a party their intractable position with an upward inflection will suggest doubt to the listener’s subconscious. Making a suggestion or asking a question with a downward inflection will communicate a command to the listener’s subconscious. It is important to note that the effects of inflection are not immediate or necessarily guaranteed. However, because it is a communication to the subconscious, repetition will essentially tend the listener to the message communicated by the inflection.

## **Conclusion**

It is essential for an effective mediator to be a masterful communicator. This requires one to process, in real time, many chunks of information simultaneously. This paper has sought to make explicit some aspects of Non-Verbal Communication that a mediator would have to process and utilize. While we already do some of these unconsciously, much of this is unstructured and haphazard. It is hoped that this paper will give mediators who are interested in developing these skill-sets a clear structure and starting point for skill acquisition, practice and utilization.