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The Juror as Audience: The Impact of Non-Verbal Communication at Trial

By Janet Lee Hoffman and Andrew Weiner
Janet Hoffman & Associates LLC



Janet Lee Hoffman



Andrew Weiner

Some of the most significant evidence presented at trial is not governed by the rules of admissibility and may be received by jurors without counsel even being aware of its presentation. Years ago I served as a juror in a three-week trial. I was struck at the time by the extent to which I was drawn to and distracted by the non-verbal, non-testimonial information conveyed each day during the proceeding. I found myself observing not only the participants in the proceeding itself but also the spectators in the gallery. I remember taking notice of one testifying expert who returned most days to watch the trial unfold. On days he failed to show up, I wondered if that day's testimony was less important.

During my years as an advocate, I have often been reminded that jurors are taking in this kind of information. Following one trial in which my client received a favorable verdict, several jurors later told me they had observed that I had been ill during the course of the trial. Notwithstanding my best efforts to disguise my symptoms, the jurors picked up on how I was feeling. They recalled being concerned about how my illness was impacting me and appreciated my efforts to appear each morning for court.

In another case, I sat across from an attorney who flamboyantly emphasized certain points he argued by wadding up his notes and tossing the crumpled paper into a waste basket in true basketball fashion. I found out later that his theatrics amused the jurors; they even spent time imitating him during their deliberations. His efforts to impress, however, distracted from his argument. And although he demonstrated a flair for the theatrical, he failed to win his case.

Jurors are sworn to decide cases based solely on the evidence presented and the application of the law to the evidence. Yet, they are exposed daily, both inside and outside the courtroom, to

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so much more information than is admitted into the record. As illustrated by the events described above, jurors are impacted in some ways by litigants' behavior, comportment and other non-verbal communication. How much these factors actually affect jury verdicts is unknown; nevertheless, one should be mindful that jurors notice. For example, following a recent lengthy trial, jurors commented to the court that they felt some of the parties were not paying attention to witnesses' testimony if the litigants did not believe the testimony was relevant to their case. This trial reminded me of the dynamic effect non-testimonial information has on jurors and triggered my interest in exploring the impact of non-evidentiary information in courtrooms. By understanding the different ways non-verbal information is communicated, trial counsel can optimize its impact in their own presentation and will know when to object to certain forms of non-verbal communication that could prejudice the client.

Below is a synthesis of information gathered from research scientists, jury consultants and courts who have examined the impact of non-verbal communications on jurors. This article also addresses the court's role in safeguarding against forms of non-verbal communication that may prejudice a litigant and counsel's role in actively managing the effect of these potentially powerful forms of communication.

What Is Non-Verbal Communication?

When the eyes say one thing, and the tongue another, a practiced man relies on the language of the first.

- Ralph Waldo Emerson

Jurors are generally instructed to consider only evidence (i.e., testimony and exhibits) when deciding a case.¹ Yet, the courtroom is not a laboratory in which jurors scientifically evaluate evidence in a sterile environment.² The trial process boils down to formally introduced evidence and argument mixed with a variety of non-verbal communication, which may at times yield unpredictable results. Model jury instructions capture this dynamic with regard to the non-verbal component of witness testimony, noting that the assumption that a witness's testimony is truthful may be overcome by the manner in which the witness testifies and nature and quality of that testimony.³ The model instructions, however, do not address the messages that are conveyed to jurors

through various forms of non-verbal communication by those who are not witnesses or by witnesses when they are off the witness stand.

One of the first steps in understanding and managing the effect of non-verbal communication on jurors is to consider the jurors themselves. Prior to being called for service, most jurors have never before set foot into a courtroom. They come from all walks of life and often arrive with an expectation that their experience in court will mirror scenes from popular movies and television. With few exceptions, trial is rarely that exciting or dramatic. Nevertheless, trial consultant, Tom Capps, notes that "jurors often try to uncover some of the drama they expected by closely observing all of the participants in the courtroom."⁴ Through even the most subtle non-verbal cues, jurors attempt to discover a hidden narrative that exists in the shadows behind the testimony of witnesses and other evidence presented in the case.⁵

Non-verbal communication is most commonly recognized as "body language." Eye contact, facial expressions, gestures, and posture all convey information to an observant juror. Other forms of non-verbal communication, such as dress and appearance, the relative proximity of counsel and litigant to the jury, paralanguage (speech rate, volume, variations in pitch), and the presence of spectators in the gallery, may also affect jurors' impressions.⁶ The use of eye contact, higher vocal volume and synchronized hand gestures are a few factors that have been associated with persuasiveness and confidence. Conversely, speaking in a monotone and frequent self-touching are signals that the speaker is less assured. Of course, the relative weight and impact of these different forms of non-verbal communication vary as they are measured through the subjective lens of individual jurors.⁷

The impact of non-verbal communications has been studied in the context of demonstrative exhibits. When used in personal injury cases or criminal prosecutions involving violent crimes, research shows that graphic images contribute to increased damage awards and higher conviction rates.⁸ In a scientific study on this effect, sample jurors were given a product liability case package in which an infant's hand had been severely burned by a steam vaporizer—the facts slightly and intentionally skewed in favor of the defense. The jurors were separated into three groups: the

first received detailed descriptions of the injury but no photos, the second received graphic photos taken immediately after the incident, and the third received both the injury photos as well as post-recovery photos.⁹ In both groups shown the graphic images of the plaintiff's injury, jurors awarded significantly higher non-economic damages.¹⁰ Interestingly, the influence of the photos on jurors' determination of liability was also dramatic: 58% of jurors in the group shown no photos found in favor of the defendant, 51% of jurors shown the graphic photos found in favor of the plaintiff; and 60% of jurors shown both sets of photos returned defense verdicts.¹¹ These results not only confirm the influence graphic imagery has on jurors' perceptions when assessing damages, but also its improper effect on liability verdicts.

Jurors Have a Virtual Backstage Pass

In the theatrical works we love and admire the most, the ending of the drama generally takes place offstage.

- Gustav Mahler

The difference between the formal presentation of evidence and information communicated through non-verbal means can be understood in terms of a theater performance. Witness testimony is part of the performance given "on stage," while non-verbal communication of information occurs through jurors' "offstage observations."¹² Unlike a traditional theater setting where actors waiting offstage are unseen by members of the audience, in the courtroom, litigants and counsel cannot hide backstage when it is not their turn in the limelight. Jurors have a virtual pass to observe the actors backstage and are able to view each of the players throughout the course of the proceeding.¹³ Nor are these offstage observations limited to the courtroom itself; jurors may also be affected by observing trial actors' behavior in elevators, hallways, restrooms and even outside the courthouse.¹⁴

The effects of these so-called offstage observations vary among individual jurors. For example, studies on the effect of a defendant's physical attractiveness on jurors indicate more favorable outcomes for those perceived as attractive.¹⁵ Yet, physical attractiveness being a distinctly personal preference may not impact any one juror in the same way.¹⁶ Similarly, different jurors may interpret a defendant's tendency to fidget—often an indication of anxiety or boredom—as

communicating the worry of the innocently accused or the idleness of a guilty mind simply waiting for the inevitable guilty verdict.¹⁷

In a recent study published in the journal *Law & Human Behavior*, researchers attempted to quantify the influence of offstage observations on individual jurors and whether they have a carry-over effect on group deliberations.¹⁸ The study found that jurors' discussions about offstage observations had little measurable effect on the trial outcomes.¹⁹ This conclusion is supported by the fact that merely 1.5% of juror discussion topics across all 50 cases in the study involved offstage observations.²⁰ Further, the majority of jurors' remarks favoring one party over the other focused negatively on plaintiffs, yet less than one-quarter of these cases resulted in a defense verdict.²¹ Although the study found that offstage observations discussed by jurors during deliberations had little effect on verdicts, the study did not attempt to evaluate nor reach a conclusion regarding the impact of observations that were not openly discussed among jurors.

Another interesting discovery from this study was jurors' keen awareness of attempts by trial participants, particularly litigants, to "perform for the jury through displays of strong emotion or back-channel comments about witness's testimony."²² Jurors' critical remarks about these types of efforts highlight the common misconception that jurors are gullible and easily fooled.²³ The study's authors also note that because many criminal defendants elect not to testify at trial, jurors in criminal trials may focus on and rely more heavily on offstage observations.²⁴ What is not known or quantified is the extent of the impact these observations may have had on individual jurors or how the observations of one juror may shape the attitudes of other jurors. However, the study established that jurors are exposed to and consider far more information throughout the trial process than what is admitted as evidence.

All Rise

Power is the most persuasive rhetoric.

- Friedrich Schiller

Non-verbal cues from judges can have a profound influence on jurors. Of all the courtroom actors, the person who holds the most power, and whose influence on jurors may be greatest, is the judge.²⁵ Part of the reason judges' potential influence on jurors is so great is based on what has been called

the *Rosenthal Effect*.²⁶ The Rosenthal Effect, named after psychology professor and researcher Robert Rosenthal, occurs when individuals modify their behavior to conform with what they perceive to be the expectation of the person in authority.²⁷ In the courtroom, that person is the judge. The trial judge guides jurors on procedures they must follow and manages the jurors throughout the proceeding.

One of the best places for counsel to actively reduce the potential influence of a trial judge's bias is during the reading of the jury instructions. Researchers have found that the use of model instructions, which are often formally worded and confusing to a layperson, leads jurors to rely on non-verbal cues from the judge more so than the use of modified instructions that are more easily understood.²⁸ By making an effort to simplify jury instruction, counsel can aid jurors in understanding their duties at trial and minimize the risk that they will lean on their perceptions of the trial judge's biases in reaching their verdict.

Of course, even most well-intentioned and competent trial judges are at times unable to prevent their non-verbal behavior from showing how they feel about a party or counsel and thereby unwittingly reveal a bias. In *State v. Mains*, the Oregon Supreme Court considered the effect of a trial court judge's seemingly biased approach to questioning a defense expert during cross-examination.²⁹ Recognizing jurors' sensitivity to both words and non-verbal communications of trial court judges, the court notes that excessive intervention by a trial judge "diminishes the effectiveness of the adversary system and may deprive a litigant of his right to an impartially administered trial."³⁰ Indeed, Oregon trial court judges are prohibited from instructing jurors or making comments "with respect to matters of fact."³¹ Notably, the Federal Rules contain no similar restriction.³²

The judge's role is meant to be one of impartiality.³³ Indeed, the court not only must remain unbiased in its actions, but must avoid even the appearance of prejudice through the use of language or conduct.³⁴ Yet, even the most careful judges are subject to their own human nature. Often having access to much more information than what is presented to jurors, trial judges may draw their own conclusions about testifying witnesses or the weight of the evidence. Armed with this information, a judge is at times unable to avoid transmitting subtle cues to jurors through non-verbal

behavior as evidence is presented. The Alabama Supreme Court in *Allen v. State* acknowledged and accepted that judges transmit information to jurors when it wrote the following: "The trial judge is a human being, not an automaton or a robot. He is not required to be a Great Stone Face which shows no reaction to anything that happens in his courtroom."³⁵

For this reason, trial counsel should observe the court's manner and demeanor and, if necessary to preserve the fairness of the proceeding, make timely objection to any expression of bias against her client. Such an objection should be made only when counsel believes the bias will seriously prejudice the client's rights since counsel's objections to comments or expressions of the trial court might alienate the judge and possibly the jury. When objecting, counsel should be sure to include a detailed description of the conduct at issue to be sure that the nuances of the court's non-verbal acts are fully and fairly considered on appeal.³⁶ Counsel should also request that the court provide a curative instruction directing the jurors to disregard the court's actions. Success on appeal depends on a showing that the court's conduct created "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interest of the court and the interests of the accused."³⁷

Dress for Success

Clothes make the man. Naked people have little or no influence on society.
- Mark Twain

A client's physical appearance both on and off the witness stand conveys a great deal to jurors. Similarly, counsel's attire can draw the attention of both jurors and the court, though not always in the best way. Counsel should wear "comfortable, well-fitting clothes that are in good repair" and avoid clothing or hairstyles that are too distracting.³⁸ As a general matter, all persons attending court must be dressed appropriately.³⁹ Within this restriction, counsel has broad latitude in advising clients how best to present themselves.

In her article on the theater of the courtroom, Loyola Law School professor Laurie L. Levenson discusses how the defendants' attire and demeanor during the 1993 trial of the infamous Menendez brothers influenced jurors' impressions of the accused.⁴⁰ Lyle and Erik Menendez were ultimately convicted of the brutal murder of their parents, but

not before jurors in their first trial could not agree whether to convict them of murder or manslaughter and failed to reach a verdict.⁴¹ The two brothers, who were in their early twenties at the time of the first trial, appeared in court wearing crewneck sweaters, button-down shirts and slacks. The outfits, which gave them an appearance of youthful innocence compared with a more formal suit and tie, were discussed by jurors during deliberations.⁴² In a book recounting her experience as a juror in the first Menendez trial, Hazel Thornton recalled jurors' recognition that the outfits, along with defense counsel's reference to the defendants as "boys" and her maternal behavior in court, were intended to elicit sympathy from jurors.⁴³ Ms. Thornton's account illustrates jurors' awareness of so-called "offstage observations" and the effect it has on jurors' consideration of formally admitted evidence, though in that case, awareness by some jurors that they were being manipulated was not enough for a conviction.

I personally experienced the effect a client's attire can have on jurors in a case I tried as a young, inexperienced lawyer. My client was facing rape and kidnapping charges and I wanted to soften his appearance. I had him appear for court wearing a sweater, but the sweater fit him too tightly and highlighted his muscular physique. I only noticed this unintended effect on his appearance when I called him to the stand to testify. Rather than appearing benign and harmless, the too-tight ribbed sweater made him look strong and physically powerful and sent the wrong message to jurors.

In a practice not endorsed by this author, a criminal defendant's use of nonprescription eyeglasses while appearing in court is another example of how appearance can affect jurors' perceptions.⁴⁴ While eyeglasses are primarily worn by persons with vision defects, their use as a fashion accessory is on the rise.⁴⁵ Characterized as the "nerd defense," the use of unnecessary eyeglasses plays on the commonly held stereotype that people who wear eyeglasses have a high intelligence.⁴⁶ Some attorneys assert that the use of eyeglasses is highly effective for conveying an appearance of innocence.⁴⁷ However, it is important to note that this positive influence on jurors' perception may be limited to cases involving violent crimes. In white-collar crime cases, defendants wearing eyeglasses were more often perceived as guilty.⁴⁸

Further, the practice of outfitting a client

in spectacles in an effort to influence jurors' perceptions can backfire. In a recent and highly publicized case in Washington, D.C., Orlando Carter and four other men were charged with multiple counts of murder for their alleged roles in what was described as the South Capitol Street Massacre.⁴⁹ Each of the defendants arrived for trial wearing noticeably large-framed and heavy-rimmed glasses.⁵⁰ Prior to trial, only one of the five defendants had ever appeared during pretrial hearings wearing eyeglasses.⁵¹ By eliciting testimony that witnesses had never seen the defendants wearing glasses in the past, prosecutors exposed the defendants' attempt to manipulate jurors' perceptions—a revelation that may have contributed to the guilty verdict.⁵²

The use of nonprescription eyeglasses to influence jurors' perceptions also raises an ethical question. Under the Oregon Rules of Professional Conduct, a lawyer is prohibited from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation" ⁵³ Advising a client to wear unnecessary eyeglasses may be nothing like rolling a perfectly healthy plaintiff into court in a wheelchair in a personal injury claim, yet both involve the use of a prop designed to influence how the client is perceived. Certainly the comparison is more apt in a criminal case where the defendant's identity is at issue.⁵⁴

Courts also recognize the impact a defendant's physical appearance has on jurors' evaluation of guilt or innocence. For example, the United States Supreme Court has held that the use of visible shackles on a defendant undermines the fundamental presumption that a criminal defendant is innocent until proven guilty.⁵⁵ Only in cases where the government can show a substantial need based on safety concerns or risk of escape can a defendant be compelled to appear before jurors while visibly shackled.⁵⁶ However, the Court is careful to distinguish between a defendant appearing before jurors in shackles, which it describes as "inherently prejudicial," and a defendant who is forced to appear in prison garb.⁵⁷ Rather than adopt a "mechanical rule vitiating any conviction, regardless of the circumstances," in which a defendant is compelled to appear in prison clothes, the Court recognizes circumstances in which a defendant may elect to appear in prison attire hoping to elicit sympathy.⁵⁸ In these cases, a defendant's failure to raise a timely objection negates the compulsion necessary to establish a constitutional violation.⁵⁹

As the above cases illustrate, a client's appearance can have a real and profound impact on how jurors perceive the client. Assisting clients to cultivate an image that meshes with the narrative counsel presents at trial is an effective tool for connecting with jurors in a positive way and helps to make a favorable impression. For example, a civil plaintiff's conservative dress and conduct at trial may be effective in conveying to jurors that he is a sympathetic victim. Similarly, a criminal defendant's appearance and demeanor might convey a message of contrition or suggest that he is incapable of committing the crimes for which he has been charged. However, counsel should exercise restraint when advising clients on how to appear in court and remain cognizant of jurors' ability to see through an obvious charade.

May I Sit Here?

Where you stand depends on where you sit.
- Nelson Mandela

Just as a person's physical appearance can play an important role in how he is perceived, a party's relative proximity to the jury box is also important.⁶⁰ Anthropologist Edward T. Hall describes four zones of space that exist around a person: (1) intimate space extending out only eighteen inches, (2) personal space stretching out to four feet, (3) social distance reaching out twelve feet, and (4) public distance in the space beyond.⁶¹ Hall further describes social distance as the space used by "people who work together," while people who are at a public distance are "outside the 'circle of involvement.'"⁶² In this sense, the party sitting nearest the jury box is more likely to be within the social distance, giving him a distinct advantage in making a personal connection with jurors over the party sitting farther away.⁶³

In federal criminal trials, the prosecution generally sits at counsel table closest to the jury box. Often, government investigators and experts (e.g. FBI or IRS agents) sit just behind the prosecution. As a result, the entire prosecution team is seated in the immediate vicinity of jurors, or as Hall describes in his work, inside the social distance zone. By occupying this space, prosecutors enjoy a certain intimacy and connection with jurors.

Regardless of this practice, seating arrangements in the courtroom are within the trial judge's discretion.⁶⁴ When challenged by defense attorneys, the most common objections are that the state's

burden of proof entitles it to the advantage of being closer to jurors or that the prosecution must be positioned between a defendant and jurors as a bulwark to protect their physical safety.⁶⁵ Indeed, the government made this objection when an attorney for Kenneth Lay, former head of Enron Corporation, requested that he and his client be seated at the table nearest to the jury during his high profile case in Texas District Court.⁶⁶ Describing his decision as guided by "fairness and common sense," Judge Simeon Lake resolved the issue by allowing each party to sit at the table closer to the jury when presenting their respective cases.⁶⁷ Custom and practice alone should not be the sole basis for denying a litigant's preferred seating in court.

Conventional wisdom tells us that jurors are more likely to reach a favorable verdict for your client if they have reason to like him. By taking the table nearer to jurors, counsel places a client within social distance to jurors, thus making it more likely that jurors will be able to observe the client's non-verbal cues and relate to them on a more personal level. Of course, when considering seating arrangements at trial, counsel should be aware of the idiosyncrasies of the client. The potential advantage of being closer to the jury may at times be outweighed by a client's inability to maintain decorum in court. Added distance from jurors in those cases may help reduce unwanted scrutiny.

Ask the Audience

The audience is the best judge of anything. They cannot be lied to. Truth brings them closer. A moment that lags—they're gonna cough.
- Barbra Streisand

Spectators in the gallery can also influence jurors.⁶⁸ With few exceptions court proceedings are open to the public. Because jurors are insulated by the court—instructed not to speak to anyone about the evidence as it unfolds—spectators in the gallery can be a barometer by which they gauge their own responses to witnesses' testimony and counsels' arguments. Jurors, especially those with no prior experience with court procedure, may expect the trial process to mirror their favorite legal-drama. A full gallery of spectators tends to meet those expectations, infusing the courtroom with energy and causing jurors to pay more attention. Conversely, an empty gallery may leave jurors feeling abandoned, making it more likely they will simply tune out. However, the presence of spectators also

increases the potential for jurors to be distracted and unduly influenced. In certain circumstances, these distractions may be grounds for objection when there is an argument that trial spectators' influence on jurors is prejudicial.

In *Holbrook v. Flynn*, a leading case on the issue, the Court considered a defendant's challenge to the presence of four uniformed and armed state police troopers seated in the gallery directly behind the defendant.⁶⁹ The Court disagreed that the troopers' presence created an inference of guilt and was inherently prejudicial, holding that the proper question when addressing challenges to courtroom arrangements is whether "an unacceptable risk is presented of impermissible factors coming into play."⁷⁰ The presence of spectators at trial wearing buttons in support of crime victims has been contested on similar grounds.⁷¹ In *Norris v. Risley*, the defendant, who had been charged with kidnapping and rape, successfully argued that the presence of female spectators wearing buttons with the words "Women Against Rape" was "'so inherently prejudicial as to pose an unacceptable threat' to the [defendant's] right to a fair trial."⁷² Here, the court concluded the buttons "tainted [the defendant's] right to a fair trial both by eroding the presumption of innocence and by allowing extraneous, prejudicial considerations to permeate the proceedings without subjecting them to the safeguards of confrontation and cross-examination."⁷³

To establish, however, that visible messages or symbols worn by trial spectators present an unacceptable risk of prejudice is a high burden. In *Pachl v. Zenon*, the Oregon Court of Appeals held that buttons worn by spectators with the inscriptions "C.V.U." and "Crime Victims United" were not inherently prejudicial.⁷⁴ Unlike the buttons in *Norris v. Risley*, which "proclaimed public outcry" for a conviction in that particular case, the buttons in *Pachl v. Zenon* did not create an unavoidable effect on jurors that would cause them to "consider factors other than the evidence and law of the case."⁷⁵

Outward displays of bias by spectators are clear targets for an objection, but counsel should monitor less obvious non-verbal communication between spectators and jurors as well. One often overlooked example is when a testifying witness returns to the courtroom on days following his or her appearance on the witness stand. In my experience,

jurors' ability to observe the non-verbal reactions of previously testifying witnesses to subsequent witness testimony or legal argument might have the effect of the witnesses testifying a second time. Yet, this additional "testimony" is given without the opportunity for cross-examination. Counsel should take notice of spectators at trial and be prepared to object to conduct or attire that could result in prejudice.

Conclusion

Jurors are sworn to consider only the evidence and exhibits presented on the record. Thus, trial counsel's first priority is mastery of the facts and law at issue in the case. Yet, the volume and influence of non-verbal information being communicated both inside and outside the courtroom have an undeniable effect on how jurors process and interpret this evidence. By understanding how so-called offstage information is expressed and understood, counsel can increase his own effectiveness and can mitigate the impact of non-verbal cues that could have a negative impact on jurors.

Counsel should consider those elements that are within her direct control. She should dress in a manner that conveys confidence and increases rapport with jurors. When addressing the jury, she should step out from behind the podium or counsel table if allowed, make eye contact and adopt a conversational tone. Counsel should also determine whether it is advantageous to sit closer to the jury. Further, it is also important to understand that many jurors expect that the trial will provide some dramatic moments. Well-placed bits of stagecraft or a timely pause can be effective ways to draw jurors in and meet their expectations.

Equally important, counsel must help clients to make a favorable impression on the jury. Clients should avoid or minimize behaviors that may be construed negatively: eye-rolling, nodding along with a witness's testimony, smiling or smirking all convey messages to an observant juror. Clients should also avoid frequent asides with counsel and instead write down questions and concerns—taking notes is a visual cue that conveys interest and involvement. Most importantly, be mindful that trial is both physically and emotionally exhausting. Clients may be tempted try to reduce the stress of trial by multi-tasking or simply tuning out. However, a client who appears detached or mentally checked

out sends the wrong message to jurors. Clients should make every effort to remain present and in the moment.

Finally, be mindful of others in the courtroom and their potential influence on jurors. Subtle though unintentional cues from the court and the presence of spectators in the gallery can have a profound effect on how jurors interpret evidence and judge the credibility of witnesses. When an offstage source of non-verbal information could result in prejudice, timely objection may curtail its effect on jurors and will at a minimum preserve the objection on the record. Effective trial advocacy requires more than a mastery of the fact and law. By understanding how jurors receive information through non-verbal means, counsel can present a more persuasive case and reduce factors that may negatively impact jurors.

Endnotes

- 1 See e.g., UCJI No. 10.01.
- 2 Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 574 (2008).
- 3 See UCJI No. 10.03.
- 4 Tom Capps is a trial consultant based out of Woodburn, Oregon.
- 5 See Levenson, *supra* note 2, at 575, n. 11.
- 6 Elizabeth A. LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 LAW & PSYCHOL. REV. 83, 83-84 (1984).
- 7 *Id.* at 94-95.
- 8 See Bryan Edelman, *The Impact of Graphic Injury Photographs on Liability Verdicts and Non-Economic Damage Awards*, THE JURY EXPERT: THE ART AND SCIENCE OF LITIGATION ADVOCACY, Sept. 2009, at 1, 2.
- 9 *Id.* at 3.
- 10 *Id.*
- 11 *Id.*
- 12 Mary R. Rose, et al., *Goffman on the Jury: Real Jurors' Attention to the "Offstage" of Trials*, 34 LAW & HUM. BEHAV. 310, 310 (2010).
- 13 *Id.* at 311.
- 14 *Id.*
- 15 See Levenson, *supra* note 2, at 582.
- 16 See LeVan, *supra* note 6, at 92-94.
- 17 See Levenson, *supra* note 2, at 583.
- 18 Rose, *supra* note 12.
- 19 *Id.* at 318-19.
- 20 *Id.* at 322.
- 21 *Id.* at 318.
- 22 *Id.* at 321-22.
- 23 *Id.* at 322.
- 24 *Id.*
- 25 See Andrea M. Halverson, et al., *Reducing the Biasing Effects of Judges' Nonverbal Behavior with Simplified Jury Instructions*, 82 J. APPLIED PSYCHOL. 590 (1997).
- 26 LeVan, *supra* note 6, at 84.
- 27 *Id.*
- 28 See Halverson, *supra* note 25, at 597. The researchers analyzed the two sets of instructions used in their study through computation of a number of readability indexes. These included simple comparisons of words per sentence and the use of passive voice as well as how the instructions scored on the Flesch Reading Ease and Flesch-Kincaid Grade Level tests.
- 29 295 Or. 640 (1983).
- 30 *Id.* at 659.
- 31 ORCP 59E.
- 32 See FED. RULES OF CIV. PROC. 51; FED. RULES OF CRIM. PROC. 30.
- 33 See JR 1-101(A); also see *State v. Garza*, 125 Or. App. 385, 388 (1993).
- 34 *Garza*, 125 Or. App. at 388.
- 35 290 Ala. 339, 342 (1973).
- 36 See, e.g., *Allen*, 290 Ala. at 343.
- 37 *Garza*, 125 Or. at 389.
- 38 Kelly Zusman & the Hon. Anna J. Brown, *Couture in the Courtroom*, OREGON STATE BAR BULLETIN, Aug./Sept. 2013, at 70.
- 39 See, e.g., UTCR 3.010(1) (requiring court attendees to dress "so as not to detract from the dignity of court").
- 40 Levenson, *supra* note 2, at 593.
- 41 *Id.* at n. 105.
- 42 *Id.* at 594, n. 111 (citing HAZEL THORNTON, HUNG JURY: THE DIARY OF A MENENDEZ JUROR 111-12 (1995)).
- 43 THORNTON, *supra* note 42, at 73-74.
- 44 See Sarah Merry, "Eye See You": *How Criminal Defendants Have Utilized the Nerd Defense to Influence Jurors' Perceptions*, 21 J.L. & POL'Y 725 (2013).
- 45 *Id.* at 731 (citing an estimate by the Vision Council that, as of the year 2011, approximately sixteen million Americans wore nonprescription eyeglasses solely for the purpose of altering their appearance).
- 46 *Id.* at 733-39 (citing a 2008 study conducted by psychologist Michael J. Brown in which mock jurors found that defendants accused of a violent crime who were depicted wearing glasses appeared less physically threatening than those without glasses and that the mock jurors returned fewer guilty verdicts for those defendants who were depicted wearing glasses).
- 47 Debra Cassens Weiss, *Jurors Less Likely to Convict Defendants Wearing Glasses, Say Lawyers and 2008 Study*, A.B.A. J. (Feb. 14, 2011) (quoting attorney Harvey Slovis: "I've tried cases where there's been a tremendous amount of evidence, but my client wore glasses, dressed well and got acquitted").
- 48 See Merry, *supra* note 44, at 753.
- 49 Rahiel Tesfamariam, *Lessons from the South Capitol Street Massacre*, WASHINGTON POST, May 4, 2012, http://www.washingtonpost.com/blogs/therootdc/post/lessons-from-the-south-capitol-street-massacre/2012/05/04/gIQAxucE1T_blog.html.

- 50 Merry, *supra* note 44, at 756.
 51 *Id.* at 756–57.
 52 *Id.* at 757.
 53 ORPC 8.4(a)(3).
 54 See Merry, *supra* note 44, at 761–62.
 55 *Deck v. Missouri*, 544 U.S. 622, 630 (2005).
 56 *Id.* at 624.
 57 *Estelle v. Williams*, 425 U.S. 501, 513, n. 10 (1976).
 58 *Id.* at 508.
 59 *Id.* at 512–13.
 60 See Steven Shepard, *Should the Criminal Defendant Be Assigned a Seat in Court?* 115 YALE L.J. 2203 (2006).
 61 *Id.* at 2208, n. 30 (citing EDWARD T. HALL, *THE HIDDEN DIMENSION*, 108–22 (1966)).
 62 *Id.* at 2208–09.
 63 Jeffrey S. Wolfe, *The Effect of Location in Courtroom on Jury Perception of Lawyer Performance*, 21 PEPP. L. REV. 731, 769–71 (1994).
 64 See, e.g., *Mahon v. Prunty*, No. 96-55411, 1997 WL 51570, at *2 (9th Cir. Feb. 6, 1997) (unpublished decision) (noting that the trial court did not abuse its discretion by seating the defendant at the table closer to the jury).
 65 See Shepard, *supra* note 60, at 2204–05, n. 10.
 66 *Id.* at 2204.
 67 *Id.* Interestingly, when it came time to present the defense case, Lay and his counsel elected to stay at the far table.
 68 See THORNTON, *supra* note 42, at 47.
 69 *Holbrook v. Flynn*, 475 U.S. 560, 562–63 (1986).
 70 *Id.* at 570.
 71 See, e.g., *Carey v. Mulsadin*, 549 U.S. 70 (2006).
 72 918 F.2d 828, 830 (9th Cir. 1990) (quoting *Holbrook*, 475 U.S. 560 at 572).
 73 *Id.* at 834.
 74 145 Or. App. 350, 360, n.1 (1996) (en banc).
 75 *Id.*

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