

**The Semiotics of Non-verbal Communication in the Attorney,
Client Consultation Process**

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CHAPTER 1

1.1 SUMMARY

In 2010, the Law Society of South Africa, expressed concern over the number of law graduates that were lacking in essential skills and they stressed that clients in legal matters are placed at risk if new practitioners are not properly equipped to assist them.¹ Many lamented the academic nature of the LLB programmes at most tertiary institutions as concentrating only on the “knowledge of the law” rather than the enhancement of important skills and abilities. The “radical dichotomy” that exists between theory and practice in the law curricula at most tertiary law schools is at the root of the problem

Whilst there is no denying that the ubiquity of doctrinal development is central to legal studies, law is no longer seen as a “technique of professional practice” only. Legal Realism has highlighted the fact that law permeates all facets of life and should therefore be studied as an embodiment of knowledge that permeates the “real” world.

The focus of my study is on one key area of communication that has been largely ignored thus far in the legal arena, i.e. non-verbal communication. Effective communication is a fundamental dexterity to the attorney and a lack thereof can

¹ See the Law Society of South Africa (LSSA) Press Release on the findings of the LLB Curriculum Research as presented by the Council of Higher Education (CHE) at a Colloquium on 11 November 2010.

result in the likelihood of psychological and emotional long-term difficulties. My study furnishes some insight into the challenges facing most attorneys during the consultation process.

The study outlines the importance and ubiquity of the different sign systems (semiotics) that regulate human interaction. The growing body of knowledge about non-verbal communication has illustrated that it is the main sign system that parallels verbal communication in the human interactive process. The aim of this study was to establish the attorneys' perceptions of implementing non-verbal communication into their daily lives and the legal system in South Africa.

A qualitative approach (where attorneys were interviewed) broadened my understanding of the attorneys' experiences and I was allowed to be privy to their personal interpretations and perspectives on non-verbal communication in the legal arena. By recording and documenting their experiences, valuable insight was gained into their emotional and psychological responses to their legal experiences. The analysis of their experiences yielded unique and distinct themes to emerge, which was then formulated into a theoretical experience

The attorneys were unanimous in their call for training in non-verbal communication. It was anticipated that this would serve as a means of alleviating some of the challenges facing them during the consultation process. Successful

implementation would require attorneys to have a positive, flexible and creative approach to using non-verbal skills in consultations with clients.

The study finds that legal realism combined with a semiotics methodology offers the law student an apposite approach to researching and analysing systems of meaning within the communicative legal framework. A framework that integrates realism, semiotics and non-verbal communication contains all the ingredients needed to improve the communicative legal skills of the attorney. The amalgamation of non-verbal communication skills with traditional legal skills would go a long way in removing the deep-seated dichotomy that still exists between theory and practice in the LLB curricula.

1.1 OPSOMMING

Gedurende 2010 het die Suid-Afrikaanse Regsvereniging hul bekommernis oor die aantal regsgegradueerdes wat 'n gebrek het aan essensiële vaardighede uitgespreek, en het dit benadruk dat kliënte benadeel kan word indien nuwe praktisyns nie toegerus is om hulle by te staan nie. Baie het die akademiese ingesteldheid van die LLB-vakke wat by meeste tersiêre instellings aangebied word, betreur, daar dit slegs op "regskennis" toegespits is en nie op die bevordering van belangrike vaardighede en vermoëns nie. Die "radikale onderskeid" wat tussen teorie en praktyk in the regsleerplanne by meeste tersiêre regsskole bestaan, vorm die hart van die probleem.

Terwyl daar nie betwyfel kan word dat die omvattendheid van doktrinêre ontwikkelings sentraal tot regstudies is nie, word die reg nie meer slegs as ‘n “tegniek van professionele praktyk” gesien nie. Regsrealisme beklemtoon die feit dat die reg alle fasette van die lewe deurdring en dat dit gevolglik as ‘n vergestaltung van kennis wat die “werklike” wêreld deurdring, bestudeer moet word.

Die fokus van my navorsing is een kern-gebied van kommunikasie wat tot dusver grootliks in die regsarena geïgnoreer is, en dit is nie-verbale kommunikasie. Doeltreffende kommunikasie is ‘n fundamentele vaardigheid vir die prokureur en ‘n gebrek daaraan kan moontlik lei tot sielkundige en emosionele probleme oor die lang termyn. My navorsing bring insig na vore aangaande uitdagings wat meeste prokureurs gedurende die konsultasie-proses in die gesig staar.

Die navorsing sit die belangrikheid en die alomvattendheid van die verskillende tekensisteme (semiotiek) wat menselike interaksie reguleer, uiteen. Die groeiende kennis omtrent nie-verbale kommunikasie toon aan dat dit as hoof-tekensisteem in die menslike proses van interaksie gelykstaan aan verbale kommunikasie. Die doel van hierdie navorsing was om vas te stel wat die prokureurs se sieninge is omtrent die gebruik van nie-verbale kommunikasie in hul daaglikse lewens en in die Suid-Afrikaanse regsisteem.

A kwalitatiewe benadering (waartydens prokureurs ondervra is) het my begrip omtrent die prokureurs se ervarings verbreed, en ek was toegelaat om toegang te verkry tot hul persoonlike interpretasies en perspektiewe oor nie-verbale kommunikasie in die regsarena. Deur hul ervarings op band vas te lê en te dokumenteer, is waardevolle insig verkry in hul emosionele en sielkundige reaksies op hul regservarings. 'n Analise van hul ervarings het daartoe gelei dat unieke en definitiewe temas te voorskyn gekom het, wat dan in 'n teoretiese ervaring omskep is.

Die prokureurs was eenparing in hul oproep om opleiding in nie-verbale kommunikasie. Die verwagting bestaan dat dit sou dien om sekere uitdagings wat hulle gedurende die konsultasie-proses in die gesig staar, die hoof te bied. Suksesvolle ingebruikneming sou vereis dat prokureurs 'n positiewe, buigbare en kreatiewe benadering moet inneem omtrent die gebruik van nie-verbale vaardighede tydens konsultasies met kliënte.

Hierdie navorsing bevind dat regsrealisme te same met 'n semiotiese metodologie die regstudent voorsien van 'n behoorlike benadering om navorsing te doen en om betekenissisteme in die kommunikatiewe regsraamwerk te ontleed. 'n Raamwerk wat realisme, semiotiek en nie-verbale kommunikasie integreer, bevat al die bestanddele wat nodig is om die kommunikatiewe vaardighede van die prokureur te verbeter. Die samevoeging van nie-verbale kommunikasie vaardighede en tradisionele regsvaardighede sal ver gaan om die

diepgesetelde onderskeid wat steeds tussen teorie en praktyk in die LLB-leerplanne bestaan, te verwyder.

1.2 DEFINITION OF KEY TERMS AND CONCEPTS

It is necessary to define key terms and concepts that will be frequently used in this research.

1.2.1 Semiotics

Semiotics is a science that studies signs. These signs in turn assist in the construction of meaning.

1.2.2 Non-verbal Communication

Non-verbal communication involves communication by means other than words. The traditional dimensions of non-verbal communication include amongst others, physical appearance, personal space, facial expressions, gestures, posture, touch, eye contact, vocal cues and time.

1.2.3 Legal Realism

Legal Realism is a revolutionary theory which opposes the traditional approach to law. The key tenet of legal realism is that man made law is subject to idiosyncrasy and eccentricity. Legal realists believe that law does not comprise of only factors within the legal domain but is intrinsically associated with real-life

outcomes. Realists therefore believe that social factors influence law and legal decisions. As a result, law cannot be seen as autonomous from society.

1.2.4 Gestures

Gestures constitute recurrent movements of the body and are reflective of human thought processes.

1.2.5 Kinesics

Kinesics is the study of body movement, posture and gestures.

1.2.6 Haptics

Haptics refers to touch which is an important communicative tool. There are different types and styles of touch but they vary according to personal preference and culture.

1.2.7 Oculesics

Oculesics refers to eye movement. Research has shown that the extent to which a person opens their eyes is related to their emotional state.

1.2.8 Proxemics

Proxemics refers to personal space and distance. The distances that man is comfortable often depend on their culture and personal preferences.

1.2.9 Chronemics

Chronemics refers to time. The way an individual uses time can communicate non-verbal information and messages about them.

1.2.10 Paralanguage

Paralanguage refers to the vocal cues that accompany speech. These cues can enhance speech and reveal a person's emotional state.

1.3 DECLARATION

I, **DESAN IYER**, declare that the work presented in this dissertation has not been submitted before for any degree or examination and that the sources I have used or quoted have been acknowledged as complete references. It is in this regard that I declare this work as originally mine.

It is hereby presented as the complete fulfillment of the requirements for the award of the ***Doctors in Law*** Degree.

Signature : _____

Date : _____

1.4 ACKNOWLEDGEMENT

My sincere gratitude and appreciation goes to the following:

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1.5 PROBLEM STATEMENT

Modern legal studies at most tertiary institutions in South Africa do not include the study of non-verbal communication as a key component in the communicative process. Therefore, within the domain of the legal profession, there is a degree of ignorance about the effectiveness of non-verbal cues and signs as a means of improving the legal and communicative skills of attorneys.

The study will attempt to answer the following questions:

- ◇ What is the significance of non-verbal communication to the attorney and the client in a dual legal relationship?
- ◇ Would the ability to read and decode non-verbal signs add value to the attorney and the legal profession in general?

1.6 AIMS OF THE STUDY

Some investigations have been undertaken on the role and importance of non-verbal behaviour as a communicative tool, yet limited research has been undertaken on the study of non-verbal communication, and its impact and benefits to the legal profession.

On the one hand the investigation aims to show that the South African legal system tends to overemphasise the role of verbal and textual communication in communicative interactions, whilst underemphasising the role of non-verbal communication in the sphere of communication. This research is aimed at investigating the possibility that attorneys can develop their interactive communicative legal skills once the verbal and non-verbal communication is linked together synchronously. In order to substantiate my claim, I will provide a conceptual framework for the improvement of legal skills from a realist and semiotic perspective.

1.7 RATIONALE OF THE STUDY

It is hoped that the results of the investigation will influence a review of the current LLB curriculum at the University of Zululand and other tertiary institutions in South Africa so as to incorporate the study of non-verbal semiotics into the programme. A study of non-verbal communication should greatly improve the practical legal skills of the aspiring attorney, and enhance the reputation of the legal profession in South Africa.

In addition to the above, the research should be of interest to academics, legal practitioners and law students who view communication and the science of interpreting meaning as the most important tool of their trade.

1.8 HYPOTHESES

To bring clarity and a critical semiotic element to the research, the hypotheses given below should be understood against the critical teachings of the semiotician, Ronald Stamper.

Interpersonal communication consists of a magnitude of messages that are exchanged through a process of expression and interpretation.² These messages consist of signs which convey meaning.³ A myriad of signs and symbols guide our decision making in every-day life.⁴ Human beings are guided to act in a specific manner when they see certain signs and symbols, no matter their race, religion or culture.⁵ These signs define mankind – how they behave, how they react, how they settle on choices to ensure a harmonious lifestyle.⁶ Signs are everywhere.⁷ We derive meaning from signs and we communicate in signs.⁸ It is how we ultimately understand the signs that will improve our decision-making abilities and life in general.⁹ Semiotics, in simple terms and amongst others, is concerned with the study of signs and their effect on social life.¹⁰ It

² Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 9.

³ Roelofse J.J. *Signs and Significance A Different Perspective on Communication* (McGraw-Hill Book Company Johannesburg 1982) at 28. The author contends that messages comprise of signs which convey meaning.

⁴ Ibid.

⁵ Hoffman M.H.G. 2006(61) What is a Semiotic Perspective and What Could It Be? *Educational Studies in Mathematics* at 280. The author contends that signs should be the focus of social interaction in the classroom. Although the author discusses the role of signs in communication in mathematics, strong parallels can be drawn with law.

⁶ Roelofse J.J. *Signs and Significance A Different Perspective on Communication* (McGraw-Hill Book Company Johannesburg 1982) at 27.

⁷ Harman L.D. 1986(9) Sign, Symbol and Metalanguage: Against the Integration of Semiotics and Symbolic Interactionism *Symbolic Interaction* 147-160.

⁸ Ibid.

⁹ Ibid.

¹⁰ Hrushovski B. 1979(1) The Structure of Semiotic Objects: A Three-Dimensional Model *Poetics*

encompasses both verbal and non-verbal communication.¹¹ To understand non-verbal communication, one needs to be able to analyse and interpret signs.¹² By applying a modern semiotic theory as presented by Stamper, it becomes possible to search for the real understanding of a sign.¹³

Communication between humans is difficult because of the possibility of miscommunication and misinterpretation.¹⁴ However, by applying the semiotic ladder as a model, and taking into account the social context, the communicator's intention, the physical aspect, the relationship with the recipient and communicator, the structure, meaning and properties of the sign, it is possible to delimit the possible interpretations that may be attached to a particular sign.¹⁵ Once one is in a position to establish what the sign means, it becomes easier to understand and interpret non-verbal communication.¹⁶

In light of the above, the four (4) hypotheses are considered below:

◇ People engaged in conversation use as a rule not one but many sign systems simultaneously, and a lack of understanding of the various sign systems may

Today at 364. It is argued by the author that semiotics encompasses a multi-dimensional approach. He views semiotics as "sign-processing" or a system of signs which create meaning.

¹¹ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988) at 34.

¹² Ibid.

¹³ See Stamper R.K. *Organisational Semiotics: Informatics without the computer?* In K.Liu, R.J Clarke, P.Bogh Anderson and R.K. Stamper eds. (MA: Kluwer Academic Publishers Boston 2001) at 115-171.

¹⁴ Ibid. See also Liu K. The Evolution of Organisational Semiotics – A Brief Review of the Contribution of Ronald Stamper – A Paper based on an interview with Ronald Stamper on 22nd December 2003.

¹⁵ See Stamper R.K. *Organisational Semiotics: Informatics without the computer?* In K.Liu, R.J Clarke, P.Bogh Anderson and R.K. Stamper eds. (MA: Kluwer Academic Publishers Boston 2001) at 115-171.

¹⁶ Ibid.

impact negatively on the communicative process;

◇ Spoken utterances or verbal communication are given a “privileged” status in the legal profession despite various aspects of a person’s appearance, speech manner and non-verbal behaviour also playing a vital role in the communicative process;

◇ Non-verbal signs communicate content, sometimes more efficiently than linguistic signs and an understanding of non-verbal communication can improve the communicative legal skills of legal professionals;

◇ An understanding of non-verbal communication is essential in the extraction of valuable and relevant information during the attorney-client consultation process.

1.9 RESEARCH PLAN AND METHODOLOGY

In general terms, methodology refers to the methods or procedures that we use in order to solve problems or make discoveries.¹⁷ The methods and underlying assumptions that we use are vital “building blocks” in the construction of our research.¹⁸ This study adopts a qualitative methodology with a case study approach where I conduct in-depth interviews with ten participants. Their responses are then analysed and the findings discussed. From a qualitative

¹⁷ Davies M.B. *Doing a Successful Research Project* (Palgrave MacMillan New York and U.K. 2007) at 212-213.

¹⁸ *Ibid.*

perspective, it is hoped that a holistic overview of the experiences of the attorney in practice sets the tone for a journey of discovery into the realm of non-verbal communication in the legal sector.

The project therefore entails the following:

◇ The qualitative phase will report on current published literatures of fundamental theories, instruments, reports, articles, legislations, and cases law in the area of study.

◇ This will be followed by the phase of study, during which a representative sample of attorneys in the Zululand region will be interviewed to determine what their perceptions are about non-verbal communication, as well as the extent to which they engage or adopt non-verbal communication during particular interpersonal interactions with a variety of clients that form part of their communication network.

◇ A detailed analysis of data gathered from the interviews.

◇ A summary of the relevant results of the survey.

◇ Statement of recommendations based on the summary of results.

The study proceeds from a phenomenological framework which is juxtaposed against the backdrop of semiotics. The research methodology is detailed and the

rationale for choosing a qualitative approach is elucidated on. The back-end of the chapter provides a detailed description of the study design which incorporates such aspects as the sampling and selection of the participants, the data collection methods adopted and the analysis of the data.

1.9.1 Phenomenology as a Methodology

The experience of the attorney within the context of the consultation process will be studied in accordance with the principles of phenomenology. Phenomenology stems “from the existential-phenomenological approach in philosophy which is (and was) concerned about human existence and experience, rather than metaphysical reality, and the way in which phenomena are experienced by human beings.”¹⁹

Reber,²⁰ describes a phenomenon as follows:

“a phenomenon is any occurrence that is open to observation”.

Phenomenology has its origins in the works of German philosopher Husserl and French phenomenologist Merleau-Ponty and is widely regarded as offering ways of understanding that is absent from other research methodologies.²¹ True

¹⁹ Terre Blanche M, Durrheim K. and Painter D. *Research in Practice* (University of Cape Town Press 2006) at 463.

²⁰ Reber A.S and Reber S *The Penguin dictionary of Psychology* (London: Penguin Books 2001).

²¹ Husserl E. *Logical Investigations* (New York: Humanities Press 1970).

phenomenological research seeks to describe rather than explain, and proceeds from a vantage point free of any preconceptions.²²

This method focuses on the “lived world of experience” where the personal experiences of people are detailed within their physical environment by accessing their conscious mind.²³ Unlike empirical philosophies which tend to measure objective reality through rational scientific processes, phenomenology aims to unravel reality by experiencing life as it is.²⁴ Reality therefore is seen as the unadulterated form of phenomena that focuses on the life experiences of people as they develop.²⁵

By understanding and comprehending the personal experiences of people, without the baggage of one’s own assumptions and expectations, it becomes easier to capture the essence of their feelings and thoughts in the world of the subject.

Spielberg “advocates the direct investigation of phenomena as consciously experienced, without theories about their causal explanation and as free as possible from unexamined preconceptions and presuppositions”.²⁶

²² Ibid.

²³ Ibid.

²⁴ Valle R.S., King M. and Halling S. *An introduction to existential phenomenological thought in psychology*. In R.S. Valle & S. Halling eds. *Existential-phenomenological perspectives in psychology: Exploring the breadth of human experience* (New York: Plenum Press 1989) at 3-16.

²⁵ Eagleton T, *Literary theory: An introduction* (Oxford: Basil Blackwell 1983).

²⁶ Spielberg H. *The phenomenological movement: A historical introduction* (The Hague: Nijhoff 1982).

According to Davies,²⁷

“phenomenology is a major product of twentieth-century sociological theory developed in order to explain and explore the way people view the world in light of their own experience.....”

It is therefore clear that the phenomenology method is a central component of qualitative methodology.²⁸ A phenomenological method will be used to experience the world of the subject by attempting to understand their mind-set, attitudes and feelings. There is no better way to understand the mindset of the attorney than by interviewing them in their own work environment – that is the confines of their office.

In order to successfully adopt the phenomenological method of research, it is imperative to see things from the point of view of the subject matter. There is also a deliberate attempt to remain as free as possible from any preconceptions prior to discussions with the subject matter. In this study, I will attempt to understand open mindedly the phenomenological world of the attorney within the context of the communicative process. The phenomenological method will allow me to understand the lived experiences of the attorney in their natural setting and further analyse and appreciate how they make sense of the social world within

²⁷ Davies M.B. *Doing a Successful Research Project* (Palgrave Macmillan 2007) at 240.

According to Davies, phenomenology is the manner in which people interpret the behaviour of others through their own subjective analysis of the world.

²⁸ Ibid.

the confines of the legal world.²⁹ The advantages of using this method is that it ensures that information emerges naturally, the data is less likely to be contaminated by the techniques used and a comprehensive data of human experience is derived.³⁰

1.9.2 Validity of the Study

In an attempt to understand the experiences of the attorney within the confines of the legal arena, more so the joys and frustrations of eliciting information from the client during the consultation process, I needed to interview the attorneys. In terms of the literature available on non-verbal communication within the legal arena, there has been limited work done on the subject matter. A review of the literature available shows a great deal of studies done on non-verbal communication in general and most of these studies were conducted within the traditional empirical analytical paradigm. However, due to the limited literature available on non-verbal communication within the legal sector, it was decided to conduct in-depth interviews in order to understand the subjects' true feelings and daily experiences in respect of the subject matter.

According to Dowling and Brown,³¹ interviews allow the researcher to probe, prompt and obtain vital information, explore complex issues, and gain the true perspectives of participants, including their feelings, experiences, ideas and life

²⁹ Creswell J.W. *Qualitative inquiry and research design: choosing among five traditions* (Thousand Oaks :Sage 1998).

³⁰ Ibid.

³¹ Dowling P. and Brown A. *Doing Research/ Reading Research* 2nd edition (Routledge London & New York 2010).

histories. Interviewing is the predominant mode of data collection in qualitative research.³² In-depth interviews allow the researcher "...to understand the world from the participant's point of view, to unfold the meaning of people's experiences, and to uncover their lived world prior to scientific explanations".³³

In light of the above, the present study is not conducted within the empirical-analytical framework but from a phenomenological, semiotic and legal realistic paradigm where the perspectives of the social actors themselves form the focus of the study. The subjects' experiences combined with the findings of the literature study will provide fresh information about the phenomenon, non-verbal legal communication.

1.9.3 The Qualitative Approach

Qualitative research attempts to collect rich descriptive data in respect of the phenomenon being studied.³⁴ It is through this derivation of this data that our understanding of the phenomenon is shaped.³⁵ Our understanding of people, life and the world in general has developed through the use and understanding of this progressive research paradigm that now forms the basis of most forms of research.³⁶

³² Ibid.

³³ Kvale S *Interviews: an introduction to qualitative research interviewing* (Thousand Oaks: Sage 1996).

³⁴ Davies M.B. *Doing a Successful Research Project* (Palgrave Macmillan 2007) at 135-137.

³⁵ Ibid.

³⁶ Terre Blanche M, Durrheim K. and Painter D. *Research in Practice* (University of Cape Town Press 2006) at 47.

According to Holloway and Wheeler,³⁷ qualitative research focuses on studying subjects by interacting and observing them in their natural environment and then receiving their feedback which comprises of their meanings and explanations. Unlike quantitative research which focuses on statistics, qualitative research focuses on understanding phenomena within their natural environment and then constructing meaning from the participant's own perspective.³⁸ I aim to dwell into the minds of the subjects and obtain their understandings, experiences and meanings from their own perspectives. The qualitative approach will allow me to best achieve these objectives.

The approach is ideally suited to allowing me to enter into the world of the attorney, and explore their views, beliefs, ideals and practices. It is important for me to gain insight into the subjective meanings that the attorneys attach to the communicative process within the context of the consultation process. The approach allows for an extensive amount of verbal data to be collected from a modest number of participants. Themes are then extracted from the data, and the results are presented in a holistic form. In an effort to capture the experiences of the participants and understand the subjective meanings that evolve during the interviews, I will represent some of the data captured in the form of direct quotes and transcripts.

³⁷ Holloway I & Wheeler S *Qualitative research for nurses* (Oxford: Blackwell Scientific Publications 1996)

³⁸ Creswell J.W. *et al. First Steps in Research* (Van Schaik Publishers Pretoria 2010) at 145-153.

1.9.4 Research Design

The design of this study is qualitative as indicated in the earlier paragraphs. In order to highlight the qualitative nature of the study, it is imperative for me to highlight the interview techniques used, the sampling and selection of participants, and the manner in which the data was collected and analysed.

1.9.5 Selection of Participants

At the outset of the study, I intend to enter into the “world of the attorney” and understand and interpret the meaning that the attorney gives to the phenomena of non-verbal communication within the context of their daily experiences in the domain of the legal arena. I therefore chose to focus on a phenomenological study which brings to the forefront “the essence of the experience being studied.”³⁹ This can only be done by choosing subjects who have had particular experience in the subject matter and their input and experiences can be fully analysed through direct interaction with them. Selecting a random sample of participants who relay their experiences through questionnaires or surveys will fail to achieve the desired result.

According to De Vos⁴⁰, the phenomenological approach requires the researcher to make use of naturalistic methods of study which involve conversations and interactions with the subjects. This strategy of interpretative enquiry requires,

³⁹ Creswell J.W. *Qualitative inquiry and research design: choosing among five traditions* (Thousand Oaks: Sage 1998).

⁴⁰ De Vos A.S *et al. Research at Grassroots* 3rd ed. (Van Schaik Publishers Pretoria 2005) at 270.

“participant observation and long interviews (with up to ten people) as methods of data collection.⁴¹ In order to learn from people and arrive at conclusions, we need to study people. Part of the process of studying people involves “sampling their experiences”. It is imperative therefore to choose a sample that is considered to be representative of a certain group or population.⁴²

According to Arkava and Lane⁴³, the study of phenomenon in its entirety would be difficult as the amount of data to be analysed would be astronomical. Generally where the population is too large to study, or where the researcher does not have the time, money or resources to study a population in its entirety, it is possible to study only a segment of the population which is representative of the elements of that population that constitute the core of our study.⁴⁴ It can be a challenge for the researcher to know when enough participants have been used. There is a general view amongst researchers that the number should not be fixed ahead of time.⁴⁵

Seidman,⁴⁶ believes that one should look for a saturation of information, namely where the researcher hears the same information repeatedly and learns nothing new. I chose participants who are practicing attorneys with specific experience

⁴¹ Ibid.

⁴² Kerlinger F.N. *Foundations of behavioral research* 3rd ed. (Fort Worth: Harcourt 1986).

⁴³ Arkava M.L. & Lane T.A. *Beginning social work research* (Boston: Allyn & Bacon 1983).

⁴⁴ Powers G.T., Meenaghan T.M. and Toomey B.G. *Practice-focused research: integrating human service practice and research* (New Jersey: Prentice Hall 1985).

⁴⁵ Powers G.T., Meenaghan T.M. and Toomey B.G. *Practice-focused research: integrating human service practice and research* (New Jersey: Prentice Hall 1985).

⁴⁶ Seidman I. *Interviewing as qualitative research* 2nd ed. (New York: Teachers College Press 1998).

under the study and with the ability to contribute towards the subject-matter effectively. This method of selection is referred to as “purposive sampling” where the sampling is done with a specific purpose in mind that is to use participants that are typical of the population.⁴⁷ It forms part of non probability sampling where the selection of samples is not randomly and statistically done.

Rahili⁴⁸, views the following criteria as important in selecting participants for a phenomenological study:

- ◇ the participants must be able to express themselves freely;
- ◇ they must be able to relate their inner feelings and experiences openly;
- ◇ they must have knowledge and interest of the subject matter;
- ◇ they must have experienced the phenomenon within a recent time- frame;
- ◇ they must be relaxed when relating their experiences to the researcher.

The criterion for selecting participants in this study was their legal experience as practicing attorneys. According to Hyener,⁴⁹ a massive amount of data can emerge from even one interview. Due to the qualitative focus of the study and the large amounts of data emerging from the in-depth interviews conducted with the participants, it was decided not to exceed more than ten interviews. The

⁴⁷ Punch K.F. *Introduction to social research: Quantitative and qualitative approaches* (London: Thousand Oaks 1998).

⁴⁸ Rahilli D. 1993(32) A phenomenological analysis of authentic experience *Journal of Humanistic Psychology* at 49.

⁴⁹ Hyener R.H. 1985(8) Some guidelines for the phenomenological analysis of interview data *Human studies* at 279.

decision to limit the study to ten participants was further motivated due to saturation point being reached after a certain point in the interviewing process.

The participants selected for this study comprised five males and five females from diverse backgrounds, all currently working as attorneys at the Empangeni Justice Centre in Kwazulu-Natal. They were conducted via the Justice Centre Executive and interviewed within the space of one week in January 2011.

Strydom⁵⁰ is of the view that,

“... (a)nyone involved in research needs to be aware of the general agreements about what is proper and improper in scientific research”.

In an effort to conform to ethical codes of practice with regard to informed consent, I informed the participants about the content and objectives of the study, the interview process, the details of the researcher, the issue of anonymity and the manner in which the results were to be disseminated. All the participants gave their written consent for their involvement in the study. They all agreed that the interviews be audio-recorded, transcribed and for the data captured during the interview to be used in the study. In terms of the agreement reached between the researcher and the participants, their names have been changed in order to protect their identity.

⁵⁰ Strydom H. *Ethical aspects of research in the social sciences and human service professions* In De Vos A.S. ed. *Research at grass roots: for the social sciences and human services professions* 3rd ed. (Van Schaik : Pretoria) at 62-75.

1.9.6 Data Collection

The method of data collection adopted in the study was the qualitative in-depth interview. Interviews were personally conducted with each participant. Nieuwenhuis believes that the aim of qualitative interviews is “to see the world through the eyes of the participant, and they can be a valuable source of information.”⁵¹ It is through this form of data collection that a researcher can obtain “rich, descriptive data” that aids in the understanding of the “participant’s construction of knowledge and social reality.”⁵²

Semi-structured interviews were used in the research process. The advantage of using semi-structured interviews according to Greef is its flexibility, which allows the researcher to “gain a detailed picture of a participant’s beliefs, or perceptions or accounts of, a particular topic.”⁵³ I prepared a set of predetermined questions on an interview schedule but the interview process was guided by the schedule rather than being dictated by it. The interview schedule allowed me to outline the issues to be addressed beforehand and develop a plan of action to deal with sensitive issues.

According to Morse,⁵⁴ the interview schedule allows the researcher, the time and thought to generate insightful questions with appropriate content and structure. In

⁵¹ Creswell J.W. *et al. First Steps in Research* (Van Schaik Publishers: Pretoria 2010) at 87.

⁵² *Ibid.*

⁵³ Greef M. Information collection: interviewing In De Vos A.S. ed. *Research at grass roots: for the social sciences and human services professions* 3rd ed. (Van Schaik : Pretoria) at 296.

⁵⁴ Morse J.M. *Qualitative nursing research: a contemporary dialogue* (Newbury Park: Sage 1991).

terms of flexibility the semi-structured interviews allowed the researcher to probe and clarify answers and give the participant sufficient opportunity to tell the story. Permission to interview the participants was obtained formally in writing from the Head of the Justice Centre. It was decided to interview attorneys from the Justice Centre because they consult with a vast number of clients on a daily basis. They are expected to be proficient in the art of communication.

The interviews were conducted at the offices of each attorney. I had sufficient time with each participant and this enabled me to establish a relationship of trust and rapport with each of them. Prior to conducting the interview, the process and procedure was explained to each participant and their informed consent was obtained in writing. I made use of an assistant to audio-record each interview and notes were also taken manually. Each participant's expressions, feelings, attitudes and experiences were also noted.

I applied the following techniques during the interview process as set out by Seidman.⁵⁵

- ◇ the participant was allowed to do the talking whilst I did the listening;
- ◇ the participants were asked short, clear and brief questions;
- ◇ the participants were asked open-ended questions;
- ◇ questions that were leading, controversial or sensitive were avoided;

⁵⁵ Seidman I. *Interviewing as qualitative research* 2nd ed. (New York: Teachers College Press 1998) at 261.

- ◇ the participants were kept focused and were told to furnish concrete answers;
- ◇ the participants were given a free rein but I maintained control;
- ◇ I followed up on important points and returned to incomplete points;
- ◇ I maintained minimal verbal responses;
- ◇ I probed and clarified answers;
- ◇ I concluded the interview with a general question.

The interview with open-ended questions was geared towards allowing the participants to freely relate their experiences. Each interview lasted approximately fifteen to twenty minutes and there was sufficient time for me to establish a good rapport with each participant.

The participants were given the opportunity to give a subjective account of their experiences which captures the essence of phenomenology. The interview process was interactive with the participants being given the opportunity to do the talking whilst I had ample opportunity to facilitate the discussion, probe and clarify answers, observe the general feelings, facial expressions and body language of the participants.

The participants all indicated that they were comfortable with English being the medium of communication during the interview process and therefore no translator was used. Therefore any possibility of information being inaccurately translated or the process being slowed down by a translator was avoided. I made

a concerted effort to ensure that the participants were aware of the reasons for the use of a tape recorder and the interviews only commenced once they were comfortable and at ease with the device. The entire interview process was conducted in a logical manner with me being wary of the numerous pitfalls in interviewing such as unnecessary distractions and interruptions amongst others.⁵⁶

1.9.7 Data Analysis

The method of data analysis adopted was the qualitative data and interpretive analysis approach. In terms of this approach meaning is extracted from the “explanation, understanding or interpretation from the qualitative data collected of the people and situations that they are investigating.”⁵⁷ This approach allows for me to gain insight into the thought processes of the participant by analyzing their thoughts, feelings and experiences of the phenomena.

By inductively analyzing the raw data, I was able to establish common themes without the restraints of making deductions in advance which could create preconceptions that obscure the data.⁵⁸ I was mindful of the fact that the qualitative data consisted of interactions and observations rather than statistics and therefore chose to search for common themes, words and patterns when analyzing the data.

⁵⁶ Field P.A.& Morse J.M. *Nursing research: the application of qualitative approaches* (Chapman & Hall: London 1994).

⁵⁷ Creswell J.W. *et al. First Steps in Research* (Van Schaik Publishers: Pretoria 2010) at 99.

⁵⁸ *Ibid.*

The data which was collected by electronic means, that is by a digital tape recorder was transcribed and special attention was given to the transcription process. The transcriber was briefed to include non-verbal cues in the transcript and to ensure that the recordings were transcribed verbatim. Due to the data comprising a large mass of words, I chose to organize the data into categories where each participant was given a folder and a pseudonym which allowed for easier identification of common characteristics and themes. I was mindful of the fact that it was very important to know and understand the data and therefore the recorded interviews were listened to time after time and the written texts were reread several times. This allowed for me to make reflective notes throughout the different stages of the qualitative data analysis. A process of coding was used to divide the data into meaningful segments.

According to Seidel,⁵⁹ codes or labels can be assigned to meaningful segments and they then serve as containers or collection points for rich data. These codes can also assist in making new discoveries as well as assisting one in rationalizing the data process.⁶⁰ The coding process was extremely beneficial in that it allowed me to move back and forth between data and make new discoveries in respect of the data gathered. After coding the data, I continued to modify the codes which then assisted in the establishment of themes, patterns and eventually conclusions. I was fully aware of the importance of comparing the

⁵⁹ Seidel J. & Kelle U. *Different functions of coding in the analysis of textual data*. In Kelle U ed. *Computer-aided qualitative data analysis: theory, methods and practice*. (London: Sage 1995).

⁶⁰ Ibid.

analysed data with the existing theories in order to make contributions to the existing body of knowledge.

1.9.8 Ethical Considerations

I adhered to a strict code of ethics when undertaking the study.

According to Strydom,⁶¹

“ethics is defined as a set of widely accepted moral principles that offer rules for, and behavioural expectations of, the most correct conduct towards experimental subjects and respondents, employers, sponsors, other researchers, assistants and students.”

The following ethical research guidelines were strictly adhered to:

- ◇ I was sensitive to the rights, values, traditions, and practices of the participants;
- ◇ the participants were given the right to take part or withdraw from the study at any time;
- ◇ I obtained the written informed consent of each participant before commencing with the interview;
- ◇ the aims and objectives of the study was pointed to each participant;
- ◇ confidentiality and anonymity in respect of the participant’s names were adhered to;
- ◇ the participants were informed of their rights to refuse to answer any personal

⁶¹ Strydom H Ethical aspects of research in the social sciences and human services professions In De Vos A.S. ed. Research at grass roots: for the social sciences and human services professions 3rd ed. (Van Schaik : Pretoria) at 69.

or highly sensitive question.

I ensured that a letter of informed consent was handed to each participant who then gave written permission to allow all information derived from the interviews to be used for research purposes. It was also agreed that each participant's name and or any identifiable detail would remain confidential and not form part of the study. The consent letter is included in the thesis marked "Annexure A".

A letter of permission to interview the participants was obtained from the Justice Centre Executive and the letter is included in the thesis marked "Annexure B".

CHAPTER 2 – LEGAL REALISM

2.1 Introduction

What is law? What is legal knowledge? How does an attorney develop legal skills? Throughout the history of academic law, these questions have raised recurrent tensions and sparked healthy debate but sadly very legal scholars have been able to grasp and understand the true nature of law.⁶² The layperson may wonder as to why legally trained students are unable to grasp the true nature of law. The answer lies in the notion that law has two distinct faces.⁶³ The obvious one is where law is viewed as a doctrine of ideas which are constantly analysed, interpreted and developed.⁶⁴ The other, the “hidden face” is where law regulates the various facets of social life.⁶⁵

Christopher Columbus Langdell was the first to express the view that law is a complete system on its own where abstract principles derived from case law determines legal decisions.⁶⁶ However, the legal realists rejected this view on the basis that it was too traditionalistic and not scientific enough.⁶⁷ The influence of a sociological movement in jurisprudence influenced the realist view that merely

⁶² Kleyn D. and Viljoen F. *Beginner's Guide for Law Students* 4th ed. (Juta and Co. Ltd. Cape Town 2010) at 1.

⁶³ Catterrell R. *The Sociology of Law An Introduction* (Butterworths London 1984) at 5.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Twining W. *Karl Llewellyn and the Realist Movement* (Willmer Brothers Limited Birkenhead Great Britain 1973) at 10. Langdell, who was once the Dean of the Harvard Law School saw law as a science where all the relevant materials could be found in books. He applied this theory to his methods – a formalistic approach which was later challenged by the realists.

⁶⁷ Leiter Brian 1999(99) Positivism, Formalism, Realism *Columbia Law Review* at 1147.

applying abstract principles does not reflect the reality of a legal system.⁶⁸ Realists argued that social and economic factors must be taken into account when legal decisions are made.⁶⁹

It is extremely difficult for the trained legal mind to see beyond the realms of the legal world.⁷⁰ For centuries, the law teacher and student have seen law as traditional and ceremonial with the primitive function of maintaining peace and order.⁷¹ The court and judges were seen as the sole instrument in giving effect to the function of law.⁷² The underlying principle behind this formalistic view was that judicial decisions were only guided by legal rules, which rules were clearly set out in legal texts and case precedents.⁷³ Law was seen as inert, objective and impervious to the social climate. It was against this traditional formalistic background that the emphasis on the verbal and the written emerged.

For many, law was regarded as a legal doctrine only” or a “set of technical instruments”.⁷⁴ The court was seen as the sole instrument of legal control,

⁶⁸ Ibid at 1148.

⁶⁹ See Chapter 8 titled American Realism in Freeman M.D.A. 1994 *Lloyd's Introduction to Jurisprudence* 6th ed. Sweet and Maxwell Ltd. London at 655.

⁷⁰ Radin M. 1937(25) *The Education of a Lawyer California Law Review* at 676-691.

⁷¹ Wizner S. 1998(17) *Is Learning to Think like a Lawyer Enough? Yale Law and Policy Review* at 583.

⁷² Ibid.

⁷³ Wilkins D.B. 1990(104) *Legal Realism For Lawyers Harvard Law Review* at 471.

⁷⁴ McDougal M.S. “The Law School of the Future : From Legal Realism to Policy Science in the World Community” 1947(56) *The Yale Law Journal* 1438. It is important to acknowledge the contributions of Jeremy Bentham (1748-1832), John Austin (1790-1859), Hans Kelsen (1881-1973) and H.L.A. Hart (1907-1992) when touching on positivism. Bentham, one the early theorists on positivism was also a staunch supporter of utilitarianism (a view that all human action should be judged by the “pleasure-pain” barrier and law should be created so as to generate the best consequences for as many people as possible). Bentham believed that law constituted a “command” from those in control or power (command thesis) and his views were popularized by his ardent supporter and student, John Austin who reiterated the view that law is

without imaginative consideration of community values and social issues.⁷⁵

These views contributed towards a delay in the movement away from the inner doctrinal consistency of the formal legal order.⁷⁶

In recent times, a growing awareness has emerged that sees law as an important aspect of society which cannot be isolated from social phenomena.⁷⁷ The need to encourage the law student to learn, “how to think rather than just what to know” is crucial to improving the legal skills of the attorney.⁷⁸ Realistic jurisprudence is

a series of “commands” that stem from a sovereign (a group to whom the political community pays obedience). Hans Kelsen, one of foremost jurists of the twentieth century expressed the view that a hierarchy of norms rather than morality constitutes any legal system. Professor Hart, regarded as the leading contemporary representative of British positivism firmly believed that law and morality are separate entities even though law may have been at times been influenced by morals and ethics. See Bentham J. 1945 *The Limits of Jurisprudence Defined* at 84 and Bentham J. 1988 *A Fragment on Government* at 3 in Roederer C. and Moellendorf D. *Jurisprudence* (Juta and Company Ltd 2004) at 66. See also Summers R.S. *Essays in Legal Philosophy* (Basil Blackwell Oxford 1970) at 184.

⁷⁵ McDougal M.S. “The Law School of the Future : From Legal Realism to Policy Science in the World Community” 1947(56) *The Yale Law Journal* 1438.

⁷⁶ It is important to briefly discuss the tenets of the natural law theory and positive law theory as both impacted on the emergence of legal realism. In the Middle Ages, legal philosophy was dominated by the church as Christians shared a common denominator with the universe, i.e. a “law written in (men’s) hearts, a moral sense of doing good and being good. See Bodenheimer E. *Jurisprudence The Philosophy and Method of the Law* 2nd ed. (Harvard University Press Cambridge 1970) at 14. The Greek and Roman thought in the pre-modern society had a major influence on western legal philosophy and the three major philosophers of the time, Plato (427-347 BCE), Aristotle (384-323 BCE) and Cicero (106-43 BCE) were extremely influential in their thinking and views. See Johnson D. et al. *Jurisprudence A South African Perspective* Lexis Nexis Butterworths Durban 2001) at 5. The key tenet of natural law is that good must prevail over evil, whether that good arises from mankind’s reason or a God figure. The early nineteenth century saw the emergence of the positivist movement which to a large extent signified an insurgency against the naturalist movement. See Dias R.W.M. *Jurisprudence* 5th ed. (Butterworths London 1995) at 331. Many different meanings can be attributed to positivism but a key tenet of positivism according to Hart is that “laws are commands”. In other words written law is the sole source of legal authority and religion and morality (key concepts in natural law) play no role in the governance of man. See Hart H.L.A. 1958 Positivism and the Separation of Law and Morals *Harvard Law Review* at 601.

⁷⁷ Cotterell R. *The Sociology of Law An Introduction* (Butterworths London 1984) at 2

⁷⁸ Dias R.W.M. *Jurisprudence* 5th ed. (Butterworths London 1985) See Preface.

Kant believed that an understanding of law requires its students to proceed from a metaphysical perspective rather than from a purely empirical perspective. See Kant I. *Metaphysische Anfangsgrunde der Rechtslehre* discussed in Entreves A.P.D. *Natural Law* Hutchinson University Press London at 99. Kant believed that the human mind operates *a priori* which is separate from its senses. According to him the root of metaphysics is the ability to

extremely important in this sense as it stimulates a critical understanding of the law.⁷⁹ Law is increasingly being seen as a social phenomenon where social factors inform everyday legal issues.⁸⁰ There is little doubt that technical skills can be learned but when lawyers have to deal with “conceptual puzzles” or social problems that need deciphering, they encounter difficulties.⁸¹

For the modern day law student, the ability to, “combine astute legal analysis with an awareness of social conditions” is the key to improving their legal minds.⁸² It is a well known fact that we are now living in a world where our intellectual skills are highly developed through a deeper understanding of science, psychology and the human mind.⁸³ Economic, social and political considerations now define law.⁸⁴ The famous nineteenth century forbearer of historical jurisprudence, James Carter⁸⁵ once wrote:

“Systems of law must be shaped in accordance with the actual usages of men. It is a folly to suppose that unbending rules can be made beforehand, and men be disciplined to learn them and adapt the business of life to them.”

reason which together with experience contributes towards the building of knowledge.

⁷⁹ Ibid.

⁸⁰ Anleu S.L.R *Law and Social Change* (Sage Publications Ltd. London 2010) at 1.

⁸¹ Catterrell R. *The Sociology of Law An Introduction* (Butterworths London 1984) at 6.

⁸² Goldberg J.C.P. The Life of Law 51(5) *Stanford Law Review* at 1419.

⁸³ Kessler M.1995(29) *Lawyers and Social Change in the Postmodern World Law & Society Review* 769 at 1346.

⁸⁴ Ibid. According to the learned author, “this confusion has been inherited from a time when we were living in a completely different world, a world of completely different interdependences, and when attitudes toward the proper role and function of law in a communities were very different.”

⁸⁵ Carter J.C. “The Provinces of the Written and Unwritten Law” 1890(24) *AM Law Review* (1890) at 15 discussed in Twining W. *Karl Llewellyn and the Realist Movement* (Willmer Brothers Limited Birkenhead Great Britain 1973) at 310.

A century ago, men like James Carter were way ahead of others in terms of how they viewed law. Carter believed that justice and the law must be “adapted to human affairs” in order to ensure that those applying the law do not sacrifice justice for the sake of uniformity.⁸⁶ This progressive view of law was seen as a direct threat to the traditional or formalistic approach, but despite the diffident attitude of many legal personas towards the new order, the realistic view of law continues to gain credence even to this day.⁸⁷

An understanding of law is the starting point for any law student or attorney in developing a “refined set of tools” to solve and deal with legal issues in the “real” world.⁸⁸ Theories of law play a vital role in interpreting the focal area and configuration of legal practice, and legal arguments proceed from that concealed foundation that jurisprudence offers.⁸⁹ In this chapter, legal realism as a stream of thought in legal philosophy and jurisprudence will be dealt with. The different

⁸⁶ Ibid. See discussion on Carter in Twining W. *Karl Llewellyn and the Realist Movement* (Willmer Brothers Limited Birkenhead Great Britain 1973) at 310.

⁸⁷ Jackson B.S. 1968(16) Evolution and Foreign Influence in Ancient Law *The American Journal of Comparative Law* at 372. According to Jackson, modern scholarship has evolved to such a degree that the settled manner of dealing with legal problems has to be reconsidered.

⁸⁸ De Groot M. and Vrielink M.O. Legal Theory and Sociological Facts 1998 17(3) *Law and Philosophy* at 252.

⁸⁹ Sharma S.R. *Encyclopedia of Jurisprudence* Vol. 1 (Anmol Publications New Delhi 2003) at 4. Jurisprudence is widely regarded as the theory and philosophy of law which inculcates an understanding of human thought in relation to social existence. It provides scholars with an understanding of the legal system and nature of law. *Juris Prudentia* is a Latin term which means knowledge of the law. (Oxford English Dictionary 2nd ed. 1989). The subject matter of jurisprudence is expansive as it comprises the philosophical, historical, sociological and analytical structures of legal theory. Jurisprudence has by and large focused on the relationship between the idyllic nature of justice and the flawed reality of laws operating within specific societies. See Johnson D. et al. *Jurisprudence A South African Perspective* (Lexis Nexis Butterworths Durban 2001) at 5.

streams of thought in legal philosophy and jurisprudence⁹⁰ will not be dealt with (except where relevant to this research), and neither will Scandinavian realism be discussed in detail.⁹¹ This chapter aims to draw on the tenets of legal realism which are apposite to this research, with the focus on one facet of legal semiotics, i.e. non-verbal communication in legal discourse.

2.2 The roots of legal realism

It is not an easy task to define realistic jurisprudence. The many conflicting cross-currents within the realist movement have led to it being characterized at different times as a movement, a philosophy, a school and even a revolt against legal convention.⁹² However, despite these different outlooks, realists vehemently

⁹⁰ A broad division of these schools are the philosophical jurisprudence of the nineteenth century and earlier, historical jurisprudence, and analytical jurisprudence. The division, however, is arbitrary, and is merely an attempt to broadly categorise a multitude of views. The research will not venture into the paradigm and methodologies, of, for instance, the historical school, legal positivism, the naturalist school, et al. as presented by a multitude of thinkers, for example Kant, Von Savigny, Dooyeweerd, Maine, Kelsen, Hart, Dworkin, Bentham, Austin, Grotius, Locke, Von Jhering, Stammler, Von Gierke, et al.

⁹¹ Scandinavian realism concentrates on the concept of legal rights. The works of Hagerstrom, Olivecrona, and Ross fully expound this theory. The founder of the Scandinavian realist movement school, Axel Hagerstrom (1868-1939) challenged most theories and views about the law at that time. He saw law as a "psychological occurrence". His views were further developed by Karl Olivecrona (1897-1980) who also saw law as a psychological phenomenon exempt from the sovereign influence.

⁹² Wacks R. *Understanding Jurisprudence An Introduction to Legal Theory* 1st ed. (Oxford University Press New York 2005) at 175. During the end of the 19th century, American legal education was dominated by the view that law is a complete formal science and there was no need to look for answers outside law (legal formalism). See Wilkins D.B. 1990(104) *Legal Realism for Lawyers Harvard Law Review* at 474. Formalism is widely regarded as a theory of adjudication by judges who decide cases solely on objective facts, rules and logic. The early 20th century saw the emergence of this revolutionary movement known as legal realism which looked at law from a controversial yet dynamic perspective. The emergence of legal realism arose against the backdrop of the industrial revolution that swept through the United States of America towards the end of the nineteenth century where courts became inundated with new regulations and copious cases. The court system in America was suddenly bombarded with an array of different cases which seemed to destabilize the basic foundation of the system of precedent. In an attempt to simplify the legal process, a realist view emerged that the existing structure failed to give due recognition to the complexities of a modern and changing world. See Duxbury N. 1991(18) *Jerome Frank and the Legacy of Legal Realism Journal of Law and*

rebuff the single conduit of logic in favour of a holistic scientific enquiry into the operations of the legal system.⁹³ In the early part of the twentieth century, the legal realist movement revitalized interest in the fields of social science and law.⁹⁴ During this period, legal realists challenged the natural law order that revolved around principles found in nature.⁹⁵ Realists believe that rules are too rigid to decide reality and they do not take into account vital factors such as economic and political considerations.⁹⁶ For them law does not comprise of only factors within the legal domain but is intrinsically associated with real-life outcomes.⁹⁷

Knowledge of sociological jurisprudence as a precursor to legal realism is crucial to tracing its emergence against the social backdrop of the progressive movement and the mushrooming effect of contemporary social sciences during the period of inception.⁹⁸ The sociological aspect of law is founded on three

Society at 177.

⁹³ *Ibid* at 176.

⁹⁴ Constanzo M. *Psychology Applied to Law* (Thomson & Wadsworth Canada 2004) at 4.

⁹⁵ Natural law served as a moral validation in respect of all laws and it was the ideal which presided over positive laws. Plato developed a theory of natural law (idealism) which revolved around ideals and these ideals (forms of reality) according to him could not be seen by the ordinary man. He believed that ideals were God-like, hidden from humans and justice which was one example of an ideal was universal and unchanging in its command over human laws. Aristotle who was widely regarded as the father of natural law like his counterparts Socrates and Plato highlighted the importance of morality as the “thread” that determines what is right and wrong. Aristotle believed that things have a natural purpose in life and these things move towards a natural goal. Others believed natural law to come to pass from mankind’s ability to apply reason to any given situation. Philosophers such as Thomas Hobbes (1588 to 1679), Jon Locke (1632 to 1704) and Jean-Jacques Rousseau (1712 to 1778) highlighted the importance of reason especially in the origins of political power struggles. See Bodenheimer E. *Jurisprudence The Philosophy and Method of Law* (Harvard University Press Cambridge, Massachusetts 1970) at 6-9. In “Plato’s View of the Law” Plato’s view of inequality and distinction in duties and functions of man is clear. See also Roederer C. and Moellendorf D. *Jurisprudence* (Juta and Company Ltd. 2004) at 31. The realists, unlike the naturalists believed that judges served the important role of creating the law rather than applying it mechanically.

⁹⁶ Decew J.W. 1985(4) Realities about Legal Realism *Law and Philosophy* at 409

⁹⁷ Harris J.W. *Legal Philosophies* 2nd ed. (Butterworths London, Edinburgh, Dublin 1997) at 98.

⁹⁸ Sociological Jurisprudence focuses on the social aspects and effects of legal institutions and

claims which are closely intertwined: law must be understood as a social phenomenon, law constitutes one aspect of social control and that a mere analysis of legal concepts is insufficient to explain “law in use”.⁹⁹ Legal realism is seen as a bridge between sociological jurisprudence and law as a social phenomenon.¹⁰⁰

The roots of legal realism lie in the pragmatist sociological-positivist approach of Roscoe Pound with its emphasis on functionalism.¹⁰¹ Pound (1870-1964) who became famous for his works on sociological jurisprudence stressed the importance of distinguishing between “law set forth in books” and “law in action”.¹⁰² However, his intention was not to pit each against the other but to seek a way forward for both to complement each other. Pound’s vision encapsulated lawyers performing a social function in society, a role which

law in general and legal realism is widely regarded as its offshoot. The link between legal realism and sociological jurisprudence can be traced back to the writings of the following famous writers: O.W. Holmes 1897(10) *The Path of Law Harvard Law Review* 457 and Roscoe Pound 1911(24) *The Scope and Purpose of Sociological Jurisprudence Harvard Law Review* 591.

⁹⁹ Wacks R. *Understanding Jurisprudence An Introduction to Legal Theory* 1st ed. (Oxford University Press New York 2005) at 197.

¹⁰⁰ Hunt A. 1981(8) *Dichotomy and Contradiction in the Sociology of Law British Journal of Law and Society* at 47.

¹⁰¹ Roscoe Pound, a leading scholar who taught at the University of Nebraska, Northwestern, the University of Chicago and served as Dean at the Harvard Law School was also Supreme Court Commissioner. He ascribed to some of the ideas set forth by Justice Holmes whom he believed revolutionized legal thought. See Pound R. 1921(34) *Judge Holmes’s Contributions to the Science of Law Harvard Law Review* at 449-453. Even though realists reject formalism, they look at in its positive form from a social perspective. Positivists view law as being “positive” or “posited” where law as is laid down should be seen as distinct from the concept of morality. Positivism is regarded as a key theory of knowledge that focuses on how we acquire knowledge. The questions about the nature of the universe and god were dealt with by philosophers in the pre-modern era. However, the Enlightenment era saw philosophers change their way of thinking towards a more rational and scientific way of acquiring knowledge. See Bodenheimer E. *Jurisprudence The Philosophy and Method of the Law* 2nd ed. (Harvard University Press Cambridge 1970) at 3-70.

¹⁰² Pound R. 1910(44) *Law in Books and Law in Action American Law Review* at 12.

facilitated the cohesion between law and the varying social interests of society.¹⁰³

His assault on traditionalism paved the way for law interacting with other disciplines, such as psychology, criminology and economics.¹⁰⁴

The sociological approach of Pound paved the way for Frank, Llewellyn and Holmes, who are the main exponents of legal realism to make significant contributions towards the phenomenon known as “law”.¹⁰⁵

The pragmatist view of Justice Holmes (1841-1935) who was widely regarded as the founder of American legal realism was a key factor that influenced the realist movement.¹⁰⁶ Holmes saw law as a tool that was necessary in order to achieve social goals.¹⁰⁷ Experience and knowledge were crucial to achieving this social outcome.¹⁰⁸ Another key factor that influenced the movement was the decisions coming out of the Supreme Court at that time.¹⁰⁹ It was argued that decisions were being influenced by social, economic and political factors rather than

¹⁰³ Ibid at 12.

¹⁰⁴ This interaction between law and other disciplines extended much later to semiotics. A branch of semiotics became known as legal semiotics. The interaction between law and semiotics will be discussed in Chapter 3.

¹⁰⁵ The works of Hagerstrom, Olivecrona, and Ross fully expound this theory.

¹⁰⁶ Gilmore G. 1961(70) Legal Realism: Its Cause and Cure *The Yale Law Journal* at 1037. Justice Oliver Wendell Holmes, a hero figure amongst realists challenged the traditional standing of legal rules and concepts. An American jurist who served as a Supreme Court Justice in the United States from 1902 to 1932, he became known for his concise opinions and statements about law.

¹⁰⁷ Holmes O.W. 1897(10) The Path of Law *Harvard Law Review* 457. See also Freeman M.D.A. 1994 *Lloyd's Introduction to Jurisprudence* 6th ed. Sweet and Maxwell Ltd. London at 656. Holmes believed that the “life of law” is experience. Justice Holmes believed that only a lawyer or judge who is acquainted with the historical, social and economic aspects of the law would be in a position to carry out his duties effectively.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. Realists firmly believed that judges' decisions are not based exclusively on legislation and case law. External stimuli, even factors that may influence a judge unconsciously all play a role in the drive to achieve the right legal decision.

abstract concepts.¹¹⁰ Holmes persuaded law students to separate law from morality and look beyond rules and precedents.¹¹¹

In one of his earlier books Holmes clearly set out his revolutionary way of thinking by stating the following:

*“The very considerations which judges most rarely mention, and always with apology, are the secret root from which the law draws from all the juices of life.”*¹¹²

Holmes was able to see beyond formalism when thinking about, studying and applying the law and his “realistic approach” to law highlighted the need to move beyond the basis of law. Legal realism focuses on “law in action” and unlike most other legal theories, it also focuses on the practical application of law which is crucial to the practicing attorney.¹¹³ Realists such as Jerome Frank and Karl N. Llewellyn viewed law as a field that exceeded the bounds of statutes, case law and precedents.¹¹⁴ They believed that extrinsic factors such as personal beliefs,

¹¹⁰ See *Lochner v New York* 1905 198 US, where a law limiting the working hours of bakers was deemed to be unconstitutional. The realists argued that the term “liberty” was not given an abstract interpretation but a liberal one and the case was based on a political choice.

¹¹¹ Constanzo M. *Psychology Applied to Law* (Thomson & Wadsworth Canada 2004) at 5.

¹¹² Holmes O. W. *The Common Law* (Boston: Little Brown 1881) at 2-3.

¹¹³ Llewellyn K. 1930(30) A Realistic Jurisprudence, The Next Step *Columbia Law Review* at 431. Realists differed at times as to how the problem of formalism should be dealt with. Radical realism was strongly against formalism and the radical realists adopted a more political criticism of formalism. With interest in this view having wavered, the development of progressive realism from the pragmatism of Holmes emerged. They moved away from an extremely political approach to one that was non-legal in nature. The progressive group viewed law as a social science where legal behaviour could be predicted and described. See Wacks R. *Understanding Jurisprudence An Introduction to Legal Theory* (Oxford University Press New York 2005) at 178. See also Wacks R. *Understanding Jurisprudence An Introduction to Legal Theory* (Oxford University Press New York 2005) at 178.

¹¹⁴ Tamanaha B.Z., “Understanding Legal Realism” 2009(87) *Texas Law Review* 749.

private interests, political and social influences all affect the way in which a judge arrives at his or her verdict.¹¹⁵ Llewellyn and many other realists after his time believed that traditional law could not compel or predict a specific outcome or result because many different factors influenced the decisions of judges.¹¹⁶ Llewellyn famously described legal realism as “a concept to be used as a thinking tool.”

According to Llewellyn, a lawyer would not be able to predict a legal outcome by only paying attention to legal rules.¹¹⁷ The changing legal environment characterized by gaps in legislation, fluctuating social needs, and scientific expansion have presented the ideal platform for judicial creativity.¹¹⁸ It is this legal creativity that is required for law students to see beyond the rules, precedents and statutes that characterize the legal system. It is through focusing on the different variables, such as the “reaction of the judges to the facts and to life around them”, that will enable one to “appreciate how little, in detail one can predict out of the rules alone”.¹¹⁹

¹¹⁵ Ibid.

¹¹⁶ See Llewellyn K. 1930 *The Bramble Bush* at 180. See also Miles T.J and Sunstein C.R. “The New Legal Realism” *The University of Chicago Law Review*, 2008(75) 832. Llewellyn believed that rules guide decisions rather than control them.

¹¹⁷ Ibid.

¹¹⁸ See Samuel Summers *Instrumentalism and American Legal Theory* (Cornell University Press 1982) discussed in Decew J.W. 1985(4) Realities about Legal Realism *Law and Philosophy* at 409.

¹¹⁹ Llewellyn K.N. *The Bramble Bush : The Classic Lectures on the Law and ITS Study* (Oxford University Press 1930). Realists therefore argue that legal rules are merely “words” which are open to different interpretations and it is usually the judge who will attach meaning to these words or rules. It is therefore the judge who makes the law and the very same judge is not only guided by precedents or statutes which are open to different interpretations but by different variables. A legal rule uniformly applied to different fact situations cannot result in the correct legal decision in all the different situations. Realists therefore argue that social factors influence law and legal decisions. As a result, law cannot be seen as autonomous from

2.3. Tenets of legal realism

This school emphasizes the “security of realistic results”.¹²⁰ Realists do not all agree about their theories but a key precept of realism is that court decisions are influenced by policy considerations and subjective value judgments.¹²¹ This dynamic approach towards law which challenged legal certainty was borne out of an era of social change.¹²² Even though realists focused on law “as it is”, they challenged the objectivity and consistency of legal rules.¹²³ This attack on legal thought was based on a claim that law was indeterminate.¹²⁴

Their cynicism of legal orthodoxy was derived from their firm belief that rules do not decide the outcome of a case.¹²⁵ If law was simply a set of rules as asserted by Hart, then legal cases would simply be resolved by applying these rules without formal litigation.¹²⁶ However, the reality of many legal systems worldwide is that scores of legal cases are only decided through litigation and the outcomes

society.

¹²⁰ Hosten W.J. et al. *Introduction to South African Law and Legal Theory* (Butterworth Durban 1983).

¹²¹ Decew J.W. 1985(4) *Realities about Legal Realism Law and Philosophy* at 409.

¹²² Hosten W.J. et al. *Introduction to South African Law and Legal Theory* (Butterworth Durban 1983) at 83.

¹²³ Despite challenging the process of legal reasoning, realists were seen as positivists of a “special type as they focused on the law as is. As positivists, but skeptical of legal orthodoxy and “rule skeptics” they stressed the aspect of law-in-action. See Wilkins D.B. 1990(104) *Legal Realism for Lawyers Harvard Law Review* at 474. See also Hosten W.J. et al. *Introduction to South African Law and Legal Theory* (Butterworth Durban 1983) at 83.

¹²⁴ In terms of the indeterminate argument, realists argued that it was possible to derive manifold answers to specific legal problems. They believed that law is more than just rules and rules do not always provide the best solution to the problem. See Singer 1988(76) *Legal Realism Now California Law Review* at 467.

¹²⁵ *Ibid.*

¹²⁶ Murphy J.G and Coleman J.L. 1990 *Philosophy of Law-An Introduction to Jurisprudence* at 33.

are not easily predicted. This gives credence to the school of thought that law is more than just a system of rules that can be applied mechanically in order to calculate an outcome.¹²⁷

Realists firmly believe that law is more than just an abstract concept that serves some mythical function.¹²⁸ The realist view is that law must be seen for the practical function that it serves in society.¹²⁹ This standpoint (broadly construed as instrumentalist) contrasts sharply with the formalist viewpoint and these divergent viewpoints have sparked great debate amongst legal scholars in recent times.¹³⁰

Realism does not concentrate purely on the single path of logic but focuses on the sociological investigation into the sciences.¹³¹ An investigation into the social factors that make law has created the opportunity to explore human behaviour, personalities, social awareness as well as economic and political realities.¹³²

Realism has created a link between law and other disciplines and to a large

¹²⁷ Ibid at 33.

¹²⁸ Duxbury N. 1991(18) Jerome Frank and the Legacy of Realism *Journal of Law and Society* at 182. See the discussion on Jerome Frank's basic legal myth where he states that certainty in law is but a childhood fantasy.

¹²⁹ Omoregbe J. 2004 *Philosophy of Law An Introduction to Philosophical Jurisprudence* 4th ed. Joja Educational Research and Publishers Ltd at 126. Many of the legal realists believed that law is not just what appears in legal texts but is indeterminate where a combination of social factors and behavioural patterns influence judicial outcomes and decisions.

¹³⁰ See Decew J.W. 1985(4) Realities about Legal Realism *Law and Philosophy* at 406. These two divergent standpoints in respect of law, broadly construed as formalist and instrumentalist respectively has sparked great debate amongst legal scholars in recent times. According to Decew, instrumentalists such as Oliver Holmes, Jerome Frank, Karl Llewellyn, John Gray and Roscoe Pound believed that law should serve practical and creative purposes in accordance with social realities.

¹³¹ Catterrell R. *The Sociology of Law An Introduction* (Butterworths London 1984) at 7.

¹³² Hosten W.J. et al. *Introduction to South African Law and Legal Theory* (Butterworth Durban 1983) at 84.

degree can be attributed to curing the gaps and ambiguities in the purely formalistic legal system of the past.¹³³ For the realists, a major component in addressing some of inadequacies of the traditional legal system was to study the personalities, outlook, social, economic and political background of the legal personnel in order to predict with some certainty legal outcomes and court decisions.¹³⁴ Their approach can best be summed up by searching for “real factors” in legal outcomes.¹³⁵

Llewellyn compiled a list of what he termed, “the characteristics of the realist movement. The list which illustrates the gradual shift in legal thought reflects his conceptualization of legal realism.¹³⁶ Llewellyn summarized the characteristics of legal realism as follows:

2.3.1 the notion of law in flux;

2.3.2 the notion of law as a means to an end;

2.3.3 the notion of a society being in flux faster than law;

2.3.4 the separation of “is” and “ought” for study purposes;

2.3.5 the misgivings of traditional rules relating to courts and people;

2.3.6 the usefulness of categorizing cases into narrower categories;

2.3.7 the doubt over prescriptive rules influencing court decisions;

¹³³ Wilkins D.B. 1990(104) *Legal Realism For Lawyers Harvard Law Review* at 498.

¹³⁴ Hosten W.J. et al. *Introduction to South African Law and Legal Theory* (Butterworth Durban 1983) at 85.

¹³⁵ *Ibid.*

¹³⁶ Llewellyn K. 1931 *Some Realism about Realism Jurisprudence* at 53. The 1931 list was a follow-up to his 1925 list which reflected his earliest expressions on realism.

2.3.8 the evaluation of law in terms of its effects;

2.3.9 the programmatic attack on the problems of law.

In terms of the above characteristics, realists such as Llewellyn saw law as a means to shaping behaviour and solving perceived problems.¹³⁷ Llewellyn believed that using realistic methods to change the law brings about a change in society, resulting in the betterment of mankind.¹³⁸

2.4 An evaluation of legal realism

Despite criticism leveled at realism and realists (such as their downplay of coherent legal systems, the over-emphasis of the ‘human factor’ in judicial decision making and the tendency to collect data without proper justification) there is no doubt that realism has encouraged critical thinking and problem-solving in legal education and jurisprudential enquiry.¹³⁹ Importantly, there has been a shift in the manner in which judges analyse and interpret the law and rules.¹⁴⁰ In other words there is no longer an over-reliance on the literal approach towards interpreting the rules. The biggest positive has been an acceptance of the interrelationship between law and many other disciplines which has advanced and highlighted the “humanity element” in the legal system.¹⁴¹ It is this

¹³⁷ Llewellyn K. 1931 Some Realism about Realism *Jurisprudence* at 53.

¹³⁸ Ibid.

¹³⁹ Hosten W.J. et al. *Introduction to South African Law and Legal Theory* (Butterworth Durban 1983) at 85.

¹⁴⁰ Ibid at 86.

¹⁴¹ Ibid. In recent times the interaction between law and disciplines such as psychology, criminology, politics, economics, international relations, semiotics et al. has been recognised.

interrelationship between legal realism, semiotics and non-verbal communication that will be highlighted and implemented in my study in order to advance the communicative legal skills of the attorney.

One can now safely say that legal decisions are no longer arrived at by a perfunctory application of the law.¹⁴² As a legal realist, I firmly believe that many non-legal components inform everyday legal decisions and outcomes. Social, economic and human factors play a vital role in determining how and why decisions are reached.¹⁴³ Within the South African landscape, there appears to be a move towards social change and the enforcement of socio-economic rights as America did at the time of the realists.

In my view, recent court decisions show a shift away from formalism towards a realist approach where the socio-economic impacts of legal decisions are being highlighted.¹⁴⁴ In the case of *Prince v President of the Law Society of the Cape*

¹⁴² See *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 BGD at 5501, where Friedman J recognized legal realism as an important school of thought. He recognized social, economic and human factors as important components of a true legal system. See also *Kayamandi Town Committee v Mkhwaso* 1991 (2) SA 630 (C), where the court held that the local authority had to consider the plight of the illegal squatters before evicting them. *Incasu Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), court stressed the importance of balancing the rights of the landowner against the rights of the unlawful occupier and highlighted the need for mediation to take place before granting the eviction order.

¹⁴³ *Ibid.* See also *Jafta v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005(2) SA 140 (CC) where the court held that homelessness, poverty and and insecurity are all cogs of one huge socio-economic problem that must be addressed together having due regard to the historical, social and economic background of those affected.

¹⁴⁴ See also *Government of Republic of South Africa and Others v Grootboom and Others* 2001 SA 46 (CC) where the court “placed upon the state and all other entities and persons to desist from preventing or impairing the rights of access to adequate housing”. The case illustrates a realist approach as the court emphasized that the socio-economic rights of the poor and homeless must be respected. The court also emphasized that social, political and economic factors must be taken into account.

*and others*¹⁴⁵ the Constitutional Court had to decide on the issue of freedom of religion. Prince applied to the Law Society to have his contract for articles registered. In his application, he disclosed that he had two previous convictions for possession of cannabis and that as a Rastafarian; he would continue to use cannabis as it was part and parcel of his culture and religion. The majority court emphasised that the main issue in the matter was whether the law was inconsistent with the Constitution. It became clear that the judges in their majority were hesitant to go outside the text and they adopted a positivistic approach when arriving at their decision. However, Sachs J in his minority judgment remarked:

“...because they are politically powerless and unable to secure their position by means of a legislative exemption, the Rastafari are compelled to litigate to invoke their constitutional rights. They experience life as a marginalized group seen to dress and behave strangely, living on the outer reaches rather than in the mainstream of public life. The court has accepted that: ‘to understand the other one must try, as far as is humanly possible, to place oneself in the position of the other.’ An inflexible application of the law that compels him to choose between his conscience and career threatens to impoverish not only himself but all of South Africa and to dilute its burgeoning vision of an open democracy.”¹⁴⁶

¹⁴⁵ 2002 2 SA 794 (CC).

¹⁴⁶ See *Prince v President of the Law Society of the Cape and others* 2002 2 SA 794 (CC) at para 157 and 170.

It is clear from the aforementioned quote that Sachs J recognized that there are times when judges need to move beyond the text. He mentioned the fact that Rastafarians have to rely on the court because they do not have the power to have their views aired in the political arena. Sachs J judgment highlights the popular belief that politics, social circumstances and policy considerations can and should play a role in the decision of judges. Sachs J adopted a realist approach when going beyond the text. Like the realists, he emphasised that a judge's role is dynamic and not merely mechanical in nature. The minority judgment of Sachs J clearly illustrates the long standing viewpoint of realists that judges do "make law" when interpreting legislation.

According to Max Radin,¹⁴⁷ a lawyer's business involves knowing their subject matter and this can be achieved by obtaining specific information about the social structure, the organization and the practices of the community in which they live in. The legal mind has to be receptive to constant changes in form, content and character of legal transactions.¹⁴⁸ It is against this backdrop of legal realism, that a realization has emerged that law cannot function purely on a traditional model that fails to take into account the progressive nature of the world that we are living in. The work of Bernard S. Jackson supports the conception by Justice Holmes that law is more than just an abstract set of rules.

¹⁴⁷ Radin M. 1937(25) *The Education of a Lawyer California Law Review* at 691.

¹⁴⁸ *Ibid* at 684.

According to Jackson,¹⁴⁹

“..... laws may not be taken into isolation from their mother systems, but must be considered according to the functions they serve as parts of an infinitely larger total legal complex”

These famous words of Jackson clearly highlight the realist perspective of seeing law as more than just a set of legal rules. Jackson believed that modern scholarship has now been confronted by many new breakthroughs which have resulted in the reconsideration of textual problems which appeared to be settled.¹⁵⁰ Jackson argued that law cannot be defined by inert theories because there are an infinite number of invariables – both from within a society and outside it – that determine the development of law.¹⁵¹

From the works of great jurists, lawyers, semioticians and philosophers, some of whom I have mentioned in this Chapter, we may draw lessons that the modern

¹⁴⁹ Jackson B.S. 1968 16(3) Evolution and Foreign Influence in Ancient Law *The American Journal of Comparative Law* at 372.

¹⁵⁰ Jackson B.S. *Semiotics and Legal Theory* (Routledge and Kegan Paul London and New York 1985) at 3-7. In recent times all aspects of law have been challenged. The Critical Studies movement is more radical than legal realism in that like realism it attacked formalism but went one further to attack all aspects of the legal system including legal liberalism and legal scholarship. The movement can be credited to a group of American scholars who appeared to be disillusioned with the conventional legal scholarship. The movement gained popularity and by the 1980's resulted in the culmination of the Conference on Critical Legal Studies where members from leading American schools joined. Some of the prominent members included amongst others Duncan Kennedy, Roberto Unger, Peter Gabel, Karl Klare and Mark Tushnet. This theory of jurisprudence builds on realism in that it focuses on the “historical contingency of law” as well as the “use of political tradition” and “doctrinal techniques”. See Roederer C. and Moellendorf D. 2004 *Jurisprudence* Juta and Company Ltd at 248. See also Meintjies-Van der Walt L. et al. 2008 *Introduction to South African Law Fresh Perspectives* 1st ed. Pearson Prentice Hall Cape Town at 586.

¹⁵¹ Jackson B.S. *Semiotics and Legal Theory* (Routledge and Kegan Paul London and New York 1985) at 3-7.

day lawyer must be skilled in the vast array of legal variables in order to deal with contemporary legal issues. Even though much of the academic writing on legal realism focuses on judges and court decisions, realist methods embrace law in all its forms. Due to the fact that many legal cases do not even go to court, it is not my intention to focus myopically on one minutia – that is court work and judges decisions only. My study focuses to a large extent on the “real world” of the lawyer. Lawyers and judges do share a common denominator – they rely on much of the same material such as statutes and case law and they tend to exercise some influence over the other.¹⁵² Lawyers seek to persuade judges to grant judgment in their favour whilst judges provide opinions to guide them.¹⁵³ In lieu of this connection, legal realism affords lawyers, like judges the clout to change the legal terrain.

My study proceeds from the basis that lawyers apply the law through the actions of “real people” – their clients rather than as conceptual deductions from the pages of legal documents. According to Sarat and Felstiner,¹⁵⁴ clients expect their lawyers to discuss the likely judicial outcomes of the case as compared to reciting formal rules. This ties in with the realist view that it is the legal persona and not the rules that determines the fate of the client. In addition to perusing the relevant legal materials, the attorney must comprehend the problem at hand and then create a credible legal argument. In order to understand the nature of the

¹⁵² Wilkins D.B. 1990(104) Legal Realism For Lawyers *Harvard Law Review* at 476.

¹⁵³ Ibid.

¹⁵⁴ Sarat A. and Felstiner W. 1989(98) Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office *Yale Law Journal* at 1663.

problem, the attorney must possess effective communicative skills to elicit relevant material from the client.

In my view, adopting legal realism as an instrumentalist tool in the communicative legal process is crucial to “laying the building blocks” for the “foundation stage” of improving the legal skills of the attorney. Improving legal representation and predicting judicial decisions is possible if one looks for discernible patterns in the entire legal process rather than just the existing legal rules.¹⁵⁵ For the attorney to provide the best possible representation for the client, the attorney would have to look beyond the boundaries of legal rules and texts, and proceed against the backdrop of social, political and economic awareness.¹⁵⁶ Realists have been eager “to come to grips with life, experience, process, growth, context, and function”.¹⁵⁷ One can go on and add “communication” to that list.

Communication is crucial to the realists’ concept of law-in-action and it is this often overlooked “real factor” that determines the true potential of an attorney.¹⁵⁸

The experience of non-verbal communication is a field that has been largely ignored in the legal sector.¹⁵⁹ Non-verbal communication is one of those

¹⁵⁵ Leiter B. 2001(3) *Legal Realism and Legal Positivism Reconsidered Ethics* at 281.

¹⁵⁶ Hosten W.J. et al. *Introduction to South African Law and Legal Theory* (Butterworth Durban 1983) at 84.

¹⁵⁷ White M.G *Social Thought in America: the Revolt against Formalism* 2nd ed. (Beacon 1957).

¹⁵⁸ Hall E.T. and Hall 1977(3) M.R. *Nonverbal Communication for Educators Theory into Practice* at 141. The authors stress that everything communicates and to communicate effectively one needs to read and decode these messages.

¹⁵⁹ *Ibid.*

essential variables that impact strongly on the entire communicative process.¹⁶⁰

Semiotic meanings are created and exchanged during this process of interchange between the attorney and client and this is evident when law is viewed through a “realistic lens” as a form of symbolic communication.¹⁶¹

Legal realism has highlighted the need for the attorney to recognize these non-verbal signs and symbols within the context of the legal environment.¹⁶² The use of realist methods to explore this vital component in the consultation process can only stimulate the process of “growing” the communicative legal skills of the attorney.¹⁶³

¹⁶⁰ Ibid.

¹⁶¹ Meisenhelder T. 1981(4) *Law as a Symbolic Action: Kenneth Burke's Sociology of Law Symbolic Interaction* at 45.

¹⁶² Ibid.

¹⁶³ Legal realism serves as my preferred choice because of its focus on the practical application of law. Some of the criticism leveled against the other main theories can be summed up as follows: Critical Legal Studies is characterized by a false consciousness which creates the illusion that the legal basis for the established socio-economic hierarchies is natural. The critics believed that all aspects of law are indeterminate meaning that for every rule or principle there was a mirrored norm that was equally sound. They believed that law was not rational enough to determine how a legal dispute has to be decided. This irrationality was caused by a “fundamental contradiction” in human existence between the self and other. Their leftist tendencies in modern legal thought contributed towards a negative appraisal of legal material and legal claims put forward by higher socio-economic hierarchies. The critics believed that their main function was to unsettle or trash hierarchical systems in society and they have been criticised for undermining legal systems without providing positive solutions. The movement lost some of its appeal in the late 1980's and disintegrated into smaller intellectual concerns. Within the South African context, it has been argued that the critical movement is superfluous as the Constitution serves the role of analysing legal order and effecting legal change. There is hardly any evidence that South African courts have used or intended to use this approach when adjudicating upon cases solely because critical legal studies has been critical of adjudication. The primary function of the movement has always been to analyse and criticise court decisions. See Gabel P. 1984 Reification in Legal Reasoning *Critical Legal Studies* at 18. See Heyns C 1990(107) Reasonableness in a Divided Society *SALJ* at 279. See Kennedy D. 1983(14) The Political Significance of the Structure of the Law School Curriculum. See Kennedy D. 1970 Legal Education as Training for Hierarchy in Kairys ed. *Politics of Law* at 38. See Unger R.M. 1983(96) The Critical Legal Studies Movement *Harvard Law Review* at 564. See Freeman A.D. 1981(90) Truth and Mystification in Legal Scholarship *Yale Law Journal* at 1229. See the discussion on the application of CLS in South Africa in Van Blerk A.E. 1998 *Jurisprudence An Introduction* revised first ed. Butterworths Durban at 164 where the common view that our Roman-Dutch common law heritage has not been poisoned by apartheid

LeVan¹⁶⁴ stressed the importance of non-verbal communication in the practical application of the law when he stated that:

“... nonverbal communication subtly affects the entire proceedings of a trial. It is constantly present and being asserted, yet the attorney is often unaware of its existence.”

Even before the trial stage, it is important for the attorney to recognize the consultation process as a significant form of interactive communication.¹⁶⁵ The consultation process is laden with verbal and non-verbal signs that produce meaning, resulting in “the creation of social relationships, systems of knowledge and cultural identity.”¹⁶⁶ Semiotics in partnership with legal realism serves as important analytical tools in uncovering the various sign component structures that are present during the interview process. Semiotics is ultimately concerned with how communication becomes possible.¹⁶⁷ Communication is an essential component of the legal field whilst semiotics, like realism, has a vital role to play in law in that it allows for communicational problems to be looked at from different angles.¹⁶⁸

legislation was discussed.

¹⁶⁴ LeVan E.A. 1984(8) Non-verbal communication in the courtroom: Attorneys beware *Law and Psychology Review* 83-104 .

¹⁶⁵ Duke C.R. 1974(25) Nonverbal Behaviour and the Communication Process *College Composition and Communication* at 397-404.

¹⁶⁶ Duke C.R. 1974(25) Nonverbal Behaviour and the Communication Process *College Composition and Communication* at 397-404.

¹⁶⁷ Ibid.

¹⁶⁸ Kevelson R. *Law and Semiotics* (Plenum Press New York 1987) at 2. According to Kevelson, the Centre for Semiotic Research in Law, Government and Economics was formed in 1984 with the aim of analysing legal problems and issues from a semiotic perspective and utilising

Bernard Jackson stressed that law cannot be explained on the basis of “artificial reasons of the law” but must be looked at from a wholly external framework which encompasses different variables.¹⁶⁹ He saw modern day law as fitting in with the realist jurisprudential theory as opposed to naturalism or positivism due to legal rules comprising a human element.¹⁷⁰ Societal goals, human practices and emotional states inform legal rules and decisions and semiotics admit similar philosophical arguments.¹⁷¹

In the constitutional era, with the focus being on socio-economic rights and South Africa going through this transitional period of social change, realism and semiotics would serve as important analytical tools when looking at the non-

the resolutions in actual practice.

¹⁶⁹ Jackson B.S. 1968 16(3) Evolution and Foreign Influence in Ancient Law *The American Journal of Comparative Law* at 372.

¹⁷⁰ Ibid. A general criticism of the positive law theory is that it has contributed to a denunciation of legal values which has seen the rise of oppression and dictatorship in the last century. It has been blamed for the “mechanical” interpretation of statutes by courts. It has been suggested that a judge may find it difficult to completely distance himself from his own presuppositions which would make it impossible to apply the law free from all moral considerations. It has failed to give us an adequate account of law primarily because of its empirical approach to the study of law. However, whatever the pitfalls of the positive law theory, one cannot doubt that it has facilitated the critique of existing legal norms and structures. It has laid the foundation for the emergence of the Critical Studies and Realist movements. See Devenish G 1991 Teleological Evaluation: A Theory and Modus Operandi of Statutory Interpretation in South Africa *SAPL* at 67. See also Dugard J 1971 88 The Judicial Process, Positivism and Civil Liberty *SALJ* at 181. Criticism directed towards the natural law theory, especially by the positivists is that revelation of God’s law in the Holy Scripture, which allows for mankind to share everything, does not apply to the modern day concept of, “individual ownership”. I believe that this argument put forward by Hans Kelsen is sound and does hold true when examined within the context of a modern heterogeneous society. See Kelsen H. 1965 (17) The Pure Theory of Law *Stan. Law Review* 1142. The notion of a “uniform morality” has been attacked by positivists on the basis that there is no one or common morality that can be attributed to all different cultures across the world. In my view, even though cultures have common fundamental principles of morality, cultural practices of what is right and wrong vary from culture to culture. Jean-Paul Sartre believed that there is no higher natural order and man creates his own nature. See Sartre J.P. *Being and Nothingness* transl.by Barnes H.E. (Meuthen New York 1969).

¹⁷¹ Ibid at 24. Jackson talks about a legal system made up of symbols that induces ideas.

verbal skills of the attorney.¹⁷² The groundwork has been laid for me to proceed towards a legal realist investigation into non-verbal communication and skills development by applying a semiotics methodology.

¹⁷² See the case of *Government of Republic of South Africa and Others v Grootboom and Others* 2001 SA 46 (CC) which reflects a departure from formalism towards realism.

CHAPTER 3 - SEMIOTICS

As mentioned in the previous paragraph, the legal realism movement has highlighted the need for law and lawyers to become progressive when interpreting and applying the law. This can only be achieved through an understanding of the entire communicative process – both the verbal and non-verbal interface.¹⁷³ An effective lawyer must be familiar with the historical, social and economic aspects of the law because law is more than just an abstract set of rules which can be applied to all situations.¹⁷⁴ By using a “semiotic lens” to analyse the non-verbal legal communicative process, it becomes easier to identify any shortcomings in the skill levels of young attorneys.

Semiotics, a highly intellectual discipline is said to be the, “knowledge of the 21st century”.¹⁷⁵ Whether it is described as a “discipline of the postmodern age”, a “doctrine of signs” or the “science of sciences”, there is little doubt that it offers a universal theoretical basis for all qualitative studies.¹⁷⁶ Unlike psychologically-orientated studies of non-verbal behaviour which focuses mainly on empirical data capturing, semiotics acquire facts from different disciplines and scrutinizes them from a sign theory perspective.¹⁷⁷ Semiotic investigations are dominated by

¹⁷³ Blanck, Rosenthal and Cordell 1985(38)The Appearance of Justice : Judges Verbal and Nonverbal Behaviour in Criminal Jury Trials *Stan L. Rev.* at 89.

¹⁷⁴ Cotterrell R. *The Sociology of Law An Introduction* (Butterworths London 1988) at 5.

¹⁷⁵ Kull K.; Salupere S. and Torop P. *Semiotics Has No Beginning* In Deely John *Basics of Semiotics* Tartu (University Press Tartu 2005).

¹⁷⁶ Ibid at 5. According to John Deely semiotics is the fuse for all disciplines.

¹⁷⁷ Chandler D. *Semiotic for Beginners* <http://www.aber.ac.uk/media/Documents/S4B/sem02.html>. (Date of use: February 2010). In terms of the sign theory perspective, signs which are the transmitters of meaning forms the basis of the study.

observation and reasoning rather than experimentation.¹⁷⁸ The semiotic approach dates back to the time of great philosophers such as Aristotle and Plato who viewed language as the sign systems of our minds.¹⁷⁹ The modern day tradition of sign analysis into meaning construction developed centuries ago.¹⁸⁰ The works of Boethius (480-528) and Augustine (354-430) contributed to the development of medieval theories of sign and semiotics.¹⁸¹

As early as the 13th century, a mixture of Aristotle and Augustinian influence saw the emergence of an elaborate theory of signs which began to influence the fields of arts and science.¹⁸² Roger Bacon,¹⁸³ widely regarded as one of the most influential medieval theorists of signs developed a broad conception of signification and a detailed theory of a linguistic sign. Bacon looked at the semantics of spoken language and concluded that words signify endless things.¹⁸⁴ During the 12th and 13th century the written and spoken word was seen

¹⁷⁸ Ibid.

¹⁷⁹ Eschbach A. and Trabandt J. *History of Semiotics* (Benjamins Amsterdam 1983).

¹⁸⁰ Kull K.; Salupere S. and Torop P. *Semiotics Has No Beginning* In Deely John *Basics of Semiotics* Tartu (University Press Tartu 2005). The history of semiotics date back to the ancient Greek (6th century AD), Latin(17th century), modern (20th century) and postmodern eras. The different philosophical approaches to the sign and meaning creation can be broken down into the phenomenological approach designed by Edmund Husserl, the relation aspect developed by Martin Heidegger and finally the process formation of meaning developed by Peirce. According to Deely, the director of the Semiotic Society of America, semiotics has developed within the historical framework of philosophy. The different definitions given to semiotics include the "study of signs", the "sign systems" and "communication".

¹⁸¹ Evans J.D. *Medieval Semiotics* (Northern Illinois University USA 1986). Augustine's theory of signs draws from the Stoic philosophy of language. According to Augustine, a sign means something to the mind of both the sender and receiver.

¹⁸² Ibid. See also the substantive revision of Medieval Semiotics, Stanford Encyclopedia of Philosophy at <http://plato.stanford.edu/entries/semiotics-medieval>.

¹⁸³ Bacon R. 1978(34) De Signis ed.K.M. Fredborg, L. Nielsen and J. Pinborg *Traditio* at 75-136 in *Medieval Semiotics*, Stanford Encyclopedia of Philosophy at <http://plato.stanford.edu/entries/semiotics-medieval>.

¹⁸⁴ Ibid. Bacon developed a general concept of signification and a comprehensive theory of the linguistic sign. He looked at a sign as forming a relationship with something to someone.

to signify the concept of a sign.¹⁸⁵ However, towards the middle 13th century a conceptual change in thinking saw mental concepts being accepted as signs of things.¹⁸⁶ The 14th century saw the emergence of a logical concept of a sign where logic was seen to be exclusively intertwined with signs.¹⁸⁷ The logical theory of signs as a concept, extended well into the 15th and 16th century.¹⁸⁸ Thereafter a number of 17th and 18th century logicians advanced on the earlier theories of signs to develop highly elaborate sign theories.¹⁸⁹ Even though semiotics is seen as a young discipline, views about signs, logic and meaning developed centuries ago.¹⁹⁰

The semiotic method has led to newer insights and fresh perspectives on research and due to the dynamic nature that characterizes semiotic investigations, it is now being seen as a major element in understanding non-verbal communication.¹⁹¹ The semiotic-orientated study of non-verbal communication is based on a channel of sign systems which analyses facts

¹⁸⁵ Supra at 182. During this era, a transformation gradually took place where the sign - from initially being seen from a formal perspective (written and spoken) now included the mental concept element.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid. William Ockham looked at the sign from within the realm of logic and developed a logical concept of a sign. He believed that a sign has to have some relevance, in order for it to stand for something.

¹⁸⁸ Ibid. See also Ashworth E.J. 1969(51) The doctrine of supposition in the 16th and 17th Centuries *Archiv fur Geschichte der Philosophie* at 260-285. During the 15th and 16th century, an extended notion of the sign was discussed by different authors where signification and representation were common themes that emerged.

¹⁸⁹ Evans J.D. *Medieval Semiotics* (Northern Illinois University USA 1986). See also the substantive revision of *Medieval Semiotics*, Stanford Encyclopedia of Philosophy at <http://plato.stanford.edu/entries/semiotics-medieval>.

¹⁹⁰ Ibid.

¹⁹¹ Wiener M. et al. 1972 Nonverbal behaviour and nonverbal communication *Psychological Review* 185-214.

through signs which in turn convey value and meaning to the receiver.¹⁹² The verbal and non-verbal signs produce meaning, which in turn lead to, “the creation of social relationships, systems of knowledge and cultural identity.”¹⁹³ The semiotician analyses every component of a structure to uncover meaning from the minuscule of detail.¹⁹⁴

Larson¹⁹⁵ likened a semiotic receiver to the famous detective Sherlock Holmes, who solved many a case by analysing every inch of a crime scene, often uncovering meaning from the tiniest of sources that would easily have been ignored by a lay person. My study will emphasise the importance of exploring signs (specifically non-verbal) within the confines of the legal arena.¹⁹⁶ Semiotics together with realism will provide the theoretical tools for the analysis of non-verbal legal communication (signs) in the legal arena. These two dynamic frameworks address the signs of law and allows for an analysis that goes beyond

¹⁹² Laferriere Daniel 1979(65) Making Room for Semiotics *Academe* at 434-440.

¹⁹³ Bezuidenhout *A Discursive-Semiotic Approach to Translating Cultural Aspects in Persuasive Advertisements* <http://ilze.org/semio/007.htm> (Date of use: May 2010).

For a look into the development of semiotics with the social and political context in apartheid South Africa, see Tomaselli K.G. and Shepperson A. 2000(11)1 Re-Semiotizing the South African Democratic Project: The African Renaissance *Social Semiotics*. The authors highlight that within the South African context, the application of semiotics in the pre-constitutional era has largely been politicized. The apartheid system combined with the ideological positions of South African academics within the political and social formations influenced the use of semiology in South Africa. According to Keyan and Shepperson, those conservatives who wished to show no link with apartheid preferred to use European semiology with an interpretive theological framework in literary studies. The activists on the other hand in an effort to highlight their position in the struggle, applied semiotics in language, media, performance and cultural studies.

¹⁹⁴ Ibid.

¹⁹⁵ Larson C.U. *Persuasion, Reception and Responsibility* (USA: Wadsworth Publishing Company Inc.1989).

¹⁹⁶ See Privateer P.C. and Laferriere D. 1981(67) Semiotics in Academia: A Brief Analysis *Academe* at 316 where it was held that semiotics does not encompass the study of signs but also how semiotic relationships that exist within the universe are interpreted.

the established jurisdiction of law.¹⁹⁷ For the attorney to provide the best possible representation to the client, she must extract “every inch” of relevant information from the client – even information that is not forthcoming verbally.¹⁹⁸ The exploration and analysis of the sign-vehicles that are emitted from the client during the consultation process will allow the attorney to gather and extract all the vital information and meaning that is necessary for the building of a strong case.¹⁹⁹ Before analysing the link between realism, semiotics, and law, it is imperative for the researcher to first look at the definition of semiotics.

Semiology or semiotics is widely regarded as a science that studies signs.²⁰⁰ These signs in turn assist in the construction of meaning.²⁰¹ The term semiotics initially spelt semeiotics (Greek: of signs), was first used by Henry Stubbes in English to symbolize the branch of medical science relating to the interpretation of signs.²⁰² Two decades later John Locke used the term semeiotike to explain how science in the form of a system of signs can be used to understand the human mind.²⁰³ Semiotics has also been referred to as an eclectic field that is

¹⁹⁷ See Wagner A. and Broekman J.M. *Prospects of Legal Semiotics* (May 4 2010) Springer at <http://ssrn.com/abstract/1600262> where an insight into the book is given by Peter Goodrich, Professor of Law, Cordoza School of Law New York.

¹⁹⁸ Lasswell H.D. and McDougal M.S. 1943 (52) *Legal Education and Public Policy: Professional Training in the Public Interest* *The Yale Law Journal* at 207. The learned authors contend that law schools need to revise their curriculums and legal skill training to incorporate the social facets of life that dictate their responsibility.

¹⁹⁹ *Ibid* at 203. The learned authors contend that outdated legal educational practices need to be reformed so as to serve unrelenting modern-day needs.

²⁰⁰ Denzin N.K. 1987(10) *On Semiotics and Symbolic Interactionism* *Symbolic Interaction* at 2.

²⁰¹ Hjelmslev L. *Prolegomena to a Theory of Language* (Madison: University of Wisconsin Press 1963).

²⁰² Stubbe H. *The Plus Ultra Reduced to a Non Plus* (London 1670) discussed in Chandler D. *Semiotic for Beginners*.

²⁰³ Locke J. *An Essay Concerning Human Understanding* (London 1690) discussed in Chandler D. *Semiotic for Beginners*.

concerned with the principles by which signification (process by which words, behaviour and objects create meaning) occurs.²⁰⁴ It follows then that semiotics is ultimately concerned with how communication becomes possible.²⁰⁵ Communication is an essential component of the legal field whilst semiotics has a vital role to play in law in that it allows for communicational problems to be looked at from different angles.²⁰⁶

However, even amongst leading semioticians there has been some disparity as to the true meaning of semiotics.²⁰⁷ Some have referred to semiotics as a project rather than an established science due to the uncertainty around its ideologies and concepts.²⁰⁸ Others have referred to semiotics as a scientific discipline or a science in its infancy due to its association with a range of other studies.²⁰⁹ However or whatever way one views semiotics, there is a general agreement amongst semiotic scholars that it represents a construction of meaning and knowledge through different sign system structures which interact with a variety of other disciplines.²¹⁰ Semiotics does not deal with the study of one specific thing but looks at a variety of things that at times stand for something else.²¹¹

²⁰⁴ Barley S.R. 1983 Semiotics and the Study of Occupational and Organizational Cultures *Administrative Science Quarterly* at 394.

²⁰⁵ Ibid.

²⁰⁶ Kevelson R. *Law and Semiotics* (Plenum Press New York 1987) at 2. According to Kevelson, the Centre for Semiotic Research in Law, Government and Economics was formed in 1984 with the aim of analysing legal problems and issues from a semiotic perspective and utilising the resolutions in actual practice.

²⁰⁷ Noth W. *Handbook of Semiotics* Indiana (University Press Bloomington 1995).

²⁰⁸ Noth W. *Handbook of Semiotics* Indiana (University Press Bloomington 1995).

²⁰⁹ Ibid.

²¹⁰ Laferriere Daniel 1979(65) Making Room for Semiotics *Academe* at 435.

²¹¹ Ibid at 434.

There are two conflicting traditions in semiotics arising from the works of Charles Peirce and Ferdinand de Saussure.²¹² Some of the well known semioticians who have followed in the semiological tradition of Saussure include, amongst others Louis Hjelmslev, Roland Barthes, Julia Kristeva, Claude Levi-Strauss, Christian Metz and Roland Barthes.²¹³ Others such as Thomas Sebeok, Charles W. Morris, Ivor A. Richards and Charles K. Ogden have followed closely in the tradition of Peirce.²¹⁴ Umberto Eco is widely regarded as the leading semiotician who has attempted to bridge the gap between the divergent traditions of Peirce and Saussure.²¹⁵ Their views will be discussed in more detail in the next few paragraphs.

In the nineteenth century, Charles Peirce defined “semiotic” as a “formal doctrine of signs” which allow us to create meaning.²¹⁶ Signs are human constructs and convey meaning in a variety of ways.²¹⁷ The human brain is designed to attach meaning to the multitude of signs and symbols that are everywhere and mankind’s decision-making and thought processes are guided by how they interpret these myriad of signs.²¹⁸ Speech, words, body language, images, non-

²¹² Chandler D. *Semiotic for Beginners* <http://www.aber.ac.uk/media/Documents/S4B/sem02.html>. (Date of use: February 2010).

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ See Eco U. *The Theory of Semiotics* (Bloomington: Indiana University Press 1976) discussed in Denzin N.K. 1987(10) On Semiotics and Symbolic Interactionism *Symbolic Interaction* at 1-19.

²¹⁶ Pierce C. *Collected Papers: Volume V. Pragmatism and Pragmaticism* (Cambridge: Harvard University Press 1960) discussed in Barley S.R. 1983 Semiotics and the Study of Occupational and Organizational Cultures *Administrative Science Quarterly* at 393-413.

²¹⁷ Barley S.R. 1983 Semiotics and the Study of Occupational and Organizational Cultures *Administrative Science Quarterly* at 394.

²¹⁸ Rossano M.J. 2010(51) Making Friends, Making Tools, and Making Symbols *Current Anthropology* at 89-98.

verbal behaviour, sounds, gestures and objects are all signs that define our everyday life.²¹⁹

The emergence of semiotics as a method of investigating sign systems did coincide with the awareness and realization that many scholars had in fact used semiotics under different more traditional frameworks.²²⁰ Friedman is one such individual whose work did not fall under the direct umbrella of semiotics, yet his work has contributed towards the study of legal semiotics.²²¹ Friedman believed that law is given its meaning through different social systems and that there is no one overriding system that controls a society.²²² He believed that a legal act which is both verbal and non-verbal comprises signs constituting legal authority within a social structure.²²³

Legal semiotics does not subscribe to the view that law must always be in black and white (in writing).²²⁴ Within a legal network, there are legal acts which constitute an exchange of information by means of verbal and non-verbal signs.²²⁵ From a semiotic perspective it appears that the entire communicative

²¹⁹ Kirch M.S. 1979(63) Non-verbal Communication across Cultures *The Modern Language Journal* at 416-423.

²²⁰ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988) at 23.

²²¹ Friedman L. *The Legal System* (Russel Sage New York 1975) discussed in Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988) at 23.

²²² *Ibid* at 24.

²²³ *Ibid*. See the discussion by Kevelson on Friedman where she discusses the link between Friedman's view on the law and Peirce's semiotic views.

²²⁴ Hand Learned *The Spirit of Liberty* 1st ed. Dillard (Hamish Hamilton London 1954) discussed in Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988) at 5.

²²⁵ *Ibid* at 5-6.

process is guided by the meaning that is attached to signs and these signs which encompass both verbal and non-verbal communication have a colossal effect on social life.²²⁶ All societies have created multifarious sign systems that have evolved as a result of changing trends and times, and the legal environment should be no different.²²⁷ Within the legal field, these legal subsystems which comprise of both verbal and non-verbal sign systems must be recognized and interpreted in a manner that meets society's needs and wants.²²⁸

The attorney should always be looking to attach meaning to different signs in the legal environment.²²⁹ To identify these signs, the attorney has to look beyond the written text.²³⁰ A presiding officer shaking her head in court, a client with both hands draped over her face, a witness nervously shaking in the witness box are but a few of the multitude of signs that convey meaning to the attorney.²³¹ To understand non-verbal semiotics, one needs to first focus on the role of signs within the construct of social life.²³²

²²⁶ Bell P. 2002(12) Subjectivity and Identity: Semiotics as Psychological Explanation *Social Semiotics* 201-207.

²²⁷ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988) at 33.

²²⁸ *Ibid* at 33.

²²⁹ Beck A. 1987(7) The Semiology of Law *Oxford Journal of Legal Studies* 475-488.

²³⁰ See Goodrich P. Language, Text and Sign in the History of Legal Doctrine – a contribution in Carzo D. and Jackson B.S. *Semiotics, Law and Social Science* (In Copertina Rene Magritte Golconde 1953) at 96. According to Goodrich, law is more than just a central text. It encompasses social realities which form an important component of the legal system.

²³¹ Roth W. and Lawless D.V. 2002(31) When up Is down and down Is up: Body Orientation, Proximity and Gestures as Resources *Language in Society* 1-28. According to the learned authors, in any setting the body is key to making sense of communication and if visual access to the body is prevented, then communication breakdown is likely to occur.

²³² Bell P. 2002(12) Subjectivity and Identity: Semiotics as Psychological Explanation *Social Semiotics* 201-207.

I have spoken about sign and sign structures in the earlier paragraphs and the questions that may be posed by many legal professionals and law students are: What are signs? What is the relevance of signs to the legal profession? How does the attorney become aware of signs in the legal environment? How does one interpret signs?

The word sign or sign-ificance is fundamental to the creation of meaning.²³³ The sign is essentially the medium that makes communication possible.²³⁴ Signs may be classified into six general categories,²³⁵

- ◇ *signal* - when a mechanical reaction is triggered by a sign, the reaction constitutes a signal;
- ◇ *symptom* - a habitual sign establishing a link between it and what it signifies;
- ◇ *icon* - a sign that resembles something;
- ◇ *index* - a sign that establishes a direct link with the object;
- ◇ *symbol* - a sign that has no logical link with the object;
- ◇ *name* - a sign that establishes a common class or identity;

These six categories of signs fall within the non-verbal communicative process and an understanding of these sign processes can assist in decoding non-verbal

²³³ Roelofse J.J. *Signs and Significance A Different Perspective on Communication* (McGraw-Hill Book Company Johannesburg 1982) at 28.

²³⁴ Ibid at 29.

²³⁵ Harman L.D. 1986(9) Sign, Symbol and Metalanguage: Against the Integration of Semiotics and Symbolic Interactionism *Symbolic Interaction* 147-160.

behaviour.²³⁶ Signs can stand for objects, their referents or even abstractations but they generally do not convey meaning in isolation.²³⁷ What this means is that the sign is always linked to the communicator's intention within the framework of transferring information.²³⁸ There is a view that law has nothing to do with law but instead comprises a plurality of significations which interlock from different discourses to form the system of law.²³⁹

According to Umberto Eco,²⁴⁰

“semiotics is concerned with everything that can be taken as a sign”.

These words of Eco serve as an important prelude into uncovering the link between semiotics and law. Within the confines of an attorney's office, there are a variant of factors and signs that serve as veiled transmitters of information within the legal environment.²⁴¹ Judicial texts, legal terms and cases are familiar signs that dominate the legal world but these signs do not work in isolation.²⁴² The unspoken environment provides the meaning and many attorneys are

²³⁶ Ibid at 148.

²³⁷ Roelofse J.J. *Signs and Significance A Different Perspective on Communication* (McGraw-Hill Book Company Johannesburg 1982) at 30. According to the author, signs can represent the actual object, a pictorial of the object, a representation of the object and even be a referent of our inner feelings and emotions.

²³⁸ Danet B. 1980(14) *Language in the Legal Process* Law and Society Review at 445.

²³⁹ Rush P. 1990(53) Semiotics in the Trial of Jurisprudence *The Modern Law Review* at 122.

²⁴⁰ Eco U. *A Theory of Semiotics* (Bloomington: Indiana University Press 1976) discussed in Graham J.F. 1978(6) Semiotics and Semantics *Boundary 2* at 591-598.

²⁴¹ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988). Kevelson who went into a detailed analysis of Peirce's work contends that communication revolves around meaningful signs. In the legal environment, an awareness of both verbal and non-verbal sign systems is key to improving communication.

²⁴² Ibid. Kevelson contends that the legal system comprises of a web of interrelated communicative process that do not work in isolation.

unaware of this dynamic reality that exists beyond rationality.²⁴³ The black gown hanging on the wall is a sign which may transfer meaning to the client within a specific legal context. The client, by analysing the garment, is able to distinguish between the sacred and symbolic nature of the gown compared to ordinary forms of dress and even make distinctions in power according to the dress. The client may be able to construct meaning and views about her attorney by merely observing the state of the gown. A tattered and torn gown simply thrown on the floor will surely create a negative impression of the attorney whereas a sparkingly clean gown neatly folded or hanged on the wall may create the opposite effect.

By reading the sign, and utilizing its meaning, the client may be able to determine whether to go ahead with instructing the attorney, without having to meet the attorney personally.²⁴⁴ The client is able to construct meaning by just looking at the setting, the office space, the files strewn across the desk, the degrees on the wall etc. These are all signs that convey meaning to the client and it is important that the attorney is aware of these signs.²⁴⁵ Likewise, the attorney can draw information from the sign structure of the client without the utterance of a word.²⁴⁶

²⁴³ Koch R. 1971(10) *Nonverbal Observables Theory into Practice* at 288-294. According to the author, many signs and signals are difficult to see at the beginning. It is only when one looks for them will one be able to see them.

²⁴⁴ Duke C.R. 1974(25) *Nonverbal Behaviour and the Communication Process College Composition and Communication* at 397. According to Duke, a huge array of behaviour exists within the confines of non-verbal communication but it is a neglected area of communication.

²⁴⁵ Koch R. 1971(10) *Nonverbal Observables Theory into Practice* at 293. According to Koch, most disciplines will benefit from utilizing non-verbal signs in a positive way. For the attorney, use of these positive non-verbal signs is crucial in building a good rapport with the client during the communication process.

²⁴⁶ *Ibid.*

By merely observing and interpreting the basic body language of the client such as gestures, facial expressions and body movement, the attorney is able to determine how to react to the client and conduct the interview.²⁴⁷ A client who cancels her first appointment or shows up late for the appointment may be difficult to represent. This may constitute a sign that the client does not respect the attorney's time which in turn could mean that the client may not respect the court or the attorney's advice.

Therefore, everything in life can be broken down into signs.²⁴⁸ It is how we identify its meaning within the correct context, that helps define our relationships with others.²⁴⁹ The starting point for identifying signs within one's own environment is the realisation that a sign is "something which stands to somebody for something in some respect or capacity".²⁵⁰

As mentioned in earlier paragraphs, the founders of semiotics are Ferdinand de Saussure and Charles Sanders Peirce.²⁵¹ De Saussure saw semiology as a science that studies the "role of signs as part of social life", whilst Peirce looked

²⁴⁷ Smith A.E. and Nester P. 1977 Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* at 290.

²⁴⁸ Carzo D. and Jackson B.S *Semiotics, Law and Social Science*(In copertina Rene Magritte Galconde 1953.)

²⁴⁹ Barley R.S 28(3) Semiotics and the Study of Occupational and Organizational Cultures *Administrative Science Quarterly* at 393-413.

²⁵⁰ Peirce C.S. Collected Papers of Charles Sanders Peirce Vol 2: Elements of Logic (Charles Hartshorne and Paul Weiss eds. Harvard University Press 1960) discussed in Harman L.D. 1986(9) Sign, Symbol, and Metalanguage: Against the Integration of Semiotics and Symbolic Interactionism *Symbolic Interaction* at 149.

²⁵¹ See Harmon L.D. 1986(9) Sign, Symbol and Metalanguage: Against the Integration of Semiotics and Symbolic Interactionism at 148-151.

at semiotics as a “formal doctrine of signs” which are intimately related to logic and continuously reflect our daily thought processes.²⁵² De Saussure proposed that a sign can be categorised into two aspects;²⁵³

- ◇ *signifier* - the form which the sign takes
- ◇ *signified* - the concept it represents

According to De Saussure, these two components combined constitute a sign and assist in the creation of meaning²⁵⁴.

Peirce was less concerned with the linguistic aspect of semiotics but focused mainly on reality and how we make sense of the world.²⁵⁵ Peirce proposed that signs can be categorised into three aspects;²⁵⁶

- ◇ representamen - the form which the sign takes
- ◇ interpretant - making sense of the sign
- ◇ object – to which the sign refers

²⁵² Ibid at 148.

²⁵³ Ibid at 149.

²⁵⁴ Carzo D. and Jackson B.S *Semiotics, Law and Social Science*(In copertina Rene Magritte Galconde 1953) at 12.

²⁵⁵ See Harmon L.D. 1986(9) *Sign, Symbol and Metalanguage: Against the Integration of Semiotics and Symbolic Interactionism* at 148-151.

²⁵⁶ Peirce C.S. *Collected Papers of Charles Sanders Peirce Volumes V and V1* (Cambridge: Harvard University Press 1960) discussed in Carzo D. and Jackson B.S *Semiotics, Law and Social Science*(In copertina Rene Magritte Galconde 1953.)

Peirce used his triangular model to illustrate the point that meaning is produced when the three components interact.²⁵⁷

Peirce and De Saussure highlighted the importance of signs in producing meaning through the interactive process.²⁵⁸ This process involves understanding phenomenon, processing it mentally and transmitting it to others.²⁵⁹ The work of Pierce and De Saussure has been extended by a number of semioticians such as Eco, Kevelson, Jackson, Stamper, et al.²⁶⁰

In recent times, there has been a shift away from classification of sign systems towards deeper understanding of meaning and the social factors that influence the sign systems.²⁶¹ Eco expanded on the work done by Pierce and looked at semiotics from a social perspective.²⁶² Eco looked at semiotics from a realist perspective and contended that subjective factors influenced the entire interpersonal communicative process.²⁶³ According to Eco, semiotics involves many different areas of research, amongst others paralinguistics, kinesics and proxemics which all form part of non-verbal communication.²⁶⁴

²⁵⁷ Ibid at 13.

²⁵⁸ Ibid. Peirce's main contributions remain in the field of Logic whilst Saussure saw semiotics as part of social and general psychology.

²⁵⁹ Ibid.

²⁶⁰ Ibid at 14. Morris saw semiotics as an instrument of sciences which included logic.

²⁶¹ Eco U. 1981(14) The Theory of Signs and the Role of the Reader *The Bulletin of the Midwest Modern Language Association* 35-45.

²⁶² Eco U. 1981(14) The Theory of Signs and the Role of the Reader *The Bulletin of the Midwest Modern Language Association* 35-45.

²⁶³ Ibid.

²⁶⁴ Ibid.

Ronald Stamper introduced a modern semiotic theory.²⁶⁵ Stamper believed that signs enable one to perform actions.²⁶⁶ These actions performed in relation to the sign define the meaning of the sign which is then linked to reality which is socially construed and constantly altered through the use of signs.²⁶⁷

According to Stamper, it is important not only to establish “HOW” a sign means (which falls under the sphere of traditional semiotics), but also “WHAT” it means (which falls under the sphere of traditional hermeneutics).²⁶⁸ Stamper can be credited for developing semiotics further by introducing three additional aspects (physical, empirical and social) to the original Peircian semiotics (syntactics, semantics and pragmatics).²⁶⁹ The six levels as depicted in a semiotic ladder are independent of each other, but together form a complex conceptual structure that is not primitive.²⁷⁰

Stamper classifies all types of communication into six levels,²⁷¹

◇ *social world*, being the social context of the interaction;

²⁶⁵ See Stamper R.K. *Organisational Semiotics: Informatics without the computer?* In K.Liu, R.J Clarke, P.Bogh Anderson and R.K. Stamper eds. (MA: Kluwer Academic Publishers Boston 2001) at 115-171.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Ibid. See also Liu K. The Evolution of Organisational Semiotics – A Brief Review of the Contribution of Ronald Stamper – A Paper based on an interview with Ronald Stamper on 22nd December 2003.

²⁶⁹ See Stamper R.K. *Organisational Semiotics: Informatics without the computer?* In K.Liu, R.J Clarke, P.Bogh Anderson and R.K. Stamper eds. (MA: Kluwer Academic Publishers Boston 2001) at 115-171. According to Stamper, organizations comprise legal and cultural norms that regulate behaviour.

²⁷⁰ Ibid.

²⁷¹ Ibid.

- ◇ *pragmatics*, being the user's intentions that orchestrate the communicative activity;
- ◇ *semantics*, being the meaning of the communicated message;
- ◇ *syntactics*, being structures that form expressions;
- ◇ *empirics*, being the physically observable activity; and
- ◇ *physical*, being the physical support or basis for the communication.

To understand non-verbal communication, one needs to be able to analyse and interpret signs.²⁷² Non-verbal behaviour falls within the system of signs because non-verbal behaviour falls within the ambit of the communicative process.²⁷³ By applying a modern semiotic theory as presented by Stamper, it becomes possible to search for the real understanding of a sign.²⁷⁴

Communication between humans is difficult because of the possibility of miscommunication and misinterpretation.²⁷⁵ However, by applying the semiotic ladder as a model, and taking into account the social context, the communicator's intention, the physical aspect, the relationship with the recipient and communicator, the structure, meaning and properties of the sign, it is possible to delimit the possible interpretations that may be attached to a

²⁷² French R.L. 1977(16) Teaching the Nonverbal Experience *Theory into Practice* at 176.

²⁷³ Hall E.T. and Hall 1977(3) M.R. Nonverbal Communication for Educators *Theory into Practice* at 141. The authors stress that everything communicates and to communicate effectively one needs to read and decode these messages.

²⁷⁴ See Stamper R.K. *Organisational Semiotics: Informatics without the computer?* In K.Liu, R.J Clarke, P.Bogh Anderson and R.K. Stamper eds. (MA: Kluwer Academic Publishers Boston 2001) at 115-171.

²⁷⁵ LeVan E.A. 1984(8) Non-verbal communication in the courtroom: Attorneys beware *Law and Psychology Review* at 83-104

particular sign.²⁷⁶ Once one is in a position to establish what the sign means, it becomes easier to understand and interpret non-verbal communication.²⁷⁷

Bernard S. Jackson²⁷⁸ looked at the link between law and semiotics and many of his works focused on sense construction. He believed that law cannot be explained on the basis of “artificial reasons of the law” but must be looked at from a wholly external framework which encompasses different variables.²⁷⁹ Jackson argued that law cannot be defined by static theories because there are an infinite number of invariables – both from within a society and outside it – that determine the development of law.²⁸⁰ He therefore saw modern day law as fitting in with the realist jurisprudential theory as opposed to naturalism or positivism due to legal rules comprising a human element.²⁸¹ Societal goals, human practices and emotional states inform legal rules and decisions and semiotics admit similar philosophical arguments.²⁸²

Roberta Kevelson²⁸³ dedicated her life to fusing law and semiotics together. She followed the Peircean framework and viewed the legal system as a model of intersubjective social change where the interrelating communicative process is a

²⁷⁶ Nierenberg G.I. and Calero H. *How to Read a Person like a Book* (Thorsons Publishing Group: England 1980) at 155.

²⁷⁷ Leathers D. *Nonverbal Communication Systems* (Allyn and Bacon, Boston 1976) at 21-36.

²⁷⁸ Jackson B.S. *Semiotics and Legal Theory* (London, Routledge 1985).

²⁷⁹ *Ibid.*

²⁸⁰ Jackson B.S. *Semiotics and Legal Theory* (London, Routledge 1985). Jackson argued that law is not a “reified” system but a system where rules and decisions are linked to social practices, goals and psychological frameworks.

²⁸¹ *Ibid* at 3.

²⁸² *Ibid* at 24. Jackson talks about a legal system made up of symbols that induces ideas.

²⁸³ Kevelson R. *Law and Semiotics Volume 3* (Plenum Press New York and London 1989).

sign system which is made up of a pattern of sign structures.²⁸⁴ She viewed the legal system as one that is no longer formal but flexible where all legal propositions are hypothetical in nature.

According to Broekman,²⁸⁵

“lawyers consider language as their precious instrument but mingle sign and words, fuse doctrine and expressiveness, mix names and symbols. They have a mastery of their language, but one could ask whether having such mastery is something that effects life whilst you are uttering the sentence?”

Broekman’s words clearly highlights the legal professions preoccupation with the verbal and a one-dimensional approach to applying the law can be detrimental to all parties involved. To a semiotician, case names, legal jargon and doctrines are all signs that form part of the process of creating meaning. To lawyers, these are merely words which are recited in court without the conceptualization of reality and self-thought. The law profession is such that it creates an environment where the lawyer is in a position to utilize semiotics within the context of their daily activities.²⁸⁶

According to Peter Goodrich,²⁸⁷

²⁸⁴ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988).

²⁸⁵ Broekman J.M. *Pierce and Legal Semiotics* <http://semioticssoflaw.com/site/secondschool.php> (Date of use: 25 May 2010).

²⁸⁶ See Balkin J.M. The Promise of Legal Semiotics (1991) Faculty Scholarship Series Paper 278 at <http://digitalcommons.law.yale.edu/fss-papers/278> Date of use: 20 February 2010.

²⁸⁷ Goodrich P. Review: The Law as a System of Signs 1989(18) *Contemporary Sociology* 926.

“The familiar aphorism that ‘justice must not only be done, but must be seen to be done’ appropriately captures the disciplinary sense in which the symbolic dimensions of legality are recognized as crucial features of the institution and its practices.”

The words of Goodrich are ironic in the sense that lawyers do not usually see past the legal texts yet they conduct their business in an arena that is alive with signs and symbols. The legal environment allows for the lawyer to understand her own sign interpretations and recognize the logic of legal discourse within the context of reality.²⁸⁸ There is a wide belief that “law will be more and more confronted with binary thought patterns, sign systems and semiotic processes, which are already dominating the world of e-communication and e-sciences together with the conceptualization of reality.”²⁸⁹ Peter Goodrich, like Roberta Kevelson visualized semiotics as the codifying discipline that maps the relations between argument, interpretation and the law.²⁹⁰

In the legal arena, semiotics is often engaged in the analysis of written texts.²⁹¹ However, a text can exist in different modes and may be verbal or non-verbal or both.²⁹² The use of semiotics in analysing non-verbal codes and behaviour is

²⁸⁸ See Rush P. 1990(53) Semiotics in the Trial of Jurisprudence *The Modern Law Review* at 121-129. According to the author, legal adjudication comprises of a system of signs which must be analysed to interpret their meaning.

²⁸⁹ Laferriere Daniel 1979(65) Making Room for Semiotics *Academe* at 434.

²⁹⁰ Goodrich P. Review: The Law as a System of Signs 1989(18) *Contemporary Sociology* at 926.

²⁹¹ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988) at 24.

²⁹² *Ibid* at 33.

almost non-existent.²⁹³ Yet semiotics forms an important cog in the non-verbal communicative process.²⁹⁴ Semiotics is extremely important because it helps us become aware of signs which are everywhere.²⁹⁵ We live in a world of signs and to make sense of the world we need to be able to give meaning to these signs.²⁹⁶ It is through semiotics that we can become aware of reality.²⁹⁷ Semiotics teaches us to “look beneath the surface” and not take things at face value.²⁹⁸ By being able to analyse and interpret signs correctly, we are in a better position to construct meaning and ultimately understand ourselves and others better.²⁹⁹

Semiotics therefore underlines the role of signs within the domain of the communicative process, be it in the form of verbal, non-verbal and visual communication.³⁰⁰ To improve on the non-verbal communicative legal skills of the attorney, it becomes vitally important to be aware of the different sign structures that construct the attorney-client relationship process.³⁰¹ Once the attorney is aware of the function of these signs which are used in the process of communicating verbally, non-verbally and visually, the attorney is better prepared

²⁹³ See Hiller J.A. and Grossfeld B. 2002(50) Comparative Legal Semiotics and the Divided Brain: Are We Producing Half-Brained Lawyers? *American Journal of Comparative Law* at 199. The learned authors contend that an approach to law that is static and inflexible is outdated and unacceptable.

²⁹⁴ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988) at 5.

²⁹⁵ Ibid.

²⁹⁶ Roelofse J.J. *Signs and Significance A Different Perspective on Communication* (McGraw-Hill Book Company Johannesburg 1982) at 25.

²⁹⁷ Steiner P. 1981(12) In Defence of Semiotics: The Dual Asymmetry of Cultural Signs *New Literacy History* at 415-435.

²⁹⁸ Ibid.

²⁹⁹ Ibid,

³⁰⁰ Laferriere Daniel 1979(65) Making Room for Semiotics *Academe* at 434.

³⁰¹ Senel M. “The Semiotic Approach and Language Teaching and Learning” 2007 3(1) *Journal of Language Teaching and Learning* 118.

for entrance into meaning and signification.³⁰² The attorney-client consultation process becomes a wider spectrum for the interchange of vital information and messages. My objective is not to declare prevailing theories of law to be incorrect. My objective is to illustrate that law co-exists with other disciplines and a plurality approach to law will assist in improving the legal skills of the young attorney.³⁰³ Semiotics and legal realism in my view provides a refreshing and modern approach to understanding law within the framework of constructive challenge to existing legal thought.³⁰⁴ Semiotics deals mainly with how meaning is made by both encoders (lawyers) and decoders (clients). In the legal arena meaning need not only be derived from texts or the verbal but by the non-verbal signs or signals that are emitted during the legal process. This modern dynamic approach to interpreting and analysing law in its symbolic form is crucial to adding richness and depth to the way in which law is practiced.

³⁰² Ibid.

³⁰³ Gilmore G. 1961(70) Legal Realism: Its Cause and Cure *The Yale Law Journal* at 1037-1048. Traditional explanations do not constitute half of what the present day legal system is all about. Law is dynamic and changes as society changes.

³⁰⁴ See Cotterrell R. 2000(7) Pandoras box: Jurisprudence in legal education *International Journal of the Legal Profession*

CHAPTER 4 - NON-VERBAL COMMUNICATION

4.1 Defining Non-verbal Communication

In the previous paragraph, it was highlighted that law can no longer be seen as an isolated system where modern day variables are ignored. Communication is an important component in the legal system.³⁰⁵ Non-verbal communication, an important cog in the communicative process has largely been neglected as part of the total legal complex.³⁰⁶ The reasons are understandable. It is fully realised that words and language are essential to a scholarly study of law but there are other important variables that have entered the fray, with non-verbal communication being one of them.³⁰⁷ Before delving into the virtues of non-verbal communication, it is imperative to first examine the broad concept of communication.

Communication is a process whereby meaning is transferred from the sender to the receiver. Communication is defined in the dictionary³⁰⁸ as the channel of transmitting information. The three main forms of communication are verbal, non-verbal and vocal communication.³⁰⁹ Communication “drives” the world and often

³⁰⁵ Frost R. et al. *Communication Dynamics* (Lexicon Publishers Johannesburg 1993) at 1-3.

³⁰⁶ *Ibid* at 49.

³⁰⁷ Koch R. 1971(10) *Nonverbal Observables Theory into Practice* at 290.

³⁰⁸ See definition of Communication in Webster's Dictionary (1989)

³⁰⁹ Frost R. et al. *Communication Dynamics* (Lexicon Publishers Johannesburg 1993) at 1-3

“makes” or “breaks” human relationships.³¹⁰ The foundation for successful relationships is good communicational skills.³¹¹ Meaning can be transferred via different means or channels. In order to communicate effectively, one needs to be able to exploit different communication channels.³¹² This is done by taking into consideration the message type, environment and the audience.³¹³ By exploring the different channels and strategies, one becomes more versatile as a communicator in varying situations.³¹⁴

Communication generally takes place verbally and non-verbally.³¹⁵ Verbal communication involves words that we use to convey meaning, whilst non-verbal communication involves communication by means other than words.³¹⁶ The features of non-verbal communication are boundless and the channels of conveying messages can take place through, amongst others, touch, smell, facial expressions, body posturing, vocal conveyance and even silence.³¹⁷

Non-verbal communication can take place consciously and unconsciously and sometimes even against the wishes of the sender of the message.³¹⁸ It can take

³¹⁰ Roelofse J.J. *Signs and Significance A Different Perspective on Communication* (McGraw-Hill Book Company Johannesburg 1982) at 1.

³¹¹ Ibid.

³¹² Westmayer A.S., DiCioccio L.R. and Rubin R.B. 1998(48) Appropriateness and effectiveness of communication channels in competent interpersonal communication *Journal of Communication* at 27.

³¹³ Ibid.

³¹⁴ Ibid.

³¹⁵ Duke C.R. 1974(25) Nonverbal Behaviour and the Communication Process *College Composition and Communication* at 397.

³¹⁶ Knapp M.L and Hall J.A *Nonverbal Communication in Human Interaction* (Crawfordsville, IN : Thomson Learning 2002).

³¹⁷ Bull P. 2001(14) State of the art: Nonverbal communication *The Psychologist* at 644.

³¹⁸ Ibid at 645. According to P. Bull, non-verbal communication can be a difficult topic to study

place between persons and at times within the inner being of a person.³¹⁹ An understanding of non-verbal behaviour can assist humans in perceiving their own interpersonal dynamics as well as developing a deeper insight into the intrapsychic functioning of others.³²⁰ Being attentive towards non-verbal cues can assist people in understanding themselves as well as well as others.³²¹

According to Galloway,³²²

“...to recognize that how we say something is as important as what we say is difficult to grasp because little conscious thought is given to process of providing information through non-verbal action. We are usually unaware of our own awareness.”

These famous words of Galloway clearly highlight the importance of being attentive to non-verbal cues. Our actions are guided by our reactions to the non-verbal cues of others. Because these actions seem so natural to us, we rarely attribute our reactions to non-verbal cues.³²³

In this chapter, I will look at the works of leading behavioural scientists that have attempted to understand non-verbal communication and fuse some of their theories with similar work done by researchers in other disciplines. It is quite

because it can be, “unintentional, unconscious and idiosyncratic.”

³¹⁹ Ibid.

³²⁰ Schefflen A.E. 1963(22)Communication and regulation in psychotherapy Psychiatry at 126-136.

³²¹ Ibid.

³²² Galloway C. 1968(7) Nonverbal Communication *Theory into Practice* at 172.

³²³ Ibid. According to Professor Galloway, non-verbal cues may be used to effect an impression, convey an attitude, and influence others or be influenced by others.

astonishing that in the present climate of human and technological advancement, detailed studies on non-verbal communication really only took off in the 1960s.³²⁴ Public interest in the matter gradually increased thereafter, but even today most people are still ignorant about non-verbal communication, and the impact and effect that it has on their daily lives.³²⁵ For the attorney, to identify and analyse non-verbal signs within the realm of an ever-changing legal environment is crucial to improving their skills.³²⁶ An understanding of semiotics and realism is fundamental to improving the non-verbal skills of the attorney.³²⁷

Charles Darwin's work on body language over a century ago invoked modern day studies of facial expressions and body language worldwide.³²⁸ Since then, studies have revealed close to one million non-verbal cues.³²⁹ In recent times, most researchers will agree that Mehrabian and Birdwhistell have been influential in highlighting the impact of the non-verbal component in the communicative process.³³⁰ There is general consensus amongst most researchers that a major part of non-verbal behaviour is learned and the meaning of many body movements is culturally determined but there is also evidence to support the notion that some part of non-verbal behaviour is genetic or inborn.³³¹

³²⁴ Fast J. *Body Language* (Pan Books London & Sydney 1970).

³²⁵ Dunning G.B. 1971(10) Research in Nonverbal Communication *Theory into Practice* at 250

³²⁶ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988) at 5.

³²⁷ Ibid.

³²⁸ Darwin C. *The Expression of Emotion in Man and Animals* (Appleton-Century-Crofts, New York 1872).

³²⁹ Pease A. *Body Language* (Sheldon Press London 1988)

³³⁰ Mehrabian A. *Nonverbal Communication* (Aldine Atherton Inc. Chicago 1972).

Mehrabian believed that communication is 55% non-verbal whilst Professor Birdwhistell held that over 65% of communication is non-verbal.

³³¹ Mehrabian A. *Nonverbal Communication* (Aldine Atherton Inc. Chicago 1972). See also

4.2 The Importance of Non-verbal Communication

Human beings “cannot not communicate”.³³² We can refrain from communication using words, but it is difficult to escape non-verbal communication.³³³ It has been widely accepted that non-verbal communication is an essential cog in the communicative process.³³⁴

Non-verbal communication is embedded in human structure and we make use of non-verbal cues sometimes without even being aware of it.³³⁵ The use of non-verbal cues has simplified the communicative process and the number of cues that exist is endless.³³⁶ The magnitude of the scale of non-verbal cues that a human may go through during their life-span is evidenced by a study done by Brannigan which listed 135 gestures.³³⁷ Birdwhistell later revealed in his study that 20 000 facial expressions are possible.³³⁸

Poyatos F. *Nonverbal Communication and Translation* (John Benjamins, Amsterdam 1977).

³³² Myers G.E. and Myers M.T. *The Dynamics of Human Communication : A Laboratory Approach* 6th ed. (McGraw Hill Inc. New York 1992) at 233.

³³³ Ibid.

³³⁴ Dunning G.B. 1971(10) *Research in Nonverbal Communication Theory into Practice* at 250

³³⁵ Duke C.R. 1974(25) *Nonverbal Behaviour and the Communication Process College Composition and Communication* at 398.

³³⁶ Koch R. 1971(10) *Nonverbal Observables Theory into Practice* at 289.

³³⁷ Brannigan R. 1969 *Man's Silent Signals: Non-verbal Vocabulary of Gestures and Expressions Time* at 86.

³³⁸ Birdwhistell R. *Kinesics and Context* (University of Pennsylvania Press: Philadelphia 1970) at 1-15.

Non-verbal messages transfix a number of disciplines.³³⁹ In sport, specifically cricket, the umpire raising their index finger conveys a message to the batsmen that he is out. At school, the ring of a bell or the wail of a siren signifies a lunch break or the end of school. The sight of a person attired in a white coat at hospital signifies the presence of a doctor.

In a courtroom, the sight of someone in a black robe conveys a message to those present that the person belongs to the legal profession. The waving of the index finger by a teacher towards a learner conveys a message to the learner to behave in class. The list is endless. In all of the above scenarios, vast amounts of meaning are being conveyed without a word being uttered.³⁴⁰ These cues are as basic to communication as words.³⁴¹

The importance of non-verbal communication is highlighted by the ability of humans learning to communicate via signs and symbols long before they learn to communicate via other channels such as speech.³⁴²

³³⁹ Mehrabian A. *Nonverbal Communication* (Aldine Atherton Inc. Chicago 1972).

³⁴⁰ Ibid. According to Mehrabian there are five categories of non-verbal behaviour proposed by Ekman and Friesen. These are:

- (1) emblem- where the non-verbal act replaces words;
- (2) illustrator- where the non-verbal act emphasises speech;
- (3) affect display- where the non-verbal act is linked to primary affects;
- (4) regulator- where the non-verbal act initiates or terminates the conversation;
- (5) adaptor-acts that reassure bodily needs.

³⁴¹ Grant T. and Borchers R. *Communicating at Work 2nd* ed. (Van Schaik Publishers: Pretoria 2008)

³⁴² Harrison R.P. *et al.* 1972 The non-verbal communication literature *Journal of Communication* at 460

According to Balkin,³⁴³

“...history provides the contextual changes that demonstrate that the intellectual frameworks of the past are ill-equipped to the progressive aspirations of the future, and that (from the standpoint of progressives) these frameworks will age, stagnate, and become obstructions to progressivism...”

Balkin clearly sees the need for frameworks and disciplines to evolve with time. Non-verbal communication has a crucial role to play in this regard. It has revolutionized many disciplines and frameworks that centre on the communicative process and it has caught the attention of the public to such an extent that everyone wants to know how they can use non-verbal systems to influence and read others.³⁴⁴ The simple meeting of a stranger epitomizes non-verbal communication in play.³⁴⁵ An impression is formed merely by observing the clothing, how she stands, moves and speaks.³⁴⁶ The impression may be incorrect but nevertheless informs our actions.³⁴⁷ If a conversation takes place, non-verbal signs symbolizing a new friendship or impending departure dictates the next step.³⁴⁸ Indeed we use non-verbal signals all the time without consciously being aware of it.³⁴⁹

³⁴³ Balkin J.M. 1991 *The Promise of Legal Semiotics Faculty Scholarship Series Paper* at 278.

³⁴⁴ *Ibid.*

³⁴⁵ Hinde R.A. *Non-verbal Communication* (Cambridge University Press 1972) at 1-6.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*

³⁴⁸ Milford L.S. 2001(27) *Nonverbal Communication Litigation* at 32.

³⁴⁹ *Ibid.*

Non-verbal signs are ever-present but mankind has favoured the use of verbal forms as part of their evolving communicative system.³⁵⁰ Non-verbal behaviour is part of a broad interactive process that includes different components such as body patterns, facial expressions, gestures, posture, and body lean.³⁵¹ Humans have a database of behavioural involvement patterns that are activated when they communicate.³⁵² As part of the communicative process, they activate involvement cues and behavioural patterns that serve as an important source of information.³⁵³ The one common focal point in the numerous theories of language is that “non-verbal behaviour precedes verbal behaviour in the evolution of communication”.³⁵⁴

The importance of non-verbal communication is underlined by Mehrabian who attached specific relative values for the components of the communicative process.³⁵⁵ According to Mehrabian, the impact of the verbal component on an interpersonal communication is only seven percent, and the impact of the non-verbal component on an interpersonal communication is ninety-three percent.³⁵⁶ Although other studies have reached slightly different figures, what is common to

³⁵⁰ Smith H.A. 1979(49) Non-verbal Communication in Teaching *Review of Educational Research* at 632.

³⁵¹ Patterson M.L. 1987(11) Nonverbal behaviour: A functional perspective *Journal of Nonverbal Behaviour* at 110.

³⁵² Coker D.A. and Burgoon J.K. 1987(13) The nature of conversational involvement and nonverbal coding Patterns *Human Communication Research* at 463.

³⁵³ Patterson M.L. 1982(89) A sequential functional model of nonverbal exchange *Psychological Review* at 231.

³⁵⁴ Nolan M.J. *The relationship between verbal and nonverbal communication*. In G.J. Hanneman & W.J. McEwen eds (Communication and behaviour. Reading, Mass: Addison-Wesley 1975).

³⁵⁵ Mehrabian A. *Nonverbal Communication* (Aldine Atherton Inc. Chicago 1972). at 52-55.

³⁵⁶ Mehrabian A. *Nonverbal Communication* (Aldine Atherton Inc. Chicago 1972). at 52-55.

most studies done is the finding that non-verbal communication plays a dominant role in the interpersonal communicative process.³⁵⁷

The interesting aspect about non-verbal communication is that, unlike verbal communication, one cannot easily control or manipulate this form of communication.³⁵⁸ It is much easier to control words or language, but facial expressions, gestures and body language is usually orchestrated by feelings and emotions.³⁵⁹ Our actions, speech or even silence are part of a communicative process that conveys messages to others about us.³⁶⁰

Non-verbal communication is seen as the “primary mode” of interpersonal communication, whilst verbal communication is viewed as the “secondary mode” of communication with the focus being on the transfer of cognitive information.³⁶¹ Non-verbal communication is central to us communicating our emotions and gives us vital information about a person’s intelligence, their true self and their credibility.³⁶²

Argle classified the functions of non-verbal behaviour into five categories namely, “expression of emotion, communication of interpersonal attitudes, support

³⁵⁷ Feldman R.S. *Application of Nonverbal Behavioral Theories and Research* (Lawrence Erlbaum Associates, Inc. New Jersey 1992).

³⁵⁸ Milford L.S. 2001(27) *Nonverbal Communication Litigation* at 33.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

³⁶¹ Myers G.E. and Myers M.T. *The Dynamics of Human Communication : A Laboratory Approach* 6th ed. (McGraw Hill Inc. New York 1992) at 199-238.

³⁶² Burgoon J.K, Burke T. and Pfau 1990(17)M. *Nonverbal Behaviours, Persuasion and Credibility Human Communication Research* at 140.

speech, self-presentation and rituals.”³⁶³ Human emotions are expressed or conveyed through the face, body and voice.³⁶⁴ The building and preservation of relationships often takes place through non-verbal cues such as touch and gaze.³⁶⁵

Speech is usually harmonized and re-affirmed with non-verbal cues such as the shaking of the head or a smile.³⁶⁶ Non-verbal attributes like appearance and dressing inform the image that is presented to another.³⁶⁷ Rituals in the form of greetings through handshakes are used often to acknowledge the presence of another, without at times even a word being uttered.³⁶⁸ Humans tend to rely on non-verbal behavior when the verbal and non-verbal communication is contradictory.³⁶⁹

Research on non-verbal communication has created an understanding of social behaviour and it is now accepted that it can be used in different social contexts such as job interviews, psychiatric therapy, intercultural communication, and

³⁶³ Argyle M. *Bodily Communication 2nd* ed. (New York, NY: Methuen 1988).

³⁶⁴ Mehrabian A. *Nonverbal Communication* (Aldine Atherton Inc. Chicago 1972) at 8

³⁶⁵ *Ibid* at 10.

³⁶⁶ *Ibid* at 11.

³⁶⁷ *Ibid* at 11.

³⁶⁸ Philippot P. et al. *The Social Context of Nonverbal Behaviour* (Cambridge University Press US 1999) at 21.

³⁶⁹ Knapp M.L. *Nonverbal Communication in Human Interaction* (Holt, Rinehart and Winston: New York 1972).

occupational training within the different professions.³⁷⁰ People can now be trained on developing non-verbal perceptive skills.³⁷¹

The study of non-verbal behaviour has led to the scientific study of body movements. Kinesics, which is the study of body movements, has resulted in non-verbal behaviour being now closely scrutinized, recorded and analysed.³⁷² Psychologists have used non-verbal communication to understand emotions, whilst anthropologists and ethnologists have recently focused on non-verbal elements like posture, touch movement to understand social processes.³⁷³ However, a study of non-verbal communication has resulted in a progressive intellectual movement that allows people to improve their interactive social skills to such an extent that they can change their behaviour patterns if they so desire.³⁷⁴

4.3 The Link between the Verbal and Non-verbal Interface

According to Mehrabian, the potential of human communication is only realized when the verbal and non-verbal interface work together synchronously.³⁷⁵ Non-verbal communication has been closely linked to emotion and interpersonal

³⁷⁰ Philippot P. et al. *The Social Context of Nonverbal Behaviour* (Cambridge University Press US 1999) at 17.

³⁷¹ Costanzo M. and Archer D. 1991(18) A method for teaching about verbal and nonverbal communication *Teaching of Psychology* at 223-226.

³⁷² Duke C.R. 1974(25) Nonverbal Behaviour and the Communication Process *College Composition and Communication* at 397-404.

³⁷³ *Ibid* at 397.

³⁷⁴ Philippot P. et al. *The Social Context of Nonverbal Behaviour* (Cambridge University Press US 1999) at 20.

³⁷⁵ Mehrabian A. 1968(2) Communication without words *Psychology Today* at 52-55.

relationships but it is sometimes taken for granted that it is closely related to the verbal. Condon and Ogston³⁷⁶ contended that human communication is part of a process called “self synchrony” where movements of the different parts of the body are synchronised with speech. This synchronization between non-verbal behaviour and speech forms an essential cog of the human interactive process.³⁷⁷

Studies have shown that there are least six ways in which non-verbal communication works “hand in hand” with the verbal messages.³⁷⁸

4.3.1 The Redundancy Model

In terms of the redundancy model (where the verbal is made redundant by the non-verbal which carries the same meaning) non-verbal cues can be used to reinforce the verbal message.³⁷⁹ We congratulate a colleague on their promotion and we smile and shake his or her hand to repeat the message. The non-verbal behaviour increases the accuracy of the spoken words.

4.3.2 The Substitution Model

In terms of the substitution model (where the non-verbal message substitutes the verbal message) we use non-verbal signals to express our feelings rather than

³⁷⁶ Condon W.S and Ogston W.D. 1966(143) Sound film analysis of normal and pathological behaviour Patterns *Journal of Nervous and Mental Disease* at 338-347.

³⁷⁷ Bull P.E. and Connelly G. 1985(9) Body movement and emphasis in speech *Journal of Nonverbal Behaviour* at 169-187.

³⁷⁸ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978).

³⁷⁹ *Ibid* at 10.

verbal because of the wholesomeness of non-verbal imagery.³⁸⁰ At a funeral we may sympathize with a friend who had lost a family member by embracing her rather than uttering any words. It is said to increase the effectiveness of the communication.

4.3.3 The Complementation Model

The complementation model (where the non-verbal adds more detail to the verbal) supplements what is being said verbally.³⁸¹ It is used to clarify the verbal message by expanding on it. When relating exciting news or discussing a traumatic incident, we tend to re-create the scene by using non-verbal signs such as gestures and explicit facial expressions.

4.3.4 The Emphasis Model

In terms of the emphasis model (where we make use of non-verbal cues to highlight a point) we rely on non-verbal cues to convey vital information to the receiver.³⁸² We may increase the pitch of our voice or use gestures to highlight the point we are making.

4.3.5 The Contradiction Model

In terms of the contradiction model (where the non-verbal message conflicts with the verbal message) we may hide our true feelings by depicting the opposite of

³⁸⁰ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978) at 10.

³⁸¹ Ibid at 12.

³⁸² Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978) at 12.

how really feel.³⁸³ During a job interview, a person may say that they are not nervous but their body language shows that they are nervous.

4.3.6 The Regulation Model

In terms of the regulation model (where non-verbal elements are used to manage the communicative process) we use non-verbal communication to regulate the interactive process.³⁸⁴ We often use non-verbal cues to control the duration of the conversation or prevent interruptions. It is an extremely effective means to manage the interactive process. The six models mentioned above highlight the importance of the relationship between the verbal and non-verbal interface during the communicative process.

4.4 Theories on Non-verbal Communication

There has been a superfluity of work done on non-verbal communication within the disciplines of science, and philosophy and fortunately such work has extended to other disciplines in the last few decades.³⁸⁵ Theoretical development on interactional non-verbal behaviour has resulted in a better understanding of non-verbal communication.³⁸⁶

³⁸³ Ibid at 12.

³⁸⁴ Ibid at 13.

³⁸⁵ Myers G.E. and Myers M.T. *The Dynamics of Human Communication : A Laboratory Approach* 6th ed. (McGraw Hill Inc. New York 1992) at 199-238.

³⁸⁶ Duke C.R. 1974(25) Nonverbal Behaviour and the Communication Process *College Composition and Communication* at 397-404.

The early studies of non-verbal communication focused on systematic empirical research where a single behaviour pattern was studied at a time.³⁸⁷ The focus of these studies was on how culture, gender, personality or a specific situation affected a single behaviour.³⁸⁸ Little or no emphasis was placed on the multitude of non-verbal behavioural patterns that were displayed by people interacting with each other.³⁸⁹

4.4.1 The Equilibrium Theory

However, this changed with the advent of the equilibrium theory where Argyle and Dean looked into the non-verbal behavioural adjustments that people make when interacting with each other.³⁹⁰ According to the equilibrium theory, a series of behaviours such as gaze, distance, facial movement determines level of interest in the interaction process.³⁹¹ According to Patterson, early empirical research supported the equilibrium theory and also extended the range of non-verbal behaviour cues to include body orientation, lean, touch, posture, and expressiveness.³⁹² These non-verbal cues were important in determining the involvement level of people in the interactive process.

However, a limitation to the theory emerged where individuals in the study reciprocated the higher involvement of the partner rather than compensating for it

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Ibid.

³⁹⁰ Argyle M. and Dean J. 1965(28) Eye-contact distance and affiliation *Sociometry* at 289-304.

³⁹¹ Ibid at 291.

³⁹² Patterson M.L. 1968(7) Compensation in non-verbal immediacy behaviours: A review *Sociometry* 237.

by turning away or averting the gaze.³⁹³ A number of different theories emerged in the 1970's and 1980's to explain compensation and reciprocation, but a common dominator to most of these new theories was the link between arousal and non-verbal involvement in the adjustment process.³⁹⁴

4.4.2 The Arousal Theory

In terms of the arousal theory, where non-verbal cues such as touch stimulated arousal, this could lead to positive reciprocation such as smiling back or touching.³⁹⁵ Patterson suggested in his arousal labeling theory that arousal brought about by a change in non-verbal behaviour led to a labeling process and reciprocation.³⁹⁶ Capella and Greene, however suggested in their discrepancy-arousal theory that arousal on its own was responsible for non-verbal adjustments.³⁹⁷ A common denominator to most of the arousal theories is that non-verbal interaction from a "liked" other results in reciprocation in a positive form, whilst non-verbal interaction from a "disliked" other results in compensation or negative behavioural patterns.³⁹⁸ A major limitation to these arousal theories was that the reason for the behaviour in the interaction process was generally

³⁹³ Ibid at 238.

³⁹⁴ Patterson M.L. *Towards a comprehensive model of nonverbal communication*. In W.P. Robinson & H. Giles (Eds.) *The new handbook of language and social psychology* (Chichester 2001 UK: Wiley 159-176).

³⁹⁵ Ibid.

³⁹⁶ Ibid.

³⁹⁷ Capella J.N. and Greene J.O. 1982(49) A discrepancy-arousal explanation of mutual influence in expressive behaviour for adult and infant-adult interaction *Communication Monographs* at 89-114.

³⁹⁸ Ibid.

ignored and they failed to take into account that underlying feelings and behaviour are not always synchronised.³⁹⁹

4.4.3 The Functional Theory

These limitations influenced Patterson to introduce a functional model to interactive non-verbal behaviour that moved away from the reciprocation concept and focused on the different types of non-verbal behaviours and the communication functions that each perform within the various social settings.⁴⁰⁰

The important functions of non-verbal communication include “providing information, regulating interaction, expressing intimacy, exercising influence, and managing impressions.”⁴⁰¹ The functional model did provide a marked improvement on the previous theories but one major limitation of the model was its failure to test predictions of behavioural adjustments.⁴⁰²

3.4.4 The Adaptation Theory

In an effort to improve on the limitations of the previous theories, Burgoon and her colleagues proposed the interaction adaptation theory which determined that a person’s interaction position and behaviour is influenced by a range of social, individual and biological factors.⁴⁰³ The various factors such as settings, biological needs, moods, personality traits all influenced the level of interaction

³⁹⁹ Ibid.

⁴⁰⁰ Patterson M.L. *A functional approach to nonverbal exchange*. In R.S. Feldman & B. Rime eds *Fundamentals of nonverbal behaviour* (Cambridge, UK : Cambridge University Press 1991).

⁴⁰¹ Ibid.

⁴⁰² Ibid.

⁴⁰³ Burgoon J.K., Stern L.A. and Dillman L. *Interpersonal adaptation: Dyadic interaction patterns* (Cambridge UK: Cambridge University Press 1995).

between persons.⁴⁰⁴ The functional model highlighted the adaptive nature of non-verbal prototypes in variable settings.⁴⁰⁵ However, the functional model like the previous models focused purely on the sending or coding of non-verbal communication.⁴⁰⁶ It was left to Patterson to develop a more complete model that integrated both the sending and receiving aspect of non-verbal communication and combined the behavioural and social judgment processes into a more holistic model.

4.5 Categories of Non-verbal Communication

Several researchers have divided non-verbal behaviours into different categories.⁴⁰⁷ Cook classified non-verbal communication into two categories, static nonverbal cues which do not change during communication and dynamic non-verbal cues which do change during the communication process.⁴⁰⁸ Some of the non-verbal cues that remain static are face, physique, voice and clothes whilst a few of the dynamic non-verbal cues are posture, gesture, facial expression, tone of voice and distance.⁴⁰⁹

Koch, however listed more than two divisions of non-verbal cues.⁴¹⁰ He classified non-verbal cues into posture, gestures, eyes, skin, proximity, skin changes, voice

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978) at 52.

⁴⁰⁸ Cook M. *Interpersonal perception* (Harmondsworth, England: Penguin 1971)

⁴⁰⁹ Ibid.

⁴¹⁰ Koch R. 1971(10) Nonverbal observables *Theory into Practice* at 288-294.

tone, tactility, intonation, volume, hesitations, pitch, quivering, dress, breathing, time, methods, materials and actions.⁴¹¹

Duncan on the other hand classified non-verbal cues into six categories i.e. kinesic behaviour, paralanguage, proxemics, artifacts, olfaction and skin sensitivity.⁴¹² Knapp went even further and classified the non-verbal into seven categories, some of which overlapped with those specified by Duncan.⁴¹³

These categories were listed as proxemics, kinesics, paralanguage, environmental influence, touching, artifacts and physical characteristics.⁴¹⁴ I will use the main categories portrayed by Knapp to dwell deeper into the reliability of some of the popular non-verbal cues as his study is large enough to identify with any of the seven categories and small enough to avoid severe disintegration of the research material.

4.5.1 Kinesics

Kinesics derived from the Greek word kinesis, meaning motion, is now scientifically called body language.⁴¹⁵ Its origin can be credited to Ray Birdwhistell, an American researcher who was deemed to be an expert on

⁴¹¹ Ibid.

⁴¹² Duncan S. 1969(72) Nonverbal communication *Psychological Bulletin* at 118-137.

⁴¹³ Knapp M.L. *Nonverbal communication in human interaction* (New York: Holt, Rinehart and Winston 1978).

⁴¹⁴ Ibid.

⁴¹⁵ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978) at 54.

studies pertaining to body language.⁴¹⁶ The entire body is involved in non-verbal communication. Most of these body movements take place fluently and usually unconsciously.

According to Ekman, the human body leaks information without people being aware of such leakage.⁴¹⁷ The face is said to be the chief signifier of emotion and eye movement is crucial to illustrating emotional displays.⁴¹⁸ The pupils of the eye retort differently to changed circumstances.⁴¹⁹ Facial expressions, according to Ekman show support, camaraderie, and deceit.⁴²⁰ The facial expressions common to most studies that commune emotion are anger, sadness, happiness, fear, surprise and disgust.⁴²¹ Gestures, postures and body movements are all forms of body language that convey meaning.⁴²² These non-verbal cues are means of assisting people in deciding whether to interact with another.⁴²³

They can send positive or negative signals between people and observing these signals is key to determining whether they want to associate with each other or rebuff the entire interactive process.⁴²⁴ Kendon⁴²⁵ believed that body movement

⁴¹⁶ Birdwhistell R. *Kinesics and Context* (University of Pennsylvania Press: Philadelphia 1970) at 1-15.

⁴¹⁷ Ekman P. *Emotion in the Human Face* (Cambridge: Cambridge University Press 1982).

⁴¹⁸ Ibid.

⁴¹⁹ Ibid.

⁴²⁰ Ekman P. *Emotion in the Human Face* (Cambridge: Cambridge University Press 1982).

⁴²¹ Ibid.

⁴²² Duke C.R. 1974(25) Nonverbal Behaviour and the Communication Process *College Composition and Communication* at 397-404

⁴²³ Ibid.

⁴²⁴ Duke C.R. 1974(25) Nonverbal Behaviour and the Communication Process *College Composition and Communication* at 397-404

⁴²⁵ Kendon A. *Some uses of gesture*. (In O.Tannen & M.Saville-Troike (Eds) *Perspectives on Silence* 1985) at 215-234.

can at times be a substitute for speech especially where it may not be convenient to use speech. It may be a simpler, faster and less formal way of conveying a message. It is as significant as speech in conveying meaning.⁴²⁶

4.5.2 Proxemics

Proxemics is the study of how humans use space when interacting.⁴²⁷ Humans tend to become uncomfortable when their space is invaded, and like animals it is believed that humans are extremely territorial.⁴²⁸ Personal distance, social distance and intimate distance and public distance vary according to the circumstances and different cultures.⁴²⁹ Humans follow their own set of rules when determining how they will use their space.⁴³⁰ Humans tend to use space as a protective barrier and severe psychological and physical harm can occur when their space is invaded.⁴³¹ Hall believed that people have territorial norms, values, behaviours and expectations which all shape the communicative process.⁴³²

4.5.3 Chronemics

Chronemics is the study of utilization of time which is regarded as a form of interpersonal communication.⁴³³ Researchers suggest that the manner in which

⁴²⁶ Ibid.

⁴²⁷ Hall E.T. *The Silent Language* (Doubleday, Garden City, NY 1966).

⁴²⁸ Myers G.E. and Myers M.T. *The Dynamics of Human Communication : A Laboratory Approach* 6th ed. (McGraw Hill Inc. New York 1992) at 229.

⁴²⁹ Ibid.

⁴³⁰ Ibid at 11.

⁴³¹ Ibid.

⁴³² Hall E.T. *The Hidden Dimension* (Doubleday, Garden City, NJ 1973).

⁴³³ Myers G.E. and Myers M.T. *The Dynamics of Human Communication : A Laboratory Approach* 6th ed. (McGraw Hill Inc. New York 1992) at 227.

someone uses time can communicate vital non-verbal data about themselves.⁴³⁴

Knapp and Hall⁴³⁵ believed that people view time as interval orientated and these time intervals may influence how they behave and co-ordinate their daily activities. Different cultures view and use time differently, but it is important to be aware of these differences in perception because they impact on the communicative process.⁴³⁶

4.5.4 Paralanguage

Paralanguage is the study of vocal cues that accompany speech.⁴³⁷ Some of these vocal cues include tone and pitch of voice, delivery speed, pause in sentence, and intonation.⁴³⁸ People's states of mind are usually reflected by their pitch of voice.⁴³⁹ It is easier to decipher the true meaning of a message when the paralanguage allies with the accompanying verbal message.⁴⁴⁰ Laughing or crying are vocal cues that when accompanying speech can reveal a person's well-being or emotional state.⁴⁴¹ For the attorney, the knowledge and use of paralanguage is crucial to getting the message across to the different role-players.

⁴³⁴ Ibid.

⁴³⁵ Knapp M.L and Hall J.A. *Nonverbal Communication in Human Interaction* (Crawfordsville IN: Thomas Learning 2002).

⁴³⁶ Richmond V.P. and McCroskey J.C. *Nonverbal Behaviour in Interpersonal Relations* (Boston MA: Allyn and Bacon/Pearson Education 2004).

⁴³⁷ Myers G.E. and Myers M.T. *The Dynamics of Human Communication : A Laboratory Approach* 6th ed. (McGraw Hill Inc. New York 1992) at 211.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ Lewis H. *Body Language: A Guide for Professionals* (Thousand Oaks, CA: Sage 1998) at 22.

⁴⁴¹ Ibid.

4.6 The Different Approaches to Non-verbal Communication

The study of non-verbal communication has resulted in many different approaches to the subject matter, many of them providing valuable insight into this important form of communication.⁴⁴² I will focus on the most popular approaches to non-verbal communication.

4.6.1 The Body Language Approach

In terms of the body language approach, body movements convey specific meaning that can aid the interactive process.⁴⁴³ It is said that these non-verbal messages are much more reliable than the verbal messages as the body emits actions that are usually involuntary, impulsive and instantaneous and generally verifies the verbal message.⁴⁴⁴

However, a limitation to this approach is that people tend to draw inferences from isolated instances which can be disingenuous and it is difficult to determine when exactly behaviour becomes emblematic.⁴⁴⁵ It is therefore important to treat body language literature with caution.⁴⁴⁶

⁴⁴² Galloway C.M. 1971(10) *The Challenge of Nonverbal Research Theory* at 310.

⁴⁴³ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978) at 29.

⁴⁴⁴ *Ibid* at 29-30.

⁴⁴⁵ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978) at 31.

⁴⁴⁶ *Ibid*.

4.6.2 The Ethological Approach

The ethological approach focuses on non-verbal behaviour among the animal kingdom.⁴⁴⁷ Non-verbal behaviour is believed to be genetically driven or innate.⁴⁴⁸ Ethologists believe that certain behavioural patterns have evolved from a precivilised period and that non-verbal behaviour is more archaic than verbal behaviour.⁴⁴⁹ This controversial approach has been criticised by scientists who tend to favour the nurture approach and firmly preserve the view that non-verbal communication is learned.⁴⁵⁰ Other researches have gone on to reject any comparative data linking human beings and animals due to a marked difference in the cognitive ability of the two species.⁴⁵¹ The more recent approach adopts a functional stance in respect of non-verbal communication and is aptly called the functional approach.⁴⁵²

4.6.3 The Functional Approach

The functional approach does not focus on the causes of behaviour but looks at the array of factors that influence behavior.⁴⁵³ A limitation to this approach is that it is difficult to detach a function from another when a person's objectives

⁴⁴⁷ Ibid at 32.

⁴⁴⁸ Ibid.

⁴⁴⁹ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978) at 33.

⁴⁵⁰ Ibid at 33.

⁴⁵¹ Ibid at 34.

⁴⁵² Ibid at 47. The functional approach focuses on the types of non-verbal behaviour and the different functions they perform.

⁴⁵³ Burgoon J.K. and Saine T. *The Unspoken Dialogue An Introduction to Nonverbal Communication* (Houghton Mifflin Company 1978) at 48.

persistently change.⁴⁵⁴ Despite limitations to many of the approaches, they have in some way contributed to the evolution of non-verbal communication.⁴⁵⁵

However, the afore-mentioned approaches to non-verbal communication all seem to restrict themselves to empirical methods and seem to be founded within the psychology discipline.⁴⁵⁶ It is for this reason that I chose to focus on the relatively new and progressive semiotic approach to the study of non-verbal communication which draws facts from different disciplines and views them from a sign theory perspective.⁴⁵⁷ It is the semiotic approach to non-verbal communication that will form the basis of my study.

4.7 Non-verbal Communication in Law

The ability to detect, analyse and decode signs within the non-verbal communication process is critical to improving the communicative legal skills of attorneys.⁴⁵⁸ Coverage in various texts of the non-verbal component in human communication has extended to a number of disciplines such as anthropology, linguistics, psychoanalysis, clinical psychology, social psychology and sociology.⁴⁵⁹

⁴⁵⁴ Ibid at 48.

⁴⁵⁵ Ibid.

⁴⁵⁶ Galloway C.M. 1971(10) *The Challenge of Nonverbal Research Theory* at 310-314.

⁴⁵⁷ Laferriere Daniel 1979(65) *Making Room for Semiotics Academe* at 434-440.

⁴⁵⁸ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988) at 5-10.

⁴⁵⁹ Spiegel J. and Machotka P. 1974 *Messages of the Body* at 63.

There has been limited research done on the role of non-verbal communication in law.⁴⁶⁰ A study of legal literature suggests that what little research has been done on non-verbal communication in law has focused mainly on the courtroom environment.⁴⁶¹ Considering that the legal profession places a great deal of emphasis on communication, it is difficult to fathom that such little research has been done on the impact of non-verbal communication in the legal sector.⁴⁶²

Lawyers live in a world of communication.⁴⁶³ The spoken and unspoken discourse forms the very foundation of the legal discipline.⁴⁶⁴ On a professional level, they communicate in court, they communicate at the office, and they communicate to court officials, clients and colleagues on a daily basis.⁴⁶⁵ It is a profession that requires them to be competent communicators and predictors of outcomes.⁴⁶⁶

Within the domain of the legal arena, non-verbal signs serve a multitude of functions.⁴⁶⁷ The most significant of these are creating good first impressions of us and stereotyping others, influencing others, communicating our attitudes and

⁴⁶⁰ See Brayne Hugh 1998(32) *Counselling Skills for the Lawyer Can the Lawyer learn anything from the Counsellors? The Law Teacher* at 137. The author believes that skills development is crucial to understanding law at all levels and law schools tend to underemphasize a key skill – how to relate to the client.

⁴⁶¹ Barkai J.L. 1990(27) *Nonverbal Communication From The Other Side : Speaking Body Language San Diego Law Review* at 101.

⁴⁶² *Ibid.*

⁴⁶³ Smith A.E. and Nester P. 1977 *Lawyers, Clients, and Communication Skill Bingham Young University Law Review* at 275.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid* at 278. According to Smith and Nester, very seldom will lawyers identify the reason for their failures as being a lack of effective communication skills.

⁴⁶⁶ *Ibid* at 287. Smith and Nester are of the view that many lawyers incorrectly believe that traditional skills such as research are of greater importance interaction with their clients.

⁴⁶⁷ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988) at 5.

thoughts, promoting interaction, facilitating speech production and being actively involved in detecting and engaging in deception.⁴⁶⁸ The ability to detect and analyse non-verbal signs within the legal domain is the mark of a skilled lawyer.⁴⁶⁹

According to Balkin, legal semiotics is a process of discovery that goes beyond the lawyer's regular old-fashioned duties.⁴⁷⁰ In a courtroom environment, non-verbal signals may at times influence the judgment of the presiding officer or even the testimony of the witnesses.⁴⁷¹ It has been widely accepted that in countries where the jury system is applied, knowledge of non-verbal techniques is fundamental to influencing the jury and controlling trial proceedings.⁴⁷²

LeVan⁴⁷³ highlighted the importance of non-verbal communication within the setting of a courtroom and he stated that:

⁴⁶⁸ Burgoon J.K., Buller D.B and Woodall W.G. *Nonverbal communication : The unspoken Dialogue* (New York: Harper and Row 1989).

⁴⁶⁹ Balkin J.M. The Promise of Legal Semiotics 1991 Faculty Scholarship Series Paper 278 at <http://digitalcommons.law.yale.edu/fss-papers/278> (Date of use: 13 March 2010).

⁴⁷⁰ Ibid at 1839. Balkin believes that legal semiotics facilitates a discovery process in law that has not been explored previously.

⁴⁷¹ Blanck P.D., Rosenthal R. and Cordell L.H. 1985(38) The appearance of justice: Judges verbal and nonverbal behaviour in criminal jury trials *Stanford Law Review* at 89 -94.

⁴⁷² Ibid.

⁴⁷³ LeVan E.A. 1984(8) Non-verbal communication in the courtroom: Attorneys beware *Law and Psychology Review* 83-104 . Gestures and facial expressions are transmitted by every individual in the court. LeVan contends that the attorney in her opening statement uses gestures and eye contact to persuade the jury. Likewise, the judge silently communicates her attitudes and feelings about the case to the jury through her posture and facial expressions. Non-verbal signals are unwittingly sent by the witness messages through clothing, general appearance, posture and facial expressions. The witness on the stand, may reveal more through fidgeting with her clothes and body movements than through her testimony.

“In the courtroom, nonverbal communication subtly affects the entire proceedings of a trial. It is constantly present and being asserted, yet the attorney is often unaware of its existence.”

As LeVan points out above, the body language of attorneys is important in building a good affinity with jurors and judges.⁴⁷⁴ The use of positive non-verbal cues such as smiling and calm vocal tones is an important tool in influencing these court officials.⁴⁷⁵ Likewise, negative non-verbal cues such as hostile gestures and lack of eye contact can be devastating to the attorney’s prospect of success in the case.⁴⁷⁶ The attorney’s ability to elicit favourable information out of a witness depends largely on non-verbal cues such as eye contact, facial expressions, body positioning, tone of voice and head nods.⁴⁷⁷

Within the South African setting, it must be noted that Appeal courts rely solely on the transcribed proceedings from the lower courts to arrive at their decisions. Therefore these courts pay little attention to non-verbal communication. However, before the matter gets to the Appeal Court, the “groundwork” is usually done in the lower courts where non-verbal communication certainly has role to play in trial proceedings. In most courts, the use of non-verbal cues can ease the anxiety levels of the witness and cause them to speak significantly longer in

⁴⁷⁴ LeVan E.A. 1984(8)Non-verbal communication in the courtroom: Attorneys beware *Law and Psychology Review* at 89.

⁴⁷⁵ Ibid at 90.

⁴⁷⁶ Efran M.G. 1974(8)The effect of physical appearance on the judgment of guilt, interpersonal attraction and severity of recommended punishment in a simulated jury task *Journal of Experimental Research in Personality* at 45.

⁴⁷⁷ Ibid.

response to questions.⁴⁷⁸ According to Matlon,⁴⁷⁹ it is also very important for an attorney to be able to decipher the non-verbal cues that accompany the spoken, especially when such cues are inconsistent with the verbal. These hostile cues, such as the lack of eye contact or sarcastic tones are signs that the witness is uncomfortable and possibly deceptive in their responses.⁴⁸⁰

It is not easy for people to exercise conscious control over the non-verbal signals but words can be easily rehearsed.⁴⁸¹ A skilled attorney will then use these signs to “breakdown the witness” which would have been extremely difficult if the attorney relied exclusively on the verbal testimony.⁴⁸² Likewise, observing the facial expressions, gaze patterns, and body movements of a presiding officer is crucial to determine the true attitude of the presiding officer towards the accused.⁴⁸³ These non-verbal cues can also serve as an important signal to the attorney to move on in terms of her line of questioning, especially if such questioning has reached a saturation point.

Detecting deception on the part of a witness is vital to attacking the credibility of that witness and non-verbal signals of deception can be picked up by careful

⁴⁷⁸ Remland M.S. and Jones T.S. 1989(37) The effects of nonverbal involvement and communication apprehension on state anxiety, interpersonal attraction, and speech duration *Communication Quarterly* at 71-81.

⁴⁷⁹ Matlon R.J. *Communication in the legal process* (New York: Holt, Rinehart and Winston Inc. 1988)

⁴⁸⁰ Ibid.

⁴⁸¹ Remland M.S. and Jones T.S. 1989(37) The effects of nonverbal involvement and communication apprehension on state anxiety, interpersonal attraction, and speech duration 1989(37) *Communication Quarterly* at 71-81

⁴⁸² Ibid.

⁴⁸³ Remland M.S. 1984(19) The implicit ad hominem fallacy: Nonverbal displays of status in argumentative Discourse *Journal of the American Forensics Association* at 79-86.

observation.⁴⁸⁴ For Burgoon, some of the most reliable non-verbal indicators are: blinking, pupil dilation, speech errors, vocal pitch, and hesitations.⁴⁸⁵ It is human nature to look to the non-verbal system when one is cautious about the authenticity of the verbal message.⁴⁸⁶ It is important to first determine a disjoint between the spoken and the non-verbal signals.⁴⁸⁷ Once this is ascertained, the next step is to look for a change in the verbal indicators.⁴⁸⁸

According to Leathers,⁴⁸⁹

“The best way to protect ourselves against deceptive communication is to increase one’s sensitivity to the subtle cues which are part of multichannel communication.”

The ability to read leakage cues accurately will certainly improve the communicative skills of the attorney as well as assist with detection of deception as highlighted by Leathers above.⁴⁹⁰ A skilful trial lawyer or litigator cannot be successful without mastering the ability to decode non-verbal behaviour.⁴⁹¹

⁴⁸⁴ Burgoon J.K., Buller D.B and Woodall W.G. *Nonverbal communication : The unspoken Dialogue* (New York: Harper and Row 1989).

⁴⁸⁵ Ibid at 29.

⁴⁸⁶ Davis A.J. 1963(63) *The Skills of Communication The American Journal of Nursing* at 66-70.

⁴⁸⁷ Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 232

⁴⁸⁸ Ibid.

⁴⁸⁹ Leathers D. *Nonverbal Communication Systems* (Allyn and Bacon, Boston 1976, 21-36).

Leathers is of the view that we have conscious control over the meanings we communicate verbally or facially but lesser control over gestures or psychological responses such as blushing, sighing, etc. These communicative cues over which we limited conscious control then provide the receiver with important information as to our true intentions. Very often these cues are nonverbal and are referred to as leakage cues. The ability to read leakage cues provides the best protection against deceptive communication.

⁴⁹⁰ Ibid.

⁴⁹¹ Nierenberg G.I. and Calero H. *How to Read a Person like a Book* (Thorsons Publishing Group: England 1980, 155)

However, not all lawyers are litigators and many choose to focus their attention and energies towards the office scenario where consultations with clients become “the order of the day”.

It therefore becomes important to look at non-verbal communication within the context of the attorney, client consultation at the office which is the primary setting where all lawyers, litigators and non-litigators alike conduct their “groundwork”. The first consultation process between the attorney and client is the most important in the legal process, as the client’s statement forms the basis of her case.⁴⁹² The consultation process is pivotal to obtaining pertinent information from client which will then be used by the attorney to provide the best possible representation for the client.⁴⁹³ Despite there being some research done on the impact of non-verbal communication in the courtroom, little work has been done on the impact of non-verbal communication on the attorney, client interview process.⁴⁹⁴

I therefore intend to focus much of my attention on the importance of non-verbal communication within the domain of the attorney’s office and the consultation process which is an important area that has previously been neglected by researchers.

⁴⁹² Smith A.E. and Nester P. 1977 Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* at 290

⁴⁹³ Ibid.

⁴⁹⁴ Ibid.

4.8 The Attorney-Client Consultation Process

I have highlighted the importance of understanding non-verbal communication within the context of semiotics and realism. Within the legal arena, there is a degree of ignorance about the important role that non-verbal communication can play in the entire communicative process.⁴⁹⁵ This is due to the legal professions pre-occupation with words, speech and analyzing texts. It must be remembered that words, speech and texts are just one important part in the communicative process. The non-verbal aspects of communication have now been widely recognized to be just as important, if not more important than the verbal component.⁴⁹⁶

The attorney-client consultation process is one of the important stages in the legal process even though very little attention has been placed on studying interview techniques at tertiary level.⁴⁹⁷ It is the process where attorneys can obtain valuable information from their clients in order to provide the best possible legal representation during the case.⁴⁹⁸ It is important for the attorney to get some idea of the problem by creating a relaxed atmosphere which then induces feelings of trust and candidness from the client.⁴⁹⁹ It is unfortunate that many newly qualified attorneys spend little time developing their interaction skills.⁵⁰⁰

⁴⁹⁵ Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 232.

⁴⁹⁶ Haase H. and T. Tepper 1972(19) Nonverbal Components of Empathic Communication *Journal of Counselling Psychology* at 417.

⁴⁹⁷ Smith A.E. and Nester P. 1977 Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* at 290 -292.

⁴⁹⁸ Ibid.

⁴⁹⁹ Porterfield P. 1957 Clients are People *Students Law Journal* at 3.

⁵⁰⁰ Brayne H. 1998(32) Counselling skills for the Lawyer Can Lawyers learn anything from

Lawyers usually begin interviews by asking about the facts and then spending the better part of the interview writing down those facts.⁵⁰¹ Very little emphasis is placed on establishing a strong relationship or rapport with the client which in turn helps relax the client, resulting in her divulging accurate information.⁵⁰² Lawyers fail to realize that by paying attention to non-verbal cues and establishing a good rapport with the client at the outset, the possibility of better representation for their clients improve drastically.⁵⁰³

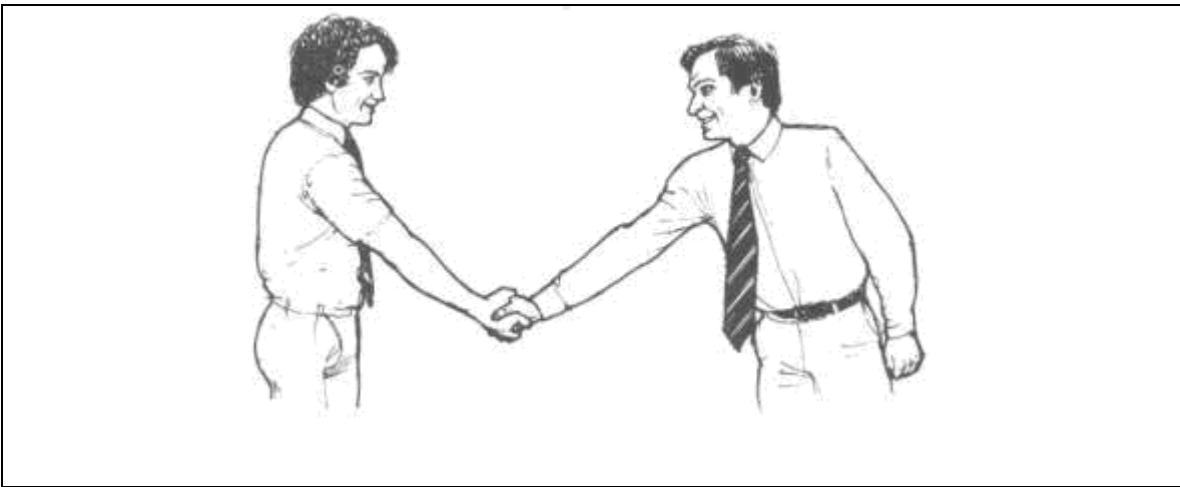


Figure 1

Figure 1⁵⁰⁴ illustrates a simple handshake between the attorney and the client. A handshake which is a “warm gesture” establishes a good rapport with the client at the outset of the consultation and is essential to establishing a trusting

Counsellors? *The Law Teacher* at 137-156. According to Brayne, many students and practitioners believe that communicational skills do not need to be learned as they are simple to grasp. He believes that law schools need to highlight the importance of lawyer-client interactive process.

⁵⁰¹ Smith A.E. and Nester P. 1977 Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* at 290 -292

⁵⁰² Ibid.

⁵⁰³ Ibid..

⁵⁰⁴ Figures 1 to 20 downloaded from Pease A *Body Language: How to read others' thoughts by their gestures* www.secret-solutions.com/body-language-by-Allan-Pease.pdf. (20 March 2010)

environment.⁵⁰⁵ Gestures are just one of many facets to non-verbal communication.⁵⁰⁶ Ruesch and Kees⁵⁰⁷ viewed non-verbal communication as signs or codes which can depict a multitude of intentional or unintentional gestures. These gestures are usually produced in conjunction with other modes of communication and serve an important role in improving the interaction process.⁵⁰⁸

The opening few seconds of the consultation are crucial to the success of the entire consultation process.⁵⁰⁹ The client who may be a victim, suspect or a witness will often display varying degrees of co-operation.⁵¹⁰ It is therefore imperative for the attorney to break through this “veil of reluctance” in order to elicit as much information from the client as possible. Communicational skills in the form of the verbal and non-verbal are crucial in fostering a greater degree of interaction during the consultation process.⁵¹¹

The attorney can tell her client that she is pleased to see her, but if the attorney’s eyes shifts to the floor, the handshake is weak or the hands are folded in a protective manner, then the client is unlikely to believe her.⁵¹² The success of the

⁵⁰⁵ Kirch M.S. 1979(63) Non-verbal Communication across Cultures *The Modern Language Journal* at 416-423.

⁵⁰⁶ Ibid at 417.

⁵⁰⁷ Ruesch J. and Kees W. *Nonverbal Communication: Notes on the Visual Perception of Human Relations* (Berkeley:University of California Press 1956).

⁵⁰⁸ Ibid.

⁵⁰⁹ Argyle M & Dean J. 1965(28) Eye Contact, Distance and Affiliation *Sociometry* at 289.

⁵¹⁰ Ibid at 290.

⁵¹¹ Duke C.R. 1974(25) Nonverbal Behaviour and the Communication Process *College Composition and Communication* at 397.

⁵¹² Ibid.

consultation often depends on the attorney's ability to get the client to talk and therefore the non-verbal signs that emanate from the attorney must appear genuine.⁵¹³

The attorney should aim to gather as much information as possible during the consultation process. It must be borne in mind that the consultation process is a vibrant interactive process that comprises many different variables that determine the effectiveness of the process.⁵¹⁴

It is extremely important for the attorney to recognize the consultation process as a significant form of interactive communication.⁵¹⁵ Non-verbal communication is one of those essential variables that impact strongly on the entire communicative process.⁵¹⁶ Verbal and non-verbal meanings are created and exchanged during this process of interchange between the attorney and client as law is a form of symbolic communication.⁵¹⁷ It becomes necessary for the attorney to recognize these non-verbal signs and symbols within the context of the legal environment.⁵¹⁸ By applying the semiotic ladder as a model, and taking into account the structure, meaning and properties of the sign, it is possible to delimit the possible interpretations that may be attached to the particular sign.⁵¹⁹

⁵¹³ See Fifra Interviewing Techniques: Appendix B at Fifra Inspection Manual, February 2002.

⁵¹⁴ Ibid.

⁵¹⁵ Duke C.R. 1974(25) Nonverbal Behaviour and the Communication Process *College Composition and Communication* at 397-404.

⁵¹⁶ Ibid.

⁵¹⁷ Meisenhelder T. 1981(4) Law as a Symbolic Action: Kenneth Burke's Sociology of Law *Symbolic Interaction* at 45.

⁵¹⁸ Ibid.

⁵¹⁹ Nierenberg G.I. and Calero H. *How to Read a Person like a Book* (Thorsons Publishing Group:



Figure 2

Figure 2⁵²⁰ illustrates the importance of body movement in the communicative process. A client will find it difficult to believe an attorney whose body movement

England 1980) at 155.
⁵²⁰ Supra at 504.

contradicts the verbal message.⁵²¹ Posture is a good indicator of emotional well-being and a reflection of status.⁵²² Constant changes in posture can disrupt the interactive process and suggest anxiety.⁵²³ Regular crossing and uncrossing of the legs and the shifting of body weight suggest uneasiness on the part of the attorney or the client during the interactive process.⁵²⁴

According to James,⁵²⁵

“body language is the most, fluent, lyrical, revealing and significant form of communication.”

The consultation process is the ideal setting for lawyers to use body language techniques and non-verbal cues to enhance communication between the parties.⁵²⁶ It is part of human nature to observe and interpret each other’s non-verbal behaviour which can be done on a conscious and unconscious level.⁵²⁷ However, there is no single guideline book which can accurately interpret non-verbal communication due to non-verbal behaviour having manifold meanings within different contexts.⁵²⁸ It is therefore imperative to ensure that non-verbal

⁵²¹ Burgoon J.K., Buller D.B and Woodall W.G. *Nonverbal communication : The unspoken Dialogue* (New York: Harper and Row 1989) at 54.

⁵²² Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 240.

⁵²³ *Ibid* at 241.

⁵²⁴ *Ibid*.

⁵²⁵ James J. *Body Language Bible* (Vermilion London 2008).

⁵²⁶ Binder D. and Price S. 1977 *Legal Interviewing & Counselling* at 27.

⁵²⁷ Davis A.J. 1963(63) *The Skills of Communication The American Journal of Nursing* at 67.

⁵²⁸ *Ibid*.

behaviour is interpreted within the correct context and not as an isolated display.⁵²⁹

A good lawyer should always be aware of the communication variables available to her during the communicative process.⁵³⁰ A lawyer can elicit information from the client by looking at the client which reinforces the lawyer-client interactive process.⁵³¹ The lawyer should project an image with which the client can identify and therefore non-verbal communication deserves conscious attention.⁵³²



Figure 3

Figure 3⁵³³ depicts two contrasting set of bodily postures that can convey dissimilar messages to the client. A lawyer, with arms neatly folded, smiling and maintaining direct eye-contact often creates a base from which the client

⁵²⁹ Ibid.

⁵³⁰ Smith A.E. and Nester P. 1977 Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* at 295.

⁵³¹ Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 235.

⁵³² Ibid at 236.

⁵³³ Supra at 504.

becomes motivated to participate freely and openly during the consultation.⁵³⁴ On the other hand, a lawyer with hands covering the face, looking away in a “distant gaze” during the interactive process may lead to a superficial consultation with inaccurate information.⁵³⁵

Talk is another variable that can easily be monitored by the attorney and, in addition to language, includes a variety of expressions such as sighs, exclamations; heavy breathing etc.⁵³⁶ It can suggest a variety of emotional nuances.⁵³⁷ The manner in which an individual uses language may result in unconscious categorizations and prejudices.⁵³⁸

Touch is an important variable that should be demonstrated within the correct cultural context and appropriate circumstance and skill.⁵³⁹ A touch can send out many different messages to the client but can generally be used to stimulate relaxation, comfort, and discomfort and show concern on the part of the attorney.⁵⁴⁰ It can be used as a reinforcing device that constantly reassures the client that she has nothing to worry about.⁵⁴¹ However, the level of personal

⁵³⁴ Frost R. et al. *Communication Dynamics* (Lexicon Publishers Johannesburg 1993) at 63.

⁵³⁵ Frost R. et al. *Communication Dynamics* (Lexicon Publishers Johannesburg 1993) at 64.

⁵³⁶ Burgoon J.K., Buller D.B and Woodall W.G. *Nonverbal communication : The unspoken Dialogue* (New York: Harper and Row 1989) at 65.

⁵³⁷ Ibid

⁵³⁸ Ibid. Unconscious categorizations could include culture, class, age etc.

⁵³⁹ Ibid.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid at 67.

intimacy varies from individual to individual and the attorney must be careful not to enter into the dimension of patronization or any form of sexual harassment.⁵⁴²

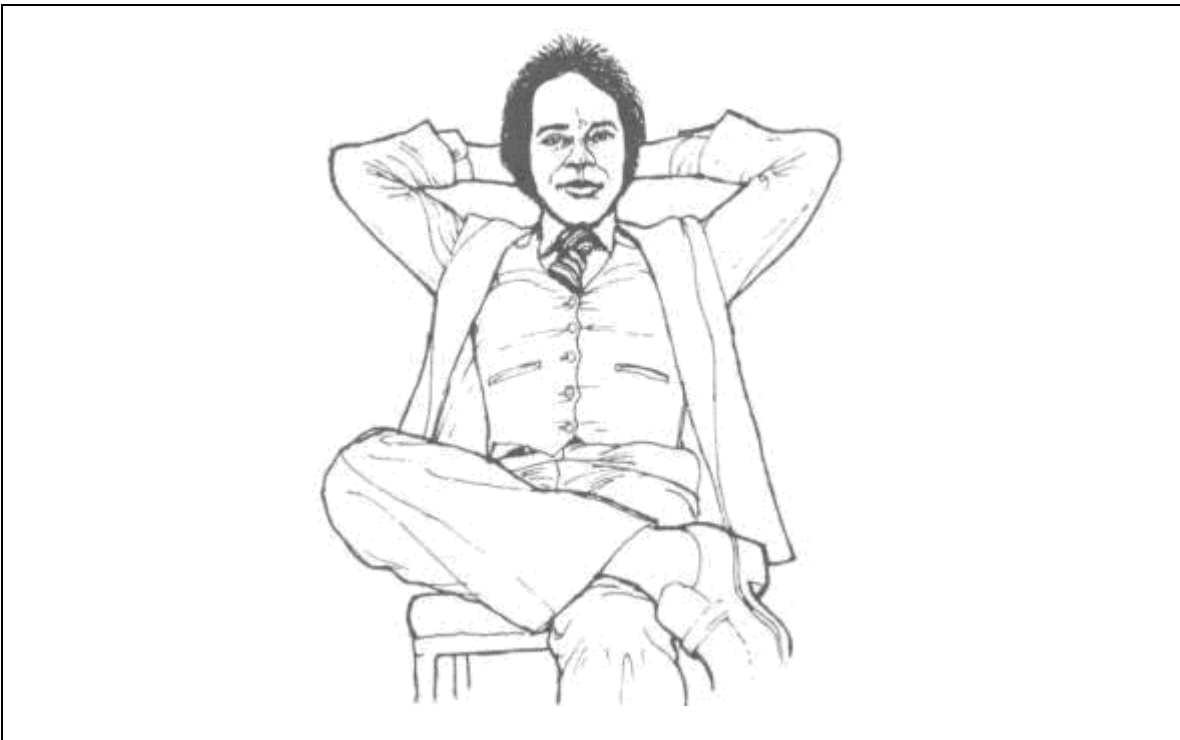


Figure 4

The lawyer's bodily postures (as illustrated by Figure 4)⁵⁴³ are vital communicative components that convey important messages to the client.⁵⁴⁴ A lawyer relaxing with his feet on the desk or slouching on the chair may show a lack of professionalism or even concern to the client which in turn could impact negatively on the communicative process between the two.⁵⁴⁵

⁵⁴² Frost R. et al. *Communication Dynamics* (Lexicon Publishers Johannesburg 1993) at 60-65.

⁵⁴³ *Supra* at 504.

⁵⁴⁴ Burgoon J.K., Buller D.B and Woodall W.G. *Nonverbal communication : The unspoken Dialogue* (New York: Harper and Row 1989) at 53.

⁵⁴⁵ *Ibid.*

Voice is another variable that can influence the communicative process.⁵⁴⁶ The lawyer can use volume and tone to influence the communication process without even relying on the language aspect.⁵⁴⁷ Plausibility is generally determined by a lawyer's volume and tone of voice but it can easily be destroyed by attaining extreme levels during conversation.⁵⁴⁸ Office design and the surrounding environments are variables that can communicate messages of professionalism or a lack of it to the client.⁵⁴⁹ It can depict distance, remoteness, or even coercion, factors fashioned by the physical distance between the attorney and client.⁵⁵⁰ Social interactive variables such as the lawyer's greetings to the client, the distance between the two, the number of times and manner in which the attorney looks at the client and talks with him can all be significant building blocks in establishing that vital bond between the attorney and client.⁵⁵¹ Knowledge and proper application of these variables can facilitate accurate communication and create an emotional climate that is conducive to a greater sharing of information.⁵⁵²

The analysis of non-verbal behaviour can take place through listener or speaker behaviour.⁵⁵³ Speaker behaviour is usually associated with truth and deception and contrasting signs between the verbal and non-verbal interface usually

⁵⁴⁶ Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 237.

⁵⁴⁷ *Ibid* at 238.

⁵⁴⁸ Elred E. 1960(60) Improving Nurse-Patient Communication *Journal of Nursing* at 6

⁵⁴⁹ Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 245.

⁵⁵⁰ *Ibid*.

⁵⁵¹ Smith A.E. and Nester P. 1977 Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* at 293.

⁵⁵² Kimball K. 1969(71) Techniques of Interviewing *Annals Internal Med.* 147.

⁵⁵³ Burgoon J.K., Buller D.B and Woodall W.G. *Nonverbal communication : The unspoken Dialogue* (New York: Harper and Row 1989) at 284-297.

indicate that someone is telling lies or being deceptive.⁵⁵⁴ On the other hand, a speaker can observe certain non-verbal cues on the part of the listener to establish her interest in the subject-matter.⁵⁵⁵



Figure 5

A lack of eye-contact can indicate that the listener is not really interested in the speaker.⁵⁵⁶ The eyes (as illustrated by Figure 5)⁵⁵⁷ play a vital role in determining whether communication should continue or cease.⁵⁵⁸ When listening to someone attentively, we tend to glance at the other person between periods ranging from three to ten seconds, to show a keen interest in the subject matter.⁵⁵⁹ We also

⁵⁵⁴ Ibid.

⁵⁵⁵ Burgoon J.K., Buller D.B and Woodall W.G. *Nonverbal communication : The unspoken Dialogue* (New York: Harper and Row 1989) at 284-297.

⁵⁵⁶ Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 235.

⁵⁵⁷ Supra at 504.

⁵⁵⁸ Ibid.

⁵⁵⁹ McCroskey J.C. *An Introduction to Interpersonal Communication* Englewood Cliffs (New Jersey: Prentice-Hall, Inc. 1971) at 112.

tend to maintain direct eye-contact for longer periods when there is interest in the speaker.⁵⁶⁰



Figure 6

⁵⁶⁰ McCroskey J.C. *An Introduction to Interpersonal Communication* Englewood Cliffs (New Jersey: Prentice-Hall, Inc. 1971) at 112.

Eye-contact (as illustrated by Figure 6)⁵⁶¹ facilitates effective communication and studies that have tested non-verbal behaviour have shown that a lack of eye-contact severely hinders the communicative process and the forming of a good and healthy relationship between the attorney and client.⁵⁶² Effective communication is achieved through eye-contact that is normal and intermittent rather than fixed or intense.⁵⁶³

However, it must also be remembered that eye movement must be understood within the context of cultural differences.⁵⁶⁴ Eye-contact or movement may vary more than other non-verbal behaviours across different cultures due to customs, traditions, beliefs and status of people.⁵⁶⁵

Culture also dictates the social distances that govern people.⁵⁶⁶ Culture refers to a group's common values and principles that serve as mental guidelines for the onset of their thoughts and actions.⁵⁶⁷ People of different culture react differently to an invasion of body and personal space.⁵⁶⁸ This is due largely to the person's cultural background resisting change in a foreign environment.⁵⁶⁹ It is important for the attorney to have information or background knowledge in respect of the

⁵⁶¹ Supra at 504.

⁵⁶² Fretz F 1979(26) Nonverbal Behaviours and Client Evaluations *Journal of Counseling Psychology* at 304.

⁵⁶³ Ibid.

⁵⁶⁴ Kirch M.S. 1979(63) Non-verbal Communication across Cultures *The Modern Language Journal* at 416-423.

⁵⁶⁵ Ibid.

⁵⁶⁶ Hinde R.A. *Non-verbal Communication* (Cambridge University Press 1972) at 315.

⁵⁶⁷ Ibid at 316.

⁵⁶⁸ Tolmage T. *et al. Non-verbal Communication in the Courtroom*
[http://www.stephanpeskin.com/PracticeAreas/Nonverbal Communication](http://www.stephanpeskin.com/PracticeAreas/Nonverbal%20Communication)(Date of use:10 May 2010)

⁵⁶⁹ Ibid.

client's culture.⁵⁷⁰ Translation which is not only a linguistic tool but a cultural one can serve as an important cross-cultural agent that minimizes misunderstandings between people.⁵⁷¹ Anxiety and gender are also key variables that impact on the spatial distance levels of man.⁵⁷²



Figure 7

Proxemics (the study of distance) is an important component of non-verbal communication.⁵⁷³ It is important for an attorney to identify and utilize proxemics within the context of anxiety and culture so as to ensure that the consultation process is laden with intimacy, closeness and professionalism.⁵⁷⁴

⁵⁷⁰ Kirch M.S. 1979(63) Non-verbal Communication across Cultures *The Modern Language Journal* at 416-423.

⁵⁷¹ Ibid.

⁵⁷² Ibid.

⁵⁷³ Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 244.

⁵⁷⁴ Ibid.

There are four general zones⁵⁷⁵ that a person surrounds herself with:

- ◇ *Intimate zone* (0 to 18cm) – reflects the distance that close friends, lovers and children are comfortable with;
- ◇ *personal zone* (1,5 to 4 feet) – reflects the distance used to conduct conversations on a personal level;
- ◇ *social zone* (4 to 8 feet) – reflects the distance used to conduct business with strangers;
- ◇ *public zone* (8 feet and beyond) – reflects the distance used to conduct business on a more formal basis with the public.

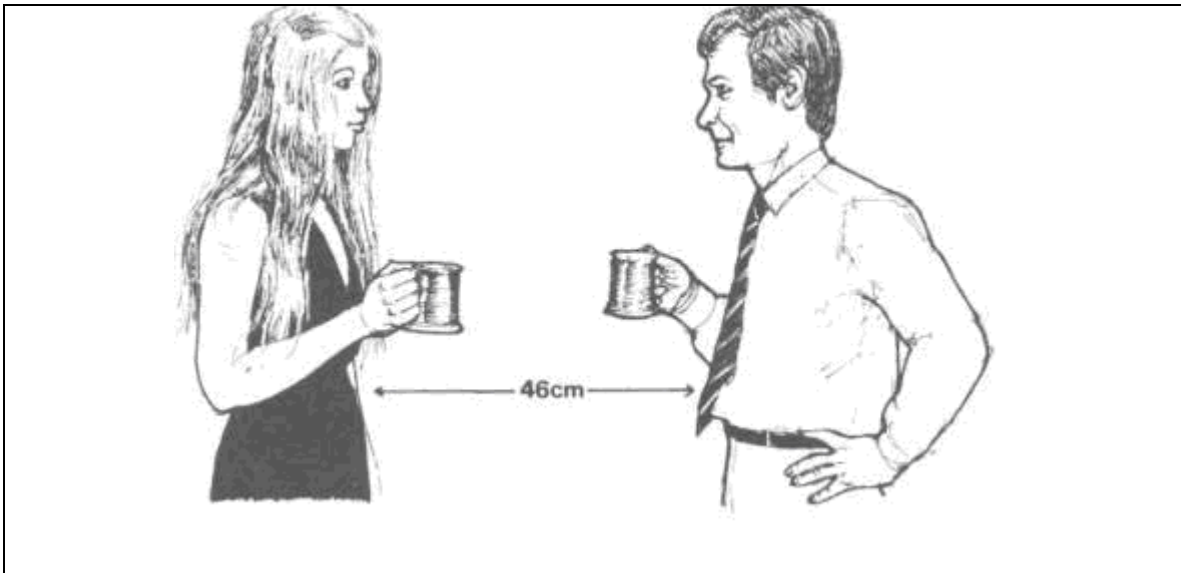


Figure 8

Figure 7 (previous page)⁵⁷⁶ depicts two individuals who engage with each other in the intimate zone. As illustrated by Figure 8⁵⁷⁷ it is important for the attorney engaging with the client to ensure that she does not enter into the intimate zone

⁵⁷⁵ Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 244.

⁵⁷⁶ *Supra* at 504.

⁵⁷⁷ *Ibid.*

as this may lead to discomfort and hostility on the part of the client.⁵⁷⁸ To maintain the appropriate spatial distance from the client when standing or sitting is vital to establishing a good professional relationship.⁵⁷⁹

To elicit as much information as the attorney can from the client during the consultation process, body movements or kinesics must be observed and utilized within the correct range.⁵⁸⁰ The importance of understanding the distinctive properties of body language to the attorney can never be overemphasized. As Kendon succinctly put it, “body movement is arguably as fundamental as speech for the representation of meaning.”⁵⁸¹

Touch (haptics) is an important communicative tool that if used in the correct context can be instrumental in calming a difficult client or gaining the confidence and trust of the client.⁵⁸² However, it goes hand in hand with personal space and one needs to ensure that there is permission or good reason to touch.⁵⁸³ Handshakes are generally regarded as a basic form of touch and acceptable in a professional environment.⁵⁸⁴

In South Africa, the diversity of backgrounds and cultures dictate that one exercises caution when touching a stranger. Some cultures regard touch as an

⁵⁷⁸ Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 244

⁵⁷⁹ Ibid.

⁵⁸⁰ Hinde R.A. *Non-verbal Communication* (Cambridge University Press 1972) at 90.

⁵⁸¹ Kendon A. *Some uses of gesture*. In O.Tannen & M.Saville-Troike(Eds) *Perspectives on Silence* (Norwood, NJ: Ablex 1985)at 215-234.

⁵⁸² Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 241.

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

intrusion into one's personal space whereas in other cultures it is regarded as a sign of friendliness.⁵⁸⁵ However, there are many other variables that determine whether it is acceptable to touch a stranger.⁵⁸⁶ The reason for touch, the manner of touch, and the non-verbal signals of the recipient are all important indicators in determining whether touch is appropriate in the circumstances.⁵⁸⁷

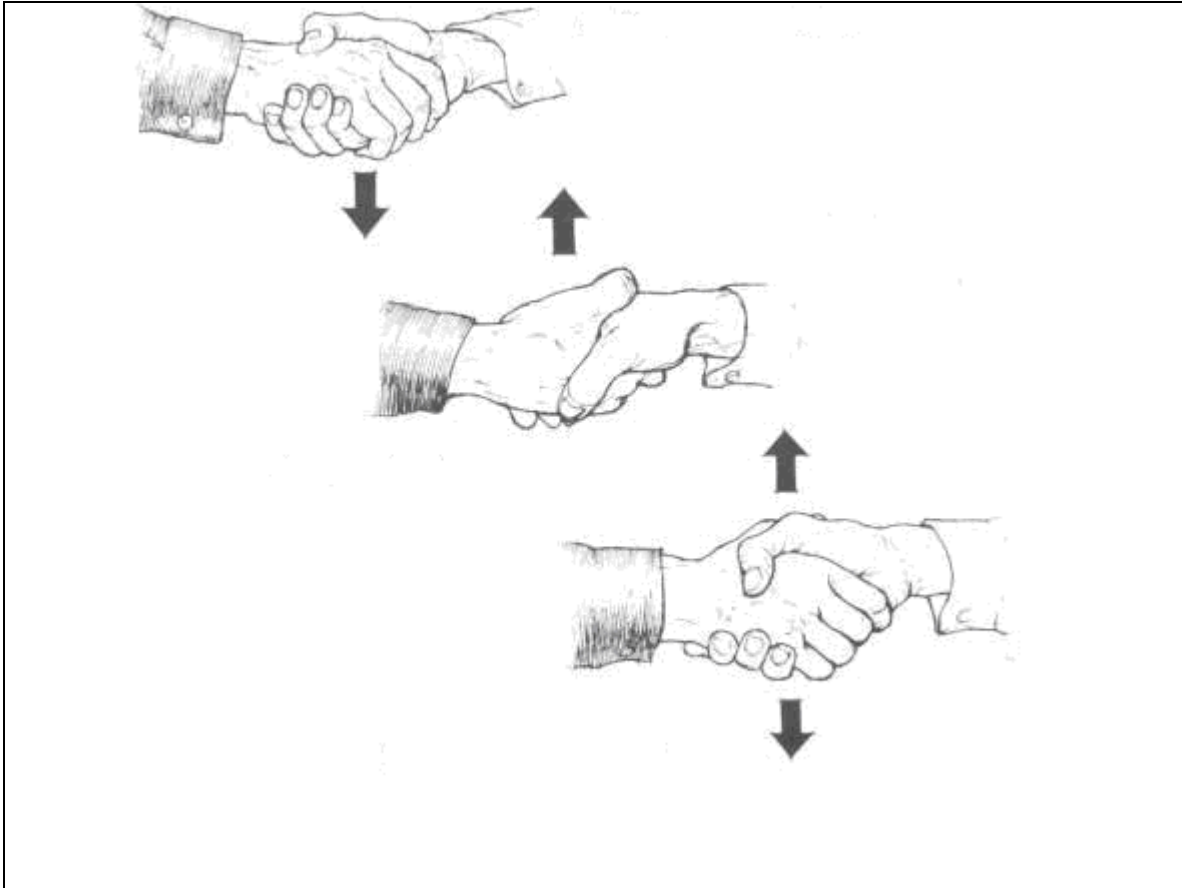


Figure 9

⁵⁸⁵ Kirch M.S. 1979(63) Non-verbal Communication across Cultures *The Modern Language Journal* at 416-423.

⁵⁸⁶ Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 241.

⁵⁸⁷ *Ibid.*

Even styles of handshake vary according to culture and personal preference (as illustrated by Figure 9)⁵⁸⁸ and therefore it is important for the attorney to be familiar with the cultural variations of the client.⁵⁸⁹

The attorney can use gestures to encourage free-flow conversation.⁵⁹⁰ Gestures can also be used when it is difficult to use speech or to assist with the understanding of the subject matter.⁵⁹¹ According to Kendon, gestures may be used to convey emotions and interpersonal attitudes.⁵⁹² An attorney clenching her fists or shaking her head vigorously from side to side may convey anger more effectively than a violent flow of words.⁵⁹³



Figure 10

⁵⁸⁸ Supra at 504.

⁵⁸⁹ Eunson B *Communicating in the 21st Century* (Kyoda Printing Singapore 2005) at 242.

⁵⁹⁰ Burgoon J.K., Buller D.B and Woodall W.G. *Nonverbal communication : The unspoken Dialogue* (New York: Harper and Row 1989) at 54-65.

⁵⁹¹ Ibid.

⁵⁹² Kendon A. *Some uses of gesture*. In O.Tannen & M.Saville-Troike(Eds) *Perspectives on Silence* (Norwood, NJ: Ablex 1985)at 215-234.

⁵⁹³ Ibid.

On the other hand a client with hands covering the face may reveal that she is uncomfortable or embarrassed to openly discuss the subject matter.⁵⁹⁴ A simple smile with hands clasped together by the attorney (as illustrated by Figure 10) goes a long way towards gaining the confidence of the client.⁵⁹⁵ These body movements or gestures can be a silent means of communication that requires the receiver to have the necessary skill and awareness to analyse such behaviour.⁵⁹⁶ Speech and gesture are generally interlinked to clarify meaning and for the attorney it is imperative that any statement or message from the client is never misinterpreted.⁵⁹⁷ Such a misinterpretation or misunderstanding can impact negatively on the client's case.⁵⁹⁸

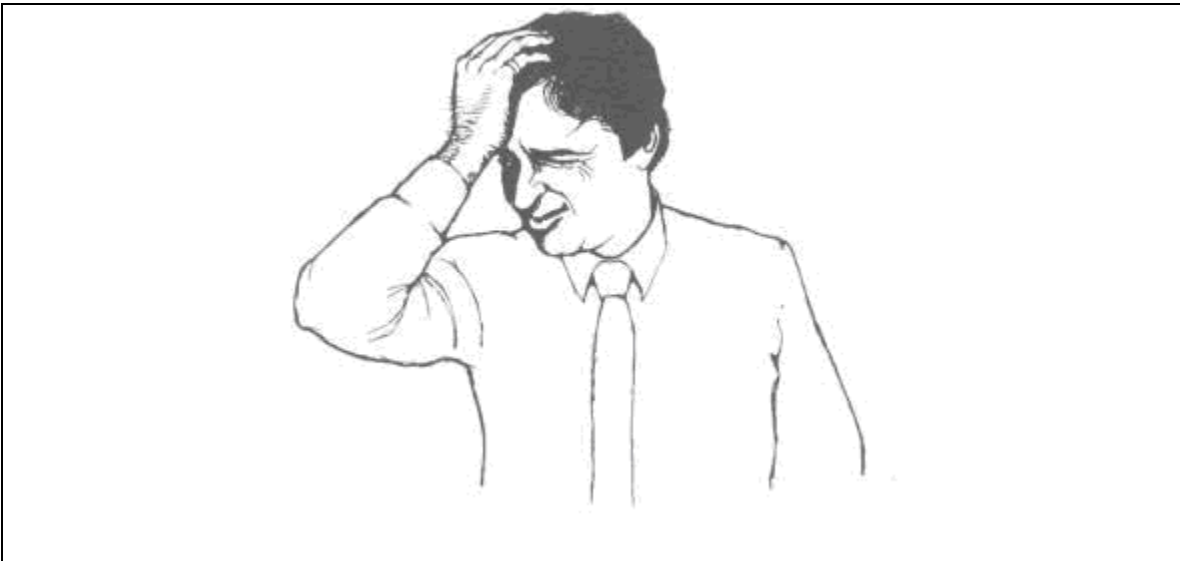


Figure 11

⁵⁹⁴ Frost R. et al. *Communication Dynamics* (Lexicon Publishers Johannesburg 1993) at 49-73.

⁵⁹⁵ Ibid.

⁵⁹⁶ Ibid.

⁵⁹⁷ Kelly S.D. et al. 1999(40)Offering a hand to pragmatic understanding: The role of speech and gesture in comprehension and memory *Journal of Memory and Language* at 577.

⁵⁹⁸ Ibid.

In a courtroom scenario, and even during the consultation process, the attorney must ensure that she maintains credibility with her audience and the client.⁵⁹⁹ Negative gestures (as reflected by Figure 11 in the previous page)⁶⁰⁰ can be perceived as unwelcome and threatening.⁶⁰¹ As highlighted in previous chapters, how attorneys are perceived and judgments of presiding officers can be influenced by the attorney's non-verbal communication.⁶⁰² Delivery of the statement in a credible manner is vital to "winning over" the audience.⁶⁰³



Figure 12

⁵⁹⁹ M.S. Remland M.S. *The Importance of Nonverbal Communication in the Courtroom Paper* presented at the annual meeting of the Eastern Communication Association, 84th New Haven, Cape Town, April 29, 1993.

⁶⁰⁰ *Supra* at 504.

⁶⁰¹ *Supra* at 610.

⁶⁰² *Ibid.*

⁶⁰³ *Ibid.*

Studies have shown that delivery is positively influenced by factors such as strong eye contact, positive and varied tones, congruency between speech and body movements, natural gestures, fluent speech, and positive movement.⁶⁰⁴ Self-touch, wooden facial expressions and phony bodily movements (as reflected by Figure 12 in the previous page) are proven negatives in the art of delivery.⁶⁰⁵

An understanding of the different variables that impact on delivery is crucial to “winning over the audience”.⁶⁰⁶ Non-verbal communication is not only crucial to the art of delivery but also of the essence in assessing the impact of the delivery on the audience.⁶⁰⁷



Figure 13

⁶⁰⁴ Rieke R.D. *Communication in legal advocacy* (Columbia SC: University of South Carolina Press 1990).

⁶⁰⁵ Ibid.

⁶⁰⁶ Ibid.

⁶⁰⁷ Ibid.

The attorney must be “armed” with strong persuasive skills in order to be successful in her given profession.⁶⁰⁸ Strong non-verbal cues such as good posture, firm eye-contact, facial eloquence and unsystematic bodily movements (as illustrated by Figure 13)⁶⁰⁹ impact positively on the persuasive skills of the attorney.⁶¹⁰ In a study done on courtroom attorneys, jurors rated the “aggressive” attorney more effective than the “passive” attorney in having strong persuasive skills.⁶¹¹ The “aggressive” attorney used loads of strong eye-contact, poignant gestures, high volume and rapid speech rate in the delivery technique.⁶¹²

During the consultation process, it is imperative to use strong and powerful delivery techniques on the client in order to hold the client’s attention and facilitate an effective sharing of information session during the process.⁶¹³ Studies have further revealed that fluent speech on the part of the speaker, accompanied with assured body language (as reflected in Figure 14 below)⁶¹⁴ can influence ratings of proficiency and trustworthiness on the part of the listener.⁶¹⁵

⁶⁰⁸ Smith A.E. and Nester P. 1977 Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* 297.

⁶⁰⁹ Supra at 504.

⁶¹⁰ Barkai J 1990(27) Nonverbal Communication from the Other Side: Speaking Body Language *San Diego Law Review* at 101.

⁶¹¹ Rieke R.D. *Communication in legal advocacy* (Columbia SC: University of South Carolina Press 1990).

⁶¹² Ibid.

⁶¹³ Smith A.E. and Nester P. 1977 Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* at 295.

⁶¹⁴ Supra at 515.

⁶¹⁵ Barge K.J., Schlueter D.W. and Pritchard A. 1989(54) The effects of nonverbal communication and gender on impression formation in opening statements *The Southern Communication Journal* at 330-349.

The ability to identify and use the range of non-verbal behaviours facilitates an effective transfer of information and meaning between the speaker and listener.⁶¹⁶ Misunderstandings can often be clarified if people develop the ability to identify any discrepancy between the verbal and non-verbal interface.⁶¹⁷



Figure 14

The use of basic non-verbal cues such eye contact, smiles, head-nods; appropriate spatial distance and proper vocal tones are key ingredients in the building of a good rapport with the client.⁶¹⁸ Studies have further revealed that the length of responses during an interview or consultation can increase significantly if these basic non-verbal cues are used during the process.⁶¹⁹

⁶¹⁶ Barkai J 1990(27) Nonverbal Communication from the Other Side: Speaking Body Language *San Diego Law Review* at 101.

⁶¹⁷ Ibid.

⁶¹⁸ Smith A.E. and Nester P. 1977 Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* at 296.

⁶¹⁹ Remland M.S and Jones T.S. 1989(37) The effects of nonverbal involvement and communication apprehension on state anxiety, interpersonal attraction, and speech duration *Communication Quarterly* at 75.

During the consultation process, it is important for the attorney to avoid using a hostile tone of voice, as well as staring at and interrupting the client who is going through the difficult and emotional experience of divulging confidential and personal information.⁶²⁰ A firm but polite gaze as illustrated by Figure 15⁶²¹ may be all that is required when the client is speaking.⁶²²



Figure 15

For the attorney, the knowledge of these non-verbal cues creates “a multichannel system of communication” that provides the necessary skill in which to convey meaning.⁶²³ Lying and deception are part and parcel of the interpersonal experience.⁶²⁴ Deception can be defined as the intentional transfer of a message

⁶²⁰ Matlon R.J. *Communication in the legal process* (New York: Holt, Rinehart and Winston, Inc.1988)

⁶²¹ Supra at 504.

⁶²² Supra at 631.

⁶²³ Pease A. *Body Language* (Sheldon Press London 1988).

⁶²⁴ Weiler J. and Weinstein E. 1972(35) Honesty, fabrication and the enhancement of credibility *Sociometry* at 316-331.

that is meant to contradict a person's actual opinion.⁶²⁵ When children lie, instinct tells them to cover their mouth with their hands as reflected by Figure 16⁶²⁶ below.⁶²⁷



Figure 16

As children grow into adults, their gestures become refined and advanced and even though the brain sends messages to them to block the deceitful words by covering the mouth (Figure 17 below)⁶²⁸, the resultant gesture evolves into a nose touch or finger glance across the mouth or nose.⁶²⁹

It is therefore more difficult to read the non-verbal cues of a mature adult as compared to a young child.⁶³⁰ The deception framework comprises both the

⁶²⁵ Zuckerman M. et al. 1984(46) Learning to detect deception *Journal of Personality and Social Psychology* at 519-528.

⁶²⁶ Supra at 504.

⁶²⁷ Zuckerman M. et al. 1984(46) Learning to detect deception *Journal of Personality and Social Psychology* at 519-528.

⁶²⁸ Supra at 504.

⁶²⁹ Supra at 638.

⁶³⁰ Ibid.

emotional and cognitive components.⁶³¹ Due to the everyday use of deception amongst people, they tend to be more proficient at deceiving than at detection.⁶³² In a criminal environment, the accused person's potential loss of freedom is a strong motivator for that person to be an excellent deceiver.⁶³³



Figure 17

People engage in deception when they alter the quantity, quality and clarity of information all at the same time or at different times.⁶³⁴ Some people lie more convincingly than others but inevitably it becomes difficult to submerge the subconscious mind which automatically acts contradictory to the verbal lie.⁶³⁵

⁶³¹ Vrij A. 1994(18) The impact of information and setting on detection of deception by police detectives *Journal of Nonverbal Behaviour* at 117-136.

⁶³² De Turck M.A. and Miller G.R. 1990(16) Training observers to detect deception: Effects of self-monitoring and rehearsal *Human Communication Research* at 603-620.

⁶³³ Vrij A. 1994(18) The impact of information and setting on detection of deception by police detectives *Journal of Nonverbal Behaviour* at 117-136.

⁶³⁴ Rugbeer Y. *Deceptive Communication: When it is legitimate to deceive others, and when it is not* (PHD Thesis: University of Zululand 2005)

⁶³⁵ Ibid.

Research has shown that even though people may learn to suppress certain bodily gestures when lying, numerous micro gestures such as twitching, pupil dilation, sweating, flushing of the cheeks and eye blinking amongst others are transmitted to signal the incongruence of a lie.⁶³⁶



Figure 18

For the attorney, an untruthful client may be very difficult to represent in the long run. Besides jeopardizing the case, an untruthful client can potentially ruin the reputation of the attorney. It is therefore vital for the attorney to identify these contradictory signals at the initial consultation stage.⁶³⁷ Even the most skillful of liars would in time release these micro gestures that would contradict the verbal message.⁶³⁸ It is through focused observation and practice that these

⁶³⁶ Pease A. *Body Language* (Sheldon Press London 1988).

⁶³⁷ Harrison A.L. et al. 1978(42) Cues to deception in an interview situation. *Social Psychology* at 380-391.

⁶³⁸ Ekman P and Friesman W.V. 1974(29) Detecting deception from the body or face *Journal of Personality and Social Psychology* at 288-298.

subconscious signals become evident to the naked eye.⁶³⁹ The attorney may also use her knowledge of subconscious signals to avoid sending incongruent or negative messages to the opponent or client.⁶⁴⁰ It is important for the attorney to pay special attention to the face, which is the part of the body most likely to reveal deception.⁶⁴¹

It is not easy to determine whether someone is lying.⁶⁴² It is a difficult process as one cannot simply rely on the more informative sources such as the face and head only.⁶⁴³ It is extremely important to observe the leg, arm and foot movements.⁶⁴⁴ The person who tends to deceive may position herself further away from the listener than when she is being truthful, may gesticulate less frequently and decrease the number of head nods.⁶⁴⁵ Her speech rate may become slower and speech errors made more frequently and may smile more than when being truthful.⁶⁴⁶

During the consultation process, an attorney has the perfect opportunity to examine the congruency between the client's words and actions.⁶⁴⁷ Due to people having more control on a conscious level over their verbal messages

⁶³⁹ Ibid.

⁶⁴⁰ De Paulo B.M. 1992(111) Nonverbal Behaviour and Self-Presentation *Psychological Bulletin* at 203-243.

⁶⁴¹ Liggett J. *The Human Face* (Constable, London 1974) at 10.

⁶⁴² Ibid.

⁶⁴³ Duke C.R. 1974(25) Nonverbal Behaviour and the Communication Process *College Composition and Communication* at 401.

⁶⁴⁴ Ibid.

⁶⁴⁵ Mehrabian A. *Nonverbal Communication* (New York: Aldine-Atherton 1972) at 86.

⁶⁴⁶ Ibid.

⁶⁴⁷ Smith A.E. and Nester P. 1977 Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* at 296.

compared to their non-verbal behaviour, it is important for the attorney to be able to analyse any incongruency between the two in order to detect deception.⁶⁴⁸ This can be done by listening which is an important element of any consultation.⁶⁴⁹

In addition to active listening, observation and awareness are also critical elements in detecting deception.⁶⁵⁰



Figure 19

In studies done by Paul Ekman, who was widely regarded as an expert in the study of facial expressions and deception, it was determined that the lying subject generally displayed nervous cues such as eye rubbing, lip licking and scratching.⁶⁵¹ The lying subject displayed less of the casual gesticulation that

⁶⁴⁸ Pease A. *Body Language* (Sheldon Press London 1988).

⁶⁴⁹ Ibid.

⁶⁵⁰ Ibid.

⁶⁵¹ Ekman P. *Telling Lies* (W.W. Norton and Company New York 1992).

accompanies speech and more of the incongruent signs (as reflected by Figure 19)⁶⁵² that appeared to be in divergence with the speech.⁶⁵³

Further studies have shown that in order to detect deception, special attention must be given to the following non-verbal cues: speech errors, hesitations, vocal pitch, blinking, pupil dilation, response length and pupil dilation.⁶⁵⁴

Attempts to detect deception within the legal arena must be approached with caution. Within the domain of the legal setting, feelings of anxiety and apprehension are common and these feelings can easily be misconstrued for non-verbal signals of deception.⁶⁵⁵ It is therefore very important to look for a cluster of non-verbal signals in different settings so as to ensure that the client is extremely relaxed during the onset of proceedings.⁶⁵⁶ The clusters of non-verbal signals to look for, in addition to those mentioned above are the shifting of the arms, legs and feet, furrowing of the brow and rapid eye blinking, which convey a message of deception.⁶⁵⁷

It is important for the attorney to reduce the personal space between herself and the client in order to get the client out of the comfort zone.⁶⁵⁸ The client may find

⁶⁵² Supra at 504.

⁶⁵³ Ekman P. *Telling Lies* (W.W. Norton and Company New York 1992).

⁶⁵⁴ Rugbeer Y. *Deceptive Communication: When it is legitimate to deceive others, and when it is not* (PHD Thesis: University of Zululand 2005)

⁶⁵⁵ Kraut R.E. and Poe D. 1980(36) Verbal and nonverbal cues in the perception of lying *Journal of Personality and Social Psychology* at 380-391.

⁶⁵⁶ Ibid.

⁶⁵⁷ Shadow M. 2008 Improving Nonverbal Communication in Criminal Justice *Law* at 2.

⁶⁵⁸ Kraut R.E. and Poe D. 1980(36) Verbal and nonverbal cues in the perception of lying *Journal*

it difficult to lie where there is an invasion of personal space resulting in high levels of anxiety.⁶⁵⁹ However, the attorney must make an effort to observe the client's speaking styles and be wary of other factors such as intoxication, drug abuse, culture diversity, and age which can all be barriers to detecting deception.⁶⁶⁰

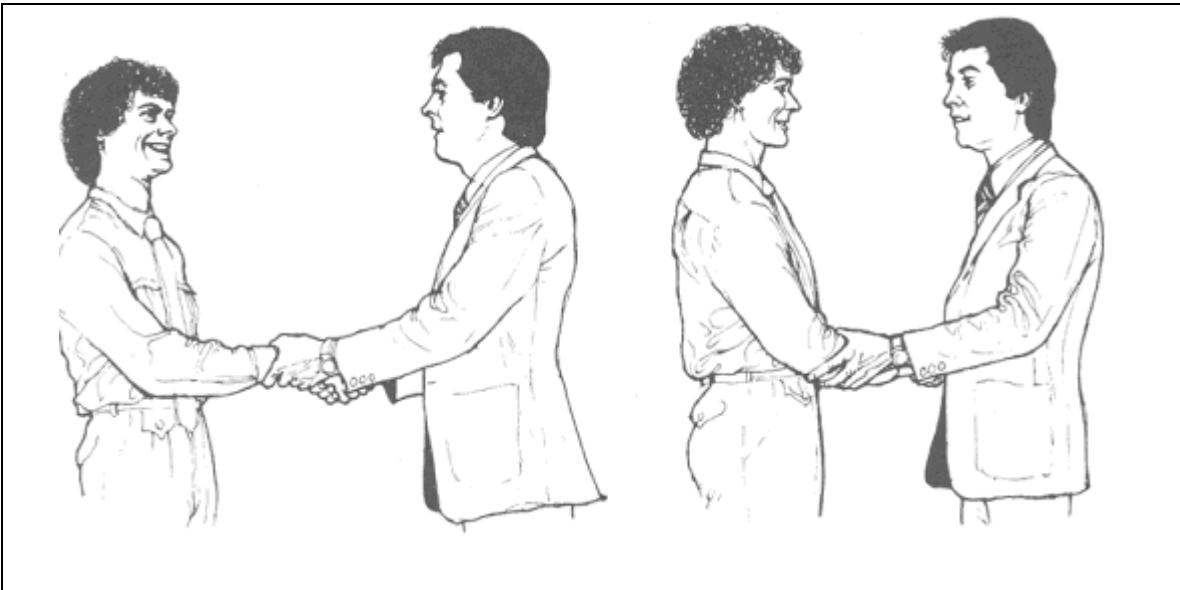


Figure 20

By reducing the personal distance between the attorney and the client to a distance that is both acceptable and comfortable (as illustrated by Figure 20)⁶⁶¹ the attorney may be in a better position to observe the client and detect incongruencies between the verbal and non-verbal.⁶⁶² The best way for an

of Personality and Social Psychology at 380-391

⁶⁵⁹ Ibid.

⁶⁶⁰ Ibid.

⁶⁶¹ *Supra* at 504.

⁶⁶² Pease A. *Body Language* (Sheldon Press London 1988).

attorney to improve her skill of reaching the truth is to observe process and comprehend the non-verbal meanings within the correct context.⁶⁶³

4.9 The Reliability of Non-verbal Measurements

The fact that non-verbal behaviour is natural and usually unintentional makes it a challenging but interesting field to study.⁶⁶⁴ Technology in the form of video recorders has made it possible to analyse non-verbal behaviour from a scientific angle.⁶⁶⁵ Complex body and facial movements which are sometimes invisible to the naked eye can be viewed repeatedly.⁶⁶⁶ Computer and digital analysis have replaced some of the older measuring systems.⁶⁶⁷ One such system involved attaching recording equipment to the body to analyse non-verbal behaviour but this system had major flaws in that many participants became self-conscious, resulting in their movements becoming restricted.⁶⁶⁸

Digital and video recording have drastically improved the precision and reliability of non-verbal measuring with some tests showing an accuracy of over ninety

⁶⁶³ Duke C.R. 1974(25) *Nonverbal Behaviour and the Communication Process* College Composition and Communication at 402.

⁶⁶⁴ French L.R. 1977(16) *Teaching the Nonverbal Experience Theory into Practice* at 176-182.

⁶⁶⁵ M.S. Bartlett M.S. *et al* 1999(36) *Measuring facial expressions by computer image analysis Psychophysiology* at 253.

⁶⁶⁶ *Ibid.*

⁶⁶⁷ *Ibid.*

⁶⁶⁸ Harling P.A. and Edwards A.D.N. *Progress in gestural interaction* (London: Springer-Verlag 1997).

percent.⁶⁶⁹ Studies have revealed the consistency of non-verbal behaviour in different channels, thus improving the reliability of such a measure.⁶⁷⁰

Ekman developed a reliable measurement technique known as Facial Effect Scoring Techniques (FAST), which uses photos of facial expressions rather than verbal descriptions to judge facial expressions.⁶⁷¹ Schefflen on the other hand verified the consistency and reliability of a system of non-verbal communication in posture, position and orientation.⁶⁷²

Most research done on non-verbal communication commonly highlights the ability of the observer to learn to interpret and analyse non-verbal behaviour.⁶⁷³ It is now possible for observers to use measuring techniques with high accuracy to interpret non-verbal behaviour.⁶⁷⁴ It is now widely accepted that non-verbal communication can be regarded as a skill which can be learned.⁶⁷⁵ Communication skills training which incorporates non-verbal dimension has already been used in different disciplines and within diverse social contexts.⁶⁷⁶ In the medical field, education, safety and security, psychiatry and employment,

⁶⁶⁹ M.S. Bartlett M.S. *et al* 1999(36) Measuring facial expressions by computer image analysis *Psychophysiology* at 253.

⁶⁷⁰ Davidtz J. *The Communication of Emotional Meaning* (New York: McGraw-Hill 1964).

⁶⁷¹ Ekman P and Friesman W.V. 1974(29) Detecting deception from the body or face *Journal of Personality and Social Psychology* at 288-298.

⁶⁷² Schefflen A. 1968(13) Human Communication: Behavioral Programs and Their Integration in Interaction *Behavioral Science* at 44-55.

⁶⁷³ Dittman A, Parloff M. and Boomer D. 1965(28) Facial and Bodily Expressional Cues *Psychiatry* at 239-244.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ Hargie O.D.W. *The handbook of communication skills* (London: Routledge 1997) at 473-482.

⁶⁷⁶ *Ibid.*

amongst others, communication skills training has taken off.⁶⁷⁷ Occupational training and tests in non-verbal perceptiveness have now become the norm across different disciplines.⁶⁷⁸

The legal field, however appears to be lagging behind other disciplines despite communicational skills being an essential cog in the make-up of law.⁶⁷⁹ According to Bull, the practical significance of studying non-verbal communication far exceeds formal training procedures.⁶⁸⁰ An understanding of social interaction and behaviour is possible through the dissection of books, articles and electronic media but key to understanding non-verbal communication is first becoming aware of the different channels of communication that impact on social interaction.⁶⁸¹

In a perfect world, we would all have the time we need to use technology to analyze non-verbal behaviour. However, in the real world there is limited time to size up a situation and make a judgment call. For the attorney, there may literally be minutes to observe a witness and make a decision that could impact negatively or positively on the future of the client. Jo-Ellan Dimitrius, America's leading behavioural expert has developed a method called S.P.E.E.D. (Scan, Pare, Enlarge, Evaluate, and Decide) which are people-reading techniques that

⁶⁷⁷ Ibid.

⁶⁷⁸ Constanzo M and Archer D 1989(13) Interpreting the expressive behaviour of others: The Interpersonal Perception Task *Journal of Nonverbal Behaviour* at 225-245.

⁶⁷⁹ Duke C.R. 1974(25) Nonverbal Behaviour and the Communication Process *College Composition and Communication* at 402.

⁶⁸⁰ Bull P. 2001(14) State of the art: Nonverbal communication *The Psychologist* at 647.

⁶⁸¹ Ibid.

improve the quality of decisions and increases the odds of reading people accurately.⁶⁸²

However, according to Dimitrus there can never be a foolproof measure to read non-verbal cues, and S.P.E.E.D. should only be used when time is of the essence as longer patient analysis measures may be more reliable when patterns are allowed to develop more fully.⁶⁸³ During the consultation process, where time is of the essence for the attorney, S.P.E.E.D. may be an effective method to analyse the non-verbal behaviour of the client. The method involves the following techniques:⁶⁸⁴

4.9.1 SCAN

It is important for one to scan the environment and then the individual by looking for anything peculiar or unique that defines the person or the moment.⁶⁸⁵ It is necessary to take cognizance of the individual's physical appearance, body language, eye movements, speech, and facial expressions to gauge how they relating to you.⁶⁸⁶

⁶⁸² Dimitrius J. and Mazzarella W.P *Reading People* (Ballantine Books New York 2008)at 324.

⁶⁸³ Ibid.

⁶⁸⁴ Ibid.

⁶⁸⁵ Dimitrius J. and Mazzarella W.P *Reading People* (Ballantine Books New York 2008)at 326.

⁶⁸⁶ Ibid.

4.9.2 PARE

It is important to dissect and evaluate the information after noting the appearance and behaviour of the individual.⁶⁸⁷ This stage involves identifying the items or traits that stand out.⁶⁸⁸

4.9.3 ENLARGE

It is vital to identify those traits that are most important and then bring them into focus. After scanning the environment, one notices a handful of features that one wants to view more closely. It is important to then focus on those and to zoom in.

4.9.4 EVALUATE

It is imperative to look for deviations from normal behaviour.⁶⁸⁹ One needs to look for extremes and search for patterns that have developed.⁶⁹⁰ The different cues put together generally create a pattern that becomes clear after concentration.⁶⁹¹

4.9.5 DECIDE

The decision must be made quickly after completing the previous four steps.⁶⁹²

The S.P.E.E.D. method is similar to Stamper's semiotic theory which advocates that one needs to see the information as signs in a social setting where norms or

⁶⁸⁷ Dimitrius J. and Mazzarella W.P *Reading People* (Ballantine Books New York 2008)at 326.

⁶⁸⁸ Ibid.

⁶⁸⁹ Dimitrius J. and Mazzarella W.P *Reading People* (Ballantine Books New York 2008)at 328

⁶⁹⁰ Ibid.

⁶⁹¹ Ibid.

⁶⁹² Ibid at 329.

social conventions govern people's behaviour.⁶⁹³ It is important to look for the different variables that form part of the communication process. The S.P.E.E.D. method has been used by Dimitrius in court and during jury selection and has contributed to her being extremely successful as a jury consultant.⁶⁹⁴

According to Dimitrius, it often takes a trained eye to pick up the "subtle nuances of nonverbal communication".⁶⁹⁵ She believes that "what people admit or conceal in response to questions is often apparent in their body language, as they respond to questions not only verbally but also with their mannerisms, revealing true answers that may contradict their spoken words."⁶⁹⁶ Although one cannot rely on non-verbal cues alone, it has been accepted that it can provide valuable information.⁶⁹⁷ The prospect of training lawyers to become more knowledgeable of non-verbal cues is a process in the making.⁶⁹⁸ For the present, a greater alertness to occasions of non-verbal proceedings is paramount to improving the communicative legal process.⁶⁹⁹ Research on non-verbal communication has shown that it does improve the communicative process and it assists in understanding ourselves and others.⁷⁰⁰ For the legal profession, an understanding of the functions of signs which we use in order to communicate

⁶⁹³ See See Stamper R.K. *Organisational Semiotics: Informatics without the computer?* In K.Liu, R.J Clarke, P.Bogh Anderson and R.K. Stamper eds. (MA: Kluwer Academic Publishers Boston 2001) at 115-171.

⁶⁹⁴ Dimitrius J. and Mazzarella W.P *Reading People* (Ballantine Books New York 2008) at 324.

⁶⁹⁵ Ibid.

⁶⁹⁶ Ibid.

⁶⁹⁷ Duke C.R. 1974(25) *Nonverbal Behaviour and the Communication Process* *College Composition and Communication* at 397.

⁶⁹⁸ Shadow M. 2008 *Improving Nonverbal Communication in Criminal Justice Law* at 5.

⁶⁹⁹ Galloway C. 1968(97) *Nonverbal Communication Theory into Practice* at 172.

⁷⁰⁰ Burgoon J.K., Buller D.B and Woodall W.G. *Nonverbal communication : The unspoken Dialogue* (New York: Harper and Row 1989) at 284-297.

non-verbally is vital to improving the overall communicative legal skills of the attorney.⁷⁰¹

It is clear from the researcher's in-depth analysis of literature available on non-verbal communication that the non-verbal component is the "heartbeat" of the human communicative system. The famous linguist, Fernando Poyatos saw non-verbal communication as interdisciplinary and cross-cultural in nature where lucid sign systems play important roles in alleviating problems intrinsic in intercultural and subcultural communication.⁷⁰² Communication is regarded as the most important "tool of trade" for the attorney and to succeed in her trade, the attorney must be skilled in the art of non-verbal communication.

⁷⁰¹ Kevelson R. *The Law as a System of Signs* (Plenum Press New York 1988) at 5-10.

⁷⁰² Poyatos F. *Nonverbal Communication Across Disciplines* (John Benjamins 2002). The author discusses a three step reality model, "verbal language – paralinguistic-kinesics" which provides the basis for his study into multisystem communication.

CHAPTER 5- DATA ANALYSIS

5.1 Introduction

This chapter explores the results of the investigation into the participants' conscious experience of using non-verbal techniques within the domain of their legal environment. As mentioned in the first chapter, I coded the transcribed data and then searched for common themes when organizing the data. The identified codes were looked at and the themes that recurred in the data were then highlighted.

The common themes were then placed into categories which were easily identifiable. Those codes that did not fit into categories were kept separately. The transcripts were re-read on numerous occasions to ensure that all vital information was captured and placed into the relevant categories.⁷⁰³ I then looked for any links or connections in the various categories. These direct links were highlighted by using network diagrams to simplify the process.⁷⁰⁴ After analyzing the data inductively, it became necessary to interpret the data. This important stage of the study in my view determines the relevance of the study in

⁷⁰³ Nieuwenhuis J. Analysing qualitative data in Creswell J.W. *et al. First Steps in Research* (Van Schaik Publishers: Pretoria 2010) at 99.

According to Nieuwenhuis, by organising words into themes or patterns and then arranging them into coherent categories, one is able to establish meaning.

⁷⁰⁴ Ibid.

that one is now in a position to establish the findings and results which hopefully can establish new insights into the research area.

Before discussing the common and contrasting themes and patterns that emerged from an analysis of the transcribed data, it is necessary to provide a brief description of the participants. In order to comply with the ethical code that was agreed to between the parties, none of the participants' true names will be revealed. Due to the legal privilege that exists between the attorney and client, I chose not to sit in on the consultation process between the two. However, I have practiced as an attorney for nearly a decade, and I have worked as a supervisory attorney at the Justice Centre which has enabled me to observe junior attorneys as well as participate in consultations with clients. My experiences will be threaded throughout the chapter in that it would provide further experiential illustration to the interviews with the attorneys.

5.2 A Brief Description of the Participants

The 10 participants in this study are all practicing attorneys with legal experience ranging from 1 to 20 years.

Sbu is a 50 year old African male attorney who joined the legal profession some 7 years ago. He obtained his LLB degree at the University of Zululand. Before joining the profession, he lectured communication science for many years at a tertiary institution. He consults with 3 to 7 clients on a daily basis. He also attends court regularly conducting criminal trials on a daily basis. He chose law as a

career path because he wanted to do court work and he enjoys “unearthing” the truth when people are trying to conceal the truth.

Sima is a 35 old Indian female attorney who has 12 years experience as an attorney. She obtained her LLB degree at the University of Durban Westville. In addition to her LLB degree she also successfully completed a Masters degree in Law. She practiced on her own accord for a number of years before joining the Legal Aid Board. She sees approximately 4 clients a day and conducts criminal trials on a daily basis. She chose to study law because she found it interesting and enjoyable to watch the court room drama on television.

Jon is a 30 year old White male attorney who has been practicing for approximately 6 years. He obtained his LLB degree at the University of Natal in Durban. He worked for a private law firm before joining the Legal Aid Board. He consults with 4 to 7 clients on a daily basis. He also conducts criminal trials on a daily basis. He chose law as a career path because he has a passion for it. He also sees lawyers as people who add value to the development of communities.

Priya is a 23 year old Indian female candidate attorney who has been practicing for just over 1 year. She obtained her LLB degree at the University of Zululand. She sees on average 5 clients per day. She chose law as a career path because she wanted to do something in the professional field and was attracted to it.

Sipho is a 28 year old African male attorney who has been practicing for 6 years. He completed his LLB degree at the University of Natal, Pietermaritzburg. He

sees 4 to 5 clients on a daily basis and also does court work. He chose law as a career path because he finds it interesting. He enjoys court work and dealing with the different legal scenarios.

Mandla is a 33 year old African male attorney who has been practicing for 8 years. He completed his LLB degree at the University of Zululand. He sees 1 to 2 clients a day and conducts numerous criminal trials. He was inspired to do law after reading the novel, "Isichabu se Nkantolo" at school and he finds the legal arena challenging but enjoyable.

Shireen is a 32 year old Indian female attorney who has been practicing for 8 years. She completed her LLB degree at the University of Natal, Durban. She worked at a private firm before joining the Justice Centre. She sees a minimum of 4 clients a week and attends court twice a week. She chose law as a career path because she is outspoken by nature and "likes getting the bad guy into prison".

Jabu is a 31 year old African female attorney who has been practicing for 7 years. She studied law at Rhodes University and then transferred to the University of Natal, Durban where she completed her LLB degree. She consults with clients at the office and also does criminal work. Watching the television programme LA Law got her interested in law. She had a sense of wanting to assist the community and felt that law was the best option in reaching a wider range of people across different disciplines.

Tando is a 32 year old African male who has 6 years experience as an attorney. He completed his LLB degree at the University of Zululand. He consults with approximately 6 clients on a daily basis and also conducts criminal trials on a daily basis. He chose to go into law because there were not many lawyers in the family. He also saw the need to promote justice and defend people who were treated unjustly.

Siya is a 43 year old African male attorney who has 18 years experience in the legal field. He has gained invaluable legal experience whilst in private practice, prosecution and at the Legal Aid Board. He completed his law degree at the University of Zululand. He consults with a number of clients on a daily basis whilst also finding the time to conduct criminal trials. He chose law as a career path after being exposed to the litigation process during a family dispute. He enjoys “thinking on his feet” and helping people who are in dire straits.

All the participants were interviewed within the confines of their office so that the researcher could explore their conscious experience of communicating within the familiar setting of their legal environment. It was also the ideal opportunity to observe some of the participants in their working environment. It was interesting to note that some of the junior attorneys such as Tando and Siphon (1-6 years experience) paid little attention to their own appearance as well as the office appearance during the interview. Tando's shirt was not tucked in at the back

whilst Sipho's gown was displayed haphazardly on his table amongst the many files strewn across the table. It was interesting to note that some of the senior attorneys such as Siya and Sima (6-18 years experience) remained well groomed throughout the day. Their formal attire was neatly in place even during the afternoon session and their files were neatly set kept on one side of the table. Their gowns were neatly placed in the corner and a professional environment was maintained throughout the period of observation.

5.3 Reliability of the Coding Process

Many common themes and issues emerged (which will be discussed in detail in the paragraphs below) after an extensive evaluation of the data captured during the interviews with the participants. I made use of inductive codes which emerged from the data captured. Once the coding process was finalized I searched for new information and thereafter attempted to summarize the data. The set of codes were organized into themes or categories which were labeled. I went to great lengths to ensure that the "trustworthiness" of the data was not compromised at any stage. This was done by comparing the data gathered during the interviews with the written notes that was taken by the research assistant. An assistant also went through the coding process to aid the credibility of my study. The use of an assistant enabled me to check whether I captured the ideas and themes correctly. The categories that emerged from the independent coder were then compared to the categories that emerged from the researcher. The reliability of the coding process was therefore maintained.

5.4 Common Themes

From the summaries of my data, the following themes emerged:

5.4.1 Challenging Aspects of the Legal Profession

5.4.2 Non-verbal Communication

5.4.3 Interaction

5.4.4 Body Language

5.4.5 Silence

5.4.6 The Experience of Deception

5.4.7 Culture

5.4.8 Confusion

5.4.9 Facial Expressions

5.4.10 The LLB Curriculum

5.4.5 Conclusion

This chapter analysed the experiences of ten attorneys. The themes and patterns that emerged from the analysis of their experiences were set out. The themes that emerged from this study broaden our understanding of the phenomenon of non-verbal communication in practice. The experiences of the attorney during the consultation process provided valuable insight into their responses, attitudes, meanings as well as to the interpretations that they attribute to non-verbal communication and its role in the legal profession. In the next chapter, the merits

of the study are assessed and the theories and literature discussed in the previous chapter is juxtaposed with the results of the study.

CHAPTER 6 - RESULTS AND EVALUATION

6.1 Introduction

In the previous chapter, the experiences of the ten attorneys were discussed. Their verbatim narratives were given and common themes and patterns that emerged were discussed as part of the phenomenological research of the study. The findings constitute an integral part of this study in an effort to gauge the importance and relevance of non-verbal communication to the attorney and the legal profession in general.

The aims and objectives of this study are to assist in restoring the standard and quality of services offered by attorneys to their clients by:

◇ Understanding their experiences during the consultation process;

- ◇ learning of their difficulties during the communicative process with the client;
- ◇ understanding the meaning and substance that they attribute to non-verbal communication;
- ◇ understanding their non-verbal experiences during the consultation process; an
- ◇ and learning of their views on the role and future of non-verbal communication in the development of the communicative legal skills of the attorney.

This chapter also presents an overview of the current study in terms of its relative strengths and weaknesses. It is hoped that the information gleaned in this study will create the ideal platform for future research on the topic. The research may assist in the process of theory-building in the legal field as well as a review of the LLB curriculum at tertiary level.

6.2 Results

6.2.1 Findings from the literature review

From the available and relevant literature it was found that non-verbal communication is an essential cog in the communicative process. It is especially important during the consultation process. Non-verbal communication is vital during the early stages of the consultation process as it impacts greatly on first impressions. First impressions provide the platform from which attorneys can make judgments and decisions. It is vital for the attorney to set the “stage” for the consultation process and to motivate the client to participate freely and accurately.

Non-verbal communication in the form of personal appearance, body language, vocal cues, facial expressions, personal space and posture play important roles in obtaining accurate information and deserves the attorney's conscious attention. Establishing good rapport with the client through a handshake or smile can impact on the success of the consultation. Getting the client to talk is vital to the consultation process and this can only be done through establishing a trusting environment. An understanding of non-verbal communication is therefore vital to establishing good interactive skills.

Adopting a realistic approach towards the legal process is crucial to "laying the building blocks" for the "foundation stage" of improving the legal skills of the attorney. Improving legal representation and predicting judicial decisions is possible if one looks for discernible patterns in the entire legal process rather than just the existing legal rules. In terms of this study, adopting a realist legal approach to analysing the non-legal components of legal communication would form the "groundwork" for the process of improving the legal skills of the attorney.

Once the groundwork has been laid, semiotics is crucial to uncovering the various sign component structures that are present during the interview process. A semiological approach to analysing the world of the attorney is crucial to understanding non-verbal communication. Like realism, semiotic investigations are dominated by observation and reasoning. The framework of non-verbal

communication is based on a channel of sign systems which if analysed correctly will convey value and meaning to the attorney and client. The consultation process is laden with verbal and non-verbal signs that produce meaning, resulting in “the creation of social relationships, systems of knowledge and cultural identity. The literature review has highlighted the importance of exploring signs (specifically non-verbal) within the confines of the legal arena. This sign exploration process can be made possible by applying Stamper’s semiotic ladder and Dimitrius’s S.P.E.E.D. method as analytical tools in the communicative legal process.

Law students need appropriate and professional training in respect of non-verbal skills. This can be done at tertiary level as well as professional legal training during articles of clerkship. Adequate support must be available to assist mainstream lecturers in developing their skills and competencies required to teach non-verbal communication. The legal profession needs to be positive in terms of their perceptions towards this form of communication which has received very little attention in the past.

6.2.2 Findings from the interview stage

Common themes emerged during the analysis of the participant’s experiences of their interactions with clients. The researcher made it a point to record the distinctive features of each experience in its social context. However even though

the distinctive nature of each experience was noted, due regard was given to them in relation to each other and not as independent entities. The table marked Figure X below displays the themes extracted from the experiences of the participants. These themes were gleaned from the interviews with the participants. The themes divided by the total number of participants reflects the percentages arrived at in the summary below.

For the purposes of convenience, the participants are reflected by the letter P together with a numerical denomination.

| Themes | P1 | P2 | P3 | P4 | P5 | P6 | P7 | P8 | P9 | P10 | Total |
|-------------------------------------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|------------|--------------|
| Difficult/ Challenging | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 10 |
| Interaction | 1 | 1 | 1 | 1 | | | 1 | 1 | 1 | | 7 |
| Deceit | 1 | 1 | | 1 | 1 | | | | 1 | | 5 |
| Non-verbal Communication | 1 | | | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 8 |
| Body language | 1 | 1 | | | 1 | 1 | 1 | 1 | 1 | 1 | 8 |
| Facial expressions | | | | 1 | | 1 | 1 | | 1 | 1 | 5 |
| Culture | | | | | | | 1 | | | 1 | 2 |
| Caution | 1 | 1 | | | | | | | 1 | 1 | 4 |
| Silence | 1 | | | | | | | | | | 1 |

| | | | | | | | | | | | |
|------------------|---|---|--|---|---|---|---|---|--|--|---|
| Confusion | 1 | 1 | | 1 | 1 | 1 | 1 | 1 | | | 7 |
|------------------|---|---|--|---|---|---|---|---|--|--|---|

Fig. X.

All the participants in this study (100%) experienced working as an attorney extremely challenging. It appears that different components of their profession such as court work and consultations with clients caused the greatest difficulty for them. These areas of difficulty appeared to contribute to a general feeling of inadequacy and low morale amongst many of them. The younger attorneys found the job especially challenging. It appeared that this was due to a modest degree of training in respect of certain legal skills as well as the lack of experience in practice.

Moral dilemmas around representing guilty clients appeared to contribute significantly towards feelings of guilt and anguish. One of the participants indicated to the researcher during a follow-up informal conversation that she did not want to reveal the internal conflict and stress that she goes through on a daily basis because she may be deemed a “weak attorney” by her colleagues.

It became apparent that some of the participants chose to detach themselves from their “work society” for fear of complication and emotional attachment with their clients. This notion is reinforced by the researcher’s observation of a number of candidate attorneys whilst in the employ of the Justice Centre many years ago. A discussion with the supervisory attorney confirmed that some of the

participants appeared cold and impassive during their interactions with their clients. I was told that they failed to display any emotion during the consultation process.

The majority of participants (70%) indicated that interacting with clients during the consultation process posed the greatest challenge for them. Some of the participants found the experience of dealing with different personalities cumbersome. Levels of tension increased when there appeared to be a “breakdown in communication” between the attorney and the client. The participants indicated that they experienced humiliating treatment at the hands of some clients who felt that they lacked the experience and skill to represent them. Communicating across different language barriers exacerbated the process of “getting through” to client on a personal and professional level. Gaining the trust and confidence of the client posed a serious challenge to most participants.

Some of the participants (50%) felt that their clients were not being truthful during the initial consultation. Sbu mentioned that the consultation process became difficult when the body language was not in sync with the verbal messages. Priya indicated that it took a while for the truth to emerge from some of her clients. Jon indicated that clients at times “manufactured” instructions in their mind. Sima mentioned that clients seemed hesitant at first because they were not familiar with the legal process. She picked up that some of her clients remained distant

and silent and were picky about which questions they should answer. Therefore the theme of deception remained prevalent during the interview process.

In the literature review, it was mentioned that the best way for an attorney to improve her skill of reaching the truth is to observe process and comprehend the non-verbal meanings within the correct context. An awareness of external stimuli and different sign structures are crucial components when observing the client. To avoid the possibility of miscommunication and misinterpretation, the attorney must be aware of the different levels of communication. By applying the semiotic ladder as a model, and taking into account the social context, the communicator's intention, the physical aspect, the relationship with the recipient and communicator, the structure, meaning and properties of the sign, it becomes possible to delimit the possible interpretations that may be attached to a particular sign. Once the attorney is in a position to establish how and what the sign means, it becomes easier to detect incongruencies between the verbal and non-verbal component. The participants' difficulty in getting their clients to divulge vital and essential information may be attributed to their inability to observe and comprehend the different sign structures that construct reality. Semiotics is crucial in determining how meaning is made within the legal environment.

At least 40% of the participants indicated that they experienced humiliating treatment at the hands of some clients who asked called them "state attorneys" and at times asked for them to be replaced by a more qualified attorney. The

clients by and large failed to “open up” during the consultation process. They remained cautious during the consultation process. The participants were asked for their input as to what caused their clients to refrain from “opening up”. Many felt that the legal process is not “user-friendly” for the client. According to Sima, many of the clients do not understand the legal process. Sbu was of the view that guilt, fear and the approach of the attorney were factors that all contributed to the cautious nature of the client during the consultation process. Jabu felt that the client is forced into a “new setting” or environment and therefore does not know what is really required. Tando mentioned that the clients are unwilling to divulge information because they are fearful of the attorney and the legal process. It is only once they gain your confidence and relax do they become more comfortable.

There was a general feeling by 70% of the participants that confusion and a lack of understanding of the communicative process hindered their ability to effectively interact with the client during the consultation process. Many of the challenges experienced by the participants during the consultation process can be attributed to a “communicative ineptness” on their part. This appears to correspond with Smith and Nester⁷⁰⁵ who looked at the concept of “communicative ineptness” and suggested that it stems from the client’s reaction to the attorney’s failure to communicate effectively. Such attributions, they theorise, can be dealt with by lawyers communicating in such a way as to deal

⁷⁰⁵ Smith A.E. and 1977 Nester P. Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* at 276.

successfully with those clients who are not themselves good communicators and this will result in the feeling of failure becoming less frequent.⁷⁰⁶

Awareness of the different components of the attorney-client communicative process and the improvement of communicative techniques are paramount in addressing some of the challenges facing attorneys who grapple with the interactive process.⁷⁰⁷ As mentioned in the earlier chapters, communication comprises of both a verbal and non-verbal component. The participants revealed a basic understanding of non-verbal communication. By their own admission, their use of the non-verbal component during the consultation process was limited. This was mainly due to a lack of training and understanding of non-verbal communication.

Fuller and Quesada⁷⁰⁸ in their studies revealed that communication whether it is verbal or non-verbal, between lawyer and client is necessary in order to determine initial needs and expectations of both parties during the interaction process. If the communication is lacking, then the hope of success and satisfaction is negatively affected.⁷⁰⁹ In the literature review, it was mentioned that the law profession is such that it creates an environment where the lawyer should be in a position to utilise semiotics within the context of their daily activities. An understanding of the legal environment allows for the lawyer to

⁷⁰⁶ Ibid.

⁷⁰⁷ Smith A.E. and Nester P. 1977 Lawyers, Clients, and Communication Skill *Bingham Young University Law Review* at 277.

⁷⁰⁸ Fuller F. and Quesada 1973(23) Communication in Medical Therapeutics *J. Com.* at 361.

⁷⁰⁹ Ibid.

understand her own sign interpretations and recognize the dynamics of the legal world within the context of reality. The communicative ineptness on the part of a number of the participants may be attributed to their failure in recognizing and understanding the binary thought patterns, sign systems and semiotic processes that are embedded in the attorney, client consultation process.

I highlighted the work of Stamper in previous chapters, as one who believed that signs enable one to perform actions. These actions performed in relation to the sign define the meaning of the sign which is then linked to reality which is socially construed and constantly altered through the use of signs. However, a lack of awareness of one's own sign system, as well as that of the client and the legal environment would in most instances result in a consultation that is superficial and inaccurate.

The difficulty in interaction is a serious cause for concern bearing in mind that all the participants confirmed consulting with clients on a daily basis. This also, to an extent, verifies the researcher's hypothesis that the communicative legal skills of the young attorney require urgent attention and development in order for the standard of legal work to improve. This may suggest, at a therapeutic level, training in the use of non-verbal communication and semiotics that could form an important part of an intervention strategy that assists in alleviating some of the challenges discussed above.

The Pie Graph Figure Y below shows the multitude of non-verbal components that should be used during the consultation process in order to facilitate interaction.

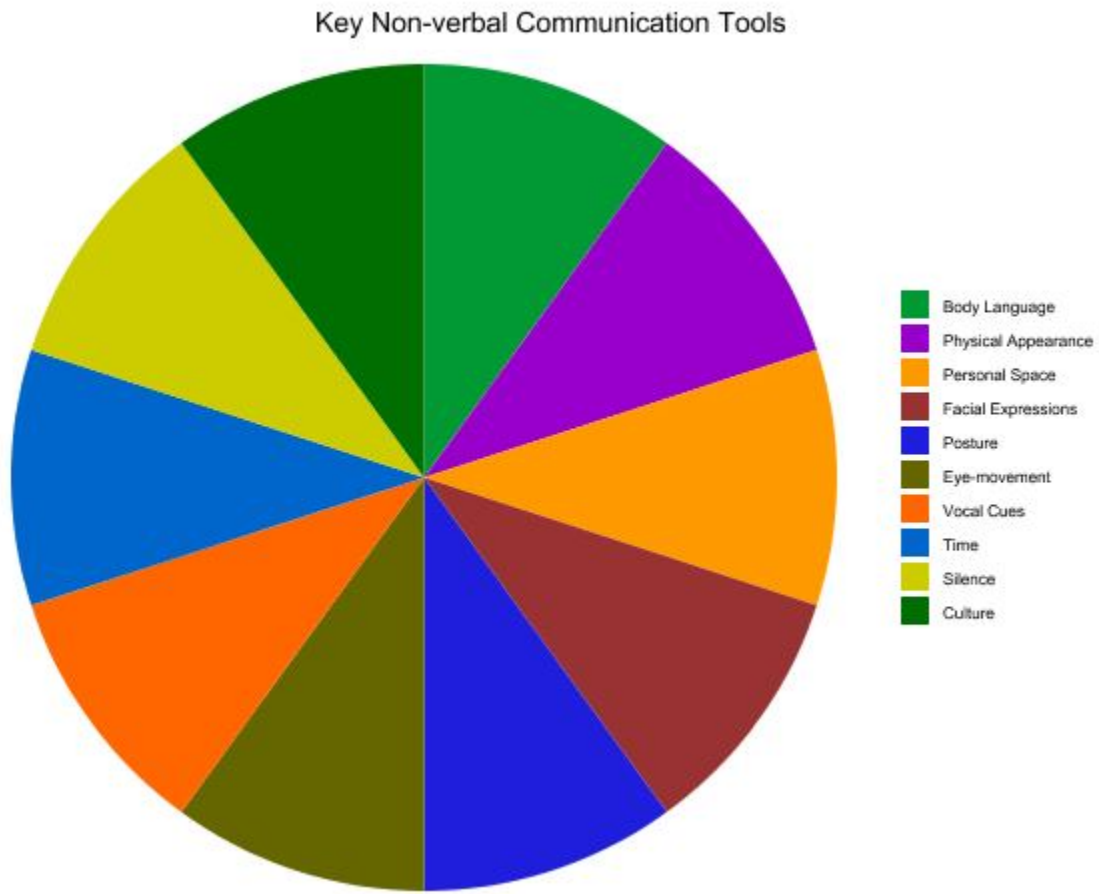


Fig. Y.

The majority of participants (80%) revealed a basic understanding of non-verbal communication. By their own admission, their use of the non-verbal component during the consultation process was limited. This was mainly due to a lack of training and understanding of non-verbal communication.

Most participants (80%) referred randomly to body language techniques and signs that they used during the consultation process. 50% of the participants mentioned that facial expressions was an integral part of their consultation technique. The majority of participants indicated that they used non-verbal communication at times during the consultation process and to a lesser degree at trial. Priya mentioned that she smiles and nods her head to show the client she is listening attentively. Shireen uses “warm gestures” such as smiling to make the client feel at ease. Siya mentioned that it is important to be aware of your facial expressions, the way you look at the client and your approach during the “welcome stage” of the consultation.

According to Jabu, first appearances do make a difference and she stressed the importance of receiving the client in the proper manner. She felt those small gestures such as clearing the desk, nodding, maintaining eye contact and ignoring calls made the client feel appreciated during the consultation process. However, Siphon mentioned that he uses non-verbal cues on a subconscious level. Sima and Jon admitted to hardly ever using non-verbal cues during the consultation process. Of concern to the researcher is that none of the participants made any mention of time, space or attire as vital cogs in their communicative process.

The Pie Graph Figure Z below depicts only a small percentage of the non-verbal components used by the participants during the consultation process.

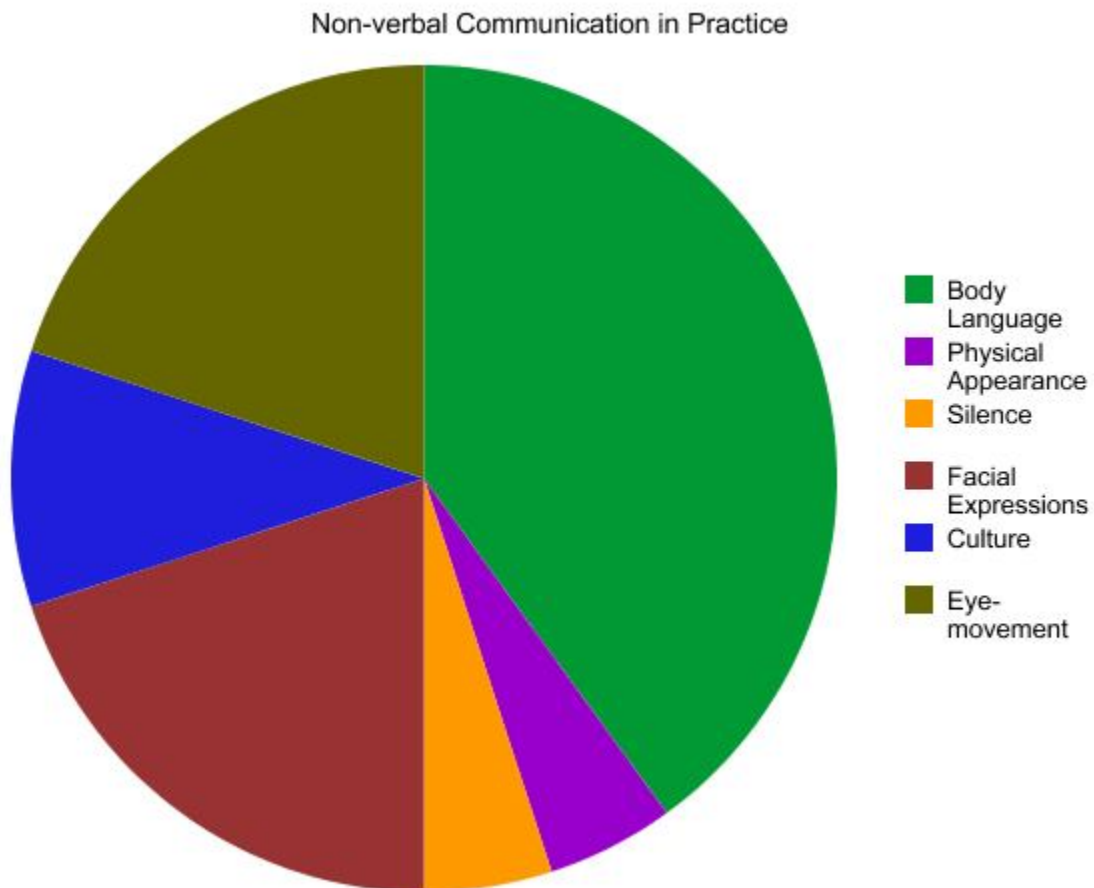


Fig. Z.

The participants definition of non-verbal communication merely “scraped the surface” in terms of a true understanding of the intricacies of non-verbal communication. However, hardly any of the participants made mention of key primary non-verbal functions such as physical appearance, personal space, facial expressions, posture, eye contact and vocal cues. Only 20% of the participants mentioned culture as a factor that is crucial to the communicative

process. This is startling considering the diversity of cultures that exist in South Africa. According to E. T. Hall, the famous anthropologist it is important to distinguish between the personal or organizational culture of people in order to fully understand them.⁷¹⁰ It is distressing to note that Siya was only one of two participants to highlight the role that culture plays in analysing non-verbal communication. Culture is a key sign system that may impact on one's evaluation of non-verbal behaviours. According to Work,⁷¹¹ all communication, except to an extent intrapersonal is cross-cultural. In other words, each human being has his or her own cultural system which they take into interactions with others. The participants made no mention of getting familiar with and understanding their clients' cultures as a way of facilitating interaction. This is a cause for concern considering that culture is an important sign system that impacts greatly on the communicative process. The diversity of cultures in South Africa dictates that attorneys make use of non-verbal elements to minimize the chances of misunderstanding during the interactive process.⁷¹² For example, if a client is late for the consultation, it may be because the client is polychronic rather than discourteous or indolent.

Only one of the participants (10%) regarded silence as important component of non-verbal communication. One other (10%) considered physical appearance as a non-verbal component that is crucial to the communicative process. This

⁷¹⁰ E.T. Hall *Understanding Cultural Differences, German, French and Americans* (Intercultural Press : Yarmouth 1990).

⁷¹¹ Work W. 1981(30) ERIC Report: Communication across Cultures *Communication Education* at 2.

⁷¹² Ibid.

indicated a lack of awareness and understanding of essential cogs in the communicative process. Sbu was the only participant to mention silence as a component in the non-verbal communicative structure. Silence is an important cog in the communicative process and it complements speech.⁷¹³ According to Kurzon,⁷¹⁴ silence plays an important role in social interaction and there may be a number of reasons (be it intentional or unintentional) for a person not responding to the speaker or a situation. Intentional silence may be a cultural practice that is aimed at self analysis whereas unintentional silence may be due to a variety of reasons but generally embodies semiotic experiences.⁷¹⁵

However, Kurzon views silence as an important component of legal proceedings where some legal systems consider the silence of the accused as an expression of guilt whereas other systems do not consider silence as a key negative factor.⁷¹⁶ Kurzon defines silence as a sign and looks at a sociopragmatic model of the interpretation of silence where in some instances the personal inhibitions of a person gives rise to the silence and in others there is a deliberate attempt to be uncooperative.⁷¹⁷ It is therefore imperative for the attorney to interpret silence in the correct context and this may lead to more meaningful interactions between the attorney and client.

⁷¹³ Dauenhauer B.P. *Silence: The Phenomenon and its Ontological Significance* (Bloomington Indiana University Press 1980).

⁷¹⁴ Kurzon D. *Discourse of Silence* (John Benjamins Publishing Company, Amsterdam 1998).

⁷¹⁵ Greene A.B. *The Philosophy of Silence* (Richard R. Smith, New York 1940).

⁷¹⁶ Kurzon D 1995(23) The right of silence: A socio-pragmatic model of interpretation *Journal of Pragmatics* at 55-69.

⁷¹⁷ Ibid.

The use of semiotics in them analysing non-verbal codes and behaviour was almost non-existent. It was highlighted in previous chapters that semiotics forms an important cog in non-verbal communication and their lack of awareness in respect of the non-verbal sign structures that permeated the legal environment contributed to their difficult experiences during the interactive process. In the literature review, the primary functions of non-verbal behaviour as defined by Argyle⁷¹⁸ were discussed. These included expression of emotion which occurred mainly through the face, body and voice. Communication of interpersonal attitudes through non-verbal signals such as touch, tone of voice and gaze is another. Synchronization with speech such as nodding of the head constitutes another primary function. Thereafter, we have self-presentation through non-verbal attributes like appearance. Finally rituals in the form of handshakes and other forms of greeting make up the primary functions of non-verbal behaviour.

Most of the participants used rituals to greet the client. It emerged that some of them made use of rituals unconsciously. However, hardly any of the participants made mention of the other key primary functions. This indicated a lack of awareness and understanding of essential cogs in the communicative process such as physical appearance, personal space, facial expressions, posture, eye contact and vocal cues.

⁷¹⁸ Argyle M. *Bodily Communication* 2nd ed. (New York, NY: Meuthen 1998)

The findings of this study suggest that the majority of participants perceive their involvement in the consultation process as being controlled by the verbal component. This is corroborated by the researcher's observation of some of the participants. Two of the participants were not conscious of their appearance during the interview process. Their shirts were not tucked in and their gowns were strewn across the table. They displayed very few "warm" gestures such as forward leans, upright posture and decreased distance. I was told by the supervisory attorney that some of the participants always appeared cold and impassive during the consultation process. Most of the participants seemed to lack awareness about spatial relations and its influence on interaction. There was no mention of dress and office décor as factors that play a role in establishing a relationship between non-verbal behaviour and communication.

Significantly, absent from the participants accounts of non-verbal communication was the issue of perception. Studies done by Hickson and Stacks⁷¹⁹ revealed that perception is an important part of non-verbal communication. By being attentive and utilizing non-verbal behaviours that show propinquity we send out positive signals.

Other sign systems that impact on the communicative process include the physical environment, the intensity of the setting and the maturity of the individual. Some of the other participants also mentioned facial expressions, eye

⁷¹⁹ Hickson M.L. & Stacks D.W. Non-verbal Communication Studies and Applications 1993
Dubuque IA: WM C Brown Communications.

movements and hand gestures in their response to the question on non-verbal communication. Before the interview process, I took time to observe the office settings of each participant. Unfortunately, the settings at most offices at the Justice Centres around the country are open plan where privacy becomes an issue. Looking at the semiotics of the settings, the offices appeared to be more like cubicles with very little leg space for the client. Two chairs, a table and a cabinet were all that one could find in most offices. All offices were painted in beige which added to the poor lighting in most offices. The chairs which were blue were placed very close to the desk and there was not much space between myself and the attorney. There was definitely an imposing desk (attorney) – chair (client) set-up which created a vertical top-down interaction scenario which can hinder the interactive process. A round table indicating participatory interaction or a lounge suite would have created a more relaxing environment for the client. As indicated earlier, files were strewn across the table or kept on the floor which created an environment of general untidiness. Some of the participants had their gowns placed on their table which again added to an environment of general untidiness. It was clear to me that most of the participants had very little clue as to the importance of the semiotics of settings in a legal environment.

From the literature review, it is apparent that non-verbal communication is fundamental to effective human interaction.⁷²⁰ According to Remland, despite the importance of non-verbal behaviour in most communicative contexts, “little has

⁷²⁰ Duke C.R. 1974(25) *Nonverbal Behaviour and the Communication Process College Composition and Communication* at 397-404.

been done to synthesize what we know about the impact of non-verbal communication in the courtroom environment.”⁷²¹ Remland sees this position as unfortunate as “few contexts depend more on the uses of both the spoken and unspoken discourse.”⁷²² The underutilisation of non-verbal communication applies equally so to the attorney-client consultation process. Most of the participants in this study lacked a deep understanding of non-verbal communication. The result is the underutilisation of non-verbal communication which severely hinders their ability in certain instances to extract vital information during the consultation process.

All the participants felt that an understanding of non-verbal communication was vital to lawyers as it would broaden their communication skills. The participants made it quite clear that non-verbal communication did not form part of their legal studies at tertiary level. The researcher noted that the participants completed their LLB degrees at different institutions in Kwazulu Natal. This indicates that non-verbal communication does not form an integral part of the LLB curriculum at most tertiary institutions across Kwazulu Natal. This is startling considering that the “art of communication” is an integral part of the legal process. It was interesting to note that despite none of the participants having studied non-verbal communication during their LLB studies, all of them vehemently expressed the importance of introducing same at tertiary level.

⁷²¹ Remland M.S. The Importance of Non-verbal Communication in the Courtroom 1993 (Paper presented at the Annual Meeting of the Eastern Communication Association 84th New Haven Cape Town) Information Analyses – Speech Conference Papers.

⁷²² Ibid.

The importance of the communicative process is outlined in the work of Fuller and Quesada,⁷²³ where they held that, “.....in the practice of any profession in which one person seeks to help solve the problems of another, the nature of communication between them is an important factor influencing whether either or both will define the results as successful.” Little has been done to improve lawyer communications in the legal arena.⁷²⁴ By improving lawyer communications, we increase client satisfaction, thereby improving on the reputation of the legal profession. This can be achieved by incorporating non-verbal communication into the LLB curriculum at all tertiary institutions throughout South Africa.

The participants made it clear that from their experiences that a command of non-verbal communicative techniques was essential to being an effective and skilled lawyer. All the participants felt that non-verbal communication can add value to the legal profession. Some of the participants felt that non-verbal techniques can be useful during the consultation process whilst others were of the opinion that it can be used effectively during the court process. Tando felt that non-verbal communication can be useful during the consultation process, whilst Jabu and Shireen were of the opinion that it can be used effectively during the court process. She felt that court decisions could be different if emphasis was also placed on the non-verbal aspects.

⁷²³ Fuller F. and Quesada J. 1973(23) *Communication in Medical Therapeutics* 1973 (23) *J. Com.* at 361.

⁷²⁴ Milford L.S. 2000(27) *Nonverbal Communication Litigation* at 32.

Mandla and Tando felt that it is useful in trying to “read” the client. Jabu further pointed out that it is essential in helping to improve the image of the attorneys and status of the profession. Jon appeared sceptical when posed with the question, as he felt that the courts focus mainly on the texts and evidence rather than body language. Siphon felt that non-verbal communication can add value to the profession but only to a limited extent. Mandla expressed the view that you can obtain more information from clients by using non-verbal techniques. The participants expressed genuine interest in getting to understand non-verbal communication and using that knowledge as a means of improving their communicative legal skills.

There was a general feeling that court decisions could be different if emphasis was also placed on the non-verbal aspects. Some of the participants felt that it could be useful in trying to “read” the client. Some of the experienced participants indicated that non-verbal techniques could be used to detect deception and facilitate interaction. All the participants were adamant that non-verbal communication is underemphasised in the legal profession as compared to verbal communication. In fact Jon mentioned that it was not emphasised at all. Siphon never heard of non-verbal communication in the legal sector. Siya accentuated the importance of non-verbal communication in the courtroom scenario. All the participants unanimously agreed that non-verbal communication has a vital role to play in the legal arena.

One of the participants expressed the view that non-verbal communication may be essential in helping to improve the image of the attorneys and status of the profession. On the opposite side of the spectrum, there were a few participants who felt that non-verbal communication was not as important as verbal communication because the courts focused mainly on the texts and evidence rather than body language. There was a general feeling amongst most of the participants that you could obtain more information from clients by using non-verbal communication. Those participants with legal experience were able to call on that experience when relying on non-verbal communication during the court and consultation process. The participants expressed genuine interest in getting to understand non-verbal communication and using that knowledge as a means of improving their communicative legal skills.

6.3 Evaluation of the Study

It is important for the researcher to provide an evaluation of the present study in terms of its relative strengths and weaknesses. This section will look at the strengths and weaknesses of the study as well as suggestions and recommendations for future research.

6.3.1 Strengths

The study commenced with a theoretical overview of the existing literature on non-verbal communication. We know from the literature available on non-verbal

communication that it plays an important role in the process of social influence, communication of emotion and interpersonal relationships. The study focused on a relatively “untouched” area of legal communication. Even though there has been limited work done on non-verbal communication in the legal arena, we know from the literature available on non-verbal communication across various other disciplines that it can play a vital role in improving the communicative legal skills of the attorney. A platform has been created for contributions towards theory-building practices in this field.

A qualitative phenomenological approach broadened our understanding of the participant’s experiences and I was allowed to be privy to their personal interpretations and perspectives on non-verbal communication in the legal arena. By recording and documenting their experiences, valuable insight was gained into their emotional and psychological responses to their legal experiences. The analysis of their experiences yielded unique and distinct themes to emerge, which was then formulated into a theoretical experience.

The “purposive sampling” approach was followed. This approach permitted the selection of a specific sample group (attorneys with varying degrees of experience) and this allowed for a greater understanding in respect of their outlook on the importance and relevance of non-verbal communication to the attorney and the legal profession in general. The participants represented samples from different cultural and ethnic backgrounds. In being given the

opportunity to understand their experiences in their legal setting, I was able to achieve many of the aims and objectives of the study. The decision to adopt the interview design as compared to a questionnaire format allowed the immediate and true experiences of the participants to emerge.

At the outset of this study I had set out to:

- ◇ understand their experiences during the consultation process;
- ◇ learn of their difficulties during the communicative process with the client;
- ◇ understand the meaning and substance that they attribute to non-verbal communication;
- ◇ understand their non-verbal experiences during the consultation process;
- ◇ learn of their views on the role and future of non-verbal communication in the development of the communicative legal skills of the attorney.

Gass and Seiter⁷²⁵ outlined the importance of non-verbal communication. They indicated that non-verbal communication can be used to create positive and negative impressions of ourselves.⁷²⁶ It can be used to construct and destroy relationships as well as mould expectations of people.⁷²⁷ It fashions perception as well as behaviour.⁷²⁸ It is important in emotional communication and therefore central to interpersonal relationships.⁷²⁹ The fact that non-verbal communication

⁷²⁵ Gass R.H. and Seiter J.S. *Persuasion, Social Influence and Compliance Gaining* (United States of America: Pearson Education, Inc. 2003).

⁷²⁶ Ibid.

⁷²⁷ Ibid.

⁷²⁸ Ibid.

⁷²⁹ French L.R. 1977(16) *Teaching the Nonverbal Experience Theory into Practice* at 176-182.

can be unintentional and unconscious makes it the ideal skill for the attorney to master.⁷³⁰

If the attorney can be successful in looking credible and authoritative, then the attorney becomes more persuasive.⁷³¹ Non-verbal cues can be significant in developing a good rapport with the client.⁷³² Through non-verbal behaviour, the attorney can reinforce expectations and facilitate interaction.⁷³³

From the literature study it emerges that the current one-dimensional communicative legal system constitutes a challenge to most young attorneys especially the complexities of the consultation process. The participants' perfunctory recitation of legal rules during the consultation process played little or no part in improving their interaction with clients. The need for them to see beyond their formalistic approach to applying the law was clearly evident.

I was able to establish the lawyers' perceptions of the implementation of non-verbal techniques during the consultation process. Many of the participants expressed difficulty in interacting with the client. By their own accord, most of them lacked any understanding of the different components of non-verbal communication and its sign structures. However, all the participants

⁷³⁰ Ibid.

⁷³¹ Sarat A. and Felstiner W.L.F. 1989(98) Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office *The Yale Law Journal* at 1663-1688.

⁷³² Koch R. 1971(10) The Teacher and Nonverbal Communication *Theory into Practice* at 231-242.

⁷³³ Ibid.

acknowledged the important role that non-verbal communication could play in the development of their communicative legal skills. They were unanimous in their call for the introduction of non-verbal communication into the LLB curriculum at tertiary level.

6.3.2 Limitations

Given the modest number of participants in this study, it would be iniquitous to generalize these findings to legal professionals from different sectors of the legal spectrum. The experiences of presiding officers for instance may vary from the experiences of attorneys and advocates in respect of their non-verbal communicative techniques. The experiences of the client in addition to the attorney would have provided a more holistic understanding of non-verbal communication during the consultation process.

Another issue with regard to the limitations of this study is the subjective influence of the researcher. I had been a practicing attorney in the past, and my presence and contributions during the interview and entire research process may have had an influence on the outcome of the findings. However, the phenomenologist views subjectivity as the “stepping stone” to achieving true objectivity and it is impossible to eliminate the subjective influence of the researcher in its entirety. From a phenomenological perspective, true objectivity involves using every possible means to be as true to the phenomenon as possible. In this respect, I used different means such as coding, follow -up

interviews, transcripts as well as independent assistants to verify the findings of the study and provide an evenhanded viewpoint of the experiences of the participants.

6.3.3 Suggestions for Future Research

Suggestions for future research were also generated by this study. A significant recommendation to emerge from this study was the proposal that non-verbal communication be integrated into the LLB curriculum. The participants expressed the view that a study of non-verbal communication could add value to the legal profession and in particular their consultation techniques.

The findings suggest that there is room for future work on the subject matter.

Such studies could add value to the findings of this study by:

- ◇ investigating the perspectives and experiences of the clients during the consultation process;
- ◇ learning of the client's difficulties during the communicative process with the attorney;
- ◇ understanding the meaning and substance that the client attributes to non-verbal communication;
- ◇ investigating and describing the experiences of a more heterogeneous sample of legal professionals such as private attorneys, advocates and magistrates.

CHAPTER 7 - CONCLUSION

The analysis of the communicative process implies that it comprises of an array of sign systems that influence communicative interaction. My study has clearly outlined the importance and ubiquity of the different sign systems that regulate human interaction. The growing body of knowledge about non-verbal communication has illustrated that it is the main sign system that parallels verbal communication in the human interactive process. A multidisciplinary approach to viewing the communicative process has already seen substantial changes to all facets of life. There is a realization that one can deal with anything in the environment if one links their verbal and non-verbal messages in definite ways.

Even though non-verbal communication is still a relatively underdeveloped area of research, there is enough of a picture of what it is all about to talk about it as a field in its own right. The findings in this study help us to broaden our understanding of the phenomenon of non-verbal communication in the legal arena.

The aim of this study was to establish the attorneys' perceptions of implementing non-verbal communication into their daily lives and the legal system in South Africa. The findings of the literature review clearly illustrate the importance of understanding and utilizing non-verbal components in most communicative

processes. Effective communication is a fundamental dexterity to the attorney and a lack thereof can result in the likelihood of psychological and emotional long-term difficulties. The study furnished some insights into the challenges facing most attorneys during the consultation process and there is no doubt that effectual attorney-client interaction constitutes a major challenge to the legal system in South Africa.

The participants were unanimous in their call for training in non-verbal communication. It was anticipated that this would serve as a means of alleviating some of the challenges facing them during the consultation process. Successful implementation would require attorneys to have a positive, flexible and creative approach to using non-verbal skills in consultations with clients. Although the dominating concept of legal education remains the analysis of laws and legal rules, the time has come for ruminating over perspectives of a multidisciplinary approach to building effective lawyering skills.

Acquiring knowledge as a law student goes deeper and wider than merely learning rules and procedures. The need for law teaching to be informed by other disciplines and not just legal expertise must be seen as realistic.⁷³⁴ The law student needs to see beyond the boundary of legal rules alone in order to provide the best possible representation to the client.⁷³⁵ Legal realism and semiotics

⁷³⁴ Brayne H C Counselling skills for the lawyer can lawyers learn anything from counsellors? 1998 *The Law Teacher* at 137-156.

⁷³⁵ Arulanantham A.T. 1998(107) Breaking the Rules? Wittgenstein and Legal Realism *The Yale Law Journal* at 1859.

offer the law student an apposite approach for researching and analysing systems of meaning within the communicative legal framework. A framework that integrates realism, S.P.E.E.D. and the semiotic ladder contains all the ingredients needed to improve the communicative legal skills of the attorney.

S.P.E.E.D. (Scan, Pare, Enlarge, Evaluate, and Decide) would be idyllic in analyzing the non-verbal behaviour of the client within the setting of the lawyer's office. It will improve the quality of decisions and increase the odds of reading people accurately, especially if applied in conjunction with the semiotic ladder. The application of the semiotic ladder as an additional analytical tool would create an awareness of the legal environment and its role-players. The semiotic ladder would be crucial in analysing the structure, meaning and properties of the sign within the legal environment. It would make it possible to delimit the probable interpretations that may be attached to a particular non-verbal sign. Once the attorney is in a position to establish what the sign means, it becomes easier to understand and interpret non-verbal communication.

I strongly believe that the study of non-verbal communication amalgamated with traditional legal skills would go a long way in removing the deep-seated dichotomy that still exists between theory and practice in the LLB curricula.

Annexure A

The Justice Centre Executive
Advocate B.N. Mthethwa
Empangeni Justice Centre
Empangeni
3880

15 December 2010

Dear Sir

REQUEST FOR PERMISSION TO CONDUCT MY RESEARCH WITH ATTORNEYS FROM THE EMPANGENI JUSTICE CENTRE

Kindly note that permission is hereby requested to conduct interviews with a random selection of attorneys who are based at the Empangeni Justice Centre. I will be conducting my interviews at the offices of the attorneys who are based within the Empangeni area.

The proposed research is intended to contribute to the understanding of non-verbal behaviour, and its impact and benefits to the legal profession.

This research is aimed at investigating the possibility that attorneys can develop their interactive communicative legal skills once verbal and non-verbal communication is linked together synchronously.

It is hoped that the results of the investigation will influence a review of the current LLB curriculum at the University of Zululand and other tertiary institutions in South Africa so as to incorporate the study of non-verbal behaviour into the programme. A study of non-verbal behaviour should greatly improve the practical

legal skills of the aspiring attorney, and enhance the reputation of the legal profession in South Africa.

In addition to the above, the research should be of interest to academics, legal practitioners and law students who view communication and the science of interpreting meaning as the most important tool of their trade.

Thanking you in anticipation.

Yours faithfully

Desan Iyer
Lecturer
Department of Private Law
University of Zululand

Approved by the Justice
Centre Executive

Annexure B

PERMISSION TO USE MY RESPONSE FOR ACADEMIC RESEARCH

Please complete this section to show that an actual person participated in this interview. The information that you provide during the interview is strictly confidential. Your personal identity will not be revealed to your colleagues, members of the legal profession or anyone else in a position of authority.

I hereby give permission that my responses may be used for research purposes provided that my identity is not revealed in the published records of the research.

Initials and surname: _____

Signature: _____

Date: _____

Annexure C: Transcript of Interviews

KEY:

R – RESEARCHER

Q- QUESTION BY
RESEARCHER

I- INTERVIEWEE

INTERVIEW 1.

Good day. My name is Desan Iyer. As an admitted attorney, lecturer in law and a researcher I thought it would be a good idea to interview you as part of my research about the role and impact of non- verbal communication in the legal arena.

I would like to reiterate that the aim of this interview is to obtain your ideas and opinions regarding the role and importance of non- verbal behaviour as a communicative tool and its impact and benefits to the legal profession. It is hoped that the results will greatly improve the practical legal skills of the aspiring attorney and enhance the reputation of the legal profession in South Africa.

The interview should take around 10 minutes.

R- Are you available to respond to some questions at this time?

I- Yes.

R- May I audio record the interview as it would help me listen to it at a later stage?

I- Yes.

R- Can you please sign the letter of informed consent so I can use your response for official research?

I- Yes.

Let us begin by asking you some question about you and your work.

Q- Where did you complete your tertiary education?

A- University of Zululand.

Q- Why did you choose law as a carrier path?

A- I was interested to do court work.

Q- How long have you been practicing as an attorney?

A- About 7 years.

Q- What are the things you like most about your work, if any?

A- Unearthing the truth which people are trying to conceal. By people I am referring to the normal person and even the complainant and witness.

Q- Do you find aspects of your work challenging?

A- Yes, very much so because each case is different. You learn everyday. You can do rape today and do rape tomorrow but the circumstances will be totally different.

I want to move on to the gist of my research which pertains to non- verbal communication,

Q- What is your understanding of non- verbal communication?

A- That is the congruence between what the person says and what his body says. The body could be eyes; it could be smiling or frowning and keeping quiet when he has to answer a simple question. Yes, in fact silence is an important aspect of non-verbal communication.

Q- Did you study any form of non- verbal communication during your studies at university?

A- No, not in LLB but I had been doing and teaching communication science before so it was part of my studies in communication science but not in my law degree.

Q- Do you feel that the role non- verbal communication is under emphasised in the legal profession as compared to the emphasis that is placed on verbal communication?

A- Yes it is ignored when it actually should be included. Some attempt should be made to give the students the rudiments of non- verbal communication or communication itself.

Q- Do you feel the ability to read and decode non- verbal behaviour can add value to the legal profession in general?

A- Yes, certainly I feel so because a person communicates not only by talking but even by silence and movement.

Q- Specifically in terms of the consultations process between you and the client, can you tell me how many clients do you consult with on a daily basis?

A- On a daily basis it is between 3 to 7 clients.

Q- Do you encounter any problems trying to elicit any information from the client during the process?

A- Yes you do like when the client totally shuts up and does not want to be open.

It becomes difficult sometimes if he does communicate but his body language betrays him in that what he is telling you verbally is not what actually happened.

Q- What do you think may cause the client to refrain from opening up?

A- The guilt in some cases, the fear in some cases, both in some cases or the approach of the attorney or advocate. The other thing is that they don't know the difference between the police and the attorney, particularly if he is from the legal aid board. He doesn't know the difference between the investigating officer, the prosecutor and the attorney. He thinks that it is one and the same thing.

Q- You did mention that you encounter some problems when you are trying to elicit some information from the client. How do you deal with such problems?

A- You try to make him feel comfortable, you assure him that he can confide in you, you are not part of his accusers and you are trying to assist him. Sometimes it works.

Q- Do you use any non- verbal techniques in trying to make the client comfortable or reassure them?

A- Yes, I may use them but I use it unconsciously. For instance, relaxing and telling some relevant jokes so that he sees a human being as well. I find myself using a lot of body language.

Q- So you do use non- verbal techniques during consultations process?

A-Yes it happens automatically without me consciously using it. I find myself using a lot of body language.

Q- Do you feel that an understanding of non- verbal communication can assist you when consulting with a client or when conducting a trial?

A- It can because the tone of your voice for instance goes a long way to make him, “come out of his shell” or “go into his shell”. If you use a loud tone showing that he is lying or something, he “crawls into his shell” and becomes defensive even to you, his attorney.

Q- Do you think that non-verbal communication should form part of the LLB curriculum at tertiary level?

A-Yes I feel that would assist the students to widen their communication skills.

Q- Finally, is there anything else that you would like to add about any of the above topics that we have just discussed?

A- Yes. I would add that probably language skills as well as communication skills should be introduced at an elementary stage in the LLB so that lawyers are not merely technical of what is wrong and what is not wrong but also being human in their approach.

R- Thank you very much for having participated in this interview.

INTERVIEW 2

Good day. My name is Desan Iyer. As an admitted attorney, lecturer in law and a researcher I thought it would be a good idea to interview you as part of my research about the role and impact of non- verbal communication in the legal arena.

I would like to reiterate that the aim of this interview is to obtain your ideas and opinions regarding the role and importance of non- verbal behaviour as a communicative tool and its impact and benefits to the legal profession. It is hoped

that the results will greatly improve the practical legal skills of the aspiring attorney and enhance the reputation of the legal profession in South Africa.

The interview should take around 10 minutes.

R- Are you available to respond to some questions at this time?

I- Yes

R- May I audio record the interview as it would help me at a later stage?

I- Yes

R- Can you please sign the letter of informed consent so I can use your response for official research?

I-Yes

Let us begin by asking you about general information about you and your work

Q- Where did you complete your tertiary education?

I- University of Durban Westville and I then went on to do my Masters at UNISA

Q- Why did you choose law as a carrier path?

I-I just enjoyed law and the court room drama

Q- How long have you been practicing as an attorney?

I-For about 12 years

Q- Do you find some aspects of your work challenging?

I- Yes, that's because right now I am based in the sexual offences court and dealing with children and that is a bit of a challenge

Q- What are the things you like most about your work?

I-Thinking on your feet.

Ok. Moving on to the gist of my research, that is non- verbal communication,

Q- What is your understanding of non-verbal communication?

I- Mine would be body language, the eye movement; the throat sounds of the witness or the client, the body whether it is steady or shaking. That is my understanding of the non-verbal.

Q- Did you study any form of non- verbal communication at your legal studies at the tertiary institution?

I- No.

Q- Do you feel that the role of non- verbal communication is under emphasised in the legal profession as compared to the emphasis placed on the verbal communication?

I-Yes I think it is.

Q- Do you feel that the ability to read and decode non- verbal behaviour can add value to the legal profession in general?

I- Yes, I would think so because it would basically direct you. If you can read the body language and you find that you are not breaking them down or you are not getting through to the witness, by asking them a question they might answer it in a favourable way but if you watch their body language and their eyes and they are not looking at you properly, their demeanour at the time will tell you that there is a problem and you can basically break down the witness in that way. It would be an opening to say that there is a problem and there is something being kept from you

Q- In terms of the consultation process, how many clients do you consult with on a daily basis?

I- On a daily basis I would have about 4 clients.

Q- Do you encounter problems when eliciting information from the client during the process?

I- Yes, some of them don't understand the legal procedure or that it is best that you open with the attorney. So you will find them not wanting to answer the question or they will remain silent for certain ones. For certain ones, they are busy thinking of the best answer and you can see that they are far away from you. It is very difficult in that way when the person is not talking to you and he will tell you what he wants to tell you and not answer your questions

Q- How do you get them to open up during the consultation process?

Do you make use of any non-verbal techniques to make them feel at ease?

I- I don't use non-verbal techniques to get them to open up. I would basically spin the law in my way saying that I am here to help them and its best that he assists me so that I can assist him at the end of the day. So most of them will generally answer the question or tell me what they have to say.

Q- Do you feel that an understanding of non- verbal communication can assist you when consulting with a client or when conducting a trial?

I-I think with the conducting a trial and understanding of witnesses. In consulting I don't think it's so helpful for me. But I know when you are dealing with witnesses and questioning and cross-examining witnesses it has assisted in that manner.

Q- What about when you are consulting with the client in order to prepare for the trial, do you think it is important to use non- verbal communication?

I-I don't know how you would view it but with us we don't push the client to be honest with us because at the end of the day the client will say "yes I did it" but I want to plead not guilty. Then you have yourself in a difficult position. So I am there to just get his version and for him to give me his response to the state's statements. That's what I'm there for but to consult with him and read his body language to find out whether he is lying to me, no I wouldn't use it in that sense.

Q- Do you feel that non- verbal communication should form part of the LLB curriculum at tertiary level?

I- I honestly think one should be able to understand it. You must know most of the time that the state has the onus. They lead the most witnesses and if we have training on body language, then we are able to deal with the state witnesses in a better manner. Because the demeanour of a state witness is very important and for you to be able to read that, it would assist you

Q- Is there anything else you would like to add about any of the above topics?

I- No

R- Thank you very much for having participated in this interview.

INTERVIEW 3

Good day. My name is Desan Iyer. As an admitted attorney, lecturer in law and a researcher I thought it would it would be a good idea to interview you as part of my research about the role and impact of non- verbal communication in the legal arena.

I would like to reiterate that the aim of this interview is to obtain your ideas and opinions regarding the role and importance of non- verbal behaviour as a

communicative tool. I will also focus on its impact and benefits, if any to the legal profession. It is hoped that the results will greatly improve the practical legal skills of the aspiring attorney and enhance the reputation of the legal profession in South Africa.

The interview should take around 10 minutes.

R- Are you available to respond to some questions at this time?

I- Yes

R- May I audio- record the interview as it would help me to listen to it at a later stage?

I- Yes

R- Can you please sign the letter of informed consent so I can use your response for official research?

I-Yes

Q- Where did you complete your tertiary education?

I- Natal University-Durban.

Q- Why did you choose law as a carrier path?

I- I had a passion for it and I could see that in South Africa, lawyers as well as legal practitioners are people who add value to the development of our societies since our societies have been changed from the system of apartheid to the democratic South Africa. So lawyers could change the values and how the community develops. I would say they had to add value, so that's why I decided to do law.

Q- How long have you been practicing as an attorney?

I- For 6 years.

Q- Do you find some aspects of your work challenging?

I- I would say it is challenging because you deal with different cases. Each and every case develops you and it changes your thinking. You don't have a static mindset. Your mind is always changing and the way you see things is always changing.

Q- As I mentioned to you that my focus is on non-verbal communication. What is your understanding of non-verbal communication?

I-It is the demeanour of the person who talks, the way the person responds to questions without giving answers. Maybe that person becomes scared, becomes agitated and doesn't understand those types of things

Q- Did you study any form of non- verbal communications during your times at university?

I- No, not at all.

Q- Do you feel that the role of non- verbal communication is under emphasised in the legal profession as compared to verbal communication?

I- Yes, definitely it is underestimated. In some instances it is not even emphasised at all.

Q- Do you feel that the ability to read and decode non-verbal behaviour can add value to legal profession in general?

I- Yes, I could say so but at this stage it is not possible since the court of law only analyses the text and only emphasises on the person who is giving evidence. They emphasise on the evidence that is being given by the person who is testifying and they don't put more emphasis on how he behaves before the court.

Q- How many clients do you consult with on a daily basis?

I- I consult with about 4 to 7 clients a day.

Q- Do you make use of any non- verbal techniques during the consultation process?

I- Sometimes, but in a minimal way.

Q- Can you tell us about those techniques?

I- I would say a person who is testifying is not confident when he is giving you instructions. He gives you instructions that he has made up in his mind. It is something that is not real and he is thinking about what to say since he is not confident in what he is telling you.

Q- Do you feel that non- verbal communication should form part of the LLB curriculum at tertiary level.

I- I would say yes.

Q- Is there anything else that you would like to add about any of the above topics that we have discussed?

I- Not at all.

R- Thank you very much for having participated in this interview.

INTERVIEW 4

Hi there. My name is Desan Iyer. I am an admitted attorney, lecturer in law and a researcher I thought it would be a good idea to interview you as part of my research about the role and impact of non- verbal communication in the legal arena.

I would like to reiterate that the aim of this interview is to obtain your ideas and opinions regarding the role and importance of non- verbal behaviour as a communicative tool and its impact and benefits to the legal profession. It is hoped that the results will greatly improve the practical legal skills of the aspiring attorney and enhance the reputation of the legal profession in South Africa.

The interview should take around 10 minutes.

R- Are you available to respond to some questions at this time?

I- Yes

R- May I audio-record the interview as it would help me listen to it at a later stage?

I- Yes

R- Can you please sign the letter of informed consent so I can use your response for official research?

I-Yes

R- Let us start with some general questions about you and your work:

Q- Where did you complete your tertiary education?

I- University of Zululand

Q- Why did you choose law as a carrier path?

I-I always wanted to do something in the professional field so, since I wasn't that good with numbers and science, I chose law because I did like it.

Q- How long have you been in practice?

I- For 1 year and 3 months.

Q- What are the things that you like most about your work, if any?

I- I like conducting trials for both the excitement of it and the thrill.

Q- Do you find some aspects of your work challenging?

I- It would likely be bail applications and for example if I am doing trials the whole day. That's a bit challenging

Q- What is your understanding of non- verbal communication?

I- My understanding would be the demeanour of the person and the way he behaves.”

Q- Did you study any form of non- verbal communication during your studies at tertiary level?

I- No.

Q- Do you feel that the role of non- verbal communication is underemphasised in the legal arena as compared to verbal communication?

I- Yes I do

Q- Do you feel that ability to read and decode non- verbal behaviour would add value to the legal profession?

I-Yes I do

Q- How would you feel that it would add value to the profession?

I-I think it would improve the skills of the attorneys in being able to tell by the demeanour that that client or witness is lying.

Q- In terms of the consultation process, I'm sure you consult with a number of clients on a daily basis?

I-Yes I do

Q- How many do you consult with on average?

I- On average, about 5 clients a day.

Q- Do you encounter problems when eliciting information from your client during the consultation?

I- Yes I do

Q- What type of problems do you encounter?

I- If I had to ask him if maybe he would tell me the truth because I am your attorney and I won't tell anyone but I'm just trying to help you, he would just look

at me and then after a while he would tell me the truth and say, 'I did do this but I want to plead not guilty'

Q- So how eventually do you get a client to open up?

I- I just basically introduce myself, talk to him and ask him where is he from. Just the general stuff and then after that make him feel comfortable. Ask him whether he has any children, what he does for a living. After he is comfortable then only do we begin.

Q- Do you use any non- verbal techniques in making the client comfortable?

I- Yes, I would maybe smile at him in a polite way. Ask him to take a seat. I would not frown or anything like that and I wouldn't make him feel uncomfortable by maybe rushing them. I would smile and listen and agree to everything he says and nod my head.

Q- Do you feel that an understanding of non- verbal communication can assist you when consulting with a client or conducting a trial?

I- I think it can assist me when conducting a trial or in both areas it can. Because, for example I know that my client is lying by the way he acts or his demeanour.

When I ask him a question, he shies away. Then I know that he is lying and I can properly advise him

Q- Is there anything else you would like to add about any of the above topics that we have just discussed?

I- I think it would be a good thing to get this into tertiary level.

R- Thank you very much for having participated in this interview.

INTERVIEW 5

Hi. My name is Desan Iyer. As an admitted attorney, lecturer in law and a researcher, I thought it would it would be a good idea to interview you as part of my research about the role and impact of non- verbal communication in the legal arena.

I would like to reiterate that the aim of this interview is to obtain your ideas and opinions regarding the role and importance of non- verbal behaviour as a communicative tool and its impact and benefits to the legal profession. It is hoped

that the results will greatly improve the practical legal skills of the aspiring attorney and enhance the reputation of the legal profession in South Africa.

The interview should take around 10 minutes.

R- Are you available to respond to some questions at this time?

I- Yes

R- May I audio- record the interview so that I may listen to it at a later stage?

I- Yes

R- May you please sign the letter of informed consent so I can use your response for official research?

I-Yes

Let us begin by asking you some general questions about you and your work:

Q- Where did you complete your tertiary education?

I- University of Natal, Pietermaritzburg

Q- Why did you choose law as a carrier path?

I- It is interesting and you get to deal with different things.

Q- How long have you been practising as an attorney?

I- Approximately 6 years.

Q- What are the things you like most about your work?

I- I like going to court, appearing in court and I like drafting pleadings.

Q- Do you find some aspects of your work challenging?

I- Yes I do.

Q- What are those challenges?

I- Sometimes you have a lot of clients at one go to deal with and that is what I find challenging

R- Moving on to the gist of my research:

Q- What do you understand about non- verbal communication?

I- We can look at it in two ways. One is what a person reveals about themselves through their facial gestures and body movements which they don't intend to reveal to anybody. Two – facial expressions, hand gestures and so forth that are done with the intention to convey a message to someone. This can be done intentionally to expressly communicate something to somebody or they happen automatically without the person giving anything away but they actually do

Q- Did you study any form of non- verbal communication at tertiary level?

I- No I did not.

Q- Do you feel that the role of non- verbal communication is underemphasised in the legal profession as compared to the verbal communication?

I- I have never heard of non- verbal communication in the legal profession.

Q- Do you feel that the ability to read and decode non- verbal behaviour can add value to the legal profession?

I- To a minor degree, yes I think so. There may be occasions where it could be of assistance. I don't think it will have a major impact but I'm sure there will be instances where it could assist.

Q- Could you elaborate on those instances?

I- Let us say, for instance, you are dealing with another attorney during settlement negotiations and the client is there. What they say and what they actually mean can be two different things. They may be saying something to you but their body language may be saying something totally different. It can be of assistance in a situation like that.

Q- Looking at the attorney client consultation process, how many clients do you see on a daily basis?

I- I normally see 4 to 5 a day.

Q- Do you encounter any problems when you are trying to elicit any information from these clients?

I- Usually not. Sometimes one does – but that's normally a case of interpretation and so forth which you can get by verbally communicating further with a person. I don't see that as a general rule or problem with your own client

Q- Do you make use of non- verbal techniques during the consultation process with your clients or other attorneys?

I- No, not consciously.

Q- Unconsciously?

I- That is possible. Yes.

Q- Do you feel that an understanding of non- verbal communication can assist you when you are consulting with a client or conducting a trial?

I- Yes, it could. Especially with a trial when you are dealing with witnesses. One must bear in mind the way they answer and perhaps their body language can give you an indication that a witness is getting nervous or when he possibly has something to hide

Q- Do you feel that non- verbal communication should form part of the LLB curriculum at tertiary level part of legal skills aspect at tertiary level?

I- I would say it would be interesting for authorities to expand on it and see how and what happens with it.

Q- Is there anything else you would like to add to what you have mentioned?

I- No.

R- Thank you very much for having participated in this interview.

INTERVIEW 6

Good day. My name is Desan Iyer. As an admitted attorney, lecturer in law and a researcher I thought it would it would be a good idea to interview you as part of

my research about the role and impact of non- verbal communication in the legal arena.

I would like to reiterate that the aim of this interview is to obtain your ideas and opinions regarding the role and importance of non- verbal behaviour as a communicative tool and its impact and benefits to the legal profession. It is hoped that the results will greatly improve the practical legal skills of the aspiring attorney and enhance the reputation of the legal profession in South Africa.

The interview should take around 10 minutes.

R- Are you available to respond to some questions at this time?

I- Yes

R- May I audio-record the interview as it helps me listen to it at a later stage?

I- Yes

R- Can you please sign the letter of informed consent so I can use your response for official research?

I-Yes

Let us begin by asking you some general questions about you and your work:

Q- Where did you complete your tertiary education?

I- University of Zululand

Q- Why did you choose law as a carrier path?

I- I think it is because back in 1992, I knew nothing about it but there was a novel at school that we were reading "Isichabu se Nkantolo". There was a law part involved in it which interested me. School had an influence in my choice to do law.

Q- How long have you been practising?

I- As an admitted advocate, it has been 8 years now.

Q- Do you find some aspects of your work challenging?

I- Always challenging but I enjoy my work.

Moving on to the gist of my research

Q- What is your understanding about non- verbal communication?

I- My understanding is that you look at the demeanour or the attitude of the person. There are those things whereby a person will respond using body language. And then you can deduct from the body language as to there must be

something into whatever the person tries to portray. And then you can verbally go deeper into that.

Q- Did you study any forms of non- verbal communication during your studies at university?

I- No I did not.

Q- Do you feel that the role of non- verbal communication is underemphasised in the legal profession as compared to the emphasis placed on verbal communication?

I- Yes I do feel that.

Q- Do you feel that the ability to read and decode non- verbal communication behaviour can add value to the legal profession in general?

I- It can add value because you come across different clients. Others are outspoken and they can talk whilst others most of the time will disclose information by using body language to transmit or to communicate. If you are able to 'read' the body language, you will be able to interview deeper and retrieve that information from the client

Q- How many clients do you consult with on a daily basis?

I- Not much. Maybe 1 or 2.

Q- Do you encounter any problems when you are trying to elicit information from the client sometimes?

I- No, I don't. Except if ever there is a problem, maybe with his defence and his misleading and showing not to follow what is going on. In those instances I then need to get through to them

Q- Do you make use of non- verbal techniques sometimes when consulting with your clients?

I- Yes, I do. Mostly when we look at the eye contact and the expression of the face when you are asking some questions or when the person is talking. A person can talk and give a general statement but when looking at his face, you can see that there is a contradiction between his face and what he is saying. And then a person can try and limit the emotions and feelings when they are talking and on the face. You can see that whatever he is talking about is causing a lot of pain.

Q- Do you feel that an understanding of non- verbal communication can assist you when consulting with a client or even during the trial?

I- It will assist. Simply because most of the clients when they are in the witness box and when they are encountering some difficult questions, you learn from their body language that there is a problem even before they answer. Whoever is in court, even the presiding officer is looking at their demeanour or their attitude. So it will assist, even when you are consulting and preparing your case. You will be able to know and understand fully

Q- Do you feel that non- verbal communication should form part of the LLB curriculum at tertiary level?

I- It should. The verbal communication is important in its own because it is one of the ways that information is transferred.

Q- Is there anything else you would like to add?

I- No.

R- Thank you very much for having participated in this interview.

INTERVIEW 7

Good day. My name is Desan Iyer. As an admitted attorney, lecturer in law and a researcher I thought it would be a good idea to interview you as part of my research about the role and impact of non- verbal communication in the legal arena.

I would like to reiterate that the aim of this interview is to obtain your ideas and opinions regarding the role and importance of non- verbal behaviour as a communicative tool and its impact and benefits to the legal profession. It is hoped that the results will greatly improve the practical legal skills of the aspiring attorney and enhance the reputation of the legal profession in South Africa.

The interview should take around 10 minutes.

R- Are you available to respond to some questions at this time?

I- Yes

R- May I audio-record the interview as it would help me listen to it at a later stage?

I- Yes

R- Can you please sign the letter of informed consent so I can use your response?

for official research.

I-Yes

Let us begin by asking you some general questions about you and your work:

Q- Where did you complete your tertiary education?

I- University of Natal – Durban

Q- Why did you choose law as a career path?

I- I was very interested in law. I am more of a verbal person. I liked law and getting the bad guy into prison, but now I am a defence attorney.

Q- What are the things you like most about your work?

I- I like the fact that it uses your mind. It is challenging in that sense. It does not operate in a vacuum and the law is constantly changing but everyday is a challenge as you meet new people everyday. Specifically for me I will say yes because most of our clients are Zulu speaking and I am English speaking so that in itself is a challenge.

Q- Do find some aspects of your work particularly challenging?

I- Specifically for me I will say yes because most of our clients are Zulu speaking and I am English speaking, so that in itself is a challenge and to get it across and do your best as an attorney is even more challenging because you don't the same language.

R- Moving on to the main aspect of my research of non- verbal communication:

Q- What is your understanding of non- verbal communication?

I- I think it is gestures from smiling, how you use your body movement, signals that you send the other person without saying a single thing and it's a valid form of communication

Q- Did you study any form of non- verbal communication during your legal studies at a tertiary institution?

I- No I did not.

Q- Do you feel that the role of non- verbal communication is underemphasised as compared to the emphasis placed on verbal communication?

I- I think it is, definitely.

Q- Do you feel that the ability to read and decode non- verbal behaviour can add value to the legal profession in general?

I- Yes I think it can.

Q- Can you elaborate on that?

I- Yes I think it can. I am going to say that we only tape in a criminal trial what a person has said but no one indicates when a person is fidgety or even if the magistrate has noticed that the person is not making eye contact and stuff –that is not recorded. It forms part of your decision as well and I think if you put more emphasis on the behaviour of the person whether it be the accused or witness and add that to the record, I think you will get much different outcomes from it because there is too much reliance on just the verbal

Q- In terms of the attorney client consultation process, do you consult with clients on a daily basis?

I- Not on a daily basis but I attend court on a Tuesday and every Friday, so at least 4 times in a week I have to speak to clients.

Q- Do you encounter any problems when eliciting information from the client during the consultation process?

I- I do encounter problems. The first one being that I do not speak the language so I depend largely on the interpreter and just getting that interpretation across is important for me. I do depend on non-verbal signals myself.

Q- Do you feel that when you use these non- verbal skills and techniques, the client tends to open up during the consultation process?

I- They do. They are definitely more at ease when they can see that the trust is forthcoming. If you have a very closed-off attitude, you don't make eye-contact with them and you don't smile at them or show some friendliness, automatically they are just to the point and they give you one word answers. And you have to draw a lot out of them but the consultation becomes easier when you appear and your whole body demeanour appears more open to them and I feel that they trust better.

Q- Do you feel that non- verbal communication should form part of the LLB curriculum at tertiary level?

I- I think it is important because many people forget how effective it is as a tool. It can help not only attorneys but also candidate attorneys when they start off because they only have theoretical knowledge and on a practical point they need to be taught how to deal with a client – not just in a verbal manner. We at Legal Aid deal with the majority of indigenous people and that sort of training of non-verbal skill is important. You create ease via your non-verbal language. I think it is important especially for our organization.

Q- I am sure that you have observed candidate attorneys conducting interviews with clients. Have you seen many of them using non- verbal communication?

I- I have seen very bad techniques, for instance not making eye contact and in the manner of how they sit. This thing about professionalism – sitting behind the desk. You will find that some of the new guys sit next to their client. That does not help because the client cannot see your body language. I have seen them also make eye contact in a very demanding way which creates unease with the clients. You also get those candidate attorneys who are not confident and it shows in their body language especially when they address a client. I think it also

creates a poor consultation because it shows that the candidate attorney is not confident and may not know his work properly. Those non-verbal things show that he is not in control of the situation and clients pick up very easily on that.

Q- Is there anything else that you would like to add?

I- No, just that I think it is an interesting topic and it would be of great use if it were to be incorporated into the LLB studies.

R- Thank you very much for having participated in this interview.

INTERVIEW 8

Hi. My name is Desan Iyer. As an admitted attorney, lecturer in law and a researcher I thought it would be a good idea to interview you as part of my research about the role and impact of non- verbal communication in the legal arena.

I would like to reiterate that the aim of this interview is to obtain your ideas and opinions regarding the role and importance of non- verbal behaviour as a communicative tool and its impact and benefits to the legal profession. It is hoped

that the results will greatly improve the practical legal skills of the aspiring attorney and enhance the reputation of the legal profession in South Africa.

The interview should take around 10 minutes.

R- Are you available to respond to some questions at this time?

I- Yes

R- May I record the interview so that I can listen to it at a later stage?

I- Yes

R- Can you please sign the letter of informed consent so I can use your response for official research?

I-Yes

Let us begin by asking you some general questions about you and your work:

Q- Where did you complete your tertiary education?

I- I started at Rhodes University and University of Natal- Durban

Q- Why did you choose law as a carrier path?

I- I think it was a false impression of watching LA law. I think I generally I had a sense of wanting to assist the community and when I thought about in a mature

state of mind, I thought law was the best option because there is law in every human reaction or interaction that is based on law. So you reach wider range of people in a broader field that cuts across a lot of disciplines because there is law in every discipline so that's how I came to choosing law.

Q- How long have you been admitted as an attorney?

I- 7 years

Q- What are the things you like most about your work, if any?

I- I think I like the challenge of breaking the law without breaking the law.

Q- Elaborate?

I- Basically, especially in criminal law, is the sense of getting the client acquitted because the state has not proven the fact that he is guilty but knowing that actually the facts were against you. So it is that challenge of getting things done against the odds.

Q- Do you find certain aspects of your work challenging?

I- Very much so, I think the personalities that we deal with and if you don't have a strong heart it may defeat you

Q- In terms of non- verbal communication, what is your understanding of non-verbal communication?

I- It is communication not using your language or your tongue. So it is gestures, movement, and just those kinds of bodily communication.

Q- Did you study any form of non- verbal communication at university?

I- No not at all.

Q- Do you feel that the role of non- verbal communication is underemphasised as compared to verbal communication in the legal arena?

I- Extremely so.

Q- Do you feel that the ability to read and decode non- verbal behaviour can add value to the legal profession in general?

I- I think it can. It can add value to us interpreting non-verbal evidence in court and I also think it can help us to improve our image as attorneys and improve the status of the profession.

Q- Do you consult with clients on a daily basis or on a weekly basis?

I- I would say from a week to a monthly basis. Not so much because of the office I am based at.

Q- Do you encounter any problems when you are trying to elicit any information from the client during the consultation process?

I- I think so. I think it is because the client does not know what is really required. They depend on you to ask the question to get the information from them. They don't really know what is important and what needs to be said.

Q- Do you use any techniques when encountering a difficult client or when trying to obtain information from a client who is not willing to open up?

I- The strategy that I have adopted, because I am working with the regional office and we deal with complaints, the client comes in irritated thinking that Legal Aid is not efficient and does not care about the client or we just don't do our work. So I think it is important how you approach the client, the way you come out of your office and 'kinda' like receive him from reception and literally point to the seat that he should sit on. That kind of initial interaction is important before you get to the problem I think. Clearing your desk, writing down as he speaks to you, looking at

him, nodding and ignoring calls – you know those small gestures make the client at that stage feel that time is being taken to hear him out.

Q- Do you feel that an understanding of non- verbal communication can assist you when consulting with a client or conducting a trial in court?

I- Very much so. I think it can but if it is appropriately read. If not I think that it can be extreme. It can lead to an unfair judgement if it is relied on too much.

Q- You mentioned appropriately read, what do you mean by that?

I- Like within the context of your verbal question, in the context of the attorney, your understanding and background and education. As well as the client's background, understanding, level of education, state of mind as well because he may be in a freighting position, even prior criminal history or behaviour of that client may lead him to act in a different way compared to a client who is first time interacting with the law. So all those thing need to be filtered in.

Q- So you mentioned background, are you also including culture?

I- Yes.

Q- Do you feel that non- verbal communication should form part of the LLB curriculum at tertiary level?

I- I think it should, definitely. I would like to add that this is a very interesting topic for a doctorate and I think it adds value. It is something relevant and appropriate and it is something that will help the profession grow.

Q- Is there anything else you would like to add?

I- I would like to add that this is a very interesting topic for a doctorate and I think it adds value. It is something relevant and appropriate and it is something that will help the profession grow.

R- Thank you very much for having participated in this interview.

INTERVIEW 9

Good day. My name is Desan Iyer. As an admitted attorney, lecturer in law and a researcher I thought it would it would be a good idea to interview you as part of my research about the role and impact of non- verbal communication in the legal arena.

I would like to reiterate that the aim of this interview is to obtain your ideas and opinions regarding the role and importance of non- verbal behaviour as a communicative tool and its impact and benefits to the legal profession. It is hoped that the results will greatly improve the practical legal skills of the aspiring attorney and enhance the reputation of the legal profession in South Africa.

The interview should take around 10 minutes.

R- Are you available to respond to some questions at this time?

I- Yes

R- May I tape record the interview?

I- Yes

R- Can you please sign the letter of informed consent so I can use your response for official research.

I-Yes

Let us begin by asking you some general questions about you and your work:

Q- Where did you complete your tertiary education?

I- University of Zululand.

Q- Why did you choose law as a carrier path?

I- I always wanted to do something that was personal because in my family there are nurses. So I wanted something that was different. I also realised that many people were interested in justice and then I chose to do law. I decided that I would be an attorney rather than being a prosecutor or something else because I wanted to promote justice and defend people who are, sometimes, treated unjustly.

Q- How long have you been practising as an attorney?

I- 6 years.

Q- Do you find aspects of your work challenging?

I- Yes, very challenging. There are different aspects of the law that sometimes you need to research so that you can familiarise yourself and be on the top of everything otherwise you will have a problem in court if you do not do that research. It is challenging because you need to find newly decided cases to acquaint yourself with and prepare for the proper address in court to represent your client.

Q- What is your understanding of non- verbal communication?

I- My understanding is that you can be able to detect or to understand the person using his body language and whether what he is saying is true or not true or whether he is sure of what he is saying or is trying to mislead. It is very important. It even plays a very crucial role when the court will have to decide at the end perhaps on the demeanour of the person giving evidence. Sometimes a person will behave funny and then the other person can see that whatever he is saying – that there is no truth in it. Sometimes he will look at the ground which is an indication that what he is saying has no truth in it at all

Q- Did you study any form of non- verbal communication at university?

I- No not at all. I only gained an experience when consulting. It is by experience that I have been able to use non- verbal techniques.

Q- Do you feel that the role of non- verbal communication is underemphasised in the legal profession as compared to the verbal communication?

I- It is very much under emphasised because mostly it is verbal and even when you represent the client, you will have to draw the court to the action of the

witness so that the court may take notice of that action or body language that the witness takes. At the end the magistrate or the judge can draw some inference through the body language of the witness.

Q- Do you feel that understanding and decoding non- verbal behaviour can add value to the legal profession?

I- Very much.

Q- How many clients do you consult with in a daily basis?

I- It depends, but maybe 6.

Q- When consulting with clients do you sometimes find it difficult to get information during the first consultation?

I- That happens a lot. You find that they are not easy to give information and sometimes through your body language they can learn that you are an easy person and they don't have to fear anything and then they become comfortable.

Q- During the consultation do you use any non- verbal techniques to get information out of the client?

I- Yes, I would say so. Sometimes you will show the client that you are not another person but you are a human being that is here to assist them. You will show them that you are relaxed by your body language and they can see that you are relaxed.

Q- What do you do to show them that you are relaxed?

I- I will be smiling at them and maybe I will blink my eyes at them to show them that I understand very well. Sometimes I will go as far as demonstrating with my body to show them that I need them to tell me the truth.

Q- Do you feel that non- verbal communication should form part of the LLB curriculum at universities?

I- Yes I think it can help a lot because there are things that we do not understand through verbal communication and it can be better understood through non-verbal communication. So I feel that it should form part of the LLB programme.

Q- Is there anything else you would like to add?

I- No.

R- Thank you very much for having participated in this interview.

INTERVIEW 10

Good day. My name is Desan Iyer. As an admitted attorney, lecturer in law and a researcher I thought it would it would be a good idea to interview you as part of my research about the role and impact of non- verbal communication in the legal arena.

I would like to reiterate that the aim of this interview is to obtain your ideas and opinions regarding the role and importance of non- verbal behaviour as a communicative tool and its impact and benefits to the legal profession. It is hoped that the results will greatly improve the practical legal skills of the aspiring attorney and enhance the reputation of the legal profession in South Africa.

The interview should take around 10 minutes.

R- Are you available to respond to some questions at this time?

I- Yes

R- May I audio- record the interview so that I can listen to it at a later stage?

I- Yes

R- Can you please sign the letter of informed consent so I can use your response

for official research?

I-Yes

Let us begin by asking you some general questions about you and your work:

Q- Where did you complete your tertiary education?

I- University of Zululand

Q- Why did you choose law as a career path?

I- It is from my experiences as a child, being closer and there was a stage where my father had to litigate on a civil matter involving a business and I got interested in law. It was from my father because I was closer to the problem and he hired an attorney on a commercial dispute. So from that I got interested in law.

Q- How long have you been practising as an attorney?

I- For about 18 years now

Q- What are the things that you like most about your work, if any?

I- The challenges, thinking on your feet, helping people, upholding justice and interacting with people basically which is a lot more involved in helping people.

Q- Any dislikes?

I- Look sometimes you get involved in certain points. You might feel that you are not getting your way or the decision does not go the way you have planned, the way you have prepared your arguments, the way you have analysed the matter where you feel that the decision you get at the end is not what you expected. Of course, you have reasons to appeal, there are avenues to appeal. But sometimes you feel that it will take longer for your client to obtain relief. It could be that he has been sentenced to a custodial sentence or it is a simple matter that he lost and it has bad implications. Sometimes you get involved emotionally with the client and you feel their pain although ethically and professionally you are not suppose to do that but there will be matters that you are passionate about.

Q- Moving on to the main aspect of my research which is non- verbal communication, what is your understanding of non- verbal communication?

I- Bodily behaviour. In human beings communication is verbal – it is quite a law thing. In most part – it is non-verbal. It is getting cues from a person. For instance when you speak to me, I look at your face and if your face is more frank, I am

more likely to open up to you generally. So it has a lot to do with appearances – both on your part and the client's part.

Q- You say on the client's part, could you please elaborate on that?

I- Let's say it is a divorce matter for instance. You can assess whether the client agrees with that particular point or you can assess if you are getting through to your client because the most important part is that you are developing a relationship with the client. So part of assessing whether you are getting through to the client is looking at the bodily behaviour. In fact what they taught you at university is that you should make the client comfortable. Part of assessing that is through the body language – controlling yours and controlling the clients because the client cannot give you proper instructions if they are uncomfortable. So watching body language or non-verbal language is important. It applies in court as well although there is a specific way that it applies which I have found. In other words you have to look at the traditions and upbringing of the client. That is why I am saying that culture does play a role in non-verbal communication

Q- Did you study any form of non- verbal communication at university?

I- Not at university. Even when I did my junior degree we were not even doing practical legal training. The first training I got was when I was doing full time PLT.

What we were taught was communication skills, where you got seated down by experts who share information on how to handle matters in court and even how to handle consultations. So it was not at university when I learned.

Q- You mentioned that you have about 18 experience as an attorney. Do you think that your experience has contributed to you picking up these non- verbal techniques during your years of practice?

I- A good example is a child. A child witness may not be able to express herself properly from her body language. An example would be when someone's name is mentioned, and you can watch the behaviour of the child. If there was something traumatic and the name of the perpetrator is mentioned, in most instances, the child will squirm and try to hide the face. But the most important thing is to get it on record or to make sure that whatever you are trying to impress, that bodily language is communicated verbally so to get it on record or it

gets to the attention of the person who should know about the non- verbal communication. So it has helped a lot.

Q- Do you use non- verbal techniques during your initial consult with your client?

I- Not a lot on my part. The part where you are welcoming the client, you play a role and use non-verbal particularly the face, manner of approach, sometimes how you look at the client, appearing relaxed. It must appear that this is a consultation and you do not want to appear intimidating. The important thing is the demeanour part which can be used and assessed by either parties in court to find out whether the witness is telling the truth or not. The main part where I use it is when correcting certain behaviours from my clients. Sometimes you can intimidate a witness to your advantage but not in a way that will render the trial unfair.

Q- Do you feel that the role of non- verbal communication is under emphasised in the legal profession as compared to the emphasis placed on verbal communication?

I- I am undecided on the issue, maybe I have not looked at it properly but I would not say that it is underemphasised because it has been proven that most of our communication is non- verbal. But I in law it is underemphasised. It would be a good thing for it to be introduced in the law curriculum.

Q- Do you feel that the ability to read and decode non- verbal behaviour can add value to the legal profession?

I- Reading or understanding – yes

Q- Is there anything else that you would like to add?

I- No not really but it is my feeling that depending on how you structure it should be part of practical legal training. It will help students to think on their feet.

R- Thank you very much for having participated on this interview.

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