THE ADVOCATE'S USE OF SOCIAL SCIENCE RESEARCH INTO NONVERBAL AND VERBAL COMMUNICATION: ZEALOUS ADVOCACY OR UNETHICAL CONDUCT?

CAPTAIN JEFFREY D. SMITH*

The ability to communicate in a persuasive manner is an important skill for all lawyers to possess, but it is especially critical to trial and defense counsel. Social scientists have conducted numerous experiments studying the impact on message recipients of nonverbal and verbal communications. This article examines that research and discusses whether it is ethical for counsel to apply at courts-martial the results of those studies in an effort to increase their persuasiveness in the courtroom.

Part One examines nonverbal aspects of courtroom messages and discusses how counsel potentially could use nonverbal communication at courts-martial to increase the persuasiveness of their courtroom presentations. Part Two of this article analyzes the use of language in the courtroom by considering two issues. First, does a witness's speech style affect the jury's perception of the witness? Second, can the attorney's choice of words influence the substance of a witness's testimony and the jury's recollection of the evidence? Finally, Part Three addresses whether the Army's Rules of Professional Conduct for Lawyers' prohibit counsel from using the various techniques suggested by research into nonverbal and verbal communications.

I. Nonverbal Communication in the Courtroom

When an individual speaks, he or she communicates both verbally and nonverbally. Experts in the field generally agree

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*Judge Advocate General's Corps, U.S. Army. Currently assigned as Trial Counsel, I Corps and Fort Lewis, Fort Lewis, Washington. Previous assignments: Funded Legal Education Program, 1986-1989; Corps of Engineers Officer, 1983-1986. B.S., United States Military Academy, 1983; J.D., University of Virginia School of Law, 1989. Member of the Virginia State Bar. Previous publications: Comment, *High School Newspapers and the Public Forum Doctrine:* Hazelwood School District v. Kuhlmeier, 74 VA. L. REV. 843 (1988); Smith, *Administrative Inspections in the Armed Forces After* New York v. Burger, The Army Lawyer, Aug. 1988, at 9.

[1] Dep't of Army Pam. 27-26, Rules of Professional Conduct for Lawyers (31 Dec. 1987) [hereinafter **DA** Pam. 27-26].

that over sixty percent of the meaning of a communicated message is contained in the nonverbal behavior that accompanies the oral message.[2] Research has demonstrated that message recipients use the nonverbal component of a communication to make decisions concerning the speaker's credibility, persuasiveness, and competence.[3] For purposes of this article, three elements of nonverbal communication will be examined: kinesics, paralinguistics, and proxemics.

A. Kinesics.

Kinesics, the study of so-called "body language," involves examining and interpreting the movement of the body.[4] One of the most important and widely recognized aspects of kinesics is eye contact. A speaker either may look directly at the target of his or her communication ("gaze maintenance") or may look slightly downward while speaking ("gaze aversion").[5] Several experiments have examined the effect of this looking behavior on the message recipient's perceptions of the speaker. In one study, researchers used a courtroom simulation to determine whether message recipients would use an alibi witness's looking behavior to make an inference concerning the speaker's credibility. The experiment also investigated whether the message recipients had enough confidence in their judgments concerning the speaker's credibility to apply that information to a subsequent decision.[6]

Participants in the study rated witnesses who exhibited gaze aversion as being less credible than witnesses who exhibited gaze maintenance.[7] Subjects also judged the defendants for whom the gaze aversion witnesses testified as more likely to be guilty than the defendants for whom gaze maintenance

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[2] Peskin, *Non-verbal communication in the courtroom* TRIAL DIPL. J., Spring 1980, at 8. Some researchers claim that the impact of a verbal message consists of seven percent verbal and 93% nonverbal communication. *Id.* at 7. For a more detailed examination of nonverbal communication. see A. EISENBERG & R. SMITH, NONVERBAL COMMUNICATION (1971); G. NIRENBERG & H. CALERO, HOW TO READ A PERSON LIKE A BOOK (1971).

[3] Additionally. a speaker may use nonverbal communication to assess the impact of his message on the listener. For example, the trial attorney may use nonverbal communication as a gauge of juror reactions to his arguments and questions. ***See*** *Peskin. supra* note 2. at 7

[4] *Id.* at 6.

[5] Hemsley & Doob, *The Effect of Looking Behavior on Perceptions of a Communicator's* ***Credibility.*** 8 J OF APPLIED SOC. PSYCHOLOGY 136 (1978).

[6] *Id.* at 137.

[7] *Id.* at 141.

witnesses testified.* Thus, the message recipients used a witness's visual behavior to make an inference concerning the witness's credibility *and* to make a subsequent evaluation of the defendant's guilt. This study provides empirical support for the practice of instructing one's witnesses to look at the fact-finder, rather that at counsel, when answering questions.

In addition to gaze maintenance, researchers have identified other body movements that message recipients perceive as indicative of credibility and persuasiveness. **A** series of studies that required observers to rate the persuasiveness of a speaker revealed that more gestures, more facial activity, less self-touching, and moderate relaxation led to higher ratings of persuasiveness.[9] Listeners interpret the use of gestures as indicating credibility and persuasiveness, however, only if they appear natural and are not used excessively so as to distract from the verbal content of the message.[10]

B. Paralinguistics.

Paralinguistics studies the sound of an oral communication by examining variables such as pitch, speech rate, intensity, tone, and volume of the voice.[11] Researchers have discovered that pitch and speech rate affect a listener's perception of the speaker's credibility and persuasiveness.[12] In one study, subjects listened to recordings of male speakers answering interview questions and then rated the speakers on a variety of characteristics. The recordings had been altered so that the pitch of the speakers' voices was raised or lowered by twenty percent or left at its normal level.[13] The subjects in the experiment rated the high-pitched voices as being less truthful, less persuasive, and significantly more nervous than the lower pitched voices.[14] Consequently, although changes in pitch can be used to avoid a monotonous presentation and to highlight a

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[8] *Id.* at 142.

[9] Miller & Burgoon, *Factors Affecting Assessments of Witness Credibility*, in PSYCHOLOGY OF THE COURTROOM 169, 175-78 (1982).

[10] *Peskin, supra* note 2, at 55.

[11] Id. at 8.

[12] Apple, Krauss & Streeter, *Effects of Pitch and Speech Rate on Personal Attributions*, 37 J. OF PERSONALITY AND SOC. PSYCHOLOGY 715 (1979); Miller, Maruyama, Beaber & Valone, *Speed of Speech and Persuasion*, 34 J. OF PERSONALITY AND SOC. PSYCHOLOGY 615 (1976).

[13] Apple, Krauss & Streeter, *supra* note 12, at 717-18.

[14] Id at 720. 724.

phrase or argument, variations in pitch must be used with discretion.

Research has also demonstrated that the rate at which one speaks affects a listener's perception of the speaker. Several experiments have studied the relationship between rate of speech and persuasion by varying the rate of speech.[15] In one experiment, researchers discovered that a message delivered at a rate of 191 words-per-minute produced a greater amount of listener agreement with the speaker's position than did the same message delivered at the normal rate of 140 words-per-minute or at the slow rate of 111 words-per-minute.[16] Moreover, listeners rated the faster speaker as being more knowledgeable, more trustworthy, and more competent.[17] A second series of experiments confirmed the results of that earlier study, finding that listeners judged slow-talking speakers as being less truthful, less fluent, and less persuasive.[18] These results may reflect a belief on the part of the listeners that only a skilled speaker can rapidly present complex material in a clear manner.

Not only are rapid speakers judged to be more credible, competent, and persuasive, but also researchers have discovered that a dramatic increase in the rate of speech does not significantly affect a listener's comprehension. In one study, researchers electronically increased the speed of a message to 282 words-per-minute — twice the average speech rate of 140 words-per-minute — without significant losses in comprehension.[19]

C. *Proxemics.*

Individuals maintain different zones of space between each other depending upon their relationships, the subject matter of their conversations, and the social settings. Proxemics studies the spatial relationships between a speaker and other people or objects.[20] Research suggests that in the courtroom, counsel can increase the credibility of their own witnesses and decrease the believability of their opponent's witnesses by applying proxemics.

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[15] *Id.* at 717, Miller, Maruyama, Beaber & Valone, *supra* note 12, at 615

[16] Miller, Maruyama, Beaber & Valone, *supra* note 12, at 619-21

[17] *Id.* at 616

[18] Apple, Krauss & Streeter *supra* note 12, at 723

[19] Peskin, *supra* note 2, at 5

[20] A. EISENBERG & R. SMITH, *supra* note 2, at 28

According to proxemics, counsel can enhance the credibility of their own witnesses during direct examinations by standing across the courtroom from witnesses in the profile position to the jury. This position increases the perceived status and importance of a witness by expanding his or her personal territory in the courtroom. Additionally, by standing in the profile position, the lawyer shares the fact-finder's attention with the witness.[21]

Researchers also claim there are two ways in which the trial lawyer can use proxemics during cross-examination to decrease the credibility and persuasiveness of an opponent's witnesses. First, counsel can stand near the witness in an open position in front of the jury. By standing near the witness, the lawyer decreases the witness's personal territory, thereby delimiting his or her importance and status. By facing the jury, the attorney commands the jury's attention, diverting attention away from the witness.[22]

Second, an adverse witness's credibility can be damaged by slowly moving towards the witness during cross-examination. Frequently, the witness will become preoccupied with the lawyer's movement and begin to show signs of anxiety. Although that anxiety is due to the presence of counsel, rather than the questions being asked, the fact-finder may perceive that the witness is nervous and stumbling in his or her testimony because he or she is being deceptive.[23]

In summary, courtroom communications have both a verbal and a nonverbal component. Research into nonverbal communication has demonstrated that listeners use the nonverbal component of a message to draw conclusions concerning the speaker's credibility, intelligence, and persuasiveness. Consequently, nonverbal communications provide a potential means that trial and defense counsel may be able to use to increase the persuasiveness of their courtroom advocacy.[24]

II. Verbal Communication in the Courtroom

In discussing social science research into the verbal component of courtroom communications, two issues will be ex-

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[21] Colley, *Friendly Persuasion*, TRIAL, Aug. 1981, at 46.

[22] *Id.*

[23] *Peskin, supra* note **2,** at 9.

[24] For a discussion of whether using nonverbal communication techniques at courts-martial violates the Army's Rules of Professional Conduct for Lawyers, see *infra* notes 68 to **76** and accompanying text.

amined. First, what effect does a witness's style of speech have on a fact-finder's perception of the witness? Second, will the lawyer's choice of words during the questioning of a witness affect the witness's testimony and the fact-finder's recollection and analysis of that evidence?

A. Speech Style of Witnesses.

In the typical contested court-martial, witnesses for the Government and for the defense provide conflicting accounts of what happened. To obtain a favorable verdict, both trial and defense counsel want their witnesses to testify in credible and persuasive manners. Of interest is the effect of a witness's style of speech on the listener's perceptions of the speaker's credibility and persuasiveness. William O'Barr studied that issue and identified four characteristics of speech style that affect a listener's perceptions of a witness.[25]

1. Powerless *vs.* Powerful Speech.—O'Barr began his study by observing, recording, and analyzing over 150 hours of actual courtroom testimony. After listening to speakers from a variety of backgrounds, O'Barr discovered that the speech of the different witnesses contained certain linguistic features that appeared to vary with the respective speaker's social power and status. Individuals of low status and social power—the poor and uneducated—tended to use a style of speech characterized by the frequent use of words and expressions that conveyed a lack of forcefulness in speaking. This style, termed "powerless," involved the frequent use of the following:

(a) "hedges" in the form of:

(1) prefatory remarks (e.g., "I think" and "I guess");

(2) appended remarks (e.g., "you know"); and

(3) modifiers (e.g., "kinda" and "sort of").

(b) "intensifiers" (e.g., "very" and "definitely").

(c) "hesitation forms" (e.g., "uh," "um," and "well").

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[25] For a detailed discussion of the research conducted by the Law and Language Project, see W. O'BARR, LINGUISTIC EVIDENCE: LANGUAGE, POWER AND STRATEGY IS THE COURTROOM (1982); Conley, O'Barr & Lind. *The Power of Language: Presentational Style in the Courtroom,* 1978 DUKE L.J. 1376; Erickson. Lind, Johnson &O'Barr, *Speech Style arid Impression Formation in a Court Setting,* 14 J. OF EXPERIMENTAL SOC. PSYCHOLOGY 266 (1978)

(d) "polite forms" (e.g, the use of "sir" and "please").

(e) "question intonation" (making a declarative statement while using a rising intonation).[26]

O'Barr also identified a more forceful and direct manner of testifying. Witnesses having relatively high social power and status in court — that is, the well-educated, professionals, and expert witnesses — tended to use a speech style that exhibited relatively few of the features of the powerless style. O'Barr called this style the "powerful" style of courtroom speech.[27]

O'Barr then conducted an experiment to determine whether a witness's speech style affects a listener's perception of the speaker. Participants in the study listened to different versions of courtroom testimony that differed only in the speaking style used by the witness — that is, either powerless or powerful.[28] The subjects then rated the speaker on a number of characteristics. Participants rated witnesses using the powerful style of speech as more convincing, more competent, more intelligent, and more trustworthy than witnesses using the powerless style. As such, listeners showed greater acceptance of the information conveyed by speakers using the powerful style of speech.[29] This suggests that trial and defense counsel could increase the credibility and persuasiveness of their witnesses by preparing them to testify using the powerful speech style.

2. *Hypercorrect* Speech in *Testimony*.—O'Barr also studied the formality of the witnesses testimonies. Although most of the testimony recorded and analyzed was more formal than everyday conversations, O'Barr observed that some witnesses used a style of speaking significantly more formal than the style they used in their out-of-court conversations. Witnesses who used this "hypercorrect" style tended to use convoluted grammatical structures and to substitute more difficult and obscure words for their ordinary vocabularies.[30] They also used bits of legal terminology and overused whatever technical or professional vocabulary they did possess. Accordingly,

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[26] Conley, O'Barr & Lind, ***supra*** note 25, at 1380.

[27] Erickson, Lind, Johnson & O'Barr, ***supra*** note 26, at 268.

[28] *Id.* at 269-73.

[29] Id. at 273-76.

[30] For examples of hypercorrect speech and vocabulary, see W. O'BARR, ***supra*** note 25, at 83-84.

those witnesses spoke in a stilted and unnatural manner, rather than in the formal style they apparently sought.[31]

To study the effect of hypercorrect speech on listeners, O'Barr had subjects listen to testimony in which the witness used either hypercorrect speech or the standard formal courtroom speaking style. Participants rated the witnesses using the ordinary formal style of speech significantly more convincing, competent, qualified, and intelligent than witnesses using the hypercorrect style.[32] This result led researchers to conclude that jurors — based upon what they infer about a witness's background and social status — develop certain expectations concerning the witness's behavior. When a witness violates those expectations by speaking with an inappropriate level of formality, jurors react punitively.[33] This suggests that counsel should advise their witnesses to testify using their normal, out-of-court vocabularies while, of course, staying within the confines imposed by the formality of courts-martial.

3. Narrative vs. Fragmented Styles of *Testimony.*—O'Barr next examined the testimonial style used by witnesses on direct examination. Some of the testimony recorded by O'Barr consisted of relatively infrequent questions by the attorney and long, narrative answers by the witness. Other testimony involved frequent questions by the lawyer and short answers by the witness.[34] These stylistic differences prompted an experiment to determine if a witness's credibility can be enhanced by allowing the witness to testify in long, narrative answers — that is, in a "narrative" form — rather than in short, brief answers — that is, in a "fragmented" form.

O'Barr had subjects listen to reenactments of direct testimonies from a criminal trial. Each witness presented the same substantive testimony on each tape using either the narrative or fragmented style. The study then assessed listeners' evaluations of the witness's competence.[35]

Although the results of the study were rather complex,[36] O'Barr did make some general conclusions. First, listeners fre-

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[31] CONLEY, O'BARR & LIND *supra* note 25, at 1389-90; Conley, *Language* in *the Courtroom*, Trial, Sept. 1979, at **34.**

[32] CONLEY, O'BARR & LIND *supra* note 25, at 1390.

[33] *Id.*

[34] W. O'BARR *supra* note **25,** at 76-77.

[35] *Id.* at 78-79; CONLEY, O'BARR & LISD *supra* note 25, at 1387-88.

[36] For a detailed discussion of the results. see W. O'BARR, *supra* note 25. at 80-82; COSLEY, O'BARR & LIND, *supra* note 25. at 1388-89.

quently evaluate witnesses who use the narrative style more favorably than witnesses who use the fragmented style. Second, listeners tend to base their evaluations of a witness on their perceptions of the examining lawyer's opinion of the witness. If a listener interprets the use of the narrative style as indicating that the lawyer trusts and believes the witness, the listener is more likely to reach a similar conclusion concerning the witness.[37] This study provides empirical support for the common practice of advising witnesses to use a narrative style when testifying on direct examination.

4. Simultaneous Speech and Interruptions. — During cross-examination, the examining attorney and the witness often interrupt each other and speak simultaneously in an effort to dominate and control the testimony. O'Barr's final study examined the effect of these hostile exchanges on listeners' perceptions of the witness and the attorney. Using a segment of an actual cross-examination, O'Barr made four different tapes that presented the same evidence, but which differed in terms of the verbal exchange between the witness and the attorney. The tapes consisted of the following scenarios: (1) no simultaneous speech; **(2)** simultaneous speech, but neither party dominated; **(3)** lawyer dominated by persevering in about seventy-five percent of the instances of simultaneous speech; **(4)** witness dominated by persevering in about seventy-five percent of the instances of simultaneous speech.[38]

The experiment resulted in two important findings. First, listeners perceived the lawyer's control over the presentation of testimony as low in all situations involving simultaneous speech, regardless of which party dominated the exchange. That is, no matter which party dominated a cross-examination containing simultaneous speech, listeners rated the lawyer as having far less control over the presentation of evidence whenever simultaneous speech occurred. Similarly, listeners rated the witness as being more powerful and more in control whenever there was simultaneous speech.[39]

Second, in situations in which counsel dominated by persevering in the vast majority of the simultaneous speech exchanges, the lawyer "lost" in the eyes of the listeners. When the attorney appeared to "win" the exchange by persevering more than the witness, listeners rated the lawyer as giving the

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[37] W. O'BARR, *supra* note 25, at 82.

[38] *Id.* at 88-89.

[39] *Id.* at 90.

witness less opportunity to present his or her testimony. Listeners also rated the attorney as being less fair to the witness and as being less intelligent. When the witness dominated, however, subjects felt that the witness had a better opportunity to present his or her version of events and the participants evaluated the *lawyer* as being more intelligent and fairer than when the lawyer dominated the verbal exchange.[40]

O'Barr's final study suggests that counsel should avoid interruptions and simultaneous speech during a cross-examination to preclude the appearance of having lost control of the examination. When simultaneous speech does occur, however, the lawyer should not attempt to dominate the exchange. To do so creates an appearance of unfairness to the witness and will result in the lawyer receiving a negative overall assessment from the jury.[41]

B. Using Language to Influence a Witness's Testimony.

Social scientists have discovered that the wording of a question can influence the answer given to that question significantly. In one experiment, researchers studied the effect of altering the wording of a question on an individual's account of events he or she recently witnessed.[42] Subjects viewed a film of an automobile accident and then were asked questions about what they observed in the film. The question, "About how fast were the cars going when they smashed into each other?" elicited significantly higher estimates of the cars' speed than questions that used the verbs "collided," "bumped," "contacted," or "hit" in place of "smashed."[43] On a retest a week later, subjects who had been questioned using the verb "smashed" were more likely to answer yes to the question, "Did you see any broken glass?" even though broken glass was not present in the film.[44]

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[40] *Id.* at 90-91.

[41] *Id.* at 91; CONLEY, O'BARR & LIND, *supra* note **25,** at 1392.

[42] Loftus & Palmer, *Reconstruction of Automobile Destruction,* 13 J. OF VERBAL LEARNING AND VERBAL BEHAV. **585** (1974).

[43] The verb "smashed" elicited a mean speed estimate of 40.8 miles per hour while the verb "contacted" elicited a mean speed estimate of 31.8 miles per hour. The mean speed estimates obtained using the other verbs fell between those obtained for smashed and contacted. *Id.* at 586.

[44] Loftus & Palmer, *supra* note 42.

In a second experiment, subjects viewed a film depicting a multiple-car accident and then completed a questionnaire.[45] Half of the individuals were asked several questions starting with the words, "Did you see a . . . ," such as, "Did you see a broken headlight?" The other subjects were asked several questions beginning with the words "Did you see the . . . " such as, "Did you see the broken headlight?" In some cases, the item asked about was present in the film, while in other cases the item was not present.[46]

Subjects who completed the questionnaire containing questions using the indefinite article "a" were over twice as likely to reply "I don't know" than were subjects who completed the questionnaire containing questions using the definite article "the." This result held true whether or not the item—such as, the broken headlight—was actually in the film. Additionally, subjects interrogated using "the" questions were more than two times as likely to report seeing something that was not present. That is, subjects who answered questions containing the definite article "the" gave over twice as many false reports as compared to subjects who answered questions containing the indefinite article "a."[47]

The ability of subtle variations in the wording of a question to influence the answer given also has been demonstrated in the context of questions concerning an individual's personal experiences. In one study, interviewers questioned subjects about their headaches and about headache products.[48] One question asked how many headache products the individual had tried and gave a range of possible responses. When the possible responses were phrased in terms of small increments—that is, one, two, or three products—the subjects claimed to have tried an average of 3.3 other products. When the possible responses were phrased in terms of larger increments—that is, one, five, or ten products, the subjects claimed to have tried an average of 5.2 products.[49]

A second question concerned how often the participants suffered headaches. When the interviewers asked one group of subjects if they had headaches "frequently," and if so how

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[45] Loftus & Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 BULL. OF THE PSYCHONOMIC SOC'Y 86 (1975).

[46] *Id.* at 87.

[47] *Id.* at 87-88.

[48] Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCHOLOGY 660 (1975).

[49] *Id.* at 561.

often, those subjects reported an average of 2.2 headaches per week. When the interviewers asked a second group of participants if they had headaches "occasionally," and if so how often, those subjects reported only *0.7* headaches per week.[50]

In summary, research has demonstrated that subtle variations in the wording of a question can influence the answer given dramatically. This effect occurs when an individual describes recently witnessed events and when he or she reports about his or her personal experiences. This suggests that trial and defense counsel can influence the content of a witness's testimony by carefully formulating the wording of the questions they ask. Although this may result in a witness providing the version of events that is most favorable to one's client, that testimony may not be the most accurate account of what actually occurred.[51]

C. Using Language to Influence Jury Deliberations.

Social science research also has identified two concepts that appear capable of influencing jury deliberations. First, studies suggest that pragmatic implications influence jury members' recollections of the evidence and their opinions about a witness. Second, it appears that the technique of priming affects a fact-finder's analysis of ambiguous evidence.

1. Pragmatic Implications. — Testimony at courts-martial may consist of directly asserted statements, as well as logical and pragmatic implications. A logical implication exists when some information necessarily is implied by a remark. For example, the statement, "John is taller than Bill," logically implies that Bill is shorter than John. When a sentence contains a logical implication, the sentence cannot be interpreted and understood meaningfully without believing that the logical implication is true.[52]

In contrast to a logical implication, a pragmatic implication exists when a statement leads the hearer to expect something that neither is stated explicitly nor is implied necessarily and logically in the sentence. For example, the statement, "The prisoner was able to leave the confinement facility," leads one

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[50] *Id.*

[51] For a discussion of the ethical ramifications of this practice, see *infra* notes 81 to 87 and accompanying text.

[52] Harris & Monaco, *Psychology of Pragmatic Implication: Information Processing Between the Lines*. 107 J. OF EXPERIMENTAL PSYCHOLOGY: GENERAL 1, 2 (1978).

to believe—and pragmatically implies—that the prisoner left the confinement facility. The sentence, however, does not state that he left the confinement facility and he actually may have never left. Unlike logical implications, pragmatic implications do not have to be understood for the listener to comprehend the sentence meaningfully. Unless the context indicates otherwise, however, a listener usually will make the pragmatic inference upon hearing the statement.[53]

Several studies have demonstrated that listeners frequently remember the pragmatic implication of a sentence, rather than what the statement directly asserted.[54] That is, people tend to misremember the content of sentences containing pragmatic implications, believing these statements directly asserted what actually was implied only pragmatically. In one study, subjects heard an excerpt of mock courtroom testimony. Half of the subjects heard certain information directly asserted—such as "I rang the burglar alarm"—while the other half heard the same information pragmatically implied—that is, "I ran up to the burglar alarm." The participants later were asked to indicate if certain statements concerning the testimony were true, false, or indeterminate. A significant number of subjects incorrectly remembered pragmatic implications as being direct assertions, rating 71.4% of the pragmatic implications and 79.6% of the direct assertions as being definitely true. This tendency to misremember pragmatically implied information as having been asserted directly occurs even when the listeners specifically are warned not to treat implications as assertions of fact.[55] At a court-martial, pragmatic implications could influence a panel's deliberations because the members may incorrectly believe that witnesses directly asserted information that actually was implied only pragmatically.[56]

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[53] *Id.* at 3. Pragmatic implications may take several forms. They may involve events in a temporal sequence (*e.g.*, "The safe cracker put the match to the fuse," implies "The safecracker lit the fuse") or an implied cause (*e.g.*, "The clumsy chemist had acid on his coat," implies "The clumsy chemist spilled acid on his coat"). Pragmatic implications also may entail the implied instrument of some stated action (*e.g.*, "John stuck the wallpaper on the wall," implies "John pasted the wallpaper on the wall"). Finally, a pragmatic implication may imply location (*e.g.*, "The barnacles clung to the sides," implies "The barnacles clung to the ship"). *Id.* at 3-5.

[54] *See, e.g.*, Harris, Teske & Ginns, MEMORY FOR PRAGMATIC IMPLICATIONS FROM COURTROOM TESTIMONY, 6 BULL. OF THE PSYCHONOMIC SOC'Y 494 (1975).

[55] *Id.* at 495-96. The figures cited are the overall mean score across all experimental groups.

[56] For a discussion of the ethical ramifications of this practice, see *infra* notes 88 to 89 and accompanying text.

2. *Priming.* — Researchers have discovered that repeated exposure to a specific category of information increases the propensity to classify ambiguous information according to that category — a concept known as priming. In one study, researchers primed certain subjects through exposure to words associated with hostility and then gave all of the participants in the study a description of an individual's actions that was ambiguous on the primed trait. The subjects who had been primed were substantially more likely to rate the person's actions as hostile.[57] This effect is strongest when priming occurs immediately before the presentation of the ambiguous information and when there is some delay between the presentation of the ambiguous information and its classification by the listener.[58]

One potential courtroom application of priming would be in an opening statement. For example, in his or her opening statement, a trial counsel in an assault and battery case might make frequent references to violent actions without limiting those references to violent acts by the accused. Priming theory maintains that the trial counsel's use of words associated with violence will increase the probability that panel members will interpret ambiguous behavior by the accused as being violent. Similarly, defense counsel might make frequent references to more passive actions in an effort to increase the probability the members will interpret the accused's ambiguous behavior as nonviolent.[59]

In summary, social science research has discovered various ways in which verbal communications affect a listener. First, listeners use a speaker's speech style to assess the individual's credibility, persuasiveness, and trustworthiness.[60] Second, subtle variations in the wording of a question can influence the answer given dramatically.[61] Finally, the implications and premises within oral communications can affect the listener's recollection and analysis of what he or she heard and his or her opinion concerning the speaker.[62]

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[57] Lind & Ke, *Opening and Closing Statements*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE **229, 241-42** (1985).

[58] *Id.* at **242.**

[59] For a discussion of the ethical ramifications of this use of priming, see *infra* notes **90** to **92** and accompanying text.

[60] *See supra* notes **25** to **41** and accompanying text.

[61] *See supra* notes 42 to **51** and accompanying text.

[62] *See supra* notes **52** to 59 and accompanying text.

The extent to which the research findings discussed above can be applied directly to the courtroom setting remains an area of controversy among social scientists.[63] Some skeptics question the external validity of the research, arguing that the jury simulation technique used in many of the studies does not reflect the reality of an actual trial accurately.[64] Despite this criticism, however, it appears that use of the communication techniques suggested by social science research can affect the trial process, making the true controversy the extent to which the process can be influenced. The issue that then must be addressed is whether these efforts to influence courts-martial violate the Army's Rules of Professional Conduct for Lawyers.

III. Ethical Considerations

Trial and defense counsel must fulfill several roles. First, they are advocates and in that role, counsel must "zealously assert[ ] the client's position under the law and the ethical rules of the adversary system."[65] Second, they are officers of the legal system; therefore, each of them has a "duty of candor to the tribunal."[66] Finally, trial and defense counsel are public citizens who have a "special responsibility for the quality of justice'' dispensed by the court.[67] Given these potentially conflicting duties, is the use at courts-martial of the research findings previously examined zealous advocacy or a violation of the lawyer's duties as an officer of the court and a public citizen? An examination of the various techniques that apparently are capable of influencing the courts-martial process demonstrates that, in general, those techniques do not violate the Army's ethical rules.

A. Nonverbal Communications.

There are several reasons why the use of kinesics and paralinguistics should be viewed as zealous advocacy. First, the use of kinesics and paralinguistics is merely an effort by the advocate to increase the persuasive power of the words used in his or her presentation and is analogous to the lawyer practicing

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[63] Tanford & Tanford, ***Better Trials** Through **Science: A Defense** of Psychologist-Lawyer Collaboration*, 66 N.C.L. REV. **741, 754** (1988).

[64] *Id.* at 754-55.

[65] DA Pam. **27-26,** Preamble **(A** Lawyer's Responsibilities).

[66] *Id.* rule 3.3.

[67] ***Id.*** Preamble **(A** Lawyer's Responsibilities).

the delivery of an opening statement and closing argument. In each case, counsel is attempting to find the most persuasive method of communicating to the fact-finder the factual and legal basis for returning a favorable verdict.

Moreover, our judicial system implicitly recognizes that the trial lawyer's duty zealously to advance the client's interests involves more than merely identifying the legal arguments that support the client's position. If the only requirement was to find the right words, then the lawyer's arguments could be given to the fact-finder in written form. Our trial system, however, is based upon oral advocacy — a fact that amounts to an implicit acknowledgment that the manner in which information is presented in the courtroom is a critical aspect of the legal process. The use of kinesics and paralinguistics therefore should be viewed as a legitimate and ethical effort by counsel to increase the persuasiveness of his or her presentation.

Second, there is a tendency to exaggerate the probable effects that nonverbal communications have on the fact-finder, and to ignore that the strength of the evidence actually has the greatest impact on the fact-finder's decision.[68] Most studies examining the influence of nonverbal communications hold evidentiary strength constant and manipulate the variable of interest, such as, eye contact. Studies manipulating evidentiary strength have discovered that extralegal factors, such as nonverbal communication, have the greatest impact when the evidence is weak or ambiguous, and may have little or no effect when the evidence is strong.[69]

Although counsel should be allowed to use kinesics and paralinguistics freely, there are limitations on the use of proxemics. Using proxemics during a direct examination to enhance the credibility of one's own witnesses[70] is an ethical and legitimate tactic that is similar to the common practice of preparing a witness to testify by conducting practice direct and cross-examinations. In both cases, counsel is not affecting the content of the witness's testimony. Rather, counsel merely is helping the witness present his or her testimony in the most persuasive and credible manner possible.

There are several reasons why, in general, employing proxemics during cross-examination also should be viewed as a permissible and ethical tactic. First, an individual has the

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[68] Tanford & Tanford, *supra* note 63, at 755

[69] *Id*

[70] ***See*** *supra* note 21 and accompanying text

right to test his or her opponent's proof, and using proxemics is one method of testing an adversary's evidence. This technique is similar to using the verbal component of a cross-examination to cast doubt upon the credibility of a witness.[71] Second, there are ways to reduce the effectiveness of this use of proxemics without imposing a total prohibition. During pretrial preparation, counsel may warn his or her witnesses that opposing counsel may use proxemics during cross-examination in an effort to make witnesses appear nervous. Additionally, during voir dire counsel can inform the jury that, as is to be expected, witnesses may appear to be nervous. The lawyer then may argue on closing that any lack of composure on the witness stand resulted from the witness being nervous — not from attempts at deception.

One problem area, however, is the use of proxemics to damage the credibility of an opponent's witness who has accurately and truthfully testified. Is it ethical to use proxemics to make that witness appear nervous and therefore less credible, less persuasive, and less trustworthy?[72] The American Bar Association Standards for Criminal Justice prohibit trial counsel, but not defense counsel, from using proxemics in this situation.[73]

Trial counsel always must remember that a "prosecutor is both an administrator of justice and an advocate" whose duty "is to seek justice, not merely to convict."[74] Accordingly, if trial counsel knows that a witness is testifying truthfully, he or she "should not use the power of cross-examination to discredit or undermine [that] witness."[75] Moreover, if trial counsel reasonably believes that a witness is telling the truth, "the method and scope of cross-examination" may be affected.[76] Given this guidance, a trial counsel should use proxemics — as well as the full range of cross-examination techniques — only when he or she knows or reasonably believes that a witness is not testifying accurately or truthfully.

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[71] For a defense of this impeachment technique, see M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 43-49 (1981).

[72] *See supra* notes 22-23 and accompanying text.

[73] Unless they are clearly inconsistent with the Uniform Code of Military Justice, the Manual for Courts-Martial, and Department of the Army Regulations, the American Bar Association Standards for Criminal Justice apply to counsel, military judges, and clerical support staff. *See* Army Reg. 27-10, Legal Services: Military Justice, para. 5-8 (1 July 1984).

[74] American Bar Association Standards for Criminal Justice, 3-1.1 [hereinafter ABA Standards].

[75] ABA Standard 3-5.7.

[76] *Id.*

B. Speech Style.

As previously discussed, a witness's speech style can affect the listener's assessment of the witness's credibility, truthfulness, and persuasiveness. Consequently, trial and defense counsel can increase the fact-finder's acceptance of a witness's testimony by manipulating the witness's style of speech.[77] This practice does not violate the Army's ethical rules and not only should be permitted but actually should be encouraged.

Although observers tend to correlate a witness's style of speech with his or her truthfulness, credibility, and persuasiveness, in reality the speech style used by the witness correlates with his or her social status.[78] Consequently, a panel's decision may be based upon the social status and power of a party's witnesses, rather than upon the strength of the evidence. Counsel can mitigate that effect by training witnesses who belong to a lower social class to use the powerful style of speech. This will counteract the members' natural tendency to view these witnesses as less credible, less trustworthy, and less persuasive. This appears to be the only method of mitigating that tendency because research has shown that jury instructions telling jurors to disregard style of speech are ineffective.[79] Instructing witnesses to testify using a powerful style of speech does not violate the Army's ethical rules provided counsel does not instruct the witness to change the substance of his or her testimony. Additionally, this use of social science research actually improves the adversary process by increasing the likelihood that a panel will decide the case based on the evidence and not on the social status and power of each side's witnesses.[80]

C. Using Language to Influence Witness Testimony.

Researchers have discovered that a lawyer can influence a witness's testimony through the wording of the questions counsel asks.[81] The practice of preparing and coaching witnesses prior to trial, however, would appear to undermine an attorney's ability to influence a witness's testimony by the wording of his or her questions. Specifically, because most

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[77] *See supra* notes 25 to 41 and accompanying text.

[78] *See supra* notes 25 to 41 and accompanying text.

[79] W. O'BARR, *supra* note *25,* at 96.

[80] See Tanford & Tanford, *supra* note 63, at *750.*

[81] *See supra* notes 42 to 51 and accompanying text

witnesses will have practiced their testimony before trial, their versions of events should be well-settled and not easily swayed at trial by subtle variations in the wording of a question.

The practice of preparing witnesses to testify at an Article 32 Investigation and at trial, however, does pose a potential problem. During that preparation phase, trial and defense counsel, by carefully choosing the wording of their questions, may influence a witness's recollection of what he or she observed or experienced. After further rehearsal and coaching, the version of the "facts" created through counsel's strategic use of language becomes the witness's in-court testimony. Is this practice ethical?

The Army's ethical rules contain several prohibitions on the use of false evidence. Specifically, a lawyer "shall not knowingly make a false statement of material fact or law to a tribunal . . . [or] offer evidence that the lawyer knows to be false."[82] Additionally, an attorney "shall not falsify evidence [or] counsel or assist a witness to testify falsely . . . ."[83] A lawyer violates these prohibitions if he or she intentionally interviews and prepares witnesses using carefully formulated questions knowingly to present at trial favorable — but false — evidence.

Such clear-cut ethical violations are probably infrequent. The more common — and difficult — situation is when counsel, using carefully formulated and worded questions during the pretrial investigation and preparation, obtains the desired version of events but he or she is uncertain about the accuracy of the witness's answers. May counsel present that version of events at trial or should any effort to elicit favorable testimony through the use of strategically formulated questions be considered unethical?

Dean Freedman has addressed this issue in the general context of preparing a witness to testify.[84] Freedman begins by noting that the process of remembering is more a process of reconstruction than of recollection. He argues that the process is a creative one in which questions play an essential role in the reconstruction of what happened and when honest clients will, without realizing it, both invent facts and suppress

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[82] **DA** Pam. **27-26,** rule **3.3.**

[83] **DA** Pam. **27-26,** rule **3.4.**

[84] M. FREEDMAN, *supra* note **71,** at **59-77**

them.[85] A witness's testimony, therefore, is often "subjectively accurate but objectively false" and "accurate recall is the exception and not the rule."[86]

Accepting Dean Freedman's argument, it appears that the use of carefully formulated questions designed to elicit favorable testimony is ethical, provided the lawyer does not use testimony that he or she knows is false. Some measure of consolation is provided by the fact that counsel for each side is attempting to present a favorable version of events. The panel will hear each version and decide which account is closest to what actually happened. In this situation, in which both trial and defense counsel strive to protect their respective client's interests, the "lawyer can be a zealous advocate . . . and at the same time assume that justice is being done."[87]

D. Using Pragmatic Implications and Priming to Influence Jury Deliberations.

The use of pragmatic implications to influence the jury's recollection and analysis of the evidence long has been practiced by both witnesses and lawyers. Does counsel violate the Army's ethical prohibition against creating and knowingly using false evidence when he or she instructs a witness to pragmatically imply a falsehood? Arguably, although a witness commits perjury if he or she asserts or logically implies a false statement, the witness does not commit perjury when he or she pragmatically implies something false. After all, the witness swears to tell the truth — not necessarily to imply the truth. As such, a lawyer who instructs a witness pragmatically to imply a falsehood, technically at least, has not suborned perjury.

Research has demonstrated that listeners often remember the pragmatic implication of a statement, rather than the statement itself, believing that information which was pragmatically implied was asserted directly.[88] Consequently, the effect of pragmatically implying a falsehood is often the same as a directly asserted false statement — that is, the fact-finder makes a decision based on false information. Accordingly, a lawyer who instructs a witness to pragmatically imply

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[85] *Id.* at 65-68.

[86] *Id.* at 66.

[87] Preamble to Model Rules of Professional Conduct (1983)

[88] *See supra* notes 54 to 55 and accompanying text.

a falsehood should be treated as if he or she directed the witness to make a false statement in violation of the Army's ethical prohibition against creating and knowingly using false evidence.[89]

Unlike the above use of pragmatic implications, the use of priming should be permitted. First, each side will attempt to use the words most favorable to its case and efforts at priming may therefore cancel themselves out. This view is supported by research that suggests that priming effects may be inhibited by an adversarial presentation of information.[90] Second, although trial counsel may speak forcefully when characterizing the accused, he or she may not be excessive and incite the passions of the fact-finder.[91] Finally, if there is a significant potential for prejudice from the repeated use of certain words or phrases, one may seek from the judge a ruling prohibiting the use of that language during the trial.[92]

IV. Conclusion

Social science researchers have demonstrated the effect that nonverbal and verbal communications have on the message recipient. Applying that research to the courtroom provides a potential means by which trial and defense counsel can increase the persuasiveness of their trial advocacy. The Army's Rules of Professional Conduct for Lawyers, however, place limitations on counsel's use of some of the techniques suggested by social science research. Although the Rules provide some guidance applicable to the use of nonverbal and verbal communications, there are a number of areas in which the Rules do not provide a definitive answer. This article has identified some techniques that trial and defense counsel can use to increase the persuasiveness of their advocacies while also prompting discussion among counsel concerning the ethical constraints on their behaviors when they prepare for, and appear at, courts-martial.

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[89] **DA** Pam. **27-26,** rules **3.3,3.4.**

[90] Lind & Ke, *supra* note **57,** at **242.**

[91] Trial counsel may strike only "hard but fair blows." *See* United States v. White, **23** M.J. **84, 88 (C.M.A. 1986);** United States v. Zeigler, **14** M.J. **860, 866 (A.C.M.R. 1982).**

[92] This was done in a criminal trial involving an obstetrician-gynecologist charged with manslaughter because he performed a late abortion. Prior to trial, the defense attorney obtained a court order prohibiting the use at trial of phrases such as "baby boy," "smother," and "murder." Danet, *Baby or Fetus?: Language and the construction of reality in a manslaughter trial,* **32** SEMIOTICA **187, 189 (1980).**