

Snips and Snails and Puppy Dog Tails

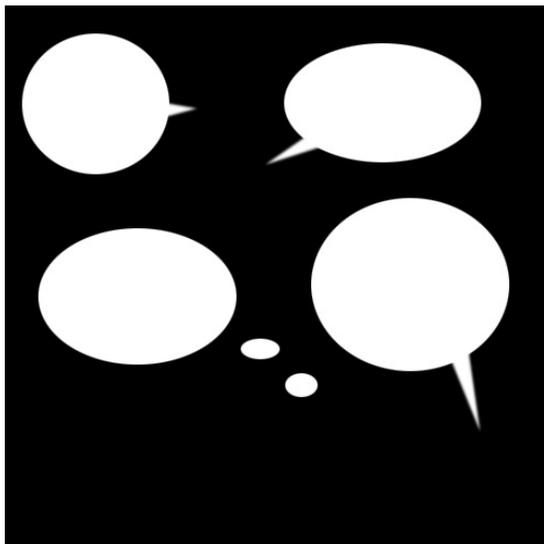
Does What We're Made of Make a Difference in the Courtroom?

by [Laura Dominic](#)

It's 2010. Why are we even talking about gender and the practice of law? Haven't we already "Come a long way, baby?" Hasn't the powerful female lawyer portrayed on the myriad TV legal dramas sent the message to the public that being a good lawyer has nothing to do with your gender? The answer to that is yes...and no. Whether you're a male or a female, in and of itself, doesn't make you any more or less competent as a lawyer. But your gender does play a role in what society has taught you about how you should and should not communicate, and how the public perceives your communication. And it's in that socialization process where we can find answers about how our gender impacts our communication and credibility in the courtroom.

Whether you win or lose, of course, depends on the facts, but how your message is received by the jury, judge, mediator, or the arbitrator plays a role. When it comes to communication behaviors, there are verbal and nonverbal elements that affect credibility, and there are general differences in the way men and women communicate. Some pose advantages for each gender, and some pose disadvantages. The good news is that there are teachable/learnable verbal and nonverbal elements of presentation that drive credibility, and a lawyer's credibility is a key component in persuasion.

This article addresses the intersection of effective communication and gender by analyzing those traits associated with gender that can increase credibility and make attorneys more effective advocates for their clients.



Where Do You Fall on the Communication Spectrum?

The differences in male and female speech patterns have long been researched. Very generally we can describe the typical male speech pattern or "masculine style" as having communication traits such as assertiveness, loud volume, and a strong upright body position. The typical female speech pattern includes traits such as a passiveness, softer voice, a tilted head, and lower volume.

While we would never argue that one style is better than the other (in fact this article will address how and when traits on both ends can be advantages or disadvantages for lawyers), many masculine communication traits have become associated, rightly or wrongly, with power and credibility because men have traditionally held positions of authority and played more dominant roles in society. However, it is important to keep in mind that not all men and women fall within their respective gender style. In fact, most female litigators adopt more masculine communication traits. An important exercise for any lawyer looking to hone their communication skills is to recognize what kinds of communication traits they employ. Knowing which traits increase your chances of connecting with the jury, landing a client, or persuading

a judge to rule in your favor can give you a competitive advantage over your opposition. Similarly, knowing which socially constructed traits decrease your credibility with the jury or send the wrong message to your business partners will alert you to what changes you should consider making in your communication style.

An important caveat needs to be made here. When we discuss “typical” communication patterns in this article, or talk about what women or men “tend to do,” these are generalizations and don’t necessarily apply to all men and all women. However many studies have found that more women tend to display the traits associated with the feminine style, while men tend to be low in these traits. In order to understand why this is true, we provide a quick review of how society has shaped the way we communicate.

Sugar and Spice and All That’s Nice

It is no surprise that boys and girls are biologically different from the moment their sex is defined. Nature has its well-defined parameters of what makes a boy a boy and a girl a girl. But it is not the natural differences that account for how we communicate; it’s how we are socialized that influences our communication patterns. We need to look no further than the schoolyard playground to see the differences between boys and girls. The boys are playing in large hierarchical groups with an obvious leader who is making up the rules. Their games are competitive and rule-based. Victory comes from winning, and losers are punished if they cry or fret over their loss. Contrast the boys with the girls, and you’ll see much smaller groups -- dyads or triads of “best friends.” Unlike the boys, the goal for girls is not to win; it’s to bond and be liked by their peers. For the girls, the discussion of what they are playing is much more important than the play itself, and when someone is upset, other girls offer sympathy and comfort.

As a result of this socialization, boys learn to be competitive and goal oriented; they learn to compete for a spot at the top without worrying about the feelings of those they climb over to get there. Girls learn to form relationships and promote egalitarianism within the group. They learn that getting along is important and that minimizing conflict is vital to belonging.

In this brief description, you should be able to see the roots of the *typical* adult male and female professional. The male professional got his start learning that it is more important to act than to talk, and that the endgame and the rules along the way are important. The female professional grew up learning that she gets ahead by reading a situation, and fostering and promoting relationships.

Great Expectations

A second important role that society plays in our communication centers on the expectations that others have of us when we talk. Because girls and boys tend to fall into roles described above, we expect that they will continue to have similar roles throughout adulthood. These expectations may occur at the subconscious level, and account for why women are often told to “smile” much more than men are. When expectations are not met, cognitive dissonance interferes with our processing of that information. So, when I subconsciously expect a woman (who, remember, is the promoter of group happiness) to smile, I’m confused when she doesn’t, and may negatively judge her message. This may explain why some of our clients complain that they have been unduly dubbed “a bitch” when they are overly aggressive in the courtroom or overly dominant in the boardroom.

To clarify the importance of societal expectations, one only needs to think about the power of stereotypes. Stereotypes can be characterized as the file cabinet in your brain. Very generally, stereotypes of men include assertive, rational, strong, direct and insensitive. Stereotypes of women include emotional, gentle, quiet, and sensitive. Couple the gender stereotypes with the stereotypes for lawyers (do I really need to fill those in for you?) and you have a recipe for what your audience expects from you before you even walk in the courtroom.

The intersection of gender and attorney stereotypes can begin to inform us about how society views attorneys and what they expect from them. For some people, their stereotype of an attorney is male. The fact that most people will associate the male pronoun with the lawyer indicates that as a female attorney, there is a built in expectation violation that occurs nearly every time you walk into a courtroom. But there is an upside (and a downside) to expectation violation, and this is where communication comes into play. Take, for example, when a female attorney walks into the courtroom, there will undoubtedly be one or two jurors who will think quite consciously, "Hmm? She's a woman," and some may expect her to be less competent than her male counterpart. But when she employs communication traits associated with high credibility, she violates those expectations and enjoys the benefit of jurors being pleasantly impressed with her ability. A converse scenario explains the downside – a male attorney who enjoys the initial benefit of a jury expecting excellence loses a lot of persuasive power when he uses low-credibility communication traits. The key to overcoming judgments based solely on societal expectations is to understand how you can use communication to enhance your credibility.

The remainder of this article focuses on the credibility ratings assigned to the verbal and nonverbal communication traits that are most commonly at play in a litigating setting, focusing on which traits are more typical of men and which are more typical of women, and when those traits become advantages and disadvantages.

The Words We Use

Communication traits generally and easily fit into one of two categories – verbal or nonverbal communication. Verbal communication refers specifically to the words we use and language choices we make. Nonverbal communication refers to how we look and sound when we say the things we say. In the courtroom we do both, and both categories contain traits that help and hurt credibility. We'll explore verbal communication first.

Maintenance Work v. Task Master

Consistent with our social gendering discussion above, we can generalize that women choose words that build rapport and maintain relationships with others. We hear words such as "I see," and "I know how you feel" more often from women than from men. Men tend to choose words that are task oriented and report the status of things – "The point is," "I need you to..." "Listen up." Using words that build rapport can be a strength when building trust with new clients, working with an upset witness, or fostering team spirit in the firm. In addition, attorneys who use communication to *continue* the conversation ("uh huh, tell me more," "interesting, what else happened,") learn more in voir dire and in cross-examination.

Questions v. Statements

Women ask more questions than men. After all, she wants to build relationships and get to know the other person, right? In contrast, the typical masculine speech style tends to make statements, and then ask for simple affirmation or denial. – *"And then you signed the contract. Correct?"* In the context of examinations, this is effective if you want to make sure a specific detail is included, but it can be ineffective if you are trying to get the witness to tell the story in their own words. Often in witness preparation sessions with male attorneys, a large part of our role is helping him ask the right questions to invite the witness to share information. Some very helpful stories have been unveiled this way.

While the advantage of asking questions favors women, there is one type of question that hurts credibility – tag questions. A tag question is a question that asks for confirmation (not affirmation) – *"We ought to oppose this motion, shouldn't we?"* *"The deposition is scheduled for 9 am, isn't it?"* Tagging-on a confirmation questions sends the message that we're not sure of ourselves.

Intensifiers, Hedges, and Hesitations

Among some of the least credible verbal communication traits are intensifiers, hedges, and hesitations. Studies have found that women, more than men, use these vocal fillers. Intensifiers include words such as "very," "really," and "so much." Intensifiers account for much of the stereotype of the "valley girl" and would not be part of a credible lawyers' speech. You wouldn't expect a lawyer's opening to begin, *"My client was really, really hurt by the very bad conduct of this totally awful defendant."*

The same is true for hedges, which qualify a statement, and hesitations, which signal insecurity. People who use words such as "well," "kind of," "sort of," "I think," and "maybe" are not as credible as those who do not. Consider the credibility difference between the two following opening statement lines:

Low credibility: *"I think probably you'll agree with me that what this case is about is a plaintiff who truly made very, very bad choices and well, I mean, caused his own demise."*

Higher Credibility: *"This is a case about a businessman who made poor business choices, which ultimately caused his own demise."*

Competition v. Consensus

Again generalizing about the differences between masculine and feminine speech styles, we see that the masculine style engages in verbal language that is more competitive than friendly. Boys are taught to be comfortable and non-stressed during confrontation, and tend to show less emotion in stressful situations. This style can be an advantage in mediation when



you don't want to show your cards. A down side to the competitive style is that men tend to dominate conversations and interrupt women in conversation more frequently than women dominate and control men in conversation, which can have a negative impact on the jury or clients who witness the interruption.

The use of polite forms of speech is a product of the consensus gaining style of feminine communication. Because more women employ the feminine style than men, women more frequently use the polite phrases such as, "I'm sorry," and "we." While saying "I'm sorry" is an important part of consoling and sympathy, in a professional setting this polite form can hurt credibility. Think about what "I'm sorry" means – it is accepting responsibility for something you have done. But when we apologize for something that is not our fault, you're taking on undue responsibility and potentially hurting your credibility. Take for example, "I'm sorry we can't have the meeting today; my partners cannot be there." While you may feel bad for not being able to hold the meeting, you do not need to own the responsibility for the reason why. Try instead simply removing the unnecessary apology – you accomplish the same goal without the risk of hurting credibility.

The use of the term "we" has advantages and disadvantages. Women are much more willing to include the group when praising a team than men are. "We accomplished a lot this quarter" v. "I want to thank you for assisting me in reaching my goals this quarter." Inclusion builds trust and rapport. However, the downside comes when a woman is inclusive when she really deserves the credit. Informing the senior partner that, "We have completed the Motion for Summary Judgment Memorandum and feel confident that it is a solid and persuasive brief," when *she* did all the work does not earn the same amount of credibility if you simply changed, "we" to "I." At the same time male partners run the risk of earning an unwanted label by not including the team. Simply replacing "I" with "we" can increase respect and morale in the firm.

Everything But the Words

Nonverbal communication encompasses everything besides the words you use. It's the tone of your voice, the gaze of your eyes, your body position and your facial expressions. The impact of nonverbal communication can be as great or even greater than the words you choose. An easy presumption to make is that because fact-based evidence is such a predominant part of litigation, the words we use must be more important than how we look and sound when we say them. Certainly words are important, but we cannot underestimate the importance of nonverbal communication. For example if the strength of the evidence you present is incongruent with the nonverbal delivery, the message sent through the nonverbal channel will usually win. Imagine if you said, "My client and I feel strongly that there was no wrongful conduct," with a quiet, sullen tone and your head hung low. The jury may believe the nonverbal cues over your words.

Men and women display very different nonverbal cues, some of which are controlled more by our biology (e.g., tone and pitch of our voice) than by our socialization. It is important to recognize the credibility assessments people make about you based on your nonverbal cues, and change those that invite low credibility ratings.



Eye contact

One of the best indicators of credibility is eye contact. When delivering an opening statement or closing argument, making eye contact with every member of the jury will enhance your credibility more dramatically than if you simply scanned the jury box. Typically, women anchor their gaze more on people's faces than men do, but women are also more likely to break eye contact when confronted. If your objective is to build rapport and credibility, the key is to look people in the eye, but not so long as to make them uncomfortable or to appear as if you are challenging them. If your objective is to inconspicuously make a witness uncomfortable, then you should make repeated and unwavering eye contact.

Voice

Obviously the tone and quality of our voices will be a part of any spoken message, and will impact perceptions of credibility. Generally, a relatively loud, low tone, and moderately fast pace is more credible than a quiet, high pitched, very fast or very slow pace. Men have the advantage of having voices that fill courtrooms. They also have lower pitch. When some women try to increase their volume their pitch becomes higher, and the rate becomes faster (which may explain why female attorneys feel as though they are interrupted by judges and opposing counsel more than men do). When working with younger female associates, pitch is one of the first nonverbal traits we address. We're not trying to make a female sound unnaturally like a man, or ask her to strain to lower her pitch. But listen carefully to a more seasoned female attorney, and almost invariably her pitch is lower than a younger attorney (and most likely lower than her own voice was 10 years earlier).

Along with the head tilt, a rising intonation is a nonverbal trait that belongs almost exclusively to women. A rising intonation is that questioning tone heard at the end of a sentence that is not in fact a question. The rising intonation reduces what should be a strong, decisive statement to a weak, indecisive question. This is particularly obvious with many female witnesses. The following is from a witness preparation session with a nurse. First, read the answer with a strong voice from beginning to end; then read it with a rising intonation at the end.

"Next, I checked the vital signs of the mother. Then I looked at the fetal heart monitoring strip to check on the baby. Then I documented the chart."

Clearly, the first reading signals to a jury a nurse who knew what she was doing and it makes a much stronger impression on a jury. Stating it as a question only makes the jury question her credibility as they wonder about how much of a patient advocate she may have been.

Body Position

Your body position sends a lot of messages to your audience while you are communicating. Generally, an open body position (arms comfortably at your side or outwardly extended, shoulders relaxed and back, and legs in a shoulder wide stance) is more credible than a closed position (arms crossed or close to the body, hands clenched, shoulders hunched, and legs crossed at the ankles when standing.) Interestingly, men and women typically use the open body positions in different situations. Women show a closed body position in

uncomfortable settings whereas men are more relaxed, often leaning back in chair totally wide open. These contrasting body positions are often seen in boardroom meetings or cocktail party settings (particularly when comparing younger associates with older partners). Think about making a subtle adjustment in your body position next time you want to send a message that you are comfortable and confident.

In contrast to uncomfortable settings, women, more than men, tend to engage in nonverbal communication behaviors that show interest – head nodding, forward leans, and mirroring postures. These body positions are particularly effective when examining witnesses. While jurors expect to see some assertiveness when examining a witness, they also expect attorneys to be polite. To a jury, a body position that shows interest translates into the politeness they expect to see. During more assertive cross-examinations, female attorneys may avoid some of the negative feedback we hear from jurors about the unnecessarily aggressive male attorney.

On several occasions, we've had particularly assertive male attorneys ask us what they can do to capitalize on their assertiveness on cross-examination while not coming across as unnecessarily aggressive. Our advice usually entails slight changes in body position, while maintaining a stern voice -- standing in front of a witness with arms slightly extended rather than pointing a finger, dropping one arm to the side rather than gripping the podium with both hands, or nodding in response to some answers rather than maintaining a constant gaze. Softening the nonverbal tone will pair well with the assertiveness jurors expect and want.

Head Position

Mentioned earlier, the head tilt is a behavior that is almost uniquely characteristic of women. Women often sit and speak with their head titled to one side, while men rarely do. What is important is that the head tilt is commonly associated with low credibility as it is a sign of perpetual curiosity or bewilderment. Women, next time you are in large group setting, see if you can see this trait in others. You'll become more conscious of this behavior and change it while sitting at counsel table or delivering your opening statement.

Conclusion

While this is but a short and brief analysis into a much-researched topic, the bottom line is that men and women alike can enhance their communication effectiveness by adopting the traits and behaviors associated with higher credibility. Though the communication continuum labels certain traits as masculine and feminine, it is inaccurate to focus on whether men or women are more effective speakers. Instead, we should focus on the communication behaviors that increase perceptions of credibility. Each of us can benefit by identifying those traits that hinder our credibility, and focusing on changing behaviors that will increase our effectiveness. When we understand the messages that our



verbal and nonverbal communication cues send, we can begin to hone the traits that negatively impact our credibility and refine those that capitalize on our strengths. This is not a perfect prescription for success. Because each of us finds our self using different styles—understanding what needs be changed, and what should be embraced will vary from person to person. Additionally, consider who is receiving the message (client, judge, jury, opposing counsel, or colleagues) and the context of the message (deposition, settlement negotiations, voir dire, examination, etc.) to understand if there is a masculine or feminine trait that could increase effectiveness.

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Editor's Note

As you page through this issue, you'll see content on shadow juries, managing and mentoring Millennials, a review of the iJuror application for the iPad, recommendations on family law disputes, some research on damages presentation, thoughts on communication and gender of attorney, supplemental jury questionnaire items for Arab or Muslim parties in cases, and an interview with the trial consultants involved in the civil rights retrials featured in the new movie *Neshoba*. As always, our goal is to educate and inform and cause you to think. We do that through a combination of articles and a sprinkling of original research and technical pieces aimed at helping you keep up with the latest in trial advocacy and thought. We have two departures from trial advocacy in this issue--the interview elicited by the *Neshoba* movie release and the article on *Managing and Mentoring Millennials*.

We are proud of our history with civil rights and proud of our ASTC members who have worked to bring justice (albeit delayed). We're bringing you this interview with Andy Sheldon and Beth Bonora to show that pride and to highlight the contributions of these consultants. (And to encourage you to see the movie!) The Millennial piece is a follow-up to our piece in the July issue on what we really know about the Millennial generation. There has been a tremendous debate in the online community on the work ethic of the Millennial attorney. We are publishing this review of research on the Millennials at work and offering management/mentoring tactics to firms struggling with welcoming and retaining Millennial attorneys.

Read. Comment. Enjoy. Tell your friends and colleagues about The Jury Expert! And (ta-da!) watch for our very cool and way current web redesign coming at some point during the next month!

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