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*Shave, Haircut or Total Makeover: The Reality of Trial Witness Preparation*

## **Demeanor, Deception and Credibility in Witnesses:**

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### **DEMEANOR**

Jurors use intuition in judging demeanor, deception, and credibility in their daily lives. Since jurors bring life experiences with them to court, understanding perceptions of truthfulness and lying behavior is critical. Whole books are written on the topic of lying<sup>i, ii</sup> and a television series, *Lie to Me*, spawned from the work of Dr. Paul Ekman, the renown psychologist in the area of human emotion and lying. Social scientists study lying behavior, but knowing the myths that jurors' believe is crucial. This paper focuses on perceptions of behavior and suggests ways to enhance witness credibility.

*Witness Assessment Method.* How do you feel about your natural ability or intuition in sizing up witnesses? Do you understand how to use information from expressions, voice, and gestures in witnesses' testimony? Do you recognize signs of perplexity, interest, and comprehension from posture, gaze and expression?

This section on demeanor describes assessing witnesses' behaviors to sharpen your intuition. While there are individual differences for witnesses, a witness assessment method can be a template to evaluate any witness. Articulating the specific behaviors contributes to further defining your gut feeling. Use the template included or your own method to mark the witnesses' baseline behavior and changes from baseline. Adding subjective qualities such as whether the witness is direct, honest, persuasive, qualified, and understandable are a good start. Break down subjective qualities into observable behaviors. Allow space to add other subjective evaluations on attractiveness or jury appeal and advice for witness preparation for your witnesses.

*Role Expectations for Witnesses.* In judging a witness, it is important to understand expectations of the witness' role as well as interpret his or her behavior. Jurors make decisions about witness testimony based on more than just the witness' occupation. The witness' role in the case and how it is fulfilled contributes to whether the witness has a pivotal role. Is this witness a friend of the plaintiff, a treating doctor, or an expert? In looking at witnesses, jurors evaluate them against their expectations of the role of a friend, treating doctor, expert, etc.

How the witness fulfills the role is crucial. Assess how jurors might perceive witnesses when developing case strategy and deciding who will testify. Does the witness' appearance match the expected role? Does he or she look like a CEO, financial advisor, or a hydrology expert? Does the operations manager responsible for firing the plaintiff match the jurors' expectations of a manager? Does the advising financial consultant sound confident testifying that the building should have sold at the time it was sold, rather than at the top of the market?

In assessing the role, if you see a CEO chewing gum for example, it diminishes the role. Of course a witness would not chew gum on the witness stand. None of your witnesses should chew gum in videotaped depositions either. Make sure that role expectations are considered before depositions and avoid habits or behaviors that detract from the essence of the testimony.

*Behavioral Patterns.* Isolated behavior sometimes becomes an exaggerated headline (e.g., a slip of the tongue or a racist comment). Behavioral patterns of a witness tell the whole story. It is common knowledge that witnesses who break down on cross are not as effective as those who remain consistent. Across several hours or several days, you can more readily see changes in witnesses' behavior. When a witness is comfortable and feeling in control while being questioned, he or she appears more confident and credible. Tension arises when presented with damaging documents. Jurors notice behaviors such as nervous fidgeting, tapping the foot, and sweating when watching videotapes or live witnesses. What matters is whether the witness is consistently nervous or does this particular testimony elicit nervous behavior.

**WITNESS ASSESSMENT TEMPLATE**

NAME \_\_\_\_\_

EMPLOYED POSITION \_\_\_\_\_

ROLE IN CASE \_\_\_\_\_

**FULFILL ROLE REQUIREMENTS**

APPEARANCE \_\_\_\_\_

BEHAVIORS \_\_\_\_\_

**NONVERBAL PERCEPTIONS**

POSTURE \_\_\_\_\_

GESTURES \_\_\_\_\_

FACIAL EXPRESSIONS \_\_\_\_\_

**VERBAL PERCEPTIONS**

VOICE \_\_\_\_\_

EXPRESSION \_\_\_\_\_

BASELINE DEVIATIONS \_\_\_\_\_

SUBJECTIVE IMPRESSIONS \_\_\_\_\_

STRENGTHS \_\_\_\_\_

WEAKNESSES \_\_\_\_\_

ADDITIONAL COMMENTS \_\_\_\_\_

STRATEGY CONSIDERATIONS \_\_\_\_\_

*Confidential, attorney work product – Impressions by Dr. Cynthia Cohen*

*Instructions on Demeanor.* Can demeanor assist in the impeachment of a witness? The Judicial Council of California Civil Jury Instructions suggests that jurors pay attention to demeanor in evaluating truthfulness. It suggests that jurors rely more on their visual assessments than on their notes.

You habitually recognize baseline behavior in those close to you. It is easier to read behavior from a family member or coworker versus a stranger. When behavior changes in those close to you, it is easy to ask, "What is the matter?" or share in their joy. Focusing on facial and vocal expressions aids recognizing truthfulness in witness testimony.

The moment the witness walks into the courtroom, jurors begin making attributions. How the witness walks reveals levels of energy, leadership, and confidence. Jurors may not know how to describe the behavior or their gut reactions. Whether articulated or not, these perceptions affect them. Straight back shoulders versus shoulders hunched over affects perceptions of confidence. Understanding how proud posture and high energy deems witnesses as more credible is important to convey in witness preparation.

*Voice and Expression.* What do James Earl Jones, Sean Connery, and Katie Couric have in common? They are rated as having the best voices in a 2001 poll.<sup>iii</sup> There are stereotypes associated with vocal characteristics. Imhof notes a female with a breathy voice is perceived as more feminine, prettier, petite, effervescent, high-strung and shallower than other females. The same voice characteristics in a male lead to perceptions that the person is young and more artistic.<sup>iv</sup> Imhof's empirical study varied pitch in males and females. Women with a low voice are perceived to be more agreeable than women with a high voice. The reverse pattern emerges for men. They are perceived as less agreeable when speaking with a low voice. Higher pitch voices are more commonly associated with deception.

Vocal expressions contribute to perceptions about the witness. Vocal expressions are as important as facial expressions and verbal content. When assessing voice, we notice pitch and tone. When there is a lower octave like a DJ's voice or James Earl Jones, the voice is deemed more credible. During a witness prep session, one witness had a throatiness in his speech where his vocalizations stemmed from the throat rather than the diaphragm. His father had been a preacher. If the raspy voice doesn't work for the witness, one way of training the voice is to practice speaking from the diaphragm rather than projecting from the throat.

Vocal expression includes phrasing, pausing, and interruptions. In another witness preparation session, a mining expert consistently interrupted the questioning lawyer. He also volunteered information on cross. When a witness interrupts to answer the question before the questioner finishes, it insults the jurors' intelligence. Maybe the witness knows what question will be asked, but it is important that the jurors hear the question. When explaining the response-time continuum between silence and interruption, this expert had an "aha moment." His wife complained that he interrupts her all the time too. He got it. He slowed down to hear the question instead of trying to show his smarts. Suggest to fast talking witnesses that they wait five seconds to respond. Of course they will respond in three seconds or less, but they soon stop interrupting.

Another witness had hesitated speech. Speech hesitancy can be interpreted as indecisiveness – an attribute against the grain that an advisor is decisive. This witness needed to prove he successfully negotiated the contract. Finding the right rhythm in responding to questions makes a difference.

*Congruence between Verbal and Nonverbal Behavior.* “I am calm!!” Do the nonverbal perceptions (posture, gestures, facial expressions) match the verbal perceptions (voice, expression)? Look at congruence between verbal and nonverbal behaviors. When the verbal and the nonverbal behaviors don’t match, we tend to believe the witness’ nonverbal behavior. Experienced trial lawyers understand nuances. The general public may not. Some jurors are cynical, while other jurors take content at face value.

Nonverbal behaviors are not as consciously controlled as verbal behaviors. This becomes important when discussing deception and credibility. Facial expressions are sometimes consciously controlled as in fake smiles or crocodile tears. The astute or trained observer often sees leakage. Leakage is a term we discuss with micro expressions and deception. Leakage is the emotion slipping out somewhere, whether it is covering the mouth or involuntary signs in the lips.

*Witness Assessment from My Cousin Vinny.* Marisa Tomey as Miss Vito in *My Cousin Vinny* is a classic example of a contrast effect for witness credibility. A contrast effect occurs when more than expected is delivered. Although Miss Vito was assisting Vinny in investigating the crime scene, she originally is reluctant to be a witness. Her knowledge is drawn out while being voir dired as an expert.

Judge: Can you answer the question?  
Ms. Vito: No. It’s a trick question.  
Judge: Why is it a trick question?  
Vinny: Watch this.  
Ms. Vito: Cause Chevy didn’t make a 327 in ’55. The 327 didn’t  
come out until ’62. And it wasn’t offered in the Bel Air with a  
four-barrel carb  
till ’64. However, . . .  
Prosecutor: And is there any way in the world the Buick that the  
defendants were driving made those tire tracks?

Ms. Vito is credible when she says the two tire tracks are even. She describes the car that made these two equal length tire tracks had positraction and it was not available on the ’64 Buick Skylark. She explains limited slip differential and a regular differential when she relates to the jury that anyone stuck in the mud in Alabama knows that when you step on the gas, one tire spins while the other doesn’t. Everyone on the jury nods and some even verbalize, “that’s right.”

While Ms. Vito originally did not portray what jurors would expect an automotive expert to look like, her knowledge base from working in her father’s shop qualified her. Her verbal and nonverbal behavior is consistent. She is very expressive. The underestimation by the prosecutor (and the jury, as well as the audience) adds to her credibility. While listening to her testify, she seems like someone who would be comfortable with elbow grease.



### MS. VITO'S WITNESS ASSESSMENT

NAME	Marisa Tomey as Ms. Vito
EMPLOYED POSITION	Worked in father's garage
ROLE IN CASE	Expert on automotive issues: tire tracks
FULFILL ROLE REQUIREMENTS	
APPEARANCE	Heavy makeup, short skirt, doesn't look like mechanic
BEHAVIORS	Tries to leave stand – reluctant to testify
NONVERBAL PERCEPTIONS	
POSTURE	Shoulders square, sits upright on the stand
GESTURES	Animated, busy arms, crosses arms briefly on voir dire
FACIAL EXPRESSIONS	Makes faces, rolls eyes with responses to judge, good eye contact with jury
VERBAL PERCEPTIONS	
VOICE	High pitched, bit irritating, twang
EXPRESSION	Expressive, talks quickly, combative on cross
BASELINE DEVIATIONS	Becomes confident talking about tire tracks
SUBJECTIVE IMPRESSIONS	Down to earth, no airs, genuine, flirtatious
STRENGTHS	Personalizes her experience well
WEAKNESSES	Voice is a tad irritating, could be explosive
ADDITIONAL COMMENTS	She knows car mechanics, models of cars, tires
STRATEGY CONSIDERATIONS	Evidence of tire tracks exonerates defendants

*Confidential attorney work/product – Impressions by Dr. Cynthia Cohen*

Miss Vito is asked about a photo showing the tire tracks leaving the scene of the crime. The prosecutor wholly underestimates her knowledge of cars. Her “expert” opinion turns the case, since the car the defendants were driving could not have made those tire tracks.

## DECEPTION

Lies succeed or fail in the courtroom because of the liar's emotions and motivations and the lie detector's ability to detect lies. The ability to detect lies is a learnable skill. This skill and knowledge helps understand when and why lies succeed or fail. Knowing common myths about lying behavior helps your case as well. Sometimes a truthful person is disbelieved. Nervousness or sweating occurs for many reasons. Awareness of the myths is important for witness preparation.

*Can You Detect Deception?* "Liar, Liar, Your pants are on fire!" children often shout as if lying created effects that were immediately obvious to the onlooker. As we grow older, we rely on more subtle signs in deciding whether to trust someone. We refer to people as "shifty eyed" or imagine someone has an "honest face." Often, we are convinced we can judge others' characters on the basis of how they look and behave. Despite what we believe, however, reliance on this kind of common sense often leads to errors. In conducting litigation, it can cost you the case.

As a litigator, can you detect a liar? Researchers have sought to identify which people are likely to recognize a liar when they meet one. Ekman and Friesen's 1969 theoretical statement about cues to deception explores leakage and deception cues.<sup>v</sup> Ekman's classic research<sup>vi</sup> on whether individuals could test who is lying, used nurses to lie or to be truthful about scenes that are pleasant to watch. The nurses in training were asked to describe this beautiful scene at the beach in both conditions. They were either watching a bloody surgery or truly looking at beaches.

When members of the Secret Service, FBI, CIA, federal polygraphers, police, psychiatrists, psychologists, judges and attorneys were tested, the results were unsettling. Psychiatrists and psychologists did no better than chance. Interestingly, judges and psychiatrists rated their ability to detect lies lower than the Secret Service members, federal polygraphers, and the police. Secret Service members were better at detecting liars than members of the FBI and CIA. Secret Service officers on the streets are constantly vigilant for any changes in behavior and constantly scanning the environment. [Of course this classic research was done years before the April 2012 Secret Service scandal in Columbia.] Those who were accurate varied clues for every person that they saw. Those who were not accurate didn't vary their clues. Instead, they relied on fidgeting and speech content. Success occurred because they were not looking for the Holy Grail, nor a belief that there is one indicator for lying behavior. There are however key indicators for physiological expressions of emotions and determining deception. On the whole, those who were good at recognizing emotions were more accurate in judging who was lying. Although most people are not better than chance in detecting deception, some groups of police professionals have demonstrated significant lie detection accuracy.<sup>vii</sup> This improvement in ability could be from specific training in detection.

Who Lies? Indeed, studies on deception (Ekman's research) show that few of us are good judges of character in the absence of experience because the way people look and behave seldom reveals their true motivations. Some people lie more successfully than others. Good liars, like professional actors, have the ability to become the role they are playing. They do not believe they are lying; they believe the events they describe are actually happening. Pathological liars, on the other hand, cannot choose to be truthful. They know they are lying, but cannot stop themselves. They fool people sometimes – usually in brief encounters. These brief encounters may be a clerk at a store, or in a dating situation at a bar or online. People tend to lie a lot for sport. Whether an individual lies under oath depends on whether he or she has gotten away with lying in the past.

Pathological liars and natural performers. Pathological liars cannot choose to be truthful. They know they are lying, but can't stop. They fool some people. Some people within their circles know they are constantly lying. You may have an ex-brother-in-law of this type. Natural performers, like actors, are very convincing. Professional actors are like very good poker players. They have a gift to become the role they are playing. They believe they are not lying. Most lies are not lies about emotions. Feelings about lying betray the liar. For example President Nixon's sweating on camera.

Emotion. Being able to detect emotion in witnesses is equally important and effective for determining credibility or lying behavior. Can you recognize each of the different types of emotion in witnesses (i.e., anger, contempt, disgust, happy, sad, surprise, fear, and guilt)? Here is how emotions give clues to deception.

Fear. In a trial, jurors have role expectations for witnesses. Sometimes you have an armchair psychologist in the jury box trying to decide why a witness would feel a certain way? By understanding the emotions that liars are experiencing, one can sometimes recognize the deception cues in masking emotions. Ekman illustrates that it is possible to predict behaviors that distinguish liars from truth tellers, especially when the liar is apprehensive about being caught. For example, the cues indicative of detection apprehension are fear cues. These include higher pitch, faster and louder speech, pauses, speech errors, and indirect speech. The greater the liars' detection apprehension, the more evident these fear cues should be. Liars should appear more fearful as the stakes become higher and the anticipated probability of success becomes lower.

Fear interplays with lying behavior in a number of ways: 1) Fear of being caught lying. Not everyone is afraid of being caught. The higher the stakes increases fear of punishment in being caught; 2) Past experience plays a part. The more times a liar has gotten away with a lie and succeeded, then fear dissipates for the liar; 3) How well can the target detect the lie? If you have a trained polygrapher, then the liar's fear would increase; and 4) Would a truthful person be afraid? What are the consequences of not being believed? Is there a gang member seeking revenge if the witness speaks the truth?

*Guilt.* Not everyone feels guilty about engaging in a lie. What are the shared values? If someone feels guilt about lying or there is a moral issue, the first time that person tells the lie is the easiest time to catch micro expressions. Emotions are often briefly revealed through leakage. The tenth time that they tell the lie, liars tend to believe their own lies. There are noticeable changes in face and body. A lie catcher must look at the situation and determine if there is a compelling reason for one to feel guilty.

*Contempt.* Anita Hill was in the hot seat at the Clarence Thomas Senate Hearings. She was somewhat a reluctant witness confronted with details about her accusations of sexual harassment while working with Clarence Thomas at the EEOC. When asked to recall incidents about that time period, she had micro expressions indicating contempt (her eyebrow being raised). The leakage occurred the first time she was asked by then Senator Joe Biden about the Coke can. When further asked about pornography, her slow eyelid movements illustrate her emotion in recalling the negative events.

*Sadness.* Susan Smith drove her babies into the lake. When interviewed on television she cried crocodile tears. She had planned to commit suicide by driving into the lake with her babies. However she stopped short. For nine days before her confession, her story had police searching for a Black carjacker. Sheriff Wells found many inconsistencies in her story and when confronted, she confessed. Her crocodile tears at a press conference were a dead give away before the confession. Many of us know what sadness and real tears look like. Sadness engages more facial muscles.

*Duping Delight.* People who enjoy lying as an art, enjoy the thrill or excitement to win. Ekman calls this Duping Delight. Liars see the challenge in fooling the other person. The reputation of the person being lied to is important. It is not much fun putting something over on a dummy. Like Frank Abagnale, Jr. in the movie *Catch Me if You Can*, liars get a bigger thrill lying to someone smart like the FBI.

*Misconceptions about Deceit.* In the courtroom, stereotypes can be hazardous for lawyers and their clients. Some common myths about nonverbal behavior produce misleading clues and lead juries to think witnesses are lying when they're not. These clues include avoiding eye contact and movements such as scratching, picking, crossing one's arms, or tapping the foot. Most people believe lack of eye contact or shifting eyes is a clue to deceit. It is unreliable. Fidgeting such as foot tapping is often confused as a sign of lying. It is best to understand the person's baseline to define the behaviors and mannerisms. Is tapping the foot part of the person's usual repertoire? During the person's usual conversations, does the person have a pattern or rhythm of looking at someone and looking away? What if they break that rhythm? Shifting eyes can be useful if linked to other signs.

Jurors seldom understand body language that is culturally different from their own. Eye contact is a learned behavior and there are cultural differences. Looking away often occurs when someone is carefully constructing an answer. It is not a sign of lying. Umms, ahhs, inarticulate words used to fill pauses are not signs of lying – they are signs of thinking.

### **Misconceptions or Myths about Lying**

- Crossing arms
- Lack eye contact, looking away, shifting eyes
- Movement (fidgeting, scratching, picking hands, tapping foot)
- Nose is growing
- Sweating or nervousness
- Ums, ahhs – filling pauses

Training in Detection. Contrary to popular belief, women do not do better than men in recognizing lying. It takes teamwork in a deposition because watching the witness is more focused when separate from asking questions. Studying videotaped depositions afterwards is useful, especially if discovery is still ongoing and there is a chance for further inquiry. Getting a baseline of the individual's behavior can be difficult at the first meeting for many reasons. Detecting deception is a learnable skill. Ekman's F.A.C.E. training in physiological differences in emotions develops the skills.

Infallible Lie Detector? In the courtroom, lies succeed or fail depending on the liar's motivations and the ability of the observer (lie detector) to detect lies. The most significant body of scientific psychological work on lying focuses on methods for detecting deceptiveness by observing nonverbal behavior. Unfortunately, both for psychologists and lawyers, results suggest there is no infallible lie detection tool – human or mechanical. Individuals are so complex that there are no certain, universal signs of lying. There is nothing that works for everyone. There is no change in voice or body that always means one is lying. There is no sign of lying that belongs to lying itself. There are however, signs of fear.

Micro expressions. Physiologically humans are all keyed the same when you connect facial muscles to emotions. A frown from a remote island native in New Guinea uses the same facial muscles as a frown from a California native. When someone tries to mask an emotion (e.g., anger, sadness, happiness, surprise) there is often leakage of emotion and micro expressions are revealed. Micro expressions are small bits or blips of the emotion being felt. Micro expressions are revealed when first learning an unknown such as the prosecutor discovered evidence implicating the defendant. Training in recognizing emotions helps the lie detector pick up clues quicker. Below are a couple celebrity examples of witnesses being presented with evidence.

President Clinton. President William Clinton is a solid communicator whose baseline presentation is very presidential. His speech pattern is controlled, self-assured, calming, and absent ums, ahhs, or fillers during television casts. During the Monica Lewinsky debacle, we saw flat denials of ever having sex with that woman. In a press conference with his wagging finger, "I want you to listen to me. I did not have sex relations with that woman, Miss Lewinsky. These allegations are false." Later in an interview with Jim Lehr, we hear a different tune.

Clinton: I did not ask anyone to tell anything but the truth. There is no improper relationship. I intend to cooperate with this inquiry.  
Lehr: No improper relationship. Define what you mean by that?  
Clinton: There is not an improper sexual or any other improper relationship.

When we see the grand jury videotape, we see deviations from the baseline. President Clinton is not prepared for the prosecution having evidence or details that were revealed and is at a loss for a reply consistent with his normal presidential baseline.

Clinton: You are free to infer that my testimony is that I did not have sexual relations as I understand this term to be defined.  
Prosecutor: Including touching her breast?  
Clinton: That is correct.  
Prosecutor: The insertion of an object into the genitalia of another person?  
Clinton: There is nothing here about that is there? [Clinton's forehead reveals leakage as he tries to control his emotions when he comments. His face reddens and his forehead muscles scrunch during this short pause.] I never thought about that.

Best time to catch the micro expressions is when not prepared on the newly introduced topic. Clinton knows how to use his verbal communication strength and the best time to catch his lie is the first time presented with the evidence. Clinton later that day returns to baseline presidential mode and delivers comments to the public. "Indeed I did have a relationship with Monica Lewinsky that was not appropriate. In fact it was wrong . . . lapse in judgment. I told the grand jury, at no time did I ask anyone to lie, hide or destroy evidence or to take any other unlawful action."

O.J. Simpson. As *Dateline* says, "If the criminal case had the glove, the civil case had the shoes." Viewing the videotaped deposition of O.J. Simpson as a defendant in the civil trial, you see his expressions when confronted with evidence of wearing the murder shoes for the first time. O.J. is caught lying about the "ugly-ass Bruno Magli shoes."

*Testimony before the photographs are introduced.*

Petrocelli: Do you know why the shoe prints found at Bundy, matched Bruno Magli shoes?  
Simpson: No.  
Petrocelli: Did you every buy shoes that you knew were Bruno Magli shoes?  
Simpson: No.  
Petrocelli: How do you know that?  
Simpson: If Bruno Magli makes shoes that look like the shoes they had in court involved in this case, I would have never worn those ugly ass shoes.

*After photographs of OJ Simpson wearing Bruno Magli shoes introduced.*

Petrocelli: Anything about the depiction of you in the photograph that tells you something is wrong in that photograph?  
Simpson: Everything looks a little big. [Simpson's eyes go wide when he first sees the pictures. It is a look of fear.]  
Petrocelli: Excuse me?  
Simpson: Everything looks a little big.  
Petrocelli: The body parts?

Simpson: The clothing – the pants and the coat looks a little big for me.  
Petrocelli: Anything else?  
Simpson: I don't recognize the shoes obviously.

The first time Simpson looks at the pictures is when you get the emotional reaction of the wide eyes. After that the emotions and expressions are more controlled and the reaction does not reappear.

*Mistakes Liars Make.* It is no secret that people frequently make mistakes when they are lying. Most liars don't plan their lies. Because most lies are about facts rather than emotions, a liar's emotions often reveal deception. Frequently, feelings about lying betray the liar. Mistakes in lying often occur for one of two reasons – thinking or feelings. If your job is to detect a lie, you can take advantage of how poorly people prepare and that their emotions become involved in the process of their lying. The liar is often vulnerable because he or she is in the position of trying to hold onto a thought without revealing it. The pressure of this struggle makes revelation more urgent, especially if the lie is about feelings. The conflicting emotions usually slip out, if not verbally than nonverbally via involuntary muscle movements (e.g., covering one's mouth or quivering lips).

Liars' failure to prepare a line ahead of time often traps them. A professional liar has a prepared script. One trick to catch the professional liar is taking him or her off script. Instead of walking through the timeline "then what happened?" ask the witness to tell the story backward. Reverse order proves to be successful for police officers ability to detect deception.<sup>viii</sup> Regarding feeling – lies about feelings are harder to control than lies about facts. When emotions are involved in the process of lying, there generally is nonverbal leakage. There may be involuntary signs in the lips. Guilt increases the leakage. Shame prevents it.

You can learn to catch these signals and to pursue those suspected of lying more aggressively. Learn to understand nonverbal signs and their meanings more accurately. For example, it is often easy to recognize signs of fear in a witness but one must know what is behind such signs. Is this person afraid of being caught lying or merely afraid of being disbelieved? What motivates the witness? What differences between the person being questioned and the questioner affect perceptions about what is said? These kinds of psychological insights require understanding of how others think and are among the skills that can be learned.

*Clues to Deceit.* Deception clues can be discovered in length of answers. In rehearsed situations, answers get longer. If unrehearsed, we find the opposite. Liars are not always vivid with details. Innocent witnesses often tell the story with irrelevant material. They add details that aren't useful to the core of what occurred, but are included as the person tells the story. Liars prepare in a linear direction (e.g., this happened, next this, then . . .)

Affect is a big clue especially when it differs from baseline. If the witness is generally animated and the voice suddenly flattens, look at the specific content of the testimony. When affect changes, there are fewer illustrator movements with hands, the head, and the upper eyelids. There are many kinds of smiles. We all

have encountered fake smiles. There is a big difference between polite smiles and enjoyment smiles. Guilt cues are not as clearly determined, but could include cues to sadness such as lower pitch, softer and slower speech, and downward gazing.<sup>ix</sup>

When liars deceive, they become psychologically aroused in a way that puts stress on the voice, leading to an increase in pitch. In Ekman and Friesen's study using nursing students, they measured the nursing students' pitch through a speech analysis computer program. This analysis indicated that those in the lying condition had significant increases in pitch.<sup>x</sup>

Gestural slips are changes in behavior that occur when some emotion is felt. There may be a shoulder shrug or covering the mouth or body shift. Nonverbal behavior is not as easily edited as verbal behavior. The voice may go higher and tighter or there is a pained expression on the witness' face.

DePaulo's monumental meta-analyses of the empirical studies on deception reports 158 cues to deception.<sup>xi</sup> Results show that liars make a negative impression and are more tense. Many behaviors have weak or no discernable links to deceit. Cues to deception are more pronounced when people are motivated to succeed, especially when dealing with identity challenges rather than money gains. Cues to deception are stronger when lies are about transgressions.

Besides detecting deception through emotions and micro expressions, there are a number of other methods. Besides the widely known method of polygraphs, thermal imaging uses a physiological method recording skin temperature<sup>xii</sup> Another method to outsmart liars, uses questions about spatial and/or temporal information. Vrij et al. found that up to 80% of liars and truth tellers could be correctly identified when assessing their drawings.<sup>xiii</sup>

Interview style makes a difference in ability to detect lies. Accusatory styles typically result in suspects making short denials, thus fewer verbal cues that might reveal deceit.<sup>xiv</sup> There is a higher probability of making false accusations than when using an open-ended information gathering strategy. Liars interviewed by trained interviewers were more inconsistent leading to the trained interviewers' greater accuracy rate in detecting deception.<sup>xv</sup>

#### **Clues to Spotting Lying**

- Affect differs than baseline
- Smiles inconsistent with emotion
- Micro expressions revealing inappropriate emotions
- Signs of fear or guilt
- Fear cues (higher pitch, faster/louder speech, speech errors, indirect speech)
- Gestural slips (e.g., shoulder shrugs)
- Shifting eyes if linked to other signs
- Length of answers, details
- Can't tell the story backward

## CREDIBILITY

Instructions on Credibility. The Judicial Council of California broadly defines parameters for jurors to assess credibility. Below are the Council's suggested pre-instructions on credibility.<sup>xvi</sup>

Evidence Code section 312 provides:

Except as otherwise provided by law, where the trial is by jury:

- (a) All questions of fact are to be decided by the jury.
- (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.

The "credibility of expert witnesses is a matter for the jury after proper instructions from the court."

Jurors Determining Credibility. Jurors deciding the criminal prosecution of William Balfour in the murder of singer and actress Jennifer Hudson's mother, brother, and nephew had circumstantial evidence. They had critical pieces of evidence, but jurors saw holes in the timeline.<sup>xvii</sup> Jurors decided they would evaluate witnesses one by one. They would decide on credibility as testimony of each witness was read back. Jennifer Hudson was credible, but her testimony was irrelevant. In listening to all the witnesses, pieces of evidence came together. Cell phone records indicated that Balfour was not where he claimed to be at the time of the murders. He was convicted.

Hudson's jurors were able to transcend the CS/ Effect or the absence of DNA and focus on relevant testimony. Jurors generally try to do their best in determining credibility. While the courts spell out the instructions for determining credibility, psychologists study underlying factors of credibility.

Lawyers start building credibility during voir dire and through trial attempt to deliver on promises. Witnesses have a shorter time to build credibility. What

happens during examinations is critical to whoever calls the witness. While there are individual differences, there are groups of people who are likely to be believed or disbelieved. Jurors usually believe experts who have prepared carefully, celebrities, presidents, professors, and doctors. Jurors usually do not believe the mother of the defendant, officers of the corporation, and in some venues – the police.

*Liking and Credibility.* Early psychology studies of trustworthiness looked at underlying characteristics. Anderson<sup>xviii</sup> compiled a list of 555 adjectives used to describe people. He asked college students to indicate how much they would like a person who had each of those characteristics. The trait most valued by college students in the 1960s was sincerity. Of the eight top adjectives, six related to sincerity (i.e., sincere, honest, loyal, truthful, trustworthy, and dependable). The adjectives rated lowest were liar and phony – dishonest was close to the bottom. Possessing the highly rated qualities increases the probability that one will be liked.

There are many theories of liking and while determinants of liking (e.g., proximity, rewards, similarity, and complementarity) do not insure credibility, liking contributes to consideration of trusting the witness. Similarity is one of the most important factors affecting liking. Sharing a common interest in playing bridge or golf, for example. The effect of similarity is seen most clearly with people who share cultural and demographic characteristics, attitudes, beliefs, interests, and background.

Lawyers sometimes like a juror and falsely assume that it is reciprocal. Liking is more visible with witnesses. How much you like someone greatly affects how much he or she likes you. Once you form a positive impression of someone, it makes it more likely that the two of you will like each other. If you form a negative impression, the reverse is true. The more positive you are in expecting to be liked, greatly increases the chance that you will be liked. If however your enthusiasm is seen as having something to gain, then you may be seen as disingenuous.

Liking plays an important part in how you relate to your client. Jurors notice everything in the courthouse and being respectful of clients is critical. Remember jurors trust body language. Another factor that affects liking is physical attractiveness. People considered attractive are more liked than people considered not attractive.<sup>xix</sup> Stroebe's research indicates that physical attractiveness is more important to men than to women, similarity had a greater effect for females than males.

While it is overly simple to conclude that more contact is always good, familiarity leads to liking. Zajonc<sup>xx</sup> showed subjects pictures of faces. Some of the faces were shown as many as twenty-five times, others only one or two times. Afterward, the subjects were asked how much they liked each face and how much they thought they would like the person pictured. The more often the subjects had seen a face, the more they said they liked it and that they thought they would like the person pictured.

Freedman, Carlsmith and Sears<sup>xxi</sup> studied the effect of familiarity with actual people. Each pair of subjects met either three, six, or twelve times. At each meeting, they sat across from each other without talking. At the end of the series of meetings, the subjects were asked how much they like each of the other subjects. The more often they met, the more they liked each other. Consider having your client at trial as much as possible. Initially-unlikeable people may become more likeable to jurors.

Other things being equal, there is a tendency to like people more if they are honest rather than dishonest, helpful rather than harmful, friendly rather than unfriendly. On direct exam it is easy to relate to witnesses in a friendly manner.

#### **Suggestions for Credible Witnesses**

- Appropriate facial expressions (e.g., smile appropriately)
- Eye contact with questioner
- Talk to jury when directed
- Take time to think before speaking
- Sit upright in witness chair
- Straighten shoulders (unless victim)
- Deflect bad arguments – not argumentative, not evasive or defensive.

*Trustworthiness, Expertness and Credibility.* Psychological studies of expert witnesses' credibility, frequently illustrate two factors –trustworthiness and expertness. (Lay witnesses are judged according to their role expectations. Trustworthiness is important.) Obviously for expert witnesses, both trustworthiness and expertness are critical. In selecting expert witnesses for a particular case, it is important to know whether jurors stereotype or have a gender bias for that particular profession.

Studies reveal whether gender differences in jurors' perceptions exist. In Cohen and Monroe's study, women experts are viewed equally trustworthy as their male counterparts, but males are viewed as more expert.<sup>xxii</sup> This study using written scenarios comparing jurors' perceptions of male and female doctors, piggybacked a mock trial with jury eligible community residents<sup>xxiii</sup>. If repeated today, there might be different results since perspectives of female doctors evolve with more women entering medical school and more jurors being treated by women doctors.

Trial lawyers often speculate on whether a female or male attorney ought to cross examine the expert. The decision of who does the cross depends on the team's resources. Larson and Brodsky measured gender effects of cross exam and warn of introducing personally intrusive questions. Male and female experts were both rated as more credible, trustworthy, and believable when subjected to personally intrusive questions on cross-examinations.<sup>xxiv</sup> In trial the intrusive questions would be objected to as irrelevant. Perhaps a strategy not to object and let the cross examiner be intrusive would be successful. As the jurors dislike the intrusion, they rate the expert as more credible.

Outright deception could be a problem on the part of the witness. You might recall an instance catching a witness lying or falsifying information. Sometimes winning the battle, you can lose the war. It's a complex balance between proving lying and proving your case. Jurors rely on evidence and credibility of witnesses. They remain the finders of fact and want to be the deciders of credibility.

A successful way to deal with lying is illustrated in a case with 32 witnesses, each one from a plaintiff's standpoint provided a piece of information to prove a fact in the case. No one saw the exact incidents. Plaintiffs had all these people putting together this mosaic that circumstantially proved the fact. One of the defense's themes was rumor. Defense had a big piece of butcher paper with the witnesses' names on one side and the relevant facts across the top. Every time a witness got on the stand, Marc Whitehead, the trial lawyer, unrolled all this butcher paper going "crinkle, crinkle."<sup>xxv</sup> Whitehead loved the crinkle and says the sound bolstered the theme, "And the jury would think *rumors*. Now I've got to really listen. Does this guy really know? Is this first-hand knowledge or is he reporting something that somebody told him? Very effective in reminding the jury that there were a lot of witnesses up there lying to protect their buddy. They didn't say they were lying, but they were mistaken in repeating information that they had no first hand knowledge. That was another example of a way to talk about credibility and help the jury focus on who was really telling the truth and the ability to know what the truth was."

*Confidence, Clarity & Expressiveness.* Confidence, clarity and expressiveness are three factors developed through assessing and preparing a witness. The factors represent observable witness behavior during direct and cross exam. We tested Mr. Crane's before and after witness preparation videotapes with fifty mock jurors. The mock jurors readily saw his fidgeting, picking at his fingers, and lack of affect. In factor analyzing the mock jurors' ratings of this witness, we extrapolated these factors that relate to any witness. (Each factor represents a continuum of positive and negative behaviors.) Confidence is seen in voice command, posture, and how one sits in the witness chair or stands to demonstrate a diagram. Clarity is being articulate with words as well as the graphics – this includes teaching concepts. Expressiveness (or dynamism) refers to affect, changes in voice inflections, and use of senses.

Mr. Crane's attorney brought out the negatives in the initial Q & A practice session. Mr. Crane, a plaintiff suing a former partner, looked very solemn on the witness chair. Meeting this man in person, one sees a totally different energetic person. This man who feels awful about suing his former partner is crushed because the former partner was a mentor. With a few suggestions we turned this somber man into a stellar witness. This occurred with a few attitude and behavior changes. Giving Mr. Crane permission to smile on the witness stand was the first change. He believed the courthouse was a somber place and completely masked feelings. Once he was permitted to express himself, one could see his love of the company and the medical benefits to its customers. In describing how this medical optical product works, Mr. Crane touched his eye. (This impromptu physical touch connected with jurors' senses.) In the initial preparation session,

### MR. CRANE'S WITNESS ASSESSMENT

NAME	Richard Crane
EMPLOYED POSITION	General Partner, med-optical-tech
ROLE IN CASE	Plaintiff
FULFILL ROLE REQUIREMENTS	
APPEARANCE	Looks like a businessman, clean cut
BEHAVIORS	Lots of fidgeting. picking at fingers
NONVERBAL PERCEPTIONS	
POSTURE	Shoulders straight and stiff
GESTURES	No movement, lack of affect
FACIAL EXPRESSIONS	Solemn, mouth turns down and no smiles.
VERBAL PERCEPTIONS	
VOICE	Monotone
EXPRESSION	Sounds sad, hesitant, fills pauses with ums, ahhs,
BASELINE DEVIATIONS	Different personality in person!
SUBJECTIVE IMPRESSIONS	Disconnected to jurors
STRENGTHS	Comes to life when describes company products, caring about consumers
WEAKNESSES	Defensive about dropping out of med school
ADDITIONAL COMMENTS	More energetic when explaining product
STRATEGY CONSIDERATIONS	Introduce qualifications after talking about product. Use med school background to bolster work with med products, drop "problem" with school.

*Confidential, attorney work product – Impressions by Dr. Cynthia Cohen*

Mr. Crane's attorney asked about problems in medical school and why he dropped out. In the second session, we changed a negative to a positive. Most individuals do not get into medical school. Mr. Crane used his two years of medical school as a positive basis for developing a medical product. It made sense to bring this experience into his testimony. Mr. Crane still had a few "ums" in his speech, but his attorney's newly framed questioning elicited better responses.

Weighing all the Witnesses. Judge Kane warns that making conclusions as the events happen is like building a house of cards and watching the entire edifice tumble when a joker is added to the roof.<sup>xxvi</sup> There may be one witness that stands out who makes or breaks the case, but most cases build upon the story. Whether you are looking for the joker or carefully building the house, consider each witness that you place in order and consider each witness that you cross. In the search for credibility it depends on the client's story and how well it is told. Poorly prepared stories lose credibility.

Conclusions. We learn a lot from mock trials and from jury interviews about what actually happens in the jury box and in deliberations. One can never replicate the dynamics of the real jury in a mock trial. However in both, we learn how jurors judge credibility of witnesses. Through the jurors' lens, witnesses are credible or not. They sometimes determine credibility based on age, race, occupation, education, or mental acuity, but not always. Underlying factors of trustworthiness contribute.

Learning to read witnesses better has clear advantages in both pretrial and courtroom proceedings. By making use of communication theory combined with in-depth pretrial research, litigators may not control the outcome of a case, but they can perhaps improve the odds for a favorable verdict. Practical tips for determining deception include establishing a baseline of a witness' behavior and looking at congruence between his or her verbal and nonverbal behaviors. Accurate interpretation of nonverbal clues helps in identifying witnesses who are lying or possibly jurors who have biases to hide.

While there is no sign of lying that characterizes lying itself, lawyers who want to be more aware of an individual's potential for lying can learn skills that will help detect deceit. To the extent that you understand and interpret nonverbal clues correctly, you can advance advocacy and improve your discovery procedures. Similarly, you can prepare witnesses to be more effective in front of juries, not by making them better liars, but by helping them become aware of their behaviors and of jurors' perceptions of them.

Further, an understanding of jurors' methods of comprehension can help fashion arguments that jurors will interpret correctly. Jurors understand complex issues such as securities, patent processing, underwriting, total loss v. partial loss, and complex insurance practices when the concepts are translated into meaningful issues that relate to their daily lives.

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