Virtual workplace investigations: The “next normal”- Credibility assessment in virtual settings

February 16, 2023

This is the third part in a three-part series

In the first part of our series on virtual workplace investigations, we discussed how the COVID-19 pandemic has impacted workplace investigations, and why proceeding virtually can be an attractive option.

In part two, we took a closer look at virtual investigation best practices.

Part III – Are we effective lie detectors?

Virtual investigations and hearings have become a standard but some still wonder if the benefits of in-person proceedings are lost. How can we read a witness when screens, kilometres and time zones stand in the way?

In this third installment, we comment on the assessment of credibility of witnesses in virtual settings. We explore how body language and demeanour, which proponents of in-person proceedings believe is best assessed in person, may even mislead the investigator. We also outline why it is not necessary to be in the presence of a witness to properly assess their credibility for the purpose of conducting a thorough workplace investigation.

The big question: are humans effective lie detectors?

Demeanour and credibility in the court system

During interviews, investigators generally tend to look at multiple cues from the witness, including facial expression, body language and tone of voice to assess credibility.

The Supreme Court of Canada observed that there is a “deeply rooted presumption in our legal system that seeing a witness’s face is important to a fair trial, by enabling effective cross-examination and credibility assessment”.[1] While this statement applied in

the context of trials before courts, considering that credibility assessment requires a visual analysis of non-verbal demeanour by looking at the witness's facade has certainly been transposed to the world of administrative investigations.

Facial cues fall within the general demeanour evidence concept at common law, which includes the behaviour, conduct and mannerism of witnesses and is used to make findings of credibility during trials. Canadian courts have nevertheless been cautious about overly relying on demeanour evidence in making credibility assessment. Although judges may consider it, drawing conclusions based on demeanour at trial in the absence of a "reference point" for how a person "normally expressed [them]selves" was in one instance found to be troubling by the Ontario Court of Appeal, and even a reviewable error.[2]

Virtual assessment

In a recent case rendered during the COVID-19 pandemic, the defendant had been asking for an in-person trial, arguing that demeanour was important in assessing credibility, which suggested that demeanour could best be observed in person. The Court reiterated that demeanour was only a minor factor in assessing witness credibility and that "[b]esides, the witness can be seen virtually, and in many cases, it is easier and better for a judge to observe a witness virtually than in a witness box ahead of and lower than the Judge's dais."[3]

This supports the view that a virtual proceeding is not only just as adequate but sometimes offers advantages for the purposes of judge-assessed credibility.

Further, stereotypical attitudes and the artificial pressures associated with a courtroom are factors that have been acknowledged by our courts as affecting demeanour. The courts have recognized that "one of the dangers [of demeanour evidence] is that sincerity can be and often is misinterpreted as indicating truthfulness".[4]

There is no reason why this should be any different for the investigator who, from certain points of view, gathers information about demeanour in order to assess credibility in the same manner as a trial judge. Further, having the witness in their own chosen environment can help remove outside stress factors which may influence how they present to the investigator. The "atmosphere" of testimony is a factor our courts have considered as having the potential to alter the way in which a witness will testify.[5]

That being said, even virtually, investigators should, just like judges, be cautious to overly rely on demeanour to assess credibility in their administrative investigations.

Lie detection

If we look at expert studies, relying on our internal lie detectors to assess credibility is preposterous.

First, it has been theorized that individuals generally operate on a default presumption that others are fundamentally honest. This idea that humans have a bias to naturally believe others are telling the truth is called the "truth-default theory".[6] Studies also show

that we tell a lie every day (and college students tell two).[7] The combination of these facts is unsettling when applied to the workplace investigation context.

To add to this, humans are not very successful at catching others in a lie. Rates of successful lie-truth discrimination are only around 54 per cent according to an often-cited meta-analysis,[8] which means we are only slightly better than a coin-toss. Unfortunately, it would appear that "[h]onest demeanour has little to do with actual honesty",[9] according to experts.

Seasoned investigators certainly know that some witnesses are more gifted in the art of persuasion than others, but that does not mean they are being more truthful. It is however easy and tempting to get convinced that they are when assessing their credibility by thinking: "this witness was not nervous, they looked at me directly, they spoke confidently, they were articulate and their posture was relaxed". Perhaps they are simply more comfortable talking to strangers, or better at controlling their tells.

Some will read these lines and think that *they* are better at detecting lies, perhaps because of their occupation. While investigators typically have extensive training and experience with handling witnesses and assessing credibility, what experts call "receiver expertise" when attempting to assess honesty does not account for better lie detection.[10] Studies did not show evidence that those who can be identified as "deception experts" such as law enforcement personnel, judges and psychiatrists, were superior in discriminating lie from truth.[11]

Assessing credibility "with your eyes closed"

Thankfully, other elements can be gathered, reviewed and considered regardless of how the meeting is held, and do not require asking ourselves if every cordial smile, folded arms or nervous tick is hiding deceit.

When conducting any investigation, including a virtual one, the investigator should focus notably on the following:[12]

- Is the witness an **interested party** in this matter/do they have a reason to lie?
- Are there **inconsistencies** in the testimony/with other testimonies?
- Has the witness **actually lied** to the investigator already?
- Does the **evidence corroborate** the testimony?
- How **probable** is the witness's version?
- Was the witness **collaborative or defensive**?
- Is the testimony **affirmative or negative**?[13]

These elements are more objective than demeanour, which can mislead even the most astute investigators.

Takeaways

In conclusion, the virtual setting requires the investigator to be nimble and vigilant, and to adapt their methods to circumstances. Attempting to get a passing grade in credibility assessment would likely be best achieved by turning to more factual techniques, whether virtually or in-person.

If you have any questions about credibility assessment in virtual settings, or about any of the topics outlined in the virtual workplace investigations series, please reach out to the author or key contacts listed below.

The virtual workplace investigations series:

Part I – Postponing the investigation vs. proceeding by virtual means

Part II – Best practices

Footnotes

[1] *R. v. N.S.*, 2012 SCC 72 (CanLII), [2012] 3 SCR 726, para. 27.

[2] *R. v. Hemsworth*,2016 ONCA 85, see notably para. 49 [*Hemsworth*].

[3] *Fraser v. Persaud*, 2021 ONSC 8429, para. 28.

[4] *R. v. Rhayel*, 2015 ONCA 377, para. 85.

[5] *Hemsworth*, *supra* note 2, at para 48: "[…] the appellant's "careful fashion" of testifying may relate to such factors as the unfamiliar atmosphere of the courtroom, the artificiality of the circumstances under which the appellant was being asked to provide information and the pressure he was under given what was at stake".

[6] Levine, T. R., "Truth-default Theory (TDT) (2014), "A Theory of Human Deception and Deception Detection", *Journal of Language and Social Psychology, 33*(4)*,* 378-392.

[7] DePaulo, Kashy, Kirkendol, Wyer et Epstein (1996), "Lying in Everyday Life", *Journal of Personality and Social Psychology 70 (5)*, 979-995, p.991.

[8] Bond, C. F., Jr., & DePaulo, B. M. (2006). "Accuracy of Deception Judgments", *Personality and Social Psychology Review*, 10, 214-234, p.224.

[9] Levine, T. R., *supra* note 5, p.8.

[10] Bond, C. F., & DePaulo, B. M. (2006), *supra* note 7, p.229.

[11] *Ibid*.

[12] See for example: *Casavant Frères Ltée* c. *Le Syndicat des employés de Casavant Frères Limitée (C.S.D.)*, D.T.E. 86T-634.

[13] The Supreme Court of Canada held the following: "a witness who testifies to an affirmative is to be credited in preference to one who testifies in the negative" in *Lefeunteum* c*. Beaudoin*, 1897 CanLII 51 (SCC), [1897] 28 R.C.S. 89, p. 93.

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