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Credibility Concerns About Virtual Arbitration Are Unfounded

By **Wayne Brazil** (May 26, 2020, 5:23 PM EDT)

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The COVID-19 pandemic is forcing a stressed legal community to assess the pros and cons of conducting arbitrations by videoconference. Lawyers or arbitrators who suggest conducting hearings by videoconference are getting a lot of pushback — much of which is rooted in fear that videoconferencing will compromise an arbitrator's ability to reliably resolve credibility contests.

I think this fear is misplaced. Why?

Thoughts about three related questions inform my view: (1) how many cases really "turn on credibility," (2) what does "credibility" mean in our legal world, and (3) how do arbitrators actually make credibility determinations?

Before addressing these questions, it is critical to bear in mind that when an arbitrator watches a witness testify on a large video screen, the arbitrator is still watching the witness testify. The witness's face is still in front of us. We can see expressions change, eyes dart, heads turn to the side to search for signals from counsel or a co-party, or heads bend down to search a document for an answer.

We can see initial reactions to questions, reluctance to respond, indirection, indecision, circularity, obfuscation — as well as forthright, straight-on answering (which, we've learned, sometimes can pose the greatest threat to making accurate findings).

Given these facts of videoconferencing life, the real question is this: How much is an arbitrator's ability to assess credibility compromised, really, when he or she watches a witness testify, live, on a big screen, instead of watching the witness testify a few yards away in person?

To address this question, we begin by asking how many cases actually turn on credibility? Are we prone to exaggerating the number?

Experienced judges and arbitrators know that the outcome of relatively few cases of any complexity is dependent on whether the arbitrator believes the testimony of any given witness at the time that testimony is given. While we (just like everyone else) form general impressions of people who are testifying before us, we also know that our powers of psychic divination are, shall we say, limited.

Self-aware arbitrators know they are not particularly good at looking into other people's hearts or minds

as they speak. And many of us have been guinea pigs in experiments by sophisticated psychologists and psychiatrists that have proven how difficult it is for experienced judges and lawyers to tell whether people are lying just by watching the way they perform verbally.

Moreover, in many cases the evidence with the most probative muscle is data-based or documentary — prices, units, inventory, components (compared or standing alone), source codes, log books or contemporaneous notes, letters, emails, specific provisions or words in contracts or the absence of provisions or specific words in contracts, etc.

To dig deeper, however, we must turn to the closely related remaining two questions we posed at the outset: What does the word "credibility" mean in the legal world and how do arbitrators actually go about assessing or measuring the credibility of testimony.

What is "credibility" anyway?

Some people think that credibility is a synonym for truthfulness, and that determining the relative credibility of witnesses is a simple, binary task of deciding who is telling the truth and who is lying. For many reasons, this view is mistaken.

First, this view assumes that "truthfulness" is a simple moral and empirical concept. In fact, truthfulness is much more complicated.

People can be truthful in their hearts, meaning that what they say is what they really believe, but their truth can be based on assumptions, ideas, experiences or emotions that other people do not share. One person's truth can be sincerely based on an individuated mental or psychological platform from which he or she draws inferences and records perceptions.

But another person, working from a different platform, might see the same truth (even the same single event) quite differently. In other words, human truth is, literally, not an absolute, permanently cast thing out there. It can be elusive, mobile and variable with the angle of perception. Like the real world as modern physics has taught us to understand it.

Second, there is a huge difference between lying and accuracy. A witness who is not lying, who has no intention of lying and feels no reason to lie, can simply be "wrong" — meaning (for this purpose) that most people, even working from a variety of platforms, would not agree that how the witness recounted an occurrence was how it actually occurred.

Memory is notoriously fallible, which means that a witness with the purest of hearts can testify truthfully — but inaccurately — as a result of an imperfect memory.

Perception also is notoriously fallible — and individuated. It has been shown, famously, that people in different cultures actually "see" different colors when looking at the same swath. And we all know how reliable eyewitness testimony has been shown to be.

Testimony is the product of memory and perception working in combination — thus increasing considerably the risk of honest error.

The law adds another layer of necessary complexity to this situation. In the legal world, objective facts sometimes actually are artificial mental constructs necessarily built by judges or arbitrators at the end of

a long process.

"Findings of fact" are what we call these constructs. They are the labels we attach to the ultimate products of a process that requires consideration and assessment of a very large number of variables.

A finding that one witness's testimony about one event or communication is more "credible" than another witness's testimony about the same event or communication is an example of such an artificial construct. It is a legal product whose creation is mandated by the need to close a dispute. It is not an assertion by the trier of fact that she is sure she knows what actually happened.

This is a very important point for lawyers and clients who are trying to determine how much they might be risking by agreeing to participate in a hearing remotely, rather than in person.

How do arbitrators go about constructing this kind of a legal product?

Good arbitrators do not begin the process of making findings of fact until everything is over — until all the witnesses have been examined and cross-examined, all the documents have been admitted and studied, all the arguments have been heard and recorded, all the post-hearing briefings have been completed and digested.

It is not until this point that the arbitrator begins the journey toward making findings. And this journey is not over a simple linear route. Rather, the arbitrator constructs (often in the form of an outline) a comprehensive comprehension of all the evidence and argument, then begins systematically assessing relationships between all the testimonial evidence and all the documentary evidence, looking for consistencies, plausibilities, and narratives that square with experience — and trying to identify the testimony that does not fit as well into the comprehensive context as other testimony.

It is in this kind of context-dense and content-dense setting that an arbitrator decides which versions of events are more credible than other versions of those same events.

Stated differently, when an arbitrator must decide whether a testimonial statement is more likely accurate than not, he or she takes systematically into account a host of considerations: (1) the relationship between the content of the testimony and the content of other evidence, especially documentary evidence that was generated close in time to the disputed event and under well-established habits or practices, or in the normal course of business for an independent reason, (2) the clarity and quality of all of the other testimony by the witness, (3) the internal consistency and coherence of the testimony, (4) its conformity with common experience or with what would be commonly expected in the circumstances, (5) the age of the perceptions, (6) motives, (7) perspectives, (8) capacities — the list goes on. No single factor controls.

Nota bene: the witness's appearance while testifying, and the manner in which the examination or cross-examination was conducted, either fall off the analytical grid or fade into relative insignificance.

It follows that whether the witness delivers his or her testimony six feet from the arbitrator or via satellite makes virtually no difference.

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