

Deception: “Do you swear to tell the whole truth and nothing but the truth, so help you God?”

By Andrew Sheldon

Let's take another look at a central tenet of our legal system: that people are going to tell us the truth and, if they are not, that we can catch them at it. Research has been available for a decade that belies that basic notion. The basic research finding is that deceptive behavior is actually much more pervasive than honesty - in all walks of life, not just in the legal arena. Clearly, this has many basic practical applications in any litigation practice.

As introductory and background reading, a comprehensive overview entitled *Lying* by Sissela Bok (Bok, 1978) is excellent. Somewhat philosophical yet simultaneously specific, Dr. Bok will take you through a variety of scenarios in public and private life in which deception occurs. For our purposes, we will focus just on the legal system.

In Court and On Trial

To be sure, the identification of lying is difficult and the often intense, complex dynamics of a trial may make lie detection even trickier. Opportunities for deception in law may occur in our interviews with witnesses and with clients, in negotiations with our colleagues, in witness testimony both in depositions and in court, and during voir dire with potential jurors. In many of the situations we encounter as lawyers, lying is assumed to be a probability and we have developed protocols with which to confront the lying behavior. For example, cross examination is built into our system as a search beyond and behind the veil of what appears to be the truth, a search for “the rest of the story” as Paul Harvey used to say.

A list of cues that are often used to identify lying includes the ever popular “shifty eyes.” We have often encountered comments from jurors and mock jurors alike that the witness was “obviously lying” because “he kept looking from side to side” and “he never did look you in the eye.” Yet, gaze aversion, as it called, is considered a false cue for lying. One of the reasons witness work is such a valuable tool is that the witness can be helped to relax so that, in her more relaxed state, false cues like rapidly shifting eye movement do not occur.



At the opposite end of the continuum, coaching a witness to look directly into the camera or to connect with a juror while testifying by engaging in eye contact can become a real deception cue if the witness overcompensates by extending eye contact beyond what is socially appropriate. In this uncomfortable unbroken staring state, the witness may be perceived as “working too hard to appear truthful.”

In the broadest sense, lying ranges from the harmless to the harmful, from the so-called “white lie” to the sinister betrayal. A lie may be totally unintentional as when we make a simple mistake. A lie may be well-

intentioned as when we tell a dying person how well he looks when we all know better. And, of course, a lie may be intended to avoid responsibility for illegal behavior as when a cynical CEO claims he has no knowledge of fraud. The range of possibilities is broad, but much more inclusive than one would have first thought. From this broad and inclusive definition (which can include even silence when truth demands something different), it is not difficult to consider the basic notion that lying is much more prevalent than honesty.

It is a concept that Paul Ekman first taught us in 1985 in *Telling Lies, Clues to Deceit in the Marketplace, Politics, and Marriage* (Ekman, 1992). At first, we think it's an overbroad and over-inclusive definition of lying. After all, who thinks that a partner is lying when she says "Fine," after you ask her how she is feeling when in truth she is in the middle of her worst migraine in a year.

Lawyers live in a world where spotting a lie is a necessary skill - but how good are we? According to studies of people in various walks of life, no one is very good at spotting a lie. The fact is most people are bad lie detectors. How bad? On average, the research says most of us can detect lying only 55% of the time, little better than chance. What does that mean for jury selection? If we can not tell the truthful from the deceitful answer, what should we do?

Deciphering Deception

If we dig down into the issue of spotting a lie, we find some very interesting information. In 2008 at the AMA conference in San Francisco, psychology professor Maureen O'Sullivan (O'Sullivan, 2008) reported that among 13,000 people her team had tested to discover who might be very good at spotting lies, only 31 people were good at it. That is not many. She calls these experts "wizards."

When my team first began looking at deceptive communications in 1987, we set up a pilot project to try to get some insight into the cues people *believe* they use when spotting lies and liars. One of our questions was: If you were outside yourself watching you while you were lying, how would you know you were lying? The answers ranged from "My eyes would dart back and forth" to "lots of er's and um's" to "frowning a lot" to "I'd have this tight band around my head but you wouldn't be able to see it" to "I never lie." All of the folklore around how one uncovers a lie was confirmed. But not much of the reality.

In a research project with global reach, Charles Bond of Texas Christian University (Bond, 2000) asked over 2000 people from 60 countries to tell him how they spotted liars. The most common answer was "liars won't look you in the eye." Yet, we know that gaze aversion, as it is called, is not a reliable way to spot lying behavior. In truth, liars lie and do not dart their eyes or shift their gazes or clear their throats anymore than does someone telling the truth.

Remain Flexible

So how then can we tell if someone is lying? According to Dr. O'Sullivan, we have to be flexible in applying the rules of lie detection. It will not help, for example, to always rely on non-verbal cues (body language) or to always rely on verbal cues such as pauses in sentences. Instead, the people who are very good at spotting lies apply a variety of cues and apply them differently to different people.

Watch For Micro-expressions

Micro-expressions are fleeting, ultra-brief facial expressions that betray a person's true feelings or attitudes about what they are saying or doing at that moment. An effective way to evaluate a witness' truth telling is by using the frame-by-frame operation on your video player. Review the videotape of the deposition a frame (or several frames) at a time looking for sudden shifts in facial expression. You may notice a deponent who believes he has successfully deceived you in a deposition drop his guard just long enough to broadcast his arrogance for a split second.

Developing skill in reading micro-expressions is hard-won precisely because the cues are so brief, so fleeting. Videotape helps because slow motion allows one to slow down the action, then to pause on a particular expression. Suddenly, it all becomes clear as you observe the expression of contempt, no longer veiled, on the screen.

*Identify and Ignore False Cues*

Beyond these broad approaches to detecting lying, we find it very helpful to “clean our glasses” by getting rid of the most common *false* cues people use when spotting liars. It is very common for people to tell us that a person who is not “looking us in the eye” is lying. Called “gaze aversion,” this behavior is not a reliable cue of lying behavior. (Next time your teenager looks away from you when you confront them about not telling the truth, you can relax and give him or her the benefit of the doubt.)

Deleting these useless cues before we even try to

accurately identify a liar should increase accuracy because we are no longer trying to identify behaviors that are not helpful in identifying a lie, it will interfere with our accuracy. For example, if I think that shifting in a chair is indicative of lying (it is not), I am more likely to miss real cues.

Other behaviors you can discard when trying to uncover the truth include shifting around, touching the nose and clearing the throat. Studies show that people touch their noses no more or less frequently when telling the truth as when lying.

Triangulate Your Focus

Lie detection is a process of tuning in. Without the unreliable, inaccurate cues interfering, we can begin to really pay attention in order to see through. Since most of us are not normally focused on discovering deceit, we need to take the time to focus on the person whose behavior we are evaluating. Distractions will interfere with lie detection.

The nature of the focusing, in our experience, that is necessary for in-court lie detection is very intense and often requires the assistance of several people who are all focused on the same testimony. We call this process “triangulation.”

Basically, we increase the probability of accurate detection by increasing the number of trained observers. In jury selection, for example, the process is often intense and moving so quickly that it is next to impossible for

the lawyer actually asking the open-ended questions to also focus adequately on the potential juror's behavior. In even the best voir dire, the lawyer's focus is often more on what the next question will be or on understanding the content of the juror's response than on evaluating the truthfulness of the answer. In open court, group voir dire, the assistance of several trained observers enhances lie detection.

Another way to facilitate lie detection during voir dire is through the use of individual, sequestered voir dire. (We have never found individual voir dire conducted at the bench to be conducive to the level of focus that is needed for effective juror evaluation.) Sitting in chambers gives one a better chance to more closely focus on the juror's behavioral cues. The juror is alone, not conforming to whatever socially acceptable norms that the jury panel may have offered in open court.

Spot the Over-Actor

Next, we know that the highly motivated liar is going to do everything possible to keep from being discovered. That means that he or she is actually more likely to resemble an honest person because that is the best hiding place. Thus, one set of deceptive behaviors involves liars trying to look like non-liars.

Studies (Bond & Depaulo, 2008; Vrij et al, 2004; Colwell et al, 2006) show that when they are lying, people move around less, blink less, make fewer speaking errors and do not try to backfill omitted details. In other words, the liar is trying to make us think he or she is being honest by overplaying the role. Tricky stuff.



Next, remember to stay flexible and to include a constellation of cues in your evaluation: not just verbal cues and not just body language and not just content. Look intently for micro-expressions, as Paul Ekman called them.

Listen Quietly

Finally, among all the possible cues to deceptive behavior, the one we prefer involves listening, sometimes with eyes closed. Vocal cues can be complex, but basically we are listening for content (Does what the person is saying fit into the context of the rest of the testimony?) and voice tone (Does the throat tighten up and an unusually high tone show up?). The reason we like this set of cues is due to a British study (Wiseman, 1995) that asked people to try to spot lying. The people with the highest "hit" scores were those who could not see the person and were not distracted by visual cues.

After all is said and done, the most important thing to remember is that lying is truly difficult to spot which makes daily living a field day for liars. Yet it is possible to enhance your skills through practice.

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Editorial Exuberations

Spring is in full swing when it seems like the new calendars just went up on the wall. Our May issue is the biggest we've assembled yet both in size and in the range of ideas/perspectives incorporated. Thanks to your reading and suggestions we are continuing to evolve and expand. *The Jury Expert* is also on [Twitter](#) with daily links relevant to litigation and a few fun things to mull over your morning libations. Keep the feedback, ideas, and suggestions coming!

We are pleased to have a lengthy feature on the controversy about Generation Y and the prevalence of narcissism. We are publishing this issue on the heels of a heated debate in the blawgosphere on Generation Y in the legal workplace (see a summary of that controversy [here](#)). In a departure from our usual style of one author and several trial consultants reacting to the piece--in this case we have two articles (one saying narcissism is on the rise in our young people and the other begging to differ). Three experienced trial consultants with special interests in generational issues provide feedback on the articles and how this controversy relates to litigation advocacy and then both authors respond. This feature doesn't resolve the differences of opinion between the researchers but we hope it gives you a sense of how to use (or not use) generation and/or age in jury selection, case sequencing and narrative.

Our second academic feature is one of which we can all be proud. It's an exploration of just how the process of deliberating on a jury makes us better people and better citizens. How nice to hear something uplifting about the jury process for a change! Two past Presidents of the American Society of Trial Consultants respond to this article (ten years in the making) and then the authors follow-up with additional thoughts.

In addition, we have pieces on a wide range of issues from trial consultants: deception, juror stress, technology in high profile trials, questioning the child witness, using a simple mnemonic to aid you in organization in voir dire, and how to prepare expert witnesses. And of course, our favorite thing (two again this issue). It's a lot to ponder. Come back and visit the website and read to your hearts content! That's why we're here. Use us. --[Rita R. Handrich, PhD](#)



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