

TRUTH AND DECEPTION: THE DIFFICULTY WITH ASSESSING CREDIBILITY IN ONLINE DISPUTE RESOLUTION

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I. INTRODUCTION

The pandemic changed the way the world does business. Overnight, business dealings moved online, including resolving disputes. However, questions remain whether we can effectively make credibility determinations online. Such determinations can be critical for discovering the truth in all contexts of dispute resolution, from the mundane to circumstances implicating life or death.

It was the fall of 2010. I was working as an undercover police officer. My assignment was to pose as a reporter for a college newspaper and contact a man who was suspected of murdering a college classmate nearly ten years earlier.¹ I was to deliver two lines of information to him: (1) the police had found a body they believed to be that of his classmate; and (2) the police were currently conducting DNA testing on the remains.

Neither of these statements were true. Detectives had not located a body, despite their valiant efforts, but believed they knew the general area of where the missing woman's remains were buried. Our thought was that being presented with this vague information would prompt the suspect to drive several hours to the location where he buried the body to see if the police had in fact recovered the remains. It would likely be the only way for the suspect to relieve the stress of the unknown if he was involved in his classmate's disappearance.

Showing up unannounced at dinner time, I met the suspect at the front door of his residence. I was nervous. I did not want my undercover performance to jeopardize the investigation for the lead detective. Because of my nervousness and inexperience working undercover, I was acutely aware of my inadvertent "tells."² I attempted to moderate the pitch of my voice, my mannerisms, and my breathing so not to betray my anxiousness and true profession.

I introduced myself to the suspect and we exchanged customary pleasantries. Based on the suspect's open body language and his initial willingness to engage in conversation, I judged his reception of my presence as welcoming. We spoke briefly about our shared alma mater and then I delivered the two preplanned statements.

¹ 2001 PLACENTIA POLICE DEP'T REP. 01-0662; *see generally* *Dateline: The Night Lynsie Disappeared* (NBC television broadcast July 20, 2012); *On the Case with Paula Zahn: Vanished in the Night* (Discovery television broadcast Aug. 19, 2012); *Criminal Confessions: Placentia* (Oxygen Network television broadcast Nov. 5, 2017) (discussing the history of the case and the investigative process that was used).

² *Tell*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/tell> [<https://perma.cc/Q2ZV-MYZE>] (last visited Nov. 6, 2023) ("An inadvertent behavior or mannerism that betrays a poker player's true thoughts, intentions, or emotions.").

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The change in the suspect's demeanor was immediate and striking. The rosy color instantly drained from his face. He began to stammer and supply odd responses during our brief conversation that followed. It was as if he was distracted and thinking about something else. I could almost see his mind racing based on his behavioral changes. I observed him swallow hard several times and manipulate his lips and tongue as if he were trying to reinvigorate a dry mouth. I was cognizant of the suspect's subtle facial movements and recognized them as that of a possible dry mouth because I had a dry mouth as well given my own anxiety that I was acutely trying to conceal.

The suspect did not ask any follow up questions, such as, "What happened to her?" or "Where was she found?" His reactions were not the reactions one would expect of someone who was just told his dear friend, who had been mysteriously missing for nearly ten years, was located. The suspect's warm, open disposition was no more. He quickly ended our conversation, stating to the effect that it was not a good time to talk after all. I left his residence, mission complete.

To our surprise, the rouse worked. The following day or thereabouts, the suspect drove several hours to see if the dirt was disturbed in the location where he had buried his classmate's body. The suspect was subsequently arrested, confessed to murdering his classmate, charged, and later pled guilty to murder.³

This brief encounter and the marked change in the suspect's demeanor in reaction to the information I gave him prompted a career-long interest in behavior analysis and credibility assessment during interviews and interrogations. I have long since left my career as a police officer, but now work as in-house counsel for a sheriff's office. I also own a business⁴ that provides neutral fact-finding investigations to human resource professionals tasked with investigating allegations of workplace misconduct.

You may be wondering what the aforementioned narrative has to do with an article about dispute resolution. This account highlights the importance of behavior perception during credibility assessment in administrative interviews, litigation, and alternative dispute resolution processes, such as arbitration. Oftentimes, the outcome of a dispute hinges on

³ Criminal Case Summary, THE SUPERIOR CT. OF CAL. CNTY. OF L.A., <https://www.lacourt.org/criminalcasesummary/ui/> [<https://perma.cc/8XU4-FVZ8>] (search case number VA117346; then click submit; a chart will appear indicating that the individual was found guilty and convicted of 187(a) of the California Penal Code, which is the charging section for murder); see Brandon Ferguson, *Breaking: Chris McAmis Pleads Guilty, Officially a Murderer*, OC WEEKLY (Apr. 16, 2012), <https://www.ocweekly.com/breaking-chris-mcamis-pleads-guilty-officially-a-murderer-6463479/> [<https://perma.cc/L2QN-QFNG>].

⁴ WDI, offices in Wyoming and California.

the credibility of the testimonial evidence presented in the matter.⁵ With the rise of video conferencing software and other online dispute resolution processes, particularly since the abrupt restructuring of the workplace due to the COVID-19 pandemic, this topic is ever prevalent.

This article presents an argument as to why the use of video conferencing software during dispute resolution may hamper an advocate's ability to effectively present evidence and a fact-finder's capacity to assess the credibility of testimonial evidence. This article will first introduce evidentiary standards and then discuss the use of credibility assessment to meet the evidentiary standard required to prove a particular type of case. Next, the article includes a brief historical discussion of online dispute resolution and the benefits of using video conferencing software as a means to resolve disputes. The article then discusses the drawbacks of online dispute resolution with respect to credibility assessment and how this may affect a party's due process rights. The article concludes with a discussion of areas for future research.

II. PROVING A CASE

I surmise that most lay people's understanding of evidence comes from watching crime dramas unfold on television and that the general populous has a weaker understanding of evidentiary requirements for other types of cases. What differs between criminal trials and civil disputes is the strength of the evidence required to prove a case.

A. *Burden of Proof*

Burden of proof refers to a party's obligation to prove a charge, allegation, or defense. The party bringing a case usually has the burden of proof since that party is usually seeking something from the opposing party.⁶ The term "burden of proof" consists of two parts: the burden of production and the burden of persuasion.⁷

The burden of production suggests which party must come forward with evidence to support a particular triable proposition.⁸ Whether a party has satisfied its burden of production is an issue of law for the court, not an issue

⁵ See Hazel Genn, *Assessing Credibility*, COURTS AND TRIBUNALS JUDICIARY 2 (2016), https://www.judiciary.uk/wp-content/uploads/2016/01/genn_assessing-credibility.pdf [<https://perma.cc/TQA8-NKBY>].

⁶ BROOKE D. COLEMAN ET AL., LEARNING CIVIL PROCEDURE 802 (3d ed. 2018).

⁷ Bd. of Trs., Cmty. Coll. of Baltimore Cnty. v. Patient First Corp., 120 A.3d 124, 134 (Md. Ct. App. 2015).

⁸ 29 AM. JUR. 2D *Evidence* § 168 (2023).

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of fact for a jury.⁹ For instance, the burden of production for a criminal theft case falls on the prosecutor to provide specific enough facts to the court—establishing a *prima facie* case—to suggest a theft actually occurred, rather than a noncriminal explanation, such as the property inadvertently being lost or misplaced.

The burden of persuasion, on the other hand, “describes the obligation of a party to introduce evidence that persuades the fact finder, to a requisite degree of belief, that a particular proposition of fact is true.”¹⁰ For instance, in a criminal theft case, the burden of persuasion falls on the prosecutor. The prosecutor must persuade the fact-finder or jury that the facts not only substantiate that all of the elements of theft have been met, but that the accused defendant is the person who committed the theft, rather than someone else.

B. *Evidentiary Standards*

The level of persuasion needed to prove a case will depend on the type of matter at issue and is ordinarily expressed in one of three ways: (1) proof beyond a reasonable doubt; (2) clear and convincing evidence; and (3) a preponderance of the evidence.¹¹ Proof beyond a reasonable doubt carries the greatest burden of persuasion of the three standards. This standard is used in criminal trials and requires that the fact-finder have no serious doubts about the guilt of the defendant.¹² It does not require the fact-finder to have no doubt at all,¹³ just no significant doubts. If one were to assign a percentage of certainty that is needed to satisfy the standard, one could say the fact-finder needs ninety percent certainty, however, there is no universal agreement on this exact percentage.¹⁴

The clear and convincing standard of evidence imposes a lesser burden of persuasion than proof beyond a reasonable doubt. The clear and convincing standard is defined in a variety of ways, including persuading the fact-finder that the proposition is highly probable, producing a firm belief or conviction in the mind of the fact-finder that the allegations are true, or convincing the fact-finder to a degree of belief somewhat greater than the facts being more probably true than not.¹⁵ If one imagines the scales of justice, the clear and convincing standard would require a tilt distinctly in favor of one

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Quarry Knoll II Corp. v. Planning & Zoning Comm’n*, 780 A.2d 1, 31 (Conn. 2001).

¹² *COLEMAN ET AL.*, *supra* note 6, at 804.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 29 AM. JUR. 2D *Evidence* § 170 (2023).