

# A Guide To Nonverbal Cues As In-Person Jury Trials Resume

By **Jeff Dougherty** (May 2, 2022)

After a two-year hiatus resulting from the COVID-19 pandemic, attorneys are once again faced with the prospect of trying cases in person, in front of live jurors.

So, what do trial attorneys — and their witnesses — need to remember about body language, demeanor and tone of voice as it relates to jury psychology? An experience I had prior to the courts shutting down speaks directly to the question.



Jeff Dougherty

I was sitting in a dark room behind a one-way mirror watching a group of mock jurors deliberate. It was a sexual harassment case that was going to trial in the coming months.

Part of the mock trial involved exposing the participants to video deposition clips of the supervisor of the person accused of the harassment. One of the claims was that this supervisor had knowledge of the harassment for quite some time, but he did nothing about it.

Then there it was — as the mock jurors were discussing this witness's testimony, one of them said: "As soon as I saw him touch his face, I knew he was lying."

Wow, just one gesture and this witness was lying? There goes the whole case in an instant, because of a simple gesture.

You might think I was surprised to hear such an assessment and ultimate conclusion — I wasn't. If I've heard such a pronouncement from mock and actual jurors once, I've heard it one hundred times.

## How Can Jurors Tell When Someone Is Lying?

They can't. The problem is they think they can.

Research has shown that most people think they're good at detecting lies.[1] It turns out, laypeople are about as good at detecting lies as a coin toss.[2][3] There is no single indicator of lying, or the so-called Pinocchio effect.[4]

This fact is a problem in everyday interactions to be sure, but it's even more acute in trial.

There's a lot riding on whether jurors believe the testimony of a given witness. The consequences for criminal trials can mean the difference between freedom and the loss of freedom, including one's life. For civil trials, it can mean the difference between zero dollar verdicts and verdicts in the millions or hundreds of millions of dollars.

## Lie Detection Fallacies

After speaking with hundreds of jurors and thousands of mock jurors, I've heard many reasons people think witnesses are lying, and I've listed my favorite three below, with an explanation of what's actually true.

## ***Lack of Eye Contact***

The most common belief about deception is that if the person with whom you're talking averts their gaze, then they're being dishonest.[5] This myth is something you've probably heard all your life.

How many times have you heard the phrase, "Look me in the eyes and tell me X"? The implication being that, if you're being honest, you can look someone in the eyes, but if you're lying, you'll avert your gaze.

The reality is that there's no difference in eye contact between people who are lying and those who are being truthful.[6] In fact, some evidence suggests that liars engage in more eye contact than truth tellers.[7]

## ***Nervousness***

Nervousness has been found by some researchers as the second most common reason people think someone is lying.[8] Examples of nervousness recognizable to everyone include sweating, fidgeting, touching the face, rocking, experiencing a dry mouth and rapidly blinking the eyes.

When people see these behaviors, their logic goes something like this: "This witness is behaving this way because she's nervous, and she's nervous because she's lying. There's no reason to be nervous if you just tell the truth."

The reality is that testifying is anxiety-provoking for virtually every witness, particularly during cross-examination. So it follows that witnesses will exhibit behaviors indicative of nervousness when testifying and thus, they appear to the layperson to be lying.[9] To make matters worse, some research has shown that liars don't exhibit nervous behaviors more than truth tellers; in fact they might even exhibit fewer.[10]

## ***Looking Up and to the Right (or Left)***

A branch of psychology in the '70s and '80s promoted the idea that if a person looks up and to the right, or left if they're left-handed, then they're lying. The idea was that if people look up and to the right, then they are engaging the right, or creative, hemisphere of the brain and thus creating a story, whereas looking up and to the left means they are engaging the left, rational hemisphere and therefore telling the truth.

This idea made its way into popular culture and is still believed today by many.

In reality, there's evidence to suggest that there's no difference in the direction people look when they're lying or telling the truth.[11]

## ***Why This Matters***

People aren't going to change their beliefs about their own ability to detect lies, and they're not going to change the cues they rely on to make these detections. This truth means people will continue to make false attributions about behavioral indicators of lying, and they're going to get it wrong about 50% of the time.

In the context of trial and witness testimony, it gets worse. Once people are selected to sit

on a jury, their lie detection radar goes into overdrive, and they scrutinize and make more assumptions about a witness's body language and demeanor than they would in everyday settings.[12] A primer on jury psychology illustrates why this is true.

Once jurors hear the words "raise your right hand and repeat after me" applied to them, there's no getting out of this; they're on the jury. They've got an important job to do — render a just verdict. But to do so, they need to figure out who is right and who is wrong, i.e., who is being honest and who isn't.

Furthermore, their verdict will have a profound effect on the parties, and they also face the prospect of rendering the wrong verdict, which would be a devastating miscarriage of justice. This all makes the jury's task very daunting.

Making it even more difficult for jurors is the fact that they're frequently required to listen to testimony that is complex and often confusing, and delivered in a manner that can be boring, laborious and sequenced oddly.

Faced with such a challenge, jurors may become hypersensitive to anything they believe will augment their ability to make the right decision. If jurors can figure out which witnesses are lying, they can figure out which side to trust and thus believe, despite the confusing nature of the context and content of the testimony.

So, while jurors might not understand exactly what's being said from the witness stand, they do understand what body language means, or at least they think they do.

As such, they often pay a great deal of attention, and might assign much greater weight than normal, to the body language, demeanor and tone of voice of each party's witnesses, and they sometimes make sweeping judgments about the credibility of a witness based on such nonverbal cues alone, disregarding the actual words spoken, just as in the example cited above.

With all this in mind, lawyers who prepare witnesses to testify need to keep in mind that it's not enough to simply tell witnesses to "just tell the truth," or to hand them a list of tips for testifying. Witnesses need to be trained to testify, which entails learning about jury psychology, juror expectations, what strengthens and weakens witness credibility, how to handle direct and cross-examination and keep demeanor consistent, how to deliver testimony confidently, how to keep emotions in check, and so much more.

All of this takes time and rigorous practice, with the right kind of targeted feedback delivered at the appropriate times. If done incorrectly, or worse, not at all, witnesses who are telling the truth run the risk of the jury or judge assuming he or she is lying — which can ultimately result in the miscarriage of justice.

So the question remains: What can attorneys do during witness preparation to substantially decrease the likelihood of their witnesses doing something that harms their credibility, likability and believability? The answer is there's a lot, but here are three important themes.

### ***Address the emotional side of being a witness.***

One of the biggest barriers to any witness's ability to testify effectively is emotions. Litigation produces a wide range of emotions in every witness, such as frustration, anger, anxiety, vulnerability, resentment, and the list goes on.

Notably, sometimes emotion appears to be anger, but that is often a mask for the actual emotion the witness is experiencing. Until the underlying emotional barriers are identified, addressed and resolved, any witness's ability to present a calm and professional demeanor on the witness stand will be substantially impaired.

***Make practice realistic.***

Many witness preparation sessions contain practice Q&A, but they are conducted in an informal way. This is a mistake. While informal Q&A examples can be a helpful starting point, witnesses need to experience the same type of pressure and Q&A scenario they will experience in the deposition or on the witness stand, before they actually testify for real. This requires rigor and realism.

When possible it's best to attempt to mimic the style of opposing counsel during these sessions, and if practical, have an attorney the witness doesn't know conduct the Q&A. This is the only way to uncover the witness's failure points, both in the substance and delivery — body language, demeanor — of their testimony.

A word of caution: This has to be done correctly and at the right time. If attorneys start out too aggressive too soon, it can do more harm than good.

***Devote enough time to practice sessions.***

Some attorneys fear that if their witnesses practice too much, they'll appear scripted, and so not enough time is devoted to this vital component of witness preparation.

It's true that jurors don't like testimony that looks scripted, so this is a valid concern. However, it's better to err on the side of too much practice than too little practice. You can fix the scripted-looking nature of testimony with the proper training, but it's very difficult, and sometimes impossible, to fix surprise errors in the content or delivery of testimony in depositions or on the witness stand.

---

*Jeff Dougherty is president of Litigation IQ.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Bella M. DePaulo, Kelly Charlton, Harris Cooper, James J. Lindsay, Laura Muhlebruck, The Accuracy-Confidence Correlation in the Detection of Deception Personality and Social Psychology Review. November, (1997).

[2] Laura Zimmerman, Deception Detection 47 Monitor on Psychology 46 (2016).

[3] Bella M. DePaulo, Why Are We So Bad at Detecting Lies? Psychology Today. May (2013).

[4] Joe Navarro, The End of Detecting Deception Psychology Today. July (2018).

[5] The Global Deception Research Team, A World of Lies Journal of Cross-Cultural

Psychology. 37 (1) 60. January  
(2006). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2957901/>.

[6] S.L. Sporer & B. Schwandt. Moderators of Nonverbal Indicators of Deception: A Meta-Analytic Synthesis. *Psychology, Public Policy, and Law* 13 (1) 1-34. (2007).

[7] Samantha Mann, Aldert Vrij, Sharon Leal, Par Anders Granhag, Laura Warmelink, Dave Forrester. Windows to the Soul? Deliberate Eye Contact as a Cue to Deceit. *Journal of Nonverbal Behavior*. 35 (3) 205-215 (2012).

[8] The Global Deception Research Team A World of Lies *Journal of Cross-Cultural Psychology*. 37 (1) 60. January  
(2006). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2957901/>.

[9] Paul Eckman Fear, Lies and Scott Peterson: How Signs of Fear Can Tell Us Everything and Nothing. (2009) <https://www.paulekman.com/blog/fear-lies-scott-peterson/>.

[10] Richard Wiseman The Truth About Lying and Laughing *The Guardian* April (2007).

[11] Richard Wiseman, Caroline Walt, Leanne Ten Brinke, Stephen Porter, Sara-Louise Couper, Calum Rankin. The Eyes Don't Have It: Lie Detection and Neuro-Linguistic Programming. *Plos One*. July  
(2012). <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0040259>.

[12] Jeff Dougherty Witness Preparation: Body Language Alone Can Make A Witness Look Like He's Lying. February (2019). <https://www.litigationiq.com/post/i-knew-that-witness-was-lying-how-to-avoid-this-sentence-in-the-jury-room>.