



SOAR's 31st Annual Conference

Strengthening the Core: FUNdamental Concepts and Skills Nov 7th, 2019

AFTERNOON PLENARY

Balancing Justice: Assessing Credibility and Evidence

Mark Sandler, Evaluating Credibility or Reliability

Some important questions in assessing **credibility**

Ask yourself:

What is the inherent probability of the witness's account? Does the account logically make sense?

Is it internally consistent?

How does it measure up against the undisputed evidence?

How does it measure up as against other evidence you regard to be reliable and credible?

Does the witness have an apparent bias or motive to fabricate? Or, by contrast, is there a proven absence of motive to fabricate? (One must be careful to distinguish between proven absence of motive and the neutral absence of proven motive.)

Has the witness shown, through admissible evidence of prior dishonesty, a disregard for the truth?

Has the witness shown a willingness or unwillingness to concede obvious facts against that witness's self-interest?

Has the witness shown a willingness or unwillingness to expand upon or enlarge his or her allegations in ways that appear to amount to exaggeration or hyperbole when given an opportunity to do so?

Is it likely or unlikely that the witness could remember with declared certainty unremarkable facts or forget facts of great significance?

Has the witness made prior inconsistent statements and if so, how material are they?

Many, though not all, of the above questions are also relevant in evaluating **reliability**. Some additional questions (organized around three themes) to ask yourself in evaluating **reliability**:

Ability to observe

Did the witness have a good or poor opportunity to make the observations described? What were the circumstances surrounding the witness's observations? What limitations, if any, were there on the witness's ability to provide a complete account of relevant events?

What was the witness's condition (as might affect reliability) at the time?

Ability to remember what the witness observed

Does the witness appear to have a good or poor memory? Are any difficulties in memory genuine (unreliable) or contrived to avoid an answer (credibility)?

Does the witness have a reason to recollect the relevant events?

How, if at all, has the passage of time or other circumstances, impacted on the witness's ability to remember?

Ability to accurately communicate

Is the witness able to accurately communicate what he/she saw or remembers?

Does the witness appear to be reporting what others saw or heard, or assembling an account (even if not deliberate) based on information from others?

Jurisprudence now accepts that **demeanour** should play a diminished role in the evaluation of credibility.

*What is **demeanour**?*

The manner in which a witness testifies, his/her physical posture, gaze, strength or pitch of voice, hesitations while responding, eye or body movement – all of these types of visual and auditory cues

*Why is **demeanour** a poor tool in evaluating credibility?*

Visual or auditory cues we regard as badges of dishonesty are not.

Visual or auditory cues we regard as badges of honesty are not.

Psychopaths know what are conventionally regarded as badges of honesty and adopt them or avoid what are conventionally regarded as badges of dishonesty.

Lawyers affect their own witness's demeanour/presentations or instruct his/her on demeanour. So the witness's demeanour may not be his/her own.

Judges and adjudicators have few or no comparators or a baseline to evaluate how the witness's demeanour compares to other situations.

Judges and adjudicators have insufficient cultural competence to evaluate what visual or auditory cues mean in a cross-cultural setting.

Query: why place any reliance on demeanour whatsoever in evaluating credibility given our frequently it is misinterpreted.