DEMEANOR EVIDENCE AND FACT FINDING

National Association of Hearing Officials
2022 Professional Development Conference
Chicago, Illinois August 2022

Course Description

Demeanor Evidence and Fact Finding

Course Description

- Discussion of the nature, history, and use of demeanor evidence to determine credibility of witnesses in fact finding by administrative law judges and other hearing officials.
- Analysis of credibility determinations involving demeanor evidence in the written decisions of ALJs.
- Examination of the hypotheticals involving demeanor evidence drawn from administrative hearings.

Demeanor evidence (Non Verbal Cues) 1

DEMEANOR EVIDENCE IN FEDERAL CASE LAW

I. **Nature of Demeanor Evidence (Non Verbal Cues)**

Dyer v. MacDougall, 201 F. 2d 265, 268-269 (2d. Cir., 1952). Judge Learned Hand:

"**It is true that the carriage, behavior, bearing, manner and appearance of a witness- in short, his 'demeanor'- is a part of the evidence**. **The words used are by no means all that we rely on in making up our minds about the truth of a question** that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are. They may, and indeed they should, take into consideration **the whole nexus of sense impressions which they get from a witness**. This we have again and again declared, and have rested our affirmance of findings of fact of a judge, or of a jury, on the hypothesis that this part of the evidence may have turned the scale.

Demeanor evidence (Non Verbal Cues) 2

- Dyer Quote (continued)
- **"Moreover, such evidence may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." [bold added for emphasis].**

(Non Verbal Cues) 3

- II. **Nature of Demeanor Evidence (Summary Judgment under FRCP Rule 56)**
- *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 269-270, 106 S. Ct. 2505, 91 L. Ed. 2d 202(1986)
  Justice Rehnquist, Dissenting:
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- "The case proceeds to trial, and at the close of the plaintiff's evidence the defendant moves for a directed verdict on the ground that the plaintiff has failed to produce sufficient evidence of malice. The only evidence of malice produced by the plaintiff is the same testimony of witness A, who is duly impeached by the defendant for the prior perjury conviction. In addition**, the trial judge has now had an opportunity to observe the demeanor of witness A, and has noticed that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers**" [bold added for emphasis].

Credibility and Demeanor 1

- III. **Nature of Demeanor Evidence (Oral Testimony and Credibility)**
- *Broadcast Music v. Havana Madrid Restaurant Corp.* 175 F. 2d 77, 80 (2d. Cir., 1949)

- Judge Jerome Frank:
- "**For the demeanor of an orally-testifying witness is 'always assumed to be in evidence.' It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, his intonations, his grimaces, his features, and the like- all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned.** For such a court, it has been said, even if it were called a 'rehearing court,' is not a 'reseeing court.' Only were we to have 'talking movies' of trials could it be otherwise. **A 'stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify.** The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.' It resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have 'impeached' him." [bold added for emphasis].

Credibility and Demeanor 2

- IV. **Demeanor Evidence (Oral Testimony, Jury Trials, Confrontation and Cross-Examination)**

- *California v. Green*, 399 U.S. 149, 157-158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)
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- Justice White, for the court:

- "Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause: 'The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, **but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.**' *Mattox v. United States*, 156 U.S. 237, 242--243, 15 S.Ct. 337, 339, 39 L.Ed. 409 (1895)." [bold added for emphasis]

Credibility and Demeanor 3

- V. **Demeanor Evidence (Oral Testimony, Jury Trials, Confrontation and Cross-Examination)**
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- *Lee v. Illinois* 476 U.S. 530, 540-541, 106 S. Ct. 2056, 90 L. Ed 2d 51 (1986)

Justice Brennan, for the Court:

- But the confrontation guarantee serves not only symbolic goals. The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials. In *California v. Green,* 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970), we identified how the mechanisms of confrontation and cross-examination advance the pursuit of truth in criminal trials. Confrontation, we noted, "(1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) **permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility**" [bold added for emphasis]..

Credibility and Demeanor 4

- VI. **Demeanor Evidence and Confrontation Clause**
- *Coy v. Iowa* 487 U.S. 1012, 1019-1020, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988)

- Justice Scalia for the court: [bold added for emphasis]

- The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts. He can now understand what sort of human being that man is.....[citations ommitted] It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly. **The Confrontation Clause does not, of course, compel the witness to fix his eyes upon the defendant; he may studiously look elsewhere, but the trier of fact will draw its own conclusions**.

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- Coy quote continued:
- “Thus the right to face- to-face confrontation serves much the same purpose as a less explicit component of the Confrontation Clause that we have had more frequent occasion to discuss the right to cross-examine the accuser; both "ensur[e] the integrity of the fact-finding process." ..... The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential "trauma" that allegedly justified the extraordinary procedure in the present case. **That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult.”**

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- VII. **Demeanor Evidence (non verbal cues and communication)**

- *United States v. Naugle* 879 F. Supp. 262, 267 (E.D. N.Y., 1995)
- Senior District Judge Weinstein:

- The Supreme Court has noted the significance of face-to-face contact in a variety of contexts. For example, its robust right-of-confrontation jurisprudence reflects the understanding that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' " ..... Describing a defendant as less than human is a kind of lie--one more difficult to tell in the defendant's presence. **Similarly, decisions on the importance of demeanor evidence suggest the importance of tone and body language in conveying information. .....** This distinction has also been central to the Court's opinions on the public's right to observe criminal proceedings. "As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom."). [bold added for emphasis]

Skeptics and Demeanor Evidence 1

XI. **Demeanor Evidence (Skeptics Question Reliability of Demeanor Evidence)**

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Edmunds v. Deppisch, 313 F.3d 997 (7th Cir., 2002). Posner, J.

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- DEMEANOR EVIDENCE EXCLUDED
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- Holding: The Federal Court of Appeals for the 7th Circuit held that excluding evidence related to the demeanor of the baby's parent's on the day that the baby died did not violate the defendant's constitutional right to present evidence in her defense. (Note the defendant was not the parent of the baby, she was a day care provider)
- The excluded evidence was described by the Court as follows [citations omitted]:
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Skeptics and Demeanor Evidence 2

- Edmunds case quotation: “The excluded evidence was evidence that would have been given by three witnesses: (1) the helicopter pilot who brought Natalie to the hospital, who saw the parents a few minutes after he arrived walking normally in the parking lot of the hospital, **appearing neither distraught nor emotional, and later speaking with an "odd" lack of panic in their voices**; (2) a police officer who talked to the parents toward evening, and observed that **the father seemed "nervous" and "fidgety"**; and (3) a chaplain who met with the parents twice during the afternoon, and **who thought they displayed "a guarded demeanor, showing very limited expression of grief,"** which was not what he would have expected in the circumstances; he also thought that **the father had seemed afraid to enter Natalie's hospital room, and he observed that in the hospital room the father stood a few feet behind his wife with his hands in his pockets and then left the room while his wife remained.** The trial judge excluded all this evidence on the ground that "absent someone who has the expertise to interpret reactions, I don't think the observations have any probative value." No expert testified, and no scholarly literature was tendered to the judge, concerning the proper interpretation of the parents' behavior.” Edmunds, 313 F. 3d at 999.

Skeptics and Demeanor Evidence 3

- Edmunds case quotation:“The trial judge excluded the evidence because he thought its probative value was negligible without a foundation that had not been laid. The rule thus applied was Wisconsin's counterpart of Fed.R.Evid. 403, which no one supposes unconstitutional. If his ruling was reasonable, there is no basis for deeming it unconstitutional.
  It may have been incorrect. The judge allowed testimony of **Edmunds' allegedly hysterical demeanor on the fatal day--so, she asks, why not evidence concerning the parents' demeanor?--though it is hard to see how her being hysterical would, in the circumstances, have indicated guilt, and the prosecutor did not mention her hysteria in the closing argument. Evidence concerning witnesses' demeanor, whether on or off the stand, is routinely admitted to establish that a witness is lying, had guilty knowledge**

Skeptics and Demeanor Evidence 4

- In *United States v. Frappier*, 807 F.2d 257, 262 (1st Cir.1986), "**testimony that appellant's behavior at the wake of her deceased husband was emotionless and self centered" was admitted as bearing on her guilt**--and that is the type of evidence that Edmunds wanted to present here. Even closer is the evidence admitted in *Commonwealth v. Counterman*, 553 Pa. 370, 719 A.2d 284, 301 (1998): "a medical social worker" testified "**that when she met Counterman [the defendant] at the hospital he did not appear to be grieving over the deaths of his children, that he expressed concerns about insurance, and that when she met Mrs. Counterman, she appeared frightened of her husband**.
- The validity of the inferences drawn from demeanor evidence in these settings has been questioned. As Olin Guy Wellborn III, "Demeanor," *76 Cornell L. Rev.* 1075 (1991), bluntly puts it, summarizing empirical studies: "According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness." Edmunds, 313 F. 3d at 999- 1000.

- Question: Are hearing officials with fact finding duties mar able to use demeanor evidence?

Telephone hearings (no visual clues) 1

- DEMEANOR EVIDENCE IN STATE CASE LAW
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- I. Demeanor evidence (Telephone hearings and credibility determinations)
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- Whitesides v. State, Department of Public Safety, Division of Motor Vehicles (2001) 20 P. 3d 1130 (Supreme Court of Alaska)
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- **TELEPHONE HEARINGS VIOLATE DUE PROCESS OF LAW**
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- Holding: The Supreme Court of Alaska held that a motorist was deprived of due process of law in a driver's license revocation proceeding (for refusal to take blood alcohol breath test) because the state of Alaska held the hearing by telephone, and did not offer the driver an in person hearing, when the credibility of the driver was material to the hearing. Matthews, CJ, stated in support of the holding:
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Telephone hearings (no visual clues) 2

- “ 2. *In-person testimony is a valuable tool for evaluating the credibility of witnesses.*
  Here we deal with the second of the *Mathews* factors. In terms applicable to this case, do telephone hearings create an unacceptable risk of an erroneous deprivation of a person's right to drive? This turns in large part on the value of the live testimony of a party.
  The significance of live testimony and demeanor evidence has been long recognized. Blackstone explained that, "[by] examination of witnesses *viva voce,* in the presence of all mankind, ... and this [method] only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness." [FN 16] 3 William Blackstone, *Commentaries* *373. This method "was also indeed familiar among the *ancient* Romans ... [a]nd this, or somewhat like it, was continued as low as the time of Hadrian." [FN 17] id. At 374.

Telephone hearings (no visual clues) 3

- Babcock v. Employment Division (1985) 72 Or. App. 486, 696 P. 2d 19
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- TELEPHONE HEARINGS DO NOT VIOLATE DUE PROCESS OF LAW
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- Holding: The Oregon Court of Appeals held that a former employee who challenged denial of unemployment benefits was not denied a fair hearing under statutory and due process of law requirements because the state unemployment agency held a telephone hearing in her case. The former employee was denied unemployment benefits because of a determination that she was discharged for misconduct. Gillette, PJ stated in support of the holding [citations omitted]:
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- This brings us to the **most difficult issue, credibility**. Judging the credibility of witnesses is certainly an element of the referee's function. **Physical appearance can be a clue to credibility, but of equal or greater importance is what a witness says and how she says it.** Beyond testing credibility by the inherent plausibility of a witness' testimony we are satisfied that the **audible indicia of a witness' demeanor are sufficient** for a referee to make an adequate judgment as to believability. We find no statutory violation. The due process issue must be decided on federal constitution grounds....

Telephone hearings (no visual clues) 4

- *Babcock quotation continued:*
- *Eldridge* established **three factors** which ***491** must be balanced in determining whether, in a particular case, due process is satisfied: (1) **the private interest** affected by the official action, (2) **the risk of erroneous deprivation** of that interest through the procedures to be used and the value of additional or substitute procedures in assuaging the risk and, finally, (3) **the government's interest** (usually as a matter of economy) in utilizing a particular procedure. .... [T]he record shows that she had an **opportunity to cross-examine** her employer's witness and **to rebut employer's statements, as well as to explain her side of the controversy.** Our review of the record in this case has not revealed that petitioner was unfairly prejudiced by the nature of the hearing**; neither do we believe that requiring the parties to appear in person would lessen the risk of erroneous deprivation of petitioner's interest.** Finally, and perhaps most importantly, in a world of limited public resources we find that the **Division has a strong interest in employing telephone hearings as an efficient and fair response** to its logistical limitations. 696 P. 2d at 21
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- **Question: Do video conference hearings resolve the lack of visual cues with telephone hearings?**

Video Hearings (1)

- 1. Widespread use of Skype and Facetime as well as the availability of Adobe Connect and Webex software has made video communications through modern technology an accepted part of business life and family life.
- 2. What is your experience with video communications either in business or professional life or as a means fo family communication?
- 2. Are video hearings a better option than telephone hearings?
- 3. What advantages do video hearings have, and what disadvantages do they have, in your experience?

Video Hearings (2)

- Social Security Video hearings are explained here:
- https://www.ssa.gov/appeals/pubs/70-067.pdf
- Advantages of video hearings are greater convenience and flexibility for hearing claimants and quicker hearings. The ALJ is in a different location than the claimant and the claimant's representative.
- The audio portion of the hearing is recorded but not the video portion. Privacy of the claimant is protected by the use of technology.
- A number of State central panels use streaming video to educate hearing claimants about their upcoming hearings.
- See: Top ten things not to do at an administrative hearing
- http://www.azoah.com/Vol17.html

Video Hearings (3)

- Immigration courts also use video hearing technology.
- See: https://www.americanimmigrationcouncil.org/content/video-hearings-immigration-court-foia
- A number of state Administrative Hearing offices also use streaming video to educate hearing claimants about hearing related matters, as well as to conduct video hearings.
- See: http://www.azoah.com/Vol33.html

Zoom and higher education

- My law school (and the entire university) switched to Zoom instruction on March 16, 2020. We taught classes exclusively on Zoom until August, 2021. We now have live classes in our law school classrooms but all members of our community have to be vaccinated unless a medical or religious exemption is granted, have to wear masks in the building, have to be tested weekly for COVID, and have to pass a green dot questionnaire for every day on campus. I run a zoom class at the same time as my live class for students who are sick or are in quarantine from COVID. This has been a different experience.

Remote court hearings (pandemic)

- Many state court systems for both criminal and civil cases have used remote hearing technology as a substitute for live hearings because of COVID 19. Some of these cases were hybrid, with some court officials being in the courtroom and other participants joining the hearing on Zoom, Google Meets, or Microsoft Teams. Some of the hearings were fully remote. California has extended remote court hearings through June 2023, for access to justice reasons. This parallels was has been happening in many sectors of our economy.

Remote admin. Hearings

- What has been your experience with your agency with remote hearings? What about hybrid hearings? Does zoom make it easier to assess demeanor and credibility compared to live hearings? What about when hearing participants wear masks? In my experience, having my students wear masks may be good from a safety standpoint but I miss out on a lot of non verbal cues in that setting. Is Zoom more challenging from that standpoint when students don't have to wear masks, or are live sessions with participants wearing masks more challenging for demeanor clues?

Fact finding Deference 1

- Deference to ALJ fact findings based on Credibility Determinations
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- Finucan v. Maryland State Board of Physician Quality Assurance (2003) 151 Md. App. 399, 421, 827 A. 2d 176 (Maryland Court of Special appeals upheld ALJ fact finding based in part on principle of deference to ALJ credibility determinations. Court upheld revocation of physicians' license for unprofessional conduct with patients). Barbara, J, stated in support of the holding: " Dr. Finucan complains that the ALJ did not appropriately assess the credibility of the witnesses. We again perceive no error. It is well settled that the credibility findings of an agency representative who sees and hears witnesses during an administrative proceeding are entitled to great deference on judicial review. [citations omitted] (noting that " 'where credibility is pivotal to the agency's final order, [the] *ALJ's findings based on the demeanor of witnesses are entitled to substantial deference and can be rejected by the agency only if it gives strong reasons for doing so* ' ") ."

Fact finding Deference 2

- Finucan quote continued: “The ALJ wrote: "I would have to believe that several people are lying and/or mistaken if I am to accept the scenarios set forth by [Dr. Finucan] as true. I cannot accept [Dr. Finucan's] scenarios as anything other than self-serving, contradictory, untrue and inconsistent with the weight of the evidence." The Board gave the proper deference to the ALJ's credibility based determinations and so shall we. There is simply no reason, much less a strong reason, to disturb those findings.” “Dr. Finucan also argues that the ALJ acted arbitrarily and capriciously in analyzing the evidence adduced at the hearing. He contends that certain testimonial and documentary evidence should have been accorded different weight than that given it by the ALJ. We disagree.

- The ALJ had before him seventy exhibits and the testimony of sixteen witnesses. It was the ALJ's responsibility to resolve any conflicts in the evidence presented, and to draw inferences from that evidence. It was also for the ALJ, not us, to accord each item of testimonial and documentary evidence the weight it deserves.[citations omitted]. The ALJ submitted a detailed opinion, including seventy-two findings of fact, all of which have a substantial evidentiary basis in the record. The Board accepted those fact findings and, based on them, concluded that Dr. Finucan committed the conduct proscribed by § 14-403(a)(3). There was no error.

Fact finding Deference 3

- Note, the Maryland court decision is broader than the deference principle in the California APA discussed below.
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- CALIFORNIA APA DEFERENCE STANDARD [CALIFORNIA GOV'T CODE SECTION 11425.50(b)]
- (b) "….. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it."

Fact finding Deference 4

- *Mason v. Office of Administrative Hearings* (2001) 89 Cal. App. 4th 1119, 1131-1132, 108 Cal. Rptr. 2d 102 (California Court of Appeal overturned Superior Court reversal of agency decision that minor was not eligible for developmental disability benefits. Agency had adopted ALJ decision. Court of Appeal discussed California deference principle (Ca Gov. Code S 11425.50) as to ALJ credibility determinations. The Fact findings made by the ALJ included discussion of expert testimony). EXPERT TESTIMONY
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Fact finding Deference 5

- *California Youth Authority v. State Personnel Board* (2002) 104 Cal. App. 4th 575, 595-596, 128 Cal. Rptr. 2d 514 (California Court of Appeal upheld Superior Court denial of petition for writ of administrative mandate brought by Authority to challenge Board decision revoking termination of employee by Authority. Employee had challenged termination for misconduct in administrative hearing. ALJ had issued proposed decision upholding termination, but Board adopted a decision revoking termination. The Court of Appeal discussed California deference principle (Ca Gov. Code S 11425.50) as to ALJ credibility determinations.

Fact finding Deference 6

- CYA case continued: The Court of Appeal held that the ALJ did not make the kind of credibility determination that would have triggered the "great weight of the evidence" deference standard, and thus the court did nor give deference to the ALJ's credibility determination. This was because the ALJ made credibility determinations without identifying in the record any specific "observed demeanor, manner or attitude" of the witnesses that supported the credibility determinations. Further, the ALJ made credibility determinations as to the former employees' testimony based on the plausibility of the testimony of other witnesses, and based on inconsistency of the former employee's testimony with other witnesses' testimony. These credibility factors are based on the content of the witnesses' testimony NOT on demeanor of the witness testifying. CONTENT OF TESTIMONY BASED CREDBILITY FACTORS
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Fact finding Deference 7

- *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*
- (2004) 118 Cal. App. 4th 1429, 1446, 13 Cal. Rptr. 3d 826 (California Court of Appeal vacated Board decision reversing Department decision to suspend license of alcoholic beverage licensee for illegal sale of alcohol to underage customer. The Court of Appeal concluded that the reasonable reliance defense included fake ID's as well as government issued ID's. The Court also held that the ALJ's fact findings, that the licensee's employee did not reasonably rely on the fake ID presented by the minor customer, were binding on judicial review.

Fact finding Deference 8

- *Department* case continued: This was because in part, that the issue of whether the licensee employee made a reasonable inspection to determine whether an ID was genuine was a fact question, resolved by the ALJ. The ALJ observed the ID (held in a wallet behind plastic lamination) in exactly the same way as had the employee of the licensee, who did not testify at the hearing. The ALJ made specific findings as to why the ID was an obvious forgery. The court assumed that the ALJ's observations of physical evidence supported his findings. The Court of Appeal did nor discuss Ca. Gov. Code Section 11425.50(a). Thus, the ALJ fact findings, and observations, are different than in the last two cases. ALJ OBSERVATION AND EXAMINATION OF DOCUMENTS
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Fact finding Deference 9

- *Cate v. State Personnel Board* (2012) 204 Cal. App. 4th 270, 138 Cal. Rptr. 3d 691) (no deference was given to ALJ credibility determinations when based solely on review of the record. The ALJ in this case was assigned to review record and issue a proposed decision after the original ALJ who heard the case retired without issuing a proposed decision. REVIEW OF RECORD BY ITSELF
- In some administrative law settings, a new hearing would have been ordered instead of a record review.

Fact finding Deference 10

- *San Diego Unified School District v. Commission on Professional Competence* (4th Dist., Div. 1, 2013) 21 Cal. App. 4th 1120, 1147-1149, 154 Cal. Rptr. 3d 751. The California Court of Appeal held that the superior court did not give great weight to the credibility determination of the Commission on Professional Competence when the court decided a school district's petition for a writ of mandate that challenged the Commission's decision that a teacher charged with inappropriate touching of students in the classroom should not be discharged from employment by the school district for evident unfitness to teach students. The superior court had granted the petition and vacated the Commission decision. The court of appeal reversed the trial court judgment and ordered a remand to the trial court to deny the school district's petition. The court of appeal found that the trial court did not give great weight to the Commission's credibility determinations as was required under Gov. Code § 11425.50.

Fact finding Deference 11

- SAN DIEGO case [continued]:Specifically, the Commission found that the student who testified to inappropriate touching in the classroom during school had a demeanor when describing the touching that was “without significant emotion” and the demeanor of the student’s mother who also testified suggested some “overdramatization”. The commission also relied on some testimonial content factors, such as the implausibility of the student’s testimony, differences in the student’s various accounts of how the touching happened, and the lack of corroboration by other witnesses as well as the positive demeanor of another witness, a teacher’s aide whose testimony was found to be “very credible” with relaxed testimony, who admitted when she could not recall details, and who answered questions “in a direct and truthful manner to the best of her recollection”.

Fact finding Deference 12

- DEMEANOR DFACTORS PLUS TESTIMONIAL CONTENT FACTORS [San Diego case]
- (*Kifle-Thomson v. Board of Chiropractic Examiners* (2012) 208 Cal. App. 4th 518, 533–535, 145 Cal. Rptr. 3d 627) When an agency refers to a licensee's conduct during a hearing and concludes that this conduct indicated a "lack of candor, insight and honesty" particularly the licensees' "repeated [ ]" inability to recall "significant events" as aggravating evidence that justified a license revocation, the agency complied with the requirements of Gov. Code § 11425.50(b). DEMEANOREVIDENCE FACTORS

Immigration Judges 1

- Credibility Determinations by Immigration Judges in immigration law (applications for asylums)
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- *Djouma v. Gonzales*, 429 F.3d 685, 687-688 (7th Cir., 2005) (denial of asylum claim upheld on appeal)
- Opinion by Judge Posner,
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- "We understand the dilemma facing immigration judges in asylum cases. **The applicant for asylum normally bases his claim almost entirely on his own testimony,** and it is extremely difficult for the judge to determine whether the testimony is accurate. **Often it is given through a translator, and even if the applicant testifies in English, as a foreigner his demeanor will be difficult for the immigration judge to "read" as an aid to determining the applicant's credibility.** Unfortunately, the Department of Homeland Security and the Justice Department, which share responsibility for processing asylum claims, have, so far as appears, failed to provide the immigration judges and the members of the Board of Immigration Appeals with any systematic guidance on the resolution of credibility issues in these cases..... The departments seem committed to case by case adjudication in circumstances **in which a lack of background knowledge denies the adjudicators the cultural competence required to make reliable determinations of credibility."**

Immigration Judges 2

- *Apouviepseakoda v. Gonzales* 475 F.3d 881, 897-898 (7th Cir., 2007)
- Dissenting opinion of Judge Posner
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- The fact that she was testifying through an interpreter has a significance that my colleagues do not appreciate when they say that "The IJ spent 6 hours in a hearing room, face to face, with Ms. Apouviepseakoda. We have never met her." I take this to be an allusion to **the common though not necessarily correct belief that being present when a witness testifies greatly assists a judge or juror in determining whether the witness is telling the truth. Even if so in general, it cannot be so when the witness is a foreigner testifying through an interpreter, especially if the judge cannot even hear the foreigner, but only the interpreter. Reading the facial expressions or body language of a foreigner for signs of lying is not a skill that either we or Judge Brahos possess.**

Immigration Judges 3

- *Iao v. Gonzales* 400 F.3d 530, 534 (7th Cir., 2005)
- Judge Posner opinion
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- 4. *Insensitivity to the possibility of misunderstandings caused by the use of translators of difficult languages* such as Chinese, and relatedly, *insensitivity to the difficulty of basing a determination of credibility on the demeanor of a person from a culture remote from the American,* such as the Chinese. E.g., *Lin v. Ashcroft*, 385 F.3d 748, 756 n. 1 (7th Cir.2004); *Ememe v. Ashcroft*, 358 F.3d 446, 451-53 (7th Cir.2004); *Mendoza Manimbao v. Ashcroft*, 329 F.3d 655, 662 (9th Cir.2003); *He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir.2003); Deborah E. Anker, "Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment," 19 *N.Y.U. Rev. L. & Social Change* 433, 505-27 (1992); Neal P. Pfeiffer, "Credibility Findings in INS Asylum Adjudications: A Realistic Assessment," 23 *Tex. Int'l L.J.* 139 (1988). Behaviors that in our culture are considered evidence of unreliability, such as refusing to look a person in the eyes when he is talking to you, are in Asian cultures a sign of respect.
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Use of demeanor evidence in litigation

- This is an excellent article on use of demeanor evidence in litigation (written by Cynthia R. Cohen, Ph.D.)
- https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/33_demeanor_deception.authcheckdam.pdf
- DEMEANOR Jurors use intuition in judging demeanor, deception, and credibility in their daily lives. Since jurors bring life experiences with them to court, understanding perceptions of truthfulness and lying behavior is critical. Whole books are written on the topic of lying , and a television series, Lie to Me, spawned from the work of Dr. Paul Ekman, the renown psychologist in the area of human emotion and lying. Social scientists study lying behavior, but knowing the myths that jurors' believe is crucial. This paper focuses on perceptions of behavior and suggests ways to enhance witness credibility.

Credibility and Administrative Law 1

IX. **Credibility Determinations in Administrative Law**

Universal Camera v. N.L.R.B., 340 U.S. 474, 496-497, 71 S. Ct. 456, 95 L. Ed. 456 (1951)

Justice Frankfurter for the court:

Nothing in the statutes suggests that the Labor Board **should not be influenced by the examiner's opportunity to observe the witnesses he hears and sees and the Board does not.** Nothing suggests that reviewing courts should not give to the examiner's report such probative force as it intrinsically commands. To the contrary, s 11 of the Administrative Procedure Act contains detailed provisions designed to maintain high standards of independence and competence in examiners. ..... Thus, the Senate Committee responsible for the Administrative Procedure Act explained in its report that **examiners' decisions 'would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing**.'

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Universal Camera Quote (continued):

The House Report reflects the same attitude; and the Senate Committee Report on the Taft-Hartley Act likewise indicates regard for the responsibility devolving on the examiner. **We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.** The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is 'substantial.' [bold added for emphasis].

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X. **Demeanor Evidence (ALJ Use in Credibility Determinations)**
History of Use of Demeanor Evidence

N.L.R.B. v. Dinion Coil Co. 201 F. 2d 484 (2d. Cir., 1952).

Judge Jerome Frank: [bold and italics added for emphasis]

If, in similar circumstances, a trial judge made such a finding, we would be obliged to accept it. For the pivotal factor here is the **Examiner's disbelief in Holland's testimony, a disbelief that rested on an evaluation of Holland's credibility, which in turn the Examiner founded upon 'his observation of the witnesses.'** Repeatedly, the courts have said that, since observation of such 'demeanor evidence' is open to a trier of the facts when witnesses testify orally in his presence, and since such observation is not open to a reviewing tribunal, that fact-trier's findings, to the extent that they comprise direct or 'testimonial' inferences, are ordinarily unreviewable. True, **demeanor evidence may sometimes mislead; but our courts regard it nevertheless as an excellent clue to the trustworthiness of testimony.** The Federal Civil Procedural Rules, 28 U.S.C.A., reflect this view

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Judge Jerome Frank (continued)

*It has had a long history. In the earlier period of Roman legal development, according to Millar, the witnesses testified orally before the judex, and the practice of having oral testimony heard by the judge prevailed originally in the Roman-canonical procedure. Ullman tells us that the 14th century Postglossators- who, as judges or advocates, 'had their eyes fixed upon the practical administration of the law'- maintained that the 'indispensable requisite for the judge to form his opinion on the trustworthiness of witnesses was that they appeared before him personally. * * * The personal impressions made upon the judge by the witnesses, their way of answering questions, their reactions and behavior in Court, where the only means of ascertaining whether their statements were trustworthy or not. * * * It was thought necessary, therefore, that the judge * * * should put on record in the files any specific reactions, e.g., that the witness stammered, hesitated in replying to a specific question, or showed fear during the interrogation * * * .' Subsequently, however, written testimony became in general the norm in canon and lay continental courts until the 19th century.*

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In English chancery it came about that the 'canon law influence prevented the oral examination of witnesses save as an extraordinary measure,' while at English common law the testimony was oral. For the most part, America inherited this difference between chancery and common law procedures. In the federal courts, except for a short period from 1789 to 1802, oral testimony in open court was not required in equity litigation; indeed, for many years it was virtually banned. But Rule 46 of the Equity Rules of 1912 reverted to the 1789-1802 practice of reliance on oral testimony as the normal method in equity suits. The present Civil Rules continue that valuable reform. **The result of the stress on demeanor is to confer immense discretion on those who, in finding facts, rely on oral testimony.** [bold added for emphasis]

Credibility in IDEA litigation

Credibility and deference in do novo review

Credibility determinations require factual support. No deference will be given to credibility determinations that do not have that support.

Doyle v. Arlington County School Board 953 F.2d 100, 104-105 (4th Cir., 1991)

"Dr. Solomon had stated that, in her opinion, a highly individualized program was the only methodology which would suffice for Mairin. However, , the reviewing officer concluded that Dr. Solomon saw her role as that of an advocate and found her testimony not to be credible. While it is true that by statute and regulation the reviewing officer is required to make an independent decision, we are of opinion that his reason for discrediting a witness who he had not seen or heard testify, in the face of the crediting of that same witness by a hearing officer who had seen and heard the witness testify, is so far from the accepted norm of a fact-finding process designed to discover truth that we think the due weight which should be accorded the decision of the reviewing fact-finding officer depending on that credibility decision is none. For example, F.R.C.P. 52(a) provides that "... due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." And we have held that "[W]e may not reverse a trier of fact, who had the advantage of hearing the testimony, on the question of credibility." *McCrary v. Runyon*, 515 F.2d 1082, 1086 (4th Cir.1975), *aff'd*, ***105** 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). See also *Federal Practice and Procedure,* Wright and Miller, (1971), Civil § 2586.

Demeanor Questions 1

Nature of Demeanor Evidence

1. What is demeanor evidence? (Definition)

2. What specific behaviors or actions characterize each of the three components, "Demeanor, Manner, and Attitude" of demeanor evidence?

3. Do you use demeanor evidence in your fact finding determinations? Why or why not?

4. If you use demeanor evidence, what specific demeanor evidence behaviors or actions have you found in your experience as an administrative adjudicator to be reliably associated with truth telling, and which with deception (testifying falsely)?

5. If you use demeanor evidence, which specific behaviors or actions have you found NOT to be reliably associated with truth telling or with deception?

Demeanor Questions 2

Demeanor evidence and credibility determinations

6. How is demeanor evidence used to make credibility determinations in administrative hearings?

7. Is demeanor evidence more useful in making credibility determinations with certain types of cases, and certain types of fact disputes?

8. Is Demeanor Evidence more persuasive when it is inconsistent with or isolated from other credibility factors?

9. Is Demeanor Evidence more persuasive when it is consistent with other credibility factors?

10. Is it more difficult or easier to use demeanor evidence to determine credibility of a witness compared to other factors (such as plausibility or consistency of testimony)?

Demeanor evidence articles 1

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