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DE-CODING WITNESS CONDUCT

Our behaviour is influenced heavily by our environment. Courts and courtroom conduct play a large role in guiding witness behaviour. This paper looks at what happens when a witness swaps the stand for the sofa.

Courtrooms inspire awe and respect by design. For a witness physically taking the stand, the solemnity of the occasion is immediate. The buildings themselves communicate gravity and formality. Wigged judges sit elevated and apart, surrounded by symbols and security guards. Witnesses also take their cue from the deferential demeanour of Court officers and Counsel teams.

All of this ceremony is lost when hearings move online. Fact witnesses can testify from the comfort and familiarity of their living room, featuring none of the usual guides or reminders of appropriate behaviour. For a witness, the psychological experience of testifying virtually is worlds apart from the live experience.

We have already looked at how we perceive witnesses differently online (Paper 3, Virtual Witness) But what about how witnesses actually behave? Do people act differently when they testify remotely? Paper 2 in this series (Flying Cyber-Solo) has explored some of the ways an audience changes our performance. This paper considers how different qualities of the virtual setting may impact a witness's general behaviour, and how we might combat any negative effects with practical measures.

DANCE LIKE NOBODY'S WATCHING

We behave very differently when we're being watched. Under scrutiny, we behave more honestly and more positively towards others. This effect is so strong that even an image of a pair of eyes changes our decisions and actions (*watching eye effect*).

Psychological scientists aren't usually guineapigs themselves. But researchers at Newcastle University turned the tables on unsuspecting academics by investigating payments they made into the "honesty box" in the departmental coffee room. Over a period of 10 weeks, the researchers edited the price list for hot drinks by adding either a photograph of flowers or a photograph of a pair of eyes directed at the thirsty customers. Prices stayed the same but the menu tampering produced a stunning effect: deposits into the honesty box almost trebled when coffee-takers saw a picture of watching eyes.[1]

Researchers found a similar honesty-boosting effect on children hunting for Halloween candy, this time by using a well-placed mirror. Trick-or-treaters visiting specific houses were told to take only one piece of candy from a bowl. They were then left alone momentarily – half of the time in front of a mirror. Covert researchers observing from afar saw that children were far less likely to sneak sweets over their quota when they had to watch themselves in a mirror.[2] Apparently looking yourself in the eye really does make a difference.

The watching eye effect also happens when we operate online. In fact, one of the first findings of this strange tendency came from a study of the economically altruistic choices people made in a computer-simulated game. The researchers in this study were surprised to notice that their participants made more cooperative choices when they were "watched" on screen by a robot called Kismet with human-like eyes (inspired by Microsoft's "Clippy" the paperclip-shaped animated agent).[3] Very little, it seems, is needed to trigger this effect.

The watching eye effect has been found across a wide range of situations and behaviours – including online environments. The finding is perhaps less surprising when we consider how important gaze cues are in communication and social interaction. It also accords with the very special status gaze processing occupies in the human brain. We have neural architecture dedicated to processing faces – including the eyes in particular. Neurons that are only activated when we see eyes pointing a certain direction (gaze-selective neurons) are found throughout multiple regions of the brain, not just the visual processing areas.

Virtual hearings are an unusual setup in this regard. Other people are of course watching but a witness's sense of that scrutiny is reduced. Most of the audience are hidden and a witness has few reminders of their presence. With today's video platforms, witnesses are also likely to see their "reflection" a digital mirror alongside the cross-examiner's face. However, unless the advocate deliberately emulates eye contact by staring directly into the camera, a witness will not experience the grilling feeling they otherwise might in person.

Measures that may increase the watching eye effect during virtual hearings include:

- Having the tribunal members visible onscreen throughout a witness's testimony.
- Having someone physically present in the same room as the witness (if social distancing rules allow).

DIGITAL SHEEP

One likely reason for the watching eye effect is that we feel pressure to follow expected (good) behaviours when we're in company. This tendency reflects the light side of social conformity – where we fall in line with what others are doing (or with what we think is expected of us) even if we secretly disagree or object. In doing so, we promote social harmony and civil order.

Stanley Milgram's seminal studies on social conformity were focused on its dark side: essentially, can you get someone to do something horrible by applying social pressure? In his landmark study, the answer was a shocking but resounding "Yes". In the 1970s, Milgram set up an experiment where participants were meant to deliver electric shocks as punishment to a fellow participant sat next-door whenever they made a mistake on a test. The fellow participant was actually an actor and the shock generator a sham. The procedure required the participants to increase the strength of the shocks the generator delivered from "Slight Shock" (15 volts) right through to "Danger: Severe Shock" (375 volts) and finally on to a horrifying "XXX" (450 volts). The participants were clearly distressed about hurting the guy next door and many protested. But with repeated nudging from the lab-coat-wearing experimenter ("*The experiment requires that you continue*") 65% complied with the instructions, including inflicting an apparently lethal shock.[4] Clips from Milgram's original obedience experiments make for eye-opening if uncomfortable watching (available on YouTube).

Other demonstrations of social conformity abound including those with much lighter overtones. One example is seeing how people react when they step into an elevator where everyone else is facing the wrong way (spoiler: people generally follow the herd and turn to face the back).

What these studies show is that we look to others for guidance on how to behave. In the presence of social pressure – either spoken or implied by others' behaviour – we follow what others do, even if it goes against our private inclinations. The research shows that we are particularly obedient to authority figures – which explains the surprising power of a high-vis jacket.

When a witness enters a courtroom, they are surrounded by cues indicating how to behave. In national courts, security guards may be present. In the courtroom itself, the judge is physically elevated above everyone else and framed by official emblems and symbols such as coats of arms or scales of justice. Counsel for each party are trained and practised at behaving deferentially before the judge or tribunal, including rising to stand when they do. In short, the sombre and formal tone of the proceedings is immediately apparent in a physical trial.

We're missing almost all of these cues in virtual hearings. Instead, it is up to the judge or arbitrator to set the appropriate tone through their words and manner, and for Counsel to follow.

For most fact witnesses, testifying before a court of law (virtually or otherwise) is a one-off event. They simply aren't accustomed to the usual standards of behaviour in formal proceedings. Added to their innocence, in remote hearings the majesty of a courtroom is displaced with the banality of their living room. Faced with an environment with far less gravitas, virtual fact witnesses may demonstrate different levels of formality or propriety. This could lead to witnesses going further and more quickly off-piste than perhaps their Counsel would like.

Inviting a fact witness to testify from Counsel's offices with one or more members of the legal team present can help remind them of the gravity of the proceedings and instil the social conformity we may otherwise be missing.

FEEL FREE

Witnesses are likely to behave differently in virtual hearings because the majority of participants are not visible. An interesting, related effect is *online disinhibition*, where people feel less restrained communicating over the internet than they do face-to-face. This propensity comes from cyber-psychology – an emerging field of study looking at the way technology impacts our mind and behaviour. In effect, online disinhibition encourages people to say things they otherwise wouldn't – a phenomenon which can have both positive (self-disclosure) and negative (trolling) side-effects.

Online disinhibition is usually associated with asynchronous internet communication such as those used in social media channels or chatrooms. In those instances, people can often comment anonymously. It's also hard to read other people's emotions because there's no non-verbal feedback. Virtual

hearings are not entirely analogous because witnesses communicate in real time. They also have some, albeit limited, non-verbal feedback to go on. However, the setting of the virtual hearing may mean that witnesses – particularly those testifying from their homes – feel much more relaxed, less inhibited and less guarded.

Anecdotal evidence from criminal trials suggests that defendants behave less formally and less appropriately when they attend Court via video link. For example, without the immediate physical presence of a wigged adjudicator in front of them, defendants being sentenced via video link have been reported to swear, complain or otherwise retaliate when they would rarely do so face-to-face in Court.[5] Civil trials are less likely to provoke such extreme reactions. But remote witnesses dialling in from home will feel a similar diminished sense of the gravity of the occasion.

Whether or not such online disinhibition effect helps or hinders a virtual hearing may depend on your perspective (judge/arbitrator or Counsel/party). For particularly nervous witnesses or those intimidated by a formal courtroom setting, it may improve their performance by enabling them to speak more freely. As often happens in chatrooms and on social media, witnesses may also disclose more than they would have done on the stand – something which may be good or bad depending on your viewpoint.

Suggested measures to set the mood in virtual courts and hearing rooms [6]

	Judge or arbitrator to give appropriate **directions** on the gravity of the occasion at the opening of the proceedings and when a new witness is sworn in.	All Counsel visible on webcam to be **dressed** as if they were appearing in Court.	Virtual **waiting rooms** to be designed with the context in mind and operated by staff who create the appropriate tone.	Judges and arbitrators to appear in front of a **plain backdrop** save for appropriate **judicial emblems** or symbols (e.g. coats of arms).

A NEW VIRTUAL COURTROOM ETIQUETTE

Our behaviour is not a constant. Our physical surroundings change the way we feel, and we behave differently in front of an audience. These factors are likely to influence witnesses when they testify remotely from their homes compared to taking the stand in Court. Certain factors in virtual settings we cannot control. But there are a number of adjustments we can make to emulate the solemnity of the hearing room more closely, and to encourage appropriate behaviour in a witness testifying remotely.

NOTES

[1] Bateson, M., Nettle, D. & Roberts, G. (2006) Cues of Being Watched Enhance Cooperation in a Real-World Setting. *Biology Letters*, 2(3): 412-4.

[2] Beaman, A. L., Klentz, B., Diener, E. & Svanum, S. (1979) Self-Awareness and Transgression In Children: Two Field Studies. *Journal of Personality and Social Psychology, 37*(10): 1835-1846.

[3] Burnham, T. & Hare, B. (2007) Engineering Human Cooperation: Does Involuntary Neural Activation Increase Public Goods Contributions? *Human Nature*, 18: 88-108.

[4] Milgram, S. (1974) *Obedience to Authority: An Experimental View*. New York: Harper and Row.

[5] Wallace, A., Roach Anleu, S. & Mack, K. (2019) Judicial Engagement and AV Links: Judicial Perceptions From Australian Courts. *International Journal of the Legal Profession*, 26:1, 51-67.

[6] Adapted from Mulcahy, L., Rowden, E. & Teeder, W. (2020) Exploring the case for Virtual Jury Trials during the COVID-19 crisis.

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