

# ADR Times

## PERSPECTIVES on Dispute Resolution—

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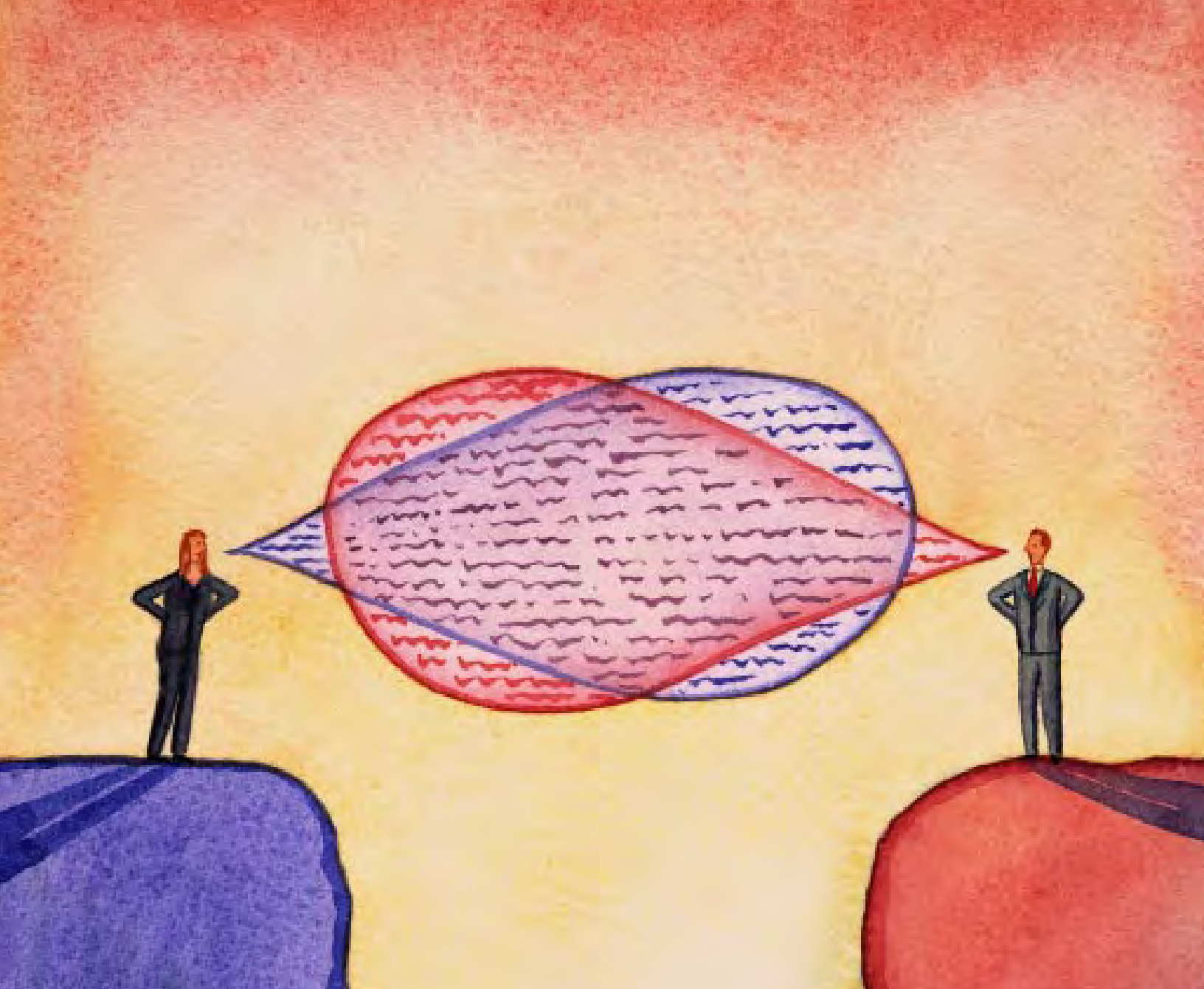
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# "HE SAID, SHE SAID"

*How Does an Arbitrator Decide Who to Believe?*

by Eric Epstein

It is common at an arbitration hearing for each side to present diametrically different versions of the dispute. This is especially true in cases of sexual harassment in which the accuser tells one story and the accused tells a completely different story. In such cases, it is the Arbitrator's responsibility to determine who is telling the truth so that a fair and equitable determination can be made.

However, that is far easier said than done. As an Arbitrator who has handled numerous such hearings, I would like to provide you with some factors that I consider useful in ascertaining the truth. Although an evaluation of these factors certainly cannot guarantee that the Arbitrator will make the right call, I believe that in most circumstances it tilts the odds substantially in favor of a correct outcome. Although the "weight" to be given to each factor may vary, here are the top ten factors that I consider in trying to separate fact from fiction.

### *An Arbitrator's Guide to Employment Disputes:*

**1. The Background and History of the Accuser:** If the accuser has a relatively unblemished background, and, most importantly, has not previously filed a complaint of sexual harassment against anyone, this is a factor in her favor.<sup>[1]</sup> On the other hand, if the accuser has a history of making allegations of sexual harassment then some caution may be warranted.

**2. The Background and History of the Accused:** If the accused is a long term employee, and was never previously accused of any type of sexual harassment, then that is a factor in his favor. Conversely, if he has previously been accused of sexual harassment, or has a reputation within his company of making inappropriate remarks of a sexual nature, or inappropriate touching, or other inappropriate conduct of a sexual nature, then this is a factor to consider as to whether or not he did what he is accused of doing in the present case.

**3. Contemporaneous Complaints:** If the accused made a contemporaneous complaint either to a co-worker or to a supervisor, or even to a friend or relative, that would be a factor in her favor. The immediate reporting of the complained-about conduct is an indication that such conduct took place, although certainly not conclusive. Conversely, the lack of a contemporaneous complaint may mitigate against the accuser, but

there are often reasons why a complaint may not be immediately made (e.g., fear of retaliation, etc.).

**4. Motive to Lie by the Accuser:** There are various reasons why an accuser might lie. An arbitrator therefore must consider the context of complaints about sexual harassment particularly if the accuser has received a negative performance evaluation, the accuser has been warned that she is subject to termination for a performance related issues, the accuser believes she may be in danger of being imminently fired, or she has in fact been terminated. In certain contexts, she may have a motive to exaggerate the circumstances of what happened. The accuser may be more likely to interpret events in a manner that is not consistent with a reasonable person, in order to place herself in a "protected" category. In certain instances, accusations are a way to retaliate against the company for perceived mistreatment or termination.

**5. Motive to Lie by the Accused:** The accused always has a motive to lie. If he is found to have committed the offending conduct, he is subject to being disciplined, suspended, transferred, or terminated. Furthermore, if he is married or in another committed relationship, substantiated charges of sexual harassment may seriously affect his other relationships. Therefore, the accused always has some motive to either justify his behavior or deny that it occurred. Therefore, such denials must be taken in that context.

**6. Independent Witnesses:** This is the holy grail of determining who is telling the truth. If there is truly an independent witness, who has no axe to grind or motive to lie, who supports the version of one side or the other, that independent witness' testimony is given great weight by me and very likely could tip the scales. In determining if the witness is truly "independent," the Arbitrator must consider the relationship of the witness to the accused and accuser, whether the witness has anything to gain or lose by telling the story that she/he is telling, and whether the witness had the ability to observe, understand, and remember the events in question.

**7. Documents:** Frequently, documents may be relevant to uncovering the truth amidst disputed facts. Often times (especially in large companies) there will be an

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investigation which will contain written statements and reports. It is important to note whether the statements and reports are consistent with the current testimony. In addition, occasionally there may be emails, text messages, or voice mails which may be consistent or inconsistent with the version of the events that are now being told. If there are major inconsistencies between the documents and the current testimony, that clearly raises serious concerns about the witness' credibility.

**8. Prior Statements Regarding the Incident:** Similar to the reasoning regarding documents above, there may also be prior oral statements by the accused or accuser to other people relating to the events in question. If such statements are either consistent or inconsistent with the version now being proffered, that would be a factor to take into consideration. Clearly, prior consistent statements would lend some credibility to the version now being given, especially if such statements were given at or about the time of the event. On the other hand, prior inconsistent statements would clearly be a factor to be weighed against the person who is now telling a different story.

**9. Demeanor of the Witness:** Although the demeanor of the witness is a factor, I do not usually give it great weight, as I have learned from experience, that barring exceptional circumstances, it is very difficult to ascertain whether or not a witness is telling the truth simply by observing his or her demeanor. Some people (e.g.,

police officers) believe they can tell if a person is lying by whether or not he or she blinks their eyes, changes the tone of his or her voice, fails to make eye contact, or acts nervous. However, such actions are not a reliable indicator of deception. In a little known study, it was shown that police officers are terrible judges of whether a person is telling the truth or not. This is contrary to popular belief (and certain television shows) but can be very easily explained. People are often very nervous when being questioned by police and therefore the police often take this nervousness as a sign of guilt. The same may be said for arbitration hearings. Many witnesses are naturally nervous, especially victims of sexual harassment and those who believe they are being unfairly accused. Therefore, a witness' "nervousness" is rarely a factor that I consider in determining whether such witness is telling the truth. On the other hand, there are occasional telltale signs, which although not infallible, can perhaps raise a red flag regarding the witness' credibility. For example, a witness who shows disrespect toward another person often will feel less guilty about lying about that person. For example, if the accused refers to the accuser as "that woman," as opposed to using her name or title, then there may be a greater likelihood that the accused would feel a compulsion to lie about that person.<sup>[2]</sup>

Another indication of veracity is whether or not the witness' testimony appears rehearsed. If it appears that



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the witness is simply reciting something that she or he has memorized—as opposed to telling the story in their own words—then that is a factor that could affect my evaluation of the witness’ credibility. Another indication of possible deception that I occasionally see is when a person shakes his or her head, indicating yes or no, but answers differently. So if a person nods their head in an up or down manner generally indicating yes, when asked a critical question, but verbally answers the question no, that sends a confusing signal and gives their answer less credibility since the body language is saying one thing, but the words are saying another.

Finally, in extreme cases, if you believe that you have developed a “baseline” of a person’s behavior when telling the truth, and then you see a marked departure from that “baseline” when the witness is asked a critical question, then the answer to the question may not be truthful. For example, as an arbitrator you may begin to notice that a person always answers a question one way, or in a particular tone, or at a particular decibel level, or waits a certain amount of time before answering. Essentially, you find a “baseline” over many questions which are not disputed. But, if a critical question gets asked and the witness’ demeanor totally changes from the “baseline,” this may be an indication that the answer is not as credible. This is the general way a polygraph works in that it develops a baseline for answers known to be truthful, and compares them with the dis-

puted questions. These nuances are not easy to pick up on and these techniques are certainly not foolproof, but demeanor is one factor to consider.

**10. Burden of Proof:** When all else fails, I fall back on the burden of proof. There are some cases which are essentially a draw, where the above factors even out and there is no clear “winner.” In these cases, in which the he-said/she-said cannot be reconciled, I rely on who has the burden of proof. Simply put, if the person having the burden of proof on a particular issue has not carried his or her burden by a preponderance of the evidence, then I find for the other side on that issue.

Until we come up with a foolproof method of determining the truth, the above factors can hopefully assist the trier of fact in reaching the right decision. ▀

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### ENDNOTES

[1] Throughout this article, I have chosen to use the female pronoun to denote the accuser and the male pronoun to denote the accused. Although there are instances of same-sex harassment or of a male accusing a female of sexual harassment, for the ease of reading I have used the pronouns of the most common situation which is a female accusing a male of sexual harassment.

[2] You may recall that in an interview denying any improper conduct, President Clinton, referring to Monica Lewinsky, said: “I never had sexual relations with **that woman.**”