

Polygraph

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Contents

Polygraph Subjects' Perceptions of Examiner Competence and Personal Attributes and Their Relationship to the Outcomes of Polygraph Examinations Akihiro Suzuki and Frank Horvath	143
The Specific Application of Polygraph For Insurance Companies Connie K. Rallis Hoff	152
Employer Uses of Polygraph Jane W. Bradshaw	159
To Polygraph Or Not: The Effects of Preemployment Polygraphing on Work-Related Attitudes Lawrence T. White, Margaret Lopez and Craig Haney	185
Book Review Donald J. Krapohl	200
Book Review Gordon H. Barland	200

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POLYGRAPH SUBJECTS' PERCEPTIONS OF EXAMINER COMPETENCE AND
PERSONAL ATTRIBUTES AND THEIR RELATIONSHIP TO THE OUTCOMES OF
POLYGRAPH EXAMINATIONS

By

Akihiro Suzuki and Frank Horvath

The literature on polygraphic testing shows a persistent and consistent contention that the training, competence, and personality attributes of examiners have important effects on the outcome of polygraph examinations (Inbau, 1942; Larson, 1932; Marston, 1938; Reid & Inbau, 1977). For instance, Reid and Inbau (1977) point out that examiner qualifications are to be regarded as basic prerequisites to the proper application of the polygraph technique. They state:

"An examiner must be an intelligent person, with a reasonably good educational background--preferably a college degree. He should have an intense interest in the work itself, a good practical understanding of human nature, and suitable personality traits which may be evident from his otherwise general ability to 'get along' with people and be well liked by his friends and associates. No amount of training or experience will overcome the lack of these necessary qualifications.(304)."

In spite of such contentions by field examiners there has been little empirical research on the relationship between the attributes and competence of examiners and polygraphic outcomes. In fact, the research that is available addresses only the issue of examiner competence in evaluating the outcomes of examinations. Horvath and Reid (1971), for example, demonstrated that less experienced examiners were not as adept at evaluating polygraphic data as more experienced examiners. Their data, however, were not useful for assessing the effect of examiner competence and attributes on the administration or outcomes of polygraphic tests.

Because the administration of a field polygraph examination involves a very close and complex interaction between the examiner and the subject it would be naive to assume that that interaction has no effect on polygraphic outcomes. This is especially true, of course, since research in other fields shows that similar interaction can have important and often unintended effects on outcomes (Rosenthal, 1976). The purpose of this research, therefore, was to determine whether the perceptions of field polygraph subjects about examiner competence and personal attributes are related to polygraphic outcomes.

Method

Of the 87 polygraph examiners certified by the Japanese Police Agency, 17 of them were randomly selected to participate in this study. Of

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Polygraph Subjects' Perceptions of Examiner Competence

those 17 selected, seven were experienced examiners, having carried out more than 1000 examinations, seven were less experienced, having conducted fewer than 500 examinations, and three examiners were moderately experienced who had carried out more than 500 but less than 1000 examinations ($M=786$). The number of examinations carried out by all 17 examiners ranged from 107 to 3876 with a median of 847.

Each of the 17 examiners was given 15 questionnaires designed for use in this study. The questionnaire consisted of two sections. In the first section, completed by the examiner, the examiner was asked to record data relevant to polygraph outcomes, including his judgment of a subject's truthfulness/deception, the nature of the investigation, whether or not the subject had confessed to the crime under investigation, and biographical data pertinent to the examiner's background. In indicating his decision of the subject's truthfulness, each examiner was asked to record on a five-point scale--strong indications of deception, deception indicated, inconclusive-over-reactive, inconclusive-under-reactive, and truthfulness--his impression of the subject's degree of responsiveness shown in the polygraphic data as well as his opinion of the subject's truthfulness.

In the second section of the questionnaire, polygraph subjects were asked to indicate, on a 25-item paired adjective check-list adopted from Aoki (1972), perceptions of the examiner's personality attributes. Such perceptions were recorded on a seven-point continuum for each adjective pair, as shown in Table 1. (It is to be noted here that the Japanese to English translation of the adjective pairs has slightly distorted the original meaning of some items.)

In total, 255 subjects completed a questionnaire since each of the 17 examiners was instructed to ask 15 successive subjects to participate. In the event that a subject refused to complete a questionnaire, each examiner was instructed to continue with the distribution of the check-list until 15 questionnaires were completed. All of the completed questionnaires were then returned for analysis.

All subjects who participated were suspected of violations of the Japanese criminal code; thus, these results pertain only to subjects examined for law enforcement, not commercial, purposes.

Analysis of the subject-completed questionnaires was initially carried out to reduce the responses to the 25-item check lists to more workable dimensions. To do so, the check-lists were subjected to varimax rotated factor analysis (Nie, Hull, Jenkins, Steinbrenner & Bent, 1975). Briefly, this statistical technique permits one to determine underlying patterns of relationships among items. In this case, for instance, it was found that the "factor loading scores" yielded five groupings of items, as shown in Table 2. These five groupings, or factors, were then inspected to determine whether they appeared to be useful for further analysis. Because factors 4 and 5 made little contribution to the total variance in the data they were discarded from further analysis. The items in factor 3, not being clearly conceptually related, were also disregarded. Inspection of the items in factor 1 appeared to denote subject perceptions of the examiners' professional and technical competence; that factor was, therefore, identified as "professional competence." The items in factor 2, dealing as they did with the perceived openness and fairness of the examiner, led to denotation of that factor as "open personality."

PAIRED-ADJECTIVE CHECK LIST

ITEM	Ratings*						ITEM
	E	M	S	U	S	M	E
1. Gentle:							:Stern
2. Not Persistent:							:Persistent
3. Unkind:							:Kind
4. Hard to Approach:							:Easy to Approach
5. Mild:							:Harsh
6. Meticulous:							:Careless
7. Not Self-confident:							:Self-confident
8. Impatient:							:Patient
9. Quick-witted:							:Dull
10. Bad Listener:							:Good Listener
11. Insincere:							:Sincere
12. Polite:							:Rude
13. Feeble:							:Vigorous
14. Calm:							:Excitable
15. Unsociable:							:Sociable
16. Sedate:							:Restless
17. Unpersuasive:							:Persuasive
18. Frivolous:							:Serious
19. Uneducated:							:Educated
20. Experienced:							:Inexperienced
21. Reticent:							:Frank
22. Unconventional:							:Conventional
23. Unprejudiced:							:Prejudiced
24. Suspicious:							:Not Suspicious
25. Reliable:							:Unreliable

* E = extremely
 M = moderately
 S = slightly
 U = undecided

* * * * *

After the two major factors were identified, each subject's score for factors 1 and 2 was determined. Then, a mean factor score for various groupings of subjects was determined. The mean factor scores were used to determine the relationship between each of the two identified factors and examiner experience, the ratings made by each examiner of each subjects' polygraphic data, and the outcomes in those examinations in which the subject's guilt or innocence was confirmed by either a confession or other fully corroborating evidence, or both.

Polygraph Subjects' Perceptions of Examiner Competence

FACTOR LOADINGS FOR THE PAIRED ADJECTIVE CHECK LIST

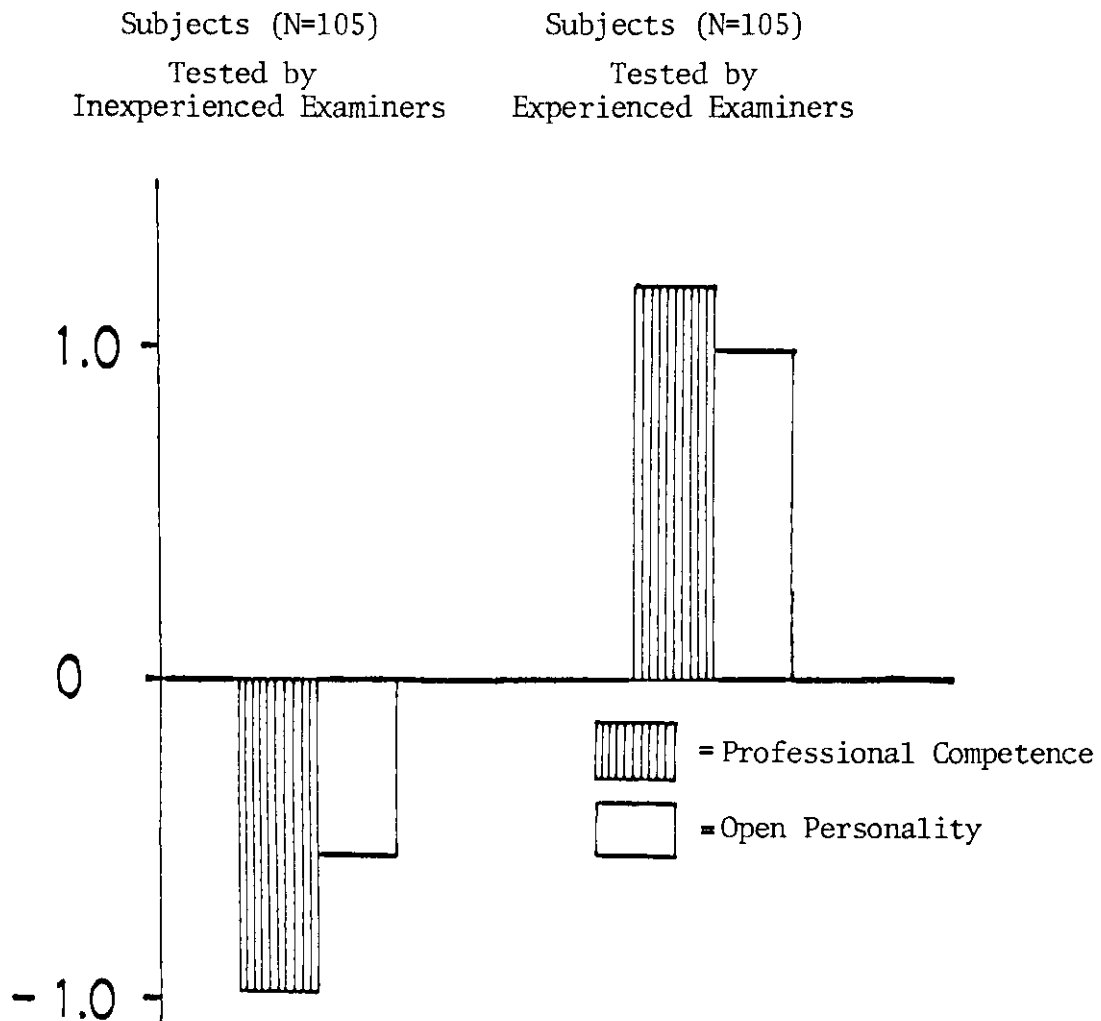
Factor Item	No.	Factor Loadings				
		1	2	3	4	5
"Professional Competence"	14	0.727	0.177	0.232	0.080	-0.089
	20	0.710	0.133	0.041	0.012	-0.094
	12	0.666	0.173	0.295	0.016	-0.125
	8	-0.633	-0.124	0.130	0.180	0.014
	11	-0.594	-0.277	-0.049	0.065	0.332
	17	-0.591	-0.135	0.092	0.284	-0.030
	7	-0.588	-0.160	0.147	0.096	0.196
	19	-0.546	-0.102	0.121	0.209	-0.210
	9	0.527	0.233	-0.065	0.086	0.052
	25	0.490	0.465	0.063	0.058	0.021
	6	0.404	-0.026	-0.044	-0.060	0.185
	16	0.401	0.338	0.187	-0.082	0.227
"Open Personality"	4	-0.124	-0.610	-0.181	0.166	0.105
	21	-0.155	-0.576	-0.226	0.321	-0.094
	23	0.292	0.522	0.058	0.110	-0.088
	3	-0.396	-0.518	-0.045	0.100	0.222
	10	-0.179	-0.450	-0.311	0.387	0.037
	22	0.067	0.427	0.054	-0.054	-0.072
Unidentified	5	-0.016	0.109	0.562	-0.072	-0.105
	18	-0.020	0.147	0.552	-0.061	-0.015
	1	0.167	0.470	0.544	0.003	0.092
	13	-0.308	-0.063	0.468	0.050	-0.020
	2	0.046	0.391	0.422	-0.090	-0.212
Unidentified	15	-0.299	-0.336	-0.325	0.487	0.186
Unidentified	24	-0.007	-0.229	-0.132	0.042	0.421
% Variance		4.569	2.824	1.881	0.752	0.705
% Common Variance		(42.6%)	(26.3%)	(17.5%)	(7.0%)	(6.6%)

Results

Figure 1 shows a comparison of the mean factor scores (for the "professional competence" and "open personality" factors) for the subjects who were examined by experienced examiners to those who were examined by inexperienced examiners. (The data pertaining to the subjects' ratings of the moderately experienced examiners are excluded from this figure.) As can be seen in that figure, the mean factor scores for the two factors were distinctly different for the experienced and inexperienced examiners, the experienced examiners being perceived by their polygraph subjects as more "professionally competent" and having more "open personalities."

Figure 1

Mean Factor Scores of Examiners' Attributes for Subjects
Tested by Experienced and Inexperienced Examiners

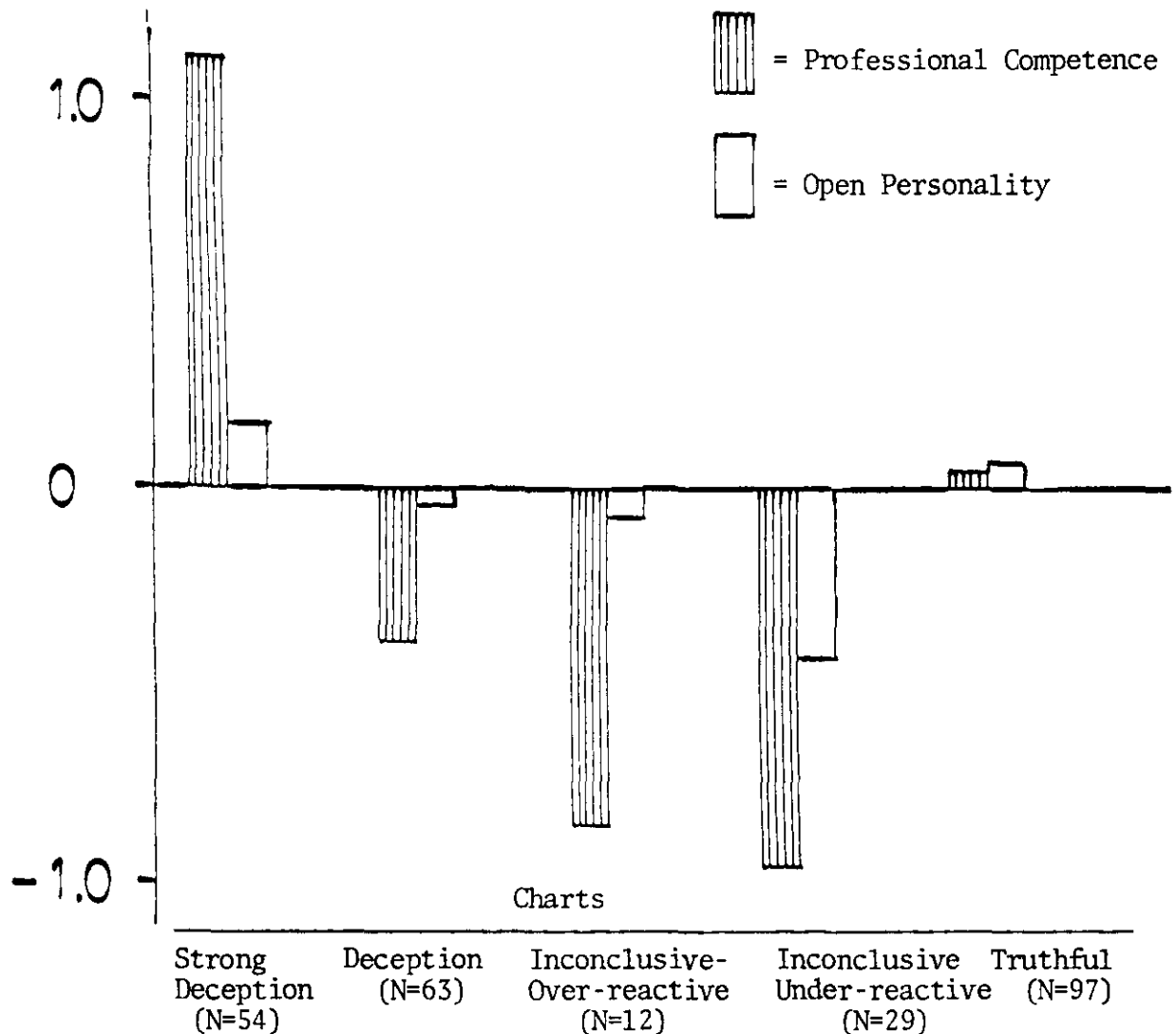


Polygraph Subjects' Perceptions of Examiner Competence

Figure 2 displays the mean factor scores of all subjects, grouped according to their examiner's rating of the subject's polygraphic data. As indicated in that figure, subjects whose polygraphic data were judged to be "strongly deceptive" and those whose data were judged to be "truthful" rated "professional competence" and "open personality" positively. Subjects whose polygraphic data were judged to be intermediate between those extremes rated "professional competence" and "open personality" much less positively.

Figure 2

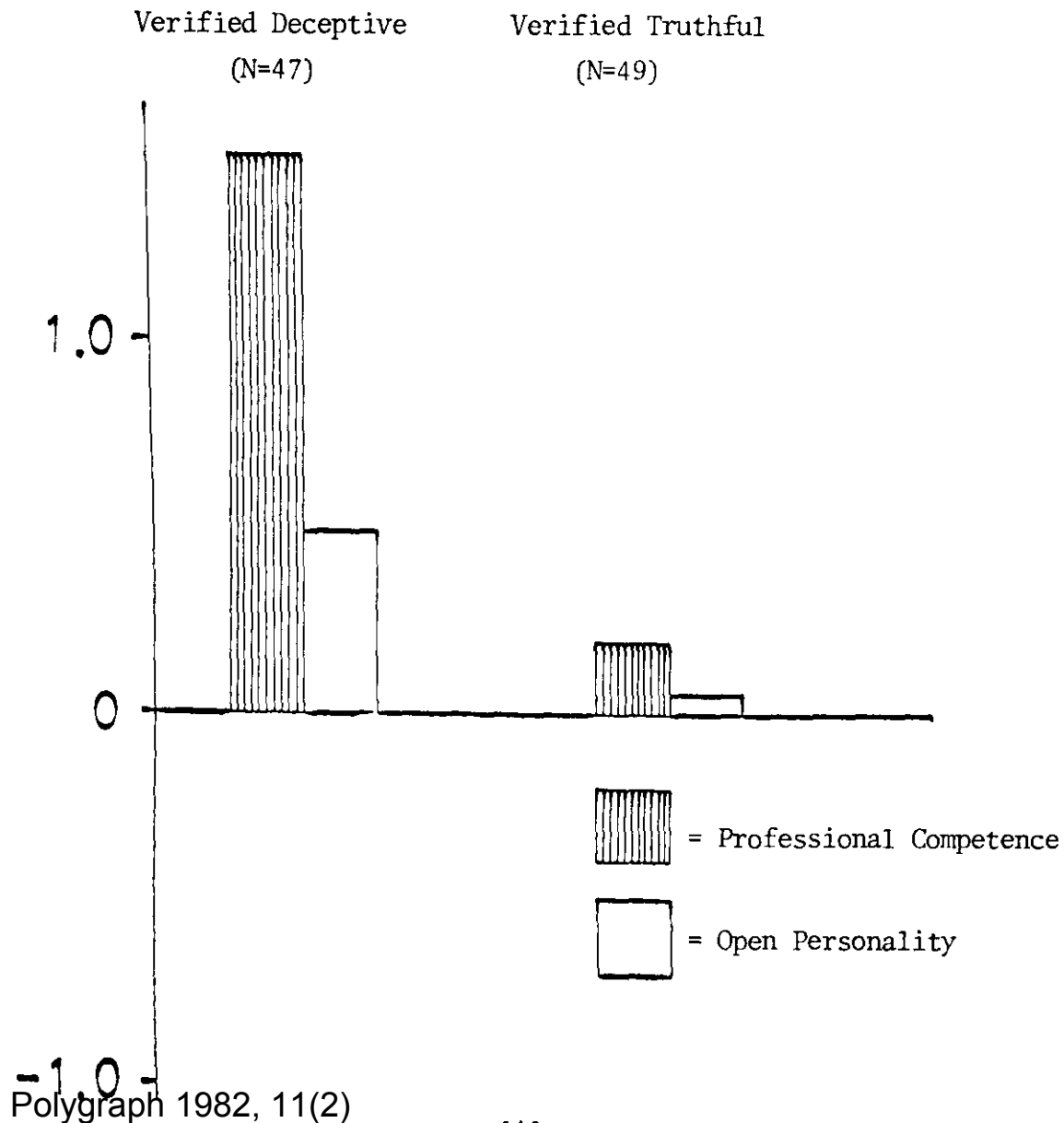
Mean Factor Scores of Examiners' Attributes For
Subjects Categorized by Examiners' Ratings of Polygraph Charts



To compare further the subject's perceptions of their examiner's attributes on the two factors, the mean factor scores for those subjects whose guilt or innocence could be confirmed and whose polygraphic data were rated as "definitely guilty" or "truthful" were determined. Those data are displayed in Figure 3. It is apparent in inspection of that figure that both confirmed-guilty (N=47) and confirmed-innocent subjects (N=49) rated the "professional competence" and "open personality" of their examiners positively, the confirmed guilty subjects ratings, however, being more extreme than those of the confirmed innocent subjects.

Figure 3

Mean Factor Scores of Examiners' Attributes For
Verified Deceptive and Verified Truthful Subjects



Discussion

The reports of field examiners that suggest that the experience of the examiner is an important consideration in polygraph testing are clearly supported by these findings. In this study, the examiners who were in fact more experienced were indeed perceived by their subjects' as being more "professionally competent" and having more "open personalities" than were the less experienced examiners. Generally, the subjects' perceptions of the attributes of the experienced examiners appeared to coincide nicely with those characteristics that Reid and Inbau (1977) have for many years contended are important to success as a polygraph examiner. That is, the subjects' ratings indicated that the traits of the experienced examiners were consistent with a professional, objective demeanor and with having a good practical understanding of human nature, and suitable personality traits enabling one to get along well with people.

It is not certain from these data, however, that experience itself eventually evens out "rough edges;" that is, our data do not show that by experience alone one can acquire the characteristics leading to "professional competence" and "open personalities." Rather, it might be that there is a self-selection mechanism by which those who possess certain essential personality traits have longer tenures in the field whereas those without such traits, being "less successful," leave the field. Whether there are stable personality attributes that make for optimal success in polygraph testing and whether those attributes may interact with the work effort in such a way that experience becomes helpful are issues in need of further investigation.

Apart from the fact that these data show that subjects can perceive differences between experienced and inexperienced examiners these data also suggest that those perceptions may be related to outcomes in polygraph examinations. Those subjects whose polygraphic data were judged to be "strongly indicative of deception" and those whose data were judged to be indicative of "truthfulness" perceived their examiners to be more "professionally competent" and to have more "open personalities" than did those subjects whose data were judged to be less definite in their indications. Similarly, those subjects whose deception (guilt) was confirmed tended to evaluate their examiners as being more "professionally competent" and have more "open personalities" than did those subjects whose truthfulness (innocence) was verified. Although it is not clear from these data that subjects' perceptions of their examiners lead to erroneous polygraphic indications, it is indicated that more definitive polygraphic data may be a result of the nature or the quality of the interaction between the examiner and the subject than is generally recognized. In short, the relationship between the examiner and the subject is probably an important determinant of polygraphic data. Such a conclusion is consistent with a suggestion previously advanced by Horvath (1977) in his study of examiners' interpretation of polygraphic data.

Field polygraph examinations necessarily involve significant interaction between the examiner and the subject. During that interaction an examiner may alter a number of factors believed to be related to the detection of deception. For instance, behavioral cues and verbal statements of the examiner may be perceived by a subject in such a way that the subject's motivation is either diminished or enhanced (Gustafson & Orne,

1963); or, the subject's perception of the context of the situation or of the awareness of the consequences may be altered (Podlesny & Raskin, 1977) or, the extent of and the way in which the stimulus information is processed may be affected (Waid, Orne, Cook & Orne, 1978; Waid, Orne, & Orne, 1981). What is needed, therefore, as our data suggest, is a systematic analysis of the personal attributes of polygraph examiners and a determination of the precise relationship between these attributes and measures of performance in polygraph testing.

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THE SPECIFIC APPLICATION OF POLYGRAPH FOR INSURANCE COMPANIES

By

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It is not difficult to imagine a scenario in which an individual, accused of homicide, submits to a polygraph examination to establish the truthfulness of his pleas of innocence. Likewise, it is not difficult to picture an accused rapist taking a lie detector test to prove that he himself is a victim of an honest mistake in identity by the accuser. And it is even easier to visualize a police department interrogation room in which a suspected burglar is being administered a polygraph examination to determine his involvement in the crime.

The obvious similarity within each of these hypothetical situations is the criminal nature of the issue under investigation. It is a natural reaction for a person to associate the process of lie detection with acts of a purely criminal character, and within that context the general public looks favorably upon the findings of an effective polygraph examination. Mass media, specifically television shows that depict fictionalized polygraph examinations, as well as news broadcasts that report upon the reality of polygraph results, has fixed upon its audience an overwhelming image of lie detection solely within the sphere of criminal investigations. Consequently, in the minds of most people, the science of polygraph possesses a certain degree of legitimacy when applied to incriminate or exonerate accused felons.

Yet, the legitimate applications of polygraph need not be confined to the framework of criminal inquiries. The purpose of polygraph is the verification of facts, and while the judicial fact finding process is most commonly thought to occur in criminal cases, truth verification is no less important in civil disputes. Therefore, where the determination of fact is at issue, the use of polygraph transcends the criminal context to all phases of civil and contractual liability.

In this regard, the use of polygraph by insurance companies can significantly reduce premiums, act as a preventative to fraudulent claims, and protect insurance companies from payment of fraudulent claims that can not otherwise be established as fraudulent through conventional investigative channels. It is my proposal that insurance companies should adopt a program with premium reductions for policies containing a polygraph verification clause.

The polygraph verification clause would consist of a written contract between the insured and insurer stating that prior to payment of any claim, the company would have the right to ask the Insured to submit to a polygraph examination for verification of all aspects of the claim. As an example, a typical polygraph verification clause may be incorporated into any set of standard policy rules as follows:

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The Company shall have discretion over requesting the Named Insured to submit to a polygraph examination in order to verify the factual contingencies that are prerequisite to payment by the Company of the Insured's claim. Where the Company refuses payment of a claim based upon adverse polygraph results, the Insured retains the right to a second polygraph examination which, if favorable to the Insured, eliminates polygraph as a factor in denying the claim. If both examinations produce untruthful polygraph findings, the Insured retains no legal recourse for payment of the claim.

A polygraph examination would not be routine procedure with every claim but, rather, procedure only when insurance company investigators believe that such action is advisable or necessary. Where the test results conclusively reflect deception on the part of the insured, payment on the claim may be denied. In the event, however, that the polygraph results are either conflicting or inconclusive, the company shall have no right to refuse payment of the claim based solely upon the test findings. Under these circumstances, the significance of the polygraph results becomes moot, and additional evidence would be necessary for denial of the claim.

The legality of incorporating the polygraph clause into an insurance policy is a matter that has been subject to misunderstanding born of erroneous information. For instance, in Illinois it has been widely published by the State Department of Insurance within its 1978 pamphlet that an insurance company may not request an insured to submit to a lie detector test. The State, in a later publication, amended that statement to indicate that "no policy contract may require that the insured submit to a lie detector test before payment of a claim can be made by the company."

This statement is accurate only insofar as it draws a distinction between an insurance company's power to "request" as opposed to its power to "require" a polygraph examination as a precondition to its honoring a claim. It neglects, however, the text of The Adopted Rules for the Illinois Department of Insurance. Under that document, there exists no explicit prohibition against polygraph as a policy term. Instead, insurance companies are encouraged to pursue any means of discovery where there occurs a loss in which fraud is suspected.

Furthermore, traditional contract law analysis would favor inclusion of a polygraph verification clause within an insurance policy. Where an insured is given no meaningful choice in accepting or rejecting the polygraph clause or where the company attempts to secretly impose such a clause upon an incompetent or unwary policy-holder, the element of "unconscionability" may be deemed to invalidate the clause. But, where the bargaining power of the company and the insured are comparable, and where the policy terms are not overwhelmingly unfair to the insured, all policy conditions, including the Polygraph Verification Clause, are legitimate and enforceable.

Thus, from a legal standpoint, the State of Illinois, by its own regulations, makes no prohibition against the incorporation of a polygraph clause within insurance policies. Even beyond the borders of this sample state, traditional contract law would not be infringed by an insurance policy providing reduced premium rates to those policyholders who

Polygraph 1982, 11(2)

Specific Application of Polygraph for Insurance Companies

voluntarily accept a polygraph verification clause. Under those circumstances, not only is there a free choice available to the insured, but there exists an incentive toward lower premium rates for those who choose to accept it.

Recent case law suggests a growing acceptability of polygraph as a means of assisting both the Courts and insurance companies in identifying instances of insurance fraud. In Moskos v. National Ben Franklin Insurance Company, 60 Ill.App.3d 130, 1978, the plaintiff Moskos was suspected of setting fire to his own store in order to collect upon his insurance policy written by Ben Franklin. The insured had been denied payment on his claim, in part due to the fact that a polygraph examination failed to exonerate him of any responsibility for the arson. The Appellate Court affirmed the decision of the Circuit Court to consider the polygraph results in determining the insured's right to collect upon the claim. It held the polygraph results to be valid in deciding whether the defendant insurance company "had a reasonable basis for concluding that the plaintiff was the arsonist." The polygraph evidence was deemed to be relevant in establishing that the defendant insurance company did not act in bad faith by denying the claim through their contention that the plaintiff committed arson upon the insured property. The Court thereafter upheld consideration of the polygraph evidence in deriving its conclusion to Mr. Moskos' suit.

The benefit to insurance companies which offer a polygraph verification clause is obvious: a dramatic reduction in payment of fraudulent claims resulting in substantial monetary savings to insurance companies. As an added benefit, this polygraph verification clause would act as a preventative to the filing of fraudulent claims. Even in the case of a well-intentioned policyholder, who when he takes out his policy has every intention of acting in good faith, the prospect of a polygraph test may act as a deterrent when a legitimate claim arises and the temptation to exaggerate the actual loss is too great. Another example would be where the policyholder is facing financial ruin and the only possible alternative to bankruptcy seems to be a fire. If polygraph verification is necessary for the insured to recover his losses and the additional threat of criminal prosecution for arson is more imminent, a definite deterrent has been provided.

Such a deterrent would certainly be beneficial to an insurance company, but why should any policyholder sign a polygraph verification clause? After all, for the insured to be administered a polygraph examination would require some degree of inconvenience in time and effort. The incentives for the policyholder would be a significant reduction in premium rates coupled with diminished processing time on legitimate claims.

The reduction of fraudulent claims could and should be passed on directly to the policyholders participating in such a program. Yet the question arises whether premium reduction is worth the inconvenience should the insured be required to take a polygraph examination in order to collect on his claim. However, when considering that auto and home policies are today absorbing from 5 to 10% of many families' take home pay, the magnitude of the savings becomes more tangible. And when further considering that most insurance companies throughout the country estimate their fraudulent claims at 50% of all claims filed, the possibilities of

such a proposal in terms of reducing premiums becomes staggering. This proposal provides an alternative for honest policyholders who have been bearing the brunt of ever increasing premiums as a direct result of fraudulent insurance claims.

Even under existing policies that do not provide for polygraph verification, the cost savings achieved through such a procedure is substantial. Under these circumstances, the proposed polygraph examination is not an essential element of the underlying policy but is instead a mere request for the insured to render full cooperation with the company's investigation.

The current figures of one prominent Chicago based insurance company, which utilizes polygraph in this manner, show that eight out of ten claimants, who are identified for polygraph examinations and who then agree to the test, will reflect deception in their test results. From this 80% category, 30% will ultimately confess the fraudulent aspect of their claim following their examination. This company will honor claims of individuals who fail polygraph examinations provided they do not thereafter admit their fraud. But it is within the company's legal rights to deny claims made by individuals who do confess their fraud subsequent to a polygraph test. From a business standpoint, the return to this company on their investment in polygraph, even to the extent of a 30% rate of confessed insurance fraud, prompts repeated use of this procedure for claim verification.

According to the Insurance Crime Prevention Institute, by the end of the 1960s fraudulent claims were costing the insurance industry an estimated two billion dollars a year. As fraud rises so do losses and therefore premiums. Insurance is a cost-plus business with the financial loss due to illegitimate claims being passed on directly to the customer. The only remedy for this epidemic thus far, has been long and painstaking investigations which not only slow down the settlement process but are often times more expensive than settlement. This is why it is not only desirable but imperative that every possible resource be explored in order to combat this growing problem.

Polygraph, as set forth in my proposal, is a feasible means to check this uncontrolled growth. To date, the use of polygraph with regard to insurance fraud remains very limited. A polygraph verification clause provides the contractual and legal requirements to maximize its usage and potential in the insurance field. If insurance fraud is allowed to continue on its current course, it will not only adversely effect policyholders, but it will also have a detrimental impact upon the entire insurance industry. We see not only the policyholder as the loser who is initially bearing the brunt of the current trend, but the insurance industry as a long term loser that is currently suffering a loss of confidence among the public. As premiums increase, more and more people are being priced out of the insurance market. This inevitable decline in their market share is a reality that insurance companies are being challenged to resolve.

A look at the major types of insurance fraud schemes demonstrates the practical application of polygraph in distinguishing legitimate from illegitimate claims.

Specific Application of Polygraph for Insurance Companies

Auto insurance runs so high in urban areas that many people have already been priced out of that market. Automobile property fraud schemes generally aim at getting a quick settlement where there isn't much question about who caused the accident. The profitability of such schemes can be appreciated only when one becomes aware of the extent to which even organized crime has become involved in automobile property fraud. Due to the prevalence of such unlawful activity, it should be of major concern to insurance companies and honest policyholders as well, to take every step possible to weed out automobile claims that are fraudulent.

Some of the most common auto insurance schemes include staging a car accident with an already damaged car, having a car stolen and stripped so as to allow recovery of an amount greater than its actual value, and inflating damage claims. An actual case history will illustrate the utility of a polygraph examination in uncovering auto insurance fraud.

A female insured, who had fallen behind on her auto payments, was experiencing mechanical failure with her luxury car. The engine required major repairs that would create, for the insured, an unmanageable expense even if the car had already been fully financed. As a result, the insured decided to stage a theft of her own car and have it stripped of parts only to the extent that the defects, which she was financially incapable of repairing, would then presumably be remedied by the insurance company after the car was "recovered."

The insured filed a police report with very convincing accounts of the alleged theft. Several days later, the police recovered the auto in a vacant lot. The car, which had no significant damage beyond an absence of certain engine components, was impounded by the insurance company pending investigation. A subsequent polygraph examination upon the insured revealed that she had not only arranged for the disappearance of her auto, but that the car had been undergoing mechanical repairs prior to the alleged theft.

Following her polygraph test, the insured confessed to the examiner that she did, in fact, falsify her claim and that she was responsible for staging the theft so as to collect from her insurance company. From this incident, it is clear that polygraph has wide application for insurance companies in substantiating not only the truthfulness of an alleged incident, but the surrounding circumstances as well. This is particularly helpful in those instances of a partially legitimate claim where the fraudulent aspect would otherwise go undetected if polygraph examinations were not administered.

Today, most automobile insurance includes coverage for injuries to persons as well as vehicles. This type of coverage is a favorite among insurance swindlers. The swindles include exaggerating injuries sustained in a legitimate accident, getting into a vehicle after an accident and feigning injury, or a minor accident staged for the purpose of claiming injury.

Another type of automobile injury fraud involves doctor/lawyer conspiracies of staging phony accidents and inflating medical claims. The Insurance Crime Prevention Institute estimates that doctor and lawyer working together can easily get away with hundreds of thousands of dollars

through these phony medical specials. The deterrent effect of a polygraph verification clause can be most easily recognized in those instances where doctors and lawyers are involved. These professional people with so much to lose can best appreciate the increased risk of their detection should a polygraph verification clause be incorporated into their client's policies. This deterrent should result in an immediate and significant decline in the doctor/lawyer swindles, because for these professionals who are willing to engage in this unlawful activity, the chances of their being detected has been greatly enhanced. Again, for all different types of automobile injury fraud, polygraph could verify the truthfulness of the claim as well as any surrounding circumstances.

The same principle holds true for various other types of insurance fraud schemes such as inflated billing schemes, product liability cons, slip and fall scams, and other property frauds.

In the United States in 1976, there were 1.3 million reported fires with an estimated total dollar loss of 3.5 billion dollars. The dollar loss from arson was about 43% or 1.5 billion dollars. The National Academy of Sciences estimates that of the arson losses, about 30% to 40% were set to collect insurance.

Arson for profit is particularly frustrating for insurance companies. In other types of coverage, proof that the claimant caused the loss invalidates the claim. However, fire coverage usually indemnifies both the insured and the mortgage holder, and the mortgagee must be paid even if the insured set the fire deliberately. For this reason, it is critical that the profit be removed from this crime. The polygraph verification clause would be sufficient deterrent for many potential arson for profit schemes.

There are several reasons why an individual, who is a potential risk to burn his own property, would take out a policy with a polygraph verification clause. First of all, many policies are taken out in good faith with no intention to defraud the insurance company until extenuating circumstances arise that make arson appear to be a logical alternative. Secondly, if the trend toward a polygraph verification clause is great enough, one may not want to be conspicuous by retaining a traditional policy.

If a large segment of the population contracts for polygraph verification, with the motivation being significantly lower premiums, a greater number of insurance investigators would be in a position to concentrate more fully upon investigations of traditional policyholders with suspicious fire claims.

Generally, experienced firefighters can tell whether a fire was set from the color of the flames and smoke, the burn pattern, and the speed with which a fire burns. With arson for profit under control, insurance investigators could devote more time to interviewing witnesses and firefighters in order to determine the cause of a fire. The end result is more effective prosecution and, therefore, an additional deterrent to the underlying crime.

As rampant as the arson for profit schemes are, insurance companies

Specific Application of Polygraph for Insurance Companies

may find that the only policy they can offer for fire coverage on certain properties would contain a polygraph verification clause.

Insurance companies that realize the inherent benefits of a polygraph verification clause and adopt such a program, will derive further benefits from a marketing perspective. First of all, by making insurance more affordable, a larger segment of the population is drawn into the potential market. Secondly, the pioneer insurance companies which implement this program will gain a large share of the existing market by offering this unique program. And lastly, the polygraph clause will enable insurance companies to be more competitive by offering a means for reducing premiums. The extent to which premiums would be reduced depends upon the way the program is implemented and the efficiency with which it is maintained. The professionalism used in designing such a program would determine the full extent to which its benefits could be realized.

The target market for a polygraph verification clause would be the honest, average American who has no intention of defrauding his insurance company. His attraction would be the monetary benefit derived from significantly reduced insurance premiums as well as diminished processing time in honoring legitimate claims. Even though policies containing polygraph verification clauses probably would fail to draw the professional swindlers, those individuals will become all the more conspicuous as they cling to their traditional policies.

Investigators should be free to concentrate their efforts upon suspicious traditional policy claims while polygraph examiners, at a comparatively minimal expense, would be in a position to verify suspicious claims falling under the polygraph verification clause. Significant reduction in fraudulent claims would be realized by the deterrent effect such a clause would have upon both professional swindlers as well as the originally good faith policyholders who take unlawful advantage of legitimate claims by inflating their losses. This clause will thereby serve to eliminate the human vulnerability to temptation, or in other words, to help keep the honest people honest. But the foremost benefit to be gleaned from insurance policies containing a polygraph verification clause consists of reduced premium rates to the insured and a concurrent reduction in payment of fraudulent claims by the insurance company.

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EMPLOYER USES OF POLYGRAPH

By

Jane W. Bradshaw

Introduction

Employee misconduct has become a paramount concern of public and private employers in recent times, as employee crimes against property have been estimated to cost between \$12 billion and \$40 billion annually. In response to the alarming rate of internal theft, along with increased on-the-job assaults and the use of alcohol and drugs, employers have significantly expanded utilization of security techniques including the polygraph--commonly referred to as the lie detector.

Although the lie detector may diminish internal losses, the device is not without its adversaries. Labor unions are consistently against the lie detector's use in business, and several states now have legislation prohibiting the mandatory use of a lie detector test as a condition either of gaining or retaining employment.

The practical and legal problems accompanying the use of the lie detector in business, in light of both state and federal court cases and arbitration decisions, form the subject of this memo.

Issues Presented

1. Can an employer legally require a potential employee to take a pre-employment polygraph examination as a condition of employment?
2. Can an employer require an employee to take a polygraph examination as a condition of continued employment?
3. Will an employee's refusal to take a polygraph examination constitute "just cause" for discharge within the meaning of
 - a. Principle of arbitration law? and/or
 - b. Section 10(c) of the National Labor Relations Act? and/or
 - c. Chapter 15, Section 1, of the Indiana Employment Security Act (I.C. 22-4-15-1)?

Editor's Note: This article is a report prepared by the author while serving as a law clerk in the summer of 1981. It is comprehensive and presents valuable information about various statutes, policies and decisions pertaining to labor relations and arbitration associated with employer uses of polygraphs.

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Employer Uses of Polygraphs

4. Of what evidentiary value are the results of polygraph examinations in the following:

- a. Arbitration cases?
- b. Unfair labor practice cases?
- c. Unemployment compensation cases?

Short Answers

1. An employer may request that a prospective employee submit to and successfully take a polygraph examination as a condition of employment. However, if the employer's use of the polygraph examination has a disproportionately adverse impact on members of a protected group, such use is in violation of Title VII, Civil Rights Act of 1964. Furthermore, the employer is in violation of the National Labor Relations Act if he uses the polygraph examination to inquire into an applicant's union sympathies.

2. An employer may require an employee to submit to a polygraph examination in very well-defined situations; where the employee is the subject of specific evidence indicating misconduct in his employment, or in the case that the employer's use of the polygraph examination represents a bargained-for condition of employment.

3. Generally, where there is a lawful motive for the employer's use of the polygraph examination, the employee's refusal to take the examination constitutes "cause" for discharge within the meaning of Section 10(c) of the National Labor Relations Act. The "just cause" determination has not yet been interpreted under Chapter 15, Section 1 of the Indiana Employment Security Act.

4. Many courts allow polygraph evidence to be used only if there has been a prior stipulation of such use by both parties. Arbitrators have emphasized protection of the individual's rights by refusing to admit polygraph evidence or by allowing it to be used only as corroborative evidence. Where the employer used the polygraph examination to pry into his employees' union sympathies, the polygraph results are strong evidence of an unfair labor practice. In unemployment compensation cases, an employee's refusal to submit to a polygraph examination is not considered "misconduct related to work," which would disqualify the employee from receiving unemployment compensation benefits.

Statutory Materials

National Labor Relations Act, 49 Stat. 449 (1935), as amended by Pub. L. No. 101, 80th Cong., 1st Sess., 1947, and Pub. L. No. 257, 86th Cong., 1st Sess., 1959; 29 U.S.C. §§151-68, F.C.A. 29 §§151-68.

Prevention of Unfair Labor Practices

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8, affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may

be established by agreement, law, or otherwise: Provided that the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is consistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board of such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., Title 28, §§ 72S-B, 72S-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced in writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further that in determining whether a complaint

Employer Uses of Polygraphs

shall issue alleging a violation of Section 8(a)(1) or Section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

ARTICLE 4

UNEMPLOYMENT COMPENSATION - INDIANA EMPLOYMENT SECURITY ACT

22-4-15-1 [52-1539]. Grounds for disqualification -- Exceptions. -- With respect to benefit periods established prior to July 4, 1971, an individual shall be ineligible for waiting period or benefit rights: For the week in which he has left work voluntarily without good cause or has been discharged for misconduct in connection with his work, and for all weeks subsequent thereto until such individual has thereafter earned remuneration equal to not less than ten [10] times his weekly benefit amount in employment. For the purposes of this section the term employment shall include service constituting employment under any employment security law of this state, of another state or of the federal government. Provided, however, that if such individual receives dismissal wages covering a period of time subsequent to such week the disqualification shall become effective at the end of such period.

* * *

"Discharge for just cause" as used in this section is defined to include but not be limited to separation initiated by an employer for falsification of an employment application to obtain employment through subterfuge; knowing violation of a reasonable and uniformly enforced rule of an employer; unsatisfactory attendance, if the individual can not show good cause for absences or tardiness; damaging the employer's property through wilful negligence; refusing to obey instructions; reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer's premises during working hours; conduct endangering safety of self or co-workers; incarceration in jail following conviction of a misdemeanor

or felony by a court of competent jurisdiction or for any breach of duty in connection with work which is reasonably owed employer by an employee. [Acts 1947, ch. 208, §1501, p. 673; 1957, ch. 261, §1, p. 615; 1965, ch. 190, §9, p. 348; 1967, ch. 310, §19, p. 1162; 1971, P.L. 355, §35, p. 1376; 1972, P.L. 174, §1, p. 844.]

ARTICLE 5

UNLAWFUL (LABOR) PRACTICES CHAPTER 3

Black-Listing

22-5-3-1 [40-301]. Preventing discharged employee from obtaining work -- Penalty. -- If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent, or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars [\$500] nor less than one hundred dollars [\$100], and such person, agent, company or corporation shall be liable in penal damages to such discharged person, to be recovered by civil action; but this section shall not be construed as prohibiting any person or agent of any company or corporation from informing, in writing, any other person, company or corporation, to whom such discharged person or employee has applied for employment, a truthful statement of the reasons for such discharge. [Acts 1889, ch. 166, §1, p. 315.]

22-5-3-2 [40-302]. Damages for preventing employees from obtaining other work. -- If any railway company or any other company or partnership or corporation in this state shall authorize, allow or permit any of its or their agents to black-list any discharged employees, or attempt by word or writing, or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left said company's service, from obtaining employment with any other person, or company, said company shall be liable to such employee in such sum as will fully compensate him, to which may be added exemplary damages. [Acts 1889, ch. 166, §2, p. 315; 1895, ch. 110, §1, p. 230.]

ARTICLE 6

LABOR RELATIONS CHAPTER 3

Letter From Employer Upon Termination

22-6-3-1 [40-122]. Letter required -- Contents -- Exceptions. -- Whenever any employee of any person, firm or corporation doing business in this state shall be discharged or voluntarily quits the service of such person, firm or corporation, it shall be the duty of such person, firm or the officer of the corporation having jurisdiction over such employee, upon written request of such employee, to issue such employee a letter, duly signed by such person, firm or officer, setting forth the nature and character of service rendered by such employee and the duration thereof, and

Employer Uses of Polygraphs

truly stating for what cause, if any, such employee has quit or been discharged from such service: Provided, That this section shall not apply to any person, firm or corporation which does not require written recommendations or written applications showing qualifications or experience for employment. [Acts 1915, ch. 51, §1, p. 107.]

1964 CIVIL RIGHTS ACT
42 U.S.C. 2000 et seq.

Title VII

Subchapter II. -- PUBLIC ACCOMMODATIONS

§ 2000 a. Prohibitions against discrimination or segregation in places of public accommodation -- Equal access.

(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

* * *

* * *

FAIR CREDIT REPORTING ACT

15 U.S.C. 1681 et seq.

Subchapter III. -- Credit Reporting Agencies

§ 1681a. Definitions; Rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

(c) The term "consumer" means an individual.

(d) The term "consumer report" means any written, oral, or other communication or any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 1681b of this title. The term does not include (A) any report containing information solely as to transactions or experiences between the consumer and the person making the report; (B) any authorization or approval of a specific extension of credit directly or

indirectly by the issuer of a credit card or similar device; or (C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made and such person makes the disclosures to the consumer required under section 1681m of this title.

(e) The term "investigative consumer report" means a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.

* * *

§ 1681b. Permissible purposes of consumer reports

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe --

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an amount of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

§ 1681c. Reporting of obsolete information prohibited

(a) Except as authorized under subsection (b) of this section, no

Employer Uses of Polygraphs

consumer reporting agency may make any consumer report containing any of the following items of information:

- (1) Bankruptcies which, from date of adjudication of the most recent bankruptcy, antedate the report by more than fourteen years.
- (2) Suits and judgments which, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.
- (3) Paid tax liens which, from date of payment, antedate the report by more than seven years.
- (4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.
- (5) Records of arrest, indictment, or conviction of crime which, from date of disposition, release, or parole, antedate the report by more than seven years.
- (6) Any other adverse item of information which antedates the report by more than seven years.

(b) The provisions of subsection (a) of this section are not applicable in the case of any consumer credit report to be used in connection with --

- (1) a credit transaction involving, or which may reasonably be expected to involve, a principal amount of \$50,000 or more;
- (2) the underwriting of life insurance involving, or which may reasonably be expected to involve, a face amount of \$50,000 or more; or
- (3) the employment of any individual at an annual salary which equals, or which may reasonably be expected to equal \$20,000, or more.

§ 1681d. Disclosure of investigative consumer reports

(a) A person may not procure or cause to be prepared an investigative consumer report on any consumer unless --

(1) it is clearly and accurately disclosed to the consumer that an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made, and such disclosure (A) is made in a writing mailed, or otherwise delivered, to the consumer, not later than three days after the date on which the report was first requested, and (B) includes a statement informing the consumer of his right to request the additional disclosures provided for under subsection (b) of this section; or

(2) the report to be used for employment purposes for which the consumer has not specifically applied.

(b) Any person who procures or causes to be prepared an investigative

consumer report on any consumer shall, upon written request made by the consumer within a reasonable period of time after the receipt by him of the disclosure required by subsection (a)(1) of this section, shall make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure shall be made in a writing mailed, or otherwise delivered, to the consumer not later than five days after the date on which the request for such disclosure was received from the consumer or such report was first requested, whichever is the later.

(c) No person may be held liable for any violation of subsection (a) or (b) of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b) of this section.

Discussion

I. Prefatory Remarks

Few modern scientific devices have caused more controversy in the employment setting than the polygraph. Currently, many employers, burdened with the challenge of detecting dishonest employees or settling disputed facts in grievance procedures, urge the lie detector as a quick and easy method of ascertaining the truth. Indeed, some employees, when confronted with circumstantial evidence of guilt, have also requested a polygraph examination to prove innocence.

The theory of lie detection is simple: lying causes emotional conflict; conflict leads to fear or anxiety which, in turn, results in measurable physiological changes. More stress is required to lie than to tell the truth, and the polygraph records this stress as the examinee responds to questions framed by the examiner. In the employment setting lies the quarrel: Is the correlation between lying and the physiological changes recorded by the polygraph so clear that a man's job should depend on the test?

The critical question concerning the validity of the polygraph is whether the examiner's interpretation of the test results is accurate. Scientific verification of every determination is impossible because the test results can be verified only by a subsequent confession. Verification of pre-employment polygraph results is even more complicated because the applicants judged deceptive are not hired, and because no follow-up investigation is conducted to confirm the judgment.

A. The Polygraph Technique

The polygraph is an electronic device that upon being attached to the human body records blood pressure, pulse, respiration and perspiration on a graph, which is then "interpreted" by the examiner. In discerning whether the examinee has attempted deception, the examiner must select some point on the polygraph recording as separating truth from falsehood. The examiner's determination concerning the presence or absence of deception must take into account the examinee's physical and mental condition upon testing -- as many factors may affect the recording, such as excessive anxiety, fatigue, drug or alcohol influence, or pathological disorders.

Employer Uses of Polygraphs

B. The Polygraph's Use in Business

The polygraph is most commonly used in those businesses engaged in the sale and distribution of drugs and in those businesses engaged in the manufacture of small parts, but is also widely used in banking, retail sales, insurance, and various other commercial enterprises. The most recent statistical data indicates that in 1974 over 400,000 polygraph examinations were administered in the private employment setting by over 3,000 polygraph examiners. Based on a survey in 1972, one writer estimates that twenty-five percent of all major corporations use the polygraph as part of their normal personnel procedure.[1]

C. Reliability and Accuracy

Neither the infallibility nor the complete acceptance of the polygraph has arrived. Proponents of the polygraph adduce validity from their experience of between eighty to ninety-five percent accuracy. The favorable claims of accuracy assume the presence of a qualified examiner, of whom it has been estimated that only twenty percent exists.[2] In essence, a polygraph operated by a qualified examiner is limited to verifying truthful statements, *i.e.*, determining whether or not the subject believes what he is saying is true. The importance of this observation is that guilt or innocence, in the legal sense, depends first upon the operative facts, then upon the presence or absence of a guilty mind. Employers often rely solely on polygraph results, which arguably may reflect only *mens rea*. The challenge as to the polygraph's validity is not an issue that is discussed in this memo, but remains, nonetheless, an important consideration.

II. Constitutional Protections

In 1976 "fifteen states had enacted legislation either prohibiting or substantially limiting the use of lie detectors in the employment environment. In addition, eighteen other states have statutes that require the licensing of polygraph operators." [3] Indiana has neither statutory nor regulatory provisions pertaining to the use of polygraphs nor the licensing of polygraph examiners.

When a private employer requires a prospective or present employee to submit to a polygraph examination, the absence of state action precludes judicial intervention. The constitutional protections against unreasonable searches, compelled self-incrimination, denial of counsel and invasion of privacy only apply when state action infringes on such protection. Therefore, unless there is a statutory or common-law right which the present or prospective employee may assert against the employer who requires a polygraph examination, the employee is without remedy.[4] It has been held that an employee or a prospective employee has no common-law right to employment.[5] Thus, any grounds that an employee or a prospective employee may have for objecting to an employer's use of the polygraph must be based in either statutory provisions or in an employment or labor contract.

III. Statutory Provisions

A. National Labor Relations Act

1. Discrimination Under Section 8(a)(3).

If an employer utilizes a polygraph examination to determine a job applicant's or a present employee's union sympathies,[6] the employer is in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act.[7] Sections 8(a)(1) and (3) provide that "[i]t shall be an unlawful labor practice for an employer -- (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; ... (3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to engage or discourage membership in any labor organization ..."[8] The National Labor Relations Board[9] has refused to issue unfair labor practice complaints where workers were terminated for refusing a polygraph examination, without evidence of anti-union motivation of the employer.[10] In one case, the employer suspected certain employees of stealing merchandise, and requested that the suspects submit to a polygraph examination to "clear themselves" of guilt. The NLRB held that even though the employer did not consult the union before using the polygraph, the employer's actions did not constitute an unfair labor practice because such actions were motivated by economic considerations.[11]

2. Considerations Under Section 8(a)(5).

An employer may have to negotiate with the representative union before implementing a program which would require employees suspected of job-related misconduct to submit to a polygraph examination. In Medicenter, Mid-South Hospital,[12] the union alleged that management committed an unfair labor practice by instituting a new employment policy which required all employees to submit to a polygraph examination, without bargaining with the representative union over the policy. The union relied on Section 8(d) of the NLRA, which mandates collective bargaining regarding "wages, hours, and other terms and conditions of employment." [13] The union in Medicenter sought reinstatement and backpay for thirty-six employees who refused to submit to a polygraph examination and were discharged. Although the testing was motivated by acts of vandalism at the employment site, the NLRB determined that, as the polygraph had not been used previously and the examination was required as a condition for continued employment, the employer had unilaterally changed the terms of employment.[14] However, the NLRB's final determination found that the employer did not violate the NLRA, as the union had sufficient opportunity to bargain over the proposed testing, since the union received actual notice of the employer's intent.[15]

The Board's decision in Medicenter may be applicable when any disciplinary action follows an employee's refusal to submit to a polygraph examination.[16] The NLRB in Medicenter stated that, "[b]y analogy, where the policy decision itself does not necessarily require the termination of employees ... the employer should be at the very least obligated to bargain about the consequences flowing from the decision -- in this case, the penalty for refusing to take the [polygraph] examination.[17]

There is some authority for the principle that where an employee is denied union representation during the polygraph examination and consequently refuses to submit to the examination and is discharged, the employer violates the NLRA.[18]

Employer Uses of Polygraphs

B. Indiana Employment Security Act

The "discharge for just cause" provisions of the Indiana Employment Security Act[19] provide in part:

"Discharge for just cause ... is defined to include but not be limited to separation initiated by an employer for ... knowing violation of a reasonable and uniformly enforced rule of an employer ..."[20]

An employee discharged for misconduct in connection with his work is disqualified from receiving unemployment compensation under Indiana law.[21] However, the Indiana courts have not yet determined whether an employee's discharge based on his refusal to submit to a polygraph examination represents "just cause," which would disqualify the employee for unemployment compensation. Looking to the language of the Security Act, it would follow that the employer's use of the polygraph must be an established and well-understood employment policy used only where reasonable cause exists to suspect an employee of misconduct connected with his employment.

Other states have considered an employee's refusal to submit to a polygraph examination as insubordinate behavior and proper cause for discharge. In Creader v. Dept. of Public Safety,[22] the police officer's dismissal for insubordination was upheld, with the court noting that the request was reasonable and that the examination related to an interdepartmental investigation.[23]

In two unemployment compensation cases, the employee's refusal to submit to a polygraph examination which resulted in discharge did not disqualify the employee for unemployment compensation. In Everitt Lumber Co., Inc.,[24] the two claimants were terminated by the company for refusing to take a polygraph examination which the company, in an investigation of inventory losses, requested all employees to take. The claimants had, prior to the company request, signed forms giving their consent to taking such a test at any time during the course of their employment. The basis for the claimants' refusal was the offensive nature of the polygraph examination questions, a basis recognized by the court, which found the employer responsible for the terminations.[25] Thus, each claimant was granted a full award of unemployment benefits subject to the Colorado Unemployment Compensation Act.[26]

In Swope v. Florida Industrial Commission Unemployment Compensation Board of Review,[27] the employer gave notice that employees would be required to submit to polygraph examinations periodically in regard to whether they had taken merchandise or money from the employer (a large department store). The Florida Unemployment Compensation Board determined that the employees' refusal to submit to polygraph examinations, which resulted in dismissal, disqualified the employees for benefits "for having voluntarily left their employment without good cause."[28] On certiorari, the District Court of Appeal quashed the Board's findings as not supported by the facts:

"[V]iolation of an employer's rule which leads to discharge will not disqualify one for benefits unless it appears that the action

which prompted the discharge amounted to misconduct within the meaning of the Act ... In the instant case petitioners had not been singled out and accused of any acts of dishonesty. As to them the test was a fishing expedition ..."[29]

As enumerated by the aforementioned cases, the conditions under which the polygraph examination policy is instituted and specific facts indicating some job-related misconduct are important considerations in determining whether an employee's refusal to submit to a polygraph examination constitutes "just cause for discharge."

C. Civil Rights Act of 1964

The Equal Employment Opportunity Commission[30] and federal courts have consistently held that an employer's pre-employment use of polygraph tests that has a disproportionately adverse impact on minority group applicants violates Title VII of the 1964 Civil Rights Act,[31] unless such tests are shown to be job-related.[32] In general, any pre-employment testing that is not job-related could provide a rejected minority applicant with a cause of action for employment discrimination under Title VII.[33]

In Davis v. City of Dallas,[34] the plaintiffs, a black female and a white female, alleged that the police department's hiring practices, which included a pre-employment polygraph examination, had a disproportionately adverse impact on black and female applicants. Although the court did not discuss the polygraph examination policy specifically, it held that the employer's employment practices had a disproportionately adverse impact on blacks but did not have such an impact on females.[35] In contrast to the Davis decision, Judge Holder in Bailey v. DeBard[36] held that a polygraph examination administered to black Indiana State Police applicants was acceptable and presented no discrimination issue with respect to minorities. Both Bailey and Davis, it should be noted, pertained to public employment and therefore did not include the issues involved in private employment.

The EEOC has decided several cases on private employers administering polygraph examinations as part of a pre-employment policy. In one EEOC decision the charging party, a black male, applied for a bus driver position at the employer's business. The applicant satisfied all pre-employment rigors except the polygraph examination, which negated his consideration for employment. The EEOC determined that the policy did not have a disproportionately adverse impact upon black applicants, as the employer had not hired applicants of other races who failed the polygraph examination under similar circumstances.[37]

In addition to the civil rights issues involved in pre-employment polygraph use, identical issues may be raised when an employer requires polygraph examinations as a condition for continued employment, and discharges those employees who fail the examination. In Johnson v. Georgia Highway Express, Inc.,[38] two black employees of a freight company were submitted to polygraph testing under the company's campaign to eradicate internal theft. The black employees were dismissed for failing the polygraph examinations. The court noted that:

Employer Uses of Polygraphs

[polygraph examinations, such as those administered in the case at hand, are not tests that require validation under Title VII ... or the regulations of the Equal Employment Opportunity Commission ...][39]

However, the court held that the test was validated by expert testimony to the effect that the polygraph examination lacked racial overtones or discriminatory characteristics.

The court's decision in Johnson is in conflict with some other EEOC decisions. For example, it was held in EEOC Decision No. 75-061,[40] that an employer did not violate Title VII by discharging a black employee who failed a polygraph examination motivated by recent employer cash disappearances. Dicta in EEOC Decision No. 75-061 indicates, however, that an employer's use of polygraph examinations to question employees may violate Title VII if such tests have an adverse racial impact on blacks as a class or if an employer would have retained a white employee who failed a polygraph examination under similar circumstances.[41] Furthermore, in Davis v. City of Houston,[42] in which a black guard was dismissed after failing a polygraph examination spurred by recent thefts, the court stated that it was "not concerned with the plaintiff's guilt or innocence of the theft charge or even with the wisdom of the use of a polygraph investigation, [but it was] ... concerned with whether defendant's policy towards its employees was applied equally without regard to race." [43] Therefore, it is unclear whether an employer who requires polygraph examinations of his employees will be evaluated for the purpose of determining if the employer's policies violate Title VII by the disparate impact analysis or the disparate treatment analysis or both.

D. Indiana Blacklisting Statute

The Indiana Blacklisting Statute[44] is a rather obscure provision dealing with disclosures concerning a discharged employee. The statute provides in part:

A person who, after having discharged any employee from his service, prevents the discharged employee from obtaining employment with any other person commits a class C infraction, and is liable in penal damages to the discharged employee, to be recovered by civil action;

However, the statute does not prohibit an employee from forwarding a written statement to prospective employers composed of a "truthful statement of the reasons for the discharge." [46]

Only one decision has interpreted the Indiana Blacklisting Statute. In Wabash Railway Co. v. Young,[47] the employee voluntarily quit and the employer wrote to prospective employers, disparaging the employee as a "labor agitator." The court nullified the statute's applicability as only protective of discharged employees, which the plaintiff was not. The Court dicta followed that a libel action against the employer would not lie, because of the absence of proof of the employer's bad faith intent to injure the employee. It follows from the Wabash Railway Co. case that an employer may make a good faith statement to another employer in regard to a former employee, and be relieved of tort liability thereunder.

Other states have comparable blacklisting statutes, and the scant case law has interpreted the language much the same.[48]

The Oklahoma blacklisting statute provides strict guidelines as to libelous employer conduct,[49] but Oklahoma case law has interpreted the statute to except that truthful information concerning an employee which a prospective employer would need to know. In State v. Dabney, the court, relying on case law based on statutory interpretation, stated that:

The act does not attempt to interfere with the right of an employer to discharge an employee for cause or without cause. It does not seek to prohibit an employer from communicating to other employers the nature and character of his employees when the facts would be for their interests.[50]

The court in Dabney considered together the alleged libelous publication and the allegations of the complaint to bring the situation within the terms of that statute.

The Oregon statute[51] parallels the Oklahoma blacklisting statute, prohibiting the former employer from publishing information which would hamper the employee in securing future employment. The court in Johnson v. Oregon Stevedoring Co.,[52] noted the strong public policy argument underlying the blacklisting statute:

The matter of the employment of the laborer in honest toil is pre-eminently of public concern; and public policy requires that his rights shall not be violated.[53]

The plaintiff in Dick v. Northern Pacific Railway Co.,[54] alleged that his superior wrongfully published information maligning the employee's character and fitness for his occupation, from which he was subsequently discharged. Noting the insufficiency of the pleadings in finding for the employer, the Supreme Court of Washington in dicta stated the basis for a criminal action as:

[T]he mere allegation that the plaintiff has been blacklisted is not sufficient, in view of the variety of meanings attached to that word, not only in common parlance, but in the statute itself. There must be some allegation of the facts constituting the act of blacklisting, as defined by the statute, coupled with an allegation that such acts caused the injury charged.[55]

The court in Seward v. Receivers of Seaboard Airline Railway,[56] interpreted North Carolina's blacklisting statute such that an employer

may ... state orally or in writing, and as well without as with a previous request, all that he may believe to be true concerning his ex-employee...[57]

The Supreme Court of North Carolina further stated that an employer could give a truthful statement as to the reason of discharge, and the statement, once made in the honest belief of its accuracy, will protect the employer.[58]

Employer Uses of Polygraphs

The minimal authority discussed herein indicates that an employer may in good faith publish information to another employer with regard to information gathered from an employee's polygraph examination. Where the employee has confessed to job-related misconduct, whether or not the employee was summarily discharged, that information could arguably become part of an employer's evaluation of an employee. What is unclear about the Indiana blacklisting statute is whether the asserted reasons for discharge must be "truthful" in the sense of proven misconduct or whether the reasons must be "truthful" in regard to the employer's reason(s) for discharge. In the future, employees dismissed for failure of a polygraph examination without evidence of misconduct may litigate this issue.

E. Fair Credit Reporting Act

In Peller v. Retail Credit Co.,[59] the plaintiff alleged that the defendants violated the Fair Credit Reporting Act[60] by misusing information acquired from a polygraph examination. The plaintiff applied for a job with defendant Robley, who requested that the plaintiff submit to a polygraph examination to be administered by defendant Zonn. Plaintiff consented, and was later informed that he had failed the polygraph examination and would not be hired. The plaintiff obtained a different job; however, the subsequent employer terminated the plaintiff's employment after being advised by the Retail Credit Company of the plaintiff's polygraph examination results.[61] The court held that the FCRA did not apply to defendants Zonn and Robley because they were not a consumer reporting agency as defined by the FCRA. The Act defines a "consumer reporting agency" as:

[A]ny person which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in whole or in part in the process of assembling or evaluating consumer credit information or other information of consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or faculty of interstate commerce for the purpose of preparing or furnishing consumer reports.[62]

The court stated that defendants Robley and Zonn were not engaged "in whole or in part in the process of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports.[63] In addition, the court states that defendant Zonn was exempt from the FCRA because the Act excludes from its definition of consumer report "any report containing information solely as to transactions or experiences between the consumer [plaintiff] and the person making the report [defendant Zonn]."[64]

Thus far, even though at least one court has relieved an employer of liability under the Fair Credit Reporting Act, no other federal courts have decided whether a prospective or current employee's polygraph examination results are part of a "consumer report" within the meaning of the FCRA. To preclude any possible violation under the Act, an employer should attempt to limit the dissemination of information gathered from polygraph examinations to those required by federal or state law.

IV. LABOR ARBITRATION

A. Refusal to Submit to a Polygraph Examination

Many law journal commentators since the early 1960's have indicated that the majority of arbitrators oppose the philosophy that an employee should be discharged or otherwise penalized for refusing to submit to a polygraph examination.[65] In general, arbitrators are not called upon to determine whether an employer's pre-employment use of the polygraph examination upon applicants is appropriate, because applicants are not protected by union agreements.[66]

No negative inference may be taken from an employee's refusal to submit to a polygraph examination, even if the employee earlier gave written or oral consent to submit to testing.[67] In Chapman Harbor,[68] an employee was charged with "unbecoming behavior," which was grounds for discharge or discipline under the terms of the labor contract. The employee was discharged after she initially consented to a polygraph examination, but later refused the testing. Arbitrator Neblett held that the employer's decision to discharge the employee because of her refusal to submit to the polygraph examination was improper.[69] Furthermore, in Bowman Transportation Co.,[70] the arbitrator refused to allow an employer to discharge an employee for his refusal to cooperate in the employer's investigation of recent thefts of company property, even though the employee had previously agreed to the examination.[71]

Some arbitrators have held that an employee's refusal to submit to a polygraph examination is just cause for discharge. In most of these labor cases, however, there was substantial evidence which would indicate the employee's guilt in the job-related misconduct under investigation.[72]

In Bowman I,[73] the grievant was placed on indefinite suspension after he refused to submit to a polygraph examination required of all employees subsequent to the theft of company freight. Allegedly, the employees were informed by management that the employees would not be dismissed for refusal of the testing procedure. The grievant, not aware of this management stance, was warned by a supervisor that such refusal would result in indefinite suspension. The grievant protested that he would only submit to the polygraph examination if he were suspected of the specific misconduct and needed to prove his innocence. No evidence indicated the grievant's implication in the theft. Arbitrator Whyte held that "[i]f [an employer] has the right to investigate property losses, it has the right to use investigation techniques which are not illegal and not prohibited by the labor agreement." [74] Although the grievant's indefinite suspension was not sustained because the grievant was not given adequate warning as to the management polygraph policy, and because ambiguity existed as to what the discipline would be for an employee's refusal to take the test, the arbitrator noted that in the proper context, an employee's refusal to submit to polygraph testing is proper grounds for discharge.[75] Bowman I is unique in that the arbitrator would have allowed the employee's dismissal for refusing the polygraph examination, without any corroborative evidence of the employee's guilt in the alleged misconduct.

In Bowman II,[76] an employee who drove the truck from which

Employer Uses of Polygraphs

merchandise was stolen refused a polygraph examination, after earlier agreeing to an examination. Thereafter, the employee agreed to the testing if a lawyer could be present, and if the questioning were limited to the specific theft. The polygraph examiner refused the employee's requested test conditions, and the employee subsequently refused to be tested. The issue before the arbitrator was whether the employee's refusal was reasonable cause for indefinite suspension. Arbitrator Laughlin noted that an employer "may compel an employee to take a polygraph test if, without said test, there is plausible showing that the employee is guilty of serious dishonest acts." [77] Furthermore, the arbitrator distinguished American-Maize Products Co., [78] and B.F. Goodrich Tire Co., [79] cases in which arbitrators refused to consider the employee's refusal to submit to polygraph testing as just cause for discharge, on the grounds that in those cases there was no corroborative evidence indicating the grievant's guilt, and the employer was using the polygraph examination as a fishing expedition. [80]

Arbitrator Laughlin in Bowman II found that the employer had legitimate reasons for requiring the polygraph examinations. It was noted that the testing might exonerate the grievant, or in the extreme opposite, adverse results might induce the grievant to confess. [81] Furthermore, the examination results might give the employer justification for subsequent disciplinary action, and cause for instituting supplementary security procedures. [82]

In Warwick Electronics, Inc., [83] where the employer issued written notice to employees with regard to penalties for refusal to submit to polygraph testing, the arbitrator held that, (1) where the contract between the employer and the union stipulated that the security guards would "cooperate fully in all investigations," (2) where the union had been informed by the company that this phrase meant that the security guards must submit to polygraph tests, and (3) where the union had acquiesced to the management's demand for polygraph testing at collective bargaining, the guards' right to refuse the polygraph examination had been waived by the union. [84]

There is a noticeable distinction between the arbitration cases that have refused to allow an employee to be discharged because of his refusal to consent to a polygraph examination, and those cases which have allowed such refusal as just cause for discharge. In the former, there was no corroborative misconduct. In the latter, there was either corroborative evidence which implicated the employee or the labor contract authorized such dismissal. In Warwick, [85] the security guards were issued only written warnings and were ultimately not discharged. In Bowman I, [86] the employee's indefinite suspension was annulled as there existed no corroborative evidence of guilt. Thus, the Bowman I and II cases and Warwick, instead of being considered the minority perspective, might more accurately be described as exceptions to the general rule. [87]

B. Action Based Upon Results of a Polygraph Examination

An employer may not discharge an employee based on disclosures made by the employee during a polygraph examination which indicate misconduct outside the narrow focus of the alleged incident. In Firestone Tire & Rubber Co., [88] the grievant admitted to petty theft of company property

unrelated to the specific misconduct under investigation. Prior to the examination, the employer promised that the questioning would be limited to the current investigation of break-ins which resulted in the theft of \$23,000 worth of property, but subsequent to the grievant's examination, the employer discharged the grievant. Arbitrator Welch, in noting the grievant's honest and candid admission of theft (value of \$100 - \$150) stated the adverse consequences such honesty wrought:

Because of his generosity and candor Grievant stands as discharged for Company property. This will not only disqualify him from receiving unemployment compensation benefits but it also would make it improbable if not impossible for him to get another job anywhere requiring a position of trust and responsibility.[89]

The grievant was reinstated with back pay as a result of the Firestone findings.

The general rule is that an employer may not discharge an employee solely because the employee failed a polygraph examination, unless there is other corroborative evidence establishing the employee's guilt.[90] Thus far, no arbitrator has held that polygraph evidence alone is sufficient to justify an employee's discharge.

The majority view on the evidentiary value of polygraph test results was epitomized by the arbitrator in the Continental Air Transport Co., Inc.,[91] case:

The great weight of legal authority is against the use of lie detector results as evidence in criminal and civil cases. Granted there is considerable use of polygraph testing by governmental and industrial institutions, nevertheless, it is not infallible ... This arbitrator cannot, in view of the majority position of the courts of our land, determine the rights of an individual predicated upon the results of a lie detector test. The arbitrator holds these tests to have no probative value, and not admissible as evidence in these proceedings.[92]

A similar finding was issued in Louis Zahn Drug Co.,[93] in which the arbitrator determined that proof of guilt of an employee suspected in company property thefts must be "beyond a reasonable doubt," and that discharge could not be based solely on the adverse results of a polygraph examination. In that case, the polygraph examination originator and the examiner both testified as to the inconclusive nature of polygraph results, and at one point in the testimony, the grievant was implored to submit to a second examination.[94]

The refusal of employees to take polygraph examinations in connection with company property thefts, unless the questioning was limited to one alleged theft, did not constitute insubordination so as to justify discharge in the Town & Country Food Co.[95] case. In Town & Country, the number of suspects was significantly narrowed to the six employees with access to the stolen property, four of whom refused the testing. In reinstating the four employees, the arbitrator distinguished between insubordination and self-incrimination:

Employer Uses of Polygraphs

Mere refusal to take a "lie detector" test is not insubordination ... Inasmuch as polygraph test results are generally inadmissible ... refusal to take such a test cannot constitute a proper and just cause for discharge predicated upon insubordination.[96]

In Bowman Transportation Co.,[97] the employee failed a polygraph examination pursuant to vandalism of company property. Arbitrator Hon held that polygraph examination results, standing alone, are not sufficient evidence to establish guilt, but that polygraph results should be accorded probative value when used in conjunction with other evidence.[98]

In Nettle Creek Industries, Inc.,[99] corroborative evidence included testimony from another employee who had witnessed the grievant's act of theft. The grievant failed a polygraph examination and was summarily discharged, but raised at arbitration the employer's refusal to allow union representation during the testing. Arbitrator High, although noting the conclusive evidence against the grievant in allowing the discharge, held that in another factual situation without corroborative evidence, the employee would have been reinstated.

Other arbitrators approach the results of a polygraph examination as only one piece of evidence to be considered in light of all evidence presented. In American Maize Products Co.,[100] the grievant had been discharged for an altercation with his supervisor. The polygraph examination of the supervisor supported the supervisor's version of the story. Arbitrator Larkin, in sustaining the employee's discharge, opined:

[W]hen the Arbitrator is confronted with conflicting stories, it is necessary to consider the personal interests of the witnesses, the nature of their testimony, their demeanor on the stand, and their impeachability. As to the results of the polygraph examination we concur in the conclusion reached ... in Koppers Co., Inc.,[101] ... Such tests are only one element to be considered. Where supported by other corroborative evidence, the test may be given some weight. However, no adverse inference was drawn from the grievant's refusal to take such a test. In the instant case, our conclusion is based on the total record.[102]

In a similar case, Koppers Co., Inc.,[103] the grievant was discharged for assaulting his supervisor, a charge the grievant denied. The supervisor successfully submitted to a polygraph examination, while the employee refused such testing. In denying the grievant's protest, the arbitrator noted:

With respect to the polygraph test given to supervisor, I consider the results ... to be one element tending to support [the supervisor's] story. On the other hand, I have drawn absolutely no adverse inference against the grievants from their refusal to take such a test.[104]

Most arbitrators have established procedures which allow for the admission of polygraph results, where there has been a prior stipulation between the parties, or where the labor contract provides for polygraph

testing. In Bethlehem Steel Corp.,[105] the grievant was discharged for assaulting a fellow employee on company property. The union protested the admission of the polygraph results of the assaulted employee (the grievant refused the examination), and the Company proposed to introduce in its place, the testimony of the polygraph examiner. The arbitrator, in holding that the discharge of the grievant was not supported by the evidence, noted the inadmissibility of the polygraph examiner's testimony because the union had protested the employee examinations and, thus, any evidence in culmination thereof would be without the consent of all parties concerned.[106]

In yet another case, Kisco Co., Inc.,[107] the same conclusion was reached. In Kisco, an employee was discharged for insubordination, based on the verbal assault of a foreman. The foreman's account of the conflict was supported by his subsequent polygraph examination, and the Company proposed that such evidence together with the examiner's testimony be admitted, over the Union's objection. In allowing a 90-day disciplinary suspension but disallowing the permanent discharge of the grievant, the arbitrator held that the results of the foreman's polygraph examination, along with the examiner's testimony, was inadmissible, notwithstanding the general conclusion that polygraph results have sufficient validity to warrant consideration by an arbitrator:

I am sustaining the Union's objection to the polygraph evidence offered by the Company. I deem the evidence to be inappropriate in an arbitration unless offered in pursuance to the terms of the labor contract or otherwise acquiesced in by the parties. I take this view because an arbitrator's authority is derived from the labor agreement of the parties ...[108]

V. CONCLUSION

The long-standing disfavor the polygraph examination has been accorded in both court and arbitration cases is slowly easing, with many courts and arbitrators allowing employees or job applicants to be tested, and admitting the polygraph results into evidence in subsequent actions. Of primary importance is the protection of individual rights, and both courts and arbitrators are placing more weight on the pre-test stipulation and the use of polygraph results as only corroborative evidence.

Footnotes

1. Stephens, Polygraph Preemployment Screening, Bus. Studies, Spring 1969 at 30; Bus. Week, Jan. 13, 1973, at 88.

2. Inbau & Reid, The Lie Detector Technique: A Reliable and Valuable Investigation Aid, 50 A.B.A.J. 470 (1964).

3. C.B. Craver, The Inquisitional Process in Private Employment, 63 Cornell L. Rev. 1, 29 (1977). See, also, Note, Lie Detectors in Private Employment: A Proposal for Balancing Interests, 33 George Washington L. Rev. 932 (1965); Note, The Polygraph and Pre-Employment Screening, 13 Houston L. Rev. 551 (1976).

4. See, e.g., Hudgens v. National Labor Relations Board, 96 S. Ct. 1028, 1033, 424 U.S. 507 (1976).

Employer Uses of Polygraphs

5. United States Steel Corporation v. Nichols, 229 F.2d 396 (6th Cir. 1956).

6. For National Labor Relations Board cases with applicable facts, see, e.g., Solo Serve Co., 219 NLRB 395, 90 LRRM 1079 (1975); Commonwealth Foods, Inc., 203 NLRB 891, 83 LRRM 1214 (1973); National Food Service, Inc., 196 NLRB 295, 80 LRRM 1017 (1972).

7. 29 U.S.C 151 et seq. [Hereinafter "NLRA"].

8. 29 U.S.C. 158 (a)(1) and (3).

9. Hereinafter "NLRB".

10. See, Case No. 5R-211, 45 LRRM 1074 (1959) (Employer discharged employees refusing a polygraph examination after an inventory check revealed merchandise and money shortages).

11. Case No. F-816, 43 LRRM 1377 (1958). See, also, Food Service, Inc., 196 NLRB 295, 80 LRRM 1017 (1972); National Shoppers Drug Mart, Inc., 226 NLRB 901, 94 LRRM 1223 (1976).

12. 221 NLRB 670, 90 LRRM 1576 (1975).

13. 29 U.S.C. 158 (a) (5).

14. 221 NLRB at 675-6.

15. Id. at 678.

16. See, e.g., Gulf Coast Automotive, 256 NLRB No. 84, 107 LRRM 1279 (1981). Single issue the Board reviewed was the use of polygraph testing of employees as a unilateral change in working conditions).

17. 221 NLRB at 676.

18. Dale Industries, Inc., 145 NLRB 1050, 55 LRRM 1115 (1964), rev'd on other grounds, 355 F.2d 851 (6th Cir. 1966). But see, Bethlehem Steel Corp., 55 LA 994, 995 (Seward, 1970) (An employee suspected of intoxication was not entitled to the presence of a shop steward during the administration of the breathalyzer test, because no such contract provision existed).

19. I.C. 22-4-1-1 to 22-4-38-3. [Hereinafter "Security Act"].

20. I.C. 22-4-15-1.

21. Id.

22. 364 So.2d 155 (La. 1978).

23. But, cf, Everitt Lumber Co., Inc. v. Industrial Comm., 39 Colo. App. 336, 565 P.2d 967 (1977); Larsen v. Motor Supply Co., ___ Ariz. App. ___, 573 P.2d 907 (1977); Roux v. New Orleans Police Dept., ___ La. ___, 223 So.2d 905 (1969); Swope v. Florida Industrial Comm., ___ Fla. ___, 159 So.2d 653 (1964).

24. 39 Colo. App. 336, 565 P.2d 967 (1977).
25. 565 P.2d at 968.
26. Section 8-73-108(7), C.R.S. (1973).
27. 159 So.2d 653 (Fla. 1964).
28. Section 443.06(1), Fla. Stat., F.S.A. provides disqualification for benefits by one who "has voluntarily left his employment without good cause" or "been discharged by his employing unit for misconduct connected with his work."
29. 159 So.2d at 654. For similar fact situations, see., e.g., Spaulding v. Florida Industrial Comm., 154 So.2d 334 (Fla. 1963); Stape v. Civil Service Comm. of City of Philadelphia, 404 Pa. 354, 172 A.2d 161 (1961).
30. Hereinafter "EEOC".
31. 42 U.S.C. 2000 et seq. (1976).
32. See, e.g., Davis v. City of Dallas, [24 EPD §31,307] 483 F. Supp. 54 (N.D. Tex. 1979); EEOC Decision No. 75-061, CCH EEOC Decisions §6519 (1974); EEOC Decision No. 76-65, CCH EEOC Decisions §6649 (1975).
33. See, e.g., Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir. 1975); Gregory v. Litton Systems, Inc., 472 F.2d 631 (9th Cir. 1972).
34. 483 F. Supp. 54 (N.D. Tex. 1979).
35. Id. at 58-59, 61-62.
36. 10 EPD §10,388 (S.D. Ind. 1975).
37. EEOC Decision No. 76-65, CCH EEOC Decisions §6649 (1975).
38. 488 F.2d 714 (N.D. Ga. 1972).
39. Id. at 7167.
40. CCH EEOC Decisions §6519 (1974).
41. Id. at §6519 at 4313.
42. 23 EPD §31,009 (S.D. Tex. 1979).
43. Id. at §31,009 at 16,215.
44. I.C. 22-5-3-1 and -2.
45. I.C. 22-5-3-1.
46. Id.

Employer Uses of Polygraphs

47. 162 Ind. 102, 69 N.E. 1003 (1904).
48. See, e.g., St. Louis Southwestern Railway Co. of Texas v. Hixon, 104 Tex. 267, 137 S.W. 343 (1911); Dick v. Northern Pacific Railway Co., 86 Wash. 211, 150 P. 8 (1917); Seward v. Receivers of Seaboard Airline Railway, 159 N.C. 241, 75 S.E. 34 (1912).
49. 77 Okl. Crim. 280, 141 P.2d 303 (1943).
50. Id. at 308.
51. Gen. Laws of Or. 1903 p. 137; codified at Or. L. Sections 2179, 2180.
52. 270 P. 772 (Ore. 1928).
53. Id. at 776.
54. 86 Wash. 211, 150 P. 8 (1915).
55. 150 P. at 13.
56. 159 N.C. 241, 75 S.E. 34 (1912).
57. 75 S.E. at 36.
58. 75 S.E. at 38.
59. 359 F. Supp. 1235, aff'd., 505 F.2d 733 (1973).
60. 15 U.S.C. 1681 et seq. [Hereinafter "FCRA"].
61. The cavil appeared to be the fact that on an earlier occasion, the plaintiff had smoked marijuana.
62. 359 F. Supp. at 1237 [citing FCRA, 15 U.S.C. 1681a(b)].
63. 359 F. Supp. at 1237.
64. Id. [citing FCRA, 15 U.S.C. 1681(d)].
65. D.T. Dennehy, The Status of Lie Detector Tests in Labor Arbitration, 31 Lab. L.J. 430 (1980); C.B. Craver, The Inquisitorial Process in Private Employment, 63 Cornell L. Rev. 1 (1977); S. Abrams, Polygraphy Today, 3 Nat. J. Crim. Defense 85 (1977); Comment, The Polygraph and Pre-Employment Screening, 13 Houston L. Rev. 551 (1976); Comment, Privacy: The Polygraph in Employment, 30 Ark. L. Rev. 35 (1976); Comment, The Working Man's Nemesis -- The Polygraph, 6 N.C. Central L.J. 94 (1974); L. M. Burkey, Privacy, Property, and the Polygraph, 18 Lab. L. J. 79 (1967); The Polygraph and Labor Arbitration, 19 Syracuse L. Rev. 684 (1968); Comment, Lie Detectors in the Employment Context, 35 La. L. Rev. 695 (1975); Comment, Lie Detectors in Private Employment: A Proposal for Balancing Interests, 33 Geo. Wash. L. Rev. 932 (1965); Comment, Lie Detectors in Labor Relations, 19 Arb. J. 193 (1964).

66. Comment, Lie Detectors in Private Employment: A Proposal for Balancing Interests, 33 Geo. Wash. L. Rev. 932, 937 (1965). See, also, Hearings on the Use of Polygraphs as "Lie Detectors" by the Federal Government Before the House Committee on Government Operations, 88th Cong., 2d Sess. 157 (1964).

67. See, e.g., Chapman Harbor Convalescent Hospital, 64 LA 27 (Neblett, 1975); Art Carved, Inc., 70 LA 869 (Kramer, 1977); Braniff Airways, Inc., 73 LA 304 (Ray, 1979); Skaggs-Stone, Inc., 40 LA 1273 (Koven, 1963); Temtex Products, Inc., 75 LA 233 (Rimer, 1980); Simonize Co., 44 LA 658 (Koven, 1964).

68. 64 LA 27 (Neblett, 1975).

69. Id. at 28.

70. 60 LA 837 (Hardy, 1973).

71. Id. at 838. But, see, Warwick Electronics Co., 46 LA 95 (Daugherty, 1966) (By agreeing to "cooperate fully" in contract, union promised that its guards would help employer in investigation of theft, waiving guards' rights to refuse polygraph examinations).

72. See, e.g., Bowman Transportation, Inc., 73-2 ARB at 8336 (Whyte, 1973) [Hereinafter "Bowman I"]; Bowman Transportation, Inc., 61 LA 549 (Laughlin, 1973) [Hereinafter "Bowman II"]; Warwick Electronics Co., supra, n. 70; B.F. Goodrich Tire Co., 36 LA 552 (Ryder, 1961); Allen Industries, Inc., 26 LA 363 (Klamon, 1956) (arb.).

73. 73-2 ARB at 8336.

74. Id. at 4243.

75. Id. at 4243-244.

76. 61 LA 549.

77. Id. at 555.

78. 45 LA 1155 (Epstein, 1965).

79. 36 LA 552.

80. 61 LA at 555.

81. Id. at 557.

82. Id.

83. 46 LA 95. See n. 70.

84. Id. at 97-8.

85. 46 LA 95.

Employer Uses of Polygraphs

86. 73-2 ARB at 8336.
87. For an interesting analysis of the Bowman I and II cases, see, D.T. Dennehy, The Status of Lie Detector Tests in Labor Arbitration, supra, n. 64.
88. 75 LA 659 (Welch, 1980).
89. Id. at 661.
90. See, e.g., Paramount Wedding Ring Co., 78-1 ARB at 8033 (Fish, 1978); Nettle Creek Industries, Inc., 70 LA 100 (High, 1978); Bowman Transportation, Inc., 64 LA 543 (Hon, 1975); Braniff Airways, Inc., 73 LA 304 (Ray, 1979); Brinks, Inc., 78-2 ARB at 8337 (Pinkus, 1978); City of Benton Harbor, 78-2 ARB at 8337 (Roumell, 1978); Mount Sinai Hospital Medical Center, 73 LA 297 (Dolnick, 1979).
91. 38 LA 778 (Judge Eiger, 1962).
92. Id. at 780.
93. 40 LA 352 (Sembower, 1963).
94. Id. at 358. See, also, Daystrom Furniture Co., 65 LA 1157 (Laughlin, 1975).
95. 39 LA 332 (Lewis, 1962). [This is a Fort Wayne, Indiana case.]
96. Id. at 335.
97. 64 LA 543 (Hon, 1975). [Hereinafter "Bowman III"].
98. Id. at 457.
99. 70 LA 100 (High, 1978).
100. 71-1 ARB at 8265 (Larkin, 1971).
101. 68-1 ARB at 8084 (Kates, 1967).
102. Id. at 3921.
103. 68-1 ARB at 8084.
104. Id. at 3307. See, also, Illinois Bell Telephone Co., 39 LA 470 (Ryder, 1962). (Results of polygraph examination were admissible as pertinent and relevant, but the polygraph procedure was termed "not infallible").
105. 68 LA 581 (Seward, 1977).
106. Id. at 582-83.
107. 75 LA 574 (Stix, 1980).
108. Id. at 576.

TO POLYGRAPH OR NOT:
THE EFFECTS OF PREEMPLOYMENT POLYGRAPHING
ON WORK-RELATED ATTITUDES

By

Lawrence T. White, Margaret Lopez and Craig Haney

Abstract

A crucial factor concerning the use of the polygraph in employment settings has been overlooked: How does the polygraph experience affect a new employee's work-related attitudes? College students (N=228) read one of two scenarios describing standard job application procedures -- one included a polygraph examination, the other did not -- and then responded to a questionnaire of work-related attitudes. Subjects reading the polygraph version expressed more negative attitudes toward the employer, work situation and other employees. We suggest the polygraph experience acts as a symbolic communication to the prospective employee from the employer, imparting unpleasant information that may lead to feelings of distrust and dislike.

As the problem of employee theft escalates, so does the use of polygraph examinations. In a survey of 143 large corporations, Belt and Holden (1978) discovered that 20 percent were currently utilizing the polygraph. Fully half of the retailers and commercial banks (who historically experience high rates of employee theft) indicated they were presently using polygraph examinations. Moreover, Belt and Holden estimate between 200,000 and 500,000 such tests are administered annually to employees nationwide.

Even though the polygraph has found a home in the business world, its use remains controversial. Opposition has typically focused on ethical concerns or on issues of validity and reliability. The ethics debate is, of course, a continuing one and we do not address it here. The validity and reliability of polygraph exams within the employment context have been examined elsewhere (Sackett & Decker, 1979; Ash, 1980). In the present study we address a separate question that is often overlooked in discussions of the propriety and utility of preemployment polygraphing: How does the experience of being polygraphed affect work-related attitudes?

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Polygraph tests are used by the business sector for three purposes: (1) as a preemployment screening device, (2) as a periodic check of employee honesty, and (3) as an investigative tool for specific instances of theft. Work-related attitudes may be affected by each of these instances, but the effects would seem to be more critical when the test is used as part of the application procedure. Attitudes about the employer, work conditions and other employees are beginning to take shape during this initial period. Thus, the attitudinal consequences of polygraph exams should be greater at this stage than later on when attitudes about work have stabilized.

Ash (1973) and Silverberg (1980) have addressed this general issue. In his study of job applicants who had been polygraphed, Ash found most applicants expressed favorable attitudes toward the exam: its validity, fairness, and appropriateness. Neither did they feel the test had invaded their privacy. Silverberg's study reported similar findings. However, these studies focused on attitudes toward the polygraph itself, not subsequent work-related attitudes. Attitudes toward the polygraph are, at best, only indirectly indicative of a new employee's work-related attitudes. Thus, we seek the answer to a new question: How does taking a polygraph examination as part of the application procedure affect a new employee's attitudes about the workplace and the people in it?

The Study and Its Findings

Briefly, subjects read one of two employment scenarios* describing standard job application procedures. One description included a polygraph examination and the other did not. Subjects then responded to a questionnaire asking about work-related attitudes.**

Our subjects were 228 undergraduate psychology students attending either the University of California, Santa Cruz or California State University, Fresno. Their ages ranged from 17 to 54 years with a mean age of 19.8 years. All but seven had been employed at least once prior to the study. In terms of age, education, and previous employment, our sample closely resembles those persons applying for the lower-paid positions in retail businesses and commercial banks where polygraph tests are most commonly used.

Subjects were recruited to participate in a study concerning "Personnel Selection and Hiring Procedures." Some subjects read a control (NO POLY) scenario about a college student who needs a job, applies for a position at a restaurant, and is eventually hired. Each subject was instructed to imagine himself or herself as the job applicant. Normal hiring procedures (i.e., filling out an application blank and being interviewed by the manager) were described in detail.

Other subjects read the experimental (POLY) scenario; it was identical to the control version except a polygraph examination was included.[1] Specifically, the job applicant in the scenario is asked to voluntarily submit to a polygraph exam. The applicant agrees and is polygraphed a few days later.

* See appendix A & B.

** See appendix C.

After reading their respective scenario, each participant completed a post-experimental questionnaire, using ten-point Likert scales to indicate his or her attitudes about various work-related issues. For example, "What kind of work relationship do you think you will have with your new employer?" and "How long do you think you will actually work at the restaurant?" The questionnaire also contained items designed to measure subjects' global attitudes toward polygraph exams.

After completing the questionnaire, subjects were told the actual purpose of the study and thanked for their participation. Comments by subjects during the debriefing session revealed no suspicions concerning the experimental manipulation.

Before comparing the work-related attitudes of the experimental and control groups, it is useful to note some general opinions about polygraphing expressed by the total sample (see Table 1).

Although nearly 90 percent of the sample had never been polygraphed, most (85.2%) were willing to be polygraphed under certain circumstances. Three-fourths of the respondents thought polygraph examiners should be licensed by the state. Surprisingly, few (7.5%) preferred to work at a place where all employees had been screened for honesty; half (48.0%) said it would not matter.

Initial analysis of the work-related attitudinal items revealed no consistently significant differences between males and females or UC Santa Cruz students and CSU Fresno students. Therefore, for subsequent analyses, subject data were pooled across "sex" and "school." Further analysis focused on the differences between POLY subjects and NO POLY subjects.

Compared to NO POLY subjects, POLY subjects thought the manager of the restaurant liked them less ($t=-3.92$, $p<.001$), thought the manager liked his other employees less ($t=-5.01$, $p<.001$), and thought the other employees liked the manager less ($t=-4.06$, $p<.001$). Similarly, POLY subjects thought the manager trusted them less ($t=-3.59$, $p<.001$) and thought the manager trusted his other employees less ($t=-4.85$, $p<.001$). Furthermore, subjects reading the polygraph scenario anticipated a lower quality working relationship with their new employer ($t=-4.83$, $p<.001$). These six items taken together suggest that new employees who have been polygraphed as part of the application procedure may be less satisfied with their present employment situation than those employees who have not been polygraphed. This conclusion is supported by findings on another item. POLY subjects indicated they intend to work at the restaurant for a shorter period of time than did NO POLY subjects ($t=-3.11$, $p<.002$).

Perhaps the most interesting findings revolve around the issue of employee theft. It has been generally assumed that a polygraph examination functions to "keep honest people honest." Our findings provide little support for this assumption. POLY subjects reported they were as likely to steal cash or food as were NO POLY subjects ($t=1.00$, n.s.). And when asked the question, "If you felt you were being underpaid, would you then be more likely to steal something at work?", POLY subjects replied "Yes" nearly twice as often as NO POLY subjects ($\chi^2 = 8.93$, $p<.02$). Even more surprising, POLY subjects estimated 50.2% of the other employees had probably stolen something at work; NO POLY subjects offered a considerably

To Polygraph Or Not

Table 1

Opinions About Polygraphing (N = 228)

	<u>Yes</u>	<u>No</u>	<u>Not Sure</u>
Have you ever been polygraphed?	7.5%	89.8%	2.7%
Do you think polygraph examiners should have to be licensed by the state?	75.0%	6.6%	18.4%
<u>Under what circumstances would you be willing to take a polygraph exam?</u>			
Under any circumstances		29.1%	
Under no circumstances		14.8%	
If I needed a job in a hurry and did not want to wait for a reference check		8.1%	
If I had to be bonded or insured		7.2%	
If I were to be handling large amounts of cash or valuable merchandise		21.5%	
(Respondents checking more than one of the last three choices)		19.3%	
	<u>Yes</u>	<u>No</u>	<u>Would Not Matter</u>
Would you prefer to work at a place where all employees had been screened for honesty via a polygraph examination or other similar test?	7.5%	44.5%	48.5%

lower estimate of 30.6% ($t=4.59$, $p<.001$). In light of the well documented influence of peer norms on behavior, this finding is especially important. It suggests that the polygraph experience may actually increase the likelihood of an employee engaging in some type of employee theft.

One last finding: The average effect size[2] of the reported items is .63. According to Cohen (1977), this represents a medium-to-high difference between groups, especially for a study in which the impact of the experimental situation was, at best, of moderate strength. In other words, the obtained differences in work-related attitudes are not only statistically significant - they are large enough to be noticed in the real world.

Discussion and Conclusions

In short, our experimental findings suggest that taking a polygraph examination as part of the application procedure may induce negative work-related attitudes in new employees. Because our subjects did not actually take a polygraph exam, we must emphasize the tentative nature of our findings and the need for additional data on this issue. Although this was an exploratory study, the results are interesting and potentially important. To understand why polygraphing may give rise to negative work attitudes, we suggest thinking of the polygraph experience[3] as a two-way symbolic communication between the employer and the prospective employee. That is, the polygraph test not only provides the employer with information about the prospective employee, it also provides information to the prospective employee about the employer.

What is the nature of this latter information? Accurate or not, four messages are probably conveyed to the prospective employee:

- (1) Employee theft is a major problem on this job.
- (2) I (the employer) do not, on an a priori basis, believe you (the employee) to be honest.
- (3) You must prove your innocence.
- (4) Your need for privacy is less important than my need for honest employees.

Emotional reactions to these subtle messages may lower the self-esteem of a prospective employee. He or she may feel untrustworthy, expendable, and humiliated by having to prove innocence. This possibility is supported by another one of our findings: POLY subjects reported less confidence in their ability "to do a good job" ($t=-2.58$, $p<.02$). Lowered self-esteem may have important implications for the employer concerned with theft. Aronson and Mettee (1968), for example, demonstrated that low self-esteem can induce dishonest behavior.

Polygraphing may unwittingly hinder the battle against theft in another way. Recall that POLY subjects offered higher estimates of peer theft. Message 1 may explain why. An employee who assumes that most other employees are honest may change his or her mind after the polygraph

experience. In simplified form, the employee may reason, "This test must be costing my employer lots of money if he gives it to everybody applying for a job. I guess more people steal than I thought." This new normative "worldview" may increase the likelihood of new employees engaging in theft since they feel everyone else is doing it, too. Thus, the reduction of thefts due to fear of being caught by the polygraph may be counterbalanced by an increase in theft due to restructured norms, resulting in no net reduction of employee theft.

Anecdotal evidence[4] supports our hypothesis. An Atlanta-based convenience-store chain has polygraphed its employees for 20 years but says theft has not declined. A Georgia chain of catalog showrooms has also experienced no reduction of thefts, even though all employees are polygraphed.

Employers who feel they must polygraph might also want to consider ways to make the polygraphing procedure less demeaning, less frightening, less omnipotent. Increased open communication between employer and applicant about the reasons for polygraphing and the applicant's right to refuse without penalty should be encouraged. Perhaps the employer can emphasize that the applicant is being asked to take the test only because he or she is a top prospect and will definitely be hired if the test results are satisfactory. Silverberg (1980) suggests that applicants be "... frankly advised that polygraph testing is only one tool in the entire employment screening process." Polygraph examiners can take steps to improve the testing procedure, too. Knowledge of test results should be shared with examinees. Silverberg's study showed that examinees immediately given results, as opposed to those not given results, expressed slightly more favorable attitudes toward the polygraph.

Further research in this area should address several issues. First, to what extent do the present findings generalize to non-college students? Non-collegians may respond to the polygraph experience in a different manner. Since the majority of applicants asked to take polygraph examinations are not college-educated, this possibility should be investigated. Second, do subjects taking an actual polygraph examination respond in a similarly negative manner? Perhaps the written scenario induced certain attitudes which would not otherwise occur. Of course, it is also possible that an actual polygraph exam induces even more negative attitudes. Third, do the negative work-related attitudes induced by the polygraph experience accurately predict real behavior? Because attitudes are sometimes weakly linked to behavior, a conclusive study of the effects of pre-employment polygraphing must examine behavior as a dependent variable.

Although our focus has been on polygraphing and its potential problems, we must not lose sight of the larger issue -- employee theft. Polygraph examinations alone should not be expected to resolve such a complex issue; more fundamental solutions may be required. However, until employers are aware of the subtle psychological costs of preemployment polygraphing, they may not have the incentive to pursue those more fundamental solutions.

Footnotes

1. The polygraph portion of the experimental scenario was written by

the second author, a professional polygraph examiner, to accurately portray a typical preemployment polygraph procedure.

2. Effect size (d) represents the degree to which the experimental and control groups differ on a given scale. To calculate d, divide the difference between group mean by the standard deviation of the population.

3. We use "polygraph experience" to mean (a) being asked to take a polygraph examination and (b) actually taking a polygraph examination.

4. From the Wall Street Journal, June 16, 1981, p. 1.

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Appendix A

(POLY Scenario)

Imagine that you are a college junior. You have spent your first two years living on campus and now think that you would like to live in an apartment with a friend but the added expense is considerable. In order to supplement the money that you get from your parents, you decide to get a part-time job. You hear of an opening for a busperson at the Salty Schooner, a good restaurant in town, and drive down immediately to apply.

When you enter the restaurant you seek out the manager and tell him that you would like to apply for the busperson opening. The manager informs you that the beginning wage is \$3.10/hour but that it will be increased to \$3.25/hour after a six-week probationary period. He then gives you an application, asks you to fill it out at home, and come back tomorrow for a short interview.

To Polygraph Or Not

When you get home you fill out the application. It asks you about your health, where you have gone to school, where you have worked before, and the names and addresses of references. At the bottom is a box that says, "Check here if you agree to submit to a polygraph examination in order to aid us in evaluating your application." You check the box.

You go back into the Salty Schooner the next day. You are ushered into the manager's office. You remind yourself to be very polite and mature-appearing. The manager looks over your application and seems impressed by your experience as a busperson during the summer. He asks you how long you plan to work at the Salty Schooner, if hired. You say at least for the coming school year, if not longer. The manager then arranges a time for you to take the polygraph examination.

After asking you a few more questions, the manager says that he is also considering two other young people and that he will call in a few days to let you know his decision. You are a little excited when you leave the restaurant because you think that you have a good chance of getting the job and you are already anticipating your first paycheck.

The next day you drive to the polygraph examiner's office in town. You are somewhat apprehensive as you open the door and go inside. You are met in the waiting room by the examiner.

Examiner: Hi. I'm Bob Jones. Are you from the Salty Schooner?

You: That's right.

Examiner: Why don't you come inside and we'll get started.

(You go into the exam room.)

E: You can have a seat right over here.

(You both sit down.)

E: How are you today?

Y: OK, except I'm sort of nervous about this test.

E: That's pretty normal. Nearly everyone is. I take it you've never had a test like this before?

Y: That's right.

E: Before we actually get around to doing the test, I'll explain everything that we'll be doing. We'll also review every question that will be on the test before we actually run through the test. There won't be any surprises involved in this procedure at all. The first thing I want to do, though, is get your name, address, and some background information like that. A lot of this is information that I, as an examiner, need in order to do my job, rather than information that is needed by employer.

(Gets your name, address, social security number, date of birth, place of birth, height and weight.)

E. Before we go any further, let me explain a little bit about how the test works. It's a little easier for you if you understand what's happening during the test, and why it happens. What the testing procedure is based on is the fact that when you tell a lie, there are changes that go on inside of your body that you can't stop from happening. Ultimately, what it comes down to, is the fact that you can't lie to yourself. We've all known people who were good at lying to other people; they can look you right in the eye and tell you a lie without blinking or stuttering or anything like that. But no matter what your behavior is on the outside when you tell a lie, you still know inside what the truth really is. And when you say something that's not the truth, you feel at least a little uncomfortable inside. On top of that, when you feel as though you might get caught telling a lie, it's a kind of emotional threat. Your body responds exactly the same way as any other time you're faced with a threat.

You know that feeling you have when you look up in the rear-view mirror and see red lights flashing? (You nod.) When you tell a lie, it's not as dramatic as that, but the same reaction is there. What we're looking at are the changes that would happen if you were to lie to a question. Usually people are nervous about taking this kind of a test, so during the whole test you are going to be a lot more uptight than if you were relaxing at home, or even working. What I'll do is get the instrument balanced in to wherever your body is. What we're measuring is -- given however you are during the test -- does anything change suddenly when you answer the questions. The thing that's important for you to remember when you're going through this is that all of these changes are reflexes, and that the same thing happens when you tell just a little white lie as when you tell a really big lie. I can't tell how big the lie is; I can just tell that you didn't answer the question truthfully. So when we're going through the rest of the information and going through the questions before we get to the test, it's important to tell me anything that comes into your mind regarding that question, even though it seems like it's not very important, or maybe doesn't fit under that question. Then we can talk about whatever it is, and we can make sure that the questions during the test are worded in a way so that you don't react to them because of some little thing that isn't really important, OK? (You nod.) I also have this release for you to sign after you look it over. This gives me permission to give the results to your employer after we're done.

Y: Will I know the results when we're through?

E: Absolutely. It's your test. I won't tell your employer anything about the test that I don't tell you first.

(You read the release and sign it.)

E: Now, what kind of health have you been in recently?

Y: Pretty good.

E: No recent illnesses or injuries?

Y: No, I'm pretty healthy.

To Polygraph Or Not

E: As far as you know, do you have any high blood pressure or heart problems?

Y: No, not as far as I know.

E: What medications, drugs, or alcohol have you had in the past 24 hours?

Y: I had some wine with dinner last night, but that's all.

E: How much sleep did you get last night?

Y: I was out sort of late. Maybe six hours.

E: And how far have you gotten in school?

Y: I just started my junior year in college a couple of week ago.

E: Are you working right now?

Y: No. I had a job as a busperson this summer but I had to quit when I moved here to go to school.

E: How long did you work there?

Y: About three months.

E: Have you ever been fired or asked to leave a job?

Y: No, nothing like that. One place I worked I didn't get along with the manager but I quit -- they didn't make me leave.

E: OK. Now, what kind of things can you remember right off hand that you've ever taken from an employer?

Y: I can't think of anything that I've really stolen.

E: Is there anything at all, though, even little things that you've taken -- something that you might be thinking about when we get to the questions on the test?

Y: Well, we used to get a glass of wine without paying for it at the end of our shift but that was given to us. I did take a couple of glasses home. I didn't really steal them. I was going to take them back but I never got a chance before I moved.

E: OK. Now what I'm going to do is go through the questions that will be on the test. I'll read the question to you, and I need to know how you would answer it on the test. It's usually pretty obvious but I just need to make sure we're communicating on the same level. Also, if the question isn't clear to you or doesn't sound right, let me know. Then we can talk about the question, or find a different way to ask it, so that when we get to the test, you feel comfortable answering it. The first question is "Have you falsified your application for this company in any way?"

Y: No.

E: "Have you lied about the reason why you left any job?"

Y: No.

E: "Did you ever steal any money from a former employer?"

Y: No.

E: "Besides what you already told me about, did you steal any merchandise from a former employee?"

Y: No. Oh, wait a minute. I just remembered that when I was about 17 I worked at a gift shop and I took a few greeting cards.

E: OK. That's not really any problem. We'll just include that when I say "Besides what you already told me about ...", OK?

Y: OK.

E: "Have you been truthful about how long you plan to work at the Salty Schooner?"

Y: Yeah. I told the manager I wanted to work at least for this school year but I don't know what my plans are after that.

E: The last question is, "Have you lied to any question asked during this test?"

Y: No.

E: Now, the only other questions I'll ask are at the beginning of the test. Just to let you get used to the procedure, and to let me make sure that I've got everything adjusted alright, I'll ask a couple of questions that don't really mean anything, like "Do you live in California?", "Were you born in the United States?" -- one or two of those, OK?

Y: OK.

E: Now, during the test I'll be behind you, just so that you are not reacting to me or to the instrument. I need you to sit up straight, keep your feet flat on the floor, look straight ahead, and just answer the question "Yes" or "No", not "No, I haven't" or anything like that. There is a blood pressure cuff that goes on your arm. It's not real tight, just a little snug. There are two rubber tubes -- one around your chest and one around your stomach. Then there are two metal attachments on your fingers. After I get all the attachments in place, I'll begin activating the instrument. The last thing I'll do is make the blood pressure cuff get a little tighter around your arm. I'll tell you just before I begin to ask the questions. At the end of the test I'll tell you that the test is over but I need to have you sit still for about ten more seconds while I get everything turned off. I'll go through the whole test, turn everything off, let you relax for a minute or two, and then repeat the entire test. We always go through the test at least twice. It doesn't mean that I think you're lying about anything, or that anything went wrong; it's automatic. Do you have any questions before we get started?

To Polygraph Or Not

Y: No.

(Examiner puts attachments on you, turns on the instrument, and goes through the test twice.)

E: OK. I don't see any problems here at all.

(Examiner takes attachments off you.)

Y: I passed?

E: Yes. I'll be in contact with the manager later today, and I'll let him know.

You leave the examiner's office more than a bit relieved that the exam went well. You try to estimate your chances of being hired as you drive home.

Two days later, you receive a phone call from the manager of the Salty Schooner. He informs you that you have been hired and should report to work the next day.

Appendix B

(NO POLY Scenario)

Imagine that you are a college junior. You have spent your first two years living on campus and now think that you would like to live in an apartment with a friend but the added expense is considerable. In order to supplement the money you get from your parents, you decide to get a part-time job. You hear of an opening for a busperson at the Salty Schooner, a good restaurant in town, so you drive down immediately to apply.

When you enter the restaurant you seek out the manager and tell him that you would like to apply for the busperson opening. The manager informs you that the beginning wage is \$3.10/hour but that it will be increased to \$3.25/hour after a six-week probationary period. He then gives you an application, asks you to fill it out at home, and come back tomorrow for a short interview.

When you get home you fill out the application. It asks you about your health, where you have gone to school, where you have worked before, and the names and addresses of references.

You go back into the Salty Schooner the next day. You are ushered into the manager's office. You remind yourself to be very polite and mature-appearing. The manager looks over your application and seems impressed by your experience as a busperson during the summer. He asks you how long you plan to work at the Salty Schooner, if hired. You say at least for the coming school year, if not longer.

After asking you a few more question, the manager says that he is also considering two other young people and that he will call you in a few days to let you know his decision. You are a little excited when you

leave the restaurant because you think your chances of getting the job are good. You are already anticipating your first paycheck.

Two days later, you receive a phone call from the manager of the Salty Schooner. He informs you that you have been hired and that you should report to work the next day.

Appendix C

(Post-Examination Questionnaire)

We would like to get your impressions of the people involved in the scenario you just read. Most of the following questions require that you circle a number from 1-10. Please circle the number that best describes your answer.

1. How much do you think you will like your new job?

Very Little 1 2 3 4 5 6 7 8 9 10 Very Much

2. How much does the manager of the Salty Schooner like you?

Very Little 1 2 3 4 5 6 7 8 9 10 Very Much

3. How long do you think you will actually work at the Salty Schooner?

4. How much does the manager trust you?

Not At All 1 2 3 4 5 6 7 8 9 10 Totally

5. How fair is your hourly wage?

Very Unfair 1 2 3 4 5 6 7 8 9 10 Very Fair

6. If you felt that you were being underpaid, would you then be more likely to steal something at work?

YES NO NOT SURE

7. What percentage of your fellow employees have probably stolen something at work?

8. If you knew that other people at work occasionally stole something, would that make you more likely to steal something?

YES NO NOT SURE

9. How valuable of an employee does the manager think you are?

Not At All Valuable 1 2 3 4 5 6 7 8 9 10 Extremely Valuable

To Polygraph Or Not

10. How likely is it that you would ever steal cash or food at work?

Very Unlikely 1 2 3 4 5 6 7 8 9 10 Very Likely

11. How likely is it that you would occasionally let friends eat for free at the Salty Schooner by not ringing up their bill?

Very Unlikely 1 2 3 4 5 6 7 8 9 10 Very Likely

12. What kind of work relationship do you think you will have with your new employer?

Terrible 1 2 3 4 5 6 7 8 9 10 Excellent

13. Does the manager, in general, like or dislike his employees?

Dislikes Very Much 1 2 3 4 5 6 7 8 9 10 Likes Very Much

14. How confident are you that you can do a good job at the Salty Schooner?

Not At All Confident 1 2 3 4 5 6 7 8 9 10 Very Confident

15. Does the manager, in general, trust or distrust his employees?

No Trust 1 2 3 4 5 6 7 8 9 10 Total Trust

16. Do the employees of the Salty Schooner, in general, like or dislike their manager?

Dislikes Very Much 1 2 3 4 5 6 7 8 9 10 Like Very Much

17. Your age: _____

18. Sex: M F

19. Previous employment (check one):

☐ I have never worked

☐ I have worked in a retail store or restaurant

☐ I have worked but never in a retail store or restaurant

20. Have you ever been polygraphed? YES NO NOT SURE

21. Have you ever undergone a voice stress analysis?

YES NO NOT SURE

22. Briefly describe any polygraph and/or voice stress analysis experience you have had.

23. Would you prefer to work at a place where all employees had been screened for honesty via a polygraph examination or other similar tests?

YES NO WOULDN'T MATTER

24. Under what circumstances would you be willing to take a polygraph exam?

____ Under any circumstances

____ Under no circumstances

____ If I needed a job in a hurry and did not want to wait for a reference check

____ If I had to be bonded or insured

____ If I were to be handling large amounts of cash or dealing with valuable merchandise

25. Do you think that polygraph examiners should have to be licensed by the state?

YES NO NOT SURE

26. Comments:

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BOOK REVIEW

By

Donald J. Krapohl

Loftus, Elizabeth F., Eyewitness Testimony. Cambridge: Harvard University Press, 1979, 253 pp.

This book superbly explains how the limits and biases of the human memory manifest themselves in eyewitness testimony. Professor Loftus shows by research and example that the recollections of eyewitnesses can be at the mercy of pre- and post-event circumstances, ethnic biases, suggestion and stress. Most examiners will, in fact, recognize these types of subject errors in their own professional experiences.

The book is heavily weighted in scientific research, but is written in a form that can be understood by the layman. It can be an important resource for an examiner who is called upon to give polygraph testimony that runs counter to eyewitness accounts.

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BOOK REVIEW

By

Gordon H. Barland

Bennett, Richard H., Jr., Patrick C. Hardee and Ronald K. Klobert. HAGOTH: Fundamentals of Voice Stress Analysis. Hagoth Corporation, 1977, 119 pages, no index. \$3.95.

It is hard to take this book seriously, for it was obviously written more as a promotional gimmick than anything else. About half the book consists of a TV script written in four days by Rick Bennett, then president of the now defunct Hagoth Corporation, to plug his company's voice analyzer. He boasts that the script "didn't make it past the secretary", whereupon it became Chapter 8 in this book.

The book is replete with errors, typographical and otherwise, and displays a blithe disregard for scholarship. For example, the following discussion of control questions occurs on page 19:

"Control questions are similar to (in some cases identical to) irrelevant questions and usually replace them in the test sequence of questions. The difference is that the truth of the response is known for control questions. Consequently there are two types of control questions - known truths and known lies. Known truths are usually identical to the irrelevant questions -- day of the week, the date, etc. Known lies are of three types: (1) subject lies to a known truth at the request of the evaluator, (2) the highly probably lie -- ever hurt someone you loved? and (3) induced doubt."

Book Reviews

The authors take the position that covert testing is both easier to learn and more accurate than overt testing (p. 31):

"Irrespective of the moral and legal questions, covertly obtained data is (sic) tremendously more reliable than overtly obtained data. The reason has to do with the scientific method: THE EXPERIMENTER SHOULD NOT CONTAMINATE THE DATA THROUGH HIS ACT OF OBSERVATION ... When a subject is aware you are testing him, this knowledge will have a significant effect on his psychological stress patterns, providing a great opportunity for contamination of the results. Thus, the proper training of an overt examiner could take weeks, while the proper training of the covert examiner takes just a few hours."

The book abounds with numerous other examples of sophomoric reasoning and a cavalier disregard for accuracy, but this reviewer sees no reason to further belabor the point.

About the only thing good that can be said about this book is that it is the first attempt at a book-length work on voice analysis. The next book can only be better. Caveat emptor!

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MOVING?

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