

# Can a Polygraph Test Help Your Client?©

I asked a criminal defense attorney recently, “Why don’t more attorneys use polygraph testing?” His answer was, “Most of them don’t know very much about it and don’t know how to use it.”

The purpose of this article is to suggest ways that you may be able to use polygraph testing to help your clients. But first, a few words about validity and reliability.

In 1997, the American Polygraph Association ([www.polygraph.org](http://www.polygraph.org)) published a compendium of research studies on the validity and reliability of polygraph examinations conducted since 1980. Ansley, summarizing its content regarding field examinations (real tests, not simulations), wrote the following:

*Researchers conducted 12 studies of validity following 3,174 field examinations, producing an average accuracy of 98 percent. Researchers conducted 11 studies involving the reliability of independent analyses (one examiner reviewing another’s charts) of 1,609 sets of charts from field examinations confirmed by independent evidence, producing an accuracy of 92 percent.*

The numbers show that the accuracy and validity of the modern polygraph are far better than the news media report. Polygraph testing has become the best method we have for verifying truth. In 1993, the U.S. Supreme Court left the door to admissibility ajar when it forsook the Frye Standard in favor of a new standard in *Daubert v Merrell Dow Pharmaceuticals*.

The following are some of the many situations where you might want to consider asking your client to take a polygraph examination.

## **An offer from the prosecution to drop the charges if your client passes a police polygraph test**

Would the prosecutors be making this offer if they had a strong case? Probably not.

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Why not have a private examiner test your client first? Although results of your client’s police polygraph test may be inadmissible, incriminating statements he or she makes during the course of that examination *are* admissible. If you let the police test your client first, you might be setting him or her up for a replay of *Custer v Sitting Bull*.

Some skeptics have suggested that the private examiner might be considered a “friendly examiner” and would conduct a test your client might pass even though he or she was guilty. Not so. The “friendly examiner hypothesis” was debunked by research long ago. Another notion that found its way to the bunk pile was the belief that a psychopath can fool the polygraph because he or she allegedly has no conscience. A classic study conducted during the mid-70s pitted the lying abilities of diagnosed psychopaths versus the human white rats of research—college sophomores. The sophomores proved to be better liars than psychopaths, but neither group was very successful in fooling the polygraph.

Under no circumstances should your client submit to a so-called “voice stress test.” These devices historically have been known by a variety of different names, e.g., psychological stress evaluators, voice stress analyzers, and the latest—computer voice stress analyzers. Somewhere along the line, someone thought that hooking this gadget up with a computer would somehow legitimize it. The problem with voice stress is that there is no published research that shows this technology really works. Independent studies reveal that voice stress is no more accurate than flipping a coin.

## **When your client refuses to consider a generous plea bargain offer**

Suppose the case against your client is overwhelming, but he or she refuses to see it that way. Perhaps as a result of beating a pre-

vious rap, your client becomes convinced that he or she can sweet talk a jury. A polygraph examination and a review of the accompanying videotape of the entire procedure may help convince him or her to plea bargain.

However, when your client actually passes the polygraph test, you suddenly have the best bargaining tool on your side—the truth.

**Case File:** An attorney sent his elderly client for a polygraph examination concerning allegations that he (the client) had sexually molested his granddaughter. This grandfather took a state police polygraph examination and the results were inconclusive—something that happens five to ten percent of the time. However, he cleared the private polygraph examination with ease. The prosecutor dropped all charges.

## **When your client gets expelled from school**

Kids get expelled from school for a lot of different things these days—using or selling drugs on school property, starting fires in lockers and restrooms, carrying weapons, and fighting. Oftentimes the only witnesses against the client are other kids. Principals and school boards will usually listen to polygraph results that are favorable to your client.

**Case File:** Billy was accused by another boy of setting a roll of paper towels on fire in the boys’ restroom. Billy told the principal the other boy set the fire. Billy’s parents believed Billy (of course) and knew that expulsion would put a serious damper on their Ivy League dreams. After Billy filled out a Crime Questionnaire,™ which he passed, Billy’s lawyer sent him for a polygraph examination, which he also passed. Billy returned to school, graduated with his class, and became a volunteer fireman.

## **When your client becomes embroiled in civil litigation**

The polygraph has helped settle disputes about child custody and visitation, revealed

the truth to accusations of physical and sexual abuse, dispelled allegations of marital infidelity, and facilitated payments of insurance claims.

**Case File:** The husband tells his attorney, "I think my wife is cheating on me. I want a divorce." The wise legal counselor responds, "Suppose you are wrong and your wife is not cheating on you, would you still want a divorce?" The man exclaims, "Of course not! I love my wife!" The attorney suggests that the husband ask his wife to take a Fidelity Questionnaire™ and, if she passes that, a polygraph examination. The wife agrees and says, "I'll take your tests if you agree to quit accusing me once I pass them!" The husband agreed. The wife passed the tests and they lived more-or-less happily ever after.

### **When your business client suffers a loss to his business caused by employee theft, sabotage, or vandalism**

Some people think that the Employee Polygraph Protection Act of 1988 closed the door completely on testing employees in the private sector. Not so!

There are many situations when your business client can ask an employee to take a polygraph test. These situations include instances when the employee had access to what was stolen and the employer has a basis for "reasonable suspicion" to believe the employee is the one who stole it. In cases where "reasonable suspicion" is not obvious, a written survey called the Specific Loss Questionnaire™ is often successful in uncovering it.

**Case File:** A computer storeowner discovered an expensive laptop missing from a secure area accessible to employees only. She had no basis for "reasonable suspicion" that any particular one of her six employees had stolen it. She asked each to complete a Specific Loss Questionnaire.™ On the questionnaire, one of the employees reported seeing a brand-new laptop of the same make and model during a visit to a co-worker's residence. The owner reasoned it must be her stolen laptop. Since she offered employees a 40 percent discount, it would be highly unlikely that the suspect had purchased the computer elsewhere. During his polygraph examination, the suspect admitted, "borrowing the computer to take it home and try it out." When he brought the computer back

to his employer, she accepted it and handed him a pink slip in return.

### **When your client says "I didn't do it! And, I'll take a polygraph test!"**

Think about this for a minute. Your client is offering to undergo an experience about five times more uncomfortable than a root canal and roughly as appealing as walking on hot coals barefooted. He or she verbalizes a *specific unsolicited* denial accompanied by a spontaneous offer to undergo a dreaded lie detector test. Do you think he or she might just have a good shot at clearing the test?

### **Other uses for polygraph testing in criminal cases**

According to James Matte, Ph.D. in his book *Examination and Cross Examination of Experts in Forensic Psychophysiology Using the Polygraph*, the polygraph has also been used to support motions to suppress evidence, effect settlements, disprove unfavorable evidence in sentencing reports, support psychiatric examinations, aid in state and federal arbitration, and to monitor sex offenders as a condition of their parole or probation.

In summary, Diogenes' lantern of ancient Rome has been replaced by the modern polygraph instrument. The truth is a mighty weapon to have on your side when you practice law. Attorneys who utilize polygraph testing will uncover new and exciting opportunities to better serve their clients. ♦

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### **REFERENCES**

- Ansley, N. (ed.) (1997), November–December. *The Validity and Reliability of Polygraph Testing*, Newsletter, American Polygraph Association, 30 (6): 6.
- Daubert v Merrell Dow Pharmaceuticals, Inc.*, 113 S Ct 2786, 125 L Ed 2d 469, 509 US (1993).
- Bassett, J. W., *The Crime Questionnaire™* (1996–2002), *Specific Loss Questionnaire™* (1988–2002), *Fidelity Questionnaire™* (2001–2002).
- Matte, J., *Examination and Cross Examination of Experts in Forensic Psychophysiology Using the Polygraph*, J.A.M. Publications, Williamsville, NY, 2000.