

THE NATIONAL LAW JOURNAL

DAILY UPDATES ON WWW.NLJ.COM

NEWS FOR THE PROFESSION

MONDAY, JULY 14, 2008

An incisivemedia publication

LIE DETECTORS EARN RESPECT

New technology has won over some reluctant courts.

By Tresa Baldas
STAFF REPORTER

IT'S THE TRUTH: It may be getting tougher to lie in court.

A wide range of tests designed to catch liars is starting to gain some respect in court, including the much abused polygraph, voice stress analyzers and a newer test that tries to tell if someone is faking an illness or injury.

In recent years, courts have expanded the use of polygraphs in particular, allowing lie detector results to be admitted as evidence, and subjecting more individuals to mandatory testing, including parolees, sex offenders and police officers.

Many lawyers cite technological advancements and increased use of lie detectors in general as reasons for their growing acceptance. As the tests get more reliable, and more people use them, they say, more judges are willing to consider them as evidence.

"Nobody could spell polygraph five years ago. But as the technology gets better and better, judges are feeling more comfortable with at least eyeballing the results," said Susan Moss of New York's matrimonial firm Chemtob Moss Forman & Talbert.

Moss also noted that family law attorneys are getting "more wiggle room" to submit polygraph results in motions for judicial review.

But lawyers aren't just asking judges to eyeball lie detector results. They're pushing to get the evidence submitted at trial—and some of them are succeeding.

In Ohio, a law student accused of rape was acquitted last summer after a judge allowed his polygraph results to be admitted as evidence, over the objections of the prosecutor. The judge acquitted the defendant, in part, because of the poly-

graph results. *Ohio v. Sharma*, No. CR 06-09-3248 (Summit Co., Ohio, Ct. C.P.).

In New Jersey, an appeals panel last June upheld the burglary conviction of a man who failed a voice stress analysis—another type of lie detector that measures stress in a person's voice. The defendant claimed the voice-stress exam was deceptive and coerced him into making a confession, but the court disagreed. *New Jersey v. Torres*, No. A-3350-0574 (N.J. App. Div.).

In Florida, a motion is currently pending before a federal court to allow jurors to hear that a suspect in the murders of four people at sea passed a lie detector test. Prosecutors are fighting to keep the evidence out. *U.S. v. Archer*, No. 07-20839-CR (S.D. Fla.).

The 'Fake Bad Scale'

On the civil litigation front, a new test known as the Fake Bad Scale is increasingly being used by defendants in personal injury cases who claim that plaintiffs are lying or exaggerating about injuries. The Fake Bad Scale is a true-or-false test that attempts to identify those faking pain, psychological symptoms or other injuries alleged in personal injury claims. In the last year, the Fake Bad Scale has been upheld by one administrative law judge, but rejected by two courts in Florida.

Currently, New Mexico is the only state that allows polygraph results to be admitted without stipulation by both the defense and prosecution. About a dozen states allow polygraph results to be admitted if both parties agree to it. Most states, however, ban the practice altogether.

In the federal courts, judges have discretion over polygraph admissibility. The U.S. Supreme Court gave them that discretion in 1998, when it held that "the scientific community remains extremely polarized about the reli-

ability of polygraph techniques," and thus left it up to individual jurisdictions to decide such matters. *U.S. v. Scheffer*, 523 U.S. 303 (1998).

"I think there is a slow trend building that is overcoming the courts' reluctance to admit polygraph results. I think that they are being used more and I think that their reliability is increasing," said criminal trial attorney William Matthewman, of Boca Raton, Fla.-based Seiden, Alder, Matthewman & Bloch.

Matthewman is pursuing the motion to have polygraph results admitted in a Florida murder trial involving four crew members of the Joe Cool fishing boat who were killed at sea. A defendant passed a lie detector test, and Matthewman is trying to get that before a jury. He is relying on a 1989 11th U.S. Circuit Court of Appeals ruling, which allows for the admission of polygraph results in federal trials, provided that certain requirements are met. *U.S. v. Piccinona*, 885 F.2d 1529 (11th Cir. 1989).

Matthewman, who has successfully used polygraph results in prior cases, argued that if jurors can hear DNA evidence, ballistic evidence and hair evidence, "there's no reason to exclude polygraph evidence."

Kirk Migdal, the Ohio defense attorney who successfully had lie detector results admitted in a sexual battery case over prosecutors' objections, agreed.

"[The polygraph] is either good science or it's not. I think it's good science," said Migdal, a solo criminal defense lawyer in Akron, Ohio. "You shouldn't require stipulation. They don't for fingerprinting, DNA, blood splatters....The jurors can weigh it just as if it were any other piece of scientific evidence."

But jurors might give too much weight to lie detector results, countered Robin Sax, a deputy district attorney in Los Angeles who believes its



ROBIN SAX: Polygraphs are OK as an investigative tool, but should not be admitted in trials.

safer to omit polygraph results during trial.

"It's better to keep it out than risk a prejudice it has to a jury," Sax said. "It's good enough as an investigative tool, but I wouldn't want a case to rest on the reliability of the polygraph."

Sax said that prepolygraph interviews, where investigators interview suspects just before they are about to take the polygraph, are especially helpful. That's when suspects tend to admit to certain things, she said, adding those statements are admissible in court.

"In that interview we get a lot of admissions because all of a sudden, the suspect is sitting there thinking, 'What is this test going to say?' They can make preadmissible statements, and those can be helpful in determining guilt," Sax said.

Sax noted that, in recent years, she's seen an uptick in the use of voice-stress analyzers in child sex abuse cases, adding that one jurisdiction in particular "uses them in practically every child sex assault case to determine whether they can get any admissible statements."

Sax, however, said the validity of tests like the voice-stress analyzer and polygraphs remains to be seen, adding that the polygraph in particular remains highly controversial.

"The problem isn't the courts. The scientific community doesn't find it reliable," Sax said.

Neither does Joshua Marquis, district attorney in Clatsop County, Ore., who rarely, if ever, drops criminal charges because a defendant passed a lie detector test prior to trial.

"The science behind them is not strong," Marquis said. "The absolute worst offenders—people who are true sociopaths—lying is a way of life for them, so they're going to probably pass them easily."

Marquis, does, however, see polygraphs as a useful tool in monitoring probationers, a growing practice that has been upheld by dozens of courts despite defense lawyers' claims that such tests violate the constitutional right against self-incrimination.

The 2d Circuit in 2006 upheld the practice of using polygraph exams to monitor convicted sex offenders who have been released, holding

that such testing "produces an incentive to tell the truth, and thereby advances the sentencing goals." *U.S. v. Johnson*, No. 04-4992.

Chicago criminal defense attorney Tamara N. Holder strongly disagrees, arguing that it's wrong to force a defendant to undergo testing when they've already served their sentence.

She also has reservations about the polygraph itself.

Currently, Holder, a solo, is challenging the results of a polygraph in a child abuse case, claiming that investigators coerced a 16-year-old into taking a polygraph, which she didn't pass, and then charged her with aggravated battery to a child. She recently filed a pretrial motion to make sure that any polygraph statements are excluded from trial. *People v. Jordan*, No. 07 CR 23415 (Cook Co., Ill. Cir. Ct.).

"The polygraph is the only thing that could possibly hurt her. She never admitted to anything in her statement," said Holder.

Holder added that she's seen a rise in the use of polygraphs by law enforcement. "Absolutely. I am seeing police officers unable to build a strong case against somebody and using the polygraph as a crutch to get charges, instead of doing a proper investigation."

Police officers, meanwhile, may find themselves sitting in the lie detector seat in Massachusetts.

Most recently, the Massachusetts Supreme Judicial Court in May ruled that police officers can be forced to take polygraphs in the course of an internal investigation. The case involved a police officer who was accused of child molestation, but refused to take a polygraph because he was never charged. *Furta-do v. Town of Plymouth*, No. SJC-10049 (Mass.).

In Massachusetts, trial courts have discretion to admit polygraph evidence, which is admissible only after a party can show the polygraph examiner is reliable through producing proficiency-exam results.

Also in Massachusetts, polygraph results played a significant role in the high-profile case of Louis Greco,



TAMARA N. HOLDER: She is currently challenging the results of a polygraph in a child abuse case.

one of four men wrongfully convicted and sentenced to die in 1968 for a mob-related murder.

Last year, Greco's estate was awarded \$28 million from the federal government over his wrongful conviction. *Limone v. U.S.*, No. 02cv10890-NG (D. Mass.). Greco, who had passed several lie detector tests, died in prison in 1995 and was posthumously exonerated in 2004.

Two weeks ago, the commonwealth of Massachusetts also paid \$500,000 to Greco's estate to settle another civil suit filed over the wrongful conviction. *Warner v. Commonwealth of Mass.*, No. CV2007-02365 (Suffolk Co., Mass., Super. Ct.).

Among the claims was that prosecutors wrongfully ignored several polygraph results.

"They not only ignored it, but argued against the test results....It was the whole case," said Boston attorney John Cavicchi, who for years fought for Greco's release and eventually filed civil suits over his conviction.

Cavicchi, a solo, is calling on courts to give polygraph results their due place in the courts. After all, he argues, the FBI uses them. The military uses them. And police departments all over the country use them.

"What is wrong with the courts?" Cavicchi said. "If the polygraph is so unreliable, then why are the taxpayers paying all this money for them?" **NLJ**



JOSHUA MARQUIS: He sees polygraphs as a useful monitoring tool, but the "science is not strong."