

# Polygraph Policy Model for Law Enforcement

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The intense nationwide controversy surrounding polygraph has caused use of the technique, including use by law enforcement, to be subject to intense scrutiny. A number of State legislatures,<sup>1</sup> as well as the Congress of the United States, have passed or are considering bills which impact on and/or could prohibit certain polygraph testing in the private sector.<sup>2</sup> Sentiment for removal of polygraph testing from the arsenal of investigative techniques available to law enforcement has been expressed recently in the media.<sup>3</sup> Also, the interest in polygraph generated by continuing media attention has heightened the vulnerability of policy administrators and polygraph examiners,<sup>4</sup> and even municipalities,<sup>5</sup> to civil/personnel liability actions from citizens who believe their rights were violated; that they were examined using unprofessional methods and procedures, or that they suffered emotional damage.<sup>6</sup>

To preclude legitimate criticism of a polygraph program and to promote the professional and ethical application of the technique, each law enforcement department which uses polygraph should have a well-structured, carefully

considered written policy for polygraph usage. That policy, when applied judiciously and uniformly, will do much to allay fears and charges of polygraph abuse and help prevent loss of the technique's availability by legislative action. It will also serve as a ready source of information for investigators and officials who might have questions concerning polygraph usage.

Incorporated into this article is a chart designed to assist law enforcement executives and managers in quickly identifying most, if not all, of the policy areas that should be addressed for various polygraph applications. If these policy areas, plus a few items which follow later in this article, are covered in a department's policy, and if supervisors and examiners adhere to the policies, use of polygraph will be reasonable, appropriate, and defensible.

The comments which follow describe certain aspects of the chart. Numbers appearing in the text correspond to the circled numbers on the chart. Remember that the chart sets out areas which should be addressed in departmental policy. However, suggested policies, examples, etc., contained herein are just that and should not be construed as necessarily the best or only policy which a department could or

should adopt.<sup>7</sup> The best policy for a particular department will depend on many factors and conditions operating within the department.

## GENERAL POLICY CONSIDERATIONS

### Approval Authority

① Departmental policy should specify which individuals in the agency are authorized to approve particular types of polygraph examinations. It is recommended that approval authorities be designated by title rather than by name to preclude having to change the policy document when a new incumbent is appointed to the position.

The rank/position level which is appropriate for approval authority will vary from department to department, depending on such factors as department size, structure, and the confidence the chief policy-making authority of the department has in the officers to exercise sound judgment and discretion in the use of polygraph. Examples of the level of authority which might be appropriate for various investigative applications are set forth in the chart. Because polygraph effectiveness is a function of how and when the technique is used in the

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***“...each law enforcement department which uses polygraph should have a well-structured, carefully considered written policy for polygraph usage.”***





Special Agent Furgerson

investigative process, it is critical that the approval authority be an experienced, mature investigator who has a proven record of investigative insight.

For particular routine polygraph applications, it may be preferable to authorize examinations by use of a standing order or as a matter of departmental policy. For example, if a department requires that all applicants be polygraphed, considerable administrative time will be saved by a standing order prescribing the conduct of the examinations and setting forth how and at what stage in an applicant's processing the examination is to be administered.

#### Approval Criteria

When authorizing an examination, the approval authority should:

- 1) Determine that investigation by other means has been as thorough as circumstances reasonably permit. Polygraph effectiveness and accuracy are greatest when relevant issues and the examinee's knowledge of the matter under investigation have been narrowly defined and well-defined.
- 2) Insure that the proposed examinee has been interviewed and that consistent with the circumstances of the case, the development of additional information by means of polygraph is essential and timely for further conduct of the investigation. Use of polygraph should *not* be a "last resort" effort to salvage a case. The decision as to when polygraph should be used in the investigative process must be based on individual case circum-

stances—weighing the exigencies of the situation against the improved capability of the technique to fully resolve issues resulting from greater investigative thoroughness.

- 3) Verify that there is reasonable cause to believe the person to be examined has knowledge of or was involved in the matter under investigation, or is withholding information relevant to the investigation. Dragnet-type screening of large numbers of suspects should be avoided.
- 4) Consideration should also be given to the following:
  - Age factor (a waiver must be obtained from a parent or guardian if a minor is examined);
  - Known physical or mental abnormalities;
  - Ensuring full security for an examinee in custody;
  - Ensuring pending prosecution is not jeopardized; and
  - Results of any prior polygraph examinations afforded the examinee.

Although he may not be the final "approval authority" for polygraph examinations, the examiner must make the ultimate determination concerning the suitability of an individual for polygraph testing. Persons who are not sufficiently sound physically or mentally should not be afforded a polygraph examination. Prior to testing, the person to be examined should have had adequate food and rest. The examinee should not, at the time of the examination, be under the adverse effects of alcohol, narcotics, drugs, stimulants, or sedatives. During the pretest interview, the examiner should determine whether the person to be examined is presently

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***"...the examiner must make the ultimate determination concerning the suitability of an individual for polygraph testing."***

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receiving or has in the past received medical or psychiatric treatment or consultation.

If the examinee exhibits symptoms of mental or physical fatigue, narcotics addiction or the influence of intoxicants, a mental disorder, etc., the polygraph examination should not be conducted. If, in the examiner's opinion, the condition would inhibit the individual's ability to respond or otherwise cause the individual to be an unfit candidate for examination.

A mental disorder could cause the examinee to lose contact with reality or become violent during the test, and an examinee experiencing physical discomfort, disabilities, or defects may suffer abnormal physiological reactions to the test. If the examiner has any doubt concerning the ability of an examinee to safely undergo examination, an opinion/statement should be obtained from the examinee's physician before proceeding with the test.

Finally, polygraph examinations should be given only to individuals who freely and without threat or coercion consent in writing to be examined and who cooperate with and follow the examiner's instructions during the examination process.

#### **Issues**

② Matters discussed with examinees during the polygraph interview and questions asked during the actual testing must be scrupulously limited to the matter under investigation and items strictly pertaining to the actual conduct of the examination. The examiner must avoid any suggestion of impropriety or appearance that any part of the examination process is being used to elicit unrelated personal information or to

satisfy the examiner's curiosity. Historically, the failure of examiners to exercise good judgment in the matters they discuss with examinees has been a primary source of criticism concerning polygraph.<sup>8</sup> It is important, therefore, that departmental policy identify those issues which are not to be addressed unless they are (in a particular case) directly relevant to the investigation. Religious beliefs or affiliations, beliefs and opinions regarding social matters (e.g., integration, abortion, unions, political preferences, etc.), and information concerning sexual opinions and practices are examples of areas which should be avoided.

#### **Use of Polygraph Examination Results**

③ Departmental policy should recognize that polygraph is not a perfect investigative process and that polygraph results, both examiner opinions following chart evaluation and (even) confessions and admissions obtained from examinees, are subject to error. Therefore, results should be considered in the context of a complete investigation. They should not be relied upon to the exclusion of other evidence or used as the sole means of resolving questions of verity. Absent prior stipulated agreement with a defendant and his counsel, polygraph examiner opinions as to truth or deception, based upon interpretation of polygraph charts, are not intended for use as evidence in criminal, civil, or administrative courts. Statements, admissions, confessions, etc., made by examinees during a polygraph examination are normally admissible.<sup>9</sup>

#### **TYPE INVESTIGATION**

There are basically five types of polygraph usage which are common in law enforcement and which should be

addressed from a policy standpoint, namely, applicant testing, internal investigations, criminal/law enforcement investigations, examinations conducted as a service to other agencies, and examinations of convicted subjects. If polygraph is not permitted in certain situations by a department, departmental policy should state this specifically. This will preclude the possibility of having an examination administered inadvertently contrary to the "intentions" of management. If certain types of examinations are conducted only on rare occasions or as an exception to general procedures, the written policy should be specific as to the situations wherein use of polygraph could be approved.

#### **APPLICANTS**

It has been well-documented that polygraph is highly useful in the applicant investigation process, and many law enforcement agencies use it routinely for such purposes.<sup>10</sup> During a recent survey of National Academy students at the FBI Academy, about 50 percent indicated that their departments used polygraph during the applicant investigation process. Its use is predicated on its value in helping to insure the suitability of applicants for law enforcement work (history of criminal or other disqualifying behavior as defined by department policy) and for verifying the accuracy and completeness of information furnished on application forms or statements of personal history or during interviews.<sup>11</sup> It is also believed polygraph serves as a useful deterrent to those seeking to penetrate law enforcement departments for untoward purposes.

④ Departmental policy should be clear as to which classes of applicants are, or may be, required to submit to

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***"Managers should be aware of polygraph limitations and use good judgment in evaluating and making investigative and personnel decisions based on polygraph findings."***

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pre-employment polygraph examinations. Employment application literature and application forms should specify if a polygraph examination will be, or may be, required during application processing and that the purpose of the examination will be to verify the accuracy and thoroughness of information furnished. While this procedure is useful in alerting applicants to the use of polygraph, it also insures uniform application of the technique and acts as a deterrent against the submission of false/incomplete information by applicants. If successful completion of a polygraph is a necessary prerequisite for employment according to departmental policy, all literature concerning employment opportunities should indicate this fact.

Those departments which do not use polygraph as a routine procedure during applicant processing may elect to use it only in those instances when questions concerning the applicant's suitability for employment arise during the background investigation. Polygraph can be very valuable when problems of conflicting information develop and other investigative techniques are ineffective in resolving the matter. Departments using polygraph in this manner should include language in their polygraph policy and/or hiring policy which clearly provides for the use of polygraph on a case-by-case basis as required to resolve background investigation issues.

Once a department decides to use polygraph as part of its applicant processing, policy should be established to define clearly the purpose of the examination and the specific issues to be addressed during polygraph testing. Great care should be exercised in this area to ensure that polygraph is used wisely.

Generally, it is preferable that polygraph be used only for those areas of interest which cannot be explored effectively by other means, e.g., thorough background investigation, appropriate records checks, and medical examinations and psychometric testing or psychiatric interviews.<sup>12</sup> This is consistent with the philosophy that polygraph should be a complement to, and not a substitute for, other investigative techniques, or in this case, for traditional personnel selection methods.

Questions concerning the applicant's basic honesty would be appropriate. As with polygraph examinations conducted for other purposes, questions used for applicant examinations must be reasonable and as unobtrusive as possible and should be such as would be appropriate in any personnel/applicant interview situation, or which could be asked on the department's personnel application form.

#### **INTERNAL INVESTIGATIONS**

Polygraph is often useful in investigations involving law enforcement agency personnel. The majority of these uses occur in situations set forth on the accompanying chart.

#### **Personnel Security/Integrity Program**

Polygraph is used by some departments to insure an employee's suitability for initial or continued assignment to selected special duties, e.g., vice, narcotics, intelligence, organized crime, etc.<sup>13</sup> It is essential that such examinations be administered under a consistent, uniform policy to demonstrate that fairness, not favoritism, is involved in these critical selections. The examination should be concerned only with the officer's freedom from "compromise" or some other type of coercive influence prior to and/or during the sensitive assignment.

#### **Criminal Investigation Involving Departmental Officer or Employee (Voluntary)**

If an officer or employee becomes involved as a subject or witness in a criminal investigation wherein prosecution is the objective, he or she should be treated the same as any other citizen, insofar as possible use of polygraph is concerned (given *only* if the employee freely volunteers to take the examination). This is necessary to protect the employee's constitutional rights and permit use of any statements or admissions made during the examination to be entered into evidence. In these situations, as in all other law enforcement applications, it is recommended that no adverse inference be drawn from a subject's refusal to submit to an examination. Adverse inferences *may* be drawn in administrative inquiries and internal investigations, but refusal to submit to examination in these situations *should not* constitute the sole basis for disciplinary action. (8)

#### **Internal Investigation/Administrative Inquiry (Required)**

Polygraph can be highly useful in investigations involving an employee's conduct where prosecution is not the ultimate objective. For reasons of fairness and to preclude allegations that polygraph is being used to coerce or intimidate an employee, or to otherwise single them out for "special treatment," departmental policy should specify those types of situations which could result in an employee being required to submit to a polygraph examination. It is best if the policy requires the existence of a substantial objective basis (not just a vague suspicion or intuition) to believe that the employee was involved in a serious violation of law or departmen-

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tal regulation. The types of forbidden activities or situations which might result in a requirement for a polygraph examination should be specified in the policy. Examples of such situations are set forth in the sidebar. ⑥

### Person Making Allegation

If a citizen or another departmental employee makes an allegation of misconduct against an employee, polygraph may be useful in determining if there is any substance to the allegation. Of course, if it is possible to establish the veracity of the allegation by other means, that course should be followed. But, as is often the case, when a serious allegation is made and other avenues for substantiating its truthfulness are not available, polygraph may be the only viable alternative.

While polygraph has potential application for testing both the accuser and the subject of the allegation, experience has demonstrated the advisability of testing the accuser first. Frequently, persons who are making spurious allegations out of revenge, jealousy, or for whatever motive will refuse to be tested or will admit during testing that the allegations were unfounded. When an accuser does consent to testing, the polygraph process is valuable in that it helps to narrow the issues and eliminate exaggerations and/or partial truths. Another reason for testing the accuser first is that it often permits resolution of the matter without having to unnecessarily subject a valued employee to an examination. It is unfortunate that there will be situations where examination of the employee will be the only viable means for the employee to demonstrate his innocence and clear his name. Yet, it is fortunate that there is a means.

It should be noted that just because a person making an allegation "fails" a polygraph examination, based upon the examiner's interpretation of the polygraph charts, the possibility still exists that there was an element of truth in the allegation. It is possible that an accuser, by either exaggerating the nature and extent of an employee's wrongdoing, or by lying about or denying personal involvement in the wrongdoing, may be found deceptive during the polygraph examination, while actually furnishing some truthful and accurate information about the employee's wrongdoing.

It is also possible that an accuser may honestly believe he is being factual in what he is reporting, and yet be totally mistaken. Because polygraph is only useful in determining the examinee's perception of the truth, and not actual or "ground truth" as polygraph researchers say, the accuser may clear the polygraph as "non-deceptive" with the result that the polygraph findings are misleading. Managers should be aware of polygraph limitations and use good judgment in evaluating and making investigative and personnel decisions based on polygraph findings. Because an element of uncertainty normally exists concerning polygraph chart interpretation and the exact nature of an examinee's psychophysiological responses to questions, it is always recommended that if at all possible, no decisions be made solely on the basis of an examiner's interpretation of polygraph charts.

### Examiner Selection in Internal Investigations

⑤ For obvious reasons, it is important that examiners chosen to work internal investigation cases be selected with special care. There should never be a compromise concerning the quality of the examiner selected for these types

of examinations. The examiner must have impeccable credentials as an examiner and be respected for his competence, integrity, and high ethical standards.

Objectivity and accuracy will be promoted and ethical considerations satisfied by use of an examiner who is not more than slightly acquainted with employees being tested. It is even preferable that examiners not know the accused employee or the person lodging the allegation.<sup>14</sup> To accomplish this, smaller departments may use an examiner from another department or agency,<sup>15</sup> or even to contract for the services of a commercial examiner.

To protect the confidentiality of internal investigations and prevent further embarrassment and extraneous psychological stress to an officer, consideration should be given to having the examination conducted at a site where the testing will not be apparent to fellow employees. Use of an offsite location, when needed, will prevent rumors and unnecessary damage to an employee's reputation.

### LAW ENFORCEMENT APPLICATION

The primary use of polygraph in the law enforcement community is for investigations of criminal violations. All the general policy considerations discussed above apply to these applications, including policy on approval authority and criteria, limitations on issues to be addressed, and use of polygraph results and examiner conclusions.

⑦ One area deserving special comment is the use of polygraph to verify information furnished by citizens and informants, especially those whose reliability has yet to be established or is

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**“...department policy should also include provisions for establishing that polygraph examinations were taken freely and voluntarily.”**

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suspect. Consideration should be given to establishing a policy that requires polygraph be considered prior to significant commitments of manpower or financial resources solely on the basis of unsubstantiated information furnished by citizens or informants. This can be especially useful in matters involving allegations against prominent individuals and public officials whose reputations could be unduly tarnished by the mere existence of an investigation. Frequently, the use of polygraph for such “verification” or “confirmation” purposes will disclose there is no basis for the allegations or that they were grossly exaggerated or distorted. In either case, valuable investigative time will have been saved and possible embarrassment to a citizen of the department will have been prevented.

An interesting application of polygraph is to aid in establishing “probable cause” where a warrant is sought and part or all of the basis for its issuance is predicated on information furnished by an informant or witness of unknown reliability.<sup>16</sup> Polygraph, in this situation, can add weight to the probable cause documentation.

In view of the inherently stressful nature of polygraph examinations, it is recommended that departmental policy prohibit the use of polygraph for the dragnet-type “screening” of large numbers of suspects in criminal investigations. Likewise, the use of polygraph as an expedient substitute for logical investigation by conventional methods should be forbidden. Limiting polygraph usage in this manner will do much to improve its effectiveness.<sup>17</sup>

#### **POLYGRAPH ASSISTANCE TO OTHER AGENCIES**

Occasionally, other departments, law enforcement and otherwise, may

request polygraph assistance for one of their investigations or in connection with some type of personnel action. There is generally no reason why the support should not be given, provided the requested examination meets the standards for approval set forth in the policy of the department furnishing the support.

In those situations where polygraph support for particular applications, e.g., applicant processing, is furnished on a routine basis, an interdepartmental memorandum of understanding is appropriate. It should describe the terms of the agreement and the responsibilities of each department.

For polygraph support requests of a nonroutine nature, it is useful for the requesting agency to formalize requests in writing on a case-by-case basis. Requests should set forth the nature of the investigation/inquiry and briefly describe the investigation conducted to that point. The polygraph examiner can be briefed on specific details by an official of the requesting agency most familiar with the case. The formal request should also specify the issue(s) to be addressed, any special precautions or instructions to be observed, and the type of examination report desired. The exact questions to be asked and their wording should be left to the discretion of the polygraph examiner.

When another department requests polygraph support for the first time, or when new requesting officials make their initial requests for support, they should be furnished a copy of the instructions in force at the examining agency so there will be no misunderstanding regarding the policy followed when conducting an examination. It would also be wise for the examiner to brief officials from the requesting agency concerning polygraph theory, limitations and capabilities, and evalua-

tion of polygraph results and examiner conclusions. A briefing is especially critical for noninvestigative agencies whose officials may have no basic understanding of the investigative process and the proper role of polygraph.

#### **POST-CONVICTION EXAMINATIONS**

⑨ Following their convictions, but prior to sentencing, the examination of defendants may be very useful. Examination results may legitimately influence sentencing and be helpful in a number of post-conviction investigative activities. Examples of particularly good uses of polygraph in post-conviction circumstances are contained in the sidebar.

The use of polygraph following a trial, however, should normally be limited to legitimate, continuing investigative interests. Except under the most compelling circumstances, such as when ordered by a judge, post-conviction examinations *should not* address issues such as the veracity or guilt of the defendant concerning the basic trial issue. Polygraph's proper role is not to usurp the function of the trial process. When polygraph is used as part of a plea or pre-sentencing agreement, the terms of the agreement should be carefully documented and approved by the judge, defense attorney, prosecutor, and the defendant.

#### **MISCELLANEOUS CONSIDERATIONS**

##### **Polygraph Consent Forms**

In addition to whatever method is used for advising examinees of their constitutional rights, department policy should also include provisions for establishing that polygraph examinations were taken freely and voluntarily. This

can probably best be accomplished with a preprinted form developed in cooperation with the department's legal counsel. Consultation with legal counsel is important to insure that all legal requirements, including pertinent judicial precedents from recent court decisions, have been satisfied. As a minimum, a polygraph consent form should establish that the examinee realizes that the examination is to be taken freely and voluntarily, that it will be discontinued at any time at the request of the examinee, and that the examinee may refuse to answer any particular question during the examination.

In designing a polygraph consent form (or a consent to interview with polygraph form, which may be a more appropriate name), it is also useful to include wording which indicates that the examinee is consenting to an "interview with polygraph" or that the polygraph examination is an interview process which includes the use of a polygraph instrument. The purpose is to preclude misunderstanding concerning the nature of the examination process, which includes pretest and post-test interview/interrogation phases as well as the actual testing phase. The component phases of the polygraph process are described adequately elsewhere.<sup>18</sup> What is critical to understand is that following indications of "deceptive" responses during the conduct of the testing phase, it is normal and proper for the examiner to attempt to determine the nature of any problems the examinee had in responding to the test questions. If sensible and adequate reasons for the observed reactions are given by the examinee, additional tests may be conducted to verify that the examinee has indeed been candid. The test-interview-retest process continues

until the examinee either tests non-deceptive or the examiner concludes that deception is the only apparent reason for the noted reactions to relevant questions. Under normal circumstances, there is no requirement that each retesting and/or interview phase be preceded by additional rights advisements. However, any deviation from normal circumstances, such as a significant delay between phases, should trigger consideration as to the advisability of reminding examinees of their constitutional rights.<sup>19</sup>

#### **Monitoring/Recording Polygraph Examinations**

While there is no absolute requirement that polygraph examinations must be monitored, experience has demonstrated that significant benefits may be derived from this practice. There are no appreciable drawbacks to such witnessing.

In attaching the polygraph components, examiners must make physical contact with examinees when placing components to their fingers, arms, and the breast area of their bodies. With female examinees, it is advisable to have a witness to this procedure to assure that the examiner's conduct was entirely proper.

When an examinee is believed to have been less than candid during polygraph testing, an attempt is normally made to elicit truth through questioning and persuasive reasoning. Confessions or incriminating admissions are often made by examinees as a result of this approach. These confessions and admissions are sometimes later retracted, changed, or denied. During the course of examinations, examinees also frequently make subtle, but significant, adjustments to previous statements made during the investigation. For these rea-

sons, it is highly useful to have the case officer present to witness the polygraph interview.

Experience has also taught that witnesses, while of great value, should not be physically present in the polygraph room during the examination process. The examiner must establish rapport with the examinee in an emotionally charged atmosphere. This can normally be accomplished best in a one-on-one situation with no one else present in the room. Further, deceptive examinees are more likely to tell the truth when confronted with examination results if the case officer, before whom the examinee has previously maintained a facade of truthfulness and cooperation during previous interviews, is not present. Being alone with the impartial and objective examiner presents an optimum opportunity for the examinee to be candid regarding the issue with minimal damage to his self-esteem and pride.

Necessary witnessing of examinations can generally take place free of outside interference or distraction by use of one-way windows and sound reproducing (monitoring) equipment. Some situations, however, involve space limitations and physical conditions which mitigate in favor of closed-circuit television for witnessing.

While, given certain conditions, it may be possible for witnessing/monitoring to be accomplished legally without the knowledge of examinees, there is generally no compelling reason why that practice would be advisable. Experience has shown that advising examinees of the presence of witnesses on monitoring devices prior to the examination has not inhibited or impacted adversely on the examination process.

**“...experience has demonstrated that significant benefits may be derived from [monitoring polygraph examinations].”**



*Witness observes polygraph examination through one-way window.*

The notification on witnessing/monitoring of examinations can be accomplished during execution of the advice of rights and polygraph consent process.

In establishing departmental policy, administrators should also consider whether polygraph examinations, or portions of the polygraph examination process, should be recorded. Occasionally, good judgment and/or circumstances, such as a court order, may dictate the advisability of or require recording. In most situations, however, the advantages which would accrue from recording (either audio or video or both) are available through routine witnessing/monitoring as recommended

herein, and yet have none of the disadvantages which may be associated with recording. As with any other interview or interrogation situation, many things are said which would be misleading when viewed only in the context of information captured on a recording. Depending on examiner competence and the availability of witnesses who have received special instruction, recording of the testing phase of the examination process could be beneficial by providing a method whereby use of physical countermeasures by the examinee might be better detected.

Therefore, with regard to witnessing/monitoring, it is recommended that absent circumstances which make it impossible or impracticable, polygraph examinations be witnessed as a matter

of policy, that such witnessing be accomplished by witnesses located outside the polygraph suite, and that all such witnessing be conducted with the prior knowledge of examinees. Policy should also specify that witnesses are to be limited to those with a legitimate interest in the investigation and/or those who will serve as government witnesses to the examination process. The recording of examinations may be advisable or required in some situations.

#### **Examiner Competence**

As examiner competence is of primary importance in the operation of a successful polygraph program, it is recommended that departments establish minimum (certification) standards for their examiners. The following are suggested:

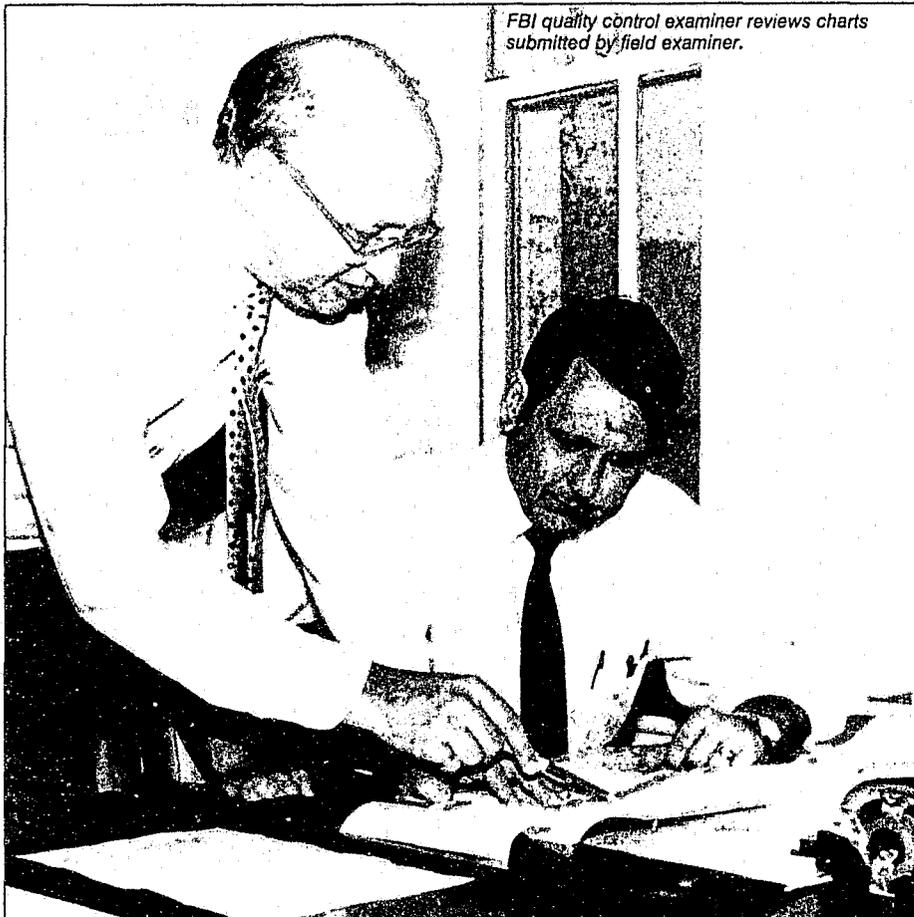
- Graduation from a reputable polygraph school (The American Polygraph Association accredits polygraph schools which adhere to prescribed curricula and instructor requirements);
- Participation in periodic retraining seminars/courses at established intervals—preferably not to exceed 2 years; and
- Conducting a minimum number of examinations annually (The FBI requires its examiners to conduct a minimum of 48 per year to retain certification).

#### **Quality Control**

Experience has shown the value of quality control as an integral part of law enforcement polygraph usage. In such a program, polygraph charts and documentation are reviewed “in the blind” by another senior and well-qualified ex-

*(continued p. 19)*

“...examiner competence is of primary importance in the operation of a successful polygraph program...”



aminer to insure that they substantiate the conclusion of the testing examiner as to truth or deception. Departments too small to establish their own quality control program may be able to avail themselves of such a program through cooperation with another department. If it is impossible to obtain a quality control review locally, charts and documentation from particular important cases may be submitted to the FBI for review. They should be sent to: **Director, Federal Bureau of Investigation, Attn: FBI Laboratory, Washington, DC 20535.**

#### Footnotes

<sup>1</sup>Norman Ansley, *Quick Reference Guide to Polygraph Admissibility, Licensing Laws, and Limiting Laws*, 11th ed. (Severna Park, MD: American Polygraph Association, 1987).

<sup>2</sup>H.R. 1524, "Employee Polygraph Protection Act," 99th Cong., 2d Sess. (1986) and S. 1815, "Polygraph Protection Act of 1985," 99th Cong., 1st Sess. (1985). If enacted these bills would prohibit private sector employers from administering polygraph examinations to employees or prospective employees.

<sup>3</sup>Paul Berg, "Plea for More Restraints on Use of Polygraph," *The Washington Post*, January 13, 1987, Health Sec., p. 25.

<sup>4</sup>42 U.S.C. sec. 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured on an action at law, suit in equity, or other proper proceeding for redress." For a discussion of constitutionally based civil litigation against law enforcement officers, see, Jeffrey Higgin-

botham, *Defending Law Enforcement Officers Against Personal Liability in Constitutional Tort Litigation*, *FBI Law Enforcement Bulletin*, vol. 54, No. 4, April 1985, pp. 24-31, & No. 5, May 1985, pp. 25-31.

<sup>5</sup>A municipality may also be named as a defendant in an action under 42 U.S.C. sec. 1983 charging a constitutional violation only where the individual law enforcement officer's conduct was the result of a custom, policy, or practice of the municipality. For a discussion of municipal liability arising from constitutional tort litigation, see, Daniel L. Schofield, "Law Enforcement and Government Liability: An Analysis of Recent Section 1983 Litigation," *FBI Law Enforcement Bulletin*, vol. 50, No. 1, January 1981, pp. 26-31.

<sup>6</sup>According to a "News-Lines" article, *U.S. News And World Report*, p. 77, April 1, 1985, "Polygraph tests can cause emotional damage, the Minnesota Court of Appeals declared in affirming a lower court's \$60,000 award against a bank. After deposits were missed, two tellers were asked to take lie detector tests. One began having nightmares in which the polygraph turned into an electric chair. She also was unable to work with money. Psychiatrists testified that the test had led to post-traumatic-stress syndrome...."

<sup>7</sup>For a comprehensive and instructive example of a polygraph program policy statement and implementing instructions, see, Department of Defense (DOD) Polygraph Program Directive, Number 5210.48, December 24, 1984, which established basic DOD policy for polygraph usage, and DOD Polygraph Program Regulation Number 5210.48-R, January 1985. The regulation, which implemented the polygraph policy, specifies the circumstances under which the polygraph may or shall be used, prescribes procedures for conducting examinations, and establishes standards for the selection, training, and supervision of DOD polygraph examiners. The directive and regulation were published in *Polygraph Law Reporter*, vol. 8, No. 1, March 1985, and No. 2, June 1985, respectively, Norman Ansley ed., (Severna Park, MD: American Polygraph Association). For another treatment of this subject area, see, Richard O. Arthur, "Recommended Law-Enforcement Polygraph Rules & Regulations," *The Journal of Polygraph Science*, vol. 21, No. 3, November-December 1986. The *Journal* is published by and available through the National Training Center of Lie Detection, Inc., 200 West 57th Street, New York, NY 10019.

<sup>8</sup>See, e.g., Stephen Budiansky, "Lie Detectors," *The Atlantic*, vol. 254, No. 4, October 1984, p. 40.

<sup>9</sup>James K. Murphy, "The Polygraph Technique—Past and Present," *FBI Law Enforcement Bulletin*, vol. 49, No. 6, June 1980, p. 4. Also, see, *Polygraph Law Reporter*, Norman Ansley ed., (Severna Park, MD: American Polygraph Association) for abstracts of Federal and State cases wherein issues related to admissibility of polygraph, or other forms of truth verification, are addressed.

<sup>10</sup>Billy Dickson, "Pre-Employment Polygraph Screening of Police Applicants," *FBI Law Enforcement Bulletin*, vol. 55, No. 4, April 1986, pp. 7-9.

<sup>11</sup>*The Accuracy and Utility of Polygraph Testing* (Washington, DC: Department of Defense, 1984), pp. 9-10. Also see, generally, David E. Nagle, "The Polygraph in Employment: Applications and Legal Considerations," *Polygraph*, vol. 14, No. 1, March 1985, pp. 1-33.

<sup>12</sup>Frank S. Horvath, "The Police Candidate Polygraph Examination: Considerations for the Police Administrator" *Police*, June 1972, pp. 33-38.

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<sup>13</sup>The value of requiring polygraphs for officers assigned to law enforcement intelligence units is pointed out in *Basic Elements of Intelligence: A Manual of Theory, Structure and Procedures for use by Law Enforcement Agencies Against Organized Crime*, E. Drexel Godfrey, Jr., Ph.D., and Don R. Harris, Ph.D., (Technical Assistance Division, Office of Criminal Justice Assistance, Law Enforcement Assistance Administration, U.S. Department of Justice, p. 97, 1971).

<sup>14</sup>Richard O. Arthur, "Should a Law-Enforcement Polygraphist Examine His Fellow Officers?—NO!" *The Journal of Polygraph Science*, vol. 9, No. 3, November-December 1974, pp. 3-4; cf., James C. Young, "Should a Law-Enforcement Polygraphist Examine His Fellow Officers?—YES!" *The Journal of Polygraph Science*, vol. 9, No. 3, November-December 1974, pp. 1-2.

<sup>15</sup>Melvin Kilbo, "Interagency Agreement," *FBI Law Enforcement Bulletin*, vol. 55, No. 5, May 1986, pp. 14-15.

<sup>16</sup>*Herlong v. State*, 236 Ga. 326, 223 S.E.2d 672 (1976). In this murder prosecution, it was ruled that the court did not err in admitting evidence that a witness had been given a lie detector test and that warrants were obtained for the defendant immediately thereafter; such testimony was admissible to explain the conduct of police officers.

<sup>17</sup>Supra note 15.

<sup>18</sup>*Scientific Validity of Polygraph Testing: A Research Review and Evaluation—A Technical Memorandum* (Washington, DC: U.S. Congress, Office of Technology Assessment, OTA-TM-H-15, November 1983), pp. 11-25. Also see, Stanley Abrams, *A Polygraph Handbook for Attorneys* (Lexington, MA: Lexington Books, 1977), pp. 69-97.

<sup>19</sup>While this additional advisement of rights may not be necessary, it may be useful in subsequent legal proceedings in showing that given the totality of the circumstances, there was a knowing and intelligent waiver as required under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). See *Vassar v. Solem*, 763 F.2d 975 (8th Cir. 1985) for the court's discussion on the voluntariness of confessions obtained following the testing phase of polygraph examinations. See also, *United States v. Eagle Elk*, 711 F.2d 80, 83 (8th Cir. 1983) cert. denied, —U.S.—, 104 S. Ct. 1015, 79 L.Ed.2d 245 (1984). This court held that the defendant had, prior to his polygraph examination, knowingly and intelligently waived his right to have counsel present at a post-polygraph interrogation.

**1 Approval:** When authorizing an examination the approving authority should determine that an investigation by other means has been as thorough as circumstances reasonably permit, recognizing that polygraph effectiveness and accuracy are greatest when relevant issues and the examinee's knowledge of the matter under investigation have been narrowly and well-defined. The proposed examinee should have been interviewed, and consistent with the circumstances of the case, the development of additional information by means of polygraph should be essential and timely for further conduct of the investigation or inquiry. There should be reasonable cause to believe that the person to be examined has knowledge of or was involved in the matter under inquiry or investigation, or is withholding information relevant to the inquiry of investigation. The following should be considered:

- a. Determine if age is a factor. If a minor is to be examined, ensure a waiver is obtained from a parent or guardian.
- b. Are there any known physical or mental abnormalities?
- c. If the examinee is in custody, can full security and control be assured?
- d. Will the use of polygraph jeopardize pending prosecution?
- e. What were the results of any prior polygraph examinations afforded the examinee?

Although not the final "Approval Authority" for polygraph examinations, the polygraph examiner must make the ultimate determination concerning the suitability of an individual for polygraph testing. Due to the nature of polygraph examinations, the following guidelines are appropriate:

- a. Persons who are not in sufficiently sound physical or mental condition will not be afforded a polygraph examination.
- b. A person to be examined should have had adequate food and rest before the examination. Examinee should not, at the time of the examination, be under the effects of alcohol, narcotics, drugs, stimulants, or sedatives. During the pretest interview, the examiner will specifically inquire of the person to be examined whether he/she is presently receiving or has in the past received medical or psychiatric treatment or consultation.

Polygraph examinations will not be conducted if, in the opinion of the examiner, any of the following inhibit the individual's ability to respond or otherwise cause the individual to be an unfit candidate for examination:

1. It is apparent that the examinee is mentally or physically fatigued.
  2. The examinee is unduly emotionally upset, intoxicated, or adversely under the influence of a sedative, stimulant, or tranquilizer.
  3. The examinee is determined to be addicted to narcotics.
  4. The examinee is known to have a mental disorder which causes the examinee to lose contact with reality or which would reasonably result in the examinee becoming violent during a test.
  5. The examinee is experiencing physical discomfort of significant magnitude or appears to possess disabilities or defects which, in themselves, might cause abnormal physiological reactions.
- d. If the examiner has any doubt concerning the ability of an examinee to safely undergo an examination, obtain an opinion/statement from the examinee's physician before proceeding with the test.

**2 Issues:** The following issues are not to be addressed unless directly relevant to the investigation or inquiry and then only in keeping with established departmental regulations/policy:

- a. Religious beliefs or affiliations;
- b. Beliefs and opinions regarding social matters;
- c. Information concerning sexual opinions and practices.

**3 Use of Examination Results:** Polygraph examinations are aimed at developing information which was unavailable prior to the examination (e.g., confessions, admissions against interests, the identification of false/exaggerated informant information, false exculpatory statements, false claims by alleged "victims," and the development of additional investigative avenues). Results are to be considered in the context of a complete inves-

igation. They are not to be relied on to the exclusion of other evidence or used as the sole means of resolving questions of verity. Polygraph examiner opinions as to truth or deception based upon interpretation of polygraph charts are not intended for use as evidence in criminal, civil, or administrative courts. Statements, admissions, confessions, etc., made by examinees during a polygraph examination are admissible.

**4** Employment application literature and forms should specify that accuracy and thoroughness of information furnished on the application are subject to verification by polygraph examination.

**5** Selection of a polygraph examiner to conduct examinations of department employees must be handled with special care to insure objectivity. Consideration may be given to using an examiner from another department who does not know the examinee. Also, if the site of the department's polygraph suite is near the examinee's work space and the fact that the employee was being tested would be readily apparent to the employee's peers and fellow employees, thereby unduly increasing the psychological stress on the employee, good judgment may dictate conducting the examination away from the employee's own office/precinct.

**6** The department must establish the existence of a substantial objective basis to suspect that the employee is involved in one or more of the following situations.

- a. The intentional and unauthorized release of sensitive, protected information (including, for example, the disclosure of information which is prohibited by law or regulation) with the reasonable expectation that it would ultimately be disclosed to those from whom the information is protected and would seriously and adversely affect a departmental function;
- b. Serious questions concerning an employee's relationship with or allegiance to an organized criminal element;
- c. The illegal or improper exercise of influence, coercive or otherwise, by an individual or group on an employee, which could reasonably be expected to

seriously affect or inhibit the employee in the impartial and effective performance of the employee's duties:

- d. The intentional and unauthorized destruction, mutilation, alteration, misplacement, taking, falsification, or other impairment of previously existing documents or evidence in the department's possession or control;
- e. Use or unauthorized dealing in controlled substances, as defined under the Comprehensive Drug Abuse and Controlled Substances Act of 1970, Title 21, United States Code, by department employees during the course of their employment; or
- f. The furnishing of false statements or the failure to candidly disclose information concerning prior criminal activities requested during the course of his/her employment processing.

**7** Use of polygraph should be considered prior to making significant commitments of manpower or financial resources solely on the basis of unsubstantiated information, particularly in sensitive investigations or when information which is to serve as case predication is not readily verifiable by other means.

**8** The fact that a subject/suspect was requested to submit to a polygraph examination and refused to do so should not be recorded in any type of investigative report in a manner which could reasonably be construed as prejudicial to the individual.

**9** Post-conviction continuing investigative interests include investigation to resolve issues that were not central to the issues adjudicated by the jury or court. Examples are:

- a. Perjury during trial;
- b. Defendant's compliance with plea bargaining arrangements/conditions;
- c. Accuracy and completeness of information furnished by cooperating witness; and
- d. Validity of extenuating and mitigating circumstances bearing on sentencing considerations.

# POLYGRAPH POLICY MATRIX

	TYPE INVESTIGATION	PREDICATION	APPROVAL AUTHORITY ①	CONSEQUENCE OF FAILURE TO TAKE OR COOPERATE DURING EXAM	ISSUES ②	USE OF POLYGRAPH EXAMINATION RESULTS ③	SPECIAL REQUIREMENTS & CONSIDERATIONS
APPLICANTS	APPLICANT (pre-employment examination) ④	NEED TO: • Insure suitability • Verify accuracy & completeness of info. on application • Resolve questions or conflicts arising during background investigation	Personnel Officer Administrative Officer Personnel Selection Board or Standing Order Policy	NO JOB a condition of employment	• Freedom from coercive forces • History of criminal or other disqualifying behavior • Accuracy and completeness of info on application form	One factor to be considered in SUITABILITY DETERMINATION	Scope of any "lifestyle" questions should be scrupulously limited to those areas of legitimate interest as defined by department policy
	PERSONNEL SECURITY/ INTEGRITY PROGRAM	NEED TO: insure employee's suitability for initial or continued assignment to selected special duties, e.g., vice, narcotics, intelligence, o.c., etc., as defined by department policy	Personnel Officer/ Administrative Officer/ Personnel Selection Board or Standing Order Policy	Denial of Participation in or removal from special duty or assignment	ISSUES PERTAINING TO SUITABILITY OF EMPLOYEE for assignment: 1) to particularly sensitive duty or freedom from "compromise" prior to or during assignment	One factor to be considered in SUITABILITY DETERMINATION	Exercise special care in selecting polygraph examiner ⑤
	DEPARTMENTAL OFFICER/EMPLOYEE (Voluntary)	INVESTIGATIVE NEED Same justification as for use in any investigation	Chief of Police Director of Public Safety Director Superintendent of State Police Highway Patrol State Bureau of Investigation	NONE The officer or employee should be treated the same as any other citizen whose submission to an examination is on a voluntary basis	Issues relevant to BASIC INVESTIGATIVE THRUST	INVESTIGATIVE DIRECTION	⑤
INTERNAL INVESTIGATIONS	DEPARTMENTAL OFFICER/EMPLOYEE (Required) Administrative Inquiries and Internal Investigations involving certain serious violations of law or policy	Substantial objective BASIS TO BELIEVE OFFICER/EMPLOYEE MAY BE WITHHOLDING INFORMATION relevant to the matter being investigated ⑥	Chief of Police Director of Public Safety Director of Internal Affairs Division Director Superintendent of State Police Highway Patrol State Bureau of Investigation	MAY DRAW ADVERSE INFERENCE (but may not constitute sole basis for disciplinary action)	Issues relevant to BASIC INQUIRY/INVESTIGATION	INVESTIGATIVE DIRECTION One factor considered in ADMINISTRATIVE/ DISCIPLINARY ACTION DETERMINATION	⑤
	PERSON MAKING ALLEGATION against officer/employee	INVESTIGATIVE NEED Same justification as for other types of investigation	Chief of Police Director of Public Safety Director of Internal Affairs Division Director Superintendent of State Police State Bureau of Investigation	FACTOR TO BE CONSIDERED	Issues relevant to BASIC INVESTIGATIVE THRUST	INVESTIGATIVE DIRECTION One factor considered in ADMINISTRATIVE/ DISCIPLINARY ACTION DETERMINATION	Select polygraph examiner with special care to insure objectivity. Possibly an examiner from another department who does not know officer/employee against whom allegation is directed
LAW ENFORCEMENT	LAW ENFORCEMENT MATTERS	INVESTIGATIVE/OPERATIONAL NEEDS ⑦	Division District Precinct Commanding Officer or Chief of Detectives	NONE ⑧	Issues relevant to BASIC INVESTIGATIVE THRUST	INVESTIGATIVE or OPERATIONAL DIRECTION	Dragnet-type screening of large numbers of suspects or use as a substitute for logical investigation by more conventional means prohibited
	ASSISTANCE TO OTHER AGENCIES/ Law Enforcement Departments	LEGITIMATE INVESTIGATIVE NEED when requested in accordance with conditions of interdepartmental agreements	Chief of Police Director of Public Safety or Standing Order Policy	Depends upon circumstances and reputations of requesting agency	Issues relevant to BASIC INVESTIGATIVE THRUST	REPORTED TO REQUESTING AGENCY for appropriate use	Be alert to requests for examinations of questionable propriety or raising political overtones or implications
POST CONVICTION	POST CONVICTION/ PRE-SENTENCING (continuing investigation)	Required in furtherance of continuing investigative interests ⑨	Division District Precinct Commanding Officer	MAY INFLUENCE PLEA AND SENTENCING Arrangement	LIMITED TO ISSUES WHICH PREDICATED EXAMINATION should not address issues adjudicated during judicial proceedings	May influence SENTENCING AND POST CONVICTION INVESTIGATIVE DIRECTION	If exam is conducted as part of a plea or pre-sentencing agreement terms of the agreement should be carefully documented and approved by the judge, defense attorney and prosecutor
	POST CONVICTION/ PRE-SENTENCING (Verdict Guilt of defendant concerning trial issue)	May be ORDERED/REQUESTED BY TRIAL JUDGE OR DEFENSE ATTORNEY	Chief of Police Director of Public Safety	MAY INFLUENCE POST TRIAL JUDICIAL DETERMINATIONS	Limited to SPECIFIED ISSUES	Possible factor in POST TRIAL JUDICIAL DETERMINATIONS	Polygraph should be used in this manner only under the most compelling of circumstances. Polygraph's proper role is not to usurp the function of the trial judge.