



Standard Guide for PDD Paired Testing¹

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1. Scope

1.1 This is a guide for the derivation of quantitative assessments of the credibility of proposed witness testimony through the application of established statistical principles to combinations of PDD examination results, and for the utilization of such assessments in the interests of justice (The Marin Protocol).

1.2 This guide describes circumstances in which proven statistical principles, applied to PDD results, can reliably quantify the trustworthiness or untrustworthiness of witness testimony, and

1.2.1 Delineates requirements necessary to effect the generation and practical use of such results, including:

1.2.1.1 Criteria regarding witnesses to be examined,

1.2.1.2 Criteria for determining facts upon which witnesses are to be examined,

1.2.1.3 Certification of examiners eligible to conduct examinations,

1.2.1.4 Combinations of results which support strong inferences, and

1.2.1.5 Appropriate uses to which strong inferences can be put.

1.3 Courts and others responsible for adjudicating questions of fact may choose whether and when to invoke paired PDD testing.

1.3.1 This guide expresses the rights and obligations of all participants in order to best serve the interests of justice when it is invoked.

1.3.2 Paired PDD testing must not be invoked in any case in any jurisdiction where to do so would violate the laws of that jurisdiction.

1.3.3 Adherence to these guidelines ensures that the conclusions reached will be valid.

1.4 This guide is directed to the proposed testimony of witnesses in criminal, civil, administrative and family court litigation, regarding factual claims, where

1.4.1 It is unlikely that the witnesses could be honestly mistaken, and

1.4.2 The facts in dispute are such that the case may hinge on whom the trier of fact believes; whenever,

1.4.3 Witnesses on opposite sides of a case offer contradictory testimony.

1.4.4 Two or more witnesses testifying for one side offer mutually corroborating testimony.

2. Referenced Documents

2.1 *ASTM Standards*:²

E2031 Practice for Quality Control of Psychophysiological Detection of Deception (Polygraph) Examinations

3. Significance and Use

3.1 The goal of this guide is to reduce the incidence and impact of perjured testimony in administrative proceedings and in the criminal, civil and family court systems.

3.2 It is a mathematically established statistical principle that the probability of two independent events both occurring is the algebraic product of the probabilities of either event occurring alone.³

3.3 In litigation, the situation frequently arises:

3.3.1 That witnesses from opposite sides offer diametrically contradictory testimony regarding a fact or facts, such that one must almost certainly be lying, and

3.3.2 That witnesses from one side corroborate each other's testimony, such that either both must be telling the truth, or both must be lying.

3.4 Where both witnesses are examined regarding a fact:

3.4.1 By PDD examiners who have personally established that the level of accuracy they are able to achieve meets or exceeds requirements established by the courts of the jurisdiction.

3.4.2 The results when taken together support a strong common inference about the respective deceptiveness of the subjects.

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² For referenced ASTM standards, visit the ASTM website, www.astm.org, or contact ASTM Customer Service at service@astm.org. For *Annual Book of ASTM Standards* volume information, refer to the standard's Document Summary page on the ASTM website.

³ Press, S.J., *Bayesian Statistics: Principles, Models, and Applications*, John Wiley & Sons: New York, 1989.

3.4.3 If the minimum accuracy is set at 86 %, the probability that the inference will be wrong is less than 2.00 %. If the minimum accuracy is set at 90 %, the probability that the inference will be wrong is no higher than 1.00 %.

3.5 When more than two witnesses are examined by such examiners about a fact and all results support a common inference about the deceptiveness of the subjects regarding that fact, the probability that the inference will be wrong is even lower, in accordance with the statistical principle.

3.6 The validity of this guide rests on evidence that competent examiners are personally capable of achieving sufficient accuracy.

3.6.1 Determination of examiners' competence must be based not primarily on their training, years of experience, or the number of tests they have conducted, but on their personally demonstrated capability of the participating examiners.

3.7 The conditions and procedures outlined in this guide shall be known as the "Marin Protocol," for the originator.⁴

4. Procedures

4.1 A litigant should be entitled, by offering to have his or her own witness(es) undergo polygraph examinations by certified examiner(s) regarding potentially dispositive facts, to request a ruling from the presiding judicial authority that the witness(es) from the opposing side who intend to offer contradictory testimony be examined by certified examiner(s) concerning those facts.

4.1.1 A fact should be deemed "potentially dispositive" if a finding in regard to it, in either direction, could be decisive to the verdict. For example, where the fact at issue is whether an item of evidence had been fabricated, then even though a finding that it had not been fabricated might not be decisive, the fact at issue would nevertheless be "potentially dispositive" if a finding that the item was genuine could be decisive.

4.1.2 An otherwise potentially dispositive fact may be adjudged to be not potentially dispositive if supervening irrefragable evidence such as videotape or forensic materials is available regarding that fact.

4.2 A party's offer must specify the facts on which each witness is to be examined.

4.2.1 Where a litigant offers to have any witnesses examined about a fact, that offer must apply to all witnesses of the litigant intending to testify about that fact.

4.2.2 To satisfy the statistical probability requirements, and to ensure perjured testimony is not offered by secondary witnesses, all witnesses from the opposing side who intend to testify about that fact must either undergo PDD examination, or refuse on the record to do so. The presiding officer should treat a refusal to undergo PDD examination in regard to a fact by any witness other than the defendant in a criminal proceeding as equivalent to a finding of deception.

4.2.3 Defendants in criminal proceedings should have the right to offer to undergo PDD examination pursuant to this protocol in regard to dispositive facts for the purpose of

excluding, impeaching or rebutting testimony by prosecution witnesses regarding those facts, without compromising their rights under the Fifth and Fourteenth Amendments or being obliged themselves to later testify regarding that fact.

4.2.4 Neither a finding of deceptiveness nor the refusal of a witness to be examined should be used in any proceeding for any purpose other than exclusion, impeachment or rebuttal of testimony.

4.2.5 The challenging attorneys are responsible to specify the fact or facts about which witnesses are to be examined.

4.2.6 The judge or presiding officer should exercise reasonable discretion to reject a request regarding a fact on the grounds that the fact is not potentially dispositive, or is not likely to be known to more than one witness, such as a person's state of mind.

4.2.7 The PDD examiners are responsible for the formulation of the actual wording of the questions.

4.3 Deterrents to Abuse:

4.3.1 Where examinations administered pursuant to this guide result in a determination of deceptiveness regarding one party's testimony, and a determination of non-deceptiveness in regard to the opposing witness, that party whose witness has been found deceptive shall ordinarily bear the costs of the PDD examinations and all other costs incurred in the application of the guide to those witnesses.

4.3.2 It is important to discourage the frivolous invocation of this guide, particularly in furtherance of false accusations of police misconduct such as coercion of confessions or planting of evidence. The court or presiding officer should advise the offering (accusing) party that if he or she is found deceptive and the accused law enforcement officer is found non-deceptive, the frivolous accuser may be subject to sanctions including referral of the incident for possible prosecution.

4.3.3 If a witness is deemed unsuitable or non cooperative for PDD testing by the polygraph examiner the Marin Protocol shall be null and void and without effect. The testing examiner shall specify the reason(s) for a decision of unsuitability or non cooperation.

4.3.4 Except in extraordinary circumstances, witnesses examined pursuant to a request under this protocol should be examined by different examiners. Insofar as practical, the examinations should be conducted simultaneously.

4.3.5 To prevent conflicts of interest and minimize the occurrence or appearance of impropriety, when a party's witness has been found deceptive or a witness of the opponent has been found non-deceptive by examinations conducted pursuant to this guide, the party or the court may request that the relevant videotapes and all other work products be submitted for a quality assurance review in compliance with Practice **E2031**.

4.3.5.1 When quality assurance process is initiated, the videotapes and all other work products shall be submitted through a disinterested intermediary to an independent, quality control reviewer, certified at an accuracy of at least 86 % for both deceptive and non-deceptive conclusive results.

4.3.5.2 When a reviewer believes that the materials warrant a result different from that of the original examiner, he shall state in writing the specific reasons for his objection, and his

⁴ Marin, J., "He said / She said: Polygraph evidence in court," *Polygraph*, Vol 29, No. 4, 2000, pp. 299-304.

opinion as to the correct result. The videotape and the charts shall then be submitted to two additional reviewers. If both of those reviewers agree with the original examiner, the examiner's conclusion shall stand as the official result. If both agree with the first reviewer, the reviewer's conclusion shall be the official result. Otherwise, the result shall be officially recorded as inconclusive. The new official result shall be treated for all purposes as if it were the unchallenged result of an original examiner.

4.3.5.3 When a reviewer believes that serious deviations from the norms of good practice of the methodology employed by the original examiner preclude a sound conclusion, he shall state in writing the specific reasons for his opinion. The videotape and the charts shall then be submitted to two additional reviewers. If both of those reviewers agree with the original examiner, the examiner's conclusion shall stand as the official result. Otherwise, the witness shall be retested by a different examiner.

5. Exclusionary Application

5.1 Either party may offer to have one or more of his witnesses undergo examination regarding dispositive facts, thereby challenging the witnesses from the opposing side intending to testify regarding those facts to do the same.

5.1.1 The offer should contain the stipulation that where either party's witness(es) test positive for deception in regard to any facts, and the opposing party's witness(es) test negative in regard to those facts, then the deceptive witness should not testify in regard to those facts at the discretion of the court.

5.2 The PDD results are not admitted into evidence before the finder of fact unless explicitly permitted by the court.

5.2.1 The examiners do not appear as experts before the finder of fact at trial.

5.3 Precedents and existing rules concerning the admissibility of polygraph results or the appearance of polygraph examiners as expert witnesses before the finder of fact, by stipulation of the parties or otherwise, are not affected and need not be modified.

5.4 Exclusion under this guide is an embodiment of the principle that courts should exclude untrustworthy, confusing and misleading evidence.

5.4.1 This exclusionary application of the guide is analogous to and shares the underlying rationale of established rules of evidence such as those regarding hearsay. It no more intrudes upon the province of the jury than do such rules, and unlike them is supported by a strong mathematical foundation quantifying the untrustworthiness of the evidence to be excluded.

5.4.2 This guide does not address and is not affected by the issue of the scientific basis of PDD or by the issue of the admissibility of PDD examination results as scientific evidence.

5.5 Under the Exclusionary Application of the Marin Protocol, if either party's witness(es) test positive for deception in regard to a fact or refuse to be examined about it, and the other party's witness(es) test negative in regard to that fact and none test positive, the refusing or deceptive party's witness(es)

should be excluded from testifying in regard to that fact at the discretion of the court.

5.5.1 If neither party requests testing of witnesses regarding a fact, the protocol does not apply regarding that fact. the protocol does not apply regarding that fact.

5.5.2 Unedited beginning-to-end videotapes of the examinations together with the charts and reports of the examiners and the reports of reviewers shall be made available to the judge or presiding official.

5.5.3 Witnesses should be subject to cross-examination as any other witnesses.

5.5.4 Under the Exclusionary Application, in no event shall either side be permitted to make any reference to the polygraph before the trier of fact, unless explicitly permitted to do so by the court.

5.6 Question-and-answer sequences concerning dispositive facts may be cited for the purpose of impeachment of a witness, so long as the citation does not reveal that the sequences occurred during a polygraph examination.

6. Admissibility Application: Impeachment and Rebuttal

6.1 Either party may offer to have one or more of his witnesses undergo examination regarding dispositive facts, thereby challenging the witnesses from the opposing side intending to testify regarding those facts to do the same.

6.1.1 The challenging party's offer shall stipulate that,

6.1.2 If a witness from either side tests non-deceptive regarding facts and a witness from the other side tests deceptive about those facts or refuses to undergo examination in respect to them, then

6.1.3 If the deceptive or refusing witness nevertheless offers testimony about those facts, then the polygraph results shall be admitted:

6.1.3.1 For purposes of impeachment and rebuttal:

(1) Supported by the testimony of the polygraph examiners, and

(2) Supported by testimony of such other witnesses as may be necessary to make clear to the finder of fact the rationale underlying inferences about the untrustworthiness of the testimony; including as necessary,

(3) The validity of Litigation Certificates, or

(4) The validity of the mathematical reasoning, or both.

6.2 Nothing about the polygraph may be introduced by either side in regard to testimony about facts where examinations have produced any other combination of results or about which neither party has requested testing.

6.2.1 Unedited beginning to end videotapes of the examinations together with the charts and reports of the examiners and the reports of reviewers shall be made available to the judge or presiding official.

6.3 If neither party requests testing of witnesses regarding a fact, or the examinations produce any other combination of results about a fact, then no testimony about the polygraph examinations shall be admissible regarding that fact.

7. Applications

7.1 Courts or presiding officials may initiate or utilize examinations conducted in accordance with this protocol:

7.1.1 In challenges to testimony supporting search and arrest warrants;

7.1.2 To assess the trustworthiness of witnesses offering alibi or other exculpatory testimony;

7.1.3 To assess the weight to be given to the word of informants whose trustworthiness is uncertain or those who may have conflicting interests;

7.1.4 To ascertain the good faith of litigants as a guide to the conduct of the case, including adjudication of motions and the negotiation of settlements; and

7.1.5 In requests for post-conviction relief, to assess the weight to be given to witness recantations and exculpatory confessions.

8. Certification

8.1 The statistical basis for the validity for this protocol depends upon the proven ability of each participating examiner to perform at a known level of accuracy. Consequently, only examiners who have personally demonstrated their level of accuracy shall be eligible to conduct examinations or conduct Quality Assurance reviews pursuant to it.

8.1.1 Examinations shall be conducted by persons holding a Contested Testimony Resolution Certificate, or its equivalent, from a competent certifying authority, based upon their having demonstrated their personal accuracy, and on their having met certain other criteria.

8.2 Examiners shall be eligible for certification upon completion of a supervised examination regimen conducted under the auspices of the courts or other entity of federal or state government, or an institution or organization designated as a Contested Testimony Resolution Certificate Issuance Authority or its equivalent by the American Polygraph Association, or the American Association of Police Polygraphists, or the American Bar Association,.

8.2.1 The examiner:

8.2.1.1 Has not been convicted of a felony or misdemeanor involving moral turpitude;

8.2.1.2 Has attained the age of 21 years; and

8.2.1.3 Has demonstrated competence in an established procedure or procedures by conducting complete examinations of subjects including pretest interview, question formulation, question presentation and the interpretable charts and data collection.

8.2.2 The examiner's competence in the correct administration of the procedure is affirmed by a panel of examiners after watching videotapes of the examiner conducting examinations.

8.2.3 The examiner shall analyze charts from an archive of at least 100 examinations where ground truth is known, obtaining:

8.2.3.1 Conclusive results for at least 80 % of the subjects, and

8.2.3.2 Correct results for 86 % of the conclusive results reported.

8.3 Certification of any examiner shall be limited to the procedure(s) used in obtaining the certificate.

8.4 A roster of certified examiners shall be made available to the courts.

8.4.1 Examiners may elect not to have their names placed on the roster. Examiners shall have a reasonable time after they are informed of their results in which to make such election.

9. Responsibilities of the Court

9.1 The courts of each jurisdiction should select examiners from the roster of Contested Testimony Resolution Certificate holders.

9.2 The court should require examination results to be accompanied by an unedited beginning-to-end videotape of the examination.

9.2.1 The videotapes, together with the charts and reports of the examiners and the reports of reviewers should be made part of the record or appellate and other purposes.

10. Keywords

10.1 Contested Testimony Resolution certificate; evidence; false statements; forensic psychophysiology; litigation; Marin Protocol; perjured testimony; perjury; polygraph; testimony; trustworthy testimony; untrustworthy testimony

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