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## Evidence - Lie Detector Tests - Prior Stipulation of Admissibility

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## EVIDENCE—LIE DETECTOR TESTS—PRIOR STIPULATION OF ADMISSIBILITY

The state appellate courts unanimously<sup>1</sup> and the federal courts<sup>2</sup> with but one exception<sup>3</sup> have held lie-detector test results inadmissible as evidence in criminal trials. Usually the test results are rejected under the rationale set forth in the leading case of *Frye v. United States*:<sup>4</sup> the test "has not yet gained such standing and scientific recognition" to justify its admission in the court room.<sup>5</sup>

Where a prior stipulation has been executed, however, the decisions are not unanimous; neither are they numerous. Two jurisdictions, California and Iowa, have admitted the results in evidence.<sup>6</sup> Wisconsin and New Mexico have rejected them.<sup>7</sup>

In *State v. Trimble*,<sup>8</sup> the defendant was charged with incest and voluntarily submitted to a lie-detector test, stipulating in writing prior to the test that the results could be admitted in evidence. At trial the results were admitted, but

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1. *State v. Bohner*, 210 Wis. 651, 246 N.W. 314 (1933), Annot., 86 A.L.R. 616 (1933); *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31 (1938), but see *People v. Kenny*, 167 Misc. 51, 3 N.Y.S.2d 348 (1938), decided a few months before the *Forte* case, allowing the admission of the test results in evidence, and not expressly overruled by *Forte*. *People v. Becker*, 300 Mich. 562, 2 N.W.2d 503 (1942), Annot., 134 A.L.R. 1174 (1942); *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43 (1945); *State v. Lowry*, 163 Kan. 622, 185 P.2d 147 (1947); *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949); *State v. Pusch*, 77 N.D. 860, 46 N.W.2d 508 (1950); *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495 (1951), Annot., 23 A.L.R.2d 1306 (1952); *Kaminski v. State*, 63 So.2d 339 (Fla. 1953); *People v. Carter*, 48 Cal.2d 737, 312 P.2d 665 (1957). Cases collected in 23 A.L.R.2d 1306 (1952). In New Mexico, the admission in evidence of the testimony of the examiner as to the operation of the machine has been held prejudicial error. *State v. Varos*, 69 N.M. 19, 363 P.2d 629 (1961). See also *Leeks v. State*, 95 Okla. Crim. 326, 245 P.2d 764 (1952); *People v. Aragon*, 154 Cal. App.2d 646, 316 P.2d 370 (2d Dist. 1957).

2. *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923), Annot., 34 A.L.R. 147 (1925); *Marks v. United States*, 260 F.2d 377 (10th Cir. 1958); *United States v. Stromberg*, 179 F. Supp. 278 (S.D.N.Y. 1959). See *United States ex rel. Sadowy v. Fay*, 284 F.2d 426 (2d Cir. 1960).

3. In *Tyler v. United States*, 193 F.2d 24 (D.C. Cir. 1951), the statement of a witness that he told the defendant that the lie-detector indicated the defendant was lying was admitted as evidence bearing upon the question whether the defendant's confession was voluntary.

4. 293 Fed. 1013 (D.C. Cir. 1923).

5. The device used in the *Frye* case to detect deception was a Marston "systolic blood pressure test." For a description of this device, see Marston, *Psychological Possibilities in the Deception Tests*, 11 J.Crim.L. 551 (1921).

6. California: *People v. Houser*, 85 Cal. App.2d 682, 193 P.2d 937 (4th Dist. 1948). Iowa: *State v. McNamara*, 104 N.W.2d 568 (Iowa 1960). For an excellent comment on the *McNamara* case, see 46 Iowa L. Rev. 651 (1961).

7. Wisconsin: *Le Fevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943). New Mexico: *State v. Trimble*, 68 N.M. 406, 362 P.2d 788 (1961).

8. 68 N.M. 406, 362 P.2d 788 (1961).

over the objection of the defense counsel. The New Mexico Supreme Court reversed on appeal. It held that even a signed waiver did not alter the Frye rule excluding lie-detector test results.<sup>9</sup>

It is questionable whether the Frye rationale is, today, a valid reason to exclude evidence obtained from a lie-detector test,<sup>10</sup> although there still seems

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9. The court quoted, *id.*, at 407, 362 P.2d at 789, from *Frye v. United States*, 293 Fed. 1013, 1014 (D.C.Cir. 1923),

We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from discovery, development, and experiments thus far made,

and then held that "the signing of a waiver did not alter the [Frye] rule with regard to the admissibility of . . . [the lie-detector] evidence," 68 N.M. at 408, 362 P.2d at 789. The court cited three cases in support of its holdings: *Le Fevre v. State*, 242 Wis. 416, 8 N.W.2d 288 (1943); *Marks v. United States*, 260 F.2d 377 (10th Cir. 1959); *Colbert v. Commonwealth*, 306 S.W.2d 825 (Ky. 1957). However, the *Le Fevre* case should not be authoritative when the examiner is present in court and testifies as to the results of the lie-detector test. See note 20, *infra*. And the latter two cases are not in point on the question of the admissibility of lie-detector test results where there has been a validly executed prior stipulation. In the *Marks* case there was no stipulation. In the *Colbert* case, the defendant orally agreed in open court to take a lie-detector test and to be bound by the result. The trial court admitted the results, but the court of appeals reversed, holding that a sufficient foundation had not been laid. The court did not approach the case as one involving a stipulation of "full admissibility," because "there was no written stipulation, but only an oral agreement to take the test and be bound by the results . . . [the] agreement was not entered of record at the time it was made," 306 S.W.2d 827. Compare the civil case of *Stone v. Earp*, 331 Mich. 606, 50 N.W.2d 172 (1951) where, during the trial, in the judge's chambers, and by direction of the judge, opposing counsels agreed to have their clients take a lie-detector test, the results to be used in evidence. The Michigan Supreme Court held the admission of the results in evidence to be error.

10. Accuracy of the test: See Inbau & Reid, *Lie Detection and Criminal Interrogation*, 110-12, 127 (3rd ed. 1955). This authority estimated the accuracy of the test, when applied under favorable conditions, to be 95%, with a 4% margin of indefinite determinations and a 1% margin of possible error. But see Levitt, *Scientific Evaluation of the "Lie-Detector"*, 40 Iowa L. Rev. 440, 450 (1955). Mr. Levitt says that Mr. Inbau's estimations are "too optimistic" because they are "based primarily on the large number of factors which can induce an erroneous interpretation of the polygraph record." Mr. Levitt himself gives some of these factors in his article, pp. 451-56. See note 14 *infra*, concerning these sources of error in interpretation.

Probative value: "Obviously the traditional explanation for exclusion of lie detector results [ *i.e.* scientific recognition] is contrary to the accepted doctrine that all facts having rational probative value are *prima facie* admissible, even though they tend only to a 'slight degree' to prove an issue before the court. . . . The sooner we recognize that even though our experiences with the lie detector indicate a very high degree of accuracy and probative value . . . and that the only rational basis for excluding such evidence is upon considerations of policy (perhaps a judicial fear of undue prejudice in the minds of the jury resulting from a lack of proper administrative standards for controlling the competency of the operator, the type of the machine used and the circumstances under which it is used), the sooner we can identify the real difficulty and guide our efforts toward setting up proper standards of control and permissible areas of evidentiary usefulness." Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 Vand. L. Rev. 385, 395-96 (1952).

to be no "scientific recognition" of the test among scientists.<sup>11</sup> Few opinions expressly recognize what seem to be the serious dangers inherent in admitting the test results,<sup>12</sup> namely, (1) the conclusive effect it may have upon the jury,<sup>13</sup>

11. There are no adequate statistics showing that the validity of the test for lie detection has "scientific recognition." But see Cureton, *A Consensus as to the Validity of Polygraph Procedures*, 22 *Tenn. L. Rev.* 728, 739-40 (1953), in which Mr. Cureton's survey regarding uses of the polygraph shows, indirectly, that the validity of the test for lie-detection is "recognized" by a substantial body of scientists (i.e., psychologists, examiners, psychologist-examiners). McCormick, in his book on *Evidence* §§ 170, 174 (1954), says that there need be only a "substantial body of scientific opinion" accepting the test, and citing Cureton, says there is this body of opinion:

General scientific acceptance is a proper condition upon the court's taking judicial notice of scientific facts, but not a criterion for admissibility of scientific evidence.

. . . Frequently the opinions seem to demand a universality of scientific approval, which as pointed out above, has no basis in the standard applied to other kinds of expert testimony in scientific matters. If we thus deflate the requirement to the normal standard which simply demands that the theory or device be accepted by a substantial body of scientific opinion, there can be little doubt that the lie-detector technique meets this requirement.

However, Professor Inbau, in response to a question whether there was "general acceptance" of the lie-detector test among today's scientists, answered the question in the negative:

As regards the "general acceptance of the test among scientists" . . . First of all, we would have to be specific about the meaning of the word "scientists." Even if we limit it to psychologists and physiologists, I think you will find that a large number of psychologists and physiologists just do not know enough about the technique and have not made sufficient inquiry to harbor an opinion. If by the word scientists you mean police science specialists, I think here again you would find that a considerable number of them would want to know who the polygraph examiner is before expressing a willingness to accept his conclusions. Perhaps all of this may add up to the fact that there is, at the present time, no general acceptance of the results among scientists. (Letter from Fred E. Inbau, Professor of Law, Northwestern University, to a staff member of the *Natural Resources Journal*, December 5, 1961.)

As long as no statistics or proof can be obtained showing a "substantial" body of scientific opinion which accepts the test as an accurate and reliable detector of deception, the courts will be able to exclude the test results on the grounds that no foundation was laid. See e.g., *State v. Cole*, 354 Mo. 181, 188 S.W.2d 43 (1945); *People v. Forte*, 279 N.Y. 204, 18 N.E.2d 31 (1938); *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949). See Comment, 6 *S.D.L. Rev.* 136, 146 (1961), on the *McNamara* case, where the writer says the test probably won't be accepted among scientists until the field of lie-detection becomes standardized (see note 14, *infra*).

12. In the cases in note 1, *supra*, the results were rejected primarily because there was no foundation laid showing recognition among scientists of the accuracy or reliability of the lie-detector. In some of the cases "escape" by the machine from cross examination was an important reason for rejection.

Other reasons given to exclude the test results, but which have not carried much weight with the majority of courts considering the issue are: (1) Due process: *Silving, Testing of the Unconscious Criminal Cases*, 69 *Harv. L. Rev.* 683 (1956). For a criticism of this theory, see Skolnick, *Scientific Theory and Scientific Evidence*, 70 *Yale L.J.* 694 (1961). See *United States ex rel. Sadowy v. Fay*, 284 F.2d 426 (2d Cir. 1960) where the court says that it is not a denial of due process to exclude lie-detector evidence. (2)

and (2) the effect of an erroneous interpretation by an examiner.<sup>14</sup> Yet where the parties understand these dangers, but nevertheless stipulate in writing to the admissibility of the test, there is little to justify exclusion of the test.<sup>15</sup> Parties may agree to waive the rules of evidence and stipulate that a fact may be proved

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Self-incrimination: See Silving, *supra* at 686; *People v. Schiers*, 160 Cal. App.2d 364, 329 P.2d 1 (1958) (dissenting opinion discussing thoroughly the issue of self-incrimination and citing authorities); but see Wicker, *The Polygraphic Truth Test and The Law of Evidence*, 22 Tenn. L. Rev. 711, 718 (1953); Sell, *Deception Detection and the Law*, 11 U. Pitt. L. Rev. 210, 224 (1950). (3) Cross-examination: See *State v. Lowry*, 163 Kan. 262, 185 P.2d 147 (1947): "But the machine itself—conceding the comparatively high percentage record as to accuracy and reliability claimed for it — escapes all cross examination." Accord, *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949); *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495 (1951). But see Sell, *supra* at 220. (4) Hearsay: See *United States v. Stromberg*, 179 F. Supp. 278 (S.D.N.Y. 1959); 33 Tul. L. Rev. 880, 884 (1959). (5) Substitute for jury deliberation: See *United States v. Stromberg*, *supra*; but see Wicker, *supra* at 724; 19 Ga. B.J. 90, 95 (1956). (6) One writer attacks the scientific basis of the lie detector: "The theory of the detector contains two fundamental assumptions: first, a regular relationship between lying and certain emotional states; second, a regular relationship between these emotional states and changes in the body.

"The scientific basis for lie detection is questionable. There seems to be little evidence that upholds the claim to a regular relationship between lying and emotion; there is even less to support the conclusion that precise inferences can be drawn from the relationship between emotional change and physiological response." Skolnick, *Scientific Theory and Scientific Evidence*, 70 Yale L.J. 695, 700 (1960).

13. "If lie-detector results were admitted as legal evidence they would be offered and treated of proof of some very important phase of the case, usually the validity of the entire claim or contention of one of the parties. There would then be a tendency on the part of many judges and juries to accord conclusive weight and significance to the test results." Inbau & Reid, *Lie Detection & Criminal Interrogation* (3rd ed. 1955), at 128.

14. An unqualified or biased examiner is probably the greatest danger attached to use of the lie-detector in trials. An unqualified examiner cannot accurately diagnose the factors that may affect the test results which are, *inter alia*: a subject's nervousness, physiological abnormalities, mental abnormalities, unresponsiveness, and ability to "beat" the machine. These factors are discussed by Inbau & Reid, *supra* note 13, at 64-99. Yet even where the examiner is qualified, these factors may cause the results of a test to be indefinite.

In addition, there are few qualified examiners in the field of lie-detection. "Although there are 300-400 persons who regularly give polygraph tests and examinations, leading professionals have admitted that not more than 10% are truly competent." Highleyman, *The Deceptive Certainty of the "Lie-Detector"*, 10 Hastings L.J. 47, 57 (1958). The suggested and desired remedy for incompetent diagnosis is standardization in the field of lie-detection, i.e., ". . . the formulation of adequate professional standards for polygraph experts and the promulgation of effective methods of enforcing these standards by professional discipline, court rules or statutes." Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 Tenn. L. Rev. 711, 727 (1953).

15. "There seems to be no substantial reason why an agreement and stipulation to admit lie-detector tests in evidence should not be upheld. The final decision, however, might well be left to the sound discretion of the trial court. If it should appear to the trial judge, therefore, that the circumstances of a particular case did not warrant such a procedure, or if he knew or had any reason to believe that the expert in the case was not properly qualified, he would have the discretionary right to ignore the agreement and

so long as the stipulation does not violate a rule of policy.<sup>16</sup> The question of the admissibility of lie-detector results over objection, where the defendant has signed a "proper"<sup>17</sup> stipulation, should be narrowed to whether possible prejudicial effect, or possible erroneous interpretation of the results are policy reasons strong enough to exclude the test. It would seem, however, that even these policy reasons should not override a stipulation where the defendant has been advised by counsel and has stipulated that the examiner is an expert.<sup>18</sup>

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stipulation and decline to accept the lie-detector evidence." Inbau & Reid, *supra* note 13, at 134.

See 1943 Wis. L. Rev. 430, 443; Harmon & Arthur, *The Utilization of the Reid Polygraph*, 2 *Crim. L. Rev.* 12, 16 (1955). But see Comment, 46 *Iowa L. Rev.* 651, 656 (1961) on the recent case of *State v. McNamara*, 104 N.W.2d 568 (Iowa 1960), in which the writer found it difficult to understand how the presence of a stipulation could cure the defects of prejudice and unreliability, the grounds upon which the McNamara court would probably have excluded the results in the absence of stipulation.

A stipulation cannot cure the defects of prejudice and unreliability, if the defendant is not cognizant of them when he signs the stipulation. However, where the defendant does recognize the effect that the introduction of the test results may have upon the jury, and also possibility of erroneous results, but he still signs the stipulation with advice of counsel, the policy reasons for excluding the test should not override the defendant's gamble (see notes 18 and 30, *infra*).

The defendant, then, should be fully aware of the dangers of prejudice, and the agreement should contain a stipulation that the examiner is an expert, that the test is taken voluntarily, and that the results may be used in evidence. It should be signed by the defendant, his counsel and the prosecuting attorney. For a suggested form of agreement and stipulation, see Inbau & Reid, *Lie Detection & Criminal Interrogation* (3rd ed. 1955), at 135.

16. 9 *Wigmore, Evidence* 2592, at 591 (3rd ed. 1940). The defendant may waive a hearsay objection and his privilege against self-incrimination, as well as any objection he may have that no foundation was laid showing scientific recognition.

17. "Proper" is here used to mean that the defendant signed a waiver with knowledge of the danger of prejudice and with belief that the examiner was competent.

18. Where a defendant and his counsel sign a stipulation, it should, perhaps, be assumed that the defendant has been made aware of the danger of prejudice. Where the parties stipulate that the examiner is an expert, this should not preclude the defendant from attacking the examiner's credibility, see note 30, *infra*, but it should be sufficient to waive any objection by the defendant as to the witness's competency. But even this assumption need not be made, since express statements of the defendant's knowledge can and perhaps should be made a part of the stipulation.

The lie-detector has probative value, as shown by Cureton's survey of scientific opinion, Cureton, *A Consensus as to the Validity of Polygraph Procedures*, 22 *Tenn. L. Rev.* 728 (1953); and see Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 *Vand. L. Rev.* 385, 395-96 (1952). The reliability of the test is supported by prominent experts in the field of lie-detection; its accuracy is supported by statistics. The defendant is able to see the device in use; he can learn the scientific bases behind its performance. The lie-detector is not a fortune teller's mystic ball, nor is a lie-detector examiner a mind-reader purporting to have extra-sensory perception. Neither the mystic ball, nor the field of extra-sensory perception enjoy even a small percentage of the "scientific acceptance" obtained by the lie-detector. Nor would the testimony of the fortune teller or the mind reader be allowed in evidence to prove deception, or non-deception. It is, of course, a question of degree as to just how much scientific recognition is required before the court will even allow the testimony concerning the deception device. But from

In two instances, the Trimble case and a Wisconsin case, *Le Fevre v. State*,<sup>19</sup> the test results were excluded even though there had been a prior written stipulation. In the *Le Fevre* case, the results were held inadmissible because the examiners were not in court to testify; only written reports were offered in evidence.<sup>20</sup> The court, in *Le Fevre*, cited an earlier Wisconsin case<sup>21</sup> to support its holding.<sup>22</sup> There had been no prior stipulation in the earlier case, and the results there were excluded under the *Frye* rationale.<sup>23</sup> In *Trimble* the defendant was illiterate; he was not represented by counsel when he signed the stipulation. Thus he had not been advised by counsel regarding the hazards involved in admitting the test. Upon these facts it is understandable why the court would not allow the admission of the results.<sup>24</sup> Both the *Trimble* and the *Le Fevre* cases illustrate two situations in which the test results are justifiably rejected despite the parties' prior stipulation of admissibility.<sup>25</sup>

The *Trimble* court, however, does not discuss the defendant's illiteracy and

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what available authorities have written, it has been shown that the lie-detector is sufficiently recognized to be admitted in evidence where the parties stipulate to its admissibility.

19. 242 Wis. 416, 8 N.W.2d 288 (1943).

20. [A] polygraph test report was excluded although the state and the defendant had stipulated that it could be used. However, the case seems to turn on the conception that admitting the report without putting the examiner on the witness stand was probably not within the contemplation of the parties to the stipulation and would violate the hearsay evidence rule." Wicker, *supra* note 14, at 722, n. 55. See 1943 Wis L. Rev. 430, 436-37.

21. *State v. Bohner*, 210 Wis. 651, 246 N.W. 314 (1933).

22. The evidence was excluded in three sentences, with no reasons given other than the citation of the *Bohner* case, *supra* note 21, as follows: "On the trial defendant offered the report and findings of Professor Mathews; also the report and findings of Haney and Keeler. On objection by the state, those parts of the reports containing the findings were excluded and did not get before the jury. They were properly excluded. *State v. Bohner*. . ." 242 Wis. at , 8 N.W.2d at 292 (1943).

One writer, however, believes the *Le Fevre* court would not have excluded the results if the examiners would have been present at trial to testify. See Comment, 1943 Wis. L. Rev. 430, 437-38, where the writer says: "It is difficult to believe that the court intended to lay down the rule that the doctrine of the *Bohner* case will govern, even though the parties enter into a stipulation before trial whereby they agree to admit the results of the tests." See also the opinion in *State v. Lowry*, 163 Kan. 622, 185 P.2d 147, 149, 151 (1947), from which it might be inferred that had there been a stipulation of admissibility the test results would not have been excluded.

23. The *Bohner* case, *supra* notes 21, 22, was the first to follow the *Frye* case in determining the lie-detector's admission in evidence. The Keeler Polygraph, a more advanced deception device than that used in the *Frye* case, was used in the *Bohner* case.

24. If the procedures of taking the test are conducted so that the defendant may not be aware of the dangers of prejudice and an inexperienced examiner then the court, at its discretion, should be able to exclude the results notwithstanding a prior agreement and stipulation. See the quote from *Inbau & Reid*, *supra* note 15.

25. Yet neither court gave reasons for their exclusion of the evidence beyond citing the *Frye* and *Bohner* cases. The appellate court precedents in the area of lie-detection have been "one of the hurdles inhibiting judicial acceptance of polygraph tests." Wicker, *The Polygraphic Truth Test and the Law of Evidence*, 22 Tenn. L. Rev. 711, 725 (1953).

lack of counsel, nor the bearing that those facts might have had upon its holding. The opinion is disturbing because it can be interpreted as laying down a general rule that lie-detector test results won't be admitted in evidence under any circumstances.<sup>26</sup> No mention is made of the California case, *People v. Houser*,<sup>27</sup> or the Iowa case, *State v. McNamara*,<sup>28</sup> where, in each case, lie-detector test results were admitted by reason of prior stipulations.<sup>29</sup>

Since the court did not mention any reasons for its holding other than the Frye rationale, a reasonable inference is that in New Mexico, even if there were a proper stipulation signed by the defendant, his counsel, and the prosecuting attorney, and a proper foundation laid, the court would not allow the results in evidence.

If the court again has occasion to consider the admissibility of lie-detector results based upon a prior stipulation of admissibility, it will probably be confronted with the Houser and McNamara cases; it will then be necessary for the court to make explicit its reasons for admitting, or excluding the results. If the court admits the results in a future case in which the defendant has waived his objection to admissibility, in order to mitigate the possibility of an unjust result perhaps the court will allow the defense to attack the reliability of the machine and the credibility of the examiner-witness, as well as entitle the defendant to a cautionary instruction concerning the weight to be given the lie-detector evidence.<sup>30</sup>

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26. The opinion in the case of *State v. Perlin*, 268 Wis. 529, 68 N.W.2d 32 (1955), decided twenty-two years after *State v. Bohner*, 210 Wis. 615, 246 N.W. 314 (1933) (see notes 19-21 supra and accompanying text), has been criticized for the same reason, i.e., that the court seems to lay down a rule barring the admissibility of lie-detector evidence under any circumstances. See 19 Ga. B. J. 90-91 (1956). The Perlin court said this: "Some argument is also made to the effect that the trial court improperly denied defendant's request for a lie detector test. . . . In any event, results of such a test are not evidence admissible upon trial." 268 Wis. at , 68 N.W.2d at 36 (1955).

27. 85 Cal. App.2d 682, 193 P.2d 937 (4th Dist. 1948), in which there was a prior stipulation signed by defendant and his counsel, that the examiner was an expert operator and interpreter and that the results could be admitted in evidence. The court, 193 P.2d at 942, said: "It would be difficult to hold that the defendant should now be permitted on this appeal to take advantage of any claim that such operator was not an expert and that as to the results of the test such evidence was inadmissible, merely because it happened to indicate that he was not telling the truth. . . ."

28. 104 N.W.2d 568 (Iowa 1960), in which the defendant signed a stipulation that she voluntarily submitted to the test and that the examiner could give his professional opinion as to the results of the test in court. The stipulation was signed by the defendant, her counsel, and a deputy sheriff.

29. This may not at all be the court's fault. The briefs on appeal did not mention the Houser or McNamara cases.

30. In a jurisdiction following the Houser and McNamara rules, a defendant who signs a prior stipulation of admissibility merely takes an unnecessary gamble. If the test results show that the defendant is truthful in denying his guilt, the prosecuting attorney will probably dismiss the case. If the test results show that the defendant is lying, however, he will be bound by his stipulation and must allow the results to follow



him into the court room. Thus in a jurisdiction allowing evidence of lie-detector test results upon stipulation it will be, in all probability, the rare case that a defendant would sign a prior stipulation; for if he signs no stipulation, and is shown to be truthful in denying his guilt, it is still likely that his case will be dismissed. On the other hand, if the test shows deception, the defendant will be able to enter the court room without the results of the test upon his back, with the hope of jury acquittal.

In that rare case, however, where a stipulation is signed prior to taking the test, the defendant ought to be allowed certain precautions at trial to guard against possible prejudices: (1) opportunity to extensively cross-examine the examiner concerning the functioning of the machine (to show the jury that no bells ring, no lights blink); (2) an instruction cautioning the jury not to give more weight to the examiner's testimony than they ". . . shall find it to be entitled. [That they] may disregard any such opinion, if [they] find it to be unreasonable." Cal. Jury Inst. (rev. ed. 1958), at 84. Further, although the defendant stipulates that the examiner was competent as an expert in lie-detection, and that the machine was in reliable working condition, perhaps the defense should still be allowed to attack the credibility of the examiner (his competency in operating the machine, i.e., the questions used, his interpretation of results, his schooling, etc.), and the reliability of the machine itself.