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Reexamining Polygraph Admissibility

*United States v. Piccinonna*¹

*Underwood v. Colonial Penn Insurance Co.*²

For over fifty years, various forms of polygraph evidence have not been admissible into evidence.³ While courts occasionally have flirted with greater admissibility,⁴ the general rule today is that expert testimony on polygraph examinations is not admissible. Even courts which do allow expert polygraph testimony severely restrict its admissibility. Admissibility often is subject to the sound discretion of the trial court.⁵ Despite criticisms that polygraph testing has been validated scientifically and that other forms of scientific evidence pose the same problems, courts have been reluctant to sanction the use of any evidence concerning polygraph testing.⁶ Two recent federal cases shed new light on the topic, illustrating slight modifications in the judiciary's attitude towards the admissibility of this category of evidence.

Recently, the Eleventh and Eighth Circuits, respectively, reviewed the rules of evidence as applied to polygraph⁷ evidence in *United States v. Piccinonna*⁸ and *Underwood v. Colonial Penn Insurance Co.*⁹ While both courts held in favor of greater admissibility of polygraph evidence, neither held that polygraph evidence should be admissible under the same standards as other scientific evidence. Instead, the courts established intermediate approaches to the admissibility of polygraph evidence. It is beyond the scope of this Note to attempt to address the reliability of polygraph evidence. Instead, this Note considers the different rules for admissibility set forth in these two cases and presents a critical look at these intermediate standards.

¹. 885 F.2d 1529 (11th Cir. 1989).
². 888 F.2d 588 (8th Cir. 1989).
³. See *infra* text accompanying notes 51-77.
⁵. See *infra* text accompanying notes 71-73.
⁷. The polygraph is often referred to in lay terms as the lie-detector.
⁸. 885 F.2d 1529 (11th Cir. 1989).
⁹. 888 F.2d 588 (8th Cir. 1989).
I. FACTS AND HOLDING

Piccinonna and Underwood present interesting contexts in which to reexamine polygraph admissibility because they illustrate the variety of situations in which the question may arise. The factual differences in the cases are striking. One is a criminal case; one is a civil action. In one, the polygraph test had been administered before trial. In the other, no polygraph exam was given. While in both suits the polygraph evidence was offered by the defendant, one case involved the use of the evidence to exculpate the defendant, and in the other case the defendant offered the evidence to inculpate the plaintiff as an arsonist. Thus, there is a contrast in the defensive and offensive uses of polygraph evidence. More striking, however, is the way in which the courts chose to deal with greater polygraph admissibility.

A. United States v. Piccinonna

In United States v. Piccinonna, Julio Piccinonna appealed his conviction on two counts of perjury. Piccinonna claimed that the trial court erred in not admitting the testimony of a polygraph expert and the results of a polygraph examination. The Eleventh Circuit remanded the case for a determination of admissibility according to the new rules provided by the opinion.

Piccinonna arose out of an investigation by a grand jury into alleged antitrust violations in the South Florida garbage industry. Piccinonna worked in the waste disposal business, and received a grant of immunity for his testimony on the antitrust violations. The grant did not protect him from a perjury prosecution. "Piccinonna testified that he had not heard of the agreement between garbage companies to refrain from soliciting each other's accounts and to compensate each other for taking accounts," but several witnesses' testimony implied that Piccinonna was a part of the agreement. This led to Piccinonna's indictment for four counts of perjury.

10. 885 F.2d 1529 (11th Cir. 1989).
12. Piccinonna, 885 F.2d at 1530.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
Before trial, the government refused to stipulate about the admissibility of a polygraph expert’s testimony or the results of a polygraph test.18 Nevertheless, Piccinonna took a polygraph test from a licensed examiner and claimed that the examiner’s report proved that Piccinonna did not lie before the grand jury.19 On Piccinonna’s motion, the district court held a hearing on the admissibility of the polygraph evidence.20 The court held that the per se exclusionary rule on polygraph evidence required exclusion of the evidence.21 The court, however, allowed Piccinonna, after his conviction, to perfect the record for appeal by including the polygraph examination report in the event that the Eleventh Circuit wished to reevaluate its rule regarding polygraphic evidence.22

On appeal, the Eleventh Circuit created the following standards for polygraph evidence admissibility: —subject to Federal Rules of Evidence 40123 and 40324 and the rules covering expert testimony25—

(1) where the parties stipulate in advance as to the circumstances and scope of admissibility of polygraph evidence, then the judge shall admit such evidence;

(2) even without stipulation, polygraph evidence may be used to impeach or corroborate a witness where

(a) a party gives notice that it intends to use polygraph evidence,

18. Id. As will be discussed later, stipulation by the parties before a polygraph examination is administered as to its admissibility is one of the few widely recognized exceptions to the rule that polygraph evidence is not admissible.

19. Id.

20. Id.

21. Id.

22. Id. at 1530-31. The record on appeal included the report of the polygraph examination and the transcript of an evidentiary hearing in another case. Id. at 1531.

23. Federal Rule of Evidence 401 provides:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401.

24. Federal Rule of Evidence 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

(b) the opposing party has an opportunity to administer its own polygraph examination, and
(c) the requirements for admissibility under the Federal Rules of Evidence are met for impeachment or corroboration testimony, then the judge shall admit such evidence at his or her discretion.26

B. Underwood v. Colonial Penn Insurance Co.27

In April of 1986, Rudolph W. Underwood purchased a homeowner’s insurance policy with the defendant, Colonial Penn Insurance Company.28 Colonial later cancelled the policy.29 While Underwood received notice of the cancellation on June 2, 1986, the effective date of cancellation was June 23, 1986.30 Underwood also had a renter’s insurance policy with American General Insurance Company covering the same house.31

On May 13, 1986, Underwood reported to American General and to the police that electronic equipment had been stolen from his home.32 A deputy sheriff went to Underwood’s home on June 12, 1986, to investigate the report.33 Later that day, Underwood’s home was completely destroyed by fire.34 Colonial refused to pay Underwood’s claim for the fire loss, and Underwood sued.35

Underwood testified that he told the deputy sheriff that "he would cooperate in the theft investigation."36 On cross-examination, the defense sought to introduce evidence that Underwood was uncooperative37 and that he refused to take a polygraph examination.38 Underwood moved for a

26. Piccinonna, 885 F.2d at 1536.
27. 888 F.2d 588 (8th Cir. 1989).
28. Id. at 589.
29. Id.
30. Id. On June 8, 1986, Underwood responded by taking out an insurance policy with Prudential Property and Casualty Insurance Company. Prudential paid Underwood’s claim for the loss of his home on June 12, 1986. Prudential intervened in the original suit and appealed to maintain its ability to intervene if Underwood was successful in his claim. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
37. Indeed, the language allegedly used by Underwood was profane and hostile. Id.
38. Id.
The motion was denied, and the court admitted the evidence concerning Underwood's refusal to submit to a polygraph examination. The trial court stated four reasons for admitting the evidence of Underwood's refusal to take a polygraph examination. First, the evidence was admissible "under Federal Rule of Evidence 404(b) as proof of motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake." Second, the evidence could be used to impeach Underwood. Third, defense counsel "inadvertently injected" Underwood's refusal to submit to an exam. Fourth, the trial court found "the probative value outweighed any prejudicial effect."

The jury returned a verdict for Colonial, and the court denied Underwood's motion for a new trial. On appeal, the Eighth Circuit held: (1) the evidence was admissible "under Federal Rule of Evidence 404(b) to show motive, plan, scheme, [or] design[;]" and (2) the evidence was admissible to impeach Underwood's credibility because of (a) Federal Rule of Evidence 613; (b) Federal Rule of Evidence 801(d)(2); or (c) to impeach "Underwood's credibility by contradiction." In addition, the court found Federal Rule of Evidence 403 satisfied; the probative value of the refusal to take the polygraph exam outweighed any unfair prejudice. The court specifically limited its holding to the facts presented. Because the evidence of Underwood's refusal to take a polygraph exam was "admissible to show motive and to impeach", the trial court did not abuse its discretion in denying Underwood's motions, and the Eighth Circuit affirmed.

39. Id. The court had instructed defense counsel "not to mention Underwood's refusal to take the polygraph test until the court had an opportunity to research Arkansas law on the admission of polygraphs." Id.
40. Id. at 589-90.
41. Id. at 590.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id. The court specifically stated that the evidence was "not offered as substantive evidence." Id.
47. Id. at 591.
48. Id.
49. Id.
50. Id.
II. LEGAL BACKGROUND

_Frye v. United States_51 was the first reported case on the question of admissibility of polygraph evidence.52 The _Frye_ court, while acknowledging the need for expert testimony to aid the jury in understanding matters beyond "common experience or common knowledge,"53 distinguished between "experimental and demonstrable stages" of scientific endeavors.54 To admit expert scientific testimony, the court held that the testimony must be based upon scientific principles which "have gained general acceptance in the particular field in which it belongs."55 The court held that the systolic blood pressure test involved in _Frye_ did not meet this requirement.56

_Frye_ was the basis for excluding polygraph evidence for fifty years.57 Increasingly, courts have criticized application of the _Frye_ standard for the exclusion of polygraph evidence.58 "[T]he courts excluding polygraph results almost invariably rely on three grounds for ruling polygraph evidence inadmissible: unreliability, lack of sufficient examiner or technique standards, and undue impact on the jury."59 Scholars have widely debated the continuing validity of these criticisms.60 Reliability and validity go to the very heart of the polygraph debate; these issues question the assumptions on which polygraph is based and its accuracy.61 The lack of examiner and technique standards "is premised on the objection that the integrity of a polygraph

51. 293 F. 1013 (D.C. Cir. 1923).


53. _Frye_, 293 F. at 1014.

54. _Id._

55. _Id._ The burden of proof as to the general acceptance of the principle or technique in the scientific community is on the proponent of the evidence. _Piccinonna_, 885 F.2d at 1531 (citing MCCORMICK ON EVIDENCE § 203 (3d ed. 1984)).

56. _Frye_, 293 F. at 1014.

57. _Piccinonna_, 885 F.2d at 1531 n.4; _Sevilla_, _supra_ note 4, at 7.

58. _Piccinonna_, 885 F.2d at 1532; MCCORMICK, _supra_ note 55, at 628.

59. _Sevilla_, _supra_ note 4, at 16. See also _Piccinonna_, 885 F.2d at 1532.

60. The scope of this Note is much too limited to deal with the various contentions raised. For the discussion in the _Piccinonna_ case, see _Piccinonna_, 885 F.2d at 1532-33, 1537-41. See generally _Sevilla_, _supra_ note 4, at 16-25.

61. See, e.g., _Piccinonna_, 885 F.2d at 1538-41. For a brief treatment of how the polygraph works, see Note, _Banning the Truth-Finder in Employment: The Employee Polygraph Protection Act of 1988_, 54 Mo. L. REV. 155, 156-62 (1989). For a synopsis of the attacks on reliability and validity, see _Piccinonna_, 885 F.2d at 1537-41 (Johnson, J., concurring in part and dissenting in part); see also MCCORMICK, _supra_ note 55, at 626-27.
examination depends almost entirely on [the] experience and competence of the examiner."62 The objection to polygraph evidence as having too great an influence upon the jury is based on a fear that the jury will attach too great an importance to the "scientific" finding of the polygraph examiner.63 "When polygraph evidence is offered in evidence at trial, it is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi."64 Consistent with the differing opinions of the commentators, the courts have developed varying standards of admissibility.

There are now three general approaches to the admissibility of polygraph evidence.65 The "traditional approach" excludes all polygraph evidence whether offered as substantive evidence, for impeachment, or for corroboration.66 According to the Piccinonna court, the Fourth, Fifth, and District of Columbia Circuits follow this approach.67

A second approach admits polygraph evidence in the judge's discretion where the parties have stipulated to admissibility before the exam is administered.68 The Eighth Circuit generally follows this approach.69 The Eighth Circuit, however, seems willing to permit polygraph evidence in other situations as well.70

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62. Sevilla, supra note 4, at 18. For states with licensing requirements for polygraph examiners, see Annotation, Validity and Construction of Statutes Licensing or Otherwise Regulating Operators of Polygraph or Similar Devices, 32 A.L.R. 3d 1324 (1970 & Supp. 1990). See also Sevilla, supra note 4, at 19 nn. 54-55 (objections and citations concerning polygraph standards) (impact of state licensing statutes).


64. Sevilla, supra note 4, at 16-17 (citing United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975)).

65. Piccinonna, 885 F.2d at 1533; MCCORMICK, supra note 55, at 628.

66. Piccinonna, 885 F.2d at 1533; MCCORMICK, supra note 55, at 628.

67. Piccinonna, 885 F.2d at 1534. The court notes that these circuits have occasionally suggested a more liberal approach but have always continued with the per se exclusion rule. For example, in United States v. Clark, 622 F.2d 917 (5th Cir. 1980), cert. denied, 449 U.S. 1128 (1981), twelve concurring judges expressed their willingness to reconsider the per se rule once an appropriate case arises. Piccinonna, 885 F.2d at 1534; see also MCCORMICK, supra note 55, at 628.

68. Piccinonna, 885 F.2d at 1533; MCCORMICK, supra note 55, at 628-29.

69. Piccinonna, 885 F.2d at 1534. See Anderson v. United States, 788 F.2d 517, 519 (8th Cir. 1986); United States v. Alexander, 526 F.2d 161, 166 (8th Cir. 1975).

70. Piccinonna, 885 F.2d at 1534. See United States v. Yeo, 739 F.2d 385, 388 (8th Cir. 1984) (government allowed to call polygraph expert where offered to rebut evidence responsive to defendant's testimony); United States v. Oliver, 525 F.2d 731,
The third approach allows admission of polygraph evidence in the discretion of the court where special circumstances are present, without requiring stipulation between the parties. The Third, Sixth, Seventh, Ninth, and Tenth Circuits, and the Court of Military Appeals all follow this approach, although the circumstances required for admission vary. Some of these circumstances include allowing polygraph evidence to rebut the defendant’s claim that his confession was procured through coercion, to explain why a police investigation was not conducted more thoroughly after the defendant had failed a polygraph test, and to show that a polygraph exam was administered when that fact is relevant in itself.

Thus, the courts have fashioned several approaches to polygraph evidence. These approaches vary from the general rule for expert scientific evidence, Federal Rule of Evidence 702. Some commentators, including McCormick, have stated that polygraph evidence should be treated the same as other scientific evidence for purposes of admissibility, with Rule 403 providing sufficient safeguards. As stated in McCormick, "[a] great deal of lay testimony routinely admitted is at least as unreliable and inaccurate, and other forms of scientific evidence involve risks of instrumental or judgmental error." Despite such criticisms, the courts have retained a cautious approach to polygraph admissibility based on the three principal concerns of unreliability, lack of standardization, and undue jury influence.

736 (8th Cir. 1975) (discretionary rather than per se rule applied where parties stipulated to use of exam results).
71. Piccinonna, 885 F.2d at 1533-34; MCCORMICK, supra note 55, at 629.
72. Piccinonna, 885 F.2d at 1535.
73. Id. (citations omitted).
74. Federal Rule of Evidence 702 provides:
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
FED. R. EVID. 702.
75. MCCORMICK, supra note 55, § 203. See also Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 VAND. L. REV. 385, 396 (1952).
76. See FED. R. EVID. 403.
77. MCCORMICK, supra note 55, at 629.
III. THE INSTANT DECISION

A. United States v. Piccinonna

After reviewing traditional objections to the admissibility of polygraph evidence and the approaches taken by the several circuits, the Eleventh Circuit specifically rejected the *per se* exclusion rule\(^78\) and developed new standards for admissibility. The court gave three reasons why it was abandoning the *per se* rule.\(^79\) First, the court cited the great technological advances in the field of polygraph.\(^80\) Second, polygraph testing has received "increasingly widespread acceptance as a useful and reliable scientific tool."\(^81\) Third, the court found no convincing evidence that juries are unduly influenced by polygraph evidence.\(^82\) The dissenting judge challenged each of these reasons.\(^83\)

The dissent maintained that polygraph evidence has not overcome the *Frye* "general acceptance" standard\(^84\) asserting the three traditional objections to polygraph evidence.\(^85\) The dissent concluded that polygraph evidence should be inadmissible under Rules 702\(^86\) and 608\(^87\) because the use of polygraph evidence under these rules does not eliminate the concerns expressed in Rule 403.\(^88\)

The majority was not sufficiently convinced by its three reasons for expanded admissibility to hold that all polygraph evidence is admissible. Because polygraph "is a developing and inexact science," the court found that it would be "inappropriate to allow the admission of polygraph evidence in all situations in which more proven types of expert testimony are allowed."\(^89\)

\(^78\). "[T]he Frye general acceptance test does not act as a bar to admission of polygraph evidence as a matter of law." *Piccinonna*, 885 F.2d at 1536.

\(^79\). *Id.* at 1535.

\(^80\). *Id.*

\(^81\). *Id.*

\(^82\). *Id.*

\(^83\). *Id.* at 1537-42.

\(^84\). *Id.* at 1537.

\(^85\). *Id.* at 1538-41. For the three traditional objections, see *supra* text accompanying notes 57-63.

\(^86\). See *supra* note 74 for the text of Federal Rule of Evidence 702.

\(^87\). *Piccinonna*, 885 F.2d at 1542.

\(^88\). *Id.* at 1541.

\(^89\). *Id.* at 1535. The court then stated: "However, as Justice Potter Stewart wrote, 'any rule of law that impedes the discovery of truth in a court of law impedes as well the doing of justice.'" *Id.* (citing Hawkins v. United States, 358 U.S. 74, 81 (1958) (Stewart, J., concurring)).
The court adopted a balancing approach in which it would compare "the need to admit all relevant and reliable evidence" with the danger of unfair prejudice.90 The court found two instances in which the balance favored admissibility of polygraph evidence.91

In both situations, the trial courts in the Eleventh Circuit continue to apply the Federal Rules of Evidence to polygraph evidence.92 Specifically, the judge is to apply Rules 401, 403, and 702. The court stated that the trial judge has wide discretion in excluding polygraph expert testimony.93 Reasons to exclude expert polygraph testimony include unacceptable qualifications of the examiner, an unfair test procedure, a poorly administered test, or irrelevant or improper questions.94

The first situation in which polygraph evidence should be allowed in the Eleventh Circuit is where the parties stipulate to admissibility in advance of the test.95 The parties must agree to the circumstances surrounding the test and the scope of admissibility.96 Circumstances include "material matters" such as the manner of administering the test, the types of questions asked, and identifying a polygraph examiner.97 To stipulate to the scope of admissibility, the parties must agree upon the purposes for which the evidence will be introduced.98 When these requirements are met, the test results will be admissible.99

The second situation in which polygraph evidence will be allowed is when the evidence is offered for impeachment or corroboration, but admissibility is subject to three conditions and the judge's discretion.100 As an example of the requirement that the use of polygraph evidence must satisfy the rules concerning impeachment or corroboration, the court used Rule 608

90. Id.
91. Id. at 1535-36.
92. Id. at 1536.
93. Id. at 1537. The standard of review on appeal for such a decision is "a clear abuse of discretion." Id. (citing Worsham v. A.H. Robins Co., 734 F.2d 676, 686 (11th Cir. 1984)).
94. Id.
95. Id. at 1536.
96. Id.
97. Id.
98. Id.
99. Id. The dissent in Piccinonna agreed with the court's holding allowing the stipulated use of polygraph evidence. Id. at 1537 (Johnson, J., concurring in part and dissenting in part).
100. Id. The three requirements are notice to the opposing party that polygraph evidence will be offered, opportunity for that party to conduct its own examination, and satisfaction of the Federal Rules as to impeachment and corroboration. See supra text accompanying note 26.
which allows "[e]vidence of truthful character" only after a witness’s character for truthfulness has been attacked. The court stated, "evidence that a witness passed a polygraph examination, used to corroborate that witness’s in-court testimony, would not be admissible under 608 unless or until the credibility of that witness were first attacked."101

The court, in announcing the criteria for the admission of polygraphic evidence, did not resolve Piccinonna’s dispute. Instead, it remanded the case to the district court with instructions to conduct "further proceedings consistent with this opinion."102 Understandably, the district court had difficulty deciphering the court’s opinion on remand.103 The district court stated, "At the outset, this court is unclear as to its duty under the Eleventh Circuit’s Delphic pronouncement."104 The district court found that Piccinonna had satisfied the first two requirements under the exception for impeachment or corroboration.105 Nevertheless, the district court found the evidence irrelevant and, alternatively, inadmissible under Federal Rule of Evidence 608. The district court sustained Piccinonna’s conviction.106

B. Underwood v. Colonial Penn Insurance Co.

Underwood appealed the trial court’s refusal to declare a mistrial or to grant a new trial based on the admission of evidence concerning Underwood’s refusal to submit to the polygraph examination.107 Abuse of discretion is the standard of review for ruling on motions for mistrials and new trials in the Eighth Circuit.108 The court noted, citing a Seventh Circuit case, that the district court may exercise its sound discretion in admitting or excluding polygraph evidence.109 It also noted that polygraph evidence is usually excluded.110

101. Piccinonna, 885 F.2d at 1537.
102. Id.
104. Id. at 1336. The court found that it was to determine the admissibility of the polygraph test which Piccinonna had taken in 1985 rather than grant a new trial or consider the admissibility of a test Piccinonna had taken in January, 1990. Id.
105. Id. at 1337.
106. Id. at 1339.
107. Underwood, 888 F.2d at 589.
108. Id. at 590 (citing Ryco Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1221-22 (8th Cir. 1987), cert. denied, 484 U.S. 1026 (1988) (motion for a new trial); Jim Halsey Co. v. Bonar, 284 Ark. 461, 471, 683 S.W.2d 898, 905 (1985) (motion for a mistrial)).
109. Id. (citing Simmons, Inc. v. Pinkerton’s, Inc., 762 F.2d 591, 604 (7th Cir. 1985)).
110. Id. (citing United States v. Dietrich, 854 F.2d 1056, 1059 (7th Cir. 1988)).
In this case the Eighth Circuit held that the polygraph evidence was admissible.\textsuperscript{111} In allowing the evidence, the court accepted three of the district court’s reasons. First, the court specifically stated that this evidence "was not offered as substantive evidence."\textsuperscript{112} Instead, the evidence was admissible under Federal Rule of Evidence 404(b) because "[t]he jury could have reasonably inferred from the conversation that [the deputy] suspected the allegedly stolen items were still present in the house, and that the Deputy’s investigation was a motive for the ensuing fire."\textsuperscript{113} Second, the polygraph evidence was properly admitted to impeach Underwood’s credibility.\textsuperscript{114} Colonial claimed the evidence was admissible under Rules 613, allowing impeachment with a prior inconsistent statement, or 801(d)(2), allowing admissions by party-opponents. Underwood’s refusal to take the polygraph exam was a prior inconsistent statement to his assertion at trial that he had told the deputy he would cooperate.\textsuperscript{115} In addition, the court found the evidence admissible to impeach by contradiction.\textsuperscript{116} Third, the court agreed with the district court’s decision that the probative value outweighed any unfair prejudice, thus satisfying Federal Rule of Evidence 403.\textsuperscript{117} The court rejected the idea that the injection of the "polygraph reference was ‘inadvertent’" because defense counsel deliberately disobeyed the judge.\textsuperscript{118} The court thought, however, that the defect was cured by jury instructions.\textsuperscript{119}

IV. ANALYSIS

A. United States v. Piccinonna

In Piccinonna, the court purported to balance "the need to admit all relevant and reliable evidence against the danger that the admission of the

\textsuperscript{111} Id. at 591.

\textsuperscript{112} Id. at 590.

\textsuperscript{113} Id. at 590-91. The court distinguished Aetna Ins. Co. v. Barnett Bros., Inc., 289 F.2d 30 (8th Cir. 1961). In Aetna, a witness to a fire refused to take a polygraph examination after first stating that he would. The Eighth Circuit refused to admit into evidence the refusal to take the polygraph exam. Aetna was distinguished on its facts in that "]t]he polygraph evidence . . . could not have shown motive under rule 404(b) because the witness’s refusal to submit to a polygraph test occurred after the fire." Underwood, 888 F.2d at 591 (emphasis added).

\textsuperscript{114} Underwood, 888 F.2d at 591.

\textsuperscript{115} Id.

\textsuperscript{116} Id.

\textsuperscript{117} Id. This is the weighing to be done under Federal Rule of Evidence 403.

\textsuperscript{118} Underwood, 888 F.2d at 591.

\textsuperscript{119} Id.
evidence for a given purpose will be unfairly prejudicial."\textsuperscript{120} The court found two situations in which the balance favored admitting polygraph evidence.

1. Stipulation

The first instance in which polygraph evidence will be allowed is when the parties stipulate in advance to admissibility.\textsuperscript{121} The court's requirements for an effective stipulation\textsuperscript{122} are set out in broad terms, yet the court's approach recognizes the potential areas for dispute between the parties which may arise after the examination. The laundry list of requirements is meant to prevent future disagreements or at least provide a framework in which to resolve them. When the required stipulations have been made, the court states that "evidence of the test results is admissible."\textsuperscript{123} Admission, however, is not mandatory; the judge must be sure that the evidence complies with Federal Rules of Evidence 401 and 403.\textsuperscript{124}

This result is very workable and rational. The rule allowing stipulation recognizes that, usually, the parties may resolve the traditional objections to polygraph evidence\textsuperscript{125} among themselves.\textsuperscript{126} Allowing the parties to settle this among themselves alleviates the concerns that the use of polygraph evidence will degenerate into nothing but a battle of the experts\textsuperscript{127} and that determining admissibility of polygraph evidence is too time consuming for the courts.\textsuperscript{128} This rule also recognizes that while stipulation may remove the potential problem of unfair prejudice, the stipulated evidence may still confuse the issues, mislead the jury, waste time,\textsuperscript{129} or simply be irrelevant.\textsuperscript{130} Maintaining the trial judge's control over expert testimony despite stipulation

\textsuperscript{120} Piccinonna, 885 F.2d at 1535.
\textsuperscript{121} Id. at 1536.
\textsuperscript{122} See supra text accompanying notes 95-99.
\textsuperscript{123} Piccinonna, 885 F.2d at 1536 (emphasis added).
\textsuperscript{124} Id.
\textsuperscript{125} See supra text accompanying notes 59-65.
\textsuperscript{126} On this point the dissenting judge agreed. "If the parties wish to alter the applicability of Rules 403 and 702 in their case, they should be able to do so by advance stipulation, as long as they do not interfere with any third party's interests or the adjudicatory role of the courts." Id. at 1537 n.1 (Johnson, J., concurring in part and dissenting in part). The dissent would allow the trial judge "broad discretion" in rejecting the stipulation. Id.
\textsuperscript{127} This is so because the parties agree to only one examination.
\textsuperscript{128} Sevilla, supra note 4, at 10.
\textsuperscript{129} See FED. R. EVID. 403.
\textsuperscript{130} See FED. R. EVID. 401.
recognizes that occasionally situations which the parties did not contemplate will occur and that there might be some abuse of the stipulation rule. The rule formulated by the court is really a rule of convenience; the judge may forego making any determinations based on the three principal objections to polygraph evidence and may rule on the admission of the evidence in the familiar Federal Rules of Evidence context.\footnote{131}

2. Impeachment and Corroboration

The second situation in which polygraph evidence could be admitted under \textit{Piccinonna} is where the evidence is offered for impeachment or corroboration.\footnote{132} To be admitted for these purposes, no prior agreement among the parties is necessary, but the party seeking admission must meet three requirements.

The first two requirements seem fair. The proponent of the polygraph evidence must give notice and provide the other party with an opportunity to conduct its own polygraph examination.\footnote{133} These requirements keep the use of polygraph evidence on an even playing field. Each party can attempt to use polygraph evidence to its advantage. This does not mean that the original proponent of the evidence will always use the evidence offensively (that is, for corroboration), because a party may impeach its own witness.\footnote{134} However fair these requirements may be, they seem to invite trouble. In particular, the second requirement invites a "battle of the experts." While expert swearing matches are not uncommon in the courtroom, they would be unique for the purposes to which the Eleventh Circuit limits the use of polygraph evidence; that is, impeachment or corroboration.

The third requirement for the admission of polygraph evidence, absent stipulation, is to satisfy the Federal Rules on impeachment and corroboration.\footnote{135} Because "polygraph is a developing and inexact science,"\footnote{136} testimony by a polygraph expert is not admissible as substantive evidence. Thus, the testimony of the polygraph expert may help the trier of fact assess the credibility of other evidence, but that evidence must already be before the

\footnotesize{131. For the contrary view that polygraph evidence should not be admissible despite stipulation, see Sevilla, \textit{supra} note 4, at 13 (citing People v. Baynes, 88 Ill.2d 225, 430 N.E.2d 1070 (1981)).}
\footnotesize{132. \textit{See supra} text accompanying notes 100-01.}
\footnotesize{133. \textit{See supra} note 100 and accompanying text.}
\footnotesize{134. Federal Rule of Evidence 607 states that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness."}
\footnotesize{135. \textit{See supra} text accompanying notes 100-01.}
\footnotesize{136. \textit{Piccinonna}, 885 F.2d at 1535.}
Once the in-court testimony has been given, the ensuing battle of experts over the subject's belief in the truth of statements made during an examination does not present the jury with any information not already before it. A battle of experts over the subject's belief in the truth of the statements made, however, is to be distinguished from a conflict over the subject's general character.

Although the district court on remand found the polygraph evidence inadmissible because it was irrelevant, it also "suggest[ed] that even if the 1985 polygraph results had been deemed relevant, it is doubtful that such evidence would ever be admissible," even if limited to impeachment or corroboration. In its analysis, the district court did not distinguish between the use of polygraph evidence for impeachment or corroboration and its use to attack or bolster general credibility.

The district court stated that Rule 702 had to be reconciled with Rule 608(b). Rule 608(b) prohibits proving specific instances of conduct by extrinsic evidence; "[t]hus, the results of one specific polygraph test offered as one specific instance of truthfulness would not be admissible pursuant to Rule 608(b)." Next, the district court stated that if Piccinonna attempted to introduce the polygraph results as "expert opinion testimony and hence not

137. Requiring the topic of the expert's testimony previously to have been introduced into evidence avoids the situation where the only relevance of the expert's testimony would be the subject's general veracity.


139. The questions and answers recorded during the 1985 polygraph examination failed both Federal Rules of Evidence 402 and 403. The questions were not "substantially the same questions" as those asked during the grand jury investigation. Because of this, the probative value of the evidence was "slight," and the jury could be mislead. The court recognized Piccinonna's argument that there is a degree of unfairness in holding Piccinonna to the 1985 polygraph because he had no guidelines for proper procedure. The district court found that the examiner could have posed the identical questions which the grand jury asked; therefore the defendant was "bound by his choice of questions." Id. at 1336-38.

140. Id. The court suggested a few ways in which the evidence would nevertheless be inadmissible. The district court predicted the government in a criminal trial would never stipulate because the offered evidence would always be favorable to the defendant. Id. This would not necessarily be the case if, as in other circuits, the stipulation was done before the exam was given. See supra text accompanying notes 68-70.

141. See supra note 74.

142. Piccinonna, 729 F. Supp. at 1336-38. See infra note 147.

143. Piccinonna, 729 F. Supp. at 1338.
barred by Rule 608(b), the evidence might still be inadmissible" under Rule 608(a).\textsuperscript{144} The court wrote:

Rule 608(a) limits testimony concerning the credibility of the witness to evidence in the form of opinion or reputation but subject to the limitation that "(1) the evidence may refer only to character for truthfulness or untruthfulness."

This court holds that a single polygraph testing session represents an inadequate foundation upon which an expert can base an opinion on the defendant’s "character" for truthfulness or untruthfulness. It is inconceivable that anyone, expert or not, could form a valid, reliable, and admissible opinion as to the "character" of a witness based on nothing more than one single session, would be inadmissible as speculative and without any adequate foundation, and is thus likely to mislead any fact finder.\textsuperscript{145}

The very nature of the polygraph exam means that the expert’s opinion is limited to a narrow temporal sphere. While the reputation and traditional opinion witnesses may say, "the witness has a reputation for truthfulness" and "I consider the witness to be a truthful person," the polygraph expert may only say that the subject was truthful during a day-long exam. The expert’s opinion based on a one-day exam has little to do with the subject’s general veracity.\textsuperscript{146} Thus, allowing a polygraph expert to testify to a subject’s veracity is a substantial departure from the traditional rule of allowing a witness to testify to a subject’s general veracity. Also, the polygraph exam could be considered a "specific instance" under Rule 608(b),\textsuperscript{147} but it is unlikely that the polygraph examination could be considered "conduct" by the subject. These concerns will largely prevent the admission of expert polygraph evidence to attack a witness’s character under Federal Rule of

\begin{itemize}
  \item 144. Id.
  \item 145. Id.
  \item 146. Of course, inquiry is allowed into the basis for the expert’s opinion. FED. R. EVID. 705.
  \item 147. Federal Rule of Evidence 608(b) provides, in part:
  \begin{itemize}
    \item Specific instances of the conduct of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) conceding the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
  \end{itemize}
\end{itemize}
Evidence 403.\textsuperscript{148} As long as the credibility of the witness has been raised, it is hard to imagine a situation where the probative value of a polygraph expert testifying to the witness's general veracity will outweigh the concerns for confusing the issues, misleading the jury,\textsuperscript{149} or undue delay.\textsuperscript{150} At the very least, the judge's discretion could prevent the non-stipulated use of polygraph evidence to attack the witness's general character for veracity. The district court considered that "the Court of Appeals may have intended to create an exception to Rule 608 in the case of polygraph testimony," but this idea was rejected on the grounds that "had the appellate court intended to create an exception to the rule, it would have done so explicitly."\textsuperscript{151} Indeed, if the Eleventh Circuit meant for the exam to be treated as a specific instance of conduct, there would be no need to limit the use of polygraph evidence to impeachment or corroboration.\textsuperscript{152} Thus, a court allowing polygraph evidence to show character would be adding a method of proving character not approved by Congress in Rule 608.\textsuperscript{153}

In stating that where polygraph evidence is offered to show character it should be inadmissible under Rule 608, the district court was eminently correct. The problem with this analysis, however, is that it does not address

\textsuperscript{148} The court specifically stated that the offered evidence must meet Federal Rule of Evidence 403 before it will be allowed. See supra text accompanying note 93.

\textsuperscript{149} FED. R. EVID. 403.

\textsuperscript{150} The battle of the experts concerning the proper interpretation of polygraph examination results will no doubt take considerable time.

\textsuperscript{151} Piccinonna, 729 F. Supp. at 1338.

\textsuperscript{152} As the advisory committee's note states:

Of the three methods of proving character provided by this rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion.

FED. R. EVID. 405 advisory committee's note.

\textsuperscript{153} The court also evaluated the possibility that the question of admissibility was to be answered solely on the basis of Federal Rule of Evidence 702, giving the trial court discretion to establish "the quantum of evidence required to establish an adequate foundation for expert testimony." The court rejected this idea for two related reasons. First, the court found it "unlikely" that the Eleventh Circuit "intended to reduce the existing standards pertaining to the admissibility of expert opinion testimony under Rule 702." Piccinonna, 729 F. Supp. at 1338. Second, the court dismissed the notion that the admissibility of polygraph evidence "should rest upon . . . the subjective judgment of individual trial judges" as to "what constitutes a sufficient predicate upon which to base admissibility." Id.
polygraph evidence offered to impeach or corroborate. Using polygraph evidence to impeach or corroborate is different from normal impeachment or corroboration evidence in that the statement made by the subject does not become valuable because of its existence.\textsuperscript{154} Instead, the statement’s value is derived from its interpretation by an expert. Aside from the additional step involved, it is difficult to see how the use of polygraph evidence to impeach or corroborate is any different from other evidence offered for the same purpose. Of course, the concerns raised in Rule 403 may overcome the probative value of the evidence, but the increased likelihood of not satisfying the Rule 403 requirement is not a sufficient ground to eliminate otherwise relevant evidence.

The Eleventh Circuit’s test, however, runs into serious problems where the case involves a perjury charge or a crime in which dishonesty is an essential element. If the defendant testifies and his testimony covers the alleged dishonest actions, there necessarily will be impeaching evidence in order to maintain the suit. Admitting polygraph evidence to impeach or corroborate in this situation will have no different function than introducing the polygraph evidence as regular substantive evidence. Distinguishing between these two purposes on a theoretical level does little to alleviate the practical effect that a conviction may be based upon (presumably) undesirable polygraph evidence. A jury instruction fails to combat this problem. If convictions based upon polygraph evidence are to be avoided, more assurance is required than a subtle distinction which the jury is directed to acknowledge. In addition, the court’s test raises the interesting problem of whether to allow a criminal defendant to use polygraph evidence where the defendant does not take the stand. For these reasons, the Eleventh Circuit’s impeachment or corroboration exception to polygraph evidence inadmissibility should not be applied to criminal cases involving perjury or crimes for which dishonesty is an essential element. Even if the circuit allows such use of polygraph evidence, there is sufficient danger in improper use by the jury to exclude polygraph evidence under Federal Rule of Evidence 403.

\begin{itemize}
\item \textbf{B. Underwood v. Colonial Penn Insurance Co.}
\end{itemize}

\textit{Underwood v. Colonial Penn Insurance Co.} is much less troublesome than \textit{Piccinonna}. There, the evidence was offered for a strictly non-substantive purpose. Indeed, one might argue that the case really did not involve a polygraph evidence question.

\textsuperscript{154} Presumably, an inconsistent statement or an admission made during the course of a polygraph test could be admitted into evidence without expert testimony. Of course, the witness would still have the opportunity to explain an inconsistent statement. \textit{See} FED. R. EVID. 613(b).
Strictly speaking, because there was no polygraph examination administered, there could be no substantive use of the evidence in question. The only substantive use of Underwood’s refusal to submit to an exam would be the negative inference drawn from his refusal. Used in this manner, the refusal to take a polygraph exam is much like the refusal to take the stand in one’s own defense. Because using the latter as a negative inference of guilt is impermissible, the former should be treated the same way at least in a criminal case. Taking a polygraph test is, in a sense, like testifying because one must make statements and have their credibility judged. The same inferences from the failure to testify in one’s own behalf, then, also apply to the failure to submit to a polygraph exam. This is especially true in a jurisdiction which prohibits the substantive use of polygraph results because the failure to take an exam would produce substantive evidence while the results of an exam actually administered could not be used substantively. The end result is inconsistent treatment of polygraph evidence. Using polygraph evidence (including the refusal to submit to polygraph examination) for non-substantive purposes avoids many of the concerns with this type of evidence.

When polygraph evidence is offered for non-substantive purposes, the traditional objections to polygraph admissibility become irrelevant or are greatly reduced. Where the results of the test are not admitted, there can be no challenge to their validity or to the reliability of polygraph testing in general. Similarly, the results cannot be attacked through the insufficiency of the procedures used in the exam or the lack of procedural standardization in polygraph testing. In addition, if the results of the exam are not admitted for their substantive value, but for some other reason, the courts may avoid the question of who is qualified as a polygraph expert. The third traditional objection to polygraph admissibility, undue influence upon the jury, retains some of its force even where the evidence is offered for a non-substantive purpose. A jury may still draw too great an inference from the fact that a polygraph exam was taken or was refused. As with other evidence, such as hearsay, the trial judge may give the jury cautionary instructions to prevent improper use of the evidence. Of course, if the danger of improper use is too great, Federal Rule of Evidence 403 will be grounds for excluding it.

V. CONCLUSION

Evidence of polygraph tests remain fraught with problems. Because strong arguments can be made both for and against the admissibility of polygraph evidence, it is wise for the courts to adopt a "go slow" approach.

155. For example, a jury might reason that a criminal defendant who took an exam before trial failed that exam. This conclusion would follow from the fact that the government is still prosecuting the defendant because he failed to clear his name.
While a prophylactic per se exclusion rule is certainly easy to apply, it ignores the prospect that in some situations evidence concerning polygraph testing will survive Rule 403. Certainly, there is ample ammunition for the war over whether polygraph testing has met the Frye standard. Courts should adopt rules which recognize that evidence of polygraph tests has some value in certain cases and which minimize the dangers perceived with polygraph evidence. To say that the evidence on these dangers is inconclusive is no justification for abandoning caution; indeed, it advocates caution. While remaining cautious, the rules for polygraph evidence should remain flexible to meet the myriad of situations in which the question will be presented.

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