

RESOLUTION 13-15-2009

DIGEST

Inadmissible Evidence: Polygraph Examinations

Amends Evidence Code sections 351.1 and 801 to extend inadmissibility of polygraph examinations to civil proceedings, including family, juvenile and probate matters.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Evidence Code sections 351.1 and 801 to extend inadmissibility of polygraph examinations to civil proceedings, including family, juvenile and probate matters. This resolution should be approved in principle because this provision would codify existing case law.

In *Arden v. State Bar* (1987) 43 Cal.3d 713, 723, the California Supreme Court discussed its earlier adoption of the “general rule that, because the results of polygraph examinations lack the requisite level of scientific acceptance and thus are of questionable probative value, a stipulation among the parties is required for such evidence to be admissible” and the application of that rule in the civil context. (*Id.* at p. 723 [citing in part *Robinson v. Wilson* (1974) 44 Cal.App.3d 92, 103; *Gideon v. Gideon* (1957) 153 Cal.App.2d 541, 546].) The *Arden* Court also discussed the Legislature’s reaffirmation of the rule “through its 1983 enactment of Evidence Code section 351.1 which repudiated a decision by the Court of Appeal liberalizing the rule.” In enacting Evidence Code section 351.1, it appears that the Legislature did not intend, by its enactment, to preclude prior case law upholding the inadmissibility of polygraph testing in civil cases.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Evidence Code Section 351.1 and Evidence Code Section 801 to read as follows:

- 1 § 351.1
- 2 (a) Notwithstanding any other provision of law, the results of a polygraph
- 3 examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure
- 4 to take, or taking of a polygraph examination, shall not be admitted into evidence in any
- 5 criminal proceeding, including pretrial and post conviction motions and hearings, or in any
- 6 trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court or
- 7 in any civil proceeding, including but not limited to family, juvenile and probate matters and
- 8 any administrative hearings, unless all parties stipulate to the admission of such results.

9 (b) Nothing in this section is intended to exclude from evidence statements made
10 during a polygraph examination which are otherwise admissible.

11
12 § 801

13 If a witness is testifying as an expert, his testimony in the form of an opinion is
14 limited to such an opinion as is:

15 (a) Related to a subject that is sufficiently beyond common experience that the opinion of an
16 expert would assist the trier of fact; and

17 (b) Based on matter (including his special knowledge, skill, experience, training, and
18 education) perceived by or personally known to the witness or made known to him at or
19 before the hearing, whether or not admissible, except as evidence expressly inadmissible
20 under Evidence Code Section 351.1, that is of a type that reasonably may be relied upon by
21 an expert in forming an opinion upon the subject to which his testimony relates, unless an
22 expert is precluded by law from using such matter as a basis for his opinion.

(Proposed new language italicized; language to be deleted stricken).

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS:

Existing Law: Existing law under Evidence Code Section 351.1(a) addresses the admissibility of polygraph examination results in criminal proceedings.

This Resolution: The proposed amendments would update these sections to reflect the per se inadmissibility of polygraph exam results, or offers/denials to take polygraphs examinations in civil cases, as set forth by various California appellate court decisions that have interpreted and applied the existing version of California Evidence Code Section 351.1. The amendment of Evidence Code Section 801(b) would eliminate the ability to “bootstrap” this evidence through the use of expert witnesses.

The Problem: Appellate court decisions interpreting and applying Evidence Code Section 351.1 have repeatedly held that polygraph examination results or offers/denials to take polygraph examinations are inadmissible in civil proceedings.

Specifically, polygraph examination results or evidence of denials/offers to take polygraph examinations have long been held inadmissible in civil cases. (*People v. Wilkinson* (2004) 33 Cal.4th 821; *Rufo v. Simpson* (2001) 86 Cal. App. 4th 573, 602-603.) “In the absence of a stipulation between the parties, the results of a polygraph examination, as well as the fact of an offer to take, a refusal to take, or the taking of a polygraph examination, are inadmissible as evidence in California criminal and civil proceedings.” (*Rufo v. Simpson* (2001) 86 Cal. App. 4th 573; *Arden v. State Bar* (1987) 43 Cal. 3d 713; *Aengst v. Board of Medical Quality Assurance* (1980) 110 Cal. App. 3d 275, 282-283; *Robinson v. Wilson* (1974) 44 Cal.App.3rd 92; *Gideon v. Gideon* (1957) 153 Cal.App.2d 541.)

Historically, polygraph examinations have been deemed inadmissible due to: (1) their lack of scientific reliability under Kelly/Frye; (2) the lack of state oversight or standardization of polygraph examiners, their qualifications and their testing procedures; (3) the concerns for substantially increased trial time to litigate collateral issues regarding the reliability of the test and qualifications of the examiner and (4) the concern that jurors/trier of fact would assign excessive credence to polygraph examination results.

Despite this, Evidence Code Section 351.1 remains silent as to its admissibility in non-criminal proceedings (absent stipulation of both parties). The result is confusion and uncertainty in the law and costly, time-consuming and invariably prejudicial efforts by proponents of these examinations to seek admissibility.

The issue is of special importance in non-jury civil proceedings such as family, juvenile, probate and administrative hearings, where the actual trier of fact may be tasked with determining the admissibility of such evidence. In such circumstances, where polygraph examination results or related evidence is either sought for admission or sought to be precluded, the mere placement of these facts before the trier of fact for a preliminary determination of admissibility may have the effect of “ringing the bell” and in turn placing the opponent of such evidence with the unenviable and prejudicial task of “unringing the bell” at trial.

Section 801 is also sought to be amended to prevent bootstrapping polygraphs examination results through expert testimony.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

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