

Test Questions and Questionable Questions: When Can We Test for Memory or Intent?

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Relevant questions, in comparison question polygraph tests, are intended to describe the examinee's involvement in the behavioral issue under investigation. They should not rely on words that describe motivation or mental state as the basis for culpability. Mens rea (Latin for "guilty mind") and actus reus ("guilty act") are important in the legal context, but it has been considered mostly problematic to try to include mental state and motivational terminology into polygraph questions. Most examiners are deeply familiar with the myriad of excuses used to relieve oneself of personal responsibility for a criminal act. The pragmatic solution has been to take note of excuses and distorted thinking during the interviewing portions of the polygraphs, and to emphasize the use of behaviorally descriptive questions that do not rely on complex assumptions about motivation or mental state.

The practical value of avoiding references to mental state and motivational terminology is to ensure that polygraph test results can be accurately interpreted. They are indicative of deception or truth-telling as a proxy for guilt or innocence. There is nothing to gain from engaging in excessive psychologizing (e.g., actually endorsing the notion that a person can commit a serious crime yet somehow still be free of criminal culpability or personal responsibility). Polygraph results are rarely used in the courtroom, but the use of behaviorally descriptive polygraph questions will improve their practical usefulness. Use of behaviorally descriptive relevant questions will reduce opportunities for others to confound the meaning of test results beyond any practical usability. Despite the apparent wisdom of using behaviorally descriptive relevant ques-

tions whenever possible, there may be cases for which the circumstances warrant test questions that do involve memory or mental state.

For example: the investigation of a sexual assault that is alleged to have occurred when both the complainant and suspect have consumed large quantities of alcohol. In such cases there may be physical evidence in the form of DNA. It is not unusual for examinees to attempt to exculpate themselves by disclaiming any memory of an alleged assault. In such cases we might consider the use of relevant questions such as the following:

R1: Do you remember engaging in sexual contact with X

R2: Do you remember engaging in sexual contact with X at that party last Friday?

R3: Do you remember engaging in sexual contact with X at <location>?

Often people who claim no memory of these alleged offenses will not pass these questions, and they will subsequently confess that they do remember their behavior. It is somewhat understandable that a person may wish to not remember committing an offense, but if a person is sufficiently alert and functional to commit a sexual offense it is also likely they will retain some memory of that behavior.

A related example would be the investigation of an alleged sexual assault against a complainant who claims no memory or awareness of the sex act due to sleep, alcohol or drugs. Especially when sexual contact is confirmed by physical evidence - wherein the suspect claims that the complainant participated in a responsive and voluntary manner. Toxicologists will remind us that there may be times when it is possible for a person to retain no

memory of events while appearing to others to be non-unconscious and responsive though perhaps intoxicated. Relevant questions in this case might be the following:

R1: Did X appear to you to be awake when you engaged in sexual contact with her?

R2: Did X appear to you to be responsive during your sexual contact with her?

R3: Did X appear to you to be conscious while you had sexual contact with her?

These relevant questions are not intended to directly address the complainant's level of consciousness. There is no scientific basis for attaching polygraph sensors to a suspect with the goal of investigating the state of mind of the complainant. Instead the questions are formulated to investigate the examinee's perception, knowledge and belief (all related to mental process) regarding the complainant's state of consciousness, based on their own direct observation and interaction with the complainant.

As another example consider the investigation of the unlawful removal of material or information from a specific location. Here the examinee does not dispute the stuff was removed or went missing, but claims either no knowledge of how it occurred or that it occurred unintentionally. Relevant questions might include the concepts of intention, planning and knowledge. For example:

R1: Did you intentionally remove X from <location>?

R2: Did you deliberately remove X from <location>?

R3: Did you devise any plan to remove X from <location>?

R4: Did you know that X would be removed from <location> before it occurred?

Although opinions may vary somewhat regarding the exact question formulation, the goal of this examination will be to test suspect's culpability for an act in which the evidence already confirms has occurred. Strict prohibitions against the use of mental state

or motivational terminology would have us limit relevant questions to only those that describe a behavioral act. Taken literally, this would prohibit the use of some secondary relevant question about guilty knowledge or evidence. For example, the question "Do you know where any of that missing money is now?" would be unacceptable because "knowledge" refers to mental state. Similarly, a question such as "Do you know for sure who removed those reported missing diamonds?" could become unusable. It refers to knowledge or belief, both of which involve mental activity. Taken to extreme, such a restriction would limit the usefulness of polygraph testing for investigators. If there exists a published standard of practice or restriction regarding this practice, then examiners are obligated to comply with it. If not, then there may be nothing to gain from imposing restrictions in the absence of scientific evidence or a compelling legal reason. At this time there is no scientific evidence or compelling legal reasons to impose a uniform restriction on the use of these questions.

The 2013 AAPP Examiner Handbook includes no prohibition against relevant questions that refer to mental state or motivational terminology. Similarly, APA Standards of Practice do not strictly prohibit such questions.

The AAPP Model Policy for Post-Conviction Sex Offender Testing does include language, in section 7.1.2.G, that supports memory, mental state or motivational terminology. This is allowed when they are the target of the investigation after an admission of the behavioral acts.

Standards, model policies and best practices exist to support field examiners. Effective standards should improve the quality of work and reduce exposure by encouraging best practices. In the absence of any strict limitation or directly applicable standard, the closest applicable published guidelines allow us to use relevant questions that involve memory and mental state only after someone admits the behavior. 