**CALIFORNIA SEX OFFENDER MANAGEMENT BOARD**

**FRAMEWORK FOR THE USE OF POLYGRAPH TESTING**

**WITHIN THE CALIFORNIA CONTAINMENT MODEL**

2014

California state law requires the use of Post-Conviction Polygraph Testing (PCSOT) with every individual who is on state parole or county probation as the result of committing a sex crime and who is required to register as sex offender.

Guided by recommendations from the California Sex Offender Management Board, in passing Chelsea’s Law (AB 1844), legislators decided that the interests of community safety would be best served if such persons were managed under what is called the “Containment Model.” The Containment approach includes supervision, treatment and polygraph and requires collaboration among those involved in the management of each such person.

|  |
| --- |
| Penal Code 290.09, subd. (a)(1) Every sex offender required to register pursuant to Sections 290 to 290.023, inclusive, shall, while on parole or formal supervised probation, participate in an approved sex offender management program, pursuant to Sections 1203.067 and 3008. |

Recognizing, at least to some extent, the complexities that would be generated by the polygraph requirement, the legislation included a phrase intended to anticipate and address these potential issues.

|  |
| --- |
| **PROBATION**  Penal Code 1203.067 (b) On or after July 1, 2012, the terms of probation for persons placed on formal supervised probation for an offense that requires registration pursuant to Sections 290 to 290.023, inclusive, shall include all of the following: …  (3) Waiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program.    **PAROLE**  Penal Code 3008. (d) On or after July 1, 2012, the parole conditions of a person released on parole for an offense that requires registration pursuant to Sections 290 to 290.023, inclusive, shall include all of the following: (3) Waiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program. |

The courts have found a legal issue was raised by the requirement of a waiver of the privilege against self-incrimination. In no other field except the management and treatment of sex offenders is polygraph required to be used as a treatment and management tool. Outside of the field of sex offender management and treatment, there is nowhere to look for guidance and precedent regarding how best to implement such testing in ways that are legal and ethical.

The use of PCSOT is widespread in the field of sex offender treatment. The large-scale survey of practices in the field conducted by Safer Society ([www.safersociety.org](http://www.safersociety.org) ) indicates that almost 80% of adult sex offender treatment programs in the United States make use of some type of polygraph testing, whereas in Canada, only 10% of the programs use the polygraph. On page 56, the Safer Society report states: “…surveys of providers commonly report that they believe the polygraph is a useful management tool.” Later it is noted that “…whether polygraph induced disclosures…are associated with lower re-offense rates has not been well studied.”

Increased use of the polygraph in sex offender management has been followed by challenges and court decisions regarding its legality. Some of these cases raise the question of whether requiring an offender to disclose information which may later be used against him in some manner violates the constitutional ban against compelled self-incrimination. Nationwide, various published court decisions have taken different approaches and have come to a variety of conclusions. This issue is unsettled under California law. The California Supreme Court has agreed to review three cases raising the question of whether an offender may be required to waive his or her right against self-incrimination. All three cases upheld use of the polygraph as part of the Containment Model. The only issue is whether the Fifth Amendment waiver is constitutional. Review on this narrow issue was granted in July 2014. A court opinion typically issues two or more years after grant of review by the California Supreme Court.

Existing law still requires that polygraph be done as part of the Containment Model. A polygraph requirement imposed as a condition of probation has been upheld in California because it was related to compliance with probation conditions regarding no contact with minors. The offender had a duty to answer truthfully unless he invoked the privilege to questions showing a realistic threat of self-incrimination, because “the mere requirement of taking the test itself is insufficient to constitute an infringement of the privilege.” (*People v. Miller* (1989) 208 Cal.App.3d 1311.)

California law still requires the offender to waive his or her Fifth Amendment rights in order to participate in treatment programs under the Containment Model. This remains the law until either the Supreme Court rules it unconstitutional, or it is amended by the Legislature. However, the type of polygraph exam required is not specified in the statutes, and is left to the discretion of the Containment team (treatment provider, supervising officer, and polygraph examiner).

The unsettled state of the law in 2014 leads to some interesting dilemmas for the Containment team. For example, if the offender is asked about previously undisclosed criminal activities, it remains possible that a refusal to answer such questions will result in revocation proceedings. However, the APA Model Policy, adopted by CASOMB, provides, “Polygraph testing and polygraph test results should not supplant or replace the need for professional expertise and judgment. Polygraph test results should not be used as the sole basis for revocation of any individual from court supervision or termination of sex offense specific treatment.” (Model Policy at § 4.1.)

It is up to the Containment team to decide whether to require a sexual history polygraph, an instant offense polygraph, or to use only a maintenance or monitoring polygraph, which covers actions of the offender only during the current supervision period. If non-criminal behavior is disclosed during a polygraph which is a violation of supervision conditions, there is a legal issue raised about use of such disclosures since the Fifth Amendment only addresses self-incrimination leading to consequences in criminal proceedings, Unanswered is the question whether an offender may refuse to answer a question that could subject him to civil liability, or aid in a civil commitment proceeding. (One scenario involving this question can occur when a client who pled nolo contendere and never admitted to the offense is now required to take a polygraph addressing whether he did commit the instant offense.)

In light of the unsettled law in this area, it is vital that a complete “Informed Consent” statement be signed by any polygraph subject. CASOMB has model Informed Consent forms for each type of polygraph which are not mandatory, but recommended. As with any informed consent procedure, the important potential negative consequences must be explained to the participant. Because those consequences are considerably different depending upon which type of polygraph examination is being administered, a separate Informed Consent should be used for each type of testing: Sexual History, Instant Offense or Maintenance. The issues involved in each type of testing are complicated. Combining all of these issues into one extensive document could place an unreasonable burden upon the examinee.

An Informed Consent document must be candid about potential consequences. For example, even though statements can be found in the Penal Code and in the recent court decisions maintaining that the intent of the law is that polygraph testing is only for treatment and management purposes, such statements do not allow a provider to represent that the disclosed information could not fall into the hands of those who might want to use it for other purposes. In fact, the provider should acknowledge the reality that it could.

**CONCLUSION**

Containment teams must follow state law, which mandates waiver of the Fifth Amendment during polygraph exams. Yet this must occur within the framework of an unsettled legal picture which is likely to continue to evolve and unfold, perhaps for a number of years. Within this reality, the requirement that polygraph testing be administered to all designated individuals must be put into practice in the day-to-day of management of sexual offenders within the Containment Model.

The California Sex Offender Management Board has developed some model forms and recommendations for polygraph use under the current circumstances. This information is made available only for informational purposes. These forms are not intended to be mandatory, nor does the recommendation for their use constitute legal advice. These documents are in no way intended to supersede or conflict with the guidelines of the American Polygraph Association or similar standards. If there is any perceived conflict with other legal and/or ethical requirements for mental health providers, the provider must make the decision of how to proceed with the advice of their own counsel. The Informed Consent documents are intended to fill a gap and to assist treatment providers, polygraph examiners and supervising agencies who must implement an unsettled law.

Attached to this overview statement are three model Informed Consent documents for sexual history, instant offense, and maintenance/monitoring polygraph examinations. Also attached is a set of guidelines for polygraph examiners, treatment providers and supervising agencies regarding implementation of mandated polygraph testing.