

## FRAMEWORK FOR THE USE OF POLYGRAPH TESTING WITHIN THE CALIFORNIA CONTAINMENT MODEL

2017

### Polygraph and Sex Offender Containment – History of the Law in California

California law requires the use of Post-Conviction Polygraph Testing (PCSOT) with every individual who is on state parole or formal 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) in 2010, 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 individual.

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.

The Containment Model statutes require every participant to be subject to polygraph examinations as part of the treatment model, to manage risk and fine tune supervision provisions during the probation or parole period.

#### **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.

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. 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.”

### **Polygraph in the Containment Model Upheld by California Supreme Court**

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The law requires that polygraph be done as part of the Containment Model for offenders on formal probation or parole. 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). See [The Law on Polygraph in the Containment Model in California and the CASOMB FAQs](#) for more information on types of polygraph examinations and how they are used.

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 requires the offender to “waive” his or her Fifth Amendment rights in order to participate in treatment programs under the Containment Model. Offenders challenged the requirement that they waive the privilege against self-incrimination. The California Supreme Court held that use of polygraph in this context is constitutional in its decision in *People v. Garcia* (2017) 2 Cal.5th 792. Offenders are not literally required to waive the right against self-incrimination, but retain the right to “take the Fifth” to avoid future incrimination. However, a refusal to answer a polygraph question, even if the Fifth Amendment is invoked, is a violation of the terms of supervision and can result in revocation.

*Garcia* held that offenders must fully and truthfully answer all questions posed during polygraph examinations. Since the answers are compelled, the information given as part of the polygraph examination cannot be used against the offender in a subsequent criminal proceeding. Nor can a criminal investigation be started from answers given during the polygraph, nor can evidence obtained from such an investigation be used in a later criminal trial. However, if an answer shows the offender violated the terms and conditions of supervision (including committing a new offense during supervision), probation or parole can be revoked. A revocation action is not a criminal proceeding.

Failure to answer a question during a polygraph exam violates legally required terms of supervision. (Pen. Code, §§ 1203.067, 3008). However, the American Polygraph Association (APA) Model Policy, adopted in part 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.” (APA Model Policy at § 4.1.) In other words, failure to answer should be considered in combination with other factors known to the Containment team in making a decision to proceed with revocation.

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. The courts have not resolved the question whether an offender may refuse to answer a question that could subject him to civil

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liability or aid in a civil commitment proceeding. (One scenario involving this question can occur when a client who pled nolo contendere and never legally admitted to the offense is now required to take a polygraph addressing whether he did commit the instant offense.)

For that reason, 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. Use of the CASOMB forms is 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. Combining all of the issues into one extensive informed consent document could place an unreasonable burden upon the examinee.

An Informed Consent document must be candid about potential consequences. Fortunately, *Garcia* resolved the issue of criminal use of statements made during polygraph by clearly stating that an offender has immunity from prosecution based on statements made during the polygraph. While answers are compelled (mandatory), they cannot be used in later criminal proceedings. The Informed Consent waivers explain other possible uses of answers given during the polygraph exam (e.g., civil and mandatory reporting).

### CONCLUSION

California law mandates mandatory participation in polygraph exams. The type of polygraph exams required are determined by the Containment team. Polygraph examiners must adhere to the [CASOMB Certification Standards](#) for polygraph, which were adapted from the APA’s guidelines.

Use of the California Sex Offender Management Board’s model Informed Consent forms is not 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 APA 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.