

THE LAW ON USE OF POLYGRAPH IN THE CONTAINMENT MODEL IN CALIFORNIA

People v. Garcia (2017) 2 Cal. 5th 792

- **Offenders are required to answer all questions during the polygraph exam fully and truthfully. Compelled responses cannot be used in evidence against offenders in a subsequent criminal proceeding.**

Offenders must fully and truthfully answer all questions posed during polygraph examinations. Failure to answer a question would violate legally required terms of supervision (Pen. Code, §§ 1203.067, 3008). Since the answers are compelled, they cannot be used against the offender in a subsequent criminal proceeding.

Q: What if the offender is deceptive on the polygraph or reveals a new offense that occurred during the supervision period?

A: Supervision terms and conditions can be modified if there are changes in risk level revealed by the polygraph. If a new criminal offense that occurred during the supervision period is revealed, the offender's statement made during the polygraph exam cannot be used against him or her in a trial on a new criminal charge, but can be used in a revocation proceeding. A revocation proceeding is not deemed to be a "criminal proceeding."

Q: What if the offender refuses to answer a question during the polygraph exam?

A: Probation or parole can be revoked if the offender refuses to answer.

- **Offenders must be advised before treatment begins that no compelled statement (or the fruits thereof) elicited under questioning during the polygraph exam may be used against the offender in a subsequent criminal prosecution.**

Garcia requires advising offenders prior to beginning the Containment Model treatment program that statements made during the polygraph exam cannot be used against them in later criminal proceedings. The CA Sex Offender Management Board provides model informed consent and release forms that can be used to advise offenders on this point: see www.casomb.org, under the Containment Model tab.

Q: What if there is evidence that is independent of the offender's compelled statement of a new criminal offense committed during the supervision period?

A: If there is independent evidence of the offense the People can file criminal charges but the prosecution bears the burden to show its evidence was derived from a legitimate source wholly independent of the compelled statement.

- **Polygraph examiners should avoid asking questions that elicit names of victims, dates or locations of offenses.**

Polygraph examiners should not ask for facts that could support a criminal prosecution. The purpose of the polygraph is to determine the offender's current risk level, inform treatment, and flag whether he or she is compliant with supervision terms. If the offender reveals during the examination, without being asked names or details, a previously unknown victim who was a minor, the treatment provider (who is a mandated reporter) must report the new offense to Child Protective Services (CPS). Since no information about the victim's name or the date or place of offense should have been obtained, there will be little that CPS can do with such a report.

- **Offenders are required to waive the psychotherapist-patient privilege to allow the Containment team to share information.**

Offenders must waive the psychotherapist-patient privilege as a condition of probation or parole. This enables the treatment provider to consult with the supervising officer and polygraph examiner on a regular basis. The Containment team is required to exchange relevant information about reform and rehabilitation of the offender, including information disclosed during therapy. Information exchanged should facilitate the team's understanding of the challenges the offender presents and allow team members to measure the effectiveness of the sex offender treatment and monitoring program.

Q: What if the offender refuses to waive the privilege?

A: The waiver should be included in the terms and conditions of supervision and refusing to agree to the waiver should mean a prison term or, if supervision has already begun, revocation.

Q: How often should the Containment team meet?

A: The law requires communication among the team (treatment provider, supervising officer, and polygraph examiner) at least once a month. Polygraph examiners should regularly attend Containment team meetings. Some jurisdictions have monthly teleconferences (or more frequently, as needed), and meet in person quarterly.

Polygraph FAQ's

Q: What types of polygraph examinations are required?

A: The Containment Model statutes do not specify the type of polygraph examination(s) required. (Pen. Code, §§ 1203.067, 3008). The decision about which polygraph exams to use, and in what order, must be made by the Containment team (treatment program, supervising officer and polygraph examiner). The types of examinations are: sexual history, instant offense, and maintenance. (See Post-Conviction Sex Offender Polygraph Certification standards at www.casomb.org, under Certification).

Q: Is there an order for polygraph exams that is normally followed?

A: The order of exams is at the discretion of the Containment team. Sometimes the sexual history exam is used first. Sometimes teams elect to start with an instant offense exam if the offender denies commission of the offense. Later, the team may or may not elect to do a sexual history exam. All teams should use a maintenance exam after the offender has been on supervision for some period of time, and at least once a year thereafter. If an offender is higher risk, the team may start with the maintenance exam. The order and frequency of polygraph exams is based a case by case determination made by the Containment team.

Q: When should the exams be done?

A: If an instant offense exam is done, it is best in the first one to three months of treatment. A maintenance exam should be done three to six months after treatment begins. Ideally, there would be a final maintenance exam done one month before the person is certified as having successfully completed the treatment program. If a sexual history exam is done, it should be after the treatment provider has gotten to know the offender and there has been time to prepare for the exam, for example, if a sexual history questionnaire will be used.

Q: If a sexual history questionnaire is used to prepare for a polygraph exam, should it be shared with the supervising officer?

A: No, a sexual history questionnaire prepared pre-polygraph should not be shared with the supervising officer, although the provider can share any concerns about risk with the Containment team at any time.

Q: Is the polygraph examiner a member of the Containment team and if so, is he or she required to attend Containment team meetings?

A: The polygraph examiner is an important member of the Containment team and is strongly encouraged to attend Containment team meetings because collaboration by the supervising officer, treatment provider and polygraph examiner is vital to the success of the Containment Model.

Q: Can supervising officers participate in the selection of the polygraph examiner?

A: The supervising officer and treatment provider should agree on a polygraph examiner. Supervising officers or treatment providers can encourage attendance at Containment team meetings by keeping an approved list of examiners who adhere to CASOMB certification standards and participate in Containment team meetings.

Q: Should the polygraph examiner ask the name or date of the offense if the offender discloses a previously unknown victim during the polygraph examination?

A: No. Examiners can ask a victim's approximate age (under 18? under 10?) and gender, but should not ask for other information about the victim. The offender should not be asked about the victim's relationship with the offender or where the victim lived.

Q: What if the offender discloses, during the polygraph exam, that there was a previously unknown victim who was a minor at the time—does this require reporting under the Child Abuse Neglect and Reporting Act (CANRA)?

A: The polygraph examiner is not a mandated reporter but the treatment provider is, so even if the victim’s name, or date of the offense, has not been disclosed, the treatment provider may legally be required to make a report to Child Protective Services.

Q: Can probation or parole do a probation/parole search in response to something the offender said during the polygraph examination?

A: Yes. But anything found in a search that was a direct response to something revealed during the polygraph exam will not be admissible in a criminal trial. It may, however, be used in a revocation proceeding if relevant.

Q: Should a polygraph exam be videotaped?

A: Yes, CASOMB strongly recommends videotaping the polygraph exam.

Q: Can a video of a polygraph exam be used in evidence at a revocation hearing?

A: Yes, but it should be admitted in camera and viewed only by the trial court and the parties’ attorneys.

Q: Is the “polygraph examination” considered to include both the pre-test and post-test interviews by the polygraph examiner?

A: Yes, the polygraph examination includes the pre-test interview, administration of the polygraph, and the post-test interview.

Q: If the person is required to fill out a sexual history questionnaire in preparation for a sexual history polygraph, is this considered part of the polygraph examination?

A: Yes, a sexual history questionnaire that a person is required to complete in preparation for a sexual history polygraph exam is considered part of the polygraph examination.

Q: Is it best practice to have a different polygraph examiner perform the second polygraph exam?

A: No, as long as the Containment team is satisfied with the original examiner there is no need to change examiners.

Q: Should polygraph exams be used with juveniles?

A: There is little research regarding effectiveness of polygraph with juvenile offenders. The Association for the Treatment of Sexual Abusers recommends against using polygraph with juveniles. Polygraph exams are legally required in California only for a juvenile adjudicated of a sex offense listed in Penal Code section 290.008 after having served time for the sexual offense at the California Division of Juvenile Justice (formerly California Youth Authority). CASOMB recommends that for these individuals, only the maintenance polygraph exam be used.

Q: How should hearing impaired persons be accommodated during a polygraph exam?

A: For hearing impaired examinees, an interpreter using sign language may be employed, or the examinee can be asked to nod “yes” or shake their head “no.” Written polygraph questions and answers may not be used.

Q: Are statements made to the polygraph examiner immediately post-polygraph also subject to immunity?

A: There is no settled law on this question in California, but in CASOMB’s view, statements made to the polygraph examiners in the pre-or post-interview are also privileged and subject to use immunity, because they are a compelled part of the polygraph process.

Q: Is the sexual history pre-test questionnaire protected as a disclosure that was made during the polygraph exam, or could it be used against the offender in a subsequent criminal proceeding?

A: This is a gray area of the law. It is possible a court might find the questionnaire, if disclosed outside the exam itself, was not just part of the polygraph exam. If so, the offender would be unprotected from use of the pre-test questionnaire against him or her in a subsequent trial. On the other hand, if the questionnaire is used only in treatment and during the polygraph exam itself, and is not disclosed to the supervision officer/agent, use of the pre-test questionnaire would be protected by the psychotherapist-patient privilege when used during treatment. Disclosures made in the polygraph exam are of course protected constitutionally under Garcia. The supervision officer/agent will later receive a copy of the polygraph examiner’s report, which will contain the protected disclosures made by the offender and keep probation/parole in the know.

Q: Should the same polygraph examiner be used for repeat exams with one offender?

A: After four examinations by one examiner, the best policy is to use a different examiner for subsequent exams with that same subject.

Q: Can failing a polygraph exam be the basis for denying a certificate of successful completion of treatment?

A: A failed polygraph exam should not be the sole reason for denying the certificate. Failure to pass a polygraph should be only one factor in determining whether someone has successfully completed the active phase of treatment. Polygraph exams are a useful tool to obtain information for treatment and supervision but even at the best of times there is an error rate and reasons why, other than failure to be truthful, someone might not be able to pass a polygraph exam.