

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 Certification 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.

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: 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: 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.

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