THE LAW ON USE OF POLYGRAPH IN THE CALIFORNIA CONTAINMENT MODEL

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 subsequent criminal proceedings.

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 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 date or place of offense should have been obtained, historically, there has been 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 could 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 communicate?

A: The law requires communication among the Containment 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. Communication may vary between the different members of the Containment team, emails prior and after the polygraph exam may involve all three members of the Containment team.

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, specific issue, maintenance, and monitoring. (See Post-Conviction Sex Offender Polygraph Certification standards at www.casomb.org, under Certification).

Q: Is there an order for the frequency and type of polygraph exams?

A: The order and frequency of polygraph exams is based on a case-by-case determination made by the Containment team and in accordance with the CASOMB Post-Conviction Sex Offender Polygraph Standards. For more specific information see the CASOMB Post-Conviction Sex Offender Polygraph Standards.

Q: What is the consideration for which exam?

A: If an instant offense exam is done first, it is best done in the initial 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 reviewed the completed sexual history questionnaire with them.

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

A: Yes, the sexual history exam results should be shared with the supervising officer. After the exam the sexual history questionnaire can be shared with the supervising officer, if requested.

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 at the request of supervision and/or treatment provider.

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.

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 at the time of the offense and the approximate time the offense occurred, it is not recommended that examiners ask for additional identifying information. The offender should not be asked about the victim's relationship with the offender or where the victim lived.

Q: If the offender discloses an unknown victim during the polygraph exam, is the polygraph examiner a mandated reporter?

A: No. The polygraph examiner is not a mandated reporter. The polygraph examiner is expected to inform other containment team members when the offender reports unreported sexual abuse. Supervision agents and treatment providers are mandated reporters (PC 11166, Child Abuse and Neglect Reporting Act (CANRA).

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 and the American Polygraph Association (APA) requires videotaping of the polygraph exam.

Q: Can any portion of a polygraph exam be subpoenaed?

A: Yes, it can be subpoenaed.

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: Is the person required to fill out a sexual history questionnaire in preparation for a sexual history polygraph?

A: Yes, a sexual history questionnaire and will be used by a polygraph examiner during the sexual history polygraph exam.

Q: Is it recommended to utilize different polygraph examiners in performing polygraph examinations.?

A: Due to the risk of familiarization and other possible retest effects, examiners should not conduct more than four consecutive examinations per year with the same examinee. This does not include re-testing due to a lack of resolution from an earlier examination.

Q: If an examinee has other than a favorable test, should there be a retest?

A: The Containment Team should work collaboratively to determine if the individual needs a retest.

Q: If an examinee has other than a favorable test, should a different examiner be used for a retest?

A: The Containment Team should work collaboratively to determine if a different examiner should be utilized for a retest.

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 in supervising youth in this population should not be the norm, should be rarely used only when justified on a case-by-case basis. Best practices indicate that its use should be limited to youth age 16 or 17[1].

Q: How should someone with an identified disability, language barrier or someone who is not fluent in English be accommodated for polygraph testing?

A: Consult with the Containment Team.

Q: How should someone who has a language barrier be accommodated for polygraph testing?

A: When someone has a language barrier, accommodation is legally and ethically required to ensure the test is fair, accurate, and compliant with professional standards. If there is not a qualified Polygraph examiner who speaks the same language, then the use of a qualified interpreter is recommended. The pre-test interview is imperative to ensure that with interpretation, the individual's understanding is clear. If the understanding remains unclear, the test should be postponed or cancelled, and concerns should be discussed with the Containment Team. Ultimately, if the examinee cannot fully understand the questions, the test is not valid.

Q: What will be included in the report?

A: Anything that you disclose throughout the entire time you are with the polygraph examiner.

Q: Is the sexual history/autobiography 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: Completion of the sexual history questionnaire completed by the supervised person is a required step that should be completed prior to and is seen as part of the Sexual history polygraph. Since it is a required part of the polygraph direct answers provided by the supervised person would be covered by derivative use immunity[2] as it is a required statement to conduct required sexual history polygraph.

[1] CASOMB Juvenile Guidelines

[2] Derivative use of immunity is a compelled testimony protection that limits the government's ability to use an individuals statements provided during a polygraph examination.

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

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.

Q: If I do not agree with the contents of my polygraph examination report is there anything I can do?

A: Discuss the concern with the members of the Containment Team to include the therapist and the supervising officer. Include information about where to file polygraph complaints about suspected misconduct with the polygraph examiner.