



Polygraph Testing

VI. Sexual assault bills

Indiana HEA1654 Sex crime victims and polygraph examinations.

(Dembowski, Steele)

Prohibits a law enforcement officer from requiring an alleged victim of a sex crime to submit to a polygraph or other truth telling device.

Provides that a law enforcement officer may not refuse to investigate, charge, or prosecute a sex crime solely because the alleged victim of the sex crime has not submitted to a polygraph or other truth telling device.

Removes restrictions for when the victim services division of the criminal justice institute (institute) may reimburse a medical services provider for the costs in providing forensic services. Creates the secured storage fund to assist counties with paying for the secured storage of a sample (sample) from forensic medical examinations of a sex crime victim (victim). Requires a hospital to give notice to a victim of certain rights and to contact law enforcement. Requires law enforcement to transport the sample to secured storage. Requires the sample to remain in secured storage for specified periods of time. Requires the institute to provide notice to victims regarding the sample. Requires a prosecuting attorney to appoint a sexual assault response team (SART) if a SART is not established in a county, or to join with one or more other counties to create a regional SART. Requires a SART to develop a plan regarding evidence of sexual assaults. Provides that the failure to comply with certain statutory provisions, county plans, or SART protocols relating to the collection and preservation of evidence of a sexual assault does not, standing alone, affect the admissibility of evidence in a civil or criminal proceeding.

04/23/2007 Signed by the Governor

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VAWA 2005 Restricts the Use of Polygraphs with Victims of Sexual Assault

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One of the provisions of the recently enacted VAWA 2005 is that jurisdictions will no longer be eligible for STOP funding **if their policy or practice is to ask or require adult, youth or child victims of sexual assault to submit to a polygraph examination or other truth telling device as a condition for proceeding with the investigation of the crime.** In addition, the refusal of a victim to submit to such an examination must not prevent the investigation of the crime.

Over the last few years, I have trained and written articles generally discouraging the use of polygraphs, Voice Stress Analysis and other methods for "Lie Detection" during the course of an investigation. This provision may cause some concern and so I hope this Promising Practices article will help to alleviate resistance to change in departmental policies and procedures as jurisdictions rethink their policies in response to the new law. To further support your efforts to meet this new requirement, we have provided guidance from the International Association of Chiefs of Police and provisions from model laws at the conclusion of this article.

First, **I often find that polygraphs, like some release waivers, are used to shut down an investigation while providing a perception of immunity, rather than being used to build an investigation.** I also find that these interrogation tactics can sometimes create a "false report" by intimidating victims into withdrawing their cooperation or even recanting their report. These methods can include the use – or threat of using – polygraph examinations, voice stress analysis, handwriting analysis, statement validity analysis, and other means to determine whether the victim is telling the truth. Unfortunately, **such methods are routinely used with sexual assault victims in some areas of the country, often times as a way of screening cases so that we do not "waste our time" doing an investigation of a report we suspect is false.**

These screening methods are particularly likely to be used with certain types of sexual assault cases -- those that raise some of the "red flags" listed below:

- The victim and suspect know each other.
- The victim and suspect have had sex before.
- The victim is an adolescent.
- No weapon was used.
- No physical violence was reported.
- There is no sign of physical injury.
- The victim is calm
- The victim didn't report to law enforcement for days, weeks, or even months.

- The victim reported to someone other than law enforcement.
- The victim is difficult to locate.
- There is little or no evidence to corroborate the allegation.
- The victim does not follow through or participate with the investigation.
- The victim changes his or her account of what happened.
- The victim is uncertain or vague about the details of the sexual assault.
- The victim recants.
- The victim later recalls additional information.
- Details in the victim's account are provably false.
- The victim is not seen as credible.
- The victim is elderly, disabled, or unattractive.
- The victim was drunk and/or voluntarily used drugs at the time of the assault.
- The victim is suspected of being a prostitute or drug addict
- The victim is thought to be involved in previous criminal behavior. The victim is belligerent.
- The victim is homeless
- The victim has a physical or mental impairment
- The victim fails a polygraph examination.
- The victim has reported sexual assault(s) in the past.
- No suspect can be identified.
- The suspect seems sincerely upset and confused by the allegations.
- The suspect seems respectable, credible, or even likeable.
- The suspect is attractive and has an active, consensual sex life.

Yet such methods are widely viewed as inappropriate – both because they are ineffective for this purpose and because they destroy any trust the victim has with law enforcement. Of course, this in turn eliminates any chance for successful investigation and prosecution.

Imagine the following scenario:

A woman is sexually assaulted and experiences emotional trauma as a result. She then decides to report the assault to the local police department, which **increases her anxiety level**. The police officer then uses (or threatens to use) some method to determine whether or not she is lying (e.g., a polygraph examination, voice stress analysis, handwriting analysis, statement validity analysis, etc.), and **she interprets this as evidence that the police do not believe her**.

This **again increases her stress level**, which in turn increases the likelihood that the examination or analysis will detect a "lie." **On this basis, the police investigator determines that the**

woman has filed a false report, and may even threaten her with prosecution or try to make her pay for the forensic examination that was conducted in her case. The woman is devastated, and either withdraws her cooperation or recants her story. The investigator walks away from the situation, further convinced that most sexual assault reports are false.

In fact, the polygraph is known to be unreliable when used with people experiencing crisis and many argue that they are therefore inappropriate for use with sexual assault victims (e.g., Jordan, 1996; Sloan, 1995). Even **J.E. Reid, the developer of the modern polygraph examination offers a long list of factors that can influence the validity of the test results, such as:**

- extreme emotional tension or nervousness
- over anxiety
- anger
- concern over neglect of duty or responsibility that made possible the commission of the offense by someone else
- involvement in other similar acts or offenses
- physical discomfort during test
- adrenal exhaustion
- physiological and mental abnormalities (Reid & Inbau, 1977)

Many of these factors are extremely likely to be seen with sexual assault victims, rendering the validity of the polygraph examination **extremely questionable**. Yet other factors may be introduced by the examiner that further limits the validity of the polygraph examination, including:

- excessive interrogation prior to test
- excessive number of test questions
- inadequate question phraseology
- inadequate control questions (Reid & Inbau, 1977)

Because so many of these factors are likely to be seen in a sexual assault investigation, they suggest that polygraph examinations are simply inappropriate for use with sexual assault victims. That is why **polygraph findings are inadmissible in courts in all 50 states**, except for certain, narrowly defined uses. Several states have even enacted laws to prohibit the use of the polygraph with sexual assault victims or limit the use to very specific circumstances.

Furthermore, **because new technologies such as computerized voice stress analysis (CVSA) operate on similar principles, the same advisories apply.**

- In fact, there is currently no technology available to truly “detect lies.”
- Rather, the polygraph examination and computerized voice stress analysis are **designed to detect physiological reactions of stress**, which may be associated with lying, or may be caused by anxiety, fear, guilt, and shame associated with sexual assault victimization.

It is therefore recommended that the polygraph should never be used with victims of sexual assault during the course of the investigation – even if the victim requests it. A competent, evidence-based investigation will most likely reveal the truth much more effectively than these interrogation tactics.

On the other hand, there are some states and jurisdictions where the polygraph examination is used strategically with sexual assault victims during the courtroom proceedings, however, this is only after a thorough investigation has been completed and documented. The use of the polygraph examination in this very specific situation is addressed in the Concepts and Issues Paper on sexual assault investigation recently released by the **International Association of Chiefs of Police (IACP)**:

“There are some states and jurisdictions where the polygraph examination is used strategically with sexual assault victims during the courtroom proceedings. This tactic can be particularly useful in the case of a non-stranger sexual assault resulting in a consent defense, but it should only be used in the phase of courtroom proceedings and not during the investigation. To illustrate, many defendants state that they will only take a polygraph examination if the victim will also take one at the same time. In addition, many defense attorneys will not allow the defendant to take a stipulated polygraph if the victim has already passed a polygraph or voice stress test. In this type of situation, it can sometimes be strategically beneficial to offer a polygraph examination of the victim, in court and in front of the defendant’s wife, girlfriend or mother. This strategy must be used only if the situation is discussed with the victim in advance, **in the presence of a victim advocate or other knowledgeable support person.**”

In some states like Ohio, the results of a stipulated polygraph are admissible because the person administering the polygraph can be called as a witness by the prosecutor to testify at trial as an expert regarding all aspects of the

test administered, and “such testimony shall be offered and received as evidence in the trial without objections of any kind by any party to the agreement except as to the weight of the evidence.” **Of course, it is critically important to ensure that this practice is not abused by having policies that clearly state that law enforcement should not require, offer, or suggest that a victim take a polygraph or voice stress during the investigation stage.** Using such tactics during the investigation is not recommended because they are not generally reliable under such conditions, they may contribute to a sense of revictimization, and they may eliminate the proper use of a court stipulated polygraph after indictment and during the pre-trial stages” (IACP Concepts and Issues Paper, 2005, p. 13).

Despite these concerns, many law enforcement agencies do in fact ask (or require) victims to take a polygraph examination as part of their sexual assault investigation. For example, based on her national survey of 83 rape crisis centers in 19 states, Sloan (1995) found that:

- **As many as 31 rape crisis centers (in 15 states) reported that sexual assault victims had been asked to take the polygraph examination before a police investigation was initiated.**
- **Worse, 22 rape crisis centers (in 13 states) reported that sexual assault victims had been told that there would be no police investigation if they did not take the polygraph examination.**
- **As many as 18 rape crisis centers (in 9 states) reported that sexual assault victims were told that they would go to jail if they lied during the polygraph examination.**

Not surprisingly, this use of the polygraph examination had a damaging effect on numerous sexual assault investigations, either because victims “failed” the polygraph examination, refused to take it, and/or withdrew their cooperation as a result. For example, Sloan (1995) documented on the basis of her national survey that:

- **A total of 32 rape crisis centers (in 13 states) reported that sexual assault victims withdrew their cooperation with the police investigation as a result of their experience with the polygraph examination**

- **Because the victim “failed” or refused to take the polygraph examination, 13 rape crisis centers (in 8 states) reported that the sexual assault charges were dropped.**
- **11 rape crisis centers (in 9 states) reported that no investigation was conducted after the sexual assault victim “failed” or refused the polygraph examination.**

The researcher even cited at least one instance where the sexual assault victim was actually arrested for “failing” the polygraph examination.

In addition to all of these concerns about using polygraphs with sexual assault victims, there are similar issues when using a polygraph with suspects in a sexual assault case. This is especially true when the suspect believes that he had permission to engage in sexual activity with the victim. As a result, he is understandably upset by the victim’s allegations, and may even be extremely emotional. He certainly does not define his actions as sexual assault, and therefore he may pass a polygraph examination when asked about the facts of the case.

As a result of these concerns, many states have enacted laws such as California’s which prohibit anyone investigating or prosecuting a sex offense from requiring or requesting that the victim submit to a polygraph examination as a prerequisite to filing an accusatory pleading. In fact, the language of California’s law matches very closely with the language included in VAWA 2005, even though the law has been on the books for over twenty years. California Penal Code 637.4 reads as follows:

- (a) No state or local government agency involved in the investigation or prosecution of crimes, or any employee thereof, shall require or request any complaining witness, in a case involving the use of force, violence, duress, menace, or threat of great bodily harm in the commission of any sex offense, to submit to a polygraph examination as a prerequisite to filing an accusatory pleading.
- (b) Any person who has been injured by a violator of this section may bring an action against the violator for his actual damages or one thousand dollars (\$1,000.00), whichever is greater.

Texas Criminal Code similarly prohibits peace officers from requiring a polygraph examination from a “person who charges or seeks to charge” a variety of sex offenses (Texas Code of Criminal Procedure Article 15.051). Therefore, VAWA 2005 may not require any legislative, policy, or protocol changes in states with

this type of prohibition already on the books. Law enforcement agencies should consult with legal counsel to see if any additional change is needed.

Other states have made legislative changes to address the issue of polygraphing victims of sexual assault, but fell short of prohibiting the practice as a precondition for investigating the case. For example, the Kentucky state legislature passed a law this past year as part of an effort to update their standards for polygraphists. As a result, the law was designed to apply directly to polygraph examiners rather than law enforcement officials. As reported in the February 4, 2005 SATI e-News, the regulations were drafted by the Kentucky Justice and Public Safety Cabinet, and although they do not forbid the practice of polygraphing victims they impose several criteria that must be met before any such examination is conducted. These provisions were designed to be consistent with the procedures taught to new polygraph examiners for years, but until that point, polygraph examiners weren't required to comply with the procedures after certification.

Other agencies and organizations have also taken a practice stand in discouraging or prohibiting the use of polygraph examinations with sexual assault victims. To illustrate, a multidisciplinary task force in Florida recently adopted a Model Policy (1999) for statewide use. One of the provisions of that model policy was the following admonition:

"The use of polygraph exams or voice stress tests with victims shall be strongly discouraged and set forth in policy ... such tests should be conducted only under limited circumstances and ... those circumstances ... should be set forth in policy" (Florida Model Policy, 1999, p. 15).

The Model Policy on sexual assault investigation that was recently released by the IACP includes a similar provision, stating that:

"Law enforcement agencies should establish policies to clearly state that officers should not require, offer, or suggest that a victim take a polygraph examination or submit to SCAN or voice stress analysis during the investigation stage" (IACP Concept and Issues Paper, 2005).

Yet in the wake of VAWA 2005, even this type of legislation or model policy will not go far enough to meet the new mandate. Regardless of the standards imposed on polygraph examiners or admonitions in any model policy, **VAWA 2005 clearly states that law enforcement investigators and prosecutors cannot request or require victims of sexual assault to submit to a polygraph examination or other truth telling device as a condition for**

proceeding with the investigation of the crime. This will require law enforcement agencies to respond more proactively by implementing written policies and protocols, with the information disseminated in training for officers, detectives, and prosecutors. **This legislative development also provides an excellent opportunity for law enforcement agencies to work cooperatively with victim advocacy organizations such as rape crisis centers to craft appropriate protocols, conduct cross-disciplinary training, and design a structure for responding to any potential violations.**

References:

- Jordan, F.D. (1996). Sex Crime Investigations: The Complete Investigator's Handbook. Boulder Colorado: Palladin Press.
- Reid, J.E. & Inbau, F.E. (1977). Truth and Deception: The Polygraph ("Lie Detector") Technique. Baltimore, MD: Williams & Wilkins Co
- Sloan, L.M. (1995). Revictimization by polygraph: The practice of polygraphing survivors of sexual assault. *Medicine and Law*, 14, 255-267.

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