Prohibitions Against Polygraphing Victims of Sex Crimes

Comments on Federal Law (42 USCS Section 3796gg8)
& State Regulation (502 KAR 20:020 Section 4)

www.kasap.org
502-226-2704

Federal law enacted in January 2006 *prohibits law enforcement officials, prosecutors, and other government officials from asking or requiring a victim of a sex crime to submit to polygraph examinations as a condition for proceeding with an investigation.* See 42 USCS § 3796gg8(a). Furthermore, refusal of a victim to submit to a polygraph examination shall not prevent the investigation, charging, or prosecution of the offense. See 42 USCS § 3796gg8(b).

In response, the Kentucky Justice and Public Safety Cabinet has updated 502 KAR 20:020 Section 4, which was previously promulgated to ensure the fair treatment of sex crimes victims who submit to polygraph exams. The updated regulation is available online at www.lrc.ky.gov/kar/502/020/020.htm .

This Fact Sheet is provided to ensure that Kentucky officials have up-to-date information regarding both state and federal laws. Essential points of law include:

- A polygraph examination of a victim shall not be requested, required, or conducted as a condition for proceeding with the investigation of the crime.
- A victim of a sex crime has the right to refuse examination and must be informed of this right. Refusal to submit to examination shall not prevent investigation, charging, or prosecution.
- A polygraph examination of a victim cannot be conducted UNLESS:
    1. The suspect has passed, declined, been found unsuitable for exam, or cannot be identified or located after a “thorough investigation,” as defined in 502 KAR 20:020 Section 1(4); and
    2. There must be a clear issue to test on based on a thorough investigation; and
    3. Before the examination, the investigating officer provides a signed, written document:
        a. describing any inconsistencies in the victim’s allegation; and
        b. stating if any inconsistency can be substantiated by existing evidence; and
        c. listing investigative strategies which have been used in the case; and
        d. declaring that the victim has not been told that the investigation would cease if the victim refuses to consent; and
        e. containing no reference to whether the victim is behaving as a 'typical' victim.
- Certain steps must also be taken to ensure that the victim understands her/his rights.
    1. The victim must be informed that s/he has the right to refuse.
    2. The victim’s written consent must be obtained.
    3. The victim must be informed that, upon her/his request, an advocate may observe through a 2-way mirror or closed circuit camera. However, the advocate must be in another room.
    4. The victim must be informed that s/he has the right to terminate the examination at any time.
- Questions about the victim's past sexual history are not allowed.
- Visual and audio contact between victim and suspect during the examination process must be avoided. If contact is made, the exam must be postponed and rescheduled for another date.
- The entire examination must be videotaped, with audio.
- Examinations may be conducted if voluntarily requested by a victim. However, a request is not considered to be at the victim’s request if it was made in response to a request by the investigator.

Questions and Complaints

This regulation is consistent with procedures previously recommended by the Kentucky State Police Polygraph Section. KSP Polygraph Program Manager Richard Kurtz is available to discuss questions and can be reached at 502-573-2100. Complaints regarding violations must be filed in writing to the Justice & Public Safety Cabinet, 125 Holmes Street, Frankfort, KY 40601-2108.