

Dear Fellow Board Members;

The Texas Polygraph Examiners Board has been charged with *regulating* the polygraph industry in Texas. As part of that obligation we have been empowered by the legislature with rule-making authority to aid us in accomplishing that end. It is my belief that we should not hesitate to promulgate rules which require our licensees to conduct their businesses in a lawful and professional manner. By doing so, we protect not only consumers of polygraph, but also the viability of polygraph as a means of determining truth.

Presently in Texas we have multiple parties who have made or propose to make polygraph rules. Such is JPCOT. As an example, while this board has no prohibition against interns performing sex offender tests, JPCOT does. In a recent request for document production under the Texas Open Records Act, a JPCOT co-chair declared that they are not a governmental body and declined to provide any records. If they are just a private group of examiners and sex therapists (we do not even know all of their identities) do they have the right to supersede this board and make enforceable rules for this industry?

This Board endorsed the original version of JPCOT guidelines on April 13, 1995. Texas Administrative Code § 810.62 (b)(24) requires that: "polygraph examinations shall only be conducted by licensed examiners that meet and adhere to the 'Recommended Guidelines for the Clinical Polygraph Examinations of Sex Offenders' as developed by the Joint Polygraph Committee on Offender Testing (JPCOT)." In recent months JPCOT has proposed changes to the original rules. What is this Board's stance to be on changes when we don't know who or what JPCOT is anymore—and they won't tell us?

I propose that this board direct Frank DiTucci to request an opinion from the Attorney General as to JPCOT's status—is it, or is it not a governmental body. If the Attorney General finds that JPCOT is a governmental body, then JPCOT must adhere to the requirements of the Texas Open Records Act and the Texas Open Meetings Act. The public has a right to know all about their activities. This board has a duty to consider any proposed changes and the impact such changes would have upon consumers. We too, have a right to know what transpires in JPCOT. If the Attorney General finds that JPCOT is not a governmental body, then let us adopt our own rules regarding sex offender testing.

I also propose we make three rules changes to the Administrative Code:

1. **Reinstatement of a requirement to report the number of tests performed annually (with modifications)**
2. **Required disclosure of payments made to third parties for polygraphs performed**
3. **Enumeration of examinee's rights to challenge polygraph results**

1. Reinstatement of a requirement to report the number of tests performed annually (with modifications)

Polygraphers should report to us the number of clinical polygraph examinations of sex offenders they are performing in their license renewals. They have in the past, annually reported the total number of all tests. While it is not necessary to report all types of test, those with a vested interest in the treatment of sex offenders need to know about sex offender polygraph activity statewide. We need these reports for statistical purposes. At various times, Mr. DiTucci will be called to testify before legislative committees. CSOT cites a number of studies indicating that recidivism rates of sex offenders have been dropping nation-wide; Texas needs to follow suit. The legislature has recognized the importance to Texas of effective treatment programs to contain sex offenders and polygraph plays a significant role in the containment of sex offenders. The over-crowding of our state's prisons and the staggering associated costs are also of vital concern to the legislature.

Frank has done an excellent job managing the TPEB on very limited funds and under enormous pressures. He is our link to the legislature. He needs to know the information and relevant statistics of our industry for legislative direction.

2. Required disclosure of payments made to third parties for polygraphs performed

Questions have arisen as to whether a polygrapher may give anything of value to a therapist who refers a sex offender to that polygrapher. If a polygrapher offers a "finders fee" or a "referral fee" to a therapist which is then passed on to the examinee in the form of a higher rate, both the polygrapher and the therapist run the risk of criminal prosecution under Tex. Penal Code § 32.43 (Commercial Bribery) unless the consent of the examinee is obtained. If we are unable to give consumers (who pay for their own testing) the right to choose their own examiner, then we should at a minimum require an examiner to disclose these kind of kick-backs to the examinee and obtain the examinee's written consent. I propose we amend our rules to specifically state that a polygrapher must disclose in writing any fee or anything of value given to a referring therapist and the polygrapher must obtain the examinee's written consent prior to administering the polygraph exam.

This proposed rules change will benefit not only the consumer, but also our licensees who should not have to offer kick-backs to unethical therapists.

3. Enumeration of Examinee's rights to challenge Polygraph Results

An examinee who disputes the validity of a polygrapher's findings should be entitled in all circumstances to have his own polygraph examiner (at the examinee's expense)

conduct an independent examination covering substantially the same questions. This approach is consistent with both the opinion in *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir 1989) where the Eleventh Circuit established fundamentally fair procedures for the introduction of polygraph evidence in court proceedings and American Polygraph Association (APA) rules. I propose we amend our rules to specifically state that an examinee who disputes the validity of a polygrapher's findings shall be entitled in all circumstances to have his own polygraph examiner (at the examinee's expense) conduct an independent examination covering substantially the same questions.

Also at some point we need to address the question of "approved polygraph lists" that have popped up throughout the state. While this board licenses approximately 250 polygraphers to operate in Texas, JPCOT only authorizes about 100 (including seven women) to perform sex offender polygraphs. Throughout the state we have certain supervision departments that reduce that 100 down to only allow a handful of examiners to perform work, almost always excluding blacks, Hispanics and women. Can any other entity in this state disqualify examiners that this board has licensed?

In sum, the Texas Polygraph Industry depends on the public's perception of our professional integrity. If we adopt these proposed amendments to our rules, we demonstrate our commitment to that integrity. These proposed rules changes emphasize to our examiners and to the public that we take our role seriously.