

JUSTICE AND PUBLIC SAFETY CABINET
Department of State Police
(Amendment)

502 KAR 20:020. Detection of deception examiners.

RELATES TO: KRS 329.010 -329.030[, 42 U.S.C. 3796gg-8]

STATUTORY AUTHORITY: KRS 15A.160, 329.030

NECESSITY, FUNCTION, AND CONFORMITY: KRS 15A.160 and 329.030(6) require the Secretary of the Justice and Public Safety Cabinet to promulgate administrative regulations establishing professional standards for detection of deception examiners. This administrative regulation establishes the practice requirements for detection of deception examiners.

Section 1. Definitions. (1) "Detection of deception examiner" is defined by KRS 329.010(1).

(2) "Secretary" is defined by KRS 329.010(5).

(3) "Sex crime" means an offense or attempt to commit an offense defined in:

(a) KRS Chapter 510;

(b) KRS 530.020;

(c) KRS 530.064(1)(a);

(d) KRS 531.310; or

(e) KRS 531.320.

Section 2. Advertising, soliciting, and discrimination are prohibited as follows:

(1) An examiner shall not advertise in any manner which would tend to deceive or defraud the public.

(2) An examiner shall not publish or circulate any fraudulent, false, or misleading statements as to the skill or method of practice of any person or examiner.

(3) An examiner shall not claim superiority over other examiners as to skill or method of practice.

(4) An examiner shall not divide fees[;] or agree to split or divide the fees received for detection of deception services with any person for bringing or referring a client.

(5) An examiner shall not attempt to solicit business as a result of information or statements obtained from an examinee relating to the examinee's past employment or employer.

(6) An examiner shall not refuse to render detection of deception services to or for any person solely on account of the race, color, creed, sex, or national origin of the person.

Section 3. (1) The examiner shall inform the prospective examinee that taking the detection of deception examination is a voluntary act and the examiner shall obtain the written consent of the examinee to undergo the examination.

(2) The examiner shall not conduct an examination on any person whom the examiner believes, through observation or any other credible evidence, to be physically or psychologically unfit for the examination at that time.

(3) The examiner shall, immediately upon request of the examinee, terminate an examination in progress.

(4) The examiner shall not render a verbal or written opinion based on chart analysis, until the examinee has had a reasonable opportunity to explain any reactions to pertinent questions.

(5) The examiner shall not interrogate or conduct an examination of an examinee's sexual behavior, or ask any questions that can be construed as being sexually oriented or personally

embarrassing to the examinee, regardless of marital status, unless the topic is a specific issue or unless it refers to the basic matter pertinent to the examination.

(6) The examiner shall not conduct an examination if the examiner has reason to believe the examination is intended to circumvent or defy the law.

(7) The examiner shall not knowingly issue, or permit an employee to issue, a polygraph examination report which is misleading, biased, or falsified in any way. Each report shall be a factual, impartial, and objective account of the pertinent information developed during the examination and the examiner's professional conclusion, based on analysis of the polygraph charts.

(8) The examiner shall not conduct a polygraph examination without first reviewing the issues to be covered during the examination and the general content of the questions to be asked during the examination with the examinee.

(9)(a) During deception tests, the examiner shall not render a conclusive truthful or deceptive decision, based on chart analysis, without presenting the same relevant test questions to the examinee three (3) or more times.

1. If the examinee has submitted to fewer than three (3) presentations of each relevant question, the results shall be recorded as no opinion.

2. The fact of the examinee's refusal shall be noted in the verbal or written report of the examination.

(b) An examiner may terminate an examination in progress at the examiner's discretion if, in the examiner's opinion, the examinee has become physically or psychologically unfit, or has become uncooperative to the point that it would be useless to continue the examination.

(10)(a) All questions and answers asked during a polygraph examination shall be marked on the polygraph charts at the appropriate place on the chart where the question was asked and the answer given.

(b) If a question sheet with numbered questions is used, the number of the asked question along with the answer given shall be noted and the question sheet shall be attached to the polygraph chart and made a part of the examinee's file.

(c) Each polygraph chart shall be identified as to the person being examined, the examiner, time and date of the examination, and the chart number.

(11)(a) The examiner shall not, unless professionally qualified to do so, include in any written report any statement purporting to be a medical, legal, or psychiatric opinion or which would infringe upon areas under the cognizance of professionals in those fields.

(b) The examiner may describe the appearance or behavior of the examinee, if:

1. The information is pertinent to the examination; and

2. The examiner refrains from offering any diagnosis which the examiner is professionally unqualified to make.

(12)(a) The examiner shall not offer testimony concerning the charts or conclusions presented by another examiner unless the examiner is thoroughly familiar with the techniques and procedures used by the other examiner.

(b) An examiner may testify concerning the examiner's independent examination of the same examinee.

(13) An examiner shall report to the cabinet any action or misconduct on the part of another examiner which would be in violation of the provisions of KRS Chapter 329 or 502 KAR Chapter 20.

Section 4. Detection of Deception Examinations of Victims of Sex Crimes. (1) The victim of a sex crime has the right to refuse examination and shall be informed of this right.

(2) An examination shall not be requested, required, or conducted of a sex crime victim as a condition for proceeding with the investigation of the crime.

(3) Except as provided by subsection (4) of this section, examination of a sex crime victim shall not be conducted unless:

(a) The victim's consent to the examination is in writing and received by the examiner before the examination begins;

(b) 1. The suspect has declined examination, has passed an examination or has been found unsuitable for an examination; or

2. After an investigation, the suspect cannot be identified or located;

(c) There is a clear issue to test on based on:

1. Interviewing the victim, any witnesses, any potential witnesses, and the suspect, if possible;

2. Submitting any evidence to the laboratory if appropriate; and

3. Pursuing any leads identified during the investigation; and

(d) Before the examination, the investigating officer has provided the examiner with a signed, written document:

1. Describing any inconsistencies in the victim's allegation;

2. Stating if any inconsistency can be substantiated by existing physical or testimonial evidence;

3. Listing investigative strategies that have been used in the case;

4. Declaring that the victim has not been told that the investigation would cease if the victim refuses to consent to an examination; and

5. Containing no reference to whether the victim is behaving like a typical sexual assault victim.

(4)(a) A sex crime victim may request examination. The investigator may arrange for the requested examination and the examination may be conducted if:

1. The request is voluntary and at the victim's own initiative;

2. It is documented in writing that the request is by the victim;

3. The written request is signed by the victim;

4. The written request is received by the examiner before the examination begins; and

5. The victim has an opportunity to consult with a victim's advocate prior to the examination.

(b) An examination shall not be considered to be at the victim's request if the victim agrees to the examination in response to a request by the investigator to take an examination.

(5) Every reasonable attempt shall be made to avoid visible and audio contact between the victim and suspect during the examination process. If contact is made, the examination shall be postponed and rescheduled for another date and time.

(6) The victim shall be advised that at the victim's request, a victim's advocate shall be allowed to watch the examination from a two (2) way mirror or by closed circuit television in real time. The examiner and the victim shall be the only two (2) individuals inside the examination room during the entire examination process, except if a language interpreter is required.

(7) At the beginning of the examination, the examiner shall advise the victim that the examination is a stressful experience and that if the victim feels uncomfortable at any time with the polygraph process, it shall be terminated immediately.

(8) The victim shall not be interrogated under any circumstance. A post-examination debriefing shall be conducted to give the victim the opportunity to explain any unresolved responses on the examination. The victim shall be advised that upon the victim's request, a victim's advocate shall be allowed to watch the debriefing session from a two (2) way mirror or closed circuit television.

(9) The testing format utilized shall be a researched comparison/control question format (CQT). The relevant questions shall be answered with a "yes" answer.

(10) An irrelevant/relevant question format shall not be utilized on any sex crime victim.

- (11) Past sexual history of the victim shall not be explored by the examiner.
- (12) Sex related comparison/control questions shall not be asked of the victim. Lie comparison questions excluding sex shall be used on sex crime victims.
- (13) At the end of the examination, the examiner shall advise the victim of the results.
- (14) Quality control of the examination shall be conducted in writing and maintained with the polygraph file at least until after adjudication of the case.
- (15) The entire examination shall be videotaped with adequate picture and sound from the time the victim walks into the testing room until the victim leaves the testing room for the last time. There shall not be a break in the videotaping of the process. The videotape shall be maintained as evidence until at least the investigation is adjudicated.

Section 5. (1) The examiner shall maintain on file for at least two (2) years all records, papers, polygraph charts, consent to examination forms, notes, question lists or sheets, and reports of polygraph examinations that the examiner conducted.

(2)(a) Except as provided in paragraph (b) of this subsection, an examiner who leaves the employment of another examiner, agency, firm, or company shall be allowed access, after showing reasonable cause, to the files of examinations that the examiner conducted during the two (2) year period prior to the date of the request.

(b) Without the approval of the employing examiner, agency, firm, or company, the examiner shall not remove any of the material contained in the file or make notes of any of the information contained therein.

(3) The cabinet shall, if there is just cause, inspect the records, reports, polygraph charts, and all paperwork connected with an examination to determine if an examiner is conducting examinations in accordance with the provisions of KRS Chapter 329 and 502 KAR Chapter 20.

Section 6. Continuing Education Requirements. (1) Each examiner shall complete at least twenty (20) hours of instruction in subject matter relating directly to the polygraph profession during the licensing year. Acceptable polygraph training for purposes of this requirement shall be:

(a) Polygraph seminars, courses, or other training sponsored by any national polygraph association, state polygraph association, or American Polygraph Association accredited polygraph school;

(b) Any training in polygraphy sponsored by a law enforcement training academy approved by the secretary or his or her designee if the instructor is certified by the Kentucky Law Enforcement Council;

(c) Training received during the course of internship established in 502 KAR 20:030 and approved by the Secretary in writing; or

(d) Any training directly relating to polygraph subject material which has been preapproved by the secretary or his designee in writing.

(2) Each examiner submitting a request to renew the examiner's license for the following year shall also submit proof of completion of the required instruction such as a copy of the diploma, certificate, or other documentation confirming instruction and attendance.

COLONEL PHILLIP "PJ" BURNETT, JR., Commissioner

APPROVED BY AGENCY: August 24, 2021

FILED WITH LRC: August 26, 2021 at 4:30 p.m.

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on 3:00 p.m. on November 22, 2021, at 521 Lancaster Avenue, Funderburk Building, Richmond, Kentucky 40475. Individuals interested in being heard at this

hearing shall notify this agency in writing by five workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through 11:59 p.m. on November 30, 2021. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person below.

CONTACT PERSON: Amy Barker, Assistant General Counsel, 125 Holmes Street, Frankfort, Kentucky 40601, phone (502) 564-8207, fax (502) 564-6686, email amy.barker@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact person: Amy Barker

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation establishes the practice requirements for detection of deception examiners.

(b) The necessity of this administrative regulation: This regulation is necessary to define the standards for polygraph studies.

(c) How this administrative regulation conforms to the content of the authorizing statutes: The regulation conforms to the authorizing statute by establishing the procedural requirements necessary polygraph studies.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This regulation clearly outlines the procedures for polygraph studies.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: The amendment establishes the procedures to follow for the implementation of certain polygraph examiners.

(b) The necessity of the amendment to this administrative regulation: The amendment is necessary to streamline the trial board proceeding process and remove the existing ambiguity.

(c) How the amendment conforms to the content of the authorizing statutes: The amendment conforms to the authorizing statute by more clearly defining the procedural requirements necessary for the discipline and removal of officers.

(d) How the amendment will assist in the effective administration of the statutes: The revised text within the regulation will remove the existing ambiguity as to when a continuance may be requested.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: The Kentucky State Police, the trial board established within the Kentucky State Police, those involved in proceedings with the trial board.

(4) Provide an analysis of how the entities identified in the previous question will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions each of the regulated entities have to take to comply with this regulation or amendment: The regulated entities can now effectively ascertain when a continuance may be granted.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities: Nothing.

(c) As a result of compliance, what benefits will accrue to the entities: The process is now more clearly defined.

(5) Provide an estimate of how much it will cost the administrative body to implement this administrative regulation:

(a) Initially: None.

(b) On a continuing basis: None.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Not applicable.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change if it is an amendment: No increase is necessary.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: The amendment of this administrative regulation does not establish any new fees or increase any fees, directly or indirectly.

(9) TIERING: Is tiering applied? No. Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all those individuals or entities regulated by it.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

(1) What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? The Kentucky State Police, the trial board established within the Kentucky State Police, those involved in proceedings with the trial board.

(2) Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 16.140

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect. If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

(a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? None.

(b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? None.

(c) How much will it cost to administer this program for the first year? Nothing.

(d) How much will it cost to administer this program for subsequent years? Nothing.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): None.

Expenditures (+/-): None.

Other Explanation: None.