

Subject: Judicial Department SMART Hearing - Polygraph

Members of the Joint Judiciary,

Tomorrow, as the committee listens to the SMART presentation by the Judicial Branch and has the opportunity to question its presenters, I strongly encourage members to investigate the Judicial Department's ongoing schizophrenic relationship with polygraph testing. On one hand, for more than three and a half decades the Colorado courts have held that evidence of polygraph test results and the testimony of polygraph examiners are per se inadmissible in both criminal and civil trials in Colorado. (*People v. Anderson*, 637 P.2d 354, 362 (Colo. 1981) (criminal case); *In re Marriage of McCaulley-Elfert*, 70 P. 3d 590, 594 (Colo. App. 2003) (dissolution of marriage). In *People v. Anderson*, the court stated, "We do not believe that the physiological and psychological bases for the polygraph examination have been sufficiently established to assure the validity and reliability of test results.") On the other hand, probation has increasingly relied on this flawed and unreliable instrument to supervise adults and juveniles convicted of sex offenses. (No other types of Colorado probationers are required to be polygraph tested. Sex Offender Management Board (SOMB) polygraph examiners are unlicensed individuals, who may not have a four-year college degree, and other than a client-initiated complaint process overseen by the SOMB, are unmonitored.) From FY2010 through FY2017 the Judicial Branch has spent \$3.7M on polygraph testing for both economically disadvantaged adults and juveniles while ordering millions more in testing for probationers deemed capable of paying for the examination. Concerningly, a growing number of probation officers voice affirmative positions on polygraph testing reflective of an addictive reliance on the results which stands in stark contrast to the decisions of the courts. It is not unheard of for probation officers to deny a probationer civil liberties and/or order increased sex offender "treatment" based solely on "deceptive" or "inconclusive" polygraph test results.

While it is quite possible tomorrow's Judicial Branch representatives will justify the incongruous positions on polygraph testing by citing SOMB standards and guidelines, the reality is, the SOMB has no jurisdiction over the Judicial Branch and the probation officers who oversee adults and juveniles convicted of sex offenses. In fact, by following the SOMB's prescriptive standards and guidelines regarding polygraph testing, probation officers, at times, could be in violation of Chief Justice Directive 16-01, which states, "Supervision of probationers shall be governed by the principle of risk of re-offending." (It should be noted that the chair and co-chair of the SOMB's Polygraph Committee either directly financially benefit, or have a family member that financially benefits, from the SOMB's continued mandated use of polygraph testing.) Also, although the Association for the Treatment of Sexual Abusers (ATSA) - an international, multi-disciplinary organization dedicated to preventing sexual abuse - no longer recommends the use of polygraph testing with juveniles under the age of eighteen, effective December 2016, probation officers continue to order polygraph examinations for this vulnerable population.

The continued use of polygraph testing by the Judicial Branch is neither smart or prudent. Probation officers who are poorly trained on the vast limitations of polygraph test results jeopardize public safety and waste taxpayer money. It is time for the committee to insist that the Judicial Branch reconcile its two-headed position on polygraph, abide by the rulings of the courts regarding the use of polygraph test results, and stop the use of polygraph testing by probation and eliminate the polygraph requirement from its Terms and Conditions of Probation for adults and juveniles convicted of a sex offense.

Respectfully,
Dale Jenkins