

Felony Sex Offender Sentencing

by Philip Cherner

This article discusses the provisions that govern adult felony sex offender sentencing and the Colorado Sex Offender Lifetime Supervision Act. The Standards of the Sex Offender Management Board also are covered, as well as conditions of probation.

*Plaintiff Heather Wesp sought tort damages against her mother and stepfather, Cheryl and Frank Brewer, alleging that Frank Brewer had sexually abused her. Criminal charges were also filed based on the same allegations. After writing letters denying the accusations, both Brewers committed suicide.*¹

One of the most traumatic events with which lawyers have to cope is a sex offense allegation. Whether the client is accused of having been a sexual perpetrator or the client is a possible victim of sexual abuse, the level of trauma to which the client will be exposed is beyond mere quantification. This article summarizes the various provisions that govern adult felony sex offender sentencing today. A large part of the statutory scheme is the Colorado Sex Offender Lifetime Supervision Act of 1998 (“Act”),² which radically changed the philosophy of Colorado sex offender sentencing.

Unless otherwise noted, this article covers the Act as amended through 2004. In 2002, the General Assembly recodified much of the felony criminal sentencing scheme. There were minimal, if any, substantive changes, but numerous provisions were renumbered.³ More than six years of experience with the Act have provided perspective and appellate interpretation, making this a good time to assess its workings.

It is not uncommon for allegations of sexual assault to arise during divorce proceedings, dependency and neglect actions, and domestic violence investigations. Therefore, some knowledge of the Act’s workings should assist a wide variety of practitioners. This article discusses the Act’s provisions and implementations, as well as the sentencing options for adult

felony sex offenders who are not sentenced under the Act. Because the treatment for offenders on probation and parole is the same for both categories of offenders, the article also summarizes the various treatment regimens.⁴

BACKGROUND OF THE ACT

Prior to November 1, 1998, sex offenders were most frequently sentenced under the general felony sentencing statute⁵ and, in rare cases, under the Colorado Sex Offenders Act of 1968 (“1968 Act”).⁶ The 1990s saw the evolution of treatment programs for sex offenders on probation and in prison. The Act can be seen as a culmination of this trend. The Act wholly abrogates the 1968 Act and imposes lifetime supervision for the more serious sex offenders, whether the offender has been sentenced to probation or to prison.

The policy behind the Act is summarized in its legislative declaration:

The general assembly hereby finds that the majority of persons who commit sex offenses, if incarcerated or supervised without treatment, will continue to present a danger to the public when released from incarceration and supervision. The general assembly also finds that keeping all sex offenders in lifetime incarceration imposes an unacceptably high cost in both state dollars and loss of human potential. The general assembly further finds that some sex offenders respond well to treatment and can function as safe, responsible, and contributing members of society, so long as they receive treatment and supervision. The general assembly therefore declares that a program under which sex offenders may receive treatment and supervision for the rest of their lives, if necessary, is necessary for

the safety, health, and welfare of the state.⁷

To provide some idea of how the Act is applied, the next section first sets out the types of crimes that are covered by the Act and the law covering life and consecutive/concurrent sentences.

Types of Crimes

In Colorado, felonies are divided into six classes, with class 1 felonies being the most serious.⁸ Felony sex offenses are effectively broken down into three categories. The first, for which the Act requires a lifetime sentence, are the most common class 2, 3, and 4 “sex offenses.”⁹



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A second group is the so-called “economic” sex crimes, such as trafficking in children, for which the Act’s lifetime sentencing is not automatic.¹⁰ Before the Act can be applied to these economic sex crimes, the court must find that the defendant is likely to commit sexual assault, unlawful sexual contact, sexual assault on a child, or sexual assault on a child by one in a position of trust. The court also must find that a victim was a stranger to the offender or a person with whom the offender established or promoted a relationship primarily for the purpose of sexual victimization.¹¹

A third group of sex felonies is excluded from the Act’s coverage altogether. These are primarily class 5 and 6 felonies. An example is attempt or conspiracy to commit a class 4 felony sex offense (such as an attempt to commit sexual assault without force), which is therefore statutorily defined as a class 5 felony.¹²

Generally, if the offense is covered by the Act, the court must impose a life prison sentence or lifetime probation. Persons who commit sex offenses not covered by the Act are sentenced to a determinant sentence of years, rather than a range, in the same manner as for other felonies.¹³ The Colorado Court of Appeals has rejected all constitutional challenges to the Act. Due process, equal protection, separation of powers, cruel and unusual punishment, and Fifth Amendment attacks were denied in *People v. Oglethorpe*,¹⁴ among other cases.

Life Prison Sentences

A court that imposes a life prison sentence is commanded to sentence the offender to “at least” the minimum in the presumptive range, to life. The presumptive range for the offense is defined in the general felony sentencing statute.¹⁵ For a class 4 felony, for example, the minimum in the presumptive range is two years. Thus, the sentence for the sex offense has to be at least two years to life. The phrase “at least” was interpreted literally in *People v. Smith*.¹⁶ Under this case, there is apparently no upper limit to the minimum. For this example, therefore, the sentence could be two years to life, fifty years to life, or ninety-nine years to life. The “top” end of the indeterminate sentence must, as required by the Act, be natural life, meaning the offender will be imprisoned forever unless paroled.¹⁷

Unlike all other felons, a defendant sentenced to prison under the Act must serve 100 percent of the minimum sentence,

less any earned time deductions, before the parole board may give initial consideration to releasing the offender to parole.¹⁸ Earned time cannot exceed 25 percent of the sentence.¹⁹ When an offender is parole-eligible, the parole board must consider releasing the defendant to parole, but it may reject the application. In fact, so far, it has rejected every parole application under the Act since its inception in 1998.²⁰

Consecutive/Concurrent Sentences

Presumably, the pre-existing body of law dealing with consecutive and concurrent sentences applies to sentencing under the Act. Thus, under the Act, the court has discretion to impose either type of sentence, unless constrained by a specific statutory provision.²¹ The Act does state:

Any sex offender sentenced pursuant to subsection (1) or (4) [of CRS § 18-1.3-1004] and convicted of one or more additional crimes arising out of the same incident as the sex offense shall be sentenced for the sex offense and such other crimes so that the sentences are served consecutively rather than concurrently.²²

In *People v. Becker*,²³ for example, the court held that a forty-eight-year to life sentence under the Act and a consecutive eight-year sentence for burglary was within the trial court’s discretion.

PROBATION AND COMMUNITY CORRECTIONS

Not all sex offenders are sent to prison; in fact, it has been estimated that two out of every three sex offenders are sentenced to probation. The Act authorizes probation for roughly the same group of individuals who were probation-eligible before its passage. On the other hand, offenders convicted of a crime of violence and habitual offenders must be sent to prison.

If probation is ordered, it must be for an indeterminate term of from ten years to life for a class 4 felony and from twenty years to life for class 2 and 3 felonies. Intensive supervised probation is required.²⁴ Offenders not sentenced under the Act are generally eligible for probation, provided their criminal history is not a bar.²⁵

Residential community corrections placement also is authorized, but only as a condition of probation.²⁶ By and large, however, the community boards and halfway houses are not willing to take sex offenders.

This section first discusses the Sex Offender Management Board (“SOMB”) and the evaluations required of sex offenders by the SOMB. It then discusses the conditions of probation.

Sex Offender Management Board

Although the SOMB was not created as part of the Act in 1998 (it preceded this legislation), it is charged with promulgating standards for the evaluation and treatment of sex offenders.²⁷ Pursuant to its authority, the SOMB has promulgated the Colorado SOMB *Standards and Guidelines for the Assessment, Evaluation, Treatment and Behavioral Monitoring of Adult Sex Offenders* (“Standards”).²⁸ These *Standards* are now at the heart of evaluation and treatment regimens for sex offenders under the Act, as well as for sex offenders not sentenced under the Act. The core value of the *Standards* is that sex offenders cannot be cured, but they can be managed. Public safety is paramount.

The SOMB is composed of twenty-one members. Representatives include individuals from the State Judicial Department (including one judge), Department of Corrections (“DOC”), Division of Criminal Justice, and Department of Human Services. Also included are licensed treatment providers, a district attorney, community corrections board member, public defender, polygrapher, victims’ rights advocate, and experts in the treatment of juvenile sex offenders.²⁹

Sex Offender Evaluations

For garden-variety crimes, a probation officer evaluates the crime and the offender and makes a sentencing recommendation to the court, called a pre-sentence report. In addition to this process, every sex offender must participate in a sex offender evaluation.³⁰ The purpose of the evaluation is to identify levels of risk and assist the probation officer in making its recommendation. The evaluation includes assessments of the following: cognitive functioning, mental health, medical/psychiatric health, drug/alcohol use, stability of functioning, developmental history, sexual evaluation, risk, motivation, amenability to treatment, and impact on the victim.³¹ In drawing conclusions, the evaluator is expected to err on the side of community safety—that is, incarceration.³²

The evaluator must be certified by the SOMB. Various tests and test instruments

are mandated by Standard 2.090. Some of these include a clinical interview, mental status exam, case file document review, treatment history, use of the sex offender risk scale,³³ and the plethysmograph³⁴ or Abel Assessment for Sexual Interest.³⁵

Conditions of Probation

The *Standards* impose a detailed regimen on the offender who is on probation. They start with the requirement of maximum supervision, also known as Intensive Supervised Probation (“ISP”). They also prohibit victim contact and unapproved contact with children under the age of 18, including the offender’s own children. Further required conditions establish geographic restrictions designed to prevent contact with potential victims (such as children and others), provide similar restrictions on employment and volunteer activity, ban possession of sexually-oriented material, and ban the use of alcohol.

When placed on probation, offenders may live only in an approved residence and must submit blood and saliva samples for DNA testing.³⁶ When defendants first meet with the probation officer, they are given an advisal concerning the sex offender’s supervision and treatment (see Appendix, below). This disclosure/advisement provides probation’s view of its role, and its tone is harsh.

ISSUES REGARDING THE STANDARDS

The *Standards* present a number of constitutional and evidentiary issues. Chief among these are the *Standards’* lack of confidentiality protection for offenders in treatment, their questionable reliance on polygraphs, and their restrictions on offenders’ contact with their own family members. A discussion of these issues follows.

Right to Silence

The *Standards* provide no rule of confidentiality after sentencing to protect the offender in treatment.³⁷ In fact, the opposite is true. The *Standards* assume the offender’s statements will be conveyed to the prosecution and to the police. Nevertheless, defendants who are sentenced retain a Fifth Amendment right to remain silent if anything they say could be used against them in a criminal proceeding.³⁸ Exercise of the right to silence may be particularly important after a finding of guilt, but before sentencing—that is, dur-

ing the period the probation officer is writing the pre-sentence report and while the sex offender evaluation is being prepared. No adverse inferences may be drawn at sentencing from the exercise of the right.³⁹

A guilty plea is not a waiver of the right to remain silent; a defendant may exercise the right after pleading guilty and before sentencing.⁴⁰ The fact that a defendant has pleaded guilty to a sex offense does not prevent an additional prosecution for some *other* sex offense. Having not been placed in jeopardy, a defendant may refuse to answer questions about “other” sex offenses. However, the *Standards* ignore these Fifth Amendment protections, leading to probation officers and treatment providers being kept in the dark about the defendant’s rights. This can result in some unpleasant interactions between the defendant’s counsel and the authorities. It also means that, unlike many other types of crimes, the offender often will need counsel after sentencing to ensure that his or her right to silence is respected.

Consider this scenario: A defendant charged with a sex offense elects to go to trial. During trial, he does not testify. He is convicted, sentenced to probation, and launches an appeal. As a condition of probation, he must participate in sex offender group therapy. If he denies or refuses to discuss the facts of the offense (as they appear in the police reports and according to the victim), he will be sanctioned under the *Standards* for his denial.⁴¹

Assuming the case is on appeal, no competent counsel would allow the defendant to make incriminating statements in a sex offender treatment group that could be used against the defendant if he is awarded a new trial. In addition, a defendant who testified at trial and proclaimed his innocence would be subjecting himself to a perjury prosecution if he says something contrary in the treatment group. Even defendants who do not appeal risk prosecution for unadjudicated crimes they disclose in treatment.⁴² On the other hand, failure to disclose in a group could be a violation of the treatment regimen.

The *Standards* do not address this conundrum. Moreover, neither the *Standards* nor any other statute have a mechanism to provide the defendant with immunity. Immunity might encourage treatment by removing the possibility of retaliation for candor.

Use of Polygraphs

The polygraph is central to sex offender evaluation and treatment under the

Standards. The substantial reliance placed on the defendant’s polygraph performance by the *Standards* presents a problem because of the polygraph’s questionable reliability, at least when assessed by the courts.⁴³

The *Standards* provide for specific-issue polygraphs, disclosure polygraphs, and maintenance polygraphs on an ongoing basis.⁴⁴ They acknowledge that a revocation cannot be premised solely on the failure to pass the polygraph, but failure to take the polygraph is a violation of probation. Also, two or more non-deceptive polygraph examinations must be completed before treatment as a conditional probation can be terminated.⁴⁵

In contrast to the *Standards*, the courts have treated the polygraph gingerly, at the least, and flat out inadmissible at most. More than twenty years ago, the Colorado Supreme Court in *People v. Anderson*⁴⁶ determined that polygraph testing was not reliable and that the results were *per se* inadmissible in a criminal trial. A number of cases that followed *Anderson* excluded references to polygraphs in criminal trials.⁴⁷ The methodology used in *Anderson* was overruled by the court in *People v. Shreck*.⁴⁸ However, its holding that polygraphs are unreliable and, therefore, inadmissible, remains the law.

The Court of Appeals recently entered the fray in *People v. Wallace*.⁴⁹ In *Wallace*, the defense sought to admit a favorable polygraph result. The trial court found the polygraph unreliable under C.R.E. 702 and also unduly prejudicial under C.R.E. 403. The C.R.E. 403 argument stemmed from the undue influence on the jury noted in *Anderson*.

The Court of Appeals affirmed the trial court. It agreed that C.R.E. 702 and 403 stated the applicable tests. The court found that C.R.E. 403 was still a bar because “introduction of the evidence would invade the province of the jury and influence its decision regarding witness credibility.”⁵⁰ Thus, the court continued to question the validity of polygraph science. There remains a tension between the assumption of polygraph reliability in the *Standards* and the assumption of unreliability in the case law.

Contact with Offender’s Minor Children

Another issue that arises regarding the *Standards* is their restriction on contact with the offender’s own children. This is especially problematic when the victim of

the offense was not one of the offender's children. Immediately following sentencing, for example, a probationer could be forced to move out of his home if any children are present.

Recent amendments to the *Standards*, however, now authorize contact once the supervising probation officer, treatment provider, and polygrapher ("treatment team") unanimously approve such contact. Standard 5.740 governs supervised contact with the offender's own children when the children are not his victims. The children are given a veto over the decision to allow contact, and there are other detailed criteria.

The Colorado courts have recognized a constitutional due process right to the integrity of the family unit.⁵¹ At least one case has held that denial of unsupervised visitation after a conviction for child abuse resulting in death did not abridge the right.⁵² In the 2004 case of *People v. Valenzuela*,⁵³ the Court of Appeals assessed the trial court's authority to remove an offender from the sex offender treatment program while keeping the offender on intensive supervised probation. The defendant was convicted of misdemeanor sexu-

al assault and felony theft, for which he was sentenced to six months in the county jail and five years on ISP probation under the sex offender program.

Thereafter, the defendant filed a motion to remove the restriction on contact with his minor children so that he could live at home with his family. The trial court found this would further his rehabilitation and granted the motion.⁵⁴ However, two months later, the probation department sought to revoke probation because "treatment providers were unable to treat defendant under Colorado Sex Offender Management Board Standards and Guidelines unless he had no contact with his five children."⁵⁵ It was therefore the probation department's recommendation that the defendant be sent to prison.

The trial court's resolution of the issue was to dismiss the probation revocation complaint, remove the defendant from sex offender intensive supervision, and place him on "regular" ISP. The Court of Appeals affirmed this order. The court found that while sex offender treatment was a mandatory condition of probation at the outset, several statutes gave the trial court authority to remove this condition

after its initial imposition.⁵⁶ The court was particularly offended by the probation department's refusal to comply with the order that the defendant be allowed to live at home.⁵⁷

In overall tone, the *Standards* seem to treat the defendant as a commodity. Although they pay lip service to respecting the defendant as an individual, the *Standards'* failure to address the defendant's post-sentencing rights is glaring and may encourage defendants to be less cooperative. The *Standards'* tone also seems to influence individual probation and parole officers, some of whom treat defendants as crimes waiting to happen rather than as individuals with a wide range of interests in treatment participation. Perhaps if the *Standards* allowed for more flexibility and gave probation officers some discretion in handling post-conviction lifestyle plans, cooperation by defendants would be enhanced.

TRIAL VERSUS DISPOSITION

Sex assault cases pose major questions about whether to plea bargain or to go to trial. Defendants and their counsel give great weight to the social stigma attached

to the crime. Prosecutors consider the fact that the victim will have to testify about painful, intimate details and likely will be subjected to cross-examination, which may be extremely adversarial. In the author's experience, sex assault cases have a higher rate of going to trial than almost any other felony (except for homicide). This rate may be even higher since the Act's passage in 1998. One reason for this may be the onerous nature of some SOMB treatment provisions, discussed above, thereby making probation less attractive than it once was.

There is also a great disparity between the consequences of a guilty verdict at trial and a plea bargain. In many cases, loss at trial may mean a mandatory life sentence. A plea offer may be to a lesser sex crime that will be sentenced outside the Act. On the one hand, this means that the plea offer will likely include a sentence to a definite term of years—or perhaps no prison at all. On the other hand, under the Act, no one sentenced to life has yet been paroled.⁵⁸ As a result, the Act has dramatically upped the ante.

Some defendants admit their offense and would willingly participate in treatment. These offenders are the most likely to enter into a plea-bargained disposition. However, some defendants are adamant that they are not guilty. This group is unlikely to plead guilty to any sex offense, but may do so to avoid the long prison sentence facing them if they are convicted.

Defendants who believe they are innocent, but do not wish to risk a life sentence are presented with a dilemma. After sentencing, if they deny or minimize their involvement to the treatment providers, they may be penalized under the *Standards*.⁵⁹ Probation for these offenders, therefore, can be short-lived. Competent defense counsel should advise clients that if they plead guilty, they likely will have to admit guilt repeatedly over the coming years.

Defense attorneys sometimes have their clients participate in a sex offender evaluation before making the decision of whether to go to trial or plead guilty. This often is helpful in evaluating the case. Also, the resulting assessment helps clients understand and appreciate the gravity of the two options.

Jail Pending Sentencing

An additional complication is presented for defendants who are on bond when they plead guilty. For many, even if proba-

tion is the likely sentence, jail is required between the plea and sentencing hearings. The Colorado Constitution was amended in 1995 to require denial of bail for offenders convicted of "crimes of violence" and "felony sex crimes against children."⁶⁰

Many felony sex crimes fall under one of these two definitions. The practical result is that offenders who are out on bail are usually jailed after a guilty plea or trial conviction, pending preparation of the sex offender evaluation and the pre-sentence report. This process often takes as long as eight weeks.

COLLATERAL CONSEQUENCES OF A CONVICTION

Common consequences of a felony sex offense conviction include the stigma and restrictions a felony conviction carries generally, such as a lifetime prohibition on possession of a firearm and ammunition,⁶¹ among others. Sex offenders, however, face additional consequences, including the sex offender registration requirement, issues related to costs and fees, and negative implications for employment.

Sex Offender Registration

Like most jurisdictions, Colorado has a comprehensive sex offender registration statute.⁶² Individuals found guilty, having pled guilty, or who received a deferred judgment for "unlawful sexual behavior" must register. "Unlawful sexual behavior" is broadly defined.⁶³ Individuals convicted of another offense, the "underlying factual basis" of which involves unlawful sexual behavior, also are required to register.⁶⁴ Failure to register is a felony.⁶⁵ Also, it is a crime to fail to cancel registration if a sex offender moves from the jurisdiction in which he or she is registered.⁶⁶

An offender must register within five days after the obligation arises and must re-register annually.⁶⁷ An exception to this requirement is if the individual is labeled a "sexually violent predator," in which case he or she must register quarterly.⁶⁸ Offenders also must keep their registration current if they move. The obligation to register is a lifelong obligation if the person is a "sexually violent predator" or if the person is convicted of the more serious sex offenses listed in the statute (CRS § 18-3-414-5(1)(a)(II)).

Internet posting is required for individuals who are labeled "sexually violent predators" and repeat offenders. Offend-

ers convicted of lesser sex offenses can petition the court for termination of their registration requirement ten or twenty years after they complete their sentence, depending on their offense. Individuals placed on a deferred judgment for unlawful sexual behavior may petition for removal from the registry, provided the case has been concluded.⁶⁹

To be labeled a "sexually violent predator," an individual must be convicted of one of the more serious sex offenses and found to be at risk of committing further sex crimes.⁷⁰ It appears the only two consequences of being labeled a "sexually violent predator," other than the stigma of the label, are increased registration frequency and Internet posting.

In Colorado, the registry can be accessed by the public in three ways. First, a person can submit a request for a records check on an individual to the Colorado Bureau of Investigation ("CBI"). If that individual is on the registry, the CBI will say so. Second, a member of the public can ask for a list of all registered offenders who are in the same law enforcement jurisdiction in which he or she resides. Finally, the statute provides for additional access on a "need to know" basis, pursuant to regulations promulgated by the Department of Public Safety.⁷¹

Fees and Costs

As noted above, there are other collateral consequences of a felony sex offender conviction. These include the fees, costs, and restitution;⁷² the sex offender surcharge;⁷³ and genetic testing.⁷⁴ The defendant also is responsible for other ongoing costs, which may include fees for probation supervision, polygraphs, sex offender group and individual treatment, plethysmographs, or Abel testing.⁷⁵ In some cases, the defendant is required to pay for room and board at a group home for sex offenders where some defendants are ordered to live.

Employment and Other Restrictions

Additional consequences arise from the control exercised by the treatment team in determining what employment the offender is allowed to accept. For example, offenders likely would be prohibited from working in any job where they have contact with children. A common condition of probation and parole is an order to disclose the offender's conviction to prospective employers.

Another consequence is a statutory prohibition on adoption.⁷⁶ Adoption procedures include a criminal records check. If the individual has a felony conviction for “any crime involving . . . sexual assaults,” he or she is barred from adopting a child for at least five years.⁷⁷

As noted above (*see* section entitled “Probation and Community Corrections”), if the offender is placed on probation, the conditions of probation also are relevant. They contain even more detailed consequences and restrictions.

TREATMENT REGIMENS

A defendant need not be sentenced specifically under the Act to come within the sex offender treatment regimen. In fact, a defendant does not even have to be convicted of a sex offense. Courts have broad power to impose conditions of probation reasonably related to the offense, the offender, and the protection of the public.⁷⁸ In addition, sex offender treatment must be ordered for offenders for whom the “underlying factual basis” involves unlawful sexual behavior.⁷⁹

Some plea bargains, however, are facilitated by an agreement that specifically sets forth that there is no underlying factual basis to support the sexual assault allegations. The stipulation can be placed on the record as part of the plea. The parties might further agree that the probation department is not to impose any offense-specific treatment requirements, such as sex offender treatment, on the defendant. Whether this order is binding on probation is unclear because there are no appellate cases on point. However, it is clear that any such agreement is not binding on the DOC’s classification and treatment decisions.⁸⁰

The Colorado DOC provides a comprehensive sex offender treatment program for prison inmates. Those who are sentenced for sex offenses are routinely referred to the program at the DOC, which also assesses the history of incoming inmates. For unadjudicated sex offenders, due process requires a hearing before the “sex offender” label attaches.⁸¹ Unadjudicated sex offenders are those inmates the DOC believes have a history of sexual misconduct, but have not been convicted of a

sex offense. After a hearing, these offenders may be found to be and thus labeled as sex offenders and placed in the DOC sex offender treatment program, along with those who have been convicted of a sex offense.

The DOC starts all sex offenders in its “core curriculum,” with the focus on “thinking” errors, anger management, and stress management.⁸² After this eighteen-hour (minimum) course, offenders are placed in the “Phase 1” therapy group. The group meets at the Fremont Correctional Facility and at the Sterling Correctional Facility four times a week and continues for approximately six months. Phase 1 also convenes at the Colorado Territorial Correctional Facility and at the Colorado Women’s Correctional Facility twice a week. There are subsets of Phase 1 for individuals with low intellectual functioning and mental illness, as well as for Spanish speakers.

After completion of Phase 1, the inmates participate in Phase 2. Phase 2 consists of a therapeutic community at the Arrowhead Correctional Center. The Colorado Women’s Correctional Facility offers



a similar program, appropriately adapted to its female population. Additional phases are directed at offenders in community corrections and on parole.⁸³

CONFIDENTIALITY AND MANDATORY REPORTING

The Colorado Children's Code requires numerous professionals (not including defense counsel) to report indications of child abuse and neglect. Failure of a mandatory reporter to report is a misdemeanor.⁸⁴ Many of these professionals (such as mental health professionals, social workers, and psychologists) are the same ones who evaluate and treat sex offenders.⁸⁵ For convicted offenders, the Children's Code has no significant impact on the equation because there is no confidentiality in the sex offender treatment process. However, it does have a significant impact on those who are charged but have not been adjudicated.

For example, assume a person is charged with sexual assault on a child and wishes to enter treatment, to be evaluated prior to conviction, or requests therapy for help in dealing with the stress of being charged. If this person enters therapy privately and, during therapy, makes disclosures of child abuse, the therapist will almost certainly have to report the disclosure. Most treatment providers believe they are not required to report the incident if it has already been reported. However, if the person describes other incidents, the treatment provider will have to tell the authorities of the added disclosures.⁸⁶

When arrested for sexual assault, defendants often are in a great deal of anguish, either because they believe they are facing false allegations, because they are confronting facts that are buried deep in their psyche, or both. Getting them confidential help is imperative. If the lawyer refers the client to a therapist, a chain of events could be initiated inadvertently, leading to revelations that may ultimately harm the offender in court.

Balanced against this pressing concern is the equally powerful knowledge that the offender may need help immediately to deal with issues as serious as a clear and present danger of suicide. One strategy is to identify the offense of which the authorities already have knowledge as quickly as possible. The client usually can discuss such an incident with a therapist without fear of mandatory reporting.

EFFECTIVENESS OF THE ACT

After more than six years since enactment, it is necessary to ask whether the Act works. Perhaps the question is better phrased by asking whether the Act's intensity and cost has reduced the instances of sex offenses in Colorado. Another question, and one that appears less relevant to the overall goals of the Act, is whether the Act has reduced recidivism.

A growing percentage of the DOC population comprises individuals serving life sentences under the Act. Each year since the Act's enactment, a larger number of individuals have been sentenced to prison for life. In 1998, 0.3 percent of the DOC population was serving life for a sex offense. In the most recent year for which statistics are available, 2003, the number rose to 2.7 percent.⁸⁷ It is unlikely that this rather steep growth curve under the Act has topped out. None of these sex offenders has been paroled, so there is a long-term potential impact on prison bed space.

In an attempt to answer whether the Act has served to reduce instances of sex offenses, two principal measures of crime rate are available. One is the *Uniform Crime Reports*, compiled by the Federal Bureau of Investigation ("FBI"), which measure reported offenses. A second measure is based on crime victimization surveys done by the Department of Justice ("DOJ"). By both measures, Colorado's sexual assault rates have dropped since the Act's creation in 1998. However, the national rate also has been dropping for years. For example, the DOJ survey shows the national rate for reported rape and other sexual assaults dropped 68 percent from 1993 to 2003.⁸⁸

The FBI *Uniform Crime Reports* show a 19.8 percent national decrease in the rate of forcible rape from 1993 to 2002. In apparent direct contrast, Colorado's rate increased from 1994 to 2002 by 9.2 percent. From 1998 to 2002, it decreased by 3.9 percent in Colorado, while the national rate over the same period dropped by 3.2 percent.⁸⁹ Therefore, it is not clear whether the Act is the actual cause of reducing the occurrence of sex offenses in Colorado.

Until a sufficient number of offenders are released from prison, statistically meaningful, outcome-based studies on the success of the program are impossible. Crime rate data for the next few years may help assess the efficacy of treatment for offenders who were not sent to prison because the recidivism rate for this popu-

lation of out-of-prison offenders can be studied.

One thing is clear: Under the current scheme, the parole board is in an impossible position. Political and public pressure opposing the release of even one sex offender is tremendous. However, if such offenders are not released, Colorado will have to install more prison beds. Moreover, the Act's implied promise—if the offenders fully and successfully participate in treatment, they will be paroled—will be broken.

CONCLUSION

This article is intended as an overview of the Act, how it is structured, and how it has been working since its adoption in 1998. Practitioners need to keep abreast of the recent interpretations of the Act through the courts to ensure protection of the rights of offenders, while protecting the public. Treatment regimens are certain to be tested in the courts, which are still grappling with the rights of defendants after sentencing.

NOTES

1. Paraphrased from *Wesp v. Everson*, 33 P.3d 191, 193 (Colo. 2001).

2. H.B. 98-1156, L. 98, Ch. 303, codified originally in CRS §§ 16-13-801 *et seq.* and now in CRS §§ 18-1.3-1001 *et seq.*

3. *E.g.*, the Act, originally CRS §§ 16-13-801 *et seq.*, became CRS §§ 18-1.3-1001 *et seq.* This article cites to current statute numbers, even when referring to cases using the older numbering scheme.

4. See also Montgomery, "Sex Offenders in the Community: Colorado's New Standards and Guidelines—Part II," 26 *The Colorado Lawyer* 65 (March 1997); Cherner, "Sentencing Dilemmas," 29 *The Colorado Lawyer* 67 (Oct. 2000).

5. CRS § 18-1.3-401.

6. CRS §§ 18-1.3-901 *et seq.*

7. CRS § 18-1.3-1001.

8. CRS § 18-1.3-401.

9. An example is sexual assault, CRS § 18-3-402. See also CRS §§ 18-1.3-1003(4) and (5), and 18-1.3-1004(a). "Sex offenders" are individuals convicted of a "sex offense," as defined in CRS § 18-1.3-1003(5). The enumerated sex offenses are: sexual assault, as described in CRS § 18-3-402, or sexual assault in the first degree, as described in CRS § 18-3-402, as it existed prior to July 1, 2000; sexual assault in the second degree, as described in CRS § 18-3-403, as it existed prior to July 1, 2000; felony unlawful sexual contact, as described in CRS § 18-3-404(2); felony sexual assault in the third degree, as described in CRS § 18-3-404(2), as it existed prior to July 1, 2000; sexual assault on a child, as described in CRS § 18-3-405; sexual

assault on a child by one in a position of trust, as described in CRS § 18-3-405.3; aggravated sexual assault on a client by a psychotherapist, as described in CRS § 18-3-405.5(1); enticement of a child, as described in CRS § 18-3-305; incest, as described in CRS § 18-6-301; aggravated incest, as described in CRS § 18-6-302; and patronizing a prostituted child, as described in CRS § 18-7-406. "Sex offense" also includes criminal attempt, conspiracy, or solicitation to commit any of these offenses specified "if such criminal attempt, conspiracy, or solicitation would constitute a class 2, 3, or 4 felony." CRS § 18-1.3-1001(5)(b).

10. CRS § 18-1.3-1004(4). These crimes are trafficking in children, as described in CRS § 18-6-402; felony sexual exploitation of children, as described in CRS § 18-6-403; procurement of a child for sexual exploitation, as described in CRS § 18-6-404; soliciting for child prostitution, as described in CRS § 18-7-402; pandering of a child, as described in CRS § 18-7-403; procurement of a child, as described in CRS § 18-7-403.5; keeping a place of child prostitution, as described in CRS § 18-7-404; pimping of a child, as described in CRS § 18-7-405; inducement of child prostitution, as described in CRS § 18-7-405.5; and criminal attempt, conspiracy, or solicitation to commit any of these offenses. *Id.*

11. CRS §§ 18-1.3-1004(4) and 18-3-414.5 (1)(a)(II) and (III).

12. CRS §§ 18-2-101 (attempt) and -201 (conspiracy). CRS § 18-1.3-1003(5)(b) exempts class 5 and 6 attempts and conspiracies from the definition of "sex offense."

13. Under CRS § 18-1.3-401.

14. *Oglethorpe*, 87 P.3d 129 (Colo. App. 2003); see also *People v. Streat*, 74 P.3d 387 (Colo. App. 2002); *People v. Dash*, 33 Colo. Law. 188 (Oct. 2004) (App. No. 03CA285, *ann'd* 8/12/04).

15. CRS § 18-1.3-401(1)(a)(V)(A).

16. *Smith*, 29 P.3d 347 (Colo. App. 2001). See also *People v. Larson*, 97 P.3d 246 (Colo. App. 2004) (fifty-year minimum upheld).

17. *People v. Becker*, 55 P.3d 246 (Colo. App. 2002). This is so despite the conflicting wording in the crime of violence statute, CRS § 18-1.3-406(1)(b).

18. CRS § 18-1.3-1006(1)(a). "On completion of the minimum period of incarceration specified in a sex offender's indeterminate sentence, less any earned time credited to the sex offender pursuant to § 17-22.5-405, CRS, the parole board shall schedule a hearing to determine whether the sex offender may be released on parole."

19. CRS § 17-22.5-405(4).

20. *Lifetime Supervision of Sex Offenders, Annual Report (hereafter, "2003 Annual Report")* (Nov. 1, 2003) at 6, prepared pursuant to CRS § 18-1.3-1011(a), by the Colorado Dept. of Corrections, Colorado Dept. of Public Safety, and State Judicial Department. The report is

available at http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/AnnualReport2003.pdf. The November 1, 2004, draft of the *Annual Report* also notes no paroles to date.

21. *People v. Anderson*, 529 P.2d 310 (Colo. 1974).

22. CRS § 18-1.3-1004(5)(a).

23. *Becker*, *supra*, note 17.

24. CRS § 18-1.3-1004(2)(a).

25. See generally CRS § 18-1.3-201.

26. CRS § 18-1.3-1004(2)(b).

27. CRS § 16-11.7-103.

28. Published by the SOMB in June 2004, available at http://dcj.state.co.us/odvsom/sex_offender/index.html (*hereafter*, "Standards").

29. CRS § 16-11.7-103.

30. CRS §§ 18-1.3-1004(2)(a) and 16-11-102(1)(b); *People v. Lenzi*, 986 P.2d 980 (Colo. App. 1999); *People v. Meidinger*, 987 P.2d 937 (Colo. App. 1999).

31. Standard 2.060.

32. Standard 2.050.

33. The Colorado Division of Criminal Justice Sex Offender Risk Scale is an actuarial scale normed on Colorado offenders from probation, parole, and prison. Standard 2.090.

34. "In the field of sex offender treatment, plethysmography means the use of an electronic device for determining and registering variations in penile tumescence associated with sexual arousal. Physiological changes associated with sexual arousal in women are also

measured through the use of plethysmography. Plethysmography includes the interpretation of the data collected in this manner." *Standards, supra*, note 28 at 11.

35. Standard 2.000. The Abel Assessment for Sexual Interest is "a two-part computerized test used to identify deviant sexual interests. The first part of the test is a comprehensive questionnaire of self-reported behaviors, accusations, arrests and convictions, and questions designed to identify cognitive distortions and truthfulness. The second part of the test objectively captures the client's deviant sexual interest while viewing 160 digital images of clothed adults, adolescents and children." See http://www.abelscreen.com/Product_Information.html.

36. Standard 5.510.

37. Standards 3.210 and 5.510(K). At a minimum, the required confidentiality waiver extends to the probation officer, treatment provider, and polygrapher. Standards 3.210 and 5.120.

38. *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1932 (1984); *People v. Elsbach*, 934 P.2d 877, 881 (Colo.App. 1997) ("A probationer has a Fifth Amendment right against compelled self-incrimination"); *People v. Fleming*, 3 P.3d 449 (Colo.App. 1999).

39. *Mitchell v. U.S.*, 526 U.S. 314, 119 S.Ct. 1307 (1999); *People v. Young*, 987 P.2d 889 (Colo.App. 1999).

40. *Mitchell, supra*, note 39.

41. See, e.g., Standard 3.610 ("An offender's continued denial of the act after plea bargaining or conviction threatens community safety and is highly distressing and emotionally damaging to the victim."); Standard 5.610, B.4 (increased monitoring for offenders in denial).

42. E.g., *Elsbach, supra*, note 38.

43. See generally Banashek and Collins, "Polygraph Examinations: Admissibility and Privilege Issues," 31 *The Colorado Lawyer* 69 (Nov. 2002).

44. "In cooperation with the supervising officer, the provider shall employ treatment methods that incorporate the results of polygraph examinations, including specific issue polygraphs, disclosure polygraphs, and maintenance polygraphs." Standard 3.730.

45. See Standards 5.230 and 3.410.

46. *Anderson*, 647 P.2d 354, 357-58 (Colo. 1981):

The defendant claims that the polygraph has attained a degree of reliability and general acceptance in the scientific community which warrants the admission at trial of

polygraph test results and testimony of polygraph examiners. So long as a proper foundation for expert testimony is laid, the defendant contends that the trial court may use its discretion to admit such evidence. We disagree. 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. Nor are we persuaded that sufficient standards for qualification of polygraph examiners exist to insure competent examination procedures and accurate interpretation of the polygraph. Further, use of the polygraph at trial interferes with and may easily prejudice a jury's evaluation of the demeanor and credibility of witnesses and their testimony. Accordingly, we conclude that any evidence of polygraph results and testimony of polygraph examiners is *per se* inadmissible in a criminal trial.

47. E.g., *People v. Dunlap*, 975 P.2d 723, 756 (Colo. 1999):

We find support for this holding in a recent United States Supreme Court decision rejecting a defendant's constitutional challenge to a *per se* rule against the admission of polygraph evidence. See *United States v. Scheffer*, 523 U.S. 303, 118 S.Ct. 1261, 1265, 140 L.Ed.2d 413 (1998) (holding that a *per se* rule against admission of polygraph evidence did not violate the defendant's right to present a defense under the Fifth and Sixth Amendments). The Court in *Scheffer* noted that "to this day, the scientific community remains extremely polarized about the reliability of polygraph techniques." *Scheffer*, 118 S.Ct. at 1265.

48. *Shreck*, 22 P.3d 68 (Colo. 2001) (rejecting the *Frye* test approved in *Anderson, supra*, note 46, in favor of the more liberal standard of C.R.E. 702). See also Gordon, "Rule 702: Admissibility of Expert Testimony," 30 *The Colorado Lawyer* 55 (Nov. 2001).

49. *People v. Wallace*, 33 Colo.Law. 181 (April 2004) (App. No. 02CA1012, *ann'd* 2/26/04).

50. *Id.*

51. *People v. Forsythe*, 43 P.3d 652, 653-54 (Colo.App. 2001).

52. *Id.*

53. *Valenzuela*, 33 Colo.Law. 229 (Sept. 2004) (App. No. 02CA2043, *ann'd* 7/29/04).

54. *Id.*

55. *Id.*

56. *Id.* See also CRS §§ 18-1.3-1007, -1008(1), and -1008(3)(a).

57. *Valenzuela, supra*, note 53.

58. *Supra*, note 20.

59. *Supra*, note 41.

60. Colo. Const., Art. II, § 19(2.5). See also CRS § 16-4-201.5(1).

61. CRS § 18-12-108; 18 USC § 922(g).

62. CRS §§ 16-22-101 *et seq.*

63. CRS § 16-22-102(9); *Meidinger, supra*, note 30.

64. CRS § 16-22-103(2)(c).

65. CRS § 18-3-412.5.

66. CRS § 18-3-412.5(1)(i).

67. CRS § 16-22-103.

68. CRS § 16-22-108(1)(d)(I).

69. CRS § 16-22-113.

70. CRS § 18-3-414.5.

71. CRS § 16-22-110(6).

72. Restitution is also required, as for all felonies. See CRS §§ 18-1.3-205 and -601 *et seq.*

73. CRS § 18-21-103(1). The surcharge is between \$500 and \$3,000, depending on the class of felony.

74. CRS § 16-11-104.

75. See notes 34 and 35, *supra*; CRS § 18-1.3-204(2)(a)(V).

76. CRS § 19-5-207(2.5).

77. *Id.*

78. *People v. Brockelman*, 933 P.2d 1315 (Colo. 1997).

79. CRS § 18-1.3-107. Subsection (1)(a) (IV) is not clearly drafted. See also the broad definition of a "sex offender" in CRS § 16-1.7-102(2)(a)(II), which includes a "history of any sex offenses"; *Meidinger, supra*, note 30.

80. CRS § 16-22-103(2)(d).

81. DOC Admin. Reg. 750 B02; *Chambers v. Colo. DOC*, 205 F.3d 1237 (10th Cir. 2000); *Fisher v. Colo. DOC*, 56 P.3d 1210 (Colo.App. 2002).

82. *2003 Annual Report, supra*, note 20.

83. *Id.*

84. CRS § 19-3-304.

85. *Id.*

86. CRS § 19-3-304(1).

87. *Colo. DOC Annual Reports*, available at <http://www.doc.state.co.us/statistics/3statisticalreports.htm>.

88. "Criminal Victimization, 2003," Dept. of Justice, Bureau of Justice Statistics, *National Crime Victimization Survey* at 5, available at <http://www.ojp.usdoj.gov/bjs/cvictgen.htm>. A decrease of 55 percent in all violent crime was measured over the same period. *Id.*

89. *Id.* n

See Appendix on page 22.

APPENDIX

DISCLOSURE/ADVISEMENT Provided by Probation Officers (Excerpts)

Notice to Attorneys, Defendants, Ministers,* and Psychotherapists Concerning Sex Offender Supervision and Treatment

(*The term minister is meant to include religious and/or spiritual persons who may be involved in supporting an offender during the time that they are under the supervision of the Court.)

Your client has either been convicted of a sexual assault offense or has indicated his/her willingness to plead guilty. You need to be aware that any community-based sentence will require the client's participation in sex offender treatment. Sex offender treatment is relatively new, so its methods are often misunderstood, even by otherwise highly qualified attorneys and therapists. Attorneys often are alarmed by what they hear about this treatment. Psychotherapists, not familiar with the literature, typically feel that such methodology is contrary to basic therapeutic techniques. Some ministers fear the therapy doesn't allow for the client's spirituality. Sex offender treatment challenges offender's perceptions and way of thinking. They often complain about the personal discomfort they experience, exacerbating the concern of their support system. This treatment has proven to be effective in reducing the risk to public safety, while at the same time enhancing the number of defendants receiving community based sentences for sex offenses. It is important for all persons to know from the beginning that the offender will undergo treatment different from traditional psychotherapy.

DIFFERENCES IN THE TREATMENT:

The criminal justice system chooses the treatment provider NOT the defendant. Offenders often feel they should have the right to choose the therapist that makes them most comfortable. But, because sex offender treatment is not yet taught in graduate schools, and because the criminal justice system has the responsibility to protect the public, the criminal justice system has to make certain the therapy used will actually enhance community safety. Thus, all persons convicted of sexually related offenses will be required to attend treatment with a therapist approved by the probation officer and listed as approved by the Colorado Sex Offender Management Board. The probationer will be responsible for payment of all treatment related bills.

Mandated treatment has a poor reputation in mental health circles. But experience has shown that a) this process takes years, not weeks or months, b) offenders often feel uncomfortable during this process, c) offenders will believe they are "cured" long before they are ready to be released from treatment. As a result, offenders drop out before they have realized the benefits of this treatment unless they are required to attend by the court.

Lack of confidentiality. Confidentiality is a cornerstone of traditional therapy. But sex offender treatment involves the probation officer/community corrections agent, the victim's therapist, the social services worker, and others. No one will be revealing the personal business of the client to persons with no need to know, but each client in sex offender treatment is required to waive his/her right to confidentiality. The exact nature of that waiver varies slightly among treatment agencies.

...

Group therapy. Effective sex offender treatment must be done in group therapy. In [in]dividual therapy, it is too easy for an offender to manipulate even experienced, competent therapists. Group members have "been there" themselves and can effectively confront and support the new group member.

Admission. The client must admit he or she engaged in the INAPPROPRIATE, UNLAWFUL SEXUAL BEHAVIOR THAT IS THE UNDERLYING FACTUAL BASIS FOR THE OFFENSE TO WHICH HE OR SHE PLED GUILTY, PLED NOLO CONTENDERE, ENTERED AN ALFORD PLEA or OF WHICH HE OR SHE WAS OTHERWISE CONVICTED. It is impossible to teach a person to control a behavior he/she says has never been practiced.

Physiological monitoring. The client will be required to undergo polygraph and or plethysmograph assessment periodically as directed by probation officer and/or therapist.

...

Additionally, special conditions of probation may be imposed which will result in limitations and changes in the client's current lifestyle. Additional conditions of probation will include but are not limited to: no contact with children, including no or restricted contact with their own children as ordered by the court, no consumption of alcohol or of any illegal substance for personal use or for the purpose of grooming a victim, residence approval by the supervising probation officer, registration as a sex offender and genetic marker (DNA) testing.

Per statute, offenders will be required to comply with an offense specific evaluation prior to sentencing. This must be done by a court or probation approved agency or provider who is registered with the Sex Offender Management Board. In addition, if ordered by the court, the offender will be required to be evaluated to determine if he or she is a sexually violent predator. Offenders living out of state may, therefore, be required to remain in, or returned to Colorado for said evaluation.

...

A complete copy of this disclosure can be found at: <http://www.philcherner.com/Articles/Sex%20Offender%20article%20-%20Disclosure%20advisement.htm>.