

Colorado Sex Offender Management Board (SOMB)
White Paper For SOMB Approved Evaluators Regarding Evaluating Risk
Factors for the Additional Special Conditions of Supervision
November 15, 2019 Board Meeting

Purpose

This white paper is written to provide guidance to Colorado Sex Offender Management Board (SOMB) approved evaluators in light of recent changes by the Colorado Judicial Department to the additional conditions of supervision for adult sex offenders and juveniles who have committed sexual offenses. The changes, effective November 1, 2018, eliminate the blanket prohibitions for internet or social media use by this subgroup of probationers. Additionally, the changes no longer prohibit the use of sexually oriented and stimulating material and entertainment for adults convicted of a sexual offense(s) unless ordered by the Court.

This white paper is precipitated by many requests to the SOMB by approved evaluators to provide sentencing recommendations related to these three identified issues. The goal of this paper is to provide SOMB approved providers with an understanding of the recently added Special Additional Conditions of Supervision and provide guidance regarding what factors the court may consider related to internet and social media access as well as access by adults convicted of a sexual offense(s) to sexually oriented and sexually stimulating material and entertainment.

The goal of identifying individualized risk factors is to assist a judge or magistrate in decision formulation. It is recognized that the necessary information to discuss each listed factor may not be available at the time of the sex offense-specific evaluation. In those circumstances, it is appropriate to note the limitations of the available information and provide guidance for future direction.

Additionally, when making recommendations this information should be clearly identified in the sex offense-specific evaluation. Please note, the SOMB does not require evaluators to provide a recommendation either for or against the use of the internet, social networking sites or in the case of adults convicted of a sexual offense(s), the use of sexually oriented or sexually stimulating materials and entertainment. The evaluator is encouraged to use professional judgment regarding the ability to extract recommendations based on the information in their possession.

Guiding Colorado Statutes and Probation's Role

Pursuant to §16-11.7-101 C.R.S, the Colorado Sex Offender Management Board has continuously strived to identify research informed and evidence-based practices to include in the *Standards and Guidelines*. The purpose of this effort is to establish a framework for the systematic assessment, clinical treatment and risk management of adults and juveniles who have committed sexual offenses. Additionally, the Colorado General Assembly requires that all

evaluators and therapists go through an approval process with the SOMB in order to be approved to provide evaluation and treatment services to juveniles adjudicated and adults convicted of a sexual offense.

The goals of probation are outlined in section §18-1.3-204 in that the conditions of probation shall be such as the court in its discretion deems reasonably necessary to ensure that the defendant will lead a law-abiding life and to assist the defendant in doing so.

Conditions of supervision must meet two primary criteria to be held constitutionally valid; 1) they must be reasonably related to the offense and 2) they must impose no greater deprivation of liberty than is sensibly necessary to advance the statutory purposes of supervision. The probation conditions must be “reasonably related” to the relevant risk factors, needs of victim and community safety and statutory requirements.

Sentencing considerations for courts are based on multiple criteria. These considerations are often based on but not limited to the severity and nature of the offense, risk and needs assessment information, social history and characteristics of the defendant, amenability to behavior change (treatment), protection of the victim and community and statements/input from the victim. Each factor is an independent consideration by the sentencing judge.

Additionally, per 18 U.S.C. §§ 3563(b) and 3553(a)(2), the terms and conditions of the sentence must also “involve only such deprivations or restrictions of liberty or property as reasonably necessary” for the purposes of deterrence, protection of the public, providing needed correctional treatment, providing just punishment for the offense and promoting respect for the law.

Judicial’s Response to Emerging Case Law and SOMB Discussion of the Issue

Appellate courts have often required individualized justification for the imposition of additional conditions of probation. Emerging case law has trended toward the emphasis of courts making specific findings of fact so not to impose a greater deprivation of liberty and uphold the statutory goals. The information provided to the court to make finding of fact should be individualized and tailored to that individual’s risks, needs, and strengths. The Colorado Judicial Branch’s response to emerging case law was to add several Special Additional Condition(s) to the existing *Additional Conditions of Supervision for Juveniles Who Commit Sexual Offenses* as well as the *Additional Conditions of Supervision for Adult Sex Offenders*. These revised conditions eliminate the blanket prohibition of internet and social media access for juvenile and adult probationers. Additionally, the changes no longer prohibit adults convicted of a sexual offense from accessing sexually oriented or sexually stimulating material and entertainment.

In lieu of the blanket prohibitions, the courts must (1) determine if restricted internet, social media use and, in the case of adults convicted of a sexual offense, use of sexually oriented and sexually stimulating materials and entertainment should be imposed, (2) the degree of restriction and (3) who will manage the imposed restrictions. For example, a judge may allow Multi-

Disciplinary Teams¹ or Community Supervision Teams² to use their discretion to modify restrictions or the judge may require that for restrictions to be modified, the issue must be brought in front of the court for a determination to modify existing restrictions.

Internet Access

The Court must determine if adults or juveniles who commit sexual offenses should be subject to a restriction regarding internet access and use. The court must make findings of fact to impose this restriction. If the court is silent, the condition is **not** imposed and therefore **not** restricted. The court may choose the following:

- To allow unrestricted access;
- To restrict all access until approved by the Court;
- To allow limited access for the purposes of employment (including job seeking), school and/or other purposes to be identified at the time of sentencing; or
- To restrict all access until approved in advance of access in writing by the probation officer in consultation with the Multi-Disciplinary Team or Community Supervision Team.

There is currently no known published research that specifically outlines if internet access increases the risk of re-offense for adults and juveniles who have committed a sexual offense. However, research informed practice suggests that decisions regarding internet access should be consistent with the risk, needs and treatment progress of the individual.

Research does exist to suggest that adults and juveniles who have committed sexual offenses should be prohibited from using adult-child sex advocacy websites (e.g., NAMBLA) because these websites increase criminogenic risk by rationalizing offenses against minors.³

Social Networking Sites

The court must determine if the adult or juvenile who committed a sexual offense should be subject to a restriction regarding social networking sites. The court must make findings of fact to impose this restriction. If the court is silent, the condition is **not** imposed and therefore **not** restricted. The Court may choose the following:

- To allow unrestricted access.
- To restrict all access until approved in advance of access in writing by the probation officer in consultation with the Multi-Disciplinary Team or Community Supervision Team.

¹ A Multi-Disciplinary Team is a team of professionals responsible for the evaluation, treatment, care and supervision of juveniles who commit sexual offenses.

² A Community Supervision Team is a team of professionals including a minimum of the supervising officer, the treatment provider, and the polygraph examiner who collaborate to make decisions about the offender.

³ D'Ovidio, R., Mitman, T., El-Burki, I. J., & Shumar, W. (2009). Adult-child sex advocacy websites as social learning environments: a content analysis. *International Journal of Cyber Criminology*, 3(1), 421-440.

Each case will present with diverse risk factors that should be identified using various assessments and other collateral data along with the interview and clinical judgement to support a link for a factual basis to recommend Special Additional Conditions. There are some commonalities on what might be considered as factual basis when writing the evaluation.

A risk, need, responsivity (RNR) approach, compared to indiscriminately prohibiting social media, may be most appropriate, taking into consideration the nature and severity of the sex offense.⁴ When making a decision regarding use of social media it is important to note if social media was used to access a victim or facilitate a sexual assault, or if social media was used to identify or groom a potential victim. Additionally, it is important to be mindful of existing website user agreements that prohibit use by adults and juveniles who have committed a sexual offense.

Sexually Oriented and Sexually Stimulating Material and Entertainment

The court must determine if the adult convicted of a sexual offense should be subject to a restriction regarding sexually oriented and stimulating material and entertainment. The court must make findings of fact to impose this restriction. If the court is silent, the condition is **not** imposed and therefore **not** restricted and the Court may choose the following:

- To allow unrestricted access; or
- To restrict all access until approved in advance of access in writing by the probation officer in consultation with Community Supervision Team (CST).

One of the challenges for approved providers and other members of the CST is the lack of consistent definition of the terms sexually oriented or sexually stimulating material. Research typically uses the term pornography, another frequently undefined term. The SOMB, in drafting Appendix D: Guidelines for the Use of Sexually Stimulating Materials in the *Standards and Guidelines* provides the following definitions for sexually oriented or sexually explicit material, as well as a definition for sexually stimulating materials.

Sexually oriented or explicit material is defined as pornographic images, videos, and narratives that may be viewed in print or on electronic devices such as a computer, television, gaming system, DVD player, VCR, video camera, voice recorder, pager, telephone, or cellular or smart phone. Such materials are developed and viewed explicitly for sexual gratification purposes.

Sexually stimulating materials are non-pornographic materials that may lead to sexual interest or arousal, but were not developed exclusively with that goal in mind. Examples of materials that may be sexually stimulating depending upon the adult or juvenile who have sexually offended include incidental nudity within the context of a non-pornographic movie, sexually suggestive

⁴ Sloss, N. M. (2015). Alternative Restrictions of Sex Offenders' Social Media Use & The Freedom of Speech. *Cath. UJL & Tech*, 24, 111; Wynton, J. S. (2011). myspace, yourspace, but not theirs: The constitutionality of banning sex offenders from social networking sites. *Duke Law Journal*, 60(8), 1859-1903.

images, and non-sexual images such as underwear advertisements and other material that an individual finds arousing or of sexual interest.

While the SOMB has not adopted a definition to identify pornography, for the purposes of this paper, the following definition from Wright, Tokunaga, and Kraus (2015) will be utilized: "Pornography is defined as media featuring nudity and explicit sexual acts designed to arouse the consumer."⁵

Use of Sexually Oriented and Sexually Explicit Materials by Juveniles

Research suggests that adolescents who use sexually explicit material (SEM), especially that found on the Internet, have lower degrees of social integration, increases in conduct problems, higher levels of delinquent behavior, higher incidence of depressive symptoms, and decreased emotional bonding with caregivers.⁶ For this reason, in addition to the use of pornography being illegal for those under the age of 18, the use of sexually explicit materials is not appropriate for juveniles. However, identifying relevant risk factors related to SEM may be helpful in the evaluation process.

Use of Sexually Oriented and Sexually Explicit Materials by Adults

Pornography use by itself does not increase the likelihood of people committing sexual aggression. However, interaction of risk factors predisposing individuals to commit sexual aggression and the use of pornography that is abusive, harmful, or illegal may increase the risk of sexual aggression.⁷ For most adults convicted of a sexual offense, there are some moderating factors which need to be present for this effect to exist.⁸ Moderating factors for participating in sexual violence most commonly refer to a predisposition for sexual aggression and other anti-social traits, reflected in negative attitudes towards women, general criminality, and violent behavior.⁹ For high risk adults convicted of a sexual offense and those who have previously committed an act of sexual aggression, this effect is even greater.¹⁰ Specifically, recidivism was 22% for violent offending and 11% (not statistically significant) for sex offending.¹¹ This effect is much higher when viewing deviant pornography, increasing violent recidivism by 185% and sexual recidivism by 233%.¹² In addition to increased recidivism rates, pornography reinforces negative cognitive distortions that objectify and degrade victims by increasing acceptance of rape myths and violence against women.¹³ As noted above, research indicates that for individuals who

⁵Wright, P. J., Tokunaga, R. S., & Kraus, A. (2015). A meta-analysis of pornography consumption and actual acts of sexual aggression in general population studies. *Journal of Communication*, 1-23.

⁶Owens, Behun, Manning, & Reid, 2012

⁷Malamuth, N. M. (2018). "Adding fuel to the fire"? Does exposure to non-consenting adult or to child pornography increase risk of sexual aggression? *Aggression and Violent Behavior*, 41, 74-89. doi:10.1016/j.avb.2018.02.013

⁸Davis, K. C., Norris, J., George, W. H., Martell, J., & Heiman, J. R. (2006). Men's likelihood of sexual aggression: The influence of alcohol, sexual arousal, and violence pornography. *Aggressive Behavior*, 32, 581-589; Hald, G. M., Malamuth, N. M., & Yuen, C. (2009). Pornography and attitudes supporting violence against women: Revisiting the relationship in nonexperimental studies. *Aggressive Behavior*, 35, 1-7; Kingston, D. A., Fedoroff, P., Firestone, P., Curry, S., & Bradford, J. M. (2008).

⁹ Id.

¹⁰Foubert, J. D., Brosi, M. W., & Bannon, S. (2011). Pornography viewing among fraternity men: Effects on bystander intervention, rape myth acceptance and behavioral intent to commit sexual assault. *Sexual Addiction & Compulsivity*, 18, 212-231.

¹¹ Kingston, D. A., Fedoroff, P., Firestone, P., Curry, S., & Bradford, J. M. (2008).

¹² Id.

already have a propensity for sexual aggression or violent behavior, viewing pornography can lead to an even greater increase in sexual aggression compared to those who do not have a propensity for sexual aggression.¹⁴ This effect is stronger for those who have previously committed an act of sexual aggression or sexual assault.¹⁵

Additionally, strip clubs and brothels normalize rape myths (e.g., “all women want sex” and “men are entitled to sexual access to women”), promote acceptance of sexual aggression, and abusive behaviors.¹⁶ Research suggests that sex offenders should be prohibited from visiting such establishments because of these risk factors.

In light of these recent changes, attorneys, probation officers, evaluators and therapists, among others, must determine how to best assist the court in making informed decisions. Courts must balance a probationer’s constitutional rights with concerns of posing undue risk to the community.

Recommendations

In order to assist the courts in determining the level and management of restrictions, it is recommended that evaluators include information in the sex offense-specific evaluation discussing the risk posed to the community if the adult or juvenile who has committed a sexual offense has access to the internet and social networking sites. Likewise, evaluators are encouraged to assess the use of sexually oriented or stimulating materials and entertainment by an adult convicted of a sexual offense. Assessment should rely on available research supported evidence regarding risk of sexual re-offense and should identify how access to the three items discussed above will contribute to the overall risk of the juvenile or adult to commit another offense.

When considering internet or social media use for adults and juveniles who have committed sexual offenses, specific issues to consider may include:

1. Previous use of the internet or social media to secure a victim
2. Previous use of the internet or social media to commit a sexual offense or engage in other problematic or illegal sexual behavior.

¹³ Foubert, J. D., Brosi, M. W., & Bannon, S. (2011); Hald, G. M., Malamuth, N. M., & Yuen, C. (2009). Pornography and attitudes supporting violence against women: Revisiting the relationship in nonexperimental studies. *Aggressive Behavior*, 35, 1-7; Malamuth, N. M., Hald, G. M., & Koss, M. (2011). Pornography, individual differences in risk and men’s acceptance of violence against women in a representative sample. *Sex Roles*; Seto, M. C., Maric, A., & Barbaree, H. E. (2001). The role of pornography in the etiology of sexual aggression. *Aggression and Violence Behavior*, 6, 35-53; Wright, P. J., Tokunaga, R. S., & Kraus, A. (2015).

¹⁴ Kingston, D. A., Fedoroff, P., Firestone, P., Curry, S., & Bradford, J. M. (2008).

¹⁵ Foubert et al., 2011.

¹⁶ Houser, K. (2007). Analysis and implications of the omission of offenders in the DoD care for victims of sexual assault task force report. *Violence against women*, 13(9), 961-970; Mancini, C., Reckdenwald, A., Beauregard, E., & Levenson, J. S. (2014). Sex industry exposure over the life course on the onset and frequency of sex offending. *Journal of Criminal Justice*, 42(6), 507-516.

When considering the use of sexually oriented and explicit materials and entertainment for adults convicted of a sexual offense only, specific issues to consider may include:

3. Use of sexually oriented or sexually explicit material in the commission of a sexual offense, such as grooming behavior or to mimic behaviors observed.
4. If access to sexually oriented or sexually explicit material will exacerbate individual risk factors that were identified in the evaluation process.

For Male Adults: When considering access to sexually oriented or explicit materials (via any medium) it may be helpful to consider how access will interact with the client's known dynamic risk factors. Below is a list of dynamic risk factors to consider when determining possible interactions. Research to date has not clearly identified dynamic risk factors associated with sexual reoffending by juveniles and females.

Note: The following is a list of some dynamic risk factors associated with adult sex offense recidivism. The list is not meant to convey that current research demonstrates an increase in the dynamic risk factors when access is allowed. Current research does not provide that level of specificity. Evaluators should consider the client's individual and contextual presentation of a risk factor and assess if access to sexually oriented or explicit materials will exacerbate individual risk factors:¹⁷

- Risk-Related Sexual Interests – interest in pubescent/prepubescent children, sexualized violence, multiple paraphilias
- Sexual Preoccupation
- Hypersexuality
- Sexual Compulsivity
- Sexual Coping
- Offense-Supportive Attitudes – distorted beliefs about victims, sexual partners, pornography, or sex that are conducive to sexually assaultive behavior
- Callousness/Hostility Toward Women
- Dysfunctional Relational Style
- Impulsivity

¹⁷ Hanson, R. K., & Morton-Bourgon, K. E. (2005). The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies. *Journal of Consulting and Clinical Psychology*, 73(6), 1154-1163. <http://dx.doi.org/10.1037/0022-006X.73.6.1154>; Långström, N., & Hanson, R. K. (2006). High Rates of Sexual Behavior in the General Population: Correlates and Predictors. *Archives of Sexual Behavior*, 35(1), 37-52. doi:10.1007/s10508-006-8993-y; STABLE 2007 Manual; Kingston, D. A., Fedoroff, P., Firestone, P., Curry, S., & Bradford, J. M. (2008); Tanner, J. (2019). Report on Colorado Sex Offender Special Additional Conditions. Retrieved from KBSolutions, Inc. website: <http://www.kbsolutions.com/SAC.pdf>; Kafka, M.P. (2010). Hypersexual Disorder: A proposed diagnosis for DSM-V. *Archives of Sexual Behavior*, 39(2), 377-400. doi:10.1007/s10508-009-9574-7. "Based on an extensive review of the literature, Hypersexual Disorder is conceptualized as primarily a non-paraphilic sexual desire disorder with an impulsivity component."

- Emotional Dysregulation
- Ineffective Coping Skills

In those cases, where the evaluator recommends restrictions on access to sexually explicit materials (including any medium), evaluators may also consider recommending restrictions on internet or social media use to limit access.

Reviewing the following sexual attitudes and beliefs may also be informative when discussing access to the internet, social media, sexually oriented or explicit materials and entertainment:¹⁸

- History or interest in viewing violent pornography. Pornography, especially violent pornography, has been shown to increase sexually aggressive thoughts and behaviors, including belief in rape myths, likelihoods to commit sexual assault, and increased acceptance of violence towards women.¹⁹

¹⁸McGrath, R. J., Lasher, M. P., & Cumming, G. F. (2012). The sex offender treatment intervention and progress scale (SOTIPS): Psychometric properties and incremental predictive validity with static-99 R. *Sexual Abuse: A Journal of Research and Treatment*, 24(5), 431-458.

¹⁹ Davis, K. C., Norris, J., George, W. H., Martell, J., & Heiman, J. R. (2006). Men's likelihood of sexual aggression: The influence of alcohol, sexual arousal, and violence pornography. *Aggressive Behavior*, 32, 581-589; Foubert et al., 2011; Hald, G. M., Malamuth, N. M., & Yuen, C. (2009); Malamuth, N. M., Hald, G. M., & Koss, M. (2011); Seto, M. C., Maric, A., & Barbaree, H. E. (2001); Wright, P. J., Tokunaga, R. S., & Kraus, A. (2015).