

“Actuarial Justice” - Representing Sex Offenders Facing Lifetime Civil Confinement – Al O’Connor, New York State Defenders Association

The Sex Offender Management and Treatment Act signed into law by Governor Spitzer on March 14, 2007 will fundamentally change the role of criminal defense lawyers in sex offense prosecutions. With the threat of lifetime civil confinement looming in virtually all felony sex offense cases, defense lawyers must now counsel clients not only about the wisdom of a guilty plea or trial, but about the likelihood of civil commitment following completion of a prison sentence. While negotiation of a plea-bargained sentence of three or four years for a client who otherwise would have faced ten or fifteen years after trial might once have been considered a “victory,” the battle lines have seismically shifted. A client who pleads guilty in exchange for a few years in prison, but later unexpectedly finds himself behind the razor wire of a “secure treatment facility” for the rest of his life won’t be singing hosannas to the negotiating skills of his criminal defense lawyer. From now on, wherever pleas are negotiated in serious sex offense cases the threat of civil commitment will be the elephant in the room.

The Act authorizes lifetime confinement of “mentally abnormal” dangerous sex offenders following completion of their penal sentences. It provides two stages of administrative review by mental health personnel prior to an inmate’s discretionary referral to the Attorney General for prosecution in a civil jury trial. The State must prove to a jury’s satisfaction by clear and convincing evidence the respondent-inmate has a mental abnormality that predisposes him to commit sex offenses, and that he has serious difficulty controlling his behavior. If the jury so finds, the judge alone will determine whether the respondent is “likely” to reoffend, a finding that will result in the respondent’s indefinite commitment to a secure treatment facility for care and treatment. If the court finds the respondent is not likely to reoffend, he will be ordered to submit to strict and intensive civil parole supervision, potentially for life. The Act also establishes the new category of “sexually motivated crimes,” expands determinate sentencing, reclassifies certain offenses as violent felonies, and greatly increases the period of post-release supervision for felony sex offenses. The new periods are:

New Periods of Post Release Supervision – Sex Offenses

First-Felony Offenders

Class B – 5 to 20 years
Class C – 5 to 15 years
Class D or E – 3 to 10 years

Second Felony Offenders

10 to 25 years
7 to 20 years
5 to 15 years

Who is vulnerable to civil commitment?

The job of counseling criminal court clients about the risk of civil commitment was made especially difficult by the Legislature’s refusal to narrow the class of offenders vulnerable to such civil prosecutions. Due to the high costs of civil commitment (estimated at \$200,000 per patient annually), only a small percentage of convicted sex offenders will actually be committed under the law each year. The legislative findings supporting the Act speak of the danger posed by “recidivistic” sex offenders, and refer to civil confinement as an “extreme”

option (Mental Hygiene Law § 10.01). But the substantive provisions do not match the rhetoric. The law casts a wide net. It is not limited to repeat offenders, or to predatory crimes directed at strangers, or children, or to crimes involving violence, or multiple victims. It subjects all persons, including first offenders, convicted of felony sex offenses and more than two dozen non-sex crimes found to be sexually motivated, to the risk of lifetime civil confinement following completion of their prison sentences. Consequently, criminal defense lawyers will need to address the subject in attorney-client conferences, even when the client is a first offender and threat of civil commitment might reasonably be considered low.

Crimes Covered by the Act

Sex Offenses [§ 10.03 (p)]

All Penal Law Article 130 felony offenses

Patronizing a prostitute in the first degree - Penal Law § 230.06 (less than 11)

Incest in the first and second degrees - Penal Law §§ 255.27, 255.26

Conspiracy or felony attempt to commit any of the foregoing crimes

Sexually Motivated Crimes – Specified Felonies [§ 10.03 (f)]

Assault in the first and second degrees - Penal Law §§ 120.10, 120.05

Gang assault in the first and second degrees - Penal Law §§ 120.07, 120.06

Stalking in the first degree - Penal Law § 120.60

Manslaughter in the first and second degrees - Penal Law §§ 125.20, 125.15 (1)

Aggravated Murder - Penal Law § 125.26

Murder in the first and second degrees - Penal Law §§ 125.27, 125.25

Kidnapping in the first and second degrees - Penal Law §§ 135.25, 135.20

Burglary in the first, second and third degrees - Penal Law §§ 140.30, 140.25, 140.20

Arson in the first and second degrees - Penal Law §§ 150.20, 150.15

Robbery in the first, second and third degrees - Penal Law §§ 160.15, 160.10, 160.05

Promoting prostitution in the first and second degrees - Penal Law §§ 230.32, 230.30

Compelling prostitution - Penal Law § 230.33

Disseminating indecent material to minors in the first degree - Penal Law § 235.22

Use of a child in a sexual performance - Penal Law § 263.05

Promoting an obscene sexual performance by a child - Penal Law § 263.10

Promoting a sexual performance by a child - Penal Law § 263.15

Conspiracy and felony attempts to commit any of the foregoing crimes

Prospective and Retroactive Applications

The law formally takes effect on April 13, 2007, but it applies retroactively to all persons convicted of one of the above-listed sex offenses or specified felonies who are still serving their sentences on that date, i.e., state prison inmates and persons serving parole, conditional release, or post-release supervision.

For offenses committed on or after April 13, 2007, the Act establishes the new crime of a “sexually motivated felony” (Penal Law § 130.91). A person is guilty of a sexually motivated felony when he or she commits one of the specified felonies listed above “for the purpose, in whole or in substantial part, of his or her own direct sexual gratification.” The *direct* sexual gratification requirement includes a temporal component and is intended to distinguish between crimes motivated, for example, by romantic jealousy or rage, which would not meet the statutory definition, and ones that include some form of contemporaneous sexual misconduct. During the Assembly floor debate on the legislation on March 6th, Assemblyman Joseph Lentol, a prime sponsor of the bill, observed that “direct” means “immediate.” Lentol further explained that a person must take a “direct step toward completion of an illegal [sexual] act” to be guilty of a sexually motivated felony.

A sexually motivated felony under Penal Law § 130.91 is classified at the same level felony as the underlying specified offense [e.g., sexually motivated felony (burglary in the second degree) is a Class C violent felony], and does not statutorily subject the defendant to increased prison time. However, all felony sex offenses now carry greatly increased terms of post-release supervision. The purpose of the new felony category is to designate certain non-sex crime offenders as vulnerable to the civil commitment law.

When a defendant is prosecuted under Penal Law § 130.91, a jury must determine beyond a reasonable doubt that the specified felony was “sexually motivated.” Only upon such a traditional jury finding may the defendant later be subject to civil commitment proceedings. The same does not hold true for defendants convicted of one of the above-listed specified felonies *prior* to April 13, 2007. They will be subject to civil commitment if the Attorney General alleges, and a civil jury finds by clear and convincing evidence, that the crime was sexually motivated. This illogical disparity in the burden of proof based solely on the date of the crime may be vulnerable to equal protection challenge.

Juvenile Offenders

The Act also applies to juvenile offenders convicted of felony sex crimes and specified felonies that are sexually motivated, but not to youthful offenders, including juvenile offenders who are granted youthful offender status. The Assembly Codes Committee memorandum accompanying the bill makes clear the Legislature anticipated the Act would hardly ever be invoked against juvenile offenders. A civil commitment petition must allege the respondent suffers from a mental abnormality that predisposes him to the commission of felony sex offenses. The Codes Committee memo points out that “given the child’s immaturity, it will be uncommon for the propensity prong . . . to be shown” (at 11 fn.).

Mental Disease or Defect – Not Competent to Stand Trial [§ 10.03 (g)]

The Act also applies to defendants found not guilty by reason of mental disease or defect who are in the custody of the Office of Mental Health, or Office of Mental Retardation and Developmental Disabilities, and to defendants committed pursuant to CPL Article 730 as incompetent to stand trial (presumably for long periods of time). For CPL Article 730 cases, the Act includes special rules for adjudication of the respondent’s factual guilt of the underlying felony as part of the civil commitment trial. Because defendants in these categories are already detained in long-term mental health settings, and their eventual release

will be contingent upon a determination that they are not dangerous, the civil commitment process will probably not be invoked very often against this population.

The “Pushing the Envelope” Pataki Class [§ 10.03 (g) (5)]

Finally, the Act applies to approximately 130 sex offenders transferred to OMH custody beginning in September, 2005 under former Governor Pataki’s controversial plan to “push the envelope” of legal authority under the Mental Hygiene Law before enactment of a civil commitment statute.

Who is Vulnerable – “Agency with Jurisdiction” [§ 10.03 (a)]

Only defendants who are in the custody of an “agency with jurisdiction” – the Department of Correctional Services (DOCS), the Division of Parole (DOP), the Office of Mental Health (OMH) and the Office of Mental Retardation and Developmental Disabilities (OMRDD) - are vulnerable to civil commitment at the completion of their prison sentences, supervision terms or commitments. Thus, defendants sentenced to local jail terms cannot be civilly committed as a result of the current felony conviction. Likewise, defendants sentenced to probation cannot be civilly committed unless they violate probation and are resentenced to state prison. Defendants currently on parole, conditional release and post-release supervision will be vulnerable to civil commitment proceedings in two ways: 1) by violating conditions of supervision and being returned to DOCS custody, and 2) near the end of their supervision terms, when the DOP has discretionary authority to refer them for screening for possible civil commitment.

Who is Vulnerable – “Related Offenses” [§ 10.03 (l)]

On a somewhat technical note - a defendant will be considered “in the custody” of DOCS or DOP for purposes of the Act when he or she is “currently serving a sentence for, or subject to supervision by the division of parole whether on parole or on post-release supervision for a sex offense, specified offense or for a *related offense*.” Related offenses are ones that, with respect to sex offenses or specified offenses, are “prosecuted as part of the same criminal action or proceeding, or which are part of the same criminal transaction, or which are the bases of the orders of commitment received by the Department of Correctional Services in connection with an inmate’s current term of incarceration.”

This means a defendant in the custody of DOCS or DOP who was sentenced for multiple crimes, some of which qualify for civil commitment and some of which do not, will be vulnerable to civil commitment proceedings even if he has formally completed the sentence for the sex offense or specified offense, and the only remaining time is attributable to a non-eligible offense, provided the sex offense or specified offense is “related” to the non-eligible criminal conviction. For example, a defendant serving 7 ½ to 15 years for a drug conviction in Queens County and a concurrent term of 2 – 4 years for a Nassau County sex offense conviction would be vulnerable to civil commitment at the completion of the prison sentence because the sex offense sentence formed a basis of the orders of commitment received by DOCS in connection with the *current* term of incarceration.

However, if that same defendant was conditionally released after ten years, he would no longer appear to be vulnerable to civil commitment proceedings because the Nassau sex offense was not prosecuted as part of the Queens criminal action or proceeding, and was otherwise not part of the same criminal transaction as the drug offense. Once the defendant is released and becomes a parolee, the sex offense order of commitment ceases to be a basis for “an inmate’s current term of incarceration.” However, this reasoning might not apply to consecutive sentences where the maximum terms are aggregated and the defendant can be said to be under DOP jurisdiction serving *all* of the sentences until the full aggregate term is satisfied. Finally, a defendant on parole for a sex offense or a specified offense, who owes time to the maximum term and is returned to DOCS custody on a new non-sex offense, would be vulnerable to civil commitment because the time owed to the old maximum would be added to the new sentence and form a basis for the current DOCS commitment.

Standards for Civil Commitment/Strict and Intensive Supervision

The United States Supreme Court has upheld sex offender civil commitment schemes that authorize lifetime confinement when two conditions are met: 1) the respondent is “mentally abnormal” and 2) dangerous. Kansas v. Hendricks, 521 U.S. 346 (1997). The Court has further clarified that a respondent’s “mental abnormality” must be coupled with lack of *control* over his sexual offending. There must be “proof of serious difficulty in controlling behavior” which in light of “the nature of the psychiatric diagnosis and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender [subject to] . . . civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.” Kansas v. Crane, 534 U.S. 407 (2002).

While the Sex Offender Management and Treatment Act ultimately tracks this standard for civil confinement in secure treatment facilities, it appears to push the boundaries of state power beyond limits currently authorized by the Supreme Court by empowering the Attorney General to file a petition alleging only that the respondent is “mentally abnormal,” without an accompanying allegation of dangerousness. It also breaks new legal ground by appearing to authorize lifetime civil parole supervision of mentally abnormal offenders who are not found to be dangerous.

Mental Abnormality Defined

Consistent with other state laws, the Act defines mental abnormality as “*a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct.*” [§ 10.03 (i)]

But it breaks with other state schemes by dividing the “mentally abnormal” population subject to the law into two classes: 1) the *dangerous sex offender requiring confinement* [§ 10.03 (e)], and 2) the *sex offender requiring strict and intensive supervision* [§ 10.03 (r)]

Dangerous Sex Offender / Sex Offender Requiring Supervision

A “dangerous sex offender requiring confinement” is “a person who is a detained sex offender suffering from a mental abnormality involving such a strong predisposition to

commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.” A sex offender requiring strict and intensive supervision is negatively defined: a “detained sex offender who suffers from a mental abnormality but is not a dangerous sex offender requiring confinement.” Collectively, these offenders are referred to as “sex offenders requiring civil management” [10.03 (q)].

The Act authorizes the Attorney General to file a petition alleging the respondent is a “sex offender requiring civil management,” (i.e., either a dangerous sex offender or a sex offender requiring strict and intensive supervision). If the court finds probable cause, i.e., that the respondent is subject to the law and suffers from a mental abnormality, the case will proceed to trial, with a jury determining the issue of mental abnormality only. If the jury unanimously finds by clear and convincing evidence that the respondent suffers from a mental abnormality, the presiding judge alone will consider whether he is a dangerous sex offender requiring confinement, or a sex offender requiring strict and intensive supervision. No third option involving outright release of a non-dangerous “mentally abnormal” offender is available. In this way, the Act stretches the boundaries of permissible state regulatory power. No court has yet upheld state power to impose onerous lifetime civil parole restrictions (GPS monitoring, curfews, etc.) on non-dangerous persons who have completed their penal sentences.

The constitutional problem could be avoided if the Act were interpreted as authorizing civil parole only when a respondent is found dangerous, but not so dangerous as to preclude management in the community under strict and intensive supervision. The Codes Committee memo lends support to this construction of the Act as it states the civil parole option is available when the respondent has a “dangerous mental abnormality” (at 1).

Screening Procedure Prior to Release

The Act provides three levels of review before the filing of a petition, two by mental health personnel and a third by the Attorney General. First, when a sex offender subject to the Act is nearing anticipated release, the agency with jurisdiction (DOCS, OMH, OMRDD) must give notice to the Commissioner of OMH and the Attorney General. The statute provides that such notice should be delivered at least four months prior to the anticipated release date, but no legal consequences flow from untimely notice, a stipulation that holds true for all procedural time frames specified in the Act – they are advisory only. The Division of Parole may, but need not, give notice prior to the discharge of a sex offender from supervision. No notice is given to the sex offender at this stage of the process.

1. Stage One review [§ 10.05 (d)] - Whenever a release notice is filed with OMH, a “multidisciplinary staff” appointed by the Commissioner of OMH and “including clinical and other professional personnel” must conduct a “preliminary review of the need” for the offender to be referred for closer evaluation by a “case review committee” (stage two). The stage one process will entail review and assessment of “relevant medical, clinical, criminal, or institutional records, actuarial risk assessment instruments or other records and reports, including records and reports provided by the district attorney.” Because the stage one process is a preliminary review and will involve scrutiny of *all* sex offenders scheduled for release from prison, it will probably entail identification of inmates fitting a pre-determined

profile of persons considered appropriate for further evaluation. Although the statute does not specify any typology for stage two referral, and it is impossible to predict how the multidisciplinary staff will exercise its discretion, here is a non-exclusive list of situations where a client might be considered at risk for stage two evaluation:

- a. Offenders with moderately high to high scores on actuarial risk assessment instrument, such as the STATIC-99 (see below)
- b. Offenders with prior sex offense charges or convictions (misdemeanor or felony), especially if they involved pre-pubescent children
- c. Offenders who have ever been charged with forcible rape/criminal sexual act involving use or threatened use of a weapon or infliction of physical injury – whether they were convicted or not.
- d. Offenders, regardless of the nature of their conviction or criminal record, who refused sex offender treatment while in prison, dropped out, or performed poorly in treatment.
- e. Offenders who have ever been charged with a penetration offense involving pre-pubescent children
- f. Offenders with long, varied and escalating criminal conduct reflective of anti-social behavior and beginning in adolescence.
- g. Cases where the district attorney has filed a “report” recommending civil commitment.
- h. Offenses that involved heavy stalking behavior, or a serious contact crime against a stranger victim.
- i. Offenders with prior convictions involving extreme violence.
- j. High profile “newsworthy” cases
- k. Offenders who have admitted to many additional uncharged sex crimes during police interrogation or in sex offender treatment programs.

By contrast, the following circumstances might reasonably be considered on the low end of the severity/risk scale and involve minimal risk of stage two evaluation:

- a. Internet-based offenses, such as disseminating indecent material to minors in the first degree, not involving a serious attempt to personally meet and engage in sexual contact with a minor, especially when the offender has a limited criminal record, and no prior sex crime charges.
- b. Statutory rape/criminal sexual act involving consensual sexual contact with similar age “peers” (e.g., 21 year old with 16 year-old, 18 year-old with a 14 year-old)
- c. First-time offenders convicted of “touching offenses” (e.g., sexual abuse in the first or second degrees) involving one or two victims, especially when the victims are related to the offender, and/or are adolescents, and the defendant does not admit to having committed additional uncharged sex crimes.
- d. Young offenders (e.g., 14 – 17 years-old) not granted YO status with no prior adult or juvenile history of sexually offending who are convicted of “juvenile” type offenses (participant in anti-social behavior towards peers that had a sexual component).

For “sexually motivated” specified offenses committed prior to April 13, 2007, the stage one review will also encompass whether the crime was, in the reviewer’s opinion, “sexually motivated” and therefore subject to the Act.

2. Stage two review [§ 10.05]

An inmate must be notified if his case is referred for stage two evaluation. But the Act does not provide for assignment of counsel at this stage, with one exception. Counsel must be assigned if the inmate refuses to submit to a voluntary psychiatric exam as part of the stage two evaluation process, and the Attorney General thereafter moves for a court-ordered psychiatric examination.¹ Otherwise, the right to assigned counsel does not attach until and unless the Attorney General files a civil management petition.

The stage two evaluation will be conducted by a “case review committee,” a 15 member body appointed by the Commissioner of OMH, which shall sit in teams of three to review a particular case. A minimum of two members of each team “shall be professionals in the field of mental health or . . . mental retardation and developmental disabilities, as appropriate, with experience in the treatment, diagnosis, risk assessment or management of sex offenders.” [§ 10.05 (a)]

While the stage one review process will involve high caseloads and will probably be characterized by profiling and categorical decision-making, stage two will likely entail more individualized and focused evaluations. Stage two evaluators will determine whether the statutory criteria of mental abnormality and dangerousness can be credibly alleged. Although both allegations are required in order to civilly commit a respondent, as noted, the Act appears to authorize the state to subject a person to lifetime civil parole upon an allegation and finding of mental abnormality alone.

State two review – will the inmate otherwise be supervised by Parole?

In connection with this more limited, but constitutionally suspect, power, the Act includes the curious direction that upon receipt of a positive recommendation from the case review committee the Attorney General shall consider the length of supervision the offender would otherwise be subjected to under the terms of the underlying penal sentence. The Act states:

In determining whether to file such a petition, the attorney general shall consider information about the continuing supervision to which the respondent will be subject as result of the criminal conviction, and shall take such supervision into account when assessing the need for further management as provided by this article.
[§ 10.06 (a)]

This is double-edged sword. Defendants sentenced to state prison for a felony sex offense committed on or after April 13, 2007 will be subjected to greatly increased periods of post-release supervision, up to 15 years for Class D and E felonies, 20 years for Class C felonies

¹ The Act authorizes the Attorney General to move for a court-ordered psychiatric exam during stage one also. However, these motions will probably be filed during stage two when the evaluation has progressed beyond the preliminary phase.

and 25 years for Class B felonies. Presumably, inmates with longer periods of court-imposed post-release supervision will face *some* decreased risk of civil management proceedings at the completion of their prison terms. The down side is they will be at risk of violating post-release supervision for longer time periods and face the renewed threat of civil commitment upon re-release from prison on such violations.

This direction to the Attorney General (and by extension the case review committee) to consider the duration of supervision as a factor in the equation spells trouble for inmates convicted of crimes committed prior to April 13, 2007. Virtually all inmates convicted of sex offenses and sentenced to indeterminate terms are denied parole release. In recent years, many have also been denied conditional release, either because they have lost good time for refusing to participate in sex offender treatment programs, or because the Division of Parole refuses to approve a community residence for them. Consequently, inmates are now commonly released with no supervision upon the maximum expiration date of their sentences. In these situations, temptations may run high in the evaluation process to recommend the filing of a civil management petition solely in order to subject the offender to civil parole supervision. Inmates with determinate sentences that include post-release supervision terms, which presently range from 1 ½ to 5 years, might experience slightly less evaluative pressure in this direction.

This unique statutory scheme may result in abusive filings, with the Attorney General alleging offenders are mentally abnormal and dangerous (thereby threatening them with possible lifetime civil confinement) in order to force a “plea” to strict and intensive civil parole supervision. Few inmates will be able to withstand that kind of pressure. If the Attorney General wishes only to subject an offender to civil parole, the State should allege he is mentally abnormal without an accompanying allegation of dangerousness.

Dangerousness - “Likely to Reoffend”

Although the Act does not require that a civil management petition specifically allege dangerousness, if the state is serious about civilly committing an offender it will have to eventually prove he is “likely to reoffend by committing additional sex offenses.” Some states with sex offender civil commitment laws specify a “more likely than not” standard for measuring the risk of re-offense, which is sometimes phrased as “substantially probable,” and means more than a 50% chance of reoffending. This more precise standard can facilitate focused evaluations of risk and can help promote consistent verdicts and meaningful appellate review of commitment orders. While “likely to reoffend” could certainly be construed in this way, the statutory language is also susceptible to less protective interpretations.

Actuarial risk assessment instruments will largely drive the process of identifying “dangerous” sex offenders. The diagnostic process of assigning mental abnormalities to targeted offenders will probably come later in the evaluation process because it is more labor intensive. In many cases, the mental abnormality diagnosis will not pose a serious obstacle to filing. As discussed below, “mental abnormality” is a highly malleable construct that can be applied to a very high percentage of prison inmates. Neither will the “serious difficulty in controlling behavior” component of mental abnormality substantially narrow the class of sex offenders at risk of being civilly committed. As one critic of sex offender civil commitment

laws has noted, “impaired self control does not make sex offenders different from other criminals – it is precisely what makes them similar to other criminals.” See Eric S. Janus, The Preventive State, Terrorists and Sexual Predators: Countering the Threat of a New Outsider Jurisprudence, Criminal Law Bulletin, Vol. 40, No. 6.

Actuarial Risk Assessment Instruments

During the past decade a number of risk assessments instruments have been devised and scientifically validated, including, among others, the STATIC-99, the Minnesota Sex Offender Screening Tool Revised (MnSOST)[<http://www.psychology.iastate.edu/~dle/MnSOST-RManual12-22-2005.pdf>], the Vermont Appraisal of Sex Offender Recidivism (VASOR) [<http://www.csom.org/pubs/VASOR.pdf>] and the Sex Offender Risk Appraisal Guide (SORAG). These instruments were developed through identification, grouping and scoring of discrete factors proven to be positively or negatively correlated with sexual reoffending. Some instruments employ “static” factors, historical and unchangeable characteristics (e.g., prior criminal record), and some use a combination of static and “dynamic” factors (e.g., response to treatment). The validity of the instruments is determined by scoring large numbers of sex offenders using historical case files and studies, and then comparing the resulting scores against the offenders’ actual reoffense rates over the course of five, ten, and sometimes fifteen years. Through such testing, a score is derived that reflects the mathematical validity of the instrument, and which also reveals the percentage of false positive and false negative results (offenders who scored high but did not reoffend and vice versa). The STATIC-99, the most commonly used risk assessment instrument, has a validity score of approximately 70%, which means it distinguishes higher from lower risk offenders at a rate significantly better than chance (50%). The developers of the STATIC-99 instrument describe it as having “moderate predictive accuracy.” STATIC-99 Coding Rules Revised – 2003 at 3.

The case review committee will certainly not use the New York risk assessment instrument devised by the Board of Examiners of Sex Offenders for use in Megan’s Law risk determinations. This instrument has never been validated, is widely discredited in the field, and would never hold up to serious scrutiny in the context of a civil commitment proceeding.

STATIC-99

The STATIC-99 instrument includes ten relatively straightforward items that are not difficult to score if the evaluator has basic background information about the subject and accurate information about his criminal history (charges and convictions). See Appendix. STATIC-99 is not appropriate for use with females or young offenders (generally less than 18). The STATIC-99 score is intended to give a baseline result. Treatment effects, age related effects, health issues, supervision strategies, long periods of offense-free time in the community, and other factors can all serve to decrease an offender’s actual risk of reoffending.

A word of caution: before using the STATIC-99 to estimate a client’s risk score, you should download and read the instructions:

http://ww2.ps-sp.gc.ca/publications/corrections/pdf/Static-99-coding-Rules_e.pdf

Some of the coding rules will seem especially foreign to criminal defense lawyers. For example, on some items the facts underlying dismissed charges (including juvenile charges) and acquittals count for scoring purposes.

Actuarial support for the STATIC-99 factors is found in research revealing prior charges and convictions (items 5 & 6), past convictions involving non-sexual violence (items 3 & 4), and non-contact sex offenses (e.g. indecent exposure) (item 7) are positively correlated with sexual re-offending. Similarly, offenders under age 25 at the time of evaluation (item 1), and those who have never lived with an intimate partner for at least two years (item 2) have higher reoffense rates. Research additionally reveals that sexual offending outside the context of the “family” (item 8), offending against male-victims (item 10) and strangers (item 9) are positively associated with recidivism.

All of these factors are “static” – that is, based on unchangeable historical facts. However, item number # 3, which asks whether the index offense (i.e., instant offense) included a conviction for non-sexual violence does offer an opportunity to *plea-bargain* away one point on the STATIC-99 scale. A one-point reduction in the STATIC-99 score is significant and could mean the difference between lifetime civil confinement and a client’s freedom.

The developers of STATIC-99 have calculated numerical probability estimates of sexual reconviction based on an offender’s risk score. See Appendix. For example, a client with a STATIC-99 score of 3 is estimated to have a baseline percentage risk of being convicted of a new sexual offense of 12% after 5 years, 14% after 10 years and 19% after 15 years. Other relevant percentages are:

<u>STATIC-99 SCORE</u>	<u>5 years</u>	<u>10 years</u>	<u>15 years</u>
4	26%	31%	36%
5	33%	38%	40%
6+	39%	45%	52%

However, as in other states with civil commitment laws, the Act does not specify an outer time limit for predicting the risk of reoffense. Frequently, evaluators conclude actual risk is higher because the 15-year STATIC-99 percentage must be extrapolated to account for risk over the offender’s expected lifespan.

Stage Two reviews – Access to Client Records

Information necessary to score certain STATIC-99 items will not always be available from the defendant’s rap sheet or the pre-sentence report for the crime of conviction. For example, the victim-related items (8, 9 and 10) can be scored even when the charges were dismissed or the defendant was acquitted, provided an evaluator concludes there is sufficient reason to credit the allegation. These items can also be scored with facts underlying probation and parole violation proceedings, as well as prison misbehavior reports.

Therefore, when a case proceeds to stage two evaluation, and certainly whenever an inmate is being seriously considered for civil prosecution, the case review committee will probably try to collect voluminous records in order to more accurately score the STATIC-99, and to facilitate clinical evaluation of the mental abnormality component.

The drafters of the Act were certainly mindful of this need for documentation. The statute grants the case review committee access, without a court order, to a wide variety of client records, regardless of sealing and confidentiality laws. It provides:

Notwithstanding any other provision of law, the commissioner, the case review panel and the attorney general shall be entitled to request from any agency, office, department or other entity of the state, and such entity shall be authorized to provide upon such request, any and all records and reports relating to the respondent's commission or alleged commission of a sex offense, the institutional adjustment and any treatment received by such respondent, and any medical, clinical or other information relevant to a determination of whether the respondent is a sex offender requiring civil management. Otherwise confidential materials obtained for purposes of proceedings pursuant to this article shall not be further disseminated or otherwise used except for such purposes. Nothing in this article shall be construed to restrict any right of a respondent to obtain his or her own records pursuant to other provisions of law. [§ 10.08 (c)].

This means the case review committee will have access, without court order, to police and prosecution files even in cases that were terminated in favor of the accused pursuant to CPL § 160.50, at least when the file may relate to the “commission or alleged commission of a sex offense,” as the term is broadly defined in the Act. It also means ready access to many otherwise confidential medical records, mental health records, Family Court records, Office of Children and Family Services (formerly DFY) records, as well as probation, parole, prison and jail files.

The lesson here is clear. A criminal defense lawyer using the STATIC-99 to advise a client about the possible risk of civil commitment should be extremely careful when relying on a client’s self-report about his prior criminal history. When in doubt, get the records. Certainly, all available records should be obtained whenever an expert is retained to evaluate a client’s risk prior to entry of a guilty plea (see below).

Stage Two - Mental Abnormality Determination

The Act’s definition of mental abnormality includes three separate elements:

- 1) A congenital or acquired condition, disease, or disorder that affects the emotional, cognitive, or volitional capacity of a person
- 2) in a manner that predisposes him or her to the commission of conduct constituting a sex offense
- 3) and that results in serious difficulty in controlling such conduct. [§ 10.03 (i)]

While all three elements present difficult issues that are the standard grist of civil commitment trials, determining whether a criminal court client might later be plausibly

diagnosed as suffering from a “mental abnormality” will, in many cases, be a fruitless exercise. “Mental abnormality” does not mean only major mental disorders, such as schizophrenia or bipolar disorder. It includes diagnoses such as pedophilia and anti-social personality disorder. More controversial diagnoses include paraphilia not otherwise specified (nonconsent - rape), and personality disorder not otherwise specified (anti-social features), sexual disorder not otherwise specified and impulse control disorder not otherwise specified. Critics of civil commitment jurisprudence argue that, in practice, “mental abnormality” is nothing more than shorthand code for a person with a history of committing crimes.

This view may be overly cynical, but if a client has a significant criminal record, especially one involving prior sex offense charges or convictions, it is a fairly safe bet the State will manage to find at least one expert to opine he suffers from a mental abnormality. For example, it has been estimated that up to 70% of prison inmates can be diagnosed as having anti-social personality disorder. This is not surprising because the disorder is defined by rule breaking, dishonesty, impulsivity, recklessness, aggression, and lack of empathy:

DSM IV Diagnostic criteria for Antisocial Personality Disorder

- A. There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:
 - 1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
 - 2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
 - 3) impulsivity or failure to plan ahead
 - 4) irritability and aggressiveness, as indicated by repeated physical fights or assaults
 - 5) reckless disregard for safety of self or others
 - 6) consistent irresponsibility, and indicated by repeated failure to sustain consistent work behavior or honor financial obligations
 - 7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another
- B. The individual is at least age 18 years.
- C. There is evidence of Conduct Disorder with onset before age 15 years
- D. The occurrence of antisocial behavior is not exclusively during the course of Schizophrenia or a Manic Episode.

Diagnostic and Statistical Manual for Mental Disorders, Fourth Ed., at 649-650 (DSM IV).

And while the mental abnormality must *predispose* the person to committing sex offenses, the client’s criminal record alone often suffices for an evaluator to conclude the required nexus is present. For example, a diagnosis of pedophilia is thought by definition to predispose a person to the commission of sex offenses. Drawing the predisposition nexus is not as straightforward for a diagnosis of anti-social personality disorder, but is not often difficult. One expert who frequently testifies for the state at civil commitment trials has written:

Basically, when the person has some degree of repetitive sexual criminality coupled with other types of criminality (and other maladaptive behaviors), one can say that *his* maladaptive pattern predisposes him to [sex crimes] while not being solely defined by such acts . . . [O]ne can conclude that, for this individual, his personality disorder predisposes him to commit [sex crimes].

Doren, Evaluating Sex Offenders: A Manual for Civil Commitment and Beyond (2002) (at p. 101).

However, one feature of the DSM IV criteria for pedophilia is critically important when advising criminal court clients about the risk of civil commitment. Statements a client makes at any time about uncharged sexual misconduct, as well as sexual *fantasies* and *urges* not otherwise acted upon, can and will be used against him in the context of a civil commitment proceeding.

DSM IV Diagnostic criteria for Pedophilia

- A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).
- B. The fantasies, sexual urges or behaviors cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.
- C. The person is at least 16 years and at least 5 years older than the child or children in Criterion A.

DSM IV at 528.

Thus, additional damaging admissions by a client during a pre-sentence probation interview, or prison-based sex offender treatment program, or a stage two psychiatric exam, can be used to boost the client's score on an actuarial risk assessment instrument, and support a mental abnormality diagnosis. Criminal defense lawyers should strongly consider advising clients who are at risk of civil confinement not to participate in the pre-sentence probation interview. If that is not possible under the terms of a plea agreement, counsel should insist on attending the interview to enforce appropriate limits on questioning. Failing that, counsel should provide the client with a written script for the interview, admitting only so much guilt as is necessary to avoid scuttling the plea agreement.

Stage Three – Review by the Attorney General

If the case review committee determines an inmate is a sex offender requiring civil management it must notify the inmate and the Attorney General. The notification “must be accompanied by a written report from a psychiatric examiner that includes a finding as to whether the respondent has a mental abnormality.” Where the inmate was convicted of a non-sex specified felony prior to April 13, 2007, the notice must also include the case review committee's findings as to whether the crime was sexually motivated [§ 10.05 (g)].

The Attorney General may not file a civil management petition unless the case review committee recommends such action. Although not legally required to do so, the Attorney

General will likely feel politically constrained to file in a very high percentage of cases where the case review committee recommends prosecution. [§ 10.06 (a)]

Civil Management Petition – Filing, Venue, & Probable Cause Determination

Once the Attorney General decides to file a civil management petition, the jig, essentially, will be up. Sex offenders are hated and deeply feared in our society. Given the opportunity to remove them from the community, most jurors (and judges) do not hesitate to do so. Experience in other states with civil commitment laws reveals a “conviction” rate close to 100%. Given the limited jury role under the New York scheme, the experience here probably won’t be any different. Jurors will not be asked to decide whether the respondent is dangerous and in need of secure confinement, only whether he is mentally abnormal and in need of civil commitment or community supervision, a choice that will be made not by them, but by the judge. Few juries will unanimously vote to acquit a convicted sex offender under these circumstances. The real action in these cases will likely take place before judges (at least capable ones who take their roles seriously), not juries. Negotiation of “pleas” to strict and intensive supervision may become an important part of defense advocacy in civil commitment prosecutions. The Act expressly provides for them:

No provision of this article shall be interpreted so as to prevent a respondent, after opportunity to consult with counsel for respondent, from consenting to the relief which could be sought by an agency with jurisdiction by means of a court proceeding under this article” [§ 10.08 (f)].

Within 30 days of receipt of the case review committee’s recommendation, the Attorney General may file a civil management petition in the Supreme Court or County Court where the respondent is located.² The petition must allege “facts of an evidentiary character tending to support the allegation that the respondent is a sex offender requiring civil management” (i.e., is mentally abnormal). The petition must be served on the respondent, and it triggers the respondent’s right to court-appointed counsel.³ Mental Hygiene Legal Service (MHLS) will be appointed to represent respondents in civil commitment proceedings, unless MHLS “cannot accept” the appointment, in which case counsel shall be appointed according to County Law Article 18-b (public defenders, legal aid offices, 18-b private counsel).⁴ [§ 10.06 (c)].

The Act’s venue provision was hard-fought. The prior Senate version of the bill assigned venue in the county of incarceration, raising the specter of all civil commitment proceedings being conducted in a handful of rural upstate counties. The Assembly version assigned venue to the county of conviction, reasoning that local juries and judges should determine the fate of respondents from their own communities. The final result is a compromise, which authorizes the initial filing in the county of incarceration but gives the respondent power to designate venue in the county of conviction within ten days of the filing. Unless

² Like all procedural time frames for government action in the Act, this one is advisory only. Failure to do so within thirty days “shall not effect (sic) the validity of the petition” [§ 10.06 (a)].

³ As noted, inmates have a right to court-appointed counsel during the administrative evaluation process if the Attorney General moves for a court-ordered psychiatric examination.

⁴ The Act also authorizes the state to contract with other legal service entities, including defender organizations, to provide such representation on a statewide or regional basis [§ 10.15 (c)].

the Attorney General can show good cause for retaining the case in the county of incarceration, the respondent's venue designation will govern. [§ 10.06 (b)]

No bail is permitted in civil management petition proceedings. Respondents who were released prior to filing must be retaken into custody [§ 10.06 (h)].⁵ The respondent has a right to be evaluated by a psychiatric examiner (psychiatrist or licensed psychologist) of his own choosing, at state expense if he is financially unable to pay for it. After the petition is filed, if the Attorney General has not already done so, he may move for a court-ordered psychiatric exam of the respondent by his own expert [§ 10.06 (d)(e)].⁶

Within 30 days of filing the court must conduct a probable cause hearing.⁷ The Act provides the "hearing should be completed in one session but, in the interest of justice, may be adjourned" [§ 10.06 (i)]. Certified psychiatric reports are admissible at the hearing without testimony from the examiner.⁸ The respondent's commission of the underlying crime may not be relitigated. If the court determines there is probable cause to believe the respondent is a sex offender requiring civil management, it must order the respondent held in a secure treatment facility pending trial.

Most respondents will continue to be subject to incarceration pursuant to the underlying penal sentence at the time of the probable cause determination. For those inmates whose penal sentences have expired, the Act authorizes continued detention predicated solely on an allegation of mental abnormality without an accompanying allegation of dangerousness. As noted, such detention may not comply with federal constitutional requirements, which appear to mandate dangerousness as a predicate for involuntary detention.

If the court finds probable cause lacking, it must dismiss the petition. A respondent may not appeal from a probable cause determination, but the State may appeal dismissal of the petition.

Trial & Jury Verdict [§ 10.07]

Within 60 days of the probable cause determination, the respondent must be brought to trial before a jury of twelve, but he may waive a jury and elect to be tried by the court. Commission of the underlying sex crime shall be deemed established and shall not be relitigated, except where the defendant was held pursuant to CPL Article 730 as incompetent to stand trial. In those (rare) cases, the jury must determine guilt, but by the lesser standard of clear and convincing evidence. For specified non-sex felonies committed prior to April

⁵ The Attorney General can prevent an inmate's scheduled release from prison if the case review committee has not acted by the release date. A securing petition filed in court will block release until the case review committee acts [§ 10.06 (f)].

⁶ Statements made by the respondent during such court-ordered examinations can only be used for purposes of the civil management proceeding. The Act provides for an adverse inference instruction at trial if the respondent fails to participate in a court-ordered exam [§ 10.07 (c)].

⁷ Subject to good cause exceptions, the statutory period is 72 hours when the respondent was retaken into custody on the petition or is scheduled to be imminently released from prison. All time periods can be extended with consent. But violations are without consequence: "[F]ailure to commence the probable cause hearing within the time periods specified shall not result in the dismissal of the petition and shall not affect the validity of the hearing or the probable cause determination." [§ 10.06 (h)]

⁸ Live testimony must be offered at trial, unless the evaluator is unavailable to testify or there is other good cause for receipt of the report only [§ 10.08 (g)].

13, 2007, the jury must also determine, by clear and convincing evidence, whether the crime was sexually motivated. Each witness must testify under oath (unless authorized to give unsworn evidence) and may be cross-examined. The respondent may testify on his own behalf as a matter of right, and call witnesses. However, the respondent may not issue a subpoena to the victim in the underlying criminal action without a court order. Either party may request closure of the courtroom, or sealing of papers for good cause shown.

The jury must determine whether the respondent suffers from a mental abnormality, which, as noted, includes three separate elements:

- 1) a congenital or acquired condition, disease, or disorder that affects the emotional, cognitive, or volitional capacity of a person
- 2) in a manner that predisposes him or her to the commission of conduct constituting a sex offense
- 3) and that results in serious difficulty in controlling such conduct.

If the jury unanimously (or the judge if a jury trial is waived) finds the Attorney General has not shown by clear and convincing evidence that the respondent suffers from a mental abnormality, the court must issue a discharge order and dismiss the petition. If the jury hangs, a second trial must be held within 60 days. If a second jury is unable to reach a unanimous decision, the civil management petition must be dismissed.

If the jury (or judge) finds that the Attorney General has proven by clear and convincing evidence that the respondent suffers from a mental abnormality, the court will then hear evidence to determine if the respondent is “dangerous.”

Judicial Determination of Dangerousness

Following submission of additional evidence, the court alone must then determine whether the respondent “has such a strong disposition to commit sex offenses,” and “such an inability to control [his] behavior” that he is “likely to be a danger to others and commit sex crimes if not confined.” The Act’s use of the phrases “such a strong disposition” and “such an inability to control” seems to require courts to revisit and reweigh the “jury issues” of predisposition and lack of control, in addition to determining dangerousness, which is reserved exclusively for the court. Dangerousness determinations will, of course, be heavily dependent on judicial construction of the standard: “likely to be a danger to others and commit sex crimes.”

If the court determines by clear and convincing evidence the respondent is likely to reoffend, it must indefinitely commit him to a secure treatment facility. If not, the court must order the respondent to submit to strict and intensive supervision by the Division of Parole.

Respondents may appeal from either determination.

Commitment to a Secure Treatment Facility

A secure treatment facility is one under the jurisdiction of the Office of Mental Health, but “may include a facility on the grounds of a correctional facility” Employees of OMH and

OMRDD must provide “care and treatment” in these facilities, and “may” provide security services if “such staff are adequately trained in security methods and so equipped as to minimize the risk of danger of escape” [§ 10.03 (o)]. The Act otherwise expressly authorizes OMH to contract with DOCS for security services.

Commitments to secure treatment facilities are indefinite. Civilly committed sex offenders will have an ongoing right to court-appointed counsel, an annual right to an OMH and independent psychiatric evaluation, and an annual right to a court hearing to challenge their continued confinement.⁹ At the hearing, the Attorney General shall have the burden of proof of establishing the respondent remains dangerous. If the court finds the Attorney General has not done so, the court must release the respondent, or order him to submit to strict and intensive supervision [§ 10.09].

Strict and Intensive Supervision [§ 10.11]

Commitments to strict and intensive supervision by the Division of Parole – either following trial or after release from a secure treatment facility - are also of indefinite duration. Conditions of supervision may include electronic monitoring, global position satellite tracking, polygraph testing and residence restrictions. The Act also provides that respondents under such supervision shall have a minimum of six “face-to-face” and six “collateral” contacts with parole officers each month. A respondent may move for modification of conditions or termination of supervision once every two years.

If a respondent violates supervision, but owes no time to the underlying penal sentence or to post-release supervision, the Division of Parole cannot proceed in the usual way, i.e. by adjudicating guilt and recommitting him to DOCS custody. In these situations, Parole can take the respondent into custody at a local jail, and the Attorney General may, within five days, file a petition seeking to commit him to secure confinement as a dangerous sex offender. If no petition is filed, the respondent must be re-released under the original terms of supervision.

Sex Offender Management Office (Executive Law § 837-r)

The Act establishes an Office of Sex Offender Management within the Division of Criminal Justice Services, which is charged with developing standards, guidelines and best practices for the assessment, treatment and supervision of sex offenders. State agencies involved in the civil commitment process, including the case review committee, must give “due regard” to its recommendations.

⁹ The Commissioner of OMH may move at any time for discharge of the respondent upon determining that he is no longer in need of confinement. Respondents may also move at any time for outright release, or release to strict and intensive supervision, but the court may deny respondent-initiated requests without conducting a hearing, except when petitions are brought in the context of annual reviews.

Additional Practice Issues for Criminal Defense Lawyers

a. The Quandary of Prison-Based Sex Offender Treatment

One positive aspect of the legislation is it provides additional resources for prison-based sex offender treatment programs. Good prison-based sex offender treatment programs should, in theory, greatly diminish the need for civil commitment proceedings. The Act requires OMH personnel to conduct a needs assessment of all sex offenders at DOCS reception, mandates that offenders be offered at least six months of treatment before stage one civil commitment review, and provides for residential counseling programs run by licensed psychologists and staffed with clinical social workers. If fully implemented (the Act is vague about the number of residential programs there will be), these programs should offer far better treatment than existing prison-based sex offender programs, which are now mainly run by DOCS employees without professional credentials.

Although prison-based sex offender treatment will offer clients access to needed treatment and an opportunity to lower the risk of civil commitment, participation is not without significant legal peril. Incriminating or damaging admissions made during the course of treatment are not confidential and may be used to build a case for civil commitment. They may even be exploited to bring new criminal charges against a client.¹⁰ However, such admissions are usually *required* to remain in treatment. Participants who refuse to divulge uncharged crimes are typically perceived as minimizing their offense history, and as failing to take full responsibility for the harm they have caused victims.

Therefore, clients who have significant histories of uncharged sex offenses should be carefully counseled about the risks of participating in prison-based treatment programs. Institutional penalties will certainly be imposed on those who refuse treatment. DOCS will probably continue to deny good time credit for program refusal and failure, although with all sex offense sentences now determinate this sanction will only involve good time loss of 1/7th of the term.¹¹ The client may lose privileges and even be punitively transferred to a disfavored prison. *See, e.g., McKune v. Lile*, 536 U.S. 24 (2002). As a policy matter, OMH will probably refer all sex offenders who refuse prison-based treatment directly to stage two civil commitment review. DOCS will likely publicize this policy through official warnings that inmates face a higher risk of civil commitment if they refuse treatment. In many cases, treatment refusal will result in a higher Megan's Law risk level score. And, of course, some of our clients will need treatment to avoid sexually reoffending and returning to prison, possibly for life.

But balanced against all of these concerns must be the risk of lifetime confinement if treatment-based disclosures tip the scale in favor of a civil commitment proceeding. When

10 All participants in DOCS sex offender counseling programs are required to sign a contract stating: "I . . . understand than any crime of detail I disclose, whether a crime I have previously committed and not been prosecuted for, or a crime that I am planning to commit, will be reported to the appropriate law enforcement agencies." DOCS Waiver of Partial Confidentiality Form.

11 The ongoing litigation in *Donhauser v. Goord*, 314 F.Supp.2d 119 (N.D.N.Y. 2004), vacated and remanded, 181 Fed. Appx. 11 (2d Cir. 2006), will not change this situation because the 5th Amendment privilege against self-incrimination does not apply to civil commitment proceedings. *See Allen v. Illinois*, 478 U.S. 364 (1986). Thus, even if DOCS is forced to offer use immunity for statements made in the course of sex offender treatment programs, such use immunity will apply only to criminal prosecutions.

the full extent of a client's history of sexual offending is substantially reflected in his arrest and conviction record, and no "bombshell" revelations will be uncovered in therapy, clients should expect to decrease their overall risk of civil commitment by successfully completing a prison-based treatment program. At the far extreme, a client with a horrible record of sexual offending who will certainly be targeted for civil commitment may have no other choice but to participate in treatment and hope for the best. In many cases, though, the safer choice may be for a client to decline treatment.

The choice will almost always be difficult. But one thing is clear. A client who is not forthcoming with his lawyer about the full extent of his sexual offending history may receive poor or even disastrous legal advice concerning participation in sex offender treatment. Helping a client overcome the denial and shame inimical to such full disclosure will require time and sensitivity. Negotiating reasonable pleas in sex offenses cases is simply going to take more time now. Because the State has drastically raised the stakes in sex offense cases – essentially transforming each one into a life imprisonment without parole prosecution - OCA Standards and Goals will have to yield to this new and deeper dimension of our professional responsibility to our clients.

b. Hiring Experts

The difficult art and science of assessing a client's risk of civil commitment obviously calls for hiring an expert whenever possible. Some courts might be inclined to deny such funding requests, viewing assessment of a defendant's future risk of civil commitment a "collateral matter." But one thing is certain: the threat of civil commitment will hardly seem "collateral" to your client. An expert assessment might be the only way to reasonably assure a client that a guilty plea is not the legal equivalent of Russian roulette. Smart judges who wish to remain in control of their calendars will grasp this point and happily grant such funding requests. For others, the Act makes clear a defendant's possible mental abnormality, lack of control, and dangerousness are not collateral. They are factors relevant to the court's sentencing function. New Penal Law § 70.80 (2) provides:

In imposing a sentence within the authorized statutory range for any felony sex offense, the court may consider all relevant factors set forth in section 1.05 of this chapter, and in particular, may consider the defendant's criminal history, if any, including any history of sex offenses; any mental illness or mental abnormality from which the defendant may suffer; the defendant's ability or inability to control his sexual behavior; and, if the defendant has difficulty controlling such behavior, the extent to which that difficulty may pose a threat to society.

Note this provision offers the District Attorney an opportunity to speak "on the record" concerning the same factors that will later be evaluated for civil commitment purposes. One plea-bargaining strategy might involve negotiating with the District Attorney for a favorable statement at sentencing concerning these issues, one that might later be used to the client's advantage.

Penal Law Amendments

The Act includes a new determinate sentencing scheme for all remaining non-violent sex crimes, applicable to crimes committed on or after April 13, 2007. It also includes greatly increased periods of post-release supervision, and reclassification of certain sex crimes as violent felonies.

New Determinate Sentencing Scheme - Non-Violent Sex Offenses

First Felony	
Class B	5 - 25 years
Class C	3 ½ - 15 years
Class D	2 - 7 years
Class E	1 ½ - 4 years

(Class D and E – definite sentences, probation and split sentences authorized)

Predicate Felony Sex Offender – Non-violent

Prior Non-violent

Class B	8 – 25 years
Class C	5 – 15 years
Class D	3 – 7 years
Class E	2 – 4 years

Prior Violent

Class B	9 – 25 years
Class C	6 – 15 years
Class D	4 – 7 years
Class E	2 ½ - 4 years

New Post-Release Supervision Terms

All sentences above to include post-release supervision:

First-Felony Offenders

Class B –	5 to 20 years
Class C –	5 to 15 years
Class D or E –	3 to 10 years

Second Felony Offenders

10 to 25 years
7 to 20 years
5 to 15 years

The Board of Parole may discharge from supervision a sex offender who is serving a period of post-release supervision in excess of five years, provided he or she has served at least five years total supervision, and at least three consecutive years of unrevoked supervision. “No such discharge shall be granted unless the division of parole: (a) consults with any licensed psychologist, qualified psychiatrist, or other mental health professional who is providing care

or treatment to the supervisee; (b) determines that a discharge from post-release supervision is in the best interests of society; and (c) is satisfied that the supervisee, otherwise financially able to comply with an order of restitution and the payment of any mandatory surcharge, sex offender registration fee, or DNA data bank fee previously imposed by a court of competent jurisdiction, has made a good faith effort to comply therewith.” [Executive Law § 259-j].

Special rule for violations of post-release supervision

The Act provides that sex offenders who violate post-release supervision and are given a time assessment of three years or more can be re-released only by action of the Board of Parole. They will not automatically be released after serving the time assessment. This rule does not apply to time assessments of less than three years.

Redesignation of certain crimes as violent felonies

The Act reclassifies five felony sex offenses currently categorized as non-violent felonies as violent felonies pursuant to Penal Law § 70.02: rape in the second degree (Penal Law § 130.30), criminal sexual act in the second degree (Penal Law § 130.45), persistent sexual abuse (Penal Law § 130.53), aggravated sexual abuse in the fourth degree (Penal Law § 130.65-a), and facilitating a sex offense with a controlled substance (Penal Law § 130.90). This change is prospective, i.e., defendants convicted of the crime prior to the amendment cannot be resentenced as violent felons. However, the new violent felony offender designations will apply when a defendant who was convicted of one of these offenses before it was reclassified is sentenced on a new felony, committed on or after April 13, 2007, pursuant to a predicate violent felony offender sentencing scheme (e.g., second violent felony offender [Penal Law § 70.04), second felony offender – prior violent (Penal Law § 70.06, persistent violent felony offender (Penal Law § 70.08), predicate drug sentencing (Penal Law §§ 70.70, 70.71)]. See People v. Morse, 62 N.Y.2d 205 (1984).

Conclusion

The Sex Offender Management and Treatment Act of 2007 will make the already hard job of defending clients in sex offense prosecutions immeasurably more difficult. Temptations may now run high among lawyers and clients to simply “take the case to trial.” And in many situations that will certainly be the right call. But not always. Recent amendments to the sentencing code mandate life imprisonment for first-time offenders convicted of predatory sexual assault (Penal Law §§ 130.95, 130.96), and the standard “trial penalty” in sex cases is usually severe. Pick your poison - plea or trial – both can lead to uncertain ruin. The Act will surely test our counseling skills, constantly challenging us to help clients see their way through a seemingly impossible choice to a better outcome.

And it will certainly help us sharpen our trial skills.

Appendix Five
STATIC-99 Coding Form

Question Number	Risk Factor	Codes	Score															
1	Young (S9909)	Aged 25 or older Aged 18 – 24.99	0 1															
2	Ever Lived With (S9910)	Ever lived with lover for at least two years? Yes No	0 1															
3	Index non-sexual violence - Any Convictions (S9904)	No Yes	0 1															
4	Prior non-sexual violence - Any Convictions (S9905)	No Yes	0 1															
5	Prior Sex Offences (S9901)	<table border="0" style="width: 100%;"> <tr> <td style="text-align: center;"><u>Charges</u></td> <td style="text-align: center;"><u>Convictions</u></td> <td></td> </tr> <tr> <td style="text-align: center;">None</td> <td style="text-align: center;">None</td> <td style="text-align: center;">0</td> </tr> <tr> <td style="text-align: center;">1-2</td> <td style="text-align: center;">1</td> <td style="text-align: center;">1</td> </tr> <tr> <td style="text-align: center;">3-5</td> <td style="text-align: center;">2-3</td> <td style="text-align: center;">2</td> </tr> <tr> <td style="text-align: center;">6+</td> <td style="text-align: center;">4+</td> <td style="text-align: center;">3</td> </tr> </table>	<u>Charges</u>	<u>Convictions</u>		None	None	0	1-2	1	1	3-5	2-3	2	6+	4+	3	
<u>Charges</u>	<u>Convictions</u>																	
None	None	0																
1-2	1	1																
3-5	2-3	2																
6+	4+	3																
6	Prior sentencing dates (excluding index) (S9902)	3 or less 4 or more	0 1															
7	Any convictions for non-contact sex offences (S9903)	No Yes	0 1															
8	Any Unrelated Victims (S9906)	No Yes	0 1															
9	Any Stranger Victims (S9907)	No Yes	0 1															
10	Any Male Victims (S9908)	No Yes	0 1															
	Total Score	Add up scores from individual risk factors																

TRANSLATING STATIC 99 SCORES INTO RISK CATEGORIES

<u>Score</u>	<u>Label for Risk Category</u>
0,1	Low
2,3	Moderate-Low
4,5	Moderate-High
6 plus	High

Appendix Six
STATIC-99 Recidivism Percentages by Risk Level

Static-99 score	sample size	sexual recidivism			violent recidivism		
		5 years	10 years	15 years	5 years	10 years	15 years
0	107 (10%)	.05	.11	.13	.06	.12	.15
1	150 (14%)	.06	.07	.07	.11	.17	.18
2	204 (19%)	.09	.13	.16	.17	.25	.30
3	206 (19%)	.12	.14	.19	.22	.27	.34
4	190 (18%)	.26	.31	.36	.36	.44	.52
5	100 (9%)	.33	.38	.40	.42	.48	.52
6 +	129 (12%)	.39	.45	.52	.44	.51	.59
Average							
3.2	1086 (100%)	.18	.22	.26	.25	.32	.37