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## The Minnesota Sex Offender Program: Federal Intervention Part 2 – The 706 Expert Report

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*This opinion piece is the second of a three-part series on the Minnesota Sex Offender Program (MSOP). On February 9, 2015, at the US District Courthouse in St. Paul, a federal trial is scheduled to determine the constitutionality of MSOP. Part 1 discussed some of the issues and concerns that led to the federal trial. Part 2 reviews the 2014 report from a team of experts appointed by the Federal Court to examine the program. After the conclusion of the trial, and the court has issued its ruling, Part 3 will review the decision and discuss implications.*

To understand why not a single individual, out of more than 700 clients at MSOP, has been able to gain full release from sexual offender civil commitment (SOCC) in Minnesota over the last 20 years, it is important to understand that MSOP is the program component of a larger system. To help understand the problems at MSOP and distinguish them from the systemic problems, and to provide professional expertise on therapeutic aspects of [this federal lawsuit](#), US District Judge Donovan Frank appointed four sex offender treatment experts, under Rule 706 of the [Federal Rules of Evidence](#), to help guide the Court.

At a Federal Court hearing on [12/18/2013](#), Judge Frank announced the appointment of the 706 Panel: **Naomi Freeman** works for Forensic Services at the New York State Department of Mental Health and leads the SIST Unit, which manages non-secure civilly committed individuals. **Mike Miner** is a Professor and Research Director of the Program in Human Sexuality at the University of Minnesota Medical School. **Deborah McCulloch** is the Director of Wisconsin's SOCC program. **Robin Wilson** was the Clinical Director at Florida's SOCC program from 2006 to 2011, during which time there was a class action lawsuit and settlement. All four experts are members of [ATSA](#).

Judge Frank commissioned the 706 Panel to complete a review of MSOP, and ordered the State to provide the Panel members with unfettered access to MSOP clients, staff, and records. The 706 Panel was not tasked with completing a "peer review," *per se*, but more accurately to [examine the program](#),



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Chief Blogger Kieran McCartan, Ph.D. and Associate Bloggers David S. Prescott, LICSW and Jon Brandt, MSW, LICSW are longtime members of ATSA. We are dedicated to furthering the causes of evidenced-based practice, understanding, and prevention in the field of sexual abuse.

interview clients and staff, probe systemic influences, and essentially try to determine why clients were not getting out of MSOP. The 2014 examination of MSOP by the 706 Panel is perhaps the most thorough independent review of MSOP ever commissioned. The findings in the Panel's 108 page [Report \(11/17/2014\)](#), are largely consistent with previous reviews. Problems with MSOP and the overarching system were the subject of a [2011 Report](#) from the Minnesota Office of the Legislative Auditor, a [2012 review of MSOP](#) by a Program Evaluation Team, and a [2013 Report](#) by the Minnesota SOCC Task Force.

To be sure, there are systemic problems with SOCC, but the 706 Panel also found significant problems with MSOP, as a program. While the Panel Report gives credit to many areas of strength at MSOP, numerous findings of the 706 Panel are of concern. The Panel Report explains how more than 700 clients have gotten mired in treatment at MSOP, and offers scores of constructive recommendations. The 706 team brings vast professional experience and credibility to their review of MSOP and the SOCC system. Their knowledge, insights, and candor makes the [706 Panel Report](#) highly informative. The entire report should be considered a "must read" for anyone who works with SVPs.

### **The 706 Panel Report: A Critical Review**

(Note: bullet points are direct quotes from the Panel Report)

It is important to acknowledge that a central problem at MSOP has been the difficulty with attracting sufficient experienced, qualified personnel, especially clinical and psychiatric staff. At one federal hearing, [Dan Gustafson](#), lead attorney representing MSOP clients, expressed that the State was shortsighted in putting MSOP's main facility at Moose Lake, a rural part of Minnesota where it is difficult to attract personnel in large numbers. Gustafson quipped that the State could have bulldozed the Metrodome and put MSOP in downtown Minneapolis but the State chose, instead, to build a new stadium there. He went on to explain that, if the State is going to use SOCC, the State has to solve this personnel problem; inadequate staff, for whatever reasons, has real consequences to MSOP clients.

### **The 706 Panel raised many concerns about MSOP treatment and treatment targets:**

- ... the MSOP's narrow focus of training and attention on treatment for problematic sexual behavior likely contributes to a culture wherein mental health disorders are not appropriately identified or understood by many MSOP staff, including clinical staff. (p.15)
- There appeared to be little recognition and understanding of the complexity and heterogeneity of the problems and issues presented by clients committed to the MSOP. (p.17)
- ... it appears that clients are over-diagnosed, especially given the prevalence of numerous paraphilic diagnoses. (p.58)
- ...the Panel observed in client records that psychological assessments... appeared to have little effect on identifying treatment targets, therapeutic goals, phase placement, or responsive intervention strategies. (p.26)

- Clinical staff and clinical supervisors do not appear to be supported or encouraged to appropriately modify the treatment offered in order to appropriately respond to the individual and complex needs of these clients. (p.45)
- Many of those with intellectual disabilities likely did not pose a significant risk to the public at the time of their commitment... they are likely to flourish with appropriate programming in less restrictive residential settings... (p.22)
- ... it appears that treatment progress is currently impeded by unrealistic expectations for client behavior... the current conflation of privilege and treatment progression exacerbates an already hostile environment... (p.70)
- with specific reference to suicidal and parasuicidal behaviors, it was the Panel's impression... that these potentially serious behaviors are too often minimized by staff as attention-seeking or bad behavior for secondary gain. (p.54)
- The Panel expresses grave concerns for the personal safety of vulnerable clients. (p.8, 56)

The Panel was particularly concerned about **MSOP's inability to obtain adequate psychiatric services for clients:**

- Psychiatric care at the MSOP is currently inadequate to meet the needs of its clientele. (p.8, 49)
- Some clients were so psychiatrically decompensated and disorganized in thought... that they may never be able to meet the established criteria to progress through the phases of treatment. (p.44)
- By providing inadequate psychiatric treatment, many clients are being inappropriately served by MSOP... The Panel was particularly concerned about the use of long periods of isolation in rooms in secluded units, which are used in response to aggressive, threatening or self-harming behavior. (p.55)
- ... SMI clients are unlikely to benefit from the MSOP as it is currently designed... (p.18)

The Panel used some strong language to express concerns about the **more than 60 clients who were committed to MSOP on the basis of juvenile-only offending,**

- The Panel opines that the majority of these individuals with juvenile-only offending should not have been civilly committed in the first place and, if they had been appropriately assessed, they would not have met criteria for commitment. (p.14)

- Specifically, assessments of MSOP clients with juvenile-only sexual offense histories often included reference to diagnostic and risk assessment tools designed specifically for use in the assessments of adults. (p.41)
- As such, it is the opinion of the Panel that the majority of individuals in this subgroup would be eligible for discharge. (p.14)

The Panel Report offered many observations about **clients being mired in the program**.

- The 2012 MSOP [Evaluation Report](#) (Haaven, McGrath, & Murphy, 2012) notes that the program has experienced difficulty moving clients through the treatment phases... promoted a culture of learned helplessness, in which staff and clients alike have come to believe that phase advancement leading to community discharge is a virtually unattainable goal. These same observations were made by the Panel. (p.35)
- ... there are many clients not participating in treatment at Moose Lake, including numbers who are reported as technically in treatment through their signature on a consent form, but not... engaged. (p.54)
- ... it was difficult to discern how long clients had been in the current treatment phase or why some clients were not participating in treatment. (p.53)

According to a [2013 MSOP report](#), approximately 100 clients had withdrawn from treatment.

Clients not completing the program at MSOP is, in part, because **the exits are effectively blocked** by legislative, executive, and judicial constraints on the SOCC system.

- Currently the legislative framework appears to make transfer to even CPS almost impossible and appears to effectively prevent provisional or unconditional discharge. (p.77)
- The Panel recommends that firm timeframes be established in which the court system... needs to make decisions regarding discharge. Currently, the process can take years to complete – in which time clients may decompensate due to feelings of hopelessness. (p.6)

The 706 Panel was particularly critical of **too few clients at MSOP being able to get to the exits**.

- The Panel very strongly recommends that MSOP administration ensures that discharge planning begins on admission. (p.6)
- In comparison to most other SOCC programs, in which periodic reviews of civil commitment status are conducted on a periodic basis... it is unusual and of great concern to the Panel that

assessments of this sort are only completed at MSOP when a client is actually petitioning for release... (p.33)

- It appears that lower risk offenders are being civilly confined within the MSOP at a higher rate than in other states. (p.74)
- ... there are individuals currently committed who likely do not meet commitment criteria. (p.75)
- ... there is nothing in current policy or procedural guidelines to prohibit MSOP from proactively filing petitions for CPS, provisional discharge, or unconditional discharge for clients who merit such placements – they just don't do it. (p.78)
- MSOP administration has an [ethical obligation](#) to release individuals who no longer meet the criteria for SOCC in order to ensure that client civil liberties are protected... (p.69)

**Clients getting stuck in treatment phases is largely an internal matter**, within the control and discretion of MSOP clinical and administrative staff. In August 2014, [Judge Frank wrote](#) (p.34), “The Court notes its growing concern that MSOP is perhaps not doing its part to make sure that people are properly placed in various phases of its program...” The 706 Panel expressed similar observations.

- ... clients seem to spend an unnecessary length of time in Phase Three prior to progression to CPS [Community Preparation Services] ... This delay seems to be a result of a pervasive belief on the part of MSOP administration and staff that it is not their responsibility to proactively petition and rigorously advocate for clients to advance in phases and to CPS. (p.44)

After 20 years, only [about 3-5%](#) of more than 700 MSOP clients are in the final stage of treatment prior to Conditional Release. If today there were 100 or 200 clients who had completed secure treatment, and MSOP staff were advocating, however unsuccessfully, for the conditional release of clients to be treated in the community, it would be clear for all to see that it is simply “politics” blocking the MSOP exits, and fault for a “clearly broken” system could be dropped solely on the steps of the State Capitol. But to a great extent, **clients at MSOP have lost faith in both the program and the system**.

- Generally, clients want the court to know that they are desperate and that their only hope is that someone in a position of authority will recognize their collective experience... and do ‘something’ to ‘fix it.’ Many clients have been in treatment for 15 years or longer... Sadly, some elderly clients expressed grave concerns that they would die at MSOP. (p.47)

Since MSOP was established 20 years ago, approximately 30 clients have died while confined. Many clients are infirmed; the oldest current client is 92.

**The Panel, however, is also critical of the entire SOCC system in Minnesota.**

- ...the emotional climate at Moose Lake [MSOP] is replete with negativity, despair, and hopelessness. (p.52) The MSOP climate is characterized by high levels of learned helplessness and hopelessness, both on the part of the clients and the staff. (p.13).
- The majority of other SOCC states have successfully released clients to community conditional release programs within reasonable timeframes, with few documented sexual or violent reoffenses. (p.67)
- ... the Panel believes that the legal representation received by clients is insufficient. (p.78)
- Clearly, there are issues to be addressed in making MSOP the best program... [but] the current legislative commitment and release framework would continue to call into question whether the intent is to provide treatment... or the intent is to provide for a lifetime of confinement for certain people who have sexually offended. (p.79)

While some might think that the authors have “cherry-picked” the Panel Report for disparaging quotes, the full report, is actually more critical than noted herein. While the Panel Report described many program attributes at MSOP, the [Panel was commissioned](#), essentially, to help determine whether the concerns raised in the petition to the Federal Court had merit. Program strengths and beneficence, while important, will not offset unconstitutional conditions of confinement, if such conditions are found. Prior to the 706 report, [Judge Frank wrote](#), “Time and again, professional assessments have identified grave deficiencies in the program.” (p.68) Now, the 706 Panel Report largely echoes the findings of [previous reports](#), and substantially corroborates complaints brought by MSOP clients, and the concerns of many stakeholders.

The State created a [complex SOCC scheme](#) that “captures too many people and keeps too many of them too long” (SOCC Task Force Final Report, p.1), and a release process that “appears to effectively prevent provisional or unconditional discharge” (706 Panel Report, p.77). Judge Frank’s [February 2014 order](#) suggests that the Federal Court will simplify criteria for confinement at MSOP, “Today, the Court finds that it is constitutionally mandated that only individuals who constitute ‘a real continuing, and serious danger to society,’ may continue to be civilly committed to MSOP. If the evidence demonstrates that MSOP systematically continues to confine individuals who are not ‘a real continuing, and serious danger to society,’ then such confinement will be held unconstitutional.” (p.66)

In his [February 2014 order](#), Judge Frank also wrote, “If the evidence requires it, the Court will act... The politicians of this great State must now ask themselves if they will act to revise a system that is clearly broken, or stand idly by and do nothing, simply awaiting Court intervention.” (p.68-69) Unfortunately, but [not surprisingly](#), all three branches of State government have been unable, or unwilling, to [equitably manage SOCC](#). In [a8/11/14 Federal Ruling](#), Judge Frank wrote, “It is obvious that but for this litigation [clients] would likely have languished for years in the prison-like environment of MSOP-Moose Lake, without any realistic hope of gaining [freedom].” (p.34) And most recently, in a Federal Ruling on 2/2/2015, Judge Frank wrote, “At a minimum, the evidence has shown that, to date, the executive and legislative branches in Minnesota have let politics, rather than the rule of law and the rights of ‘all’ of their citizens guide their decisions.” (p.42)

It takes great judicial and political courage for any judge to issue a ruling of “unconstitutional.” Such rulings are typically controversial, and often subject to appeal – perhaps all the way to the US Supreme Court. No one knows that better than Federal Judge Martha Craig Daughtrey of the US Court of Appeals for the Sixth District, who wrote an eloquent dissent in the case of [DeBoer v. Snyder](#) – the case that sent same-sex marriage to the US Supreme Court in 2015. Judge Daughtrey expressed dismay with her fellow judges on the Appeals Court who ruled that same-sex marriage should best be decided by the populace and their elected representatives. [Judge Daughtrey disagreed](#), “If we in the judiciary do not have the authority, indeed the responsibility, to right fundamental wrongs left excused by a majority of the electorate, our whole intricate constitutional system of checks and balances, as well as the oaths to which we swore, prove to be nothing but shams.” (p.64) Perhaps Judge Frank is cut from the same cloth.

If those with authority and leadership had recognized the value (and political refuge) of the many previous investigations into MSOP, and heeded recommendations, the State might have avoided [this lawsuit](#). Blame for the sorry state of SOCC in Minnesota belongs to many. Responsibility for finding and implementing prudent public policies to effectively degrade sexual violence belongs to all.

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Blog Note: This is Part 2 of a three-part series. After the US District Court releases its ruling, expected in March or April of 2015, Part 3 will review the decision and discuss implications.