ually dangerous persons, it is important to keep the definitions of the relevant jurisdiction in mind.

On the other hand, this may also raise ethics-related concerns on both sides of the argument. One clinician may have strong moral objections to the sexually offending behavior itself, while another may take issue with the use of paraphilia NOS to pathologize criminal behavior. On either side of the argument, clinicians involved in these evaluations must be aware of their biases and may need to decline such referrals in some circumstances.

For the general clinician, it is important to keep in mind the weight of reporting sexual offending behavior in the medical record. For this reason, careful attention should be paid to being clear about the source of the information cited in the record, as well as clearly describing any institutional behavior of a sexual nature in behavioral terms, without judgment or interpretation.

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Duty to Warn or Protect

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Colorado's Professional Liability Statute Provides Support for Summary Judgment in Favor of a Psychologist Who Completed an Evaluation for the Colorado Probation Department

Colo. Rev. Stat. § 13-21-117 provides liability protection and defines the responsibilities of mental health providers in cases involving duties to third parties. In *Fredericks v. Jonsson*, 609 F.3d 1096 (10th Cir. 2010), the U.S. Court of Appeals for the Tenth Circuit affirmed a summary judgment in favor of the defendant, a psychologist who completed an evaluation at the request of the Colorado probation department, holding that Colorado's mental health professional liability statute, Section 117, applied to and protected the defendant from the plaintiff's claims.

Facts of the Case

In January 2004, Troy Wellington was convicted of stalking the minor children of James and Brook Fredericks. Mr. Wellington was sentenced to eight years probation. One condition of his probation was that he complete a "mental health evaluation/counseling or treatment." The probation department asked a private forensic psychology clinic to complete a full mental health evaluation of Mr. Wellington. Mary Margaret Jonsson, PhD, completed the evaluation on May 12, 2004. During the evaluation Mr. Wellington told Dr. Jonsson that "he used to have frequent violent fantasies involving members of the Fredericks family, but that he no longer had violent thoughts directed" at the Fredericks family (*Fredericks*, p 1098). Dr. Jonsson did not convey any warnings to the probation department or to the Fredericks. On May 26, 2004, two weeks after the examination, Mr. Wellington, while intoxicated, stole a car and drove to the Fredericks' home. He broke a window at the home in an apparent break-in attempt, but was deterred by a security alarm and fled into a neighbor's yard and passed out. In May 2006, the Fredericks filed suit in United States District Court for the District of Colorado asserting that Dr. Jonsson negligently failed to warn them or the probation department of the danger posed by Mr. Wellington. Dr. Jonsson moved successfully for summary judgment on the ground that Section 117 (Colo. Rev. Stat. § 13-21-117) protected her from liability because Mr. Wellington had not made a threat against a specific identifiable party. The United States Court of Appeals, Tenth Circuit, affirmed the summary judgment of the district court.

Ruling and Reasoning

The U.S. Court of Appeals considered two major questions when formulating its decision. First, the court considered whether Section 117 applied in the case. The statute provides that "a mental health professional . . . shall not be liable for damages in any civil action for failure to warn or protect a person against a mental health patient's violent behavior, and any such person shall not be held civilly liable for failure to predict such violent behavior" (*Fredericks*, p 1099). However, it mandates that when a patient has communicated to the mental health care provider a serious threat of imminent physical violence against a

specific third party, such a duty does arise. In such cases, the mental health professional is required to make "reasonable and timely efforts to notify any person or persons specifically threatened, as well as notifying appropriate law enforcement agency or by taking other appropriate action including, but not limited to, hospitalizing the patient" (*Fredericks*, p 1099).

The Fredericks argued that the statute applies only where there is a relationship between a patient and a therapist. They asserted that Mr. Wellington was not a patient, as he was not receiving treatment and therefore Section 117 did not apply. The court examined the language and common-law context of Section 117 and associated case law, specifically *Martinez v. Lewis*, 969 P.2d 213 (Colo. 1998). In the *Martinez* decision, the Colorado Supreme Court ruled that the agreement between Dr. Lewis and the plaintiff to examine the plaintiff in the context of an independent medical examination did not constitute a patient-physician relationship. This decision seemed to lend credence to the Fredericks family's assertion that a patient-therapist relationship did not exist between Mr. Wellington and Dr. Jonsson. However, in *Martinez*, the word patient was not defined. The court noted that in Section 117, as well as in the Colorado psychologist licensing statute, the concept of a patient is considered more broadly than in the state supreme court's decision in *Martinez*. The court observed that the Colorado statute defining the duties of Independent Medical Examiners (IMEs) is entitled Accountability of Independent Medical Examiners to Their Patients (Colo. Rev. Stat. § 10-16-601 (2010)). The court concluded that the use of the term patient in several areas of Colorado statutory law, including Section 117, reflects the state legislature's intent to define the patient-professional relationship broadly, to include evaluations such as the one completed by Dr. Jonsson. The court concluded that Dr. Jonsson was bound by the language in Section 117 and did have a "special relationship."

The second major question considered by the Tenth Circuit was whether, if Section 117 applied in this case, Mr. Wellington had communicated to Dr. Jonsson a serious threat of imminent physical violence against the Fredericks. They argued that a reasonable psychologist in Dr. Jonsson's position would have been able to determine from Mr. Wellington's history that he posed a serious risk of violence to them. They did not offer any evidence that Mr. Wellington told Dr. Jonsson that he had an imminent intent to commit violence against them, but argued that Dr. Jonsson should have inferred imminent risk, given the defendant's violent history.

The court referred to *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), which acknowledged the value of safeguarding confidentiality but concluded that "this interest must yield to the extent to which the disclosure is essential to avert danger to others" (*Fredericks*, p 1102). In analyzing the concept of the special-relationship doctrine, consistent with *Tarasoff*, the Tenth Circuit made clear that the duty of a nontreating mental health practitioner is not greater than that of those who are treating a dangerous person. The court opined that the evaluation determining whether a person is a danger to others is the same, whether or not the person is being treated by the provider, and that "the mental health provider has a duty to warn only when the patient himself predicts his violent behavior (by communicating—that is, expressing—his threat to the mental health provider)" (*Fredericks*, p 1105).

To illustrate their point, the court cited *McCarty v. Kaiser-Hill Co., L.L.C.*, 15 P.3d 1122 (Colo. Ct. App. 2000). Marvin McCarty told a psychologist that he had had a problem with his supervisor at work on the previous day and described strong negative feelings about his supervisors. He expressed concern that he might not be able to control his anger and was experiencing feelings described as homicidal rage. The psychologist concluded that he had a duty under Section 117 to warn Mr. McCarty's supervisors. The psychologist warned the supervisors and Mr. McCarty was fired. He asserted that he had never communicated a serious threat of imminent violence, and therefore the psychologist was not protected by Section 117. The Colorado Court of Appeals disagreed, noting that Mr. McCarty's statements "were sufficient to demonstrate as a matter of law that the psychologist had a duty to warn supervisors" (*Fredericks*, p 1106). The Tenth Circuit distinguished *McCarty* from *Fredericks* in that Mr. Wellington did not communicate imminent danger, and stated that, although he had harbored violent thoughts in the past, he had no violent thoughts directed toward the plaintiffs at the time of Dr. Jonsson's evaluation.

Discussion

This case is an important addition to *Tarasoff* and its progeny. A central issue is the degree to which a threat must be specifically communicated to a mental health provider. Kachigian and Felthous (*J Am Acad Psychiatry Law* 32:263–73, 2004) classify duty-to-warn statutes into one of four categories. The first includes those statutes that appear to create a definite duty, such as those in Idaho and Michigan. The second includes states that prohibit liability except under specified circumstances such as New Jersey and Arizona. The third includes those states with permissive statutes such as Florida and Mississippi. Permissive statutes contain language such as "The psychiatrist may disclose . . . ," and the fourth contains states that define unique approaches.

The Colorado statute that was applicable in *Fredericks* represents an example of a statute that falls into the second category, in that it "prohibits liability" under certain circumstances. Colorado's Section 117 is based on the APA model law published in 1987. The APA model law recommended that states draft duty-to-protect laws containing language that indemnifies psychiatric practitioners unless the patient makes "an explicit threat to kill or seriously injure a clearly identified or reasonably identifiable victim or victims." In the APA's model law, practitioners who fail "to take such reasonable precautions to prevent the threatened harm" would not be indemnified.

Peterson v. State, 671 P.2d 230 (Wash. 1983), is an example in which the "reasonably identifiable victim" aspect was not considered in the final decision. In *Peterson*, an entire class of potential victims (i.e. all road users) were owed protection according to the court. In *Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. 185 (D. Neb. 1980), the court did not require an explicitly identified victim. The *Fredericks v. Jonsson* decision is an addition to the *Tarasoff* progeny, where not only is imminent dangerousness a necessary condition, but a reasonably identifiable victim is a required element for the duty to protect and possibly warn third parties. This case reduces the ambiguity facing Colorado mental health practitioners when faced with a patient who expresses violent intent toward a third party. In addition, it supports the practice that nontraditional patient-health professional relationships, such as occur in forensic evaluations and independent medical examinations, fall in the category of special relationships. Therefore, in Colorado and jurisdictions with similar statutory law, there is a duty to third parties when the specific criteria defined in the APA Model Code (1987) are met.

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Mental Health Evaluation/ Counseling as a Special Condition of Supervised Release

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A Court Rules That a Defendant Must Comply With Special Conditions of Supervised Release, Including a Mental Health Evaluation, After Serving the Custodial Sentence

In *United States v. Wayne*, 591 F.3d 1326 (10th Cir. 2010), the U.S. Court of Appeals for the Tenth Circuit affirmed a U.S. district court ruling that required that the defendant undergo a mental health evaluation to determine the potential need for counseling and treatment as a condition of supervised release following completion of the custodial sentence.

Facts of the Case

Jacqueline Wayne was indicted in the U.S. District Court for the Western District of Missouri on five counts of wire fraud in February 2008. She pleaded guilty to Count 1 of the indictment. Ms. Wayne received a sentence of 37 months' imprisonment, followed by three years' supervised release. As a special condition of supervised release, the court ordered Ms. Wayne to participate in a mental health evaluation, as directed by the probation office, for the purpose of determining if mental health counseling was needed. Ms. Wayne raised no objection to the initial supervised-release condition at the sen-