California Department of Mental Health

Sexually Violent Predator Evaluations

An Introduction – A reintroduction

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Sacramento, California
September 7-9, 2011

Why this? Why now? Why me?

For “new” evaluators an introduction to the SVP law, the evaluation process, and the Department of Mental Health’s expectations.

For “old” evaluators an opportunity for a professional “tune up.” An opportunity to learn about shifts in program emphasis and Department expectations.

Why this? Why now? Why me?

SVP reports are ultimately tested in the adversarial context of superior court hearings and trials.

In court, the factual and logical foundation of opinions and conclusions and their relevance to the legal issues before court are are crucial.

Why this? Why now? Why me?

While SVP evaluators are to exercise independent professional judgment, they must do so within the framework of the SVP law.

To do this, SVP evaluators must understand the law—not to practice law—but to navigate within its boundaries. Those boundaries will be a focus of this conference.

Conference Outline

Afternoon-Wednesday, September 7, 2011

- Introduction to the Conference
- Introduction and review: DMH Fact-Based, Fact-limited, Case-specific, SVP-focused approach to forensic evaluation.
- Introduction and review: Forensic Report Writing - Part One - Basic principles.

Conference Outline

Thursday Morning, September 8, 2011

- Introduction and review: SVP Reports' Criterion A – Qualifying Crimes.
- Introduction and review: SVP Reports' Criterion B – "Diagnosed Mental Disorder."

Thursday Afternoon, September 8, 2011

- Introduction and review: SVP Reports' Criterion C – Dangerousness assessment.

Conference Outline

Friday Morning, September 9, 2011

- Writing forensic reports for DMH: Part Two – Guidelines, Dos and Don’ts.
- Writing forensic reports for DMH: Part Three – The Abstract of Essential Findings.

Friday Afternoon, September 9, 2011

- Introduction and review: Your role as an expert witness in court – Universal principles and specific tips.

Ground Rules, Goals, and Disclosures

1. Intend to provide the “new” evaluators with the basic information they need to start work as SVP evaluators.

2. The title of the conference is not “everything you wanted to know about SVP” or “every thing I know about SVP.”

3. Most conference sections will include didactic presentations complemented by panels of experienced SVP evaluators.

Ground Rules, Goals, and Disclosures

4. In my presentations, I have to tried to find and focus on simple core issues that are often obscured in “professional” discourse.

5. This conference should give evaluators an understanding of areas in which the Department is shifting emphasis and expectations.

6. The conference should give evaluator what you need to know to continue to continue successfully with the Department.

Ground Rules, Goals, and Disclosures

7. My presentations have been shaped by a year of study, visits to trial courts and the archives of the district appellate court, reading hundreds of SVP reports, and a lot of thinking.

8. My approach has been unabashedly negative. I was looking for problems, and problems (cases) seemed to be looking for me.

9. When my comments turn critical, if the shoe doesn't fit don't wear it. Apparently I'm not talking about you or your work.

Disclosures – The Law

- For mental health professionals.
- For SVP evaluators.
- Cases that clarify concepts.
- Cases that define terms.
- California cases.
- Applying law – practicing law.
- Case holding/rulings.
- Models of judicial thinking.

Disclosures – The Law

- Statements of the law have been summarized and paraphrased in order to simplify and clarify.
- Most things in law and psychiatry are complex—with a host of exceptions and qualifying contexts. The price of simplification is some loss of technical accuracy.

Principles

1. *Give a man a fish and you feed him for a day. Teach a man to fish and you feed him for a lifetime.* *Chinese Proverb*

2. Applying principles versus using recipes, formulas, or rituals.

3. Principles are generalizable.

4. Principles are for forever.

Standardized Assessment Protocol

1. The DMH Evaluator Handbook and Protocol of 2008 were ruled “underground regulations.”
2. In February 2009, the Department of Mental Health formally agreed that the handbook and the protocol would no longer be used.

Standardized Assessment Protocol

California Code of Regulations Section 4005

Evaluator Requirements

The evaluator, according to his or her professional judgment, shall apply tests or instruments along with other static and dynamic risk factors when making the assessment. Such tests, instruments and risk factors must have gained professional recognition or acceptance in the field of diagnosing, evaluating or treating sexual offenders and be appropriate to the particular patient and applied on a case-by-case basis.

Standardized Assessment Protocol

California Code of Regulations Section 4005

Evaluator Requirements (Continued)

The term “professional recognition or acceptance” as used in this section means that the test, instrument, or risk factor has undergone peer review by a conference, committee or journal of a professional organization in the fields of psychology or psychiatry, including, but not limited to, the American Psychological Association, the American Psychiatric Association, and Association for the Treatment of Sexual Abusers.

Standardized Assessment Protocol

California Code of Regulations Section 4005

Evaluator Requirements (Re-visited)

The evaluator, according to his or her professional judgment, shall apply tests or instruments along with other static and dynamic risk factors when making the assessment. Such tests, instruments and risk factors must have gained professional recognition or acceptance in the field of diagnosing, evaluating or treating sexual offenders and be appropriate to the particular patient and applied on a case-by-case basis.

Standardized Assessment Protocol

1. The DMH Evaluator Handbook and Protocol of 2008 contains information that may be useful and is that does not conflict with Code of Regulations §4005.

2. The DMH Evaluator Handbook and Protocol of 2008 cannot be cited as the current handbook or protocol for SVP evaluations.

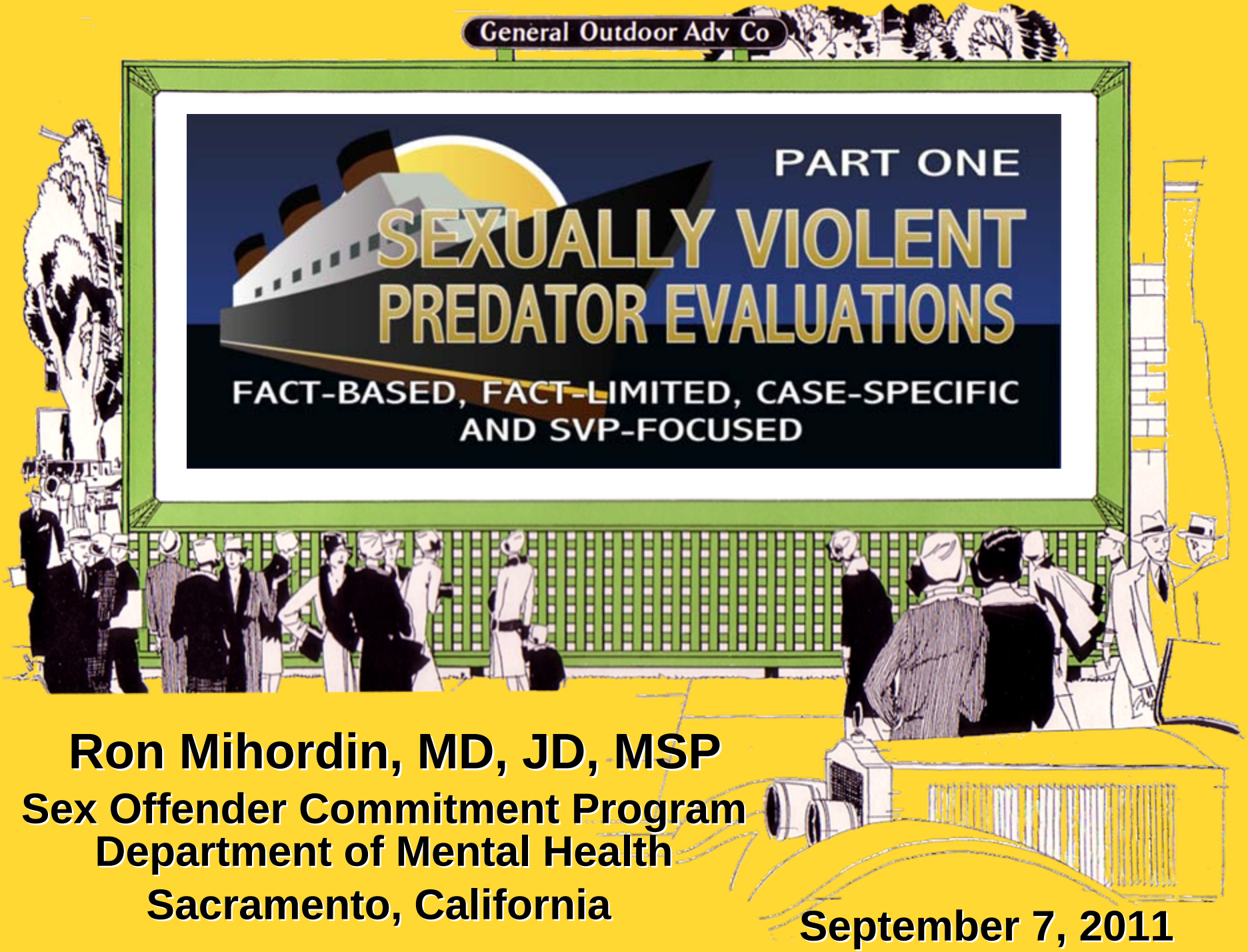
3. The former handbook offered “a suggested framework of of to organize and carry out an evaluation.”

Standardized Assessment Protocol

4. The some language found in the 2008 Handbook has become boilerplate that is almost invariably pasted into contemporary SVP reports.

5. Borrowing 2008 handbook language or language from any sources other than the California codes and appellate law and routinely using such language as boilerplate in SVP reports is problematic and should be avoided.

6. The general language of §4005 supports evaluator “independence” within legal, Departmental policy, and contract guidelines.



Ron Mihordin, MD, JD, MSP
Sex Offender Commitment Program
Department of Mental Health
Sacramento, California

September 7, 2011

Fact-Based

Conclusions are based on logically and clinically valid interpretations of all the available relevant trustworthy documented facts or observations.

Fact-Based

"The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed."

***Pacific Gas & Electric Co. v. Zukerman* (1987)**

Fact-Based

Conclusions are fact-determined not outcome-determined.

SEXUALLY VIOLENT PREDAT0R EVALUATORS
TASKS AND RESPONSIBILITIES
IN GENERAL

As a Department of Mental Health Sexually Violent Predator evaluator you must base the decisions you make on the facts and the law.

You must apply the law to the facts, as you determine them, and in this way arrive at your findings and conclusions regarding the various SVP criteria.

You must accept and follow the law, whether or not you agree with the law.

You must not be influenced by pity for a prisoner/parolee or by prejudice against him or her. You must not be biased against a prisoner/parolee because he or she has been referred for SVP evaluation or has been found by others to have met some or all of the SVP criteria. You must not infer or assume from the fact of referral for evaluation or prior findings or conclusions by others that he or she is more likely to meet any or all of the SVP criteria. In your evaluation, your report writing, and any subsequent testimony, you must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and prisoner/parolee have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach conclusions consistent with the facts and the law regardless of the consequences.

Fact-Based

Evaluator recognizes the difference between:

- ✓ FACTS (Observations and trustworthy documented observations), and
- ✓ OPINIONS (Labels, characterizations, and impressions).

Fact-Based

Evaluator considers:

- ✓ Social Context
- ✓ Language
- ✓ Ethnicity
- ✓ Culture

Introducing:

The ideal bad role model.

Dr. Exz *

*** SVP evaluator who proudly says: "I can do these evaluations in my sleep." And, his reports look as though he does.**

The Big Mistake
(Fact-based)

Dr. Exz says:

"I make up my mind first, then I look at the facts. Corroborating facts is for journalists—not doctors!"

Fact-Limited

No relevant facts

or

insufficient trustworthy facts

DO NOT SUPPORT POSITIVE FINDINGS

Fact-Limited

Presumptions are not valid substitutes for missing trustworthy relevant facts.*

Fact-Limited

"Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote, or conjectural, then his conclusion has no evidentiary value."

***Pacific Gas & Electric Co. v. Zukerman* (1987)**

General Applicability Cases

People v. Dodd (2005)

- Context: MDO
- Issue: Sufficiency of evidence that Dodd suffered from the severe mental disorder of pedophilia.

General Applicability Cases

People v. Dodd (2005)

- Facts: Dodd was convicted of committing a lewd and lascivious act with a child under the age of 14 and sentenced to state prison, PC 288 (a).

General Applicability Cases

People v. Dodd (2005)

- Facts: Doctor Lykes testified that Dodd suffered from pedophilia based on the underlying molestation offense [1] that occurred in May 1998, a 1990 conviction [2] for unlawful sexual intercourse, and information in a report [3] by a parole agent that Dodd molested a seven-year-old girl in April 1998.

General Applicability Cases

People v. Dodd (2005)

- Facts: In the underlying offense [1] , Dodd touched the genital area of a five-year-old child with his groin while the child was taking a bath. The 1990 offense [2] involved a sexual relationship between Dodd and a 13- or 14-year-old girl who became impregnated and bore his child when she was 14.

General Applicability Cases

People v. Dodd (2005)

- Facts: The only information regarding the molestation of the seven-year-old girl in April 1998 [3] was contained report by a parole agent to the BPT.

General Applicability Cases

People v. Dodd (2005)

- Facts: The report stated: ". . . on 4/17/98, it was reported that Dodd was responsible for molesting a seven-year-old girl. This prior case is strikingly similar to the present case [May 1998 underlying offense], which involved Dodd allegedly molesting the child of his girlfriend . . ."

General Applicability Cases

People v. Dodd (2005)

- Facts: Doctors Lykes, Starr and Record based their diagnoses of pedophilia on these three events.

Doctor Foss based his diagnosis on the underlying offense [1] and the information in the June 1998 parole report [3] regarding the April 1998 incident.

General Applicability Cases

People v. Dodd (2005)

- Facts: Doctors Phenix and Trompetter concluded that there was insufficient documentation to support a diagnosis of pedophilia.

Doctor MacGregor she did not consider the April 1998 incident [3] because it was not sufficiently documented to be considered in a diagnosis.

General Applicability Cases

People v. Dodd (2005)

- Facts: The [trial] court said: “If it's reasonable to conclude that the [April 1998 incident] occurred, then I think the diagnosis of pedophilia is supportable.” The [trial] court ruled that the April 1998 incident “occurred,” and found that “pedophilia is a reasonable diagnosis based upon” the underlying offense [1] and the April 1998 incident [3].

General Applicability Cases

People v. Dodd (2005)

- Facts: Experts Lykes, Foss, Starr, and Record all relied on the parole report [3] that Dodd molested a young girl in April 1998, and considered this incident as essential to their diagnoses. The trial court found no other factual basis to conclude that Dodd had *recurrent* sexual fantasies or behavior directed at young children.

General Applicability Cases

People v. Dodd (2005)

- Law: The reference in the June 1998 parole report to Dodd's molestation of a young girl in April 1998 was unreliable hearsay, and . . . the trial court abused its discretion in ruling that the experts could consider that incident in forming their opinions.

General Applicability Cases

People v. Dodd (2005)

- Law: Even if other portions of the June 1998 parole report had strong indicia of reliability, its brief and conjectural reference to the April 1998 incident fails to establish the occurrence of the incident with sufficient reliability to be considered by the experts in forming their opinions.

General Applicability Cases

People v. Dodd (2005)

- Law: A qualified expert . . . may base his or her opinion on information that is itself inadmissible hearsay if the information is reliable and of the type reasonably relied upon by experts on the subject.

General Applicability Cases

People v. Dodd (2005)

- Law: A trial court may not admit an expert opinion based on information furnished by others that is speculative, conjectural, or otherwise fails to meet a threshold requirement of reliability.

General Applicability Cases

People v. Dodd (2005)

- Law: Our Supreme Court has stated, "any material that forms the basis of an expert's opinion testimony must be reliable . . . the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based."

General Applicability Cases

People v. Dodd (2005)

- Law: The principal subject of the June 1998 parole report is the May 1998 underlying offense [1]. The report recites the details of that offense based on interviews with the investigating police officers, a police report, and the parole agent's personal investigation and participation in Dodd's arrest . . .

General Applicability Cases

People v. Dodd (2005)

- Law: The detailed content of that portion of the report stands in stark contrast to its section concerning the April 1998 incident [3] which begins: "It should be noted . . ." There is no other reference to the incident in the June 1998 parole report, and the incident is not designated as a parole violation charge.

General Applicability Cases

People v. Dodd (2005)

- Law: Although the parole agent asserted that the April 1998 incident was strikingly similar to the qualifying offense, here is no indication that his comment was based on facts other than the age of the purported victims and the closeness in time of the two incidents.

General Applicability Cases

People v. Dodd (2005)

- Law: The parole report does not identify the source of the information regarding the April 1998 incident, and nothing in the report or the record as a whole indicates that the parole agent obtained the information from police officers, witnesses, the victim and her family, arrest or crime reports, his own investigation, or any other source which could be deemed reliable.

General Applicability Cases

People v. Dodd (2005)

- Law: An expert opinion cannot reasonably be based on nonspecific and conclusory hearsay that does not set forth any factual details of an act necessary for the opinion.

General Applicability Cases

People v. Dodd (2005)

- Law: The agent did not include the April 1998 incident [3] as a parole revocation charge, and there is no evidence that the BPT treated the incident as a basis for revocation of Dodd's parole, or that criminal charges were ever filed concerning the incident.

General Applicability Cases

People v. Dodd (2005)

- Law: Unlike a probation report, the June 1998 parole report, at least as to the April 1998 incident, does not describe the factual circumstances of the criminal offense, the defendant's prior record, statements by the defendant to the probation officer, and information concerning the victim of a crime.

General Applicability Cases

People v. Dodd (2005)

- Ruling: Insufficient evidence to support the finding that Dodd suffered from the severe mental disorder of pedophilia.

Fact-Limited

"Any material that forms the basis of an expert's opinion testimony must be reliable. For the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based."

The People v. Shawn Dodd
(November 2005)

Fact-Limited

If clinical judgment is not founded on reliable, relevant, case-specific facts and observations, then it is just another name for *guessing*.

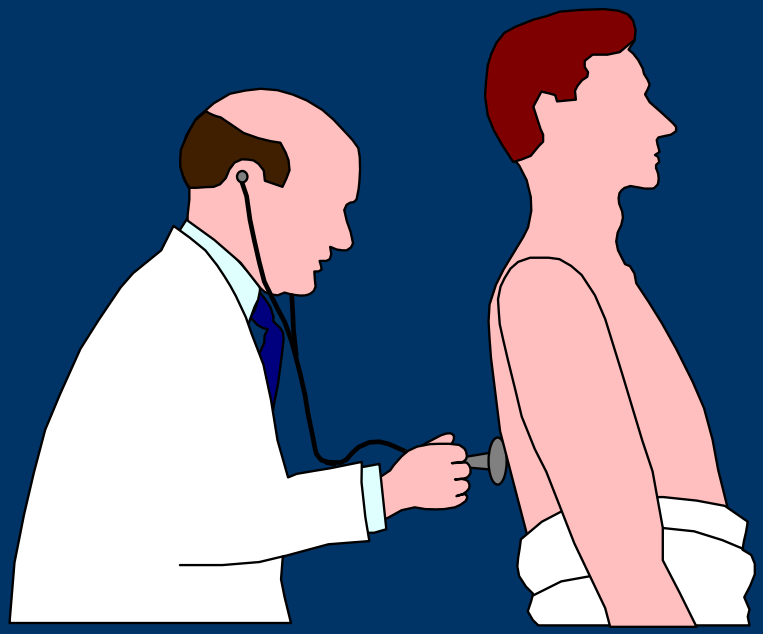
The Big Mistake
(Fact-limited)

Dr. Exz says:

"I'm licensed. That means I can say anything I want to."

Case-Specific

Conclusions are based on the subject's personal symptoms and history of mental disorder,



NOT ON:

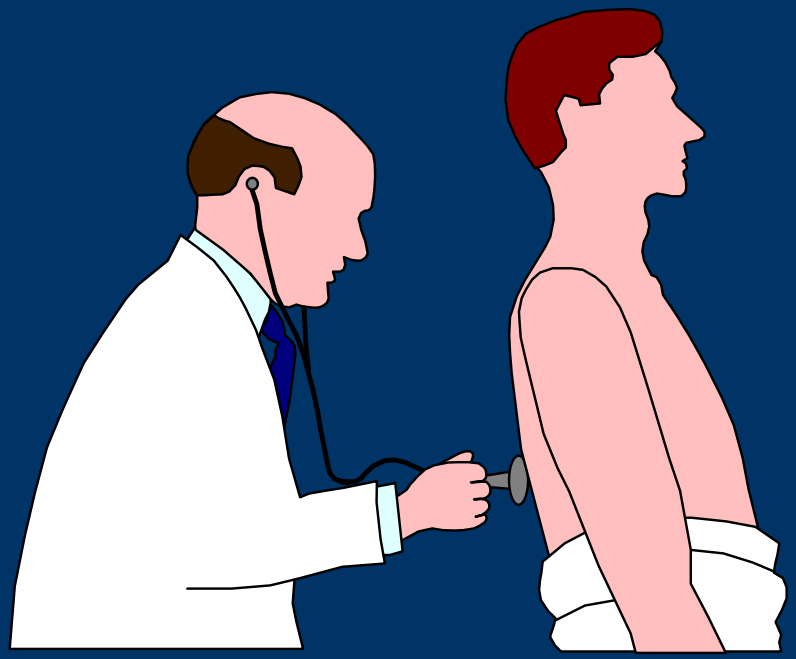
- ✓ The typical natural history of the disorder, or
- ✓ The typical presentation of the disorder, or
- ✓ General risk factors.

Case-Specific

1. Evaluate this person not “these people.”
2. The DSM diagnostic criteria characterize disorders not people.
3. Present the person’s symptoms that confirm the diagnosis or dangerousness assessment.
4. Don’t present what he or she doesn’t have.
5. Generalizing from the “prototype” rather than the facts of the case is improper.
6. “They may.” “They can.” “They often.”

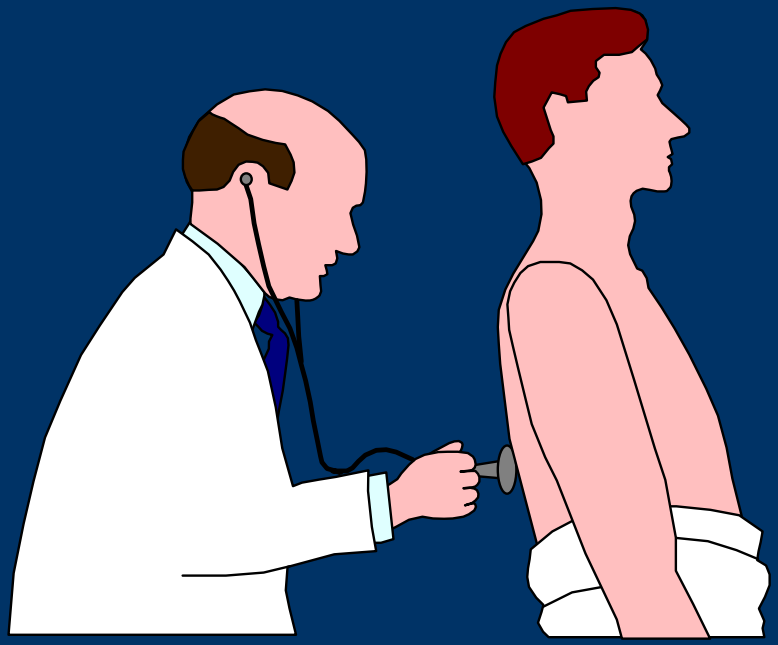
Case-Specific

Evaluators consider the subject's particular relevant psycho-social attributes.



- ✓ **Language**
- ✓ **Intelligence**
- ✓ **Ethnicity**
- ✓ **Education**
- ✓ **Culture**
- ✓ **Personality**

Case-Specific



Evaluators consider the situational context of the subject's words and conduct.

Case-specific

2.08 Appreciation of Individual and Group Differences

Forensic practitioners strive to understand how factors associated with age, gender, gender identity, race, ethnicity, culture, national origin, religion, sexual orientation, disability, language, socioeconomic status, or other relevant individual and cultural differences may affect and be related to the basis for people's contact and involvement with the legal system.

Specialty Guidelines for Forensic Psychology,
APA Council of Representatives,
Adopted August 3, 2011

Case-specific

6.03.03 Persons Lacking Capacity to Provide Informed Consent

Forensic practitioners appreciate that the very conditions that precipitate psychological examination of individuals involved in legal proceedings can impair their functioning in a variety of important ways, including their ability to understand and consent to the evaluation process.

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Adopted August 3, 2011

Case-specific

10.03 Appreciation of Individual Differences

When interpreting assessment results forensic practitioners consider the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences that might affect their judgments or reduce the accuracy of their interpretations .

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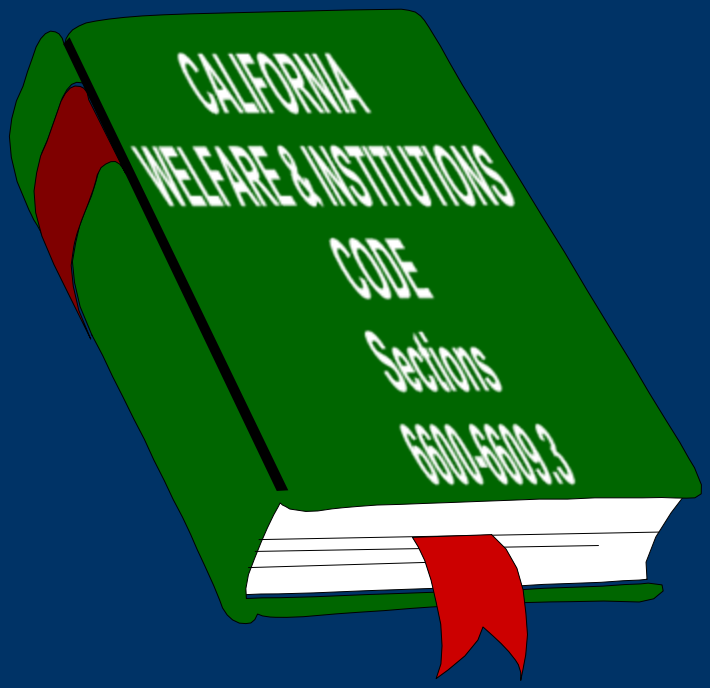
Adopted August 3, 2011

The Big Mistake
(Case-specific)

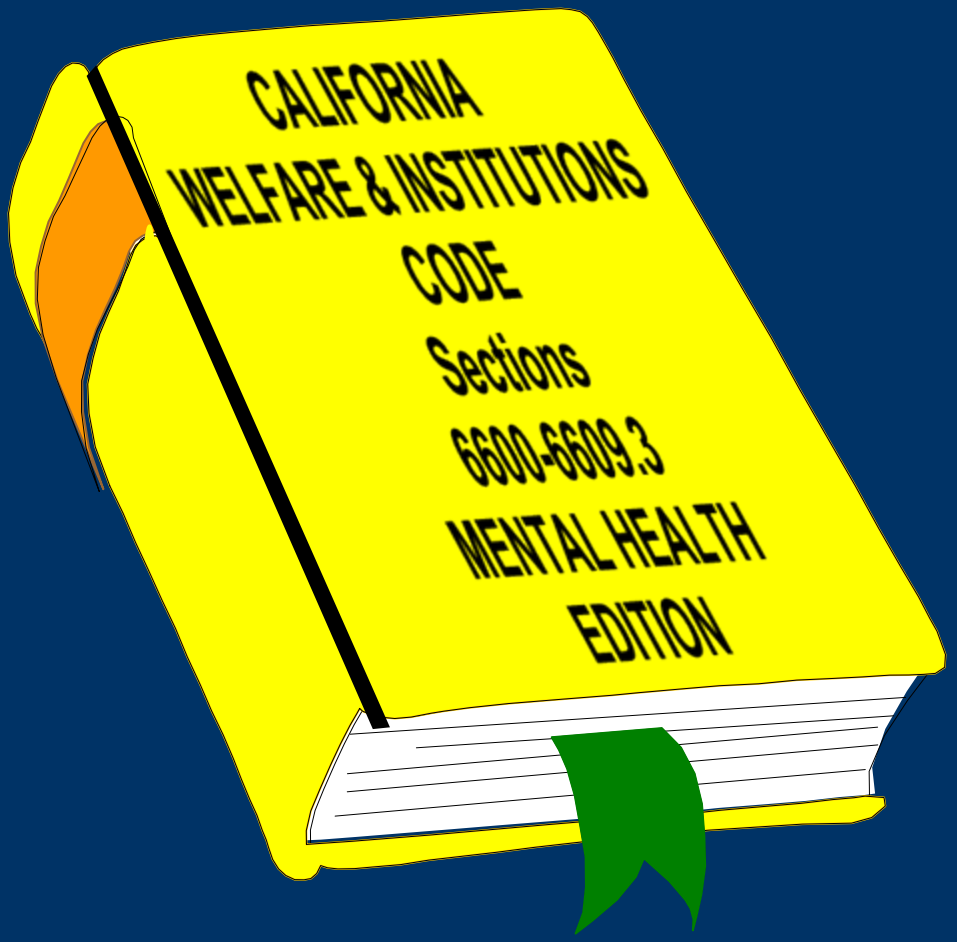
Dr. Exz says:

"I'm not talking about this guy. I'm talking about pedophiles."

SVP-Focused



Conclusions are separately responsive to the specific questions inherent in each SVP criteria.


CALIFORNIA
WELFARE & INSTITUTIONS
CODE
Sections
6600-6609.3
MENTAL HEALTH
EDITION

SVP-Focused

Responses to questions not posed by the language of the statute dilute the impact of SVP reports.

SVP-focused

10.01 Focus on Legally Relevant Factors

Forensic examiners seek to assist the trier of fact to understand evidence or determine a fact in issue, and they provide information that is most relevant to the psycholegal issue. In reports and testimony forensic practitioners typically provide information about examinees' functional abilities, capacities, knowledge, and beliefs, and address their opinions and recommendations to the identified psycholegal issues.

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SVP-focused

11.04 Comprehensive and Accurate Presentation of Opinions in Reports and Testimony

Forensic practitioners are encouraged to limit discussion of background information that does not bear directly upon the legal purpose of the examination or consultation. Forensic practitioners avoid offering information that is irrelevant and that does not provide a substantial basis of support for their opinions, except when required by law.

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APA Council of Representatives,
Adopted August 3, 2011

SVP-focused

11.04 Comprehensive and Accurate Presentation of Opinions in Reports and Testimony

The opinions to be offered. The specific substance of forensic reports is determined by the type of psycholegal issue at hand as well as relevant laws or rules in the jurisdiction in which the work is completed.

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SVP-focused

10.01 Focus on Legally Relevant Factors

Forensic examiners seek to assist the trier of fact to understand evidence or determine a fact in issue, and they provide information that is most relevant to the psycholegal issue.

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Adopted August 3, 2011

SVP-Focused

In the Ghilotti case, the Supreme Court noted that the SVP evaluator's recommendations were conclusive [not subject to judicial review] "insofar as the evaluator's recommendations represent the application of their professional judgment within statutory requirements."

"On the other hand, the statute does not allow the evaluators utter free rein . . . The evaluators' professional judgment is therefore to be exercised within a specified legal framework, and their accurate understanding of the statutory criteria is crucial to the Act's proper operation."

People v. Ghilotti (2002)

The Big Mistake
(SVP-focused)

Dr. Exz says:

"SVP criteria? I make up my own questions—then I answer them."

Forensic Services Analytic Method

I. Building Blocks

- Documented data.
- Observed data (Interview and MSE).
- Reasoning (clinical/legal).
- Conclusions.

Forensic Services Analytic Method

No Open-ended "Conclusions."

1. Acceptable choices:

- **"Meets criterion or criteria."**
- **"Does not meet criterion or criteria."**
- **"Insufficient basis to conclude. (A negative finding.)**

Forensic Services Analytic Method

No Open-ended "Conclusions."

2. Unacceptable choices:

- **"Rule-out."**
- **"Provisional."**

3. OK in screening and treatment.

Unless you are taking the person home with you or are going to be clinically following him, "rule-out" is a cop-out.

Conclusions

11.04 Comprehensive and Accurate Presentation of Opinions in Reports and Testimony

When providing professional reports and other sworn statements or testimony, forensic practitioners strive to offer a complete statement of all relevant opinions that they formed within the scope of their work on the case, the basis and reasoning underlying the opinions, the salient data or other information that was considered in forming the opinions . . .

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Forensic Services Analytic Method

II. Application Principles

- Each criterion is separate and distinct.
- Criteria identification and sequence.
- Reconstructing history vs. taking a history.
- Statutory definitions vs. clinical concepts.
- Clinical vs. legal standards of proof.

Method

9.04 Use of Multiple Sources of Information

Forensic practitioners ordinarily avoid relying solely on one source of data, and corroborate important data whenever feasible.

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APA Council of Representatives,
Adopted August 3, 2011

Paraphilias – Controversies?

9.01 Use of Appropriate Methods

When performing examinations, treatment, consultation . . . forensic practitioners seek to maintain integrity by examining the issue or problem at hand from all reasonable perspectives and seek information that will differentially test plausible rival hypotheses.

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SVP Decision Making

Mental Health Professional

Standard: Preponderance (best fit).

Negative: Less than preponderance.

Weighing: Truth of facts.
Credibility of informants.

Bias: None appropriate.

Judge/Jury

Standard: Beyond a reasonable doubt.

Negative: Not beyond a reasonable doubt.

Weighing: Truth of facts.
Credibility of witnesses.

Bias: None appropriate.

Forensic Services Analytic Method

III. Data Sources

- Documents
  - ✓ DECS
    - **D**isability and **E**ffective **C**ommunication **S**ystem.
    - Computer access.
    - Written report.
    - Evaluator assessment.
    - Documentation in SVP report.

Forensic Services Analytic Method

III. Data Sources

- Documents
  - ✓ DECS
  - ✓ CDCR Central File – RAP Sheet

Records of
Arrest and
Prosecution
Sheet

Forensic Services Analytic Method

III. Data Sources

- Documents
  - ✓ DECS
  - ✓ CDCR Central File – RAP Sheet
  - ✓ Police Reports
  - ✓ Probation Officers Reports (POR)
  - ✓ Medical/psychiatric Reports
  - ✓ Hospital Charts
  - ✓ District Attorney
  - ✓ Other
- Subject interview and MSE

Method

6.03.02 Persons Ordered or Mandated to Undergo Examination or Treatment

If the examinee is ordered by the court to participate, the forensic practitioner can conduct the examination over the objection, and without the consent, of the examinee.

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Method

9.03 Opinions Regarding Persons Not Examined

When it is not possible or feasible to examine individuals about whom they are offering an opinion, forensic practitioners strive to make clear the impact of such limitations on the reliability and validity of their professional products, opinions, or testimony.

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