

**California Department of Mental Health**

# **Sexually Violent Predator Evaluations**

**An Introduction – A reintroduction**

**Ronald J. Mihordin, M.D., J.D., M.S.P.**

**Acting Clinical Director Evaluation Service**

**Sex Offender Commitment Program**

**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 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.



**PART ONE**  
**SEXUALLY VIOLENT  
PREDATOR EVALUATIONS**  
FACT-BASED, FACT-LIMITED, CASE-SPECIFIC  
AND SVP-FOCUSED

The billboard is framed in green and features a large illustration of a cruise ship on the left. Below the ship, a group of people in formal attire is depicted. The background of the billboard is dark blue with a yellow sun or moon. The text is in bold, white and yellow fonts.

**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 PREDATOR 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<sup>\*</sup>**

**\* 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. Zuckerman (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 Trompeter 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***.





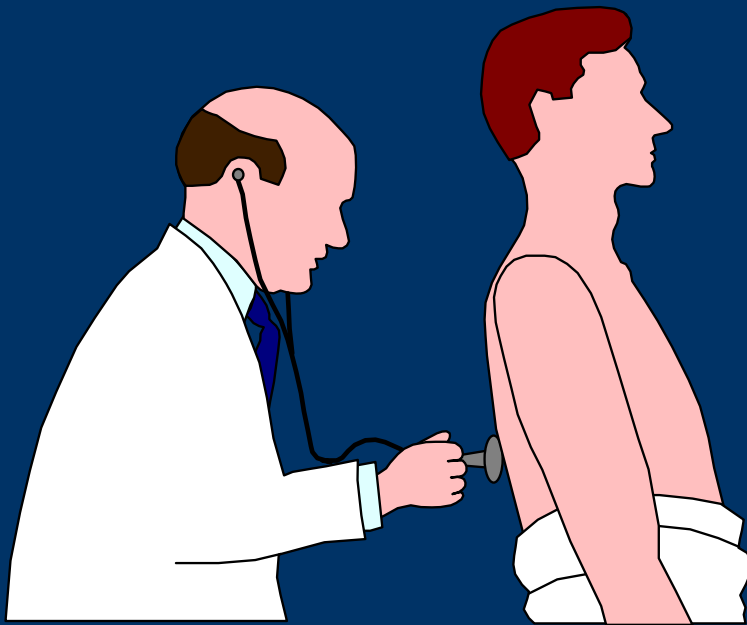
# The Big Mistake (Fact-limited)

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:**

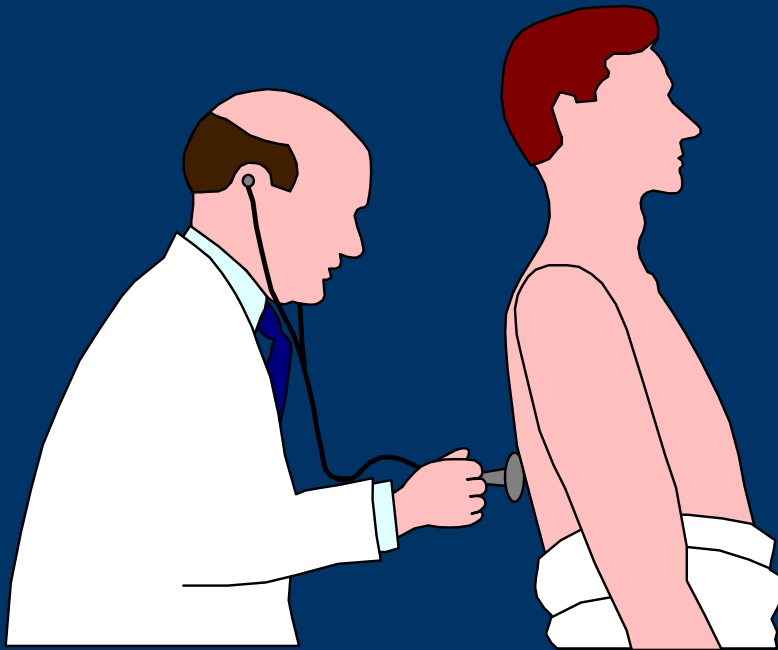
- ✓ The typical natural history of the disorder, or
- ✓ The typical presentation of the disorder, or
- ✓ General risk factors.

# 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.”

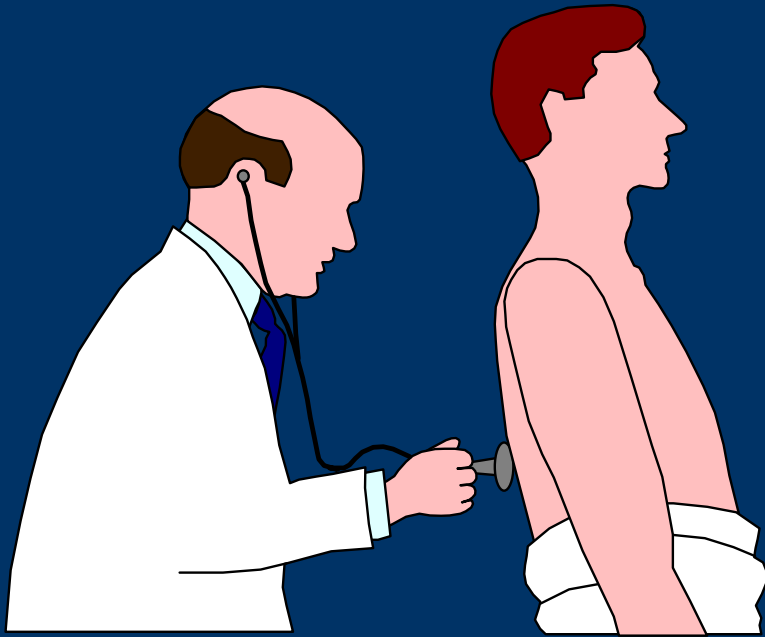
# Case-Specific

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.

*Specialty Guidelines for Forensic Psychology,*  
APA Council of Representatives,  
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 .

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



# The Big Mistake (Case-specific)



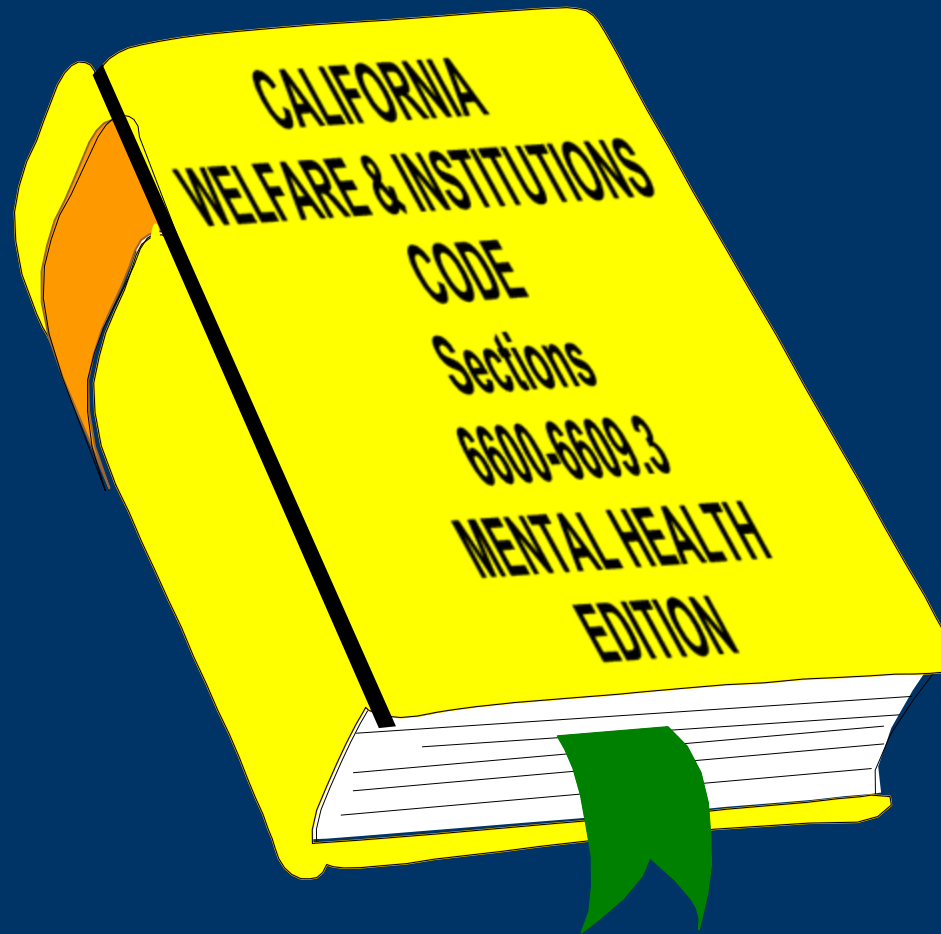
**Dr. Exz says:**

**“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**.

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

# 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.

*Specialty Guidelines for Forensic Psychology,*  
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.

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

# 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.

*Specialty Guidelines for Forensic Psychology,*  
APA Council of Representatives,  
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 . . .

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

# 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.

*Specialty Guidelines for Forensic Psychology,*  
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**.

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

# SVP Decision Making

## Mental Health Professional

**Standard:** Preponderance (best fit).

**Negative:** Less than preponderance.

**Weighing:** Truth of facts.  
Credibility of informants.

**Bias:** None appropriate.

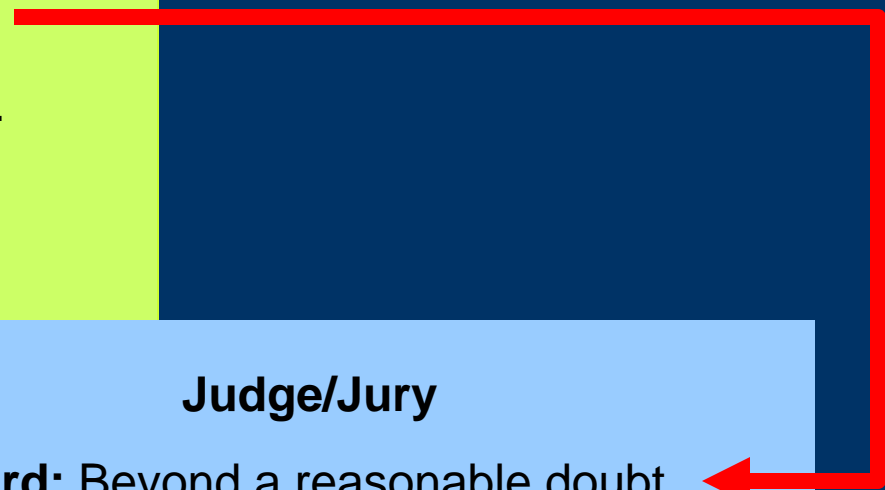
## Judge/Jury

**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

**R**ecords of  
**A**rrest and  
**P**rosecution  
**S**heet

# 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.**

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

# 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.

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

**California Department of Mental Health**

# **Sexually Violent Predator Evaluations**

**An Introduction – A reintroduction**

**Ronald J. Mihordin, M.D., J.D., M.S.P.**

**Acting Clinical Director Evaluation Service**

**Sex Offender Commitment Program**

**Sacramento, California**

**September 7-9, 2011**



**Sexually Violent Predator Evaluations  
An Introduction - A Reintroduction**

**Writing DMH Forensic Reports  
Part 1 - Basic Principles**

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

**September 7, 2011**

*A Great  
Communicator  
in Action*

# SVP Forensic Reports

## Goals of Training

1. Not a remedial English course.
2. To raise awareness-sensitivity.
3. To create a new identity.
4. Writing as a unperfectable craft.
5. Writing as a thoughtful activity.
6. An uphill battle:
  - We can do it without thinking.
  - Talking, writing – chewing, breathing
  - “So, what’s wrong with the way I write?”
  - “No one’s complained up to now?”

# SVP Forensic Reports

## SVP Writing by Contract

1. The May 1, 2011 – December 31, 2011 SVP evaluator requires the contractor to perform services under the following terms:
  - Contractor must competently and timely conduct evaluations as assigned. Contractor must **communicate** his/her evaluation findings in written reports and oral testimony **succinctly and with clarity**.

# SVP Forensic Reports

## SVP Writing by Contract

- The sexually violent predator (SVP) reports must also be consistent with **Government Code Section 6219** and be capable of being readily **understood by the general public.**

# SVP Forensic Reports

## Government Code §6219

- (a) Each department, commission, office, or other administrative agency of state government shall write **each document** that it produces in **plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style.**
  
- (b) As used in this section, a "state agency document" means any contract, form, license, announcement, regulation, manual, memorandum, or **any other written communication** that is necessary to carry out the agency's responsibilities under the law.

# SVP Forensic Reports

## SVP Writing by Contract

- The sexually violent predator (SVP) reports must also be consistent with **Government Code Section 6219** and be capable of being readily **understood by the general public**.
- Contractor must submit an **Abstract of Essential Findings** of no more than two pages for evaluation reports **more than 15 pages** in length.

# SVP Forensic Reports

## General Principles

1. Speak to a wide audience.
  - If it's not understood, it's not communication.
  - Don't **underestimate** the reader's intelligence.
  - Don't **overestimate** the reader's knowledge.



# **SVP Forensic Reports**

## **General Principles**

2. Speak to a wide audience.
  - Our readers include:
    - a. Mental health professionals.
    - b. Legal professionals.
    - c. Administrators and staff.
    - d. General public – jurors.

# SVP Forensic Reports

## A Reader-Centered Philosophy

“Anyone who take writing seriously remembers the purpose of writing in the first place—to communicate with the reader.”

“The writer must . . . **ensure** (not *insure* and not *assure*) that his meaning will get across that abyss between his mind and those of his many (unknown) readers.”

*Getting The Words Right,*  
Theodore A. Rees Cheney

# SVP Forensic Reports

## The Perfectibility of Words

“Words often ill serve their purpose. When they do their work badly, words **militate** against us. Poor grammar, sloppy syntax . . . impede communication and [foster] misunderstanding. Another . . . **obstacle to effective communication: too many words.**”

*The Dictionary of Concise Writing,  
2<sup>nd</sup> Edition, Robert Hartwell Fisk*

# SVP Forensic Reports

## The Perfectibility of Words

“We often believe that many words are better than few. Perhaps we imagine that the more we say, the more we know or the more others will think we know, or that the more obscure our writing is, the more profound our thoughts are. Seldom . . . Is this so. **Wordiness** is arguably **the biggest obstacle to clear writing and speaking.**”

*The Dictionary of Concise Writing,  
2<sup>nd</sup> Edition, Robert Hartwell Fisk*

# SVP Forensic Reports

## The Perfectibility of Words

Usually, in reading ~~someone's writing~~, we see more words than we need to . . .

For example:

- “At this juncture . . . .”
- “At this moment in history . . . .”
- “Now .”

*The Dictionary of Concise Writing,  
2<sup>nd</sup> Edition, Robert Hartwell Fisk*

# SVP Forensic Reports

## The Perfectibility of Words

Today, the style is prevailingly shoddy. In almost everything we read and hear there is complexity instead of simplicity and obscurity instead of clarity. This is particularly inexcusable in ~~written material~~ [writing], where words can be reworked.

*The Dictionary of Concise Writing,  
2<sup>nd</sup> Edition, Robert Hartwell Fisk*

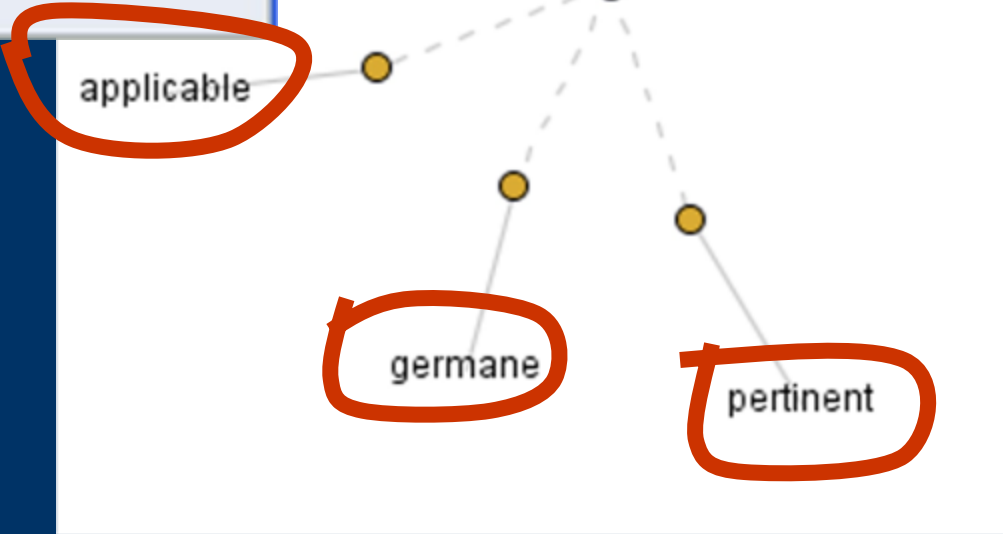
ADJECTIVES ON OFF

having a bearing on or connection with the subject at issue

capable of being applied; having relevance

relevant and appropriate

having precise or logical relevance to the matter at hand





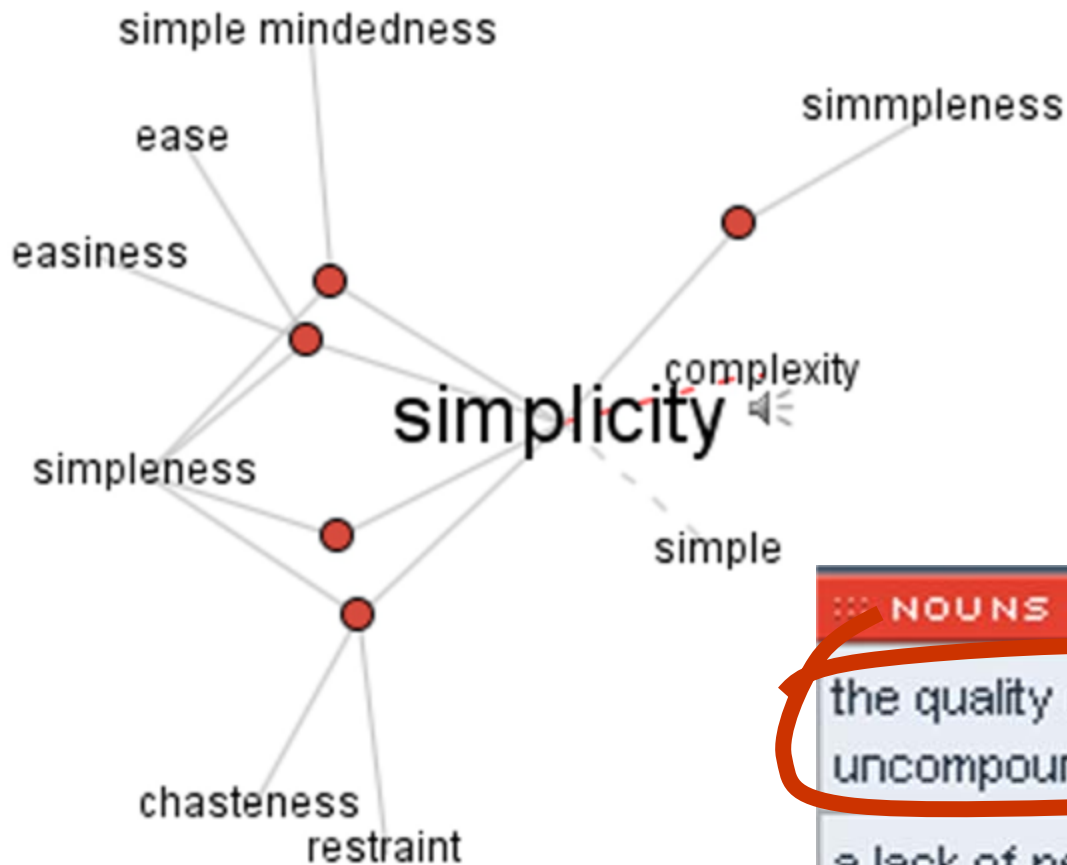
⋮ NOUNS

ON  OFF

free from obscurity and easy to understand the comprehensibility of clear expression

the quality of clear water





**NOUNS** ON OFF

- the quality of being simple or uncompounded
- a lack of penetration or subtlety
- absence of affectation or pretense
- freedom from difficulty or hardship or effort
- lack of ornamentation

# Relevancy

## 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**.

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

# Relevancy

## 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.

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

# Relevancy

## 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.

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

# SVP Forensic Reports

## The Keys



### Relevancy

- Pertinent, applicable
- To the point
- Context-dependent



### Simplicity

- Not complex
- Few parts – few words
- Elegant



### Clarity

- Easy to understand
- Unambiguous

# **SVP Forensic Reports**

## **Data Dumping**

In the context of oral testimony or a report, presenting significant amounts of unedited raw data (observations, documents, lists, references or quotations) including both the relevant and the irrelevant without identifying which is which.

The reader or hearer is presented with what is more of a do-it-yourself kit than a fully assembled report.

# SVP Forensic Reports

## Data Dumping

### 1. The Effects.

- Reader misses important points.
- Writer doesn't see the "story."
- Reader loses interest.
- A short story becomes a phone book.
- More is less.
- Invites cross examination.
- Increases the chances for error.
- Wastes time.
- Wastes money.
- Wastes trees.

# SVP Forensic Reports

## Data Dumping

### 2. The Causes.

- Laziness.
- Uncertainty.
- Ignorance.
- Poor training – Wrong training.
- No training.
- Inexperience.
- Lack of self-confidence.
- Preemptive witness evasiveness.





# WHY IT TAKES LONGER TO KEEP THINGS SHORT

USA TODAY FRIDAY MARCH 25, 2011  
AL NEUHARTH, USA TODAY Founder

- 1. Short is not easy, in writing or speaking.**
- 2. Short is much more difficult.**
  - ▶ President Franklin Delano Roosevelt said it took him about an hour to write a one hour speech, but two hours to do a 30-minute version.
  - ▶ Mark Twain said, “If I had more time, I’d write shorter.”
- 3. First draft of this column sometimes runs more than 500 words. That’s easy.**



# WHY IT TAKES LONGER TO KEEP THINGS SHORT

USA TODAY FRIDAY MARCH 25, 2011  
AL NEUHARTH, USA TODAY Founder

4. **Trimming it down can take up to two or three hours. That's difficult.**
5. **Getting things short and to the point is the most important thing in:**
  - **Personal communication.**
  - **Professional communication.**
  - **Writing or speaking.**
  - **Grade school, high school, college, job.**



# WHY IT TAKES LONGER TO KEEP THINGS SHORT

USA TODAY FRIDAY MARCH 25, 2011  
AL NEUHARTH, USA TODAY Founder

## 6. Long-winded stuff loses the attention of:

- Listeners.
- Readers.
- Viewers.
- Friends.
- Family.

***7. Think things through and keep them short.***

# SVP Forensic Reports

## Data Dumping

### Preemptive Witness Evasiveness?

1. Doctors, scientists and economists have been given the power of evasion through the magic of **bafflegab**.
2. **Bafflegab** – complex opinions and confusing jargon used to evade answers on cross-examination.
3. Report writing as an exercise in preemptive evasiveness as a witness?

West  Nutshell Series

LYNN BAHRYCH

# Legal Writing

in a  
nut  
shell

4th Edition

WEST®

## The Final Touch

1. Careful revision from a printed draft is essential.
2. As all writers know, brevity takes more time than verbosity. Your . . . writing will be more persuasive if it is lean and sharply focused.

West  Nutshell Series

LYNN BAHRYCH

# Legal Writing

in a  
nut  
shell

4th Edition

WEST®

## Writing for the Lay Reader

1. Plain English is part of legal writing curricula.
2. The goal: clarity and ease of reading for non-professionals.
3. Ordinary, everyday words when possible.
4. Specialty words must be defined in Plain English.
5. Boilerplate has no place in writing for the lay reader.

West  Nutshell Series

LYNN BAHRYCH

# Legal Writing

in a  
nut  
shell

4th Edition

WEST<sup>®</sup>

## Writing for the Lay Reader

6. Before you write, ask:
  - Who is the audience?
  - What can I assume they know?
  - Some or no knowledge of the law?
  - Some or no knowledge of my profession?
  - Will professional terms be understood?
  - Can I use professional terms without sounding condescending?

West  Nutshell Series

LYNN BAHRYCH

# Legal Writing

in a  
nut  
shell

4th Edition

WEST®

## Persuasive Writing

1. Keep it simple.
2. Your writing should make sense to the reader in terms of everyday life.
3. Be Concise.
4. Judges - universally complain that briefs are **too long**.
5. Complain that there is **too much laborious, unapplied case analysis**.



West  Nutshell Series

LYNN BAHRYCH

# Legal Writing

in a  
nut  
shell

4th Edition

WEST®

## Persuasive Writing

1. Judge's point of view:  
shorter is better.
2. Strings of citations and  
multiple case are rarely  
helpful.
3. Long quotations from  
cases and other  
authorities may not be  
read.

West  Nutshell Series

LYNN BAHRYCH

# Legal Writing

in a  
nut  
shell

4th Edition

WEST®

## Persuasive Writing

1. Unpersuasive words may weaken the impact of your writing.
2. Avoid using “clear” and “clearly” or “simply” or “obvious” and “obviously.”
3. Nouns and verbs persuade, adjectives and adverbs don’t.
4. These overused words may irritate the reader.

West  Nutshell Series

LYNN BAHRYCH

# Legal Writing

in a  
nut  
shell

4th Edition

WEST®

## Persuasive Writing

### Controlling Tone

1. Tone often overlooked by legal writers.
2. Tone is never overlooked by readers.
3. Conspicuous tone blocks reception of content.
4. Reader reacts to tone first, then content.
5. Beware of tones: informal, **stuffy**, **pretentious**, bitter, hyperbolic, casual, or uncertain.

# SVP Forensic Reports

## Data Dumping

2. Put yourself in the readers shoes.

- Ever read USA Today?
- Ever buy a “For Dummies” book?
- Ever use CliffsNotes or Nutshell Series?
- Used Rick Steves’ travel guides?
- Read the “white pages” for fun?

# SVP Forensic Reports

## Don't Data Dump

1. Digest, process, summarize, prioritize the material from source documents.
2. Don't let ideas get lost in a jungle of words and numbers.
3. Accentuate the relevant, eliminate the irrelevant and don't mess with Mister In-Between.
4. Less is usually more.
5. Give the reader more than a do-it-yourself kit.

# **SVP Forensic Reports**

## **Do Good Guide Work (GGW)**

1. Don't just point and name.
2. Explain what it is (simply).
3. Put it in context.
4. Identify significance.
5. Identify relevance.

# SVP Forensic Reports

**So you want to obfuscate? Here's how.**

1. **Vocabulary** – Use words not part of everyday conversation.
2. **Format** – Use long “compound” paragraphs.
3. **Detail** – Go from helpful to distracting and confusing.
4. **Background** – Use concepts familiar to only elite insiders.
5. **Volume** – Put the reader off by a daunting demand of his time.

# SVP Forensic Reports

**So you want to obfuscate? Here's how.**

6. **High Density** – Throw too many ideas at the reader in too few words.
7. **Low Density** – Give the reader too little useful information in too many words.
8. **Disorder** – Present information without regard to chronology or issues.
9. **Emphasis** – Do not distinguish what is important from what is less important or irrelevant.



# **SVP Forensic Reports**

## **Economy of Expression**

1. Say only what needs to be said.
2. The writer who is frugal with words writes a more readable report.
3. You can shorten long reports by eliminating:
  - Redundancy.
  - Wordiness.

# SVP Forensic Reports

## Economy of Expression

3. You can shorten long reports by eliminating:

- Jargon.
- Evasiveness.
- Overuse of passive voice.
- Circumlocution.
- Clumsy prose.

# SVP Forensic Reports

## Economy of Expression

### 3. Weed out:

- Overly detailed descriptions.
- Gratuitous embellishments.
- Elaboration of the obvious.
- Irrelevant facts or observations.

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### The Power of Plain Talk

I am always struck with the **confusing verbal clutter** that most lawyers [mental health professionals?] **use talking to** each other , the judge, the witnesses and even the **juries**.

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### The Power of Plain Talk

Law schools [graduate schools] supply both the best and worst of what practice is all about: How to spot all the issues in a case, but not how to **write and speak simply and clearly** to judges, juries, clients, witnesses and other “real people.”

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### Plain Language

- Speak in **simple sentences**. Compound and complex sentences invite confusion. One idea per sentence, please.
- Use **simple words**. You want everything you say to command instant understanding.
- **Facts**, not opinions, have the power to persuade.

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### Words to Avoid

- “Plainly,” “clearly” or “obviously” are words that should not be used. **If something is really plain, clear, or obvious you don't need to say so.**
- “Egregious,” “Heinous,” or “Outrageous.” If something is really that bad, you shouldn't have to tell people that. These are pompous words, don't use them.

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### Go for the Lean Look

- Start with a **simple outline** that covers the issues, facts, and conclusions.
- **Cull out** the weak or irrelevant points.
- **Toss out** whatever gets in the way of message.
- **Discard** what doesn't need to be said, even if it doesn't hurt.
- What's left will be tight. Lean. Spare. It will crackle with power because it is **not diluted** with stuff that doesn't matter.



# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### Go for the Lean Look

- In law [graduate] school, we were rewarded with good grades for spotting and articulating every conceivable issue but were almost never expected to **drop what wouldn't fly in the real world.**
- Failure to toss out the weak or irrelevant stuff runs the risk of creating a **mishmash of ideas** and **lumpy, sodden writing.**

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### Writing that Works

- You don't **need to say** everything you **can say**.
- You don't want your reader to react like the fifth-grader who wrote in his paper: "This book told me **more about penguins than I wanted to know.**"
- It's a report not a treatise. **Don't tell the reader everything you had to learn to write the report.**
- It's not an initiation into a secret order. **Don't haze the reader** by torturing them with technicalities they don't need.

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### How to Not Make Your Point

- Burying your message in clutter.
- Making your point based on obscure, esoteric technicalities.
- When it comes to technical matters, most people have a short attention span.
- Making the centerpiece of your message something that doesn't relate to the interests or abilities of the fact-finders.

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### How to Not Make Your Point

- Overstating your message. Understatement is more powerful than overstatement.
- Using adjectives and adverbs—those exciting, seductive words that keep slipping into what you write and how you talk.
- Using adjectives and adverbs. They're poison. Adjectives and adverbs tell people what to think. **Simple verbs and nouns are the workhorses of good speaking and writing.**

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### Communicating Effectively

- As a lawyer [forensic psychologist], you are a professional writer and speaker.
- No one pays you to do legal research [or a forensic evaluation] and do nothing with it.
- You are a paid writer and speaker. You have the **responsibility of being an effective writer and speaker. A communicator.**
- Clarity and simplicity are the keys to effective communication.

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### A Poor Trade Off

- Precision or clarity?
- Lawyers [forensic psychologists] are obsessed with precision.
- Purchasing precision at the price of clarity is a self-defeating bargain.
- You can be both precise and clear—it's just more work.

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### Keeping it Simple

- Avoid any word that does not command instant understanding. Your words should let the reader see your ideas without straining to grasp your meaning.
- “But, we deal in complicated concepts beyond the ken of ordinary folk. Special ideas need special words that only special people understand.”
- *Au contraire mon ami* – Most legal concepts can be grasped by an average 12-year-old.

# SVP Forensic Reports

## More Complicated Than Splitting an Atom?

### Nuclear Fission

Another name for splitting atomic nuclei is nuclear fission. In nuclear fission the two fragments that result have less mass than the original nucleus. What happened to the missing mass? Scientists found a clue in Einstein's theory of relativity. Albert Einstein (1879-1955) showed that a small amount of mass can become a great deal of energy. His famous equation,  $E = mc^2$ , tells that the energy (E) of any particle of matter equals its mass (m) times the speed of light (186,000 miles per second) multiplied by itself ( $c^2$ ). When an atom is split in nuclear fission the lost mass is changed into an explosive burst of heat, light, and other high-energy radiation.



# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### Keeping it Simple

- The problem is your “bad” vocabulary. You’ve got to train yourself to use simple language again.

### Keeping it Short

- Obsession with precision leads to trying to make every sentence **a completely accurate, self-contained statement** of law [psychology] or the facts.
- **You can't do it. So don't try.**

# **SVP Forensic Reports**

## **McElhaney's Tricks of the Trade**

### **Keeping it Short**

- If you've made a point, you don't need to say it again in the next paragraph, or even say that you said it before. Too many road signs clutter the path.
- Rule of Thumb: Rewrite any sentence that is more than two lines long.

### **Skip the Footnotes**

- Footnotes fragment and interrupt.
- Unless your goal is to be viewed as a pompous pedant.

# **SVP Forensic Reports**

## **McElhaney's Tricks of the Trade**

### **Active Voice is Usually Best**

- Passive voice has a formal tone that some think lends an air of dignity to writing.
- Passive voice is “a little stuffy” and tends to make sentences longer.
- Passive voice is avoided by good writers. Instead good writers use the active voice.
- Passive voice is not grammatically incorrect—just be sure you have a good reason for using it.

# SVP Forensic Reports

## McElhaney's Tricks of the Trade

### Dumping Buckets of Facts

- Present key facts not laundry lists.
- Don't pour a bucket of numbered facts over the jury.
- Don't pour a bucket of numbers over the jury.
- The effective report does not simply solve a legal, math, or word puzzle. It tells story. It answers a question.
- The report should build **a bridge and not a wall** between writer and reader.
- A tone of academic erudition always puts a wall between you and the lay reader or hearer.

# SVP Forensic Reports

## Plagiarism - Definition

1. Plagiarism – Deliberate representation of someone else's *words* or *ideas* as one's own or the *deliberate arrangement* of someone else's material(s) as one's own.

*Avoiding Plagiarism*, Justina Elmore,  
Milne Library, SUNY Genesco (2007)

# SVP Forensic Reports

## Plagiarism - Definition

2. Any one of the following constitutes plagiarism:

- Direct quotation without appropriate punctuation and citation of source;
- Paraphrase of expression or thought without proper attribution;
- Dependence upon a source for a plan, organization or argument without appropriate citation.

*Avoiding Plagiarism*, Justina Elmore,  
Milne Library, SUNY Genesco (2007)

# SVP Forensic Reports

## Plagiarism - Types

### 1. Deliberate plagiarism:

- Copying a source and passing it off as your own thought or idea.
- Using . . . material from others . . . and turning it in as your own work.

*Avoiding Plagiarism*, Justina Elmore,  
Milne Library, SUNY Genesco (2007)

# SVP Forensic Reports

## Plagiarism - Types

### 1. Accidental plagiarism:

- Citing a source but forgetting to put quotation marks around the quote or using quotation marks but forgetting the citation.
- Carelessly using the same words when you meant to paraphrase or summarize with your own words.

*Avoiding Plagiarism*, Justina Elmore,  
Milne Library, SUNY Genesco (2007)



# SVP Forensic Reports

## Plagiarism - Types

### 2. Accidental plagiarism:

- Paraphrasing too closely and having the same sentence or paragraph structure as the source.
- Writing a paper that so closely follows a source as to have the same outline or paragraph structure.

*Avoiding Plagiarism*, Justina Elmore,  
Milne Library, SUNY Genesco (2007)

# **SVP Forensic Reports**

## **Plagiarism - Types**

1. Copy and Paste Plagiarism:
2. Word Switch Plagiarism.
3. Metaphor Plagiarism.
4. Idea Plagiarism.
5. Reasoning Style/Organization Plagiarism.

<http://www.geneseo.edu/~brainard/plagiarismtypes.htm>

# Forensic Reports:

1. Must present the factual basis for each finding.
2. Must limit findings to those supported by “substantial evidence.”
3. Must present the logical nexus between facts and findings.
4. Must represent individual professional judgment **within statutory guidelines.**
5. Must respond to all questions inherently posed by the law.
6. Must be case-specific.
7. Must be easily understood by the general public.

# **SVP Forensic Reports**

- 1. Fact-based.**
- 2. Fact-limited.**
- 3. Case-specific.**
- 4. SVP-focused.**
- 5. Reader-centered.**

**California Department of Mental Health**

# **Sexually Violent Predator Evaluations**

**An Introduction – A reintroduction**

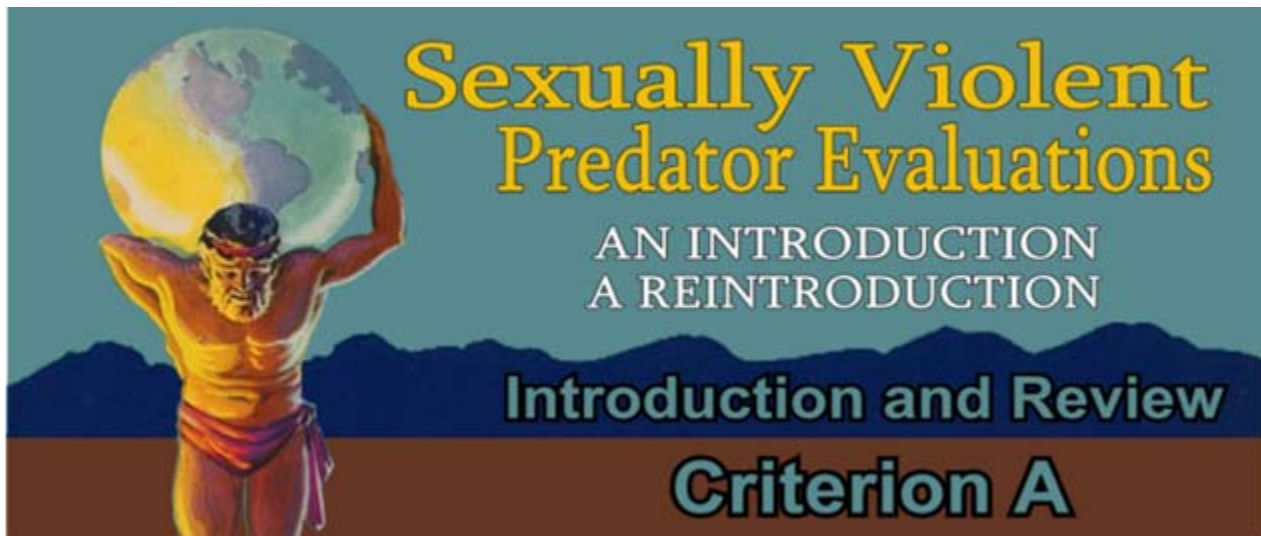
**Ronald J. Mihordin, M.D., J.D., M.S.P.**

**Acting Clinical Director Evaluation Service**

**Sex Offender Commitment Program**

**Sacramento, California**

**September 7-9, 2011**



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

**September 7, 2011**

# A Sexually Violent Predator is:

A person who has been **convicted** of a **sexually violent offense** against one or more victims and who has a **diagnosed mental disorder** that makes the person a danger to the health and safety of others in that it is **likely** that he or she **will engage in sexually violent criminal behavior**.

# **SVP Report Outline**

**I. Identifying Information.**

**II. Findings.**

**A. Qualifying Conviction(s).**

**B. Diagnosed Mental Disorder(s).**

**C. Disorder-based Danger.**

**III. Conclusion.**



# SVP Evaluation

As Simple as ABC? (or CTR?)

**C**Crime(s)

**T**autology

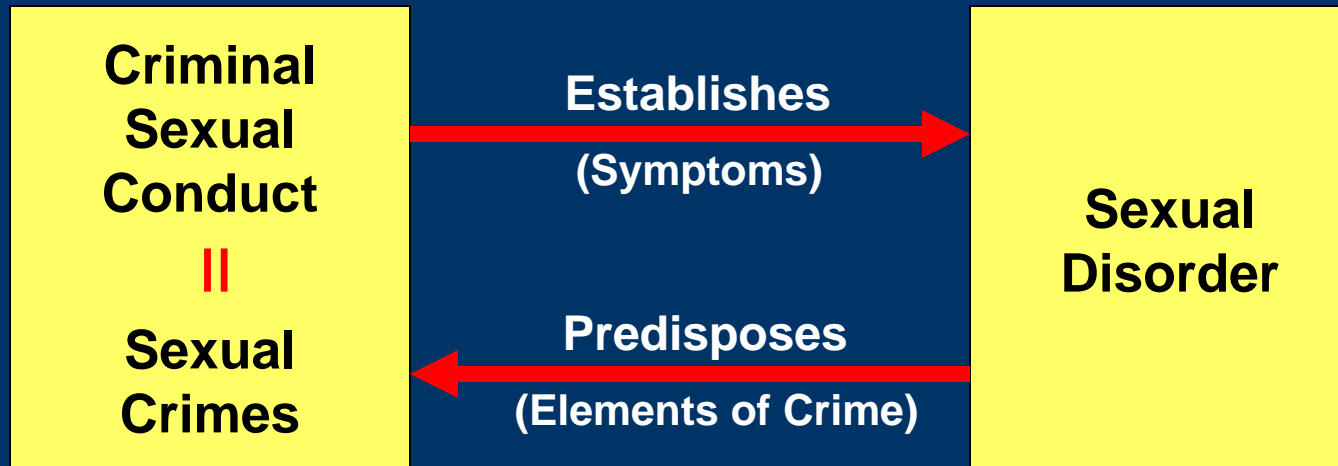
**R**hetorical Question

# SVP Evaluation

As Simple as ABC? (or CTR?)

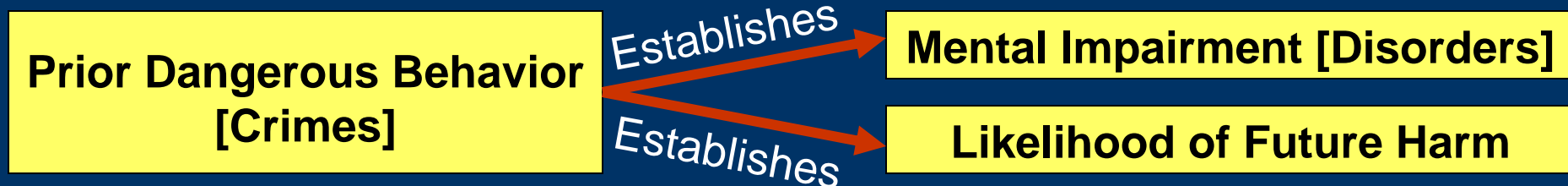
1. The Crime(s)? – Enumerated.

2. The Tautology:



## 2. The Tautology:

- A tautology upheld by the US Supreme Court.
- “. . . the [SVP] Act precludes commitment based solely on evidence of . . . prior crimes.” *People v. Hubbart* (1999)
- For the mental health professional: Sex Crimes = Symptoms



- “The United States Supreme Court has consistently upheld commitment schemes authorizing the use of **prior dangerous behavior [crimes]** to **establish** both present **mental impairment** and the **likelihood of future harm**.”

*People v. Hubbart* (1999)

# SVP Evaluation

As Simple as ABC? (or CTR?)

1. The Crime(s).

2. The Tautology.

3. The Rhetorical Question:

*Does a person who has committed sexual violent crimes and who has a disorder that predisposes him or her to commit such crimes represent a serious and well founded risk to commit such crimes?*

“The United States Supreme Court has consistently upheld commitment schemes authorizing the use of **prior dangerous behavior [crimes] to establish** both present mental impairment and **the likelihood of future harm.**”

*People v. Hubbart (1999)*

# Welfare and Institutions Code §6600 (a) (1)

## “Sexually Violent Predator” Defined

"Sexually violent predator" means a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

# Welfare and Institutions Code §6600 (a) (2)

## Qualifying Convictions

For purposes of this subdivision any of the following shall be considered a conviction for a sexually violent offense:

- (A) A prior or current conviction that resulted in a **determinate prison sentence** for an offense described in subdivision (b).
- (B) A conviction for an offense described in subdivision (b) that was committed prior to July 1, 1977, and that resulted in an **indeterminate prison sentence**.

# Welfare and Institutions Code §6600 (a) (2)

## Qualifying Convictions

- (C) A prior conviction in **another jurisdiction** for an offense that includes **all of the elements** of an offense described in subdivision (b).
- (D) A conviction for an offense under **a predecessor statute** that includes **all of the elements** of an offense described in subdivision (b).
- (E) A prior conviction for which the inmate received **a grant of probation** for an offense described in subdivision (b).



# Welfare and Institutions Code §6600 (a) (2)

## Qualifying Convictions

- (F) A prior finding of **not guilty by reason of insanity** for an offense described in subdivision (b).
- (G) A conviction resulting in a finding that the person was a **mentally disordered sex offender**.
- (H) A prior conviction for an offense described in subdivision (b) for which the person was **committed to the Department of the Youth Authority** pursuant to Section 1731.5.
- (I) A prior conviction for an offense described in subdivision (b) that resulted in an **indeterminate prison sentence**.

# Welfare and Institutions Code §6600 (a) (3)

## Qualifying Evidence

Conviction of one or more of the crimes enumerated in this section shall constitute evidence that may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination. The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health.

# Welfare and Institutions Code §6600 (a) (3)

## Qualifying Evidence (Continued)

Jurors shall be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a **currently diagnosed mental disorder** that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

# Welfare and Institutions Code §6600 (a) (4)

## Commitment Procedure Start Date

The provisions of this section shall apply to any person against whom proceedings were initiated for commitment as a sexually violent predator on or **after January 1, 1996**.

# Welfare and Institutions Code §6600 (b)

## “Sexually Violent Offense” Defined

“Sexually violent offense” means the following acts when committed by **force, violence, duress, menace**, fear of immediate and unlawful **bodily injury** on the victim or another person, or **threatening to retaliate** in the future against the victim or any other person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity, as defined in subdivision (a):

# Rape - Penal Code §261 (b) Definition

## “Duress”

As used in this section, "duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.

# Rape - Penal Code §261 (c) Definition

## “Menace”

As used in this section, "menace" means any threat, declaration, or act which shows an intention to inflict an injury upon another.

# Penal Code §288 (i) (3) Definition

## “Bodily Harm”

As used in this subdivision, "bodily harm" means any substantial physical injury resulting from the use of force that is more than the force necessary to commit the offense.



# Rape - Penal Code §261 (a) (6) Definition

## “Threat to Retaliate”

Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, **"threatening to retaliate"** means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

# Welfare and Institutions Code §6600 (b)

## “Sexually Violent Offense” Defined (Continued)

A felony violation of Section 261, 262, 264.1, 269, 286, 288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207, 209, or 220 of the Penal Code, committed with the intent to commit a violation of Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code.

# Welfare and Institutions Code §6600 (b)

## “Sexually Violent Offense” Defined (Continued)

Penal Code Section	Crime Name
261 (a) – (c)	Rape
262 (a) (1) – (5)	Spousal Rape
264.1	PC 262, 262 or 289 Acted in concert
269 (a) (1) – (5)	Aggravated Sexual Assault of Child
286 (a) – (k)	Sodomy

# Welfare and Institutions Code §6600 (b)

## “Sexually Violent Offense” Defined (Continued)

Penal Code Section	Crime Name
288(a) – (c)	Lewd Acts on a Child
288.5	Continuous Sexual Abuse Child < 14
288a(a) – (k)	Oral Copulation
289 (a) – (c) 289 (e) – (f)	Sexual Penetration Foreign Object

# Welfare and Institutions Code §6600 (b)

## “Sexually Violent Offense” Defined (Continued)

Below felony with intent to commit 261, 262, 264.1, <del>269</del> , 288, <del>288.5</del> , 288a, or 289	
207	Kidnapping
209	Kidnapping for Ransom, Extortion, Robbery, Sex Crime
220	Assault for Mayhem, Rape, Sodomy, Oral Copulation

# Welfare and Institutions Code §6600 (c)

## “Diagnosed Mental Disorder” Defined

**“Diagnosed mental disorder”** includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

“Diagnosable Mental Disorder” is not defined.

## **Welfare and Institutions Code §6600 (d)**

### **“Danger to the Health and Safety of Others” Defined**

"Danger to the health and safety of others" does not require proof of a recent overt act while the offender is in custody.

## **Welfare and Institutions Code §6600 (e)**

### **“Predatory” Defined**

"Predatory" means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.

# Welfare and Institutions Code §6600 (f)

## “Recent Overt Act” Defined

“Recent overt act” means any criminal act that manifests a likelihood that the actor may engage in sexually violent predatory criminal behavior.



# Welfare and Institutions Code §6600 (g)

## Juvenile Adjudication - Determinate Term Sentence

Notwithstanding any other provision of law and for purposes of this section, a **prior juvenile adjudication** of a sexually violent offense may constitute a prior conviction for which the person received a determinate term if all of the following apply:

- (1) The juvenile was **16 years of age or older at the time he or she committed the prior offense.**
- (2) The prior offense is a sexually violent offense as specified in subdivision (b).

# Welfare and Institutions Code §6600

## Juvenile Adjudication - Determinate Term Sentence

- (3) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 because of the person's commission of the offense giving rise to the juvenile court adjudication.
- (4) The juvenile was committed to the Department of the Youth Authority for the sexually violent offense.

# Welfare and Institutions Code §6600 (h)

## Specific Treatment for Minors

A minor adjudged a ward of the court for commission of an offense that is defined as a sexually violent offense shall be entitled to specific treatment as a sexual offender. The failure of a minor to receive that treatment shall not constitute a defense or bar to a determination that any person is a sexually violent predator within the meaning of this article.

# Welfare and Institutions Code §6600.1

## Sexually Violent Offense – Victim Under 14

If the victim of an underlying offense that is specified in subdivision (b) of Section 6600 is a **child under the age of 14**, the offense shall constitute a "sexually violent offense" for purposes of Section 6600.

# Welfare and Institutions Code §6601

- (d) Pursuant to subdivision (c), the person shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of Mental Health. If both evaluators concur that the person has a **diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody**, the Director of Mental Health shall forward a request for a petition for commitment under Section 6602 to the county designated in subdivision (i). . . .

See: *People v. Ghilotti*

See: *People v. Cooley*

**California Department of Mental Health**

# **Sexually Violent Predator Evaluations**

**An Introduction – A reintroduction**

**Ronald J. Mihordin, M.D., J.D., M.S.P.**

**Acting Clinical Director Evaluation Service**

**Sex Offender Commitment Program**

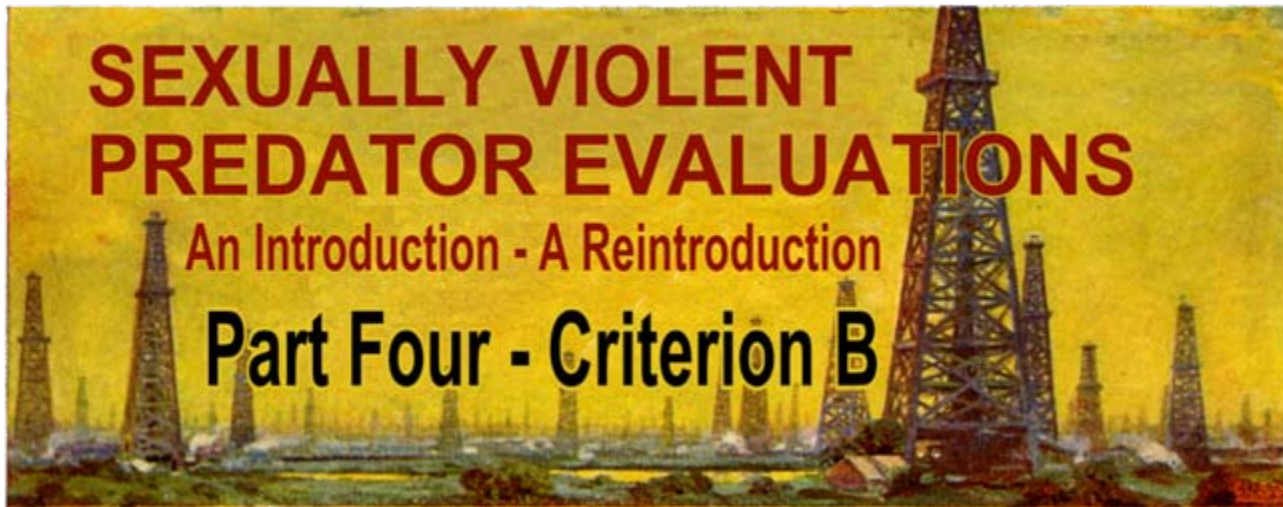
**Sacramento, California**

**September 7-9, 2011**

# SEXUALLY VIOLENT PREDATOR EVALUATIONS

An Introduction - A Reintroduction

## Part Four - Criterion B



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

**September 7- 9, 2011**

# Criterion B – The Question

Does the person have a “diagnosed mental disorder?”

or

Does the person have a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others?



# Criterion B – The Question

- “**Diagnosed** mental disorder” is defined in WIC 6600 (b).
- “**Diagnosable** mental disorder” appears elsewhere in the statute but **is not defined**.
- Misstatement: “A diagnosed mental disorder” that predisposes the person to commission . . . .”
- ATM (Automatic Teller Machine) machine.

# Diagnosed Mental Disorder

Welfare and Institutions Code Section 6600 (c)

A congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

**Congenital or Acquired Condition**

**+**

**Requisite Predisposition**

**+**

**Emotional-Volitional Impairment**

**=**

**“Diagnosed Mental Disorder”**

# **Congenital or Acquired Condition**

# Congenital or Acquired Condition?

- Any DSM-IV-TR disorder?
- Only DSM-IV-TR paraphilias?
- Not DSM-IV-TR personality disorders?
- Any condition characterized by the word *disorder* preceded by two adjectives?

# Diagnosed Mental Disorder

## The Boilerplate

A “diagnosed mental disorder” is defined in the statute as a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual act in a degree constituting the person a menace to the health and safety of others.

While “diagnosed mental disorder” is statutorily defined, **clinicians utilize the diagnostic categories of DSM-IV-TR to describe the mental disorder.**

## The Question

1. Ambiguous language – Correct application of law?
2. Code for “Only-Paraphilia”- Material legal error?

# DSM-IV-TR Disorders

1. Disorders First Diagnosed in Infancy, Childhood, or Adolescence.
2. Delirium, Dementia, and Amnestic and Other Cognitive Disorders.
3. Mental Disorders Due to General Medical Conditions.
4. Substance-Related Disorders.
5. Schizophrenia and Other Psychotic Disorders.
6. Mood Disorders.
7. Anxiety Disorders.
8. Somatoform Disorders.
9. Factitious Disorders.
10. Dissociative Disorders.
11. Sexual and Gender Identity Disorders.
12. Eating Disorders.
13. Sleep Disorders.
14. Impulse-Control Disorders.
15. Adjustment Disorders.
16. Personality Disorders.
17. Other Conditions that are Focus of Clinical Attention.

# Paraphilias - Essential Features

- Occurring over a period of at least six months:
- Recurrent, intense **sexually arousing** fantasies, sexual urges, or behaviors generally involving:
  - Nonhuman objects,
  - The suffering or humiliation of oneself or others,
  - Children or other nonconsenting persons.



# Paraphilias – Controversies?

1. “Garage” diagnoses – Paraphilic Coercive Disorder, Hebephilia, or Gerontophilia.
2. An expression of whose volitional impairment?
3. “Red flag” diagnoses for DMH reviewers.
4. General rule: If it’s outside the contemporary DSM, it is out-of-bounds for DMH SVP reports.
5. DSM is where we “draw the line.”

# Paraphilias – Controversies?

6. Sexual Sadism is a DSM-listed disorder.
7. Paraphilia (Not Otherwise Specified) is a DSM-listed disorder.
8. A test of intellectual discipline and integrity.
9. NOS applied to “all but one criterion met” cases, not the “one or no criterion met” cases.
10. **Mental state not behavior** is key to supportable diagnoses of Sexual Sadism or Paraphilia NOS (nonconsent).
11. Proof of mental state is hard to come by.

# Paraphilias – Controversies?

## 9.01 Use of Appropriate Methods

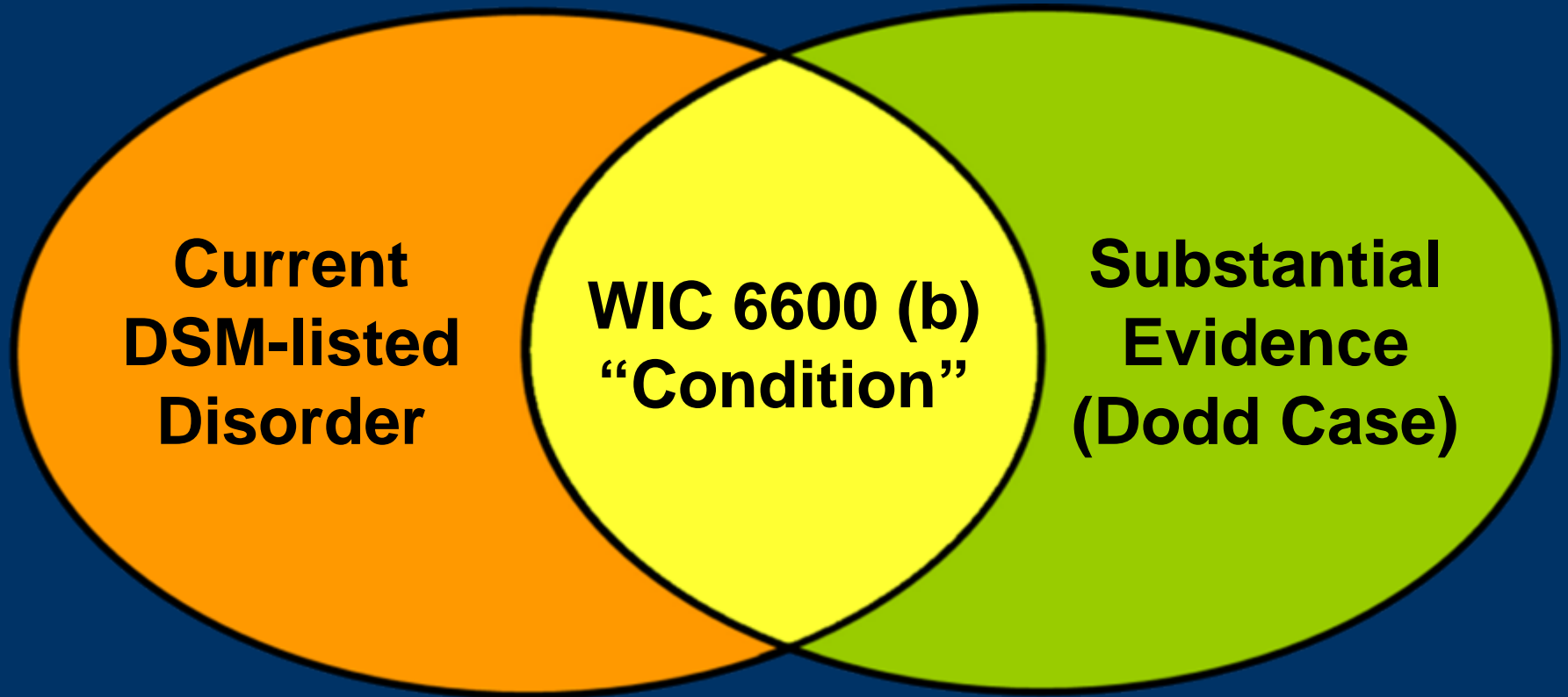
When performing examinations, treatment, consultation . . . forensic practitioners seek to **maintain integrity** by examining the issue or problem at hand from **all reasonable perspectives** and seek information that will differentially **test plausible rival hypotheses**.

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

# Paraphilias – Controversies?

12. Diagnostic zeal can dull intellectual sharpness.
13. “Evidence of something” becomes evidence of mental state.
14. Sadistic behavior does not prove sexual sadism.
15. Violence associated with sexual crimes does not prove sexual sadism.
16. Violence toward women does not prove sexual sadism.
17. Planning and preparation does not prove sexual sadism.

# Congenital or Acquired Conditions WIC Section 6600 (b)



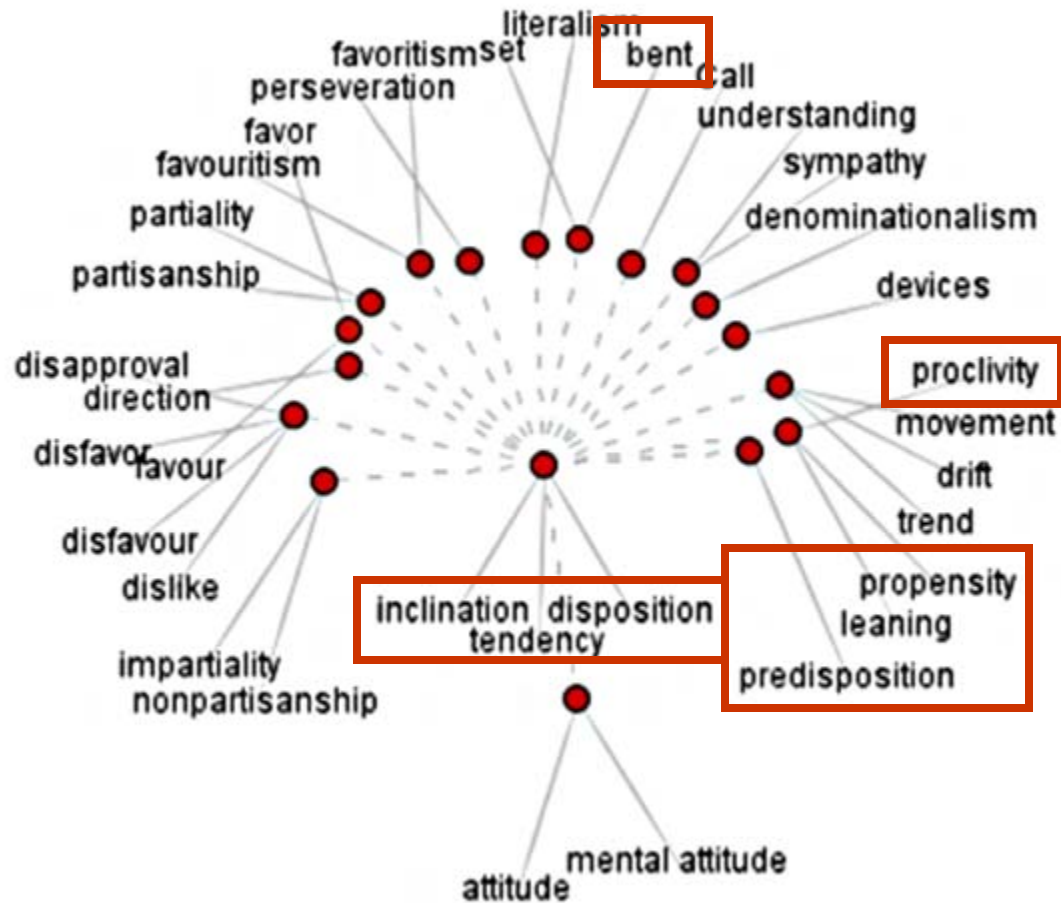
**Out-of-Bounds**

**Congenital or Acquired Condition**

**+**

**Requisite Predisposition**

# Predispose? Predisposition?



# Diagnosed Mental Disorder

Welfare and Institutions Code Section 6600(c)

A **paraphilic** condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.



# Diagnosed Mental Disorder

Welfare and Institutions Code Section 6600(c)

A congenital or acquired condition affecting the emotional or volitional capacity that **paraphilically** predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.

**Congenital or Acquired Condition**

**+**

**Requisite Predisposition**

**+**

**Emotional-Volitional Impairment**

# Emotional-Volitional Impairment

1. Objective Psychological Analysis.
  - a. Behavior persists notwithstanding emotional distress/ego-dystonia.
  - b. Behavior persists notwithstanding self-sought voluntary treatment for behavior or emotional sequelae.
  - c. Behavior persists notwithstanding self-motivated/initiated attempts to control/avoid.

# Emotional-Volitional Impairment

## Case Law - Based Analysis

1. A recidivist violent sexual offender who, due to a mental disorder, is **unlikely to be deterred by the risk of criminal punishment** lacks control in the requisite sense. [102 Cal.App.4th 1107]

*People v. Burris* (2002)  
102 Cal.App.4th 1096

# Emotional-Volitional Impairment

## Case Law - Based Analysis

2. A person who does not want to rape, feels remorse after raping, yet continues to rape anyway, "lacks control."
3. A person who *does* want to rape, feels *no* remorse after raping, and continues to rape despite having been criminally punished for prior rapes, *also* "lacks control."

*People v. Burris (2002)*

# Emotional-Volitional Impairment

## Case Law - Based Analysis

4. An offender who chooses to reoffend because, emotionally or cognitively, he has a "defective understanding or appreciation" of the consequences also "lacks control" in the requisite sense.
5. An offender can lack control **even if he has an antisocial personality disorder** and lacks remorse.

*People v. Burris (2002)*

**Congenital or Acquired Condition**

**+**

**Requisite Predisposition**

**+**

**Emotional-Volitional Impairment**

**=**

**“Diagnosed Mental Disorder”**

## People v. Superior Court (Ghilotti) (2002)

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."



# Material Legal Error

People v. Superior Court (Ghilotti) (2002)

1. “The requirement that SVPA evaluators apply criteria set forth in the statute invokes the inherent judicial power to determine whether an evaluator’s recommendation stems, on its face, from an inaccurate understanding of those criteria, and thus constitutes legal error.”
2. “An evaluator’s report is infected with legal error if, on its face, it reflects an inaccurate understanding of the statutory criteria governing the evaluation.”

# Material Legal Error

People v. Superior Court (Ghilotti) (2002)

3. “An evaluator’s **legal error shall be deemed material if**, and only if, (1) there appears a reasonable probability, sufficient to undermine confidence in the outcome, that **the error affected the evaluator’s ultimate conclusion**, and (2) a change in the evaluator’s conclusion **would either supply or dissolve, the necessary concurrence** of two designated evaluators.”

MATERIAL LEGAL  
ERROR CAN BE  
FOUND  
ANYWHERE,  
BUT . . .

# All Errors

```
graph TD; AllErrors([All Errors]) --- LegalError([Legal Error]); AllErrors --- ClinicalError([Clinical Error]); LegalError --- OutcomeChanging([Outcome-Changing Legal Error]); MaterialLegalError[Material Legal Error] --> OutcomeChanging;
```

**Legal Error**  
Mistake of understanding &  
application of law.

**Outcome-Changing  
Legal Error**

**Clinical Error**  
Profession Judgment  
e.g., Diagnosis  
e.g., Risk Assessment

**Material Legal Error**

**Congenital or Acquired Condition**

**+**

**Requisite Predisposition**

**+**

**Emotional-Volitional Impairment**

**=**

**“Diagnosed Mental Disorder”**

## Condition Identification (DSM) Phase

### Paraphilias

DSM Criteria  
(Sexually  
arousing urges,  
fantasies, or  
behavior)

YES

NO

### Other Conditions

DSM Criteria

YES

NO

## Condition Analysis (SVP) Phase

### Paraphilias

Requisite  
Predisposition  
Definitional?  
Case Specific?

YES

NO

### Other Conditions

Requisite  
Predisposition  
Case Specific?

YES

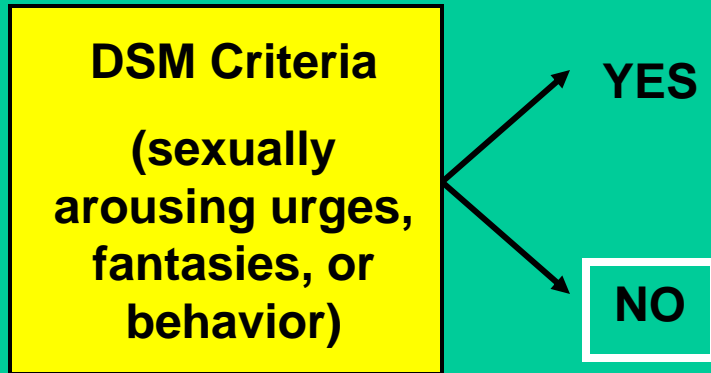
NO

**DIAGNOSED MENTAL DISORDER**

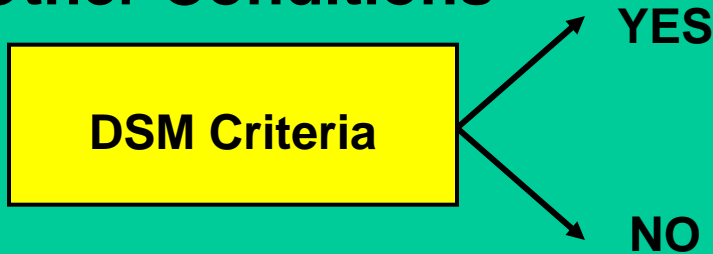
# Criterion B – Material Legal Error (Type I)

## Condition Identification (DSM) Phase

### Paraphilias

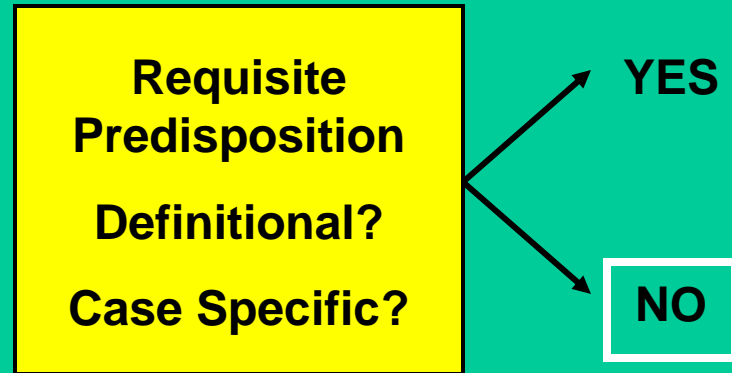


### Other Conditions

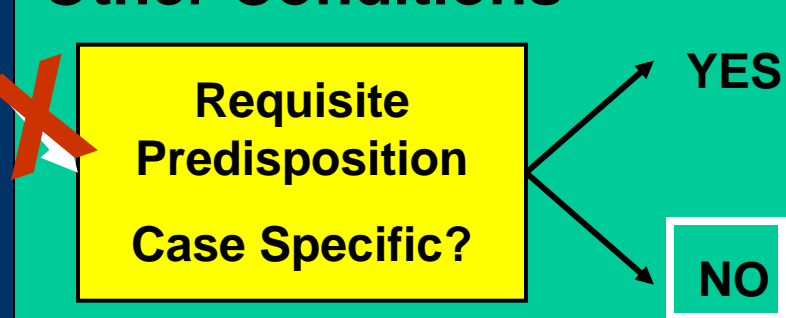


## Condition Analysis (SVP) Phase

### Paraphilias



### Other Conditions

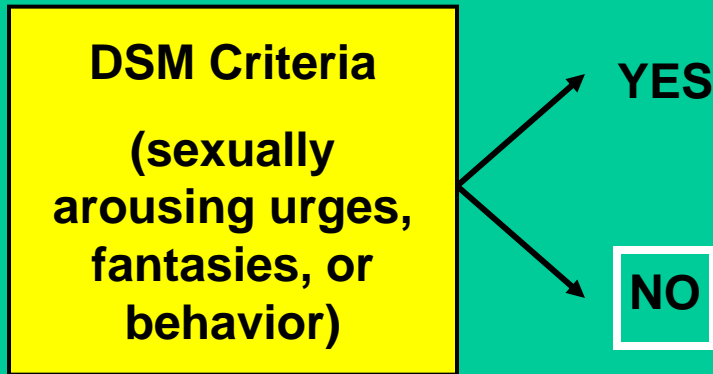


**DIAGNOSED MENTAL DISORDER**

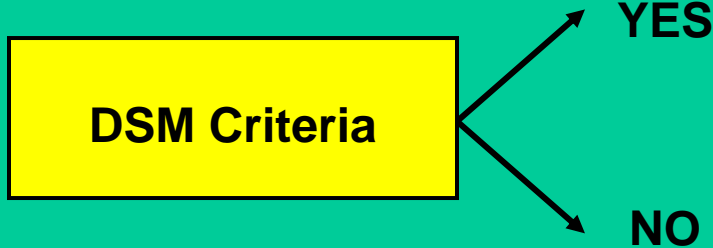
# Criterion B – Material Legal Error (Type II)

## Condition Identification (DSM) Phase

### Paraphilias

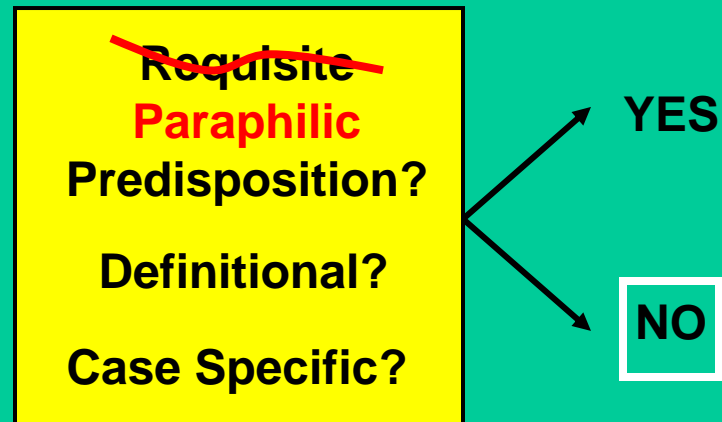


### Other Conditions

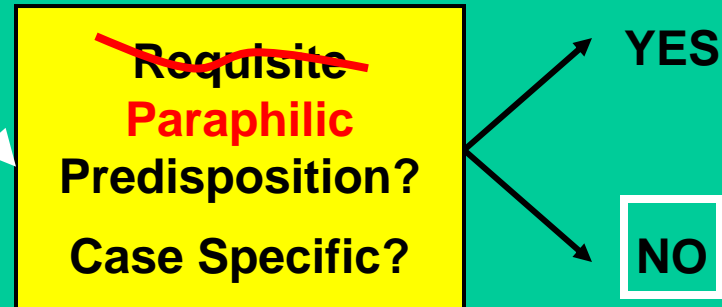


## Condition Analysis (SVP) Phase

### Paraphilias



### Other Conditions



**DIAGNOSED MENTAL DISORDER**



# Material Legal Error

Case No. 00130

## 1. Criterion A - Positive

- ✓ SVP-Qualifying: Forcible Rape and Oral Copulation, 7 yo female victim, subject age 24.
- ✓ SVP-Qualifying: Oral Copulation, 17 yo female victim, subject age 36.
- ✓ Parole Violation: Rape, “adult” female victim, subject age 50.
- ✓ Subject current age: 52.

# Material Legal Error

Case No. 00130

## 2. Criterion B - Negative

a. R/O Paraphilia, NOS, Non-consenting Females.

- ✓ “[Subject] is simply a very antisocial man who takes what he wants when he wants it and has no concern for others.”
- ✓ “I do not believe the evidence indicates he is specifically attracted to sex with non-consenting victims.”

# Material Legal Error

Case No. 00130

## 2. Criterion B - Negative

### b. Antisocial Personality Disorder, Severe

- ✓ Conduct disorder prior to age 15.
- ✓ “Very large number” of offenses against property and persons, sexual and non-sexual.
- ✓ Serious rules violations in prison and violations of “conditions of release.”
- ✓ A psychopath.

# Material Legal Error

Case No. 00130

## 3. Criterion C - Negative

- ✓ SVR-20: High risk.
- ✓ Static-99R: High risk.
- ✓ MnSOST-R: Very high risk.
- ✓ Protective factors: None.
- ✓ Future offense likely predatory: Yes.
- ✓ Can be safely or effectively treated as OP: No.

# Material Legal Error

Case No. 00130

## 3. Criterion C - Summary

In summary, it is not likely that [subject] will reoffend in a sexually violent predatory manner if he is released . . . .

This follows only from the fact that [subject] cannot be clearly diagnosed as having a severe mental disorder which predisposes him to such offending.

# Material Legal Error

Case No. 00130

## 3. Criterion C - Summary

It may well be that [subject] will go on to reoffend in a sexual manner as indicated by the several risk estimation instruments utilized here.

However, any such reoffending would be the result of his general antisocial and substance abuse disorders and not due to a disorder which specifically drives him toward sexual offending.

# Material Legal Error

Case No. 00131

1. Criterion A - Positive

2. Criterion B - Negative

- ✓ Diagnosis: Antisocial Personality Disorder
- ✓ Irritability and aggressiveness are evidenced in incidents of domestic and sexual violence.
- ✓ His arrests involving sexually violent acts demonstrate a reckless disregard for the safety of others.

# Material Legal Error

Case No. 00131

## 2. Criterion B - Negative

- ✓ There is an absence of compelling evidence of expected behavior correlates and victim characteristics . . . associated with a **paraphilic coercive disorder**.
- ✓ Antisocial Personality Disorder . . . better **accounts for this individual's known sex offense history**.



# Material Legal Error

Case No. 00131

## 2. Criterion B - Negative

- ✓ His sexual acts involving three victims are . . . an expression of his [need] for immediate gratification, callousness, and . . . disregard for safety and welfare of others. [ASPD symptoms]
- ✓ [Foregoing are not a] manifestation of a discrete paraphilic disorder.
- ✓ Does not meet the . . . diagnostic criteria for paraphilia.

# Material Legal Error

Case No. 00131

## 2. Criterion B - Negative

- ✓ [Cannot] proffer a diagnosis of paraphilia . . . .
- ✓ The ASPD does not affect [subject's] emotional or volitional capacity. [Cf. *People v. Burris*]
- ✓ [Subject] was not diagnosed with a statutory required qualifying disorder.
- ✓ [Subject does not have] a **statutorily required sexual disorder** . . . .

# Material Legal Error

Case No. 00131

## 3. Criterion C - Negative

- ✓ Since [subject] does not meet diagnostic criteria for statutory necessary mental disorder, Criterion C, cannot be satisfied.
- ✓ Static-99R: High risk.
- ✓ Static-2002R: Moderate-high risk.
- ✓ MnSOST-R: Highest risk.

# Material Legal Error

Case No. 00131

## 3. Criterion C - Negative

- ✓ [Subject] evidenced sexual deviancy by his actions against [his] three victims.
- ✓ Actions during . . . his sexual crimes do not appear to rise to the threshold of a **specific diagnosable paraphilic disorder**.
- ✓ **ASPD . . . explains this individual's sexual offenses.**
- ✓ [Subject] does not suffer from a **qualifying Axis I condition**.

## CRITERION B

Paraphilia  
Diagnosis?

NO

Predisposition?

NO

DMD?

NO

Other  
Diagnosis?

YES

Predisposition?

YES

DMD?

YES

## CRITERION C

DMD: NO

Likely: Y/N

Criterion C: NO

DMD: YES

Likely: YES

Criterion C: YES

DMD = Diagnosed Mental Disorder

 = Material Legal Error Elements

# Material Legal Error

On the face? The keys:



Their diagnosis.



Their own words.

**California Department of Mental Health**

# **Sexually Violent Predator Evaluations**

**An Introduction – A reintroduction**

**Ronald J. Mihordin, M.D., J.D., M.S.P.**

**Acting Clinical Director Evaluation Service**

**Sex Offender Commitment Program**

**Sacramento, California**

**September 7-9, 2011**

**SEXUALLY VIOLENT  
PREDATOR EVALUATIONS**  
**An Introduction - A Reintroduction**  
**Part Five - Criterion C**

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

**September 7- 9, 2011**



# Criterion C – WIC Section 6600 (a)

1. Is the person likely to engage in sexually violent criminal behavior if released without conditions?

*WIC Section 6600 (a) (1), People v. Ghilotti*

2. Is the person's future sexually violent criminal behavior likely to be predatory?

*WIC Section 6600 (e), People v. Hurtado*

3. What is the weight of factors relevant to the possibility of voluntary (outpatient) treatment.

*WIC Section 6601 (d), People v. Ghilotti*

# Criterion C – WIC Section 6600 (a)

2. Is the person's future sexually violent criminal behavior likely to be predatory?

WIC Section 6600 (e), *People v. Hurtado*

“**Predatory**” means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.

# Criterion C – WIC Section 6600 (a)

1. Is the person likely to engage in sexually violent criminal behavior if released without conditions?

*WIC Section 6600 (a) (1), People v. Ghilotti*

2. Is the person's future sexually violent criminal behavior likely to be predatory?

*WIC Section 6600 (e), People v. Hurtado*

3. What is the weight of factors relevant to the possibility of voluntary (outpatient) treatment.

*WIC Section 6601 (d), People v. Ghilotti*

## Criterion C – WIC Section 6600 (a)

3. What is the weight of factors relevant to the possibility of voluntary (outpatient) treatment. *WIC Section 6601 (d), People v. Ghilotti*
  - a. Court: *“Evaluator’s **must** weigh the possibility of voluntary treatment with requisite care and caution.”*
  - b. Court: *“**Common sense suggests** that the pertinent factors should include:”*

## Criterion C – WIC Section 6600 (a)

3. What is the weight of factors relevant to the possibility of voluntary (outpatient) treatment.

WIC Section 6601 (d), *People v. Ghilotti*

- (1) The availability, effectiveness, safety, and practicality of community treatment for the particular disorder the person harbors;
- (2) Whether the person's mental disorder leaves him or her with volitional power to pursue such treatment voluntarily;

## Criterion C – WIC Section 6600 (a)

3. What is the weight of factors relevant to the possibility of voluntary (outpatient) treatment. *WIC Section 6601 (d), People v. Ghilotti*
  - (3) The intended and collateral effects of such treatment, and the influence of such effects on a reasonable expectation that one would voluntarily pursue it;
  - (4) The person's progress, if any, in any mandatory SVP treatment program he or she has already undergone;

## Criterion C – WIC Section 6600 (a)

3. What is the weight of factors relevant to the possibility of voluntary (outpatient) treatment.

WIC Section 6601 (d), *People v. Ghilotti*

(5) The person's expressed intent, if any, to seek out and submit to any necessary treatment, whatever its effects; and

(6) Any other indicia bearing on the credibility and sincerity of such an expression of intent.

# Criterion C – WIC Section 6600 (a)

1. Is the person likely to engage in sexually violent criminal behavior if released without conditions?

*WIC Section 6600 (a) (1), People v. Ghilotti*

2. Is the person's future sexually violent criminal behavior likely to be predatory?

*WIC Section 6600 (e), People v. Hurtado*

3. What is the weight of factors relevant to the possibility of voluntary (outpatient) treatment.

*WIC Section 6601 (d), People v. Ghilotti*



# Widget Company of America

Imagine that you are applying for a job at the Widget Company of America (WCA).

Also, imagine that you:

- Have less than 2 years of experience in the widget industry,
- Have more than 13 years of formal education,
- Have had more than 2 different jobs in the last 5 years,
- Have had a traffic ticket in the last 10 years, and
- Are unmarried.

# Widget Company of America

And, let's say that the widget industry has *accurately* has found that people with the characteristics that we just listed—your characteristics—fall within a group of individuals in which only 20% of those individuals remain on the kind of job you are seeking for more than 3 months. This finding has been incorporated in a personnel assessment tool (PAT) used throughout the widget industry.

All the people at WCA who interview and decide whom to hire have been instructed to assess each job applicant using the PAT. In effect, your interviewer will presume that you only have a 20% chance of remaining on the job for more than 3 months.

# Criterion C – From Ghilotti to Actuaryland

## The Question:

“Does the subject’s diagnosed mental disorder make the subject a danger to the health and safety of others in that it is **likely** that he or she will engage in sexually violent criminal behavior.”

## The Clarification:

“The person is **“likely”** to reoffend if . . . the person presents a substantial danger, that is, **a serious and well-founded risk**, that he or she will commit such crimes if free in the community.”

*People v. Superior Court(Ghilotti) (2002),  
27 Cal.App.4<sup>th</sup> 888*

# Criterion C – From Ghilotti to Actuaryland

## Ghilotti — Parsed

What is the meaning of the phrase upon which evaluators are to opine, i.e., whether “the person has a diagnosed mental disorder so that he or she is **likely** to engage in acts of sexual violence . . . .?”

*People v. Superior Court(Ghilotti)* (2002),  
27 Cal.App.4<sup>th</sup> 888

# Criterion C – From Ghilotti to Actuaryland

## Ghilotti — Parsed

(250 lines – 28 Paragraphs)

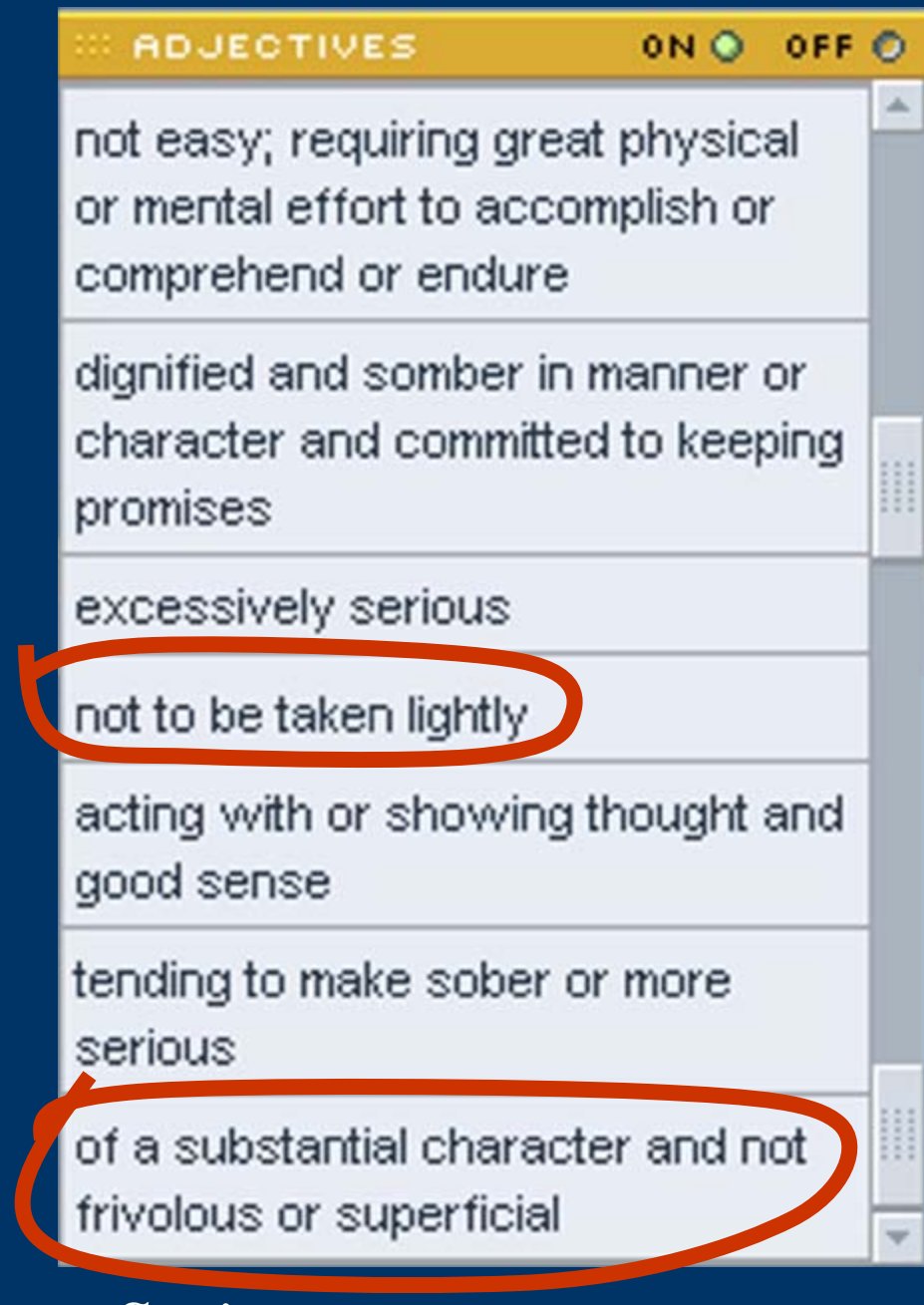
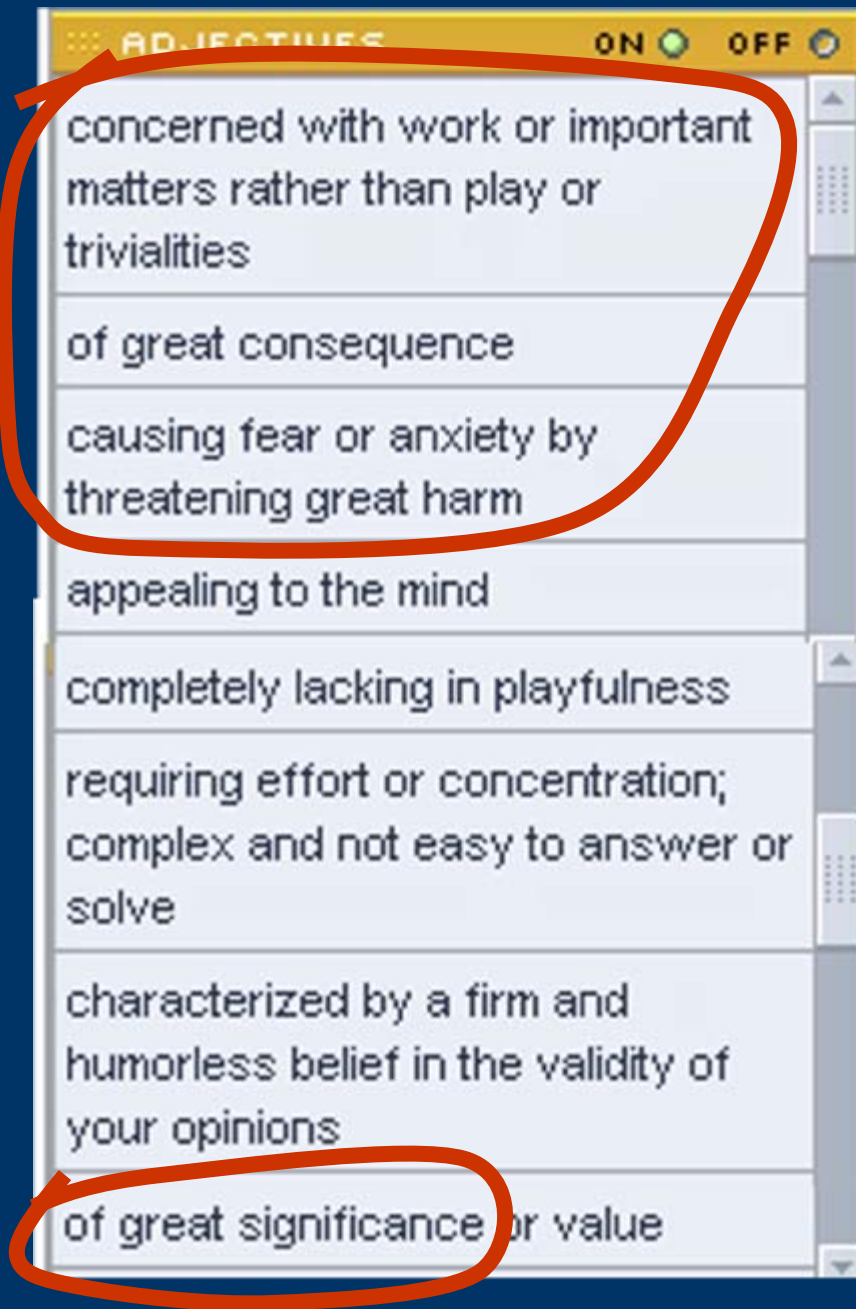
Total References:	34
Case Law:	19
Statute/Code:	7
Dictionary (lay):	4
Dictionary (law):	2
Thesaurus (law):	2
Psych. Literature:	0
Actuary/Statistics:	0

# Criterion C – From Ghilotti to Actuaryland

## *Serious* (adjective):

1. Grave, bad, critical, worrying, dangerous, acute, alarming, severe, extreme, grievous.
2. Important, crucial, urgent, pressing, difficult, worrying, deep, significant, grim, far-reaching, momentous, fateful, weighty, no laughing matter, of moment or consequence.

Collins Thesaurus of the English Language  
Complete and Unabridged 2<sup>nd</sup> Edition.  
2002 © HarperCollins Publishers 1995, 2002



# Criterion C – From Ghilotti to Actuaryland

*Well-founded* (adjective):

1. Based on sound reasoning or evidence.

[www.visualthesaurus.com](http://www.visualthesaurus.com)

*Well-founded* (adjective):

1. Justifiable, justified, reasonable, valid, warranted, legitimate, credible, plausible, well grounded, supportable, **tenable**.

Collins Thesaurus of the English Language

*Tenable* (adjective):

1. Capable of being maintained in argument, rationally defensible.

The American Heritage® Dictionary of the English Language,  
Fourth Edition copyright ©2000 by Houghton Mifflin Company.



# Criterion C – From Ghilotti to Actuaryland

## Ghilotti — Parsed

### Reference to mathematics?

The word “likely” as used in the statute, also must be construed in light of the “difficulties inherent in predicting human behavior,” particularly in **mathematical** terms. This is **particularly so** with respect to the requirements of Section 6601, which represents **only the initial screening stage** of the SVPA process.

*People v. Superior Court(Ghilotti)* (2002),  
27 Cal.App.4<sup>th</sup> 888

# Criterion C – From Ghilotti to Actuaryland

## The hope? Qualitative Assessment?

In response to the *Ghilotti* decision, Chief Assistant Attorney General Robert R. Anderson said, “I think it will allow evaluators to make a more reasoned assessment without being misguided by some type of belief that a mathematical evaluation is required.”

*Los Angeles Times*, April 26, 2002.

# Ghilotti — The Reality

**“Don’t ask, don’t tell.”**

1. The rejected unitary standard of greater than 50% has been replaced an “Evaluator’s Choice” standard.
2. First, the evaluator looks to “actuarial” risk assessment for group risk percents.
3. Next, the evaluator equates the group risk percent with the risk of the person being evaluated.

# Ghilotti — The Reality

**“Don’t ask, don’t tell.”**

4. Either consciously or unconsciously, the evaluator decides whether the risk he or she has attributed to the subject meets the evaluator’s personal percent threshold for “likely.”

# Ghilotti — The Reality

**“Don’t ask, don’t tell.”**

5. “Don’t ask.” – The evaluator will not be asked to disclose the threshold percent used to decide “*likely* to engage in acts of sexual violence . . . .”
6. “Don’t tell.” – The evaluator will not voluntarily disclose the threshold percent used to decide “*likely* to engage in acts of sexual violence . . . .”

# Ghilotti — The Reality

“Don’t ask, don’t tell.”

An Exception that Proves the Rule.

“[Doctor] explained that to qualify as an SVP, an offender must pose a serious and well-founded risk of reoffending. In [doctor’s] opinion, this risk need not be 51 percent or higher, but rather just **a good chance or around 30 percent.**”

*People v. Seja*, Cal. Court of Appeal,  
5<sup>th</sup> Dist., July 2011, Unpublished

Cutting through the  
Confused  
Reasoning  
About  
Actuarial  
Prediction

The fun and easy way\* to  
get down to business with statistics

# Actuarial Science

FOR

# DUMMIES®

**Ronald Mihordin, MD, JD, MSP**

*Acting Clinical Director Forensic Evaluation Services  
California Department of Mental Health*

**A Reference for the Rest of Us!**



FREE eTips at  
[dummies.com](http://dummies.com)\*



# PRINCIPLES OF ACTUARIAL SCIENCE

## Definitions

**Risk (risk subject):** A person . . . involved in an event associated with an actuarial risk.

**Actuarial risk:** A phenomenon that has economic consequences and that is subject to uncertainty with respect to one or more of the **actuarial risk variables**: occurrence, timing and severity.

**Risk identification:** A process for determining whether a given person . . . is a **risk subject** for a given **actuarial risk**.

# PRINCIPLES OF ACTUARIAL SCIENCE

## Principle 4.1 - Definitions

A set of classes, a set of characteristics and a set of rules for using the characteristics **to assign each risk to a class** in such a way that the conditions of Principle 4.1 are satisfied with respect to a given group of risks is called a **risk classification system**.

These classes are called **risk classes**.

The rules used for assigning risks to risk classes are called **underwriting rules**.

# PRINCIPLES OF ACTUARIAL SCIENCE

## Principle 4.1 – Risk Classification

For a group of risks associated with a given actuarial risk, it is possible to identify characteristics of the risks and to establish a set of classes based on these characteristics so that:

- a. each risk is assigned to one and only one class; and
- b. probabilities of occurrence . . . May be associated with each class in a way that results in an actuarial model which, for some degree of accuracy, is:
  1. valid relative to observed results for each class or group of classes having sufficient available data, and
  2. potentially valid for every class.

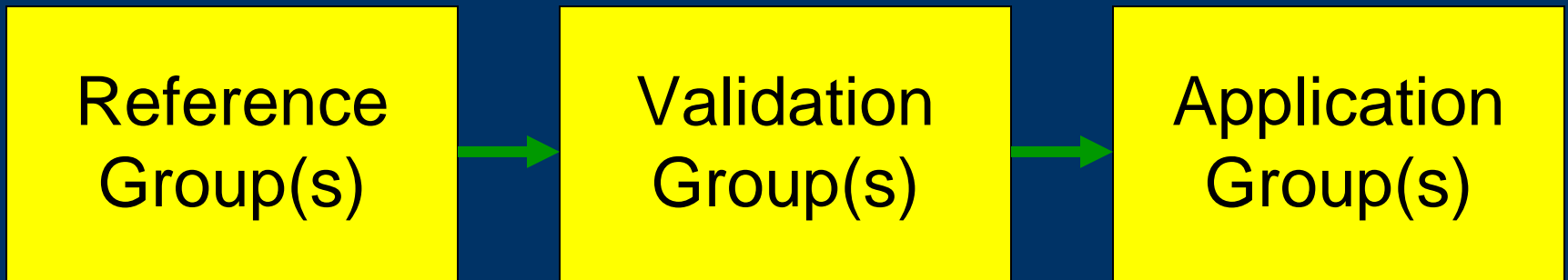
# PRINCIPLES OF ACTUARIAL SCIENCE

## Principle 4.1 – Risk Classification

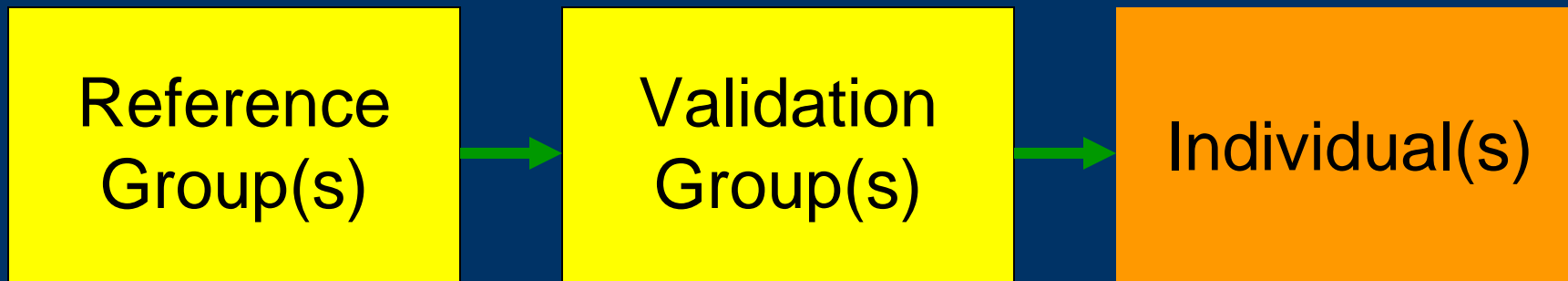
For a group of risks associated with a given actuarial risk, it is possible to identify characteristics of the risks and to establish a set of classes based on these characteristics so that:

- a. each risk is assigned to one and only one class; and
- b. probabilities of occurrence . . . May be associated with each class in a way that results in an actuarial model which, for some degree of accuracy, is:
  1. valid relative to observed results for each class or group of classes having sufficient available data, and
  2. potentially valid for every class.

## Standard Actuarial Practice



## Non-standard Actuarial Practice



# Prognostic Premises

The best predictor of future behavior is past behavior. (Generic)

The best predictor of an individual's future behavior is that individual's past behavior. (Scouting, Handicapping, Clinical)

The best predictor of future group behavior is past group behavior. (Actuarial Science)

The best predictor of an individual's future behavior is "his" group's past behavior. (Actuarial Risk Assessment-NOS)

# Actuarial Means Group

“Winwood Reade is good upon the subject,” said Holmes. “He remarks that, while the individual man is an insoluble puzzle, in the aggregate he becomes a mathematical certainty.”

Arthur Conan Doyle,  
*The Sign of the Four* (1890)

# Actuarial Means Group

1. Without reference to a group there is no way to develop or validate a actuarial tool.
2. Without reference to a group there is no way to prove accuracy of an actuarial tool in practice.
3. Accuracy of an actuarial tool can not be established in the context of a single case or a single event.
4. A Nobel Prize awaits the person who produces an actuarial instrument validated with an “n” of one.



# PRINCIPLES OF ACTUARIAL SCIENCE

## Forward and Backward

1. In actuarial risk assessment the **individual is assessed for assignment** to an actuarial risk class.
  - a. A limited number of known attributes of the individual is matched against attributes set out as underwriting rules.
  - b. The individual is placed in a risk class comprised of individuals whose individual attributes match the same underwriting rules.
  - c. **In any risk class, individuals who will experience and those who will not experience the event in question have the same actuarial characteristics.**

# PRINCIPLES OF ACTUARIAL SCIENCE

## Forward and Backward

2. For the risk class, one can predict the number of individuals, but not which individuals, in the group who will and who will not experience the event of interest.
3. Actuarial risk assessment provides no basis for doing to do the reverse, i.e., using predicted risk class outcomes to predict the outcome expectations for individual's in the risk class.
4. Actuarial Science Summarized:
  - a. **Predictable actuarial risk classes** of individuals with shared underwriting characteristics - **Doable**
  - b. **Predictable individual risk** from actuarial risk class affiliation – **Not Doable**

# PRINCIPLES OF ACTUARIAL SCIENCE

## Forward and Backward

### CAN DO

### CAN'T DO

Individual Characteristics-  
Underwriting Rule Matching

Predictable Outcome  
Expectations for Individuals

Actuarial Risk Class  
Assignment

Selection of Individuals from  
Actuarial Risk Class

Risk Class with Predictable  
Group Outcome Expectations

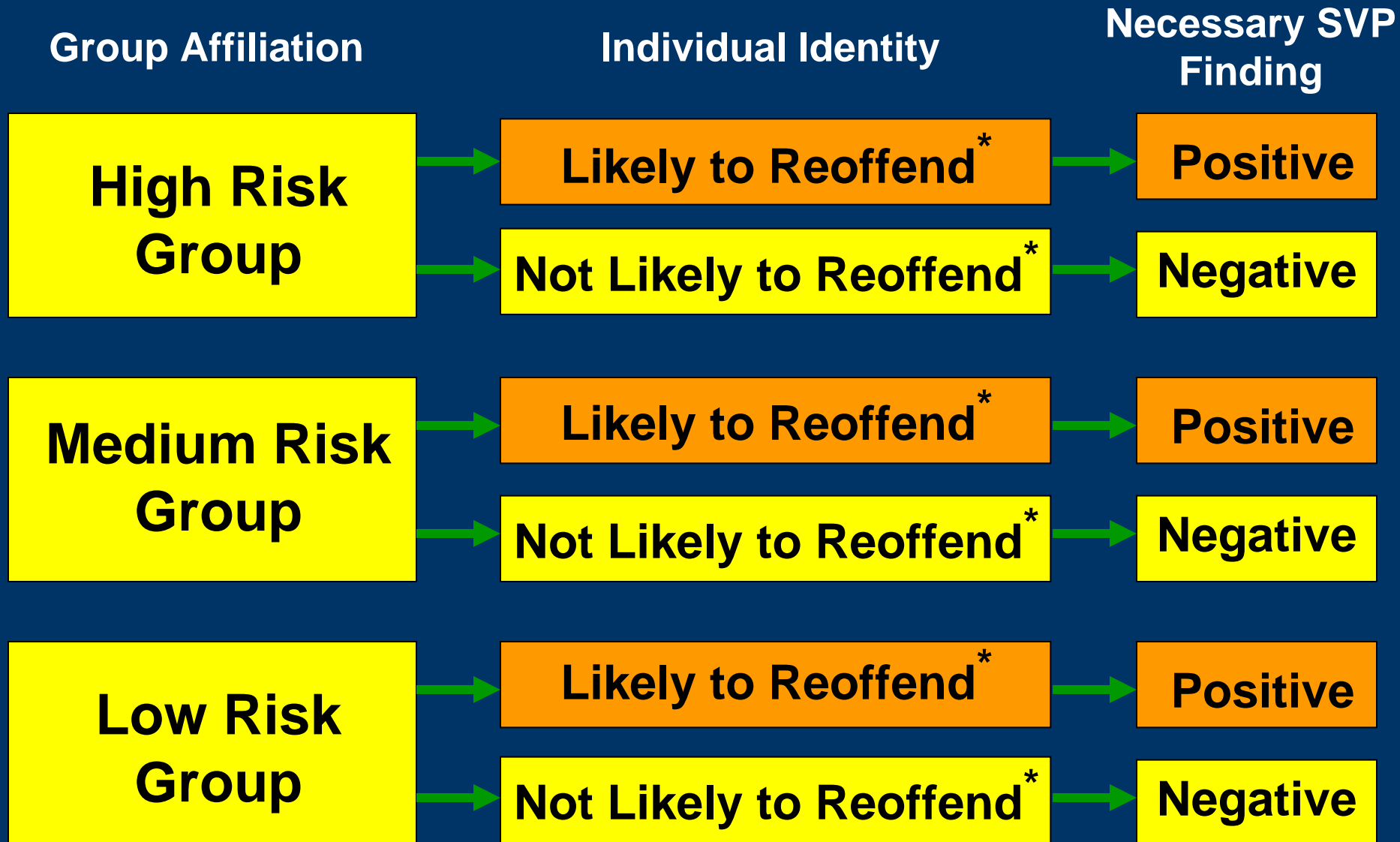
Risk Class with Predictable  
Group Outcome Expectations



# Actuarial Risk Groups — SVP Findings

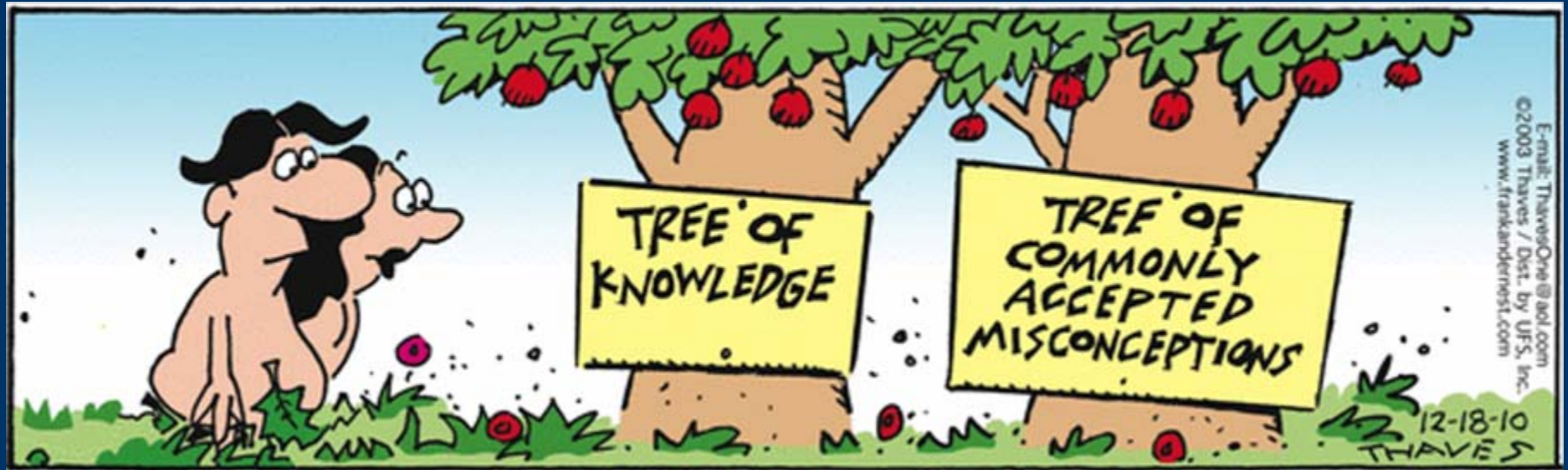
1. All the individuals within each Risk Group have equivalent actuarial characteristics.
2. In every Risk Group there are individuals that are likely to reoffend.
3. In every Risk Group there are individuals who are not likely reoffend.
4. Risk Group affiliation does not establish an individual's likelihood of reoffending.

# Actuarial Risk Group — SVP Findings



\* Serious and well-founded risk.

# Common Accepted Misconceptions (CAMs)



1. Starbucks talk versus technical discourse.
2. Personal choice and public health initiatives.
3. Risk/benefit calculation in different contexts. “How could it hurt.”
4. Tentative revocable choices versus permanent or irretrievable.

# Miscommunication

## 11.01 Accuracy, Fairness, and Avoidance of Deception

Forensic practitioners make reasonable efforts to ensure that the products of their services, as well as their own public statements and professional **reports and testimony**, are communicated in ways that **promote understanding** and **avoid deception**.

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

# Miscommunication

## 11.01 Accuracy, Fairness, and Avoidance of Deception

When providing reports and other sworn statements or testimony in any form, forensic practitioners strive to present their conclusions, evidence, opinions, or other professional products in a fair manner. **Forensic practitioners do not, by either commission or omission, participate in misrepresentation of their evidence . . .**

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



# Risk Miscommunication

1. In communicating risk, language is critical.
2. “Miscommunication of risk is often the rule rather than the exception and can be difficult to detect . . .”
3. “Statements about the probabilities of single events—such as ‘you have a 30 to 50 percent chance of developing a sexual problem’ are fertile ground for miscommunication.”

Gigerenzer, G., *Calculated Risks-How to Know When Numbers Deceive You* (2002)

# Risk Miscommunication

4. Communicating risk in percent often leaves too much to the imagination.
5. “A 30 percent chance of rain tomorrow” may be understood as:
  - a. It will rain 30 percent of the time?
  - b. It will rain in 30 percent of the area?
  - c. It will rain on 30 percent of the days that are like tomorrow?

Gigerenzer, G., *Calculated Risks-How to Know When Numbers Deceive You* (2002)

# Risk Miscommunication

6. Communicating risk in percent is ambiguous and leads to misunderstanding.
7. Opportunity for misunderstanding is reduced when risk statements use whole numbers and identify what the numbers refer to.
8. For example, *“Mr. X is affiliated with a risk class in which 20 out of 100 (20 percent) individuals can be expected to reoffend in 5 years.”*

# How Percents Deceive

1. A fraction is a number used to express portion of a whole. For example:
  - 1 of 4 parts of a inch, i.e.,  $\frac{1}{4}$  inch.
  - 1 of 2 parts of a pizza, i.e.,  $\frac{1}{2}$  of a pizza.
  - 3 people of a group 4, i.e.,  $\frac{3}{4}$  of the people.
2. A fraction is composed of a numerator and a denominator.
3. The numerator is the part of fraction above the line that denotes a certain number of equal portions of the whole.

# How Percents Deceive

4. The denominator is the part of fraction below the line that denotes the number of equal portions that comprise the whole.

**FRACTION:**       $\frac{\text{NUMERATOR}}{\text{DENOMINATOR}}$

5. A percent is a fraction that has been decimalized and multiplied by 100.

$$\frac{1 \text{ (numerator)}}{5 \text{ (denominator)}} = 0.20 \times 100 = 20 \%$$

**Numerator and denominator “disappear.”**

# How Percents Deceive

4. Without disclosure of the numerator, denominator and their source, risk statements in percent are, at best, ambiguous and, at worst, meaningless.
5. Basis for a “20 percent” risk of reoffense?
  - 20 people out of 100 people reoffended?
  - 20 offenses out of 100 chances to offend?
  - Offenses on 20 out of 100 days at risk?

**What is the numerator based on?**

**What is the denominator based on?**

# RISK ( $R_p$ ) and RISK ( $R_f$ )

## 1. Population-derived Risk

a. Actuarial (group) risk.

b. Group performance, e.g., reoffence.

c. The formula: 
$$\frac{N_f \text{ (Individuals Failed)}}{N_e \text{ (Individuals Exposed)}} = R_p$$

## 2. Frequency-derived Risk

a. Individual risk.

b. Individual performance, e.g., batting average.

c. The formula: 
$$\frac{T_f \text{ (Times Success)}}{T_e \text{ (Times Exposed)}} = R_f$$

# Equivalency-Comparability Illusion

Population-derived Actuarial Risk (Group)

$$R_p = \frac{20 \text{ (people reoffend)}}{100 \text{ (people at risk)}} = 20\% \text{ group risk}$$

Population-derived Actuarial Risk (Individual)?

$$20\% \text{ individual risk} = \frac{20 \text{ what?}}{100 \text{ what?}} = \frac{\text{Numerator?}}{\text{Denominator?}}$$

$$20\% \text{ individual risk} = \frac{20 \text{ (people reoffend)}}{100 \text{ (people at risk)}} \quad ?$$

A clone risk?



# Equivalency-Comparability Illusion

An Individual's Population-based Actuarial Risk?  
A Clone Risk?

The reoffense risk of an individual expressed as the percent of individuals who will reoffend from a group comprised of the individual and 99 of his clones.

$$20\% \text{ Clone Risk} = \frac{20 \text{ (individuals reoffend)}}{\text{Individual} + 99 \text{ clones}}$$

STATE OF ILLINOIS  
 DIVISION OF CORRECTION  
**PREDICTION REPORT OF THE SOCIOLOGIST-ACTUARY**  
 ILLINOIS STATE PENITENTIARY SYSTEM  
 JOLIET-STATEVILLE DIVISION

Number 00000 Name B \_\_\_\_\_ J \_\_\_\_\_ Docket May, 1942

Factor	Item	Score
1. Type of offense	<i>Murder</i>	1
2. Sentence	<i>Life</i>	1
3. Type of offender	<i>First</i>	1
4. Home status	<i>Average</i>	0
5. Family interest	<i>Very active</i>	1
6. Social type	<i>Socially inadequate</i>	1
7. Work record	<i>Irregular</i>	0
8. Community	<i>Urban</i>	0
9. Parole job	<i>Adequate</i>	0
10. Number of associates	<i>Two</i>	0
11. Personality rating	<i>Inadequate</i>	0
12. Psychiatric prognosis	<i>Problematic</i>	0
Total score		5

This inmate is in a class in which 3 per cent may be expected to violate the parole agreement; 2 per cent of the persons in this class may be expected to commit serious or repeated infractions of the parole rules; and 1 per cent may be expected to commit new offenses on parole.

# Risk Miscommunication?

“This inmate **is in a class** in which 3 per cent may be expected to violate the parole agreement; 2 per cent of the persons **in this class** may be expected to commit serious or repeated infractions of the parole rules: and 1 per cent may be expected to commit new offenses on parole.”

Illinois State Penitentiary System (1942)

# Risk Miscommunication?

“Mr. X scored a [number] on this risk assessment instrument. [Groups of] Individuals with these characteristics, on average, sexually reoffend at [number]% over five years and at [number]% over ten years. The rate for any violent recidivism (including sexual) for [groups of] individuals with these characteristics is . . . .”

Harris, Phenix, Hanson, & Thorton (2003)

# Risk Miscommunication?

“Mr. X scored a [number] on this risk assessment instrument. **Individuals with these characteristics, on average**, sexually reoffend at [number]% over five years and at [number]% over ten years. The rate for any violent recidivism (including sexual) **for individuals with these characteristics is** . . . .”

Harris, Phenix, Hanson, & Thorton (2003)

Association for the Treatment of Sexual Abusers



# A REASONED APPROACH:

RESHAPING SEX OFFENDER POLICY  
TO PREVENT CHILD SEXUAL ABUSE

Joan Tabachnick

Alisa Klein

# Risk Miscommunication

## Understanding Risk Assessment

*Over the past 15 years, research studies have identified different personal characteristics and factors most strongly related to adult males who re-offend sexually.*

*“So far, so good.”*



Tabachnick and Klein, *A Reasoned Approach*,  
ATSA, 2011

# Risk Miscommunication

## Understanding Risk Assessment

*With an increased understanding of these characteristics and factors, researchers have developed evidence-based actuarial risk assessment instruments (ARAIs) for adults.*

*“OK, keep going.”*



Tabachnick and Klein, *A Reasoned Approach*,  
ATSA, 2011



# Risk Miscommunication

## Understanding Risk Assessment

*These tools estimate the likelihood of sexual re-offense [for groups] based on a combination of risk factors associated with different risk.*

*“Hey, you left out the group part.”*



Tabachnick and Klein, *A Reasoned Approach*,  
ATSA, 2011

# Risk Miscommunication

## Understanding Risk Assessment

*Although these risk assessment tools do not predict whether a specific individual will commit a new sexual offense . . .*

*“Well, you got that part right.”*



Tabachnick and Klein, *A Reasoned Approach*,  
ATSA, 2011

# Risk Miscommunication

## Understanding Risk Assessment

*... they are currently the most reliable method of identifying [groups of] adults with particular characteristic that may lead to a higher risk of being re-arrested or reconvicted . . .*

*“Hey, you left out that group part again.”*



Tabachnick and Klein, *A Reasoned Approach*,  
ATSA, 2011

# Risk Miscommunication

For Example

*In order to assess [subject's] risk of sexual re-offense he was scored on five actuarial instruments that provide general base rates of sexual re-offense for [groups of] sex offenders.*

*“Look, this guy also left out that group part.”*



# Risk Miscommunication

## For Example

*[Subject] scored in the Moderate-High range of risk of sexual re-offense on the Static-99R, Static-2002R, MnSOST-R, SORAG, and the SRA-FV. Each of these instruments predicts whether an offender will be charged with a new sexual offense.*

*“Wrong! They predict how many out of a group will be charged with a new offense.”*



# Risk Miscommunication

## Comparing the Uncomparable

*[Subject] scored a 3 on the Static-99R. [Groups of] offenders with the same score . . . have been found to sexually reoffend at a rate of 11.9 percent in five years . . .*

*“OK, about 12 out of a group of 100 will reoffend. So what’s the subject’s risk? 12 out of 100  
whats?”*

Case No.: 062711-2



# Risk Miscommunication

- In reports, evaluators typically state that determining risk of reoffense is different from predicting reoffense and that they are doing the former. (A distinction without a difference?)
- What is apparently not effectively communicated is the fact that actuarially determined risk is a prediction about the proportional expected outcome for a risk class, not a prediction about any individual in the risk class. (A distinction with a difference.)

# Risk Miscommunication

## What the Courts Hear

- “Three psychologists reported that, according to Whitlock’s score on the STATIC 99 test, there was a 52% **likelihood of his re-offending** within the next 15 years.”

*People v. Whitlock (2003)*

- “Dr. M and Dr. F calculated a score of 4 on the RRASOR scale applied to appellant, which . . . meant that the **risk that he** would engage in sexually violent behavior over the next 10 years was 48.6%.”

*People v. Poe (1999)*

- “Defendant’s score of 4 on the RRASOR, a clinical tool for evaluating the probability of a sexual offender’s reoffending, indicated a 32.7 percent **likelihood that the defendant would** commit another violent sexual offense with five years . . . .

*People v. Roberge (2003)*



# Risk Miscommunication

## What the Courts Hear

“The Static-99 is an actuarial instrument that allows an evaluator to place sexual offenders in different risk categories based on historical (static) factors such as age, marital status, the number of prior offenses, the relationship of the offender to the victims and the gender of the victims.”

*“So far, so good.”*



*People v. Therrian* (2003)  
113 Cal App.4<sup>th</sup> 609

# Risk Miscommunication

What the Courts Hear

“After identifying the particular characteristics of the offender, the Static-99 test assigns a numeric score to them.”

*“OK, keep going.”*



*People v. Therrian* (2003)  
113 Cal App.4<sup>th</sup> 609

# Risk Miscommunication

What the Courts Hear

“The total score of the test is a percentage chance of the defendant’s likelihood of being convicted for a future sexual offense.”

*“Whoa! Percent of what?  
Numerator? Denominator? Clone  
Risk?”*



*People v. Therrian* (2003)  
113 Cal App.4<sup>th</sup> 609

# Risk Miscommunication

## What the Courts Hear

“In this evaluation the process of determining the likelihood of defendant reoffending **requires adjusting the actuarial risk assessment.**”

*“The baseline fallacy.  
The false surrogate. It  
just keeps getting worse.”*

*People v. Therrian (2003)*  
113 Cal App.4<sup>th</sup> 609



# The “Baseline” Fallacy

1. A strategy that both uses and enhances the **illusion of equivalency and comparability**.
2. With the false assumption (illusion) that the individual’s risk is equivalent to the risk of his or her assigned risk class, the outcome expectation of the risk class is used as a surrogate for individual risk and “adjusted” upward or downward based on alternate sample norms, “dynamic factors,” “clinical judgment,” and/or evaluator idiosyncrasy. **“Compounding the Problem.”**

# The “Baseline” Fallacy

3. A strategy with compound flaws:
  - a. The actuarial (class) risk percent is a false surrogate for the risk of any individual.
  - b. “Adjusting” the false surrogate risk in an effort to determine an individual’s risk is akin to the practice of voodoo.
  - c. Departure from the validated underwriting and scoring rules of a risk assessment system results in an *ad hoc* assessment system of unknown validity.

# The “Baseline” Fallacy

3. A strategy with compound flaws:
  - d. Offers a “patina” of actuarial, numerical precision to assessments that are significantly influenced by “clinical judgment” and evaluator idiosyncrasy. **“Sailing under false colors.”**
  - e. Inherent anchoring and floor effect bias.

# The Precision Fallacy

- Actuarial prediction is more precise, accurate, or reliable than clinical prediction.



*“Whoa! This is way too ambiguous.”*

- Actuarial prediction of **group outcomes** are more precise, accurate, or reliable than clinical predictions of **group outcomes**.

*“OK. That’s right.”*





# The Precision Fallacy

- Actuarial prediction of **individual outcomes** are more precise, accurate, or reliable than clinical predictions of **individual outcomes**.

*“Actuarial prediction of  
an individual outcome?  
That’s an oxymoron.  
Next.”*



# The Precision Fallacy

- Actuarial prediction of **group outcomes** are more precise, accurate, or reliable than clinical predictions of **individual outcomes**.

*“Clone risk? What’s the numerator. What’s the denominator. Remember— a percent is a fraction.*



1. The precision, accuracy, or reliability of a tool are irrelevant parameters when the tool is the **wrong tool for the job**.

# The Precision Fallacy

2. The precision, accuracy, and reliability debate side steps (obfuscates) foundational questions:
  - The basic conceptual error.
  - The inherent structural defect in the “instruments.”
3. Mental health professionals are rarely called on to assess group risks.
4. Exception: *People v. McKee* (2010) 47 Cal.4<sup>th</sup> 1172, on remand to San Diego Superior Ct. (2011).

## *People v. Richard McKee*

- San Diego Superior Court opinion. (April 2011)
- The issue: Equal Protection. (Group risk)
- Judge Michael D. Wellington “gets it.”

*[The Static-99] score is then correlated with the scores of a larger population of sexual offenders whose re-offense record is known to determine what percentage of offenders with a similar score have reoffended within a particular time period . . . **The score is not intended to show the specific likelihood of sexual recidivism for a particular individual.***

## ***U.S. v. Walter Wooden***

- U.S District Court for Eastern District of North Carolina, Western Division order filed August 31, 2011.
- The issue: Sexual Dangerous Predator as defined in the Adam Walsh Act.
- *All three experts in this case conducted a risk analysis based on empirical tools and actuarial instruments to evaluate, quantify, and support their dangerousness determination.*

# *U.S. v. Walter Wooden*

- *All experts agree that no psychological tests or actuarial instrument have been developed that predict with certainty an individual's risk of future sexual offending behavior.*
- *The actuarial instruments (Static-99R, Static 2002R) provide only group prediction rates on risk of re-offending. These instruments do not provide individual rates of re-offending.*
- Does the court see a problem of “certainty” (accuracy) or a problem of unsuitability and fundamental conceptual error?

# The Precision Fallacy

5. “My iPod’s more precise and accurate than your table saw.”
6. “My refrigerator is more precise and accurate than your lawn mower.”
7. A form of “bait and switch.”
  - The bait: Assessment of individuals.
  - The switch: Actuarial (group) assessment.
8. Tools that accurately and precisely provide the public with something other than what it is looking for.

# Model Disclosure Statement - 1

Because actuarial measures are based on group data, instruments such as the Static-99 and Static-2002 and their progeny **can only predict the percentage of people in the group who will offend.**

**They cannot identify which individuals in the group will be among those who do or do not re-offend.**

This type of research is very valuable in discovering what factors are shared by sexual offenders, and they provide valuable tools for communities and law enforcement when trying to determine where to put resources.



# Model Disclosure Statement - 1

Unfortunately, when they are presented to lay people in court, **they are sometimes misunderstood as having the ability to predict individual likelihood to re-offend.** There are many reasons why they cannot . . . .

. . . While the offender's history that contributes to each [risk] factor is definitely relevant to a determination of risk, I would agree with the opinion that the **actuarial assessment instruments are neither necessary nor sufficient to establish the conditions for commitment under WIC 6600.**

# Model Disclosure Statement - 2

The risk percent associated with any individual derived from a score determined by an actuarial risk assessment tool represents the number of individuals out of a group of 100 individuals with the same risk assessment tool score who will experience the event or exhibit the behavior in question. *Translated from the Latin—percent literally means “per one hundred.”*

For example, if a risk assessment tool score of 5 is associated with a risk of 25%, this means that it is reasonable to expect that, in a group of 100 individuals with a score of 5, twenty-five will experience the event or exhibit the behavior in question.

# Model Disclosure Statement - 2

For every risk percent for an event or behavior to occur there is a reciprocal risk percent that the event or behavior will not occur. The reciprocal risk is calculated by subtracting the risk percent from 100.

For example, if a risk assessment tool score of 5 is associated with a risk of 25%, the reciprocal risk that the experience or event will not occur is 75% ( $100 - 25 = 75$ ). This means that it is reasonable to expect that, in a group of 100 individuals with a score of 5, seventy-five will not experience the event or exhibit the behavior in question.

# Model Disclosure Statement - 2

In summary, actuarial (group-derived) risk assessment can tell us how many individuals out of a group of 100 individuals with the same assigned risk we can reasonably expect to experience an event or exhibit a behavior and how many individuals out of a group of 100 individuals with the same assigned risk will not experience that event or exhibit that behavior.

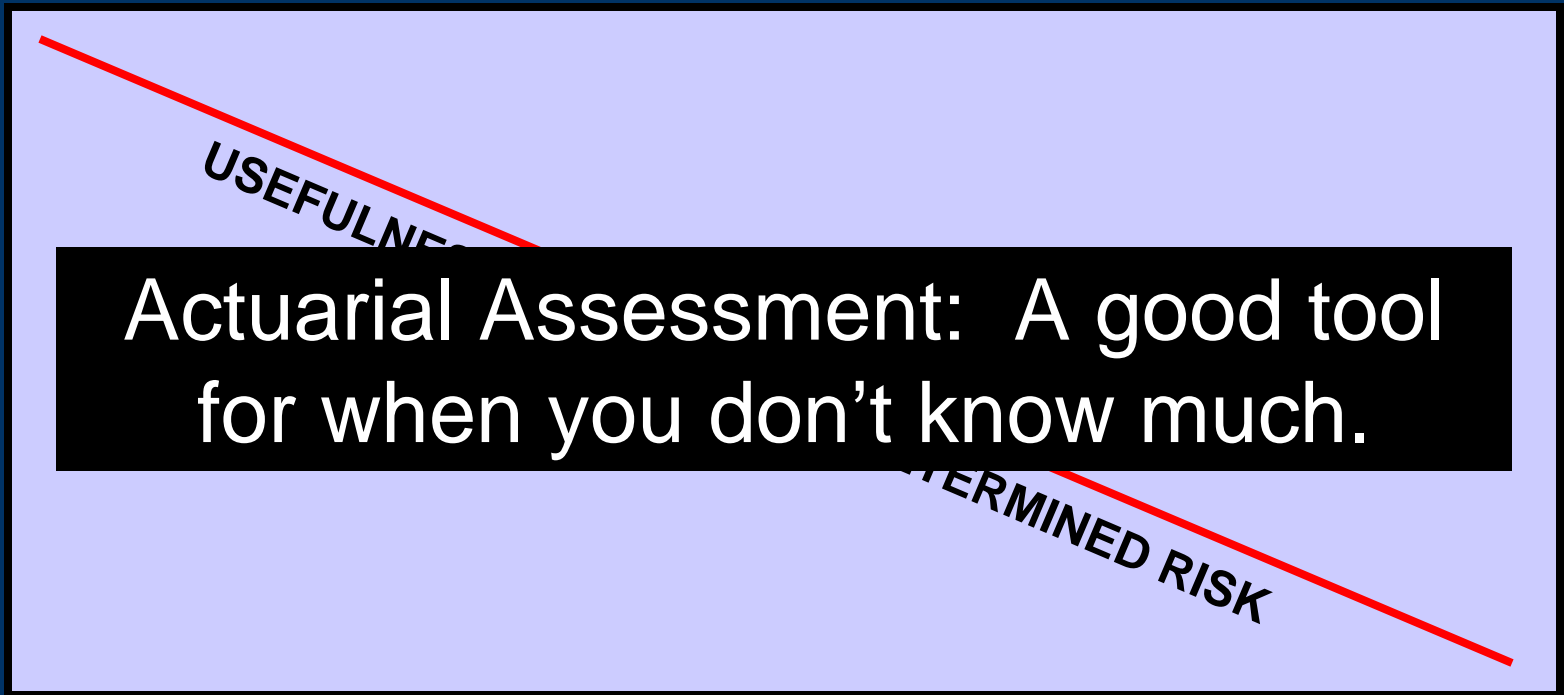
**Actuarial risk assessment does not and cannot tell us which of the two outcome groups associated with each level of risk any individual will fall within.**

# Actuarial Risk Assessment Relative Utility

Most Useful



Least Useful



Screening/Triage

Minimal  
Individual Data

Pre-examination

Goal: Group  
Risk/Prognosis

Diagnosis

Maximal  
Individual Data

Post-examination

Goal: Individual  
Risk/Prognosis

# Criterion C – From Ghilotti to Actuaryland

## Actuarial *Über Alles*?

1. Both doctors had extensive experience in psychological and psychiatric evaluation.
2. Their expertise in diagnosis and treatment was closely related to their opinions.
3. Whether they used clinical or actuarial models . . . are not reasons to exclude their testimony.
4. The expert were not restricted to one methodology or another.

# Criterion C – From Ghilotti to Actuaryland

## Evaluations without “Actuarial” Risk Assessment?

- ✓ 95 total evaluations.
- ✓ 46 different subjects.
- ✓ 23 different evaluators.

# Actuarial Risk Assessment (NOS)

## Unintended Consequences

*Risk assessments are invariably about individuals. Incidence based on the performance of groups can inform the individual assessment, but they also have the capacity to obfuscate a decision . . .*

Webster, Bloom, and Augimeri (2011)  
[www.psychiatrictimes.com](http://www.psychiatrictimes.com)



# Actuarial Risk Assessment (NOS)

## Unintended Consequences

1. Disuse atrophy of analytic/ thinking skills?
2. Blindness, myopia or tunnel vision?
3. Institutionalized prejudice/bias?
4. Anchoring? Floor effect?
5. Parroting? Plagiarizing?
6. Avoidance of accountability?

# Actuarial Risk Assessment (NOS)

## Anchoring

1. Tversky and Kahneman; *Science*, 1974
2. Anchoring occurred with random and unrelated numbers.
3. “Super-anchoring” with “meaningful” numbers?

*We use reference points . . . and start building beliefs around them because less mental effort is need to compare an idea to a reference point that to evaluate it in the absolute.*

Taleb, N., *The Black Swan* (2010)

# “Actuarial” Paralysis of Analysis

QUALIFYING  
CRIMES

At age 32, subject charged with 42 and convicted of 11 sexual offenses (4 SVP-qualifying). His drugging and raping of 5 different women over 18 months was documented in his own video-tapes of the crimes. He repeatedly slapped and struck one of his drugged but not fully incapacitated victims.

+

At age 46, after less than one year on parole, returned to prison on parole violation for possession of poster graphics depicting women “bound, tied, staked or restrained against their will.” Currently 46 years old.

+

- Static-99R score: 2 (Low-Moderate risk category)
- VRS-SO 17 factors: 4 significant, 7 moderately related to sexual recidivism.
- Protective risk factors: none.
- Probability of reoffense even higher (under-reporting).
- Future sex offense likely to be predatory.

=

**Not a serious and well founded risk to reoffend.**

QUALIFYING DISORDER

LIKELY TO . . .

# “Actuarial” Paralysis of Analysis

In 1994, [redacted] engaged in sadistic acts by drugging women and then videotaping them while he engaged in deviant acts. He placed a hood over their heads, bound and gagged some of them, and used toxic substances to keep them unconscious. It appears that some of the women would have had consensual sexual intercourse with him, and possibly even did so before these offenses, suggesting that it was their incapacitation and domination which he found to be more arousing. With this history, it is not surprising that he is diagnosed with sexual sadism.

Despite that troubling diagnosis, a risk assessment does not reveal a high level of dangerousness. As a first-time sex offender with little criminal history, [redacted] simply does not pose a substantial and well-founded level of dangerousness that would justify a civil commitment.

Possible translation: ~~My mother~~ The “actuarial” risk assessment wouldn’t let me do it, i.e., say he is a serious and well found risk to sexually reoffend.

# “Actuarial” Paralysis of Analysis

“We are satisfied that **no reasonable juror would mistake . . . use of the Static-99 test as a source of infallible truth** on the issue of defendant’s reoffending.

*“So what about the reasonable evaluator?”*



*People v. Therrian* (2003)  
113 Cal App.4<sup>th</sup> 609

# “Actuarial” Paralysis of Analysis

In this case, an overall review of the Static-99R, Static-2002R and external dynamic factors places Mr. \_\_\_\_\_ at Low to Low-Moderate risk for sexual reoffense. Therefore, I opine that Mr. \_\_\_\_\_ does not meet the likely standard as specified within WIC 6600.

- Translation?: “Thinking’s for sissies – I got actuarials.”

having a current interest in sexual sadism. Given that Mr. \_\_\_\_\_ has a life-long interest in sexual sadism, this evaluator could envision the possibility of bumping the risk for future sexual offense to the moderate level given the extenuating circumstances, but could not support raising the risk to the moderate-high or high level. The actuarial data in conjunction with the dynamic risk factors do not support that Mr. \_\_\_\_\_ is a substantial danger or serious and well-founded risk for a future sexual offense.

- A mathematical assessment of the assessment tools rather than a psychological assessment of the person.
- ~~My mother~~ The “actuarial” risk assessment wouldn’t let me do it, i.e., say he is a serious and well found risk to sexually reoffend.

# Assessing of the Assessment Tool

“In my SVP report of 03/05/08 I opinion [sic] that he was a serious and well-founded risk. Since that time there has been a revised version of the Static-99 (Static-99R). This updated instrument better accounts for the effects of age on sexual recidivism. Thus, Mr. Wilson’s score on the Static-99R dropped one point to the Low-Moderate range of risk. The Static –99R’s recidivism rates are lower than in the Static-99. This reflects the fact that sexual recidivism has decreased in more contemporary samples. These factors have led me to conclude that he is not a serious and well-founded risk to commit sexually violent behavior.”

*“And, how has the person changed?”*



# Lost in Actuaryland

Although it is of concern that Mr. [REDACTED] abducted two young girls who were strangers on separate occasions and sexually assaulted them in a brutal manner, the actuarial instruments indicate that he is most similar to those with low-moderate to moderate likelihood of sexual reoffense. His age and lack of general criminality lowered his scores on the actuarials. Also, he was not detected until after his second sex offense and the two offenses were combined which resulted in the single, index sex offense. An absence of prior sex offenses also lowered his actuarial risk for reoffense. Mr. [REDACTED] has some but not all of the dynamic factors associated with sexual reoffense. Based on an overview of the actuarial instruments, I opine that Mr. [REDACTED] does not meet the likely standard as specified within WIC 6600.



# Lost in Actuaryland

1. Alice cannot distinguish between Actuaryland and the real world.
2. In Actuaryland, two crimes are one crime.
3. In Actuaryland, a crime that precedes the last crime is not a prior crime.
4. In Actuaryland, moderate risk plus multiple dynamic factors for reoffense does not amount to a serious and well-founded risk.
5. In Actuaryland, Alice does a mathematical assessment of the assessment tools rather than a psychological assessment of the person.

# The Answer to the Last Question

## 1. *Actuarial* is a good word.

- a. For those most familiar with the word, it **denotes** a methodology which is **scientific, mathematical, and precise**.
- b. For those less familiar with the word, through its associations with insurance and insurance advertising, it connotes professional, conservative, reliable, respectable, trustworthy, solid.
  - “You’re in good hand with Allstate.”
  - Prudential—Strong as the Rock of Gibraltar

# The Answer to the Last Question

1. *Actuarial* is a good word.

c. For those unfamiliar with the word, it is naturally attractive based on the initial phonemes it has in common with a group of strong positive words.

- Act, action, activism, activity, activate.
- Actual, active, actually, actively.

2. *Tools* and *Instruments* sound good too.

a. Connote tangible, useful, scientific

b. Reality: A set of data fields, a check list, a questionnaire, and an inventory form.

# The Answer to the Last Question

## 3. Mission Impossible

- a. The phenomenological impossibility of objective analysis or discourse about the future.
- b. *Déjà vu* McNaughten
  - Sound policy, but . . .
  - Humanly imperceptible.
  - Objectively/scientifically unmeasurable.
- c. “Let Mikey do it.” – Psychiatrist/psychologists to the rescue.

# The Answer to the Last Question

## 3. Mission Impossible

- d. False confidence is better than no confidence at all.
- e. Like petting a cat – Everyone's BP is lowered.
  - Mental health expert.
  - The judge.
  - The attorney.
  - The jury.
- e. Now the impossible seems possible.
  - A useful, comforting fiction/illusion.
  - “We like it when you talk ~~dirty~~ actuary.”

# The Answer to the Last Question

## 4. Numbers-Rock-Scissors-Paper

- a. Numbers are associated with physical sciences, engineering and finance.
- b. “Numbers don’t lie.”
- c. Numbers sell – “99 and 44/100 % pure.”
- d. Numbers imply accuracy, precision, and certainty, even when:
  - They are inaccurate, or
  - They are ambiguous, or
  - They are meaningless, or
  - They measure the wrong thing.

# The Answer to the Last Question

## 5. The joy of sects (clubs, cliques)

- a. A shared common identity.
- b. Shared belief system and values.
- c. Idolized leaders, parental figures, protectors.
  - “Karl, he’s the man.”
  - “He’s like a rock star.”
  - “He’s so smart you can only understand half of what he says.”
- d. Role models.
- e. A world of disciples and Mini-Mes.

**Dogma** is the established belief or doctrine held by a religion, or by extension by some other group or organization. It is authoritative and not to be disputed, doubted, or diverged from, by the practitioners or believers.

**Heresy** is a controversial or novel change to a system of beliefs, especially a religion, that conflicts with established **dogma**.



# The Answer to the Last Question

## 6. The Andersen Phenomenon

- a. Imposing and maintaining an orthodoxy.
- b. Preemptive defense against heresy.
- c. H. C. Andersen, Denmark (1805-1875)
- d. The elements of the technique:
  - Protagonist(s) propose(s) a falsehood in self-interest.
  - People recruited to believe the falsehood are told that **only people who are incompetent or unintelligent will not believe** the falsehood.

# The Answer to the Last Question

## 6. The Andersen Phenomenon

d. The elements of the technique:

- In words and gestures, the protagonist(s) continually act(s) as if the falsehood were true.
- The protagonist(s) seek(s) to recruit believers in positions of authority and power.

e. Findings:

- When believers are confronted with irrefutable sensory evidence that what they have been told to believe is not true, they continue to behave as though the falsehood were true.

# The Answer to the Last Question

## 6. The Andersen Phenomenon

f. Why and how:

- Upon recognition of the falsity of the belief, some think that they must be unintelligent or incompetent, but do not wish to reveal that to others. They maintain the fiction.
- For these individuals, their negative assessment of their intelligence or competence is bolstered by the apparent unquestioned belief of those around them.

# The Answer to the Last Question

## 6. The Andersen Phenomenon

### e. Findings:

- Others, upon recognition of the falsity of the belief, do not think that they are unintelligent or incompetent, but do not wish to reveal their discovery to others who will think they are unintelligent or incompetent. They maintain the fiction.
- “[They can’t give up ‘actuarial’ instruments], they don’t want to be laughed at in court.”

SVP Evaluator (2010)

# The Answer to the Last Question

## 6. The Surrogate Mastery Effect

- a. Surrogate mastery engenders self-confidence.
- b. Mastery of a surrogate task or challenge can be generalized to engender confidence in the face of more difficult or unmasterable tasks.
- c. Mastery of a special vocabulary may engender confidence without actual mastery of task.
- d. Certificates, medals, plaques, trophies may give tangible (sensory) “proof” of mastery.
  - Military boot camp.
  - Vocabulary of the stock market, investing.
  - The scarecrow in the *Wizard of Oz*.

# The Answer to the Last Question

## 6. The Surrogate Mastery Effect

### e. Mastery of Assessment of Dangerousness

- A respected trainer (or a drill sergeant).
- A retreat (or camp) away from home.
- The tasks or surrogate tasks can be mastered by most within the allotted time.
- Conceptual training, indoctrination.
- Introduction to tasks and tools (weapons)?
- Development of a sense group identity. Fellow seminarians, cadets, all soon to be ordained or commissioned.

# The Answer to the Last Question

## 6. The Surrogate Mastery Effect

### e. Mastery of Assessment of Dangerousness

- Mastering the tools and task by simulated exercises—scoring assessment tool with sample data (obstacle course, firing range).
- Simulation may encourage forming small groups or choosing partners.
- In risk assessment training, the leader(s) circulate as personal trainers
- A an atmosphere of sports-like competition often develops between work groups.

# The Answer to the Last Question

## 6. The Surrogate Mastery Effect

### e. Mastery of Assessment of Dangerousness

- Individual's and work groups get caught up in the game, bent on mastery and success at the surrogate task. Games are fun.
- The tenuous relationship between the task, scoring assessment tools, and the ability to assess the future behavior of an individual is seldom, if ever, mentioned. Never emphasized.
- Toward the end the leader/trainer polls the audience for their scores. The participants check and match their score sheets like players in a bingo parlor.



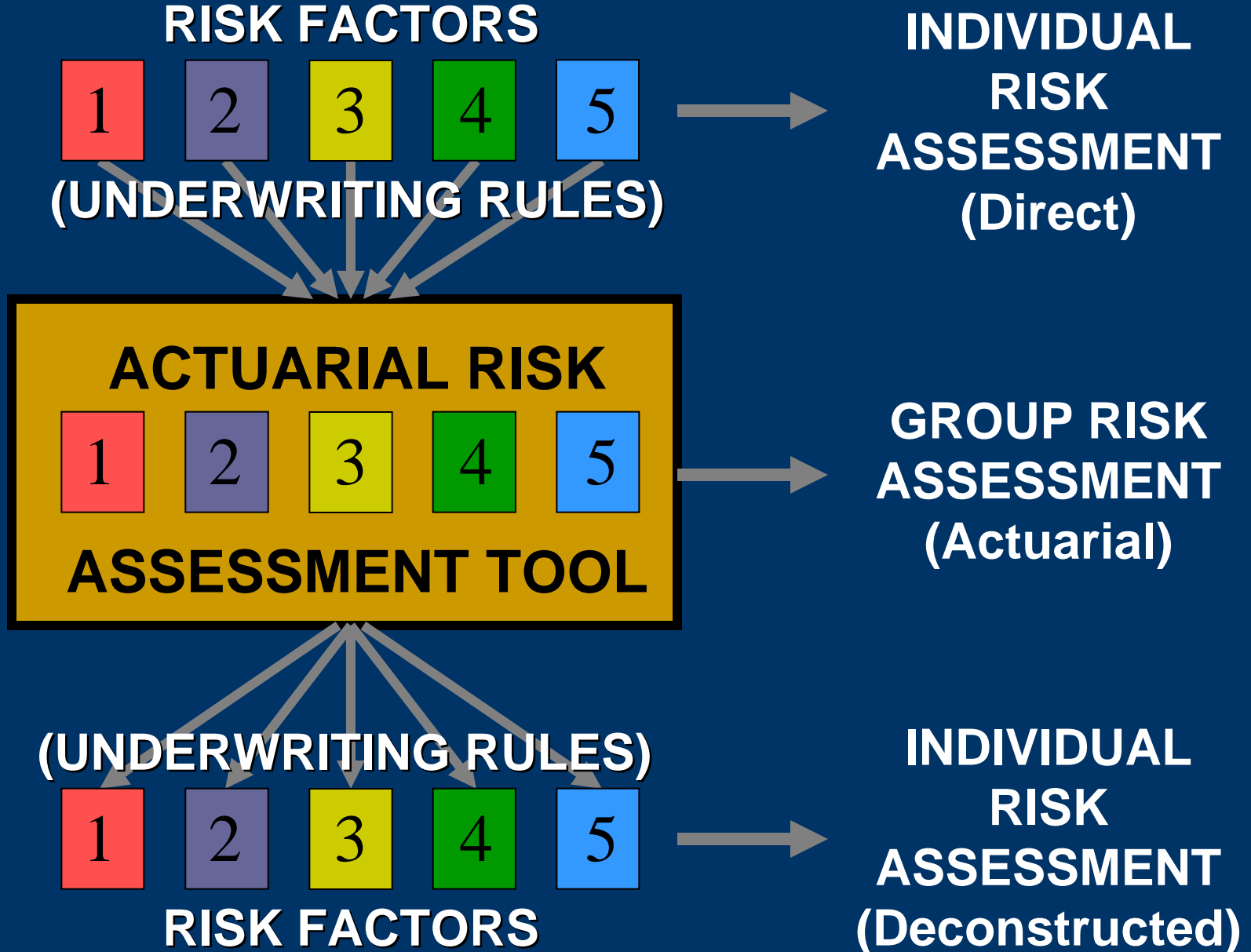
# The Answer to the Last Question

## 6. The Surrogate Mastery Effect

### e. Mastery of Assessment of Dangerousness

- In the end, no one fails. Like soldiers successfully out of boot camp, most have a new sense of confidence, or reduced anxiety about what they face—evaluations and court (actual combat).
- Most have mastered scoring a new “instrument,” mastered a new vocabulary, and may have received tangible evidence of mastery—a certificate of completion.

# RISK ASSESSMENT PATHWAYS



## Integrated Bimodal Risk Assessment

Psychosocial  
Historical Risk  
Formulation

+

Integration of  
evidence-based  
knowledge

Conclusion

Step 1

Step 2

Step 3

## Unimodal Risk Assessment

Actuarial Risk  
Class  
Assignment

Class Risk  
“adjusted” as  
surrogate for  
individual risk

Conclusion

## Integrated Bimodal Risk Assessment

### Psychosocial Historical Risk Formulation

- Psychological History\*
- Criminal History\*
- Psychological Diagnosis\*
- Current Mental State\*
- Personality\*
- Behavioral Patterns, Trends\*
- Expressed intent\*

## Step 1

## Unimodal Risk Assessment

### Actuarial Risk Class Assignment

- Scoring Static Risk Factors (underwriting)\*
- Risk class assignment\*

\* Protocol consistent

## Integrated Bimodal Risk Assessment

Integration of evidence-based knowledge

Step 2

## Unimodal Risk Assessment

Class Risk “adjusted” as surrogate for individual risk

- Case formulation “testing”\*
- Static Risk Factors\*
- Dynamic Risk Factors\*
- Direct Risk Factors\*
- Deconstructed Risk Factors\*
- Case-specific Risk Factors

- Class risk is surrogate for individual risk
- Surrogate risk “testing”
- Alternate risk class assignment\*
- Dynamic Risk Factors\*

\* Protocol consistent

## Integrated Bimodal Risk Assessment

Conclusion

The qualitative Ghilotti question of “serious and well-founded risk” is answered based on qualitative analysis of individual risk.\*

CASE-SPECIFIC

Step 3

## Unimodal Risk Assessment

Conclusion

The qualitative Ghilotti question of “serious and well-founded risk” is answered based on quantitative analysis of group risk.

“THESE PEOPLE”



\* Protocol consistent

## Integrated Bimodal Risk Assessment

Psychosocial  
Historical Risk  
Formulation

+

Integration of  
evidence-based  
knowledge

Conclusion

Step 1

Step 2

Step 3

## Unimodal Risk Assessment

Actuarial Risk  
Class  
Assignment

Class Risk  
“adjusted” as  
surrogate for  
individual risk

Conclusion

# Integrated Bimodal Risk Assessment

C. Is the inmate likely to engage in sexually violent criminal behavior as a result of his diagnosed mental disorder? YES.

This inmate's diagnosable mental disorders of Pedophilia and Antisocial Personality Disorder make him more likely than not to engage in sexually violent predatory behavior. For over 40 years, between the ages of 15 and 57, this inmate has engaged in a persistent and relentless pattern of sexually victimizing prepubescent children, primarily females. In spite of his attempt to minimize his sexual orientation, his comments continue to reveal a sexual arousal pattern toward young girls. Moreover, in spite of his age, he acknowledges a continuing sexual appetite. The combination of continued sexual interest, along with his orientation toward prepubescent girls, results in a significant and high risk for sexual reoffense.

The following are the risk factors that contribute to this inmate's being more likely than not to reoffend:

(1) An individual is considered a lower risk for sexual reoffense if the number of prior arrests is

There are additional factors that contribute to this inmate's high risk for sexual reoffense. These risk factors emerge from recent analyses of characteristics of individuals who are sexual recidivists.

at first offense the higher the risk). This inmate's first known offense occurred when he was 15 or 16.



# Integrated Bimodal Risk Assessment

- (3) An individual is considered a lower risk for sexual reoffense if the age of first arrest for a sex offense is 35, and a higher risk for sexual reoffense if the age at first arrest for a sex offense is 21. This inmate was first arrested for a sex offense at the age of 22 while he was in the United States Army.
- (4) An individual is considered a low risk for sexual offense if the number of prior arrests for sexual offenses is no greater than two. They are considered a higher risk for sexual reoffense if they have five prior arrests for sex offenses. This inmate has five prior arrests for sex offenses.
- (5) An individual is a lower risk of sexual reoffense if they have only one child molestation arrest. They are a higher risk for sexual reoffense if they have two child molestation arrests. This defendant has had five child molestation arrests.
- (6) An individual is considered a higher risk for sexual reoffense if their child victims are both male and female. This inmate has victimized both male and female children.
- (7) An individual is a higher risk for sexual reoffense if they have a documented juvenile offense record. This inmate was arrested for a sex offense and spent time in juvenile hall (one document indicates a "reform school" in San Francisco County).
- (8) An individual is considered a higher risk for sexual reoffense if they have been diagnosed with an Antisocial Personality Disorder. This examination finds that this inmate meets the essential features of an Antisocial Personality Disorder.
- (9) An individual is considered a higher risk for sexual reoffense if they have ever been committed as a Mentally Disordered Sex Offender. This inmate was found to be a Mentally Disordered Sex Offender in the late 1960's and mid- 1970's.

In conclusion, this inmate displays a number of high risk characteristics that make him more likely than not to sexually reoffend. He meets Criteria C.

### **III. CONCLUSION**

Based on the above information, in my opinion, the inmate **does** meet the criteria of a sexually violent predator as described in Section 6600(a) of the California Welfare & Institutions Code.

# DUTY TO INFORM

**FORENSIC  
MENTAL HEALTH  
ACTUARIAL  
RISK  
ASSESSMENT**

**HIGH**  
**CASE APPLICATION**  
Liberty at Issue

**MEDIUM**  
**CASE APPLICATION**  
Liberty Not at Issue

**LOW**  
**GROUP APPLICATION**

# What is there to say or do?

1. Translate ARAI risk classes into “Actuarial justification for selection” of the subject for evaluation:

<b>Risk Category</b>	<b>Selection Justification</b>
<i>High</i>	<i>High</i>
<i>Moderately-High</i>	<i>Moderately-High</i>
<i>Moderately-Low</i>	<i>Moderately-Low</i>
<i>Low</i>	<i>Low</i>

# What is there to say or do?

2. Use evidence-based risk factors (direct or deconstructed) to “test” your individualized psychosocial-historical risk formulation  
(Integrated Bimodal Risk Assessment)
3. Use evidence-based risk factors to “test” class risk as a surrogate for subject’s risk. Calls for disclosure and care to not foster the illusion of equivalency or comparability. (Unimodal Risk Assessment)

# What is there to say or do?

4. Consider whether SAP language “according to his or her professional judgment, shall apply tests or instruments . . .” supports not using “instruments” when the evaluator’s psychosocial-historical risk formulation is so “well-founded” that the evaluator’s professional judgment is that “testing” that formulation would be of no added value.
5. Is Criterion C analysis and reporting necessary in cases in which Criterion B is negative?

# Contact Information

## California Department of Mental Health

**Ron Mihordin, MD, JD, MSP**

**Acting Clinical Director**

**Forensic Evaluation Services**

**Forensic Services**

**Sacramento, California**

**(916) 654-3414    FAX (916) 654-2111**

**[ronald.mihordin@dmh.ca.gov](mailto:ronald.mihordin@dmh.ca.gov)**

**CURRENT**

**NEW**

**OTHER**

**Grammatical...**

**33%**

**33%**

**33%**

**Conceptuall...**

**33%**

**33%**

**33%**

**OK, as is.**

**33%**

**33%**

**33%**



**California Department of Mental Health**

# **Sexually Violent Predator Evaluations**

**An Introduction – A reintroduction**

**Ronald J. Mihordin, M.D., J.D., M.S.P.**

**Acting Clinical Director Evaluation Service**

**Sex Offender Commitment Program**

**Sacramento, California**

**September 7-9, 2011**



# Department of Mental Health

## Sex Offender Commitment Program



Sacramento, California  
September 9, 2011

# Introduction to and Review of The Role of the Expert Witness



Ron Mihordin, M.D., J.D., MSP  
Sex Offender Commitment Program

---

Eric Simon, Ph.D.  
SVP Evaluator - San Luis Obispo



# Scope of Presentation

- For mental health professionals.
- Not private practice oriented.
- Cognitive-Behavioral Therapy for the expert witness.
- Emphasis on process not content.
- Not a comprehensive review of the rules of evidence.



# Scope of Presentation

- 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.



# Glossary

**Trial Courts** - The courts in which issues of fact and law are tried and first determined. (Witnesses appear and testify in trial courts.)

**Appellate Courts** - The courts that hear appeals from lower court decisions. (Appellate court decisions are case law.)



# Glossary

**Lay Witness** - A witness not qualified by the trial court as an expert.

**Expert Witness** - A witness qualified by the trial court as an expert and permitted to testify in the form of opinions.

**Trier of Fact** - The trial judge or jury.



# Glossary

**Direct Examination** – The first examination of a witness by the party calling the witness.

**Cross-examination** – The examination of a witness by an attorney other than the direct examiner upon a matter within the scope of the direct examination.  
(*Examination by the opposing attorney .*)



# The Functions of a Court Trial

## The Traditional Views

The Ideal





# The Functions of a Court Trial

- The trial as forum for fact finding and issue resolution.
- The courtroom as an arena for presentation of facts.
- An arena for issue resolution by application of the law.



# The Functions of a Court Trial

- The adversarial process—a rational contest of alternate propositions.
- The courtroom as a lab where reality is dissected and legally categorized.



# The Functions of a Court Trial

## The Alternative Views

### The Pragmatic



# The Functions of a Court Trial

- A dog and pony show.
- A battle of words.
- A spin contest.
- A magic show.
- An infomercial.



# Why are you in the courtroom?

- To assist the trier of fact in understanding issues beyond the realm of common experience.
- To provide technical expertise, special knowledge.
- As a reference source on technical aspects of psychiatry/psychology.



# Why are you in the courtroom?

- To tutor the trier of fact in psychiatry/psychology.
- To charm and awe the trier of fact.
- To shock and awe the trier of fact.
- To neutralize opposing witnesses.



# Why are you in the courtroom?

- To out-number/out-weight the opposing witnesses.



# Why are you in the courtroom?

- To out-number/out-weigh the opposing witnesses.
- As an evidence maker—the Ruppelstiltskin effect.





# Why are you in the courtroom?

- To out-number/out-weight the opposing witnesses.
- As an evidence maker—the Rupelstiltskin effect.
- As a spokesperson for the attorney—the Charlie McCarthy effect.



# What Roles Will You Play?

- Treating psychiatrist/psychologist.
- Forensic psychiatrist/psychologist.
- Treating/forensic hybrid witness.



# What Roles Will You Play?

- Roles of circumstance?
- Roles ascribed by others?
- Self-ascribed roles?
- Will you be an **Awesome Wizard?**
- Will you be **Trusted Teacher?**



# The Awesome Wizard

- Ivy League education.
- Multiple academic degrees.
- Multiple board certification.
- Academic appointments.
- Academic honors.



# The Awesome Wizard

- Board/commission membership.
- Professional societies.
- Professional honors.
- Research.
- Multiple publications.
- Recognition in mass media.
- Radio/TV appearances.



# The Awesome Wizard

- Celebrity clients.
- High profile cases.
- Professional web site.
- Profession blog.
- *A Great Communicator.*
- Charisma.



# The Trusted Teacher

- Has the requisite education.
- Has the requisite degree.
- Has the requisite license.
- Knows the facts of the case.
- Knows the applicable law.
- Communicates effectively.
- Appears (is) trustworthy.



# Remember

- You don't have to be an awesome wizard to be an expert witness.
- You can choose your role.
- You can reject ascribed roles.
- You can write the script.





# The Rules of the Game

## The California Evidence Code

- Witness competency—General rule  
(Evidence Code § 700)
- Disqualification of witness  
(Evidence Code § 701)
- Personal knowledge of witness  
(Evidence Code § 702)
- Lay witnesses; opinion testimony  
(Evidence Code § 800)



# The Rules of the Game

## The California Evidence Code

### Lay Witness (Synopsis)

- With exceptions, every one, irrespective of age, is qualified to be a witness and no one is disqualified to testify.
- Inability to express oneself so as to be understood is disqualifying.
- Inability to understand the duty to tell the truth is disqualifying.



# The Rules of the Game

## The California Evidence Code

### Lay Witness (Synopsis)

- A lay witness may testify in the form of an opinion if such an opinion is permitted by law, including an opinion that is:
  - ✓ Based on the perception of the witness.
  - ✓ Helpful to understanding his testimony.



# The Rules of the Game

## The California Evidence Code

- **Qualification as an expert witness  
(Evidence Code § 720)**
- **Cross-examination of expert witness  
(Evidence Code § 721)**
- **Credibility of expert witness  
(Evidence Code § 722)**
- **Expert witness; opinion testimony  
(Evidence Code §§ 801- 805)**



# The Rules of the Game

## The California Evidence Code

### Evidence Code § 720

Any one is qualified to testify as an expert if he has **special knowledge, skill, experience, training, or education** sufficient to qualify him as an expert on the subject to which his testimony relates.



# The Rules of the Game

## The California Evidence Code

### Evidence Code § 721

The expert witness may be cross-examined as to:

- His or her qualifications.
- The subject of his or her testimony.
- Matters upon which the opinion is based.
- The reasons for his or her opinion.



# The Rules of the Game

## The California Evidence Code

### Evidence Code § 721

An expert who gives an opinion may not be cross-examined in regard to a scientific text, journal, etc., unless:

- He referred to, considered or relied on it.
- It has been admitted in evidence.
- It has been established as an authority.



# The Rules of the Game

## The California Evidence Code

### Evidence Code § 722

Compensation and expenses paid to an expert is a proper subject of cross-examination—is relevant to witness credibility and weight of his testimony.





# The Rules of the Game

## The California Evidence Code

### Evidence Code § 801

Expert opinions are limited to those that are:

On a subject sufficiently beyond the common experience so that expert opinion would assist the trier of fact.



## Evidence Code § 801

Expert opinions are limited to those that are **based on matter** (including special knowledge, training, etc.) that is:

- **Perceived by** the witness, or
- **Personally known** to witness, or
- **Made known** to witness, **whether admissible or not**, and that may be **reasonably relied upon by an expert** forming an opinion upon the subject.



# The Rules of the Game

## The California Evidence Code

- Statement of basis of opinion  
(Evidence Code § 802)

On direct examination a witness may state the reasons for his opinion and the matter (including training, skill, special knowledge, etc.) upon which it is based.



# The Rules of the Game

## The California Evidence Code

### Evidence Code § 802

The expert opinion may be based on:

- Direct observations.
- Facts assumed in a hypothetical question.
- Facts, opinions, and information from secondary sources deemed by the court to be reasonably reliable.



# The Rules of the Game

## The California Evidence Code

### Evidence Code § 805

Opinion testimony may embrace the ultimate issue to be decided by the trier of fact.



# The Rules of the Game

## “Substantial Evidence”

The opinion of a qualified expert may be based on information that is itself inadmissible hearsay **if the information is reliable and of the type reasonably relied upon by experts on the subject.**

*P. v. Gardeley* (1996)  
cited in *P. v. Dodd* (2005)



# The Rules of the Game

## “Substantial Evidence”

*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.***

*P. v. Gardeley (1996)  
cited in P. v. Dodd (2005)*



# The Rules of the Game

- *Frye v. United States* (1923) and *People v. Kelly* (1976).
- Kelly-Frye Standard—**General acceptance in the scientific community.**
- *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993).
- The *Daubert* trilogy—*Daubert*, *General Electric Co. v. Joiner* (1997), and *Kumho Tire Co. v. Carmichael* (1999).





# The Rules of the Game

- *People v. Leahy (1994)* – Post-Daubert, the Kelly-Frye test was retained in California.
- Kelly-Frye only applies to “**new scientific techniques.**”
- *People v. Stoll (1989)* and *People v. Ward (1999)* – Expert psychological or psychiatric testimony is **not scientific evidence subject to Kelly-Frye.**



# The Rules of the Game

## *“Reasonable medical certainty?”*

- A legal term searching for a meaning.
- No definition in case law.
- No appellate court consensus nationally.
- No appellate court definition in California.
- How-to books for medical experts: “More likely than not”—“51% or greater.”



# The Rules of the Game

*“Reasonable medical certainty?”*

*Although judges expect, and sometimes insist, that the expert opinions be expressed with “reasonable medical certainty,” and though attorneys ritualistically intone the phrase, no one knows what it means!*

Lewin, J. L. (1998)



# The Rules of the Game

*“Reasonable medical certainty?”*

*No consensus exists among judges, attorneys, or academic commentators as to whether “reasonable medical certainty” means “more probable than not” or “beyond a reasonable doubt” or something in between.*

Lewin, J. L. (1998)



# What to do in Court

## The Short List

- Don't try to be a lawyer.
- Know the facts of the case.
- Know the legal definitions that relate to the case.
- Know what you know and how you know it.
- Know who you are and who you're not.
- Talk straight.
- Be calm, cool, and professional.



# What to do in Court

## The MH Consensus

# Some Ethical Principles



# Ethical Principles

## Honesty and Objectivity

*Forensic psychiatrists should adhere to the principle of **honesty** and should strive for **objectivity**. Although they may be retained by one part to a civil or criminal matter, psychiatrists should adhere to these principles when conducting evaluations, applying clinical data to legal criteria, and expressing opinions.*

AAPL (2005)



# Ethical Principles

## Honesty and Objectivity

*Forensic psychiatrists enhance the honesty and objectivity of their work by basing their forensic opinions, forensic reports and forensic testimony on **all available data**.*

*They communicate the honesty and objectivity of their work, and the soundness of their clinical opinion, by **distinguishing between** verified and unverified information as well as among clinical **“facts,” “inferences,” and “impressions.”***

AAPL (2005)





# Ethical Principles

## 1.01 Integrity

*Forensic practitioners strive for accuracy, honesty, and truthfulness in the science, teaching, and practice of forensic psychology and they strive to **resist** partisan **pressures** to **provide services in any ways that might tend to be misleading or inaccurate.***

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



# Ethical Principles

## 1.02 Impartiality and Fairness

*Forensic practitioners recognize the adversarial nature of the legal system and strive to **treat all participants and weigh all data, opinions, and rival hypotheses impartially.***

*When conducting forensic examinations, forensic practitioners strive to be **unbiased and impartial, and avoid partisan presentation of unrepresentative, incomplete, or inaccurate evidence that might mislead finders of fact.***

*Specialty Guidelines for Forensic Psychology,  
APA Council of Representatives (2011)*

# Ethical Principles

## 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**.

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

# Ethical Principles

## 11.01 Accuracy, Fairness, and Avoidance of Deception

Forensic practitioners make reasonable efforts to ensure that the products of their services, as well as their own public statements and professional **reports and testimony**, are communicated in ways that **promote understanding** and **avoid deception**.

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

# Ethical Principles

## 11.01 Accuracy, Fairness, and Avoidance of Deception

When providing reports and other sworn statements or testimony in any form, forensic practitioners strive to present their conclusions, evidence, opinions, or other professional products in a fair manner. **Forensic practitioners do not, by either commission or omission, participate in misrepresentation of their evidence . . .**

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



# Ethical Principles Qualifications

*Expertise in the practice of forensic psychiatry should be claimed only in areas of actual knowledge, skills, training, and experience.*

AAPL (2005)



# Ethical Principles

## 2.03 Representing Competencies

Forensic practitioners adequately and accurately inform all recipients of their services (e.g., attorneys, tribunals) about relevant aspects of the nature and extent of their experience, training, credentials, and qualifications, and how they were obtained

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



# Ethical Principles

## Role Conflict

*The forensic evaluation and the credibility of the practitioner may be undermined by **inherent conflicts** in the differing clinical and forensic roles. Treating psychiatrists should generally avoid acting as an expert witness for their patients or performing evaluations of their patients for legal purposes.*

AAPL (2005)





# Ethical Principles

## Role Conflict

*Psychiatrists who take on a forensic role for patients they are treating may adversely affect the therapeutic relationship.*

*When requirements of geography or related constraints dictate the conduct of a forensic evaluation by the treating psychiatrist, the dual role may be unavoidable; otherwise, **referral to another evaluator is preferable.***

AAPL (2005)



# Ethical Principles

## 4.02.01 Therapeutic-Forensic Role Conflicts

Providing forensic and therapeutic psychological services to the same individual or closely related individuals involves multiple relationships that may impair objectivity and/or cause exploitation or other harm.

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



# What to do in Court

- Without credibility, your facts, your analysis, your conclusions, no matter how clearly expressed, will lose their effectiveness.
- Like in the game of Monopoly, as a mental health professional, you start with a certain amount of credibility when you take the witness stand.
- Credibility is yours to lose.



# What to do in Court

Maintain and enhance credibility by:

- Telling the truth - even when it hurts.
- Knowing the facts of the case.
- Respecting the facts of the case.
- Nonpartisan objectivity and fairness.
- Being confident - when warranted.
- Saying, “I don’t know.” - when warranted.
- Being a *mensch*.



# What to do in Court

Lose credibility by:

- Not being truthful.
- Not knowing the facts of the case.
- Not respecting the facts of the case.
- Showing bias and partisanship.
- Not being confident—when warranted.
- Being a know-it-all.
- Showboating.
- Being fluffy, huffy, or stuffy.



# What to do in Court

## The MH Consensus

# Preparation and Performance



# What to do in Court Preparation

- Review the facts of the case.
  - ✓ Your copies of the documents.
  - ✓ Your original notes.
  - ✓ Your report.
- Review the subject(s) of the case.
  - ✓ The disorder(s) (texts, DSM-IV-TR).
  - ✓ The treatment (drugs, PDR).
- Review relevant legal definitions.



# What to do in Court Preparation

- Organize and tab your materials.
- Organize and tab your thoughts.
  - ✓ What are the legal issues?
  - ✓ What are the clinical issues?
  - ✓ Which facts are relevant?
  - ✓ Gaps in your data base?
  - ✓ Weaknesses in your analysis?





# What to do in Court Preparation

- Organize and tab your thoughts.
  - ✓ Weaknesses in your conclusions?
  - ✓ Alternate reasonable formulations?
  - ✓ Foreseeable cross-examination Qs?
  - ✓ How will you respond?
  - ✓ What is “The Story?”
  - ✓ How are you going to tell it?



# What to do in Court Preparation

- How to tell the story.
  - ✓ Chronologically?
  - ✓ Around key points?
  - ✓ C-B-C order:

Conclusion



Background



Conclusion



# What to do in Court Preparation

- Rehearse your performance.
- A pre-trial conference with the attorney.
  - ✓ Insist on it.
  - ✓ Don't go to court without it.
- Ask the attorney:
  - ✓ What she is going to ask you.
  - ✓ What she expects you to say.



# What to do in Court Preparation

- Ask the attorney:
  - ✓ What previous witnesses have said.
  - ✓ About foreseeable cross-examination.
- Tell the attorney:
  - ✓ About skeletons in your closet.
  - ✓ What you plan to or can say.
  - ✓ What you don't plan to or can't say.



# What to do in Court Preparation

- Tell the attorney:
  - ✓ About the weaknesses in your testimony.
  - ✓ About the clinical complexities.
  - ✓ What questions to ask you.
  - ✓ How to ask you those questions.



# What to do in Court Preparation

- Restructure your presentation plan, if indicated.
- Immerse yourself in the case.
- Clear your mind—clear your calendar.
  - ✓ Get some rest—sleep.
  - ✓ Don't schedule distractions.
  - ✓ Plan to be early and to stay late.



# What to do in Court Performance

- As you get close to the courthouse and the courtroom, remember **you are being watched.**
  - ✓ The person you cut off in the parking lot may be a juror.
  - ✓ The fellow who hears your politically charged joke in the elevator may be your cross-examiner.



# What to do in Court Performance

- Stay out of the courtroom until you are called to the witness stand.
- Turn off your cellular phone/beeper.
- After being sworn in:
  - ✓ Be seated.
  - ✓ Lay out your documents.
  - ✓ Lay out your supplies.
  - ✓ Adjust the microphone.





# What to do in Court Performance

- If asked to give your qualifications:
  - ✓ Do so concisely not exhaustively.
  - ✓ Inform—don't sedate.
- Before responding to any question:
  - ✓ **Understand the question.**
  - ✓ Pause to think.
  - ✓ Pause for objections.



# What to do in Court Performance

- Answer the questions you are asked.
- Don't give answers to questions not asked.
- If you think your answer would be clearer if you could say more than the question required, say that, and **ask for permission** to do so.



# What to do in Court Performance

- Answer the direct examiner's questions.
  - ✓ Short answers when possible.
  - ✓ Narrative when requested.
    - Talk like you write?
    - A travelogue format.
    - Organize, organize, organize.
    - Economize, economize, economize.



# What to do in Court Performance

- Answer the cross-examiner's questions.
  - ✓ The less said, the better.
  - ✓ "Yes" or "no" when possible.
  - ✓ Short answers when necessary.
- Do not challenge the inherent premises when answering hypothetical questions.



# What to do in Court Performance

- When you can't answer a question because you don't understand it, say that.
- When you can't answer a question because it is outside your area of special knowledge, training or experience, say that.
- When your testimony is challenged on cross-examination, **embrace the challenge** as an opportunity to further clarify your point.
- **Restate, explain, clarify—don't defend.**



# What to do in Court

## Some No Brainer Qs and As

Q: Can your opinion be in error?

A: Yes.

Q: Isn't it possible that you were deceived by the patient?

A: Yes.

Q: Before testifying did you discuss the case with the attorney?

A: Yes.



# What to do in Court

## Some No Brainer Qs and As

Q: Psychology isn't a precise science like chemistry or physics, is it?

A: No.

- When the question contains the words *always* or *never*, the answer is "No."
- When the question starts with the phrase, "isn't it possible," the answer is "Yes."
- "I don't know," is always the right answer if it's true.



# What to do in Court Performance

- If you are confronted with a relevant error or misstatement in your report or testimony:
  - ✓ Don't fight reality.
  - ✓ Acknowledge the error.
  - ✓ Decide if the error calls for a new opinion.
    - If yes, revise your opinion accordingly.
    - If not, say that and explain.





# What to do in Court Performance

If you are ambushed with questions about earlier statements you made in writings, reports, publications, or testimony in other courts or other contexts, don't answer until you have had an opportunity to refresh your memory by reviewing a trustworthy copy of the statement and the full context in which the statement was made.



# What to do in Court Performance

*Experts must not advocate. To be effective, experts must merely answer questions directly, and admit the obvious, no matter where it may lead . . . The expert should simply understand that it's the lawyer's job to argue the case, and the expert's to remain objective.*

Berg, D. (2005)



# What to do in Court Performance

*Each witness chair comes equipped with a stabilizer control. It is a control easily within the reach of every expert—the lever marked “truth.”*

Baker, T. O. (1983)



# What to do in Court Performance - Language

- You're not communicating unless the hearer understands your words.
- **Don't underestimate** the trier of fact's intelligence.
- **Don't overestimate** the trier of fact's experience, background, or knowledge.
- Use respectful everyday words instead of technical terms when possible, or
- Explain technical terms simply—in a way that doesn't put off the trier of fact.



# What to do in Court

## Problem Language for Legal Experts

- “delusional ideation”
- “affect”
- “neologisms”
- “looseness of associations”
- “flight of ideas”
- “blocking”
- “lability”

Petrella and Poythress (1983)



# What to do in Court

## Problem Language for Legal Experts

- “non-specific, unsystematized paranoid ideation”
- “oriented to time, place, and person”
- “tangentiality”
- “flat affect”
- “grandiosity”

Petrella and Poythress (1983)



# What to do in Court Performance - Language

- Analogies are the “Great Communicators.”
- Analogies don’t prove propositions.
- Analogies do “bring points home.”
- But, don’t be an analogy spendthrift.
- Save them for key points and complex issues.
- Analogies can give life to brain-numbing technical and numerical data.



# What to do in Court

## The Facts and Figures:

- The first hard drive (RAMAC), delivered on September 13, 1956, weighed 2,140 lbs. and stored 5 megabytes of data.
- Today, a video ipod weighs 5.5 ounces and holds up to 60 gigabytes.
- In 1956, the RAMAC cost \$50,000, or \$10,000 per megabyte.
- Today, a gigabyte of storage on a 3.5 inch hard drive can cost less than 50 cents.





# What to do in Court

## The Analogy:

*A car in 1956 cost about \$2,500, could hold five people, weighed a ton, and could go as fast as 100 mph. If the auto industry had kept the same pace as disk drives, a car today would cost less than \$25, hold 160,000 people, weigh half a pound and travel up to 940 mph.*

**D. Fost, San Francisco Chronicle**



# What to do in Court Performance - Costume

- Dress like the typical professionals (lawyers, doctors, local TV news anchors) in the community dress for work.
- Dress to blend in not to stand out.
- Eye-catching jewelry is out.
- Dress comfortably.
- Dressing for court is not a science.



# What to do in Court

## Performance-Demeanor

- Make eye contact:
  - ✓ With the questioner.
  - ✓ With the trier of fact.
  - ✓ As directed.
  - ✓ With the questioner – short answers.
  - ✓ Initially briefly with the questioner then shift to jurors – longer answers.
  - ✓ With all the jurors, in turn –don't stare.



# What to do in Court

## Performance-Demeanor

- Humor:
  - ✓ Is for comedians not witnesses.
  - ✓ Can backfire in court.
  - ✓ Feel free to join the crowd and laugh.
  - ✓ Laughing and smiling are OK.
  - ✓ Smirking is not OK.



# What to do in Court Performance-Demeanor

- Don't head-butt an attorney.
  - ✓ There is no rational reason for an expert witness to display anger in the court room.
  - ✓ Witnesses don't win verbal fights with cross-examiners—except in movies.
  - ✓ Displaying anger, frustration, or impatience is a sure way to lose credibility.



# What to do in Court

## Performance-Demeanor

### Do Be:

- ✓ Objective
- ✓ Personable
- ✓ Courteous
- ✓ Humble
- ✓ Helpful
- ✓ Educational
- ✓ Credible
- ✓ Clear
- ✓ Consistent
- ✓ Straight forward
- ✓ Cooperative
- ✓ Responsive
- ✓ Honest
- ✓ Expert



# What to do in Court

## Performance-Demeanor

### Don't Be:

- ✓ Arrogant
- ✓ Defensive
- ✓ Combative
- ✓ Uncertain
- ✓ Nitpicky
- ✓ Overzealous
- ✓ Inappropriate
- ✓ Confusing
- ✓ Slick
- ✓ Condescending
- ✓ Hostile
- ✓ Inconsistent
- ✓ Robotic
- ✓ Emotional
- ✓ Angry
- ✓ Unintelligible



# What to do in Court

## Performance-Demeanor

Ideally, the demeanor of an expert witness will convey the impression that he or she is highly engaged, interested in the legal and clinical issues of the case but indifferent to which party prevails.





# What to do in Court Performance After Testifying

- When excused, ask for clarification as to whether you may be recalled or are free to leave the area.
- Say, “Thank you.”
- Leave the courtroom.



# What Judges Think

## Probative Value of Expert Testimony

### The Rating Scale

- 7 to 9 – Element/item **essential** to dispensing justice. Trier-of-fact would be seriously hampered if the element/item not included.
- 4 to 6 – Element/item **desirable** for inclusion in expert testimony. Could do with out it, but inclusion perhaps allows for more fully informed decision.



# What Judges Think

## Probative Value of Expert Testimony

### The Rating Scale

- 1 to 3 – Element/item unnecessary, uninformative, or **undesirable** as a feature of expert testimony.

N. Poythress (1981)

<b>Mental Health Testimony Element</b>	<b>Judges' Probative Value Rating</b>	
	<b>Median Rating</b>	<b>Rank Order</b>
<b>Descriptive testimony.</b>	<b>7.83</b>	<b>1</b>
<b>Ultimate legal issue.</b>	<b>7.60</b>	<b>2</b>
<b>Interpreting the legal standard for mental disorder.</b>	<b>6.83</b>	<b>3</b>
<b>Theoretical accounts or explanations for legally relevant behavior.</b>	<b>6.00</b>	<b>4</b>
<b>Diagnosis.</b>	<b>5.83</b>	<b>5</b>
<b>Weighing of different motives or explanations for legally relevant behavior.</b>	<b>5.50</b>	<b>6</b>
<b>Statistical/actuarial data on diagnosis or clinical observations.</b>	<b>5.25</b>	<b>7</b>
<b>Statistical/actuarial data on the relationship between clinical and legally relevant behavior.</b>	<b>3.20</b>	<b>8</b>

# Closing Arguments Analysis

## Definitions

**BioNar:** Historical/Biographical/Narrative – Including prisoner’s personal history, crime history, medical-psychological history and diagnosis, not including “actuarial” risk assessment.

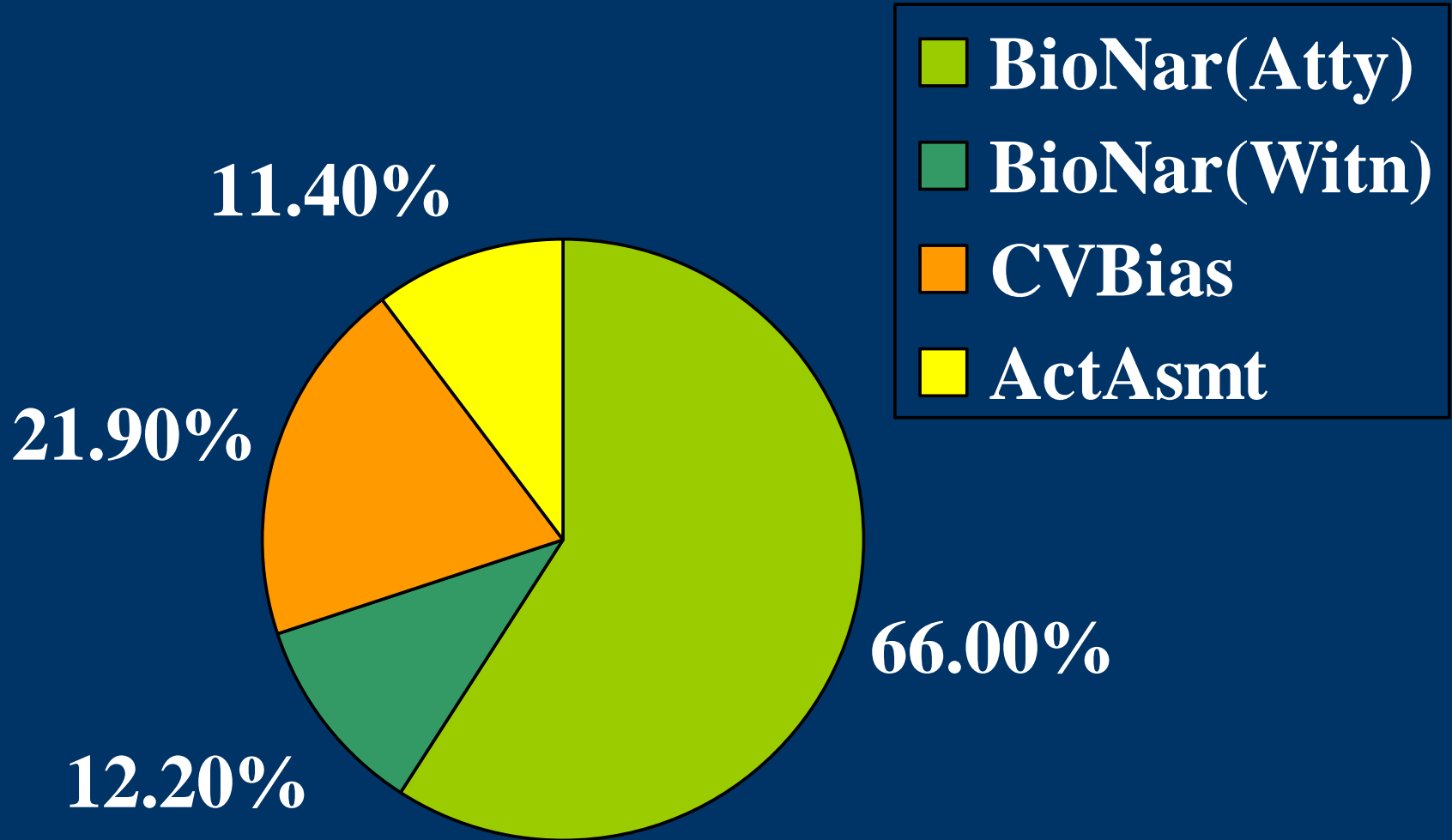
**BioNar(Atty):** Attorney BioNar statements without source attribution.

**BioNar(Witn):** Attorney BioNar statements attributed to witnesses.

**CVBias:** Witnesses’ Curricula Vitae/Background/Bias

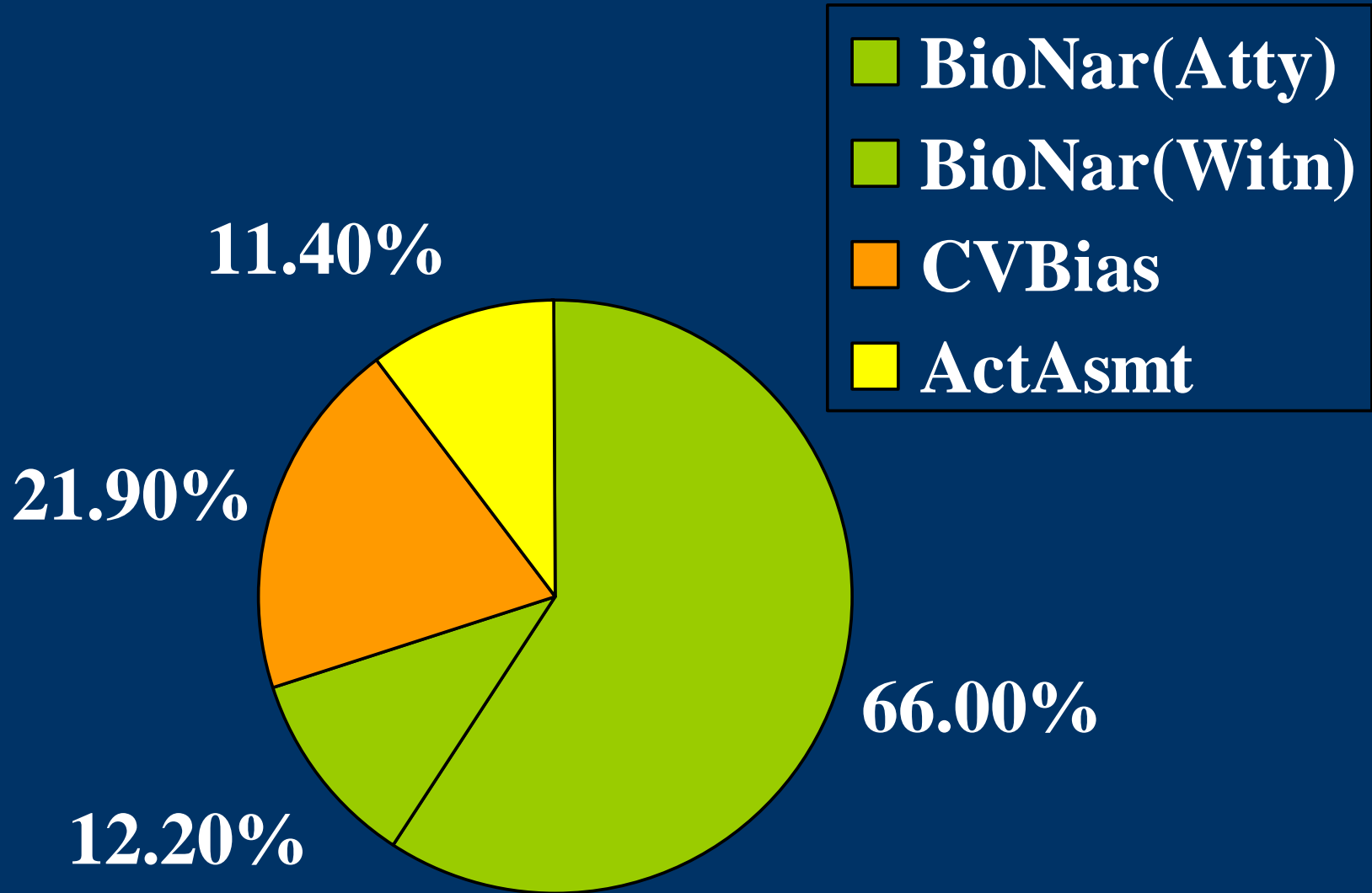
**ActAsmt:** Testimony based on “actuarial” risk assessment.

# District Attorney – Initial Closing Argument



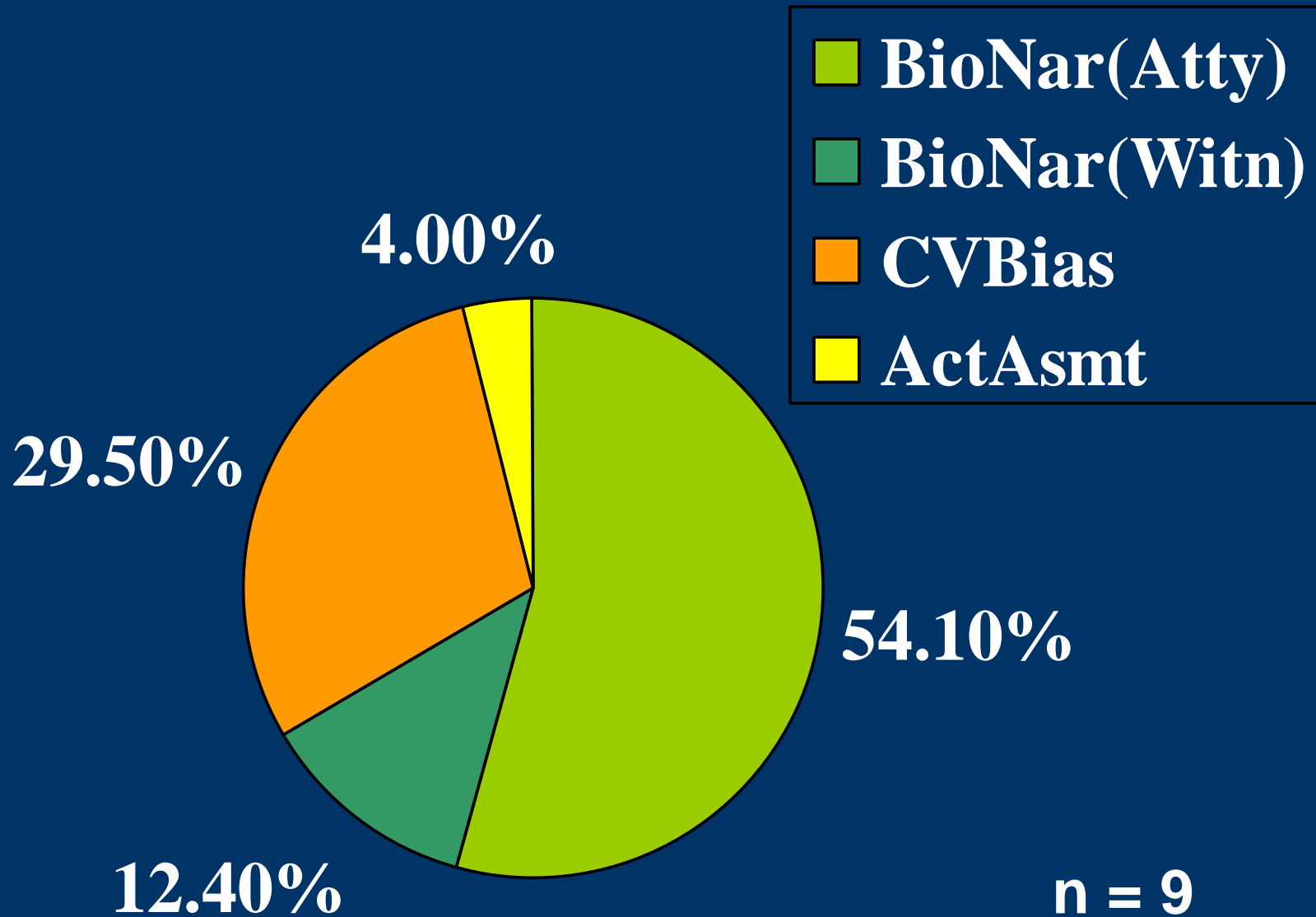
n = 9

# District Attorney – Initial Closing Argument



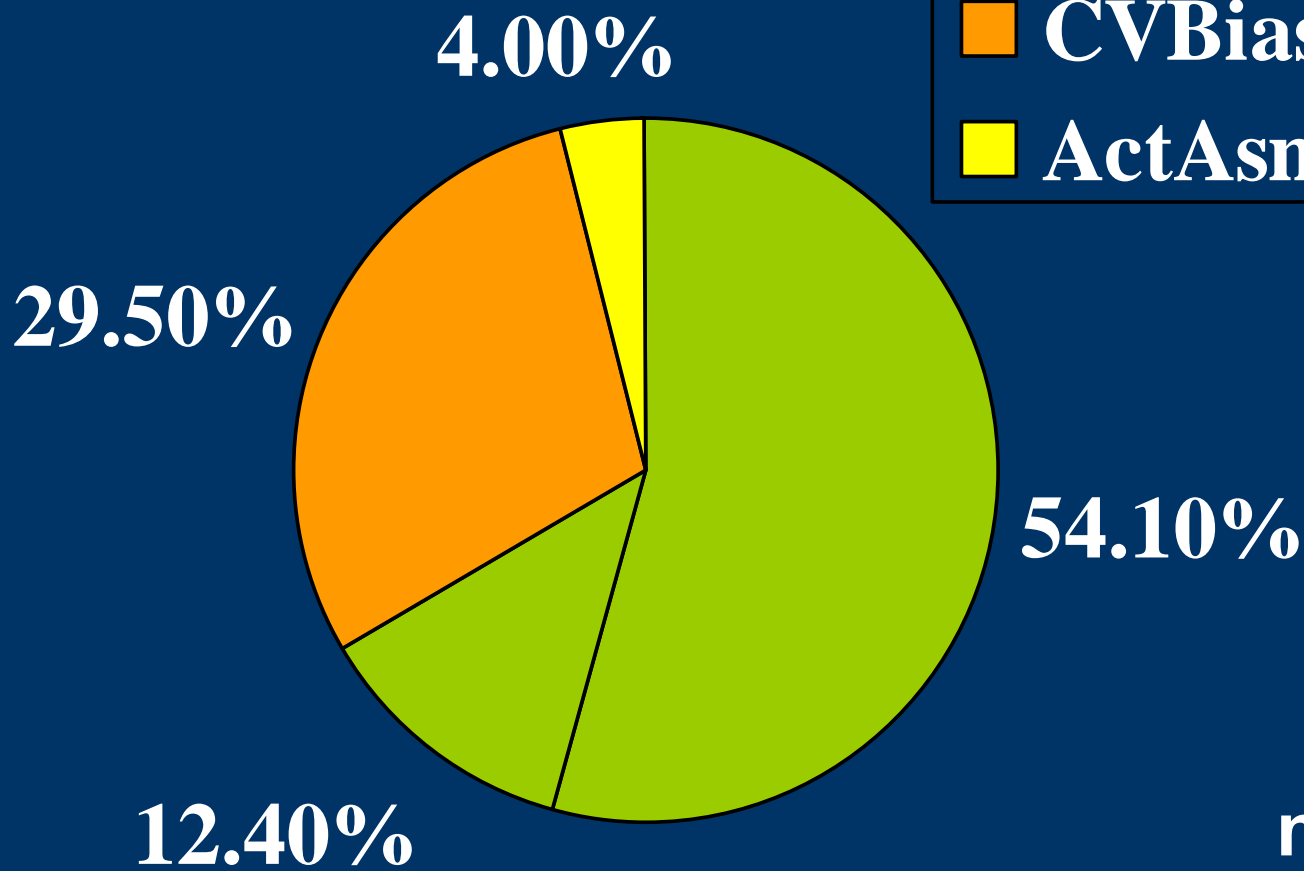
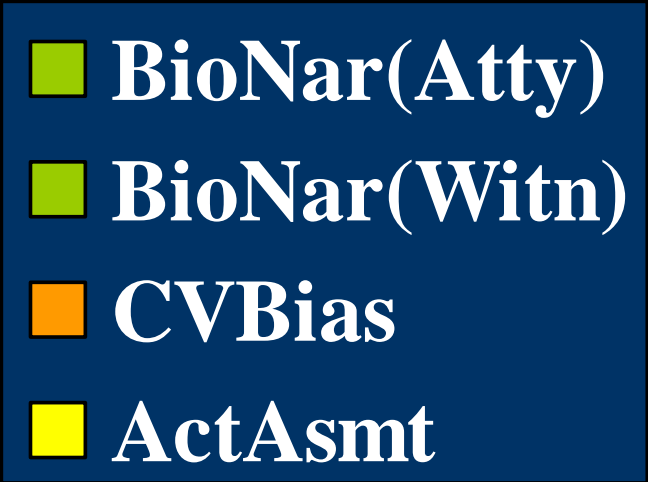
**n = 9**

# District Attorney – Rebuttal Argument

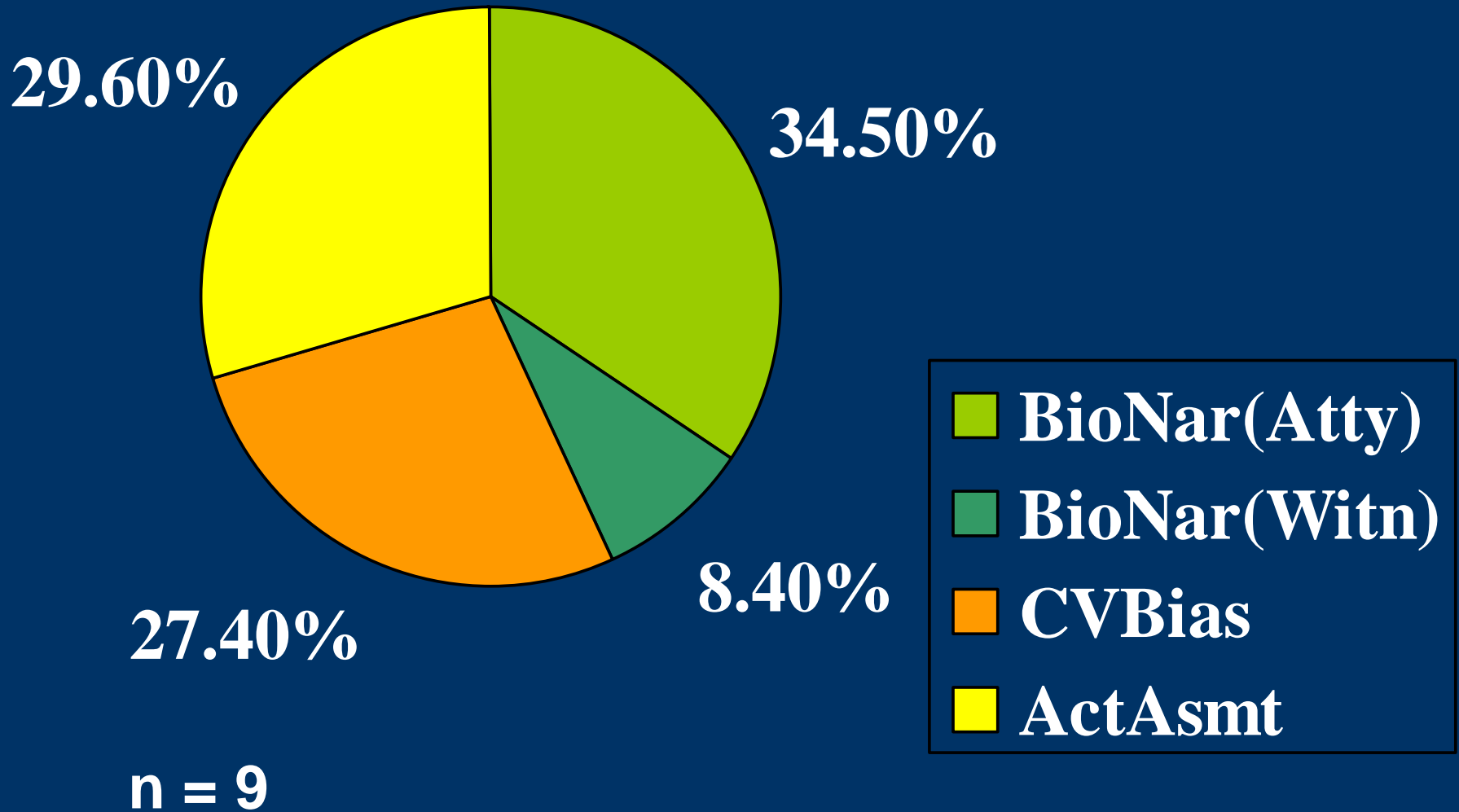




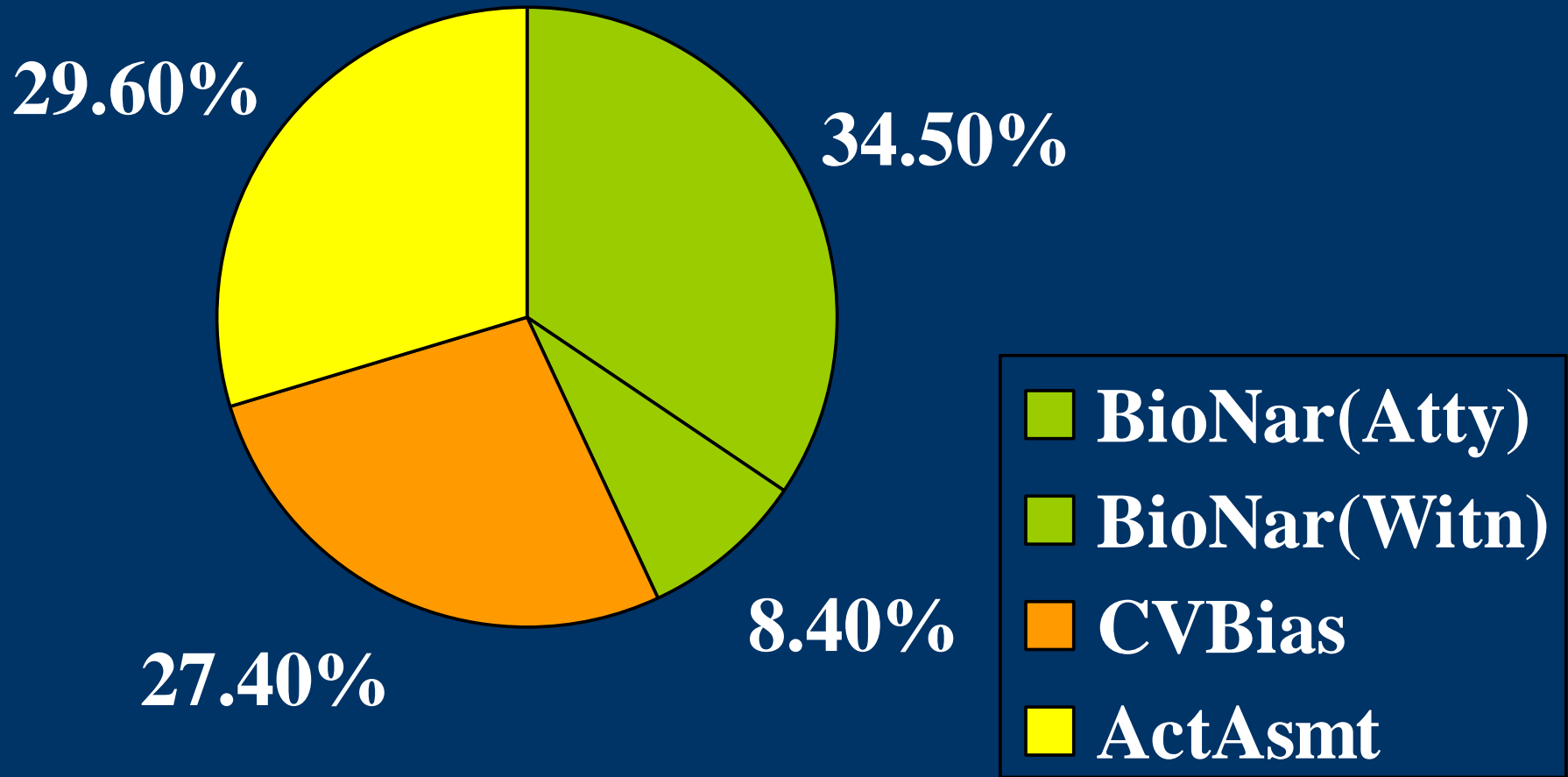
# District Attorney – Rebuttal Argument



n = 9



**Defense Attorney – Closing Argument**



**n = 9**

## **Defense Attorney – Closing Argument**



# What Lawyers and Judges Think

## Expert Testimony Problems

- Experts abandon objectivity and become advocates for their client position.
- Excessive expense of party-hired experts.
- Testimony of questionable value.
- Conflicts among experts that defy reasoned assessment.
- Disparity in competence of opposing experts.

Garg and Eder (2006)



# Being an Expert Witness

## The Three Keys



**Knowledge**



**Intelligence**



**Character**



# Contact Us

## California Department of Mental Health

**Ron Mihordin, M.D., J.D.**

**Chief MDO Clinical Coordinator**

**Forensic Services**

**(916) 654-3414    FAX (916) 654-2111**

**[ronald.mihordin@dmh.ca.gov](mailto:ronald.mihordin@dmh.ca.gov)**



# References

**Baker, T.O. (1983). *Operator's Manual for a Witness Chair*. Milwaukee, WI: Defense Research Institute**

**Berg, D. (2005). *The Trial Lawyer: What It Takes to Win*. Chicago, IL: American Bar Association**

**Brodsky, S.L. (1991) *Testifying in Court: Guidelines and Maxims for the Expert Witness*. Washington, DC: American Psychological Association**



# References

**Brodsky, S.L. (1999) *The Expert Expert Witness: More Maxims and Guidelines for Testifying in Court.* Washington, DC: American Psychological Association**

**Brodsky, S.L. (2004) *Coping With Cross-examination and Other Pathways to Effective Testimony.* Washington, DC: American Psychological Association**





# References

**Curran, W.J. and McGarry, A.L. (1986) *The Psychiatrist as Expert Witness*. In Curran, W. J. (Ed.) *Forensic Psychiatry and Psychology: Perspectives and Standards for Interdisciplinary Practice*. Philadelphia, PA: F. A. Davis Company**

***Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579.**

***People v. Dodd* (2005) 133 Cal. App. 4<sup>th</sup> 1564.**

***Frye v. United States* (1923) 293 F. 1013.**



# References

**Gabriel, R. (2006). *Training in Court Testimony.* (Workshop) Morro Bay, CA: California Department of Mental Health.**

***People v. Gardeley (1996) 14 Cal. App. 4<sup>th</sup> 605.***

**Garg, S.K. and Eder, E. (2006) *Selecting and Working with Scientific and Technical Experts.* In Cwik, C.H. (Ed.) and Witt, H. E. (Ed.) *Scientific Evidence Review: Current Issues at the Crossroads of Science, Technology, and the Law.* Chicago, IL: American Bar Association**



# References

**Gutheil, T.G. (1998). *The Psychiatrist as an Expert Witness*. Washington, DC: American Psychiatric Press**

**Gutheil, T.G. (1998). *The Psychiatrist in Court*. Washington, DC: American Psychiatric Press**

***People v. Kelly* (1976) 17 Cal. 3<sup>rd</sup> 24.**



# References

**Kennedy, W.A. (1986) *The Psychologist as Expert Witness*. In Curran, W. J. (Ed.) *Forensic Psychiatry and Psychology: Perspectives and Standards for Interdisciplinary Practice*. Philadelphia, PA: F. A. Davis Company**

***People v. Leahy* (1994) 8 Cal. 4<sup>th</sup> 587.**

**Lewin, J.L., *The Genesis and Evolution of Legal Uncertainty About “Reasonable Medical Certainty,”* 54 Maryland Law Review 380 (1998)**



# References

- Melton, G.B., et al. (1987) *Psychological Evaluations for the Courts*. New York, NY: The Guilford Press.**
- Petrella and Poythress. (1983) *The Quality of Forensic Evaluations: An interdisciplinary Study*. 51 J. Consulting Clinical Psychology 76.**
- Poythress N. (1981) *Conflicting Postures for Mental Health Expert Witnesses: Prevailing Attitudes of Trial Court Judges*. Unpublished manuscript. Ann Arbor, MI: Center for Forensic Psychiatry.**



# References

Resnick, P.J. (1988). *The Psychiatrist as Expert Witness*. (Workshop) San Francisco, CA.

Rothstein, R.F. et al. (2003) *Evidence in a Nutshell, 4<sup>th</sup> Edition*. St. Paul, MN: Thomson-West.

*People v. Stoll* (1989) 49 Cal. 3<sup>rd</sup> 1136.

Swank, P.R. (2006) *The Philosophy of Menschkeit*.  
[www.peterswank.com/menschkeit.htm](http://www.peterswank.com/menschkeit.htm)



# References

**Van Gorp, W. (1996) *How to Be an Expert Witness*. (Workshop) 9<sup>th</sup> Annual U.S.Psychiatric and Mental Health Congress, San Diego: CME Inc.**

***People v. Ward* (1999) 71 Cal. App. 4<sup>th</sup> 368.**

**\_\_\_\_\_ (2005) *Ethics Guidelines for the Practice of Forensic Psychiatry*. American Academy of Psychiatry and the Law.**



# References

\_\_\_\_\_ (2006) *Specialty Guidelines for Forensic Psychology*. American Psychological Association and American Board of Forensic Psychology.





# **What I Do and How I Do It**

**Dr. Ron Mihordin**



# What I do and how I do it.

Ron Mihordin, M.D., J.D.

- Contact witness coordinator or attorney when I receive the subpoena.
- Alert my supervisor and block out time for appearance.
- Make cancelable travel arrangements as soon as appearance time confirmed.
- Review my file, my notes, my report.



# What I do and how I do it.

Ron Mihordin, M.D., J.D.

- Review relevant legal definitions.
- Review relevant diagnostic criteria.
- Look for omissions, errors, or areas of my report I will want to or will be asked to explain, clarify, or expand upon.
- Make an outline of the key facts and events—including a “history timeline.”



# What I do and how I do it.

Ron Mihordin, M.D., J.D.

- Re-check files to **confirm factual foundation for each element** of the assertions and opinions put forth in my report.
- Talk to myself—rehearsing out loud what I will want to say or probably be will be asked for on direct examination.
- Talk to myself—rehearsing how I will respond to foreseeable questions by the cross-examiner.



# What I do and how I do it.

Ron Mihordin, M.D., J.D.

- Travel on a plan that allows for delayed or cancelled flights, traffic congestion, weather, etc.
- Arrive the night before appearance if away from home.



# What I do and how I do it.

Ron Mihordin, M.D., J.D.

- Plan to arrive at courthouse hydrated, fed, relaxed—allowing enough time to:
  - ✓ Find find a parking space.
  - ✓ Confirm and find the courtroom.
  - ✓ Confer with the attorney, if not done earlier.
  - ✓ Review and rehearse key points.



# What I do and how I do it.

Ron Mihordin, M.D., J.D.

- While waiting to be called:
  - ✓ Avoid stress or distractions.
  - ✓ Read, write, work on tasks **dissimilar** to those involved in the case.
  - ✓ Avoid substantive conversations with anyone but the attorney about the case, psychiatry, or the law.



# What I do and how I do it.

Ron Mihordin, M.D., J.D.

- I repeat and remind myself:
  - ✓ It's not my case.
  - ✓ Not to say more than I'm asked to say.
  - ✓ Not to say anything that I don't have factual support for.
  - ✓ To explain, expand, or clarify but not to defend or argue.
  - ✓ To recognize and admit errors.





# What I do and how I do it.

Ron Mihordin, M.D., J.D.

- I repeat and remind myself:
  - ✓ Not to fight reality.
  - ✓ To be guided by the facts and logic not identification with either party.
  - ✓ To let the “chips fall where they may.”
  - ✓ To remember that the shortest distance between two point is a straight line.



# What I do and how I do it.

Ron Mihordin, M.D., J.D.

- I repeat and remind myself:
  - ✓ It's OK for me to like my opinion but not to fall in love with it.
  - ✓ Cross-examination isn't personal even when it's personal.
  - ✓ To be alert for ambiguous, overly generalized questions.



# What I do and how I do it.

Ron Mihordin, M.D., J.D.

- I repeat and remind myself:
  - ✓ To avoid giving the testimony of experts not called to testify.
  - ✓ That I will have been effective if the trier of fact understands my opinion and how I arrived at it—whether they concur with it or not.



# **What I Do and How I Do It**

**Dr. Patricia Kirkish**



# What I do and how I do it.

Patricia Kirkish, Ph.D.

- My self-ascribed role:
  - ✓ I assist the trier of fact by bringing to the courtroom my special knowledge and training.
  - ✓ I clarify for, and explain to, the trier of fact the psychological elements in the case that they need to understand in order to answer the legal questions before them.



# What I do and how I do it.

Patricia Kirkish, Ph.D.

- My self-ascribed role:
  - ✓ I am not an advocate—it is not my case to win or lose.
  - ✓ My testimony is but a fraction of all that the trier of fact will consider.
  - ✓ I do not argue the case, but my testimony may serve as the mortar that secures the foundation for rational, fact-based conclusions by the trier of fact.



# What I do and how I do it.

Patricia Kirkish, Ph.D.

- When initially subpoenaed, I call the attorney and ask:
  - ✓ What are the legal issues?
  - ✓ Will the trier of fact be a judge or jury?
  - ✓ Will I be asked my opinion regarding the ultimate question(s) in the case?
  - ✓ Or, will I be asked to present more general background information as to how the mental illness or symptoms in this case fit a legal standard or a statutory definition.



# What I do and how I do it.

Patricia Kirkish, Ph.D.

- When initially subpoenaed, I call the attorney and ask:
  - ✓ How will my testimony be expected to relate to any previous written report I may have submitted in the case.
  - What elements need to be further explained and clarified?
  - What are the strengths and weaknesses of my conclusions/opinions?





# What I do and how I do it.

Patricia Kirkish, Ph.D.

- I remind the attorney that:
  - ✓ My opinions are based on my current knowledge of the facts of the case and context surrounding those facts.
  - ✓ New facts may call for a new opinion.
  - ✓ I am confident in my opinion, but it is not immune to new relevant clarifying information.



# What I do and how I do it.

Patricia Kirkish, Ph.D.

- Pre-trial preparation
  - ✓ I review my report and all available source documents (discovery).
  - ✓ I re-think the pros and cons of my conclusions and re-weigh the data relating to each element of my report.
  - ✓ I review the applicable statutory standards.
  - ✓ I review the relationship between the inmates symptoms and the applicable legal definitions and criteria.



# What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony - Direct
  - ✓ Answer the questions posed clearly and openly as possible.
  - ✓ Avoid answers that go beyond what was asked.
  - ✓ Speak at a slower than conversational rate, but with inflection sufficient to maintain the attention and interest of the trier of fact.



# What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony - Direct
  - ✓ Look at the trier of fact.
  - ✓ Adjust the delivery of the testimony based on the response/interest level of the trier of fact.
  - ✓ Be yourself.
  - ✓ May use mild humor—humor that does not show disrespect for the court, the law, or the parties.



# What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony - Direct
  - ✓ Avoid using technical language (jargon).
  - ✓ An effective expert witness explains complex issues in language understood by lay persons.
  - ✓ An effective expert uses analogies and examples.



# What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony – Cross Examination
  - ✓ Do not be argumentative.
  - ✓ Be honest and open about the scope of your opinions and conclusions.
  - ✓ Tell the trier of fact what data you relied on and the confidence you have in that data and your opinion.



# What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony – Cross Examination
  - ✓ If you cannot be answer a question as posed, say so.
  - ✓ If you do not understand a question, say so.
  - ✓ It is not the role of the witness to explain what the questions means.



# What I do and how I do it.

Patricia Kirkish, Ph.D.

- Testimony – Cross Examination
  - ✓ Maintain a thoughtful, serious, polite, and unbiased manner.
  - ✓ The expert is in court to provide information—not to win or lose the case.