Risk Assessments in Violence and Sex Cases: Current, Practical Advice for Attorneys Employing Mental Health Experts

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Abstract

Attorneys working in violence and sex-related, criminal cases often have to address the interrelated questions: How dangerous is this Defendant? What is the likelihood he will reoffend? Are there ways to minimize the level of risk he poses? Risk Assessment evaluations conducted by mental health experts are increasingly being used in these cases because they are proving to be useful to the legal process in a variety of ways. In the last 40 years, the state-of-the-craft in these assessments has evolved from a reliance on clinical intuition (Clinical Method) to research-based, quantitative methods (Actuarial Instruments) to the currently preferred approach of Structured Professional Judgment (SPJ); which borrows from the best of its predecessors and guides examiners in considering and weighing all factors that have been established to be associated with violent and sexual recidivism. There are several SPJ instruments available in the professional literature. The one we recommend for use with adult Defendants in violence cases is the HCR-20-V3, which is the most frequently used SPJ instrument in the world (Douglas, Hart, Webster & Belfrage, 2013). We recommend the Risk for Sexual Violence Protocol (RSVP) SPJ instrument in sex offense cases (Hart, Kropp, Laws, Klaver, Logan & Watt, 2003), along with the objective, computer-administered Abel Assessment for Sexual Interests – 3rd Edition (AASI-3). (Abel, Jordan, Rouleau, Emerick, Barboza-Whitehead & Osborn, 2004). Risk Assessments necessarily involve all the methods and procedures followed in typical, forensic assessments (i.e. clinical interview, review of records, psychological testing, reference to the DSM-5 Manual) and the inclusion of SPJ-derived data. While there is wide professional discretion in the selection of risk assessment instruments, forensic evaluations that do not include at least some actuarial data would, in our judgment, fall below the current standard of practice.

A critical set of questions for attorneys working in violence and sex-related criminal cases often include the following: How dangerous is this person? What is the likelihood he will reoffend? Is there a way to minimize the level of risk he poses?

These questions are especially relevant in all cases where there is a probability that the Defendant will ultimately be released. Such violence-related cases include: Assaults, Domestic Violence, Child Abuse, Arson, Kidnapping, and Homicide. The issue also arises in sex-related cases such as: Lewd & Lascivious Conduct against minors, Rape, Child Pornography, Voyeurism, Exhibitionism, SVP, etc. This article provides attorneys with a primer on the issue of Risk Assessments and recommendations for employing mental health experts in this area.

Risk Assessment evaluations conducted by mental health experts are being used increasingly in these types of cases because they are proving to be helpful to the legal process in a variety of ways. When and in what ways are they helpful? In our opinion, these assessments are <u>most</u> helpful during sentencing and in pre-adjudication, plea-bargaining negotiations.

In both instances, they help establish the "weight" of a case, i.e. just how dangerous is this person? In coming to terms when there is a difference of opinion (between opposing counsel or trying to persuade a judge), Risk

Assessments provide an analysis of a case based on a validated, agreed-upon set of factors that have been established by research and generally accepted by the mental health profession. They make intuitive, common sense to Triers of Fact.

Risk Assessments are least helpful if the case is "triable" (from a Defense perspective), and the argument is that the Defendant is innocent. Experts are, of course, not allowed to address the Ultimate Issue and there is no single "profile" of offenders that the expert can argue the Defendant does *not* meet, so if the argument is that he did not commit the acts he is charged with, then opinions on how dangerous he is are not likely to be that useful to a Trier of Fact in determining guilt or innocence.

Risk Assessments, however, can be quite useful in the Guilt Phase, plea-bargaining negotiations over the "weight" of a case. They provide an objective basis for arguing how much of a risk a given Defendant represents, and what kind of adjudication makes sense. Risk Assessments are perhaps most useful in the Sentencing Phase, when they provide Judges with a clear sense of the level of risk a Defendant poses and which factors (e.g. substance abuse counseling, anger management training, etc.) can be addressed in managing the level of risk he poses, going forward.

Definitions of Violence, Risk, and Assessment

In order to work from a common vocabulary in these matters, it is important to define a few terms at the outset. There are numerous definitions of "Violence" in the professional, psychological literature and none of them are perfect. The definition we suggest is inherent in the state-of-the-art approach known as Structured Professional Judgment (SPJ), which is used in the assessment instrument we recommend: the HCR-20-V3, which is the most frequently used risk assessment instrument in the world. We described this instrument in detail below (Douglas, Hart, Webster & Belfrage, 2013).

Violence is defined as: "Actual, attempted or threatened infliction of bodily or serious psychological harm to another person. The action has to affect a person other than the actor (suicide attempts count if intended to affect another person)." Completed, attempted, inchoate acts count. The acts must be purposive and cannot be legally sanctioned (e.g. self-defense, acts by Police, etc.).

What does not count as violence? Acts against animals (unless meant to distress owner), Damage to property (unless meant to distress owner), Acts with legal authorization; e.g. Police, Military, emergency medical treatment, "normative" scuffles, and Acts between consenting adults: martial arts, other sporting events, S & M.

"Risk" is defined as a perception or judgment we form about a person that they represent a certain degree of threat or hazard. It is not a prediction; it is a construct much like IQ. It tells us something about that person's potential, for learning in the case of IQ, for violence or sexual recidivism in the case of risk. It is never completely understood and can be assessed only with some degree of uncertainty, since we never have all the relevant data (Douglas et al., 2013). The context, time-frame, and a host of personal factors have great influence on our judgments. In addition, like "psychopathy" (another empirically proven construct), these constructs have been demonstrated to be significantly associated with real-world behavior; academic and vocational success in the case of IQ and recidivism rates in the case of psychopathy (Weiss, Saklofske, Coalson, Raiford, eds. (2010); Lyon, (2014); Hare & Neumann, (2006).

"Assessment" is the process by which mental health experts arrive at certain judgments about individuals. The procedure should be spelled out in their reports and justified by the referral question. The procedure should be replicable and combine nomothetic with idiographic data to formulate an opinion about a particular individual; e.g. what we know about addiction or sex offending and how it applies to *this* particular evaluee's history.
Risk Assessment procedures should be fully disclosed and transparent so the reader is fully informed on everything that was done and considered in the case, on which records were reviewed, which tests administered, what collateral sources consulted, topics covered during interviewing, etc.

How are Risk Assessments different from Typical Psych Evaluations?

Most Comprehensive Psychological Evaluations in criminal cases consist of at least the following subsections:

- **Clinical Interview**: This should be conducted by whoever is signing the report and not delegated to an underling, if there is a chance the expert may be testifying. It simply diminishes their credibility if the history is procured by someone other than the one putting their name on the evaluation. It is likely to be considered skimpy if the Clinical Interview lasts significantly less than 2 hours.

- **Review of Records**: This should include *all* the Discovery the parties are going to be introducing as evidence. We prefer investigation reports to interviewing collateral sources, so as not "create" evidence when a collateral source adds new data (incriminating or exonerating) that was not available in the records reviewed.
- **Psychological Testing**: We recommend the judicious use of typical psychological tests, as they do *not* correlate well with recidivism rates (Quinsey et al., 2006). Tests like the MMPI-2-RF are very useful in the assessment of diagnoses and malingering, but they do not add much to our appreciation of recidivism risk (Rogers, 2008). In Risk Assessments, testing should consist mainly of instruments designed and developed expressly for that purpose, and not for general clinical tasks; i.e. use of the HCR-20-V3, rather than the MMPI-2-RF, for forensic purposes.
- **DSM Manual**: The current version of the DSM manual (5th Edition) was published in June 2013 (American Psychiatric Association, 2013). There was an approximately one-year grace period in its implementation, which has expired in September 2014. (You should expect all reports from that point on to rely on DSM-5 diagnoses).

The typical psychological evaluation report then concludes with a Summary / Discussion section in which all these data are synthesized to offer an opinion on the evaluee's clinical diagnosis and how his psychological state affects the underlying, forensic question; e.g. his Competence, Sanity, amenability to treatment, etc. Risk Assessments should include all these data and include a detailed analysis on the level of risk a person exhibits, based on empirically proven methods and factors. We offer a set of recommendations for exactly which measures and factors to consider. First, however, we need to survey briefly how the field of Risk Assessment has developed.

Brief Historical Overview

Risk Assessment methods have developed in three distinct historical phases, featuring different approaches, with each incorporating and improving on the findings and methods of the earlier one: 1- Clinical Method: employed exclusively through to the 90's, and relying principally on DSM diagnoses, Clinical Intuition, and Psychological Testing (Monohan, 1981), 2- Actuarial Instruments: used increasingly since the mid-90's, featuring instruments like the STATIC-99, VRAG, SORAG, etc., and, 3- Structured Professional Judgment (SPJ): the state-of-the-craft at this time, which uses both Clinical and Actuarial insights, as embodied in the HCR 20-V3.

In the early to mid-70's, both the American Psychological and American Psychiatric Associations, along with the ACLU and a number of legal scholars, argued that violence Risk Assessments had not been proven valid or reliable, should be abandoned, and should *not* be entrusted to either the mental health or legal profession (Douglas et al., 2013). By the mid- 1990's, however, there had been an enormous amount of research (exemplified in the research of Robert Hanson and Vernon Quinsey) into the question of the characteristics of violent offenders who recidivated. That remarkably productive era gave us the numerous Actuarial Instruments, which have identified the Risk Factors characteristic of offenders who re-offended. This work was empirical in nature and attempted to be an objective, quantitative alternative to the more theoretical insights of the Clinical Method. From the Actuarial phase, we obtain insights such as the difference between Static (e.g. age, number of priors) versus Dynamic factors (e.g. currently abusing drugs, being diagnosable with a psychiatric disorder, like depression). Actuarial Instruments represented a vast improvement over more purely Clinical Methods, because they were demonstrated to show a relationship between a given person's characteristics and the recidivism rates associated with large groups of individuals sharing similar characteristics.

Clinical Methods: are still employed by a number of practitioners. They rely principally on two sources of information for their opinions. The first is Psychiatric Classification. Most mental diagnoses, by themselves, as found in DSM-5, are not particularly helpful since they do not relate to violence or sexual offending. Some diagnoses *are* relevant to a propensity for violence- any of the paranoia-related conditions (Schizophrenia, Delusional Disorder, Amphetamine-Induced Psychosis), having an Antisocial (i.e. habitually criminal) Personality Disorder, and the abuse of substances.

However, most psychiatric disorders do not correlate well with violent or sexual re-offending and should not be used as the principal basis for opinions about a given person's likelihood of re-offending.

The second source of information relied upon in Clinical Methods is Psychological Testing. While testing with the MMPI-2-RF and similar measures is useful for diagnosing mental disorders and detecting Malingering, they correlate poorly with violence or sexual offending.

We recommend the judicious use of such measures and, instead, strongly recommend that Actuarial Instruments be used as part of the Risk Assessment procedure. The Clinical Method relies unduly on the practitioner's intuition and experience as a basis for their opinion.

Actuarials Instruments: From the mid-1990's on, Actuarial Methods sought to make up for the inadequacies of the Clinical Method by using quantitative, objective techniques. The approach is similar to the way insurance companies set our automobile policy rates. They ask, which factors are associated with more claims? The more a given applicant represents these factors, the higher the insurance premium they will be paying, because they represent a greater risk of getting involved in an automobile accident. The Actuarial Method in Risk Assessment similarly asks: Which factors have been shown to be associated with re-offending, to what degree, and which of these factors does our target subject show? Actuarial Methods have proven significantly superior to Clinical Methods, and not surprisingly, have been adopted by many, if not most, criminal justice agencies.

Instruments like the STATIC-99 improve on reliability and validity of judgments from Clinical Methods. They have identified factors clearly associated with re-offending, such as age of offender (younger offenders represented a higher risk), number of priors, age and sex of victim (younger and males represent higher risk), and having lived with a lover for at least 2 years. While these instruments have proven much more useful than purely Clinical formulations, they have been criticized as too "mechanical," being overly reliant on static factors to the exclusion of important risk factors and under-emphasizing dynamic factors.

The Static 99-R is the most widely used and researched Actuarial Risk Instrument for use with sex offenders (Helmus, Hanson & Thornton, 2009; Hanson & Thornton, 1999). In California, it is endorsed by the SARATSO Committee (State Authorized Risk Assessment Tool for Sex Offenders). It is easily scored, based on easily obtained information. It can be used solely with archival data and does not require a clinical interview. It consists of 10 items, identifying static risk factors, yielding 4 risk levels (e.g. low, low-moderate, moderate-high, high), and presents the recidivism rates associated for 5 and 10-year intervals.

Some of the othe, frequently used Actuarial Risk Assessment Measures are: RRASOR (Hanson, 1997), MnSost-R (Epperson, Kaul & Hesselton, 1998), VRAG & SORAG (Quinsey, Harris, Rice & Cormier, 2006), Violence Risk Scale-Sex Offender Version (Oliver ,Wong, Nihcolachuck & Gordon, 2007), and STABLE 2007 / ACUTE 2007 (Hanson, Scott, Harris & Helmus, 2007).

The effectiveness of Actuarials has been such that Quinsey & Associates (2006) recommended: "Actuarial methods are too good and clinical judgment too poor to risk contaminating the former with the latter." This led them to conclude: "What we are advising is not the addition of actuarial methods to existing practice, but rather the complete replacement of existing practice with actuarial methods." In our judgment, this is more on an outlier opinion, and the best practice is to incorporate Actuarial data with professional judgment.

Which Actuarial Instrument should an expert use? Every Actuarial Instrument was developed for use with circumscribed definitions, specific samples, and employing given risk factors and time frames. Always ask: which Definitions of violence, with what types of subjects, under which circumstances, over what time frames, will the instrument be used? If the instrument does not fit your particular situation, under cross, ask: "Doctor, isn't that like using a hammer when you should be using a wrench?"

A promising, newer Actuarial Instrument is the Ohio Risk Assessment System (Latessa, Smith, Lemke, Makarias & Lowenkamp, 2009). It has many psychometric strengths and consists of separate tools with corresponding factors for decisions made at the Pre-Trial, Community Screening, Community Supervision, and Prison Intake and Re-Entry stage. It was developed specifically for Ohio's criminal justice system and therefore has questionable generalizability elsewhere. Its normative samples were about 50% White, 46% African American, and 4% Other. To the extent that the target subject does not fit under these sampling characteristics, the ORAS will have serious limitations, although there are currently a number of validational studies taking place in other states.

Structured Professional Judgment (SPJ): The current, state-of-the-craft in forensic work is the Structured Professional Judgment approach, which combines the best of the Clinical and Actuarial Methods. The SPJ *requires* that the expert evaluating a given person consider *every* factor that has been established through empirical research to be associated with violent or sexual recidivism; no more, and no less.

The expert then sums up and weighs the particular combination of factors for the subject case and offers an opinion on how much of a risk the particular person poses. Using this procedure, the expert has to consider all the relevant risk factors, but has discretion as to how much weight to assign them for a given case. The SPJ approach is the preferred method, currently, in clinical or legal settings where there is a need to assess the risk for violent or sexual offending that a person poses. User qualifications include knowledge of the relevant literature, expertise in individual assessment, and the legal ability to diagnose mental disorders. Paraprofessionals with training can perform screening for interested attorneys.

Violence Risk Assessment

There are several SPJ instruments available in the literature for evaluating the level of violence risk that a particular individual poses. The one we recommend for use with adults is the HCR-20-V3 (Douglas, Hart, Webster & Belfrage, 2013). The HCR-20-V3 is the most widely used risk assessment tool in the world. (hcr-20.com). In our judgment, it has the strongest validational base and the broadest support in the research and professional literature. The HCR-20-V3 considers past (Historical), present (Clinical) and future (Risk) factors, both static and dynamic. It has been found applicable in multiple settings and provides an index of a person's potential for violence and results in guidelines for managing that risk.

Its authors have made available an Annotated Bibliography and Website for the HCR-20-V3, respectively, at: https://drive.google.com/file/d/0Bxtl9-E7YdIRTRkU1FFR3N1b28/view?usp=sharing;hcr-20.com (webinars and on-site trainings are available)

The twenty HCR-20-V3 items are as follow:

Historical (H)		Clinical (C)	Risk Management (R)
H1- Problems with Violence	H6- Major Mental Disorder	C1- Lack of Insight	R1- Professional Services and Plans
H2- Other Antisocial Behavior	H7- Personality Disorder	C2- Violent Ideation or Intent	R2- Living Situation
H3- Relationships	H8- Traumatic Experiences	C3- Recent Symptoms of Major Mental Disorders	R3- Personal Support
H4- Employment	H9- Violent Attitudes	C4- Instability	R4- Treatment or Supervision Response
H5- Problem Use of Substances	H10- Treatment or Supervision Response	C5- Treatment or Supervision Response	R5- Stress or Coping

This is taken from the Professional Manual of the HCR-20-V3 (Douglas, et al., 2013). The steps taken in the use of the HCR-20-V3 are: 1- Gather / document case info; 2- Identify the presence of 20 factors; 3- Assess the relevance / weight of factors; 4- Integrate findings into a formulation on the case; 5- Identify and describe most likely scenarios; 6- Recommend strategies for managing risk; and, 7- Document judgments on overall risk.

For work with Adolescents, we recommend the SPJ-founded instrument: the Structured Assessment of Violence Risk for Youth (SAVRY). (Borum, Bartel & Forth, 2006); or the Youth Level of Service / Case Management Inventory (YLS/CMI). (Hoge & Andrews, 2002).

Protective Factors

Risk factors, in a sense, only "indict;" they point out what in a given person is more likely to lead to recidivism. A relatively recent development in Risk Assessment work is the search for demographic and psychological factors that "immunize," or are associated with, lowered recidivism rates (Yoon, Spehr & Briken, 2011). These Protective factors "defend" and are not merely the absence of risk. The Structured Assessment of Protective Factors for Violence (SAPROF) is such an instrument, consisting of 3 dimensions and 17 items (mostly dynamic). Its intended usage is to be a complement to the HCR-20-V3, or other risk-based instruments (de Vogel, de Ruiter, Bouman & de Vries Robbe, 2012). It is to be used with male, adult violent and sexual offenders.
Use with females, advisedly. A Youth Version is available. It is especially useful for treatment-targeting and assessment. It has a well-developed validational base compared to the HCR-20-V3. So, in effect, the method we advocate in Violence cases is the combination of the following procedures: Clinical Interview, Review of Records, Psychological Testing, Actuarial Instrument, SPJ Risk Assessment Instrument (HCR-20-V3), and Protective Factors (SAPROF).

Sexual Offending Risk Assessment

In sex cases, we recommend following much of the same approach as in Violence cases, with a few additional considerations. Insofar as an SPJ Risk Assessment instrument, we recommend the Risk for Sexual Violence Protocol (RSVP). (Laws, Kropp, Laver & Logan, 2003). The RSVP contains 22 items across 5 domains- Sexual Violence History, Psychological Adjustment, Mental Disorder, Social Adjustment, and Manageability. It consists of Static and Dynamic factors, with recommendations for risk management following its use.

A most important advent in risk management for sex offenders is the Abel Assessment for Sexual Interest-3rd Edition (AASI-3) (Abel, Jordan, Rouleau, Emerick, Barboza-Whitehead & Osborn, 2003). The "Abel," as it is commonly known, is a computer-based, objective measure of a respondent's persisting sexual interests, as detected through a person's Visual Reaction Time (VRT). Its measurement is not contingent on the veracity of response as the Criterion index is revealed unconsciously. With the AASI-3, you discover whether a particular respondent has persisting sexual interests in males and/or females in four age categories: adult, adolescent, school-age (6-12) and pre-school. Having a deviant sexual interest in pre-pubertal children has been established as an important risk factor in sexual recidivism. The AASI-3 cannot, and should not, be used to attempt to establish guilt, but it plays an important role in determining the level of risk a person poses and in risk management strategies to reduce that risk. In a sample of 200+ Hispanic Defendants charged with Lewd and Lascivious Conduct against Minors (under the age of 14), as evaluated by the senior author, we found that about 20% of them have deviant AASI-3 findings. The AASI-3 is becoming (if it is not already) the Standard of Practice in these types of evaluations due to an increasing number of favorable *Daubert* and *Kelly Frye* rulings. It has also received the endorsement of AATSA as one of two objective methodologies (Plethysmographs being the other) for assessment and treatment of sex offenders. It is becoming increasingly more difficult to argue against employing the AASI-3 in the risk assessment of sexual offenders.

In California, and other Southwestern states particularly, Hispanic Defendants represent an important cultural sub-group. In the forensic experience of our senior author, a frequent phenomenon has been the case of young (18-19 years of age), unassimilated men having sexual contact with 13-year-olds. Most of them had grown up in rural, less-well educated environments in which their conduct was not considered as taboo as it is within mainstream American culture. In an article on this issue we published in a peer-refereed journal, we argued that these Hispanic men (and their underage sexual partners) had grown up with, and internalized, a set of sub-cultural values which were tolerant of their behavior (Flores de Apodaca, Schultz, Anderson & McLennan, 2005). An anthropology Professor and co-author on the paper (Schultz) noted that this was a worldwide phenomenon, and not simply a Central American one. In all parts of the world that were remote, rural, and less well-educated, there was effectively a truncated or absent adolescence, and a much younger initiation into sexuality, marriage, and childbirth. This contrasts with a Pedophilic Orientation, which is anything but normative and represents a deviant form of compensating for underlying feelings of inadequacy as a male.

Underlying Dynamics in Sex Offenses against Minors

In assessing risk in sex cases, our clinical intuition and experience has been that the underlying dynamics of an offender offer implications for the level of risk that individual poses, in a systematic manner. We are thinking further about a continuum of internal motivations for offending which ranges from the more purely Compensatory to the Predatory. It has been the observation of the senior author that some men offend sexually to compensate for feelings of inadequacy (lifelong and / or situational) and their patterns of offending seem to have some consistencies in terms of what motivates them: they tend to have affectionate relationships with their victims prior to molesting them; they relate to the Victim as a psychological equal and seem to want their approval and affection; their sexual contact is less advanced and, at least at the outset of their offending, non-genital; their offending seems to have had a *regressed* quality to it and they are more likely to express sincere remorse and empathy for the Victim; they are more amenable to risk management strategies and represent a lesser risk to reoffend.

This differs significantly from what we think of as a more Predatory offender. This type of offender is more likely to pick a Victim (or victims, he is more likely to have multiple ones) with whom he had little or no prior relationship. He is more likely to fuse violence or coercion into his offending and to be more sexually adventuresome and exploitative of his victims.

This offender is more internally, rather than situationally, motivated and is more likely to have engaged in other antisocial acts. He lacks remorse and is more likely to be fixated in his sexual orientation. He is more likely to deny or minimize his sexual offending and fail to offer meaningful remorse or empathy.

In sexual offending cases, the methodology we advocate is combining Clinical Interviewing, Review of Records, Psychological Testing (for diagnostic and Malingering purposes), Actuarial Instrument (e.g. STATIC-99R), SPJ Assessment (RSVP), and AASI-3.

These are the most practical, state-of-the-art recommendations we can make at this time, the end of 2014. However, this is a fast-evolving, dynamic field. It is not possible to anticipate what will evolve and what revisions will be needed to make further recommendations. This article represents our best judgment at this time.

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