Comments on the DMH Proposed Regulations as Amendments to Title 9, CCR, through the addition of §§ 4000 and 4005

by Tom Watson, 3/27/09

The rule the DMH is trying to promulgate will affect every sex offender in prison in California, and every sex offender parolee who gets violated. It also will affect every person presently being detained pursuant to the SVPA who was previously evaluated while in the custody of the CDCR and is now in the adjudication process or has been civilly committed to the DMH.

Currently, the law in California requires every sex offender in the custody of the CDCR be evaluated pursuant to a "***Protocol***" established by the DMH prior to release. The results of this evaluation may result in the person **not** being released, but instead being referred for life time civil commitment. The State has been trying to convert determinant sex offender sentences to life sentences through this system.

Tom Watson wrote petitions which were filed by Michael St.Martin that resulted in the last two "***Protocols***" being declared underground regulations. They just won the challenge against the November 2008 edition on February 18, 2009.

Next, the DMH removed the language objected to in the petitions, which left about one page out of the original 69 pages (40 ***Protocol*** pages plus 29 Exhibit pages). Following an Order to Show Cause in a Sacramento County SVPA case, the DMH filed for an emergency regulation containing two sections to be added to Title 9 of the California Code of Regulations, Sections 4000 and 4005. They are now following up with the required promulgation process.

Needless to say, the DMH is extremely upset over the loss or their original ***Protocols***. No attorney had been successful at challenging this ***Protocol*** in twelve years of trying. The public defenders and appellate attorneys were flabbergasted when non attorneys did what they could not. The Petitions that successfully challenged the ***Protocols***, pdf copies of the ***Protocols***, and the OAL Decisions are available at http://www.defenseforsvp.com.

The ***Protocol*** that was declared an underground regulation contained language mandating the outcome of the evaluation in certain situations. For example, a person who has not completed all five phases of the DMH sex offender treatment program is considered to meet the criteria if he also has a mental condition. Few people incarcerated by the DMH have been able to complete this program. No one in CDCR custody can possibly complete this program prior to being civilly committed to the DMH. Thus, if any sex offender in CDCR custody has any mental health history that allows the evaluator to label him with a mental abnormality, the evaluators must find him to meet the criteria for civil commitment according to the ***Protocol*** just declared an underground regulation. That is only one example of the many mandated outcome scenarios contained in that ***Protocol***.

The current proposed rule that is before the OAL is very generic and essentially directs the evaluators to prepare the evaluations in accordance with current professional and scientific standards. We have no problem with that.

However, we know from experience what is coming. The DMH will use some sneaky underhanded method to continue mandating evaluation outcomes, such as to send the material contained in the 68 pages eliminated as underground regulations to the evaluators in the form of memorandums, guidelines, letters, etc., while trying to claim they are exempt from the Administrative Procedures Act.

In fact, underhanded games have already begun. The DMH issued a new ***Protocol*** on February 11, 2009, entitled, *Standardized Assessment Protocol For Sexually Violent Predator Evaluations.* This is a six page document that begins with the statement:

> "The Department of Mental Health is required to develop a 'Standardized Assessment Protocol.' (Welfare and Institutions Code Section 6601(c)."

This is a new ***Protocol*** which the DMH has issued and distributed, yet it is not the same one they now attempt to promulgate. Both versions were issued in the same basic time period.

The version which the DMH is presently attempting to legally promulgate as Sections 4000 and 4001 of Title 9 of the California Code of Regulations, was initially filed with the Office of Administrative Law (OAL) on January 30, 2009, and was accepted for filing by the OAL on February 6, 2009.

In the Initial Statement of Reasons for the proposed regulations the DMH states:

> "Welfare and Institutions Code Section 6601 (c) requires the Department of Mental Health (DMH) to develop and update as necessary a standardized assessment protocol to be used to evaluate whether a person is a sexually violent predator, as such term is defined in Welfare and Institutions Code Section 6600 (a)(1). The proposed regulation seeks to permanently establish into law the evaluator requirements as part of the standardized assessment protocol to determine whether a person should be deemed to be a sexually violent predator."

The question is, How can both of these documents be the ***Protocol*** required by WIC § 6601(c), when the DMH is only attempting to promulgate one of these?

The promulgation process calls for public comments. One can go to the hearing, submit written comments, or do both. The written comments can be mailed, FAXed, or emailed. The instructions of how to do so is contained in the pdf files attached hereto as "ASVP_NOTICE.pdf") called "NOTICE OF PROPOSED RULEMAKING." The other three pdf files, also attached hereto, contain the "Initial Statement of Reasons," the proposed text for Sections 4000 and 4005 of Title 9 of the California Code of Regulations, and finally, the February 11, 2009, revision to the ***Protocol*** which has not been submitted to the OAL.

A public hearing regarding this proposal will be held on May 11, 2009, in the California Room at the Department of Motor Vehicles Offices located at 2120 Broadway in Sacramento, California. It will start at 9:00 A.M. and end when all comments have been received or at 5:00 P.M. whichever comes first.

While each person making a public comment on this issue should prepare his own personal comments, the following paragraphs contain some possible areas to consider including.

Comments should certainly question why, in the same time period, the DMH has issued two different ***Protocols***, one which they have not attempted to promulgate and another which is the subject of this hearing.

It will be important for public comments to be put into the record that there shall be no other criteria, controls, standards, or the like given or sent to the evaluators by any means, including but not limited to, memorandums, guidelines, recommendations, or any other similar method , other than that contained in the two promulgated sections, unless and until that criterion, control, standard, or the like is promulgated pursuant to the Administrative Procedures Act.

Public comments should also contain objections to any of the Initial Statement of Reasons items that the person commenting objects to or believes is sophistry. Like in areas where the claim is made that there is no fiscal impact, etc.

It is imperative, and due process requires, that persons subject to evaluation under this law receive fair and impartial evaluations. The DMH must not be allowed to subvert the process by dictating outcomes of what are supposed to be impartial professional evaluations. Dictated outcomes outside the legal process will result in persons being civilly committed who otherwise would not meet the professional and legal standards for civil commitment.

When the DMH, a part of the Executive Branch of Government, dictates legal process and outcome, it has taken over a duty reserved for the Judicial Branch of Government, and thus, has violated the Separation of Powers Doctrine.

When an agency of government is allowed to manipulate and dictate the outcome of the legal process, as in this situation, the net is cast far too wide. People who do not actually meet the legal and professional criteria are nevertheless given lifetime civil commitments at great personal expense to the individual and great financial expense to the taxpayers.

The taxpayers of California are owed a fiduciary duty by government agencies of having their tax money spent wisely. When a government agency, such as the DMH is allowed to dictate a legal process, that agency is squandering taxpayer money.

Such a government agency is no better than a dictator of a third world country. That agency is ignoring the laws and the Constitutions of California and the United States.