



CHAIRMAN'S MEMORANDUM

NO. 24-98 November 16, 1998

TO: SHERIFFS, JAIL ADMINISTRATORS, COMMISSIONERS OF CORRECTION,
FACILITY MENTAL HEALTH PROVIDERS, AND COUNTY DIRECTORS OF MENTAL
HEALTH

RE: MENTAL HEALTH ISSUES REGARDING CAPITAL DEFENDANTS

Several jail administrators and mental health providers have requested guidance from the State Commission of Correction (SCOC) and/or the Office of Mental Health (OMH) in providing services to capital defendants. Representatives of the SCOC and the OMH met with representatives of the Capital Defender Office (CDO) to discuss this matter. While the CDO represents defendants facing capital and potentially capital charges, it is not the sole provider of legal representation to capital defendants. The CDO does, however, have a statutory duty to consult on all capital cases in the State even when retained counsel provide representation. As a result, the SCOC and the OMH developed the following guidelines that, hopefully, will assist you in managing inmates facing the death penalty.

1. General Considerations:

Correctional administrators should not abdicate their obligation to safely keep inmates committed to their custody. Nor should administrators prevent mental health service providers from providing services to their inmates. In most cases, the CDO or a private attorney is present when a potential capital defendant is arraigned, and accompany the defendant to the jail. This is a good opportunity for facility staff and/or mental health providers to meet with the attorney to discuss questions or issues, such as scheduling of services and confidentiality of information, for example.

New York State Commission of Correction
4 Tower Place
Albany, New York 12203-3702
(518) 485-2346

Alan J. Croce, Chairman/Commissioner

Thomas J. Goldrick, Commissioner
Patricia R. Tappan, Commissioner

The CDO has asked to be notified whenever mental health service providers seek to evaluate or treat the inmate so that the attorney may attend the evaluation or treatment with their client.

The SCOC and OMH have informed the CDO that without the inmate's consent any disclosure of information regarding evaluation or treatment would violate the confidentiality provisions of section 33.13 of the Mental Hygiene Law. Furthermore, the CDO has been advised that, even with consent, its presence during the evaluating or treatment process can have an unproductive effect upon its clinical outcome. The CDO indicated that it will do all it can to minimize this effect.

The concerns raised by the CDO are serious ones and not to be taken lightly. The CDO considers all statements made by capital defendants to be protected and confidential and that by participating in clinical interviews, inmates do not waive their statutory rights to confidentiality or their constitutional rights to freedom from self-incrimination, assistance of counsel, or due process of law.

The SCOC and OMH have assured the CDO that mental health service providers zealously protect the confidentiality of their interactions with inmates according to strict codes of ethics under which the various treating professions practice. Moreover, the provisions of Mental Hygiene Law §33.13 adequately protect the constitutional and confidentiality rights of capital defendants since all clinical information is presumptively confidential and barred from disclosure unless expressly authorized under the statute. Since there is no statutory exception for the disclosure of otherwise confidential clinical information to prosecutors of capital cases, the only applicable exceptions would be inmate consent or a court order requiring disclosure upon a finding that the "interests of justice significantly outweigh the need for confidentiality" (i.e. a judicial subpoena without this finding would be insufficient to release the information).

Finally, an on-call attorney from the CDO is available 24 hours a day, seven days a week at 800-473-8930. If private counsel represent a capital defendant, the CDO will always be able to identify such counsel.

New York State Commission of Correction
4 Tower Place
Albany, New York 12203-3702
(518) 485-2346

Alan J. Croce, Chairman/Commissioner

Thomas J. Goldrick, Commissioner
Patricia R. Tappan, Commissioner

2. Routine Interaction:

It is understood that correction officers will have routine, casual interactions and conversations with their inmates as part of daily jail life. Correction officers are generally trained to detect subtle signs of mental illnesses or other problems based on

an inmate's behavior. Should a correction officer believe that mental health intervention is needed in a particular case, and the situation is not believed to be an emergency, the inmate's attorney must be notified of the scheduled clinical encounter if the inmate has consented to the release of this information to the attorney. Upon the attorney's request and the approval of the mental health service provider, the encounter may be scheduled when the attorney can be present at the jail. An appropriate level of supervision may be required in the interim pursuant to the SCOC's security and supervision minimum standard, 9 NYCRR section 7003.3(h). Otherwise, mental health service providers must respond to correctional referrals or self-referrals from the inmate.

3. Confinement in a Designated Mental Health Unit:

An inmate may be placed in a designated mental health unit within the facility if the inmate's condition warrants such placement, and assuming such a unit is available. In this context, as well, attorneys representing capital defendants expect to be given advance notification of clinical encounters if the inmate has consented to the release of this information to the attorney.

4. Emergency Interventions:

There may be occasions when emergency intervention is necessary if an inmate is seriously decompensating and is believed to be a danger to himself or others. In such cases, even where the inmate has consented to the release of this information to the attorney, mental health service providers may meet with an inmate without having given prior notification to the attorney of the clinical encounter. Where authorized by the inmate, the attorney must be notified immediately.

New York State Commission of Correction
4 Tower Place
Albany, New York 12203-3702
(518) 485-2346

Alan J. Croce, Chairman/Commissioner

Thomas J. Goldrick, Commissioner
Patricia R. Tappan, Commissioner

5. Continuity of Care:

Services offered by jail mental health service providers and mental health professionals employed by the inmate's attorney should be coordinated to ensure that there is continuity of care. Such providers and professional should interact to facilitate the continuity of care. The sharing of otherwise confidential clinical information maintained by the jail mental health service provider shall be in accordance with Mental Hygiene Law §33.13 (i.e. inmate consent or court order upon requisite finding [see §2, Routine Interaction, above]).

Conclusion:

Capital cases are usually high profile and complex cases. Although the CDO and other attorneys representing capital defendants must zealously guard the rights of their clients, they also recognize the jail's duty to provide necessary mental health services. Hopefully, the guidelines set forth above will assist you in dealing with these situations. It should be clear, however, that an inmate must not be denied timely access to a mental health provider.

Further questions regarding mental health issues may be directed to Richard Miraglia, Director, OMH Bureau of Local Forensic Services and Planning at 518-474-7219.

Alan J. Croce, Chairman/Commissioner

**New York State Commission of Correction
4 Tower Place
Albany, New York 12203-3702
(518) 485-2346**

Alan J. Croce, Chairman/Commissioner

**Thomas J. Goldrick, Commissioner
Patricia R. Tappan, Commissioner**