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**Forensic Frequently Asked Questions**

9/23/15

**Introduction:** A number of questions have come up repeatedly in various forensic contexts. The court clinic CQI Committee collected the most common, and developed these responses, which have been reviewed and approved by the DMH legal department.

**CQI Committee:** Naomi Leavitt (chair), Hanya Bluestone, Helene Presskreischer, Joyce Perrotta, Welli Yeh.

**1. What do you do if the evaluatee has a guardian?**

The court ordered evaluation may be conducted per usual protocols regardless of whether the defendant has a guardian. The consent of the guardian is not required, nor can the guardian interfere with or prohibit the conduct of a court ordered evaluation. The court clinician may, however, solicit information from the guardian for inclusion in the report.

**2. Can you ask a defendant who you think is incompetent to stand trial, or has a guardian, to sign a release of information?**

An individual who is believed incompetent to stand trial may have the capacity to sign a valid release. The evaluator may ask for a release if the defendant demonstrates that he understands the purpose and scope of the release, and that he is under no obligation to sign it. The defendant should be allowed to consult with counsel prior to signing a release of information. If the defendant has a guardian, the release should be signed by the guardian, if the defendant's attorney is in agreement.

**3. Are we obligated to let the court know that the person has a guardian and that we did not contact him/her?**

The forensic evaluator has no affirmative obligation to report that a defendant has a guardian but it probably makes sense to so inform the court since the guardianship may be probative of whether the defendant is competent to stand trial. The guardian may also wish to provide information to the defense counsel or assistant district attorney or retain private counsel for the defendant. The evaluator also has no obligation to contact a guardian. However, if the defendant's guardian is contacted or consulted for purposes of conducting the evaluation, that information should be included in the report.

**4. What information from the CORI can be included in the report?**

Since court clinicians operate as a service to the court, and the report is provided to the court, any CORI information that is relevant to the forensic evaluation may be included in the report. This applies in any case, criminal or civil, in which a forensic evaluation has been ordered.

**5. How do you handle HIV information?**

G.L. c. 111, § 70F prevents a physician, licensed psychologist, registered nurse, or social worker from disclosing someone's HIV status without the written informed consent of the individual. There is no exception that would allow a forensic evaluator to disclose the results of an HIV test without such consent. In cases where a person's HIV status is a significant factor in the risk assessment, the report can include information that the person is known to engage in behavior (IV drug use or sexual conduct) that poses a significant risk of infection or transmission of the HIV virus. The report may also include a general statement that treatment providers or custodial agents should exercise universal precautions when interacting with someone who meets the evaluatee's risk profile.

**6. Can the evaluator ban an attorney from an interview?**

Yes. The defendant has the right to consult with an attorney prior to submitting to the examination. The courts have held, however, that the evaluation itself is not a critical stage of the criminal process that requires the presence of counsel during the interview. Rather, it is within the sound discretion of the court whether the attorney will be permitted to observe or record the interview. Any concerns regarding an attorney's request to participate in the interview process should be brought to the attention of the presiding judge.

**7. Can the evaluator place limits on an attorney's behavior during an interview?**

Yes. The evaluator may ask that counsel not interject questions, make objections, suggest responses to the evaluatee, or otherwise interrupt the evaluation.

**8. If a third party is present during an interview, does that eliminate privilege?**

In some jurisdictions, the presence of a third party may eliminate privilege. In general, privilege is usually preserved when the third party who is present during the interview is acting in a professional capacity. For example, if an interpreter is needed to facilitate communication, Massachusetts law provides that privilege is not waived as long as the person who is interviewed has a reasonable expectation of privacy. Whether the presence of a lay person, such as a family member, waives privilege has not been decided in Massachusetts. Nor is there any reported decision on whether a person who overhears the interview, such as a court officer or cell-mate, may testify about incriminating statements made by defendant to the evaluator. The court would probably exclude such testimony if it finds the defendant had a reasonable expectation that his or her statements would not be divulged.

**9. Should an evaluator conduct an assessment of competence to waive Miranda rights?**

A CST evaluation does not involve an evaluation of the defendant's competence to waive Miranda rights. A request for such an evaluation should be referred to an outside, independent evaluator. The court may, however, rely upon the evaluator's report to the extent his or her mental status observations may assist the court in determining whether the defendant has the capacity to waive his Miranda rights. If, for example, the defendant is unable to understand the role of the judge and jury, even after repeated explanation, that information may be probative of whether the defendant would have understood Miranda warnings.

**10. Should an evaluator accept referrals from the Housing Court?**

Not unless the court is asking for an assessment of a witness' competency to testify. G.L. c. 123, § 19 does require DMH to assign a clinician to assess a witness' competency to testify upon request of a justice of any court in the Commonwealth. If such examination is ordered, the judge should provide some guidance regarding the scope and purpose of the examination.

**11. What is the substance of the recent amendments to the CORI law?**

The former Criminal History Systems Board (CHSB) which oversaw CORI access has been replaced with a Criminal Record Review Board (CRRB) with the Department of Criminal Justice Information Systems (DCJIS). The new amendments to the CORI law also established iCORI, an internet database from which CORI information may be accessed. The new law contains sweeping

changes with respect to how CORI information may be obtained, and by whom. In general, access by landlords and others is limited to certain offenses and dispositions. While adult cases may not be expunged, the CORI law now allows judges, upon dismissal, to seal cases that had been continued without a finding. In addition, the waiting period for sealing convictions for felonies and other offenses has also been reduced.

**12. Are there different CORIs that include NGRI findings?**

NGRI findings are included in CORIs for entities that perform law enforcement functions. There are three levels of CORI access: required access, standard access, and open access. The broadest access to CORI information falls under the required access category, which is reserved for entities who are required or authorized by law to obtain CORI information to screen employees, interns, volunteers and professional licensing applicants. The required access category, in turn, has four separate tiers of access. State agencies typically have Required 1 access which does not include access to information regarding criminal offenses that did not result in a conviction, including cases in which the defendant was found NGRI.

**13. Should an evaluator turn over notes of the forensic evaluation to defense counsel upon request or pursuant to a subpoena?**

No. The forensic report is the property of the court and access to the report, and information contained therein, is controlled by the presiding justice. Since the evaluator's notes contain information that may be found in the report, these notes would presumably be subject to the same protections and requirements that attach to the report. If an attorney asks for, or subpoenas, the notes, the evaluator should advise counsel to seek a court order.

**14. How much background detail is required in a 15(a) screening?**

All items in our CQI checklist should be addressed (even if only say that information was not available). Additionally, you must include enough detail to support your opinions and recommendations. You may choose to include additional detail at your discretion.