



# Protect, Respect, Accommodate

## Zealous Advocacy for Mentally Ill Clients

Allison Knight

I studied psychology in college, intending to go to graduate school. I changed course mid-way and decided to become a public defender when I learned that criminal justice plays a larger role in treating mental illness than the healthcare system. Jails have become the largest providers of mental health services in the country.<sup>1</sup> The incidence of serious mental illness in jails or prisons substantially outweigh those of non-incarcerated populations.<sup>2</sup>

Representing clients with mental illness can be challenging. Public defenders usually don't have extra time to spend on individual cases, and lawyers are often ill-equipped to recognize and respond to mental health concerns. However, the number of defendants diagnosed with serious mental illness is not likely to shrink any time soon, and we are tasked with being more than just lawyers to mentally ill clients struggling to navigate the criminal justice system.

My caseload is now made up primarily of criminally accused clients diagnosed with serious mental illnesses and those facing civil commitments. I have relied on my undergraduate degree and membership and attendance in programs put on by the National Alliance for Mental Illness to help me better represent my clients. I spend a lot of time thinking about how to improve service to this group. Here are some suggestions:

### Protect Your Clients

We cannot ignore the fact that for many seriously ill defendants, every appearance in front of a judge is an opportunity for jail deputies to misinterpret circumstances, become fearful for their safety, and use excessive and unnecessary force. These misinterpretations by both police officers on the street and corrections deputies can lead to serious injury or death for mentally ill individuals. Furthermore, a mentally ill defendant's response to this overreaction can lead to additional charges for resisting arrest, aggravated harassment, or assault on a public safety officer. Effective advocacy for the most seriously ill defendants requires attorneys to work fast to get their clients into a safer environment. The typical

statutory fitness assessment process can cause defendants to wait in custody for more than a month before transfer to the state hospital for treatment. The Oregon statute does not require an assessment in order for the judge to make a finding of unfitness. Attorneys who see that their clients are suffering from an ongoing mental illness—making custody particularly dangerous—should consider filing a motion without an evaluation, especially if the client is being held in segregation or otherwise clearly in need of treatment. Also, consider waiving an acutely ill client's appearance at arraignment or other minor hearings to limit their exposure to violence or further legal jeopardy.

### Respect Privacy

Mental illness carries an intense stigma. Individuals may be reluctant to discuss their symptoms or diagnosis even in private. Avoid asking your client sensitive questions or delivering information related to their diagnosis outside of a private setting. For example, if you are planning to schedule an evaluation for competency or GEI, do not announce that to your client in a crowded hallway or in the jury box with other in-custody defendants close by. If you can't meet with your client before court to talk about the evaluation, consider writing a letter and giving it to your client in court and letting him or her ask questions, or set up a time to review it privately.

Similarly, be aware of how you present information about your client's illness in open court. Individuals may not wish to disclose information about their diagnosis to family members or others who may be present for the court appearance. Ask your client if he or she is comfortable with you sharing information about their diagnosis and symptoms, and allow him or her to direct the narrative and flow of information. If your client is not comfortable with open disclosure, consider having a conversation with the judge and DDA

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in chambers to impart the information and let them know your client does not wish for the information to be made public.

If you have a hearing in which your client's mental health history is at issue, consider filing a motion to close the courtroom, or requesting that the evidence be submitted in writing and not read into the record. Although this may be a lot of work, consider the humiliation of having a bloodthirsty DDA read, in his own dramatic fashion, every note from fourteen visits to the emergency department regarding your client's history of mania and erratic behaviors to a packed courtroom, including your client's children and in-laws. Being charged with a crime should not put one's entire life on display for all to see. We should advocate for our clients to have some measure of control over what part of their story is open for comment.

### Protect Dignity

The court system creates many scenarios in which sick people are made a spectacle. I once saw a DDA come into a courtroom for no other purpose than to regale the other DDAs with the tale of a floridly psychotic defendant who was taken down by deputies and dragged from the courtroom at arraignment. Her retelling was met with unabashed laughter by her colleagues and others in the gallery. It should go without saying that defense attorneys should never participate in ridiculing or making fun of mentally ill defendants.

Additionally, consider asking the judge to require the security deputies to remove restraints in the courtroom. Mentally ill defendants are often tagged as more dangerous as a result of their symptoms. They may remain on cumbersome heightened security protocols for months after their symptoms have abated due to jail security policies. Mentally ill people are no more likely than others to be violent, especially if they have been in custody for some time and are now receiving appropriate medication. Treating them as though they are a high risk furthers the stigma of mental illness and frames them negatively to the judge, who may be imposing their sentence.

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## Help Provide Reasonable Accommodations

Mental illness appears in many forms. There is no one-size-fits-all representation technique for mentally ill defendants. It is our job to help identify barriers to understanding and eliminate them as best we can. The first step is often a competency assessment. While there are situations in which the quickest assessment is definitely the best assessment, in many cases, failure to choose the best evaluator for your particular client can be harmful. For example, most certified forensic evaluators are good at picking out Axis I disorders such as schizophrenia or bipolar disorder and applying the fitness criteria to those diagnoses. However, many evaluators have little experience recognizing or evaluating for the effects of serious childhood trauma, developmental disorders or intellectual disabilities. Gathering as much information as possible before selecting an evaluator can inform which evaluator is most qualified and what specific testing will be useful for your client.

Once you have determined that your client is fit enough for court, it's important to be aware of the deficits that may still be present. Psychiatric medications have a wide array of side effects, including grogginess and lethargy. It may be helpful to schedule appointments or jail visits at a time of day before medications have

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taken effect to ensure the greatest understanding and retention of information. Schedule enough time to fully review information, even if your client is slower to process, whether from medication side effects or intellectual deficits. It may be helpful to write down the information and leave a copy for your client to review, or to include a friend or family member in the meeting who can review information with your client later.

Finally, when the proceedings are complete, many mentally ill defendants will be subject to some form of supervision. Consider using information you have gleaned from the assessment or treatment investigation to advocate for specific supervision terms that will be the most helpful to your client. For example, if your client is already set up with his or her own care providers, ask if that treatment can satisfy probation treatment requirements rather than requiring another assessment. Additionally, if your client gives permission, consider calling or writing the PO and explaining relevant information gleaned from the competency or other mental health assessment. Some evaluators include recommendations for accommodations in their assessments, which may be useful in ensuring understanding of probation conditions and helping the PO to direct to appropriate services.

Of course, every case is different. Unfortunately, sometimes there is nothing more that can be done for a mentally ill client besides getting a hasty competency assessment and referring them to the state hospital for medication, stabilization and discharge, only to receive them back again a short time later.

The policies of the last 50 years have abandoned the mentally ill. These policies have caused mental health and criminal justice to become inextricably linked. Real change won't happen until drastic policy and funding shifts take place. However, this does not mean that defense attorneys can do nothing but abandon their mentally ill clients to a lifetime of incarceration and suffering. We still have the opportunity to make small changes for individual clients. Those small changes can have big impacts, if not for the system as a whole, then for our clients themselves. Their dignity as a full human being requires nothing less from us. 

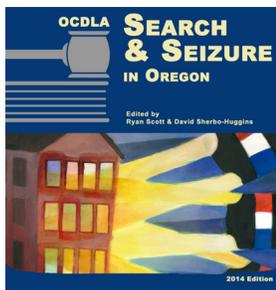
## Endnotes

- <sup>1</sup> Chang, Ailsa. "Insane: America's 3 Largest Psychiatric Facilities Are Jails," National Public Radio, 25 April 2018, <https://www.npr.org/sections/health-shots/2018/04/25/605666107/insane-americas-3-largest-psychiatric-facilities-are-jails>.
- <sup>2</sup> Doris James & Lauren Glaze, "Mental Health Problems of Prison and Jail Inmates," Bureau of Justice Statistics Special Report September 2006, available at <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

# Sept. 2017 Updates

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(2014 ed.)



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