

NEW MEXICO SENTENCING COMMISSION

MICHAEL HALL, DIRECTOR OF NMSC

NOVEMBER 2007

Summary

- NMCD conducts approximately 400 DEs per year, about 75% of which are for men and 25% for women.
- There are currently 6 licensed Psychologists in the state certified to provide competency reports who contract to provide these reports in all 13 judicial districts. Such contractors could also provide DEs.
- Average county detention per diem cost statewide us approximately \$60 per day (with a range of \$30 to \$144 per day). Average NMCD per diem is now approximately \$95.
- Based on the costs figured above, it costs an average of approximately \$4,200 per diagnostic evaluations at RDC (or \$1.7m per year)
- Both options (the status quo and conducting all evaluations locally) cost almost the same amount: approximately \$4,200.
- Current law could be changed to give judges the option of either ordering a DE by sending an offender to RDC or keeping that offender in their current detention facility or bond status. This would require a funding appropriation to Value Options through BHD and may require funding for counties.

Diagnostic Evaluation: *Alternatives to Current Law and Practice*

The LFC Request

The New Mexico Sentencing Commission (NMSC) and the New Mexico Corrections Department were asked by the Legislative Finance Committee to study the continuing need for NMCD to perform diagnostic evaluations.

The request, contained in the May 23, 2007 Corrections Department Review of Facility Planning Efforts and Oversight of Private Prisons and Health Programs, on page 47, requested:

Study, in coordination with the New Mexico Sentencing Commission (NMSC) the continuing need for NMCD to perform diagnostic evaluations, including an assessment of the results of existing evaluations; actual costs incurred by the department; other financing options; and alternative settings for the evaluation, such as county detention facilities. Report the results of the study and any recommendations to the appropriate interim legislative committees and the Legislative Finance Committee no later than December 1, 2007.

Current Law

The relevant statute which authorizes pre sentence evaluations is contained in

31-20-3. Order deferring or suspending sentence; diagnostic commitment. (1985)

Upon entry of a judgment of conviction of any crime not constituting a capital or first degree felony, any court having jurisdiction when it is satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may either:

Commit the convicted person, if convicted of a felony and not committed for diagnostic purposes within the twelve-month period immediately preceding that conviction, to the department of corrections [corrections department] for an indeterminate period not to exceed sixty days for purposes of diagnosis, with direction that the court be given a report when the diagnosis is complete as to what disposition appears best when the interest of the public and the individual are evaluated.

If it is determined that it is in the best interest of the state to conduct diagnostic evaluations locally, this statute may need to be amended to allow for the post judgment evaluation of a person in a county detention facility or while released on bond.

The Process

On September 21, 2007, the following people met to begin the process of addressing the issues raised in the LFC report. After initial discussion and information sharing at that meeting, the respective parties agreed to obtain additional information and to meet to determine the feasibility and cost of conducting evaluations locally. A copy of the minutes of that meeting are attached as Appendix A.

Subsequent to the September 21, 2007 meeting, leaders from Value Options, BHSD/HSD, NMCD and forensics contractors representing several regions of the state met on November 2, 2007 to discuss evaluations, including the costs of conducting those evaluations in the field ("field" in this case means at the local detention facility where the offender is already housed or at the local office of the forensic evaluator if the offender is out on bond). The full minutes of that meeting are attached as Appendix D.

General Findings

The following information was provided by the NMCD and others present:

- Current NM law (NMSA 31-20-3) gives judges the option of committing a convicted felon for up to 60 days for the purposes of pre-sentence diagnosis.
- NMCD RDC utilizes 40 beds for DEs
- Average length of stay for DE is 45 days
- NMCD conducts approximately 400 DEs per year, about 75% of which are for men and 25% for women.
- DEs at RDC (men) are conducted by NMCD staff.

- DEs for women take place at the Grants Women's Facility and are conducted by an outside vendor, Forensic Health Services.
- Value Options currently has a budget of \$700-800K for pre-trial evaluations. Additional funding would be required if VO were to fund DEs, which are by definition post-conviction.
- There are currently 6 licensed Psychologists in the state certified to provide competency reports who contract to provide these reports in all 13 judicial districts. Such contractors could also provide DEs.
- Defendants who are out on bond prior to sentencing must report and be processed into their local county detention facility, then be transported to RDC, where they are in turn processed into RDC. After the DE, the defendants are in turn transported back to their local detention facility to await sentencing. These transportation and county detention costs are generally borne by the counties.
- Defendants who are already in a local county detention facility still must be transported to RDC. After the DE, the defendants are in turn transported back to their local detention facility to await sentencing. These transportation and county detention costs are also borne by the counties.
- The requested fee provided by the Value Option Forensic Contract evaluators is \$1,500 per evaluation (plus costs). The current fee for competency exams is \$725, but providers state that this fee is twelve years old and too low.
- Average county detention per diem cost statewide is approximately \$60 per day (with a wide range of \$30 to \$144 per day). Average state Corrections per diem is now approximately \$95.

Summary

Based on the costs figured above, it costs an average of approximately \$4,200 per diagnostic evaluations at RDC. The requested fee provided by the Value Option Forensic Contract evaluators is \$1,500 per evaluation (plus costs). Under the

suggested standards, contract evaluators would be expected to complete 85% of their evaluations in 45 days or less. If an offender remained in the county detention facility during this time, the cost to the county would be approximately \$2,700. Both options (the status quo and conducting all evaluations locally at the higher requested rate) cost almost the same amount: approximately \$4,200. The local option would be less costly if: 1) DEs were completed in less than 45 days and 2) the fee was less than 1,500.

Based on cost alone, moving diagnostic evaluations from RDC to local detention facilities would save NMCD 40 beds. However, the total costs to the state are nearly identical and moving all evaluations out of RDC would shift those costs from NMCD to counties and Behavioral Health Division/Value Options.

Notwithstanding near equal costs, other factors that affect costs, public and officer safety, offender safety and judicial discretion need to be considered:

- There is a risk factor every time offenders are moved to RDC for the evaluation, then back to the local detention center for sentencing, then back to RDC again (assuming a sentencing of prison) for processing in to the NMCD system.
- County governments would no longer have to bear the costs of transporting the defendants from the County Detention Centers to CNMCF and then back again.
- While we do not have accurate figures on the number of offenders sent to RDC for DE who were out on bond at the time of their plea or conviction. We know that some offenders who had been out on bond during their pre-conviction period are sent to RDC for DE. If these defendants remained out on bond during a local DE, there would be a reduction of \$2,000 – \$3,000 in the costs of incarceration for those defendants.
- Dr .McDermott (NMCD) has reported at

least one instance at RDC where a pre-sentenced offender with mental illness attempted suicide while at RDC.

- Some judges order diagnostic evaluations to give a “taste of prison” in an attempt to teach the individual a lesson in what their fate may be should they continue in their criminal behavior.

Given the costs and benefits, the following actions could be taken:

- Leave the status quo by leaving the current law and practice alone. Leave the current law alone, but provide NMCD with funding to hire or contract with additional evaluators to reduce the time to conduct DEs from 45 days. Each day of reduced stay could either save NMCD the \$95 daily bed cost or free up bed space for sentenced inmates.
- The current law could be changed to allow judges to order DEs locally, thus giving judges the option of either sending an offender to RDC or keeping that offender in their current detention facility or bond status. This would require a funding appropriation to Value Options through BHD.

In summary, we hope the information contained in this report provides the Legislative Finance Committee with the information requested. Since the financial impact of keeping DEs at RDC and Grants is nearly identical to conducting all of them locally, other factors need to be considered. There are safety, cost, and pragmatic advantages to keeping offenders both close to their home/family and to the district court where their final sentencing hearing will take place after the DE has been completed. Also, as stated above, individual judges may want to choose to have an offender evaluated in a prison setting. It seems the expansion of current DE practice and law to allow for locally-conducted DEs would be the best option; it would free up some beds at RDC for NMCD and would provide sentencing judges with more options. 🌐

Appendix A
Minutes of
Diagnostic Evaluations Meeting
September 21, 2007
NM Corrections Department Conference Room

Mike Hall, Director, New Mexico Sentencing Commission
Nick D'Angelo, Chief Counsel, Corrections
Dr. Carlos Quezada Gomez, Value Options
Dr. Bianca McDermott, Mental Health Services Bureau Chief
Edna Ortiz, Department of Health
Dr. Stephen Vaughn, MD PhD, Director, NMCD Health Services Bureaus

We were asked to:

1. Assess of the results of existing evaluations;
2. Determine the actual costs incurred by the department;
3. Explore other financing options for Diagnostic Evaluations
4. Explore the use of alternative settings for the evaluations, such as county detention facilities.

The group looked at the issues in turn and will take the steps listed below to obtain accurate information.

The following information was provided by the NMCD and others present:

1. Current NM law (NMSA 31-20-3) gives judges the option of committing a convicted felon for up to 60 days for the purposes of pre-sentence diagnosis.
2. NMCD RDC utilizes 40 beds for DEs
3. Average length of stay for DE is 45 days
4. NMCD conducts approximately 400 DEs per year, about 75% of which are for men and 25% for women.
5. DEs at RDC (men) are conducted by NMCD staff.
6. DEs at Grants Women's Facility are conducted by an outside vendor, Forensic Health Services.
7. Value Options currently has a budget of \$700-800K for pre-trial evaluations. Additional funding would be required if VO were to fund DEs, which are by definition post-conviction.
8. There are currently 6 licensed Psychologists in the state certified to provide competency reports who contract to provide these reports in all 13 judicial districts. Such contractors

could also provide DEs. These vendors are now paid \$725 for felony-level competency reports. While this amount is being renegotiated between VO and these vendors, VO and NMCD staffs believe that DEs could be done for less than the cost of competency reports.

9. Defendants who are out on bond prior to sentencing must report and be processed into their local county detention facility, then be transported to RDC, where they are in turn processed into RDC. After the DE, the defendants are in turn transported back to their local detention facility to await sentencing. These transportation and county detention costs are generally borne by the counties.
10. Defendants who are already in a local county detention facility still must be transported to RDC. After the DE, the defendants are in turn transported back to their local detention facility to await sentencing. These transportation and county detention costs are also borne by the counties.
11. Average county detention per diem cost statewide is approximately \$55 per day (with a wide range of \$30 to \$144 per day). Average state Corrections per diem is approximately \$85; actual RDC and Grants costs will be obtained.
12. NMSC Sentencing Reform Committee to review existing law (31-20-3 NMSA) to see if change in process of conducting DEs would require any change in statute.

Appendix B
STANDARD PRE-SENTENCING DIAGNOSTIC EVALUATION FORM
Provided by Dr. Bianca McDermott, NMCD
To be used by all forensic evaluators

PRE-SENTENCING DIAGNOSTIC EVALUATION

NAME:
COUNTY:
CAUSE NUMBER:
SS #:
DOB (Age):
DATE OF ADMISSION:
DATE OF REPORT:
EXAMINER:

IDENTIFICATION AND REASON FOR REFERRAL:

John/Jane A. Doe is a ____ year old, _____ (race or ethnic group), _____ (male/female).

He/She was referred for a pre-sentencing diagnostic evaluation by Judge _____ of the _____th Judicial District Court in _____ (city), New Mexico, under the provisions of §31-20-3 NMSA 1978, and a court order was filed on _____ (date).

Mr./Ms. _____ has been convicted / has pled guilty to _____ .
Sentencing has been deferred pending the outcome of the current diagnostic evaluation.

NOTIFICATION OF LIMITS OF CONFIDENTIALITY AND THE PURPOSE OF THE EVALUATION:

EVALUATION PROCEDURES / SOURCES OF INFORMATION

Record Reviewed:

Collateral Contacts:

Psychological Instruments Administered:

BACKGROUND INFORMATION: (INCLUDING)

Psychosocial HX

Medical & Psychiatric HX Criminal HX

DEFENDANT’S VIEW OF THE OFFENSE:

MENTAL STATUS EXAM

PSYCHOLOGICAL / NEUROPSYCHOLOGICAL TEST RESULTS:

DIAGNOSTIC IMPRESSIONS:

According to the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), Mr. ____ meets diagnostic criteria for the following mental disorder at this time:

AXIS I, II, III, IV, V

DANGEROUSNESS / RISK ASSESSMENT

SUMMARY AND RECOMMENDATIONS:

This is where you tie it all together: Start with the basic DSM / psychiatric stuff - you are not addressing the ultimate issue of case recommendations - *just whether there is a diagnosable mental illness and what it is. This will constitute the foundation of the decisional pyramid.*

What does the person have, how severe is it, and how many diagnoses/problems is this person saddled with simultaneously from a mental health viewpoint.

Add in a sentence or two about additional finding(s) from Risk assessment instrument. Was the final outcome in the High, Medium, or Low Risk ranges and how long is the prediction good for. Note this is a probability statement NOT a yes/no finding. Example: Results of the HCR-20 (Version 2) suggest that John Doe falls into the Low Range of probability for violent behavior within the next 5 years.

If the ultimate judicial decision results in probation, it is recommended that _____ (inmate be referred for substance abuse treatment, etc.)

If the ultimate judicial decision results in incarceration to the NMCD, it is recommended that _____.

RATIONALE FOR TRANSFER OF 60-DAY DIAGNOSTIC EVALUATIONS FROM THE NEW MEXICO CORRECTIONS DEPARTMENT (NMCD) TO ADULT FORENSIC EVALUATION TEAMS OR ALTERNATE CONTRACTOR(S)

- For many years, NMCD has borne the responsibility for the 60-Day D&E's as required under NM Statute 31-20-3. These evaluations are completed at CNMCF in Los Lunas (males) and NMWCF in Grants (females). These forensic studies are utilized for the dispositional phase of the criminal process. At the time the study is ordered, the defendant has already been found guilty of a crime not constituting a capital or first degree felony. The sentencing hearing is deferred pending the outcome of the D&E study. Such offenders may be sentenced to a period of probation or to incarceration in a State prison.
- The study must not take longer than 60 days. The statutory purpose of the evaluation is defined as "*diagnosis, with direction that the court be given a report when the diagnosis is complete as to what disposition appears best when the interest of the public and the individual are evaluated.*"
- The professional standard for sentencing studies includes 3 prongs or purposes, including: treatment needs assessment; culpability determinations; and predictions of future risk. (From *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers, 2nd Edition.*)
- There are several problems with having NMCD as being the responsible party for these evaluations. All other forensic studies for NM District Courts, such as criminal responsibility, competency to stand trial, and specific intent are performed by the Adult Forensic Evaluation Contractors and/or the Forensic Division of the Behavioral Health Institute (BHI) at Las Vegas. All the forensic studies referenced above are done by doctoral level psychologists, sometimes with the assistance of master's level psychometrists / assistants. A list of such problems is detailed below.

Problems Necessitating Potential Transfer of Responsibility:

1. NMCD disproportionately employs master's level counselors and social workers. Such individuals lack the licensure required to interpret some psychometric tests utilized in the 60-day evaluations. Such tests include tests of intelligence, personality traits, neuropsychological / cognitive functioning, and actuarial risk assessment instruments. NMCD currently has no line-level psychologists that are licensed to interpret complex tests involved in forensic assessment. Females referred for D&E's are seen by doctoral level licensed providers in Grants. Our women's prisons have sub-contracted mental health services to Forensic Health Services (FHS) of Boston, and that company has several doctoral level psychologists employed in Grants. As a result, there is a discrepancy in licensure and degree status between the staff performing 60-day D&E's for male and female defendants.

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2. All NM State prisons are accredited by the National Commission on Correctional Health Care (NCCHC). One of the NCCHC standards bars correction mental health staff from performing forensic functions. Standard M-I-03, Forensic Information states: ***“The intent of this standard is to ensure that the role of the health services staff, including mental health staff, is to serve the health needs of their patients. The position of health services staff members as neutral, caring professionals is compromised when they are asked to collect forensic information that may be used against inmates. Forensic information is physical or psychological data collected from an inmate that may be used against him or her in disciplinary or legal proceedings.”*** Requiring mental health staff to perform this forensic function violates Standard M-I-03 of NCCHC, and thereby endangers NMCD’s accreditation at the prison sites where this function is carried out.
 3. On average, D&E’s take about 45 days. While defendants are housed in NMCD prisons during this time period, they occupy beds and pod space that is oftentimes needed for incoming inmates. Because D&E referrals and NMCD inmates must be housed separately, overflow D&E referrals can impede the ability of NMCD to house its incarcerated inmates.
 4. A subset of the D&E referrals are on psychotropic medication from their community or jail providers. When the medications that an incoming D&E referral is on does not match the formulary of the NMCD medical vendor, there can be problems in providing the D&E case with their customary psychotropic medications during their period of stay with NMCD.
 5. A subset of the D&E referrals are first-time offenders, and/or have serious mental illness. Such individuals are oftentimes out on bond, and then must report to their local detention center in order to be transferred to NMCD for the evaluation. This is stressful on such individuals, and in the past year, NMCD had one such individual that attempted suicide by hanging. While NMCD has not had a D&E case that resulted in suicide, this possibility exists.
 6. Some judges have utilized the 60-day D&E as a “taste of prison”, in an attempt to teach the individual a lesson in what their fate may be should they continue in their criminal behavior. NMCD should not be utilized as a quasi-program to “scare straight” offenders. There are many risks inherent in such a process, and the D&E report is an expensive work product that should not be utilized unless strictly necessary for sentencing purposes.

Appendix D
Minutes of
Adult Forensic Evaluators Meeting
Friday, November 2, 2007 – 1 PM thru 4 PM
ValueOptions New Mexico

Attendance:

Susan Cave, PhD – Forensics Contractor
Lori Martinez, PsyD – Forensics Contractor
T Gregory Kopp, PsyD – Forensics Contractor
Will D Parsons, PhD – Forensics Contractor
Richard Fink, PhD –Forensics Contractor
Connie Amidon, LPCC – Forensics Subcontractor
Marizza Montoya-Gansel – BHSD/HSD
Delfy Roach – Vice President, VONM Service Systems Relations
Carlos Quezada-Gomez, PsyD – VONM Justice/Forensic Services Liaison
Dr. Bianca McDermott, NMCD

I. Introductions

II. Presentation by Dr. Bianca McDermott, NMCD

Dr McDermott reviewed the following documents (copies attached to minutes)

- Statue related to pre-sentencing forensic diagnostic evaluations (NMSA 31-20-3)
- (Pre-Sentencing) Diagnostic Evaluation Trends, 1990 – 2004
- Number of D&E's Per Year, 2004 – July 2007
- Pre-Sentencing Diagnostic Evaluation Template
- Rationale for Transfer of D&E's from NMCD to Contractors

Following her presentation, Dr McDermott left and the meeting proceeded with only the contractors, state staff and VONM staff present.

III. Discussion of Factors impacting transfer of D&E's from NMCD to Contractors

- A. Reimbursement Rates: BHSD/HSD reimburses Felony evaluations at a rate of \$725 per evaluation, including testimony, travel and administrative costs. This rate has remained static for at least 12 years. This rate is 3-5 times lower than that earned by evaluators paid by private funders/attorneys. Furthermore, private funders/attorneys pay separate rates for travel time, testimony preparation and actual testimony time. Rates vary widely across the country. Costs estimates for other jurisdictions may be obtained from the National Association of State Mental Health Directors/Forensic Services and the American Psychological Association. After much discussion, the consensus of the group was to set reimbursement at a rate of \$1,500 per evaluation, plus travel and testimony costs.
- B. Travel/Transportation: Defendants on bond in the community should report to the local contractor's office for the evaluation at a time determined jointly by the defendants and the contractor.

New Mexico is a largely rural state, necessitating significant travel for contractors who would need to evaluate defendants at county detention centers or NMCD prisons. The detention centers or prisons may need to transport the defendant to the contractor's office for an evaluation. Payment for mileage and travel time for the contractor is highly recommended.

- C. Testimony: Contractors should be paid a separate rate for time spent preparing to testify, travel to courtrooms to testify, and actual testimony time. While traveling or testifying, the contractor is unable to perform work, resulting in loss of income as well as decreasing the amount of time available to perform clinical work. Rates for testimony time range from \$150 to \$300 per hour. Testimony should only be required on a minimal number of cases. To reduce costs, contractors should be able to testify via telephone. Costs for in-person testimony may be borne by the court, District Attorney, Public Defender and any other party requesting the testimony--thereby reducing unnecessary requests for in-person testimony. Need for in-person testimony will also be reduced by implementing a rigorous quality assurance process.
- D. Human Resources/Personnel: As with any profession requiring highly qualified and trained personnel, New Mexico has a dearth of appropriately trained and credentialed professionals willing and able to conduct publicly-funded forensic evaluations. Transfer of the NMCD D&E's will require hiring of additional contractors and/or subcontractors. To attract qualified and willing professionals, the recommended reimbursement rate should be applied. Furthermore, contractors should be able to hire subcontractors that may not be independently licensed at the Master's level; rather, doctoral interns, Master's degree students not yet independently licensed, and doctoral students under the direct supervision of an independently licensed psychologist or psychiatrist should be able to perform this work. The supervising psychologist would counter-sign the evaluations conducted by the subcontractors and be fully responsible for assuring the evaluations meet the quality, contractual and legal standards set for the evaluations.
- E. Turn-Around Time: D&E's currently performed by NMCD take an average of 45 days from first contact to report submission. The VONM contractors currently operate under a 45-day standard. Should the D&E's be transferred to the contractors, the standard should be that 85% of all D&E's would be completed within 45 days from the date of referral. Since the number of referrals varies from month to month, without predictability, and the contractors may need to travel significantly across the region assigned to them, this request is reasonable. NOTE: Current statute provides 60 days for completion of the D&E; thus, it might be good to use the first quarter to use a baseline for the actual completion time of 45 or 60 days.
- F. Quality Assurance: To ensure confidence in the quality of the work produced by the contractors and reduce the need for unnecessary in-person testimony, a robust quality assurance program must be implemented, including:
 - 1. Double-blind peer reviews of random evaluations for each contractor and subcontractor.
 - 2. Annual Training on Current Forensic Practice and Ethics: costs will vary depending on the presenter (honorarium and travel costs), training location, and required training materials. This training will allow contractors to maintain and improve their skills, as well as apply current forensic standards and ethics to their work.
 - 3. Each contractor and subcontractor is currently reimbursed by BHSD/HSD at a rate

equal to two evaluations for participating in the peer reviews and annual training. This practice should continue and be borne by NMCD for ongoing training in D&E's.

- G. Other Costs/Administrative: Both the contractors and VONM will incur additional administrative costs, including potential rate increases in malpractice insurance for the contractors. VONM shall incur additional costs to administer and monitor the D&E program and contractors, as well as to process claims, issue payment and conduct quality assurance/data reporting activities. Furthermore, funds should be set aside to ensure the Justice/Forensic Services Liaison or assigned VONM staffer can participate in an annual training or conference regarding forensic or pre-sentencing forensic evaluations, particularly quality assurance and ethics practices. Perhaps an administrative rate can be provided to VONM and each contractor.
- H. Start-Up: Contractors and/or VONM will need to recruit additional staff to meet the demand for services, as well as ensure the administrative and technical capabilities to perform the work are done. Thus, it is necessary to have a 120-day transitional period wherein both the community-based contractors and the current NMCD process operate simultaneously. In addition, Dr McDermott has offered to provide an 8-hour training to all the contractors on the process. NMCD would also need to bear the costs for lodging, per diem meals, mileage and other travel costs for the participants.

IV: Next Meeting Dates/Location: Tentative dates: March 27-28, 2008. Tentative Location: Las Cruces.