Federal Bar Council's

Program Committee Presents

Section 1983 Mediation Advocacy Training

Live Webinar
October 16, 2020
9:00 a.m. – 1:15 p.m.

CLE Credit Information:
4.5 Transitional/Non-Transitional
CLE Credits in Areas of Professional Practice

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The materials included represent the views of their respective authors and may not represent the views of all panel participants or the Federal Bar Council.

Timed Agenda

Friday, October 16, 2020
9:00 A.M – 1:15 P.M.

4.5 Transitional/Non-Transitional CLE Credits
In Areas of Professional Practice

***Please note*: Q&A will take place throughout the program. You can submit your questions using the Q&A icon located in the tool bar on your Zoom window.**

9:00 A.M. – 9:10 A.M.	**Welcome** *Hon. Lois Bloom*, United States Magistrate Judge, EDNY; *Robyn Weinstein*, ADR Administrator, EDNY
9:10 A.M. – 9:20 A.M.	**Overview of Mediating Federal Constitutional Claims** *Judge Bloom*; *Professor Brett Dignam*, Director, Challenging the Consequences of Mass Incarceration Clinic, Columbia Law School
9:20 A.M. – 9:40 A.M.	**Wrongful Arrest** *Ashley A. Taylor*, Columbia Law School, Challenging the Consequences of Mass Incarceration Clinic; *Chizoba D. Ukairo*, Columbia Law School, Challenging the Consequences of Mass Incarceration Clinic
9:40 A.M. – 9:50 A.M.	**Judicial Perspective and Q&A** *Judge Bloom*
9:50 A.M. – 10:10 A.M.	**Excessive Force** *Caleb D. Woods*, Columbia Law School, Challenging the Consequences of Mass Incarceration Clinic
10:10 A.M. – 10:20 A.M.	**Judicial Perspective and Q&A** *Judge Bloom*
10:20 A.M. – 10:30 A.M.	**BREAK**
10:30 A.M. – 10:45 A.M.	**Medical Claims** *Ida E. Ayalew*, Columbia Law School, Challenging the Consequences of Mass Incarceration Clinic
10:45 A.M. – 10:55 A.M.	**Judicial Perspective and Q&A** *Judge Bloom*
10:55 A.M. – 11:10 A.M.	**Settlement Considerations and Other Takeaways** *Ida Ayalew*; *Chizoba Ukairo*; *Caleb Woods*
11:10 A.M. – 11:20 A.M.	**Judicial Perspective and Q&A** *Judge Bloom*

11:20 A.M. – 11:30 A.M.	**Logistics of Representing Incarcerated People** *Ida Ayalew*; *Ashley Taylor*; *Chizoba Ukairo*; *Caleb Woods*
11:30 A.M. – 11:55 A.M.	**Final Q&A for Federal Constitutional Claims Section**
11:55 P.M. – 12:10 P.M.	**Break**
12:10 P.M. – 1:00 P.M.	**Mediation Advocacy in Section 1983 Cases** *Richard Brewster Esq.*, Mediator, Brewster ADR; *George Mastoris, Esq.*, Winston & Strawn; *Royce Russell, Esq.*, R-Square, Esq. PLCC
1:00 P.M. – 1:15 P.M.	**Final Q&A and Closing Remarks**

EDNY Section 1983 Mediation Advocacy Training

Friday, October 16, 2020

Section 1983 Claims & Defenses

42 U.S.C. § 1983

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Example: 8th Amendment Protections

8th Amendment Issues	Subjective Component (State of mind)	Objective Component (Nature of harm)	Cases
Use of Force	Maliciously and sadistically for the very purpose of causing harm (*Whitley*)		*Jackson* (8th Cir.) *Hudson*
Medical Neglect	Deliberate indifference	Serious medical need	*Gamble*
Conditions of Confinement	Deliberate indifference (but somewhat redundant when systemic violations; easier to prove when systemic b/c must have known)	Basic human need 2 steps: 1: list facts showing deprivation 2: show that deprivations have consequences	*Wilson* *Rhodes*
Failure to Protect	Deliberate indifference	Substantial risk of serious harm (*Farmer*)	*Farmer*

Example: 4th Amendment Protections

4th Amendment Issues	General Standards	Specific Cases
Illegal Search	Reasonable	- Warrant based on probable cause - Incident to lawful arrest - Consent - Exigent circumstances
Illegal Seizure of property	Reasonable	- Warrant based on probable cause
Illegal Seizure of person	Reasonable	- Arrest warrant based on probable cause -*Terry* Stop / Frisk (reasonable suspicion; limited scope) -- Detention during execution of search warrant -- Excessive (deadly/non-deadly) force

§ 1983 Absolute Immunity

Look at the function performed, not the identity of the actor

1.Legislative acts (vs. Administrative)

2.Judicial acts (vs. Nonjudicial)

3.Prosecutorial acts (vs. Investigative)

Immune or Not Immune?

Immune!	Not Immune!
Initiating prosecution of D that prosecutor believes is innocent	
Misleading description of testimony	
	Delaying prisoner's release for 1 month after taking plea for time served
	Legal Advice re: use of hypnosis
Instructing witness to testify falsely on the witness stand	
Deliberate withholding of *Brady* evidence in violation of discovery order	
Approval of a facially invalid warrant and presentation to magistrate	

§ 1983 Qualified Immunity

Qualified Immunity: protecting objectively reasonable though mistaken judgments:

1. Was the constitutional right violated?
    - Objective inquiry
    - Plaintiff's burden
2. Right clearly established?
    - Goldilocks problem
    - Defendant's burden

Order is now discretionary (*Pearson*)

§ 1983 Immunity Defenses

	Individual Capacity Defendant	Municipal (*Monell*) Defendant	State Defendant
11th Amendment Sovereign Immunity	No	Available, but shouldn't apply, unless acting on behalf of state	Yes (*injunctive relief exception*)
Punitive Damages Immunity	No	Yes	Yes
Absolute Immunity	Yes	No	No
Qualified Immunity	Yes	No	No

Wrongful Arrest & Warrantless Seizure Claims

Section 1983 Claims

HYPOTHETICAL

On **May 20, 2016**, Maxwell Page was arrested in his kitchen, in front of his family, by two plainclothes detectives. Two men identified themselves as officers and told him to open the door. Mr. Page walked over and called his probation officer to inform her he was about to have police contact, which he was required to do and then walked over and cracked the door open. Before he could ask what they wanted, like he planned to do, the two officers pushed the door completely open and pushed Mr. Page over into his kitchen which was to the right of the door. They proceeded to push him to the floor and handcuff him in front of his girlfriend and 4-year-old son who had come out of the bedroom. Mr. Page was not shown a warrant for his arrest and he was not told why he was being arrested. These charges were never presented to a grand jury and Mr. Page was never indicted.The charges were eventually dismissed on October 28, 2017.

Factual Basis of § 1983 Claims For MP's Case

- False Arrest: Lack of Probable Cause
  - The extended gap between the alleged activity and the arrest
  - Lack of testing of alleged substances before arrest
- Warrantless Seizure
  - Arrest took place inside his home which the police entered without consent and without a warrant

Identification of Relevant Facts

- Main source of information and context will be your client
- Pro Se Pleadings
- Little to no discovery
- Client may have already requested their criminal file
  - Arrest paperwork
  - Any substance testing result
  - Transcript of relevant hearings
  - Warrants
- Opposing counsel’s disclosure
- Defendant’s narrative

Legal Standard

In order to prevail on a **Wrongful Arrest** claim:

- Mr. Page must demonstrate that he was confined by law enforcement without consent or probable cause
- Mr. Page must establish that the officers could not have had probable cause or arguable probable cause

In order to prevail on a **Warrantless Seizure** claim:

- Officers did not have a warrant to come into hi apartment complex and home
- Mr. Page did not consent to their entry into his home
- There were no exigent circumstances that justified the officers' entry

Logistics & Considerations When Representing Incarcerated People

- Prisons visits should be planned in advance to avoid logistical issues
- Vocabulary: Use your client's name whenever possible; refer to them as your client or an incarcerated person. Avoid the terms inmate, felon or any other dehumanizing language.
- Involve the client in the case as much as they desire
- Get to know your client! You probably have a lot in common, and this is a necessary way to build trust during your representation
- If you visit, offer to get them a snack and drink from the vending machine and start each meeting or phone call by asking them how their day/week has been

Excessive Force Claims

Section 1983 Claims

4th Amendment

- Primarily used for interactions with officers while being arrested or otherwise detained
- Objective reasonableness standard *Graham v. Connor*, 490 U.S. 386 (1989)
  - Requires balancing of individual 4th amendment interests and government interests
  - Analysis is from the standpoint of a reasonable officer at the time of the incident
  - Injury required to trigger protection, but no severity threshold
  - Considerations include but are not limited to:
    - Severity of the crime
    - Immediacy of the danger to the officer
    - Attempts to flee by the suspect

HYPOTHETICAL

Camby Truzz was walking down the street smoking a hand rolled cigarette. Officer Caruana mistook this for a marijuana cigarette and approached Camby as a suspect. Camby, having had negative interactions with officers in the past and fearing further negative interactions, attempted to flee the scene. Caruana pursued and took Camby down with a two leg takedown, bruising Camby's hip. Caruana couldn't smell any scent of marijuana and noticed that the cigarette was indeed fully legal. Upon recognizing the mistake, Caruana apologized and left. Camby's hip was sore for two days thereafter.

Can Camby claim excessive force under the 4th amendment?

8th Amendment

- Applies to clients who have been convicted of a crime and are subject to punishment (i.e., serving a prison sentence) at the time of the incident
- Objective Standard *Hudson v. McMillian*, 503 U.S. 1 (1992)
  - Driven by contemporary standards of decency
  - Based on reasonableness
- Subjective Standard *Blyden v. Mancusi*, 186 F. 3d 252 (2d Cir. 1999)
  - Culpability based on malice or wantonness
  - Is there a "legitimate law enforcement or penological purpose [that] can be inferred from the defendant's alleged conduct[?]" *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir.1997)
  - Proving such a mindset based on action is not dependent upon effect on prisoner but instead on the circumstances facing the official
- Malicious use of force is a *per se* violation of the 8th amendment

HYPOTHETICAL

Zaza Paccman was convicted of credit card fraud and sentenced to serve a 10-year sentence at Joaning County Penitentiary. During a random cell check, Zaza refused to leave the cell as Zaza was taking a nap. CO Smoop grabbed Zaza by the arm and dragged Zaza out of the cell, placing Zaza in handcuffs in the common area. Smoop asked Zaza if the cuffs were too tight and Zaza said that they were fine. Smoop then tightened the cuffs further, winked at Zaza, and walked away from Zaza to check the cell. Nerves in Zaza's wrist were permanently damaged as a result of this interaction.

Can Zaza Paccman claim excessive force under the 8th amendment?

14th Amendment

- Applies to clients who are awaiting trial at the time of incident (pre-trial detainees)
- Right asserted through “Substantive Due Process Clause”
- Inquiry solely based on objective reasonableness of conduct by officers *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)
    - Issue had been previously avoided by Supreme Court before 2015
    - Difference between 14th amendment protections and 8th amendment protections lies in ability to punish those convicted of crimes

14th Amendment (cont'd)

- Factors to consider in determining reasonableness include but are not limited to:
  - The relationship between the need for the use of force and the amount of force used
  - The extent of the plaintiff's injury
  - Any effort made by the officer to temper or to limit the amount of force
  - The severity of the security problem at issue
  - The threat reasonably perceived by the officer
  - Whether the plaintiff was actively resisting

HYPOTHETICAL

Blair Runtz is a pre-trial detainee at SnF correctional facility awaiting trial for aggravated assault. Blair has glass bones and paper skin and as such is extremely fragile. Blair also has an antagonistic relationship with CO Parsley. During a movement from the rec yard to the tiers, a fight breaks out two feet from Blair that Blair does not engage in. When COs move in to break up the fight, CO Parsley pushes the detainees that weren't involved, including Blair, back from the altercation. This results in Parsley dislocating Blair's shoulder.

Can Blair Runtz claim excessive force under the 14th amendment?

Denial of Adequate Medical Care

Section 1983 Claims

Section 1983, Bivens and Medical Malpractice

- §1983 governs claims brought against a state or local official
- Federal unconstitutional medical care is higher standard than medical malpractice or general negligence under state law
  - Governing standard is “deliberate indifference to a serious medical need”
- Bivens action is the proper vehicle for a claim against a federal defendant, e.g., United States Bureau of Prisons
  - No punitive damages and no attorney fees

Estelle v. Gamble, 429 U.S. 97, 1976

- Established the government's obligation to provide medical care for those whom it is punishing by incarceration
  - an inmate must rely on prison staff to treat his medical needs; if authorities fail to do so those needs will not be met
- Established the standard for 8th Amendment deliberate indifference claims for serious medical needs of prisoners
  - "Unnecessary and wanton infliction" of pain and suffering
  - doctors/prison guards denying or delaying access to medical care

8th Amendment

- Applies to claims of inadequate medical care during period of confinement after conviction
- Incorporated through 14th Amendment to apply to states and local prisons
- Second Circuit has held the deliberate indifference standard embodies both an objective prong and subjective prong *Farmer v. Brennan,* 511 U.S. 825 (1994):

(1) Objective:, the alleged deprived must be in objective terms of 'sufficiently serious' to constitute a "serious medical need"

- (a) Hathway
- (b) Salahuddin
- (c) Armstrong

(2) Subjective: The charged official must act with a sufficiently culpable state of mind

HYPOTHETICAL

Jacob Nagel, is a convicted felon with diabetes, heart failure, and an extremely low ECF (ejection heart fraction) of 14% who is 64 years old. He expresses to correctional officers and writes to prison administration requesting to be put in isolation after the COVID-19 outbreak in March 2020. No one responds after several requests. In June 2020, Mr. Nagel has a fever with a multitude of complications including: cough, SOB, fatigue, headache, sore throat, congestion, nausea, vomiting, and diarrhea. Mr. Nagel complained to Correctional officers and wrote multiple letters to NCCC about his COVID-19 symptoms. The Correctional officers mocked his symptoms and the lack of hygienic conditions in his cell. He was told that he would have to pay $3 in order to be seen by medical staff, but could not afford the copay.

Can Mr. Nagel claim inadequate medical care under the 8th Amendment?

-

14th Amendment

- Applies to claims of medical care that is deliberately indifferent to a serious medical need during pretrial confinement
- *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)
  - *Darnell v. Piniero*, 849 F.3d 17 (2d Cir. 2017)
    - Second Circuit has recognized application of Kingsley to unconstitutional medical care claims

HYPOTHETICAL

A fight broke out while pretrial inmates were playing basketball. Joshua Hayword had been put into a headlock on the court, and hadn't been able to move any of his extremities since the day after the event. Mr. Hayword had informed guards of his inability to move and requested to be seen by medical staff, but they mocked him and said, "he was 'acting' paralyzed," and "wanted to be served" in jail. He requested to be relocated to another cell and correctional officers dragged him on a blanket into another location. Mr. Hayword is now permanently paralyzed.

Can he file for an inadequate medical care claim under the 14th Amendment?

Expert Witnesses

- Necessary to establish “serious medical need”
  - Establish that the defendant’s actions were taken with conscious disregard of danger
    - Fatal to a claim of deliberate indifference, especially at summary judgement
    - Safeguard - while cannot testify to the mental state they can testify to what should have been done and what was reasonably expected
- **Create triable issue of fact**
  - Plaintiff establishes course was “medically unacceptable under the circumstances”

PLRA Concerns

- Passed in 1996
- Used to stem the tide of litigation from incarcerated people
- Relevant in 8th and 14th amendment contexts

PLRA: Exhaustion Requirement

- Before suing in court, prisoners and pre-trial detainees are required to use internal administrative remedies and grievance procedures to the fullest extent
- If there is no “available” administrative remedy or grievance procedure then there is no requirement to exhaust *Ross v. Blake* 136 S.Ct. 1862
  - Remedy is “unavailable” if: No potential for relief, official interference with ability to grieve, or a remedial scheme so opaque that the ordinary prisoner couldn’t be expected to understand it
- Creates affirmative defense for government actors
  - Must be plead; does not create a jurisdictional hurdle for §1983 case

PLRA: Physical Injury Requirement

- “No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act” 42 U.S.C. § 1997e(e)
- Removes ability of court to grant damages in cases where there is no physical injury

Comparable Cases

Case	Amount	Disposition	Jurisdiction	Claim	Fact Summary	Date Settled	Link
Elliot Williams v. Tulsa County Jail, etc.	10.25 Million	Trial	District Court	Deliberate indifference	Summarized on the first example	March 2017	https://www.nytimes.com/2017/03/22/us/tulsa-verdict-jail-broken-neck.html
Daniel Ruiz v. San Quetin	Undecided	Undecided	District Court	Deliberate indifference	Summarized on the second example	Yet to be decided	https://www.prisonlegalnews.org/news/2020/oct/5/first-wrongful-death-claim-against-san-quentin-prison-filed-over-c

“Son of Sam” Considerations

- New York’s “Son of Sam” law is designed to give victims of certain specified crimes access to the funds of the person convicted of committing those crimes. New York Executive Law §632-a
- Up to $10,000 can be recovered before the law applies. Otherwise, 10% of the settlement money will go to the client and 90% will be held in escrow
- Funds exempt from the law:
  - Child support payments
  - Earned income if out on supervised release, parole, or probation and in accord with the terms thereof
  - The first $1,000 deposited into an incarcerated person’s account

Thank You!

Wrongful Arrest and Warrantless Seizure Case Law Sheet

Wrongful Arrest

- In the Second Circuit, to establish a claim for false arrest under 42 U.S.C. § 1983, a plaintiff must show that 'the defendant intentionally confined him without his consent and without justification.'" *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996).

- The Second Circuit has held that a § 1983 claim for false arrest, resting on the Fourth Amendment right of an individual to be free from unreasonable seizures, includes arrests without probable cause, and is substantially the same as the claim for false arrest in New York state. *See Lennon v. Miller*, 66 F.3d 416, 423 (2d Cir. 1995; *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995).

- The government bears the burden of proving, by a preponderance of the evidence, that an individual's consent to enter or search a residence was voluntary. *United States v. Buettner- Janusch*, 646 F.2d 759, 764 (2d Cir. 1981).

- In general, probable cause to arrest exists when the officers have knowledge or reasonably trustworthy information or facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrest has committed or is committing a crime." *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996); see also *Uzoukwu v. City of N.Y.*, 704 F. App'x 32, 33 (2d Cir. 2017); *Escalera v.Lunn*, 361 F.3d 737, 743 (2d Cir. 2004).

- The judge's consideration and grant of an arrest warrant supports a finding of probable cause. For false arrest, there has been an arrest and imprisonment without a warrant, the officer has acted extrajudicially and, as a result, the presumption arises that such an arrest and imprisonment are unlawful. *Smith v. County of Nassau*, 34 NY2d 18, 23 (1974).

Warrantless Search and Seizure

- The Supreme Court has stated "it is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable...subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973)

- Warrantless seizures are therefore unconstitutional and "any physical invasion of the structure of the home, 'by even a fraction of an inch, is too much' to be tolerated." *Mincey v. Arizona,* 437 U.S. 385, 390 (1978)

- The Second Circuit has set out the following factors to determine if justifiable exigent circumstances existed to allow warrantless search and seizure : "(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause ... to believe that

the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry." *United States v. Fields*, 113 F.3d 313, 323 (2d Cir. 1997)

- Ultimately, "the essential question in determining whether exigent circumstances justified a warrantless entry is whether law enforcement agents were confronted by an 'urgent need' to render aid or take action." *Loria v. Gorman*, 306 F.3d 1271, 1284 (2d Cir. 2002)

Secondary Sources

- Civil Rights & Civil Liberties Litigation: The Law of Section 1983
  - Sheldon H. Nahmod- September 2020 Update
- Sword & Shield: A Practical Approach to Section 1983 Litigation
  - Mary Massaron Ross and Edwin P. Voss, Jr.- 2015 Edition
- Section 1983 Litigation Claims & Defenses
  - Martin A. Schwartz- 4th Edition 2020-2 Supplement

Son of Sam Case Law Sheet

- New York Executive Law §632-a outlines New York's "Son of Sam" law.
    - It is designed to stop convicted people from being able to profit on their crimes. Instead, the law allows victims of that crime or the family/representatives of those victims to access profits from the commission of the crime or other funds of the convicted person.[1] Those other funds must exceed ten thousand dollars to trigger this law and cause the office of victim services to notify victims of the existence of such funds and the potential to access them.[2]

- Such funds include all funds or property other than child support and, in most cases, earned income so long as the convicted person is serving a sentence or on probation, conditional discharge, post-release supervision, or supervised release.[3]
    - Funds can also be accessed if the convicted person is no longer subject to any of the above conditions if they had been subject to those conditions within the past three years and those funds are paid to them within that three year threshold.[4]

- If the convicted person is still incarcerated, the first $1,000 placed into their account is protected from a "Son of Sam" judgment.[5]
- If the funds are awarded to the convicted person as compensatory damages as a result of a separate civil action, then the first 10% of those funds is protected from a "Son of Sam" judgment.[6]

- Lawyers of clients subject to "Son of Sam" liability should be especially careful during mediations. The client should be informed of whether or not the crime that they committed is covered by the "Son of Sam" provisions.[7]

- Furthermore, clients should be counseled on the way that the law would affect any recovery that they might get through settlement. A $10,000 settlement might seem paltry to some clients but it is plausible that some clients will be ineligible to actually net more money than that unless they can recover more than $100,000.

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[1] N.Y. Exec. Law § 632-a(3) (McKinney 2011) allows crime victims to bring an action to recover money damages from the convicted perpetrator of said crime.
[2] N.Y. Exec. Law § 632-a(2)(a-c) (McKinney 2011)
[3] N.Y. Exec. Law § 632-a(1)(c)(i-ii) (McKinney 2011).
[4] N.Y. Exec. Law § 632-a(1)(c)(iii) (McKinney 2011) (These situations are restricted to funds paid to the convicted person, "as a result of any interest, right, right of action, asset, share, claim, recovery or benefit of any kind that the person obtained, or that accrued in favor of such person… any recovery or award collected in a lawsuit … [or] earned income earned during a period in which such person was not in compliance with the conditions of his or her probation, parole, conditional release, period of post-release supervision by the department of corrections and community supervision or term of supervised release with the United States probation office or United States parole commission" where that period of non-compliance is to be measured from the earliest date of non-compliance); *See Vincent v. Sitnewski*, No. 10 CIV. 3340 TPG, 2011 WL 4552386, at *1 (S.D.N.Y. Sept. 30, 2011) (clarifying that not only are awards based on §1983 claims not protected from "Son of Sam" law access, but also that after all other statutes of limitations have expired, § 632 also gives victims an additional three year period to access the funds of the convicted person).
[5] N.Y. Exec. Law § 632-a(3) (McKinney 2011); N.Y. Correct. Law § 116 (McKinney 2011); N.Y. Correct. Law §500-c (McKinney 2019).
[6] N.Y. C.P.L.R. 5205 (McKinney 2020).
[7] N.Y. Exec. Law § 632-a(1)(a,e(i)) (McKinney 2011)

Denial of Inadequate Medical Care
8th Amendment and 14th Amendment Case Law Sheet

8th Amendment

Estelle v. Gamble, 49 U.S. 97 (1976)

- **Facts**: Respondent state inmate incurred back injuries while engaged in prison work when a bail of cotton fell on him while unloading a truck. His complaints about his pain were ignored, mocked, and used against him for disciplinary action.
- The Supreme Court reiterated from *Wilkerson v. Utah* that punishments of torture and unnecessary cruelty are forbidden when they involve lingering death. Furthermore, the Court stated that the evolving standards of decency do not include "the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153 at 2925. These principles established that the government's obligation to provide medical care for whom it is punishing by incarceration.
- While Estelle Establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.

Farmer v. Brennan, 511 U.S. 825 (1994)

- **Facts:** A transsexual prisoner brought a Bivens suit against prison officials for knowingly placing [her] in general prison population where [she] would face substantial risk of serious harm.
- Inmates has a right to humane conditions of confinement. The Court held:
    - A prison official may be held liable under the Eighth Amendment for acting with "deliberate indifference" to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.
    - When deprivation is sufficiently serious and the officer has acted with "deliberate indifference" to inmate health or safety
        - Deliberate indifference is when something is more than negligence, but is satisfied by something less than acts or omission for the very purpose of causing harming or with knowledge that harm will result. Which is equivalent to officers acting recklessly
        - Subjective recklessness, as used in the criminal law, is the appropriate test for the 8th Amendment is consistent with cruel and unusual punishment clause
    - An inquiry into the prison official's state of mind. Remand would be required to determine whether prison officials would have liability, under above standards, for not preventing harm allegedly occurring in present case

Hathaway v. Coughlin, 37 F.3d 63

- **Facts:** Joseph Foote received hip surgery where three metal pins were inserted. Out of these three pins, two broke causing Mr. Foote an immense amount of pain for year.
- If prison official have failed to provide any treatment for a medical condition, one can looks are the character of the medical condition itself (Smith v. Carpenter).
- Important, but not exclusive, factors to consider in making this determination include "the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *Chance v. Armstrong*, 143 F.3d 698, 702-03 (2d Cir. 1998).
- But when a prisoner is receiving ongoing treatment and that treatment has been inadequate or there has been a temporary delay or interruption in the treatment due to the actions of prison officials, the inquiry is "narrower." *Smith*, 316 F.3d at 185-86.

Salahuddin v. Goord, 467 F.3d 263, 280 (2d Cir. 2006).

- **Facts:** A prisoner brings the 8th Amendment deliberate indifference claim because prison officials were delaying his Hepatitis C treatments.
- Added another layer to the objective prong:
  - a court must ask "whether the prisoner was actually deprived of adequate medical care – focusing on whether prison officials provided reasonable care
  - a court must determine if the inadequacy deprived in medical care is sufficiently serious

Chance v. Armstrong, 143 F.3d 698 (2d. Cir. 1998)

- **Facts:** Plaintiff, Chance Armstrong, filed an 8th Amendment deliberate indifference claim against officers who responded inadequately to his complaints about his teeth.
- The Second Circuit Concluded that there are additional factors to take into consideration for the objective factor include:
  - the existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment
  - the presence of a medical condition that significantly affects an individual's daily activities
  - Or the existence of chronic and substantial pain. *Id*. At 702-03.

14th Amendment

Kingsley v. Hendrickson, 576 U.S. 389 (2015)

- **Facts**: Pre-trial detainee refused an order during a cell check and 4 officers came to physically remove him from the cell and finish the cell check. The detainee claims that there was excessive force used in his removal from the cell.
- Objective component:
  - Turns on the present facts for each case
  - Focus on reasonableness of actions of COs (considerations include but are not limited to: the relationship between the need for the use of force and the amount

of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting)
    - Understanding what can cause injury is enough to create 14th amendment protections (Handcuffs being too tight, etc.)
- Subjective component:
    - Expressly rejected by the court
    - No reason to look into mindset as there is no punishment of pre-trial detainees, so as such there just needs to be an inquiry into the reasonableness of any action taken by the CO
    - CO actions are still protected if they act reasonably so no wave of litigation will arise

Darnell v. Piniero, 849 F.3d 17 (2d Cir. 2017)

- **Facts**: Twenty state pretrial detainees filed an §1983 claim based on a theory of deliberate indifference in regards to their conditions of confinement. The Second Circuit determined the District Court erred in their decisions to use *Farmer's* Eighth Amendment framework on pretrial inmates, instead of properly applying *Kingsley*. "A pretrial detainees claims are evaluated under the Due Process Clause because, [p]retrial detainees have not been convicted of a crime of a crime and thus 'may not punished in any manner – neither cruelly and usually nor otherwise." *Darnell* citing *Iqbal v. Hasty*, 490 F.3d 143, 168 (2d Cir. 2007).
- "The court determined that in order to establish a Fourteenth Amendment claim for deliberate indifference to conditions of confinement under the Due Process Clause…must prove that the defendant-office aced intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have know, that the condition posed an excessive risk to health or safety." Id., at 35

Excessive Force
4th, 8th, and 14th Amendment Case Law Sheet

4th Amendment

Graham v. Connor, 490 U.S. 386 (1989)

Facts: A diabetic man went to a store to get some juice and saw that there was a long line. He quickly left the store and a police officer followed him and stopped him and there were injuries that occurred as a result of the stop.

- Objective reasonableness standard:
  - Requires balancing of the intrusion on one's 4th amendment interests vs. the governmental interests at stake (includes but isn't limited to: Severity of crime at issue, suspect posing a threat to the safety of others, whether the suspect is resisting arrest or attempting to flee)
  - Officers must act reasonably in light of the situation (*Cugini v. City of New York*, 941 F.3d 604 (2d Cir.2019) where the court found that an officer acted unreasonably in tightening cuffs to a point where permanent damage was caused during arrest of a suspect for stalking and harassing her estranged family member despite her clear signs of distress)
  - Hindsight bias must not taint analysis
  - Many courts say that there must be some injury for the force to be excessive, although that injury need not linger (*Gersbacher v. City of New York*, 2017 WL 4402538 (S.D.N.Y. 2017))

8th Amendment

Hudson v. McMillian, 503 U.S. 1 (1992)

Facts: Petitioner was in Angola and he had been arguing with a CO and a group of COs took him out of his cell put him in restraints and beat him leaving bruises and loosened teeth

- Objective component
  - "Contemporary standards of decency" are always violated when COs maliciously and sadistically use force to cause harm
    - Significant injury is not required
  - Differs from other 8th amendment contexts (conditions of confinement, medical needs)
- 8th Amendment does not cover *de minimis* uses of physical force (pushes or shoves) if that use isn't "repugnant to the conscience of mankind"

Blyden v. Mancusi, 186 F. 3d 252 (2d Cir. 1999)

Facts: Class action lawsuit against prison official alleging cruel and unusual punishment after prison riot during the forcible retake.

- Subjective Component:
  - Culpability based on wantonness (not dependent upon effect on prisoner but instead on the circumstances facing the official)
  - Asserts that there is no need for malice and the inquiry is whether force is applied in a good faith effort to maintain or restore discipline
  - "[w]here no legitimate law enforcement or penological purpose can be inferred from the defendant's alleged conduct, the abuse itself may, in some circumstances, be sufficient evidence of a culpable state of mind" *Boddie v. Schnieder*, 105 F.3d 857, 861 (2d Cir.1997)).
- Expressly claims that deliberate indifference can't be used in excessive force cases because of the odd outcomes it would bring out (can't be deliberately indifferent if you're actively inflicting pain)
- Standard for supervisory liability for excessive force:
  - Sadistic and malicious standard in Hudson makes little sense
  - Supervisory liability comes from "distinct acts or omissions that are a proximate cause of the use of that force"
  - In Blyden specifically, there were "reprisals" that are definitionally not in good faith that the prison officials failed to fix
  - Gross negligence and/or deliberate indifference should be the standards in supervisory liability (*Meriwether v. Coughlin,* 8779 F.2d 1037, 1048 (2d Cir. 1989))
  - Personal involvement has to be plead for each individual named in the complaint (*Bilan v. Davis, No. 11 CIV. 5509 RJS JLC, 2013 WL 3940562, at *7 (S.D.N.Y. July 31, 2013)*(Inmate was visiting with friends and an argument between another inmate and COs turned into a physical altercation involving 10+ COs. Complainant was injured in the altercation and was only able to identify one CO on a shaky ID)

14th Amendment

Kingsley v. Hendrickson, 576 U.S. 389 (2015)

Facts: Pre-trial detainee refused an order during a cell check and 4 officers came to physically remove him from the cell and finish the cell check. The detainee claims that there was excessive force used in his removal from the cell.

- Objective component:
  - Turns on the present facts for each case
  - Focus on reasonableness of actions of COs (considerations include but are not limited to: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to

temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting)
    - Understanding what can cause injury is enough to create 14th amendment protections (Handcuffs being too tight,
- Subjective component:
    - Expressly rejected by the court
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    - CO actions are still protected if they act reasonably so no wave of litigation will arise

Prison Litigation Reform Act (PLRA) Concerns

Exhaustion

Ross v. Blake, 136 S. Ct. 1850 (2016)

Facts: While a prisoner was being moved within the facility, a CO physically assaulted him. The prisoner reported this incident to a superior CO and subsequently filed suit under §1983. In defense, the government claimed that the prisoner failed to exhaust administrative remedies.

- Administrative procedures:
  - Must be taken to the final administrative stage, including internal appeals processes, before 8th and 14th amendment claims can be brought under
  - No exceptions to exhaustion requirements unless the procedure can be claimed to not be available
    - If it exists as a "dead-end" procedure where officers profess to not be able to or are routinely unwilling to provide any relief to the aggrieved
    - If the procedure is so opaque as to not be discernable by the reasonable inmate (*Hubbs v. Suffolk County Sherriff's Dept.*, 788 F.3d 54 (2d Cir. 2015) Where the court found that the defendants failed to prove that there was an available remedy when the grievance procedure did not detail how to grieve issues with medical care)
    - If the administration actively attempts to thwart use of the procedure through machination, misrepresentation, and intimidation
- Exhaustion is an affirmative defense that must be plead by the defendants

Physical Injury Requirement

Under 42 USC 1997e(e) prisoners cannot recover under §1983, or any other vehicle for a federal civil suit, without a showing of a physical injury (*Minneci v. Pollard*, 565 U.S. 118, 128 (2012)). While this does not have any jurisdictional implication, not having a physical injury bars a complainant from being able to recover monetarily.

Logistics of Visiting and Working with Incarcerated Clients

Logistics of Visiting With Incarcerated Clients

- The general rules for visiting New York State prisons are outlined in the DOCCS Directives however each prison operation may vary slightly so it is best to call the records office and confirm

- Scheduling a legal visit requires first calling the facility to find out the contact information of the Records Office and then emailing the Records Office a letter requesting a legal visit. The letter must contain the full name of a specific incarcerated person, the fact that it is a legal visit, their DIN (identification) number, the day and time you request to visit and what you plan to bring to the visit and your bar number. The Records Office may or may not reply so it is best to follow up to confirm that the visit has been scheduled and print out the email exchange and bring it to the facility.

- You will only be allowed to bring in what you stated you would bring in your letter. This can include pens and paper, your ID (required), car keys, a small amount of money or a card to buy food or drink at the vending machines, and legal documents you want to leave with your client. You are not allowed to bring your phone or smartwatch, food or drink (including water) or basically anything else into the facility.

- There is often a long delay between when you arrive at the facility and when you will be let through security and into the visitation room so arriving early is preferable if you have a lot to discuss in your allotted time. Some prisons also won't begin to move your client from their cell to the visiting room until you have gone through security so it may take some time for them to arrive. It is always important to make sure your client knows when you are coming so they are ready to be moved when it is time.

- Count: Every day at a certain time of day, all NY correctional facilities, make everyone say where they are and count every person in their facilities. That number must be cleared by Albany before anyone is allowed leave. This can take 45 minutes, or it can take several hours. So, unless you plan on having an extending visit it is important to schedule your visit after count (if the facility allows it) or confirm when you get there when the count will begin and leave beforehand. This also means if you arrive during count you will not be allowed inside the facility until it is over.

Logistics of Communicating With Incarcerated Clients

- All letters and documents must have "privileged and confidential" at the top of each page and envelopes should have "attorney-client material: confidential" written or stamped on the front and back of the envelope to ensure correctional officers won't read it. Never leave documents with a correctional officer to give to a client, give it to them yourself or mail it.

- When addressing the letter to your client include their DIN number after their name. Include the address where they should write back in the letter as they may not be given the letter. The speed letters will get to your clients who are incarcerated will vary.

- Legal phone calls are hard to schedule and while they are not supposed to be monitored by correctional officers you can never be sure so privileged communication should be done by mail or in person if possible. The protocols for setting up legal phone calls will vary by facility, so it is best to call and ask how to schedule one.

- It is best to send your client a letter as soon as you have confirmed you will be visiting so they will be ready. If the client has a family member that they communicate with frequently it might be helpful to establish contact with them and let that person know of any last-minute visits or change of plans to visits as they can likely get that information to your client faster than a letter will.

- Your client's ability to affirmatively call you will vary by the level of facility they are at, they may also have access to an email system called JPAY, however, each email costs money or "stamps" so it is important when you email your client and expect a response to include a return stamp because they may not be able to load money on for stamps themselves. The confidential of J pay is also dubious so privilege communication should be avoided over email as well.

Legal Phone Calls

- Generally, legal visits and privileged correspondence are preferred and expected over legal phone calls.
- When legal calls are still necessary, they must be requested in writing by an attorney in good standing, to a Supervising Offender Rehabilitation Coordinator.
- The attorney must state the legal matter cannot be adequately addressed through privileged correspondence, a legal visit would be unduly burdensome under the circumstances, and a confidential telephone call between the attorney and their client is necessary
- Additionally, DOCCS directive states that the attorney's office must be more than 45 miles from the correctional facility of their client (or 30 miles if the office is in New York City), and they must not have made a legal call within the past 30 days.
- In making such requests, the attorney should include at least three feasible times/dates and should not plan to schedule a legal call for longer than 30 minutes.
- Keep in mind that legal calls take place of other calls that inmates may make during the scheduled period.
- For more information, see DOCCS Directive #4423

Interpersonal Communication Considerations

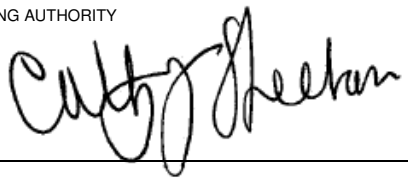
- Vocabulary: don't refer to your client as an inmate, felon or any other dehumanizing language. Use their name whenever possible, client or incarcerated person

- When you sit down with your client for a legal visit, consider offering to get them a drink and snack from vending machine as they often have items, they don't have access to otherwise and it will give you an opportunity to just talk

- Don't make assumptions about what your client can or can't understand or want to know about their case If someone filed a pro se petition that was referred for mediation they have a basic understanding of the law and are investing in redressing the fact that their rights are violated so include and explain to them the steps you are taking and why.

- Get to know your client! You probably have a lot in common, and this is a necessary way to build trust during your representation

- Bottom line: treat your client the way you would want to be treated if the rolls were reversed.

NEW YORK STATE Corrections and Community Supervision **DIRECTIVE**	TITLE **Inmate Legal Visits**		NO. 4404 DATE 09/18/2019
SUPERSEDES DIR. #4404; Dated 11/02/17	DISTRIBUTION A B	PAGES PAGE 1 OF 3	DATE LAST REVISED
REFERENCES (Include but are not limited to) 7NYCRR Part 200 & 201; Public Health Law §206(15); Judiciary Law §484; ACA Standards 4-4274, 4-4275, 4-4500, 4-JCF-3A-01, 4-JCF-3A-19; Directive #4421, #4900, #4910; National PREA Standards; CPLR 4510	APPROVING AUTHORITY 		

I. PURPOSE: To provide a uniform manner in which inmate legal visits are to be conducted throughout the Department in conformance with statutory and case law regarding inmate access to the courts.

This directive contains the guidelines which govern legal visits within a facility or institution under the control of the New York State Department of Corrections and Community Supervision.

II. DEFINITIONS

A. Legal Visit: A visit between an inmate and an Attorney, approved legal representative, or Attorney's authorized representative for the purpose of discussing confidential legal matters, or a visit between an inmate who is a foreign national and the authorized diplomatic representative of their country of citizenship, or a visit between an inmate and a representative, including an employee or registered volunteer, of a rape crisis program.

B. Attorney: One who is duly admitted to the practice of law in this State or another jurisdiction; he or she need not be formally retained or be the Attorney-of-record for the inmate.

C. Approved Legal Representative: Second or third-year law school students and law school graduates approved by order of the appropriate Appellate Division (see Judiciary Law §484).

D. Attorney's Authorized Representative: Paralegals, law students, and investigators, or any other individuals identifiably employed by or under the supervision of, and responsible to an Attorney.

E. Rape Crisis Program: Any local, State, or National organization authorized to provide rape crisis services, victim advocacy services, and emotional support services, including, but not limited to, organizations approved to provide such services in New York State by the Department of Health pursuant to Public Health Law §206(15).

F. Diplomatic Representative: An agent or representative of a foreign nation who, as confirmed by the U.S. Department of State and/or the foreign nation's embassy, has the authority to represent, supervise and/or transact the affairs of the foreign nation.

III. POLICY

A. The right of meaningful access to the courts, and the right to counsel are rights an inmate clearly retains upon incarceration. Accordingly, an inmate retains the right to legal visits.

B. A legal visit may be used solely for the purpose of discussing confidential legal matters.

C. A legal visit by an Attorney's representative (e.g., an investigator, unaccompanied by an Attorney) will only be authorized if:

1. The Attorney for whom the representative is employed certifies to the Department that such visit is necessary, in connection with his or her legal services, to the inmate being visited; and
2. The legal services relate to a specific and unresolved matter.

D. A facility or institution may not impose any further restrictions without the prior approval of the Counsel to the Department.

E. The Department strongly supports access to rape crisis services, victim advocacy services, and emotional support services for incarcerated survivors of sexual victimization. As required under the National PREA Standards 28 C.F.R. §§§115.53, 253, and 353, each facility shall enable reasonable communication between inmates and outside victim advocates for emotional support services related to sexual abuse in as confidential a manner as possible. Further, communications with a Rape Crisis Counselor are confidential under CPLR 4510. Accordingly, a certified Rape Crisis Counselor employed by or registered to volunteer with a Rape Crisis Program is entitled to a legal visit with an inmate for the purpose of discussing confidential matters.

IV. PROCEDURE

A. Attorneys and their representatives are expected to give at least 24 hours notice, to a facility, indicating the inmate(s) requested to be seen. This notice may be in writing or by telephone. The 24 hours notice requirement may be waived for good cause. However, all requests to see an inmate, including those made on the day of the visit, shall be complied with in the same manner as a request for a non-legal visit.

B. The Superintendent may deny legal visits of any Attorney or representative for good cause if such action is necessary to maintain the safety, security, and/or good order of the facility. However, prior to each such denial, the opinion of Counsel's Office must be received.

C. Rape Crisis Counselors are expected to schedule legal visits upon at least 24 hours notice through the facility's Assistant Deputy Superintendent PREA Compliance Manager or the Superintendent's designee. The notice may be in writing (including via email) or by telephone. A legal visit may be scheduled upon less than 24 hours notice for good cause.

D. Legal visits are to be conducted Monday through Friday except holidays, during the normal facility visiting hours. A denial of a legal visit on a Saturday during normal Saturday visiting hours must be approved by the Watch Commander. Attorneys and their representatives should be advised of the times when inmates are eating meals and/or count times and should be discouraged from arriving at these times. Consideration for after-hour, holiday, or Sunday visits, based on special circumstances, shall be given on a case-by-case basis.

E. In general, all legal visits shall be contact visits. The Superintendent must obtain the opinion of Counsel's Office prior to suspending contact visit privileges for any inmate and Attorney or approved legal representative.

Regular procedures apply to the suspension of an inmate's contact visit privileges with Attorney's authorized representatives.

F. If an Attorney or representative requests to see a large number of inmates, efforts shall be made to provide the greatest number of visits possible. Subject to considerations of safety, security, and good order of the facility and the legal necessity for such a visit, a limited number of inmates may be allowed to meet simultaneously with an Attorney, approved legal representative, or authorized representative.

G. Legal papers may be exchanged during a legal visit and may be left with an inmate by an Attorney or representative subject to inspection for contraband. Such inspection shall be done in the presence of the Attorney and the inmate. Care must be taken not to read the content of the papers during the inspection.

In the event that the legal materials to be exchanged are voluminous, the facility may either:

1. Conduct an inspection of the legal papers in the package room at the conclusion of the visit, provided that the removal of the papers from the visiting room and inspection in the package room can be done in the presence of the inmate, unless both the inmate and the Attorney or representative consent to such inspection out of the presence of the inmate; or
2. Have a supply of blank envelopes available in the visiting room into which the legal papers can be placed and sealed for subsequent reopening and inspection in the presence of the inmate, consistent with the procedures for handling legal mail set forth in Directive #4421, "Privileged Correspondence."

The intention to leave legal papers with the inmate should be communicated by the Attorney or representative to the visiting room Correction Officer. These procedures shall also be followed if an inmate wishes to leave legal papers with an Attorney or representative.

H. In emergency situations, or when a substantial threat exists to the safety, security, or operations of the facility, or to the visiting Attorney or representative, legal visits may be suspended. This is to be done for the duration necessary to ensure the safety and security of the facility and of the visitor.

I. Nothing in this directive is to be construed to countermand procedures as found in Departmental Directives #4900, "Security in Gate Areas/Secure Posts," and #4910, "Control of & Search for Contraband."

J. An inmate has the right to attend and the right to refuse any legal visit. Any refusal must be in writing and signed by the inmate in duplicate; one copy to be given to the Attorney requesting the legal visit and the other copy to be placed in the inmate's file. When an inmate refuses a legal visit, and refuses to sign such a statement, the refusal shall be documented and witnessed by two Department employees. (See Form 4404A, "Sample Letter".)

K. The Superintendent shall designate an area for legal visits. Such area should ensure the confidentiality of all communications during the visit.

Sent via email to: doccsgreenhavenirc@doccs.ny.gov

September 17, 2019

Green Haven Correctional Facility
30 Institution Road
594 Rt. 216
Stormville, New York 12582-0010
Attention: Records Office

Re: Legal Visit with MP (DIN # XXXXXXXX)

Dear Records Office:

We write to schedule a legal visit with MP (DIN # XXXXXXXX) on Monday, September 25, 2020 at 9:00 am related to a specific and unresolved legal matter. The following two law student interns will be visiting: Ashley Taylor (D.O.B. xx/xx/xxxx) and Chizoba Ukairo (D.O.B. xx/xx/xxxx).

I would be grateful if you could confirm the visit via email to aat2177@columbia.edu or if you have any questions or concerns about this request.

Thank you for your attention to this matter.

Sincerely,

NAME
BAR NUMBER

NEW YORK STATE Corrections and Community Supervision **DIRECTIVE**	TITLE **Inmate Telephone Calls**		NO. 4423 DATE 01/15/2014
SUPERSEDES DIR #4423 Dtd. 01/03/13	DISTRIBUTION A B	PAGES PAGE 1 OF 11	DATE LAST REVISED 05/21/2015
REFERENCES (Include but are not limited to)	APPROVING AUTHORITY		

I. PURPOSE: To set forth policy and procedures for operation of the inmate "call-home" program.

II. DESCRIPTION: The Department operates a telephone system for inmates as one of the modes by which they may maintain contact with family and friends at home. This system provides a controlled list of up to 15 phone numbers accessible to each inmate, which at most locations can be self-dialed at telephones in housing units. Employee assisted dialing is used for calls outside of the continental United States, Canada, U.S. Virgin Islands, Puerto Rico, Guam, and Central Northern Mariana Islands, and for emergency calls.

Facilities may, with the prior approval of the Deputy Commissioner for Program Services, add restrictions in order to meet certain unique facility needs.

III. GENERAL POLICY RELATING TO ALL INMATE TELEPHONE CALLS

A. Collect Calls: Calls will be made collect, except for calls outside of the continental United States, Canada, U.S. Virgin Islands, Puerto Rico, Guam, and Central Northern Mariana Islands, and some emergency telephone calls.

B. Facility Telephone Schedule: "Call-home" program operations shall be permitted everyday, including holidays, within the hours of 7:00 AM to 11:00 PM. Calls started at 11:00 PM or earlier will be allowed a full 30-minute call. Calls attempted after 11:00 PM will not be processed. Each Superintendent will determine suitable time frames for calling within those hours, and a schedule for calls will be established. Every effort will be made to maintain this schedule.

C. Monitoring Notice: The following notice shall be posted in English and Spanish adjacent to any telephone to be used by inmates advising them that their telephone calls may be monitored:

NOTICE
ALL INMATE TELEPHONE CONVERSATIONS ARE SUBJECT TO
ELECTRONIC MONITORING AND/OR RECORDING BY DEPARTMENTAL PERSONNEL

AVISO
TODAS LAS LLAMADAS TELEFONICAS DE LOS RECLUSOS PUEDEN SER ESCUCHADAS
POR MEDIOS ELECTRONICOS Y PUEDEN SER GRABADAS POR EL PERSONAL DEL DEPARTMENTO

D. Negative Correspondence and Telephone List

1. Each facility will maintain a Negative Correspondence and Telephone List in the Guidance folder of each inmate.
2. Whenever the recipient of an inmate's correspondence or telephone calls indicates, in any manner, that he or she does not wish to receive further correspondence or phone calls from the inmate, the Correspondence Unit, the Package Room, the Deputy Superintendent for Security, the Supervising Offender Rehabilitation Coordinator, the facility Community Supervision Office, and the inmate shall be notified. Form #3402, "Addition of Name to Negative Correspondence/Telephone List," shall be used for notification. A copy will be filed.
3. The Negative Correspondence and Telephone List shall contain the name of any person or business that has indicated, in any manner, that further correspondence from the inmate is not desired. If a request to be removed from an inmate's telephone or correspondence list is received, a letter in the format of Form #4422B shall be sent to the person making the request. If such a person or business indicates, at a later time, that further correspondence is not objectionable, the Superintendent or his or her designee may, but need not, direct the name of the person or business be removed from the Negative Correspondence and Telephone List.
4. No inmate shall continue to submit mail to or make telephone calls to any person or business that currently appears on his or her Negative Correspondence and Telephone List. Any inmate continuing to do so may be subject to disciplinary action and/or monitoring of outgoing mail for a specific period of time.

E. Prohibited Calls

1. Inmates are prohibited from placing telephone calls to the following (unless the individual called is a member of the inmate's immediate family, e.g. spouse, child, parent, grandparent, brother, sister, aunt, or uncle):
   a. Present or former employees of the Department of Corrections and Community Supervision and their families;
   b. Present or former employees of the Board of Parole and their families;
   c. Present or former employees of Federal, State, and local criminal justice agencies, including but not limited to, police agencies, District Attorneys, Federal and local correctional agencies, Probation Departments, and the families of such employees;
   d. Jurors involved in the conviction of the inmate, and their families;
   e. Judges involved in the conviction or indictment of the inmate, and their families; and
   f. Crime partners who are not incarcerated.

2. No inmate may place a telephone call to the residence of a victim of the crime(s) for which the inmate has been convicted or is presently under indictment, regardless of whether immediate family members maintain the same residence, unless prior written authorization has been received from the Superintendent. No inmate may place a telephone call to their child if the child is a victim of the crime(s) for which the inmate has been convicted or is presently under indictment, even if there is no Court Order specifically prohibiting such contact. The name of the person(s) will be added to the Negative Correspondence and Telephone List. Form #3402 will be completed and used for notification. A copy will be filed.
3. No inmate may place a telephone call to the residence of the victim(s) of the parole revocation for which the inmate has been returned to custody, regardless of whether or not criminal charges were made or an Order of Protection was issued. The name of the person(s) will be added to the Negative Correspondence and Telephone List. Form #3402 will be completed and used for notification.
4. No inmate may call the phone number of any person listed on a Court Order of Protection which prohibits telephone communication; unless the Order specifically states that the inmate is not prohibited from communication by phone with another person at that same phone number. The name of the person(s) will be added to the Negative Correspondence and Telephone List. Form #3402 will be completed and used for notification. A copy will be filed.

   Note: Should the facility receive two or more Orders, the terms of which appear to be in conflict with one another, the facility should contact Counsel's Office for direction.
5. Inmates are prohibited from making telephone calls for the purpose of harassing or intimidating any person. Staff and inmates are advised that such telephone calls may violate Federal and/or State laws. Facility Superintendents shall report serious and/or continuing telephone calls of this nature to the proper law enforcement authorities.
6. Inmates are prohibited from making telephone calls for the purpose of conspiring to violate Federal, State, or local laws or ordinances, and are prohibited from using facility telephones to conduct a continuing criminal enterprise.
7. Inmates are prohibited from making telephone calls to inmates in other New York State, Federal, other State, county, or local correctional facilities.

   Exception: In special situations, subject to the approval of the Superintendents of the two facilities, inmate-to-inmate telephone calls between immediate family members or the parents of a child may, but need not, be authorized once a month. Such telephone calls, when permitted, shall be employee assisted and monitored.
8. Inmates are prohibited from making telephone calls to persons under parole or probation supervision without the written approval of the Superintendent and the Parole Officer who is supervising the parolee or the Probation Officer who is supervising the probationer. Such approvals will usually only be granted in cases involving immediate family members.

   A copy of the written approval of the Superintendent and Parole Officer or Probation Officer authorizing such telephone calls will be retained in the inmate's Guidance folder.

9. Inmates are prohibited from making toll-free telephone calls. Inmates are prohibited from making telephone calls to order goods or services from private vendors or to conduct business related activities.
10. Inmates are prohibited from making telephone calls to Operator Information.
11. Inmates are prohibited from making telephone calls to unrelated minor persons under 18 years of age without the written approval of that minor's parent or legal guardian.
    a. The parent or legal guardian must forward a letter to the Superintendent granting such approval before such telephone calls may take place.
    b. A copy of the letter from the parent or legal guardian granting such approval will be retained in the inmate's Guidance folder.
12. Inmate telephone calls and telephone conversations shall be restricted to the telephone number dialed or otherwise placed by or for the inmate, and shall terminate at the actual billing address of the called party. Telephone call forwarding or third party phone calls are prohibited.
13. Inmates are prohibited from placing calls to pagers, except that an emergency call to such device may be authorized under Section V, below.
14. Inmates may not use another inmate's PIN number to place calls.

IV. CALLS UPON TRANSFER OR RETURN TO A FACILITY

A. Transferred Inmates: Within 24 hours of arrival at a new facility, an inmate shall be permitted one collect telephone call to the family. If security precautions prevent the inmate from placing this call, and if requested by the inmate, a staff person designated by the Superintendent, usually from the Guidance and Counseling Unit, shall make the call to a person of the inmate's choice.

   Exception: This procedure does not apply to an inmate in "transit status" or temporarily at a transit facility overnight or for a weekend during transfer, but it does apply to inmates in holding units in Auburn and Sing Sing.

B. Out to Court/Hospital: An inmate out to Court or in a hospital for a period of five days or more will be allowed to make a collect telephone call within 24 hours of return to the correctional facility.

   Collect calls from an outside hospital, other than a secure ward, may be made only with the approval of the Superintendent or designee.

C. Returned Parole Violators: A returned parole violator will be allowed to make one collect telephone call, within 24 hours after arrival, to a person of his/her choice.

V. EMERGENCY CALLS

A. Whenever an inmate must place any type of emergency telephone call, the inmate shall contact his or her assigned Offender Rehabilitation Coordinator, explain the emergency situation, and request that an emergency telephone call be permitted.

B. The Offender Rehabilitation Coordinator will make a recommendation to the Supervising Offender Rehabilitation Coordinator, and if the Supervising Offender Rehabilitation Coordinator approves, the call can be placed. Inmates confined in SHU status must have the Superintendent's approval.

C. In the absence of an Offender Rehabilitation Coordinator or a Supervising Offender Rehabilitation Coordinator, the inmate may contact the Watch Commander or Chaplain, and one of them will make a decision whether the request for an emergency telephone call should be granted. The decision of the Watch Commander or Chaplain does not require additional approval, but the Supervising Offender Rehabilitation Coordinator must be advised the next day of the decision.

D. Facility Guidance staff shall make chronological entries in the inmate's Guidance folder whenever an emergency telephone call is approved and completed. This chronological entry shall clearly indicate:

1. The date of the call;
2. The name of the Offender Rehabilitation Coordinator, Supervising Offender Rehabilitation Coordinator, or other employee who authorized the call;
3. The name and telephone number of the person to whom the call was made; and
4. The nature of the emergency call.

E. Whenever possible, emergency telephone calls shall be collect calls to the person receiving the call.

F. When a person receiving the emergency call is unable and/or unwilling to accept a collect call, the cost of the call will be charged to the inmate. Form #IAS2706, "Disbursement or Refund Request," authorizing payment for the call will then be completed and signed by the inmate. The form must include the date the emergency phone call was placed and the number dialed. The form must be forwarded to the Fiscal Office to determine the cost of the call as it appears on the facility phone bill. Once the disbursement amount is obtained it must be posted by the Fiscal Office.

G. In cases of extreme emergency, a Supervising Offender Rehabilitation Coordinator, Chaplain, or Watch Commander may authorize that emergency telephone calls be made at facility expense. However, this procedure should only be permitted when it is clear that both the inmate and the party receiving the call cannot pay for the call.

H. Whenever a Supervising Offender Rehabilitation Coordinator, Chaplain, or Watch Commander authorizes an emergency call at the facility's expense, a chronological entry shall be made in the inmate's Guidance folder clearly indicating the reason(s) why this unusual procedure was permitted, as well as recording the other information required in Section V-D (above).

VI. CALLS OUTSIDE THE CONTINENTAL UNITED STATES, CANADA, U.S. VIRGIN ISLANDS, PUERTO RICO, GUAM, AND CENTRAL NORTHERN MARIANA ISLANDS:

Telephone calls outside of the continental United States, U.S. Virgin Islands, Canada, Puerto Rico, Guam, and Central Northern Mariana Islands will be employee assisted (see Section VII below) with the following additional specifications:

A. Calls will be permitted two times per month, except in emergency situations.

B. Calls must first be checked by an employee designated by the Superintendent to verify whether:

1. The inmate has sufficient funds in his/her account to cover the cost of the call; and
2. The inmate has not reached the two calls per month limit.

C. All toll costs will be charged to the inmate. The inmate must complete a Disbursement Form for the purchase of a calling card through the Business Office, which will be kept with the inmate's personal property in the Inmate Records Office. The Steward, or designee, will notify the Deputy Superintendent for Program Services when a calling card is received. The Deputy Superintendent for Program Services will notify the Guidance Unit and the assigned Offender Rehabilitation Coordinator will be responsible for retrieving the calling card when a phone call has been arranged and assisting with the call. At no time should the inmate be in possession of the calling card.

D. In cases of extreme emergency, the Supervising Offender Rehabilitation Coordinator may authorize emergency telephone calls at the facility's expense. However, this procedure should only be permitted when it is clear that both the inmate and the party receiving the call cannot pay for the call.

In such cases, a chronological entry shall be made in the inmate's Guidance folder clearly indicating the reason(s) why this unusual procedure was permitted, as well as recording the other information required in Section V-D (above).

VII. EMPLOYEE ASSISTED CALL PROCEDURES

A. Placing Call: All employee assisted telephone calls will be placed and verified by the employee (usually a Correction Officer) assigned to monitor the inmate telephone call.

B. Completing Call: Once the employee has made initial contact with the recipient of a telephone call and collect charges* have been accepted, the employee will signal the inmate to start the conversation.

*Note: Calls to locations outside the continental United States, Canada, U.S. Virgin Islands, Puerto Rico, Guam, and Central Northern Mariana Islands will not be made "collect" but will be paid for as specified in Section VI above.

C. Time Limit: Conversations are not to exceed ten minutes. The Superintendent may limit these calls to five minutes, due to logistical constraints, with the advance approval of the Deputy Commissioner for Program Services. When 30 seconds remain on the allotted time limit, the inmate and his or her party will be buzzed. At the end of the allotted time, the call will be disconnected.

D. Alternative Calls: Inmates may select one alternative person to call if their initial choice is unable to accept the call.

VIII. INMATE SELF-DIAL CALLING PROCEDURES

A. Description

1. Self-dial telephones will only handle outgoing collect telephone calls within the continental United States, Canada, U.S. Virgin Islands, Puerto Rico, Guam, and Central Northern Mariana Islands; no credit card calls may be made nor incoming calls received.

2. The Self-Dial System is the property of the Department which is responsible for its installation and maintenance. System abuse or failure to follow established rules and procedures may result in its removal or the imposition of restrictions or limitations. Damaged hardware will be replaced or repaired at the discretion of the Superintendent. In cases where the damage is the result of vandalism, other repairs will be considered a higher priority.

3. System changes (moves, additions, or deletions) must be discussed with the Division of Information Technology Services.

B. Access

1. System use should not interfere with program and work assignments.
2. System access should be available to as many inmates as possible, but access may be restricted or denied to an inmate.
3. System use will normally be on a "first come-first call" basis. During peak periods such as holidays, however, it may be necessary to schedule calls with "sign-up sheets."

   A sign-in log may be maintained at each telephone location at the discretion of the facility administration.
4. In order to assure that all inmates have fair and equal access to the facility's inmate self-dial telephones, as well as to minimize abuses of these telephone systems, inmate self-dial telephones should be installed adjacent to, or in close proximity to, or in view of the regularly covered Correction Officer posts.
5. Superintendents must develop and implement a monitoring/review system to prevent individual inmates or groups of inmates from monopolizing self-dial telephones. This system should meet the facility's need to assure that all inmates have equal access to the use of the facility's inmate telephones.
6. Calls shall be limited in duration based on facility needs and will be automatically terminated when the specified time limit has been reached. No call shall exceed 30 minutes.

   When other inmates are waiting to place calls, a ten minute limit may be imposed.

C. Telephone Number Registration List

1. To Develop Telephone List
   a. At the Reception Center, the inmate's DIN is entered into the Self-Dial Telephone System on the first day of arrival. The number will be activated on the Department's System overnight.
   b. To establish the permanent Telephone List, the inmate must fill out a Telephone Form and give it to his/her Offender Rehabilitation Coordinator for approval. No inmate may add any person who is listed on an active Court Order of Protection which prohibits such contact.
2. Each inmate shall be limited to 15 approved names and phone numbers which will be maintained as his/her Telephone List. Except for immediate family members, and as otherwise specified, revisions to the Telephone List will only be made when the inmate is due a quarterly review. Phone number changes for immediate family members already on the list will be permitted.
   An inmate may add an Attorney or a Department of Health approved Rape Crisis Program to his/her Telephone List at any time by submitting a request to his/her assigned Offender Rehabilitation Coordinator.

   If the inmate's Telephone List contains the allotted 15 names and numbers, deletions must occur before the new names and numbers may be added. If deletions are not provided by the inmate, the new names and telephone numbers will not be added to the Telephone List.

3. A computer-generated record including, but not limited to, the following information shall be maintained at the Central Office's Information Technology Services' Database:
   a. Date;
   b. Time;
   c. Number called;
   d. Duration of call; and
   e. Location of telephones used.

D. Calling Procedure: The inmate shall access the System by utilization of an individual PIN number, which is the inmate DIN, modified so that the alpha letter is converted to the corresponding numeral.

1. Inmate goes off-hook.
2. System says:

   "Press "1" for English; marque "dos" para Espanol."

   If no response: - repeat message above -.
3. Inmate dials "1" or "2" on the phone keypad. If "1," the rest of the scripting is in English. If a "2" is dialed, the rest of the scripting is in Spanish.
4. The System prompts:

   "Please dial "0" plus the area code and the number you are calling after the tone."

   [tone]

   If no response: - repeat message above-.
5. Inmate dials 0 + Area Code + Number (for those areas in the North American Numbering Plan). No other international calling is in place.
6. The System prompts:

   "Enter your inmate identification code after the tone."

   [tone]

   If no response: - repeat message above-.
7. The inmate enters his/her pin number.
8. The System prompts:

   "State your full name as it is on your inmate ID card after the tone."

   [tone]
9. Inmate states his/her name. This is only on the first call. The name is recorded and reused every time that PIN is used to place a call.
10. If all validations pass, the System rings the called party number. Otherwise, message is played indicating why call could not be completed.

E. Call Delivery

LOCAL, INTRALATA, INTERLATA INTRASTATE

You have a collect call from <inmate's name or pre-recorded name> an inmate at <facility name>, a New York State Correctional Facility. If you wish to accept and pay for this call, dial "3" now. To refuse this call, hang up. If you wish to block any future calls of this nature, press or dial "7" for further information.

F. Interstate Calls

You have a collect call from <inmate's name or pre-recorded name> an inmate at <facility name>, a New York State Correctional Facility. To hear the cost of this out-of-state call, press "9" now. For customer assistance and collection or complaint procedures, dial (number supplied by vendor). Otherwise, if you wish to accept and pay for this call, dial "3" now. To refuse this call, hang up. If you wish to block any future calls of this nature, press or dial "7" for further information.

If a "9" is pressed, the System would prompt:

"The maximum cost of this out-of-state call is a $(current cost) Surcharge and $(current cost) per each minute plus any applicable Federal universal service charge. If you wish to accept and pay for this call, dial "3" now."

If the called party presses "3" to accept, the System prompts:

"Thank you." [The inmate and called party are then connected together.]

If the called party hangs up, the System prompts to the inmate:

"Sorry, your call was not accepted."

If the called party presses "7," the System prompts:

"To have your number blocked from receiving calls from all prisons dial (number supplied by vendor)."

Prompts are used to notify the end of a 30 minute call:

"You have 60 seconds left on this call."

"You have 15 seconds left on this call."

IX. ATTORNEY LEGAL CALLS

A. Generally, attorneys are expected to communicate with their inmate clients through privileged correspondence in accordance with Part 721 of Title 22 NYCRR or during legal visits (see Directive #4404, "Inmate Legal Visits"). There may, however, be certain circumstances where an attorney will need to communicate confidentially with his or her inmate client by telephone.

B. In the absence of specific court order or written direction from the Department's Office of Counsel to the contrary, the following protocols shall apply to confidential attorney legal calls:

1. The call must be requested in writing or over the telephone by an attorney who is admitted to practice law in the State of New York, currently in good standing, and registered with the Office of Court Administration in accordance with Section 468-a of the Judiciary Law. The Office of Court Administration provides an on-line attorney search function at http://iapps.courts.state.ny.us/attorney/AttorneySearch;

2. Requests must be directed to a Supervising Offender Rehabilitation Coordinator or designee. If the request is made by telephone, it must be followed by a written request sent to the e-mail address or fax number designated by the facility at the time of the call;
3. The attorney must state that the legal matter cannot be adequately addressed through privileged correspondence, a legal visit would be unduly burdensome under the circumstances, and a confidential telephone communication between the attorney and his or her inmate client is necessary;
4. The attorney's office address, as listed on the attorney registration statement filed with the Office of Court Administration in accordance with Section 118.1 of Title 22 NYCRR, must be located more than 45 miles (or 30 miles, if the attorney's office address is located in New York City) from the inmate's current facility location;
5. The attorney must not have had a legal call with the inmate in the last 30 days;
6. The attorney must provide at least three suggested dates and times (excluding weekends, evenings, and holidays) when he or she will be available to call into the facility to speak with his or her inmate client;
7. The attorney must initiate the call using the business telephone number listed on the attorney registration statement filed with the Office of Court Administration; and
8. The call must not exceed 30 minutes in duration.

C. An inmate shall receive the attorney call at one of the following locations as determined by the correctional facility:
   1. An inmate phone booth that was constructed at the facility for the purpose of accommodating legal calls;
   2. An inmate disciplinary hearing room, when not reserved for a hearing or other purpose; or
   3. Any other location where the telephone is not (absent a court order or the written consent of a party to the call) monitored or recorded and where there exists auditory confidentiality.

D. In response to the attorney's request made in accordance with this subdivision, the correctional facility shall within five business days of the request, contact the attorney by telephone, e-mail or fax and inform the attorney of the date and time of the call, as well as the name and telephone number of the facility staff member the attorney is to ask for when initiating the call;

E. If the correctional facility denies an attorney's request for a legal call, the attorney can call or write to the Office of Counsel using Office of Counsel contact information provided by the correctional facility;

F. For an inmate on restricted telephone privileges, a legal call shall be in lieu of any other call to which the inmate may otherwise be entitled during the same time period;

G. A record of the legal call shall be noted in the Guidance folder.

X. SUSPENSION OR REVOCATION OF INMATE TELEPHONE CALL PRIVILEGES

A. Inmates may have their telephone call privileges limited, suspended, or revoked pursuant to a disposition of a disciplinary hearing or Superintendent's hearing.

B. Additionally, if during the course of a continuing investigation, the facility Superintendent has reason to believe that the safety, security, good order, or well being of the facility or any person is threatened, the Superintendent may immediately take action to limit, suspend, or revoke an inmate's telephone privileges.

1. In such instances, the Superintendent must inform the inmate, in writing, of the underlying basis for the limitation, suspension, or revocation, consistent with the need to safeguard the on-going investigation.

2. The inmate must be afforded an opportunity to respond to the action of the Superintendent, usually by a written reply to the Superintendent. When the inmate's written reply is received, the Superintendent will consider the inmate's comments in deciding whether or not to continue the limitation, suspension, or revocation of the inmate's telephone call privileges.

C. An inmate may appeal the Superintendent's limitation, suspension, or revocation of his or her telephone call privileges, in writing, to the Deputy Commissioner for Program Services. A response to the appeal shall be provided within 30 days of receipt of the appeal in Central Office.

XI. TELEPHONE OUT OF ORDER: When a facility telephone which can be utilized by inmates in accordance with this directive is out of service, the Superintendent shall so advise Information Technology Services, and indicate if the outage is due to inmate damage.

XII. FACILITY EMERGENCY: When a facility-wide emergency situation exists, the Superintendent or his or her designee has the authority to temporarily suspend the telephone call-home program. The Superintendent shall immediately advise the Deputy Commissioners for Correctional Facilities and Program Services of the situation.

XIII. TELEPHONE CALLS INVOLVING CALLS TO THE HEARING IMPAIRED: Inmates may place **collect** telephone calls to hearing impaired persons through the assistance of a Chaplain or Family Services staff person, provided the hearing impaired persons possess the necessary telecommunications device.

The inmate must submit a written request to the appropriate staff person for such telephone call. The request must include the most opportune times for the call to be placed, the number to be called, and the name of the individual to be called. The time of the call may not coincide with the inmate's program hours.

The staff person will arrange for the inmate to place the collect telephone call and, as necessary, assist the inmate in doing so.

A local telephone directory provides instructions for placing collect calls through the New York Relay Center for Non-TTY (voice) users to a TTY user.

Telephone calls to the hearing impaired may be time and/or frequency limited. However, each inmate who has not lost telephone privileges is entitled to a minimum of one such call each calendar month for a minimum duration of ten minutes, provided (s)he submits a request and the party called accepts the charges.

For inmates with sensorial disabilities, please refer to Directive #2612, "Inmates with Sensorial Disabilities."

NEW YORK STATE Corrections and Community Supervision **DIRECTIVE**	TITLE **Privileged Correspondence**		NO. 4421 DATE 06/02/2016
SUPERSEDES DIR #4421 Dtd. 1/13/2014	DISTRIBUTION A B	PAGES PAGE 1 OF 5	DATE LAST REVISED
REFERENCES (Include but are not limited to)	APPROVING AUTHORITY 		

I. 721.1 PURPOSE

This directive contains and describes the policies and procedures governing privileged correspondence. *Privileged correspondence*, as defined below, is entitled to a greater degree of confidentiality during processing within the facility than that which is accorded general correspondence (see Part 720 of Title 7, "Inmate Correspondence Program").

II. 721.2 DEFINITION

A. Privileged correspondence is defined as correspondence addressed by an inmate to any of the following persons or entities at their official business address, or, except as noted in Section II-B below, received from such persons or entities:

1. *Governmental/Public Officials*: Any American Federal, State, or local government official, department or agency; any official of a Nation, State, or tribe of which an inmate is a citizen; or the Correctional Association of New York State;
2. *Legal Services*: Any attorney, approved legal representative, representative employed or supervised by an attorney, or any legal services organization;
3. *Medical Services*: Medical personnel such as physicians and dentists; or hospitals; or
4. *Rape Crisis Program*: Any local, State, or National organization authorized to provide rape crisis services, victim advocacy services, and emotional support services, including but not limited to, organizations approved to provide such services in New York State by the Department of Health pursuant to Public Health Law §206(15).

B. The following shall not be defined as *privileged correspondence,* but shall be processed as general incoming correspondence in accordance with Part 720 of Title 7, "Inmate Correspondence Program:"

1. Mail that is not delivered in an envelope bearing the identity and official business return address of one of the above listed persons or entities;
2. Mail received from a Board of Elections;
3. Mail received from the Department of Motor Vehicles;
4. Mail received from the State Education Department, excluding materials sent to inmates marked "legal mail" by the New York State Library's Prisoner Services Project;

5. Mail received from any county or local tax assessor or clerk, except for a clerk of a court (Note: notwithstanding that a county clerk may also be a clerk of a court, mail from a county clerk shall be processed as general incoming correspondence); and
6. Mail received from the Secretary of State, Department of State, corporation division or uniform commercial code unit of any State.

C. This directive does not, in itself, establish a confidential relationship between the sender and recipient of correspondence identified herein as privileged (e.g., a Central Office official in receipt of privileged mail may share that mail, and any response to it, as deemed appropriate). The privileges that apply to correspondence defined in this Section relate to processing controls, allowances of limited free postage, and advances of inmate funds for postage. These privileges are detailed in Section III below.

III. 721.3 PROCEDURE

Note: Unless otherwise provided for in this directive, the general correspondence procedures set forth in Part 720, "Inmate Correspondence Program," (such as the requirement to put return addresses on the front and back of outgoing envelopes) shall be followed.

A. Outgoing Privileged Correspondence

1. For the purpose of this directive, outgoing mail will not be considered to be privileged correspondence until it has been placed in the control of the facility administration for processing.
2. Outgoing privileged correspondence may be sealed by an inmate, and such correspondence shall not be opened, inspected, or read without express written authorization from the facility Superintendent as specified in Section III-C. Notwithstanding the foregoing or any other provisions of this directive, outgoing mail to the Secretary of State, Department of State, corporation division or uniform commercial code unit of any State shall be submitted by an inmate unsealed and is subject to inspection.
3. Postage for privileged correspondence:
    a. Letters addressed to the Commissioner or other Central Office staff shall be mailed by the facility at no cost to an inmate. This service shall only apply to regular letters; special handling charges for services such as certified mail, return receipt, or express mail must be paid for by an inmate.
    b. Each inmate will receive a weekly free postage allowance equivalent to five domestic first class one ounce letters to pay for first class postage on outgoing privileged correspondence.
        (1) This allowance may not be used to pay for any special handling charges such as for certified, return receipt, express mail, etc., unless such mail services are required by statute, court rule, or court order.
        (2) Any unused allowance will not be accumulated from week to week. Inmates will have to pay for postage costs that exceed this weekly allowance.

c. A postage-prepaid envelope received within correspondence from a court or an attorney which has been pre-addressed by the court or attorney may be received (subject to inspection by the security staff) and used by the inmate for the intended return correspondence.

d. To ensure that indigent inmates maintain their right of access to the courts, the facility shall approve an IAS 2708 advance request to pay for first class mail postage if the inmate has insufficient funds and if the following conditions are met:

(1) The mail is legal mail (e.g., it is addressed to a judge, clerk of court, attorney, or authorized legal representative; or is directly related to a potential or ongoing legal matter);

(2) Any balance of the inmate's free weekly postage allowance is applied to the legal mail postage costs; and

(3) The requested advance and the balance of unpaid previous advances for legal mail postage do not exceed $20, except as may be approved under Section III-A-3-f, below.

e. Advances for "special handling" (e.g., certified mail, return receipt, express mail, etc.) will not be approved, unless required by a statute, court rule, or court order.

f. Exceeding the $20 limit shall only be approved if an inmate can show by court rule, court order, a statute of limitations, or other legal deadline applicable to his or her individual circumstance that the legal mail must be sent prior to receipt of the next week's free postage allowance. The inmate must provide justification for such advance.

g. No request for a legal mail advance will be denied by facility staff without prior consultation with the Department's Office of Counsel. Any question whether a particular item qualifies as "legal mail," or whether an advance is allowable, should be directed to such office.

B. Incoming Privileged Correspondence

1. *Confidentiality*: Incoming privileged correspondence shall not be opened outside the presence of the inmate to whom it is addressed, and shall not be read without express written authorization from the facility Superintendent (see Section III-C below).

   A log entry should document any incoming privileged correspondence erroneously opened outside the presence of the inmate to whom it is addressed (see Section III-B-3 below). If appropriate, a photocopy of an erroneously opened envelope shall be included.

2. *Priority Handling*: Incoming privileged correspondence shall be given priority handling and shall be delivered in a consistent manner at a time when inmates are available to receive it and which does not interfere with programming. If the inmate to whom privileged correspondence is addressed is not currently at the facility, the provisions of Part 722 of Title 7, "Forwarding Inmate Mail," shall be followed.

3. *Privileged Mail Log*: A log shall be created to record receipt and delivery of incoming privileged mail. It shall identify the sender and include the inmate's name and number, the delivery date and time, the title of the delivery person, and note if the inmate refused to sign a receipt, refused delivery of the mail, or would not respond to delivery calls. If privileged mail is erroneously opened outside the presence of the inmate, that fact and any relevant explanation shall be noted in the log.
4. *Inspection*
    a. Where x-ray capability exists, incoming privileged correspondence should be x-rayed prior to being opened.
    b. Except as provided in Section III-C below, all incoming privileged correspondence shall be opened and inspected, in the presence of the inmate to whom it is addressed, for the presence of cash, checks, money orders, and contraband and to verify, as unobtrusively as possible, that the correspondence does not contain material that is not entitled to the privilege.
    c. When, in the course of inspection, cash, checks, or money orders are found, they shall be removed and credited to the inmate's account.
    d. When, in the course of inspection, contraband is found, it shall be removed and forwarded to the security office, with appropriate chain-of-custody documentation. When appropriate, the State Police shall be notified.
    e. When, in the course of inspection, material is found that does not appear to be entitled to the privilege, all parts of the correspondence shall be forwarded directly to the Superintendent without further inspection, and a report from the person opening and inspecting shall detail the circumstances.
    f. A postage-prepaid envelope received within correspondence from a court or an attorney, which has been pre-addressed by the court or attorney, may be received (subject to inspection by the security staff) and used by the inmate for the intended return correspondence.
5. *Receipt*
    a. The inmate to whom privileged correspondence is addressed shall sign a receipt for such correspondence. All receipts for incoming privileged correspondence shall be retained in an appropriate file.
    b. If an inmate refuses to sign a receipt, the delivering employee shall so indicate on the receipt, note the date and time of the refusal to sign, and deliver the correspondence to the inmate.
6. *Refusal*
    a. If an inmate refuses to accept the privileged correspondence when it is offered, the delivering employee shall note the refusal in the log and any known reason for non-acceptance. The privileged correspondence should be returned to the sender stamped "addressee refused to accept."

b. If the inmate refuses to respond to the privileged mail delivery call, a second attempt should be made to deliver the letter. If the inmate again refuses to respond, note the date and time, and any known reason for not responding to privileged mail calls in the privileged mail log. The receipt with this information shall be retained in an appropriate file. The privileged correspondence should be returned to the sender stamped "addressee refused to accept."

7. *Returned to Sender*: Privileged correspondence originally sent out of the facility by an inmate, but subsequently returned to the inmate sender by the postal service, shall be processed as incoming privileged correspondence, in accordance with the procedures as set forth in Sections III-B-1 and 2, above.

C. Authorization to Read Privileged Mail

1. The Superintendent shall not authorize the reading of incoming or outgoing privileged correspondence, unless there is a reason to believe that the provisions of this or any directive or rule or regulation have been violated, that any applicable State or Federal law has been violated, or that the content of such correspondence threatens the safety, security, or good order of a facility or the safety or well-being of any person. Such authorization by the Superintendent shall be in writing and shall set forth facts forming the basis for the action.

2. The Superintendent is advised to consult with the Department's Office of Counsel before issuing such authorization. If the facility Superintendent authorizes the reading of privileged correspondence, it shall be read only by the Superintendent, a Deputy Superintendent, or Central Office staff.

3. If after reading the contents of privileged correspondence there is reason to believe that the provisions of this or any directive or rule or regulation have been violated, or that any State or Federal law has been violated, or that the content of such correspondence threatens the safety, security, or good order of a facility or the safety or well-being of any person, then the correspondence may be confiscated, and the inmate must be given written notice of the confiscation, unless doing so would be inconsistent with the need to safeguard an investigation. The notice must include the reason(s) for the confiscation, and it must inform the inmate of the right to appeal the confiscation to the Deputy Commissioner for Program Services. In the case of incoming correspondence, the correspondent must also be given a copy of such notice and accorded the right to appeal, unless doing so would be inconsistent with the need to safeguard an investigation. Reason to believe that privileged correspondence is being used to introduce contraband or other materials not entitled to the privilege shall be sufficient reason for confiscation.

4. This Section shall not be deemed to require the express written authorization of the Superintendent to inspect incoming privileged correspondence, in the presence of the inmate, to ensure that the materials contained in the correspondence are entitled to the privilege.

Mediation Advocacy Techniques and Practice

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Table of Contents

Mediation Advocacy Training:

Tips and Best Practices

I. INTRODUCTION

Mediation as a form of dispute resolution has become increasingly popular over the years due to the many issues and headaches associated with traditional litigation. More and more those seeking forms of alternative dispute resolution are turning to mediation because of the advantages it offers over litigation as well as the flexibility it provides participating parties.

As a result, the need for effective mediators has never been greater. While the decision to resolve a matter during mediation is ultimately up to the participating parties, an effective mediator can often be the difference between a case that settles during mediation or one that is forced to move forward with litigation. It is important for mediators to keep a few basic tenants in mind to ensure that each mediation has an opportunity to produce a successful resolution.

II. BENEFITS OF MEDIATION

There are many benefits to choosing mediation as a form of dispute resolution, some of which are obvious and others that are less so. While the ultimate goal of mediation is to resolve a dispute, there are a number of benefits that can come out of mediation even if the matter is not fully settled:

a. **Faster than Litigation**: While it may take a matter months or even years to be resolved through litigation, mediations can typically reach a resolution in days or weeks.

b. **Cheaper than Litigation**: Because of the streamlined nature of mediation, it often costs much less to mediate a matter than to go through litigation. The cost to hire a mediator is significantly less than the costs associated with preparing for litigation.

c. **Informality**: Mediation is much less formal than litigation which requires adherence to a host of often tedious rules and procedures. This informality allows the parties to be more involved and allows mediators to mold the process to the needs of specific parties. Further, mediators and parties are free to come up with creative solutions that are not available in litigation.

d. **Privacy**: Typically, mediation is a confidential process that takes place in a private location, often in a mediator or attorney's office. The parties also have flexibility in deciding what papers and documents are included in the mediation record and what information becomes public.

e. **Relationship Building**: Mediation allows parties preserve and fix relationships by helping them work towards a solution. Parties are able to engage in a less adversarial manner than in litigation. In addition, there is also no clear cut winner or loser in mediation as parties are encouraged to look for win-win solutions.

f. **Narrowing of Issues**: Even if mediation is unsuccessful and a matter still moves into litigation, mediation may help the parties to resolve some issues and narrow others so that the litigation process is streamlined.

g. **Greater Client Satisfaction**: Surveys have shown that clients are often more satisfied after mediation rather than litigation not only because of the high rate of conflict resolution through mediation but also because of the increased involvement clients are afforded.

III. WHO SHOULD USE MEDIATION?

a. In some instances, a particular contract or law will require parties to submit to mediation before an action may be brought in court. However, it is often a good idea for parties to agree to mediation even if it is not required. Mediation is often most successful when it occurs at the beginning of a dispute before a conflict has gotten too far into the litigation process. Thus, advocates should suggest mediation as an option to their clients early in the litigation process.

b. Types of cases commonly resolved through mediation:

- Business disputes
- Small claims
- Divorce and child custody matters
- Employment cases

c. However, not every case is suited for mediation. In some instances, the structure and rules provided by courts may be better suited to handle a particular dispute. Parties must also be willing participants in mediation for the process to work properly. If things have already become too hostile, mediation is not likely to be successful. Parties should be made aware that they will still be on the hook for costs associated with mediation even if it is unsuccessful.

IV. TECHNIQUES FOR MEDIATORS

a. **Prepare for the Mediation**: Mediators should be sure to do their homework on the parties and issues involved in a mediation before it begins. Mediators are encouraged to ask questions of the parties before mediation begins to help get a better understanding of what is at stake and what the parties are looking to get out of the mediation.

b. **Focus on Issues Not Just Numbers**: Often, parties in mediation will immediately want to start negotiating and bargaining a final agreement. Mediators should steer the parties towards resolving big picture issues and legal disputes rather than just negotiating a final dollar amount.

c. **Utilize Caucuses Effectively**: Caucuses allow a mediator to have a private discussion with the parties separately. This is a great way to allow parties to be open and honest with a mediator so that they can learn the real issues and goals of each party. Mediators can also use pre-mediation caucuses to help build trust and a rapport with the parties before mediation begins. Mediators should be cautioned to not overuse caucuses as this may cause some parties to feel there is a lack of transparency in the meditation process.

d. **Address the Parties' Relationship and Emotions**: Mediators should pay attention to the relationship between the parties and the emotions that may be involved. Studies have found that participants in mediation generally react positively if they feel a mediator is considering their emotions and feelings.

e. **Evoke Suggestions from the Parties**: Mediators should focus on helping the parties to come up with new solutions and ideas rather than just straight out suggesting solutions on their own. Mediators should also be sure to ask how all of the parties feel about a suggestion or potential solution.

f. **Build Towards a Solution**: Above all, a mediator should structure mediation sessions with a focus on building towards a solution. This may mean helping the parties get back on track should their discussions begin to focus too heavily on minor details.

V. HANDLING PRO SE PARTIES IN MEDIATION

When a pro se party is involved in mediation the mediator must approach the process differently than if all parties are represented by counsel. There are a few things mediators should keep in mind to ensure that mediations with pro se parties remain fair to everyone:

a. **Make Adjustments**: While a mediator may handle things a certain way in a typical mediation, adjustments must be made when a pro se party is involved to ensure fairness while also maintaining impartiality.

b. **Explain the Process**: Mediators should start by giving a detailed outline of the mediation process for the benefit of the pro se party. This may include explaining the differences between mediation and traditional litigation so that the pro se party understands what is acceptable in mediation.

c. **Temper Expectations**: Because they are likely not familiar with the mediation process, pro se parties may have unrealistic expectations regarding the power of mediators and the possible outcomes of mediation. The meditator should be sure to make clear their role as well as the desired outcomes of all parties involved.

d. **Do Not Offer Legal Advice**: While a mediator should make sure a pro se party understands and appreciates the mediation process, the mediator must be sure to remain impartial and not offer legal advice or opinions to the pro se party.

e. **Make Suggestions Often**: While in a normal mediation it may be best to sit back and let the parties come up with their own solutions, mediators may need to take a more proactive step in making suggestions when a pro se party is involved. This may include suggesting how similar disputes are typically resolved to give the pro se a starting off point.

f. **Slow Down**: Mediators may need to slow down the process, especially at the offer evaluation stage, to make sure a pro se party has adequate time to fully comprehend a potential settlement offer.

VI. TIPS FOR ADVOCATES IN MEDIATION

a. **Be Aware of Timing**: As mentioned above, mediation is typically more effective the earlier it occurs in a case. Advocates should suggest mediation to their clients as a possible solution early in the process if they feel this is a viable option.

b. **Prepare**: Just like a mediator, advocates must also be sure to adequately prepare for mediation. This may include doing things differently than they are done in traditional litigation, such as informing the mediator of the legal and factual issues. Advocates should also research the mediator so that they have an idea of his or her background and experience.

c. **Prepare Your Client**: Because mediation includes more client involvement than traditional litigation, an advocate must prepare their client before mediation begins. This includes going over strategies as well as establishing clear goals for the mediation.

d. **Consider Your Adversary**: To be successful in mediation, an advocate must anticipate and understand the interests and goals of their adversary.

e. **Be Patient and Respectful**: While mediations offer quick solutions to disputes, they are not immediate. Advocates and their clients must be patient and respectful of their adversary's interests and positions to successfully work towards a solution.

f. **Listen to the Mediator**: The mediator is there to help the parties to come to a solution. Advocates should consider and build off of a mediator's suggestions as they are often geared towards coming up with a resolution.

Section 1983 and Constitutional Claims Presenter Biographies:

Hon. Lois Bloom

Lois Bloom was sworn in as United States Magistrate Judge for the Eastern District of New York on June 1, 2001. Magistrate Judge Bloom served as Senior Staff Attorney in the Pro Se Office of the United States District Court for the Southern District of New York for 13 years, where she received the Second Circuit Merit Award on three occasions.

Magistrate Judge Bloom graduated from the State University of New York at Stony Brook and obtained her law degree from the State University of New York at Buffalo in 1985. Upon graduation, she worked at the West Side SRO Law Project representing indigent tenants in housing court.

Judge Bloom has spoken on Access to Justice, Employment Discrimination, Habeas Corpus and Prisoners Rights issues at numerous conferences.

Prof. Brett Dignam

An award-winning teacher, Brett Dignam has been the indefatigable director of the Law School's Challenging the Consequences of Mass Incarceration Clinic since joining the faculty in 2010. She brings to the classroom her experience as a fierce advocate and litigator in more than 30 federal and state cases in the area of prisoner's rights. With her students, she has challenged conditions of confinement ranging from deficient medical care to lifetime solitary confinement. Students in the Mass Incarceration Clinic have had several notable victories. Most recently, five students successfully argued in U.S. District Court that permanent solitary confinement violates various provisions of the U.S. Constitution.

Before entering academia, Dignam served as a law clerk for Judge William H. Orrick on the U.S. District Court in San Francisco, and she subsequently developed a prison litigation practice in both federal and state courts. She then joined the U.S. Department of Justice in Washington, D.C., where she worked as an attorney on tax enforcement policy and on criminal appeals in all federal courts of appeals. She helped develop the Justice Department's tax division's policies on issues ranging from money laundering to the Racketeer Influenced and Corrupt Organizations Act (RICO).

As a professor at Yale Law School from 1992 to 2010, Dignam led the Prison Legal Services, Complex Federal Litigation, and Supreme Court Advocacy Clinics. She has taught and supervised students working on issues related to poverty and HIV, landlord/tenant conflicts, and immigration. She also has guided students through administrative hearings and state and federal trial and appellate courts on cases involving state habeas claims and violations of the Voting Rights Act.

As Columbia Law School's inaugural Vice Dean for Experiential Learning, Dignam oversees dozens of externships, simulations, and practicums as well as seven clinics.

Ida E. Ayalew

Ida Ayalew is a third-year student at Columbia Law School from Missouri. She is a member of the Challenging the Consequences of Mass Incarceration Clinic, the Black Law Students Association, and the Latinx Law Students Association.

Ashely A. Taylor

Ashley Taylor is a third-year student at Columbia Law School from Toledo, Ohio. She is a member of the Challenging the Consequences of Mass Incarceration Clinic, the Black Law Students Association, and Public Defenders of CLS.

Chizoba D. Ukairo

Chizoba Ukairo is a third-year law student at Columbia Law School. She is a member of the Black Law Students Association, Empowering Women of Color, and spent her second year in the Challenging the Consequences of Mass Incarceration Clinic. She is also the Executive Financial Officer of the Columbia Human Rights Law Review and a Jailhouse Lawyer's Manual.

Caleb D. Woods

Caleb Woods is a third-year law student at Columbia University. He is from Greenville, Mississippi by way of Ashburn, Virginia. Caleb has spent his law school career thus far involved in the Challenging the Consequences of Mass Incarceration Clinic, Black Law Student Association, The Columbia Journal of Race and Law, and the Frederick Douglass Moot Court.

Mediation Advocacy in Section 1983 Cases Presenter Biographies:

Richard Brewster, Esq.

Richard Brewster is a mediator whose practice includes commercial, civil rights and community mediations. He brings to his mediation practice 40 years of litigation experience, divided between commercial litigation and public service in the criminal justice area, as an Assistant U.S. Attorney and Chief of the Criminal Division in the U.S. Attorney's Office for the Eastern District of New York, a Special Prosecutor in Kings County, and an Assistant Attorney General and Special Litigation Counsel in the New York State Attorney General's Office, responsible for defensive civil rights litigation relating to the State's criminal justice agencies. He is also an Adjunct Professor of Law at both The Benjamin Cardozo School of Law and New York Law School. At Cardozo, together with Professor Lela P. Love, he teaches mediation-based conflict resolution and life skills programs to prisoners in New York State prisons. At New York Law

his bachelor of arts degree from Princeton University and his law degree from Harvard Law School.

George Mastoris, Esq.

An accomplished litigator, George represents a broad array of companies involved in high-stakes and high-profile civil and criminal litigations, arbitrations, investigations, and appeals. He has experience across a wide array of substantive areas, including antitrust, financial technology, securities, insurance, and bankruptcy. George's clients include technology companies, multinational manufacturing concerns, blockchain and biotechnology startups, banks, retailers, insurers, and private equity firms.

Since joining Winston, George has served as lead counsel in price-fixing and cartel cases, government investigations and enforcement actions, RICO actions and complex commercial litigation. He represents both plaintiffs and defendants, and has recently achieved favorable results for clients including Panasonic Corporation, Harmoni International Spice Co., ZARA USA, Nine West, GolTV, Accenture, Factory Mutual Insurance Co. and Gladius Network LLC. George also regularly counsels clients in connection with regulatory and compliance issues relating to antitrust and financial technology, including digital assets and cryptocurrency. He is also extensively involved in pro bono work at the trial and appellate level.

Royce Russell, Esq.

Royce Russell, brings over 25 years of experience in the field of Criminal, Civil Rights, Immigration and ADR. As a Prosecutor, Mr. Russell has conducted hundreds of criminal investigations and trials. This experience has served him well in the area of ADR, as well as an Arbitrator/Mediator and a litigator in the field of Civil Rights Violation, Employment Discrimination/Wrongful Termination and Immigration.

As a former Prosecutor, Mr. Russell's ability to decipher the facts and predict the legal strategies and theories of State Prosecutors and Assistant United States Attorneys are among his most notable attributes. When clients are faced with what appears to be overwhelming circumstances, his ability to keep clients informed while educating said clients contemporaneously, ensures a collaborative process in resolving legal issues. Mr. Russell's candidness and ability to think outside the box, while limiting exposure, is the successful calling card for R-SQUARE, ESQ. PLLC.