

OMH Guidance for Implementation of Outpatient Competency Restoration (OCR) December 7, 2023

For questions related to this guidance briefing, contact the Bureau of Institutional and Transitional Services of the Division of Forensic Services, at 518-549-5001.

Background: Criminal Procedure Law (CPL) §730.40(1) and CPL §730.50(1) were modified in 2012 to include the option of outpatient restoration for CPL 730.40 Temporary Orders and CPL 730.50 Commitment Orders. More specifically, the court is authorized to commit an individual to the custody of the Commissioner of OMH for care and treatment in an appropriate institution or, upon the consent of the District Attorney, commit him or her to the custody of the Commissioner for care and treatment on an outpatient basis. The purpose of this briefing is to provide guidance regarding the use of outpatient restoration.

Pre-trial release: Use of outpatient restoration should be contingent on release of the defendant pursuant to an order of recognizance or bail. The pretrial release decision should be made independent of fitness and restoration considerations. Outpatient restoration services should not be relied on to address issues beyond those directly related to restoration to competency.

Criteria for Selection of Cases: Many individuals found unfit under CPL 730 and court-ordered for restoration do not meet traditional civil commitment criteria under Mental Hygiene Law and would not otherwise be considered in need of inpatient mental health services. Outpatient restoration may be a reasonable consideration for these individuals. While CPL Article 730 provides no statutory restrictions on the types of felony cases that are deemed appropriate for outpatient restoration, clinical and environmental considerations that impact the likely success of treatment in outpatient restoration and the continuity of outpatient care can guide the selection of cases. Among the factors that need to be considered in the selection of cases are the following:

1. **Dangerousness to self or others.** Risk of harm to self or others associated with symptoms of mental illness and treatment non-compliance, as well as protective factors that may mitigate that risk, are considerations when assessing the viability of outpatient restoration.
2. **Stability in the community.** The absence of stable housing and/or other community supports can impede compliance with treatment and may weigh against use of outpatient restoration.
3. **Substance use.** A recent history of substance use might impede successful outpatient restoration unless it can be reasonably determined that the defendant is motivated to cooperate with substance use treatment, if recommended in the treatment plan for outpatient restoration.
4. **Medical needs.** Unique medical needs that cannot be accommodated within an OMH PC and are appropriately treated within a nursing facility may weigh in favor of outpatient restoration. Elderly and otherwise medically frail defendants may be appropriately placed on outpatient restoration in settings that are able to provide adequate medical care.
5. **Willingness to comply with outpatient treatment.** An expressed unwillingness to comply with outpatient treatment or history of treatment non-compliance without a comprehensive plan to address future adherence may weigh against use of outpatient restoration.

Suggested Process for Determining Appropriateness for Outpatient Restoration:

1. When information relevant to the factors listed above becomes available in the course of a competency evaluation, evaluators are advised to include that information as part of the competency report.
2. If after consideration of relevant clinical and risk factors, and upon consent of the District Attorney, there is a determination that the defendant who is subject to pretrial release may be appropriate for outpatient restoration, the court should refer the case to OMH Division of Forensic Services (DFS) for an opinion regarding the viability of restoration on an outpatient basis.
3. When outpatient restoration is ordered by the court, OMH DFS will designate an appropriate treatment provider for restoration and assist the provider, defense, prosecution and court in developing an outpatient treatment plan that takes into consideration the needs of the defendant and the resources available in the community.
4. Whenever feasible, an OMH outpatient clinic will be made available to provide treatment for restoration.

Recommended Content of Outpatient Restoration Order:

The order for outpatient restoration should include, at a minimum, the following:

1. Citation of CPL 730 authorizing the court, upon consent of the District Attorney, to commit the defendant to the custody of the Commissioner of OMH for care and treatment on an outpatient basis.
2. Statement affirming that the defendant accepts the offer of outpatient competency restoration treatment.
3. Statement requiring the defendant to abide by all terms and conditions of the order and all treatment recommendations, inclusive of mental health and substance abuse treatment (if applicable), made by the outpatient treatment provider.
4. Specification of type and frequency of follow-up reports to be forwarded from the designated treatment provider to OMH DFS and the Court (including treatment progress reports and fitness notification).
5. Statement indicating that should the clinician providing restoration services determine any of the following: (a) the defendant is no longer an incapacitated person, (b) the defendant is unlikely to be restored on an outpatient basis, (c) the defendant's non-compliance and lack of engagement make outpatient restoration efforts futile, or (d) the defendant is unlikely to be restored in any venue, such person shall give notice in writing of such determination to the Commissioner of OMH, the court, and district attorney.
6. Statement requiring the defendant to sign a consent for release of information allowing OMH access to clinical information pertinent to the issue of competency and the defendant's current level of functioning while on outpatient status in the community.
7. Notation that all statutory time periods and notifications relative to changes in status and privileges associated with inpatient restoration commitment and subsequent retentions shall apply to outpatient restoration.

In addition to inclusion of specific requirements in the outpatient restoration order, the Court's ongoing involvement over the course of outpatient restoration is helpful for encouraging the individual's participation in restorative services as well as addressing potentially problematic behaviors not related to their mental health condition and that do not have a mental health intervention.