CRIMINAL LAW SECTION MENTAL HEALTH LAW

MARCH 14, 2023

Judge Lisa Michalk Jo Ann Linzer, J.D. Kristi Taylor, J.D. STATE BAR of TEXAS



Judge Lisa Michalk, Presiding

221ST DISTRICT COURT





TEXAS JUDICIAL COMMISSION ON MENTAL HEALTH

THE NEED FOR A COMMISSION ON MENTAL HEALTH



Overcrowded dockets

- A lack of communication, coordination and collaboration among courts, state and local mental health providers, attorneys, and mental health advocates
- > A need for specialized, multidisciplinary legal training
- > A need for technology to manage dockets and caseloads
- A need for the children and adults involved in the justice system to have a voice in the decisions that affect their lives
- A lack of community resources to provide adequate mental health services to children, youth, and families



TEXAS JUDICIAL COMMISSION ON MENTAL HEALTH

The mission of the Judicial Commission on Mental Health is to engage and empower court systems through collaboration, education, and leadership, thereby improving the lives of individuals with mental health needs, substance use disorders, and intellectual and developmental disabilities.





WHY DOES MENTAL HEALTH LAW MATTER?

John died by suicide in 2018 after his mother pleaded with his attorney, the prosecutor, the doctor at the court-ordered facility—anyone who would listen—that he was suicidal and needed to be transferred to a civil commitment.



WHAT DOYOU NEED TO KNOW?

UNDERSTANDING THE DIFFERENCE: COMPETENCY, INSANITY, CAPACITY, AND MENTAL ILLNESS

- Competence to stand trial is the legally determined capacity of a criminal defendant to proceed with criminal adjudication.
- Insanity relates to a criminal defendant's mental state at the time the alleged crime was committed and is an affirmative defense to prosecution.
- Capacity relates to the individual's ability to understand the nature and consequences of decisions.
- Mental illness relates to impairment of thought, perception of reality, emotional process, judgment, or behavior; a person may have a mental illness, but still be competent to stand trial (though maybe not without counsel).

THINGS TO KEEP IN MIND AS YOU REPRESENT A CLIENT WITH MENTAL ILLNESS

- Mental Illness and Intellectual and Developmental Disabilities are not the same.
- You owe your client zealous representation
- Mitigate, Mitigate, Mitigate
- Ineffective Assistance of Counsel and Reversible Error
- Overcome your own Prejudices
- Incarceration is particularly harmful to people with mental illness
- Do not let your client get caught in the "revolving door"

DO'S AND DON'TS WHEN WORKING WITH CLIENTS WITH MENTAL ILLNESSES

Do's

- Use inclusive and respectful language
- Set calm and consistent tone in the room
- Gather information from support systems associated with the client
- Consider peer specialists to assist with engagement
- Be aware of sensitive behavioral health related information

Don'ts

- Use language that could be perceived as threatening, confrontational or disrespectful
- Use legal jargon that may not be understood
- Adopt a one size fits all approach to communication and decision making

COLLABORATION

Quarterly Systems Improvement Meetings

 Multi-disciplinary system decision makers meet to discuss systemwide problems and solutions.

Weekly Case Management Meetings

 Goals include reviewing specific cases to ensure services across systems (housing, employment, life skills, etc.) that consider and respond to the full spectrum of an individual's needs. Team members also ensure that traditional information silos are broken down to best serve the individual.

To do this, Judges and attendees need to be able to share information.

INFORMATION SHARING

State law requires that agencies share information for purposes of continuity of care and services for "special needs offenders"

This includes individuals:

- for whom criminal charges are pending or
- who, after conviction or adjudication, is in custody or under any form of criminal justice supervision.

Specifically, an agency must:

- **accept information** relating to a special needs offender or a juvenile with a mental impairment that is sent to the agency *to serve the purposes of continuity of care and services* regardless of whether other state law makes that information confidential; and
- **disclose information** relating to a special needs offender or a juvenile with a mental impairment, including information about the offender's or juvenile's identity, needs, treatment, social, criminal, and vocational history, supervision status and compliance with conditions of supervision, and medical and mental health history, *if the disclosure serves the purposes of continuity of care and services*.



Tex. Health & Safety Code § 614.017

THREE STEPS OF INVOLUNTARY CIVIL COMMITMENT





DIVERT TO WHAT? USING THE ELIMINATE THE WAIT TOOLKIT TO CREATE DIVERSION OPTIONS

Brick-and-Mortar Buildings are NOT always needed for Diversion.

Your County has Options

DIFFERENT STRATEGIES FOR DIFFERENT PEOPLE

Start with the person with mental illness or IDD. What is the least-restrictive, appropriate setting?



MENTAL HEALTH COURTS IN TEXAS

52

25

27

11

- Total Counties with 1 or more Specialty Court
 Total Counties with 1 or more MHC Program (adult/juvenile combined)
- Total Adult MHC Programs
- Total Juvenile MHC Programs

COUNTIES WITH AN ADULT MH COURT (20)

Bexar	Kaufman
Bowie	McLennan
Cameron	Medina
Comal	Midland
Dallas	Montgomery
Fort Bend	Potter
Galveston	Tarrant
Harris	Travis
Hays	Uvalde
Hidalgo	Val Verde

COUNTIES WITH A JUVENILE MH COURT (10)

Cameron	Fort Bend
Collin	Grayson
Dallas	Harris
Denton	Hidalgo
El Paso	Jefferson



Creating a Texas Mental Health Court Program The 10-Step Guide

1. UNDERSTAND THE CONCEPT

People with mental illness and intellectual and developmental disabilities (IDD) cycle repeatedly through the courts but often lack the tools to address their needs or access adequate treatment. Judges can use a Mental Health Court (MHC program to connect people with appropriate treatment, community resources, and ongoing judicial monitoring to address these issues. MHC programs can be used in various court settings, including, but not limited to, criminal, civil, and family law. MHC programs can also have varying goals, target participants, program conditions, treatment options, and can address mental health challenges in criminal courts either pre- or post-adjudication

Tex. Gov't Code § 125.001 defines a mental health court as a program that has the following essential characteristics:

- 1. The integration of mental illness treatment services and [intellectual disability] services in the processing of cases in the judicial system;
- 2. The use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety and to protect the due process rights of program participants;
- Early identification and prompt placement of eligible participants in the program;
- 4. Access to mental illness treatment services and [intellectual disability] services;
- 5. Ongoing judicial interaction with program participants;
- 6. Diversion of potentially mentally ill or [intellectual disability] defendants to needed services as an alternative to subjecting those defendants to the criminal justice system;
- 7. Monitoring and evaluation of program goals and effectiveness;
- 8. Continuing interdisciplinary education to promote effective program planning, implementation, and operations; and
- 9. Development of partnerships with public agencies and community organizations, including local [mental health or intellectual disability] authorities.

A Guide to Mental Health Court Design Mental Health Courts: A Guide to

Research-Informed Policy and Practice

https://csgjusticecenter.org/wp-content/uploads/2020/01/Guide- https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/CSG_MHC_ MHC-Design.pdf Research.pdf

2. COLLECT THE DATA

Data can be collected and analyzed to successfully launch the MHC program and to measure the program's success. Start with data that already exists in your county and consider what data could be collected in the future. Data can be used for advocating for funding, determining program improvements, and identifying what works for which participants and under what circumstances.

Develop a data collection plan for the program that identifies: 1. What data will be collected;

and Implementatio

- 2. What is the source of the data
- 3. Who is responsible for collecting the data; and
- 4. Where the data will be stored.

A Guide to Collecting Mental Health	Developing a Mental Health Court: An Interdisciplinary Curriculum
Court Outcome Data	Handbook for Facilitators
https://csgjusticecenter.org/wp-content/uploads/2020/01/MHC-	https://www.arcourts.gov/sites/default/files/Mental%20Health%20Courts
Outcome-Data.pdf	%20-%20Planning%20Guide.pdf

The 10-Step Guide Page 1 of 4

Creating a Texas Mental Health Court Program ICMH The 10-Step Guide

3. MAP COMMUNITY RESOURCES

Conduct a community mapping to convene local stakeholders, determine services available in the community or surrounding communities, survey opportunities and resources for diverting people to treatment options, and identify gaps in services. Mappings can range in depth of review and can be completed by the MHC team or by a third-party. Include a review of existing court and probation programs in the mapping to determine if there are options that already service individuals at different risk and need levels and identify which risk and need levels are not being assisted. Look to local NAMI chapters for additional resources.

JCMH Mapping Workshops	Policy Research Associates (PRA)
http://texasjcmh.gov/technical-assistance/mapping-workshop/	https://www.prainc.com/wp-content/uploads/2017/08/FFS-SIM-508.pdf
Meadows https://mmhpi.org/work/systems-transformation/	HHSC's TA Center - email: forensicdirector@hhs.texas.gov

4. SELECT THE TEAM

At a minimum, the MHC program team for a criminal court should include a judge, defense attorney, prosecutor supervision officer (pretrial/probation/parole officer), and a case manager or representative from the local mental health authority. While not critical to the team's success, consider including a representative from the sheriff's office or county jail medical, a social worker, a psychiatrist, a resource coordinator (check with your local NAMI chapter), a peer support specialist, and a person with lived experience to assist with the MHC program. For civil, family law, or other types of MHC program teams, the team should include similarly represented stakeholders.

To create the team, consider collaborating across departments and systems to get committed representatives or fund the necessary positions/roles within the court. Some treatment service providers employ staff members who may be able to fill some of the team roles needed to make the program a success. When creating the team, consider:

- Logistics of regular meetings/court settings;
- Willingness and ability to collaborate with other team members;
- · Belief in the mission of the court program;
- Willingness and ability to complete training and take continuous steps to learn about the principles that support the MHC program; and
- Ability to conduct or review screenings and assessments.

A Guide to Mental Health Court Design and Implementation https://csgjusticecenter.org/wp-content/uploads/2020/01/Guide-MHC-Design.pdf

Developing a Mental Health Court: An Interdisciplinary Curriculum – Module 3

https://csgjusticecenter.org/wpcontent/uploads/2020/08/Module_3_final.pdf

5. COMPLETE TRAINING

Seek training, mentoring, and technical assistance when creating an MHC program. Read written resources, schedule time to watch webinars available online, and observe other established treatment courts. Judges should determine what initial training should be completed by the MHC team and what ongoing training will be necessary. Also, consider what training should be developed or implemented for local treatment professionals to ensure a successful MHC program.

Sé	Council of State Governments (CSG): Learning Modules https://csgjusticecenter.org/projects/mental- health-courts/learning/learning-modules/	NPC Research https://npcresearch.com/services- expertise/technical-assistance-and- consultation/	CSG: Center for Justice and Mental Health Partnerships https://csgjusticecenter.org/resources/justice- mh-partnerships-support-center/
Resource.	Specialty Courts Resource Center (SCRC) http://www.txspecialtycourts.org/tta_bureau .html	HHSC T.A. Center – email: forensicdirector@hhs.texas.gov	SCRC: List of Active Texas Specialty Courts http://www.txspecialtycourts.org/_documents /active_courts.pdf
	JCMH Technical Assistance http://texasjcmh.gov/technical-assistance/		Center for Court Innovation https://treatmentcourts.org/

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COMPETENCY RESTORATION IN TEXAS

More than 2500 people are currently on Texas' forensic waitlist Nearly 70% State Hospital Beds in Texas are currently utilized by forensic patients Over the past 20 years, Texas has seen a 38% increase in rates of people found incompetent to stand trial

COMPETENCY RESTORATION

Under **Texas CCP Chapter 46B**, the court must stay an individual's criminal proceeding if the court determines there is evidence to support a finding of incompetency to stand trial -- that the person is not able to consult with their attorney with a reasonable degree of rational understanding and lacks a rational and factual understanding of the legal proceedings (46B – incompetency).

OVERVIEW OF THE COMPETENCY PROCESS

- Criminal Charge (Felony or Misdemeanor Punishable by Confinement)
- Competency Issues Raised by Any Party or Court Suggestion
- Informal Inquiry by the Court
- Examination of Defendant
- Findings
 - Competent to Stand Trial
 - □ Incompetent to Stand Trial, Restorable in the Foreseeable Future
 - □ Incompetent to Stand Trial, Not Restorable in the Foreseeable Future

Once the issue is raised...

High level overview of Tex. Code Crim. Pro. art. 46B.004 & 46B.005

Suggestion of Incompetency

Court required to conduct informal inquiry.

Is there "some evidence from any source" that would support a finding that Defendant may be incompetency?

If some credible evidence suggests incompetence, the court **MUST**:

1) stop the case &

2) order a competency examination

Court SHALL hold a competency trial (limited by some exceptions)

Once there is a mere suggestion of incompetency, the court is legally bound to move forward with the competency route.

Competency Evaluation Should be Reserved for Cases where the State has a Strong Interest in Prosecution

JCMH developed a proposal for the 88th Session: when a defendant is found IST and is charged with a with a class B misdemeanor or a nonviolent misdemeanor and has not been convicted in the previous two years of an offense that resulted in bodily injury to another person, then the default procedure would be to order outpatient competency restoration (OCR) services.

If there is no OCR available, either because the community does not have OCR or the defendant cannot be placed in an OCR program within 14 days of the Judge's order, then the matter would be set for a referral to civil commitment under Code of Criminal Procedure 46B subchapter F—*Civil Commitment Charges Dismissed*

CHECKLISTS FOR BETTER DIVERSION AND COMPETENCY PRACTICES

ELIMINATE the WAIT

What's My Role to Eliminate the Wait for **Competency Restoration Services?**

Local Mental Health and Behavioral Health Authorities, Local Intellectual and Developmental Disability Authorities, and other Behavioral Health Treatment Providers

Behavioral health treatment providers are the frontline in reducing the number of people with a mental health (MH), substance use disorder (SUD), or an intellectual and developmental disability (IDD) who become involved in the criminal justice system. These efforts include offering timely crisis response and pre-arrest diversion programs, providing quality community-based services, and establishing positive relationships with criminal justice partners to facilitate a collaborative approach. By connecting people to care outside of the criminal justice system, behavioral health treatment providers can reduce the number of people in need of competency restoration services. If a person is found incompetent to stand trial, providing alternatives to inpatient competency restoration can prevent a person from waiting in jail for an available inpatient bed.

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1. Expand Crisis Response and Pre-Arrest **Diversion Options**

- Do I offer a range of crisis services?
 - Do I offer services that are accessible at the earliest signs of crisis, such as walk-in appointments and telehealth, nermitted?
 - Do I offer a range of services for people experiencing acute crisis such as roundthe-clock mobile crisis teams and shortterm crisis stabilization services?
 - Do I offer follow up services after a crisis care episode that ensure ongoing access to care such as care coordination?
- Do I have pre-arrest diversion programs and partnerships in place in all counties in my local service area that focus on preventing criminal justice involvement of people with MH, SUD, or IDD, as described in Tex. Health & Safety Code §§ 533.0354 and 533.108?
- Do I deploy a full range of public safety responses, including partnering with emergency medical services?
- □ Do I provide crisis response support to law enforcement through co-response or virtual co-response?
- Have I developed a shared understanding with local law enforcement officers on the scope of their discretion and responsibilities for an emergency detention without a warrant under Tex. Health & Safety Code § 573.001?¹
- Do I have a range of easy access drop-off options for all counties in my local service area for people who need immediate crisis support?

2. Promote Alternatives to Inpatient **Competency Restoration**

- □ Do I offer outpatient competency restoration (OCR) and/or jail-based competency restoration (JBCR) to provide an alternative to inpatient competency restoration services? If not, have I explored these options?
- □ Do I have a process in place for actively monitoring persons under a Code of Criminal Procedure 46B commitment order based on Form Z, the Forensic Clearinghouse Waitlist Template

3. Provide Services that Reduce Justice-Involvement and Ensure Continuity of Care

- □ If a person has been identified to be incarcerated through the continuity of care query (CCQ), do I have an outreach plan in place with my jail?2
- Do I offer contracted jail-based treatment services?
- □ Are my staff educated on justice-responsive programs and interventions, such as cognitive behavioral treatment targeted to criminogenic risk, motivational interviewing, forensic intensive case management, and critical time intervention?
- □ Are my staff educated on criminogenic risk and need factors that contribute to recidivism?

ELIMINATE the WAIT

What's My Role to Eliminate the Wait for **Competency Restoration Services?**

POLICE

Police officers are the gatekeepers of the criminal justice system. Texas law has granted peace officers discretion in diverting people with a mental illness (MI), substance use disorder (SUD), or an intellectual or developmental disability (IDD) from the criminal justice system without arrest, when appropriate, By doing this, peace officers help ensure that criminal justice system resources are focused on people who truly pose a threat to public safety, thus decreasing the number of people who enter the criminal justice system and reducing demand for inpatient competency restoration services.

1. Plan for a Pre-Arrest Diversion and Crisis Response

- □ Have I identified pre-arrest diversion and crisis response models that will work for my agency and community (e.g., Crisis Intervention Team training; law enforcement and mental health coresponse: clinician and officer remote evaluation programs: or other interdisciplinary mobile crisis response teams) and developed policies a d procedures to support the implementation of these models?
- □ Do I have a single representative (ideally senior level) that is responsible for overseeing and managing pre-arrest diversion and/or crisis response programs?
- □ Are policies and procedures in place for crisis responses that clarify and outline the roles, responsibilities, and actions of my staff and those of our behavioral health partners?
- Do I have inter-agency memoranda of understanding, policies, procedures, and/or agreements to help guide referrals from my agency to local behavioral health providers?
- Do I collect data to help improve pre-arrest and crisis response programs





Do I communicate to my officers the importance of diverting people with MI, SUD, or I DD, when

2. Create a Culture of Diversion First

- appropriate, from the criminal justice system and connecting them to treatment?
- Do I have an agency policy for interactions with people who have MI, SUD or IDD?
- □ Per Tex. Code Crim. Proc. Art.16.23(a), are my officers aware that they must make a good-faith effort to divert a person (1) suffering a mental health crisis or (2) suffering from the effects of substance abuse to a proper treatment center in the agency's jurisdiction if:
 - 1) there is an available and appropriate treatment center in the department's jurisdiction to which the agency may divert the person:
- 2) it is reasonable to divert the person:
- 3) the offense that the person is accused of is a misdemeanor, other than a misdemeanor involving violence: and
- 4) the mental health crisis or substance abuse is suspected to be the reason the person committed the alleged offense.
- □ Per Tex. Code Crim. Pro. Art. 14.035, are my officers aware of the alternative to arrest release locations for an individual with IDD?
- Are my officers aware of the scope of their discretion and responsibilities for an emergency detention without a warrant under Tex. Health & Safety Code § 573.001?
- Do I actively work across my organization and with local partners to troubleshoot and address barriers to diversion?

ELIMINATE the WAIT

What's My Role to Eliminate the Wait for **Competency Restoration Services?**

JUDGES AND COURT STAFF

Judges play an essential role in helping eliminate the wait for competency restoration (CR) services. By leading and facilitating the collaboration of parties, courts can connect people with the appropriate mental health treatment and services. Furthermore, Judges ensure the legal system is more just, compassionate, and fair by promoting practices that help those with mental illness (MI) and Intellectual and Developmental Disabilities (IDD) receive the necessary treatment to prevent recidivism, thus balancing community needs and judicial economy.

- 1. Identify and Meet Mental Health and IDD Needs at the Earliest Point
- Do I receive timely notice of credible information from jail administration that may establish reasonable cause to believe that an individual is a person with MI or IDD? Tex. Code Crim. Proc. (CCP) art. 16.22(a)(1)
- Do I (or the Magistrate Judge) order the 16.22 Interview if reasonable cause is found (from the jail admin or from an alternative source)?
- Do I send copies of the Collection of Information Report (16.22 Report) from the Interview to the defense counsel, prosecutor, trial court with jurisdiction, sheriff, and personal bond office/pretrial supervision office? CCP art. 16.22(b-1)
- □ Have I, or has my county, developed a process for effective and efficient ordering, collecting, distributing, and consideration of 16.22 requests, interviews, and reports?
- □ Is this process written in a procedure manual for others to follow in the future
- Do I (or the magistrate judge) appoint an attorney (if applicable) as soon as possible?
- If MI or IDD is evident, am I appointing someone with training and experience on mental health (MH) and IDD and related legal issues?
- □ Am I in communication with my Sheriff about the issues that arise in my court if the jail does not ensure individuals in custody
- □ Have access to 24/7 telemental health and telehealth? Tex. Gov't Code § 511.009(a)(19).
- □ Are being provided their prescription MH medications as required by law? Tex. Gov't Code § 511.009(d)
- Have I considered utilizing a MH liaison position in the courts to connect with the jails and treatment providers, and to coordinate between courts with criminal jurisdiction and those with probate jurisdiction over civil commitments
- Does my Local Mental Health Authority (LMHA) or Local Behavioral Health Authority (LBHA) have a MH liaison already? Is my court able to communicate with this person effectively and guickly regarding specific cases and dockets?
- Have I developed a specialty court as required under Tex. Gov't Code § 125.005? 14

2. Create a Culture of Diversion First

- □ Are the 16.22 Reports and risk assessments being used for decisions about bail, appointment of counse treatment, specialty courts, & community supervision conditions? CCP art. 16.22(c)(1) - (5)
- On misdemeanor cases, am I considering treatment or diversion alternatives first, and using competency evaluations only as a last resort when alternatives are not available or appropriate?
- Are diversion alternatives being considered for individuals when appropriate?
- Have I considered outpatient or inpatient MH treatment instead of competency restoration? Has the option for Outpatient Competency Restoration (OCR) been discussed with Defense and State?
- □ If the offense charged does not involve an act attempt, or threat of serious bodily injury to another person, have I considered CCP art. 16.22(c)(5) to release the defendant (D) on bail with charges pending, enter an order transferring D to the appropriate court for court-ordered outpatient mental health services under Tex. Health & Safety Code ch. 574? CCP art. 16.22(c)(5): HSC 574.0345.

3. Consider Alternatives to State Hospital if CR is Necessarv

- Am I aware that competency restoration services (CRS) are not comprehensive mental health treatment
- □ The goal of CR is to return the client to a competent state that would allow resumption of the adjudication process. While symptoms of mental illness may be reduced during the client's time in CR services, CR is not a substitute for comprehensive MH treatment
- Have I considered Outpatient Competency Restoration or Jail-Based Competency Restoration in lieu of inpatient CR? CCP art. 468.071.
- I am aware if OCR and JBCR is available in my community. If not available, am I aware of what I can do to advocate for the creation of one or both in my community?
- Upon an indication of restoration, have I approved funding for the defendant to be re-evaluated after stabilization to see if D is still incompetent CCP art. 46B 0755?

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ELIMINATE THE WAIT: BEST PRACTICES IN COMPETENCY RESTORATION



Alternatives to Inpatient Competency Restoration Services

Oupatient Competency Restoration and Jail-based Competency Restoration services are designed for people with MI who are found incompetent to stand trial and are court-ordered to participate in competency restoration treatment. These options should be considered in addition to inpatient competency restoration services.



Active Waitlist Monitoring

Jail administrators, jail medical staff, local mental health/behavioral health authorities, the courts, and state hospitals should work together to actively monitor people on CCP 46B commitments.



Court Policies and Procedures

Efficient court policies such as a single point-of-contact between the court and the state hospital; an efficient process for communicating between courts and state hospitals; coordination for medication



Education and Awareness

Competency evaluation orders are often tied to a well-intended, but inaccurate, understanding of competency restoration services. Promoting education of CR and the IST process can help ensure that all Texans receive care at the right time and place, and that CR is reserved for only appropriate cases.

JCMH Bench Books



Texas Juvenile Mental Health and Intellectual and Developmental Disabilities Law Bench Book

Judicial Commission on Mental Health Second Edition 2021-2022

Juvenile Bench Book

2nd Edition 2021-2022

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JCMH Technical Assistance





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