

Committee on Mental Health and the Justice System Minutes

Monday, March 25, 2019

10:00 a.m. – 3:00 p.m.

State Courts Building • 1501 W. Washington St. • Phoenix, Arizona • Conference Room 119 A/B

Present: Kent Batty (Chair), Amelia Cramer, Mary Lou Brncik, Brad Carlyon, Judge Elizabeth Finn, Judge Michael Hintze, Josephine Jones, Dianna Kalandros, James McDougall, Carol Olson, Chief Deputy David Rhodes, Commissioner Barbara Spencer, Dr. Michael Shafer, Judge Fanny Steinlage, Paul Thomas

Telephonic: Shelley Curran, Judge Cynthia Kuhn, Chief Chris Magnus, Kristin McManus, Michal Rudnick, Judge Christopher Staring

Absent/Excused: Jim Dunn, Ron Overholt

Guests/Presenters: Andy Flagg, Amy Love

Administrative Office of the Courts (AOC) Staff: Theresa Barrett, Don Jacobson, Stacy Reinstein

Regular Business

Welcome and Opening Remarks

Mr. Kent Batty (Chair), introduced himself and asked Committee members and guests to briefly introduce themselves. Mr. Batty noted that three new Committee members have been named: Kristin McManus, Yuma County Legal Defender is able to join us today – the Chair welcomed Kristin and asked her to provide some background. Natalie Jones, Coconino County Public Defender and J.J. Rico, CEO of the Arizona Center for Disability Law will plan to join us for the next meeting in April.

Approval of Minutes

Members were asked to approve minutes from January 24, 2019, noting they were in the meeting packet and provided electronically in advance of the meeting. No changes to the minutes were noted. A motion to approve the minutes was made by Judge Finn and seconded by Paul Thomas. Motion was approved unanimously.

Recent News & Updates

Mr. Batty reminded the Committee of the Chief Justice's comments from the January meeting emphasizing the work being done in Arizona around mental health and the justice system is nationally recognized. Mr. Batty pointed the Committee to materials in the meeting packet from SJI awarding a major grant to the National Center for State Courts (NCSC), to work in partnership with the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) on a mental illness in the courts initiative that includes several critical resources including the development of best practices and recommendations on standards to address mental illness and the state courts response, and adapting Arizona's Presiding Judge

Guide on the Sequential Intercept Model, which will be the point of discussion and action at tomorrow's judicially led Mental Health Summit.

The Chair thanked everyone who has been participating on workgroups. Of note, the heavy lifting being done by the two workgroup chairs and to the responsiveness and engagement of Ms. Michal Rudnick and the staff at AHCCCS. The competency issues workgroup includes key stakeholders with a great deal of expertise who have been of great help to staff and the workgroup chair in accomplishing our objectives.

The Chair reminded members that the workgroups are doing work in accordance with the Committee charge in the Administrative Order and will make recommendations to the full Committee for review before anything moves forward beyond the Committee to the AJC Standing Committees and then AJC. The Committee has an interim report due in October 2019.

Workgroup Report: Education

Stacy Reinstein, Committee Staff, updated the Committee regarding the status of the action items outlined for the Education workgroup. When having folks review the civil commitment process website that is being developed by the Committee in partnership with the AZ Bar Foundation, it has been noted that we/the courts do not "own" a lot of the information being presented, and therefore do not have an immediate linkage if anything changes; for example, an AHCCCS policy or form, or screening agency contact info, or crisis agency phone number.

At this point, staff will be pursuing potential options with the Bar Foundation and internally at AOC that will allow us to provide the basic court process information as it relates to the law and court process, as well as direct people via the AZ Court Help website to the policies and forms on AHCCCS' site.

In addition, the Committee can still create a printed brochure if it wishes, as it can have a disclaimer with a date stamp. Staff will need some time to create this and send out to the Education workgroup and other interested Committee members for review.

The team will also continue to work on its objective to "educate the public on the use of advance health care directives" which includes incorporating information on the AOC website and AZ Court Help, as well as identifying stakeholders who can assist in further spreading the word. Mr. Jim McDougall noted that the Attorney General's Office does provide forms for advanced healthcare directives; however, the information in the forms does not always go far enough for a loved one's family member in the same way it would if they had an attorney. Thus, further refinement of those forms and/or education to the public may be necessary. Mr. McDougall also noted that the registry is problematic if the person who registered their advanced healthcare directive retains the pin number without sharing it with their family member/loved ones. There was legislation last year that would allow people on a "need to know basis," such as emergency personnel, to be able to access the person's directive. The Chair noted that the Committee will continue to work on this objective, including looking at what other states are doing in this area.

Workgroup Report: Competency Practices

Dianna Kalandros, Competency Practices workgroup chair, provided an update on the status of the workgroup's objectives. The group has primarily been focused on the objective to "Evaluate and recommend best practices for determining competency by psychological evaluators, to include techniques, methods, tests, etc." At this point, the workgroup is looking at best practices and templates for the competency reports and recommending necessary updates to both the guidelines and forms, as well as the current AOC training program.

Ms. Kalandros also noted that the workgroup has been looking at its objective to evaluate and recommend best practices for Restoration to Competency programs. Research has shown that there are not a lot of best practices in place nationwide other than on "how to" write reports, although ASU has staff who are working on data gathering in this area and will be presenting at the April 15th workgroup meeting, if other Committee members are interested in attending.

Further work is going to be taking place next month in the workgroup as it relates to reviewing statutory requirements for the "Clinical Liaison" and "Court Guidelines" as well as determining and recommending the minimum necessary documents to be placed in a statewide Rule 11 data depository.

Committee member Judge Steinlage asked if the workgroup would be looking at the challenges faced by rural counties who do not have anyone available to do out of custody restoration, and so individuals must be placed in custody to undergo the restoration. Ms. Kalandros noted she faced similar issues in Pinal County where they developed an outpatient program and has also worked with Graham County to help resolve some of these issues. Ms. Kalandros noted this is of interest, and something she would like the workgroup to look at as part of its recommendations. The Chair asked the Committee if they are aware if Santa Cruz and Cochise Counties are sending people to Tucson for out of custody restoration. Amelia Cramer noted that Pima County does have an out of custody restoration program but does not know at this time whether people from out of county are being transported to receive services through the program.

Key Issues Workgroup Report

Jim McDougall, Key Issues workgroup chair thanked all the members of the workgroup for all of their hard work and diligence.

Mental Disorder Definition

Mr. McDougall noted that the Committee received feedback on the Committee's proposed revisions to the Mental Disorder definition and had an opportunity to review and discuss the comments. The Committee was asked to decide if any further changes needed to be made to the definition, and if the Committee still recommends moving the definition forward through the Committee process (review by AJC standing committees and AJC).

Committee members noted that, while the feedback on costs is valid, it is important to recognize that money is being spent on this population today particularly in the criminal justice system, as well as with first responders and emergency personnel. Committee members recognized the fact that money will need to be spent to address the problem long term and there are positive cost shifts that will happen to help people and the community if the definition as developed is

changed. A member noted that constraints on rural counties need to be recognized before we shift the problem to the jails as the only secure facility that will take someone who is even minimally combative.

The Committee agreed to move forward with the definition, while clearly noting there are real costs to counties, particularly rural counties, and the Committee may need to build a financial case for where the cost shifts are that will have a positive impact. A Committee member gave an example from Pima County as a starting point: 61% of the jail population suffers from a MH disorder; approximately 1,800 inmates in the jail at any given time; it costs \$100/day/inmate = \$108,000/day to serve people who are mentally ill in that jail x 30 days = approximately \$3.3 million/month. Using those numbers, plus data from other jails, as well as possibly the mental health contracts that each county jail has with an outside provider in comparison to costs for hospital or community-based settings was suggested as a starting point for the Committee's financial case for moving these recommendations forward. A motion to approve moving the definition forward through the AOC/AJC process was made by Judge Hintze and seconded by David Rhodes. Motion was approved unanimously.

Enhanced Services Proposal

Mr. McDougall next reviewed the workgroup's "Enhanced Services Proposal" which the Committee received prior to the meeting. Mr. McDougall noted that this concept is designed to address the "revolving door" in both the criminal justice and civil mental health treatment systems by identifying people with specific needs that fall under this proposal, providing a mechanism for the court to order services that are needed, and to actively oversee compliance with the court order and provision of those services.

Mr. McDougall asked the Committee for feedback, and to determine if it recommends moving the proposal forward through the Committee process via AOC/AJC. Members expressed support, including noting that requests are made regularly by providers for the court to order various mechanisms to assist with gaining compliance by the patient. A member noted there is currently a real challenge with AHCCCS/RBHAs determining something is not medically necessary, even after the treatment team makes a recommendation to the Court, and this will need to be addressed if this proposal goes forward. Discussion ensued regarding the differences between urban courts, designated mental health courts, and the rural communities that do not have access to this level of treatment. Again, members noted that the Committee will need to collect the information and provide examples of cost and available funding to build a case for the public and the Legislature as to the population the Committee is seeking to help as well as the problems that it is working to solve.

A motion to approve the proposal of the workgroup and move it forward through the AOC/AJC process was made by Amelia Cramer and seconded by Judge Finn. Motion was approved unanimously.

Persistent or Acutely Disabled

Mr. McDougall next reviewed the workgroup's revised definition for Persistent or Acutely Disabled (PAD) which the Committee received prior to the meeting. The workgroup proposes that the definition of PAD in A.R.S. §36-502 should identify "a substantial probability of causing

harm to others” as a possible consequence of the condition not being treated. In addition, screeners and evaluators should be able to immediately hospitalize a person under A.R.S. §36-524 and §36-526 regardless of the category presented if the emergency standard is met, i.e. *“during the time necessary to complete the prepetition screening procedures set forth in sections 36-520 and 36-521 the person is likely without immediate hospitalization to suffer serious physical harm or serious illness or is likely to inflict serious physical harm upon another person.”*

Mr. McDougall asked the Committee for feedback, and to determine if the Committee recommends moving the proposal forward through the Committee process. A motion to approve the proposal of the workgroup and move it forward through the AOC/AJC process was made by Amelia Cramer and seconded by Judge Steinlage. Motion was approved unanimously.

The Chair, Mr. Batty noted that the Committee now has three recommendations that will move forward to the next level.

Presentation and Discussion: Incompetent Not Restorable

The Chair introduced the next agenda item, focused on incompetent not restorable, thanking the Key Issues workgroup for setting this presentation and discussion up, noting that when the workgroup began discussion, it realized that there was a need for education on the topic that would be beneficial for the whole Committee.

Mr. McDougall provided an overview of the presenting issue and challenges. Amelia Cramer presented examples of violent individuals who have come through the Pima County Attorney’s Office and are found incompetent to stand trial because they cannot assist in their own defense, and yet are released into the community.

Judge Mike Hintze shared specific example from Maricopa County and Phoenix Municipal Court, specifically one individual who has since died. This individual had approximately: 21 Mental Health cases (court ordered treatment), 3 Probate cases (guardianship), 14 Criminal (County), 34 Criminal (City) – these only include Maricopa and the City of Phoenix, and not any of the other jurisdictions and outside of Arizona. Judge Hintze raised the impact that these costs have across multiple individuals and entities, including: personal impact to the individual, judicial, prosecutorial, defense, jail, medical, psychiatrists, psychologists, case managers, social workers, behavioral health techs, hospital, housing, police, detention, other jurisdictions, and more.

Committee member Dr. Mike Shafer shared a presentation synthesizing the information from “A Report to the Arizona Legislative Study Committee of Incompetent Non-restorable, Dangerous Defendants” which was included in Committee packets. While there are inadequacies in county level reporting systems, highlights of the presentation include the following (data time period: SFY 2012–SFY 2016):

- 747 defendants referred for restoration to competency from 10 counties (Maricopa excluded), resulting in a statewide standardized rate of 37.2 referrals per 100,000.
- 728 defendants discharged from RTC programs
- 85% restored to competency
- 608 defendants found to be non-restorable

- Clinical basis for non-restorability determinations (10 counties, 108 defendants): 55% mental illness; 15% dementia, medical conditions; 13% intellectual disability; 11% substance abuse/alcoholism; 6% traumatic brain injury.
- Approximately 25% of defendants found to be non-restorable re-offend.

Mr. McDougall presented the legal constitutional issues for the Committee, including consideration of Ohio's Supreme Court case State v. Williams that was shared with the Committee in its materials. Ohio's incompetent not restorable statute is very similar to the next presentation that will be made by the Pima County Attorney's Office. Mr. McDougall outlined the constitutional challenges of Ohio's statute and presented the committee with this summary analysis (full analysis can be found in the Committee's meeting packet):

Criminal vs. Civil

- The argument was made that the statute is criminal in nature and as such denies defendants constitutional rights because procedural safeguards for criminal prosecution are not present were raised in this case.
- The Appellate court found that the overriding intent of the statute was to confine incompetent defendants who have been charged with serious felonies as if they had been convicted or until they can be tried and therefore was criminal in nature.
- Ohio court using the "intents/effects test" applied by U.S. Supreme Court in Kansas v. Hendricks (1997) 521 U.S. 346 [an SVP case] overruled the Appellate Court and held the statute to be remedial and therefore civil, rather than penal and therefore criminal.
- Facts used to attempt to prove the statute is criminal in nature:
 - The statute is in the criminal code not the probate code
 - The criminal indictment remains pending after commitment
 - That the D has to remain incompetent throughout commitment
 - That the length of detention is linked to a possible maximum prison sentence
- The Ohio Supreme Court overturned the Appellate Court ruling and held the statute is remedial or civil in nature and is designed primarily for the purpose of protecting the public.

Equal Protection Clause

- The Ohio Supreme Court held that the procedures used in the criminal statute which are more restrictive or more onerous are rationally related to a legitimate public interest and therefore do not violate equal protection.

Due Process Violation

- The court found the overriding purpose of the Ohio statute is to protect the public from a person who is dangerously mentally ill, has perpetrated felonious conduct, and cannot be tried because of his mental incompetency, and found that the process, standards and procedures in the statute bear a reasonable relation to this purpose. Even though there is a way to civilly commit a person who has committed a serious offense of violence, this does not prevent the legislature from creating an alternative procedure in the criminal court for persons who pose an especially high degree of risk to safety of the public.

The final presentation on this topic included the current legislative proposal from the Pima County Attorney's Office, presented by Andy Flagg, Chief Civil Deputy, Pima County Attorney's Office. The Committee posed questions and discussed various issues with the proposal, and suggested changes for consideration.

Following Mr. Flagg's presentation, Amy Love, Deputy Director of Government Affairs for the Arizona Supreme Court, shared additional current mental health related legislation being discussed at the Legislature, including the SMI Trust Fund. Ms. Love also shared the internal legislative timeline and process at the AOC as it relates to any legislative recommendations put forward by the Committee, particularly noting the importance of vetting the recommendations to stakeholder groups as much as possible prior to beginning the legislative process in January.

The Committee discussed next steps regarding the Incompetent Not Restorable topic and requested that Pima County consider the concerns and suggestions made by Committee members, do some internal redrafting and work with the Key Issues workgroup to review and bring any changes back to the Committee.

The Committee then agreed that without adopting or approving any specific proposal, it will recommend to AOC/AJC that it supports efforts to deal with this population of incompetent non-restorable defendants through the creation and adoption of a constitutional process, procedure and/or program to provide treatment to the individuals while protecting the public.

Committee members also asked the Chair, Mr. Batty to put the current recommendations for Mental Disorder definition, Enhanced Services, and PAD forward to the AJC Standing Committees in May vs waiting until the fall. Mr. Batty agreed to discuss with staff to bring those proposals to COSC and LJC in May, and report back to the Committee at the May meeting.

Future Committee Work

Mr. Batty provided the Committee with an overview of the priority setting exercise the Committee will be doing in May, looking at the existing parking lot items, and what the group prioritizes as its most important things to work on moving forward.

The Chairman also noted that a Doodle poll will be sent out by staff to determine the Committee's meetings for August through the remainder of the year, noting prior requests not to hold meetings on Wednesdays.

Good of the Order / Call to the Public

No members of the public asked to speak.

Adjournment

The meeting was adjourned at 3:02 p.m. by order of the Chair.