

Fair Justice Task Force

Subcommittee on Mental Health and the Criminal Justice System

Thursday, September 12, 2017
Conference Room 101, Arizona State Courts Building
1501 West Washington Street
Phoenix, AZ 85007

Present: Kent Batty, Chair, Susan Alameda, Mary Lou Brncik, India Davis, Jim Dunn, Vicki Hill, Josephine Jones, Kathleen Mayer, Judge Joe Mikitish, Dr. Dawn Noggle, Dr. Carol Olson, Nancy Rodriguez, Dr. Michael Shafer, Mary Ellen Sheppard, Judge Susan Shetter, Commissioner Barbara Spencer, Lisa Surhio, Detective Sabrina Taylor, Paul Thomas, Juli Warzynski, Danna Whiting

Telephonic: Dr. Tommy Begay

Absent/Excused: Detective Kelsey Commisso

Administrative Office of the Courts (AOC) Staff: Jennifer Albright, Theresa Barrett, Jennifer Greene, Don Jacobson, Jodi Jerich, Sabrina Nash, Kathy Sekardi

I. WELCOME, INTRODUCTION AND OPENING REMARKS

Kent Batty, Chair, called the meeting of Fair Justice Task Force Subcommittee on Mental Health and the Criminal Justice System (“Subcommittee”) to order at 1:05 p.m.

Mr. Batty gave welcoming comments and invited Subcommittee members to introduce themselves. He also recognized the members of the Rule 11 Workgroup, noted that Don Jacobson will serve as the Workgroup’s Chair, and explained the role of the Rule 11 Workgroup.

Mr. Batty reviewed the charge of the Subcommittee:

1. Recommend rules and procedures needed to implement new provisions of SB1157 relating to competency.
2. Determine if the current standard for ordering court ordered treatment should be altered to allow earlier intervention.
3. Recommend if any current court rule or statute should be modified to enable the courts to more effectively handle individuals in the justice system that have mental health issues.
4. Develop a Model Protocol Guide for presiding judges to use to implement the task force’s recommendations.

Mr. Batty noted that the Subcommittee will report its recommendations to the Fair Justice Task Force and further noted that three (3) Subcommittee members (Mr. Dunn, Ms. Sheppard, and himself) also serve on the Task Force.

Finally, Mr. Batty reviewed the rules for conducting subcommittee business.

I. OVERVIEW OF THE FAIR JUSTICE TASK FORCE (TASK FORCE) RECOMMENDATIONS AND IMPLEMENTATION EFFORTS

Brief History of the Fair Justice Task Force

Mr. Batty provided the Subcommittee a history of the Task Force's work and summarized its Final Report. He noted that at the time Chief Justice Scott Bales established the Task Force by [Administrative Order No. 2016-16](#), Arizona was at the forefront of a national trend to examine, and change where possible the impact of courts' practices regarding the administration of court-ordered, monetary sanctions and pretrial release policies. This effort arises from the belief that too many people are incarcerated simply because they cannot afford to pay bonds, fees, fines and penalties or because they have behavioral or mental health issues that inhibit their release. He recalled the Task Force met a total of seven (7) times and issued 65 recommendations based on 11 core principles. To further develop many of the Task Force's recommendations, additional subcommittees or workgroups were generated. To date, these groups include:

- 1) The Order to Show Cause Workgroup
- 2) The Rules Workgroup
- 3) The Post Conviction Relief Workgroup, and most recently
- 4) The Subcommittee on Mental Health and the Criminal Justice System and its Rule 11 Workgroup

Next, Mr. Batty reviewed the specific Task Force recommendations that correspond to the Subcommittee's charge. He explained that SB1157 (Laws 2017, Ch. 14) amended A.R.S. §13-4503 to allow limited jurisdiction courts, with the agreement of the Presiding Judge of the superior court of that county, to conduct Rule 11 competency proceedings. This statutory change reflects the Task Force's Recommendation No. 34 to revise current statutes for expediting mental competency proceedings for misdemeanor cases. Other statutory changes recommended by the Task Force and supported by the Arizona Judicial Council and the Supreme Court will be presented to the Legislature for its consideration at the next regular legislative session. The Court has already undertaken certain rule changes and intends to promptly consider any additional changes recommended by the Task Force.

Finally, Mr. Batty noted that Pima County was selected to receive a grant from the MacArthur Foundation to develop innovative policies that seek to reduce the misuse and overuse of jails. He further noted the Conference of State Court Administrators (COSCA) is looking at these same issues and expects to publish a white paper on the topic later this year.

Implementation Efforts of the Task Force's Recommendations

Mr. Don Jacobson, Senior Special Projects Consultant, reported on current efforts to implement the Task Force's recommendations. He noted that the courts have been working diligently to implement many of the recommendations. He reviewed several efforts currently in progress:

1. Pretrial Release Initiatives

Mr. Jacobson reviewed efforts to change pre-trial release policies and to eliminate bond schedules. He noted that courts are encouraged to use the public safety assessment

tool (“PSA”) to calculate individual risk as an alternative to defaulting to one size fits all bond schedules. He noted that the PSA is implemented in all 15 counties at the superior court level but is not in use broadly in the limited jurisdiction courts due to resource challenges. Subcommittee members discussed the differences between the new screening tool and the one previously used by Pima County. It was noted that the new tool has only been in use in Pima County for approximately one year. Mesa Municipal Court piloted the PSA and found, among its challenges, that the tool required the compilation of information that Mesa did not regularly collect. Specifically, Mesa lacked the resources to gather criminal history data.

2. Ability to Pay Initiatives

Mr. Jacobson noted legislative changes are being proposed to amend statute to provide courts more flexibility when levying penalties and financial sanctions. The Subcommittee discussed how Arizona is on the forefront in the nationwide effort to recognize that fair justice should apply to all and that those without financial means should not be disparately punished simply because they are poor. Mr. Jacobson noted efforts toward a more individualized approach when holding a person accountable. These efforts include the flexibility to reduce base fines for persons at or near the federal poverty level, expand the use of installment payments and on-line payment options, and eliminate the practice of suspending a person’s driver’s license for failure to pay a fine.

3. Judicial and Court Staff Training Initiatives

Mr. Jacobson noted that “fair justice” includes flexibility to provide individualized justice while still holding people accountable. Training judges on the options available to them through current rules and laws plays an important role in the successful implementation of the Task Force’s goals. To that point, training for judges and court staff has begun and planning for future training is ongoing.

II. OVERVIEW OF MENTAL HEALTH COMPETENCY PROCESSES

Rule 11 Process

Ms. Cassandra Urias, Deputy Administrator for Pima County Superior Court, provided a presentation on the Rule 11 process. Following her presentation, discussion ensued. Discussion included Pima County’s average length of time for both evaluation and restoration to competency of a defendant. It was noted that a court can anticipate six (6) weeks to conduct evaluations with restoration to competency for inpatient defendants averaging 110 days, but five (5) months for defendants not in custody. One member noted that she has observed restoration to competency for inpatient defendants in Maricopa County to be about 60-75 days and up to one year for defendants not in custody.

Overview of the Mesa & Glendale Court Pilot Projects

Mr. Paul Thomas, Mesa Municipal Court Administrator, and Judge Elizabeth Finn, Presiding Judge of the Glendale Municipal Court, reported on their courts’ implementations of their respective pilot projects authorized by Administrative Order No. 2015-92 to conduct criminal Rule 11 competency proceedings.

The Mesa Municipal Court Pilot Program – Mr. Thomas stated Mesa’s new, streamlined process for Rules 11 hearings was very effective in reducing the average case processing times from initial motion to conclusion. He noted that, to date, Mesa has completed 168 cases finding 100 defendants competent and 68 defendants not competent. In most cases, the prosecutor and defense counsel stipulated to a single evaluation. However, there were some cases where the parties did not stipulate to one evaluation. Of the 27 cases with two evaluations, 21 of those second evaluations were consistent with the conclusions of the first evaluation. Only six (6) cases had three (3) evaluations.

Mr. Thomas identified several changes made by the Mesa Municipal Court that resulted in the expedited resolution of Rule 11 proceedings. First, the court largely eliminated motion practice and ordered a competency evaluation if a party requested one. Additionally, Mesa eliminated the pre-screening process and encouraged parties to stipulate to a single evaluation. Mesa also set up standing, weekly appointments where mental health experts would conduct competency examinations at the courthouse. Mr. Thomas noted that having a defendant come to the courthouse instead of sending the defendants to the expert’s medical office saved considerable time and increased the likelihood the defendant would show up for the examination.

Mr. Thomas summarized key components of Mesa’s pilot project which included:

- Proper training of judges and court staff;
- Setting up appropriate procedures for the secure filing and sealing of doctors’ reports
- Scheduling standing, weekly appointment times at the courthouse for doctors to conduct competency evaluations; and
- A willingness of the parties to stipulate to a single evaluation.

Mr. Thomas concluded that Mesa’s streamlined Rule 11 process produced significant benefits. He noted that it improved service to the defendants and reduced the failure to appear rate. Other benefits he attributed to the pilot project included faster case processing times, increased cost savings, and an overarching fulfillment to promote “Access to Justice”.

Some members expressed concern that stipulating to one evaluation may not be suitable in felony cases. It was also noted that some doctors tend to be predisposed to make certain findings and that a single evaluation could lead to a disproportionate number of defendants being found competent or not competent depending on the reliance of a particular doctor.

The Glendale City Court Pilot Program – Next, Judge Finn reviewed the Glendale City Court’s Rule 11 pilot program. She noted that unlike Mesa, Glendale has a mental health court (MHC) to address defendants with mental health problems.

Judge Finn informed the Subcommittee that Glendale has completed 44 Rule 11 cases since her pilot launched. The court found 4 defendants to be competent, 39 not competent, and one case was withdrawn for felony prosecution. Two evaluations were done in all cases but one with 11 cases going to a third evaluation. Judge Finn commented that the Glendale Mental Health Court Program Coordinator has been granted access to the Maricopa County Superior Court’s case management system and can obtain sealed doctor reports from previous Rules 11 proceedings. Additionally, Glendale has established an email address where evaluating doctors

send all their reports and invoices. Judge Finn reported Glendale's Rule 11 case processing time from initial motion to conclusion was 48 days.

Subcommittee members identified a disparity in the percentage of persons found incompetent between the two pilot programs. With its MHC, Glendale can offer services to defendants with mental health issues. Although Glendale had conducted far fewer Rule 11 proceedings than Mesa, it had a much higher percentage of cases where the defendant was found to be incompetent. Judge Finn attributed this to Glendale's MHC operations and defense counsel's selective use of Rule 11 motions. She noted that since Glendale has a public defender who handles Rule 11 matters exclusively and who has a breadth of experience with mental health cases, she is able to effectively screen cases and limit the number of Rule 11 motions.

Discussion ensued. The Subcommittee discussed possible benefits of a limited jurisdiction MHC in combination with Rule 11 proceedings.

- When a limited jurisdiction court has a MHC which offers pre-adjudication diversionary treatment and also conducts Rule 11 proceedings, the court can offer more options to get services to seriously mentally ill defendants.
- The existence of a MHC may influence defense counsel's decision to file a Rule 11 motion for their seriously mentally ill defendant because treatment services can be obtained through the MHC.
- Defendants may be willing more receptive to treatment when diversionary treatment options are on the table.
- Crisis Intervention Teams (CITs) are less likely to encounter persons when they are participating in MHC diversionary treatment programs.

Additional discussion centered around a desire to better connect a limited jurisdiction court's Rule 11 proceedings with the ability to provide Title 36 treatment in an expeditious manner. Currently, a limited jurisdiction court that finds a defendant to be incompetent can only dismiss the charges or remand the matter back to superior court which delays getting a person needed treatment. Other members questioned whether some cities may be hesitant to hear Rule 11 matters for cases originating in their jurisdictions because they may not be able to bear the costs associated with those proceedings.

Recent Amendments to Rule 11

Ms. Jennifer Greene, AOC staff attorney, reviewed recent changes to Rule 11, including Order No. R-17-0041 which approved changes to Rule 11 on an emergency basis. These changes became effective August 9, 2017 and were intended to align the Rule with recent statutory changes from SB1157. Most notably, the amended Rule 11 allows a limited jurisdiction court to exercise jurisdiction over competency hearings in misdemeanor cases if authorized by the presiding judge of the superior court in the county. The comment period for the emergency rule is open until October 11, 2017.

Additionally, Ms. Greene reported that on August 29, 2017, the Supreme Court issued Order No. R-17-002 which largely restyled the entire Arizona Rules of Criminal Procedure, including Rule 11. In this Order, the Court adopted the substantive changes to Rule 11 that were authorized in

the emergency rule petition along with changes for style and added clarity. Those Rules go in effect on January 1, 2018.

It was noted that another piece of legislation, HB2239 (Laws 2017, Ch. 59), has generated some ambiguity regarding whether a court can retain jurisdiction if a defendant has been found to be incompetent and not restorable.

Court-Ordered Evaluations and Treatment

Judge Barbara Spencer, Dr. Carol Olson, and Ms. Josephine Jones provided information to the Subcommittee on the process for court ordered evaluations and treatment pursuant to the Title 36 civil commitment statutes. They noted that there have been over 5,000 Title 36 court ordered evaluations to date in Maricopa County. However, only 5-7% of persons receiving Title 36 court ordered treatment were from cases where a court remanded a matter after a Rule 11 hearing.

The presenters further noted that many people who receive court ordered treatment services have substance abuse problems. Typically, a person will do well in an inpatient setting. However, once released, those with substance abuse problems will start using drugs, stop taking their prescribed medications, and will decompensate. Discussion ensued. Comments included:

- Some defendants come to court with multiple court ordered treatment (COT) orders spanning several years.
- There should be efforts made at building better bridges between Title 36 treatment and the criminal justice system.
- HB2239 states that if a prosecutor files a petition for Title 36 court ordered evaluation, the petition must include all known criminal history including Rule 11 proceedings.

Operation of Mental Health Courts

Mr. Batty and Mr. Jacobson shared a high level overview of the differences between MHCs in superior courts and those in limited jurisdiction courts. Generally, superior courts create a post adjudication MHC. If a defendant is eligible for MHC, then the court can attach mental health terms to their probation. On the other hand, limited jurisdictions typically create pre-adjudication MHCs. In this model, the defendant will waive his right to a trial, agree to treatment terms, and hopefully make sufficient progress to “graduate.” One factor in the difference in approach is that limited jurisdiction courts typically lack probation staff.

III. DISCUSSION REGARDING SPECIFIC CHARGES TO THE SUBCOMMITTEE

Mr. Batty opened the floor for general discussion of what issues the members wish to explore relating to the charges of the Subcommittee. The discussion generated these issues:

- Identify best practices for limited jurisdiction courts to consider when developing procedures to conduct Rules 11 hearings.

- Determine whether it is practicable to create a statewide repository to be accessible to all jurisdictions that conduct Rule 11 proceedings or have MHCs.
- Identify best practices for limited jurisdiction courts to report persons who are classified as prohibited possessors pursuant to ARS §13-3101.
- Consider developing a statewide plan to implement a Sequential Intercept Model.
- Explore expanding eligibility for treatment to persons who are mentally developmentally disabled or who have physical brain disorders.
- Identify barriers to treatment and propose solutions. Discuss whether eligibility for MHC court should be expanded to persons who have a general mental health (GMH) designation but are not designated as seriously mentally ill (SMI).
- Consider how to encourage the use of advance directives and the appointment of guardians for persons who are receiving court ordered mental health services.
- Explore opportunities to educate the public about the services that MHCs provide.
- Consider changes to Arizona’s statutes to consider a person’s mental disorder at the time the crime was committed.

IV. DISCUSS OTHER CONCERNS

Mr. Batty explained how Michigan had enacted “Kevin’s Law” designed for earlier intervention for people with mental health issues. He further noted that the Michigan law encourages those facilities that provide mental health services to educate their patients about advance directives, as a means of lowering the number of crisis-based involuntary commitment proceedings. Our subcommittee has been asked to consider whether Arizona should provide for the use of such tools.

V. PROCESS MOVING FORWARD

Mr. Batty suggested a team approach to develop recommendations to be put forward to the Task Force. Members concurred.

VI. GOOD OF THE ORDER/CALL TO THE PUBLIC

No members of the public wished to address the Subcommittee.

Adjournment: The meeting adjourned at 2:08 p.m.

Next Meeting: Tuesday, October 24, 2017; 10:00 a.m.
Arizona State Courts Building, Conference Room 345A&B