

Practical Considerations Related to Release and Sentencing for Defendants Who Have Behavioral Health Needs

A Judicial Guide



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About APAF: The American Psychiatric Association Foundation—formerly known as the American Psychiatric Foundation—complements the professionalism of the American Psychiatric Association by focusing on, and playing leadership roles in, the nation's most pressing social mental health issues across our society. APAF administers programs ranging from meeting the chronically unmet needs of minority populations to conducting innovative research that contributes to the scientific base of psychiatric practice, to increasing public awareness and removing barriers to mental health care that change lives. For more information about APAF, visit <http://www.americanpsychiatricfoundation.org>.

About JPLI: The Judges' and Psychiatrists' Leadership Initiative (JPLI) aims to stimulate, support, and enhance efforts by judges and psychiatrists to improve judicial, community, and systemic responses to people with behavioral health needs who are involved in the justice system by creating a community of judges and psychiatrists, increasing the reach of trainings, and developing educational resources. For more information about JPLI, visit <https://csgjusticecenter.org/courts/judges-leadership-initiative/>.

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Introduction

Criminal court judges across the country report that the number of people they see in their courtrooms at every stage of the legal process who have mental illnesses and/or substance use disorders has increased dramatically in recent years. While most judges aim to appropriately connect people to needed care while also following the law, they often struggle with not having enough information to help guide their decision making. Judges rarely have information about defendants' specific behavioral health needs and may also be unaware of the treatment resources that are available in the community that can address those needs, which makes it difficult to make informed and timely decisions related to release and sentencing for this population.

Recognizing the significant public safety implications of this dearth of information and wanting also to improve the stabilization and recovery outcomes for these defendants, judges are actively seeking a better understanding of the types of behavioral health needs defendants have, the treatment and services that are available in their communities, and how best to work with these service providers to improve public health and safety, as well as support individuals' recovery.

"I see more people with mental illnesses in my courtroom in a day than a doctor might see in a month. That's a sad commentary on the system."

– Judge Steven Leifman
Eleventh Judicial Circuit Court of Florida

This guide is intended to provide judges with practical information and strategies to help them:

- Recognize signs that a person may have a mental illness and/or substance use disorder;
- Understand the process for screening and assessing people for these conditions;
- Become familiar with the different types of treatment that best address particular behavioral health needs;
- Collaborate with behavioral health care providers to identify the treatment resources that are available in their communities; and
- Make release and sentencing decisions and referrals to treatment that can improve public health and safety outcomes.

With the right information about defendants' behavioral health needs and the treatment resources that are available in the community to address those needs, judges can make effective referrals to treatment when making release and sentencing decisions. Judges can also reduce case-processing delays that occur if defendants exhibit disruptive behavior or have difficulty functioning in court due to symptoms of mental illness or substance withdrawal or if immediate connection to treatment is necessary. These circumstances can negatively impact court functioning by delaying cases being called on a docket, frustrating court personnel and defendants, or by requiring additional time to conduct legal procedures on any given case. With enhanced information and resources, judges can typically reduce case processing delays and disruption that can occur with this population as the processes of identification of behavioral health needs and connection to treatment are streamlined and ideally occur sooner after arrest.

This guide and accompanying bench card are the result of a May 2017 convening hosted by the Judges’ and Psychiatrists’ Leadership Initiative, a project of the CSG Justice Center and APAF that supports efforts by judges and psychiatrists to improve judicial, community, and systemic responses to people in the criminal justice system who have behavioral health needs. Judges and psychiatrists from across the country, along with people with mental illnesses who have been in the justice system and their family members, gathered to discuss strategies to help judges make informed release and sentencing decisions for defendants who have behavioral health needs.

“The judge in my case really cared about what happened to me. I was put in Mental Health Court, which kept me out of jail so I wouldn’t lose my son. I was willing to do anything for that chance; it saved my life.”

– Jeremy Sorensen
Lead Peer Mentor, Transforming
Lives Cultivating Success

At-a-Glance: A Glossary of Terms

Criminogenic needs: Static or dynamic characteristics, traits, problems, or issues that contribute to a person’s likelihood of engaging in criminal behavior.

Criminogenic risk: The likelihood that a person who has committed a crime will commit a new crime or violate the conditions of his or her supervision.

Recidivism: A common term and key metric for criminal justice systems typically used to describe the rearrest, reconviction, and/or reincarceration of a person.

Pretrial risk: Refers to the likelihood of a person failing to appear in court or engaging in new criminal activity while on pretrial release.

The Risk-Need-Responsivity Model

Involvement with the criminal justice system—especially incarceration—can cause particular problems for people who have behavioral health needs, including interruption of treatment, lapse in medication, and disruption of case management services and other critical supports. Familiarity with the Risk-Need-Responsivity (RNR) model gives judges a way to understand defendants’ often complex needs and how to approach responding to those needs to reduce recidivism. According to this model (see Table 1), assessing criminogenic risk and needs involves identifying static (unchanging) and dynamic (changeable) factors that contribute to the likelihood of a person committing a new crime or violating the conditions of his or her supervision and tailoring interventions based on the identified factors.

Table 1. The RNR Model

Risk: Match the intensity of a person’s supervision and treatment to his or her risk of recidivism (*i.e., WHO to target*)

Need: Target criminogenic needs, such as antisocial behavior, substance use, or antisocial attitudes and peers (*i.e., WHAT to target*)

Responsivity: Tailor the intervention to the person’s individual learning style, motivation, culture, demographics, and abilities (*i.e., HOW best to target*)

Static Factors

Criminal history, including:

- Number of previous arrests
- Number of prior convictions
- Type of previous offenses

Current charges

Age at first arrest

Current age

Gender

Dynamic Factors

History of antisocial behavior (including early and continuing involvement in antisocial acts)

Antisocial personality pattern

Antisocial cognition

Antisocial associates

Poor school and/or work performance

Few leisure/recreation outlets

Substance use

Pre-Trial and Criminogenic Risk Assessment Tools

Various entities within the criminal justice system use risk assessment tools to determine the appropriate level of supervision and programming to help reduce a person’s risk of reoffending. In some jurisdictions, judges have access to pretrial and/or criminogenic risk assessment information depending on whether and at what stage of case processing a jurisdiction conducts these assessments. In jurisdictions that conduct pretrial risk assessment, judges may have the opportunity to consider assessment results at the defendant’s first appearance or arraignment. [Improving Responses to People with Mental Illnesses at the Pretrial Stage](#)¹ and [“On the Over-Valuation of Risk for People with Mental Illnesses”](#)² are useful resources to aid in the understanding of the concept of pre-trial risk for defendants who have behavioral health needs.

“I think there are a number of things that judges simply do not know when it comes to mental health or addiction. And if they did know these things—if the behavioral health side and the justice side really came together to talk about what works—I think outcomes would change.”

—Dr. Kelly Clark
President, American Society of
Addiction Medicine and Chief
Medical Officer, CleanSlate Centers

In order for judges to make fully informed release and sentencing decisions for defendants who have mental illnesses and/or substance use disorders, it is important to have information on their risk of reoffending and their behavioral

1 Fader-Towe, Hallie and Osher, Fred. Improving Responses to People with Mental Illnesses at the Pretrial Stage. <https://csgjusticecenter.org/courts/publications/improving-responses-to-people-with-mental-illnesses-at-the-pretrial-stage-essential-elements/>

2 The Council of State Governments (CSG) Justice Center. “On the Over-Valuation of Risk for People with Mental Illnesses.” <https://csgjusticecenter.org/mental-health/publications/on-the-over-valuation-of-risk-for-people-with-mental-illnesses/>

health needs. The **Criminogenic Risk and Behavioral Health Needs framework**³ introduced state leaders and policymakers to the concept of prioritizing supervision and treatment resources for people based on their level of criminogenic risk and needs and the seriousness of their behavioral health needs. Once the people who are at the highest risk of reoffending and who have the greatest behavioral health and other needs are identified, criminal justice and behavioral health professionals can work together to develop and implement case plans that will actively engage the participant in ways that effectively address their needs in order to achieve positive health and recidivism outcomes.

This guide focuses is on what judges need to know to better understand defendants’ behavioral health needs and treatment options when making release and sentencing decisions.

Recognizing a Person’s Behavioral Health Needs

Judges encounter defendants who have a wide variety of behavioral health needs at every point of contact in the legal process—initial appearance, bail setting/arraignment, case update and other pre-adjudicatory appearances, sentencing, and post sentencing. While a judge may suspect that a defendant has a mental illness and/or substance use disorder based on his or her behavior in the courtroom, proper screening and assessment are necessary to determine the nature of a person’s behavioral health needs before a judge can make a referral to appropriate treatment. Taking the steps outlined in Figure 1 will enable a judge to gather the information needed to make an effective referral to treatment.

Figure 1: Determining Behavioral Health Treatment Needs

Observation

The first step for criminal court judges at any point in the legal process is to observe the defendants before them



based on several categories that may point to the presence of a behavioral health need that would require further evaluation in the form of screening and formal assessment. These categories include **appearance, cognition, attitude, affect/mood, speech, and thought process/logic**. Even during brief interactions with defendants, judges and other court personnel—such as prosecutors, defense attorneys, and court staff—can glean a significant amount of information through observation. The “[Judges’ Guide to Mental Illnesses in the Courtroom](#)”⁴ is a useful resource for judges to assist in their observation and interaction with people who may have behavioral health needs.

If a judge or other court personnel see a person in court whose behavior may indicate the presence of a mental illness and/or substance use disorder, the next step is to ensure that the person receives a behavioral health screening followed by a thorough clinical assessment if the person screens positive for a behavioral health need. As valuable as the judge’s observations are in identifying a defendant’s potential behavioral health needs, formal screening followed by a clinical assessment is the only way to definitively confirm the existence of such needs.

³ For additional information on targeting criminogenic risk and behavioral health needs, please refer to Adults with Behavioral Health Needs Under Correctional Supervision: A Shared Framework for Reducing Recidivism and Promoting Recovery. <https://csgjusticecenter.org/mental-health/publications/behavioral-health-framework/>

⁴ The “Judges’ Guide to Mental Illnesses in the Courtroom” developed previously by the Council of State Governments (CSG) Justice Center in collaboration with the American Psychiatric Association Foundation (APAF), the National Judicial College (NJC), and Policy Research Associates (PRA) as a project within the [Judges’ and Psychiatrists’ Leadership Initiative \(JPLI\)](#).

Screening for Behavioral Health Needs

The goal of screening for mental illnesses and/or substance use disorders is to identify any indicators that a person may have a behavioral health need. There are many different types of screening tools, most of which focus on either mental health or substance use needs. Screening can take place at any point in the legal process—at booking into jail, pre-release, or pre-sentencing, for example—and can be conducted by anyone who has been trained to do so. Screening that indicates that a person may have a behavioral health need should be followed by a full assessment conducted by a trained clinician.

Clinical Assessment

The purpose of a clinical assessment is to determine the scope and nature of a person’s specific needs. An assessment is a more comprehensive evaluation than a screening that is used to identify psychosocial problems; substance use and mental disorder symptoms, severity, and diagnoses; individual motivation; and appropriate treatment strategies.⁶

Some jurisdictions have court-based clinicians or resource coordinators that are able to conduct screenings and assessments, in which case, the judge is likely to be able to refer the defendant for an assessment right away. If not, judges should consider either advocating for the development of this capacity in the court or the jail or asking providers to conduct screenings followed by assessment in the community. Once a behavioral health need is suspected, a judge can either refer the defendant to appropriately trained court or jail-based personnel to conduct screening and/or assessments as needed or can refer to a community-based provider to complete these processes.

Treatment Recommendation and Referral

Based upon the results of the screening and assessment, the clinician can make a diagnosis and recommend the appropriate type of treatment for a person who has a mental illness and/or substance use disorder. There are a wide range of treatment options available in the community and making treatment recommendations is a complex process involving an understanding of the defendant’s symptom presentation, personal and family history, strengths, risk factors, motivation to engage, insurance status, and knowledge of current best practices in behavioral health. For instance, one person experiencing depression and arrested while under the influence of alcohol may be referred initially to inpatient alcohol detoxification treatment with a psychiatric medication management component while another person with similar behavioral health symptoms may be better suited to integrated co-occurring disorders treatment in an outpatient

Behavioral Health Screening and Assessment

Regardless of diagnosis, behavioral presentation, or legal status, the level of intensity and type of treatment clinically indicated for each person is best determined using validated screening and assessment instruments and processes, administered by trained professionals, which includes substance use and mental health clinicians for assessments. This best practice relieves court personnel of taking on the added responsibility of making treatment determinations when there is inadequate information about the presence and type of behavioral health need, diagnosis, and other information provided by screening and assessment processes. It is recommended that judges collaborate with trained clinicians to advise on this process. Criminal justice partners may also be able to offer judges helpful historical information about screening and assessment results for a given defendant when previously in custody.

5 Peters, Roger H., Elizabeth Rojas and Marla G Bartoi. *Screening and Assessment of Co-Occurring Disorders in the Justice System*. Substance Abuse and Mental Health Services Administration (SAMHSA), p.20. <http://store.samhsa.gov/shin/content/SMA15-4930/SMA15-4930.pdf>

6 Peters, Roger H., Elizabeth Rojas and Marla G Bartoi. *Screening and Assessment of Co-Occurring Disorders in the Justice System*. Substance Abuse and Mental Health Services Administration (SAMHSA), p.21. <http://store.samhsa.gov/shin/content/SMA15-4930/SMA15-4930.pdf>

setting. This nuanced decision-making process is best left to the trained clinicians in a judge's jurisdiction. Typically, as the clinician provides treatment recommendations they will also suggest specific provider options to the court.

Even when a judge has a good understanding of a person's behavioral health needs and has received a reliable recommendation for the appropriate treatment, there may not be sufficient treatment resources in that community to deliver the recommended services in a timely manner. Alternatively, there may be a variety of treatment options in a jurisdiction, but referral may be complicated if a defendant does not have active health insurance coverage or other practical resources to access the services. This potentially limits the judge's ability to create a treatment-based condition or sentence, which is why the development of local partnerships with behavioral health stakeholders is important.

Once a defendant is referred to treatment, ensuring that procedures are in place for conveying clinicians' recommendations to judges in a timely manner is key. In addition, information-sharing protocols must be established in order for screening and assessment results and clinical recommendations to be shared between the clinician, the court, and any other necessary court personnel within the timeframe required in the jurisdiction. In some jurisdictions, judges may be able to request information directly from clinicians; in others, defense attorneys, case managers, or even the clinicians themselves may need to initiate providing feedback to the court. A court-based clinician or resource coordinator is often in a position to coordinate the information-sharing and recommendation processes for each defendant. Regardless of how information is requested and conveyed, judges should set a reasonable deadline for submission of treatment recommendations to the court that ensures sufficient time for their review and clarification (if needed) with minimal or no disruption to the expected case processing schedule.

To be able to properly consider the treatment recommendation provided by the clinician, a judge needs to have a basic understanding of the range of treatment options that are suited to people with mental illnesses and substance use disorders. Below are brief descriptions of the types of treatment that might be recommended by a clinician based on the results of a person's behavioral health screening and assessment. These types of treatment are organized by what behavioral health treatment providers refer to as "levels of care,"⁷ which encompass the type of service provided, the intensity level/frequency of treatment, the treatment setting, and, in some instances, the level of physician oversight. A clinician may suggest that a judge refer a defendant to a level of care or to a specific treatment program or provider, any and all of which the judge could require as a condition of release or as a component of a sentence.

The two most widely used classification systems are the Level of Care for Utilization System (LOCUS) and the American Society of Addiction Medicine (ASAM) Criteria. These systems both provide structure for assessing historical factors and current circumstances that can impact treatment effectiveness, and find a "goodness of fit" between the defendant's intensity of needs and the level of services provided.

The LOCUS levels of care for mental illnesses and/or substance use disorder commonly include:⁸

1. Outpatient Treatment
2. Behavioral Health Rehabilitation Services (also called Wraparound Services)
3. Intensive Outpatient Treatment
4. Partial (Day) Hospitalization Programs (PHPs) or Assertive Community Treatment (ACT) and Forensic Assertive Community Treatment (FACT) Teams

⁷ There is a broad continuum of levels of care for mental illnesses available but there is no universally observed model available for determining patient placement.

⁸ The Level of Care Utilization System for Psychiatric and Addiction Services (LOCUS) model is one example of a model used in some jurisdictions across the country. American Association of Community Psychiatrists. <http://providersearch.mhnet.com/Portals/0/LOCUS.pdf>.

5. Medically Monitored Residential Services (Crisis Residential)
6. Medically Managed Inpatient Psychiatric Hospitalization including Detoxification

The ASAM Criteria levels of care for substance use disorders and co-occurring conditions include:⁹

1. Early Intervention
2. Outpatient Treatment
3. Intensive Outpatient/Partial Hospitalization Services
4. Residential/Inpatient Treatment and Rehabilitation
5. Medically Managed Inpatient Services including Detoxification

Providing treatment to a person who has a co-occurring mental illness and substance use disorder is a challenge in many jurisdictions across the country. Although fully integrated treatment is the preferred evidence-based practice for people with these conditions, mental health or substance use treatment providers commonly don't have staff that are appropriately trained, licensed, or experienced to treat co-occurring disorders.¹⁰ Most often, treatment of substance use and mental health disorders is delivered by different providers, creating potential for gaps in care for the patient and in communication with the court. Strategies for judges' successful collaboration with community-based treatment providers—even in jurisdictions with few resources available—will be presented in the next section of this guide.

Identifying the Behavioral Health Treatment Resources Available in Your Community

Available treatment resources vary from community to community, and the combination of resources that are available in a given community change frequently. This can make it difficult for judges to gain an accurate understanding of what treatment options are currently available in their community. For example, in urban areas there may be a large number of treatment providers available per capita, but there may also be more demand for these services and long waitlists. In contrast, in rural areas, treatment providers may be scarce, which presents an added challenge of having to travel to access care.

Behavioral health partners in the court system can be a valuable source of information about the treatment available in a particular community. Judges should consult drug, mental health, or other problem-solving court personnel or court resource coordinators, who are likely to be able to provide contact information for qualified local behavioral health care providers they find to be reliable. Judges are encouraged to get involved with the local criminal justice coordinating group, reentry council, or behavioral health and criminal justice workgroup in their jurisdiction, which can also be good sources of information on local treatment options. In some jurisdictions, judges have taken the lead in starting reentry councils or advisory groups in their communities when they do not already exist, in order to begin the conversation about how to address the complex behavioral health challenges in the criminal justice system.

Another approach might be to seek out the director of a local mental health or substance use agency. In larger jurisdictions, there may even be a criminal justice liaison within the behavioral health agency who has particular

⁹ A widely accepted tool for determining the appropriate approach to treatment is the American Society of Addiction Medicine Criteria (The ASAM). In the ASAM-PPC, treatment becomes increasingly more intensive and restrictive of personal freedom and movement as one moves from level one toward level five. American Society of Addiction Medicine (ASAM). <https://www.asam.org/resources/the-asam-criteria/about>

¹⁰ U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA), Co-Occurring Center for Excellence, *Understanding Evidence-Based Practices for Co-Occurring Disorders*, 3-4.

experience with this population. In rural locales with fewer available treatment options, it becomes even more critical to connect with public behavioral health care providers (such as a county hospital), as this type of provider is most likely to be providing services to this population.

Behavioral health systems are known to be complex, particularly in terms of the criteria for eligibility for treatment, how treatment approaches are chosen from the many that exist, how treatment is accessed, health care coverage considerations, and varying quality of treatment and related services. Cultivating relationships with the behavioral health partners in their jurisdiction can help judges keep abreast of the changing landscape of this complex system. Over time, these collaborative relationships should result in more efficient referrals of defendants to community-based treatment, and decrease case processing time within the court setting.

How to Identify Qualified Behavioral Health Care Providers in Your Community

Judges and court staff are likely to be reaching out to a range of entities and people to identify the available behavioral health resources in the community. The following questions may help them find the information they're looking for:

- Is there a behavioral health agency or practitioner in this jurisdiction to consult with to learn about the options available for people in the criminal justice system who need connection to treatment?
- Is there a resource coordinator, problem-solving court coordinator, diversion coordinator, jail assessor, court-based clinician, or another court staff member to consult with to find out what behavioral health treatment options are available in this jurisdiction?
- Is there a public or private hospital with a psychiatric inpatient or outpatient unit; a publicly funded outpatient substance use disorder or mental health treatment provider (such as a community mental health center and/or substance use treatment clinic) in this jurisdiction that provides behavioral health services?
- Are there any law enforcement, community supervision, or correctional partners in this jurisdiction who could provide the court with information on reliable treatment providers in the community?

Once prospective treatment providers have been identified, judges or court staff should make contact with these providers and begin a dialogue to determine the specific types of treatment they provide, treatment availability, and to determine if these providers have the capacity and experience necessary to work with people in the criminal justice system. Questions judges might ask providers include:

- What types of outpatient mental health and/or substance use disorder treatment do you provide?
 - What are the eligibility criteria for these programs?
- Do you have experience working with people in the criminal justice system or are you interested in gaining this experience?
- Are you willing to be trained to work with people in the criminal justice system?
- With proper consent, do you have the capacity to provide consistent, accurate reporting to the court about participant attendance, engagement, and other details of court-ordered treatment?

In addition to gathering important information and making connections through these conversations, judges and others can identify treatment and other support resources in any community by accessing the following national online resources:

- [The SAMHSA Behavioral Health Treatment Services Locator](#)
- [The American Society of Addiction Medicine Physician Finder](#)
- [The SAMSHA Opioid Treatment Program Directory](#)
- [The SAMHSA Buprenorphine Treatment Physician Locator](#)
- [National Alliance on Mental Illness \(NAMI\) website](#)
- [Faces and Voices of Recovery](#)
- [The APA Psychiatrist Finder](#)

Turning a Contact into a Collaborative Relationship

Collaborative relationships between judges and behavioral health treatment providers who have the clinical expertise to assess and recommend effective treatment options can help to streamline case processing in the courtroom, maximize defendants' compliance with court-ordered treatment conditions, and advance defendants' recovery while supporting public safety.

Once community-based treatment providers are identified, the next priority for judges is to turn the most promising contacts into collaborative relationships. In order for these partnerships to be productive, they must be based on good communication and clear protocols to ensure that both parties are getting what they need in a timely fashion.

Judges and court personnel should ensure they explicitly describe to providers the type of information they need related to treatment recommendations and defendants' treatment compliance status, as well as necessary timeframes for receiving that information. Judges and treatment providers should have a frank conversation about which pieces of information are most necessary for judicial decision making (e.g., attendance at a treatment appointment may be necessary to monitor compliance, but a change in prescribed medication is likely not necessary). When having this conversation, both parties should be mindful of the federal and state laws protecting different types of health information, which may necessitate the development of processes for obtaining clients' written authorization to share information that would otherwise be protected.¹¹ While treatment providers should be prepared to share information with judges about defendants' treatment compliance, level of engagement, and even substance use testing results (e.g., urinalysis), they should also ensure that information is treated with respect and handled with appropriate consideration for privacy, as this is an important aspect of an effective, trust-based relationship between the treatment provider and the client.

To maximize collaboration, specific data-sharing protocols should be jointly agreed upon, documented in a data-sharing agreement, and followed by judges, court personnel, and behavioral health treatment providers. These protocols should define expectations related to the transfer of defendants' health information between partners, both in terms of what content is shared and under which circumstances.¹² They should also create structure around communication practices, including regularly scheduled case conferences or other meetings to discuss individual defendants' progress, as well as to address challenges faced by both judges and treatment providers within their collaborative relationship.

¹¹ Federal law provides different regulations for mental health information privacy (under the Health Insurance Portability and Accountability Act) and substance use treatment information privacy (under 42 C.F.R. Part 2). State law often provides additional privacy protections.

¹² Council of State Governments (CSG) Justice Center. "Sharing Information between Behavioral Health and Criminal Justice Systems" <https://csgjusticecenter.org/wp-content/uploads/2016/03/JMHCP-Info-Sharing-Webinar.pdf>; https://www.bja.gov/Publications/CSG_CJMH_Info_Sharing.pdf

Considerations for Judicial Decision-Making Related to Conditions of Release and Sentencing for People Who Have Behavioral Health Needs

Judges can expect better case outcomes for defendants who have behavioral health needs—both in terms of public safety and stabilization and recovery for the defendant—when they have the information, support, and resources they need to inform their decision-making process. To that end, judges should look to employ this core set of considerations in their courtrooms when determining conditions of release or sentences for the people they encounter who have behavioral health needs:

1. Collaborate
2. Engage
3. Use reliable information
4. Individualize
5. Adapt

Collaborate

The judges, psychiatrists, people with a history of involvement with the behavioral health and criminal justice systems, and family members who participated in the convening that resulted in this paper strongly emphasized that judges should seek to foster collaboration between the court, behavioral health treatment providers, defendants, and their family members whenever possible. Best practices related to behavioral health care and recovery suggest that when a person has a voice in important treatment decisions, positive treatment outcomes are more likely. It is recommended that judges use a collaborative approach to working with people who have behavioral health needs whenever possible to build trust and encourage compliance with treatment requirements.

“[The judge in my case] had my girlfriend and my counselor write my conditions of release. It made me want to fulfill those terms so much more because the people close to me were involved in the process. We all got to be a part of the solution.”

– Paton Blough
Mental Health Advocate,
Founder of Rehinge.com

For example, instead of questioning a defendant about sensitive behavioral health-related information in open court, judges might ask the defendant and attorneys to approach the bench and speak about private information off the record. This kind of approach can help build trust and reduce personal discomfort. Collaboration is also demonstrated when judges ask people whose cases are on their docket what has worked in the past to help them maintain recovery, stay out of trouble, and what challenges they have faced. Judges might also engage family members and others in defendants’ extended support system in open court to gather information that would be helpful when making decisions about conditions of release or sentencing.

Engage

Judges will also benefit from efforts to maximize trust and engagement in both the court and treatment processes. Judges are encouraged to be respectful and consistent in their practices, as this sets a two-way expectation of

courtesy in the courtroom. Trust and engagement can also be promoted when judges are as calm and empathetic as possible in their interactions. When frustrated and under the duress of the court and custody processes, defendants may lose control and behave in provocative or disruptive ways. At these times, judges are encouraged to remain firm but fair in their manner, minimizing any visible reaction to this sort of behavior.

Engaging family members in the courtroom or through pretrial staff, whenever permitted and appropriate, can help demonstrate to the defendant that the court has a genuine interest in his or her success. Judges may also want to consider the use of peer support specialists in the courtroom. Peer specialists are individuals who have a personal history of involvement with the behavioral health and criminal justice systems and who are trained to provide non-clinical assistance to support others in their recovery process.¹³ Peer specialists are often able to enhance engagement of defendants who have mental illnesses and substance use disorders because they share a similar lived experience and can provide a model of successfully overcoming these challenges. They can also help to support compliance with treatment and other conditions by assisting defendants in applying for health care coverage, escorting them to treatment appointments, or aiding them in other critical activities.

“Families are often the first first responders. When one person is arrested, in a way, the whole family is arrested.”

– Jayette Lansbury
Criminal Justice Chair,

National Alliance on Mental Illness–New York State Chapter (NAMI-NYS)
and Founder and Director, NAMI-NYS Suffolk County Affiliate

Use reliable information

Although judges may have years of experience working with defendants who have mental illnesses and/or substance use disorders, and therefore feel they have a good sense of what to do about what they’re observing, it is recommended that they always gather as much information as possible from a variety of reliable sources prior to any critical decision making. Useful information to consider includes results of a validated behavioral health screening and assessment conducted by a licensed practitioner; the defendant’s risk of failure to appear, dangerousness, or recidivism as categorized by valid risk assessment tools; the defendant’s criminal record and other court documents; information about prior treatment history; and content derived from interviews with the defendant’s family and other support system members. In certain jurisdictions, judges have access to the results of pre-trial risk assessments or post-adjudication risk assessments, which can be an additional source of information.

Considering a wide range of information can also help judges avoid making decisions that might actually have a negative impact on the defendant’s stabilization and recovery. For example, ordering a defendant into a residential facility even though the clinical recommendation was community-based treatment may have unintended yet harmful consequences for defendants and their family members, such as loss of employment or housing, which may also adversely impact the person’s recovery. Relying on a licensed clinician’s expert guidance on a recommended course of treatment can help judges increase the likelihood of defendants’ positive treatment outcomes and avoid the cost in time and resources associated with cases that are prolonged due to the need to redirect defendants from one treatment setting to another when the appropriate approach wasn’t taken in the first place.

¹³ Substance Abuse and Mental Health Services Administration (SAMHSA). Glossary definition of terms. <https://www.integration.samhsa.gov/glossary>

Individualize

Ideally, judges will review as much information as possible about a defendant’s unique criminogenic and behavioral health needs prior to setting conditions of release and sentencing, as well as take into account the specific treatment resources that are available in the community. Judges are encouraged to utilize all of the resources at their disposal to establish a treatment requirement based on the individual’s specific needs. These resources might include behavioral health treatment records, when available; screening and assessment results; and information from defendants, family members, and others close to the defendant about what has worked or not worked in the past in terms of minimizing contact with the justice system and advancing recovery, as well as about other day-to-day concerns such as transportation, employment, and childcare, which are factors that can significantly impact compliance with court orders. Obtaining a range of reliable information will enable judges to understand a defendant’s individual behavioral health and criminogenic needs, as well as strengths, challenges, and valuable supports, all of which provide baseline knowledge to inform release and sentencing decisions, as well as to match the defendant with appropriate treatment in the community.

“We expect people with chronic mental illnesses to not be perfectly adherent to their treatment plans ... The data shows that tailoring our approach to each individual makes a difference.”

– Dr. Kelly Clark
President, American Society of
Addiction Medicine and Chief
Medical Officer, CleanSlate Centers

Because mental illnesses and substance use disorders vary widely in terms of diagnosis, symptom presentation, seriousness, and treatment options, it’s critical for judges to avoid a “one-size-fits-all” approach to setting conditions of release and sentencing for this population. Instead, judges should continuously collaborate with trusted treatment providers to individualize treatment requirements and release and sentencing decisions to account for specific needs, in addition to taking into account the treatment resources that are available in the jurisdiction.

Depending on local policy requirements, judges might consider setting pre-adjudicatory (rather than post-adjudicatory) conditions of release to minimize the negative consequences of conviction to defendant’s housing and employment status. For example, some judges may propose treatment as a condition of release to a person facing a felony charge who would lose housing or employment due to a felony conviction. The court’s promise in this case might be that if the defendant completes the treatment successfully (along with any additional required conditions), and the district attorney agrees, then the charge will be lowered and the defendant will be allowed to plead guilty to a misdemeanor instead, thus avoiding the negative impact on work or housing status. This type of individualized response helps maintain public safety while addressing defendants’ behavioral health and other needs.

Adapt

Judges should be aware that treatment and supervision requirements may need to be adapted over time in response to dynamic legal circumstances and evolving clinical recommendations. Requirements that were appropriate at an early phase of the legal process may no longer be the best fit later in the process. Judges can take into account the amount of time in custody that a defendant is still facing on a given case and the parameters likely for community supervision when deciding how long a treatment condition of release or sentencing mandate should be. For example, the defendant and defense counsel are more likely to accept a treatment requirement if it is comparable in terms of length of time to the amount of time that would be spent incarcerated or on community supervision. At the same time, the disposition is balanced, meaningful, and reflective of the importance of the case at hand.

It is often necessary to adapt conditions of release and sentences to respond to changing treatment needs. Like many medical interventions, treatment for mental illnesses and substance use disorders involves ongoing assessment of needs and symptoms. If a person's behavioral health improves or deteriorates, treatment providers strive to respond rapidly and effectively to adjust their treatment interventions accordingly, so changes in the protocol for the treatment of a mental illness or substance use disorder are relatively commonplace.

Substance use relapse or the exacerbation of psychiatric symptoms are considered by treatment providers to be an anticipated occurrence within the recovery process. For instance, a defendant may initially be sentenced to treatment for alcohol usage, but significant depression and psychotic symptoms may be observed after the person has engaged in treatment and become substance-free for a period of time. The substance use treatment provider may then ask the court to mandate a mental health assessment with participation in treatment informed by the assessment. The judge can then adjust the release or sentencing conditions to accommodate the additional treatment that is recommended as a result of the assessment.

Judges can expect this sort of dynamic process and should seek to be as adaptable as possible when it becomes clear that a treatment condition may need to be changed to address updated clinical recommendations. Treatment providers can provide critical perspective about when and if a change in requirements is needed and how it might improve outcomes.

Conclusion

Defendants who have behavioral health needs are appearing with increased frequency in courtrooms across the country. Judges are understandably focused on improving their ability to observe potential signs of mental illnesses and substance use disorders, and ask for a behavioral health screening and assessment, when appropriate. Responding to the needs of this population requires collaboration with community-based treatment providers, who can supply judges with a wide range of invaluable information, as can defendants themselves, family members, and others in the defendants' support system. When making decisions about conditions of release or sentencing, judges will see the best outcomes when taking an approach that prioritizes collaborating, engaging, using reliable information, individualizing, and adapting.

“Hopefully one day the criminal justice system will be the last resort for people with mental illnesses, not the front door.”

– Judge Steven Leifman
Eleventh Judicial Circuit Court of Florida

As judges become more adept at responding to defendants who have behavioral health needs, there is an opportunity to explore creating additional resources, such as a judicial decision tree that focuses on specific case-processing points (pre-bond/bail, pre-sentencing, sentencing, and post-sentencing updates/hearings) or a judicial training protocol related to engagement with people who have behavioral health needs.

See *Practical Considerations Related to Release and Sentencing for People Who Have Behavioral Health Needs: A Judicial Bench Card* for a concise takeaway of the insights offered in this paper.

