

Mental Health Courts: A Prosecution Perspective

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Mental health courts present a growing opportunity for prosecutors to reach better, safer, and more humane criminal justice outcomes for offenders with mental illnesses.¹ To maximize that opportunity, prosecutors need to fully engage in the planning and operations of these problem-solving courts and play an active role on mental health court teams. The following is a brief examination of some of the issues that prosecutors should be aware of as they plan or engage in a mental health court program.

Admission and Programming Standards

Prosecutors should assume an active role in exercising the “gate keeping” function for admitting offenders into mental health court programs, particularly in pre-adjudication models. Pre-adjudication models provide prosecutors with more leverage in setting program parameters because of prosecutorial control over charging decisions and, often, discretion over diversion and other forms of pre-adjudication disposition. Prosecutors, however, are equally important in post-adjudications models, as they can reduce charges or dismiss cases as part of a plea agreement to comply with treatment conditions. Successful examples of both models exist.

Prosecutors have a duty to carefully consider and address concerns about victim and public safety when determining which offenders are appropriate for mental health courts. While mental health courts originally focused on misdemeanor offenders, more recently, more and more programs have successfully managed non-violent felony offenders as well. Wherever such lines are drawn, mental health courts should have clearly outlined standards for offender eligibility and programming designed to ensure public safety.

Mental health court admission criteria can vary but usually include the following requirements:

- *The offender has a diagnosable mental illness:* Requiring the presence of a diagnosable mental illness ensures that participants are not attempting to avoid responsibility for their criminal behavior. Mental health court teams are trained to detect such instances to ensure offender accountability and to preserve limited treatment resources for those who actually need them.

¹ See Almquist, Lauren & Dodd, Elizabeth (2009). Mental Health Courts: A Guide to Research-Informed Policy & Practice. Council of State Governments Justice Center. Available: www.bja.gov/pdf/CSG_MHC_Research.pdf.

- *The offense was “related to” the mental illness:* Requiring some connection between the illness and the criminal behavior serves a similar purpose. Not all criminal behavior by individuals with mental illnesses is connected to those offenders’ mental illnesses. Mental health courts’ resources are best aimed at offenders with mental illnesses who recycle through the criminal justice system.
- *The offender understands program requirements and consents to participate:* Offender consent to participate ensures that the offender is amenable to treatment. Participants’ consent may also be helpful in obtaining the waivers necessary to access confidential records critical to evaluating offenders.

Mental health courts also vary in design but typically employ features designed to ensure positive treatment and public safety outcomes. These features include:

- *A treatment plan that reasonably ensures the safe and effective treatment of the offender in the community and minimizes the risk to the public:* A prosecutor’s paramount responsibility is to ensure public safety. Incorporating the results of a validated criminogenic risk assessment into an individualized and comprehensive treatment plan is critical to safely manage an offender in the community.
- *Regularly scheduled court appearances and follow-up:* Scheduling regular judicial follow-up and review helps promote treatment plan compliance and immediately address noncompliance through appropriate graduated sanctions and incentives. Examples of graduated sanctions and incentives include: increasing or decreasing the frequency of court review hearings or of reporting to probation; adding, dropping or altering conditions of the treatment plan; remanding a defendant into custody for short periods of time or releasing them from custody; and other changes short of revoking them entirely. Using these graduated sanctions and incentives are essential to obtaining good outcomes in mental health courts.

Training

Prosecutors must be adequately trained to play an effective role on mental health court teams. Training should include a thorough grounding in the mental health court approach, the nature of mental illness and how it is diagnosed, the existing treatment modalities, the process and tools of risk assessment, and how to advocate for conditions in a treatment plan to minimize risk and maximize the likelihood that a defendant remains in treatment while in the community.

Staffing

Due to the expertise required and the need for continuity on the mental court team, the highly specialized work in a mental health court should be concentrated in a limited number of people within a prosecutor's office.

Assignments to mental health calendars should be consistent so that the prosecutors are familiar with the criminal justice system involvement and personal histories of the offenders appearing before the court and form stable and productive working relationships with other members of the mental health court team. Consistent assignment also helps avoid subjecting defendants to a revolving series of prosecutors.

Because of the demanding nature of the work, prosecution management should be aware of the potential for job burnout and rotate staff when necessary. Any new staff should be trained as described above and also have sufficient peer-to-peer mentoring opportunities with outgoing staff to ensure continuity of knowledge about offenders appearing on the calendar.

Giving Victims a Voice

Although prosecutors should never cede their case management responsibilities to victims,² prosecutors do have a responsibility to confer with and keep victims informed about charging decisions and the dispositions of criminal cases involving them.³ Prosecutors should take particular care in communicating with victims in mental health court cases and be prepared to explain and justify decisions about dispositions.

Prosecutors should also be aware that the victims of offenders in mental health courts are often related to or otherwise connected with the offenders. Such victims frequently have lengthy histories with offenders' illnesses and their consequences and may not have the same feelings toward disposition of charges as a traditional victim might have. Whatever the relationship between the offender and victim, prosecutors should act to ensure that the victim's concerns are addressed and his/her voice heard in such proceedings.

Ethical Concerns

Mental health court operations implicate a number of ethical concerns. Because of the relaxed adversarial nature of the proceedings and the team approach used, proceedings in such courts take on a less formal appearance. Despite this more collaborative atmosphere, however, prosecutors must continue to fulfill their ethical and professional responsibilities.

These prosecutorial responsibilities include the obligations to maintain the relationship between advocates and judges required by professional traditions, ethical codes, and

² See Standard 3- Sec. 3.4 (a), American Bar Association, 1993.

³ Federal statutes, such as 18 U.S.C. § 3771, and similar statutes at the state level guarantee such rights to crime victims in felony and some misdemeanor cases.

applicable law and to avoid unauthorized *ex parte* discussions concerning cases before the court.⁴

Prosecutors are also under an ethical duty to not invidiously discriminate against or favor any person on the basis of race, religion, sex, sexual preference, or ethnicity in exercising discretion to investigate or prosecute or use other improper considerations in exercising such discretion.⁵ Promulgating appropriate, understandable, and defensible standards for dispositions and entry into mental health courts is the best defense against claims of arbitrary or capricious actions.

References to the *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed. contained herein should serve as only a starting point to examining the ethical issues that may arise in a mental health court. Practitioners should examine their state and local ethical and court rules and the applicable law in their jurisdictions to make sure that they comply with their ethical responsibilities while appearing before such courts. Some jurisdictions have adopted or modified local rules to specifically address ethical issues related to problem solving courts.

Conclusion

Through my personal experience with the design and operation of the Seattle Municipal Court Mental Health Court for nearly ten years, I saw firsthand how hundreds of mentally ill offenders could be successfully managed in the community in a safe, more effective, less costly, and more humane way. I also saw how in many instances, the interests of the victims of their crimes were better recognized, protected, and advanced. We as prosecutors should not be afraid to adopt new and innovative ways of doing justice if they improve case outcomes and maintain or improve the safety of the public. Mental health courts, that are designed and operated consistent with the principles described above, are a prime example of the kind of innovation that we should embrace and seek to advance.

⁴ See Standard 3 - Sec. 2.8 (b) and (c), *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed., American Bar Association, 1993.

⁵ See Standard 3- Sec. 3.1 (b), *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed., American Bar Association, 1993.