ELIMINATE the WAIT

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

DEFENSE ATTORNEYS

Defense Attorneys can help eliminate the wait for competency restoration (CR) services. With best practices and current policies, defense attorneys advocate for their clients to receive mental health treatment, find an amicable resolution to the case, and prevent their clients from languishing in jail waiting for inpatient CR services. By focusing on these goals for their individual clients, defense attorneys contribute to the overall effect of reducing the total number of people on the competency restoration waitlist.

1. Identify and Meet Mental Health (MH) and Intellectual and Developmental Disabilities (IDD) Needs at the Earliest Point

☐ Is the Magistrate Judge ordering a 16.22 Interview if reasonable cause is found?

☐ If I believe my client needs a 16.22 interview, am I asking the Magistrate to order one?

☐ Am I receiving a copy of the Collection of Information Report (16.22 Report) in a timely manner?

☐ Am I meeting with my client as soon as possible?

☐ At this meeting, am I asking my client about their MH and IDD history?

☐ To the greatest extent possible, am I exploring with my client the risks and benefits of all possible options, to include making a choice about whether the client wants to address their MH issues as a part of this criminal process or not?

☐ If necessary, am I re-visiting a client to re-evaluate their mental state if circumstances change?

☐ Am I asking my clients if they are receiving their prescription medications in jail? Tex. Gov't Code § 511.009(d).

☐ If my client is not receiving their medication, am I communicating with the jail, magistrate, and trial court about this issue?

☐ Have I established communication with the jail MH liaison to get updates about my client and relay information for the client's benefit.

☐ Do I ensure that my client and/or their family knows how to provide proof of client's valid prescription to the jail?

☐ Am I considering poverty, cultural differences, and language differences when determining whether to raise issues related to MH, IDD or competency?

☐ Have I investigated whether my client was ever previously found incompetent to stand trial and the subsequent procedural history?

2. Work Toward Diversion First

☐ Am I knowledgeable about local MH & IDD resources?

☐ Have I established a contact within my LMHA, LBHA, and/or LIDDA?

☐ Am I working closely with my LMHA/LBHA/LIDDA or mental health jail/court liaison to discuss alternatives to incarceration available in my community?

☐ If my client has not been charged with or previously convicted of a violent offense, have I advocated for my client's release on a MH personal bond? CCP art. 17.032; 17.03.

☐ During bond hearings, do I use my client's 16.22 report and risk assessments to advocate for my client on decisions about bail, diversion, treatment, and possible community supervision conditions? Tex. Code Crim. Proc. (CCP) art. 16.22(c)(1) - (5).

☐ If my client is being released on personal bond, have I made arrangements to ensure that the client has the transportation and other supports necessary to adhere to bond conditions?

☐ Am I aware that **competency restoration services (CRS) are not comprehensive MH treatment**?

- ☐ CRS are narrowly focused on stabilization, symptom management, and required legal education. This is not the same as providing access to a fully developed treatment plan and services with the goal of long-term recovery and a positive place in the community.

☐ If my client wants to pursue MH treatment as part of their criminal court process, am I zealously advocating for it?

☐ Have I made sure the prosecutor understands the distinction between CRS and comprehensive MH treatment?

☐ Have I advocated for the court and prosecutor to consider outpatient or inpatient MH treatment instead of competency restoration for my client?

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- ☐ If the offense charged does not involve an act, attempt, or threat of serious bodily injury to another person, have I used the 16.22 report to advocate for CCP 16.22(c)(5) diversion, which leaves charges pending in criminal court and diverts the defendant to the appropriate civil to the appropriate court for court-ordered outpatient MH services under Tex. Health & Safety Code ch. 574? CCP art. 16.22(c)(5); HSC 574.0345.
- ☐ Have I tried negotiating for a dismissal with:
  - ☐ a treatment plan;
  - ☐ a referral to outpatient MH services;
  - ☐ a referral to an assisted outpatient treatment program (with or without civil/probate court supervision); or
  - ☐ a transfer to appropriate court to commence civil commitment proceedings? CCP art. 46B.151; Tex. Health & Safety Code ch. 571, 574.
- ☐ Am I only using CR when it is necessary and the best resolution for my client that does not cause unnecessary delay or harm to my client? ABA STANDARDS RELATING TO COMPETENCE TO STAND TRIAL § 7-4.2(e) (1989).
- ☐ Have I considered using *Ake v. Oklahoma*, 470 U.S. 68, 71 (1985), (possibly ex parte with a sealed motion) for appointment of an expert for psychological assessments instead of going down the CR path to achieve the same goals, evaluations, or evidence?
- ☐ If necessary, am I requesting funding from the court for psychological evaluations (rather than competency evaluations) for decisions about trial, sentencing, and community supervision?
- ☐ Am I meeting my burden of proof (BOP) / holding the state to their BOP?
  - ☐ Typically, there is a presumption that the defendant is competent, and defense must prove incompetency by a preponderance of the evidence. CCP 46B. 003(b); *Dusky v. U.S.*, 362 U.S. 402 (1960).
  - ☐ If client has a previous, unvacated Incompetent to Stand Trial (IST) finding, was committed for restoration, and was found not likely to be restored, then client is presumed incompetent, and state must prove competency Beyond a Reasonable Doubt. *Manning v. State*, 730 S.W.2d 744 (Tex. Crim. App 1987).
- ☐ If the prosecution agrees to dismiss my client's case, have I communicated this with my client and assisted with a discharge plan or transportation upon release? Have I made the prosecution and the court aware of the need to communicate and coordinate with the client, so they are not abruptly released without understanding what happened or transportation or plan?

3. Consider Alternatives to State Hospital if CR is Necessary

- ☐ Have I considered, or asked the Court to consider Outpatient Competency Restoration (OCR) or Jail-Based Competency Restoration (JBCR)? CCP art. 46B.071.
- ☐ I am aware if OCR and JBCR is available in my community? If not available, what can I do to advocate for either or both in my community?
- ☐ Do I work with my LMHA/LBHA ahead of the competency hearing to create an OCR plan before the hearing? CCP art. 46B.072.
- ☐ Have I specifically made the request for OCR or JBCR on the record?
- ☐ Have I specifically requested these alternatives in my motion and proposed order?

4. Continue to Advocate for Individuals Who Must Wait for Inpatient CRS at the State Hospital (SH)

- ☐ Am I continuing to communicate with my client while they are awaiting transfer to SH to determine if they may have stabilized while waiting in jail (with appropriate MH treatment) to see if incompetency is still an issue in the case? *See* TEX. DISCIPLINARY RULES OF PRO. CONDUCT, *R. 1.16 Clients with Diminished Capacity*.
- ☐ If stabilization has occurred before transfer, have I requested another competency evaluation or a check for evidence of immediate restoration under CCP art. 46B.0755?
- ☐ Am I advocating for mental health treatment for my client while they are awaiting transfer to SH or other CR program?
- ☐ Am I continuing to communicate with my client once they go to the SH? *See* TEX. DISCIPLINARY RULES OF PRO. CONDUCT, *R. 1.16, Clients with Diminished Capacity*.
- ☐ Am I continuing to progress this case and communicate with the prosecutor while waiting for my client to return from the SH?
- ☐ Am I communicating with the SH regarding the direct release of my client? Do I work with my LMHA, LBHA, prosecutor, and court to make a plan to set PR bond and have my client released from SH to community living arrangement?
- ☐ If strategically appropriate, and I believe my client is competent, am I working with my court to obtain a fast court setting upon my client's return from SH, or other CR program? Have I requested a preferential setting under CCP art. 32A.01? If necessary, have I filed a motion for a speedy trial under art. 32A.01?

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- ☐ Am I monitoring my client's cumulative period (in custody, SH, inpatient CR, JBCR) to see if they have reached their maximum period of confinement under CCP art. 46B.0095?
- ☐ Am I working to make sure my client continues to receive their prescription medications while in custody after returning from SH? Tex. Gov't Code § 511.009(d).

5. Leading Through Partnerships

- ☐ Am I regularly engaging with the LMHA, Prosecutor's offices, other defense bar and/or public defenders or managed counsel offices, pretrial services, probation, and the courts to meet regularly to improve communication, policies, and procedures regarding mental health / IDD diversion?
- ☐ Are the agencies and individuals listed in Health & Safety Code § 614.017, *Exchange of Information*, accepting and disclosing available information about defendants with MH/IDD challenges, including jails, LMHAs, LBHAs, LIDDAs, attorneys, judges, probation, the Texas Department of Criminal Justice, and others?

6. Education & Awareness

- ☐ Have I been trained on best practices for clients with MH/IDD including identification, interaction, protections in Texas law, and diversion options? *Consider attending JCMH, or other appropriate attorney educator CLEs for needed training.*
- ☐ Does my defense bar, public defender office (PDO), or managed assigned counsel program (MAC) actively discuss education resources, community resources, and court practices and procedures to benefit clients with mental illness or IDD?
- ☐ Am I communicating with my defense bar, Public Defenders Office, or Managed Assigned Counsel about my successes in diversion techniques for clients with mental illness or IDD?

Additional Resources:

- Judicial Commission on Mental Health, *Texas Mental Health and Intellectual Disabilities Law Bench Book* (3d Ed. 2021-2022), http://texasjcmh.gov/media/lbrdg1tk/jcmh-adult-bench-book-3rd-edition.pdf.
- CMHS National Gains Center, *Practical Advice on Jail Diversion: Ten Years of Learnings on Jail Diversion from the CMHS National GAINS Center* (2007), http://www.pacenterofexcellence.pitt.edu/documents/PracticalAdviceOnJailDiversion.pdf.
- Texas Appleseed et al., *Mental Illness, your Client and the Criminal Law: A Handbook for Attorneys Who Represent Persons with Mental Illness* (4th ed. 2015), https://www.texasappleseed.org/sites/default/files/Mental_Health_Handbook_Printed2015.pdf.
- Alyse Ferguson, Chief Attorney, Collin County Mental Health Managed Counsel, *Practical Ideas for Counties to Streamline Competency Restoration and Save Money* (2020) http://iemvirtual.com/wp-content/uploads/2020/11/Practical-Tips-for-Competency-Restoration_.pdf.
- Brian D. Shannon & Daniel H. Benson, Texas Criminal Procedure and the Offender with Mental Illness 102-03 (6th ed. 2019) https://3394qh4fg22b3jpwm94480xg-wpengine.netdna-ssl.com/wp-content/uploads/sites/12/2019/10/Shannon-6th-Edition-Oct-2019-for-NAMI-Texas-website.pdf.

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