A Better Model: Ensuring Equal Justice for Persons With Mental Illness & Mental Retardation

"The central issue today is the same as it was at the time of Dorothea Dix when insane paupers were warehoused in jails and prisons. But today it's even more inexcusable than during Dorothea Dix's time for we have vastly improved and effective treatments. The fact that the adult and juvenile justice systems are overpopulated with persons with mental illness is symptomatic of a misdirected public policy that has failed to fully fund mental health services. Today's society must demand that public policy provide persons with mental illness the most appropriate medical treatment in the most appropriate setting."

– Marcia K. Goin, M.D., Ph.D.,
former president of
THE AMERICAN
PSYCHIATRIC ASSOCIATION,
May 2004

SOME SOBERING STATISTICS ARE INSPIRING STAKEHOLDERS in the Texas criminal justice system to find better models to meet the special needs of defendants with mental illness and mental retardation. Texas jails house more than five times as many people with mental illness as do our psychiatric hospitals. Texas prison records show that one in five Texas inmates is a former client of the state's public mental health/mental retardation system. Half of the children committed to the Texas Youth Commission have some type of mental health problem.

Several factors contribute to the overrepresentation of defendants with mental illness and mental retardation in jails and prisons across the country. First, states have shifted their focus from treating persons with mental illness or mental retardation in institutions to treating them through community-based agencies. But, because states have under-funded community mental health programs, many people are left untreated. When an individual with mental illness or mental retardation commits a crime, their law-breaking is frequently symptomatic of their disease rather than any propensity to commit crimes. Yet, once in the system, many offenders cycle through without anyone recognizing their mental illness or intellectual

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A Better Model *Continued*

disability. Research has shown that treatment or habilitation can reduce recidivism, but without new models and a broad-based commitment to new ways of addressing this challenge, our jails will continue to be a revolving door for many offenders with mental illness.

This monograph, *A Better Model: Ensuring Equal Justice for Defendants with Mental Illness and Mental Retardation*, profiles innovative approaches that some Texas counties are implementing to divert more of this special needs population away from the justice system and into care. The mental health public defender model—an approach for which funding is available through the state Task Force on Indigent Defense—is highlighted along with a list of the key components and best practices for staffing an effective MHMR indigent defense program.

For any of these models to be effective, it is critical to engage defense attorneys who are familiar with the legal issues that are impacted by a defendant's mental illness or mental retardation. Effective representation requires attorneys who know:

- how to recognize obvious and subtle signs of mental illness or mental retardation;
- what questions to ask a client to confirm an initial suspicion of mental illness or mental retardation—and how to ask those questions;
- where to look for mental health records and other mitigation evidence—and how to present this evidence to prosecutors, judges, and juries;
- what provisions apply in the Mental Health Code;
- what special bond provisions apply to persons with a mental illness or mental retardation;
- how to request mental health evaluations and competency hearings;
- what community resources and programs are available to provide treatment or services to their clients; and
- how to help their clients apply for Supplemental Security Income (SSI) benefits when appropriate.

Unfortunately, many criminal defense attorneys representing mentally ill clients lack this specialized training.

Ensuring effective representation of indigent clients with mental disabilities poses a challenge to Texas counties. Counties can meet that challenge by creating new models for representing defendants with mental illness. Improved representation of this population will lower counties' criminal justice costs over the long run—reducing the high cost of housing mentally ill inmates, the expense of recidivism, and the higher costs that result when less experienced attorneys handle cases with complicated mental health issues. Providing equal justice for the most vulnerable protects justice for all.

– Deborah Fowler
Senior Attorney,
TEXAS APPLESEED

– Maggie Wilensky
Legal Fellow,
TEXAS APPLESEED

How to Build an Effective Indigent Defense Program for Persons With Mental Disabilities

A defense program designed to address the needs of indigent defendants with mental illness or mental retardation should:

STEP 1 Provide qualified attorneys who have specialized knowledge needed to defend persons with mental illness.

STEP 2 Compensate attorneys adequately so that they can spend the additional time needed to defend these complex cases. Compensation for cases involving defendants with a mental illness or mental retardation should be higher than compensation for cases that do not involve clients with mental impairments, in recognition of the increased difficulty of defending these cases.

STEP 3 Include caseworkers who can assist attorneys in recommending diversion to the court, create treatment plans for clients, and advise attorneys on mitigation strategy. These caseworkers could also be available to the courts to provide information about community resources, so that judges will have a better understanding of the services that are available in their communities.

STEP 4 Minimize the number of days persons with mental illness spend in jail—which will result in a cost savings for counties and better treatment for those with a mental illness.

STEP 5 Reduce recidivism and probation revocation among defendants with mental illness by providing them with increased access to community mental health services.

CASE STUDY

John's case is a compelling example of the need for specially trained mental health attorneys to divert offenders away from incarceration and into treatment.

John's family reports that he began suffering mental illness as a teenager. Last winter, he was arrested after breaking into a home during a psychotic episode. He explained to the police that the voices in his head told him that he could crawl through a hole in the wall of a garage to get warm.

John was one of the first clients served by the new Dallas County mental health unit. His attorney advocated diversion away from jail, where his condition likely would have deteriorated. The court agreed and referred John to services. He now lives successfully in a group home environment.

"Mental health caseloads allow us to divert eligible defendants away from the criminal justice system and into the community and help them avoid future contact with the system," said Sarah Trimble, the attorney assigned to Dallas County's Mental Health Unit.

"Without access to services, these defendants will often fail and cycle in and out of the system, costing taxpayers far more than it does to offer treatment."

Staffing a Mental Health Defender's Office

Hiring high quality, experienced attorneys and caseworkers is key to creating a successful specialized mental health unit within an existing public defender's office. Equally effective is creating a "boutique" public defender's office that handles only cases involving clients with mental illness or mental retardation—but again, staffing is important.

Institutional public defender offices offer the most efficient method of representing clients with a mental illness or mental retardation, resulting in the lowest cost to the county. Experts agree that overall costs per case are lower in counties that use public defender systems.*

A public defender's office specialized in cases involving defendants with mental illness should be staffed by:

- A Chief Mental Health Attorney with at least five years experience in the practice of criminal law, preferably board certified in criminal law. He/she should also have substantial experience in handling cases involving clients who have a mental illness, or a dual degree in social work or a related field. If the office handles felony cases, he/she should have tried at least 10 felony cases to completion before a jury, two of which involved crimes for which the maximum punishment was at least life in prison. If the office will handle capital cases, he/she should have demonstrated experience in working on capital cases.
- Staff attorney(s) who have experience handling cases involving clients with mental illness. If the office handles felony cases, these attorneys must have tried at least three felony cases before they are eligible to work on a felony case. The number of attorneys in the office should be based on caseload, with the caseload tied to case-weighted standards.
- Caseworker(s) with a bachelor's degree in social work or a related field. Each of these caseworkers should have experience working with clients involved in the criminal justice system. The ratio of caseworkers to attorneys should be such that their caseload does not exceed 20 to 30 open cases at any given time, with a caseload of about 80 to 100 cases over the course of a year.
- Where the caseworker staff is four or more, a Supervising Caseworker with a master's degree in social work or a related field, with substantial experience in forensic work.
- Investigator(s) and administrative assistant(s) to support attorneys and caseworkers.

A non-partisan panel should oversee selection of the Chief Public Defender, as suggested by National Legal Aid & Defender Association standards. This panel should include district criminal court judges, county commissioners, and representatives from the local defense bar association.

*The Public Policy Research Institute, Texas A&M University, Study to Assess the Impacts of the Fair Defense Act on Texas Counties 69 (2005); The Spangenberg Group, Blueprint for Creating a Public Defender Office in Texas 6 (2004).

Texas Counties Implement Different Models

Mental Health Units – El Paso County and Dallas County Public Defender Offices

This year, two existing public defender offices—El Paso County and Dallas County—received Task Force on Indigent Defense (TFID) discretionary grants to create a mental health unit. These units are each staffed by an attorney specialized in cases involving defendants with mental illness or mental retardation and by two caseworkers. The El Paso unit represents adults and juveniles, while the Dallas County unit represents only adults. Attorneys and caseworkers focus on diverting eligible defendants away from the criminal justice system. When defendants do not qualify for diversion, caseworkers assist attorneys in mitigation strategy, sentencing recommendations, and expert witness identification.

Contract MH/MR Lawyers – Limestone County

Limestone County was also awarded a TFID grant in 2005 to address the needs of defendants with mental illness or mental retardation. The county used those funds to contract with three attorneys specially qualified to handle cases involving defendants with mental illness, mental retardation, or developmental disabilities. The grant requires each attorney to contract with a caseworker who will provide support to their clients and provide advice to the attorney regarding mitigation strategy and expert witnesses.

Separate Wheel – Travis County

Travis County created a separate appointment wheel to address the need for specially qualified attorneys to handle cases involving defendants who have a mental illness or mental retardation. Eight attorneys are currently on this separate list, and they are appointed in third degree felony cases and below. County Court at Law Judge Nancy Hohengarten says, "It has been very helpful to have a small group of trained attorneys working on these cases. They are learning to handle a variety of issues." Travis County also intends to enlarge its pre-trial jail diversion program by adding MHMR liaisons, two pre-trial supervision officers for defendants with mental health needs, and a prosecution team that is specially trained in mental health issues. "All of these positions are intended to focus efforts on appropriate treatment of the mentally ill in the criminal courts," says Judge Hohengarten.

Jail Diversion Programs – Statewide

While these programs do not provide experienced attorneys to handle the complexities presented by cases involving defendants with mental disabilities, their effectiveness can be enhanced by a system that does provide specially qualified attorneys. Diversion programs focus on:

- Identifying defendants who have a mental illness or mental retardation as soon as they come into contact with law enforcement or enter the system; and
- Crafting plans to divert eligible defendants away from the criminal justice system and into community treatment programs.

Diversion programs are staffed by caseworkers, often employed by local MHMR centers, who connect defendants with services and make recommendations to the court for defendant's treatment and potential for diversion from the criminal justice system.

Evaluation Needed to Assess What Works

An evidence-based evaluation component should be included in any model that a county adopts to handle criminal cases involving defendants with mental health issues.

Any method of evaluation should be consistent with the data collection that the Task Force on Indigent Defense requires or suggests. However, counties should consider measuring cost-savings to the county (through reduced recidivism, or increased ability to sustain employment following participation in the program), as well as benefits to the client.

Some good resources for information about evaluation models are:

Council of State Governments, Criminal Justice/Mental Health Consensus Project (2002).

North Carolina Office of Indigent Defense Services, The Challenge: Evaluating Indigent Defense Conference Report (2005).

W.K. Kellogg Foundation, Evaluation Handbook (Updated ed. 2004).

FUNDING FOR MENTAL HEALTH ATTORNEY PROGRAMS

The Texas Task Force on Indigent Defense has made funding for mental health defender services a priority area for its discretionary grants. Under its discretionary grant program, TFID will fund a four-year pilot project. The TFID discretionary grants fund 80% of the projects cost for the first year, 60% for the second year, 40% for the third year, and 20% for the fourth year. For more information on discretionary grants, go to the Task Force website at www.courts.state.tx.us/oca/tfid, or call Bryan Wilson, Grants Administrator, at (512) 936-6994. Grant applications for 2006 are due Friday, November 4, 2005. An online application process is available. This is an ongoing program—funding will continue into the future. The Task Force will begin accepting applications for 2007 discretionary grants in April 2006.

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