



TEXAS JUDICIAL COUNCIL
COMMITTEE REPORT
and
RECOMMENDATIONS

June 2018



**GUARDIANSHIP, MENTAL HEALTH, &
INTELLECTUAL/DEVELOPMENTAL DISABILITY**

In June 2017, the Texas Judicial Council charged the Guardianship, Mental Health, and Intellectual/Developmental Disabilities Committee with the following tasks.

- Review reforms enacted by the 85th Legislature impacting the judiciary, monitoring their implementation, and considering additional reforms to improve the ways that courts interact with individuals with a mental health condition or an intellectual or developmental disability.
- Review guardianship reforms enacted by the 85th Legislature, monitoring the implementation of those reforms, and considering additional reforms to improve the ways that courts interact with individuals in need of guardianship.

The members of the committee are:

Honorable Bill Boyce, Chair
Honorable Kelly Moore
Representative Andy Murr
Honorable Polly Spencer

Senator Judith Zaffirini
Ms. Allyson Ho
Mr. Kenneth Saks

An Advisory Group was also established to assist the committee in its work. Members of the Advisory Group are:

Judge Susan Redford (Ret.), Texas Association
of Counties

Adrienne Kennedy, National Alliance for
Mental Illness

Judge Barbara Hervey, Court of Criminal
Appeals

Dr. Tony Fabelo, Meadows Mental Health
Policy Institute

Dr. William B. Schnapp, Associate Professor of
Clinical Psychology

Honorable Harriet O'Neill (Ret.), Law Office of
Harriet O'Neill

Beth Ann Lawson, StarCare Specialty Health
System

The Meadows Mental Health Policy Institute has volunteered to provide assistance to the Council and this committee.

The committee held meetings on September 19, 2017, February 12, 2018, April 10, 2018, and June 8, 2018.

Recommendations in Brief

Refinements to Mental Health Legislation Passed During 85th Legislature

Recommendation 1: The Legislature should clarify the meaning of “assessment” under Code of Criminal Procedure Article 16.22.

Recommendation 2: The Legislature should amend Health and Safety Code Section 614.0032(b) to authorize the Texas Correctional Office on Offenders with Medical or Mental Impairments to approve and make available an electronic form for use by qualified persons in connection with mental health reporting results under Code of Criminal Procedure Article 16.22. The Legislature should make this form confidential by law.

Recommendation 3: The Legislature should amend Code of Criminal Procedure Article 16.22’s monthly reporting requirement to avoid duplicative reporting from magistrates and trial courts.

New Legislative Proposals

Recommendation 1: The Legislature should amend Code of Criminal Procedure Article 42.09 Section 8 to authorize a transfer of mental health-related information when a defendant is moved from county jail to state prison.

Recommendation 2: The Legislature should amend Government Code Section 54.003(b) to include part-time and full-time magistrates and associate judges appointed under Chapters 54 and 54A of the Government Code.

Recommendation 3: The Legislature should create and fund a network of guardianship specialty courts modeled on the existing network of Child Protection Specialty Courts.

Recommendation 4: The Legislature should expand the Office of Court Administration’s Guardianship Compliance Project to be a statewide program.

Recommendations from Chapter 574 Working Group

Recommendation 1: The Legislature should clarify Health and Safety Code Section 574.034(b)’s standard for court-ordered temporary outpatient mental health services.

Recommendation 2: The Legislature should create a new provision in Title 7, Subchapter E of the Health and Safety Code covering transfer from inpatient to outpatient treatment.

Recommendation 3: The Legislature should ensure that the provision addressing status hearings for noncompliance in Health and Safety Code Section 574.037(c-2) is clear, and should move the provision to Title 7, Subchapter E.

Recommendation 4: The Legislature should amend Chapter 574 of the Health and Safety Code to require publicly funded facilities (including private psychiatric facilities receiving payment with public funding to treat an individual under Chapter 574) to coordinate the admission, treatment plan, and discharge plan with Local Mental Health Authorities, and to pay for medication upon discharge.

Recommendation 5: The Legislature should modify Article 46B of the Code of Criminal Procedure and Chapter 574 of the Health and Safety Code to create a new civil commitment option for Class B misdemeanor defendants.

Recommendation 6: Judges should receive additional education on standards and procedures for court-ordered outpatient mental health services.

Recommendation 7: The Legislature should provide additional funding for community mental health services, including outpatient mental health services.

Recommendations in Detail

Refinements to Mental Health Legislation Passed During 85th Legislature

Background

The 2017 legislation went into effect on September 1, 2017. Feedback from courts, court staff, and stakeholders since that effective date points to the need for three refinements that will clarify procedures and the meaning of statutory language. Additionally, the committee recommends continued and increased funding for the creation of community-based and jail-based competency restoration programs under Article 46B. Funding to launch these programs currently is authorized under SB 292 and HB 13.

Recommendations

Recommendation 1: The Legislature should clarify the meaning of “assessment” under Code of Criminal Procedure Article 16.22.

As amended in 2017, Article 16.22 contains multiple references to the performance of an “assessment” if there is reasonable cause to believe that a defendant has a mental illness or is a person with an intellectual disability. The phrases “collect” or “collection of information” or “information collected” also are used in Article 16.22(a)(1)(A), (a)(1)(B), (a)(2), and (a)(3). “Assessment” also appears in Article 17.032(b)(3).

Feedback indicates that there is uncertainty about the credentials necessary for an individual to perform an “assessment;” whether this assessment focuses on competency to stand trial; and payment responsibility for the assessment.

A single uniform term should be used in place of “assessment” or “collection of information” to convey that a full-blown examination and mental health or IDD diagnosis is not required at this juncture.

Recommendation 2: The Legislature should amend Health and Safety Code Section 614.0032(b) to authorize the Texas Correctional Office on Offenders with Medical or Mental Impairments to approve and make available an electronic form for use by qualified persons in connection with reporting mental health reporting results under Code of Criminal Procedure Article 16.22. The Legislature should make this form confidential by law.

Article 16.22(a)(1)(B) provides that the magistrate shall receive “a written assessment of the information collected under Paragraph (A) on the form approved by the Texas Correctional Office on Offenders with Medical or Mental Impairments under Section 614.0032(b), Health and Safety Code.”

In its current form, Section 614.0032(b) refers to a form for use in connection with a competency examination under Article 46B; this section does not expressly refer to a screening form for use under Article 16.22. TCOOMMI has promulgated a screening

form specifically for this purpose. A new subsection should be added to Section 614.0032(b) authorizing TCOOMMI to

“(3) approve and make generally available in electronic format a standard form for use by qualified persons in connection with mental health reporting results under Article 16.22, Code of Criminal Procedure.”

Additionally, a provision should be added to Section 614.0032 to make the form confidential by law. Such a provision could be modeled after the provision addressing juvenile records in Section 58.007 of the Family Code.

Recommendation 3: The Legislature should amend Code of Criminal Procedure Article 16.22’s monthly reporting requirement to avoid duplicative reporting from magistrates and trial courts.

Feedback indicates concern over the potential for a redundant reporting requirement for screenings performed pursuant to Article 16.22. Subsection (e) should be amended as follows:

“(e) The ~~magistrate~~ clerk of the trial court shall submit to the Office of Court Administration of the Texas Judicial System on a monthly basis the number of written assessments provided to the court under Subsection (a)(1)(B).”

This change will avoid duplicative reporting from magistrates and trial courts.

New Legislative Proposals

Background

In addition to refinements of legislative changes enacted in 2017, the committee recommends these proposals for the 86th Legislative Session beginning in January 2019.

Recommendations

Recommendation 1: The Legislature should amend Code of Criminal Procedure Article 42.09 Section 8 to authorize a transfer of mental health-related information when a defendant is moved from county jail to state prison.

Under Code of Criminal Procedure Article 42.09 section 8, a county transferring a defendant to TDCJ must deliver twelve categories of information to TDCJ including court records, a presentence investigation if one was prepared, and criminal history. This provision should be amended to include any mental health records or mental health screening reports among the items to be provided to TDCJ so that there is awareness of an incoming prisoner’s mental condition and an ability to anticipate how that condition may need to be addressed.

Recommendation 2: The Legislature should amend Government Code Section 56.003(b) to include part-time and full-time magistrates and associate judges appointed under Chapters 54 and 54A of the Government Code.

During the course of multiple seminar presentations since mid-2017, there has been significant enthusiasm among courts, court personnel, and other stakeholders for training opportunities focused on these new procedures.

This enthusiasm dovetails with a 2016 recommendation made by the Texas Judicial Council's Criminal Justice Committee, excerpted here with emphasis added:

* * *

Texas Government Code 56.003(b) provides the statutory basis for funds to be appropriated to the Court of Criminal Appeals for the "continuing legal education of judges of the appellate courts, district courts, county courts at law, county courts performing judicial functions, **full-time associate judges and masters appointed pursuant to Chapter 201, Family Code, and full-time masters, magistrates, referees, and associate judges appointed pursuant to Chapter 54 as required by the Court of Criminal Appeals.**"

Sec. 56.003(c) and (d) of the Government Code provide the statutory basis for funds to be appropriated to the Court of Criminal Appeals for the continuing legal education of judges of the justice courts and municipal courts.

Rules 2, 3, and 5 of Judicial Education promulgated by the Court of Criminal Appeals require judicial education for judges of the appellate, district, county, justice and municipal courts. Rule 4 of Judicial Education promulgated by the Court of Criminal Appeals requires "judicial officers" to "complete within one year after taking office, at least 12 hours of instruction in the administrative duties of office and substantive procedural and evidentiary laws. Thereafter, the "judicial officer" is required to complete at least 12 hours of instruction in substantive, procedural and evidentiary laws and court administration. **The term "judicial officer" is defined to include full-time masters, magistrates, or referees appointed pursuant to Chapter 54 of the Government Code.**

* * *

The committee recommends that the legislature amend Government Code Sec. 54.003(b) to include part-time and full-time magistrates and associate judges appointed under Chapters 54 and 54A of the Government Code. The committee also recommends that the Court of Criminal Appeals amend its Rules of Judicial Education to require

continuing legal education for part-time and full-time magistrates and associate judges under Chapters 54 and 54A of the Government Code.

The committee recommends that the Court of Criminal Appeals examine its funding levels for judicial education and supports the Court's efforts to increase funding to a level sufficient to provide the education discussed above.

The committee recommends adopting the Criminal Justice Committee's 2016 recommendation, which will allow for additional training to implement new mental health-related procedures enacted in 2017.

Recommendation 3: The Legislature should create and fund a network of guardianship specialty courts modeled on the existing network of Child Protection Specialty Courts.

Recommendation 4: The Legislature should expand the Office of Court Administration's Guardianship Compliance Project to be a statewide program.

The committee previously discussed recommendations to (1) fund a statewide guardianship compliance project based on the successful pilot program; and (2) create associate judge guardianship courts.

The Office of Court Administration's Guardianship Compliance Project should be expanded statewide. This recommendation is also reflected in the Elders Committee Report and Texas Judicial Council Recommendations issued in October 2016. Legislation to accomplish this was passed in 2017 but ultimately was vetoed. Work on this project has continued in the interim, and significant problems with guardianship monitoring continue to be found. Therefore, it is necessary to expand the guardianship compliance project statewide to ensure that adequate monitoring of the individuals under guardianship occurs.

The Legislature should create and fund a network of guardianship specialty courts modeled on the existing network of Child Protection Specialty Courts. The recommendation mirrors the recommendation of the Texas Judicial Council's Elders Committee in its 2016 report and recommendations, except that the prior recommendation called for a pilot program. The current recommendation is discussed in the February 2018 document entitled "Texas Guardianship Association Judicial Workgroup Consensus Findings and Recommendation."

The two guardianship recommendations will complement one another in that the specialized guardianship courts will benefit from the services of the guardianship compliance project staff who would function as court auditors for those new courts.

Recommendations from Chapter 574 Working Group

Background

Chapter 574 of the Texas Health and Safety Code was added in 1991 to provide a mechanism for courts to order involuntary mental health treatment.

However, there are barriers to the use of these provisions by courts; as a result, they are rarely used to order involuntary outpatient mental health treatment. Interested stakeholders indicate that the update of these provisions based upon current practices and research on best practices in mental health treatment could provide a mechanism to divert individuals with mental health conditions from the criminal justice system and the inpatient mental health treatment system.

A working group of involved stakeholders met on June 5, 2018, to discuss possible recommendations for improving procedures governing court-ordered mental health treatment under Chapter 574.

Attending were Beth Mitchell and Aaryce Hayes from Disability Rights Texas; Adrienne Kennedy and Greg Hansch from the National Alliance on Mental Illness; Beth Ann Lawson from Star Care Lubbock; Betsey Johnson from the Treatment Advocacy Center; Justice Bill Boyce; Chris Lopez from the Texas Health and Human Services Commission; David Slayton and Megan LaVoie from the Office of Court Administration; Kristi Taylor from the Texas Judicial Commission on Mental Health; Judge Oscar Kazen; Judge Polly Spencer; and Judge Barbara Hervey from the Court of Criminal Appeals.

The working group identified two areas for longer-range study and development: (1) reorganizing Chapter 574 to make it easier to follow, and to separate the provisions for inpatient and outpatient procedures into separate subchapters; and (2) establishing a statutory framework for associate judge mental health specialty courts that could oversee a mental health civil commitment docket.

The following legislative proposals for the upcoming session emerged from this meeting.

Recommendations

Recommendation 1: The Legislature should clarify Health and Safety Code Section 574.034(b)'s standard for court-ordered temporary outpatient mental health services.

The current standard in Section 574.034(b) is difficult to read and apply because of its many subparts and sub-subparts.

A potential model for a clarified statutory standard is the one employed in Michigan, which authorizes a court to order temporary outpatient mental health services for an individual "who has mental illness, whose understanding of the need for treatment is impaired to the point that he/she is unlikely to voluntarily participate in or adhere to treatment that has been determined necessary to prevent relapse or harmful deterioration...and whose noncompliance with treatment has been a factor in the individual's placement in a psychiatric hospital, prison, or jail at least 2 times within 48

months, or has been a factor in his/her committing one or more acts, attempts or threats of serious violence within 48 months.” See Mich. Comp. Laws § 330.1401(d).

Recommendation 2: The Legislature should create a new provision in Title 7, Subchapter E of the Health and Safety Code covering transfer from inpatient to outpatient treatment.

A new notice provision in subchapter E would require inpatient commitment facilities to provide notice to the committing court 30 days after commitment begins stating whether the patient is appropriate for outpatient commitment. It also would authorize the committing court to consider whether a transition from inpatient to outpatient commitment is appropriate; if a transition from inpatient to outpatient treatment is being considered, the committing court must consult the Local Mental Health Authority, and the local judge. If the circumstances of commitment are modified from inpatient treatment to outpatient treatment, then the permissible term of outpatient commitment would restart.

Recommendation 3: The Legislature should ensure that the provision addressing status hearings for noncompliance in Health and Safety Code Section 574.037(c-2) is clear, and should move the provision to Title 7, Subchapter E.

Recommendation 4: The Legislature should amend Chapter 574 of the Health and Safety Code to require publicly funded facilities (including private psychiatric facilities receiving payment with public funding to treat an individual under Chapter 574) to coordinate the admission, treatment plan, and discharge plan with Local Mental Health Authorities, and to pay for medication upon discharge.

The recommendation is to require publicly funded facilities (including private psychiatric facilities receiving payment with public funding to treat an individual under Chapter 574) to (1) coordinate the admission, treatment plan, and discharge plan with Local Mental Health Authorities; and (2) pay for medication upon discharge.

This change likely would require amendments to statutory language in multiple places in Chapter 574, primarily in Section 574.081.

- Modify (b) to strike the second sentence or modify to ensure that publicly funded private facilities are included.
- Modify (c) to require inclusion of whether the patient is appropriate for court-ordered outpatient mental health services.
- Consider repealing (h) or modify to ensure that publicly funded private facilities do have to comply with subsection (c).

Recommendation 5: The Legislature should modify Article 46B of the Code of Criminal Procedure and Chapter 574 of the Health and Safety Code to create a new civil commitment option for Class B misdemeanor defendants.

During the 85th Legislature, the Texas Judicial Council recommended significant changes to Code of Criminal Procedure Article 46B. These changes authorized the use of jail-based and community-based competency restoration for Class B misdemeanor defendants so that use of an inpatient bed at a state psychiatric hospital (which can involve long waits for availability) is not the only restoration option.

The Chapter 574 working group considered an aspect of Article 46B's operation that was not addressed in prior recommendations. Articles 46B.004(e) and 46B.151 give prosecutors authority to dismiss charges against a defendant and ask a court to transfer the defendant for civil commitment proceedings under Chapter 574. The working group discussed how the option to seek a transfer for civil commitment proceedings is little-used because it first requires dismissal of charges. The working group voiced support for creating an option under which, in appropriate cases, prosecutors could seek a transfer for court-ordered outpatient mental health services under Chapter 574 without first dismissing charges.

- This change would likely be reflected in Article 46B.073.
- This may need modifications within Chapter 574.

Recommendation 6: Judges should receive additional education on standards and procedures for court-ordered outpatient mental health services.

Recommendation 7: The Legislature should provide additional funding for community mental health services, including outpatient mental health services.