

Mental Illness and the Court System

Summarized by Thomas T. Thomas

Unfortunately, among all the other issues, too often we family members also need to deal with the court system. At our August 26 fourth Wednesday educational session, Alameda County Deputy District Attorney **David Cook** gave an overview of court processes and decision points at the [Behavioral Health Court](#) and [Mental Health Diversion](#) from an insider's perspective. The topic of [Care Court](#) is another of the department's processes, and members of [Families Advocating for the Seriously Mentally Ill](#) (FASMI) gave an update on that process.

Cook has served in the District Attorney's office for 35 years in different assignments. For the past three years he has been the DA's representative as "collaborative counsel" at the county's two Superior Court calendars for deferred prosecution: Behavioral Health Court and Mental Health Diversion. He stressed that the information he was about to give was his personal opinions and not his department's official positions.

The process begins with a person being charged with a crime, usually a felony or misdemeanor—but not a serious offense like murder, manslaughter, a crime requiring one to be registered as a sexual offender, or driving under the influence (DUI). In pre-trial hearings, the defense attorney may explore the non-prosecutorial courts.

Behavioral Health Court has been in existence in Alameda County for 17 years, since 2009. It was created by agreement among the DA's office, the Public Defender's office, the Superior Court, and the Alameda County Behavioral Health Department (ACBH). The court meets weekly and includes representatives from all four groups, with Cook representing the DA's office. The cases are brought voluntarily, usually by the defense attorney. As a case is brought up, each of the four representatives has veto power, although the public defender and the judge usually don't veto.

In considering the case, Cook looks at the facts: the circumstances, the injuries involved, the desires of the victims—who are often family members, and whether they are looking to help their son or daughter—and whether the police report suggests a mental health issue.

If Cook accepts the case, it then goes to ACBH's representative, who looks for a diagnosis and treatment plan. To be entered into Behavioral Health Court, the person must be on MediCal, because any treatment will be at public expense. The ACBH member decides on the connection between a mental disorder and the crime being charged. The mental health representative determines the level of care that would be required, which can't be too low, such as release to outpatient treatment, or too high, such as the person being incompetent to stand trial.

If both the DA and the ACBH representative agree, then the county sets up a treatment plan and gets the judge's approval when the person enters treatment. This includes a case manager, therapy and medication as required, and assistance with benefits, housing, and employment opportunities. The person reports back to

Behavioral Health Court weekly or not less than monthly for a progress report, often with the case manager in attendance. After about a year to eighteen months with good progress, the person is eligible for graduation, the criminal charge is dismissed, and the record is sealed.

“The process is not a straight line and depends on the progress reports,” Cook said. The process can be terminated if the person is not following treatment or commits new offenses. Then the case reverts to criminal court for prosecution. Also, ACBH can request termination if the treatment program doesn’t get off the ground. “But we don’t get a lot of terminations, not a lot of recidivism or new offenses,” Cook said. “People get through the program. And the court looks for stability, with the person in a safe space.”

The **Mental Health Diversion** program was created by statute five years ago, meets weekly, and functions much the same as Behavioral Health Court. The person charged with a crime gets mental health services and a path to dismissal. The diversion program takes care of people who don’t qualify for Behavioral Health Court, for example because the person has private health insurance or because ACBH won’t approve their case.

The diversion process is less collaborative than in Behavioral Health Court. The DA’s representative doesn’t get to object, and the judge is required to ignore the objections of victims. The defense must document a mental health diagnosis under the [Diagnostic and Statistical Manual of Mental Disorders](#) (DSM). There is a presumed connection between the disorder and the crime. Since the prosecutor must prove there is no connection (proof of a negative),¹ the prosecutor seldom objects. As with Behavioral Health Court, the diversion is not allowed for serious crimes like murder or sex crimes. Mental Health Diversion is often used in domestic violence cases where the client would have to do more than plead no contest, accept community service, or pay a fine.

The defense attorney proposes a treatment plan that the judge approves. The defense provides periodic updates. And ultimately the case can be dismissed in a year for a misdemeanor or two years for a felony. The diversion can also be terminated for cause.

Cook could not say why a defense attorney would choose Behavioral Health Court or Mental Health Diversion. One might try the diversion route after failing to be accepted for Behavioral Health Court, but that would be difficult because both calendars appear before the same judge.

Katy Polony and Alison Monroe of FASMI spoke briefly about **Care Court**. To qualify, a person must have a psychotic illness or bipolar disorder with psychotic aspects and be deteriorating. However, the person cannot be so ill that they cannot accept treatment, nor so well that they are treated in the community. Rather than a criminal proceeding, the person is nominated by others to attend Care Court, although families are having difficulty achieving this. And, unlike the original intent of the program, Care Court is not a path to conservatorship.

The presentations included questions from the audience.

¹ The original statute required the defense to prove a connection, but this requirement has since been eliminated.

Q. How many cases go to Behavioral Health Court or Mental Health Diversion?

A. Some hundreds every year—say, 300 to 500.

Q. How many cases can't get into Behavioral Health Court because of ACBH criteria?

A. A minority of cases, and those can go to Mental Health Diversion.

Q. Can mental health professionals testify in Behavioral Health Court?

A. No, it is not a court proceeding where people testify.

Q. Is housing assistance offered as part of a treatment plan?

A. Yes, housing is addressed. It may include sober living, crisis residential, and public assistance in housing. Of course, housing is a critical issue in limited supply.

Q. Does Behavioral Health Court ever lead to a finding of incompetent to stand trial?

A. If the judge finds that's the case, then the determination can be considered.

Q. Is there a way for families to decide for Behavioral Health Court rather than press charges?

A. There is no way to know for certain. Behavioral Health Court starts with a charged case.

Q. Does the client appear in Behavioral Health Court?

A. Yes, both when the case is being considered and again during progress reports, either in person or on Zoom. Not every judge can sit on Behavioral Health Court, because the judge must make a connection with the client.

Q. Is treatment voluntary? Can the client withdraw from treatment?

A. Yes, but if the client withdraws, the case goes back to criminal court. And the court tries to let the client know that treatment support can continue after withdrawal or graduation.

Q. If the person is under conservatorship, can they go to Behavioral Health Court?

A. Conservatorship is a different track.

Q. Should the family pay the expense of hiring a private lawyer or use a public defender?

A. The issue is what a person can afford. If you can afford an attorney, you don't qualify for a public defender. And Behavioral Health Court requires a person to be indigent and dependent on Medi-Cal.

Q. It is getting more difficult to get into hospitalization, and many localities resist issuing a 5150, which leads to treatment. What is a family to do?

A. I wish I had a suggestion. We need more options. For many people, the only path to treatment is the criminal justice system.