



LJIC WORK GROUP ON CIVIL AND FORENSIC COMMITMENTS

DRAFT REPORT AND
RECOMMENDATIONS

Law and Justice Interim Committee
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This report is a summary of the work of the Law and Justice Interim

Committee, specific to the Law and Justice Interim Committee’s 2023-2024 civil and forensic commitments study as outlined in the Law and Justice Interim Committee’s 2023-2024 work plan. Members received additional information and public testimony on the subject, and this report is an effort to highlight key information and the processes followed by the Law and Justice Interim Committee in reaching its conclusions. To review additional information, including audio, minutes, and exhibits, visit the Law and Justice Interim Committee website:

<https://www.leg.mt.gov/committees/interim/ljic/>.

A full report, including links to the documents referenced in this print report, is available at the Law and Justice Interim Committee website: <https://www.leg.mt.gov/committees/interim/ljic/>.

LJIC WORK GROUP REPORT

INTRODUCTION

On August 16, 2023, Representative Bob Keenan, Presiding Officer of the Behavioral Health System for Future Generations (BHSFG or the HB 872 Commission), sent an email request to Representative Amy Regier, Presiding Officer of the LJIC, requesting that the Law and Justice Interim Committee (LJIC) “undertake a review of Montana’s civil and forensic commitment systems, especially as it relates to the associated statutory framework.” When the LJIC met on November 15, 2023, staff provided a review of the civil and criminal forensic commitment process.

During the work session near the end of the November 15, 2023, LJIC meeting, further discussion regarding the BHSFG Commission request was held, and Senator Esp moved to amend the LJIC work plan to include the formation of a work group made up of experts who interact with the behavioral health system on a daily basis to discuss and later participate in a panel discussion regarding potential statutory solutions to problems and bottlenecks identified in the civil and criminal forensic commitment process in Montana.

WORK GROUP MEMBERS

- Hon. Amy Eddy, Judge, Montana 11th Judicial District
- Chad Parker, Deputy Chief Legal Counsel, DPHHS
- Brett Irigoin, Dawson County Attorney
- Brian Smith, Montana Office of State Public Defender, Public Defender Division Administrator
- Laura Kirsch, PhD, ABPP, Licensed Clinical Psychologist

WORK GROUP MEETINGS

The work group met every two weeks for two hours beginning January 12, 2024, until the February 20-21 LJIC meeting. At the February LJIC meeting, the work group participated in a panel discussion regarding the work group discussions keeping in mind their particular areas of expertise and involvement in Montana’s criminal and civil commitment process. The work group also met on Friday May 3, 2024, to discuss additional thoughts and suggestions and to provide comment on this report.

BACKGROUND

FITNESS TO PROCEED/COMPETENCY

Under the United States and Montana Constitutions, all criminal defendants have the right to a fair trial, the right to counsel, and the right to due process. Further, forcing people to trial who are not fit to proceed is unconstitutional. This is codified in section [46-14-103, MCA](#), which states that a person who “is unable to understand the proceedings against the person or to assist in the person's own defense may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.” Fitness to proceed is a threshold determination in a criminal case.

Under section [46-14-202\(1\), MCA](#), a district court judge is required to order a fitness evaluation when requested by the defendant or defendant's counsel, or when the issue of fitness is raised by the court or the prosecution.

The determination of fitness to proceed as well as the effect of a finding of unfitness is found in section [46-14-221, MCA](#).

CAPACITY/TIME OF CRIME MENTAL STATE

The work group identified an important distinction between the types of evaluations frequently ordered for defendants whose mental state is in question. The capacity, or time of crime, mental state evaluation (mental state evaluation) is a separate type of forensic criminal evaluation that focuses on the defendant's mental state when the crime was committed. Unlike fitness to proceed evaluations, this type of evaluation does not trigger a constitutional analysis, is governed by statute, and thus could be amended. Most mental state evaluations are completed before trial in anticipation of use during trial or in the plea-bargaining process.

When an evaluator performs a mental state evaluation their considerations include whether the defendant's mental illness or developmental disability impaired their capacity to form the state of mind that is an element of the offense or rendered them unable to appreciate the criminality of their behavior or conform their behavior to the requirements of the law.

After trial and conviction, mental state evaluations may also be ordered for inclusion in the presentence evaluation as provided in section [46-14-311, MCA](#). After conviction, the offender is limited to arguing that they are guilty but mentally ill (GBMI), and the mental state evaluations are primarily used to determine mitigation and the appropriate place for the offender to serve their sentence. At issue generally is whether a prison setting or a secure psychiatric facility is appropriate.

CONSENSUS

The work group reached consensus regarding what is needed before consideration of statutory changes to make any statutory changes more successful and identified several potential statutory amendments that could streamline the process and help alleviate the current bottlenecks.

IMPORTANT OVERALL SYSTEM CONSIDERATIONS

Throughout the meetings of the work group as well as during the panel discussion on February 20, 2024, there were three overarching concerns shared by the members of the work group.

The first concern was the lack of forensically trained providers available in Montana to perform evaluations. The lack of forensically trained providers impacts the wait list and limits the number of evaluations that are prepared in the community where the defendant is located. As a result, most defendants must go to the Montana State Hospital or the Galen forensic facility for evaluation. It is especially difficult for defendants, counsel, courts, and prosecutors located in rural jurisdictions where there are even fewer qualified providers. Further, these jurisdictions are often located far from Warm Springs, Montana, where the Montana State Hospital and the Galen facility are located.

In addition, the Montana State Hospital historically has not designated enough providers that it will accept. Moreover, the evaluators who have been designated also perform community evaluations and have busy clinical practices making them less available for forensic work. There was discussion and testimony that the Department of Health and Human Services (DPHHS) and the Montana State Hospital are actively working toward endorsing more providers, and as of the last meeting of the work group, there 26 total endorsed providers. This is a dramatic increase in the number of endorsed providers. While this is a positive step, it is important that these providers be forensically trained. Further, a focus on ongoing forensic training should take place. Despite the appointment of additional providers, there are simply not enough psychiatrists, clinical psychologists, and advanced practice registered nurses in Montana to meet the current need for civil and criminal forensic evaluations. See section [46-14-202\(1\)](#), MCA, which states that only a “qualified psychiatrist, licensed clinical psychologist, or advanced practice registered nurse” may perform forensic evaluations.

The second concern was that a full understanding of the difficulties and bottlenecks in the civil and criminal forensic commitment process is hampered by the lack of data. However, there is evidence from the testimony before the BHSFG Commission and the LJIC that DPHHS is working diligently to rectify this situation.

The third overall system concern involves funding. In short, none of the potential statutory changes discussed below will be effective unless sufficient funding from the Legislature is provided.

AREAS OF POTENTIAL IMPROVEMENT/POTENTIAL STATUTORY AMENDMENTS

MASTER SERVICE CONTRACTS BETWEEN PROVIDERS AND DPHHS

These types of contracts could help in identifying community providers who could perform the different types of evaluations. However, the successful completion of Master Service Contracts hinges on attracting more qualified providers to Montana, providing forensic training for providers who are already here, and the timely approval of providers by the Montana State Hospital. This could be memorialized in statute with the funding stream included.

WAITLIST ISSUES

Currently, it is difficult to recommend appropriate legislative changes to alleviate the waitlist due to competing narratives. Narrative factors include:

- Montana’s growing population with mental health needs;
- the lack of available and qualified providers;
- an overabundance of defendants being referred for different types of evaluations that may be unnecessary (usually due to waitlist concerns); and
- the lack of available data on issues like the percentage of defendants found fit versus unfit that make it impossible to determine which of these narratives is most accurate.

INVOLUNTARY MEDICATION OF DEFENDANTS AFTER DETERMINATION OF UNFITNESS

For criminal defendants, a hearing is required based on the constitutionally supported process found in [Sell v. United States, 539 U.S. 166 \(2003\)](#). Currently, there is no timeline for how soon a [Sell](#) hearing must be held after a request is made. The consensus of the work group was to statutorily impose a requirement that the hearing be held within 10 days.

CIVIL COMMITMENTS

The work group reached consensus that overall, the civil commitment process is working well. However, there are concerns regarding the rapid stabilizing and cycling respondents back to their communities only for them to decompensate days later and require another petition for involuntary commitment. This cycling back and forth of civil respondents puts a strain on the judicial system as well as the prosecutors and defense attorneys who must repeatedly hold and participate in hearings involving the same person with no real resolution of their mental health challenges. The discharge planning statute states the following requirements (emphasis added):

53-21-180. Discharge plan. Each patient admitted as an inpatient to a mental health facility must have an *individualized discharge plan developed within 10 days after admission*. The discharge plan must be updated as necessary. Each individualized discharge plan must contain:

- (1) an anticipated discharge date;
- (2) criteria for discharge;
- (3) identification of the facility staff member responsible for discharge planning;
- (4) identification of the community-based agency or individual who is assisting in arranging postdischarge services;
- (5) referrals for financial assistance needed by the patient upon discharge; and
- (6) other information necessary to ensure an appropriate discharge and adequate postdischarge services.

Individualized discharge planning has been problematic in the past. The primary reason for this is a lack of resources both in terms of staffing and funding on the part of DPHHS and the Montana State Hospital. DPHHS is actively working on improving the discharge planning process.

Additionally, section [53-21-145, MCA](#), only allows patients to be discharged with a maximum of 30 days of medication. The work group unanimously supported providing patients with 30 days of medication and one refill to allow patients time to get an appointment with a provider in order to continue treatment, including medications. The work group felt that allowing one refill would help alleviate the issue of patients/respondents who cycle back and forth to the Montana State Hospital and their communities.

SINGLE PAYER FOR FORENSIC EVALUATIONS

The statute addressing payment for examinations is section [46-14-202\(4\), MCA](#). Generally, the statute requires whoever requests the evaluation to pay for it. However, if DPHHS, through one of its forensic

evaluators, performs the evaluation, DPHHS pays. As a result, DPHHS pays for most evaluations. One suggestion to simplify the payment process is for DPHHS to always pay for forensic evaluations. In keeping with other suggested statutory changes, DPHHS would need to receive adequate funding from the Legislature. Of course, the Office of State Public Defender (OPD) would still be able to request evaluations on their own and pay for them.

AREAS OF FURTHER CONSIDERATION

While fitness to proceed evaluations are governed by rights contained in the United States Constitution and the Montana Constitution, capacity/time of crime mental state evaluations are not. Consideration of a threshold standard for these types of evaluations should help alleviate the number of forensic evaluations requested, which would take pressure off of the system and help with waitlist issues. This is a potential area for a statutory amendment.

The work of the BHSFG Commission should act to reduce pressure on the behavioral health system as a whole, decrease the number of people in the system, and help stabilize the system.

Minimum training standards for forensic evaluators should be developed, and a focus on creating training opportunities should be prioritized.

The OPD, prosecutors, judges, and forensic evaluators recognize that ongoing training on these topics is an important part of the solution.

APPENDIX A: LAW AND JUSTICE INTERIM COMMITTEE MEMBERS

Before the close of each legislative session, House and Senate leadership appoint lawmakers to interim committees. The members of the Law and Justice Interim Committee, like most other interim committees, serve one 20-month term. Members who are reelected to the Legislature, subject to overall term limits and if appointed, may serve again on an interim committee. This information is included in order to comply with section 2-15-155, MCA.

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