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# OUTLINE: Fair Justice for Persons with Mental Illness: Improving the Court's Response

## **PROJECT DIRECTOR**

*Nicole L. Waters, Ph.D.*

## **PROJECT STAFF**

*Shelley Spacek, J.D.*

*Patricia Tobias, M.S.J.A.*

## **RESEARCH DIVISION | NATIONAL CENTER FOR STATE COURTS**

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## Table of Contents

<b>Acknowledgements .....</b>	<b>1</b>
<b>How to Use This Guide.....</b>	<b>2</b>
<b>Leading Change: Improving the Courts Response to Mental Health.....</b>	<b>1</b>
I. <i>Getting Started .....</i>	<i>1</i>
II. <i>Convene Stakeholders .....</i>	<i>Error! Bookmark not defined.</i>
III. <i>At Your First Meeting.....</i>	<i>Error! Bookmark not defined.</i>
IV. <i>Assess the Mental Health Landscape.....</i>	<i>Error! Bookmark not defined.</i>
IV. <i>Collect Data .....</i>	<i>Error! Bookmark not defined.</i>
VI. <i>Implement Improved Responses.....</i>	<i>Error! Bookmark not defined.</i>
VII. <i>Sustain Your Efforts .....</i>	<i>Error! Bookmark not defined.</i>
<b>Protocols in the Sequential Intercept Model .....</b>	<b>3</b>
<i>Intercept -1: Public Health .....</i>	<i>3</i>
<i>Intercept 0: Community Supports and Services .....</i>	<i>Error! Bookmark not defined.</i>
<i>Intercept 1: Contact with Law Enforcement .....</i>	<i>Error! Bookmark not defined.</i>
<i>Intercept 2: Initial Detention and Court Hearings .....</i>	<i>Error! Bookmark not defined.</i>
<i>Intercept 3: After Incarceration .....</i>	<i>Error! Bookmark not defined.</i>
<i>Intercept 4: Re-entry .....</i>	<i>Error! Bookmark not defined.</i>
<i>Intercept 5: Parole or Probation .....</i>	<i>Error! Bookmark not defined.</i>
<b>Appendix A. Arizona Statutes and Rules .....</b>	<b>Error! Bookmark not defined.</b>
<b>Appendix B. Draft Invitation and Agendas.....</b>	<b>Error! Bookmark not defined.</b>
<b>Appendix C. Checklist of Presiding Judge Action Steps..</b>	<b>Error! Bookmark not defined.</b>
<b>Appendix D. Sample Planning Materials for Sequential Intercept Mapping .....</b>	<b>Error!</b>
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## Acknowledgements

Attention by local, state, and national leaders to individualized, timely, and situationally appropriate responses to mental and behavioral health issues has increased. While the focus of this Guide is on mental health, its use and application can and should be extended to individuals with co-occurring disorders, or both mental illness and substance use disorders. Failure to respond invites a continuing public safety crisis and the continued criminalization of mental health that has devastating effects to individuals, families, and society. Therefore, state court leadership has recognized the importance of coordinated and comprehensive responses to mental health that focus on early diversion and treatment outside of the courts and the justice system. In 2017, the Conference of State Court Administrators (COSCA) published a policy paper, *Decriminalization of Mental Illness: Fixing a Broken System*.<sup>1</sup> The policy paper, adopted by the Conference of Chief Justices in 2018, addresses the evolution of responses to those with mental health issues, highlights key issues for successful responses, and makes explicit recommendations around developing a more robust, capacity-based response to those with mental health issues.<sup>2</sup> As part of these recommendations, COSCA encouraged robust implementation of the Sequential Intercept Model (SIM)<sup>3</sup> to take action on mental health issues in state courts.

*Develop recommendations designed to promote a more efficient and effective justice system for those individuals who come to court and are in need of behavioral health services.*

Fair Justice Subcommittee on Mental Health and the Criminal Justice System

Simply put, the involvement of courts in criminal cases is indicative of a failed societal response to mental and behavioral health issues. While courts are not the appropriate venue for addressing mental health issues, they are in a unique position to lead and coordinate community-based responses. Recognizing the immediate importance of addressing mental health issues in state courts, Arizona established the Fair Justice Subcommittee on Mental Health and the Criminal Justice System.<sup>4</sup> Working under the auspices of the Fair Justice For All Taskforce, the 24-member Subcommittee worked for eight months to develop “recommendations designed to promote a more efficient and effective justice system for those individuals who come to court and are in need of behavioral health services.”<sup>5</sup> The Subcommittee recommendations were presented to the

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<sup>1</sup> Conference of State Court Administrators, *Decriminalization of Mental Illness: Fixing a Broken System*, 2017, <http://cosca.nesc.org/~media/Microsites/Files/COSCA/Policy%20Papers/2016-2017-Decriminalization-of-Mental-Illness-Fixing-a-Broken-System.ashx>.

<sup>2</sup> COSCA expressly advocates for “1) an Intercept 0 capacity based standard for court-ordered treatment as used in court-ordered treatment of other illnesses to replace the dangerousness standard OW applied, 2) Assisted Outpatient Treatment (AOT) under a capacity-based standard, and 3) robust implementation of Intercepts 1 through 5 of the Sequential Intercept Model.”

<sup>3</sup> For more discussion on the Sequential Intercept Model (SIM), see *How to Use this Guide*.

<sup>4</sup> Subcommittee meeting materials and member information can be found at <https://www.azcourts.gov/cscommittees/Task-Force-on-Fair-Justice-for-All/Subcommittee/Mental-Health-and-Criminal-Justice>.

<sup>5</sup> Report and Recommendations of the Fair Justice Taskforce’s Subcommittee on Mental Health and the Criminal Justice System, May 2018, <https://www.azcourts.gov/Portals/74/TFFAIR/Subcommittee/FJ-MHCJ/Resources/Report042618TFFAIRMHCJ.pdf>.

full Taskforce for adoption in May, 2018. Arizona’s leadership provided the genesis for this project, which will address mental health responses at the local as well as the state court level by providing presiding judges a Guide to developing mental health protocols for their local jurisdictions.

The National Center for State Courts (NCSC) would like to thank the Arizona Administrative Office of Courts and the many professionals in multiple counties who have shared their time and expertise with the project team. Their extensive contributions and candor during site visits and interviews provided a wealth of information and context from which to develop this Guide. NCSC would like to especially thank Donald Jacobson for his leadership efforts coordinating and facilitating this project.

The contributions to and resources in this Guide reflect conversations with 49 state and local stakeholders from across Arizona, but primarily focused on the three pilot sites: Yavapai, Pima, and Coconino Counties. Additional observational opportunities and input was provided by Maricopa County. Input from the following agencies and courts are represented in this Guide:

## How to Use This Guide

This Guide is intended to be a practical tool for convening and developing protocols focused on working with justice-system involved individuals with mental or behavioral health issues. However, given the national focus on opioid abuse and 70,000+ overdose deaths in 2017, this Guide can and should be extended to those with co-occurring disorders. The Guide focuses on highlighting the important steps of convening stakeholders, assessing the mental health landscape, and implementing court and community responses and strategies. These process-oriented issues are addressed in the first section of the Guide. The second section focuses on the critical step of implementing protocols in a meaningful way as framed by the Sequential Intercept Model (SIM). Throughout both sections key resources and best practices are noted.

This Guide adopts the traditional SIM but also expands it to include new intercepts that allow for a better understanding of early intervention to effectively address mental health issues before they evolve into the justice system. COSCA’s policy paper expressly advocates incorporating “Intercept 0” for court-ordered treatment.<sup>6</sup> Expanding to earlier intercepts aligns with recent recommendations around a more expansive approach to the SIM.<sup>7</sup> Addressing awareness and action to respond to mental health needs, this guide incorporates both Intercept 0, and presents an even earlier stage, Intercept -1.

By overlaying the SIM framework, Figure 2 identifies intercepts and, for each one, references building blocks of infrastructure, assessment questions, and resources for both national resources and Arizona-specific actions and programming. Figure 2 provides a high-level overview of the protocol model for each intercept. Protocol building blocks at each intercept are organized in a pyramid shape, with more foundational protocols at the base of the pyramid. There are a number

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<sup>6</sup> COSCA Policy Paper, *supra* note 2 at 2.

<sup>7</sup> Policy Research Associates: <https://www.prainc.com/wp-content/uploads/2017/08/SIM-Brochure-Redesign0824.pdf>; Abreu, et al., Revising the paradigm for jail diversion for people with mental and substance use disorders: Intercept 0, 35 Behavioral Sciences & The Law 380-95 (Oct. 2017);

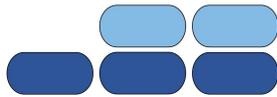
of building blocks that “reoccur” across intercepts. Examples of these include advanced directives, housing support, data sharing, etc.

This guide approaches protocol development from the individual’s perspective. This perspective supports a more expansive approach to the SIM, which has implications across both the civil and criminal justice system. Civil processes and responses often occur prior or simultaneously to involvement in the criminal justice system. Therefore, this guide explicitly integrates the interplay between the civil and criminal judicial responses

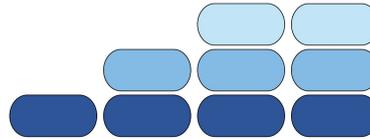
Figure 2. Protocol Building Blocks, by Intercept



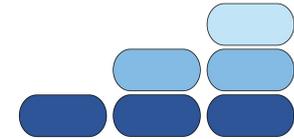
*Intercept -1: Public Health*



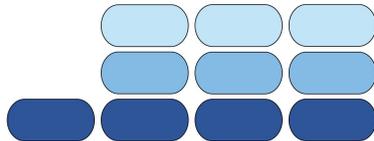
*Intercept 0: Community Supports and Services*



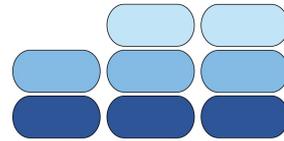
*Intercept 1: Contact with Law Enforcement*



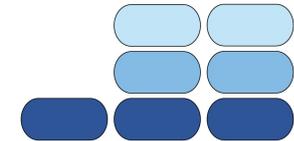
*Intercept 2: Initial Detention and Court Hearings*



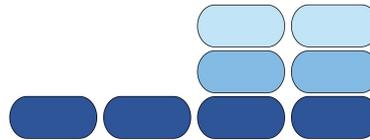
*Intercept 3: After Incarceration*



*Intercept 4: Re-entry*



*Intercept 5: Parole and Probation*



## Leading Change: Improving the Court’s Response to Mental Health

Courts are in a unique position to lead statewide and community by community change to address mental and behavioral health issues within their community. For decades, courts have gained experience in convening diverse stakeholders to tackle complex problems within and outside the justice system. From the evolution of specialty courts to dependency dockets, courts are often at the vanguard of responding to societal issues. This reality has paved the way for an independent but involved judiciary. At the national level, state court leadership has recognized the important role courts play in addressing the mental health crisis, “court leaders can, and must . . . address the impact of the broken mental health system on the nation’s courts—especially in partnership with behavioral health systems.”<sup>8</sup>

As leaders of their courts and communities, presiding judges are advantageously positioned to successfully convene and engage stakeholders and solve multi-faceted problems.<sup>9</sup>

This chapter of the Guide describes the many steps the presiding judge can take to improve the court’s response. The recommended checklist of action steps incorporates protocol development considerations across a diverse set of jurisdictions. While these action steps provide the “backbone,” protocol development will vary from jurisdiction to jurisdiction depending on existing efforts, available resources, and community infrastructure. Where possible, this Guide contains *Jurisdiction Considerations* that reflect these characteristics.

### GETTING STARTED

- Review this Guide and talk with your court administrator.
- Together, discuss the status of your court and community response to those with mental illness.
- What is the status of any other prior efforts undertaken in your county?
- Who has been involved and provided leadership on key efforts in this area?

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<sup>8</sup> COSCA, *supra* note 1 at 20.

<sup>9</sup> Recent conferences have focused on providing leadership training and resources for judges. See National Association for Presiding Judges and Court Executive Officers, 2017 Leadership Conference, <http://napco4courtleaders.org/2017-conference/>.

*Figure 3. The Community-Based Mental Health Response Mapping Process*



## Protocols in the Sequential Intercept Model

The Sequential Intercept Model (SIM) provides the framework for developing effective responses to persons with mental illness. The following description lays out the SIM with a brief description of the intercept, accompanying protocol building blocks at that intercept, opportunities for data collection and referrals, and available Arizona-specific and national resources. As previously mentioned, the protocol building blocks are structured with more foundational building blocks at the bottom of the pyramid.

The protocol building blocks are intended to be comprehensive, but additional building blocks may be identified depending on the needs of the individual jurisdiction. Several building blocks apply across intercepts; these building blocks are cross-referenced at each intercept.

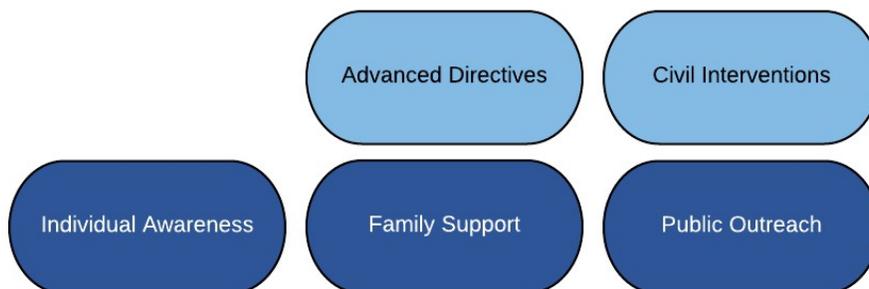
*[Example of Building Block Details]*



### *Intercept -1: Public Health*

Addressing mental health issues does not and should not begin with the justice system. Countless Americans contend with mental health issues, often successfully and without any court involvement. While there is no guarantee that an individual with mental and behavioral health issues may not eventually interact with the civil and/or criminal justice system, collaborators should recognize that early intervention is ideal. Therefore, as part of this Guide, we include Intercept -1 to illustrate the appropriate responses in the context of a public health problem.

*Figure 5. Building Blocks for Public Health*



**Public Health** intercept addresses the importance of laying a groundwork that sets up individuals, families, and public outreach systems for appropriate identification and responses to mental and behavioral health issues before *any* justice-related system comes into play. Options for leveraging legal powers include powers of attorney (POA), advance directives (PAD),

“springing” powers of attorneys,<sup>10</sup> and appointment of guardianship for determinations of incapacity.

Mental health awareness should be heightened through public outreach to individuals, family, and support systems. Awareness is intentionally broad and refers to awareness of resources. All protocol building blocks introduced in this intercept are relevant throughout the SIM. Figure 5 displays the relevant protocol building blocks organized in a pyramid style. Although all protocol building blocks should be considered, each of the layers of blocks build upon the foundation set by the bottom row.

**Individual Awareness:** Identifying mental illness is the first step to effective responses. Individuals can seek medical assistance and treatment if they are able to assess and recognize that it is necessary to seek help and comply with prescribed medications and/or treatment. Comprehensive treatment plans that are proactive and focus on developing protective factors against mental illness provide long-term effects.<sup>11</sup>

**Family Support:** Often family or friends are the first to respond to a crisis for a loved one. Organizations like National Alliance on Mental Health (NAMI), and the Treatment Advocacy Center (TAC) provide guidelines for how to respond to a mental health crisis, including how to navigate the Health Insurance Portability and Accountability Act (HIPAA), knowing how to find available resources within the community, and how to navigate the justice system (both civil and criminal).

**Public Outreach:** Public outreach and campaigns to enhance mental health awareness enable citizens, loved ones, and professionals to identify and correctly respond to the need for mental health interventions before a crisis occurs. Health fairs and mobile health units are examples.

**Advanced Directives:** Advanced directives enable an appointment of an agent to give consent or make decisions on an individual’s behalf concerning medical, mental health, and financial issues. Options for leveraging legal powers include powers of attorney (POA), advance directives (PAD), “springing” powers of attorneys, and appointment of guardianship for incapacity determinations.

**Civil Interventions:** Civil interventions include initiation of civil commitment orders and court-ordered treatment, including assisted outpatient treatment (AOT). Judges should consider hybrid solutions for civil commitment and/or competency restoration orders. Inpatient and outpatient

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<sup>10</sup> Beginning in 2010, Oregon law specifically allows powers of attorney that do not take effect at the time they are signed. The person who creates the power can give a specific date when it will go into effect, or list a particular event that would cause the power to be effective, or describe a situation when the power could be used. This type of power of attorney, called a “springing” power, springs to life only if the event the power mentions comes to pass. A person might prefer to give an agent power in the future at the time the person becomes unable to handle his or her affairs, but not before. In such a case, the person can say who will determine if the person has lost that ability.

Retrieved from Oregon State Bar - Powers of Attorney and Other Decision-Making Tools:

[https://www.osbar.org/public/legalinfo/1122\\_PowerofAttorney.htm](https://www.osbar.org/public/legalinfo/1122_PowerofAttorney.htm)

<sup>11</sup> For example, researchers are exploring the potential for integrating resilience concepts in therapeutic interventions as a way to bolster preventative psychiatric responses to mental health issues. See Amresh Shrivastava & Avinash Desousa, Resilience: A psychobiological construct for psychiatric disorders, 50 Indian J. of Psych 38-43 (2016).

can be delivered sequentially, or alternatively, beginning with outpatient options and utilizing inpatient settings as needed.

## ASSESSMENT QUESTIONS

- What public outreach on mental health currently exists (e.g., awareness campaigns, hotlines, health fairs)?
- What mental health awareness information is provided during routine medical visits?
- What resources are available on advanced directives, power of attorney, and other prospective legal planning? Where is this information provided? Is legal aid assistance available?
- What public benefit assistance is available? What are the processes to obtain and maintain financial assistance?

## RESOURCES

### Other State and National Resources

*The Stepping Up Initiative*

[County Elected Officials' Guide to Talking to the Media and the Public About People with Mental Illnesses in their Jail](#) (2018).

National Alliance on Mental Health (NAMI), NAVIGATING A MENTAL HEALTH CRISIS: A NAMI RESOURCE GUIDE FOR THOSE EXPERIENCING A MENTAL HEALTH EMERGENCY (2018) (Mental illness overview- includes self- perspective. There is also a section on mental health treatment expectations and crisis responses. The latter is more geared to family and friends.)

*Treatment Advocacy Center*

[Family and Loved Ones](#) (General information on crisis response, state laws, emergency preparedness, criminal justice involvement, guardianship, HIPAA, and various mental illnesses). See, Arizona-specific [section](#).

*Resilience Interventions*

Resilience meta-analysis found indicators of well-being were enhanced with social and emotional learning interventions: <https://www.npr.org/sections/health-shots/2018/05/23/613465023/for-troubled-kids-some-schools-take-time-out-for-group-therapy>

See also story on National Public Radio: <https://www.npr.org/sections/health-shots/2018/05/23/613465023/for-troubled-kids-some-schools-take-time-out-for-group-therapy>

## Arizona-Specific Resources

Arizona Health Choice Integrated Handbook, <http://www.healthchoiceintegratedcare.com/>

*A.R.S. Title 36, Chapter 32*, Arizona statutes set forth the requirements of a living will, a healthcare power of attorney, and a mental healthcare power of attorney. A mental healthcare power of attorney allows a person (principal) to authorize another (agent) to make mental healthcare decisions in accordance with the wishes as expressed in the directive when the principal is found to be incapable.<sup>12</sup> “Incapable” is statutorily defined (A.R.S. §36-3281(D)). An agent may admit the principal to an inpatient psychiatric facility only if that power of attorney authorizes the agent to make that decision (A.R.S. §36-3284). A sample mental health care power of attorney document is provided in statute and is also available on the Arizona Secretary of State and the Arizona Attorney General websites.<sup>13</sup> Both officials market these documents as life care planning resources for senior citizens. Persons who are seeking information on advance directives for those who are not senior citizens may not realize this information may be pertinent to their inquiry.

The Arizona Secretary of State maintains an optional Advance Directive Registry.<sup>14</sup> This is a free registry to electronically store and access one’s medical directives. It also allows the person to authorize a health care provider to access the document. Failure to file an advance directive with the Registry does not affect the validity of a health care directive (ARS §36-3293).

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<sup>12</sup> A Healthcare Power of Attorney may also contain instructions regarding mental healthcare. A person does not need to execute two separate documents.

<sup>13</sup> <https://www.azag.gov/seniors/life-care-planning>

<sup>14</sup> <http://azsos.gov/services/advance-directives>