

PRIVATE DEFENSE GUIDE TO BEHAVIORAL HEALTH COURT¹
2019

WHAT IS BEHAVIORAL HEALTH COURT (BHC)?

BHC is a treatment court (similar to Drug Court) which seeks to provide mental health and substance use disorder treatment to criminal defendants who have a serious and persistent mental illness, rather than have them follow the usual criminal prosecution path.

BHC is a **non-adversarial** collaborative court. Attorneys, both prosecutors and defense lawyers, play a different role than in traditional criminal court. When a BHC client is represented by a private defense attorney, that attorney is part of the BHC team for that particular client. The team for each client consists of the Judge, prosecutor, defense attorney, probation officer (when appropriate), Jail Health Reentry Services, and a community-based case manager. While every team member is expected to bring the perspective of his or her traditional role to the table, team members are expected to listen to each other and work together under the guidance of the treatment providers for the benefit of the clients. Because this is a treatment court, the treatment providers have the primary, and often, last say in presentations about the clients.

BHC's mission is to connect participating defendants with mental health and substance use disorder treatment in the community. The legal goal of BHC is to obtain a favorable resolution/termination of the criminal prosecution and to place the client into a treatment situation that will both serve his or her needs and help to insure that he or she will not be rearrested. Each defendant has his or her own *treatment plan*, which is monitored by the BHC team on an ongoing basis. The treatment goal of BHC is to link clients with mental illness with appropriate community services so that they will remain engaged in treatment even after BHC-mandated plan has been completed.

Clients may enter BHC with open cases, with a pending probation violation, with a deferred entry of judgment (DEJ), or with a probationary sentence with BHC as a condition of probation. **The court accepts only persons who are in custody.**² The length of BHC participation varies considerably and is necessarily tied to the client's specific needs and response to treatment. Every client makes a **minimum commitment of one year**. The legal outcome for those who are successful in BHC is negotiated on a case by case basis.

¹ This guide was written by Betsy Wolkin and Jim Senal, both of whom have represented many BHC clients, and was edited by the BHC Team. It is intended specifically for private defense attorneys. Attorneys are urged to familiarize themselves with the official BHC Policies and Procedures available at www.sfgov.org/site/uploadedfiles/courts/divisions/Collaborative_Justice/BHCPoliciesandProceduresManual.pdf

² At the present time, there are no exceptions to the custody requirement due to limited resources and the fact that all evaluations are conducted by Jail Health Reentry Services.

I THINK MY CLIENT IS MENTALLY ILL. HOW DO I GET HIM OR HER INTO BHC?

Generally, your client must have diagnosis of serious and persistent mental illness (schizophrenia, schizoaffective disorder, major depression or bipolar disorder) to be **eligible** for BHC. However, on rare occasions, individuals with other diagnoses who have serious impairments in functioning or a developmental disability diagnosis if linked to a Regional Center are admitted. Clients who are charged with murder or sex offenses are not eligible under any circumstances for BHC irrespective of their diagnosis. Defendants charged with misdemeanor or felony domestic violence offenses, misdemeanor or felony elder abuse offenses, misdemeanor or felony weapons offenses, or serious offenses (as defined by Penal Code section 1192.7(c)) are not eligible for BHC without the District Attorney's express consent. Defendants who have suffered a prior conviction for any offense listed in Penal Code section 1192.7(c) are not eligible for BHC without the District Attorney's express consent. Defendants charged with Penal Code 314.1 or 290 may be considered on a case by case basis.

BHC is not an alternative for defendants who are incompetent to stand trial within the meaning of Penal Code 1368.

Counsel should interview their clients thoroughly and discuss their prior psychiatric treatment history, diagnoses and past and current psychotropic to assess potential appropriateness for BHC.. Counsel should also determine their clients' willingness to continue to take/continue taking medication and participate in treatment. BHC is a voluntary program so your client must be amendable. To be an informed advocate for a client in BHC, this information is essential.

If you think your client may be eligible³, you must request that the court order an evaluation by Jail Health Reentry Services (JHRS) pursuant to Penal Code 4011.6 **for purposes of BHC**. This type of 4011.6 evaluation takes a minimum of three business days. The report will be returned to the court that ordered the evaluation. If the client is found diagnostically **suitable** for BHC, then the case can be sent to Department 7 (BHC) on a subsequent Tuesday afternoon, on a date specified by JHRS, for a case conference and eligibility determination. A case can be sent to Department 7 without the concurrence of the District Attorney in the court of origin, or over his or her objection, if the client is determined to be diagnostically **suitable**, except as mentioned above.

Counsel should carefully evaluate the timing of a referral to BHC. From a clinical point of view, the case should be referred to BHC as soon as possible after the client enters the criminal justice system. The sooner the client is in BHC, the sooner referrals can be made to community based treatment services and appropriate housing. Referrals are not

³ See BHC Flowchart (Appendix III) in the Policies and Procedures Manual:
www.sfgov.org/site/uploadedfiles/courts/divisions/Collaborative_Justice/BHCPoliciesandProceduresManual.pdf

initiated until formal acceptance (clinical and legal) to BHC and linkage to case management and residential treatment takes time. On the other hand, there may be legal situations where the timing of a referral to BHC should be carefully considered. There are cases that are better served by a referral prior to preliminary hearing and others where a better strategy might be to make the referral after a preliminary hearing. For example, if counsel believes that the defendant's legal situation will improve after preliminary hearing because (1) the case might be reduced to a misdemeanor, or (2) counsel anticipates that the evidence adduced at preliminary hearing will be more favorable to the defendant than the evidence contained in the police report, or (3) evidence may be adduced at preliminary hearing that tends to mitigate the crime. Under these circumstances, even if the 4011.6 report indicates that the defendant is eligible, referral to BHC for suitability might be strategically delayed.

Sometimes referral to BHC, despite diagnostic eligibility, may be delayed so that counsel has an opportunity to collect psychiatric records, conduct an independent diagnostic evaluation and develop other appropriate case mitigation materials which may aid admission and facilitate a disposition consistent with participation in BHC.

IF JAIL HEALTH REENTRY SERVICES (JHRS) FINDS THE CLIENT DIAGNOSTICALLY APPROPRIATE (OR ELIGIBLE) FOR BHC IN THE 4011.6, WHAT DO I DO NEXT?

If the client is diagnostically appropriate, the case goes to Department 7 (physically Department 15) for a Tuesday morning ⁴ case conference to determine a client's **legal eligibility** for BHC. Case conferences are held in the law library on the second floor, beginning at 9:00 AM every Tuesday and 9:00 AM every Thursday. Present during the case conference will be the Judge, the prosecutor assigned to BHC, the probation department and representatives from various treatment programs, including Jail Health Reentry Services.

Jail Health Reentry Services does a case presentation that includes the client's diagnoses, current treatment, mental health and substance use disorder treatment history and a proposed community treatment plan. If during the course of the representation of your client you have obtained information that would further inform Jail Health Reentry Services about the client's mental health history and background or suitability, this information should be provided to JHRS prior to the case conference so that it can be integrated into the suitability evaluation by JHRS.⁵ JHRS should be as familiar as possible with your client's treatment history prior to this conference. Case conferences are confidential and information provided by counsel during these

⁴ BHC is currently in session twice a week: Tuesday morning for persons in custody and Thursday morning for persons out of custody.

⁵ E-mail Melanie Kushnir, Deputy Director of Jail Health Reentry Services, at melanie.kushnir@sfdph.org, to alert her that you have supplemental materials that you are electronically forwarding or will drop off at the JHRS office at 650 Fifth Street, Suite 309.

conferences can only be used for treatment purposes.⁶

If the prosecutor agrees that the case is eligible for BHC, but requires a disposition, the case will be transferred to D15 for that purpose. If the prosecutor at the case conference does not think your client is legally eligible, because the offer to resolve the case is state prison or because the current charge or past criminal history makes him or her ineligible, the case may also be transferred to D15 in order to try to reach an appropriate disposition. The case conference is not the appropriate time to pre-try the case. The pretrial in D15 will be your opportunity to advocate for your client's **eligibility** for BHC and persuade the D.A. and/or the judge that your client should come into BHC. Defense counsel should be prepared to present any and all mitigating factors with respect to the criminal case. If the case cannot be resolved in D15 to enable the client to enter BHC, the case will be set for preliminary hearing or trial as soon as possible.

Acceptance requires that the client be **(1) suitable**, i.e. diagnostically appropriate for BHC and **(2) eligible**, i.e. can be treated in the San Francisco community health system and be amenable to treatment, meaning that the client is interested in participating in treatment for their mental health, and related problems. Acceptance then requires a determination about the legal posture of the case for admission while in BHC and agreement to that posture by the client, counsel, prosecutor, and court. Acceptance is case specific and determined on a case by case basis.

⁶ Every person who is present during case conferences is required to sign a confidentiality agreement. Counsel will be asked to do the same the first time they appear at BHC and it will remain on file and in effect thereafter. Confidential information shared at a case conference will not be used against your client in any fashion to further the criminal prosecution if your client is not accepted into BHC.

Acceptance into BHC may be predicated on the entry of a plea and a probationary sentence, a plea and a DEJ, no plea, an admission of a probation violation or no admission. Acceptance can occur with the assent of the D.A. or may be over her objection (for instance with a plea open to the court) if the client is found otherwise diagnostically appropriate and motivated to participate in BHC.⁷ The client will not be sentenced or probation reinstated and modified until released from custody. There is usually an agreement at the time of the agreement on the disposition as to what might happen if the client does well in BHC, such as a shortened probationary period, a reduction of the charged offense to a misdemeanor, early withdrawal of the plea and dismissal of the criminal charge on a deferred entry of judgment, or outright dismissal.

MY CLIENT WAS ACCEPTED INTO BHC. WHAT HAPPENS NEXT?

If your client is accepted into BHC, he or she will begin to attend BHC regularly. At the first appearance following acceptance, the judge welcomes your client and gives them a brief overview of the goals of BHC. Typically, while an individual is in-custody and awaiting placement in a treatment program, these appearances occur once or twice a month on Tuesday morning at 9:00AM. When you arrive, the team will discuss your client's status, his or her progress in in-custody treatment, and the expected wait-time for placement in a community program. If your client is out of custody, he or she will appear on Thursday morning. The case conference on Thursday is at 9:00 AM at which time there will be a progress report from the appropriate treatment provider regarding the client's progress in treatment and a recommendation as to incentives or sanctions, including remand into custody. **Whenever your client is scheduled to appear in BHC, your appearance is mandatory at the case conference in the Law Library, as well as, in Court that afternoon.** You may wish to be in contact with your client's case manager at times other than the formal case conference.

Following case-conferencing, counsel is also required to appear in court later that morning at approximately 10:30am. You will need to be present with your client at each of these appearances and ask the Judge to call your client's case(s) by calendar line. If you have a conflict, please arrange for another attorney to stand in for you and advise substitute counsel of what has been discussed in the case conference, what progress your client has made and what your client can anticipate from the court. **Do not assume that the Public Defender can stand in for you.**

HOW QUICKLY WILL MY CLIENT BE RELEASED FROM CUSTODY ONCE THEY ARE ACCEPTED IN BHC?

As soon as a client is accepted into BHC, Jail Health Reentry Services starts the process of getting approval from the Department of Public Health for appropriate services. As soon

⁷If the defendant is charged with a serious or violent felony as defined in the Penal Code, acceptance into BHC must be approved by the District Attorney and will not occur over their objection.

as a case manager is assigned, that person and the client will work together to further implement and/or revise the treatment plan as needed. Plans may include housing, medication management, therapy, education, employment and/or other appropriate services and meaningful activities. Most often, clients are linked with Citywide Case Management Forensics, an intensive case management program run by UCSF, and usually represented at BHC by Kathleen Connolly, Director. However, your client may be referred to any number of other treatment programs in San Francisco, depending on his or her needs.

A client is not released from custody without a treatment plan and housing. It is a stated goal to get people out of custody and into treatment as soon as possible, but resource limitations may result in clients spending many weeks in custody awaiting placement. **Clients should be advised of this possibility and urged to consider the long term benefits that will be derived from a positive placement in the community.** One benefit of referring a client to BHC as soon as possible in the criminal process is reduction of time in custody awaiting a community placement.

UNDER WHAT CIRCUMSTANCES WILL A CLIENT BE RETURNED TO CUSTODY?

A client is rarely remanded into custody as a sanction for not following his or her treatment plan. A remand, in the absence of a new criminal case, may occur if the client is engaging in high-risk behaviors, is a threat to public safety or is not engaged in treatment. If a client leaves a treatment program or has not been in treatment and whereabouts are unknown, a bench warrant will be issued.

UNDER WHAT CIRCUMSTANCES CAN MY CLIENT BE TERMINATED FROM BHC?

BHC is voluntary so a client can opt out of BHC at any time. His/her case will be returned to the criminal courts in the same posture that they came into BHC.

A new arrest may alter a client's status in BHC depending on the nature of the new offense. Usually, a new arrest requires a change in the treatment plan. The client may also be required to plead guilty to the new offense or admit a probation violation. This determination is made on a case by case basis.

The court may terminate a client from BHC for repeated new arrests, arrest for a serious violent crime and/or **prolonged non-compliance** with treatment

WHEN WILL MY CLIENT GRADUATE?

No client will graduate before completing a minimum of one year in BHC. Graduation for each client is determined on a case by case basis and is based on the individual's treatment needs, compliance with treatment and legal charges. **It is very important that counsel not mislead a client into thinking that one year of participation guarantees**

graduation. The goal is to graduate from BHC within a reasonable period of time after the client has become stable in his or her treatment in the community. A major criterion for graduation is demonstration of consistent engagement in treatment and being arrest-free. This generally involves a determination that the client has stable housing, is compliant with prescription medication (if on medication), is involved with some type of activity in the community (school, work, volunteer activities etc) and is connected with community services so that mental health treatment can continue. The case manager is the primary person who makes the decision with regard to clinical readiness for graduation with the concurrence of the BHC team. It is appropriate for counsel to inquire about the status of graduation after one year's participation in the program.