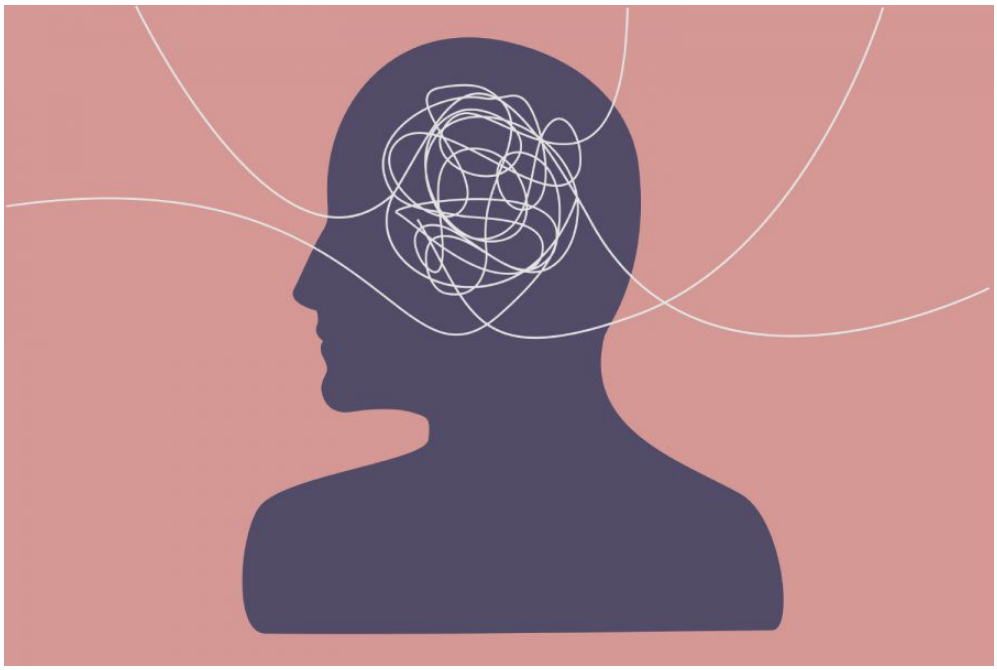

Where Do We Go from Here?
An Advocate's Guide to CARE Courts

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Community Assistance, Recovery, and Empowerment Act, or CARE Courts are now California law. Governor Newsom recently signed SB 1338, authorizing counties to begin creating their CARE Court programs.

This was not an outcome our community desired – rather than seeing the legal and bodily rights of our clients and community members subjected to a court case and all the risks that come with it, we would rather the legislature direct the funding to provide services to persons with severe mental health disease without the coercion of a court order. However, the fact is that the courts will be implemented swiftly in the next two years – with seven counties (Glenn, Orange, Riverside, San Diego, Stanislaus, Tuolumne, and the City and County of San Francisco) required to implement them by the end of 2023, and the rest by the end of 2024.

Homeless service providers, legal aid attorneys, and their allies must prepare. We have an obligation to hold CARE Courts to account, to provide as strong a legal and equitable defense as possible for our clients who come under their jurisdiction, and to ensure that the services they mandate are high-quality, accessible, and structurally sustainable. In a meeting with the California Bar Association over Zoom, advocates expressed that resources detailing the characteristics of these new courts in a concise way had not been promulgated. To that end, I have prepared the following thoughts on our next steps forward as a community.

Substantive and Procedural Legal Defense of CARE Court Clients

SB 1338 provides the following procedural guardrails that we can use to assist our clients.

1. *Right to Counsel*

CARE Court respondents have the right to be represented by counsel at all stages of any proceeding commenced under CARE Court.

2. *Legal Aid Attorneys May Represent CARE Court respondents*

QLSP attorneys may be appointed to represent clients. This is excellent news, as it will help create a continuity of services for respondents, who may already be represented by QLSP attorneys for other civil needs, such as benefits maintenance or infraction defense. If a QLSP attorney cannot be appointed, the court may appoint a public defender.

3. *Right to Supporter*

CARE Court respondents have the right for a supporter to be present at all stages of the CARE Court process. It is unclear whether supporters can be changed. A "supporter" is defined as someone who can provide the following assistance to the respondent:

> *(1) Offer the respondent a flexible and culturally responsive way to maintain autonomy and decision-making authority over their own life by developing and maintaining voluntary supports to assist them in understanding, making, communicating, and implementing their own informed choices.*
>
> *(2) Strengthen the respondent's capacity to engage in and exercise autonomous decision-making and prevent or remove the need to use more restrictive protective mechanisms, such as conservatorship.*
>
> *(3) Assist the respondent with understanding, making, and communicating decisions and expressing preferences throughout the CARE process.*

Relatedly, CARE Court proceedings are by default closed to the public, but the respondent may choose to have them opened to the public. The supporter in addition to any family or friends are allowed to be present at CARE Court proceedings at the respondent's discretion without the hearing being opened to the public.

4. *Respondents Have Additional Due Process Protections*

CARE Court respondents also have the following explicit procedural rights laid out in the statute, in addition to inherent Constitutional protections:

> *The respondent shall:*
>
> *(a) Receive notice of the hearings.*
>
> *(b) Receive a copy of the court-ordered evaluation.*
>
> *(c) Be entitled to be represented by counsel at all stages of a proceeding commenced under this chapter, regardless of the ability to pay.*
>
> *(d) Be allowed to have a supporter, as described in Section 5982.*
>
> *(e) Be present at the hearing unless the respondent waives the right to be present.*
> *(f) Have the right to present evidence.*
>
> *(g) Have the right to call witnesses.*
>
> *(h) Have the right to cross-examine witnesses.*
>
> *(i) Have the right to appeal decisions, and to be informed of the right to appeal.*

5. *Specific Severe Mental Illness Diagnosis Required*

First, the law provides that CARE Court respondents must be experiencing severe mental illness according to Welfare and Institutions Code 5600.3(b)(2):

> *For the purposes of this part, "serious mental disorder" means a mental disorder that is severe in degree and persistent in duration, which may cause behavioral functioning which interferes substantially with the primary activities of daily living, and which may result in an inability to maintain stable adjustment and independent functioning without treatment, support, and rehabilitation for a long or indefinite period of time. Serious mental disorders include, but are not limited to, schizophrenia, bipolar disorder, post-traumatic stress disorder, as well as major affective disorders or other severely disabling mental disorders. This section shall not be construed to exclude persons with a serious mental disorder and a diagnosis of substance abuse, developmental disability, or other physical or mental disorder.*

Such mental illness *must* fall under a diagnosis of schizophrenia spectrum and other psychotic disorders. The statute specifically provides that this does not include conditions that have psychotic features but are not primarily psychiatric in nature, such as "traumatic brain injury, autism, dementia, or neurologic conditions," or substance abuse disorder absent the psychotic/schizophrenic diagnosis. Having specific, concrete diagnoses for our clients referred to CARE Court will be a critical part in making sure this program is not abused to herd vulnerable unhoused persons into managed care who do not need it.

6. *Criminal Defendants Must Have Charges Dismissed*

Criminal defendants who are found mentally incompetent and are subsequently accepted into CARE programs *must* have the underlying charges dismissed in the interests of justice under Penal Code §1385. Presumably, the defendant's attorney will take care of this, but in case a judge tries to use CARE Courts similarly to formal diversion, the community should be aware that the bill amends §1370.01 of the Penal Code to add:

> *(iv) Refer the defendant to the CARE program pursuant to Section 5978 of the Welfare and Institutions Code. A hearing to determine eligibility for CARE shall be held within 14 days after the date of the referral. If the hearing is delayed beyond 14 days, the court shall order the defendant, if confined in county jail, to be released on their own recognizance pending that hearing. If the defendant is accepted into CARE, the charges shall be dismissed pursuant to Section 1385.*

7. *CARE Plans Must Be Least Restrictive Means, Enrollee Must Be "Substantially Deteriorating"*

As law enforcement, county employees, or family members begin to petition the courts for our clients to be enrolled in CARE Court, it is inevitable that some people will be referred to CARE Court who are already receiving significant and sufficient services and supports. Our job in the community is to make sure our clients do not receive disorienting and destabilizing duplicative services or become detached from the community built around them by HSPs and others. To that end, as I will undoubtedly continue to emphasize throughout this guide, thorough documentation is critical. A proposed CARE plan will fail the least restrictive means analysis so long as HSP, QLSP, or other staff and support persons can demonstrate that the person is currently enrolled in treatment.

In addition, the statute has a temporality requirement, stating that the person subject to the CARE Plan must be "substantially deteriorating" in order to qualify for services. We know that mental illness, and especially schizophrenic/psychotic mental illness, do not often follow a smooth upward or downward trajectory. Courts will be tempted to look at, e.g., a police report of someone having a particularly bad mental health day isolated from the larger picture of their mental health journey, and conclude that they must be deteriorating. As advocates, this is another opportunity for us to demonstrate, through documentation, that someone proposed for CARE Court is stable or improving, and thus that the requirement for "substantial" deterioration is not met.

8. *Referrals from First Responders Require Multiple Attempts*

Under §5974 of the CARE Act, first responders (police officers, firefighters, paramedics, outreach workers, etc.) who attempt to refer someone to CARE Court must demonstrate they have had:

> "…*repeated interactions with the respondent in the form of multiple arrests, multiple detentions and transportation pursuant to Section 5150, multiple attempts to engage the respondent in voluntary treatment, or other repeated efforts to aid the respondent in obtaining professional assistance."*

Unless the government can demonstrate through testimony or other evidence that repeated efforts were made, the respondent is *ineligible* for CARE Court. As advocates, we should assist defense counsel in verifying the government's assertions.

9. *CARE Court Referrals Must Include Affidavit(s) from Mental Health Professional(s)*

The forthcoming judicial council form used to file CARE process petitions requires, as one of its elements, an affidavit from a licensed behavior health professional, stating that

a. The licensed behavioral health professional or their designee has examined the respondent within 60 days of the submission of the petition, or has made multiple attempts to examine, but has not been successful in eliciting the cooperation of the respondent to submit to an examination, within 60 days of the petition, and that the licensed behavioral health professional had determined that the respondent meets, or has reason to believe, explained with specificity in the affidavit, that the respondent meets the diagnostic criteria for CARE proceedings, and

b. Evidence that the respondent was detained for a minimum of two intensive treatments pursuant to Article 4 (commencing with Section 5250) of Chapter 2 of Part 1, the most recent one within the previous 60 days.

Note both the 60-day assessment timeline, the specificity requirement regarding diagnostic criteria, and the evidentiary requirement for two prior involuntary commitments under WIC §5250. All of these should be rigorously tested by the respondent's defense team to ensure CARE Court is only used for the persons it is intended.

10. *Harassing and/or Fraudulent CARE Court Petitions are Sanctionable*

As many of us who have represented persons subject to court instruments know, with the coercion of court orders comes the potential for fraud and abuse. Thankfully, the Act does provide that any person who files more than one CARE Act petition that is "without merit or was intended to harass or annoy the respondent" may be found to be a vexatious litigant (as defined by Title 3A, commencing with §391, of Part 2 of the Code of Civil Procedure) by the court and sanctioned accordingly. What is unclear is whether this provision requires the repeated petitions to be made against the same person, or if they would count, e.g., NIMBY activists who file repeated fraudulent petitions against multiple unhoused persons.

11. *Respondents Shall Not Be Punished with Contempt or Failure to Appear Violations*

One of my personal fears when CARE Court was proposed was that enrollees who failed to appear for their CARE Plan hearings would be sanctioned with contempt or failure to appear. The statute explicitly states that failure to comply with a court order issued as part of a CARE Court proceeding may not result in penalty except those (such as termination from the program) that are listed in the Act itself.

In addition, respondents may also not be penalized whatsoever for failing to comply with medication orders, including termination of the CARE plan.

Access to Services

The CARE Act has fewer, but significant ways that counties can be held accountable for (not) providing an adequate level of services. This is another way advocate pressure and input will be critical during these hearings, pressing for the fullest, most appropriate interventions possible.

1. *Court May Fine County for Non-compliance*

The bill provides that "at any time during the CARE process," the court may find that the county/other local government entity is not complying with the court's orders. Upon making such a finding, the court is *required* to report it to the presiding judge of the superior court. In response, if the presiding judge corroborates that finding, they can fine the government $1000 per day, to a cap of $25000.

2. *Court May Appoint Special Master to Secure Care*

In addition, should the county continue to fail to comply with the court's orders, the presiding judge may appoint a special master, or a third party judge, to secure the care ordered at the county's cost. However, this process may only be invoked if a county has received five or more reports of noncompliance within a one-year period.

3. *Insurer Requirements*

Finally, the bill maintains a number of requirements for insurers who may have CARE Court respondents as plan members. There are too many to list here (the language can be found in § 1374.723 et seq.), but notably, beginning July 1, 2023:

a) All health care service plan contracts *must* cover the cost of developing an evaluation pursuant to a CARE plan, regardless of whether the provider is in- network.
b) Prior authorization for services *cannot* be required except for prescription drugs for care pursuant to a CARE plan.

The deepest potential problem regarding the quality of services provided to CARE Court respondents is the same problem plaguing the entire mental health care system in the United States, including California: a lack of qualified providers and an overabundance of need. I hope that advocates for the unhoused can, as a result of this law, begin establishing closer legislative ties to mental health care providers and push for stronger mandates for mental health care minimum standards. The legislation does not provide counties with additional funds to hire health care workers, and advocates and mental health care providers should push together for additional funds to support the mandate this program implements.

Assisting with Externalities

The following are a series of peripheral issues which will undoubtedly affect the success of CARE Court, but are otherwise not addressed or provided for in the legislation:

1. *Benefits Maintenance*

As the public benefits community knows, maintaining General Relief (Aid), CalFresh, CalWORKs, or any other benefit is very difficult for unhoused persons. For those deemed able to work, welfare-to-work requirements can be burdensome, condescending, and time-consuming to fulfill. For disabled unhoused persons, collecting the necessary medical documentation can be difficult. Maintaining personal medical records is also difficult as encampment sweeps and other displacement policies separate persons from their belongings and from their support networks.

Hopefully, with the new mandates that the CARE Act places on counties to provide specified types of care in a concrete, enumerated plan, advocates will able to solve problems with benefits cases quicker and more thoroughly than ever before. Having legal aid attorneys and social workers continuing to assist unhoused persons with maintaining their benefits will be critical to making CARE Courts provide the highest level of service they can.

2. *Transportation*

California is not known for the scope, efficiency, or quality of its public transportation, to the detriment of working-class and lower/fixed income residents, and especially for those experiencing homelessness. In a county such as Los Angeles, someone's "official" Department of Social Services Office may be several hours away by bus from their place of residence, support network, or service provider. Moreover, court sessions often begin as early as 8 AM. Meeting the logistical challenges of helping someone subject to a CARE plan make their court dates will be a huge hurdle for counties and advocates to overcome. Future legislative improvements to the CARE Act should *guarantee* access to transportation for CARE Court respondents.

3. *Maintaining Communication / Preventing Sweeps*

Continuing in the vein of logistical difficulties, possibly the largest difficulty in providing legal representation to unhoused persons is maintaining communication. Phones may be lost, stolen, damaged, confiscated, or traded for goods. In a time when more and more public places are barring access to non-customers, charging a phone can be difficult.

Service for low-cost phones is often low-quality. Many unhoused persons, especially those struggling with severe mental illness, may struggle to speak or understand over telephone, check email or voicemail, or return attorney communications.

In addition, as referenced above, encampment sweeps and other hostile displacement policies can not only result in advocates not knowing where their clients are, but also in the loss of critical medical and legal documentation.

As such, advocates in CARE Court should heavily emphasize § 5977.4 (a) of the CARE Act, which states that proceedings *shall* be conducted in an "informal non-adversarial atmosphere." For many judges used to traditional courts, there will likely be an adjustment period. As I stated in my post on CCWRO's Homelessness News and Notes blog (https://ccwrohomelessnessblog.wordpress.com/) when the legislation was unveiled, CARE Plans must prioritize empathy, charity, and forgiveness. The statutory language is a good first step, but it will be up to our community and coalition-building skills to enforce that atmosphere in the courts.

Maintaining Accountability

Finally, as advocates one of our most important responsibilities is holding programs like CARE Courts to account through providing transparency to the accomplishments and injustices of these systems. QLSPs and support centers are uniquely suited to tell client stories, collect data, and demand inclusion in the decision-making progress, and I hope that all of us, even if we elect not to participate in representing CARE Court respondents, will do the work necessary to make CARE Courts as just as they can be.

1. *Publicity*

Our community's deepest fear about CARE Courts is that they will turn into a rubber-stamp process by which vulnerable Californians are turned over to the conservatorship of the state and deprived of their legal and natural rights. One important tool to this end that we do not always pay enough attention to is publicity, primarily through news media.

As criminal justice reforms have taken root in the country, whether that's the abolishment of cash bail, the lowering or removal of mandatory minimums, or the election of progressive District Attorneys, a bitter counter-campaign has commenced from both (wealthy, capital and law enforcement-aligned) liberal and right-wing groups to spread fear about alleged "crime waves". As CARE Courts become established and persons who might normally be sent to

prison are given CARE Plans, there *will* without a doubt be a coordinated campaign to paint these reforms, such as they are, as threats to public safety. In order to forestall this outcome, we must do a better job of establishing relationships with journalists and highlighting good stories and successes, while still pointing out the shortcomings and potential improvements that should be made to these courts.

2. *Data Collection*

We should also take concrete steps to maintaining our own data and statistics about CARE Court outcomes. While DSS is required by the statute (§5983 et seq.) to promulgate an annual CARE Act report, there are obvious perverse incentives for state agencies to massage or obfuscate their data to paint the brightest possible picture of the program's success. As such, QLSPs, HSPs and other community partners must come together to share data and promulgate our own findings, whether through internal client data or public records requests.

3. *Access to DSS Meetings*

While the Brown Act provides for public access to many agency meetings, the law is unclear as to which subcommittee or other small group hearings have mandatory public access. Once we see how DSS plans on structuring its administration of the CARE Act, advocates must demand access and, ideally, the right to provide public comment, in as many levels of decision-making as is practical. As with data collection above, sunlight on the implementation of the law is the only way to make sure it's being implemented equitably.

4. *How CCWRO Can Help*

CCWRO, as a QLSP support center located in Sacramento with a long history of connecting grassroots organizations and administrative and legislative advocacy, is extremely well-positioned to collect stories and data about the implementation of the CARE program, and to collect community questions and feedback to provide to DSS. The Homelessness and Housing Attorney specialist at CCWRO, Andrew Chen, is particularly interested in focusing on improving the CARE Court process. From 2016 to 2019, he established a working relationship with the Los Angeles District Attorney's Office to improve its homeless court program, going from a "tough love" model to a low-barrier, equitable, service-oriented model through good relationships and clear communication. Now, he wants to attempt to help in similar ways to improve CARE Courts.

Further communications in this regard are forthcoming, Andrew's contact information is:

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