



PROSECUTOR-LED DIVERSION

Prosecutors Fact Sheet

What is Prosecutor Led Diversion?

Prosecutor-Led Diversion programs are characterized as diversion programs where prosecutors are responsible for deciding:

- What the eligibility criteria are for a given program,
- If a diversion offer is made in a given case,
- What conditions must be met to complete the program, and
- If a program participant has successfully completed those conditions.

It is not unusual for multiple criminal justice system partners to have input on these important decisions as many such programs involve cross-agency partnerships. In a prosecutor-led diversion program, however, these responsibilities are primarily exercised by the prosecutor.

Factors for Prosecutors to Consider in Creating a Diversion Program:

1. Pre- or Post-File: Should diversionary action take place before or after the filing of charges against a particular individual?
2. Charge Severity: What is the severity or degree of the charges in question (misdemeanor, felony, etc.)? What type of diversionary program would be appropriate? Should the individual be eligible for diversion at all?
3. Type of Charges: Is this the type of crime (narcotics-related, robbery, etc.) that would be appropriate for diversion? Is there an applicable diversionary program available?
4. Other Criteria: Are there additional factors, such as drug abuse/dependence, mental health, homelessness, etc., that should be considered regarding diversionary action?
5. Type of Intervention: What type of intervention would be appropriate for this defendant? Some examples of intervention types include:
 - a. Case management
 - b. Restorative justice
 - c. Education
 - d. Drug treatment
 - e. Mental health treatment
6. Length of Intervention: What is the appropriate length of time for an applicable diversionary program? Programs range from 30 days to over 2 years, with other time periods also being used.
7. Anticipated Participant Volume: How many defendants are likely to utilize or apply to the diversionary program? Is this a high-volume jurisdiction that needs additional resources to create and maintain an effective diversionary program?

Top ten things that Prosecutors should know:

1. Diversion began to emerge as early as the 1940s in the United States, and programs begun prior to the 1990s have tended to be prosecutor-led. In recent years, diversion programs have tended to be court- or pretrial services-led.
2. Diversion programs can be authorized by a provision or determined by prosecutorial discretion. Provisions often limit eligibility and take into account the types of offenses and offenders that can be considered for diversion.
3. Certain types of crimes, along with offenders who have a prior history of such crimes, are often excluded from diversion eligibility. These often include felony crimes, crimes of violence, drug trafficking offenses, victim-involved offenses, weapons-involved offenses, gang-involved offenses, and domestic violence offenses.
4. Prosecutor-led diversion often take into account the rights of a victim, if one exists. Some programs require the consent of an identifiable victim, or consultation with an identifiable victim prior to defendant's admission. In other programs, no consent is required.
5. Defendants who are admitted into a prosecutor-led diversion program can be responsible for some payment of costs. Program requirements range from a complete payment of costs due prior to program entry all the way to no costs being imposed on the participant.
6. The length of these diversion programs range from as little as 30 days to as much as 2 years or more.
7. Offers of diversion can be extended to an eligible defendant pre-filing of charges, post filing but pre-arraignment, or post-arraignment but pre-adjudication.
8. Prosecutor-led diversion programs often feature a number of restorative justice elements, such as a specified number of required community service hours, a victim panel or peace-making circle, a required letter of apology or reflective writing, and financial restitution.
9. Programs also often feature mandated social services, such as drug treatment, mental health treatment, housing assistance, employment assistance, education assistance, and public benefits assistance.
10. Different programs have different requirements for the entry of a plea or admission prior to entry into the program. In some instances, a formal plea to the charge or charges is required. Alternatively, a written admission or an agreement that an offense was committed may be required. In some programs, no plea or admission is mandated.

Frequently Asked Questions

•What is Diversion?

Diversion is a decarceration strategy that focuses on keeping certain people facing charges out of jail and off a strained criminal justice system. Low level offenders, people facing mental health or addiction challenges are some of the major groups considered for diversion.

•What are the goals and usefulness of successful prosecutor-led diversion?

A successful prosecutor-led diversion program can save resources by diverting eligible people out of traditional case processing in an over-burdened criminal justice system. Specifically, this can minimize the costs of conviction-related incarceration, while also assisting these individuals to avoid the collateral consequences of incarceration and recidivism down the line. Prosecutor-led diversion can also help to reduce these individuals' contact with more seasoned offenders, which is a significant risk factor. Ultimately, this type of program can provide restorative justice to qualifying individuals, while also serving to expedite case resolution.

•What are a prosecutor's responsibilities under prosecutor-led diversion?

Under this model, a prosecutor is largely responsible for determining the eligibility criteria for the program, as well as deciding whether a diversion offer will be made in a particular case. This process may vary depending on the basis for the creation of the program. Diversion may be implemented pursuant to a court rule or statute, or alternatively, it may be governed through prosecutorial discretion. Also, under this model, it will be the prosecutor's responsibility to determine whether a program participant has successfully completed the diversion program's conditions.

•What is the basis in creating a particular prosecutor-led diversion program?

A prosecutor-led diversion program can be created through a statute or court rule. Alternatively, it can be implemented according to prosecutorial discretion. If the program is created through a provision, such as a statute or court rule, this provision may automatically impose certain limitations on the program and its participants. Such limitations often address eligibility requirements, such as the type of offenses that can and cannot be considered for diversion or the severity of the offense, such as felonies and misdemeanors. A program based on prosecutorial discretion, on the other hand, grants more control to the prosecutor in making diversion decisions and applying limitations to eligible defendants.

•What types of limitations can a prosecutor set on individuals' eligibility for diversion?

In creating a diversionary program, particularly one governed by prosecutorial discretion, certain limitations on eligibility can be set. Such limitations address the exclusion of certain types of crimes from diversion eligibility, such as felonies or crimes of violence. In addition, individuals with a prior criminal history, as well as defendants with additional pending criminal matters or those who have already received the benefit of a prior diversion, can also be limited or even excluded from diversion eligibility. Generally, a prosecutor must consider various interests, including public safety, victim interests, case management and sentencing guidelines, in creating the guidelines and limitations of a diversionary program.

