Performance Standards & Goals for Pretrial Release & Diversion

A Project of The National Association of Pretrial Services Agencies

Approved--By The Board Of Directors Of The National Association Of Pretrial Services Agencies.

August, 1995

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FOREWORD

In 1978 the National Association of Pretrial Services Agencies (NAPSA) adopted Performances Standards and Goals for Pretrial Release and Diversion. The purpose of this effort was to establish standards for the implementation of sound release and diversion practices. These Standards have stood the test of time. They have inspired us, shaped our programs and guided us well for the past seventeen years.

During this time period, there has been a change in the attitude of our society which has resulted in the growth of innovative programs. Challenges to some of these program practices have produced court decisions. In an attempt to address the changing issues facing diversion and to continue to provide relevant information to our profession, the NAPSA Board of Directors created the Diversion Standards Revision Committee to draft the needed updates.

In 1992 our committee began the process of reviewing the Standards, researching the case law and gathering information on program practices. We found the standards somewhat intimidating to edit, a multitude of program practices to review, but surprisingly little case law and research findings to report. However, the committee remained undaunted and after three years of dedicated effort, we have reached our goal of drafting an updated, easy to use version of the Standards. Please keep in mind that we have updated, not rewritten the standards. Familiar wording and passages from the original text appear as well as references to some of the same "old" case law and research. If possible, we

recommend that the 1995 version be read in conjunction with the 1978 version. The original standards contain such valuable information that all persons involved in diversion need to have the document on hand and reach for it often. Therefore, our committee recommended that the original standards be reprinted.

In an effort to encourage research which is vital to the continued growth of diversion, an appendix on research is included, written by John Bellassai. Another appendix written by Wendy Foster, addresses confidentiality between diversion practitioner and participant.

In February 1995 the NAPSA Board of Directors adopted the standards as revised and accepted our recommendation that the 1978 version be reprinted.

Many people need to be thanked for their contributions to this project. The Diversion Revision Committee Members, Anne Gatti, Co-Chairperson, Jim Brown, John Bellassai, Sue Brannen, Barbara Darbey, Wendi Foster, Mary M. Deleo, Paul Tinjum, Donald Miller, and Lee Munn, retired member, gave tireless dedication to achieve this goal. In thanking the committee, the evenings spent at computers reviewing and rewriting chapters, the time and money spent on traveling to the meetings, the long hours of discussion, the long distance, fax and mailing costs assumed by the committee members are recognized. To Anne Gatti, appreciation is expressed for agreeing to be co-chairperson and all of the extra effort she devoted to the completion of this project.

We were fortunate to have two of the 1978 committee members, John Bellassai and Bruce Beaudin, to provide the historical perspective on the original standards and to offer suggestions and thought provoking commentary.

Special appreciation is expressed to the Pretrial Services Resource Center for providing us with the relevant case law, reviewing and commenting on preliminary drafts and for providing support. A

special thank you goes to Jolanta Juszkiewicz for sharing her outstanding intellect, insight and assistance.

Our gratitude is extended to the reviewers of our document: The Honorable Bruce Beaudin, District of Columbia Superior Court (retired), The Honorable William R. Wilkins of the Fourth Circuit Federal Court of Appeals, Minnesota State Public Defender John M. Stewart, D. Alan Henry, Director of the Pretrial Services Resource Center, David M. Davies, Administrator of Pretrial Services Division of Los Angeles County and Deputy Prosecutor Jess Wilson of Cuyahoga County, Ohio. Their willingness to review our document and take the time to provide thoughtful commentary and suggestions proved invaluable.

To the South Carolina 11th Judicial Circuit Solicitor, Donald V. Myers, my personal appreciation is given for allowing me the time and flexibility to chair this process. Assistant Solicitor Tom Chase is acknowledged for his assistance with the legal cites in this document.

Bruce Beaudin wrote in the forward to the 1978 version that the formation of standards and their implementation is an ongoing process. As that project represented the first step, this version represents the second. The process is still by no means complete. Appreciation is expressed to the NAPSA Board

of Directors and especially to George Moriarty, Past President, and Melinda Wheeler, President, for the commitment to carry this process forward.

Ann Davidson Asman Chairperson July 1995

INTRODUCTION

CHAPTER 1 POINT OF PRETRIAL DIVERSION

1.1 DEFENDANTS SHOULD BE ELIGIBLE TO APPLY FOR AND/OR ENROLL IN A PRETRIAL DIVERSION PROGRAM FROM THE POINT OF THE FILING OF FORMAL CHARGES UNTIL THE POINT OF FINAL ADJUDICATION. DEFENDANTS SHOULD BE INFORMED OF THE POSSIBILITY OF DIVERSION AS SOON AS POSSIBLE. AN OPPORTUNITY TO CONSULT WITH COUNSEL SHOULD BE PROVIDED BEFORE HAVING TO DECIDE WHETHER TO APPLY FOR AND/OR ENROLL IN DIVERSION.

1.2 A DEFENDANT'S DECISION TO APPLY FOR AND/OR ENROLL IN A PRETRI- AL DIVERSION PROGRAM SHOULD BE VOLUNTARY.

1.3 APPLYING FOR OR THE POSSIBILITY OF ENROLLING IN A PRETRIAL DIVERSION PROGRAM SHOULD NOT PRECLUDE A DEFENDANT FROMCONSIDERING AND PURSUING OTHER STRATEGIES WHICH MAY BE MORE BENEFICIAL THANTHE DIVERSION OPTION.

CHAPTER 2 ELIGIBILITY

2.1 WHEN ESTABLISHING ELIGIBILITY CRITERIA EVERY EFFORT SHOULD BE MADE TO ENCOMPASS ALL POTENTIAL PARTICIPANTS WHO CAN BENEFIT FROM THE PRETRIAL DIVERSION OPTION.

2.2 NO POTENTIAL PARTICIPANT SHOULD BE DENIED ACCESS TO THE PRETRIAL DIVERSION OPTION BASED UPON RACE, ETHNIC BACKGROUND, RELIGION, GENDER, DISABILITY, MARITAL STATUS, SEXUAL ORIENTATION OR ECONOMIC STATUS. NO PERSON WHO IS PROTECTED BY APPLICABLE FEDERAL OR STATE LAWS AGAINST DISCRIMINATION SHOULD BE OTHERWISE SUBJECTED TO DISCRIMINATION FOR ELIGIBILITY PURPOSES.

2.3 FORMAL ELIGIBILITY GUIDELINES SHOULD BE ESTABLISHED AND REDUCED TO WRITING AFTER CONSULTATION AMONG PROGRAMREPRESENTATIVES AND APPROPRIATE CRIMINAL JUSTICE OFFICIALS. THE GUIDELINES SHOULD BE DISTRIBUTED TO ALL INTERESTED PARTIES.

2.4 POTENTIAL PARTICIPANTS SHOULD NOT BE DENIED THE PRETRIAL DIVERSION OPTION BASED SOLELY ON THE INABILITY TO PAY RESTITUTIONŒOR PROGRAM FEES.

2.5 PRETRIAL DIVERSION PROGRAMS HAVE AN AFFIRMATIVE OBLIGATION TO INSURE THAT AGREED UPON ELIGIBILITY GUIDELINES ARE ADHERED TO AND HONORED BY OTHER ACTORS IN THE CRIMINAL JUSTICE SYSTEM.

2.6 WHILE IT IS THE PROSECUTOR'S PREROGATIVE TO INITIATE PRETRIAL DIVERSION CONSIDERATION FOR POTENTIAL PARTICIPANTS, COURTS SHOULD HAVE A ROLE IN MONITORING THE FAIR APPLICATION OF DIVERSION ELIGIBILITY GUIDELINES.

CHAPTER 3 ENROLLMENT

3.1 PRIOR TO MAKING THE DECISION TO ENROLL IN A PRETRIAL DIVERSION PROGRAM, A POTENTIAL PARTICIPANT SHOULD BE GIVEN THE OPPORTUNITY TO REVIEW WITH COUNSEL A COPY OF THE GENERAL PROGRAM REQUIREMENTS INCLUDING PROGRAM DURATION AND POSSIBLE OUTCOMES.

3.2 PRETRIAL DIVERSION PROGRAMS MAY REQUIRE CONDITIONS OF THE PARTICIPANT AT THE POINT OF ENROLLMENT. NO ADDITIONAL CONDITIONS SHOULD BE IMPOSED ON THE PARTICIPANT BY THE COURT OR THE PROSECUTOR.

3.3 ENROLLMENT IN THE PRETRIAL DIVERSION PROGRAM SHOULD NOT BE CONDITIONED ON A FORMAL PLEA OF GUILTY. AN INFORMAL ADMISSION OF RESPONSIBILITY MAY BE ACCEPTABLE AS PART OF A SERVICE PLAN. POTENTIAL PARTICIPANTS WHO MAINTAIN INNOCENCE SHOULD NOT AUTOMATICALLY BE DENIED THE DIVERSION OPTION.

3.4 TIME LIMITS FOR THE DURATION OF PARTICIPATION IN A PRETRIAL DIVERSION PROGRAM SHOULD BE ESTABLISHED.

CHAPTER 4 SERVICES

4.1 PRETRIAL DIVERSION PROGRAMS SHOULD UTILIZE INDIVIDUALIZED AND REALISTIC SERVICE PLANS THAT FEATURE ACHIEVABLE GOALS. SERVICE PLAN FORMULATION SHOULD OCCUR AS SOON AS POSSIBLE AFTERENROLLMENT IN CONSULTATION WITH THE PARTICIPANT AND SHOULD BE REDUCED TO WRITING.

4.2 SERVICE PLANS SHOULD ADDRESS THE SPECIFIC NEEDS OF THE

PARTICIPANT AND NOT BE DESIGNED MERELY TO RESPOND TO THE CRIMEŒCHARGED.

4.3 SERVICE PLAN REQUIREMENTS SHOULD BE THE LEAST RESTRICTIVE POSSIBLE TO ACHIEVE AGREED-UPON GOALS AND SHOULD BE STRUCTURED TO HELP THE PARTICIPANT AVOID BEHAVIOR LIKELY TO LEAD TO FUTURE ARRESTS.

4.4 RESTITUTION, VOLUNTEER COMMUNITY SERVICE WORK AND DRUG TESTING

MAY BE INCLUDED IN AN INDIVIDUALIZED SERVICE PLAN.

4.5 SERVICE PLANS SHOULD BE REVISED WHEN NECESSARY. NO ADDITIONAL REQUIREMENTS SHOULD BE SOUGHT UNLESS NECESSARY TO ACHIEVEAGREED-UPON GOALS. MODIFICATIONS SHOULD BE DETERMINED ONLY AFTER CONSULTATION WITH THE PARTICIPANT. ANY AGREED-UPON MODIFICATIONS SHOULD BE REDUCED TO A WRITTEN AGREEMENT.

CHAPTER 5 DISMISSAL

5.1 PRETRIAL DIVERSION PROGRAM POLICY SHOULD PROVIDE FOR A DISMISSAL WITH PREJUDICE UPON SUCCESSFUL COMPLETION OF PROGRAM REQUIREMENTS. IT SHOULD BE THE RESPONSIBILITY OF THE PRETRIAL DIVERSION PROGRAM TO INSURE GENERAL ENFORCEMENT OF DISMISSAL AGREEMENTS.

5.2 A PRETRIAL DIVERSION PROGRAM SHOULD LIMIT THE INFORMATION PROVIDED TO THE COURT OR PROSECUTOR TO THAT WHICH IS NECESSARY TO VERIFY THAT PROGRAM REQUIREMENTS WERE MET AND THAT THE SERVICEPLAN WAS ADDRESSED SATISFACTORILY.

5.3 UPON SUCCESSFUL COMPLETION OF A PRETRIAL DIVERSION PROGRAM, A PARTICIPANT MAY HAVE HIS/HER RECORD SEALED OR EXPUNGED IN COMPLIANCE WITH STATE LAW OR AGREED UPON POLICIES. CRIMINAL JUSTICE PERSONNEL SHOULD BE PERMITTED ACCESS TO SUCH RECORDSSOLELY TO DETERMINE WHETHER A DIVERSION CANDIDATE HAS PREVIOUSLY BEEN DIVERTED.

CHAPTER 6 NON-COMPLETION

6.1 A PARTICIPANT SHOULD BE ABLE TO WITHDRAW FROM THE PRETRIAL DIVERSION PROGRAM VOLUNTARILY AT ANY TIME PRIOR TO ITS COMPLETION AND ELECT CRIMINAL JUSTICE PROCESSING WITHOUT PREJUDICE.Œ™6.2 THE PRETRIAL DIVERSION PROGRAM SHOULD RETAIN THE RIGHT TO TERMINATE SERVICE DELIVERY OR RECOMMEND TERMINATION WHEN THE PARTICIPANT DEMONSTRATES UNSATISFACTORY COMPLIANCE WITH THESERVICE PLAN. WHEN SUCH A DETERMINATION IS MADE THE PARTICIPANT SHOULD BE RETURNED TO CRIMINAL JUSTICE PROCESSING WITHOUT PREJUDICE. THE PROGRAM SHOULD PROVIDE WRITTEN REASONS FOR THE DECISION TO THE PARTICIPANT, DEFENSE COUNSEL, PROSECUTOR AND/OR COURT.

6.3 PRIOR TO IMPLEMENTATION, A PARTICIPANT FACING TERMINATION SHOULD BE AFFORDED AN OPPORTUNITY TO CHALLENGE THAT DECISION WITH DEFENSE COUNSEL IF SO DESIRED.

6.4 ARRESTS THAT OCCUR DURING THE PARTICIPANT'S COURSE OF THE PRE-TRIAL DIVERSION PROGRAM PARTICIPATION SHOULD NOT BE GROUNDSFOR AUTOMATIC TERMINATION. A REVIEW PROCEEDING AT WHICH THE FACT OF THE ARREST AND

ALL OTHER RELEVANT CIRCUMSTANCES ARE CONSIDERED TOGETHER WITH THE PARTICIPANT'S RECORD OF PERFORMANCE SHOULDENSUE. THE DECISION WHETHER OR NOT TO TERMINATE SHOULD OCCUR ONLY AFTER WEIGHING ALL FACTORS.

CHAPTER 7 CONFIDENTIALITY

7.1 PRETRIAL DIVERSION PROGRAMS SHOULD SPECIFY TO THE POTENTIAL PARTICIPANT AT THE TIME OF ENTRY PRECISELY WHAT INFORMATION MIGHT BE RELEASED, IN WHAT FORM IT MIGHT BE RELEASED, UNDER WHAT CONDITIONS IT MIGHT BE RELEASED AND TO WHOM IT MIGHT BE RELEASED, BOTH DURING AND AFTER PARTICIPATION. AS A GENERAL RULE, INFORMATION GATHERED IN THE COURSE OF THE DIVERSION PROCESS SHOULD BE CONSIDERED CONFIDENTIAL AND NOT BE RELEASED WITHOUT THE PARTICIPANT'S PRIOR WRITTEN CONSENT.

7.2 PRETRIAL DIVERSION PROGRAMS SHOULD STRIVE TO GUARANTEE, BY MEANS OF INTERAGENCY OR INTRA-AGENCY OPERATING AGREEMENTS OR OTHERWISE, THAT NO INFORMATION GATHERED IN THE COURSE OF A DIVERSION APPLICATION OR PARTICIPATION IN A DIVERSION PROGRAM WILL BE ADMISSIBLE AS EVIDENCE IN THE CASE FOR WHICH DIVERTED OR IN ANY SUBSEQUENT CIVIL, CRIMINAL OR ADMINISTRATIVE PROCEEDING.

7.3 GUIDELINES SHOULD BE DEVELOPED FOR DETERMINING THE TYPES OF INFORMATION TO BE CONTAINED IN REPORTS TO BE RELEASED TO CRIMINAL JUSTICE AGENCIES IN SUPPORT OF A DISMISSAL RECOMMENDATION. SUCHŒREPORTS SHOULD BE LIMITED TO INFORMATION WHICH IS VERIFIED AND NECESSARY TO DETERMINE WHETHER THE PARTICIPANT HAS MET THE STANDARDS FOR SUCCESSFUL COMPLETION OF THE PRETRIAL DIVERSION PROGRAM.

7.4 QUALIFIED RESEARCHERS AND AUDITORS SHOULD, UNDER LIMITED AND CONTROLLED CONDITIONS, BE AFFORDED ACCESS TO PARTICIPANT RECORDS PROVIDED THAT NO IDENTIFYING CHARACTERISTICS OF INDIVIDUAL PARTICIPANTS ARE USED IN ANY REPORT.

CHAPTER 8 PROGRAM EVALUATION

8.1 EACH PRETRIAL DIVERSION PROGRAM SHOULD ROUTINELY MONITOR AND EVALUATE ITS PERFORMANCE AND PRACTICES.

8.2 EVALUATION OF PRETRIAL DIVERSION PROGRAMS SHOULD MEET ACCEPTED DESIGN, RELIABILITY AND VALIDITY STANDARDS.

CHAPTER 9 ORGANIZATIONAL STRUCTURE

9.1 PRETRIAL DIVERSION PROGRAMS SHOULD HAVE A WELL ARTICULATED

MISSION STATEMENT. PROGRAMS SHOULD PROVIDE AND MAINTAIN ADEQUATE AND APPROPRIATE RESOURCES NECESSARY TO ACCOMPLISH THEIR MISSIONS.

9.2 STAFFING AND ADVANCEMENT SHOULD FOLLOW AFFIRMATIVE ACTION/EQUAL EMPLOYMENT OPPORTUNITY GUIDELINES. STAFF SHOULD BE SELECTED ON BASIS OF SKILLS AND EXPERIENCE.

APPENDIX A STAFF/PARTICIPANT PRIVILEGE

APPENDIX B MONITORING AND EVALUATION PRETRIAL DIVERSION PROGRAM PERFORMANCE AND PRACTICES CHAPTER 1 POINT OF PRETRIAL DIVERSION

1.1 Defendants Should Be Eligible To Apply For And/Or Enroll In A Pretrial Diversion Program From The Point Of The Filing Of Formal Charges Until The Point Of Final Adjudication. Defendants Should Be Informed Of The Possibility Of Diversion As Soon As Possible. An Opportunity To Consult With Counsel Should Be Provided Before Having To Decide Whether To Apply For And/Or Enroll In Diversion.

COMMENTARY

Criminal justice systems operate differently. Consequently, the exact point at which a defendant becomes eligible for pretrial diversion varies. These Standards take the position that eligibil- ity for enrollment in a pretrial diversion program should occur after the filing of formal charges and only after the potential participant has had an opportunity to meet with counsel. Eligibil- ity should end at the time of adjudication.

Pretrial diversion enrollment prior to formal filing of charges is viewed as premature and generally inconsistent with the requirements for voluntariness contained in this Standard. The post-charging stage in the proceedings has been purposely recom- mended as the point for diversion eligibility determination because at this point the government has filed legal documents indicating its intention to prosecute.

Eligibility determination at this stage minimizes the likeli- hood of diverting cases which lack sufficient merit to prosecute. It is self-evident that if non-meritorious cases should not be prosecuted, they also should not be funneled into the diversion process. Only after the formal filing is the defendant aware of both the actual charge(s) and the potential consequences of prosecution. These charges may or may not be identical to the initial police charge(s).

This Standard takes the view that there is a real need for the assistance of counsel in order for the defendant to consider the alternative strategies to make an informed, voluntary choice to enter the pretrial diversion process. Assistance of counsel is also clearly needed when making a knowing and voluntary waiver of specific constitutional rights such as the right to speedy trial, the right to trial by jury, and the right to have the government prove its case beyond a reasonable doubt. These and other rightsŒare generally required to be waived upon entry into pretrial diversion.

This Standard considers that final adjudication eliminates eligibility consideration for pretrial diversion.

Avenues into pretrial diversion should exist at each stage prior to final adjudication, including post-preliminary hearing, post-indictment and at the conclusion of pretrial motions. Advocating continued access to diversion at each of the above mentioned points is specifically included to make diversion available to as many meritorious cases as possible.

1.2 A Defendant's Decision To Apply For And/Or Enroll In A Pretrial Diversion Program Should Be Voluntary.

COMMENTARY

This concept is so fundamental a consideration that it is included as a matter of definition. Legal consideration aside, common sense dictates that a defendant's participation in pretrial diversion be voluntary. Since one of diversion's primary goals is to minimize arrest-provoking behavior on the part of program participants, failure on the part of the participant to be interested in changing that behavior and lack of motivation to do so would obviously hinder progressive change and thereby jeopardize successful completion of the pretrial diversion process. To eliminate free choice in opting for diversion is to negate the importance of participant motivation. This may defeat the entire purpose of diversion. The choice to participate in pretrial diversion also must be an informed one in order to be truly voluntary. The program and the court should inquire of the defendant whether he/she understands the nature of the charge(s), the requirements of the program and the consequences of failing to complete the program, and that he/she is waiving certain statutory and constitutional rights by opting for diversion.

Finally, the choice must be uncoerced to the extent possible given the fact that the defendant may face full prosecution if he/she does not opt for diversion. Accordingly, the program and the court must make every effort to ensure that the choice is not only knowingly but freely made. The court as well as the program should determine whether any promises, threats or inducements (other than dismissal of the case for successful completion of the program) were made to entice the defendant to opt for diversion. ŒThe program and the court should also satisfy themselves that at

the time of making the diversion decision the defendant is not under the influence of alcohol or drugs or otherwise suffering from diminished capacity. Only then can it be said with confidence that the decision is voluntarily made.

1.3 Applying For Or The Possibility Of Enrolling In A Pretrial Diversion Program Should Not Preclude A Defendant From Considering And Pursuing Other Strategies Whish May Be More Beneficial Than The Diversion Option.

COMMENTARY

While, from the defendant's perspective, pretrial diversion may be the most satisfactory avenue to take to secure a favorable disposition of the pending charge(s), this is not necessarily always the case. Accordingly, alternative strategies should be evaluated closely by the defendant with counsel assisting.

Obviously, a discussion between the defendant and counsel of strategies other than diversion must occur in the context of discussing the diversion option itself. Considerations which should be discussed

with counsel include an evaluation of the likelihood of conviction if the defendant were to opt for prose- cution in the adversary system. After this evaluation, an assess- ment of possible sentences that could be imposed if convicted should be followed by a discussion of the likely sentence, based on counsel's experience. Further, there must be an honest appraisal of the likely consequences of opting for diversion and then failing to complete the program successfully. It is only through this appraisal that the individual defendant can truly weigh the consequences of the various courses of action available.

END NOTES FOR CHAPTER 1

CHAPTER 2 ELIGIBILITY

2.1 When Establishing Elibibility Criteria Every Effort Should Be Made To Encompass All Potential Participants Who Can Benefit From The Pretrial Diversion Option.

COMMENTARY

These Standards recognize that criminal justice policy makers and diversion practitioners may differ as to which categories of charges and defendants should be eligible for diversion. While blanket or presumptive eligibility may apply to first offenders charged with less serious offenses, persons with a prior criminal record and charged with serious offenses may be eligible after individual review. In addition, the standards allow programs to exclude certain defendants based solely on the serious nature of the present offense charged.

The rationale generally advanced for limiting diversion eligibility is that certain types of defendants, by the very nature of the offense charged, are less deserving of or less amenable to derive the benefits of diversion. It is difficult to reconcile this notion with the legal presumption of innocence. The Standards do not accept the premise that the offense charged is predictive of future dangerousness or amenability to rehabilitation. Courts have responded to due process and equal protection challenges to programs which exclude persons based on the offense charged.

While a case may be made for excluding defendants with certain prior convictions, especially felonies, the standards argue that little benefit is derived from uniform exclusions that cannot be realized from selective exclusions, after preliminary review, on a case-by-case basis.

2.2 No Potential Participant Should Be Denied Access To The Pretrial Diversion Option Based Upon Race, Ethnic Background, Religion, Gender, Disability, Marital Status, Sexual Orientation Or Economic Status. No Person Who Is Protected By Applicable Federal Or State Laws Against Discrimination Should Be Otherwise Subjected To Discrimination For Eligibility Purposes.

COMMENTARY Œ It is acknowledged that programs designed to serve specialized populations or programs which are experimental may be justified in excluding certain categories of persons. Pretrial diversion is a well established part of the criminal justice system and therefore the standards adopt the position that defendants should not be excluded categorically. It is suggested that established diversion programs would generally be hard pressed to justify continued exclusions on these bases.

2.3 Formal Eligibility Guidelines Should Be Established And Reduced To Writing After Consultation Among Program Represnetatives And Appropriate Criminal Justice Officials. The Guidelines Should Be Distributed To All Interested Parties.

COMMENTARY

Prosecutors, judges, defense counsel and program administrators may differ with respect as to which categories of defendants and charges should be divertible and the ways in which diversion screening should be conducted. These Standards posit that establishment of eligibility criteria that are mutually acceptable requires that all of the above professionals, through open dialogue and full airing of all relevant issues, have some

input in drafting formal eligibility guidelines. Local citizen groups and elected public officials should also be consulted in the development of eligibility criteria, in order to insure the existence of broad-based local support for diversion.

The eligibility guidelines developed should be in writing, and disseminated routinely to all interested parties. It is the position of these standards that in the absence of formal and written eligibility guidelines, possible abuses in the process may go unchallenged. As a corollary, eligibility guidelines should be reviewed regularly and updated as needed, or at least annually to reflect changes in local or state laws.

2.4 Potential Participants Should Not Be Denied The Pretrial Diversion Option Based Solely On The Inability To Pay Restitution Or Program Fees.

COMMENTARY

These standards accept the premise that participants may be required to pay restitution or program fees so long as such payment is not a pre-condition of eligibility. Admission to the program should not be denied solely on the basis of apparent inability to pay restitution or program fees. Evidence of the restitution condition should not be admissible against the defendant in any subsequent civil or criminal proceeding.

2.5 Pretrial Diversion Programs Have An Affirmative Obligation ToŒ Insure That Agreed Upon Elibibility Guidelines Are Adhered To And Honored By Other Actors In The Criminal Justice System.

COMMENTARY

It is the duty of diversion programs to verify that guidelines are properly followed and to press for interagency consultation when they are not. This should be an active, ongoing process on the part of the program.

2.6 While It Is The Prosecutor's Prerogative To Initiate Pretrial Diversion Consideration For Potential Participants, Courts Should Have A Role In Monitoring The Fair Application Of Diversion Eligibility Guidelines.

COMMENTARY

The standards recognize the prosecutor's role as central to the initiation of diversion eligibility consideration in any given case. The prosecutor is required to determine whether probable cause sufficient to substantiate prosecution exits in each case. A determination as to whether the defendant and the case falls within the scope of eligibility guidelines must be made. Each of these preliminary processing decisions directly affects whether the diversion option will be applicable in the case in question.

The prosecutor's broad discretion whether to charge is an inherent feature of the common law tradition. It is also well established that absent arbitrariness or capriciousness leading to a denial of due process or equal protection of the laws, the prosecutor's traditional discretion at the charging stage generally is not subject to judicial review. Moreover, as a matter of constitutional law, the separation of powers between the executive and judicial branches requires that the prosecutor, as representative of the executive, control the process of formal filing of criminal charges and, once filed, control the direction of the state's prosecution.

Courts in Colorado and the District of Columbia have concluded that pretrial diversion is completely a matter for prosecutorial discretion basing their decisions on traditional interpretations of the separation of powers doctrine and the prosecutor's time-honored control over the charging process. It is the view of these standards that the realities of the criminal justice process, asŒdistinguished from the theoretical model outlined above, must provide the central focus when determining whether and to what extent the prosecutor must share with the courts control over the diversion process. Courts have a role in monitoring the fair application of agreed upon diversion eligibility guidelines.

ENDNOTES FOR CHAPTER 2

CHAPTER 3 ENROLLMENT

3.1 Prior To Making The Decision To Enroll In A Pretrial Diversion Program, A Potential Participant Should Be Given The Opportunity To Review With Counsel A Copy Of The General Program Requirements Including Program Duration And Possible Outcomes.

COMMENTARY

These Standards and Commentary emphasize the need for a voluntary and informed choice on the part of a potential participant when entering pretrial diversion. Counsel plays an important part in this process. The potential participant should have a detailed understanding of the diversion option and of the various alternatives to diversion and the chance to consult with counsel before making any decision. Ideally, this detailed understanding should be reached through informational services offered by the program prior to enrollment and through meaningful consultation about the program with counsel. A program representative should be available to inform the

potential participant, ideally in the presence of counsel, about the following: a factual description of the

program, including philosophy and methodology; specific requirements of the program; normal duration of the program and probable restrictions on freedom; the likelihood of successful completion; and the degree of confidentiality that will be granted statements made by the potential participant during participation in the program. Descriptive material should also be available for the potential participant. Such material alone may suffice where actual person-to-person representations by theprogram are not feasible or are too costly.

Counsel also plays an essential part in helping the potential participant understand the possible legal benefits and drawbacks that could result from participation in diversion. Counsel should review with the potential participant the probable consequences of both successful and unsuccessful completion of the program. The effect of the waiver of any rights required as a condition of diversion should also be discussed, as well as whether such a waiver could be successfully challenged at a later date should noncompliance occur. Counsel should make the potential participant aware of any collateral effects of pretrial diversion, including practical and legal effects of expungement or sealing of arrestŒrecords or lack of such, as well as the presumption of guilt and any stigma that may be associated with participation in diversion programs.

Only when the diversion program and counsel work in concert with the potential participant can a true understanding of the diversion option, so critical to voluntary and informed choice, be reached. The need for this cannot be stated strongly enough.

3.2 Pretrial Diversion Programs May Require Conditions Of The Participant At The Point Of Enrollment. No Additional Conditions Should Be Imposed On The Participant By The Court Or The Prosecutor.

COMMENTARY

While these standards recognize the imposition of conditions of pretrial release where indicated, they oppose the setting of any additional conditions other than agreed-upon program requirements by the court or prosecutor once bond has been set or release obtained and diversion is offered. These Standards suggest that routine judicial and prosecutorial input in devising general eligibility guidelines for a diversion program is appropriate, but it is quite another matter for criminal justice policy makers to impose additional requirements on individual defendants at random. Fairness demands identical minimum requirements for successful completion of the program for all participants with the identical result (dismissal) upon successful completion. Additional service plan development should be left to the program staff, who have greater expertise in assessing participant needs and the available resources to meet those needs. For further discussion, see Chapter 4.

While in actual practice some courts impose more stringent program requirements on individual defendants, the practice is an unsound one because it places the integrity and fairness of the diversion program at risk and may jeopardize the participant's successful program completion.

3.3 Enrollemnt In The Pretrial Diversion Program Should Not Be Conditioned On A Formal Plea Of Guilty. An Informal Admission Of Responsibility May Be Acceptable As Part Of A Service Plan. Potential Participants Who Maintain Innocence Should NotŒ Automatically Be Denied The Diversion Option.

COMMENTARY

The dangers of requiring pretrial diversion participants to enter a plea of guilty are twofold. There is danger that a participant will not have the requisite information to make a voluntary and informed plea, particularly in those jurisdictions that require a decision to enroll prior to an opportunity to meet with counsel (in contravention to Standards 1.1 and 3.1). There is also the danger that by requiring a guilty plea, the program may merely become another form of plea bargaining rather than an alternative to prosecution in its own right.

There are court cases in support of this Standard. In 1987 in State v. Catlin the New Jersey Supreme Court decided that denial to the pretrial intervention program based on the objection of the victim because the defendant would not admit guilt was improper. It was ruled that any automatic decision, whatever the basis, is arbitrary and that defendants cannot be required to admit guilt. This was also stated in State (New Jersey) v. Smith from 1983.

It is the position of these Standards that requiring a defendant to enter a guilty plea prior to entering a diversion program does not have therapeutic value. However, in some instances an informal admission of responsibility to the program staff for the behavior that brought a defendant to the attention of

the criminal justice system may be used as part of a service plan. In cases where the nature of the offense alleged is tied to the arrest provoking behavior, it may be beneficial for an admission of responsibility to be made by the participant as an aid toward avoiding future arrests. It must be remembered that the foremost objective of the diversion program is not to tie receipt of services to the crime allegedly committed, but to help the participant generally achieve a more stable life situation in order to avoid future arrests. In situations where an informal admission of responsibility is made, under no circumstances should that information later be admissible into evidence if the participant is returned to court for prosecution.

Those potential participants who maintain their innocence, but who after consultation with counsel make an informed decision to take the diversion option, should not be denied that option. It is not the place of the diversion program to compel a potential participant to proceed through the criminal justice system if thatŒparticipant does not wish to do so for reasons of his/her own.

3.4 Time Limits For The Duration Of Participation In A Pretrial Diversion Program Should Be Established.

COMMENTARY

One of the primary goals of traditional pretrial diversion is to enable the system to conserve its resources for cases which would be more appropriately handled through the adversary system. In attempting to achieve this goal, it would seem that the entire diversion process should not be longer, and therefore not significantly more costly, than necessary to achieve another primary goal, that of deterring and reducing crime by influencing illegal behavior. Consistent with these goals, this standard proposes that the routine time limit for pretrial diversion be the shortest feasible.

Within the confines of any state statutes or court rules, each jurisdiction must decide, when initiating a

diversion program, the maximum length of time that normal prosecution can safely be deferred. While particularized local needs should be reflected in this decision there are two primary issues which must be addressed in reaching a final decision. First, after what time is it likely that, because of the probable unavailability of witnesses and the dulling of memory, either the prosecution or the defense would have difficulty proceeding to trial? Second, how long will it take to complete service plans designed to effect sufficient change in participants so that the likelihood of future arrests is reduced and dismissal of charges is warranted?

The nature and extent of offenses which local policy makers deem worthy of diversion consideration may also affect this decision. While the type and classification of charge may not directly relate to the participant's need for services and change, some consideration must be given to the criminal penalties that could be imposed if the defendant was convicted. In general the duration of the program should not exceed the authorized sentence for the crime charged. If this is the case, specific written reasons should be given for this.

It must also be recognized that in many cases, the accomplishment of a service plan will not effect a complete and lasting change in a participant in a short period of time. AfterŒperiods of six months to one year, for most participants, sufficient change should have occurred to make a reasonable prediction as to the participant's potential for law-abiding behavior. For those participants for whom a regimen of substance abuse treatment and/or psychotherapy is prescribed in the service plan, full rehabilitation could well take many years. However, over the course of a shorter period it should be possible to ascertain the likelihood of the participant's continuing on his/her own in a therapeutic program after the diversion process ends. Only in extraordinary circumstances should a participant be required to engage in the diversion program for a longer period than is standard.

3.5 Defendants Who Are Denied Enrollment In A Pretrial Diversion Program Should Be Afforded Administrative Review Of The Decisions And Written Reasons For The Denial. COMMENTARY

These Standards hold that where the final decision concerning diversion enrollment is made by a program administrator, some type of administrative review of that decision is essential. For those defendants denied enrollment by the program, written reasons for the denial should be provided to the defendant, counsel, prosecutor and court. Written reasons in support of denial should not be admissible as evidence nor allowed to prejudice the defendant's case in any way. The New Jersey Supreme Court, noting the advantages of administrative review and the need to disclosure reasons for denial, stated in the Strychnewicz case that:

Providing a defendant with reasons for the denial of his

application will not only allow a defendant to adequately prepare for judicial review of that decision, but will also promote the rehabilitative function which the PTI concept serves. At the very least, disclosure will alleviate existing suspicions about the arbitrariness of given decisions and will thereby foster a respect for the fair operation of the law. The New Jersey Supreme Court reiterated this concept in State v. Barath where the court held that a defendant was entitled to discovery of materials held in his file (in this case medical records and police reports) that were considered by the program when refusing the diversion option. Œ Individual jurisdictions may decide the format of such administrative hearings. These may be an informal appeal to the program administrator, an informal hearing before an

independent hearing officer or even a motions type hearing before a judicial officer.

It is the position of this Standard that program administrators should have the mandate to formulate program policies and procedures which safeguard participants' rights, but it is not their role to act as an advocate for the defendant or any other party in the criminal justice system. The decision to challenge a denial of enrollment should be the prerogative of the defense counsel.

ENDNOTES FOR CHAPTER 3 CHAPTER 4 SERVICES

4.1 Pretrial Diversion Programs Should Utilize Individualized And Realistic Service Plans That Feature Achievable Goals. Service Plan Formulation Should Occur As Soon As Possbile After Enrollment In Consultation With The Participant And Should Be Reduced To Writing.

COMMENTARY

The terminology used in this chapter is of particular importance. "Service plan" is being recommended as opposed to "treatment," "counseling," or "cures". Considering the vast range of participants, any labeling which could ultimately stigmatize participation in a diversion program is unproductive. Since participation in diversion should be voluntary on the part of the participant, it is necessary to devise a service plan at the earliest possible stage. The participant should directly confer in the formulation of the plan. It is important this be done as soon as possible in the diversion process in order to achieve informed consent on the part of the participant. Knowing exactly what is expected will decrease the likelihood of a participant's being unsuccessful in diversion. While keeping within the parameters of the diversion program, service plans should be individualized.

In keeping with the voluntary enrollment aspect of the program, it is essential that the participant be actively involved in the formulation of the service plan. In order to be effective, service plans should be viewed by participants as tools to help in their specific situations rather than as punishment, substitute sentences, or imposed conditions to be circumvented. While service plans will often place requirements on the participant, such as attendance at a certain number of counseling sessions, all requirements should be geared toward the individualized needs of the participant. The participant should be cognizant of the reasons for the requirements.

The service plan should encompass only those goals that the participant can realistically achieve within the given time frame of the program and that reflect the participant's needs and abilities. The best service plan is a formal written agreement between the participant and the diversion program staff, with all goals and conditions spelled out clearly, signed by the participant and the program representative at the beginning of the program. Œ™4.2 Service Plans Should Address The Specific Needs Of The Participant And Not Be Designed Merely To Respond To The Crime Charged.

COMMENTARY

It is axiomatic that personal characteristics of diversion program participants will vary, as will the nature of the offenses with which they are charged. Most pretrial service practitioners, as others in the helping professions, are of the view that programs should respond to the personal needs of the participant rather than treat the crime that was allegedly committed. This approach is mandated for

pretrial diversion because the participant is still presumed innocent of the offense charged. The premise on which such programs operate is that by addressing socioeconomic, educational, and health needs of the participant, the probability of future arrests is minimized.

Adherence to a model of providing services based on the personal needs of participants necessitates that a thorough and competent assessment be conducted by the diversion program staff or other professional. Every effort must be made to be culturally sensitive in making assessments and developing service plans. To

meet the diverse needs of participants the program must offer comprehensive services either in house or through referral.

This commentary does not mean that the fact of the arrest is irrelevant to the service plan. Service plans should reflect an awareness of the offense charged and contain a strategy to cope with the conduct that led to the participant's arrest.

4.3 Service Plan Requirements Should Be The Least Restrictive Possible To Achieve Agreed-Upon Goals And Should Be Structured To Help The Participant Avoid Behavior Likely To Lead To Future Arrests.

COMMENTARY

These Standards seek to further the premise that the major objective of any service plan is to help the individual participant avoid future crises and/or behavior that might lead to an arrest.

In designing service plans, program staff must keep in mindŒthat the level of intensity of service required will vary from one participant to the next. As an example, certain participants may need little more than supervised reporting once the necessary assessment has been made. Therefore service delivery and program requirements beyond the general purpose cited above may be overreaching by the program.

The opposite case would involve those participants whose personal situation is such that intensive services are needed. After a thorough assessment in these situations it is recommended that service plans include referrals for long range service delivery. For example, participants with serious substance abuse problems or serious emotional or psychiatric problems would clearly fall within this category. Completion of the program for these participants would not require that all problems be resolved; rather the participant's situation could be sufficiently improved to provide the stability required to avoid future arrests. The diversion program must be cognizant that the issues involved: the participant's charge, the potential outcomes to that participant if convicted, and the participant's needs, are all balanced.

4.4 Restitution, Volunteer Community Service Work And Drug Testing May Be Included In An Individualized Service Plan.

COMMENTARY

Several common aspects of diversion participation require particular attention - payment of monetary restitution, performance of volunteer community service work and drug testing of participants. These Standards support the premise that the above may, in some circumstances, be an acceptable part of a participant's service plan, provided they are not preconditions of program eligibility and are included in the service plan in fulfillment of goals expressed in Standard 4.3, supra. All diversion programs should have clear criteria for the use of restitution, community service and drug testing. Potential participants should have written, advance notice of these requirements.

The payment of monetary restitution may be included in a participant's service plan when it is determined to aid in the growth of the participant. In this case restitution is to be another tool of the program, which provides an opportunity for the participant to gain an understanding of his/her behavior and establish more functional behavior patterns. If restitution is a part of a participant's service plan, what should be required of that participant is a good faith effort to pay such restitution. To require full payment of restitution to successfully complete the program would be, in effect, a discriminatory practice as participants who, despite a good faith effort, could not afford to pay restitution would be terminated from the program and prosecuted due to their financial status. The concept of making a "good faith effort" is upheld by the New Mexico Supreme Court in State v. Jimenez wherein it was ruled that inability to fulfill restitution conditions, or non-willful failure to pay, does not necessarily justify termination of a diversion agreement. In that case the court stated that alternatives, such as allowing more time to pay restitution or reducing the amount to be paid, could be found that would satisfy the state's interests. In New Jersey v. Devatt the court held that a decision to terminate based on noncompliance with the restitution condition must be made only after a participant has been afforded an opportunity to a hearing where evidence as to their ability to pay can be presented.

No one should read this Standard to imply that the victim of a participant's crime should not receive restitution. In casesŒthat the program feels that restitution is necessary for the victim to feel restored, and there is no means to make monetary restitution, alternative methods can be examined. For example, victim-offender mediation can be a very effective way to determine acceptable ways to repay the victim. Another avenue is to obtain a civil confession of judgement. In such cases a participant's

diversion program would not be jeopardized, and yet the victim would be given consideration. The participant's attorney should be involved in matters dealing with establishing restitution.

Volunteer community service work also should not be an automatic part of a diversion program, but a specific tool designed to enhance an individual participant's situation or functioning. The actual placement for the volunteer community service work should be chosen by the participant, with the approval of the diversion staff. Hours of service should be reasonable, and not be beyond what the court could impose on a defendant who is convicted on the same charge.

Drug testing may also be a legitimate part of a service plan provided such testing is used to benefit the participant, and not as a means to terminate a participant's program. Due to the cost of drug testing, and given its invasive nature, it should be used only when there is good reason to suspect a participant of drug use.

4.5 Service Plans Should Be Revised When Necessary. No Additional Requirements Should Be

Sought Unless Necessary To Achieve Agreed-Upon Goals. Modifications Should Be Determined Only After Consultation With The Participant. Any Agreed-Upon Modifications Should Be Reduced To A Written Agreement.

COMMENTARY

The service plan may change in its particulars as the participant progresses or as new needs or problems arise. Moreover, as the relationship of trust and confidence between diversion staff and participant evolves, previously undetected personal needs of the participant may become apparent. Since the service plan was a collaborative effort between the participant and the diversion staff at or shortly after point of intake, substantial changes to its terms should be done only for good reason and in consultation with the participant. All changes should be in writing and signed by both the program representativeŒand participant.

If all parties view the service plan as a dynamic, helping process, the reasonable addition of new requirements is likely to be acceptable to the participant. However, staff must be cautious in seeking new requirements or restrictions as the voluntariness of the diversion program may be compromised. In the event that the participant objects to service plan modifications viewed by the program staff as essential, and made after changed circumstances and in good faith, the participant should always have the option to withdraw from the program and return for prosecution without prejudice.

If the participant does not agree with changes made in the service plan, the program should have in place an in-house procedure to review the issue. If the conflict cannot be resolved in this manner, then the program should move administratively to terminate the participant's program and return the case to court for prosecution without prejudice. The participant should have the right to an in-house hearing on the termination. ENDNOTES FOR CHAPTER 4

CHAPTER 5 DISMISSAL

5.1 Pretrial Diversion Program Policy Should Provide For A Dismissal With Prejudice Upon Successful Completion Of Program Requirements. It Should Be The Responsibility Of The Pretrial Diversion Program To Insure General Enforcement Of Dismissal Agreements.

COMMENTARY

Successful completion of the pretrial diversion program should be accompanied by a dismissal with prejudice upon completion of program requirements. Since entry of a dismissal is, as a matter of law, a judicial act, programs which do not involve the court as an active participant in the diversion process may have to grant the successful participant a disposition that falls short of dismissal with prejudice.

While these standards in no way impugn the good faith of prosecutors who enter a nolle prosequi in a diverted case, legally there is no bar to bringing the nolle prosequied charges at a later time against the same defendant. Consequently these standards advocate only the entry of a final dismissal with prejudice in the diverted case upon completion of the program requirements. It must be remembered

that only dismissal with prejudice would bar reprosecution on double jeopardy grounds as well as res judicata. Entry of a dismissal without prejudice has the same defects as the Nolle Prosequi. The National Advisory Commission on Criminal Justice Standards and Goals is in accord on this issue and has advanced the same rationale as expressed here. In addition, it would seem that fundamental fairness requires entry of dismissal with prejudice. A participant in a diversion program who successfully completes that program should be able to consider the matter closed and final and be able to plan on that basis without fear that the matter will arise again.

These standards take the position that successful completion

of program requirements should trigger the entry of the dismissal. It should be the responsibility of defense counsel to challenge prosecutorial or court refusal to dismiss charges where program requirements have been met. Consistent with Standard 2.5, Supra, which imposes an affirmative obligation on the diversion program to ensure that agreed-upon eligibility guidelines are enforced, programs should also insure that program completion guidelines are not being violated. The program, it must be stressed, is party toŒan agreement with the participant about the case disposition if the diversion program is successfully completed. Where that representation has proved inaccurate and the good faith expectation of the participant has been violated, the program, as well as the criminal justice decision-makers involved, has an obligation to see that the agreed upon bargain is kept. While the diversion program must be careful not to usurp the role of defense counsel, nevertheless, it must act to protect its own integrity when other actors in the diversion process disregard agreed upon guidelines for final disposition in successful cases.

5.2 A Pretrial Diversion Program Should Limit The Information Provided To The Court Or Prosecutor To That Which Is Necessary To Verify That Program Requirements Were Met And That The Service Plan Was Addressed Satisfactorily.

COMMENTARY

A well-developed staff-participant relationship produces a great deal of information about each participant's past and present activities and future plans. The final report should contain only a summary of all verified information directly concerned with the service plan.

It must be remembered that diversion programs are not advocates for participants. They are in the position of seeking to assist defendants in securing services and to advise decision-makers about participant outcomes. Reports, therefore, should not be deliberately slanted to favor participants. A report recommending dismissal should include positive and negative verified information (if there are any negative aspects of the case) so that the judge or prosecutor can make a reasoned decision. Further discussion of the confidential aspects of the report can be found in Chapter 7 of these Standards.

5.3 Upon Successful Completion Of A Pretrial Diversion Program, A Participant May Have His/Her Record Sealed Or Expunged In Compliance With State Law Or Agreed Upon Policies. Criminal Justice Personnel Should Be Permitted Access To Such Records Solely To Determine Whether A Diversion Candidate Has Previously Been Diverted. COMMENTARY

Upon successful completion of pretrial diversion programs, some programs have provisions for

expungement (as distinct from sealing) of records. For others, expungement may be available for reasons not directly connected with diversion, e.g., where a statute provides for expungement of records for all defendants whose charges have been dismissed, who have been acquitted, or who have been discharged without conviction, regardless of reason. However, these standards reject expungement as a satisfactory solution for ensuring the privacy of arrest and information obtained in diversion program participation. Total destruction of diversion records is also rejected as future access is essentialŒfor legitimate, though limited, purposes by the criminal justice system. If records are permanently expunged or destroyed and become unavailable to diversion decision-makers participants who are arrested again would be able to retain "first offender" status indefinitely.

Such records should be kept by a custodian designated by the legislature, court or prosecutor. In the event of improper disclosure, the custodian should be liable in a civil court.

It is recommended that each jurisdiction work to devise practical solutions to protect the confidentiality of police, court and program records, while precluding the abuse of the diversion program by applicants who have been previously diverted.

ENDNOTES FOR CHAPTER 5

CHAPTER 6 NON-COMPLETION

6.1 A Participant Should Be Able To Withdraw From The Pretrial Diversion Program Voluntarily At Any Time Prior To Its Completion And Elect Criminal Justice Processing Without Prejudice.

COMMENTARY

Since diversion enrollment on the part of the participant is voluntary, then that participant should retain the right to withdraw from participation at any point and elect to be remanded to regular criminal justice processing, without prejudice to the defense of the diverted case. In addition, the decision by a participant to voluntarily withdraw from diversion should not carry any informal or formal stigma. While permitting withdrawal of a participant from the diversion process at any point could be viewed

as wasteful to both the program and justice system resources and time, the right to withdraw voluntarily from what is a voluntary program is so fundamental as to take precedence. Forcing a participant to remain in the program past the point of the decision to withdraw is counterproductive and belies the voluntary nature of the diversionary process.

One who voluntarily withdraws from a pretrial diversion program prior to completion should be able to do so without prejudice. Prosecutors and judges often view non-completion of diversion as failure on the part of the participant to utilize the opportunity offered. Consequently, the defendant could be treated more harshly once remanded to the court. It is incumbent upon the program staff in their discussions with judges and prosecutors to emphasize that non-completion may be no one's fault and is generally agreed upon either explicitly or tacitly (through the participant's actions). It should be

understood that pretrial diversion is a human endeavor that may not work with each participant. There are a variety of circumstances under which withdrawal can occur that are not truly reflective of failure by any party.

6.2 The Pretrial Diversion Program Should Retain The Right To Terminate Service Delivery Or Recommend Termination When The Participant Demonstrates Unsatisfactory Compliance With The Service Plan. When Such A Determination Is Made TheŒ Participant Should Be Returned To Criminal Justice Processing Without Prejudice. The Program Should Provide Written Reasons For The Decision To The Participant, Defense Counsel, Prosecutor And/Or Court.

COMMENTARY

Pretrial diversion programs should be structured around policies and procedures that provide participants with meaningful opportunities for success based upon clearly articulated expectations. Realistically, however, not all participants are able to take full advantage of such opportunities at the time offered. This standard clearly advises the program to retain the right to terminate services due to unsatisfactory compliance on the part of the participant. Participants being considered for termination due to unsatisfactory or non-compliance should be informed of such, as should defense counsel. The right to terminate services or to request termination based on unsatisfactory compliance is critical to the effectiveness of the program.

The reasons for unsatisfactory or non-compliance should be fully explored with the participant (if possible) to determine if an alternate service plan acceptable to the program could be developed which might be more successful. Defense counsel should be fully informed of the difficulties the participant may be experiencing and have an opportunity to contact the participant to review the consequences of the return to criminal justice processing in the face of a program termination.

As a general rule, diversion programs do not have the authority to return program participants directly to prosecution, but must recommend such action to the prosecutor or the court. The delivery of complete information to an independent hearing examiner, the prosecutor or the court, is important since that person must ultimately make the decision to terminate participation in pretrial diversion and to resume the criminal justice process.

The delivery of this information raises problems of confidentiality of communication between program participant and program staff. Each program, therefore, should receive from criminal justice officials a commitment to the agreement that use of program information will be limited to the determination of whether a participant will in fact be terminated. See Standard 7 for more detailed discussion. Under no circumstances should this information be used in any criminal proceedings against theŒdefendant once returned to the tradional criminal justice proceedings.

6.3 Prior To Implementation, A Participant Facing Termination Should Be Afforded An Opportunity To Challenge That Decision With Defense Counsel If So Desired.

COMMENTARY

This standard suggests that a mechanism be provided for the participant and defense counsel to be

heard before a termination decision is made.

Commentators have argued that this hearing is required to be consistent with the principles expressed by the Supreme Court in Morrissey v. Brewer and in Gagnon v. Scarpelli. The Court in both Morrissey and Gagnon held that a preliminary due process hearing is required prior to revocation of parole and probation, respectively. The Court suggested that other due process considerations should apply, including notice of violation(s), the right to testify and present demonstrative evidence, the right to present witnesses and cross examine witnesses and the right to a hearing before an independent officer, which need not be a judicial

officer. Although these cases refer to probation and parole, the principles arguably apply to pretrial diversion termination because of the threat to loss of liberty following program termination.

A more recent decision by the Washington State Supreme Court in State v. Marino appears to more directly address termination from pretrial diversion by defining a role for the courts in assessing the "reasonableness" of a prosecutor's decision to terminate a participant from a pretrial diversion program through a hearing.

This standard strongly suggests that programs develop a formal mechanism for participants to challenge a termination. The procedure should be clearly articulated to each program participant at the point of enrollment and that it be made accessible to all participants, with or without defense counsel present.

6.4 Arrests That Occur During The Participant's Course Of The Pre-Trial Diversion Program Participation Should Not Be Grounds For Automatic Termination. A Review Proceeding AtŒ Which The Fact Of The Arrest And All Other Relevant Circumstances Are Considered Together With The Participant's Record Of Performance Should Ensue. The Decision Whether Or Not To Terminate Should Occur Only After Weighing All Factors.

COMMENTARY

Standard 6.4 suggests that programs give due consideration to the presumption of innocence and that a review be conducted to weigh relevant factors to determine the most appropriate response to the new arrest. Those relevant factors may include, but not be limited to: the nature of the new charge itself, the facts and circumstances of the new arrest, and the participant's record of performance in the program. Critical to this review is assessing whether the program is having an impact on the participant and if continuation is warranted. Only after a full review of the circumstances can a realistic decision be made regarding termination.

ENDNOTES FOR CHAPTER 6

CHAPTER 7 CONFIDENTIALITY

7.1 Pretrial Diversion Programs Should Specify To The Potential Participant At The Time Of Entry

Precisely What Information Might Be Released, In What Form It Might Be Released, Under What Conditions It Mghtt Be Released And To Whom It Might Be Released, Both During And After Participation. As A General Rule, Information Gathered In The Course Of The Diversion Process Should Be Considered Confidential And Not Be Released Without The Participant's Prior Written Consent.

COMMENTARY

Programs should advise potential participants from the initial point of contact exactly how all communications will be handled. It should be made clear to the potential participant at the time of screening or intake that a right to privacy exists, but diversion enrollment and participation are contingent upon the release of certain information to outside parties such as defense counsel, the prosecutor, and the court. The program should to be as specific as possible in explaining to the potential participant the types of information that other criminal justice system workers may receive.

Standard release of information forms should be presented for review at the time of enrollment. The opportunity to confer with counsel should be provided before such releases are signed. Once executed, the release(s) should be incorporated into the potential participant's file and should state precisely what information may be released and to whom by way of progress reports.

These general principles of confidentiality, with the exceptions listed above (release of some information to the criminal justice system) are of particular importance as they relate to agents outside the program and the criminal justice system.

While special provisions should be made for researchers and auditors (see Standard 8.2 and related Commentary), the caution with which any information should be released is reviewed in the standing Resolution passed by the membership of the National Association of Pretrial Services Agencies (NAPSA) in 1974, which states in full:

Resolved: That information received and collected by theŒ program shall not be released to any agency or individual that will use the information for dissemination to the general public or be recorded in a computer system that has the potential for connection with national computer files or be used by a law enforcement agency for the purposes of surveillance and investigation.

Resolved: That any information obtained in the course of such investigation shall be confidential except for the purposes of pretrial release considerations and shall not be released to any individual or agency without permission from the defendant after advice and consent of counsel.

Consequently, when information is requested by outside parties

such as potential employers, creditors, social welfare agencies, etc., diversion programs should provide only that data which is required to satisfy the seeker's legitimate need to know when the participant agrees to such a release. Under no circumstances should raw data, such as a counselor's original notes, be released to outside parties, and under no circumstances should the custody of the (potential) participant's original records (casework file, etc.) leave the physical confines of the program. Further, the recipient of any information should be required to agree in advance, in writing, to (1) specify the

purpose for which it will utilize the information obtained from the diversion program, and (2) not to release such data to third parties without the (potential) participant's prior written consent.

Appendix A contains further discussion of staff/participant privilege.

7.2 Pretrial Diversion Programs Should Strive To Guarantee, By Means Of Interagency Or Intra-Agency Operating Agreements Or Otherwise, That No Information Gathered In The Course Of A Diversion Application Or Participation In A Diversion Program Will Be Admissible As Evidence In The Case For Which Diverted Or In Any Subsequent Civil, Criminal Or Administrative Proceeding.

COMMENTARY

It is suggested in Standards 3.5 and 6.3 that prospective or enrolled participants be allowed to challenge a termination decision made by the diversion program. Courts in at least two states have issued rulings that take this position. In the course of such possible reviews, and in any case where the diversion program terminates the participant, information possibly damaging to the participant may have been elicited.

Few measures adequately ensure that information gathered by a diversion program cannot be admitted as evidence. Therefore, atŒthe very minimum, some mechanism should be created to ensure that information gathered during the course of diversion is not admissible in the normal course, if the participant is terminated from the diversion program and returned for prosecution. In the absence of a statute or court rule providing for such, the diversion program should secure an interagency operating agreement with the prosecutor, court, and other appropriate criminal justice personnel which guarantees confidentiality.

In certain cases, courts have barred the introduction of sensitive information gathered by pretrial services programs into evidence based on only an implied promise of confidentiality. While these cases may provide the basis for programs to resist subpoenas of program records when they do not enjoy formal guarantees of confidentiality, all courts will not be as sensitive to public policy considerations which support such a position. Moreover, programs should not rely solely on court support for protection of program records.

Therefore, a broader guarantee is recommended, similar to that embodied in Guideline No. 5 of the New Jersey Supreme Court's 1976 Guidelines for the Operation of Pretrial Intervention Programs. That provision bars the introduction of any information gathered during the diversion process in any subsequent proceeding, whether criminal or not, on any matter - not just the participant's guilt or innocence on the diverted case - where the introduction of the information would be contrary to the participant's interests.

When devising such a broad guarantee, close attention should be paid to existing Federal, State or local laws requiring confidentiality of information. The program should be aware that confidential information gathered during the course of participation may be used by a broad spectrum of criminal, civil, and/or administrative officers.

In summary, while the diversion option may produce information about participants that might help the

prosecutor's case should the participant be returned to court, such information should not be admissible as evidence against the participant. This is essential because, in keeping with the general philosophy presented in these Standards, the purpose of diversion is not to work as a lever to strengthen the state's case against the participant and the program's credibility with participants would be seriously jeopardized. Œ In the absence of statutory safeguards protecting the confidentiality of communications between diversion program staff and participants, formal agreements should exist between the criminal justice system and the program to protect such communications. Participants should be informed of the existence of such agreements and any limitations on absolute confidentiality which they allow before enrollment in the diversion program.

7.3 Guidelines Should Be Developed For Determining The Types Of Information To Be Contained In Reports To Be Released To Criminal Justice Agencies In Support Of A Dismissal

Recommendation. Such Reports Should Be Limited To Information Which Is Verified And Necessary To Determine Whether The Participant Has Met The Standards For Successful Completion Of The Pretrial Diversion Program.

COMMENTARY

These Standards elsewhere recognize that certain information needs to be conveyed to the criminal justice system when a dismissal recommendation is made by the diversion program. This point is addressed here because of the need to reconcile basic information released with the participant's legitimate right to privacy during (as distinct from after) the diversion process. Both prosecutor and defense counsel have legitimate needs for summary reports on progress in order to properly fulfill their responsibilities. Defense counsel must continue throughout the diversion process to represent interests and safeguard rights of the participant until the point of dismissal or, even more so, if, and when, return to regular prosecution occurs. The prosecutor, on the other hand, must be satisfied that the participant is responding satisfactorily to the diversion program and that the record of compliance with diversion requirements has been sufficient to warrant recommending dismissal or entering a nolle prosequi, depending on local procedure.

In those jurisdictions in which the judiciary plays an active role in the diversion process, the court must have access to information sufficient to support its entry of a dismissal on the record. The question, then, remains: what types of information should be conveyed, and how much.

It is recommended that verified information pertaining to fulfillment of the contract between the diversion program and theŒparticipant be conveyed. Subjective or personal opinions should be avoided. Facts irrelevant to completion of the service contract should also be omitted. In keeping with Standard 7.1, the prospective participant should be informed of the types of information which will be conveyed to the court upon program completion. It is also recommended that programs seek an agreement in writing with the court as to the type and content of the reports to be submitted for dismissal recommendations.

7.4 Qualified Researchers And Auditors Should, Under Limited And Controlled Conditions, Be Afforded Access To Participant Records Provoded That No Identifying Characteristics Of Individual Participants Are Used In Any Report.

COMMENTARY

While most of the provisions cited above apply to criminal justice agencies and exclude (unless stringent guidelines are provided) other parties, two additional groups that may need to gain access to participant records are researchers and auditors.

Potential participants should be informed at the earliest possible point that information provided by the participant may be utilized for research and auditing purposes.

Researchers retained by the diversion program may need access to confidential information in order to perform their duties accurately. In practice, many programs feel uneasy about sharing individual defendant records with or without personal identifiers. Guidelines exist, however, under the Federal Privacy Act (as well as at the local level in certain states) which severely limit access to data and guard against potential abuses or mishandling of information. Under most circumstances, auditors will not need access to records containing personal identifiers. Generally recognized professional ethics of auditing prevent divulging such information. Diversion programs must therefore ensure that only reputable firms are hired to audit their records.

Auditors should be allowed to canvas information on diversion and service program activities to assess whether proper expenditure of funds by the program has occurred. This review ensures that the diversion program is following rules of good fiscal management and allows the program to develop credibility, augmenting its chances for continued operation.

ENDNOTES FOR CHAPTER 7

CHAPTER 8 PROGRAM EVALUATION

8.1 Each Pretrial Diversion Program Should Routinely Monitor And Evaluate Its Performance And Practices.

COMMENTARY

The terms program evaluation and research encompass several different types of undertakings: monitoring, specialized research and evaluation. Monitoring, the ongoing data collection by a program through a management information system, allows the program to gather data to review a day-to-day performance of the pretrial diversion staff and the processes of intake, service delivery and successful completion or termination of participants. Specialized research involves an examination of specific problems about program participant activity or program impact in certain areas. Examples of specialized research include: examination of alternate forms of

counseling participants, examination of statewide diversion practices, review of the quality of services provided by various referral agencies, etc. Specialized research generally takes place as problems manifest themselves in an agency, or when a decision is made to reorient current practices. Program evaluation, an examination of the effectiveness of the program based upon its adherence to its stated

objectives, can include a "process" component that describes program practices and an "outcomes" or impact component that measures success.

Every diversion program, regardless of size or budget, should engage in routine monitoring through selective data collection efforts in-house. Such data can be collected routinely bydown-loading from automated management information systems or, if necessary, through periodic data collection from manual records. In either case, every effort should be made to collect specific data elements at the time and at the point in the process when these are most easily accessible. There are certain basic data elements that are directly related to the diversion program's mission, goals and objectives, and to the assumptions implicit in establishing the program (i.e., anticipated benefits to accrue to successful participants and to the local criminal justice system). These data elements have a tendency to relate to intake and outcome profiles of participants. Programs should not only collect and tabulate this type of summary information but analyze it to insure that the program is being operated in a way consistent with its stated goals and purposes.Œ™ Performance statistics when gathered and compared over time can enhance program credibility with outside parties. They can also serve as strong indicators of how and where internal changes should be made in program practices to better achieve stated goals. Regular feedback from an in-house management information system also can be a useful tool for future program planning. All existing diversion programs should, for these reasons, continually monitor their day-to-day operations to ensure that they are optimizing their efforts on behalf of enrolled defendants, the local criminal justice system, and the community generally.

At the point of start-up, diversion programs should have provisions for ongoing review of their efforts. While many programs do not have the capacity to undertake or pay for sophisticated program evaluations or specialized research, all programs can and should monitor their own performance over time, by means of collecting and analyzing certain basic performance data. In addition, it is recommended that they keep the data necessary for undertaking additional research efforts that may take place at a later date and seek support and monies for a comprehensive review of program efforts.

The case for good research and evaluation is so compelling that it should not need extended justification. The use of some, or all, of the approaches listed above (e.g., monitoring, specialized research, and program evaluation) can help diversion programs to make more sophisticated and informed program decisions. The systematic use of research and evaluation can dramatically improve the delivery of services to defendants and the program impact on the courts. If research shows aspects of the program to be ineffective, the innovative administrator can use this information to guide the development of more effective programming.

Further, many diversion programs face constraints by courts, prosecutors, and community sentiment on the types of defendants that can be diverted. Too often, diversion of defendants is restricted to those faced with minor charges. Specialized research can be used to examine the impact which diversion has or can have on defendants charged with more serious crimes.

Research and evaluation can also be integral to the issue of survival of diversion programs. For instance, a pretrial diversion program can be crippled if a sensational event involving one of its participants is publicized. This type of event inevitably occurs and can be overcome only if prior research and evaluation can show empirically the positive impact of the program. Furthermore, funding agencies generally require an evaluation to decide whether further funding is justified. Many programs

discover that in order to survive their initial phase, rigorous evaluation that demonstrates the program's impact is necessary.

8.2 Evaluation Of Pretrial Diversion Programs Should Meet Accepted Design, Reliability And Validity Standards.

COMMENTARYŒ™ Research and evaluation can be conducted in two ways: by using in-house staff or through an outside consultant. If an evaluation is undertaken by in-house staff, every precaution should be taken to ensure the integrity of the research. Be advised that most evaluations conducted by in-house staff are generally not

considered as reliable as those performed by an outside research person or facility. However this standard holds that monitoring and analyzing data on a regular basis by in-house staff is of great value. As stated earlier in this Chapter, the program can learn much about its process and impact through monitoring its own data on a regular basis.

Whenever diversion programs utilize the services of outside researchers, care should be exercised to ensure that such researchers are of high professional standards and have a good working knowledge of the diversion concept and process. Programs should require researchers and evaluators to address how sensitive data will be handled and how the confidentiality of client identifiers will be safeguarded. Written assurances to abide by appropriate nondisclosure conditions should also be secured in advance. Every effort should be made to ensure that the researchers selected follow the highest ethical standards.

See Appendix B for a detailed discussion on research. CHAPTER 9 ORGANIZATIONAL STRUCTURE

9.1 Pretrial Diversion Programs Should Have A Well Articulated Mission Statement. Programs Should Provide And Maintain Adequate And Appropriate Resources Necessary To Accomplish Their Missions.

COMMENTARY

Pretrial diversion programs should have a mission statement that concisely expresses the purpose of the program. All staff members should believe in and be committed to carrying out this mission.

Organizational structures of pretrial diversion programs vary considerably and no model format is offered in these standards. However, the effective operation of diversion programs will require adherence to the following general principles: (1) There should be a chief decision-maker accountable for the program's performance and orientation and for primary liaison with funding agencies, the criminal justice system and the community. The executive is responsible for ensuring documentation of program activities for the purposes of programmatic and financial accountability and for research; and (2) There should exist the capacity to deliver services to the defendants either directly or through referrals.

Diversion programs, at minimum, should include a core staff trained to be attuned to case specific and

legal implications for program participants. This core staff should be accountable for the coordination of tracking participants' compliance to program requirements and the delivery of services to participants by outside agencies if utilized. A designated member or portion of the staff should be vested with the responsibility of verifying that eligibility guidelines and program criteria are followed and properly communicated to appropriate parties of the criminal justice system.

These standards view charging reasonable fees for services as appropriate in order to provide and maintain adequate resources. "Reasonable" implies that there should be a sliding fee scale and that no participant is denied entrance to a program or continued services from a program because of inability to pay such fees.

Œ9.2 Staffing And Advancement Should Follow Affirmative Action/Equal Employment Opportunity Guidelines. Staff Should Be Selected On Basis Of Skills And Experience.

COMMENTARY

Composition of program staff should be reflective of the community, avoid rigid classifications and follow affirmative action/equal employment opportunity guidelines. Diversion programs should encompass a variety of staff members, thereby enriching their approach. For successful program performance, it is suggested that a mix of academically and non-academically trained staff be considered.

Every effort should be made to insure that pretrial program staff displays the following qualities: commitment, a high level of integrity, good judgement and sensitivity to diversity. Commitment is defined as a genuine concern for people and a true dedication to the concept of diversion. A high level of integrity is adherence to principles of decency and honor necessary to promote confidence that information provided by the staff is reliable and forthright. Good judgement is the capacity to be fair, reasonable, and consistent. Sensitivity is defined as being cognizant and responsive to issues of diversity. Beyond affirmative action and equal employment opportunity initiatives, pretrial diversion programs should strive to reflect the cultural diversities of their program participants and the community.

9.3 Pretrial Diversion Programs Should Be Committed To The Implementation Of Effective Managerial And Service Delivery Techniques And Should Provide Staff With Opportunities To Enhance Their Skills.

COMMENTARY

Recruitment and supervision of personnel should follow principles of sound management. The number of positions should be

sufficient to carry out programmatic guidelines. The staffing necessary to carry out these functions will vary greatly from jurisdiction to jurisdiction. Certain tasks can be effectively carried out by volunteers and students. For cost-effective reasons and empowerment of the community, such recruitment should beŒencouraged. Where community resources do not exist or are limited to address participant needs, the diversion program should develop or aid in development of resources necessary to provide those

services.

A diversion program should assist in expanding the skills of its staff. Skills should be developed among individual staff members to increase their understanding and appreciation of cultural differences and similarities within, among and between groups. "This requires willingness and ability to draw on community based values, traditions and customs and to work with knowledgeable persons of and from the community in developing focused interventions, communications, and other supports."

In addition, staff should be encouraged to belong to professional organizations. Subsidizing staff in these endeavors or locating funding to support such staff development is encouraged. Credibility and performance of the diversion discipline can only be enhanced by a concerted effort in this direction.

9.4 The Use Of Volunteers And Students Should Be Encouraged To Augment Staff And Service Capabilities. Community Volunteers And Students Should Be Accountable For Delivery Of Quality Service And Work Products.

COMMENTARY

The use of community volunteers and students is encouraged for several reasons. By involving community members in the program, community ties are promoted and the program becomes a part of the community. This personnel resource can provide a means of expanding the diversity of the staff and increasing the effectiveness of the program while keeping within budget restraints. Community volunteers and students who are engaged in pretrial diversion service delivery should have easy access to the designated staff supervisor who will monitor and guide their direct or indirect work with participants. Volunteers and students should be accountable for timely delivery of quality service and be held to the same ethical and confidentiality standards as paid staff.

ENDNOTES FOR CHAPTER 9

APPENDIX A

STAFF/PARTICIPANT PRIVILEGE IN PRETRIAL DIVERSION

For the habilitation process to achieve the desired results, it is essential that participants be willing to relate to diversion staff with openness and candor. Yet, when this type of information is shared, legal and ethical difficulties arise concerning the confidential aspect of such information.

Furthermore, diversion programs should ensure that the staff/participant privilege which they enjoy by reason of legislation, court rule, or interagency operating agreement is not misused to cloak illegal actions committed by a participant once enrolled in a diversion program.

Unless the letter of the statute or a court decision in its jurisdiction says so directly, the damage to a program's credibility with other justice system agencies, not to mention the possibility of criminal prosecution of staff members who fail to come forward with such information, are strong practical

considerations which argue against a program's taking the position that staff/participant privilege exists.

Apart from the philosophical question of whether the counselor/participant privilege should be so broad as to protect communications about past crimes or planned crimes, many programs function within the criminal justice system as part of a prosecutor or public defender office, under a court or probation department and this precludes their taking such a stance. Where programs are administratively controlled by criminal justice agencies, and program staff are thereby agents of the larger entity, it is doubtful that a different standard of accountability on this issue would be applied to them from that applied to other employees. (For example, where prosecutors and defense attorneys are officers of the court whose oaths preclude them from withholding the sort of information under discussion, judges in test cases cannot be expected to apply a different public policy standard to diversion staff of such agencies.)

A separate but related question which acquires significance here is whether the counselor/participant privilege created by legislation, court rule or interagency agreement and applied toŒpretrial diversion is the defendant's to exercise, or the program's, or both.

Unless the enabling authority for the confidentiality guarantee in the particular jurisdiction clearly provides that it extends to statements about criminal activity, diversion staff

could find themselves facing criminal prosecution as accessories before or after the fact to the crime committed by the participant who made it known to them.

In order to avoid these dangerous entanglements, in the absence of a clear absolute privilege, it is recommended that programs clearly outline the role differences between counseling staff and attorney staff; a few programs have on-staff attorneys who represent diversion participants. Furthermore, as stated throughout these Standards, the duties and tasks of the defense attorney and those of the helping services worker are fundamentally distinct. Counselors (and other service delivery staff) and attorneys do not have the same mandate, training, or responsibilities. These respective responsibilities should be spelled out with regard to handling confidential communications as well as in other areas where role conflict or confusion is likely. Diversion program staff should inform each prospective participant upon entry that the program cannot keep confidential any information communicated by the participant about crimes committed or planned, once enrolled in the program. This leads to two separate considerations.

(1) If the participant is arrested while participating in the program, and if-as is the case in most situations-such arrest constitutes a potential violation of program conditions the arrest is part of the public record and will be handled by the program under its general guidelines stipulated at entry. (This situation is reviewed under Standard 5.4.)

An important question remains, however. What happens when the participant is arrested and acknowledges guilt to his counselor? Does the counselor, now in possession of this information, become liable if the information is not related to the law enforcement officials by the counselor? Unless statutes protect the counselor/participant privilege, the program should advise the participant that information of this type should not be sharedŒ with any diversion program staff member. This lack of

statutory privilege is obviously harmful to pretrial diversion programs in the accomplishment of their mandate, since relationships of trust are difficult to develop when various ground rules limit the openness and candor a participant can safely display. Further, programs can face an uncomfortable dilemma when attempting to be responsible towards the court and effective with the participants, all the while facing the possibility of subpoenas for records, or conversations. For these reasons, all attempts should be made to develop interagency agreements or, preferably, legislation protecting this relationship and spelling out its parameters.

(2) On the other hand, a participant may "confess" to a crime (precedent to or during participation in the diversion program) which did not lead to an arrest. The diversion program staff is neither equipped for nor capable of investigating whether such crime actually occurred, nor are they trained to advise the participant about legal rights in this situation.

It is therefore advised that in this situation, the diversion program inform its participants in advance that it will refuse to consider or listen to such spontaneous "confessions", specifics of alleged crimes or descriptions of situations which suppose the commitment of illegal acts. Further, the participant should be automatically referred, under those circumstances, to counsel for advice. An understanding with other criminal justice agencies confirming that the diversion program will take such a stance in those situations should be reduced to writing.

ENDNOTES FOR APPENDIX A

APPENDIX B

MONITORING AND EVALUATING PRETRIAL DIVERSION PROGRAM PERFORMANCE AND PRACTICES

The broad term "research" actually encompasses several dif- ferent types of undertakings. These include:

a) Monitoring--the ongoing data collection by a program through a management information system. It allows the program to gather data to review the day-to-day perfor- mance of the pretrial diversion staff and the processes of intake, service delivery, and graduation/termination of clientele.

b) Specialized research--an examination of specific problems about divertee activity or program impact in certain areas. (Examples of specialized research include the examination of alternative forms of counseling participants; examination of state-wide diversion prac-

tices; review of the quality of services provided by various referral agencies; etc.) Specialized research generally takes place as problems manifest themselves in an agency, or when a decision is made to reorient current practices.

c) Evaluation--an examination of the effectiveness of the program based upon its adherence to its stated objec- tives. Program evaluation can include both a "process" component that describes program

practices and an "outcomes" or impact component that measures success. Evaluation can measure the effectiveness of the organi- zation and lead to suggestions for modification in program activities. (Ideally, evaluation should be conducted by a source outside of the program, in order to achieve objectivity and credibility with outside parties. It requires major program resources of funding and staff time to provide the evaluator with the necessary data.)

Each and every diversion program, regardless of size or budget, should engage in routine monitoring through selective data collection efforts in-house. Such data can be collected routinely by down-loading from automated management information systems or,Œif necessary, through periodic data collection from manual records. In either case, every effort should be made to collect specific data elements at the time and at the point in the process when these are most easily accessible. There are certain basic data elements which are directly related to the diversion program's mission, goals and objectives, and to the assumptions implicit in establishing the program (i.e. anticipated benefits to accrue to successful divertees and to the local criminal justice system). These data elements tend to relate to intake and outcomes profiles of participants. Programs should not only collect and tabulate this kind of summary information but analyze it to insure that the program is being operated in a way consistent with its stated goals and purposes.

Performance statistics when gathered and compared over time can enhance program credibility with outside parties. They can also serve as strong indicators of how and where internal changes should be made in program practices in order to better achieve stated goals. Regular feedback from an in-house management information system also can be a useful tool for future program planning. All existing diversion programs should for these reasons continually monitor their day-to-day operations to insure that they are optimizing their efforts on behalf of enrolled defendants, the local criminal justice system, and the community generally.

From the point of startup, diversion programs should have pro- visions for ongoing review of their efforts. While many programs do not have the capacity to undertake or pay for sophisticated program evaluations or specialized research, all programs can and should at least monitor their own performance over time, by means of collecting and analyzing certain basic performance data. In addition, it is recommended that they

o keep the data necessary for undertaking additional research efforts that may take place at a later date; and

o seek support and monies for a comprehensive review of program efforts.

Too often an evaluation has tended to be tacked on to diver- sion with a part-time consultant brought in from the outside, after the start of the project, to conduct it. Any delivery system or individual program eventually suffers when the claims which it makes remain unsubstantiated or when the results preferred can beŒeasily attacked. More specifically, pretrial diversion has been criticized by many observers because so little good research exists to validate the concept. Such national-level criticism, if it continues, is bound to have an adverse impact on local agencies who have not undertaken their own evaluations.

As Pryor and Smith (1983) have pointed out, "[w]e do know that difficult questions will continue to be

raised about whether programs designed as alternatives to prosecution can justify their funding or their start-up costs. If their goal is to have an impact on the criminal justice system, then the programs should justifiably be obligated to demonstrate such impact. Conversely, if the goal is defendant-related then the program should be able to document changes or improvements in the defendant's life." Yet documenting the beneficial effects of diversion that have been so widely and frequently claimed over the past several decades by program administrators and other proponents has proved problematic. Mullen (1974), writing early-on, noted that, "[r]egretably, enthusiasm for diversion has grown with surprisingly little validated support from the evaluation literature." Likewise,

Johnson (1977), reviewing the literature several years later, concluded, "[t]he area of evaluation presents one of the most significant liabilities to [diversion] program survival. Misused by almost every program, evaluation efforts are uninformed, oversold, and widely misconceived."

Summing up the situation at the end of the first decade of diversion, Kirby (1978) nevertheless was still hopeful. His assessment was that,

[r]esearch findings on pretrial diversion still leave many unanswered questions. . . . . It is difficult to make meaningful generalizations about diversion because empirically verified research does not exist. . . . Clearly, the quality of research on diversion is lacking, whether done by proponents or opponents of diversion. . . . . But the lack of appropriate research does not mean that diversion is a failure. Rather, it means that research does not exist to demonstrate whether or not diversion has a [positive] impact on clients. Unfortunately, many have taken the interpretation that the diversion concept has been invalidated. Nothing could be further from the truth.

Yet despite these and other similar assessments, attention to research and evaluation with regard to diversion remains very limited. A 1982 mail and telephone survey of pretrial diversion programs nationwide, conducted by Pryor for the Pretrial ServicesŒResource Center, found that few of the more than 50 programs which responded had conducted an evaluation of their efforts or otherwise gathered and reported performance statistics that documented their impact. Twelve years after that survey, the number of diversion programs which have published any research or evaluation findings remains small. This is so despite the fact that several diversion programs in the interim have greatly expanded their efforts, in some instances going statewide, in others extending eligibility to a wider range of increasingly serious offenses. In contrast, many of the first and second generations of diversion programs have now disappeared, for various reasons, without leaving program evaluations behind for others to study and build upon. Absent more and better defensible research and evaluation findings that document the positive impacts of diversion, the jury is still out in the minds of many criminal justice officials and public policymakers with regard to the utility of the basic concept of pretrial diversion.

The case for the need for good research and evaluation is so compelling that it should not need extended justification. The use of some, or all, of the approaches listed above (e.g., monitoring, specialized research and program evaluation) can help diversion programs to make more sophisticated and informed program decisions. The systematic use of research and evaluation can dramatically improve the delivery of services to defendants and program impact on the courts. If research shows aspects of the program to be ineffective, the innovative administrator should plan program modifications which might be more effective.

Further, many diversion programs face constraints by the courts, prosecutors, and community sentiment on the types of defendants which they can divert. Too often diversion of defen- dants is restricted to those faced with minor charges. Specialized research can be used to examine the impact which diversion has or can have on defendants charged with more serious crimes.

Research and evaluation can also be of help to the issue of survival of diversion programs. For instance, a pretrial diversion program can be crippled if a sensational event involving one of its participants is publicized by opponents to discredit program activities. These types of events inevitably occur and can be overcome only if prior research and evaluation can demonstrate empirically the positive impacts of the program. Furthermore, funding agencies generally require an evaluation to determine whether further funding is justified. Many programs discover thatŒin order to survive their initial phase, rigorous evaluation which demonstrates the program's impact is necessary. (In these cases a cost-effectiveness study should be included in the evaluation.)

Research and Evaluation Methodologies Utilized Should Be Consistent With the Goals Of the Individual Diversion Program And the Principles of Diversion Generally.

In order to justify their existence, pretrial diversion programs in the past too often made exaggerated claims as to their possible impact. These included:

o substantial reduction of court backlog;

o cost savings when compared with traditional criminal justice system approaches;

o time-savings for judges, prosecutors, defense counsel and other court personnel;

o significant impact on recidivism; and

o higher employment levels and/or earnings for diverted defendants who are enrolled in and complete the program.

Empirical verification of these claims has been very limited, at best. Rovner-Pieczenik (1974), Mullen (1974), Kirby (1978), and Pryor and Smith (1983) found only a few program evaluations or research studies which substantiated, in a defensible way, program claims of beneficial impact. Poor methodology, undefined variables and over-statement of objectives in most extant studies contributed to the lack of defensible findings. While some claims have been met by individual programs, the problems cited above have cast doubt upon the overall achievements of the diversion option. According to Pryor and Smith (1983), among the problems which have repeatedly characterized much of the research and evaluation to date in the diversion field are the following:

o insufficient sample size (not enough cases or defendants in the study to support the conclusions reached);

o failure to contrast results of program participants with results from comparable groups of individuals not diverted;

o exclusion of program "failures" from the analyses;

o insufficient post-program follow-up on participants and comparison group members to assess post-program recidivism;

o limited attention to the program's impact on criminal justice system (e.g., court backlogs; jail crowding, etc.); and

o absence of or inadequate approaches to the determination of a program's cost-effectiveness.

These Standards suggest a certain programmatic format for and definition of the diversion option. They also suggest that diversion represents a choice no less viable than others as long as cost, recidivism, etc., are not increased. But these objectives when stated need to be proved. The type of research outlined in the Standards of the 1973 National Advisory Commission on Criminal Justice Standards and Goals is what is generally supported here.

In addition to stating achievable objectives clearly and realistically, diversion programs need to consider the following:

o What program evaluations and research on diversion that does exist suggest that there are clearly defined variablesŒ for which data can and should be gathered: Recidivism, wage and employment variables, cost benefit or cost-effectiveness variables, system impactvariables, and similar items are appropriate subjects for study.

o Any research design should include an analysis of the items mentioned above in order to verify the impacts of the diversion program on the defendant, the local criminal justice system, and the community. Impact may be positive in some areas, nonexistent in others, and negative in others. Armed with the information gathered, policymakers can decide whether the combination of achievements and non-achievements is satisfactoryand can define the areas of change needed with more clarity.

o These variables should be precisely defined and some indication should be made as to how a particular variable should or could be measured, given the data which exists in the jurisdiction. Care should be taken not to compare results, whether they be recidivism statistics or cost-benefit statistics, with otherjurisdictions--unless it is clear that definitions are similar. One valid comparison that can and should be made is between the defendants being treated by the diversion program and a control or comparison group that is equivalent.

An evaluation of comparative recidivism rates is important when assessing the impact of any pretrial diversion program. First, it is a major rationale of certain diversion programs that if penetration into the criminal justice system is reduced for first offenders, then the recidivism rate of those first offenders should be exceptionally low. Second, decisionmakers often find recidivism rates for program participants to be the most important research finding. Recidivism may be defined in three separate ways; viz., in-program recidivism, (often called rearrest rate), short term post-program recidivism, and long term recidivism.

Many argue that the impact of diversion on the criminal justice system may be more important that the

impact on the diverted defendant. Suggested system impact includes increasing alternatives for case processing, alleviating congested court calendars, decreasing the use of correctional institutions, and reducing the cost of traditional criminal justice processing. Little research has been conducted that provides either quantita- tive or qualitative analysis on these topics. Rather, research in this area generally has tended to be subjective, citing the

opinions of diversion program staff and other system actors as to the perceived impact of a diversion program on the system, instead of more objective measures.Œ™ Cost-benefit or cost-effectiveness analysis can be among the most powerful forms of evaluation used by a program. It can confirm an argument about the savings provided by the diversion option. Yet cost-benefit analysis is often used without valid control groups or comparison groups and too often includes variables that cannot be measured in an objective way. The use of indirect costs and benefits, intangible costs and benefits, as well as alleged tax savings, too often includes variables that cannot be measured in an objective way. The economic value put on these elements often reflects the personal opinions, values and predispositions of the persons doing or funding the evaluation. Furthermore, cost/benefit analysis has been defined as a long-range approach for assessing total social impact in the economic terms of pretrial diversion. A more useful form of cost analysis is cost-effectiveness. By definition,cost-effectiveness is a short-range method for evaluating pretrial diversion programs, with special emphasis on governmental savings. Cost/effectiveness measurements are tied to actual diversion program costs versus savings effected in the budget of the local jurisdiction as a result of the existence of a diversion program. Generally, cost/effectiveness analysis is limited to internal costs directly attributed to a program within a specific funding year and variable costs which are directly affected by the diversion program within the same funding period.

Research and Evaluation Should:

o Follow Methodology Which Is Appropriate To the Program In Order To Generate Credible Results;

o Follow A Format Which Can Be Easily Communicated And Understood; and

o Be Conducted By Individuals With Appropriate Expertise.

A. Methodological Concerns

Reviews of program evaluations and specialized research studies in diversion have concluded that major technical problems due to faulty study designs have led to little confidence in the reported findings. Thus, the claim that diversion programs have a substantial long-term impact upon the diverted defendant's behavior have seldom been satisfactorily validated. For example, Rovner-Pieczenik (1974) indicates, "[s]everal programs validly demon- strated a decrease in participant recidivism during the period of the program, but methodological difficulties inherent in the evaluations research conducted by most programs did not enable us to conclude whether this finding [a decrease in-program participant recidivism] was consistent among all programs, or whether it could be extended into a post-program period."

In order to demonstrate empirically that a program is having a positive effect on the defendant, the vast majority of methodo- logist-experts and other informed commentators recommend that an experimental

design should be used. An experimental design randomly assigns defendants to either an experimental (diverted) group or to a control (non-diverted) group. Random selection ensures that the prior characteristics of the two groups are the same and that any differences in terms of recidivism, employment characteristics, etc., are due solely to the impact of the program on defendants.

Experimental designs are seldom used by programs. Among the arguments against the experimental model are:

o legal and ethical problems with random assignment;

o the fact that many programs are not familiar with the technique of experiments;

o the period of time required to obtain the results of the experiment (often, more than two years);

o difficulties in implementing random assignments in a "real world" setting;

o the question whether defendants should be deprived arbitrarily of participation in a program; and

o the high cost of conducting such a study.

On the other hand, defenders of the experimental design argue that controlled experiments are the only way to know the true impact of a program. And at least two leading teams of analysts of diversion evaluation and research have written persuasively that random assignment is neither unconstitutional nor logistically impossible to achieve in the context of real-world court system operations. Suffice to say, relatively few programs are able orŒwilling to implement an experimental design, regardless of potential benefits in so doing.

At the same time, it seems that this is the only way to attempt a more definitive answer to the question of the impact of diversion. Major research efforts at the national level have developed new ways of implementing experimental designs, such as using an overflow group to supplement the strictly random assign-

ments of individuals, or using the random procedure to select limited time periods during which individuals will be assigned to control or experimental groups.

At the local level, it will usually be far easier to use a quasi-experimental design. Such a design artificially constructs a group from court records with characteristics similar to those of a defendant group in the diversion program. This may include:

o a group of defendants who would have been eligible for diversion but went through the court system before the program started; or

o a group of defendants eligible for diversion but who rejected it or were rejected by the prosecutor; or

o a group of defendants who appear as if they would have been eligible for diversion but were not screened by the program because the program was not operating at a particular time of the day or

week, intake had been cut off temporarily due to capacity problems, etc.

A major problem with quasi-experimental designs is that the comparison group may not be exactly similar to the group or program participants. Every effort should be made to determine if they are comparable. This means that their background characteristics (e.g., current charge, age, sex, prior record, employment, etc.) should be examined to see whether both groups are equivalent. If a researcher can demonstrate equivalence, then any differences in defendant behavior between the diverted group and the comparison groups can be used to support an argument that the program alone is responsible for having an identified impact on the defendant.

It is obvious that the quasi-experimental design has some pro- blems in that truly random procedures are not used to assign defen- dants to the two groups. It might be that in spite of efforts at determining equivalence, the defendants' groups may still beŒdifferent in important ways. The quasi-experimental design faces legal and ethical opposition; however, it is accepted as legitimate by most researchers and decisionmakers when random assignment is not feasible.

The steps in the quasi-experimental procedure include:

o identification of the diverted group;

o ascertainment of personal criminal characteristics of the group;

o identification of a comparison group with similar characteristics, making tests and adjustments as necessary; and

o comparison of the performance of the two groups.

Evaluations without the use of experimental or quasi-experi- mental designs cannot offer trustworthy results. Too often pro- grams compute recidivism, rearrest, and employment statistics for program participants only. Claims are then made that the rela- tively low level of recidivism and high level of employment demonstrate that the program is having a substantial impact on the defendant. Since programs often practice "creaming", reference to such statistics are misleading. Program statistics that include no reference to comparison or control groups may simply be documenting the fact that the program at the outset chose good risks as program participants and (quite possibly) that diversion was not necessary for those individuals, i.e., that they would have "succeeded" or improved without it.

The evaluator ought to state precisely and explicitly the assumptions being made in conducting the research; the definitions used in the research; and the precise way in which the variables were operationalized and measured. It makes a considerable amount of difference if recidivism is defined as an in-program period or a period after termination of the defendant's participation in the program. In order properly to understand evaluations, these terms ought to be defined as precisely as possible.

Comparison and control groups should be validated to determine whether differences in prior characteristics might be responsible for the differences in outcomes between the two groups.

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2) The expertise of the evaluator was questionable.

3) Evaluators are frequently caught in conflicts of interest, especially when subsequent evaluation monies might be available.

4) Evaluators are often unfamiliar with the criminal justice system in general and with pretrial diversion specifically.

5) Research and evaluation reports are written in highly technical jargon that is hard for practitioners to follow.

Using in-house research staff may often be a good solution, but this approach suffers from the problem of inherent conflict-of-interest. Most programs areunable to support a separate research staff, in any event.

University faculty usually are well-qualified to do specialized research and complex program evaluations, in that they are technically superior in methodological skills and are already located in most communities. University researchers may often turn the evaluation into academic research at the expense of assistance to the agency, however--i.e., pursue their own research agenda rather than that of the diversion program. And their other commitments may make it difficult for them to be fully responsive to a diversion program's tight time line for collecting data and/or getting research findings ready in time for budget hearings, etc. Finally, many academics tend to resort to technical jargon which hinders good communication with practitioners.

Private consulting firms, on the other hand, generally are more expensive than the options cited about yet may also be strong in evaluation techniques. Nevertheless, great care should be taken whenever selecting a consulting firm, both in terms of cost considerations and in order to maintain close direction and quality control over the work to be performed. It is recommended that a competitive bid process be used, with selection based both on costŒand technical merit. A detailed contract should then be drawn up to govern all aspects of performance, including conflicts-of-interest, confidentiality of clientidentifiers, and rights-in-data, as well as the more obvious issues of work to be performed and level of compensation.

Private not-for-profit organizations, operating at the national level, generally produce studies of high quality. Unfortunately, their number is limited, and their comparative non-availability may increase thecosts and delay the research. (The same issues that apply to private consulting firms, discussed above, also apply here.)

In choosing a vendor, there is no one "right" answer as to the particular type of evaluator or researcher who should be employed. The program ought to be mindful of the issues raised above, however, and choose the vendor with the greatest probability of producing valuable work in a timely way, taking into account the

budgetary resources of the agency. Furthermore, programs which do not have funds available to them to purchase evaluation research ought to investigate the possibility of using student interns, or working informally with university professors and graduate students who are working on their theses.

Whenever diversion programs utilize the services of outside researchers, care should be exercised to ensure that the parties have a good working knowledge of diversion and that they bring high professional standards to the project. Programs should require researchers and evaluators to address in detail how sensitive data will be handled and confidentiality of client identifiers safe- guarded. Written assurances that they will abide by appropriate nondisclosure conditions should also be secured in advance. Every effort should be made to ensure that the researchers selected adhere to the highest ethical standards. ENDNOTES FOR APPENDIX B