

## CRIMINAL JUSTICE STANDARDS

# Diversion

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The *ABA CJS Criminal Justice Standards on Diversion* were approved by the ABA House of Delegates in August 2022. Commentary to the Standards is forthcoming.

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## PART I. INTRODUCTION

### Standard 1.1 Summary

These Standards:

(a) Provide guidance on the development, implementation, and evaluation of diversion programs. They are consistent with efforts to: reduce collateral consequences; address over-criminalization; reduce incarceration; curtail the burden on and investment in the criminal legal system; and, eradicate racial disparities in arrests, charging, sentencing, and incarceration. These Standards encourage jurisdictions to consider providing for diversion in the absence of additional criminal consequences and to dismiss cases where appropriate. The Standards also encourage jurisdictions, in the absence of the threat of criminal sanctions, to refer individuals to alternative care provided either by the community or the diversion program itself.

(b) Are organized into three categories: Early Diversion, Pre-plea Diversion, and Post-plea Diversion. These categories recognize that diversion can occur throughout the criminal process. The Standards urge jurisdictions to adopt earlier diversion opportunities to mitigate economic, familial, voting-related, and social harms that result from criminal interventions, especially in communities of color, while also mitigating systemic harms, like over-criminalization and over-incarceration. To that end, the Standards follow a procedural progression. As collateral

consequences become more severe and program requirements become more burdensome, the Standards identify additional due process considerations.

(c) Recognize that any intervention by the criminal legal system, including diversion programs, is coercive and imposes on a participant's liberty.

(d) Favor early diversion programs even though the prosecution may be left with weaker cases against participants who fail to successfully complete the program. These burdens are outweighed by the benefits to individual participants, and to public safety, the incarceration of fewer people, and the reduction of harms to communities, especially communities of color.

(e) Recognize that a jurisdiction may have local needs that call for a particular approach to program design. These Standards recognize that there are many stakeholders in diversion including prosecutors, defense attorneys, judges, law enforcement officers, service providers, pretrial services personnel, corrections personnel, probation and parole officers, community group representatives, and victim advocates, as well as former, current, and potential program participants.

(f) Provide guidance in the development, implementation, and evaluation of a diversion program. Programs may utilize a variety of interventions, such as crisis response, referrals to community service providers, peer-to-peer contacts, assistance with basic needs, medical care, restorative justice, or community service.

(g) Recognize that many types of alleged unlawful behavior do not present a public safety threat or can be addressed without criminal legal system involvement or a formal diversion program. A stakeholder may arrange for a person to apologize, or to stay out of trouble, or simply provide a release with no further criminal consequences. For any of these informal approaches, stakeholders are still encouraged to consult the Standards for guidance, especially with regard to the mitigation of bias and discrimination based on race, as well as ethnicity, national origin, gender identity, sexual orientation, age, disability, or religion.

(h) Provide guidance to jurisdictions as to the protection of the privacy of the individual participants and the information shared during participation in a program. The protection of this information encourages participation in the program and makes successful completion more likely. Recognizing that sharing information helps to provide appropriate and effective service,

these Standards provide guidance as to information sharing with public and private service providers consistent with the overarching principle of protecting the participant's privacy.

(i) Are in seven parts. Part I defines essential terms and articulates the principles and purposes that should guide diversion programs. Part II identifies general attributes of diversion and includes guidance as to how programs should be developed, monitored, and evaluated. Parts III-V identifies early diversion opportunities, including community-first programs (Part III), law enforcement programs (Part IV), and pre-filing programs (Part V). Subsequent parts identify operational and due process attributes unique to pre-plea programs (Part VI), and post-plea programs (Part VII).

## **Standard 1.2 Definitions**

For the purposes of these Standards:

(a) "Diversion" refers to any opportunity for a person to avoid arrest, to decline or reduce charges, to avoid a conviction, or to reduce a sentence, by fulfilling a prescribed set of conditions, by agreeing to a referral to services, or by receiving assistance or release with no further criminal consequences. "Diversion" also refers to efforts to bring a public health approach to incidents traditionally addressed by the criminal legal system, or formalized efforts to identify circumstances in which further criminal legal system intervention is outweighed by concerns regarding over-incarceration and other harms.

(b) "Program" refers to any formalized process for diversion designed in response to alleged unlawful conduct. A program may utilize various levels of responses in the form of community service, restorative justice, mediation, counseling, treatment, or any other appropriate arrangement. "Program" also refers to any formalized process designed to replace or supplement criminal legal system responses with a non-punitive, public health approach.

(c) "Early Diversion" is diversion that occurs before the prosecutor initiates prosecution. Such diversion may include: "community-first programs," "law enforcement diversion," and "pre-filing diversion programs."

(1) "Community-first programs" are programs that adopt a public health approach by redirecting incidents typically subject to criminal legal system interventions to community service providers,

community resources, and peer-to-peer contacts.

(2) “Law enforcement diversion programs” are programs that include diversion opportunities such as “pre-arrest,” “pre-bookings,” “deflection,” and “post-arrest” programs in which alleged unlawful conduct is intercepted and addressed before referral to prosecution.

(3) “Pre-filing diversion programs” are programs that occur prior to the initiation of prosecution, but after a person has been referred for prosecution.

(d) “Pre-plea diversion programs” are programs that occur after a prosecutor initiates prosecution but before any adjudication of guilt. These programs carry heightened collateral consequences and risk of incarceration. In such a program, the prosecutor agrees to dismiss or file lesser charges in exchange for the accused’s successful participation.

(e) “Post-plea diversion programs” are programs in which, upon acceptance of a plea or prior to the imposition of a sentence, a court dismisses or vacates the conviction, reduces charges, or reduces the sentence in exchange for an accused’s successful participation in a program. Post-plea diversion programs are commonly administered by problem-solving courts, treatment courts, and specialized courts. Post-plea diversion does not deviate significantly from the traditional criminal legal system. As a result, these programs tend to build in features of the criminal legal system that are often contrary to the objectives of diversion, and which lead to significant collateral consequences. For example, empirical study of post-plea diversion reveals a significant number of participants are subject to more severe penalties than similarly situated individuals who are not subject to diversion, particularly when the participant is a person of color.

(f) “Service provider” is an umbrella term that includes treatment providers who provide medical, therapeutic or rehabilitative services, as well as those who provide mediation, wrap-around, recovery support, or collateral services.

(g) “Program contract” is a written agreement that prescribes the conditions a participant must satisfy to complete a program.

(h) “Net-widening” occurs when the introduction of a diversion program causes criminal legal system interventions to increase in number and intensity than would have occurred in the absence of the program.

## Standard 1.3 Purposes

Diversion programs promote jurisdictions' efforts to:

- (a) Formalize and invest in public health and therapeutic alternatives to traditional criminal legal system interventions;
- (b) Facilitate and develop appropriate public health approaches to incidents that are traditionally criminalized;
- (c) Recognize incidents in which traditional criminal legal system interventions cause trauma and destabilization, increase harm to individuals and communities, and undermine public safety;
- (d) Shift investment of resources from the criminal legal system to community and public health systems to address structural injustices;
- (e) Encourage and fund engagement with existing community resources as well as developing new resources tailored for diversion;
- (f) Offer options at every intercept point to improve individual outcomes in order to minimize community harm, and where possible, to strengthen communities;
- (g) Avoid interventions by the criminal legal system that damage social networks and social norms, especially in communities of color;
- (h) Prevent or mitigate social, educational, economic, voting-related, and legal collateral consequences of traditional criminal legal system interventions;
- (i) Respond in a constructive and reconstructive manner to the effects of economic, educational, housing, and social segregation and exclusion based on race or poverty;
- (j) Restore communities affected by the alleged unlawful conduct;
- (k) Ensure justice and public safety while reducing the stigma and collateral consequences that result from the criminal legal system interventions;

- (l) Reduce reoffending through access to services;
- (m) Reduce reliance on arrest, prosecution, courts, detention, incarceration, and probation;
- (n) Reinforce and restore the legitimacy of the criminal legal system; and,
- (o) Ease the financial and workload burdens on prosecutor and public defender offices, law enforcement, courts, and other criminal legal system stakeholders.

## **Standard 1.4 General principles**

- (a) The availability of a diversion program should never be the basis for involving an individual in the criminal legal system.
- (b) Diversion programs should impose the least restrictive conditions for participants to facilitate success in the program.
  - (1) At a minimum, jurisdictions should not impose conditions of diversion that are more onerous than the burden imposed by a sentence that similarly situated individuals would receive in the absence of participating in diversion.
  - (2) Jurisdictions should work to be aware of, avoid, and mitigate where possible, the coercive nature of diversion.
- (c) Diversion programs should be developed according to evidence-informed or evidence-based practices.
- (d) Diversion programs should establish eligibility criteria for participation. Diversion should be offered to the broadest pool of potential participants, including consideration of individuals a jurisdiction determines to be medium and high risk, as well as individuals who are high utilizers. Jurisdictions should refrain from imposing eligibility requirements that disqualify potential participants who would otherwise benefit from the diversion program.
- (e) Any individual eligible for a program should have the opportunity to participate. Any program costs or fees, or financial burdens related to any aspect of a diversion program, should not affect a person's ability or decision to participate.

- (f) A person's decision to decline to participate in a program should not result in the imposition of additional charges or a more severe charge or sentence than would otherwise be imposed for the underlying conduct.
- (g) Programs should promote and respect the dignity and agency of participants.
- (h) The decision to participate in a program should be informed.
- (i) An identified victim should be notified of any program participation as required by the jurisdiction.
- (j) Once a person is admitted, a program should consider accommodating a person's employment schedule, and eliminating, offsetting, or reimbursing costs associated with program participation, such as transportation and childcare, to facilitate successful completion.
- (k) Programs should be designed according to evidence-informed or evidence-based practices to anticipate violations of program conditions and provide for graduated responses tied to evidence-informed or evidence-based practices before considering termination from the program.
- (l) Programs should be developed and monitored in collaboration between criminal legal system stakeholders, including prosecutors, defense attorneys, judges, law enforcement officers, service providers, pretrial services personnel, corrections personnel, probation and parole officers, community groups, victim advocates, and former, current, and potential program participants.
- (m) Programs should be adequately funded to ensure optimal implementation, including adherence to evidence-informed or evidence-based practices and models.
- (n) Parties that participate in the administration and operation of programs should be appropriately recruited and receive periodic training.
- (o) All program policies and practices should be evaluated to ensure a program is fair and effective.
- (p) Policies and practices should be evaluated to ensure they are being developed, implemented, and enforced in a way that is free of bias or discrimination based on race, as well as ethnicity, national origin, gender identity, sexual orientation, age, disability, and religion.

(q) Policies and practices should be published and readily available to assure that they are administered transparently.

## **PART II. GENERAL ATTRIBUTES OF DIVERSION**

### **Standard 2.1 Summary**

Part II describes general attributes that apply to the development, implementation, operation, monitoring, and evaluation of diversion programs.

(a) Some guidance in this Part may not apply to community-first and law enforcement programs that are discussed in Parts III and IV, but it is instructive for implementation of these programs.

(b) For all other program types, this Part should be read in conjunction with the appropriate subsequent Part: Part V (for pre-filing diversion programs), Part VI (for pre-plea diversion programs); or Part VII (for post-plea diversion programs).

### **Standard 2.2 Developing a program**

(a) Federal, tribal, state, and local governments should encourage the development and adequate funding of diversion. Jurisdictions should develop diversion programs that meet the needs of local communities, comply with due process, use evidence-informed or evidence-based methods, and implement best practices.

(b) Stakeholders should collaborate as a committee in the development of a program, and should include prosecutors, defense attorneys, judges, law enforcement officers, service providers, pretrial services personnel, corrections personnel, probation and parole officers, community group representatives, and victim advocates, as well as former, current, and potential program participants. Membership in the committee should reflect the jurisdiction's demographics based on race, sex, religion, national origin, disability, age, sexual orientation, gender identity, and socioeconomic status. The committee should host presentations on societal issues that impact the implementation and operation of diversion programs, including but not limited to: the social construction of race, biological racism, national and any local studies of racial segregation and exclusion, structural racism, the criminal legal system's role in perpetuating racial harm, and critical accounts of how race-neutral policies can reproduce racial harm. Committee members should participate in crisis intervention training. The committee should host presentations from



representatives of early diversion programs in other jurisdictions. Committees should host presentations on restorative justice principles and trauma-informed approaches to healing.

(c) Jurisdictions should view diversion as an alternative to traditional criminal legal system interventions and should seek opportunities to integrate or expand existing community resources.

(d) Jurisdictions should consider diversion a proportionate and appropriate response to alleged unlawful conduct, and that any intervention by the criminal legal system, including diversion programs, is of a coercive nature that should be understood as an imposition on a participant's liberty.

(e) To promote participant and stakeholder buy-in, programs should undertake outreach to diverse and underrepresented groups in the community, include community providers in discussions of program design, and engage in leadership that demonstrates institutional investment and commitment.

(f) Programs should be designed to avoid or mitigate collateral consequences. Stakeholders should identify and assess the collateral consequences of participating in a program and provide appropriate resources to assist participants in reducing, mitigating or otherwise addressing these consequences.

(g) Programs should be governed by publicly available and easily accessible written policies and procedures that:

(1) Describe the program's objectives and interventions;

(2) Identify roles in the program, such as who will determine whether eligibility criteria are met, administer the program, provide services, evaluate the program, establish the expectations of each role, including a demonstrated commitment to participant success, with care to build a team that represents the demographics of the community, including race, language spoken, ethnicity, disability, gender identity, and/or sexual orientation;

(3) Provide for periodic training that reinforces program objectives, promotes cultural competency, discusses racial disparities and structural racism, facilitates awareness of implicit

bias and stereotype threat, promotes crisis intervention, and improves communication techniques designed to elicit the most positive outcomes from participants;

(4) Require that treatment and service providers have the appropriate certification, licensing, and training;

(5) Specify the eligibility criteria for the broadest pool of potential participants possible and the efforts required to ensure all those eligible will have the opportunity to participate, regardless of class, race, gender identity, and sexual orientation;

(6) Explain and guard against net-widening;

(7) Add to and enhance, rather than replace, any existing community resources and services;

(8) Assess the needs of the population to be served by the program, providing outreach measures designed to ensure feedback from community members, with special care to include underserved groups;

(9) Provide adequate funding to ensure that financial burdens related to any aspect of a diversion program do not affect a person's ability or decision to participate, as well as funding to offset or reimburse costs associated with program participation, such as transportation and childcare, to facilitate successful completion of the program;

(10) Implement screening mechanisms to determine whether it is appropriate to give eligible participants the opportunity for behavioral health services or other social services in the absence of any further threat of criminal sanctions;

(11) Design the program so that its duration is reasonable in light of its objectives, the severity of the alleged underlying conduct, and the participant's needs;

(12) Delineate the potential levels of intervention or services to be offered, and provide for protocols that give due weight to any expert recommendations about an individual;

(13) Provide a flexible and appropriate level of monitoring, treatment, and contact;

- (14) Set procedures for determining what constitutes a violation of the conditions of a program contract, how the program or service provider should exercise discretion including the use of graduated sanctions to modify the terms of participation and, as a last resort, what violations will justify termination from the program;
- (15) Determine the process by which a participant and any defense attorney will be notified and may challenge an allegation that a participant violated the program contract;
- (16) Clearly state criteria for successful participation in and fulfillment of the program contract;
- (17) Determine the intended benefits to be accorded to those who successfully participate in the program; and,
- (18) Provide for ongoing program monitoring and periodic evaluation for program performance and require record-keeping and the collection of de-identified data that will aid in the determination of whether the program is fairly administered and effective, including demographic information such as race, sex, religion, national origin, disability, age, sexual orientation, gender identity, and socioeconomic status of both the program participant and an identified victim.

## **Standard 2.3 Determining eligibility**

(a) Jurisdictions should consider eligibility criteria for the broadest possible pool of potential participants and the efforts required to ensure that all those eligible can participate.

- (1) All people who are eligible should have the opportunity to participate regardless of race, ethnicity, national origin, socioeconomic status, disability, gender identity, or sexual orientation.
- (2) Jurisdictions should make affirmative efforts to determine whether an individual with behavioral health needs qualifies for the program, including screening for undiagnosed conditions that may trigger eligibility. Jurisdictions should also consider diversion for individuals who are high utilizers in need of therapeutic intervention.
- (3) Jurisdictions should provide guidelines to ensure that an individual is not declining to participate based on the person's ability to pay for costs related to program participation.

- (b) Eligibility criteria should seek to include evidence-informed or evidence-based requirements.
- (c) The opportunity to participate should not be denied because of discriminatory or arbitrary reasons.
- (1) Eligibility criteria should be designed to prevent and eradicate racial disparities between arrest rates and admission rates to a program.
- (2) Jurisdictions should not limit diversion to first-time offenders, given that racial and socioeconomic discrimination often impacts an individual's criminal history.
- (3) Jurisdictions that utilize risk-assessment tools should provide guidelines to identify and disregard any portion of an individual's risk assessment that likely reflects racial harm, racial or economic discrimination, or conscious or unconscious bias before assessing an individual's eligibility for diversion. For similar reasons, jurisdictions should consider diversion for an individual whether or not the individual is assessed low, medium, or high risk.

## **Standard 2.4 Admission into a program**

- (a) Jurisdictions should offer admission into a program as soon as practicable.
- (b) Before making a decision to participate, an individual should be informed of the basis for the allegation that the person has engaged in unlawful conduct, the anticipated conditions of participation in the program; the potential benefits of participating in the program; the likely consequences of not participating in the program, and the likely consequences of violating program conditions.
- (c) A person's decision not to participate in a program should not result in the imposition of additional charges or a more severe charge or sentence than would otherwise be imposed.

## **Standard 2.5 Entering into a program contract**

- (a) The terms of a proposed program contract should be acceptable to the program participant and all relevant parties.

(b) The program contract should be in writing and in the participant's primary language. The program should utilize any services that are necessary to effectively communicate with a participant.

(c) Participation should not be made contingent on the waiver of rights unrelated to effective treatment or successful participation in the program. Participants should be notified of specific rights that may be waived by participation in a program, such as the right to a speedy trial. An individual should have the assistance of counsel before waiving any rights.

(d) The program contract should:

(1) Afford the least restrictive conditions consistent with the needs of the participant and public safety;

(2) Identify clearly defined, attainable conditions that the program participant must satisfy;

(3) Estimate the length of the program;

(4) Identify the types of modifications that may be made to program participation;

(5) Specify violations that must be reported, who reports violations, who receives notice of the violations, what steps will be taken upon the reporting of a violation, the sanctions available for various types of violations, who determines the imposition of any sanction, and procedures that govern any modification or termination of the program contract;

(6) Explain the likely consequences of being terminated from the program;

(7) Identify the benefits afforded upon completion of the program; and,

(8) Explain any permissible use of and any limitations on the use of information the program participant provides during programming.

## **Standard 2.6 Monitoring progress and compliance in a program**

Guidelines should encourage appropriate communication between stakeholders and provide for appropriate discretion to deviate from the program's sanctions to account for individual

circumstances. If a participant is assigned to a service provider, the service provider should provide adequate support to ensure compliance with the terms of the program contract and communicate progress with other stakeholders.

## **Standard 2.7 Confidentiality of information obtained in relation to a program**

- (a) Information related to the treatment process, including intake, should be confidential.
- (b) Information divulged in the course of program intake and participation should not be used in any criminal proceedings against the participant.

## **Standard 2.8 Completing a program**

- (a) A participant's fulfillment of the terms of the program contract should trigger a determination that the participant has successfully completed the program. Upon successfully completing the program, the participant should receive written confirmation that all conditions of the program have been met, and the participant should receive the benefits promised in the program contract.
- (b) An exit interview should be conducted to gather data for evaluation of the program's strengths and areas for improvement.
- (c) Upon notification of the individual's successful completion, stakeholders should initiate the appropriate processes to expunge, seal, vacate, or otherwise shield from public view criminal records related to the underlying conduct.

## **Standard 2.9 Violating conditions of a program**

- (a) Only a clearly defined and serious violation should trigger an assessment of whether the contract should be modified to address the violation or the contract should be terminated. Any sanction short of termination should be used when possible. Before deciding to terminate a program contract, the program should consider the participant's particular needs, whether therapeutic, financial, or logistical, that once addressed may facilitate successful participation.
- (b) The participant and any defense counsel should be promptly informed of any violations of the program contract. The participant should receive a documented and reviewable decision that

provides a basis for any decision to terminate a program contract.

(c) A decision to terminate participation in a program should be subject to administrative or judicial review with assistance of counsel. The process should permit the participant the opportunity to initiate a timely review of the decision to terminate the contract, which may include the opportunity to interview any person involved in monitoring the participant's program participation and the opportunity to review non-privileged documentation relevant to program participation. Administrative or judicial review should determine whether the alleged violation of the contract was clearly defined and serious, taking into account whether the participant's alternative or mitigating interpretation of the underlying basis for the termination is reasonable.

(d) A participant's failure to complete a program should not result in the imposition of additional charges or a more severe charge or sentence than would otherwise be imposed for the underlying conduct.

(e) Because of the burdens associated with diversion programs, jurisdictions should consider sentence credit for any time spent in a diversion program at any sentencing.

## **Standard 2.10 Evaluating a program**

(a) The program should be subject to ongoing monitoring conducted by a group of diverse stakeholders, including an evaluation of compliance with the program's stated objectives and methods.

(b) The program should also be evaluated periodically by independent reviewers, to ensure fidelity to the objectives of the program. Reviewers should include but not be limited to subject-matter experts.

(c) The evaluation process should:

(1) Collect and review data (excising personal identifying information), consider relevant research and evidence-informed or evidence-based practices, and engage stakeholders in the collection of any additional data;

(2) Review the needs, resources, and objectives of the program and the community, as well as review recidivism rates and public safety metrics;

(3) Assess the number of program participants, the participation rate of those eligible for the program and admitted to the program, the success rate of those participating in the program, and whether eligibility, admission, and success rates are fairly distributed along race, ethnicity, age, sex, gender identity, and economic status; and,

(4) Summarize the information reviewed and the methodology employed, identify program accomplishments and needs, identify program shortcomings, justify any policy proposals, and ensure the use and dissemination of any lessons learned.

(d) Jurisdictions should ensure that the data and the resulting reports are available to courts, prosecutors, the defense bar, probation, corrections, law enforcement, pretrial services, and the public. The evaluation data should be disaggregated so that it may be used by independent researchers.

## **PART III. EARLY DIVERSION: COMMUNITY-FIRST PROGRAMS**

### **Standard 3.1 Summary**

(a) Community-first diversion programs adopt a public health approach by redirecting incidents typically subject to criminal legal system interventions to community service providers, community resources, and peer-to-peer contacts.

(b) Many police encounters involve contact with individuals with behavioral health episodes or substance use disorders that are better treated by those with relevant expertise, training, or lived experience.

(c) Community-first diversion programs strengthen partnerships across first-responder agencies and behavioral health, housing, medical, advocacy, charitable, and food services.

(d) Community-first diversion programs recognize that community interventions and support can address needs that, when unmet, often lead to repeated contacts with the criminal legal system.

(e) This Part provides guidance in developing and implementing a community-first program. This Part should be read in conjunction with Part II.

### **Standard 3.2 Developing a community-first program**



(a) Jurisdictions should design a program that is best suited to address the community's needs and reflects the diversity of the community. Programmatic approaches may include:

(1) Mobile crisis responders. Mobile crisis responders provide immediate on-site crisis management through de-escalation, assessment, intervention, consultation, referral, and transport to community services. Mobile crisis response teams may be comprised of specially trained police responders, an officer and a behavioral health specialist, or community responders who are not police officers.

(2) Crisis-line assistance. A crisis-line program provides remote counseling to people in crisis and provides support to officers responding to a behavioral health or substance use crisis.

(3) Peer-to-peer program. Peer-to-peer programs link persons with responders who have relevant lived experience, for example, those with behavioral health issues or substance use disorder.

(b) Jurisdictions should ensure community-first diversion programs receive adequate funding.

(c) Jurisdictions should develop criteria for identifying incidents appropriate for community-first response and programming, taking into consideration existing funding and community resources, program design, and concerns over responder safety.

(d) Jurisdictions should provide for communication protocols and support that assist in the coordination of resources and services. Such protocols and support may include:

(1) Guidance to dispatchers in diverting eligible calls to community-first teams.

(2) An independent call line for anyone in the need of a community-first responder.

(3) Training and equipment to ensure effective communication between community-first teams and law enforcement personnel.

(4) Training on and access to information relevant to assisting a person in crisis, with appropriate considerations for health information privacy.

(5) Coordination between community-first teams and police for assisting persons suffering acute behavioral health episodes where they may be a danger to themselves.

(e) Jurisdictions should implement training protocols related to community-first programming. Training should be focused on crisis intervention and safety for all, communication, and coordination, and should reach community responders, government personnel, and others involved in the program.

(f) Jurisdictions should provide protocols for the handling of contraband and other physical items collected in connection with an incident referred to the community-first program.

### **Standard 3.3 Monitoring progress and compliance in a community-first program**

(a) A committee, alliance, or coalition should periodically assess program strengths, needs, and opportunities to improve coordination with community providers. Membership should reflect the demographics of the jurisdiction.

(b) Community-first responders should internally hold regularly scheduled meetings to provide opportunities to debrief, share information, and assess program needs.

### **Standard 3.4 Confidentiality of information obtained in relation to a community-first program**

(a) Jurisdictions should develop guidelines on the confidentiality of information obtained in relation to a community-first program. Guidelines should balance sharing information to increase successful outcomes and the sensitivity of information, especially about an individual's health and social history. Jurisdictions should consider:

(1) Developing training for community providers and responders in a community-first program regarding what information should be shared and what should be kept confidential.

(2) Determining what information should be accessed by only essential program personnel.

(3) Considering how information obtained during a first contact is shared with law enforcement, prosecutors, and other members of the criminal legal system.

(b) Any health information should be treated as confidential, with access limited to only necessary personnel.

## PART IV. EARLY DIVERSION: LAW ENFORCEMENT PROGRAMS

### **Standard 4.1 Summary**

- (a) A law enforcement diversion program corresponds to diversion opportunities known as “pre-arrest,” “pre-booking,” “deflection,” and “post-arrest” programs, in which unlawful conduct is addressed before referral for charging. Law enforcement officers typically act as a referral source for a program.
- (b) Issuing citations in lieu of arrests, when those citations can be converted into criminal warrants for non-appearance and non-payment, should not be considered diversion. This practice results in net-widening as well as racially disparate burdens and social harms, including trauma and harassment from law enforcement detentions, as well as collateral consequences stemming from arrest warrants and potential arrest. Jurisdictions should instead consider de-criminalization or non-enforcement policies.
- (c) These Standards recognize that additional frameworks of law enforcement diversion programs exist, including programs in which individuals voluntarily seek aid from law enforcement. These Standards, however, provide guidance only in circumstances in which there is probable cause to arrest.
- (d) This Part covers development of a law enforcement program, admission into the program, program contracts, program participation, and termination of a contract. This Part should be read in conjunction with Part II.

### **Standard 4.2 Developing a law enforcement program**

- (a) Law enforcement should play an integral role in the development of the program.
- (b) Program guidelines should respond to the needs of particular neighborhoods and individuals, permitting for both moderate and intensive case management and supervision. Efforts should be made to make the provider as easily accessible as possible.
- (c) Programs should train and guide officers, as well as institute policies, to ensure uniform application of the criteria for admission into the program.

(d) A program should provide for:

- (1) A program manager who serves as a point of contact for all program partners including the public, line officers, and program staff to identify resources, facilitate program referrals, collect data, and ensure proper program planning and operations;
- (2) Eligibility requirements that provide clear guidance for officer decision-making in light of the limited information available to an officer through dispatch, observation, a brief encounter, a criminal record check and/or statements of a potential program participant, and the opportunity to consult with the prosecutor's office;
- (3) The conditions of the program that participants would be expected to complete;
- (4) Formalization and management of agreements with service providers;
- (5) Guidance as to the deployment of law enforcement resources, overtime approval processes, and shift-scheduling issues arising from program demands;
- (6) Coordination with the prosecutor and the defense counsel, and any court where appropriate, particularly when a participant has cases pending before or after they are admitted to a law enforcement diversion program; and,
- (7) On-going training that:
  - (i) Facilitates an understanding of diversion objectives, harm reduction, addiction science, crisis intervention training, behavioral health, and evidence-informed or evidence-based practices;
  - (ii) Reviews program policies and guidelines;
  - (iii) Introduces officers to service providers, facilitates communication techniques critical to fostering trust and cooperation, and provides protocols necessary to assess treatment needs; and,
  - (iv) Demonstrates how implicit bias undermines the diversion process while cultural competency improves it.

(e) Programs should consider connecting participants to additional community services to address their needs.

### **Standard 4.3 Admission into a law enforcement program**

(a) The officer and/or program manager should ensure that participation is offered to anyone who is eligible to participate in the program.

(b) Before referring a person to a program, an officer should provide the person with the written information that forms the officer's basis for the probable cause that a crime has occurred. No referral to a program should occur in the absence of probable cause that a crime has been committed.

(c) Consent to participate in the program should be informed. Programs should allow the person reasonable time to consult with outside resources, including legal assistance, before making a decision.

(d) Any officer referral to diversion should provide for a short deadline for the program participant to report to the service provider.

### **Standard 4.4 Entering into a law enforcement program**

(a) Upon entry in the program, the service provider should review conditions of the program with the participant.

(b) The service provider should have the flexibility to accommodate any particular needs of the participant.

(c) The service provider should notify the program participant that being terminated from diversion for the failure to satisfy program conditions may result in prosecution or may impact future eligibility determinations for participation in law enforcement diversion programs.

### **Standard 4.5 Violating conditions of a law enforcement program**

(a) The service provider should make a preliminary decision as to whether a participant has violated the conditions of the program.

(b) The service provider should notify the participant of the preliminary decision, providing the participant with a reasonable chance to fulfill the conditions of the program.

(c) If failure to complete the program impacts future eligibility determinations for law enforcement diversion programs or triggers further action by the criminal legal system, the service provider should provide the participant with a written confirmation of the decision, which should explain the basis for and consequences of the decision. The service provider should forward this report to any program manager or designated stakeholder.

### **Standard 4.6 Completing a law enforcement program**

(a) Upon successful completion of a program, the service provider should provide the participant with a written confirmation of the decision and should forward this report to any program manager or designated stakeholder.

(b) To the extent that the underlying police contact was recorded as an arrest or otherwise, the police department upon notice of successful completion should take steps under applicable law to expunge the participant's record.

## **PART V. EARLY DIVERSION: PRE-FILING PROGRAMS**

### **Standard 5.1 Summary**

(a) This Part identifies attributes unique to a pre-filing diversion program, which are programs that occur prior to the initiation of prosecution, but after a person has been referred for prosecution.

(b) This Part should be read in conjunction with Part II.

### **Standard 5.2 Developing a pre-filing program**

(a) Jurisdictions should develop a pre-filing diversion program best suited to address community needs within funding constraints.

(b) Programmatic approaches vary and may include:

(1) Prosecutorial-managed diversion. In these pre-filing diversion programs, the prosecutor's office issues a declination, a deferral of prosecution, or dismisses the case in exchange for the participant's successful participation in a program. Such programs may include:

(i) Restorative justice programs. Restorative justice programs involve community-based programming to repair harm to people, relationships, and the community and to address individual and systemwide accountability. Jurisdictions should broadly consider the application of restorative justice programming to a broad scope of unlawful conduct, and potential participants.

(ii) Counseling programs. These are programs in which a person participates in pre-filing counseling related to behavioral health issues, a substance use disorder, or trauma.

(iii) Community service programs. These are programs in which a person engages in community service for a mandated number of hours within a particular time period. Prosecutor offices should not impose obligations that the person will likely not fulfill, due to a person's physical or intellectual abilities, logistical challenges, or lack of social network.

(2) Diversion through declination. Prosecutor offices should consider formalized efforts to identify circumstances in which further criminal legal system intervention is outweighed by concerns regarding public health, over-incarceration, or disparities in referral and declination rates for communities of color. Such programs may include:

(i) Behavioral health hand-off programs. In these programs, a prosecutor office partners with a community provider to identify and refer to services those individuals who have behavioral health issues or substance use disorders.

(ii) New efforts to create default categories for declination or deferral. Prosecutorial offices should consider expanding office-wide criteria for issuing declinations.

(c) Jurisdictions should consider making pre-filing diversion broadly available, including persons accused of felonies, who have prior criminal records, or are categorized as high risk. Jurisdictions should proceed with caution in imposing restrictions that have disproportionate racial effects, such as criminal history, employment status, education-enrollment status, or the presence of stable family or community ties.

(d) Prosecutor offices should consult with public health and clinical experts to shape a program to respond to participant needs. Prosecutor offices should build partnerships with community groups to expand program opportunities.

(e) Prosecutor offices should work with participants and community providers to provide assistance in proper placement and to secure any financial assistance necessary to cover the costs of counseling. Prosecutors who are involved in screening referrals for prosecution should receive crisis intervention training, and should seek guidance and information from experts in behavioral health issues and substance use disorders.

### **Standard 5.3 Entering into a pre-filing contract**

For pre-filing programs managed by the prosecutor:

(a) Jurisdictions should exercise special care to avoid a program's net-widening potential. Admission should not occur in cases that are legally or factually insufficient for prosecution; such cases should be declined.

(b) Participants should have the opportunity to consult with defense counsel. Jurisdictions should develop criteria for identifying potential participants who cannot afford representation and should provide access to an attorney to individuals who meet those criteria.

(c) Defense counsel should assist in the decision of the person to accept or reject an offer to participate in the program. Before agreeing to participate in a program, the potential participant should be given adequate time to consult with defense counsel, who should discuss issues regarding the decision to participate in the program, including:

(1) The direct and collateral consequences of declining to participate in the program including any immigration issues, the likelihood of conviction, and the potential sentence;

(2) The requirements of the program contract, any potential negative consequences of participation, even if participation is successful, the potential consequences of violating the contract or of failing to meet its requirements, and the potential benefits of meeting its requirements;



(3) How statements the accused makes during the program may be used in any legal proceedings and/or subsequent investigations; and,

(4) How a decision to participate (or not to participate) in a program may be a factor in a pretrial release decision, the severity of charges, in any sentence that might be imposed and any other negative consequences.

(d) Any further contacts relating to the program that occur between the person and the prosecutor should involve the participation of defense counsel.

### **Standard 5.4 Monitoring progress and compliance in a pre-filing program**

Communication of participation progress and program compliance from the service provider to the prosecutor should be in writing and provided to the program participant and any defense counsel. Oral contacts between the prosecutor and service provider should be memorialized and distributed to the participant and any defense counsel.

## **PART VI. PRE-PLEA PROGRAMS**

### **Standard 6.1 Summary**

(a) Pre-plea diversion programs occur when charges have been filed, but before any adjudication of guilt. In these programs, the prosecutor agrees to dismiss charges in exchange for the accused's successful participation in a program. Although the prosecutor will typically authorize admission into such a program, the type of program will also determine who plays this role. This Part must be read in conjunction with Part II.

(b) This Part addresses entering into a program contract, monitoring program participation, and decisions to modify or terminate program participation.

### **Standard 6.2 Entering into a pre-plea contract**

(a) The prosecutor should make available to the accused and counsel sufficient information to enable the accused to make an informed decision to participate.

(b) Participation in a program should not be contingent on waiving the right to counsel.

(c) The accused should have the opportunity to consult with defense counsel before waiving any constitutional or statutory right or accepting or rejecting an offer to participate in a program. Jurisdictions should develop criteria for identifying potential participants who cannot afford representation and should provide an attorney to individuals who meet those criteria.

(d) Defense counsel should consult with the potential participant to discuss issues regarding the decision to participate in the program, including:

(1) The direct and collateral consequences of declining to participate in the program including loss of fundamental rights, immigration issues, the likelihood of conviction, and the potential sentence;

(2) The requirements of the program contract, any potential negative consequences of participation, even if participation is successful the potential consequences of violating the contract or of failing to meet its requirements, and the potential benefits of meeting its requirements;

(3) The rights the accused will waive by participating in the program;

(4) The availability of any pretrial motions and the likelihood and consequences of prevailing, and whether participating in the program would waive the right to file the motions or whether failing to successfully participate in the program would preclude raising these motions at a later date;

(5) How statements the accused makes during the program may be used in any legal proceedings and/or subsequent investigations; and,

(6) How a decision to participate, or not to participate, in a program may be a factor in a pretrial release decision, the severity of charges, in any sentence that might be imposed and any other negative consequences.

### **Standard 6.3 Monitoring progress and compliance in a pre-plea program**

(a) All contacts between the prosecutor and the accused should be made with the participation of defense counsel.

(b) Any information furnished to the prosecutor or the court relating to the accused's participation in the program, including any reports by a service provider, should be distributed to the parties, including the defense counsel.

(c) Program teams should accommodate the accused's needs, including logistical needs, such as childcare, work schedules, and transportation.

## **Standard 6.4 Violating conditions of a pre-plea program**

(a) In a program that does not involve judicial oversight, any determination that the accused has violated a condition of the program contract is subject to administrative or judicial review at the accused's request.

(b) If a program is subject to judicial oversight or judicial review, unless accused waives a hearing, the court should determine whether any violation has occurred. At this hearing:

(1) The accused should have the right to written notice of the allegations, to be present, and to subpoena witnesses;

(2) The burden of proof should be by a preponderance of the evidence that the accused violated a condition of the contract;

(3) If the court finds the allegation proven, the prosecutor should determine whether the contract should be maintained without change, modified with the agreement of the parties, or terminated. The prosecutor should not terminate the contract unless no modification is likely to enable the defendant to successfully complete it.

## **PART VII. POST-PLEA PROGRAMS**

### **Standard 7.1 Summary**

(a) This Part identifies attributes unique to programs in which accused has accepted a guilty plea. In a traditional forum, the accused proceeds to sentencing once the accused has entered a guilty plea. A jurisdiction, however, may consider a post-plea diversion program. A post-plea program may result in the dismissal or vacation of the conviction, in reduced charges, or in a sentence that is modified or reduced. This Part must be read in conjunction with Part II.

(b) Post-plea programs are often developed as problem-solving courts, treatment courts, specialized courts, and collaborative courts, though any court may develop a post-plea diversion program. Prosecutor offices also have developed such programs in conjunction with courts.

(c) The Standards strongly encourage early diversion programming. Post-plea diversion programs, where the case is so close to the issuance of a final judgment, do not deviate significantly from the traditional criminal legal system. As a result, these programs occur in the presence of features of the criminal legal system that are often contrary to the objectives of diversion. For example, empirical study of post-plea diversion reveals a significant number of participants are subject to more severe penalties than similarly situated individuals who are not subject to diversion, particularly when the participant is a person of color. Post-plea diversion programs should be carefully developed and assessed to avoid the risk of producing highly coercive conditions and outcomes that are more punitive than the traditional criminal legal system. This Part addresses post-plea diversion program attributes that respond to the increased stakes and significant collateral consequences for the accused, and the subsequent due process considerations.

(d) This Part provides guidance to program design, program contracts, participant progress and compliance, program completion, and modification or termination of program participation.

## **Standard 7.2 Entering into a post-plea program contract**

(a) The offer to participate in a program should be made prior to stipulation to facts sufficient to support guilt.

(b) Accused and defense counsel should be provided a copy of the proposed program contract before being asked to make a decision to participate in the program.

(c) Accused should be entitled to counsel during the decision to participate and throughout participation in a post-plea program. Participation in a program should not be contingent on waiving the right to counsel. Any waiver of the right to counsel should only occur on the record. The accused should have the opportunity to consult with defense counsel before waiving any constitutional or statutory right or deciding whether to participate in a program.

(d) Accused should be provided with all available information to which accused is entitled to prior to trial before being asked to make a decision to participate, or otherwise entering a plea.

- (e) Defense counsel should discuss all implications of program participation with the accused, including but not limited to:
- (1) The direct and collateral consequences of declining to participate in the program including any immigration issues, the likelihood of conviction, and the potential sentence;
  - (2) The requirements of the program contract;
  - (3) Any potential negative consequences of participation even if participation is successful, and the potential consequences of violating the contract or of failing to meet its requirements, including sentencing consequences following any program termination;
  - (4) The potential benefits of meeting its requirements;
  - (5) The rights the accused will waive in accepting participation in the program;
  - (6) The pretrial motions, including the likelihood and consequences of prevailing on those motions, that the accused will forego the opportunity to file by participation in a program;
  - (7) What disclosures are required by program participation, and how those statements the accused makes during the program may be used to modify program requirements, and may lead to sanctions or termination;
  - (8) How statements the accused makes during the program may be used in legal proceedings or subsequent criminal investigations;
  - (9) How a decision to participate (or not to participate) may factor in the severity of charges, in any sentence that might be imposed, and any other negative consequences; and,
  - (10) How information relevant to program participation may become part of the public record.

### **Standard 7.3 Monitoring progress and compliance in a post-plea program**

- (a) All contacts between the prosecutor or the court and the accused should be made with the participation of defense counsel.

(b) Any information furnished to the court, prosecutor, or supervised release officer relating to the monitoring of the program, including any report by a service provider, should be distributed to the parties, including defense counsel.

(c) Courts and program teams should accommodate the accused's needs, including logistical needs, such as childcare, work schedules, and transportation.

### **Standard 7.4 Completing a post-plea program**

(a) Successful completion of a program should trigger the appropriate jurisdictional processes to expunge, seal, or otherwise shield from public view records related to the conviction or underlying conduct.

(b) Any post-diversion supervision should be coordinated with the diversion program to ensure continuity and appropriateness of services.

### **Standard 7.5 Violating conditions of a post-plea program**

Any allegations that the accused has violated the conditions of a contract is subject to judicial review and a court hearing at the accused's request to determine whether a violation has occurred. At this hearing:

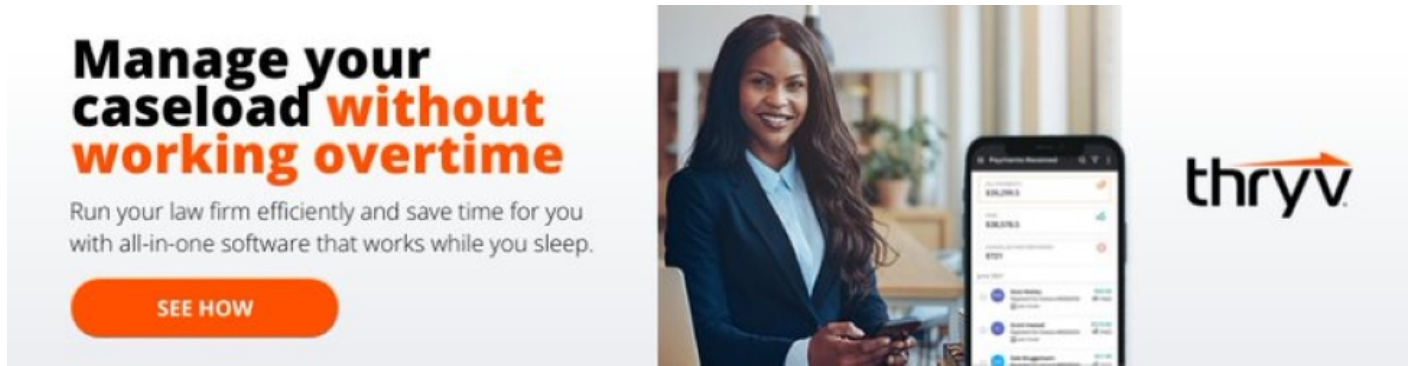
(a) The court should act as a neutral arbitrator of the allegations.

(b) The accused should have the right to written notice of the allegations, to be present, to present evidence, to subpoena witnesses, to question adverse witnesses, and to make a statement and present any information for mitigation;

(c) The burden of proof should be at least a preponderance of the evidence that the accused violated a condition of the contract;

(d) If the court finds the allegation proven, the court should determine whether the contract should be maintained without change, modified consistent with the program contract or with the agreement of the parties, or terminated. The court should not terminate the contract unless no modification is likely to enable the accused to successfully complete it.

(e) In any subsequent sentencing, a participant’s failure to complete a program should not result in the imposition of a more severe sentence than would otherwise be imposed for the underlying conduct.



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