

TO: PROCESS & REFERRAL AUTHORITY SUBCOMMITTEE, DIVERSION WORKING GROUP, DRUG OFFENSE TASK FORCE

BOB BOOTH, ADAG, ATTORNEY GENERAL (BOB.BOOOTH@COAG.GOV)
EMILY RICHARDSON, MGR., OBH (EMILY.RICHARDSON@STATE.CO.US)
JOE THOME, DIR. DCJ (JOE.THOME@STATE.CO.US)

FR: BRUCE I. BROWN, MEMBER, DIVERSION REFERRAL SOURCE SUBCOMMITTEE

RE: RECOMMENDATION OF SUBCOMMITTEE TO WORKING GROUP FOR PILOT PROGRAM

DATE: 12/26/2019

MEMORANDUM

On December 12, 2019 at the meeting of the Diversion Working Group, our Subcommittee was tasked to outline a draft proposal to address a recommendation to the Drug Offense Task Force for a pilot program recommendation to the Assembly. Our Subcommittee's subject is to address "referral sources and processes". I am circulating this draft for each of your comment prior to its presentation to the Working Group, at our next meeting, January 9, 2020.

Recommendation:

Each grant proposal shall be accompanied by a description identifying eligible referrers and referral processes, to the proposed Adult Diversion (Drug Offense) Pilot Program.

Identification of the referring entity and process should include a brief statement addressing how the Pilot Program objectives are met through the proposed process and identify all eligible referrers. Pilot Program objectives for referrers and process are:

- That Adult Diversion (Drug Offense) matters substitute for the initiation of formal court processes, whenever possible;
- That Adult Diversion (Drug Offense) services are delivered to participants at the earliest possible stage (pre-arrest);
- That persons who are eligible participants must have committed a provable crime to assure that persons who have not engaged in criminal conduct are not unnecessarily brought into criminal justice processes; and

- That the class of eligible referrers is broad enough to include important stakeholders but narrow enough to provide for efficient program administration and effective rehabilitation for participants.

Discussion

Referrers

Better outcomes, such as reduced recidivism and treatment of core issues that drive the criminal behavior, for persons who have committed criminal acts, occur when there are expeditious interventions. Traditional intervention through the criminal justice system can take several months delaying the delivery of services and treatment to offenders, among other shortcomings of delay, that are often connected to honoring important and constitutional rights afforded to offenders.

For those offenders who seek wholistic outcomes and take non-judicially determined accountability for their actions at an early stage, there should be methods via Adult Diversion programming to provide opportunities for harm reduction and self-healing, so long as any risk to public safety is not undue.

Law enforcement officers and prosecutors continue to be the primary determiners about whether traditional or non-traditional methods are employed after a criminal offense is committed. The advantage of maintaining the referral source for Adult Diversion as law enforcement and prosecutors is that any offender participation agreement provides in most cases a legally enforceable path to avoid formal criminal prosecution.

Of the twenty-two judicial districts statewide, a supermajority of the District Attorney offices currently offer adult diversion programming.¹

There exists an increasing trend of referrals by law enforcement officers and agencies to implementing diversion programming.² Law enforcement officers have unique knowledge about individuals within their community, such as opportunities to identify offenses whose genesis is largely related to drug addiction and mental health. Allowing officers to make direct referrals to Diversion is sensible. Law enforcement promises to offenders can in certain circumstances also bind prosecutors, making those agencies who want to provide programming to offenders in exchange for promises of non-prosecution, legally enforceable.³

¹ An informal survey of District Attorney offices occurred during 2019. Eighteen of twenty-two offices were responded to the survey, sixteen have Adult Diversion programs and two do not.

² See City of Longmont website describing their “Angel Initiative”. (<https://www.longmontcolorado.gov/departments/departments-n-z/public-safety-department/community-programs/police-assisted-addiction-recovery-initiative-paari>)

³ *Lucero v. Goldberger*, 804 P.2d 206, 210 (Colo. App. 1990) [Where a person is induced by law enforcement promises to take an action a prosecution for a crime may be estopped.]

More frequently in directing response to crime reports, dispatchers are alerting persons trained in mental health evaluation and treatment, often referred to as “co-responders”. Co-responders therefore are in a similar position as law enforcement officers to assess situations that could result in arrest and prosecution but have added skills to identify promoting causes as related to substance abuse and/or mental health needs. Therefore, allowing co-responders to make direct referrals to Diversion programming is encouraged.

When the earliest possible time of referral (law enforcement contact) does not occur, offenders frequently appear before a State Court Judge. Judges are often familiar with individual offenders, community needs, and Diversion programming.

However, judicial ethics can limit the role a judge may play in settlement discussions. (See Code of Judicial Conduct, Rule 2.6(B).)⁴ Therefore, whenever possible a judge in his or her discretion who will not hear the case should be making any referral or standing agreements should be made for a judge to routinely review cases for propriety of a Diversion referral, entered by the District Attorney and Public Defender.

Process for Referrers

Pilot programs are encouraged to develop systems aimed at expeditious referrals and evaluations for suitability of Adult Diversion participation. Grant applicants should identify the following:

- Methods for educating referrers to participant qualifying criteria and the process for referral to any program. Those methods should aim to be short and simple, such as by using a standardized form advising both the offender/prospective participant about the qualifying criteria and process for Adult Diversion referral and participation;
- Referral processes are encouraged to be expeditious, such as by the referrer sending an e-mail or telephonically referring to the applicable program while simultaneously alerting the offender/prospective participant about the referral;
- Encouraging non-referrers who have knowledge of the offense and offender to proactively provide information to eligible referrers with the goal of providing the greatest amount of information to eligible referrers, encouraging robust participation; and
- The non-exclusive sources of information to eligible referrers should include the offender’s counsel, family members of the offender, the offender him or herself, crime victims, and first responders (such as EMS and dispatchers).

⁴ CO ST CJC Rule 2.6(B) “A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.”