

**PERFORMANCE STANDARDS
AND GOALS
FOR**

**PRETRIAL
DIVERSION/INTERVENTION**

**NATIONAL ASSOCIATION OF PRETRIAL
SERVICES AGENCIES**

November 2008

ACKNOWLEDGEMENTS

A project such as this revision of the Pretrial Diversion/Intervention Standards never occurs without the hard work and dedication of a team of people who are committed to enhancing the field. The Diversion Committee of the National Association of Pretrial Services Agencies (NAPSA) is such a team. These professionals have volunteered untold hours in the nurturing and development of pretrial diversion/intervention programming. The Committee Co-Chair, Jim Brown, serves as the Project Director for this grant. He and the committee have guided the process of this revision and have contributed thoughtful insight into its content.

A special note of thanks is reserved for a smaller sub-group of the committee: Mary Pat Maher, Dan Peterca, Ann Hubbard, Anne Gatti and Spurgeon Kennedy who have served in an editorial capacity for the format and content. Their willingness to take a hard look at the content and to identify relevant issues from their own experience which needed to be included, provided the foundation for this 21st century edition. This group provided both insights into the greater picture as well as the attention to detail so necessary in such a document.

Finally, the US Justice Department Bureau of Justice Assistance (BJA) is to be acknowledged for its role in funding this particular endeavor. Its Community Based Problem Solving Criminal Justice Initiative grant No. 2006-LD-BX-K070, awarded to NAPSA for several diversion related projects, funded this revision. While the revision of the Standards represents just a portion of the grant, without BJA's support, this process would not have taken place. In reviewing the last Standards revision from 1995, it was apparent that the criminal justice systems at all levels had changed significantly and those changes had deeply impacted pretrial diversion/intervention programming. We thank BJA for recognizing the need and in supporting its fulfillment.

INTRODUCTION

The Introduction of the 1995 edition of the Pretrial Diversion Standards begins with the question, “what is pretrial diversion?” Finding a universal definition for pretrial diversion and intervention programming remains a challenge due to the broad variations and types of programs across the country. The original definition as published in the 1978 Standards still has value in setting the parameters for diversion: “it is a strategy designed to offer a non-punitive case processing to selected individuals charged with a crime.”¹ These Standards begin with that foundational definition but expand on it to be more inclusive of the variety of programs which have emerged since those first Standards were promulgated. In the past, the definition and purpose of diversion/intervention programs were included in the Introduction of the Standards. The authors of the 2008 revision believe that the definition and stated purpose are so important as to have their own Black Letter Standard and Commentary apart from the Introduction. Both are now included in the new Part I.

In early 1990’s when the last revision of these Standards was being developed, the Drug Court movement was just gaining recognition across the country. At that time, the authors chose not to address that type of intervention within the context of the Diversion Standards, believing that it was important to keep the two types of programming distinct as the Drug Court professionals had planned to develop their own set of Standards. In 2008, the problem solving court approach is well accepted in many jurisdictions across the country. Its popularity with courts has had a double edged effect on pretrial diversion/intervention programs. While some pretrial diversion/intervention programs have been negatively impacted by the refocusing of the system to a court centered versus a prosecutor centered approach, many programs have developed a new relationship with the courts and have experienced growth in their participant base. The diversion/intervention programs which have flourished under the problem solving court trend are located in communities where the criminal justice system acknowledges that the full force of the problem solving court may not be necessary for some cases and that those cases can be successfully diverted out of the system into traditional programs. This smart approach to tailoring the response to defendants based on assessed risk and need is supported by a growing body of research on the effectiveness of various criminal justice initiatives including problem solving courts. This research has led to the development of a defendant profile which identifies the most appropriate and effective types and intensities of intervention strategies. Local criminal justice systems can employ these strategies to intervene more successfully with defendants and best utilize limited resources. This research has opened the door for exploration of a more comprehensive problem solving approach to defendants entering local criminal justice system which engages a full range of options for intervention and case processing including both diversion/intervention programming and problem solving courts.²

The revision of these Standards is an outgrowth of interest in these new strategies on the part of the US Department of Justice Bureau of Justice Assistance through its Community Based Problem Solving Criminal Justice Initiative. There is evidence of broader interest, too, in that the American Bar Association has established a committee charged with promulgating new Standards for diversion programs and the problem solving courts for their membership. For these Standards, the authors

¹ The Board of Directors of the National Association of Pretrial Services Agencies, Performance Standards and Goals for Pretrial Release and Diversion, (1978) p. 21.

² For a comprehensive guide to establishing such an approach, see P. McGarry and B. Ney, Getting It Right: Collaborative Problem Solving for Criminal Justice, National Institute of Corrections, (Washington, 2006).

followed earlier versions and have not specifically addressed standards for the problem solving courts but instead have highlighted the opportunities that diversion/intervention programs have in working collaboratively with those courts to create a more comprehensive criminal justice response to defendants entering the system.

The Bureau of Justice Assistance (BJA) awarded a three year grant to the National Association of Pretrial Services Agencies (NAPSA) with several goals in mind. The first goal was to compose a monograph describing pretrial diversion/intervention and its best practices within the context of today's criminal justice systems. The second goal was to gather and analyze data with regard to the characteristics of diversionary programs across the country. The third goal was to write a white paper exploring the relationship between pretrial diversion/intervention programs and the problem solving courts. On further analysis, the NAPSA Diversion committee requested that BJA consider altering the third goal to target a revision of the Standards since the issues to be addressed in the white paper could be contained within the monograph. The Committee requested that the grant be used for a full revision of the 1995 Diversion Standards as much of the problem solving court based initiatives had developed since that time and diversion programs needed updated Standards to guide development and implementation of practices which were relevant to today's justice systems. In the process of revising these Standards, however, we found there were many changes to the justice landscape, not just the addition of problem solving courts, which had impacted how programs worked.

There were three areas of significant change to criminal justice systems which have clearly impacted pretrial diversion/intervention programs during the last decade. The most pervasive change involves growth of the internet and impact of disbursing criminal justice record information through electronic means. The second major change is the rise of collateral consequences as a result of legislation to prevent persons arrested and/or convicted of specific crimes from obtaining certain types of employment, education or other benefits. Both of these changes challenge one of pretrial diversion/intervention programs' primary goals of reducing the stigma which can result from an involvement in the criminal justice system. The ability to protect information and to truly effect expungement is severely compromised in some jurisdictions due to the wide distribution of criminal justice information at all phases of the process including arrests. In this document, we developed entirely new Standards to address some of these challenges and to minimize the allied consequences.

The third change as discussed earlier in this Introduction is the rise of problem solving courts during the ensuing years since the last revision. Problem solving courts and pretrial diversion/intervention programs have differences but one is distinctive: the locus of control over the case process. Unlike the problem solving court centered programs, diversion/intervention programs tend to be prosecution based. These Standards support the concept that these approaches are complementary and are both needed to provide a comprehensive strategy for effective interventions with defendants. The key is universal agreement by the local criminal justice system to the utilization of an individualized defendant assessment model which quickly identifies the most appropriate level and intensity of intervention for a criminal case (including full prosecution). Such a model of intervention generates a highly effective system which manages limited resources and defendants successfully.

The work of revising such documents is never easy, nor is it always a harmonious process. Fortunately, the committee was able to work through differences in opinions about the formation and wording of these Standards. There was one area which remained controversial, however. In the revised Standard 4.3, the Black Letter states that "*Potential participants who maintain innocence should be accepted into the program only with written, informed consent after an opportunity to consult counsel*". The revised Standard differs from the 1995 version in that it directs programs to accept such

cases. The 1995 Standard 3.3 states “*potential participants who maintain innocence should not automatically be denied the diversion option*”.³ While the content of the Commentary did not change very much, the change in the Black Letter Standard was substantial. At the heart of the controversy was the issue of proclaimed innocence, not the consultation with counsel or the informed consent on the part of the potential participant. What was challenging was that if diversion/intervention programs work to reduce future arrests through linking interventions to the behavior which provoked the current arrest, how can programs effectively intervene with someone who proclaims their innocence? Most of the committee agreed that if the defendant decides that diversion is the best criminal justice option, whether or not he seeks counsel, he must then recognize the conditions which led to the arrest and participate actively in the planning and implementation of the most appropriate intervention.

There are two notes about the format of these Standards which are important to highlight. First, in many jurisdictions, diversionary programs are called by a variety of names such as pretrial intervention and accelerated rehabilitative disposition. One of the goals of the revision committee was to be sure that these Standards were as inclusive as possible for programs. Toward that goal, the name of the Standards has been changed to include the term intervention. In many jurisdictions, intervention has a more neutral connotation than diversion and we hope this will increase the possibility that the Standards will be read and implemented. The second highlight is the incorporation of evidence based practices and language. Newer research supports the idea of determining the risk factors of rearrest by assessing the defendant’s criminogenic needs. Such an assessment creates a more targeted intervention which may be more effective in reducing rearrests, one of the goals of diversion. Along those same lines, what was once referred to in the Standards as service plans are now intervention plans. While the changes may be subtle, they reflect a movement toward grounding the Standards in proven, effective practices.

Criminal justice systems are looking for what works in these days of limited resources and defendant populations who exhibit increasingly complex needs and behaviors. These Standards are a reflection of the best practices and case law which form the foundation for our work. We offer them as a guide in the development, implementation and nurturing of pretrial diversion/intervention programs as part of an effective array of responses to the challenges of today’s dynamic community justice environment.

Barbara Darbey
November 2008

³ The Board of Directors of the National Association of Pretrial Services Agencies, Performance Standards and Goals for Pretrial Release and Diversion, (1995) p. 13.

**2008 PRETRIAL DIVERSION/INTERVENTION STANDARDS
TABLE OF CONTENTS**

**PART I: DEFINITION AND PURPOSE OF PRETRIAL DIVERSION/
INTERVENTION**

1.1 Pretrial diversion/intervention is a voluntary option which provides alternative criminal case processing for a defendant charged with a crime that ideally, upon successful completion of an individualized program plan, results in a dismissal of the charge(s).

Commentary.....page 1

1.2 The purpose of a pretrial diversion/intervention program is to enhance justice and public safety through addressing the root cause of the arrest provoking behaviors of the defendant, reducing the stigma which accompanies a record of conviction, restoring victims and assisting with the conservation of court and criminal justice resources.

Commentary.....page 2

1.3 Every jurisdiction should provide a pretrial diversion/intervention option and designate an entity to oversee and/or administer diversion services.

Commentary.....page 3

1.4 All cases considered for pretrial diversion/intervention should have prosecutorial merit.

Commentary.....page 3

PART II: PRETRIAL DIVERSION/INTERVENTION OPTION

2.1 The opportunity to apply for a pretrial diversion/intervention program should be available as soon as possible to eligible defendants from the point of the filing of formal charges through final adjudication.

Commentary.....page 5

2.2 A potential diversion/intervention program participant should have the opportunity to consult with counsel before making the decision to apply for diversion.

Commentary.....page 6

2.3 A defendant's decision to apply for a pretrial diversion/intervention program should be voluntary and made with written, informed consent.

Commentary.....page 6

2.4 The decision to apply for a pretrial diversion/intervention program should not preclude a defendant from considering and pursuing other strategies which may be more beneficial to him or her than the diversion option.

Commentary.....page 7

PART III: ELIGIBILITY FOR DIVERSION/INTERVENTION

3.1 Pretrial diversion/intervention program eligibility criteria should be broad enough to encompass all potential participants who are amenable to the pretrial diversion/intervention option.

Commentary.....page 8

3.2 No potential participant should be denied access to the pretrial diversion/intervention 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.....page 8

3.3 Formal eligibility guidelines, unless dictated through legislative statute, should be established and reduced to writing after consultation among program representatives and appropriate criminal justice officials. The guidelines should be updated on a regular basis and widely distributed to all interested parties.

Commentary.....page 9

3.4 A pretrial diversion/intervention program has an affirmative obligation to ensure that established eligibility guidelines are consistently applied. Involved criminal justice professionals also have an obligation to monitor the fair application of diversion eligibility guidelines.

Commentary.....page 9

3.5 A potential participant should not be denied access to the pretrial diversion/intervention option based solely on the inability to pay restitution and/or program fees or inability to perform community service.

Commentary.....page 10

PART IV: ENROLLMENT

4.1 Prior to making the decision to enroll in a pretrial diversion/intervention program, a potential participant should be given the opportunity to review with counsel the merits of his or her case and a copy of the general program requirements including program duration and possible outcomes.

Commentary.....page 11

4.2 The program conditions of pretrial diversion/intervention should be fair, equitable and related to the goals of the diversion placement.

Commentary.....page 12

4.3 Enrollment in the pretrial diversion/intervention program should not be conditioned on a formal plea of guilty. An informal admission of responsibility may be acceptable as part of an intervention plan. Potential participants who maintain innocence should be accepted into the program only with written, informed consent after an opportunity to meet with counsel.

Commentary.....page 12

4.4 Time limits for the duration of participation in a pretrial diversion/intervention program should be established.

Commentary.....page 13

4.5 A defendant who is denied enrollment in a pretrial diversion/intervention program should be afforded a review of the decision and the reasons for the denial should be provided to the defendant in writing.

Commentary.....page 14

4.6 A pretrial diversion/intervention program should have clearly articulated policies to address the defendant who is under pretrial release supervision and is referred for diversion/intervention. At the point of the defendant's diversion/intervention program enrollment, the court should close the pretrial release supervision case and release the defendant on his/her own recognizance.

Commentary.....page 15

PART V: INTERVENTION SERVICES

5.1 A pretrial diversion/intervention plan should be developed through the use of a comprehensive assessment of the defendant and address specific needs related to reducing future criminal behavior. Intervention plans should not be designed to respond only to the crime charged.

Commentary.....page 16

5.2 A pretrial diversion/intervention program should utilize individualized and realistic intervention plans which feature achievable goals. Plan formulation should occur as soon as possible after enrollment in consultation with the participant and should be reduced to writing. The written intervention plan should contain the conditions to be met by the participant and the potential outcome for the criminal case upon successful completion or unsuccessful termination.

Commentary.....page 16

5.3 Pretrial diversion/intervention plan requirements should be the least restrictive possible to achieve agreed-upon goals and should be structured to minimize the risk of future criminal behavior.

Commentary.....page 17

5.4 Pretrial diversion/intervention program conditions should address restoring justice and reducing recidivism by incorporating a variety of approaches including, but not limited to, defendant rehabilitation, community service, victim restoration and restitution. The nature and extent of the conditions should be matched to the level of risk of future criminal behavior.

Commentary.....page 18

5.5 A pretrial diversion/intervention program should develop, identify, and partner with treatment and other types of services in their community which have demonstrated effectiveness and the ability to provide culturally competent and gender specific programming for participants.

Commentary.....page 19

5.6 A pretrial diversion/intervention participant intervention plan 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.....page 20

PART VI: SUCCESSFUL COMPLETION

6.1 Pretrial diversion/intervention program policy should provide for a dismissal of the charge(s) upon successful completion of program requirements.

Commentary.....page 21

6.2 A pretrial diversion/intervention 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 intervention plan was addressed satisfactorily.

Commentary.....page 22

6.3 Upon successful completion of a pretrial diversion/intervention program, a participant should have his/her criminal record sealed or expunged.

Commentary.....page 22

PART VII: UNSUCCESSFUL TERMINATION

7.1 A participant should be able to withdraw from the pretrial diversion/intervention program voluntarily at any time prior to completion and elect to return to traditional criminal justice processing without prejudice.

Commentary.....page 24

7.2 The pretrial diversion/intervention program should retain the right to terminate service delivery or recommend termination when the participant demonstrates unsatisfactory compliance with the intervention plan. When such a determination is made, the participant should be returned to traditional criminal justice processing without prejudice. The program should provide written reasons for the termination decision to the participant, defense counsel, prosecutor and/or court.

Commentary.....page 24

7.3 Prior to implementation, a participant facing an unsuccessful pretrial diversion/intervention program termination should be provided the reasons in writing and afforded an opportunity to challenge that decision.

Commentary.....page 25

7.4 Arrests that occur during course of the participant's pretrial diversion/intervention program should not be grounds for automatic termination. A program review at which the facts 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.....page 26

PART VIII: CONFIDENTIALITY AND DATA PRIVACY

8.1 A pretrial diversion/intervention program 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/intervention process should be considered confidential and should not be released without the participant's prior written consent.

Commentary.....page 27

8.2 A pretrial diversion/intervention program 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/intervention program will be admissible as evidence in the diverted case or in any subsequent civil, criminal or administrative proceeding.

Commentary.....page 28

8.3 Pretrial diversion/intervention program guidelines should be developed for determining the type of information to be contained in reports to be released to criminal justice agencies. Such reports should be limited only to information which is verified and necessary.

Commentary.....page 30

8.4 Qualified researchers and auditors should, under limited and controlled conditions, be afforded access to pretrial diversion/intervention participant records provided that no identifying characteristics of individual participants are used in any report.

Commentary.....page 31

PART IX: ORGANIZATIONAL STRUCTURE

9.1 A pretrial diversion/intervention program should have a well articulated mission statement as well as operational and program goals. The mission statement and the goals should be clearly conveyed to both staff and participants.

Commentary.....page 32

9.2 A pretrial diversion/intervention program should be structured to accomplish its mission and stated goals. Program administration should provide appropriate guidance and oversight in the development of operational policies and procedures which support effective programming. The program should work to establish effective partnerships with the court, other criminal justice agencies, and with representatives of the community served by the program.

Commentary.....page 32

9.3 A pretrial diversion/intervention program should maintain adequate and appropriate resources necessary to accomplish its mission.

Commentary.....page 33

9.4 A pretrial diversion/intervention program should be an active participant in the greater community by regularly meeting with local representatives to ensure that program practices meet the needs of the community served. The diversion/intervention program should actively participate with other criminal justice organizations in a collaborative approach to criminal case processing.

Commentary.....page 33

9.5 A pretrial diversion/intervention program should be, in all policies and actions, culturally sensitive and informed. All program policies and procedures should support the inclusion of and equal opportunity for staff and participants regardless of race, ethnic origins, gender, sexual orientation, physical ability and/or any other protected class. Staffing and advancement should follow equal employment opportunity guidelines. Staff should be selected for positions based on skill and experience.

Commentary.....page 34

9.6 A pretrial diversion/intervention program should be committed to the implementation of effective managerial and service delivery techniques based on sound principles and evidence based practices. The program should provide staff with opportunities to enhance skills.

Commentary.....page 34

9.7 A pretrial diversion/intervention program should develop and maintain a financial management system that enables the program to account for all receipts and expenditures, to account for the collection and the dispersal of restitution payments, to prepare and monitor its operating budget, and to provide the financial information needed to support its operations and requests for funding to promote sustainability.

Commentary.....page 35

9.8 A pretrial diversion/intervention program should develop and operate an accurate management information system to support data collection and presentation, compliance monitoring, case management and program evaluation. The program should also develop and implement policies which address data sharing and information protection.

Commentary.....page 35

9.9 A pretrial diversion/intervention program should conduct periodic program evaluations and audits to determine effectiveness in its performance and practices.

Commentary.....page 36

PART I: DEFINITION AND PURPOSE OF PRETRIAL DIVERSION/INTERVENTION

1.1 Pretrial diversion/intervention is a voluntary option which provides alternative criminal case processing for a defendant charged with a crime that ideally, upon successful completion of an individualized program plan, results in a dismissal of the charge(s).

Commentary: In 1978, the original authors of these Standards used a broad definition of pretrial diversion as a “strategy designed to offer non-punitive case processing to selected individuals charged with a crime.” The authors of this edition decided to tailor the definition to incorporate some of the changes which have impacted diversionary practices across the country and to be more inclusive for programs whose practices may have fallen outside the more stringent definitions of the past.

In the ensuing years since the first edition and the 1995 revision of these Standards, there has been an explosion of diversionary programs in criminal justice systems across the country. The primary model for these newer programs are the problem solving courts which have increased opportunities for communities to respond to the rising tide of defendants with significant and multiple needs. There are differences between the court based problem solving approach and diversion/intervention programs. At the heart of this difference is the locus of control over the criminal case. In the problem solving courts, the court or the judge has the primary role with both the defendant and the case. In pretrial diversion/intervention, the primary decision makers with regard to the case and how it will be handled are the prosecutor and the program. In localities where both types of programs exist, these differences actually offer an opportunity to provide a more comprehensive and efficient approach to managing the defendants flowing into the system and the utilization of court resources by determining which type of case intervention is most appropriate.

By their very definition, pretrial diversion/intervention programs develop and implement individualized plans with defendants which address the behaviors that brought them to the attention of the system without drawing them further into that system. The authors of this revision of the Pretrial Diversion/Intervention Standards have expanded the definition of such programming to respond to the changes and challenges in the field. Many programs, however, have been asked to go much beyond the general definition given in this Black Letter Standard. Some programs now provide interventions to criminal justice populations which, in the past, would not be considered eligible for diversion/intervention and where instead of a dismissal of charge, the outcome might be a reduction of charge or sentence. This type of diversion/intervention program can still fit broadly under this more open definition of what is “ideal”. These Standards support the broadest interpretation of diversionary practice as it makes good sense for an effective local criminal justice system. This new definition takes into account a continuum of responses which fall under this umbrella of alternative dispositional programming.

1.2 The purpose of a pretrial diversion/intervention program is to enhance justice and public safety through addressing the root cause of the arrest provoking behaviors of the defendant, reducing the stigma which accompanies a record of conviction, restoring victims and assisting with the conservation of court and criminal justice resources.

Commentary: In the Introduction of the 1995 Pretrial Diversion Standards, the goals of such programs were outlined and to this day, those purposes have not strayed too far from their roots. Pretrial diversion/intervention programs provide an enhancement for local justice systems by offering a flexible option for processing cases which may not need the full force of the court or prosecution. The courts are severely crowded in many communities and pretrial diversion/intervention programs offer an alternative to the traditional case processing thereby freeing court resources for more serious cases.

Pretrial diversion/intervention programs offer an opportunity to intervene very early on in the case which can result in greater impact on the defendant's behavior. The less time that has elapsed between the arrest and the intervention, the greater the potential impact on the precipitating behavior. Diversion programs encourage participation in the intervention plan, utilizing techniques to engage the defendant in working through his/her presenting problems and in reducing the likelihood of future arrests.⁴

There is a growing body of research which indicates that incarceration does not deter crime and may, in fact, create more criminogenic behavior on the part of those who are treated in this manner.⁵ The potential for collateral consequences of being involved in the criminal justice system these days is significant. Legislatures continue to pass and enhance laws to prohibit those convicted of crimes from many areas of employment. By minimizing collateral consequences and reducing stigma through offering diversionary programs for appropriate candidates, a local criminal justice system can enhance public safety. Long term experience in the field of diversion points to the fact that a successful participant is less likely to be rearrested in the future if he is gainfully employed and can contribute responsibly to his family and community.

The restoration of crime victims through a variety of means is an important aspect of many diversion/intervention programs. Its impact is twofold: first, the victim receives restitution and/or mediation to recover both financial and psychological losses and second, the defendant has an opportunity to take full responsibility for his crime and to repay his victim. This aspect of diversionary programming offers both a substantial consequence and a benefit for the defendant and can be a significant deterrent for future criminal behavior.

⁴ J. Simon and S. Welter, Review of Adult Diversion in Hennepin County, Council on Crime and Justice 1999. D.A. Henry and S. Kennedy, Evaluating the Merrimack County Adult Diversion Program: Process and Outcome Evaluation (PTSC, 1999)

⁵ R. King, M. Mauer and M. Young, Incarceration and Crime: A Complex Relationship, The Sentencing Project (Washington, D.C. 2005).

1.3 Every jurisdiction should provide pretrial diversion/intervention options and designate an entity to oversee and/or administer diversion services.

Commentary: The American Bar Association Standards for Defense and Prosecution (Standard 3-3.8) and the National District Attorneys Association's Standards (Standard 44.8)⁶ each note that due consideration be given to programs such as diversion which offer the opportunity for alternative dispositions for appropriate criminal cases. It is a matter of equal protection that this type of programming be readily available in each community. The stigma of a criminal conviction in today's society is considerable. In the past, one might have been afforded more privacy for such a conviction but in the world of internet and open records, a criminal conviction can carry a substantial burden. As mentioned earlier under the Standard 1.2 commentary, a number of state legislatures and Congress have enacted laws precluding certain kinds of employment for individuals convicted under broad categories of crimes. The collateral consequences of a criminal conviction can be devastating to future employment as well as for public assistance and higher educational opportunities. By offering pretrial diversion/intervention programs, a community can mitigate some of these consequences while still addressing the arrest behavior and enhancing personal responsibility of the defendants who enter and complete the program.

The opportunity for alternative case processing and disposition for select crimes and classifications of defendants is critical to the overall fairness and functioning of the local criminal justice system. To that end, these Standards support a broad criminal justice community approach to developing and implementing diversion eligibility criteria.

This Standard also calls for the designation by the local jurisdiction of an entity to oversee diversion/intervention services. Such an entity can include, but is certainly not limited to, the prosecutor, the courts, probation, pretrial services agencies or private non-profit organizations.

1.4 All cases considered for pretrial diversion/intervention should have prosecutorial merit.

Commentary: This Standard is fundamental to the purpose and definition of pretrial diversion. As a matter of fairness, no case should be diverted which can not be prosecuted. Without merit, such a case warrants neither diversionary resources nor those of the courts and should be dismissed. By sending non-meritorious cases to diversion, the system undermines the integrity of the program and its ability to intervene meaningfully with defendants.

In Standard 2.1, there is a discussion of the fact that there must be sufficient merit to warrant prosecution of a case before diversion eligibility is to be determined. This position is supported in the ABA Criminal Justice Standards under 3-3.8 and 3-3.9, where

⁶ American Bar Association, Standards for Criminal Justice, Standard 3-3.8 (3rd ed. 1993) and National District Attorneys Association, National Prosecution Standards, Standard 44.8 (2nd ed. 1991).

the Standards call for probable cause to be established before the consideration of diversion.⁷ Non-meritorious cases which are diverted lack the means to be prosecuted should the defendant fail the program. One of the underpinnings of diversion is that if defendant fails to comply with the program, he or she will be returned to the court for prosecution. If that prosecution can not take place then the diversion/intervention program's integrity is eroded.

⁷ Ibid. ABA Standard 3-3.9.

PART II: PRETRIAL DIVERSION/INTERVENTION OPTION

2.1 The opportunity to apply for a pretrial diversion/intervention program should be available as soon as possible to eligible defendants from the point of the filing of formal charges through final adjudication.

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 eligibility for enrollment in a pretrial diversion/intervention program begins as early as formal charges are filed and that eligibility should end at the time of final adjudication. The post-charging stage in the proceedings has been purposely recommended as the point for diversion/intervention eligibility determination because the government has filed legal documents indicating its intention to prosecute.

Eligibility determination at this stage minimizes the likelihood of diverting cases that 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/intervention process. Only after the formal filing is the defendant aware of 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 establishes that final adjudication eliminates eligibility consideration for pretrial diversion/intervention. 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/intervention programs at each of the above mentioned points is specifically included to make diversion available to as many meritorious cases as possible. This approach was supported in a California case, *Morse v Municipal Court*, in which the Supreme Court of California ruled that a defendant may consent to diversion at any time up to the point at which his trial begins.⁸

Finally, the opportunity to enter into a diversionary program should be presented to the defendant as soon as possible to facilitate careful consideration of the option. In many localities, police, pretrial release staff, the defense bar and jail classification personnel assist with the early identification and referral of potentially eligible defendants for consideration. These Standards promote that each defendant have the opportunity to thoroughly explore the diversion/intervention option as well as to review the merits of his case with counsel. Early identification of diversion eligible defendants helps safeguard the time needed for a considered decision. Early intervention with defendants promotes timely victim restoration and conserves court resources.

⁸ *Morse v Municipal Court*, 13 Cal.3d 149 (1974).

2.2 A potential diversion/intervention program participant should have the opportunity to consult with counsel before making the decision to apply for diversion.

COMMENTARY: This Standard takes the view that defendants need the assistance of counsel to review alternative strategies and potential collateral consequences so as to make an informed, voluntary choice to enter the pretrial diversion/intervention process. In addition, there are a number 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 which may be required to be waived upon entry into a pretrial diversion/intervention program. The assistance of counsel is clearly encouraged when making an informed and voluntary waiver of such important rights.

2.3 A defendant's decision to apply for a pretrial diversion/intervention program should be voluntary and made with written, informed consent.

COMMENTARY: This concept is so fundamental a consideration that it is included as a matter of definition. Legal consideration aside, basic fairness dictates that a defendant's participation in pretrial diversion/intervention should be voluntary. Since one of diversion's primary goals is to minimize arrest-provoking behavior, 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/intervention process. To eliminate free choice in opting for diversion is to negate the importance of participant motivation. The choice to participate in pretrial diversion also must be an informed one in order to be truly voluntary. The program or 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/intervention. There should be written documentation, signed by the defendant, which supports his/her understanding and consent.

Finally, the choice must be as uncoerced as possible, given the fact that the defendant may face full prosecution if he/she does not opt for diversion/intervention. Accordingly, the program and the court (if involved) must make every effort to ensure that the choice is not only knowingly but also freely made. It should be determined 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. The program should also satisfy itself that, at the time of making the diversion/intervention 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.

2.4 The decision to apply for a pretrial diversion/intervention program should not preclude a defendant from considering and pursuing other strategies which may be more beneficial to him or her than the diversion option.

COMMENTARY: From a defendant's perspective, pretrial diversion/intervention may or may not be the most satisfactory avenue to take to secure a favorable disposition of the pending charge(s). Accordingly, alternative strategies should be evaluated closely by the defendant. It is the position of these Standards that, due to the complexities of such considerations, the defendant should be afforded the opportunity for consultation with defense counsel before making such a decision.

Optimally, a discussion between the defendant and counsel about strategies other than diversion/intervention should occur. Considerations should include an evaluation of the likelihood of conviction if the defendant were to opt for prosecution in the adversary system and an assessment of the possible sentence that could be imposed if convicted. 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.

PART III: ELIGIBILITY FOR DIVERSION/INTERVENTION

3.1 Pretrial diversion/intervention program eligibility criteria should be broad enough to encompass all potential participants who are amenable to the pretrial diversion/intervention option.

COMMENTARY: These Standards acknowledge that in the interest of justice and public safety, there are certain defendants whose criminal cases should be dealt with through traditional case processing. Eligibility for diversion/intervention, however, should be established to include as many appropriate defendants as can benefit from the intervention without sacrificing public safety.

While a case may be made for excluding defendants with certain prior convictions, especially serious felonies, the Standards argue that little benefit is derived from uniform exclusions from diversion/intervention based on charge alone or some other factor. A case by case review of potentially eligible defendants can yield appropriate candidates. This concept of individualized review of eligibility was supported in a California case, the People of California v Cisneros, which concerned the denial of enrollment for diversion of an illegal alien. In this case, the Appeals court ruled that while the lower court could consider the alien status of a potential candidate for diversion as a factor in the decision to deny enrollment, it can not be the only factor for exclusion.⁹

3.2 No potential participant should be denied access to the pretrial diversion/intervention 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: It is acknowledged that some programs are designed to serve specialized populations and justify excluding certain categories of persons based on unique services or focus, such as programs which provide services to women only. Most pretrial diversion/intervention programs, however, are a well-established part of the local criminal justice system and have demonstrated value for a broad base of participants. As a matter of equal justice, these Standards adopt the position that defendants should not be excluded categorically.

⁹ *People of California v Cisneros*, 100 Cal.; Rptr.2nd 784 (2000).

3.3 Formal eligibility guidelines, unless dictated through legislative statute, should be established and reduced to writing after consultation among program representatives and appropriate criminal justice officials. The guidelines should be updated on a regular basis and widely distributed to all interested parties.

COMMENTARY: Some diversion/intervention programs reside in states with specific statutes with regard to diversion eligibility and requirements. Those programs should promote broad eligibility within the context of those legislative parameters. Many diversion programs, however, must establish and promote their eligibility guidelines within the context of their own jurisdictions. Prosecutors, judges, defense counsel and program administrators may differ with respect as to which categories of defendants and charges should be diverted and the ways in which diversion screening should be carried out. These Standards posit that establishment of eligibility criteria that are mutually acceptable require 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 may be consulted in the development of eligibility criteria in order to promote broad-based local support for a diversion/intervention program.

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, there is potential for abuse and a threat to equal justice. As a corollary, eligibility guidelines should be reviewed and updated regularly to reflect changes in local or state laws and in local criminal justice policies and procedures.

3.4 A pretrial diversion/intervention program has an affirmative obligation to ensure that established eligibility guidelines are consistently applied. Involved criminal justice professionals also have an obligation to monitor the fair application of diversion eligibility guidelines.

COMMENTARY: It is the duty of diversion/intervention programs to verify that eligibility guidelines are properly followed and to encourage adherence when they are not. This should be an active, ongoing process on the part of the program.

The Standards recognize the prosecutor's role as central to the initiation of diversion/intervention eligibility consideration in any given case. Often, at this stage of the proceedings, the prosecutor alone possesses the necessary facts surrounding the arrest and information on the accused's background with which to assess whether the defendant falls within the range of diversion eligibility guidelines. The prosecutor is required to determine whether probable cause sufficient to sustain a prosecution exists in each case. 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 a representative of the executive, control the process of formal filing of criminal charges and, once filed, control direction of the state's prosecution.¹⁰ Courts in Kentucky and South Carolina have concluded that pretrial diversion is a matter of 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.¹¹ It is the view of these Standards that the realities of the criminal justice process, as distinguished 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.¹² In addition, some courts are the settings for denial of enrollment and involuntary termination hearings for diversion participants. Based on the definitions used in these Standards, the prosecutor's role is clear in the eligibility determination of a diversion participant. For many jurisdictions, however, the processing of diversion/intervention cases is more a partnership among all the interested parties.

3.5 A potential participant should not be denied access to the pretrial diversion/intervention option based solely on the inability to pay restitution and/or program fees or inability to perform community service.

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 condition of eligibility. Admission to the program should not be denied on the basis of inability to pay restitution or program fees or ability to perform community service. In 1988, The Pennsylvania Superior Court found that denying access to diversion/intervention based solely on inability to pay fees constituted a violation of the 14th Amendment.¹³ Programs which rely on participant fees to support the services should have a plan to provide diversion/intervention to indigent defendants. In a related case, the Court of Appeals of Indiana found that a prosecutor must make alternatives available when participation is precluded due to ability to pay the fees. The Indiana court also concluded that denying defendants the opportunity to participate based solely on inability to pay fees violates the fundamental principle of fairness.¹⁴

¹⁰ See *State v. Haas*; *State v. WS*; *Cleveland v. State* and *State v. Greenlee*. *State v. Jogan*, Fla CtApp, 3dDist, 9/23/80, 28 CrL 2189 "Under our existing criminal justice system, the discretion to either prosecute or nolle prosequi a defendant (conditioned upon his entry into the military forces) is a pre-trial posture vested solely in the state attorney's discretion".

¹¹ *Flynt v. Commonwealth of Kentucky* and *Commonwealth of Kentucky v Elliott*, 105 S.W. 3rd 415 (2003) and *State of South Carolina v. Tootle*, 500 S.E. 2nd 481 (1998)

¹² See *State v. Eash*; *U.S. v. Coleman*; *State v. Marino*, Wash SupCt, No. 49838-5, 1/5/84, 34 CrL 2299 "But under a diversion agreement, the prosecutor establishes the conditions and supervises the program. The court's role is less direct, consisting primarily of assuring procedural regularity throughout the criminal justice process."

¹³ *Commonwealth of Pennsylvania v Melnyk*, 548 A.2d 266 (1988).

¹⁴ *Mueller and Evans v Indiana*, 837 N.E. 2d 198 (2005).

PART IV: ENROLLMENT

4.1 Prior to making the decision to enroll in a pretrial diversion/intervention program, a potential participant should be given the opportunity to review with counsel the merits of his or her case and 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 into pretrial diversion/intervention. Defense counsel plays an important part in this process. It should be noted, however, that defendants have a choice whether to consult with defense counsel or to represent themselves in the enrollment process. Potential participants should not be denied access to pretrial diversion/intervention programs based on declaring themselves “*pro se*” in the processing of their case. Either through consultation with counsel or through personal research, the potential participant should have a detailed understanding of the diversion option and the various alternatives to diversion/intervention 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 diversion/intervention representative should be available to inform the potential participant, ideally in the presence of counsel, about the program. Such a discussion should include 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 materials should also be available for the potential participant, but particularly when he/she is choosing to enroll without benefit of counsel. Such materials alone may need to suffice where barriers to actual person-to-person representations by the program are insurmountable.

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/intervention. 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/intervention 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 participation in pretrial diversion/intervention, including practical and legal effects of expungement or sealing of arrest records or lack of such, as well as the presumption of guilt and any stigma which may be associated with participation in diversion programs.

In an ideal world, the diversion/intervention program and counsel work in concert with the potential participant to promote a true understanding of the diversion option so critical to voluntary and informed choice. The need for this guidance cannot be stated strongly enough, particularly when there is a requirement for an admission of guilt and/or waivers of essential rights. As a case in point, see a 2005 Texas case in which a defendant waived her right to counsel before agreeing to enter diversion and who, upon failing out of the program,

asked the court to have her admission of guilt be suppressed based on the fact that no counsel was present. The Texas Court of Appeals ruled that she knowingly and intelligently waived her right to an attorney and the admission of guilt would not be suppressed.¹⁵

4.2 The program conditions of pretrial diversion/intervention should be fair, equitable and related to the goals of the diversion placement.

COMMENTARY: These Standards suggest that routine judicial and prosecutorial input in devising general eligibility guidelines and in establishing universal conditions for diversion/intervention programming is appropriate. Specific intervention plan development, however, should be the responsibility of the program staff whose expertise it is to assess participant risks/needs and the available resources to address these needs. While in actual practice some courts and prosecutors impose more stringent program requirements on some individual defendants, the practice risks the integrity and fairness of the diversion/intervention program and may jeopardize the participant's successful program completion. Research on evidence based practices indicates that excessive restrictions and over conditioning are counterproductive to participant success.¹⁶

4.3 Enrollment in the pretrial diversion/intervention program should not be conditioned on a formal plea of guilty. An informal admission of responsibility may be acceptable as part of an intervention plan. Potential participants who maintain innocence should be accepted into the program only with written, informed consent after an opportunity to meet with counsel.

COMMENTARY: The dangers of having pretrial diversion/intervention participants 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 2.2 and 4.1). 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*¹⁷ 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 ruled that any automatic decision, whatever the basis, is arbitrary and that defendants cannot be required to admit guilt. There was a similar finding in the 1983 *State (New Jersey) v. Smith*.¹⁸

¹⁵ *Ludd v The State of Texas*, 2005 Tex App. Lexis 2233.

¹⁶ Roger K. Warren, Evidence Based Practices to Reduce Recidivism: Implications for State Judiciaries, The Criminal and Justice Institute and the National Institute of Corrections, (Washington, D.C. 2007) p. 21.

¹⁷ *State v. Catlin*, 215 N.J. Super. 471 (1987).

¹⁸ *State v. Smith*, 92, N.J. 143 (1983).

These Standards do not support the practice of requiring a guilty plea prior to entering a diversion/intervention program. 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 an intervention plan. In cases where the nature of the alleged offense 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/intervention program is not to tie receipt of services to the crime allegedly committed, but to assist the participant in achieving a more stable life situation in order to avoid future arrests. In situations where an informal admission of responsibility is used, under no circumstances should that admission later be admissible into evidence if the participant is returned to court for prosecution.

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

4.4 Time limits for the duration of participation in a pretrial diversion/intervention program should be established.

COMMENTARY: One of the primary goals of traditional pretrial diversion/intervention is to effectively deal with cases which are amenable to intervention so as to enable the system to conserve its resources for cases that would be more appropriately handled through the adversary system.¹⁹ In attempting to achieve this goal, it would seem that the entire diversion process should not be longer than necessary to achieve the other primary goal: that of deterring and reducing crime. Consistent with these goals, this Standard proposes that the routine time limits for pretrial diversion be the shortest feasible to accomplish those goals.

Within the confines of any state statutes or court rules, each jurisdiction must decide when initiating a diversion/intervention program the maximum length of time that normal prosecution can safely be deferred. While 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 period of 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 intervention plans designed to effect sufficient change in participants so that the likelihood of future arrests is minimized and dismissal of charges is warranted?²⁰

¹⁹ National Advisory Commission on Criminal Justice Standards and Goals, Report on the Courts 28, (Washington DC, 1973); also National District Attorneys' Association, Monograph on Philosophical, Procedural and Legal Issues Inherent in Prosecutor Diversionary Programs, (Chicago, Illinois, 1974).

²⁰ See Standard 5.3, *infra*, and Commentary.

The nature and extent of offenses which local policy makers deem worthy of consideration for diversion/intervention 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 were the defendant to be convicted. In general, the duration of the program should not exceed the normal case processing for such a charge and the authorized sentence for the crime, if convicted.

It must also be recognized that in many cases, the accomplishment of an intervention plan will not effect a complete and lasting change in a participant in a short period of time. For most participants, after periods of six months to one year, 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 intervention 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/intervention process ends. Only in extraordinary circumstances, should a participant be required to engage in the diversion/intervention program for a longer period than is standard. If a program extends the length of a defendant's participation, specific written reasons should be given to all interested criminal justice parties for the variation. Structured re-assessments of the participant's risks/needs should occur periodically to determine if the extension remains relevant.

4.5 A defendant who is denied enrollment in a pretrial diversion/intervention program should be afforded a review of the decision and the reasons for the denial should be provided to the defendant in writing.

COMMENTARY: These Standards take the view that where a program administrator makes the final decision concerning diversion enrollment, some type of administrative review of that decision is essential.²¹ For those defendants denied enrollment, 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 disclose reasons for denial, stated in the *Strychniewicz* 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

²¹ In *Hopper v. State* 546 N.E. 2) 106 (Ind. Appl. Dist., 1989) Aff'd. 603 N.E., 2d. 910 (Ind. App. 1st Dist., 1992), the Indiana Court of Appeals, First District, held that a defendant's enrollment in a diversion program cannot be terminated without minimal due process, in order to prevent arbitrary exercise or abuse of a program's discretion.

*about the arbitrariness of given decisions and will thereby foster a respect for the fair operation of the law.*²²

The New Jersey Supreme Court reiterated this concept in *State v. Barath*²³ 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/intervention option.

Individual jurisdictions may decide to use the format of administrative hearings for the review of enrollment denials. These hearings may take the form of an informal appeal to the program administrator, an informal hearing before an independent hearing officer or even a motions hearing before a judicial officer.

It is the position of this Standard that program administrators have a 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.

4.6 A pretrial diversion/intervention program should have clearly articulated policies to address the defendant who is under pretrial release supervision and is referred for diversion/intervention. At the point of the defendant's diversion/intervention program enrollment, the court should close the pretrial release supervision case and release the defendant on his/her own recognizance.

Commentary: Pretrial release programs are now offering diversion/intervention in greater numbers. The issue of how to manage defendants who are enrolled in diversion and under pretrial release supervision has been a persistent question. In the past, the defendant's release status was a moot point for diversion/intervention programs as most defendants were either totally diverted out of the system on the charge and had no release conditions, or their release status did not affect the diversionary process, such as in a release on recognizance. Now, at the time of diversion/intervention enrollment, many defendants are under pretrial release supervision with a list of conditions which may or may not be supportive of diversionary intervention plans. In addition, the nature of release conditions is that they are not voluntary. If the Diversion staff must enforce release conditions as well as monitor a voluntary intervention plan, the conflict can erode the voluntary nature of diversion.

It is the position of these Standards that diversion/intervention programs should have clearly articulated policies as to the monitoring of the release as well as the diversion conditions. The program should approach the court to resolve the conflict in favor of the diversion process through a release to the defendant's own recognizance, particularly if the defendant has demonstrated the ability to comply with the release conditions while under supervision.

²² *State v. Strychniewicz*, 68 N.J. 285, 344 A. 2d 319 (1975).

²³ *State v. Barath*, 169 N.J. Super. 181 (Law Div. 1979).

PART V: INTERVENTION SERVICES

5.1 A pretrial diversion/intervention plan should be developed through the use of a comprehensive assessment of the defendant and address specific needs related to reducing future criminal behavior. Intervention plans should not be designed to respond only to the crime charged.

COMMENTARY: It is axiomatic that personal characteristics of diversion/intervention program participants will vary, as will the nature of the offenses with which they are charged. Pretrial services practitioners agree that programs should assess the individual risk factors and corresponding needs of the participant rather than develop an intervention plan based only on the crime that was allegedly committed. The premise is that by addressing the risk factors of the participant which most likely drove the behavior that brought him or her to the attention of the system, the probability of future arrests is minimized.²⁴ Intervention plans should reflect an awareness of the offense charged but contain a strategy to cope with the conduct that led to the participant's arrest.

Adherence to a model of providing services based on the individual risk factors of participants necessitates that the diversion/intervention program staff conduct a thorough and competent assessment. Every effort must be made to be culturally sensitive in making assessments and developing intervention plans. To meet the diverse needs of participants, the program must offer comprehensive services either in house or through referral to community based resources.

5.2 A pretrial diversion/intervention program should utilize individualized and realistic intervention plans which feature achievable goals. Plan formulation should occur as soon as possible after enrollment in consultation with the participant and should be reduced to writing. The written intervention plan should contain the conditions to be met by the participant and the potential outcome for the criminal case upon successful completion or unsuccessful termination.

COMMENTARY: The terminology used in this chapter is of particular importance. "Intervention plan" is being recommended as opposed to treatment plan or counseling plan. Considering the vast range of participants, any labeling which could ultimately stigmatize participation in a diversion/intervention program is unproductive.

In keeping with the voluntary enrollment aspect of the program, it is essential that the participant be actively engaged in the formulation of the intervention plan. In order to be effective, participants should view intervention plans as tools to help in their specific situations rather than as punishment, substitute sentences, or imposed conditions to be circumvented. While intervention plans will often place requirements on the participant, such as attendance at a certain number of counseling sessions, all requirements should be

²⁴ Zaloom, J., *Pretrial Intervention Under New Jersey Court Rule 3:28 - Proposed Guidelines for Operation*, Criminal Justice Quarterly, Vol. 2, No. 4 (Fall, 1974).

geared toward the individualized risk factors of the participant. The participant should be cognizant of the reasons for the requirements. The use of effective techniques such as motivational interviewing can enhance the ability of staff to engage the participant in planning for a realistic and successful intervention.

The intervention plan should be individualized to address specific risk factors and encompass only those goals that the participant can realistically achieve within the given time frame of the program. The best intervention plan is a written, signed agreement between the participant and the diversion/intervention staff in which all the goals and conditions are spelled out clearly and is completed at the beginning of the program. Knowing exactly what is expected of him/her and what can be expected from the program can greatly enhance a participant's opportunity for success.

5.3 Pretrial diversion/intervention plan requirements should be the least restrictive possible to achieve agreed-upon goals and should be structured to minimize the risk of future criminal behavior.

COMMENTARY: These Standards seek to further the premise that the major objective of any intervention plan is to help the individual participant avoid future behavior that might lead to an arrest.

In designing intervention plans, program staff must keep in mind that 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 that go beyond the general purpose cited above may be overreaching by the program and can have a deleterious effect on the success of the participant. Recent research on criminal justice evidence based practices has found that intervention programs directed at changing behaviors to reduce recidivism are most successful when they address specific needs and match the level of intensity to the level of risk.²⁵

The opposite type of case might involve participants whose personal situation is such that intensive services are needed. After a thorough assessment of such situations, it is recommended that intervention plans include referrals for long-range service delivery. Participants with serious substance abuse problems or serious emotional or psychiatric problems would clearly fall within this category. Completion of the diversion/intervention program for these participants might not require that all problems be resolved; rather that the participant's situation would be sufficiently improved to provide the stability required to minimize future arrests. The intervention plan must strive to balance such issues as the participant's charge, the potential outcomes to that participant if convicted, and the participant's needs and to reflect the least restrictive means to accomplish the goals.

²⁵ Warren, p.21.

5.4 Pretrial diversion/intervention program conditions should address restoring justice and reducing recidivism by incorporating a variety of approaches including, but not limited to, defendant rehabilitation, community service, victim restoration and restitution. The nature and extent of the conditions should be matched to the level of risk of future criminal behavior.

COMMENTARY: As discussed earlier in Part V, diversion/intervention programs have developed a variety of interventions which address reducing recidivism based on best practices, local resources and what risk factors the participant is presenting. Many programs now incorporate rehabilitation through in-house and community based treatment programs, meaningful community service, victim restoration through a variety of means, and restitution. The Standards support the premise that these requirements may be an acceptable part of a participant's intervention plan provided they are not used to preclude acceptance into the program and that they support the intervention goals as defined in Standard 5.3, *supra*. All diversion/intervention programs should have clear criteria for the use of any intervention and should have well articulated policies on the use of drug testing. Specific interventions used should be incorporated into the written plan which is then signed by the participant.

The payment of monetary restitution may be included in an intervention plan when it is determined to aid in the rehabilitation of the participant. In this case, restitution is another tool of the program which provides an opportunity for the participant to gain understanding of his/her behavior and help him/her establish more functional behavior patterns. If restitution is a part of a participant's intervention plan, the requirement should be to make a good faith effort to pay such restitution. To require full payment of restitution in order to successfully complete the program would be, in effect, a discriminatory practice toward participants who, despite a good faith effort, could not afford to pay all or part of their restitution. This is particularly onerous if the participant could be terminated from the program and prosecuted simply due to their inability to pay all or part of the restitution. The concept of a "good faith effort" was upheld by the New Mexico Supreme Court in *State v. Jimenez*²⁶ 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*²⁷ 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 cases where the program feels that restitution is necessary for the victim to feel restored and there is no means to make monetary restitution, alternative methods should be explored. For example, victim-offender reconciliation or mediation can be a very effective way to determine acceptable ways to repay the victim through non-

²⁶ *State v. Jimenez*, III N.M. 782, 810 P.2d 801 (1991).

²⁷ *State v. Devatt* 173 N.J.Super 188, 413 A. 2d. 973 (1980).

monetary means. Another avenue is to obtain a civil confession of judgment. In such cases a participant's diversion/intervention program would not be jeopardized and yet the victim would be given consideration. The participant's defense counsel should be involved in matters of establishing restitution.

Community service work also should not be an automatic part of a diversion/intervention program but a specific tool designed to enhance an individual participant's situation or functioning. The actual placement for the community service work should be mutually agreed upon by the participant and the diversion staff. Hours of service should be reasonable and not be beyond what the court would impose on a defendant who is convicted on the same charge.

Drug testing may also be a legitimate part of an intervention plan provided such testing is used to target an identified risk/need. Drug testing should be used only when there is good reason to suspect a participant of drug use and to confirm abstinence or ascertain the need to seek substance abuse evaluation and treatment. On-going testing may be accomplished through the treatment program with monitoring by the diversion/intervention program.

5.5 A pretrial diversion/intervention program should develop, identify, and partner with treatment and other types of services in their community which have demonstrated effectiveness and the ability to provide culturally competent and gender specific programming for participants.

Commentary: Evidence based practices have been integrated into treatment for substance abuse and mental health for some time. Diversion/intervention programs should develop relationships with community based treatment programs which will enhance services to mutual clients. Diversion/intervention programs should be aware of licensing requirements and be sure that community based programs have met these requirements or an accreditation process for serving the specific populations. In addition, it is important that diversion/intervention programs be fully informed of how the community based treatment program provides cultural and gender specific programming. Of critical importance to quality and effective treatment for criminal justice participants is that the provider be able to provide sensitive and effective trauma related services. Criminal justice involved individuals often have significantly more trauma in their histories than those who are not in the system.²⁸ As a result, their recovery process can be improved through interventions which include attention to early trauma and its effects.

Pretrial diversion/intervention programs are in a unique position to help identify gaps in relevant programming within their community due the constant demand for services tailored to meet the needs of the participants. Programs are encouraged to work collaboratively with existing services and other criminal justice entities to develop new and effective programming which addresses the unmet needs of the participants, thus enhancing their own services and as well as those of the community.

²⁸ Jennings, Ann, The Damaging Effects of Violence and Trauma: Facts, Discussion Points and Recommendations for Behavioral Health Systems, National Technical Assistance Center for State Mental Health Planning, (Washington, D.C. 2004).

5.6 A pretrial diversion/intervention participant plan 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 intervention 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 but relevant needs of the participant may become apparent. Since the intervention 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 representative and participant.

If all parties view the intervention plan as a dynamic 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 voluntary nature of the diversion/intervention program may be compromised. In the event that the participant objects to intervention plan modifications viewed by the program staff as essential and made in good faith after changed circumstances, the participant should have the option to withdraw from the program and return for prosecution without prejudice.²⁹

If the participant does not agree with changes made in the intervention plan and does not withdraw, 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. Subsequently, the participant should have the right to a hearing on the termination.³⁰

²⁹ Hearings on S 1819, the Federal Criminal Diversion Act of 1977, before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 96th Cong., 2d Sess. (1978) at 80 (statement of Pretrial Services Resource Center Director Madeleine L. Crohn).

³⁰ This requirement for a pre-termination hearing is recommended elsewhere in these Standards. See Standards 4.5, *supra*, and 7.3, *infra*, and accompanying commentary.

PART VI: SUCCESSFUL COMPLETION

6.1 Pretrial diversion/intervention program policy should provide for a dismissal of the charge(s) upon successful completion of program requirements.

COMMENTARY: Successful completion of the pretrial diversion/intervention program should be accompanied by a dismissal with prejudice of the diverted criminal charge(s). 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/intervention 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 Prosequi* 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 prosecution on double jeopardy grounds as well as *Res Judicata*. Entry of a dismissal without prejudice has the same defects as the *Nolle Prosequi*. These Standards are in accord with the 1973 National Advisory Commission on Criminal Justice Standards and Goals which has advanced the same rationale as expressed here.³¹ In addition, it would seem that fundamental fairness requires entry of dismissal with prejudice. A participant in a diversion/intervention program who successfully completes that program should be able to consider the matter closed 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 a dismissal of the diverted charge(s). It should be the responsibility of defense counsel to challenge prosecutorial or court refusal to dismiss charges where program requirements have been met. If the participant is not represented by counsel, then the program has an obligation to ensure that agreed upon program completion guidelines are followed. This is consistent with Standard 3.4, *Supra*, which imposes an affirmative obligation on the diversion/intervention program to ensure that agreed-upon eligibility guidelines are enforced. The program, it must be stressed, is party to an 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, have an obligation to see that the agreed upon bargain is kept. While the diversion/intervention 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 diversionary process disregard agreed upon guidelines for final disposition in successful cases.

³¹ National Advisory Commission on Criminal Justice Standards and Goals, Report on Courts, (Washington, D.C. 1973).

6.2 A pretrial diversion/intervention 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 intervention 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 as well as future plans. The final report should contain only a summary of all verified information directly concerned with the intervention plan.

It must be remembered that diversion/intervention programs 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 a dismissal should include positive and negative verified information (if there are any negative aspects of the case) so that the judge or prosecutor can act reasonably upon the program's recommendation. Further discussion of the confidential aspects of the report is discussed in Part VIII of these Standards.

6.3 Upon successful completion of a pretrial diversion/intervention program, a participant should have his/her criminal record sealed or expunged.

COMMENTARY: Upon successful completion of pretrial diversion/intervention programs, some states have provisions for expungement (as distinct from sealing) of records. In other states, 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. Still other states provide an option for successful participants to have their record sealed. These Standards acknowledge that diversion/intervention programs must function under the statutes regulating the expungement or sealing process in their particular state. Ideally, a program should encourage participants to seek any such remedies as are provided in their state's statutes and provide support and documentation when needed.

A number of court cases have supported the need for successfully diverted participants to be granted expungement. In both 2001 and 2006, the Kentucky Court of Appeals supported the expungement process and found that "it was clear that the legislature intends for a successful pretrial diversion to, in effect, wipe the slate clean as to these charges".³²

The issues of record sealing and expungement are of significant importance particularly in this age of electronic data management and the internet. Many state legislatures have taken an aggressive stance in enhancing the collateral consequences for arrests and precluding employment for those convicted of certain crimes. Data miners on the internet scour on-line arrest records and criminal justice information to sell to prospective employers. Some states

³² *Hyatt v Commonwealth of Kentucky*, 17 S.W. 3d 121 (2000) and *Commonwealth of Kentucky v Shouse*, 183 S.W. 3d 204 (2006).

have enacted sunshine laws which make most criminal justice records public information. The issues of privacy and criminal history records are of great importance to diversion/intervention programs. One of the foremost goals of the diversionary process is to reduce the stigma of a criminal conviction. With open records and on-line criminal dockets, that goal is compromised in many jurisdictions. The program should work with the local criminal justice policy makers to address this concern and develop a means to minimize the impact of collateral consequences and to promote legislation that requires background agencies or data miners to maintain accurate, timely data. A 2005 Florida case demonstrates the complexities of these circumstances. A Florida woman successfully completed pretrial diversion/intervention and had her charges dismissed. She then went back to school and became certified as a teacher, only to find that she was rejected for employment by several districts which considered her pretrial diversion program to be an admission of guilt to a crime. She returned to court to move that her dismissal be vacated and the charges reinstated so that she could be exonerated through trial. Unfortunately, the court ruled that there was no legal basis on which a court can vacate a dismissal after completion of a pretrial diversion.³³

³³ *State of Florida v Dempsey*, 916 So.2d 856 (2005).

PART VII: UNSUCCESSFUL TERMINATION

7.1 A participant should be able to withdraw from the pretrial diversion/intervention program voluntarily at any time prior to completion and elect to return to traditional criminal justice processing without prejudice.

COMMENTARY: Since diversion enrollment on the part of the participant is voluntary, the participant should retain the right to withdraw from participation at any time and elect to be remanded to traditional 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 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/intervention program prior to completion should be able to do so without prejudice. Prosecutors and judges often view non-completion of diversion as a failure on the part of the participant to utilize the opportunity offered. Consequently, the defendant risks being 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 not be the fault of the defendant or the program 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.

7.2 The pretrial diversion/intervention program should retain the right to terminate service delivery or recommend termination when the participant demonstrates unsatisfactory compliance with the intervention plan. When such a determination is made, the participant should be returned to traditional criminal justice processing without prejudice. The program should provide written reasons for the termination decision to the participant, defense counsel, prosecutor and/or court.

COMMENTARY: Pretrial diversion/intervention 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 intervention plan acceptable to the

program could be developed which might be more successful. In full cooperation with other involved criminal justice parties, this situation might lend itself to a referral to another jurisdictional resource such as a problem solving court where a higher level of intensity might improve the potential for success for this defendant.

Prior to termination, defense counsel should be fully informed of the difficulties the participant might 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/intervention 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 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 VIII for more detailed discussion. Under no circumstances should this information be used in any criminal proceedings against the defendant once returned to the traditional criminal justice proceedings.

7.3 Prior to implementation, a participant facing unsuccessful pretrial diversion/intervention program termination should be provided the reasons in writing and afforded an opportunity to challenge that decision.

COMMENTARY: This Standard suggests that a mechanism should be provided for the participant and defense counsel (if involved) to be heard before an unsuccessful termination decision is made. Commentators have argued that a hearing is required to be consistent with the principles expressed by the Supreme Court in Morrissey v. Brewer³⁴ and in Gagnon v. Scarpelli³⁵. 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/intervention termination because of the potential threat to loss of liberty following program termination, particularly if pretrial release conditions have been ordered in the diversion case. A decision by the Washington State Supreme Court in State v. Marino appears to more directly address termination from

³⁴ *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation requires due process hearing).

³⁵ *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation requires due process).

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/intervention program through a hearing.³⁶

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. See the Commentary under Standard 4.5 *supra* regarding denial of enrollment for a discussion of the types of mechanisms which can be used for such reviews.

7.4 Arrests that occur during course of the participant's pretrial diversion/intervention program should not be grounds for automatic termination. A program review at which the facts 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: As diversion/intervention programs take on more challenging cases, new arrests while in program may become more common. Standard 7.4 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 should 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 whether continuation is warranted. Only after a full review of the circumstances can a realistic decision be made regarding termination.

This Standard does acknowledge that there are several instances where the diversion program has limited ability to make a decision to continue a defendant in an intervention plan when there has been a new arrest. When a diversion/intervention program functions as an arm of the prosecution, the decision to terminate may be made by that office, not the program. Most prosecutor based programs do report that their information regarding the defendant's program progress is considered in the decision making process.

Finally, for defendants who are under pretrial release supervision as well as participating in the diversion process, a new arrest may threaten the ability to continue diversion/intervention due to a revocation of release and reincarceration. The review described in the first paragraph of this Commentary should still be performed by the diversion/intervention program and a decision made whether to forward the information to interested criminal justice entities who are involved with processing the new charge.

³⁶ State v. Marino, 674 P.2d 171 (Washington, 1984).

PART VIII: CONFIDENTIALITY AND DATA PRIVACY

8.1 A pretrial diversion/intervention program 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/intervention process should be considered confidential and should 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 pertinent to their case 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 be as specific as possible in explaining to the potential participant the types of information that others in the criminal justice system may receive and what, if any, are his or her rights to access diversion/intervention records.

Standardized 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, to whom, for how long and by what means. Release of information forms which require information about a participant's personal health information must conform to the federal guidelines under Health Information Portability and Accountability Act, Title II³⁷. Release of information forms which require records about a participant's substance abuse history and treatment must conform to the federal guidelines under Federal Rule 42 C.F.R., Part 2. Release of information policies and procedures should be clearly spelled out for diversion/intervention program staff.

In many states, the diversion/intervention staff members are considered "mandated reporters" and must report to state or local officials on such concerns as child welfare and elderly abuse. Diversion/intervention programs must determine if their staff fall under that requirement and, if so, must ensure that disclosure of that status is made to the defendant at the initial contact.

Many programs also have "duty to warn" policies and procedures which address when confidentiality must be broken without the permission of the participant, such as threat of imminent suicide or specific threats against another person. Those policies must also be conveyed to the participant prior to any initial discussion or assessment.

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. When information is requested

³⁷ See The United States Department of Health and Human Services Office of Civil Rights website at www.hhs.gov/ocr/hipaa.

by outside parties such as potential employers, creditors, treatment providers, or social welfare agencies, diversion/intervention programs should provide only that data which is required to satisfy the seeker's legitimate need to know and only if the participant has agreed in writing 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.

8.2 A pretrial diversion/intervention program 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/intervention application or participation in a diversion program will be admissible as evidence in the diverted case or in any subsequent civil, criminal or administrative proceeding.

COMMENTARY: It is suggested in Standards 4.5 and 7.3 that prospective or enrolled participants be allowed to challenge a termination decision made by the diversion/intervention program. Courts in at least two states have issued rulings that take this position.³⁸ In the course of such reviews, and in any case where the diversion/intervention program terminates the participant, information possibly damaging to the participant may have been elicited.³⁹

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

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.⁴⁰ 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.

³⁸ *Kramer v. Municipal Court*, 49 Cal. App. 3d 418 (1975); *State v. Ledding*, 158 N.J. Super. 209 (Law Div., 1978).

³⁹ See Standards 4.5, and 7.3, *supra*, and accompanying commentary.

⁴⁰ *State v. Winston*, 219 NW 2d 617 (Minn., 1974); *State v. Williams*, 343 A.2d 29233 (N.H. App., 1975).

Moreover, programs should not rely solely on court support for protection of program records.⁴¹

Therefore, a broader guarantee is recommended, similar to that embodied in Guidelines No. 4 and 5 of the *New Jersey Supreme Court's 1996 Guidelines for the Operation of Pretrial Intervention Programs*. Those provisions bar 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 and/or local laws requiring confidentiality of information and data privacy. Recent legislation both at the state and federal level has significantly changed the landscape of data privacy. Legislation concerning immigration status and deportation of those convicted of crimes has impacted pretrial diversion/intervention programs and their ability to protect the information gathered in the process of program participation. The program should be aware that confidential information gathered during the course of participation might be used by a broad spectrum of criminal, civil, and/or administrative officers.

During the time since the last revision of these Standards, the availability of information through electronic sources has grown exponentially. The ability to protect personal data is increasingly difficult and some states now have “sunshine” legislation which permits the criminal history information to be fully open to public view. Arrests, the case dispositions and convictions are readily available online for anyone to see. Data miners of the internet collect this information and sell it to a variety of entities such as prospective employers and licensing boards. Participation in alternative dispositional programs such as diversion/intervention is noted as well as arrests and convictions. Even expungement does nothing to erase information which has already been released prior to the process, such as the arrest itself.

Many state legislatures are beginning to wrestle with the collateral consequences of criminal justice involvement and sanctions. The Minnesota legislature recently put together a committee to explore the collateral consequences of criminal justice involvement. In January of 2008, the committee published a report highlighting the consequences of arrests and convictions on employment, education and licensing. The report made a number of suggestions to mitigate some of the impact.⁴² The committee recommended increasing access to diversionary programs for appropriate candidates as a means to minimize some of the long term sanctions. It was clearly recognized that through minimizing these long term

⁴¹ In this regard, it is instructive that within 30 days of the New Hampshire appeals court's decision in the *Williams* case to the effect that information obtained in a pretrial release interview could not be subpoenaed and used against the interviewed defendant's interest at trial, the New York Supreme Court came to the opposite conclusion in *People v. Rodriguez*, (N.Y. Sup. Ct., App. Div., 1975). Neither the New Hampshire nor the New York pretrial release interview confidentiality guarantees were embodied in statutes; instead, both were based on local agency policy only.

⁴² Minnesota Legislature: Committee on Collateral Sanctions. Criminal Records and Employment in Minnesota, January, 2008.

effects, those involved in the criminal justice system would have greater opportunities to build a solid educational base and obtain long term gainful employment which are at the heart of maintaining a responsible, arrest free life.

Concerns over data privacy and confidentiality are significant for most programs today. The issue of use of the information developed as a result of an intervention plan against a defendant at any time still remains a critical aspect of maintaining program credibility. 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 but to provide an effective mechanism for a meaningful intervention. In the absence of statutory safeguards protecting the confidentiality of communications, formal agreements should exist between the criminal justice system and the program to protect such communications. Those agreements should include policies as to the use and dispersal of electronic data. Participants should be informed of the existence of such agreements and any limitations on absolute confidentiality that they allow before enrollment in the diversion/intervention program.

Today programs and participants face a broader assault on privacy and confidentiality through the means of electronic communications and data sharing. Programs should keep current with local, state and federal legislation and regulations which could impact the confidentiality and data privacy of participants. Diversion/intervention staff should understand the potential impact of such legislation on participants' future immigration status, educational, licensing, and employment opportunities and convey such information to potential participants prior to enrollment.

8.3 Pretrial diversion/intervention program guidelines should be developed for determining the type of information to be contained in reports to be released to criminal justice agencies. Such reports should be limited only to information which is verified and necessary.

COMMENTARY: Elsewhere, these Standards recognize that certain information should be conveyed to the criminal justice system when the diversion/intervention program makes a dismissal recommendation.⁴³ 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. If defense counsel continues to be involved throughout the diversion process, he/she must represent the interests and safeguard the rights of the participant until the point of dismissal or the return to traditional prosecution. The prosecutor, on the other hand, must be satisfied that the participant is responding satisfactorily to the diversion/intervention program and that the record of compliance with diversion requirements is sufficient to warrant recommending dismissal or entering a *Nolle Prosequi*, depending on local procedure.

⁴³ See Standards 6.2 and 7.2, *supra*, and accompanying notes and commentary.

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 intervention plan between the diversion/intervention program and the participant be conveyed. Subjective opinions should be avoided. Facts irrelevant to completion of the intervention plan should also be omitted. In keeping with Standard 8.1, the prospective participant should be informed of the type of information that 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 type and content of the reports to be submitted for dismissal recommendations.

8.4 Qualified researchers and auditors should, under limited and controlled conditions, be afforded access to pretrial diversion/intervention participant records provided 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 may be utilized for research and auditing purposes.

Researchers retained by the pretrial diversion/intervention program may need access to confidential information in order to perform their duties accurately. In practice, many programs feel uneasy about sharing defendants' records with or without personal identifiers. Guidelines exist, however, under the Federal Privacy Act and in the statutes of a number of states which severely limit access to data and guard against potential abuses or mishandling of information.⁴⁴ Under most circumstances, auditors and researchers will not need access to records containing personal identifiers. Generally recognized professional ethics of research and auditing prevent divulging such information. Diversion/intervention programs must therefore ensure that only reputable firms are hired to perform research or audit their records.

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

⁴⁴ See Search Group website: www.Search.org for a number of publications which deal with privacy and security of criminal justice records. See also US Department of Justice, Bureau of Justice Statistics for a 2003 publication, 2002 Compendium of State Privacy and Security Legislation.

PART IX: ORGANIZATIONAL STRUCTURE

9.1 A pretrial diversion/intervention program should have a well articulated mission statement as well as operational and program goals. The mission statement and the goals should be clearly conveyed to both staff and participants.

COMMENTARY: A well articulated mission clearly guides a program in the accomplishment of its purpose. By engaging the staff in the process of development and implementation of a mission, the program ensures that the day to day activities will be directed toward the realization of that mission.

The goals and objectives of programs should be derived from the mission and serve as activities which can be measured and targeted toward specific aspects of operational management and program services. The setting of goals and objectives is a dynamic process which changes more frequently than a mission statement. Programs are encouraged to engage the staff in the goal setting process on a regular basis so that each staff member knows, understands, and supports the program's mission and goals.

Programs should distribute the mission and goals to criminal justice partners and appropriate community resources. Utilizing strategic planning in the greater context of the criminal justice community can assist programs in assessing effectiveness and in organizing resources to help achieve the goals that are set.

9.2 A pretrial diversion/intervention program should be structured to accomplish its mission and stated goals. Program administration should provide appropriate guidance and oversight in the development of operational policies and procedures which support effective programming. The program should work to establish effective partnerships with the court, other criminal justice agencies, and with representatives of the community served by the program.

COMMENTARY: Organizational structures of pretrial diversion/intervention programs vary considerably and no model format is offered in these Standards. However, the effective operation of diversionary programs will require the adherence to the following general principles. First, there should be a chief decision-maker accountable for the program's performance and for primary liaison responsibilities with oversight bodies, funding agencies, the criminal justice system and the community. This executive is responsible for ensuring documentation of program activities for the purposes of programmatic and financial accountability and for research. Second, the program should have the means and the capacity to deliver services to the participants either directly or through referrals.

Diversion/intervention programs should include staff trained to assess case specific information and legal implications for program participants. This staff should be accountable for tracking defendant compliance to program requirements and the delivery of services to participants by outside agencies, if utilized. Each staff member 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.

9.3 A pretrial diversion/intervention program should maintain adequate and appropriate resources necessary to accomplish its mission.

COMMENTARY: The financial support for diversion/intervention programs comes from a variety of sources. Many programs are publicly funded such as court or county programs while others are funded through contracting with government entities to provide the services. Still other programs are totally dependent on participant fees to support the services. However funded, programs are challenged in today's fiscal climate to sustain their programming through collaborative work with other criminal justice and community services providers. Many programs are working in non-traditional ways to obtain grants and engage private foundations in supporting the work that they do.

These Standards view reasonable fees for service as appropriate in order to provide and maintain adequate resources. "Reasonable" implies that there should be a sliding fee scale and that no participant be denied entrance to a program or continued services from a program because of inability to pay such fees. Programs who charge fees should have policies in place for the consistent handling of participants who cannot pay.

9.4 A pretrial diversion/intervention program should be an active participant in the greater community by regularly meeting with local representatives to ensure that program practices meet the needs of the community served. The diversion/intervention program should actively participate with other criminal justice organizations in a collaborative approach to criminal case processing.

COMMENTARY: Pretrial diversion/intervention programs are fully participating partners in a community's response to the needs of those entering the local criminal justice system. As such, they have an obligation to work cooperatively both with their criminal justice partners and the greater community to make sure that the program is meeting identified needs as well as expectations. To accomplish that goal, programs should meet with community representatives on a regular basis to obtain feedback and suggestions about the impact and effectiveness of their work.

Pretrial diversion/intervention programs must work collaboratively with the court, other justice system entities, and community service providers to develop policies for the delivery and management of services needed by participants. A broad range of intervention strategies must be developed to respond to needs and risks posed by factors such as substance abuse, mental illness, physical ailments, homelessness, poor job skills, and illiteracy. In communities with problem solving courts, the pretrial diversion/intervention program should develop a strong working relationship with these courts to enhance each other's work and provide for the most effective utilization of resources. Some diversion/intervention programs may not be able to directly provide all the services needed by their participants but they do have a role in supervising and coordinating the services provided to the participants by other agencies and organizations. To function effectively and meet the needs of participants, it is important to have sound policies that are developed on a jurisdiction-wide basis involving a broad range of agencies and organizations. Regular contact with such groups enhances communication, mutual understanding and identification of gaps in services.

9.5 A pretrial diversion/intervention program should be, in all policies and actions, culturally sensitive and informed. All program policies and procedures should support the inclusion of and equal opportunity for staff and participants regardless of race, ethnic origins, gender, sexual orientation, physical ability and/or any other protected class. Staffing and advancement should follow equal employment opportunity guidelines. Staff should be selected for positions based on skill and experience.

COMMENTARY: It goes without saying that programs must be culturally informed in order to provide competent and effective services to the participants. Being culturally informed is defined as being cognizant and responsive to the ethno-cultural aspects of the participant. Culturally competent programming takes into account the context of the participant's life both behaviorally and linguistically. Programs need to be aware of the cultural impact of every aspect of their programming, including the physical structure and environment of the office, the materials distributed to participants, and the interactions of the staff with each other and the participants. Beyond equal employment opportunity initiatives, pretrial diversion/intervention programs should strive to reflect the cultural diversities of their program participants and the community. Every effort should be made to be welcoming for all who have contact with the program. Programs should provide assistance to persons who cannot speak English through accessing interpreters and by providing forms and instructions in the defendant's native language, if possible.

The composition of program staff should be diverse and reflect the community served. Hiring should follow equal employment opportunity guidelines. Every effort should be made to ensure that pretrial program staff displays a high level of commitment to the purpose of the work, integrity, good judgment and sensitivity to diversity. On-going training which supports such an approach should be incorporated into the program's staff development plan.

9.6 A pretrial diversion/intervention program should be committed to the implementation of effective managerial and service delivery techniques based on sound principles and evidence based practices. The program should provide staff with opportunities to enhance skills.

COMMENTARY: In recent years, research has identified evidence based practices which enhance the effectiveness of criminal justice programming. While the amount of research in the pretrial service field is still fairly thin, there is a broad body of evidence about effective management and service delivery techniques which can provide diversion/intervention programs with a strong foundation for building quality services. Resources abound in the field of effective and inspiring management. Programs are encouraged to take advantage of opportunities at the local level and at national conferences such as the National Association of Pretrial Service Agencies (NAPSA) Annual Conference & Training Institute. As for service delivery, these Standards provide an excellent guideline for sound principles and effective program planning.

The National Institute of Corrections has published a number of documents which address the implementation of evidence based practices in community corrections and pretrial services.⁴⁵

Program staff should have regular performance reviews which include an assessment of training and development needs. The program should strive to provide opportunities for on-going skill development tailored for each staff member. To further enhance the skills for staff, NAPSA is now offering certification for both pretrial diversion and release staff. The process of reaching certification involves a good deal of preparation and research about the field as well as testing. Those who have obtained the certification indicate an increase in their overall understanding of the pretrial field.

9.7 A pretrial diversion/intervention program should develop and maintain a financial management system that enables the program to account for all receipts and expenditures, to account for the collection and the dispersal of restitution payments, to prepare and monitor its operating budget, and to provide the financial information needed to support its operations and requests for funding to promote sustainability.

COMMENTARY: For long term financial health and sustainability, programs must have financial management systems that enable them to manage resources, account for expenditures and receipts, stay within budget, and support requests for funding of future operations. For those programs which collect and distribute restitution, such financial systems are critical to program integrity. Sound financial policies, procedures, and close monitoring are hallmarks of good overall management.

Good financial management systems support program administration in documenting the need for continued or additional funding when reporting to governmental bodies.

9.8 A pretrial diversion/intervention program should develop and operate an accurate management information system to support data collection and presentation, compliance monitoring, case management and program evaluation. The program should also develop and implement policies which address data sharing and information protection.

COMMENTARY: Programs should develop and use a management information system that will help staff perform its core functions of assessing participants needs, collecting information on criminal histories, crafting intervention plans, monitoring participant progress on those plans, and communicating with the criminal justice system and community service providers. That system should be designed to provide operational information for staff to use in day to day activities and to provide data for analysis of

⁴⁵ See such relevant publications as the Roger Warren article referenced earlier in this document and Marie VanNostrand PhD. Legal and Evidence Based Practices: Application of Legal Principles, Laws, and Research to the Field of Pretrial Services, The Crime and Justice Institute and the National Institute of Corrections, (Washington, D.C. 2007).

program and staff effectiveness. In order to have value for the program, the system must be able to provide the data for both program outcome and process evaluations.

In recent years, automation of records and access to information has challenged programs to incorporate new policies with regard to data sharing and information protection. Programs are encouraged to develop and implement policy which specifically addresses who has access to electronic records and for what reason. For those entities external to the program, policies should be established specifically addressing what and how data will be shared. The use of the internet to collect information on participants or employees should be described in detail in policy to minimize a possible invasion of privacy. The program staff should be trained on such policies and understand the consequences of violations.

Programs should also have policies in place which address the appropriate use of email and other forms of electronic communications. Most employers have determined that such work-based communications are not private and can be audited at any time. In fact, a number of diversion/intervention programs now use email as the primary means of reporting participants' progress to the courts and all other interested parties. Programs that use electronic means to communicate need to be confident of the trustworthiness of their system and understand any potential risks to confidentiality and privacy.

9.9 A pretrial diversion/intervention program should conduct periodic program evaluations and audits to determine effectiveness in its performance and practices.

COMMENTARY: The terms program evaluation and research actually 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 issues about program participant activity or program practices that impact certain areas. Examples of specialized research might include: the examination of alternative forms of counseling participants, an examination of state-wide diversion practices, a 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/intervention 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 downloading from automated management information systems or, if necessary, through periodic manual data collection from written records. In either case, every effort should be made to collect specific data elements 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/intervention 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 outcomes profiles of participants. Programs should not only collect and tabulate this type of summary information but also analyze it to ensure 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 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/intervention programs should, for these reasons, continually monitor their day-to-day operations to ensure that they are optimizing efforts on behalf of enrolled defendants, the local criminal justice system, and the community.

At the point of start-up, diversion/intervention programs should create 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 the program keep the data necessary for undertaking additional research efforts in the future; and to seek support and monies for a comprehensive evaluation 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/intervention 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 can use this information to guide the development of more effective programming.

Further, many diversion/intervention programs face constraints by courts, prosecutors, and community sentiment on the types of defendants that they can divert. 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 and thus encourage diversion of the widest number of defendants.

Research and evaluation can also be integral to the issue of survival of diversion/intervention programs. For instance, a pretrial diversion/intervention program can be crippled if a sensational event involving one of its participants is publicized. This type of event can be overcome with prior research and evaluation that empirically demonstrates the positive impact of the program. Furthermore, funding agencies generally require an evaluation to decide whether further funding is justified and programs with demonstrated value through rigorous evaluation can enhance their sustainability.

See National Association of Pretrial Services Agencies website at www.NAPSA.org for information on individual certification and to obtain publications.

See National Institute of Corrections website at www.nicic.gov for access to publications and other electronic communications.