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PRETRIAL DIVERSION: AN OVERVIEW

by Sharon Moyer

Diversion has introduced a new lexicon of words and phrases into criminal justice system terminology: the divertee, pre-trial intervention or PTI, deferred prosecution, dispute settlement, and conflict resolution. These terms have emerged from a movement to divert certain categories of defendants from the full force of criminal processing.

In Canada, federal policy initiatives have focussed on diversion in which intervention occurs after charges are laid by police. For this reason, emphasis in this Overview¹ has been placed on diversion occurring before arraignment in a criminal court, but after it has been established that sufficient evidence exists to proceed.

Types of Pretrial Diversion Programs

While most pretrial diversion programs have as their overall goal the removal of the minor criminal offender from the court process, their foci have differed. Many programs in the United States, especially in the first wave of diversion programming, emphasized the accused in their selection criteria and program strategies. Clientele were selected on the basis of their need for vocational, educational and counselling assistance, or -- in the case of diversion of addicts -- their presumed need for alcohol or drug treatment. More recently, considerations of the effects of diversion on the criminal justice system (costs, workload) have been an important feature of many pre-trial programs. A concurrent development has been a greater emphasis on the victim and the community, often by making restitution and community service a condition of diversion. Some programs, usually involving volunteers from the local community, have further expanded the original approach by concentrating on criminal activity from interpersonal disputes. These conflicts are settled out of court by mediators or arbitrators.

In this Overview, pre-trial diversion programs have been placed into three broad categories for discussion: deferred prosecution, dispute settlement and unconditional diversion programs.

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A: Deferred Prosecution

In the late 1960's and early 1970's, there was a proliferation of deferred prosecution programs in the United States. These programs delay prosecution on criminal charges, (usually less than one year), while selected defendants complete specified conditions. Program obligations have included probation supervision, job placement or counselling, attendance at group counselling, and restitution. Agreement to diversion is obtained from the prosecutor as well as the defendant. Defendants are usually minor or first offenders, whose background or social adjustment have previously impeded regular employment. If the defendant fulfills the conditions imposed, the original charges are not proceeded with in court and, in some projects, the criminal record is expunged.

There were a series of such projects in the United States (Project Crossroads, the Manhattan Court Employment Project, and nine follow-up programs utilizing strategies similar to the first two), all of which focussed on defendants who were unemployed or underemployed. Program staff provided vocational placement and other manpower-related services, both in-house and by referral to community agencies. In some projects, both professionals and ex-offender, paraprofessional staff were employed.²

A number of variations on these prototypical deferred prosecution programs have been implemented, with differences in clientele, approaches, and the locus of decision-making and control (i.e., inside or outside of the criminal justice system). Their common element is that prosecution may be re-initiated if the accused does not fulfill the conditions of diversion. Among the variations are:

1. drug and alcohol diversion programs: these may be statutory and offer detoxification or treatment to drug and alcohol abusers. In the case of some programs for the minor drug user, the condition of diversion is participation in a lecture-type drug education program.³
2. programs, such as counselling and referral to social agencies, which combine offender-oriented services with a community orientation, through victim restitution or community service.⁴
3. a small number of deferred prosecution programs offer no services or assistance to divertees - usually persons accused of possession of a "soft" drug. The

only condition of diversion is to remain conviction-free for a set period of time. While labelled diversion, this type of "program" is really an extension of the traditional power of the prosecutor to screen cases from the system.

B: Dispute Settlement

Another major category of diversion programming is dispute settlement or conflict resolution. The identifying features of such projects are the cases considered appropriate for inclusion and the mode of intervention. Clientele of these programs usually have interpersonal conflicts, such as might arise among families, neighbours, or landlords and tenants, although in some programs minor criminal matters where no personal relationship exists may also be included. These interpersonal disputes are mediated or arbitrated by a hearing officer or panel.

Many dispute settlement projects obtain clients from the prosecutor's office or the court and, less formally, via walk-ins. In the case of self-referrals, there may be no criminal charge pending. Voluntary agreement to participation by both complainant and respondent is an essential precondition. The settlements which are negotiated are sometimes enforceable in the civil courts; in others, criminal prosecution can result if resolution cannot be reached, or if one party does not fulfill the agreement. Programs also differ in their use of binding arbitration. In "pure" mediation programs, the mediator has no power to make a decision regarding the dispute without the agreement of both parties. In those that contain an arbitration element, the hearing panel or officer can settle the issue without full consent at hearings where no consensus is possible.

A typical program is the Urban Court Project of Boston. The referral sources are community members, the office of the court clerk, the prosecutor and the judge. At a meeting which is scheduled within seven days of referral, the two or three person hearing panel attempts to mediate in a way that satisfies both parties. If agreement is obtained, the conditions are written down and signed by the disputants, and witnessed by panel members. As in similar projects, the panel members are lay persons from the community who have been trained in mediation techniques. In a three month follow-up of the project, there were "breakdowns" of agreements in 15% of resolved cases.⁵

C: Unconditional Diversion

In the majority of pre-trial diversion programs, the option to reinstate the charge remains in those instances when the diverted person fails to meet the conditions of diversion. In unconditional diversion, it is not possible to refer the program participant back to court. In this type of program, the diversion is completely voluntary with no threat of subsequent court proceedings. However, in all other respects, the program is often similar to other approaches -- for example, there may be program obligations to fulfill, including a specific diversion plan.

One example of unconditional diversion is provided by a Vancouver diversion program, which is designed for the first offender charged with a summary conviction offence. Referrals to the program are made by the police and the crown attorney. Staff conduct a check of records and a community investigation to establish suitability; the accused and the victim are contacted to explain the program and their consent to diversion is requested. It is emphasized that there must be sufficient evidence to proceed with prosecution. If an information has been laid, a stay of proceedings is requested by the crown attorney. The diversion plan, which can last no more than six months, may include restitution, referral to social agencies or community service.⁶

Why Diversion?

There have been a number of arguments put forward for diverting accused persons away from formal court processing. The following are the assumptions that spurred the development of diversion.

1. The criminal justice system is overloaded with persons accused of minor offences, those who are "situational" rather than confirmed lawbreakers, those whose crimes are motivated by interpersonal conflicts and those who are in need of treatment or other services (such as drug dependent persons or the unemployed).
2. Such individuals are more effectively dealt with outside the criminal justice system, because criminal sanctions cannot solve the problems that precipitated their entry into the system. For some law violators it is also believed that involvement with the courts and

corrections is damaging: negative effects such as the creation of a criminal record and the imposition of "stigma" are aspects of the argument. Diversion proponents point, too, to the research evidence which indicates that past rehabilitative efforts by corrections have been ineffective in reducing criminal activity.

3. It is possible to develop alternative means of dealing with accused offenders without impeding such objectives of the criminal process as the protection of society, deterrence, and reinforcement of community values.

The Projected Benefits of Diversion

While most advocates recognize that diversion is not a panacea for the complex problems facing the criminal justice system, many do claim that multiple benefits will accrue from its widespread implementation. Specifically, advantages to society, to the individual diverted person, and to the system of criminal justice have been postulated.

Among the societal benefits that have been cited are the reduced cost of diversion when compared to formal justice system processing, and the belief that there will be a reduction in recidivism of successfully diverted persons. As well, in the case of community-oriented programs, exemplified by dispute settlement projects, the emphasis on the community is said to produce greater citizen involvement in criminal justice and a consequent lessening of the estrangement from the system that is currently believed to exist. The expanded use of restitution and community service orders by diversion programs will also provide the community, and specifically the victim, with compensation for criminal activity.

The advantages to the diverted person are said to include avoidance of being labelled "criminal" by the courts and of other stigma associated with criminal sanctions. In service-oriented programs the diverted person may obtain treatment or social services that might not otherwise have been received, or received later from the correctional system. It is believed that such programs give the defendant the opportunity to resolve problems or remedy conditions which could result in future conflicts with

the law. Because a number of diversion projects have ex-offenders and other non-traditional staff in counselling positions, it is possible for the divertee to benefit from their support in a way not considered possible in correctional agencies.

Advantages less direct than the provision of services have also been hypothesized. The "sieve effect", in which cases drop out of the system before the actual imposition of sanctions by the court, is a well-recognized phenomenon in criminal justice. Diversion was originally seen as a method of structuring that fallout, by providing standardized criteria for decisions that are usually made case-by-case. As a consequence, diversion was believed to be potentially more "open" and hence more fair to the accused.

Claims for the benefits to the criminal justice system include reduction in court workload, especially when programs do not require a court appearance by the defendant, and faster and cheaper processing of criminal cases. If sizeable proportions of cases coming to court are diverted, it is felt that more resources will be available to courts and corrections, enabling them to concentrate on the processing of the more serious offender.

Key Diversion Issues

The research evidence on the benefits to society, to the diverted defendant and to the criminal justice system has been negative or ambiguous and conflicting. Claims by advocates that diversion could reduce recidivism among divertees, court workloads and costs have largely been rejected by researchers. Critics concerned with individual rights have stated that those rights have been denied by the process of diversion. Furthermore, target populations have tended to be defendants who present little risk to the community and who would have received a non-institutional disposition from the courts, if they had been processed normally. Both civil libertarians and researchers have asserted that the goal of "minimization of penetration" into the criminal justice system has not been reached. On the contrary, they state that the "net" of the system has been widened.⁷

Commentators have also noted that the diversion movement, which emerged in the flush of the sixties, has altered its approach from the original humanitarian, but somewhat simplistic, notions of its founders. There has been a shift in priorities

from the defendant to the system, without a concomitant shift in strategies: diversion, once intended as an alternative to the system, has become an alternative within the system.⁸ (It should be noted that this is apparently not the case with dispute settlement programs.)

In developing a description of the issues most relevant to the situation in Canada, it was found that the checklist that follows may serve a dual purpose. It could alert the wider criminal justice audience to the major concerns raised by the literature (as found in the annotated bibliography upon which this Overview is based) and it could serve as a tool for diversion planners. Assuming that diversion will continue in some form, its viability depends on planners anticipating the problems as outlined in the literature, and developing responses to the pitfalls which have been well publicized in the past half a dozen years.⁹

Some Possible Responses to the Pitfalls of Diversion

A: The Need for Diversion

Program planners should obtain information on court functioning and the potential target groups, in order to establish the nature and extent of the need for diversion in their community. Although most planners will have a firm idea of the type of program they wish to implement, there should be some attempt to verify that their conception addresses actual, rather than assumed, problems. Thus, they must test out, in their community, some of the underlying assumptions made by the proponents of diversion.

Attempts should be made to answer the following questions:

1. Are there sufficient numbers of minor criminal offenders to warrant a diversion program?
2. What type of problems seemed to precipitate their involvement with the police and the courts?
 - a. If considering a service-oriented approach, can these problems be alleviated by the strategies being considered?
 - b. If considering a dispute settlement strategy, do the disputes going to court appear amenable to consensual agreements or arbitration?

- c. If considering community-oriented strategies, such as restitution to victims or community service, what are the attitudes of community residents and victims to such non-traditional means?

With answers, however approximate, to these and similar questions, the need for diversion in a community can be established with more assurance. Agencies contemplating setting up a diversion project should ascertain if the service or assistance will provide benefits to the target group, without infringing on individual rights. As well, information of this nature will assist in enhancing potential system funding, and community support.

B: The Development of Goals and Objectives

Once the need for diversion has been verified as far as possible, the program planners should clarify the overall goal of the project and develop specific objectives. Care must be taken to avoid inconsistency among program aims. For example, it is possible that there is some inconsistency between the goals of "reducing the costs of court processing" and "providing needed services to diverted defendants". There must be a decision on the extent to which the project is to be oriented towards the accused, the community, or the criminal justice system. The priorities among these orientations must be assessed and rated. This stage will assist in guiding the development of program strategies. It may also help to avoid the inconsistency between goals and the means developed to achieve those goals.

C: The Availability of Alternatives

The adequacy of the resource alternatives to be utilized by the program, and the attitudes held by the staff of such alternatives, should also be assessed. If a strategy of referral to local services is chosen, such agencies must be approached and their cooperation obtained, both at management and line staff levels. Guidelines for referral must be developed. Terms of reference governing the relationship with the agencies should be agreed upon during the planning phase.

D: Gaining the Support of Criminal Justice Personnel

If the diversion project is located "outside" the criminal justice system, and is therefore dependent on it for clientele, the program must gain the support of system staff who have the power to control the flow of diversion candidates. This

seemingly obvious point has, on occasion, been overlooked or downplayed. The support of senior staff must be matched by the support of those personnel who actually make referrals to the project. All staff should be part of the planning process, rather than merely informed of the final decisions. Mechanisms for accountability of program personnel must be set up in order to ensure that the program is not unduly intrusive, or otherwise neglectful of the rights of accused persons.

Even in "system-based" or "in-house" diversion, where the program is part of the criminal justice system, the components of the system that may not be involved directly with the program should also participate in the planning process and be fully aware of objectives and strategies. Planners should anticipate that diversion may have repercussions for the functioning or workload of another part of the system. For example, diversion may affect the charging practices of police, depending on the attitude of law enforcement personnel towards the project. If police approve of the program, they may charge persons in instances where previously they would have exercised their discretion not to charge. If police are not supportive, they may in some instances lay charges which would make the arrested person ineligible for inclusion into the program.

E: The Importance of Minimizing Intervention

According to critics of diversion, this issue is one of the most controversial. Researchers have frequently found that diversion programs focus on low risk candidates whose diversion is acceptable to most of those within the criminal justice system and to the community. Most programs deal with persons who, if they had not been diverted, would have received sentences such as a discharge, a fine, probation, or a suspended sentence. As a rule of thumb, it is suggested that the "treatment" or "intervention" offered by the project should not be more severe than if the accused had been processed normally by the courts. As well, the failure of the defendant to fulfill the conditions of diversion should not involve more serious penalties than if he or she had passed through the traditional court system.¹⁰ If these guidelines are followed, they will assist in ensuring that defendant rights are not violated and also help to avoid one of the most potent criticisms of pretrial intervention programming.

F: The Decision to Divert

There are two elements to a diversion decision: the decision to offer diversion to a defendant, and the defendant's decision to accept or to reject the offer.

With respect to the decision to offer diversion to a defendant, screening mechanisms should not be overly elaborate. The screening should be done in a way that minimizes the time and decision points required. If criteria are developed which are fixed and thus reduce interpretation by decision-makers, then again the program will be better able to protect defendant rights.

With regard to the decision to be made by the defendant, the potential diverttee should be made fully cognizant of the consequences of his or her decision to participate and of failure to meet the diversion conditions. Although making available the advice of defence counsel increases the costs of the program, some critics have felt that counsel's participation is essential if the candidate is to make an informed decision. Others have argued that the participation of the judiciary is necessary in order to provide the necessary safeguards.

G: Some Cautions on Projected Benefits

As implied at the beginning of this section, many of the hypothesized benefits of diversion have not been achieved, according to most evaluations. The findings suggest that program planners should not make overly enthusiastic claims as to the positive impact of diversion. During the development of the program objectives, planners may want to consider alternatives -- such as humanitarian or victim-oriented goals -- rather than purposes related to crime reduction, or cost savings to the system or to society.

In addition, in developing strategies, the issues of violation of civil liberties and defendant rights -- dangers inherent in interference into a citizen's life before an adjudication of guilt -- should be considered. Diversion staff should be committed to the "least is best" approach until there is firm evidence that diversion offers major benefits to the defendant.

NOTES AND RECOMMENDED READINGS

1. This report is based on an unpublished annotated bibliography* entitled "Post-Charge Pre-Trial Diversion: A Bibliographic Review" which was developed by the author in 1978 under a contract administered by the Criminal Justice Policy Research, Research Division of the Ministry of the Solicitor General of Canada.

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Centre of Criminology, John Robarts Library, University of Toronto; and
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2. For further description and evaluations of the first two "rounds" of deferred prosecution programs see Joan Mullen, et al, Pretrial services: An evaluation of policy-related research, Vols. I and II, Cambridge, Mass.: Abt Associates, Inc., December 1974; and National Pretrial Intervention Service Center, Descriptive profiles on selected pretrial criminal justice intervention programs, Washington, D.C.: American Bar Association Commission on Correctional Facilities and Services, 1974.
3. See Touche Ross and Company, Impact study of drug diversion in California, San Francisco: Touche Ross, 1976 for a description of the California program for minor drug offenders. For an overview of the statutory drug diversion program in Massachusetts, see John A. Robertson and P. Teitelbaum, "Optimizing legal impact: A case study in search of a theory", Wisconsin Law Review 3 (1973), pp. 665-726.
4. For several descriptions of Canadian projects which have taken this approach, see Ministry of the Solicitor General, National inventory of diversion projects (update), Ottawa: MSG, 1979.

5. For material on this and other programs utilizing dispute settlement techniques, see Daniel McGillis and Joan Mullen, Neighbourhood Justice Centers: An analysis of potential models, Washington, D.C.: Office of Development, Testing, and Dissemination, LEAA, Department of Justice, 1977.
6. Ministry of the Solicitor General, op. cit.
7. For example, John J. Galvin, et al, Alternatives to prosecution (Volume 3 of Instead of Jail), Washington, D.C.: NILECJ, LEAA, Department of Justice, 1977.
8. Madelaine Crohn, "Diversion programs: Issues and practices", Pretrial Services Annual Journal 1 (1979), pp. 20-51.
9. For a sampling of criticism of diversion, see Crohn, Ibid. as well as Ronald Roesch, "Does adult diversion work? The failure of research in criminal justice", Crime and Delinquency 24 (January 1978), pp. 72-80; M.P. Kirby, "Recent research findings in pretrial diversion - Findings 2", Washington, D.C.: Pretrial Services Resource Center, 1978. For further suggestions on program planning, see National Pretrial Intervention Service Center, Pretrial intervention services: A guide for program development, Washington, D.C.: ABA, 1977.
10. Galvin, et al, op. cit.

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