

EBDM CHARGING PROGRAM

DIVERSION PROGRAM RATIONALE AND PURPOSE

The guiding principle behind our Diversion Program is the idea that low-risk individuals are generally self-correcting. That is, their internal controls or positive family or social settings are such that formal intervention is generally not necessary as a response to criminal behavior. Indeed, formal intervention can be counter-productive since it may interfere with the positive influences referred to above. Additionally, formal intervention may expose the low-risk individual to undesirable influences by mixing that individual in with medium and high-risk individuals in a criminal justice setting.

This core principle has led us to believe that many low-risk individuals can be diverted from our justice system, both for their own benefit and for the benefit of our justice system. There can be little dispute that the Criminal Justice System in Eau Claire County and in other jurisdictions has been expending considerable resources on the prosecution of low-risk individuals. That is unfortunate since those resources could be more appropriately utilized for medium and high-risk individuals. Diverting low-risk individuals will allow us to preserve law enforcement, prosecution, publicly-paid defense attorney, court and support staff resources. The dual goals of our EBDM program in connection with low-risk individuals are to reduce recidivism by 20 % and to allow resources previously utilized in matters involving low-risk individuals to be shifted to cases involving medium and high-risk individuals.

INDIVIDUALS ELIGIBLE FOR DIVERSION PROGRAM

Our targeted population for the Diversion Program will consist of four separate groups of individuals. First, individuals who commit University of Wisconsin – Eau Claire or Eau Claire County citation violations for matters which could have otherwise been criminal will be eligible for the program. Second, individuals cited for City of Eau Claire retail theft violations involving less than \$100.00 of merchandise and, at the discretion of the City Attorney's Office, potentially additional citations. Third, subject to certain limitations regarding types of offenses and other factors set forth below, potential defendants in criminal cases who score low risk on the Proxy instrument will be eligible for the program. Fourth, subject to the same limitations set forth above, potential defendants in criminal cases who are first-time criminal offenders will be eligible for our Diversion Program.

Since approximately 2008, Eau Claire police officers, Eau Claire County Sheriff Department deputies and University of Wisconsin - Eau Claire police officers have been advised that individuals who commit relatively minor offenses such as Retail Theft, Possession of THC and Disorderly Conduct who have not previously been convicted of a criminal offense or of an ordinance charge which could otherwise be criminal, may be civilly cited for that offense as opposed to being arrested or referred to my office for criminal prosecution. That same policy will continue under our EBDM system. Those individuals committing ordinance violations which could otherwise have been criminal will be eligible for our program. It should be noted, however, that only City citations for retail theft under \$100.00 will be eligible for the program at the initial appearance stage. Other City citations may be referred to the Diversion Program by the City Attorney's Office at the pre-trial stage. Set forth below is a list of the civil citations issued by those law enforcement agencies during 2010 for offenses which otherwise could have been criminal:

COUNTY, CITY & UW-EC ORDINANCE CHARGES

County Disorderly Conduct	48
County Theft	3
County Drug	15
County Retail Theft	0
County Obstructing	8
County Worthless Check	<u>0</u>
TOTAL COUNTY ORDINANCE CHARGES	<u>74</u>
City Retail Theft	203
City Disorderly Conduct	299
City Poss. of THC	<u>110</u>
TOTAL CITY ORDINANCE CHARGES	<u>612</u>
UW-EC Disorderly Conduct	25
UW-EC Drug (Possession)	132
UW-EC Theft	2
UW-EC Obstructing	<u>18</u>
TOTAL UW-EC ORDINANCE CHARGES:	<u>177</u>
TOTAL ORDINANCE CHARGES:	<u>863</u>

From an eligibility standpoint, the pertinent point is that these individuals are ideal candidates for our Diversion Program since their lack of prior criminal record would support the proposition that, as a whole, they are most likely to have the internal controls and positive family or social settings which will lead to them to self-correct after engaging in relatively minor illegal behavior.

Beyond ordinance cases, a significant number of matters previously prosecuted criminally will be now handled through our Diversion Program. Set forth below is a list of misdemeanor cases from 2010 involving select criminal offenses:

OFFENSE	TOTAL CHARGED
Disorderly Conduct (115 were Domestic Abuse Cases)	385
Obstructing/Resisting Officer	232
Theft	122
Possession of THC	125
Retail Theft	125
Criminal Damage To Property (44 were Domestic Abuse Cases)	115
Possession of Drug Paraphernalia	39
TOTAL # of Cases:	1,143

A good number of the individuals charged in the cases set forth above are individuals who would score low risk on the Proxy. Thus, like the individuals charged with the ordinance offenses set forth above, these individuals are appropriate candidates for our Diversion Program.

In addition to individuals who are deemed to be low risk based upon the Proxy, we will allow our Diversion Program to be utilized for criminal first offenders. Criminal first offenders will be defined as individuals with no prior criminal convictions, including expunged convictions. Some individuals who engage in relatively minor criminal behavior may not be eligible for ordinance treatment and not score as low risk on the Proxy. For example, an 18-year old college student who engages in a relatively minor form of criminal damage to property would typically be referred to my office for criminal prosecution because of the potential restitution issue. That first offender would score two points on the Proxy for his age of 18, one point for having his first arrest occur at the age of 18 and thus fall into the lowest category of the medium-risk level on the Proxy.

If we limit participation in our Diversion Program to individuals who score low risk on the Proxy, this individual would be ineligible for the program. Based on this example, and a multitude of others like it, we will allow criminal first offenders to participate in the program even in instances in which they do not score low risk on the Proxy.

An important point to note regarding eligible individuals for the program is that although our eligibility guidelines are generally applicable, they may not be controlling in every instance. For example, there may be instances in which one of the prosecutors concludes that an individual who does not technically qualify for the program, would be appropriate for participation. Additionally, there may be instances in which an individual scores low risk on the Proxy, commits an eligible offense and is yet not placed in the program. That might occur, for example, if we have a 35-year-old individual who was first arrested at the age of 22 and has five or more prior offenses. That individual will score low risk on the Proxy. We may, however, decide not to place him in the Diversion Program based on the fact that he has a multitude of prior criminal convictions and periods of probation supervision. Although it is important to note that there may be exceptions, it is equally important to note that those exceptions should be relatively limited.

Finally, individuals will not be allowed to participate in the Diversion Program on more than one occasion. The establishment of that limitation is not meant to suggest that we will ignore the general principle regarding appropriate treatment of low-risk individuals. A good number of the individuals who participate in the program on one occasion, and commit a new offense, may still be accurately considered low risk. Those individuals should not be indiscriminately mixed with medium and high-risk individuals in our system and should be considered for programs like our Deferred Acceptance of a Guilty Plea program. The point is that we will maintain the integrity of the Diversion Program by limiting participation to one instance and also recognize that some offenders who commit a second offense are still low risk and should be treated as such.

ELIGIBLE OFFENSES

There is research support for the proposition that eligibility for Diversion Programs should be based upon offender characteristics, rather than types of offenses. There is certainly some logic to this proposition. However, for a number of practical reasons, we cannot entirely ignore the types of offenses committed by otherwise eligible offenders when deciding whether participation in the Diversion Program is appropriate. Nevertheless, we will endeavor to make the Diversion Program as broadly available for offenders as reasonably possible.

All eligible offenders committing misdemeanor offenses will be eligible for the Diversion Program, subject to certain limitations. One limitation is that diversion will not be utilized if restitution is likely not to be paid in a short time period, typically restitution of over \$500.00. The reason for this limitation is that diversion is meant to be a short, informal process. It cannot, therefore, include extended periods of supervision during which restitution payments will take place.

A second exception to the general rule that misdemeanors are eligible for diversion is that a misdemeanor involving more than minor injuries will not generally be eligible for diversion. The fact that an individual has been charged with misdemeanor battery because he punched another

individual in the shoulder, leaving a bruise, may not deprive that individual of the opportunity to participate in the Diversion Program. However, if that individual punched someone else in the face causing significant injuries, he may not be allowed to participate in the Diversion Program.

Similarly, some low-risk individuals charged with domestic abuse offenses may be deprived of the opportunity to participate in the Diversion Program because of the existence of significant matters of concern such as a substantiated prior history of unreported domestic offenses. We may simply conclude that there are apparent needs for counseling which cannot be addressed in a diversion.

Finally, criminal traffic matters will not be eligible for diversion. The minimum mandatory penalties in OWI cases, together with the unique factual circumstances of criminal traffic matters, are such that inclusion in the Diversion Program is not appropriate.

The point of significance regarding this discussion of exceptions to the general rule that misdemeanor offenses are eligible for diversion is that eligibility in criminal cases will ultimately depend upon prosecutorial discretion. That does not mean, however, that prosecutors will be allowed to indiscriminately and without appropriate justification deny an otherwise eligible individual the opportunity to participate in the Diversion Program. Prosecutors will be expected to point to specific factors such as those referred to above in support of any decision that an otherwise eligible offender committing a misdemeanor offense will not be allowed to participate in the Diversion Program.

To a more limited extent than misdemeanors, some offenders who commit lower-level felonies will be eligible for the Diversion Program. Good examples are provided by low-risk individuals or first offenders who engage in relatively minor incidents of forgery or misappropriation of personal identifying information. For example, an 18-year-old college student who forges one of his roommate's checks may be a good candidate for diversion.

Beyond lower-level felonies, there may be other felony cases in which diversion may appropriately occur. That determination will be based upon a case-by-case consideration. The eligibility decision that occurs in felony cases should be guided by both the general principles supporting the Diversion Program in the first instance and any overriding concerns regarding public protection.

PROGRAM DESCRIPTION

Having discussed who is eligible for our Diversion Program, and the types of offenses for which it will be utilized, it is necessary to consider how the program itself will operate. Prior to discussing the precise procedure which will be utilized for various types of individuals to get into the program, it is useful to set forth the outlines of the program.

At the outset, it should be noted that this program is premised upon the proposition that low-risk individuals are generally self-correcting. Thus, program components of counseling, treatment or

community service are unnecessary and very potentially counter-productive for the reasons set forth above.

Despite the fact that low-risk individuals tend to be self-correcting, we do not want to respond to inappropriate behavior by simply doing nothing. Failing to respond in any fashion to violations engaged in by low-risk individuals runs the risk of sending the mistaken impression that little or no consequence will occur in the future as a result of inappropriate behavior. Our program is designed to be informal enough to be consistent with the research regarding low-risk offenders and yet not so minimal as to send the wrong message to low-risk offenders.

Simply stated, individuals participating in our Diversion Program will pay a fee of \$200.00, be required to attend a one to two-hour education session and be required to remain offense-free during the time period between when the original offense occurs and program participation is completed. The fee is warranted both as a tangible consequence for unlawful behavior and in order to cover the cost of operating the program. During the short education session, low-risk offenders will receive information regarding how formal records of criminal or civil citation charges are maintained by CCAP and the Wisconsin Department of Justice. They will specifically be advised that CCAP records are public records and that employers and other individuals have reviewed and relied upon those records when making decisions which may impact them, such as employment decisions. Lastly, we will briefly explore the motivation, which has led them to make the regrettable decisions at issue.

DIVERSION PROGRAM PROCEDURE

The procedure which will be utilized during our Diversion Program will vary depending upon whether the offense at issue is a criminal offense or an ordinance offense. Additionally, the procedure will vary for ordinance offenses depending upon whether the offense is a City ordinance offense or, in contrast, a University or County ordinance offense.

UNIVERSITY AND COUNTY ORDINANCE CASES

For University and County ordinance cases for matters, which could otherwise be criminal, the procedure will begin with completion of a Proxy by the initial contacting officer or deputy. Even though a low-risk score on the Proxy is not an eligibility requirement for these ordinance cases, we want the Proxy information available for record-keeping and as a guide for law enforcement and others in our system.

Individuals who commit University or County citation violations for matters which could be criminal will be eligible to participate in the Diversion Program, assuming that they have not participated in the program in the past. Law enforcement officers will review a list provided by Diversion Coordinator setting forth the individuals who are currently participating in the Diversion Program or who have participated in the program in the past. That list will be updated weekly and forwarded to

the Communications Center, Eau Claire Police Court Officer, City Attorney's Office, Sheriff's Department and University Police Department.

Individuals who would have otherwise received University or County citations for matters which could have been criminal, and have not participated in the Diversion Program, will be advised of the possibility of Diversion Program participation by law enforcement officers. Officers will explain the program and review a sign-up document with individuals, which sets forth the details of program participation. Individuals who express a willingness to participate in the program will sign the document, provide an address at which a citation will be mailed to them in the event that they fail to meet with the Diversion Coordinator at the designated time and then will be provided with notice of the date and time they are required to meet with the Diversion Coordinator for an orientation session. The Diversion Coordinator will provide law enforcement officers with a list of available dates for the orientation session. Law enforcement officers will then provide the suspect with a carbon copy of the completed form and forward it to the Diversion Coordinator.

Upon receipt of the forms, the coordinator will confirm that the individuals have not previously participated in the Diversion Program. She will then meet with the individuals at the orientation session and explain the specifics of the program, including the requirement that the offenders pay the \$200.00 fee at or prior to the education session, attend that session and remain offense free in the interim time period. Those individuals will then be provided with written notice of the date and time of their education session. They will also be advised that failure to appear will result in issuance of a citation for the involved offense.

Understandably, there will be instances in which people do not complete the program for various reasons. In response, the Diversion Coordinator will contact the University or Sheriff's Department, which will then issue a new citation and mail it to the offender at the provided address. From that point forward, the matter will be handled consistent with our current practice. In order to avoid undermining this program, we will need to be quite consistent in our practice that an individual will not receive a second chance to participate in the program after termination.

As to the vast majority of individuals who successfully complete the program, no further action will be necessary. The Diversion Coordinator will maintain a list of the individuals who have successfully completed the program, as she will likewise maintain a list of the individuals who have been discharged from the program.

CITY ORDINANCE CASES

As noted above, the procedure which will be utilized in connection with Eau Claire City ordinance cases for our Diversion Program will be somewhat different than the procedure utilized for University and County ordinance cases. The beginning point will be the same in the sense that Eau

Claire police officers will be completing a Proxy for all criminal cases and for all Eau Claire City ordinance cases involving charges which could be criminal.

Officers will hand out a Diversion Program information sheet to individuals cited for retail theft incidents involving less than \$100.00 of merchandise. The decision to hand out the information sheets to that limited group of ordinance offenders is based upon the City's desire to initially generally limit Diversion Program participation to that group of individuals.

The next step in the process for these City ordinance cases will involve the Eau Claire Police Court Officer providing a copy of the retail theft citation and Proxy document for potentially eligible individuals to Diversion Program Coordinator. The Diversion Coordinator will then confirm that the individuals have not previously participated in the Diversion Program.

At the initial appearances in City cases, the Diversion Coordinator will identify the eligible offenders who are present and wish to receive more information about the program. She will then meet with those individuals at a nearby location in the courthouse, while Court Commissioner Adler completes the initial appearance process with the other individuals receiving citations. During those orientation sessions, the Diversion Coordinator will explain the specifics of the program to interested defendants. Those individuals who decide to participate in the program will sign a document which provides them with notice of the date and time of their education session and advise them that if they fail to successfully complete the program they will be found guilty of the issued citation by default at a return conference and ordered to pay the bond amount as a forfeiture.

As to individuals who successfully complete the program, the Diversion Coordinator will make arrangements to have their citations dismissed by the Clerk of Courts Office. She will additionally provide a list of those individuals to the Eau Claire Police Court Officer. As to individuals who do not successfully complete the program, Diversion Coordinator will arrange to have those citations defaulted with the Clerk of Courts Office. Likewise, as to those individuals, the Diversion Coordinator will provide a list to the Eau Claire Police Court Officer.

In addition to the process through which some City cases come to the Diversion Program at the initial appearance, some cases will potentially be referred for diversion following a pre-trial conference with the City Attorney's Office. The Diversion Coordinator will provide the City Attorney's Office with an updated list of current and past Diversion Program participants each Wednesday. The City Attorney's Office will then have that list available for pre-trials which are held on Thursday. During pre-trial conferences, the City Attorney's Office may decide in certain cases to refer a matter for diversion. As to those individuals, the attorney handling the pre-trial conference will complete the sign-up document which will be identical to the one utilized at the City initial appearances.

A copy of that sign-up document will then be provided to the Diversion Coordinator so that she can track whether the individual completes the program as required. In order to facilitate that process, the Diversion Coordinator will provide the City Attorney's Office with a list on a weekly basis of dates and times available for the education session. That information will need to be set forth by the City Attorney's Office on the sign-up document for any individuals who will be completing the program. From that point, the process regarding tracking completion or lack of completion for the program will be the same as outlined above for the City cases following an initial appearance.

CRIMINAL CASES

The final way in which individuals will come to the Diversion Program involves criminal cases. For the most part, participants will come from cases involving "order-ins." An order-in is a case in which the law enforcement agency at issue, most commonly the Eau Claire Police Department, has contact with an individual in connection with a possible criminal offense such as retail theft or disorderly conduct and orders that individual to appear in court during our 11:00 initial appearance sessions. Those cases are assigned to individual prosecutors for review and dictation of a criminal complaint if they believe criminal charges should be issued. Since a Proxy will have been completed in connection with each of these individuals by law enforcement and forwarded along with police reports, the Assistant District Attorney reviewing the matter will have all necessary information to determine whether participation in the Diversion Program is appropriate.

In those instances in which a potential defendant is eligible for the program, no criminal complaint will be drafted. Rather, the Diversion Coordinator will be provided with a list of those individuals for each 11:00 intake session and will contact those individuals in Intake Court prior to the time that the Intake Judge begins initial appearances. She will meet with interested individuals in a manner consistent with the procedure explained above for City ordinances cases. For those individuals who successfully complete the program, no criminal complaint will be filed. As to those individuals who do not successfully complete the program, the Diversion Coordinator will advise the Assistant District Attorney handling the matter of that fact, a summons and criminal complaint will be drafted and the individual will then be served by mail at the address provided on the Diversion Program agreement.

In addition to "order-ins," the Diversion Program will be an option for individuals who were in the past charged through issuance of a summons and complaint. That process is initiated when the District Attorney's Office receives a referral from area law enforcement officers, reviews the police reports and decides whether criminal charges should be issued. If so, we issue either a summons and complaint or complaint and warrant.

Consistent with our policy that law enforcement officers will be completing a Proxy in all criminal matters, a Proxy will be available for prosecutors reviewing those investigative files. Thus, at that

point, prosecutors will have all necessary information to determine whether an individual might be eligible for the Diversion Program. That prosecutor will confirm that any potential candidates have not participated in the Diversion Program in the past and then proceed forward.

The initial step to be taken in those situations is that the prosecutor will send a letter to the potential defendant advising that a pre-charging conference has been scheduled in my office to discuss the possibility of participating in the Diversion Program. Included with the correspondence will be the one-page information sheet regarding the Diversion

Program and information that if the defendant does not appear for the scheduled meeting, a summons and complaint will likely be issued.

Individuals who appear for the scheduled pre-charging conference will go through the same explanation and sign-up process alluded to above for the ordinance cases. Individuals who appear at the required education session, and otherwise comply with the requirements of the program, will not face a criminal charge in connection with the referred matter. Individuals who do not appear for the scheduled educational session, or who otherwise do not comply with the requirements of the program, will receive a summons and complaint in the mail at the address provided when he/she signs the Diversion Program form.

Finally, in some relatively rare circumstances, individuals who are on the daily jail court list may be allowed to participate in the Diversion Program. These should be relatively rare occasions since we do not expect to see a large number of low-risk individuals or criminal first offenders held in jail.

At any rate, there may be some instances where people on the jail list are appropriate diversion candidates. One such example is provided by domestic abuse cases which involve mandatory arrest. As to those cases, the beginning procedure will be identical to that followed by cases involving “order-ins.” That is, the assigned prosecutor will review the Proxy, along with the police reports, and decide whether participation in the Diversion Program is appropriate. If so, that attorney will advise the Diversion Coordinator of that fact and not draft or file a criminal complaint. The Diversion Coordinator will then meet with any eligible individuals prior to the 11:00 intake court session beginning and follow the same procedure set forth above for initial appearances in other situations.

One procedural point should be addressed regarding both our “order-in” cases and those cases involving individuals who have been arrested and are on our jail court list for morning court. In some instances, the Diversion Coordinator will meet with those individuals and determine that they are not appropriate candidates for diversion for various reasons. The Diversion Coordinator will bring those individuals back to Intake Court and provide one of the bailiffs with a list of those individuals. At the end of the Intake Court session, the Judge will then address bond, set a pretrial and return conference and advise the defendants that a copy of the criminal complaint will be issued to them by

mail. The Diversion Coordinator will have received information from the prosecutor handling the matter as to the charges which will be issued in the event that the individual decided not to participate in the Diversion Program or was unable to do so. That information can then be conveyed to that defendant.

To this point, there has been no discussion of the involvement of the Public Defender's Office or defense attorneys retained privately. Certainly, for individuals on the daily jail court list, and for some other individuals, the District Attorney's Office may know that the individuals are represented by the Public Defender's Office or by a privately-retained attorney. In those instances, the process will be the same as outlined above but will involve the potential defendant's attorney.

Two general procedural points regarding all diversion cases should be noted. First, offenders will be advised that they will only be allowed to reschedule an orientation or education session if they receive advance permission from The Diversion Coordinator. Only one rescheduled session will be allowed. Second, they will also be advised that no payment extensions will be allowed. Since the program is designed to take place over a relatively short time period, extended delays for payment cannot be allowed.

OTHER ALTERNATIVES FOR LOW-RISK OFFENDERS

For various reasons discussed above, some low-risk offenders in Eau Claire County will not participate in our Diversion Program. That does not mean, however, that we will ignore their low-risk status. There are a number of ways in which we will treat low-risk offenders in a manner different than medium and high-risk individuals.

One of the primary ways in which low-risk offenders will be treated differently than medium and high-risk individuals is that generally they will not be placed on probation supervision because of their tendency to self-correct and the potential negative impact on them by contact with medium and high-risk offenders in the probation supervision process. In instances in which restitution is owed by an offender but the matter is not serious enough to warrant probation supervision, a Deferred Acceptance of a Guilty Plea (DAGP) will often be a useful alternative for low-risk offenders. DAGP's may also be appropriate for low-risk offenders who commit offenses deemed to be too serious for Diversion. The relevant point is that the alternative of DAGP's for low-risk offenders will provide for a less formal manner of resolving their criminal cases than formal processes such as incarceration or probation supervision.

In addition to utilizing DAGP's, we will otherwise endeavor to fashion resolutions which recognize the low-risk status of offenders. Some examples involve utilizing community service in place of incarceration for low-risk offenders whenever reasonably possible, given the seriousness of the offense at issue and other relevant factors. In cases so serious as to warrant probation supervision,

specific steps will be undertaken to support the self-correcting tendency of these individuals and to not interfere with positive influences by imposing unnecessary conditions upon them.

Lastly, as to community service for low-risk individuals, we will be exploring the possibility of establishing segregated community service sites for low-risk individuals. The purpose of that step would be to avoid prolonged exposure of these low-risk individuals to medium and high-risk individuals at the community service site.

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