

CALIFORNIA JUDGES BENCHGUIDES

**Benchguide 62**

**PRETRIAL DIVERSION**

[REVISED 2019]



JUDICIAL COUNCIL  
OF CALIFORNIA

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OPERATIONS AND PROGRAMS DIVISION  
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Communications Editor

---

### BENCHGUIDE CONSULTANTS

Hon. Daniel J. Healy  
Superior Court of California, County of Solano

Hon. John R. Zitny  
Superior Court of California, County of Orange

Editorial comments and inquiries: Barry Harding, Attorney 415-865-7745

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This benchguide provides an overview of statewide pretrial diversion programs, including drug diversion and diversion of defendants with cognitive developmental disabilities, and locally mandated programs, including general misdemeanor diversion and parental diversion. The

benchguide also addresses some deferred entry of judgment programs. Posttrial diversion programs, *i.e.*, education, treatment, or rehabilitation programs required of defendants as a condition of probation or as part of the sentence, are not addressed in this benchguide. Discussion of diversion and deferred entry of judgment for juvenile offenders (Welf & I C §§790–795) is beyond the scope of this benchguide.

## II. PROCEDURAL CHECKLISTS

### A. [§62.2] Ordering Probation Report; Setting Hearing

Cases should be referred to the probation department for a report, if at all possible, at the arraignment hearing. See Pen C §1000(b) (prosecutor should review file as soon as possible after filing of charges to allow court to set diversion hearing at arraignment). The practice in many counties is to require a referral to occur no later than the pretrial conference.

- **JUDICIAL TIP:** In routine cases involving first-time drug offenders with clean criminal records, many judges, with the express or implied consent of the prosecutor, will summarily find a defendant suitable for diversion and summarily grant diversion without incurring the time and expense of a referral for a formal suitability evaluation. See Pen C §1000.1(b).

After the prosecutor has reviewed the case file, informed the defendant and defense counsel that the defendant is eligible to participate in a diversion program, and requested the court to refer the case to the probation department, the judge must take the following steps:

(1) *Ask the defendant whether he or she consents to have the case referred to the probation department for an investigation and report.* Pen C §§1000.1(b) (drug diversion), 1001.52(a) (misdemeanor diversion), 1001.72(a) (parental diversion).

*Note:* If cognitive developmental disability diversion program is being considered, ask the defendant whether he or she consents to have the case referred to the regional center for the developmentally disabled, the probation department, and the prosecutor for an investigation and reports. Pen C §1001.22.

(2) *If the defendant does not consent, set a trial date (or preliminary hearing) within the statutory period under Pen C §1382 (or Pen C §859b) unless defendant waives time.* Pen C §§1000.1(b), 1001.22, 1001.52(a), 1001.72(a).

(3) *If the defendant does consent:*

- *Advise the defendant of the right to a speedy trial and inform defendant that a waiver of that right is necessary for referral of the case to the probation department.*

- (Felony case) *Advise the defendant of the right to a preliminary hearing within 10 court days/60 calendar days.* Inform the defendant that a waiver of that right is necessary for referral of the case to the probation department. Pen C §859b.
- *Advise the defendant of the right to a trial by jury and inform the defendant that a waiver of that right is necessary for referral of the case for an investigation and report.* Pen C §§1000.1(b), 1001.22, 1001.52(a), 1001.72(a).
- *Ask the defendant whether he or she waives these rights.* If no, set a trial date (or preliminary hearing) within the statutory period under Pen C §1382 (or Pen C §859b). If yes, continue to step (4). Pen C §§1000.1(b), 1001.22, 1001.52(a), 1001.72(a).

(4) *Order the case referred to the probation department for an investigation and report on the defendant's suitability for diversion.* Pen C §§1000.1(b), 1001.52(a), 1001.72(a).

*Note:* If cognitive developmental disability diversion program is being considered, order the case referred to the regional center for the developmentally disabled, the probation department, and the prosecutor for an investigation and reports. Pen C §1001.22.

(5) *Advise the defendant to cooperate with the probation department's investigation.* In addition, inform the defendant that his or her statements to the probation department may not be used against the defendant in any subsequent criminal action or proceeding. Pen C §§1000.1(c), 1001.5, 1001.52(b), 1001.72(b), 1001.24.

(6) *Set a hearing date to determine whether to grant diversion.* Pen C §§1000.2, 1001.53, 1001.73. But see Pen C §1001.23(a) (court may order diversion of defendant with a cognitive developmental disability without a hearing).

- ☛ **JUDICIAL TIP:** When setting the date for a diversion hearing, the judge should allow sufficient time for the probation department to adequately conduct an investigation of the defendant. Courts generally set hearings 4–6 weeks after the referral to the probation department.

#### **B. [§62.3] Hearing: Misdemeanor Diversion (Pen C §§1001.50–1001.55)**

(1) *Call the case and ask for appearances.*

(2) *State for the record that the investigative report from the probation department was received, read, and considered.* Also mention other relevant information considered by the court. Pen C §1001.53.

(3) *Request and receive any comments from the defendant or defense counsel on the issue of diversion. Allow counsel to answer or rebut the contents of the probation report and/or other information considered by the court.*

(4) *Request and receive any comments from the prosecutor on the issue of diversion.*

(5) *Determine whether the defendant is a suitable candidate for diversion, i.e., whether defendant would benefit from the program of treatment, education, or rehabilitation mentioned in the probation report. Pen C §1001.53.*

(6) *If the judge finds the defendant unsuitable:*

- *State reason(s) for finding defendant unsuitable for diversion.*
- *Set a trial date within the statutory period under Pen C §1382 unless defendant waives time. Pen C §1001.53.*

(7) *If the judge finds the defendant suitable:*

- *State reason(s) for finding defendant suitable for diversion.*
- *Describe the diversion program requirements to the defendant.*
- *Advise the defendant that he or she will have to pay a restitution fee of not less than \$100 nor more than \$1000. Pen C §1001.90.*
- *Advise the defendant that he or she may have to pay all or a portion of the costs of the diversion program. Pen C §1001.53.*

➤ **JUDICIAL TIP:** The probation department in many counties will determine the defendant's ability to pay administrative fees and recommend a fee amount as part of its diversion investigation and report. Payment of program costs is generally negotiated between the program and the defendant.

- *State that the defendant will be required to participate in the diversion program for a period of up to 2 years. Pen C §1001.53.*
- *Advise the defendant that a failure to enroll in the diversion program or a failure to comply with or complete the program requirements may result in the termination of diversion and the resumption of the criminal proceedings against the defendant. Pen C §1001.54.*
- *Advise the defendant that the court may terminate diversion and resume the criminal proceedings if the defendant is convicted of a misdemeanor in which force or violence is used or is convicted of any felony. Pen C §1001.54.*
- *Advise the defendant that after successfully completing the program, the criminal charges will be dismissed and the arrest for the*

*charge(s) deemed to have never occurred. Pen C §1001.54–1001.55.*

(8) *Ask the defendant if he or she consents to participate in the diversion program. Pen C §1001.53.*

(9) *If the defendant does not consent, set a trial date within the statutory period under Pen C §1382 unless defendant waives time. Pen C §1001.53.*

(10) *If the defendant consents:*

- *Advise the defendant of the right to a speedy trial and inform defendant that a waiver of that right is necessary before participating in the diversion program.*
- *Ask the defendant if he or she waives this right. If no, set a trial date within the statutory period under Pen C §1382. If yes, continue to step (11). Pen C §1001.53.*

☛ **JUDICIAL TIP:** The judge should secure a time waiver even though the defendant has previously waived time at the diversion referral hearing. This practice will preclude a challenge from defense counsel that the initial time waiver was effective only to the date of the diversion hearing.

(11) *Order the criminal proceedings diverted. Pen C §1001.53.*

(12) *Order any bail bond, undertaking, or deposit on file by or on behalf of the defendant exonerated. Pen C §1001.53.*

(13) (Optional) *Order the probation department to file with the court a report of defendant's compliance with the program at specified intervals.*

(14) (Optional) *Set a progress report hearing date.*

### **C. [§62.4] Hearing: Drug Use Diversion (Pen C §§1000–1000.6)**

(1) *Call the case and ask for appearances.*

(2) *State for the record that the investigative report from the probation department was received, read, and considered. Also mention other relevant information considered by the court. Pen C §1000.2(a). Note: The court may summarily grant drug diversion without a probation department report. Pen C §1000.1(b).*

(3) *Request and receive any comments from the defendant or defense counsel on the issue of diversion. Allow counsel to answer or rebut the contents of the probation report and/or other information considered by the court.*

(4) *Request and receive any comments from the prosecutor on the issue of diversion.*

(5) *Determine whether the defendant is a suitable candidate for diversion, i.e., whether defendant would benefit from the program of treatment, education, or rehabilitation mentioned in the probation report. Pen C §1000.2(a).*

(6) *If the judge finds the defendant unsuitable:*

- *State reason(s) for finding defendant unsuitable for diversion.*
- *Set a trial date (or preliminary hearing) within the statutory period under Pen C §1382 (or Pen C §859b) (to commence from this date) unless defendant waives time. Pen C §1000.2(a).*

(7) *If the judge finds the defendant suitable:*

- *State reason(s) for finding defendant suitable for diversion.*
- *Describe the diversion program requirements to the defendant.*
- *Advise the defendant that he or she will have to pay a restitution fee of not less than \$100 nor more than \$1000. Pen C §§1001.90, 1000.3(e).*
- *Advise the defendant that he or she may have to pay all or a portion of the costs of the diversion program. Pen C §1000.3(e).*

☛ **JUDICIAL TIP:** The probation department in many counties will determine the defendant's ability to pay administrative fees and recommend a fee amount as part of its diversion investigation and report. Payment of program costs is generally negotiated between the program and the defendant.

- *State that the defendant will be required to participate in the diversion program for a minimum period of 1 year to a maximum 18 months. Pen C §1000.2(c). Note: The defendant may request, and the court must grant, for good cause shown, an extension of time to complete the program. Pen C §1000.2(c).*
- *Advise the defendant that a failure to enroll in the diversion program or a failure to comply with or complete the program requirements may result in the termination of diversion and the resumption of the criminal proceedings against the defendant. Pen C §1000.3(a), (c).*
- *Advise the defendant that the court may terminate diversion and resume the criminal proceedings if the defendant is convicted of an offense that reflects the defendant's propensity for violence or is convicted of any felony. Pen C §1000.3(a), (c).*
- *Advise the defendant that after successfully completing the program, the criminal charges will be dismissed, the arrest for the charge(s)*

*deemed to have never occurred, and the court may issue an order to seal the arrest record . Pen C §§1000.3(d), 1000.4(a).*

(8) *Ask the defendant if he or she consents to participate in the diversion program. Pen C §1000.2(a).*

(9) *If the defendant does not consent, set a trial date (or preliminary hearing) within the statutory period under Pen C §1382 (or Pen C §859b) (to commence from this date) unless defendant waives time. Pen C §1000.2(a).*

(10) *If the defendant consents:*

- *Advise the defendant of the right to a speedy trial and inform defendant that a waiver of that right is necessary before participating in the diversion program.*
- *Advise the defendant of the right to a trial by jury and inform defendant that a waiver of that right is necessary before participating in the diversion program.*
- *(Felony case) Advise the defendant of the right to a preliminary hearing within 10 court days/60 calendar days and inform defendant that a waiver of that right is necessary before participating in the diversion program. Pen C §859b.*
- *Ask the defendant if he or she waives these rights. If no, set a trial date (or preliminary hearing) within the statutory period under Pen C §1382 (or Pen C §859b) (to commence from this date). If yes, continue to step (11). Pen C §1000.1(b).*

➡ **JUDICIAL TIP:** The judge should secure a time waiver even though the defendant has previously waived time at the diversion referral hearing. This practice will preclude a challenge from defense counsel that the initial time waiver was effective only to the date of the diversion hearing.

(11) *Order the criminal proceedings diverted. Pen C §1000.1(b).*

(12) *Order any bail bond, undertaking, or deposit on file by or on behalf of the defendant exonerated. Pen C §1000.2(b).*

(13) *(Optional) Order the probation department to file with the court a report of defendant's compliance with the program at specified intervals. Pen C §1000.2(c).*

(14) *(Optional) Set a progress report hearing date.*

#### **D. [§62.5] Hearing: Diversion for Persons With Cognitive Developmental Disabilities (Pen C §§1001.20–1001.34)**

(1) *Call the case and ask for appearances.*

(2) *State for the record that the investigative reports from the regional center for the developmentally disabled, probation department, and the prosecutor have been received, read, and considered. Also mention other relevant information considered by the court. Pen C §1001.23(a).*

(3) *Request and receive any comments from the defendant or defense counsel on the issue of diversion. Allow counsel to answer or rebut the contents of the investigative reports and/or other information considered by the court.*

(4) *Request and receive any comments from the prosecutor on the issue of diversion.*

(5) *Order the criminal proceedings for the offense charged to proceed if the regional center determines that the defendant does not have a cognitive developmental disability. Pen C §1001.23(a).*

(6) *If the defendant is found to have a cognitive developmental disability and is eligible for regional center services:*

- *State the regional center diversion program is acceptable to the court, the prosecutor, the probation department, and the regional center. Pen C §1001.23(a).*
- *Describe the diversion program requirements to the defendant.*
- *State that the period of time the defendant will be required to participate in the diversion program is a maximum 2 years. Pen C §1001.28.*
- *Advise the defendant that a failure to enroll in the diversion program or a failure to comply with or complete the program requirements may result in the termination of diversion and the resumption of the criminal proceedings against the defendant. Pen C §1001.29.*
- *Advise the defendant that the court may terminate diversion and resume the criminal proceedings if he or she is charged with a felony. Pen C §1001.29.*
- *Advise the defendant that after successfully completing the program, the criminal charges will be dismissed and the arrest for the charge(s) deemed to have never occurred. Pen C §§1001.31, 1001.33.*

(7) *Ask the defendant if he or she consents to participate in the diversion program. Pen C §1001.23(a).*

(8) *If the defendant does not consent, set a trial date within the statutory period under Pen C §1382 unless defendant waives time. Pen C §1001.23(b).*

(9) *If the defendant consents:*

- *Advise the defendant of the right to a speedy trial and inform defendant that a waiver of that right is necessary before participating in the diversion program.*
- *Ask the defendant if he or she waives this right.* If no, set a trial date within the statutory period under Pen C §1382. If yes, continue to step (10). Pen C §1001.23(a).

➡ **JUDICIAL TIP:** The judge should secure a time waiver even though the defendant has previously waived time at the diversion referral hearing. This practice will preclude a challenge from defense counsel that the initial time waiver was effective only to the date of the diversion hearing.

(10) *Order defendant’s participation in either a single or dual agency diversion program.* Pen C §1001.23(b).

(11) *Order any bail bond, undertaking, or deposit on file by or on behalf of the defendant exonerated.* Pen C §1001.27.

(12) *Order the probation department (dual agency diversion program) or regional center (single agency diversion program) to file progress reports not less than every 6 months.* Pen C §§1001.23(c), 1001.28.

### III. APPLICABLE LAW

#### A. [§62.6] Overview

Diversion is the procedure of suspending the criminal prosecution of an individual, either temporarily or permanently, by substituting the individual’s participation in education, treatment, or rehabilitation programs instead of further criminal proceedings. Pen C §§1001.1, 1001.50(c), 1001.70(b), 1001.80(k)(1).

#### 1. [§62.7] Statutorily Created Diversion Programs

The general diversion procedures outlined in Pen C §§1001–1001.9 provide uniform statewide procedures for the counties to follow when operating misdemeanor diversion programs. Penal Code §§1001.50–1001.55 provide a “model” misdemeanor diversion program with legislatively prescribed eligibility criteria that a county may adopt by ordinance. See *Davis v Municipal Court* (1988) 46 C3d 64, 75, 249 CR 300. These misdemeanor diversion programs are described in §§62.10–62.16.

In addition to the above diversion programs, this benchguide describes a number of specific types of diversion programs, including:

- Drug use diversion (formerly drug deferred entry of judgment) (Pen C §§1000–1000.6). See §§62.17–62.30.
- Diversion of defendants with Cognitive Developmental Disabilities (Pen C §§1001.20–1001.34). See §§62.31–62.39.

- Parental diversion (Pen C §§1001.70–1001.75.) See §§62.40–62.45.
- Military diversion (Pen C §1001.80). See §§62.50–62.53.
- Child Abuse and Neglect Counseling (Pen C §§1000.12–1000.17). See §2.50.
- Bad check diversion (Pen C §§1001.60–1001.67). See §§62.55–62.57.
- Diversion of traffic violators (Pen C §1001.40). See §62.58.

## 2. [§62.8] Common Elements of Diversion

Characteristics that apply to all pretrial diversion programs include:

- *No admission of guilt.* A defendant may not be required to admit guilt in order to qualify for diversion. Pen C §§1000.1(d), 1001.3, 1001.66.
- *Exoneration of bail.* Any posted bail is exonerated upon the grant of diversion. Pen C §§1000.2(b), 1002(b), 1001.6, 1001.27, 1001.53, 1001.73.
- *Dismissal on successful diversion.* If diversion is completed successfully, the criminal charges are dismissed. Pen C §§1000.3(b), 1001.7, 1001.31, 1001.54, 1001.74.
- *Subsequent description of arrest.* If diversion is completed successfully, the defendant may generally answer lawfully that he or she has never been arrested for or charged with the diverted offense unless he or she is applying for a position as a peace officer. Pen C §§1000.4, 1001.9, 1001.33, 1001.55, 1001.75, 1001.80(i).
- *Defendant entitled to hearing prior to termination for cause.* The defendant is entitled to a hearing before diversion may be terminated for cause. Pen C §§1001, 1001.54, 1001.74, 1001.80(c).
- *Statements of defendant inadmissible in other proceedings.* Statements made by the defendant in connection with the determination of eligibility for diversion and any statements by defendant subsequent to the granting of diversion with respect to the charged offense may not be admitted in any action or proceeding. Nor may any information obtained as a result of these statements or information contained in reports detailing defendant's performance in the program be used in any other proceeding. However, information regarding a defendant's participation in the program is admissible in any diversion termination hearing. Pen C §§1000.1(c), 1001.5, 1001.24, 1001.25, 1001.52(b), 1001.67.

### 3. [§62.9] Benefits of Diversion

The key benefits of participating in a diversion program include:

- *Conviction avoided.* The defendant is afforded the opportunity to avoid the stigma of a criminal conviction.
- *Collateral consequences avoided.* By avoiding a conviction, the defendant avoids collateral consequences such as challenges to licensing, job application disclosures, and immigration issues.
- *Early resolution of cases.* Generally, diversion results in the resolution of cases at an early stage of proceedings, resulting in cost savings and calendar management efficiencies.
- *Exposure to education and counseling programs.* Diversion provides minor offenders prompt exposure to education and counseling programs in their own communities so as to restore them to productive citizenship without the lasting stigma of a criminal conviction. *Terry v Superior Court* (1999) 73 CA4th 661, 664, 86 CR2d 653; *People v Superior Court (On Tai Ho)* (1974) 11 C3d 59, 61–62, 113 CR 21.
- *Risk-need-responsivity management.* There is a growing body of scientific evidence suggesting that courts and treatment providers should attempt to meaningfully assess and differentiate between persons who are deemed low risk with those persons with high needs or posing high risks. “In general, low-risk individuals tend to have some positive attributes in their lives—they have jobs, they have families, they go to church, they are enrolled in school. Intensive interventions...tend to take participants away from these things. Just as important, they tend to introduce low-risk individuals to a new peer group: high risk individuals. This can create a contagion effect, turning low-risk people into high-risk people—the school-of-crime theory.” Greg Berman and Julian Adler, *Start Here: A Roadmap to Reducing Mass Incarceration*, Center for Court Intervention (New Press) (2018).

### B. [§62.10] General Misdemeanor Diversion

Counties may establish local pretrial diversion programs for defendants charged with misdemeanors. Two sets of statutes, Chapter 2.7 of the Penal Code (Pen C §§1001–1001.9) and Chapter 2.9 of the Penal Code (Pen C §§1001.50–1001.55) provide for misdemeanor diversion. Chapter 2.7 sets forth the general scheme for all misdemeanor diversion programs but provides few procedural guidelines. However Chapter 2.9 “sets out a ‘model’ misdemeanor diversion program with legislatively prescribed eligibility criteria...which a county board of supervisors may adopt by ordinance.” *Davis v Municipal Court* (1988) 46 C3d 64, 75, 249 CR 300.

Although the two chapters differ in some respects, a number of the provisions of the two diversion programs are identical. Both diversion programs are conditioned on the approval of the prosecutor. Pen C §§1001.2(b), 1001.50(b); 46 C3d at 73 (prosecutor’s power to approve or disapprove local diversion program is permissible delegation of legislative authority). However, the judge, and not the prosecutor, determines whether a defendant will be diverted. Pen C §§1001.2(b), 1001.50(b). The judge may exercise discretion to divert alleged misdemeanants only if a Chapter 2.7 or Chapter 2.9 diversion program has been established in the county. Pen C §1001.50; *People v Padfield* (1982) 136 CA3d 218, 230, 185 CR 903 (Chapter 2.7 not a general grant of authority to courts to grant diversion outside a program mandated by the state or local government).

### 1. [§62.11] Conditions of Eligibility

Counties set their own eligibility guidelines for misdemeanor diversion programs, subject to some statutory restrictions. Defendants charged with drunk driving under Veh C §23152 or §23153 or any drug offense governed by the drug diversion statutes (Pen C §§1000–1000.5) are not eligible for Chapter 2.7 or Chapter 2.9 misdemeanor diversion. Pen C §§1001.2(a), 1001.51(b). In addition, a defendant may not be diverted under Chapter 2.9 who is charged with any of the following:

- An offense for which a special diversion program is otherwise separately established under the Penal Code (*e.g.*, bad check diversion). Pen C §1001.51(b).
- An offense for which incarceration would be mandatory on conviction. Pen C §1001.51(c)(1).
- An offense for which Pen C §290 sex offender registration would be required on conviction. Pen C §1001.51(c)(2).
- An offense reduced from a felony to a misdemeanor by the court under Pen C §17(b)(5). Pen C §1001.51(c)(3).
- An offense involving the use of force or violence against a person, except a violation of Pen C §241 (assault on peace officer) or Pen C §243 (battery). Pen C §1001.51(c)(4).
- An offense for which probation may not be granted. Pen C §1001.51(c)(5).
- A driving offense punishable as a misdemeanor under the Vehicle Code. Pen C §1001.51(c)(6).

A defendant who is not charged with any of the above disqualifying misdemeanor offenses must meet the following conditions in order to be considered for Chapter 2.9 diversion:

- The defendant’s record does not indicate that probation or parole has been revoked without later being completed. Pen C §1001.51(a)(1).
- The defendant has not been diverted under Chapter 2.9 within 5 years before the filing of the accusatory pleading that charges the divertible offense. Pen C §1001.51(a)(2).
- The defendant has never been convicted of a felony. Pen C §1001.51(a)(3).
- The defendant has no prior misdemeanor conviction within 5 years before filing of the accusatory pleading. Pen C §1001.51(a)(3).

## 2. [§62.12] Chapter 2.7 Procedure

The Chapter 2.7 diversion program provides few specific procedural guidelines. These guidelines include the following:

- The defendant is not required to admit guilt as a prerequisite for placement in a diversion program. Pen C §1001.3.
- The defendant is entitled to notice and a hearing before diversion may be terminated for cause. Pen C §1001.4; *Kramer v Municipal Court* (1975) 49 CA3d 418, 122 CR 672.
- The court must exonerate any bail, undertaking, or deposit on file by, or on behalf of defendant, when diversion is granted. Pen C §1001.6.
- On defendant’s successful completion of diversion, the criminal charges are dismissed and the arrest on which the diversion is based is deemed to have never occurred. Pen C §§1001.7, 1001.9(a). See §62.16.
- Defendant’s statements made in connection with the defendant’s eligibility for diversion, or any information obtained from those statements, are not admissible in any subsequent action or proceeding. Pen C §1001.5.

Chapter 2.7 does not require, as does Chapter 2.9, referral by the probation department, or a hearing, before the court determines whether to grant or deny diversion.

## 3. Chapter 2.9 Procedure

### a. [§62.13] Referral to Probation Department

If the defendant consents to diversion and waives the right to a speedy trial, the judge must refer the case to the probation department. Pen C §1001.52(a). The probation department must conduct an investigation to determine whether the defendant is eligible for diversion under Pen C §1001.51(a) and whether the defendant would benefit from education,

treatment, or rehabilitation. Pen C §1001.52(a). The department must report its findings and recommendation to the court. If the department recommends that the defendant be referred to a community program, the report must contain a statement regarding the program's willingness to accept the defendant and how the program can assist the defendant successfully complete the program. Pen C §1001.52(a).

The defendant's statements to any probation officer made in connection with the defendant's eligibility for diversion, or any information obtained from those statements, are not admissible in any subsequent action or proceeding. Pen C §1001.52(b).

### **b. [§62.14] Hearing and Determination by Court**

The court must hold a hearing to determine whether the defendant would benefit from diversion. Pen C §1001.53. The judge may order diversion if, after reviewing the probation department's report and other relevant information, the judge finds that the defendant would benefit, and the defendant consents to participate in the program and waives the right to speedy trial. Pen C §1001.53. The defendant may be diverted for a period of not more than 2 years. Pen C §1001.53.

If diversion is ordered, the judge may inquire into the defendant's financial condition, and if the judge finds that the defendant has the ability to pay, may order the defendant to pay for all or a portion of the reasonable cost of diversion. Pen C §1001.53. The reasonable cost of diversion may not exceed the actual average cost of diversion services. Pen C §1001.53. In addition to paying the costs of the program, the defendant may be required to pay an administrative fee under Pen C §1001.16. See §§62.73–62.76.

If the judge finds the defendant unsuitable to participate in a diversion program, or the defendant does not consent to participate, the criminal proceedings must continue as in any other case. Pen C §1001.53. For discussion of the statutory period within which the judge must set a trial date, see §62.22.

When diversion is granted, the judge must enter an order directing the exoneration of any bail bond, undertaking, or deposit on file by or on behalf of the defendant. Pen C §1001.53.

### **c. [§62.15] Termination of Diversion**

The court may terminate misdemeanor diversion and reinstitute criminal proceedings on the following grounds:

- The probation department concludes that the defendant is not performing satisfactorily in or benefiting from the assigned diversion program;

- The defendant is convicted of a misdemeanor involving the use of force or violence; or
- The defendant is convicted of a felony. Pen C §1001.54.

The defendant must be given notice and the court must hold a hearing to determine whether the criminal proceedings should be resumed. Pen C §1001.54; *Kramer v Municipal Court* (1975) 49 CA3d 418, 424, 122 CR 672.

**d. [§62.16] Successful Completion of Diversion (Chapters 2.7 and 2.9)**

When the defendant has successfully completed all terms and conditions of misdemeanor diversion, (1) the criminal charges must be dismissed, (2) the arrest on which the diversion was based is deemed to have never occurred, and (3) the defendant is entitled to state that he or she was not arrested or diverted for the offense in response to any questions concerning defendant's prior criminal record. Pen C §§1001.7, 1001.9(a), 1001.54, 1001.55(a). However, a defendant who applies for employment as a peace officer must disclose the arrest in response to any question contained in the job application. Pen C §§1001.9(b), 1001.55(b). In addition, the defendant must be advised that the arrest may be disclosed by the Department of Justice in response to any peace officer job application. Pen C §§1001.9(b), 1001.55(b).

The record pertaining to an arrest resulting in successful completion of diversion may not be used in any way that could result in the denial of any employment, benefit, license, or certificate, unless the defendant consents to its use. Pen C §§1001.9(a), 1001.55(a).

**C. [§62.17] Drug Use Diversion**

BULLETIN: Effective January 1, 2018, the deferred entry of judgment program for drug users authorized by Pen C §§1000 et seq was converted to a pretrial diversion program. See 2017 ch 778 (AB 208).

A court may allow any defendant who was granted deferred entry of judgment under the former program, who has performed satisfactorily during the period in which deferred entry of judgment was granted, and for whom the criminal charge or charges were dismissed, to withdraw his or her plea and enter a plea of not guilty, and would require the court to dismiss the complaint or information against the defendant. See Pen C §1203.43(b).

### 1. [§62.18] Qualifying Drug Offenses

A defendant who is otherwise eligible (see §62.19) may be considered for pretrial diversion if charged for a violation or attempted violation of one of the following offenses (Pen C §1000(a); *People v Barrajas* (1998) 62 CA4th 926, 73 CR2d 123 (defendant who attempts to commit qualifying offense eligible under former drug diversion scheme)):

- Health & S C §11350—possession of designated controlled substances formerly classified as narcotics.
- Health & S C §11357—possession of cannabis or concentrated cannabis.
- Health & S C §11358—planting, harvesting, or processing of cannabis plants for personal use.

*Note:* Effective November 9, 2016, Proposition 64 (Adult Use of Marijuana Act) legalized possession and use of specified amounts of cannabis. Health & Safety Code §11362.1 provides that it is not unlawful for a person 21 years of age or older to possess, process, transport, purchase, obtain, or give away up to 28.5 grams of cannabis or 8 grams of concentrated cannabis. Nor is it unlawful for a person 21 years of age or older to possess, plant, cultivate, harvest, or process up to six cannabis plants. Proposition 64 did not amend Pen C §1000(a).

- Health & S C §11364—possession of drug paraphernalia.
- Health & S C §11365—presence in room or place where designated controlled substances are being used, with knowledge of and while aiding, assisting, or abetting the use of the controlled substances.
- Health & S C §11368—generation and use of forged or altered prescription to obtain a narcotic drug, if the narcotic drug secured by the fictitious prescription is for personal use and was not sold or furnished to another.
- Health & S C §11375(b)(2)—possession of designated controlled substances.
- Health & S C §11377—possession of designated controlled substances formerly classified as restricted dangerous drugs.
- Health & S C §11550—use or under the influence of designated controlled substances except when administered by or under the direction of a person licensed to dispense, prescribe, or administer controlled substances (Health & S C §11550(a)); under the influence of cocaine, cocaine base, heroin, or methamphetamine while in the immediate personal possession of a loaded, operable firearm (Health & S C §11550(e)).

*Note:* Diversion is *not* available to defendants charged with both being under the influence of phencyclidine or designated analogs of phencyclidine, *and* with either battery of a peace officer or other designated persons engaged in the performance of their duties (Pen C §243(b) or (c)) *or* being under the influence while in the immediate personal possession of a loaded, operable firearm (Health & S C §11550(e)). Health & S C §11550(g).

- Pen C §381—under the influence of toluene or similar substance.
- Pen C §647(f)—under the influence of a controlled substance in a public place.
- Pen C §653f(d)—solicitation of another person to commit designated controlled substance offenses, if the solicitation was for acts directed to personal use only.
- Veh C §23222(b)—possession of open container of cannabis or cannabis products while driving a motor vehicle.
- Bus & P C §4060—possession of controlled substance without prescription.

## 2. [§62.19] Conditions of Eligibility

After it is determined that the defendant is charged with a qualifying offense, all the following conditions must be met before the defendant is considered eligible for pretrial diversion:

- *The defendant has not been convicted of any offense involving controlled substances within 5 years of the alleged commission of the charged offense other than a violation or attempted violation of an offense listed in Pen C §1000(a).* Pen C §1000(a)(1). A guilty plea or guilty verdict, on which sentence has not been imposed, is sufficient to establish a conviction for a prior controlled substance offense. *People v Kirk* (2006) 141 CA4th 715, 719–724, 46 CR3d 258.
- *The charged offense did not involve a crime of violence or threatened violence.* Pen C §1000(a)(2). An offense does not involve a crime of violence or threatened violence unless the drug offense played some part in the commission of the violent offense, *e.g.*, defendant was under the influence at the time of the violent offense. Mere possession during the commission of a crime does not render the defendant ineligible for diversion. *People v Macafee* (1980) 109 CA3d 808, 812, 167 CR 495. See also *Harvey v Superior Court* (1974) 43 CA3d 66, 69, 117 CR 383 (possession of cannabis charge did not involve burglary when the cannabis was found during booking for burglary that had occurred 24 hours earlier).

- *There is no evidence of a contemporaneous violation relating to narcotics or other restricted dangerous drugs other than a violation or attempted violation of an offense listed in Pen C §1000(a).* Pen C §1000(a)(3); *People v Barrajas* (1998) 62 CA4th 926, 73 CR2d 123. See *People v Duncan* (1990) 216 CA3d 1621, 265 CR 612 (defendant charged with being under the influence of a controlled substance under Health & S C §11550 and driving under the combined influence of alcohol and a controlled substance under Veh C §23152, after blood test showed presence of cocaine, not eligible for diversion). Offenses related to alcohol only, such as driving under the influence of alcohol, did not render a defendant ineligible under former deferred entry of judgment program. *People v Orozco* (2012) 209 CA4th 726, 732–734, 146 CR3d 916. There is no requirement that the defendant actually be charged with the disqualifying offense. *People v Covarrubias* (1993) 18 CA4th 639, 642, 22 CR2d 475. See also *People v Flores* (1987) 196 CA3d 475, 486, 241 CR 835 (evidence of prior narcotics charge dismissed due to reasons irrelevant to the current charge and the diversion proceeding properly considered by the prosecutor); and *People v Sturiale* (2000) 82 CA4th 1308, 1315, 98 CR2d 865 (evidence of charge of transportation of methamphetamine dismissed as part of plea bargain properly considered).
- *The defendant has no prior felony conviction within 5 years of the alleged commission of the charged offense.* Pen C §1000(a)(4). See *People v Marsh* (1982) 132 CA3d 809, 813, 183 CR 455 (defendant whose prior felony offense was reduced to a misdemeanor *after* the commission of the divertible offense not eligible for diversion under former Pen C §1000). There is no case law addressing the effect of a reduction of a prior felony conviction to a misdemeanor during the 5-year time period.

### 3. [§62.20] Determination of Eligibility by Prosecutor

When a defendant is charged with a qualifying offense, the prosecutor must review the defendant's case file to determine whether the defendant meets the eligibility requirements outlined in Pen C §1000(a)(1)–(4). Pen C §1000(b). A review of the defendant's file will necessarily include the consideration of hearsay evidence, including reports from criminal investigators, arresting officers, victims, and witnesses. *Sledge v Superior Court* (1974) 11 C3d 70, 113 CR 28. In determining whether there is evidence of a disqualifying narcotics violation under Pen C §1000(a)(3), the prosecutor must make the finding on evidence amounting to more than mere suspicion or rumor. 11 C3d at 75. The prosecutor should conduct a review

of the case file as soon as possible so that the judge will be able to set a hearing for diversion at the defendant's arraignment. Pen C §1000(b).

Case law is unclear as to whether the prosecutor may base a determination of defendant's eligibility on evidence suppressed under Pen C §1538.5. Compare *People v Dyas* (1979) 100 CA3d 464, 161 CR 39 (no), with *People v Flores* (1987) 196 CA3d 475, 486, 241 CR 835 (passage of Proposition 8 (Victims' Bill Of Rights Act of 1982) may have nullified holding in *Dyas*).

After determining the defendant's eligibility or ineligibility for diversion, the prosecutor must file with the court a written declaration or state orally for the record the grounds on which the determination is based, and make this information available to the defendant and defense counsel. Pen C §1000(b). If the defendant is found eligible, the prosecutor must notify the defendant and defense counsel of the following in writing:

(1) A full description of the procedures for diversion. Pen C §1000.1(a)(1).

(2) A general explanation of the roles and authorities of the probation department, the prosecutor, the community program, and the court in the process. Pen C §1000.1(a)(2).

(3) A clear statement that (a) the court may, instead of trial, grant diversion if the defendant pleads not guilty to the offense(s) charged, waives the right to a speedy trial, to a speedy preliminary hearing, and to a trial by jury, if applicable, and (b) on the defendant's successful completion of a drug treatment program, and on the positive recommendation of the program authority, and the motion of the prosecutor, the court, or the probation department, the court must dismiss the charge(s) no sooner than 12 months and no later than 18 months from the date of the defendant's referral to the program. Pen C §1000.1(a)(3).

(4) A clear statement that if the defendant fails to meet the terms of the program or any circumstance specified in Pen C §1000.3, the prosecutor or the probation department or the court on its own may make a motion to the court to terminate diversion and schedule resumption of the criminal proceedings. Pen C §1000.1(a)(4).

(5) An explanation of criminal record retention and disposition resulting from participation in the diversion program and the defendant's rights relative to answering questions about the arrest and diversion following successful completion of the program. Pen C §1000.1(a)(5).

#### **4. [§62.21] Referral to Probation Department**

If the defendant consents to diversion and waives the right to a speedy trial, a speedy preliminary hearing, and to a trial by jury, the judge may refer the case to the probation department or summarily grant diversion. Pen C §1000.1(b). When the case is referred to the probation department, the department must investigate and consider the following factors in

determining whether the defendant would benefit from education, treatment, or rehabilitation (Pen C §1000.1(b)):

- Defendant’s age
- Employment and military service records
- Educational background
- Community and family ties
- Prior controlled substance use
- Any history of treatment
- Demonstrable motivation
- Other mitigating factors.

In addition to determining whether the defendant would benefit from education, treatment, or rehabilitation, the probation department must determine which programs would benefit the defendant and accept the defendant. Pen C §1000.1(b).

To encourage the defendant’s cooperation with the probation department investigation, Pen C §1000.1(c)(1) provides that defendant’s statements to a probation officer or drug treatment worker, or any information obtained from those statements, are not admissible in any subsequent action or proceeding. In addition, the defendant’s statements about the charged offense made after a grant of diversion, or any information procured from those statements, are inadmissible. Pen C §1000.1(c)(2).

The department must report its findings and recommendations to the court, which must make the final determination of whether the defendant should be diverted. Pen C §1000.1(b).

### **5. [§62.22] Hearing and Determination by Court**

When a defendant is found eligible for diversion by the prosecutor, the court must hold a hearing, before commencement of trial, to determine whether the defendant should be granted diversion. Pen C §1000.2(a); *Morse v Municipal Court* (1974) 13 C3d 149, 157, 118 CR 14. At this hearing, the judge must review any relevant information, including the probation department report, and determine whether the defendant consents to participate in the program as well as whether the defendant should be granted diversion. Pen C §1000.2(a).

A defendant’s participation in a diversion program does not constitute a conviction or an admission of guilt for any purpose Pen C §1000.1(d).

The defendant may be granted diversion and referred to an education, treatment, or rehabilitation program for a period not less than 12 months nor more than 18 months. However, the defendant may request, and the court must grant, for good cause shown, an extension to complete the program. Pen C §1000.2(c). The judge may require the probation department to

monitor the defendant's compliance with the program and file progress reports with the court. Pen C §1000.2(c).

When diversion is granted, any bail bond, undertaking, or deposit on file by or on behalf of the defendant is exonerated, and the judge must enter an order to that effect. Pen C §1000.2(b).

The judge may deny diversion only if he or she finds that the defendant is not suitable for the program, or if the defendant does not consent to participate. Pen C §§1000(b), 1000.2(a). Denial on any other ground is an abuse of the court's discretion. *Harvey v Superior Court* (1974) 43 CA3d 66, 68, 117 CR 383 (abuse of discretion to deny diversion on belief that defendant was a deliberate narcotics violator); *Scott v Municipal Court* (1974) 11 C3d 799, 800, 114 CR 600 (abuse of discretion to deny diversion solely because prosecutor objected).

If the judge does not grant diversion, the criminal proceedings will continue as in any other case, and the judge must set a trial date within the statutory period required under Pen C §1382, commencing on the date diversion is denied, unless the defendant consents to a longer period. Pen C §1000.2(a); *People v Denman* (1983) 145 CA3d Supp 40, 49, 193 CR 863 (interpreting similar language in former domestic violence statutes, court held that new speedy trial period begins to run after diversion denied). In determining whether the new statutory period should be 30 days (in-custody cases) or 45 days (all other cases) in misdemeanor cases, the custody status of the defendant at the time of arraignment or plea, and not the custody status on the date diversion is denied, is controlling. *People v Denman, supra*; Pen C §1382(a).

## 6. [§62.23] Pretrial Review of Prosecutor's Determination

If the prosecutor determines that the defendant is not eligible for pretrial diversion, the defendant's sole remedy is a postconviction appeal. Pen C §1000(b). Where the prosecution erroneously determines that a defendant is ineligible for diversion and the defendant subsequently is convicted or enters a plea, upon review the court may be ordered to set aside the conviction or plea. See *People v Hayes* (1985) 163 CA3d 371, 374-376, 209 CR 441.

Under the former drug diversion program (pre-1997), a defendant was not entitled to pretrial judicial review of a prosecutor's adverse diversion eligibility determination. *Sledge v Superior Court* (1974) 11 C3d 70, 75, 113 CR 28. The courts of appeal recognized an exception under the former diversion program when the prosecutor's eligibility determination involves resolution of factual issues or statutory interpretation, both judicial functions. *People v Williamson* (1982) 137 CA3d 419, 422, 187 CR 107; *People v Paz* (1990) 217 CA3d 1209, 1217, 266 CR 468. However, the courts of appeal are in disagreement as to which eligibility determinations involve those judicial functions, particularly regarding whether the

determination that there is evidence that a defendant possessed narcotics for sale rendering defendant ineligible under Pen C §1000(a)(3) is a judicial function. The courts in *Williamson* and *People v Venghiattis* (1986) 185 CA3d 326, 333, 229 CR 636 held that determining whether a defendant possesses cannabis (in violation of Health & S C §11358) for personal or commercial use involves issues of credibility and the resolution of conflicting inferences of intended use and therefore is a function of the trial court. But the courts in *People v Brackett* (1994) 25 CA4th 488, 500, 30 CR2d 557, and *People v McAlister* (1990) 225 CA3d 941, 944, 275 CR 229, held that a prosecutor's determination that there is evidence of a violation that defendant possessed narcotics for sale does not involve the resolution of conflicting inferences or the determination of credibility, and therefore is not subject to pretrial review.

### 7. [§62.24] Qualifying Programs

When the judge grants diversion, he or she must refer the defendant to one of the following programs (Pen C §1000(c)):

- Programs certified by the county drug program administrator under Pen C §1211.
- Programs that provide services at no cost to the defendant and have been deemed by the court and the county drug program administrator to be credible and effective.

The defendant may request to be referred to a program in any county, as long as that program meets the criteria above. Pen C §1000(c).

#### a. [§62.25] Inability to Pay Program Fees

A defendant who has been granted diversion may not be terminated from such diversion based solely on the inability to pay the fees of the program to which the defendant has been referred. *People v Trask* (2010) 191 CA4th 387, 396–398, 119 CR3d 91. An indigent defendant must be referred to an approved, free drug diversion program or to a Pen C §1211 certified drug diversion program that is required to provide a fee exemption. Pen C §§1000(c), 1211(a)(4).

#### b. [§62.26] Drug Testing Component

As part of a diversion treatment and supervision program, the defendant may be required to undergo urinalysis to test for the presence of drugs. However, the test results are not admissible as evidence in any subsequent criminal prosecution or proceeding. Pen C §1000(e). Urinalysis results that only establish the presence of medication prescribed to the defendant by his or her physician or psychiatrist, or medication used to treat

substance disorders may not be considered a violation of the terms of the diversion program. Pen C §1000.6(d).

**c. [§62.27] Medications to Treat Substance Use Disorders**

A defendant participating in a pretrial diversion program is authorized under the direction of a licensed health care practitioner, to use medications including methadone, buprenorphine or levoalphacetylmethadol (LAAM) to treat substance use disorders. Pen C §1000.6(a). The defendant must allow the release of medical records to the court presiding over the defendant's diversion program for the limited purpose of determining whether or not the defendant is using such medications under the direction of a licensed health care practitioner and is in compliance with the diversion program rules. Pen C §1000.6(a). The use by the defendant of medications to treat a substance use disorder may not be the sole reason for exclusion from a diversion program. Pen C §1000.6(b).

**8. [§62.28] Successful Completion of Diversion**

When the defendant has successfully completed all terms and conditions of the diversion program, (a) the criminal charges must be dismissed, (b) the arrest on which the defendant was diverted is deemed never to have occurred, (c) the court may issue an order to seal the arrest records, and (d) the defendant is entitled to state that he or she was not arrested or granted diversion for the offense in response to any questions concerning defendant's prior criminal record. Pen C §§1000.3(d), 1000.4(a). However, a defendant who applies for employment as a peace officer must disclose the arrest in response to a question contained in the job application. Pen C §1000.4(c). In addition, the defendant must be advised that the arrest may be disclosed by the Department of Justice in response to a peace officer job application. Pen C §1000.4(c).

Before dismissing the charge(s), the court must consider the defendant's ability to pay and determine whether the defendant has paid an ordered Pen C §1001.90 restitution fee and has met any financial obligation to the program. Pen C §1000.3(e). See §§62.72–62.73, and 62.76. The defendant must also reimburse the probation department for the reasonable cost of any program investigation or progress reports filed with the court. Pen C §1000.3(e).

The record pertaining to an arrest resulting in successful completion of a diversion program may not be used in any way that could result in the denial of any employment, benefit, license, or certificate, unless the defendant consents to its use. Pen C §1000.4(a). However, successful completion of diversion program does not prohibit a healing arts agency from taking disciplinary action against licensee or license applicant for professional misconduct, notwithstanding that evidence of that misconduct

may be contained in the arrest record. Bus & P C §492; Pen C §1000.4(a). In addition, any licensing agency listed in Bus & P C §144 (including the Medical Board) may request, and is authorized to receive from a state or local agency certified records regarding referral to, participation in, successful completion of, and termination from drug diversion programs. Pen C §1000.4(b).

### 9. [§62.29] Termination of Diversion

The probation department, the prosecutor, or the court on its own may make a motion to terminate diversion on the following grounds (Pen C §1000.3(a)):

- It appears to the probation department, the prosecutor, or the court that the defendant is not performing satisfactorily in the assigned education, treatment, or rehabilitation program;
- The defendant is convicted of an offense that reflects the defendant's propensity for violence; or
- The defendant is convicted of a felony.

The defendant must be given notice and the court must hold a hearing to determine whether to terminate diversion. Pen C §1000.3(b); *In re Scoggins* (2001) 94 CA4th 650, 657, 114 CR2d 508 (Pen C §1000.3(b) requires formal noticed motion). If the court finds that the defendant is not performing satisfactorily in or benefiting from the program or has been convicted of criminal activity described above, the court must resume the criminal proceedings. Pen C §1000.3(c).

Before terminating diversion, the court must consider the defendant's ability to pay and determine whether the defendant has paid an ordered Pen C §1001.90 restitution fee and has met any financial obligation to the program. Pen C §1000.3(e). See §§62.72–62.73, and 62.76. The defendant must also reimburse the probation department for the reasonable cost of any program investigation or progress reports filed with the court. Pen C §1000.3(e).

### 10. [§62.30] Preguilty Plea Drug Court Program

The presiding judge of the superior court, or a judge designated by the presiding judge, together with the district attorney and the public defender, may agree in writing to establish and conduct a preguilty plea drug court program. Pen C §1000.5(a)(1). Under such a program, the criminal proceedings are suspended without a plea of guilty for designated defendants. Pen C §1000.5(a)(1).

Only persons charged with a misdemeanor violation of Health & S C §11357.5(b)(3) (use or possession of synthetic cannabinoid compound or derivative) or Health & S C §11375.5(b)(3) (use or possession of synthetic

stimulant compound) are eligible to participate in the preguilty plea drug court program. Pen C §1000.5(a)(2); Health & S C §11375.7(a).

The drug court program must provide for sanctions and rewards, individual and group therapy, urinalysis testing commensurate with treatment needs, close court monitoring and supervision, educational or vocational counseling as appropriate, and other requirements as agreed to by the presiding judge, the district attorney, and the public defender. Pen C §1000.5(a)(1).

A positive test for use of a controlled substance, any other drug that may not be possessed without a prescription, or alcohol are not be grounds for dismissal from the program, unless the person is not making progress in the program. Health & S C §11375.7(b). The court shall consider a report or recommendation of the treatment provider in making this determination. It shall be presumed that a person engaged in a program is making progress, unless that presumption is defeated by clear and convincing evidence. The person may offer evidence or an argument that he or she would benefit from and make progress in a different program or mode. If the court so finds, it may place the person in a different treatment program. Health & S C §11375.5(b).

A prior conviction for an offense involving a controlled substance or drug that may not be possessed without a prescription, including a substance listed in Health & S C §11357.5 or §11375.5, is not grounds for exclusion from the program, unless the court finds by clear and convincing evidence that the person is likely to engage in drug commerce for financial gain, rather than for purposes of obtaining a drug or drugs for personal use. Health & S C §11375.7(d).

The following persons who are otherwise program-eligible are excluded from participating in the preguilty plea program (Health & S C §11375.7(c)):

- A person with a history of violence that indicates that he or she presents a current risk of violent behavior currently or during the treatment program. This ground for exclusion shall be established by clear and convincing evidence.
- A person required to register as a sex offender under Pen C §290, unless the court finds by clear and convincing evidence that the person does not present a substantial risk of committing sexual offenses currently or through the course of the program and the person would benefit from the program, including that treatment would reduce the risk that the person would sexually reoffend.
- A person who the treatment provider concludes is unamenable to any and all forms of drug treatment. The defendant may present evidence that he or she is amenable to treatment and the court may retain the person in the program if the court finds that the person is

amenable to treatment through a different provider or a different mode of treatment.

The provisions of Pen C §§1000.3 and 1000.4 regarding successful and unsuccessful performance in a program apply to preguilty plea programs, except as provided in Health & S C §11375.7 (see above). Pen C §1000.5(b). The court must reinstate the criminal charge that has been diverted if the court finds any of the following conditions (Pen C §1000.5(b)):

- The defendant is not performing satisfactorily in the assigned program.
- The defendant is not benefiting from education, treatment, or rehabilitation.
- The defendant has been convicted of a crime specified in Pen C §1000.3.
- The defendant has engaged in criminal conduct rendering him or her unsuitable for the preguilty plea program.

If the defendant has performed satisfactorily during the period of the preguilty plea program, at the end of that period the criminal charge or charges must be dismissed and the provisions of Pen C §1000.4 will apply. Pen C §1000.5(b).

#### **D. [§62.31] Diversion of Defendants With Cognitive Developmental Disabilities**

The court may divert a defendant who is charged with a misdemeanor offense and is determined by a regional center for the developmentally disabled to be a person with a cognitive developmental disability. Pen C §1001.21. Such a defendant may be diverted when the case is before the court on an accusatory pleading at any stage of the criminal proceedings. Pen C §1001.21(a). However, defendants with cognitive developmental disabilities who are charged with drunk driving offenses or who have been diverted under this program within 2 years of the current charge are ineligible for diversion. Pen C §1001.21(b); Veh C §23640; *People v Weatherill* (1989) 215 CA3d 1569, 264 CR 298. A defendant who is autistic or has a disabling condition closely related to mental retardation or autism (see below) may be diverted only if he or she was a client of a regional center for the developmentally disabled at the time of the charged offense. Pen C §1001.21(c).

A cognitive developmental disability is defined as any of the following (Pen C §1001.20(a)(1)–(3)):

- Intellectual disability—a condition of significantly subaverage general intellectual functioning existing concurrently with deficits

in adaptive behavior and manifested during the developmental period.

- Autism—a diagnosed condition of markedly abnormal or impaired development in social interaction, in communication, or in both, with a markedly restricted repertoire of activity and interests.
- Disabling conditions found to be closely related to intellectual disability or autism, or that require treatment similar to that required for individuals with intellectual disability or autism, and that would qualify an individual for services provided under the Lanterman Developmental Disabilities Services Act (Welf & I C §§4500 et seq).

### 1. [§62.32] Diversion Evaluations

When the judge suspects that a defendant has a cognitive developmental disability as defined in Pen C §1001.20(a), and the defendant consents to have the case evaluated for diversion eligibility and waives the right to a speedy trial, the judge must initiate a diversion investigation by the prosecutor, the probation department, and the regional center for the developmentally disabled. Pen C §1001.22 (first paragraph). Specifically, the judge must order the prosecutor and the two agencies to prepare separate evaluation reports addressing specific aspects of the defendant’s case. Pen C §1001.22 (first paragraph). If the defendant is not represented by counsel, the judge must appoint counsel to the defendant’s case. Pen C §1001.22 (first paragraph).

Statements made by the defendant to the probation department, regional center, or prosecutor during the course of their investigations, or any information obtained from those statements, may not be admitted into evidence in any subsequent action or proceeding. Pen C §1001.24. In addition, the defendant’s statements about the charged offense made subsequent to a grant of diversion, or any information procured from those statements, are inadmissible. Pen C §1001.25. If diversion is denied or revoked, neither the probation department investigation nor statements or information disclosed during the investigations by the probation department and regional center may be used in any sentencing procedures. Pen C §1001.26.

#### a. [§62.33] Regional Center’s Report

The regional center must submit a report to the probation department within 25 judicial days of the court order. Pen C §1001.22(a). This report must include the following:

- A determination of whether the defendant has a cognitive developmental disability and is eligible for regional center diversion-related treatment and habilitation services.
- A proposed diversion program tailored to the needs of the defendant, which must include treatment addressed to the charged criminal offense.
- Whether the proposed program is available through the treatment and habilitation services of the regional center. Pen C §1001.22(a).

**b. [§62.34] Prosecutor’s Report**

The prosecutor must send a report to the court, the defendant, and each of the other agencies involved in the case within 30 judicial days. Pen C §1001.22(b). This report must include the following:

- Whether the defendant’s record indicates that the defendant has been diverted under Chapter 2.8 (Pen C §§1001.20–1001.34) within 2 years before the alleged commission of the charged divertible offense.
- If the prosecutor recommends diversion, whether the prosecutor recommends a diversion program administered jointly by the regional center and the probation department (dual agency diversion) or a program administered solely by the regional center (single agency diversion). This recommendation must be provided in writing to the court, the defendant, and the two agencies within 20 judicial days of the court’s order to prepare the report.
- If the prosecutor does not recommend diversion, a written declaration stating the grounds for the recommendation.
- If dual agency diversion is recommended:
  - A full description of the diversion proceedings and the prosecutor’s investigation procedures.
  - A general explanation of the role and authority of the court, the prosecutor, the probation department, and the regional center in the diversion program process.
  - A clear statement that the court may decide in a hearing not to divert the defendant and that the defendant may have to stand trial for the charged divertible offense.
  - A clear statement that if the defendant fails in meeting the diversion terms, or is charged with a felony during the diversion period, he or she may be required, after a hearing, to stand trial for the charged divertible offense. Pen C §1001.22(b).

### c. [§62.35] Probation Department's Report

Within 30 judicial days of the court's order, the probation department must submit a report to the court, the defendant, and each of the other agencies involved in the case. Pen C §1001.22(c). The department must conduct an investigation and take into consideration the following factors in determining whether the defendant would benefit from a treatment and habilitation program (Pen C §1001.22(c)):

- Defendant's age,
- Cognitive developmental disability,
- Employment record,
- Educational background,
- Community and family ties,
- Treatment history,
- Any history of criminal activity,
- Demonstrable motivation, and
- Other mitigating factors.

The regional center's report (see §62.33) must be attached to the probation department's report to the court. Pen C §1001.22(c).

## 2. [§62.36] Court Determination of Eligibility

If a defendant has a cognitive developmental disability and is eligible for regional center services, the judge must review the evaluation reports from the regional center, probation department, and prosecutor to determine if the proposed diversion program is acceptable to them. Pen C §1001.23(a). If the program is acceptable and the defendant consents to participation and waives the right to speedy trial, the judge may order implementation of the diversion program without a hearing. Pen C §1001.23(a). The judge must then determine whether the defendant should be diverted under single or dual agency (regional center and probation department) supervision. Pen C §1001.23(b). The judge may order the defendant to participate in a diversion program for up to 2 years. Pen C §1001.28. Any bail, bond, undertaking, or deposit instead of bail filed on behalf of the defendant must be exonerated at the time diversion is ordered. Pen C §1001.27.

If the regional center determines that the defendant does not have a cognitive developmental disability, the judge must reinstitute the suspended criminal proceedings. Pen C §1001.23(a). If the defendant is eligible for diversion but the judge finds that the defendant would not benefit from diversion, the judge may reinstitute the criminal proceedings, order diversion at a later date, or make any other disposition authorized by law. Pen C §1001.23(b).

### **3. [§62.37] Monitoring by Regional Center and Probation Department**

When dual agency diversion is ordered by the court, both the regional center and the probation department are responsible for administering the diversion program and monitoring the defendant's progress. Pen C §§1001.20(f), 1001.23(c), 1001.28. The regional center must provide a report on the defendant's progress in the program to the probation department not less than every 6 months. Pen C §§1001.23(c), 1001.28. On receiving the regional center report, the probation department must submit, within 5 judicial days, its own progress report to the court and the prosecutor. Pen C §1001.23(c). A copy of the regional center's assessment must be attached to the probation department report. Pen C §§1001.23(c), 1001.28(a).

If single agency diversion is ordered, the regional center is solely responsible for administering the diversion program and monitoring the defendant's progress. Pen C §§1001.20(g), 1001.23(c), 1001.28(b). The regional center must submit a report on the defendant's progress in a single agency diversion program directly to the court and the prosecutor not less than every 6 months. Pen C §§1001.23(c), 1001.28.

### **4. [§62.38] Modification or Termination of Diversion Program**

If it appears to the court that the defendant is not meeting the terms and conditions of the diversion program, the court may hold a hearing to modify the program to require greater supervision by the regional center and/or the probation department. Pen C §1001.29. The court may also conduct a hearing to determine whether to terminate diversion and reinstitute the suspended criminal proceedings if the defendant's performance in the program is unsatisfactory or if the defendant is charged with the commission of a felony during the period of diversion. Pen C §1001.29.

A hearing to reinstitute the criminal proceedings may be initiated by the court, the prosecutor, or the regional center. Pen C §1001.29(a)–(b). In dual agency diversion cases, the probation department may also initiate the hearing. Pen C §1001.29(a). Notice of any hearing to modify or terminate diversion must be provided to the defendant by the court or the agency moving for such action. Pen C §1001.29(c).

When the cause of the hearing to reinstitute criminal proceedings is a subsequent felony charge against the defendant, the hearing must be delayed until probable cause has been established on the felony charge and the defendant is bound over for trial. Pen C §1001.29(d).

The defendant may withdraw consent to participate in the diversion program at any time. Pen C §1001.30. On withdrawal of consent, the court may reinstitute the criminal proceedings or make any other disposition authorized by law. Pen C §1001.30.

### 5. [§62.39] Successful Completion of Diversion

If the defendant has successfully completed the diversion program, (a) the criminal charges must be dismissed, (b) the arrest on which the diversion was based is deemed to have never occurred, and (c) the defendant is entitled to state that he or she was never arrested or diverted for the offense in response to any questions concerning defendant's prior criminal record. Pen C §§1001.31, 1001.33(a). However, a defendant who applies for employment as a peace officer must disclose the arrest in response to any question contained in the job application. Pen C §1001.33(b). In addition, the defendant must be advised that the arrest may be disclosed by the Department of Justice in response to any peace officer job application. Pen C §1001.33(b).

The record pertaining to an arrest resulting in successful completion of diversion may not be used in any way that could result in the denial of any employment, benefit, license, or certificate, unless the defendant consents to its use. Pen C §1001.33(a).

### E. [§62.40] Diversion to Receive Mental Health Treatment

A court may, after considering the positions of the defense and the prosecution, grant pretrial diversion to a defendant charged with a misdemeanor or felony who has been diagnosed with a qualifying mental disorder, as long as that defendant has not been charged with specified violent crimes. Here, "pretrial diversion" means temporary or permanent postponement of prosecution during the judicial process, at any time from charging until adjudication, to allow the defendant to receive mental health treatment. Pen C §1001.36(c).

A defendant may not be placed into a diversion program to receive mental health treatment if the current charge is (Pen C §1001.36(b)(2)(A)–(b)(2)(H)):

- (1) Murder or voluntary manslaughter.
- (2) An offense which would require registration as a sex offender under Pen C §290, except for a violation of Pen C §314 (lewd or obscene conduct/indecent exposure).
- (3) Rape.
- (4) Lewd or lascivious act on a child under 14 years old.
- (5) Assault with intent to commit rape, sodomy, or oral copulation in violation of Pen C §220.
- (6) Commission of rape or sexual penetration in concert with another person in violation of Pen C §264.1.
- (7) Continuous sexual abuse of a child in violation of Pen C §288.5.

(8) A violation of Pen C §11418(b) or Pen C §11418(c) (assault with a weapon of mass destruction).

The purpose of offering diversion to individuals with mental disorders is to promote:

- Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety. Pen C §1001.35(a).
- Local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings. Pen C §1001.35(b).
- Diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. Pen C §1001.35(c).

*Retroactivity.* An appellate court has held that Pen C §1001.36 applies retroactively to a defendant who was diagnosed with a mental disorder and whose case was adjudicated, but was not final on appeal. *People v Frahs* (2018) 27 CA5th 784, 788–791, 238 CR3d 483, (review granted Dec. 27, 2018, S252220).

### 1. [§62.41] Eligibility for Mental Health Diversion

In addition to not being charged with any of the above disqualifying crimes, a defendant must meet all of these criteria to be eligible for pretrial diversion to receive mental health treatment:

- The court is satisfied that the defendant suffers from a mental disorder as identified in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. The defense must provide evidence of the defendant's mental disorder, and this evidence must include a recent diagnosis by a qualified mental health expert. The expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence. Pen C §1001.36(b)(1)(A).
- The court is satisfied that the defendant's mental disorder was a significant factor in the commission of the charged offense. The court may make this finding if after reviewing any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental

disorder at or near the time of the offense, it concludes that the defendant's mental disorder substantially contributed to the defendant's involvement in the commission of the offense. Pen C §1001.36(b)(1)(B).

- The qualifying mental health expert believes that the defendant's mental disorder symptoms motivating the criminal behavior would respond to mental health treatment. Pen C §1001.36(b)(1)(C).
- The defendant consents to diversion and waives the right to a speedy trial, unless the defendant has been found to be an appropriate candidate for diversion instead of commitment under Pen C §1370(a)(1)(B)(iv), and as a result of mental incompetence cannot consent to diversion or knowingly and intelligently waive the right to a speedy trial. Pen C §1001.36(b)(1)(D).
- The defendant agrees to comply with treatment as a condition of diversion. Pen C §1001.36(b)(1)(E).
- The court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety (Pen C §1170.18) if treated in the community. The court may consider the opinions of the prosecution, the defense, or a qualified mental health expert, and may consider the defendant's violence and criminal history, the current charged offense, and any other appropriate factors. Pen C §1001.36(b)(1)(F).

## **2. [§62.42] Defendant May Be Required to Make a Prima Facie Showing**

The court may, at any stage of the proceedings, require the defendant to make a prima facie showing of minimum eligibility for diversion, and that the defendant and the offense are suitable for diversion. Pen C §1001.36(b)(3). If the court requires the defendant to make this showing, the hearing must be informal and may proceed on offers of proof, reliable hearsay, and counsel's argument. Pen C §1001.36(b)(3). If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other appropriate relief. Pen C §1001.36(b)(3).

## **3. [§62.43] Additional Requirements**

The court must be satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the defendant's specialized mental health treatment needs. Pen C §1001.36(c)(1)(A).

The court must consider the request of the defense, the request of the prosecution, the needs of the defendant, and the interests of the community before approving a proposed treatment program. Pen C §1001.36(c)(1)(B). The defendant may be referred to a program of mental health treatment

utilizing existing inpatient or outpatient mental health resources. Pen C §1001.36(c)(1)(B). Private or public funds may be used. Pen C §1001.36(c)(1)(B). A referral may be made to a county mental health agency, existing collaborative courts, or assisted outpatient treatment only if that entity has agreed to accept responsibility for the defendant's treatment, and mental health services are provided only to the extent that resources are available and the defendant is eligible. Pen C §1001.36(c)(1)(B).

*Regular progress reports.* The mental health treatment program provider must provide regular progress reports to the court, the defense, and the prosecutor. Pen C §1001.36(c)(2). A defendant may not be diverted for more than 2 years. Pen C §1001.36(c)(3).

*Restitution.* If requested, the court must hold a hearing to determine if restitution is owed to any victim because of the diverted offense (Pen C §1202.4(f)), and if owed, order its payment during diversion. Pen C §1001.36(c)(4). However, the court may not deny diversion or find that defendant has failed to comply with its terms if a defendant is unable to pay restitution due to indigence or mental disorder. Pen C §1001.36(c)(4).

#### 4. [§62.44] Change in Circumstances

The court must give notice to the defendant, defense counsel, and the prosecution and must hold a hearing to consider (1) reinstating the criminal proceedings, (2) modifying the treatment, or (3) conserving the defendant and referring the defendant to the conservatorship investigator of the commitment county to initiate conservatorship proceedings if any of the following circumstances exists:

- The defendant is charged with an additional misdemeanor allegedly committed during diversion that reflects a propensity for violence. Pen C §1001.36(d)(1).
- The defendant is charged with an additional felony allegedly committed during diversion. Pen C §1001.36(d)(2).
- The defendant is engaged in criminal conduct indicating unsuitability for diversion. Pen C §1001.36(d)(3).
- Based on an appropriate qualified mental health expert's opinion, either (Pen C §1001.36(d)(4)):
  - The defendant is performing unsatisfactorily in the assigned program (Pen C §1001.36(d)(4)(A)), or
  - The defendant is gravely disabled under Welf & I C §5008(h)(1)(B). A defendant must only be conserved and referred to the conservatorship investigator pursuant to this finding. Pen C §1001.36(d)(4)(B).

### **5. [§62.45] Successful Completion of Mental Health Diversion**

The court must dismiss the criminal charges at the end of the diversion period if the defendant has performed satisfactorily. Pen C §1001.36(e). A court may conclude that the defendant has performed satisfactorily if the defendant: (1) has substantially complied with the diversion requirements, (2) has avoided significant new violations of law unrelated to the defendant's mental health condition, and (3) has a plan in place for long-term mental health care. Pen C §1001.36(e).

If the court dismisses the charges, the clerk must file a record with the Department of Justice indicating the disposition. Pen C §1001.36(e). The arrest is deemed never to have occurred, and the court must restrict access to the arrest record under Pen C §1001.9, except if the defendant applies to be a peace officer, if a criminal justice agency seeks to access and use the sealed records, or if a court is exercising its discretion to grant diversion in a later case. Pen C §1001.36(e), (g)–(h). A defendant who successfully completes diversion need not disclose the arrest or diversion when answering a question about a prior criminal record, except when applying to be a peace officer. Pen C §1001.36(e), (g).

If the defendant successfully completes diversion, the arrest and diversion records must not be used to deny any employment, benefit, license, or certificate, unless the defendant consents. Pen C §1001.36(f).

A finding that the defendant suffers from a mental disorder, any progress reports about treatment, or any other mental disorder-related records that were created for participation in or completion of diversion, or for use at a hearing on the defendant's diversion eligibility, may not be used at any other proceeding without defendant's consent, unless the information is relevant and admissible evidence. Pen C §1001.36(h).

The county agency administering the diversion, the treatment providers, the public guardian or conservator, and the court must, to the extent not prohibited by federal law, have access to the defendant's medical and psychological records, including progress reports, as needed during the diversion period, to provide care and treatment and monitoring treatment for diversion or conservatorship. Pen C §1001.36(i).

### **F. [§62.46] Repeat Theft Crimes Diversion or Deferred Entry of Judgment**

The city or county prosecuting attorney or county probation department may create a diversion or deferred entry of judgment program for persons who commit repeat theft offenses. Pen C §1001.81(a). Repeat theft offenses occur when a person who has been cited or convicted for misdemeanor or felony theft from a store or from a vehicle two or more times in the previous 12 months fails to appear in court when cited for these

crimes, or continues to commit these crimes after release or after conviction. Pen C §1001.81(f).

The program may be conducted by the prosecuting attorney's office or the county probation department. Pen C §1001.81(a). Except as provided in Pen C §1001.81(e), diversion or deferred entry of judgment for repeat theft offenses does not limit the prosecuting attorney's power to prosecute repeat theft. Pen C §1001.81(b). See §62.49.

### **1. [§62.47] Eligibility**

If a county creates a repeat theft diversion or deferred entry of judgment program, then on receipt of a case, or at arraignment, the prosecuting attorney must refer the case to the county probation department to conduct a prefiling investigation report to assess the appropriateness of program placement. Pen C §1001.81(c). When the prosecuting attorney's office operates the program, the prosecuting attorney must determine if the case is appropriate for referral to the program. Pen C §1001.81(c).

To determine whether to refer a case to the program, the probation department or prosecuting attorney must consider, but is not limited to, these factors (Pen C §1001.81(c)):

(1) Any prefiling investigation report conducted by the county probation department or nonprofit contract agency operating the program that evaluates the defendant's risk and needs, and the appropriateness of program placement;

(2) If the defendant is willing to engage in community service, restitution, or other mechanisms to repair the harm caused by the criminal activity and address the underlying drivers of the criminal activity;

(3) If a risk and needs assessment identifies underlying substance abuse or mental health needs or other drivers of criminal activity that can be addressed through diversion or deferred entry of judgment;

(4) If the defendant has a violent or serious prior criminal record or has previously been referred to diversion and failed that program; and

(5) Any relevant information concerning the program's efficacy in reducing the likelihood of participants committing future offenses.

### **2. [§62.48] Notice to Defendant**

If a case is referred to the diversion or deferred entry of judgment program, the defendant must be given or mailed notice that includes (Pen C §1001.81(d)):

(1) The date by which the defendant must contact the diversion program or deferred entry of judgment program in the manner designated by the supervising agency; and

(2) The penalty for the charged offense or offenses.

### 3. [§62.49] Written Agreement With Defendant

The prosecuting attorney may enter into a written agreement with the defendant to refrain from, or defer, prosecution on the offense or offenses on these conditions (Pen C §1001.81(e)):

- (1) Completion of the program requirements such as community service or courses reasonably required by the prosecuting attorney; and
- (2) Making adequate restitution or an appropriate substitute for restitution to the establishment or person from which property was stolen at the face value of the stolen property, if required by the program.

### G. [§62.50] Diversion for Contributing to Delinquency of Minor (Parental Diversion)

The local prosecutor who has jurisdiction to prosecute violations of Pen C §272(a) (contributing to delinquency of minor) has the power to approve a diversion program for a parent or legal guardian who has contributed to the delinquency of a minor child. Pen C §§1001.70, 1001.71. However, the prosecutor does not have the authority to determine whether a particular defendant will be diverted. Pen C §1001.70. As with the other “true” diversion programs (e.g., cognitive developmental disability program), it is the judge, not the prosecutor, who determines whether to grant diversion.

#### 1. [§62.51] Conditions of Eligibility

When an accusatory pleading charges that a parent or legal guardian has violated Pen C §272(a) with respect to a minor child, the defendant may be eligible for parental diversion if the following conditions are met:

- The defendant’s record does not indicate that probation or parole has been revoked without later being completed. Pen C §1001.71(a).
- The defendant has not been previously diverted under Chapter 2.9 (Pen C §§1001.70–1001.75). Pen C §1001.71(b).

Unlike other diversion programs, the provisions governing parental diversion do not require the prosecutor to review the file to determine whether the defendant is eligible for diversion. It can be implied from this omission that it is the responsibility of the defendant, not the prosecutor, to initiate a diversion request.

#### 2. [§62.52] Referral to Probation Department

If the defendant consents to diversion and waives the right to a speedy trial, the judge must refer the case to the probation department. Pen C §1001.72(a). The probation department must investigate whether the defendant qualifies for parental diversion and whether the defendant would

benefit from education, treatment, or rehabilitation, and must report its findings and recommendations to the court. Pen C §1001.72(a). If the report recommends referral of the defendant to a community program, it must contain a statement regarding the program's willingness to accept the defendant and how the services offered can assist the defendant to successfully complete the program. Pen C §1001.72(a).

The defendant's statements to a probation officer made during the course of the department's investigation, or any information obtained from those statements, may not be admitted into evidence in any later action or proceeding. Pen C §1001.72(b). In addition, the defendant's statements about the charged offense made after a grant of diversion, or any information procured from those statements, are inadmissible. Pen C §1001.72(b). If diversion is denied or revoked, neither the probation department investigation nor statements or information disclosed during the investigation may be used in any sentencing procedures. Pen C §1001.72(b).

### **3. [§62.53] Hearing and Determination by Court**

The court must hold a hearing, before the start of trial, to determine whether the defendant should be diverted and referred for education, treatment, or rehabilitation. Pen C §1001.73; *Morse v Municipal Court* (1974) 13 C3d 149, 157, 118 CR 14. The judge may order diversion, if after reviewing the probation department's report and any other relevant information, the judge finds that the defendant would benefit from diversion, and the defendant consents to participate and waives the right to a speedy trial. Pen C §1001.73.

The judge may order a defendant who is to participate in a diversion program to pay all or a portion of the reasonable cost of diversion if the judge finds the defendant has the ability to pay. Pen C §1001.73. The reasonable cost of diversion may not exceed the actual average cost of diversion services. Pen C §1001.73. In addition to paying the costs of the program, the defendant may be required to pay an administrative fee under Pen C §1001.16. See §§62.73–62.76.

When the judge grants diversion, he or she must enter an order directing the exoneration of any bail bond, undertaking, or deposit on file by or on behalf of the defendant. Pen C §1001.73. The defendant may be diverted for a period of not more than 2 years. Pen C §1001.73.

If the defendant does not consent to diversion, or the judge finds the defendant unsuitable to participate, the criminal proceedings must continue as in any other case. Pen C §1001.73.

#### 4. [§62.54] Successful Completion of Diversion

If the defendant has successfully completed a parental diversion program, (a) the criminal charges must be dismissed, (b) the arrest on which the diversion was based is deemed to have never occurred, and (c) the defendant is entitled to state that he or she was never arrested or diverted for the offense in response to any questions concerning defendant's prior criminal record. Pen C §§1001.74, 1001.75(a). However, a defendant who applies for employment as a peace officer must disclose the arrest in response to any question contained in the job application. Pen C §1001.75(b). In addition, the defendant must be advised that the arrest may be disclosed by the Department of Justice in response to any peace officer job application. Pen C §1001.75(b).

The record pertaining to an arrest resulting in successful completion of diversion may not be used in any way that could result in the denial of any employment, benefit, license, or certificate, unless the defendant consents to its use. Pen C §1001.75(a).

#### 5. [§62.55] Termination of Diversion

The court may terminate diversion and reinstitute criminal proceedings on the following grounds:

- The probation department concludes that the defendant is not performing satisfactorily in or benefiting from the assigned diversion program;
- The defendant is convicted of a misdemeanor involving the use of force or violence; or
- The defendant is convicted of a felony. Pen C §1001.74.

Before the court may terminate diversion, the defendant must be given notice and the court must hold a hearing to determine whether the criminal proceedings should be reinstated. Pen C §1001.74; *Kramer v Municipal Court* (1975) 49 CA3d 418, 424, 122 CR 672.

#### H. [§62.56] Diversion of Members of Military

The court, with the consent of the defendant and a waiver of the defendant's speedy trial right, may postpone prosecution, either temporarily or permanently, of a misdemeanor and place the defendant in a pretrial diversion program, if the defendant was, or currently is, a member of the United States military who may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of military service. Pen C §1001.80(a).

### 1. [§62.57] Treatment Program

When determining the requirements of a diversion program, the court must assess whether the defendant should be ordered to participate in a federal or community-based treatment service program with a demonstrated history of specializing in the treatment of mental health problems, including substance abuse, post-traumatic stress disorder, traumatic brain injury, military sexual trauma, and other related mental health problems. Pen C §1001.80(e).

The court, in making an order to commit a defendant to an established treatment program, must give preference to a treatment program that has a history of successfully treating veterans who suffer from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of military service, including, but not limited to, programs operated by the United States Department of Defense or the Department of Veterans Affairs. Pen C §1001.80(f).

The court and the assigned treatment program may collaborate with the Department of Defense and the Department of Veterans Affairs to maximize benefits and services provided to the veteran. Pen C §1001.80(g).

If a referral is made to the county mental health authority as part of the diversion program, the county must provide mental health treatment services only to the extent that resources are available for that purpose. If mental health treatment services are ordered by the court, the county mental health agency must coordinate appropriate referral of the defendant to the county veterans service officer. The county mental health agency is not responsible for providing services outside its traditional scope of services. Pen C §1001.80(d). An order must be made referring a defendant to a county mental health agency only if that agency has agreed to accept responsibility for all of the following (Pen C §1001.80(d)):

- The treatment of the defendant.
- The coordination of appropriate referral to a county veterans service officer.
- The filing of reports on the defendant's progress in the diversion program with the court and with the prosecutor not less than every 6 months under Pen C §1001.80(h).

The period during which criminal proceedings against the defendant may be diverted may be no longer than 2 years. Pen C §1001.80(h).

The responsible agency or agencies must file reports on the defendant's progress in the diversion program with the court and with the prosecutor not less than every 6 months. Pen C §1001.80(h).

Notwithstanding any other law, including Veh C §23640, a misdemeanor offense for which a defendant may be placed in a diversion program in accordance with this section includes a misdemeanor violation

of Veh C §23152 (DUI) or §23153 (DUI with injury). However, this section does not limit the authority of the Department of Motor Vehicles to take administrative action concerning the driving privileges of a person arrested for a violation of Veh C §23152 or §23153. Pen C §1001.80(I).

## 2. [§62.58] Successful Completion of Diversion

When the defendant has successfully completed all terms and conditions of misdemeanor diversion, (1) the criminal charges must be dismissed, (2) the arrest on which the diversion was based is deemed to have never occurred, and (3) the defendant is entitled to state that he or she was not arrested or diverted for the offense if questioned about a prior criminal record. Pen C §§1001.80(c), (i). However, a defendant who applies for employment as a peace officer must disclose the arrest in response to any question contained in the job application. Pen C §1001.80(j). In addition, the defendant must be advised that the arrest may be disclosed by the Department of Justice in response to any peace officer job application. Pen C §1001.80(j).

The record pertaining to an arrest resulting in successful completion of diversion may not be used in any way that could result in the denial of any employment, benefit, license, or certificate, unless the defendant consents to its use. Pen C §1001.80(i).

## 3. [§62.59] Termination of Diversion

If it appears to the court that the defendant is performing unsatisfactorily in the assigned program, or that the defendant is not benefiting from the treatment and services provided under the diversion program, after notice to the defendant, the court must hold a hearing to determine whether the criminal proceedings should be reinstated. Pen C §1001.80(c). If the court finds that the defendant is not performing satisfactorily in the assigned program, or that the defendant is not benefiting from diversion, the court may end the diversion and order resumption of the criminal proceedings. Pen C §1001.80(c).

## I. [§62.60] Child Abuse and Neglect Counseling

A defendant who is suspected of committing a crime in which a minor is a victim of physical abuse or neglect may be referred by the prosecutor for counseling, psychological treatment, or other necessary services instead of prosecution. Pen C §1000.12(b). If the prosecutor decides that the defendant should be referred, the defendant is directed to the county department in charge of social services or the probation department. Pen C §1000.12(b). The prosecutor must seek the advice of the county department or probation department in determining whether or not to make the referral. Pen C §1000.12(b); *People v Glover* (1980) 111 CA3d 914, 917, 169 CR

12 (interpreting former identical statutory scheme as requiring county review only if prosecutor initially decides to refer defendant).

Criminal charges are not filed by the prosecutor, and no court supervision is involved. The decision to refer a defendant lies completely with the prosecutor, and the court may not interfere with that decision.

Defendants charged with sexual abuse or molestation of a minor victim, or any sexual offense involving force, violence, duress, menace, or fear of immediate and unlawful bodily injury, are not eligible for counseling under Pen C §1000.12. Pen C §1000.12(c).

## **J. [§62.61] Bad Check Diversion**

On the adoption of a county resolution declaring the availability of program funding, the district attorney may establish a local diversion program for persons who write bad checks. Pen C §1001.60. The program may be conducted by the district attorney or by a private entity under contract with the district attorney. Pen C §1001.60. For purposes of this program, writing a bad check means making, drawing, uttering, or delivering any check or draft when there is probable cause to believe there has been a violation of Pen C §476a. Pen C §1001.60.

### **1. [§62.62] Referral by Prosecutor**

The prosecutor, not the judge, decides whether or not to divert a defendant in a bad check case. Pen C §1001.61. On receipt of a bad check case, the prosecutor must determine if the case is appropriate for referral to diversion by considering all the following factors, in addition to any others:

- The amount of the bad check;
- Whether the defendant has a prior criminal record or has previously been diverted;
- The number of bad check grievances against the defendant previously received by the district attorney;
- Whether there are bad check grievances currently pending against the defendant; and
- The strength of the evidence, if any, of intent to defraud the victim. Pen C §1001.62.

The prosecutor must notify the defendant by mail of the diversion referral, stating the date and amount of the bad check, the name of the payee, the date before which the defendant must contact the person designated by the prosecutor concerning the bad check, and the penalty for writing a bad check. Pen C §1001.63.

## 2. [§62.63] Agreement to Forgo Prosecution

The prosecutor may enter into a written agreement with the defendant to forgo prosecution for a period not to exceed 6 months, pending the following conditions (Pen C §1001.64):

- That the defendant completes a class or classes conducted by the district attorney or private entity under contract with the district attorney.
- That the defendant makes full restitution to the victim of the bad check. For purposes of this diversion program, restitution means the face value of the bad check(s) and any bank charges, as described in Pen C §1001.65.
- That the defendant makes full payment of the diversion fees, if any, specified in Pen C §1001.65. Under Pen C §1001.65, the district attorney may collect a processing fee of \$50 per check in addition to the actual amount of any bank charges, including the returned check fee, if any, incurred by the victim.

As with other diversion programs, the defendant is not required to make an admission of guilt as a condition of participation in the diversion program. Pen C §1001.66. In addition, any statements of the defendant made in connection with eligibility for diversion, information obtained from those statements, or any statements or information concerning the defendant's participation in a diversion program may not be admitted into evidence in any action or proceeding. Pen C §1001.67.

## K. [§62.64] Traffic Diversion

Provisions of both the Vehicle Code and the Penal Code provide for the pretrial diversion of alleged traffic violators in the form of attendance at traffic school. Penal Code §1001.40 provides that, notwithstanding any other provision of law, counties may establish traffic school diversion programs for persons issued notices to appear for a traffic violation. Vehicle Code §41501 states that a court may continue a proceeding against a person who receives a notice to appear for a violation of any statute relating to the safe operation of a vehicle in consideration for attendance at a licensed traffic school or any other court-approved driving instruction program. If the court continues a case under Veh C §41501 and the defendant attends the required hours of instruction, the court may dismiss the complaint. Finally, Veh C §42005(b) provides that a court, instead of adjudicating a traffic offense, may order a person issued a notice to appear for a traffic violation to attend traffic school if the person consents to attend the school.

The record of a first traffic violation dismissed on completion of traffic school within an 18-month period is confidential, and may not be disclosed to any person except the court. Veh C §1808.7. Therefore, the record cannot

be disclosed to or used by the defendant's insurance company to increase defendant's policy rates. In addition, Veh C §1808.7 provides that the DMV may use the record only for statistical purposes, thereby preventing the DMV from suspending, or otherwise restricting, the defendant's driving privileges. However, the confidentiality protection of Veh C §1808.7 extends only to the record of the first dismissal within an 18-month period. Subsequent offenses charged within that period may be disclosed even if the defendant attends traffic school again and obtains dismissal of the offenses.

Persons who are ordered or permitted to attend traffic school must pay a fee to the court equal to the total bail set forth for the eligible offense in the uniform countywide bail schedule. Veh C §42007.

None of the traffic diversion statutes addresses the issue of whether traffic school is available only to those persons charged with infractions, or to those persons also charged with misdemeanors and/or felonies. However, persons charged with driving under the influence under Veh C §23152 or §23153 are ineligible for diversion. Veh C §23640; *People v Weatherill* (1989) 215 CA3d 1569, 1577, 264 CR 298.

#### **L. [§62.65] Deferred Entry of Judgment Programs**

Deferred entry of judgment suspends the criminal proceedings for a prescribed time with certain program requirements after a defendant has entered a guilty plea. A defendant found to be eligible for one of these programs must plead guilty to the charged crime and waive time for entry of judgment. Entry of judgment on the defendant's plea is then deferred pending the successful completion of the program. If the defendant successfully completes the program, the criminal charge is dismissed.

##### **1. [§62.66] Deferred Entry of Judgment Reentry Program ("Back on Track")**

A superior court may create a "Back on Track" deferred entry of judgment reentry program aimed at preventing recidivism among first-time nonviolent felony drug offenders. Pen C §1000.8. The prosecutor, the presiding judge, and a representative of the criminal defense bar selected by the presiding judge may agree to establish such a program. Pen C §1000.8. The agreement must specify which low-level nonviolent felony drug offenses under the Health and Safety Code will be eligible for the program and a process for selecting participants. Defendants convicted of sex offenses listed in Pen C §290(c) or any offense listed in Pen C §1192.7 are not eligible to participate in the program. Pen C §1000.8. The mandatory characteristics of the program are set out in Pen C §1000.8.

The prosecutor determines whether a defendant is eligible to participate in the deferred entry of judgment reentry program. Pen C

§1000.9. If the prosecutor determines that this section may be applicable to the defendant, the prosecutor must advise the defendant and defendant's attorney in writing of that determination. This notification must include the following (Pen C §1000.9(a)(1)–(5)):

- A full description of the procedures for deferred entry of judgment.
- A general explanation of the role and authority of the prosecutor, the program, and the court in the process.
- A clear statement that in lieu of trial, the court may grant deferred entry of judgment for the current crime(s) charged if the defendant pleads guilty to each charge and waives time for the pronouncement of judgment.
- On defendant's successful completion of the program and the motion of the prosecutor, the court will dismiss the charge(s) against the defendant, and the provisions of Pen C §§851.90 and 1203.4 will apply.
- A clear statement that failure to comply with any condition under the program may result in the prosecutor or the court making a motion for entry of judgment, whereupon the court will render a finding of guilty to the charge(s) pleaded, enter judgment, and schedule a sentencing hearing.
- An explanation of criminal record retention and disposition resulting from participation in the program and the defendant's rights relative to answering questions about the arrest and deferred entry of judgment following successful completion of the program.

If the prosecutor determines that the defendant is eligible for the program, the prosecutor must state for the record the grounds for the determination and make this information available to the defendant and defendant's attorney. This procedure is intended to allow the court to set a hearing for deferred entry of judgment at the arraignment. Pen C §1000.9(b).

If the prosecutor determines that the defendant is ineligible, the prosecutor must state for the record the grounds for the determination and make this information available to the defendant and defendant's attorney. Pen C §1000.9(c). If the prosecutor does not deem the defendant eligible, or the defendant does not consent to participate in the program, the criminal proceedings must continue as in any other case. Pen C §1000.9(c).

On a motion by the prosecutor for an entry of judgment, before entering a judgment of guilty, the court may hold a hearing to determine whether the defendant has failed to comply with the program and should be terminated from the program. Pen C §1000.9(d).

A defendant’s plea of guilty does not constitute a conviction for any purpose unless a judgment of guilty is entered under Pen C §1000.3. Pen C §1000.10(a).

## **2. [§62.67] Deferred Entry of Judgment for Parents or Guardians of Truant Children**

A parent or guardian of a pupil of 6 years of age or older who is in kindergarten or grades one to eight, inclusive, whose child is a “chronic truant,” who has failed to reasonably supervise and encourage the pupil’s school attendance, and who has been offered language-accessible support services to address the pupil’s truancy, is guilty of a misdemeanor. Pen C §270.1(a).

A chronic truant is defined as any pupil subject to compulsory full-time or continuation education who is absent from school without a valid excuse for 10 percent or more of the school days in 1 school year, from the date of enrollment to the current date, provided that the school district has complied with specified duties relating to reporting and responding to the truancy. Ed C §48263.6.

A superior court may establish a deferred entry of judgment program to adjudicate cases involving parents or guardians charged with a violation of Pen C §270.1(a). Pen C §270.1(a)–(b).

The deferred entry of judgment program must include the following (Pen C §270.1(b)(1)–(7)):

- A dedicated court calendar.
- Leadership by a judge of the superior court in that county.
- Periodic meetings with school district representatives designated by the chronic truant’s school district of enrollment.
- Service referrals for parents or guardians, as appropriate to each case that may include, but are not limited to, case management, mental and physical health services, parenting classes and support, substance abuse treatment, child care, and housing.
- A clear statement of the following:
  - In lieu of trial, the court may grant deferred entry of judgment for the current crime or crimes charged if the defendant pleads guilty to each charge and waives time for the pronouncement of judgment.
  - On the defendant’s compliance with the terms and conditions set forth by the court and agreed to by the defendant on the entry of the plea, and on the motion of the prosecuting attorney, the court will dismiss the charge or charges against the defendant, and the provisions of Pen C §§851.90 and 1203.4 will apply.

- Failure to comply with any condition under the program may result in the prosecuting attorney or the court making a motion for entry of judgment, whereupon the court will render a finding of guilty to the charge or charges pleaded, enter judgment, and schedule a sentencing hearing.
- An explanation of criminal record retention and disposition resulting from participation in the program and the defendant's rights relative to answering questions about the arrest and deferred entry of judgment following successful completion of the program.

On charging a defendant with a violation of Pen C §270.1(a), the prosecutor must file a written declaration or state for the record whether the defendant is eligible or ineligible for deferred entry of judgment, and the grounds for that determination. Pen C §270.1(e).

A parent or guardian of a chronic truant may not be punished for a violation of both Pen C §270.1(a) and the provision of Pen C §272 that involve criminal liability for parents and guardians of truant children. Pen C §270.1(d).

### **3. [§62.68] Deferred Entry of Judgment Pilot Program for Young Adults**

A deferred entry of judgment pilot program may be established in the counties of Alameda, Butte, Napa, Nevada, Santa Clara, and Ventura, wherein certain young adults charged with a felony may participate in the program within the county's juvenile hall. Pen C §1000.7(a), (b).

#### **a. [§62.69] Conditions of Eligibility**

A defendant may participate in a deferred entry of judgment pilot program within the county's juvenile hall if that person is charged with committing a felony offense, other than the offenses listed under Pen C §10001.7(d) (see below), he or she pleads guilty to the charge or charges, and the probation department determines that the defendant meets all of the following requirements (Pen C §1000.7(b), (d)):

- Is 18 years of age or older, but under 21 years of age on the date the offense was committed.
- Is suitable for the program after evaluation using a risk assessment tool, as described in Pen C §1000.7(c).
- Shows the ability to benefit from services generally reserved for delinquents, including, but not limited to, cognitive behavioral therapy; other mental health services; and age-appropriate educational, vocational, and supervision services that are currently deployed under the jurisdiction of the juvenile court.

- Meets the rules of the juvenile hall developed in accordance with the applicable regulations set forth in Cal Code Regs, title 15.
- Does not have a prior or current conviction for committing a felony offense listed under Pen C §667.5(c) or §1192.7(c), or Welf & I C §707(b).
- Is not required to register as a sex offender to Chapter 5.5 of the Penal Code (Pen C §§290 et seq).

The court must grant deferred entry of judgment if an eligible defendant consents to participate in the program, waives his or her right to a speedy trial or a speedy preliminary hearing, pleads guilty to the charge or charges, and waives time for the pronouncement of judgment. Pen C §1000.7(e). The defendant may serve up to 1 year in custody within a county's juvenile hall under the program. Pen C §1000.7(g). The probation department must develop a plan for reentry services, including, but not limited to, housing, employment, and education services, as a component of the program. Pen C §1000.7(h).

If the probation department determines that the defendant is not eligible for the deferred entry of judgment pilot program or the defendant does not consent to participate in the program, the proceedings must continue as in any other case. Pen C §1000.7(f)(1).

#### **b. [§62.70] Successful Completion of Deferral of Sentencing Program**

If the defendant has performed satisfactorily during the deferral period, the judge must dismiss the criminal charges(s). Pen C §1000.7(f)(3).

#### **c. [§62.71] Entry of Judgment Proceedings**

The probation department may make a motion for entry of judgment if it appears to the department that the defendant is not performing satisfactorily in the program based on any of the following (Pen C §1000.7(f)(2)):

- The defendant is not benefiting from program services;
- The defendant has committed a new criminal offense;
- The defendant has violated the rules of the juvenile hall.

Before the court may enter judgment, the defendant must be given notice and the court must hold a hearing to determine whether the judgment should be entered. Pen C §1000.7(f)(2). If the court finds that the defendant is not performing satisfactorily in or benefiting from the program, the court must render a finding of guilt to the charge(s) pleaded, enter judgment, and schedule a sentencing hearing. Pen C §1000.7(f)(2). The probation department, in consultation with the county sheriff, must remove the

defendant from the program and return him or her to custody in county jail. Pen C §1000.7(f)(2).

### **M. [§62.72] Restitution Fee**

All defendants participating in a diversion or deferred entry of judgment program, except defendants with cognitive developmental disabilities diverted under Pen C §§1001.20–1001.34, must pay a restitution fee of between \$100 and \$1000. Pen C §§1001.90(a)–(b), (i). The fee is set at the discretion of the court, and must be ordered regardless of the defendant’s present ability to pay. Pen C §1001.90(b)–(c).

The court must consider a number of factors when setting the fee in excess of the \$100 minimum (Pen C §1001.90(d)):

- Defendant’s ability to pay, including future earning capacity;
- Seriousness and gravity of the offense, and the circumstances of its commission;
- Economic gain derived by the defendant as a result of the offense;
- Losses suffered by the victim(s) of the offense, including pecuniary losses as well as intangible losses, *e.g.*, psychological harm; and
- Any other relevant factors.

The court is not required to make express finding as to the factors bearing on the amount of the fee. Pen C §1001.90(d).

The defendant bears the burden of demonstrating the inability to pay a restitution fee. The court is not required to hold a separate hearing on the issue. Pen C §1001.90(d). The court may waive the fee if the court finds compelling and extraordinary reasons for doing so, and states them on the record. Pen C §1001.90(c).

The board of supervisors of any county may impose a fee at its discretion to cover the costs of collecting the mandatory restitution fee, not to exceed 10 percent of the amount imposed. Pen C §1001.90(g).

A diversion restitution fee may be enforced in the manner provided for the enforcement of money judgments generally. Pen C §1214(a). Any portion of the fee that remains unpaid after the defendant has completed diversion is enforceable by the California Victim Compensation and Government Claims Board. Pen C §1214(a).

### **N. Program Fees**

#### **1. [§62.73] Drug Treatment**

The court may require a defendant to pay an administrative fee, as part of an enrollment fee in a drug treatment program, to cover the actual costs of (a) any criminalistics laboratory analysis, (b) processing the application for treatment, and (c) supervising the defendant. The payment may not

exceed \$500 when the defendant is charged with a felony, or \$300 when the defendant is charged with a misdemeanor. Pen C §§1001.15(a), 1001.16(a).

## 2. [§62.74] Child Abuse and Neglect Counseling

A defendant referred to a counseling program under the provisions of Pen C §1000.12 must pay the administrative cost of the referral, not exceeding \$100 dollars if the defendant is suspected of committing a felony or \$50 if the defendant is suspected of committing a misdemeanor. Pen C §1000.17. In addition, the defendant is responsible for the expense of the counseling services, as determined by the social services or probation department. Pen C §1000.17. The department must consider the defendant's ability to pay, and the defendant may not be denied counseling services if unable to pay the costs. Pen C §1000.17.

## 3. [§62.75] Other Misdemeanor Diversion Programs

Defendants diverted under any other pretrial misdemeanor programs (e.g., parental, cognitive developmental disability diversion) may be required to pay an administrative fee to cover the actual costs of processing the diversion application and supervising the defendant. Pen C §1001.16(a), (c). The payment may not exceed \$300. Pen C §1001.16(a). In addition, defendants may be required to pay all or a portion of the reasonable cost of diversion. Pen C §1001.53 (misdemeanor diversion), Pen C §1001.73 (parental diversion).

## 4. [§62.76] Defendant's Ability to Pay

The judge must take into consideration the defendant's ability to pay before ordering payment of administrative fees, and the judge may order all or partial payment as appropriate. A defendant without the ability to pay the fees must nonetheless be allowed to participate in the diversion or deferred entry of judgment program. Pen C §§1001.15(a), (e) and Pen C §§1001.16(a), (e).

## O. [§62.77] Timeliness of Diversion Request

Diversion must be requested before the commencement of trial. Once trial begins, it is too late to initiate diversion proceedings. *People v Wright* (1975) 47 CA3d 490, 493, 120 CR 899. It is irrelevant whether the defendant is acquitted of the charges that rendered the defendant initially ineligible for diversion. *People v Alonzo* (1989) 210 CA3d 466, 469, 258 CR 263. The diversion statutes do not indicate any specific point during the pretrial period beyond which the defendant cannot consent to or request diversion. Therefore, a defendant does not waive the right to consideration for diversion by making pretrial motions. *Morse v Municipal Court* (1974)

13 C3d 149, 157, 118 CR 14 (defendant entitled to diversion even though he did not consent until after Pen C §1538.5 motion denied).

**P. [§62.78] Diversion Request by Defendant**

Although the diversion statutes imply that it is the prosecutor who initiates the inquiry into whether diversion is applicable to the defendant's case, in practice defendants routinely do so by serving the prosecutor with a notice of motion for an order granting diversion, accompanied by a supporting declaration of eligibility. *People v Superior Court (On Tai Ho)* (1974) 11 C3d 59, 63 n4, 113 CR 21. In fact, a defendant who fails to initiate a diversion request may waive the right to consideration for diversion. In *People v Haycock* (1975) 45 CA3d 90, 119 CR 179, the court held that a defendant may not challenge, on appeal, the prosecutor's failure to conduct a diversion eligibility investigation when the defendant failed to make a timely request before the start of trial.

**Q. [§62.79] Defendant Charged With Multiple Offenses**

A defendant charged with a divertible offense and a nondivertible offense that does not render the defendant ineligible for diversion may be granted diversion on the divertible offense before trial on the other offense. *Harvey v Superior Court* (1974) 43 CA3d 66, 117 CR 383; *People v Fulk* (1974) 39 CA3d 851, 855, 114 CR 567. Alternatively, the prosecutor may agree to dismiss the nondivertible charge on successful completion of diversion if the defendant is willing to waive time on the nondivertible offense. However, routine dismissal of nondivertible charges may not be an appropriate exercise of judicial discretion. See *People v Superior Court (Romero)* (1996) 13 C4th 497, 531, 53 CR2d 789 (abuse of discretion to dismiss case solely to accommodate judicial convenience or alleviate court congestion).

The court is faced with a practical dilemma not addressed by the diversion statutes when divertible and nondivertible charges are pending against the defendant. If convicted of the nondivertible charge(s) and imprisoned, the defendant will be physically incapable of participating in an education and counseling program. However, if the defendant is not convicted, or the charges are dismissed, the defendant could participate in a diversion program. The court in *Harvey v Superior Court, supra*, stated that the judge should consider the array of personal and social factors bearing on diversion and decide whether these factors justify immediate denial of diversion.

If the factors make the defendant acceptable for diversion, the judge should then consider the concurrent criminal charges. If the judge determines that the probable outcome of those charges will militate against the defendant's availability and amenability to the diversion program, he or

she may grant immediate diversion on the divertible charge. However, if the judge determines that the defendant's suitability and amenability for the diversion program heavily depends on the outcome of the concurrent charges, the judge may offer the defendant a deferment of the diversion application pending disposition of the other charges.

#### **R. [§62.80] Conditioning Grant of Diversion or Deferred Entry of Judgment**

The court may not condition a grant of diversion or deferred entry of judgment on any grounds other than those specified in the statutes outlining those programs. *Terry v Superior Court* (1999) 73 CA4th 661, 665, 86 CR2d 653. In *Terry*, the court held invalid a condition of deferred entry of judgment requiring the defendant to submit to random searches of his person and possessions for narcotics. Random search conditions were also held invalid under the former drug diversion scheme. *People v Fleming* (1994) 22 CA4th 1566, 1569, 28 CR2d 78; *Frederick v Justice Court* (1975) 47 CA3d 687, 121 CR 118. The court may not require a defendant to relinquish the right to make pretrial motions in order to obtain the benefits of diversion. *Morse v Municipal Court* (1974) 13 C3d 149, 158, 118 CR 14. In addition, a condition that defendant admit guilt to a divertible offense is invalid. *Parra v Municipal Court* (1978) 83 CA3d 690, 148 CR 203.

### **IV. SCRIPTS**

#### **A. [§62.81] Ordering Probation Report; Setting Misdemeanor or Drug Use Diversion Hearing**

*[The prosecutor states that he or she has reviewed the case file and advises the defendant and defense counsel that the defendant is eligible to participate in a diversion program.]*

*Note:* In drug diversion cases, the prosecutor must provide written notification of diversion procedures to defendant and must file with the court a declaration, or state on the record, the grounds of eligibility or ineligibility. The prosecutor requests permission to have the matter referred to the probation department for a report.

[Mr./Ms.] [*name of defendant*], your attorney has told the court that you want your case referred to the probation department in order that a report may be prepared for possible diversion of the criminal proceedings against you. Do you have any questions about the diversion program?

[Mr./Ms.] [*name of defendant*], do you consent to have your case referred to the probation department for preparation of a report?

*[If defendant responds “no,” continue with normal proceedings.  
If defendant responds “yes,” continue:]*

[Mr./Ms.] [*name of defendant*], you are entitled to a speedy trial within [30 days of your arraignment or entry of plea/45 days of your arraignment or entry of plea/60 days after the finding of the indictment or filing of the information] unless you agree to a date beyond that time. Do you have any questions as to that right?

*[Defendant responds:]*

[Mr./Ms.] [*name of defendant*], in order for your case to be referred to the probation department, you must waive your right to a speedy trial. At this time, do you give up your right to a speedy trial?

[Mr./Ms.] [*name of defense counsel*], do you join in the speedy trial waiver?

*[If defendant responds “no,” continue with normal proceedings.  
If defendant responds “yes,” continue:]*

*[If felony case, add:]*

[Mr./Ms.] [*name of defendant*], you are entitled to a preliminary hearing within 10 court days of your [arraignment/entry of plea] unless you agree to a date beyond that date, and in no event may a preliminary hearing be set beyond 60 calendar days of your [arraignment/entry of plea] unless you agree to a later date. Do you have any questions as to that right?

*[Defendant responds:]*

[Mr./Ms.] [*name of defendant*], in order for your case to be referred to the probation department, you must waive your right to a speedy preliminary hearing. At this time, do you give up your right to a speedy preliminary hearing?

[Mr./Ms.] [*name of defense counsel*], do you join in the waiver of a speedy preliminary hearing?

*[If defendant responds “no,” continue with normal proceedings.  
If defendant responds “yes,” continue:]*

The court finds that the defendant has expressly, knowingly, and intelligently waived [his/her] right(s) to a speedy trial [*and a speedy preliminary hearing*].

It appears to this court that the defendant is eligible to have the criminal proceedings against [him/her] diverted. This case, pursuant to

Penal Code section \_\_\_\_\_, is hereby referred to the probation department for an investigation and report.

[Mr./Ms.] [*name of defendant*], I encourage you to cooperate with the probation department's investigation of your case. Any statements that you make to the department regarding the case and the offense for which you are charged may not be used against you in any subsequent court proceeding.

Do you have any questions about the probation department investigation?

[*Defendant responds:*]

A hearing on diversion will be held on [*date*].

[*If defendant is charged with other counts, consider their disposition, e.g., whether time should be waived. If so, set them for later hearing, take time waiver, and determine bail or own-recognition release on those counts.*]

#### **B. [§62.82] Misdemeanor or Drug Use Diversion Hearing**

Let the record reflect the presence of the defendant, who is represented by counsel, and the presence of the deputy district attorney.

I have received, read, and considered the probation report filed on [*date*], and consisting of \_\_\_\_\_ pages. I have also received, read, and considered [*list all items considered*].

[Mr./Ms.] [*name of defense counsel*], have you had an opportunity to read and consider the probation report? Would you like to be heard on the matter of diversion of the criminal proceedings in this case?

[*Defense counsel responds:*]

[Mr./Ms.] [*name of district attorney*], do you want to be heard?

[*District attorney responds:*]

[*Alternative 1: If diversion denied:*]

#### **DENIAL OF DIVERSION**

The court finds that [Mr./Ms.] [*name of defendant*] is [not suitable for/would not benefit from] a diversion program because [*state reasons*]. Accordingly, criminal proceedings will continue. The next hearing in this case is set for [*date*].

[*Alternative 2: If diversion granted:*]

### GRANT OF DIVERSION

[Mr./Ms.] [*name of defendant*], the court finds that you are suitable for the diversion program and would benefit by a program of [*specify treatment program*]. These findings are based on [*state reasons*].

[Mr./Ms.] [*name of defendant*], as part of your participation in the program you must agree to the following terms and conditions:

You must waive your right to a speedy trial [and preliminary hearing (*felony case*)].

You must comply with the program for a period of \_\_\_\_\_ [months/years]. [The program will conclude on \_\_\_\_\_ unless terminated earlier.]

You must enroll in a [*describe program*] and file proof of enrollment [in the clerk's office (and/or) with the probation department office that is supervising your case] not later than \_\_\_\_\_. You must keep the probation department informed of your status in the program, including notifying the probation department if you do not attend program sessions.

You will be responsible for payment of all or a portion of the costs of your program if the court [*or the program*] determines that you have the financial ability to pay those costs. In addition, the court will require payment of a restitution fee of \$ \_\_\_\_\_ to the Restitution Fund.

If you fail to enroll in the program, or fail to perform satisfactorily in or benefit from the program, the court may, after a hearing, terminate your diversion and resume the criminal proceedings against you.

If you are convicted of a crime during the diversion period, the court may, after a hearing, terminate your diversion and resume the criminal proceedings against you.

If you satisfactorily complete the program, the criminal charge(s) will be dismissed, and your arrest for the charge(s) will be deemed to have never occurred. In addition, if you are asked any question concerning your prior criminal record, you may answer that you were not arrested or granted diversion for the offense(s). However, there are exceptions. First, even if you successfully complete the program, if you apply for employment as a peace officer, you must disclose the arrest in response to any question in the employment application. Second, the arrest may be disclosed by the Department of Justice in response to any question on the application for employment as a peace officer.

The record relating to your arrest and successful completion of the diversion program may not, without your consent, be used in any way to deny you any employment, benefit, license, or certificate. However, a health care agency may present evidence of professional misconduct in a disciplinary hearing against a licensee or license applicant based on the same facts and circumstances contained in the arrest record.

Do you understand the requirements of the diversion program? Do you have any questions about the program?

*[Defendant responds:]*

[Mr./Ms.] [*name of defendant*], do you consent to participate in this program?

*[If defendant does not consent, resume the normal proceedings.  
If the defendant does consent, continue:]*

[Mr./Ms.] [*name of defendant*], you are entitled to a speedy trial to be set within [30 days of your arraignment or entry of plea/45 days of your arraignment or entry of plea/60 days after the finding of the indictment or filing of the information] unless you agree to a date beyond that time. In order for you to participate in this program, you must waive your right to a speedy trial.

Do you have any questions about your right to a speedy trial? At this time, do you give up that right?

*[If defendant responds "no," continue with normal proceedings.  
If defendant responds "yes," continue:]*

*[If felony case, add:]*

[Mr./Ms.] [*name of defendant*], you are entitled to a preliminary hearing within 10 court days of your [arraignment/entry of plea] unless you agree to a date beyond that date, and in no event may a preliminary hearing be set beyond 60 calendar days of your [arraignment/entry of plea] unless you agree to a later date. In order for you to participate in this program, you must waive your right to a speedy preliminary hearing.

Do you have any questions about your right to a speedy preliminary hearing? At this time, do you give up that right?

*[If defendant responds "no," continue with normal proceedings.  
If defendant responds "yes," continue:]*

[Mr./Ms.] [*name of defendant*], do you have any further questions about the terms and conditions of the diversion program?

*[Defendant responds:]*

[Mr./Ms.] [*name of defendant*], you are ordered to obey those terms and conditions. Pursuant to Penal Code section \_\_\_\_\_, the court suspends further proceedings in this case.

*[If applicable, add:]*

It is ordered that the [bond/undertaking/deposit] on file or on behalf of the defendant be exonerated.

*[Optional:]*

It is ordered that, during the period of diversion, the probation department file a report with this court relating the defendant's compliance with the program every \_\_\_\_\_ months. A progress report hearing will be held on [date]. [Mr./Ms.] [*name of defendant*] must be present on that date.

*[If defendant is charged with other counts, address criminal proceedings and bail on those counts.]*

#### **V. [§62.83] ADDITIONAL REFERENCES**

California Criminal Law Procedure and Practice, chap 27 (Cal CEB 2018)  
4 Witkin & Epstein, California Criminal Law, *Pretrial Proceedings*,  
§§385–402 (4th ed 2012).

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