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Diversion and Deflection: Using These Tools in the Justice System to Help Decrease Crime and Relieve Docket Pressure

BY ERIC F. RINEHART

As it has for many years, the State’s Attorney’s Office regularly hosts in-house trainings for its attorneys. Recently we hosted one at which I and Kevin Malia, who heads our Rehabilitative Services Division, outlined methods through which the State’s Attorney’s Office (SAO) seeks to deflect or divert appropriate prosecutions.

Someone suggested that the wider Bar might benefit from a similar overview, which led to this article. This article will discuss the philosophy and history of diversion in Lake County. A second article I will submit will outline the specific eligibility requirements of our programs.

We have all had or seen the case in which a defendant does community service, anger management, or some alcohol classes, and the defense attorney says: “C’mon . . . my guy gets it and did this class voluntarily.” If the prosecutor drops the case, we have achieved “diversion.”

Diversion has been happening in Lake County for decades. Sometimes we haven’t called it “diversion,” but “a rose by any other name would smell as sweet.” (You can never go wrong in a Docket article by quoting Shakespeare early.)

The question is not whether our local system believes in diversion (it does), or whether the local players are familiar with the concept (they are); it is a question of how much we formalize diversion and how we ensure that this “good” is dispersed to all equally without respect to class, gender, race, or personal connections between attorneys.

“Diversion” broadly means a criminal disposition that intentionally diverts a defendant from a conviction or a formal plea of guilty in exchange for the defendant performing rehabilitative steps. On a national level, “diversion” sometimes means that defendants are “diverted” from jail or prison while they are monitored in programs similar to our drug or mental health court. I will be using “diversion” throughout this article to refer to cases in which we seek rehabilitation and restoration in exchange for dismissing the pending charges.

In this article, I hope to explain the State’s Attorney’s Office’s
reasons for formalizing and expanding diversion while also inviting members of the bar to utilize these new programs. Either side can propose these diversion dispositions.

THE NEED FOR DIVERSION FROM THE SYSTEM’S PERSPECTIVE

One of the many jobs of the justice system is to respond to changing social and legal conditions. Because judges are limited in their ability to institute broad policy in light of their (appropriate) case-by-case approach, it often falls to a prosecutor’s office to lead the way with respect to re-shuffling resources or to instituting reform.

Respectfully, I think one of the biggest mistakes an individual or a system can make is to think “I can do it all, and I can do it the same as I have always done it.” With tightening government budgets, we have to admit that government must do some things differently than in the past. It must decide its priorities and it must deploy its limited resources toward those priorities. Separate from this resource-driven approach, we are morally required to account for institutional racism and to re-tool programs that continue to perpetuate and even amplify the failures of the past.

As we deal with an increase in violent crime that dates back to 2017 in Lake County, plus decades of institutional racism throughout our country, it is incumbent on the prosecutor’s office to move resources toward these most pressing problems.

With these goals in mind, the Lake County State’s Attorney’s Office looks to expand diversion opportunities with a goal of providing “individualized justice” while also decreasing docket pressures as we come out of COVID-19. By decreasing docket pressure, we allow prosecutors, defense attorneys, judges, clerks, and probation officers to focus their precious time on violent crime, DUIs, sex cases, and complicated property cases. All of this will be accomplished while keeping the victims involved and informed as (appropriately) required by the Victims’ Bill of Rights. We are the first office to hire a Chief of Victim Services, and we have expanded, for the first time in years, the number of victim witness counselors. The best diversion programs include the victims in the process.

THE NEED FOR DIVERSION FROM THE INDIVIDUAL’S PERSPECTIVE

Individuals need jobs and educational opportunities to have hope in our society. It is necessary for the protection of society that incarceration, a conviction, and/or sex-offender registration interrupt those opportunities for some. The justice system should be intentional about this sorting decision.

How many times have we heard that “supervision is not a conviction on your record?” As I explained to clients in my previous life, there is no dusty “record” in Springfield or Washington DC that counts convictions. In the digital age, the “record” is no more remote than the Clerk’s online docket system. There are certainly enormous benefits to all parties with respect to court supervision; a truly “clean record” is not one of them.

Successful completion of a diversion program means that an individual can focus for a period of time on completing restorative steps and then see his or her case dismissed. This dismissal allows for faster (though not automatic) expungement and should be reserved for those who have not only completed rehabilitative steps but also shown true remorse. No one is permitted entry into the formal diversion programs without taking responsibility for what they have done.

THE EVIDENCE

Recent studies in Texas and Pennsylvania show that diversion programs dramatically decrease crime in the long run. In Texas, research from 2020 found that defendants without a prior felony conviction who participated in a diversion program experienced an immediate and dramatic reduction in subsequent offending. The total number of future convictions fell by 75% over a 10-year follow-up period, compared to similarly situated defendants who did not receive diversion. The diversion participants also were employed at a 50% higher rate than the other group. Most critically, the study found that African American men benefitted the most from the diversion programs that were analyzed.

Out of the University of Pennsylvania, a study released in 2022 demonstrated that individuals who avoided misdemeanor sentences on their records for non-violent offenses had a 35% lower rate of recidivism than those who did not receive diversion. The Penn study also found that there were dramatic savings on incarceration costs.

Finally, closer to home, Kane County has employed a diversion program for domestic violence cases since 2010. Kane County saw a 25% decrease in intimate-partner violence between 2013 and 2019, while Lake County saw a 3% increase.

The studies show that diversion programs must be...
deployed carefully and intelligently. To that end, the Lake County State’s Attorney’s Office now has several attorneys formally reviewing felony diversion matters, which is a dramatic increase from the past.

**DEFLECTION VS. DIVERSION**

A brief note regarding definitions (this time, without Shakespeare): “deflection” is a term that usually refers to an offender performing some rehabilitative step to avoid being charged. Deflection does not involve the courts or the prosecutors with respect to an individualized case. Private defense attorneys may work with police on deflection, but in Illinois, public defenders cannot be involved, because they are not yet appointed prior to charging. (Interestingly, in Milwaukee, deflection deals are negotiated with public defenders who, under Wisconsin law, are allowed to enter a case earlier.)

Our most well-known deflection program, A Way Out, was started by the Lake County Opioid Initiative and Judge Michael Nerheim when he was State’s Attorney. This program connects treatment options with low-level drug offenders who surrender in police stations. When individuals enter treatment, the police decline possession charges against the individual. This program continues today and is administered by the Lake County Health Department. But the scale of A Way Out is primarily a matter for law enforcement and treatment providers, not prosecutors or the courts.

In August 2021, federal and private grants allowed Lake County to open the Living Room Wellness Center, which serves as a crisis center for those undergoing acute episodes of mental illness. Sandra Bankston serves as our Justice Manager for the program. She has trained over 300 police officers on how to bring individuals to the Wellness Center instead of charging them. At all times, police are allowed to consider the safety of the individual, themselves, and the community in making decisions to deflect. But the goal of the program is to empower the police to bring an individual in crisis to the center in lieu of a jail or emergency room.

The final type of deflection that currently exists in Lake County is through intake at the Juvenile Courts. Many times, juvenile intake officers will meet with a child and his family to determine if there are rehabilitative steps that can be achieved prior to the filing of a petition for delinquency. In 2021, our office secured a grant for the STEP UP program, which provides domestic violence counseling to minor offenders and their families. (Karen Levi identified this program and wrote the grant application that led to it coming into being. More about this in a future article.)

Deflection programs must have community support and be closely monitored by police and prosecutors to ensure the safety of the public. Our office will always look for more opportunities to partner with police on deflection. Deflection greatly decreases court dockets, and prosecutors retain the ability to bring charges should an individual fail to complete rehabilitative steps.

**FORMALIZING DIVERSION: REMOVING “CONNECTIONS” AS THE CURRENCY OF JUSTICE**

In 2014, the State’s Attorney Office started a formal diversion program for non-violent felony offenses called the “Alternative Prosecution Program” (APP). At that time, there was a requirement that participants have no prior convictions of any kind—including misdemeanors. The program was run by a volunteer attorney. Individuals pled guilty to low-level, non-violent felonies and the case was dismissed if they completed their rehabilitative steps—including close monitoring by the SAO and check-ins with the Court.

Between 2014 and 2020, there were 118 participants despite the fact that the SAO filed over 21,000 felony cases during those seven years. While felonies may be reduced to misdemeanors or dismissed early, only .05% of the felony caseload was handled through formal diversion. (Kane County has informally estimated that over 20% of their felony caseload is handled through formal diversion at this time.)

Much more significantly, from 2014 to 2020, only eight of those participants were African American and 28 were Latino. African American defendants make up approximately 35% of our felony caseload, but only 7% were admitted into the felony APP between 2014 and 2020.

We will continue to work hard to increase awareness about the program. (Another teaser for the second article.) For 2021, we had 20 participants enter APP (the highest number since 2018), and 30% were African American. In 2022, we have already admitted 18 participants in the first half of the year, and over 30% of the participants are African American. So far, our success rates exceed the 2014 through 2020 period; no one has failed the program in 2021 or 2022. (We will be including all this information on our SAO data dashboard.)

Aside from APP, we are also starting a formal diversion program for domestic violence cases that is modeled on Kane County and State’s Attorney Joe McMahon’s success. Lake’s program was developed in consultation with and the support of A Safe Place and North Suburban Legal Aid Clinic. In 2019, 55% of domestic battery cases were completely dismissed, and the defendants received zero treatment. This program will allow first-time defendants to quickly enter treatment by taking responsibility for the harm they caused via a plea of guilty. Upon completion of treatment, the case will be dismissed, and the plea vacated. At the same time, the survivor in the case will receive cost-free representation through the North Suburban Legal Aid Clinic. Victims will be involved in resolving the case through their counsel with the Clinic. The positions needed for this new program are funded by a
new grant we secured in 2021 from the Illinois Criminal Justice Information Authority (ICJIA).

Finally, we have strengthened ties with the College of Lake County and community-based organizations such as Legacy Re-entry Foundation and the Northern Illinois Recovery Community Organization (NIRCO) in order to connect defendants with programs that they can complete outside of court. In our misdemeanor division, in first-time retail theft, disorderly conduct, and unlawful possession of drug paraphernalia cases we are encouraging the completion of restorative or educational programs as part of an expedited diversion approach. Many attorneys over the years have (correctly) encouraged their clients to engage in rehabilitation in advance of negotiating.

Diversion in appropriate cases allows our system to quickly incentivize rehabilitation, thus relieving docket pressure while also requiring offenders to take real responsibility for the harm they have caused. Relieving docket pressure for non-violent, lower-level cases allows us to deploy more resources towards larger cases and to spend more time connecting victims to services.

While recognizing and removing past racial disparities, we must work harder to “scale-up” our diversion programs. In doing so, we can reduce crime in the long term and satisfy our constitutional mandate to restore the individual.

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