

CHAPTER 6

ALTERNATIVES TO CHARGING

6.01 PRE-FILING DIVERSION PROGRAM (PDP)

The Pre-Filing Diversion Program (PDP) diverts low-level non-violent offenders away from the criminal court process and into a voluntary supervision program. The PDP offers immediate intervention and resources to offenders and their victims. Terms of the program include, but are not limited to: intensive monitoring, treatment, counseling, restitution, community service, protective/stay-away conditions, and education. The requirements for the PDP shall be tailored to address the issues involved and may vary for each offender. The terms for each offender shall be determined by the PDP officer. Restitution shall be required in all cases involving losses.

The filing deputy shall exercise discretion in referring cases to the PDP and shall not be required to refer to the PDP every offender who may appear eligible for the program. Where the evidence, circumstances, and the interest of justice dictate that a matter should be resolved in court, the filing deputy shall exercise his or her discretion *not* to refer a case to the PDP.

An experienced PDP officer shall evaluate each referral to the program for the offender's eligibility and suitability, conduct an investigation into the circumstances of the crime and the offender's background, propose a global plan to address the offender's particular circumstances, and enter into a contract for supervision with the offender. At all times, the PDP officer shall be mindful of Marsy's Law and the circumstances pertaining to the victim(s).

When the referral offense constitutes misdemeanor conduct, the PDP officer shall monitor the offender's progress for at least six months. When the referral offense constitutes felony conduct, the PDP officer shall monitor the offender's progress for at least one year.

If the offender successfully completes the terms of the program, the case shall not be filed. If the offender fails to abide by the terms of the PDP, the case shall be filed, and the offender shall be prosecuted for the crimes committed.

The purpose of the PDP is to:

1. Divert adult offenders who commit misdemeanor and low-level, non-violent felony crimes from the criminal justice system;
2. Collect restitution on behalf of victims;
3. Direct the offender into counseling; mental health treatment; alcohol or substance use disorder treatment; parenting classes; and/or education classes, as appropriate;
4. Impose community service when appropriate;
5. Foster an understanding of the consequences of poor choices and redirect offenders away from criminal behavior;
6. Reduce recidivism rates;
7. Resolve minor problems before they escalate into more serious criminal conduct; and

8. Conserve resources that would otherwise be expended in the prosecution of minor offenses or disputes.

6.01.01 PROCEDURAL OVERVIEW

The following is a procedural overview of the PDP:

1. The filing deputy shall evaluate the case for filing and determine whether the offender is both eligible and suitable to participate in the PDP pursuant to this chapter.
2. If the filing deputy determines the offender is both eligible and suitable for the PDP, the filing deputy shall complete the Charge Evaluation Worksheet, using code “L” for PDP referrals.
3. A referral to the PDP does not guarantee acceptance into the program. The PDP officer has discretion to accept or reject a candidate upon the initial referral to the program, or at any time thereafter. When returning a case for prosecution, the PDP officer shall expedite the return of the case so that the filing may occur in time to maintain the original citation date. The referral shall also include a brief explanation supporting the return for prosecution.
4. The offender, victim(s), and arresting law enforcement agency shall be notified in writing when an offender has been referred to the PDP. The notice shall include the date, time and location of the PDP hearing.
 - a. The notification to the offender shall inform the offender that failure to appear and/or failure to respond to the notice may result in prosecution for the offense(s) underlying the referral to the PDP.
 - b. The notification to the victim shall inform the victim that he or she may contact the PDP officer; may request that the offender have no contact with the victim as a condition of the offender’s grant of Pre-Filing Diversion; and may request that restitution be collected from the offender on the victim’s behalf.
 - c. Upon referring a case to the PDP, a notice requesting preservation of evidence shall be sent to the arresting law enforcement agency.
5. When an offender is accepted into the PDP Program, a contract shall be signed documenting the terms of the PDP plan of supervision.
6. The PDP officer shall verify all relevant documents concerning the enrollment and/or completion of the terms of the PDP submitted by the offender. Additionally, the PDP officer shall obtain and review an updated copy of the offender’s criminal history information immediately prior to the end of the deferral period and determine whether the offender has committed any new offenses.
7. If an offender successfully completes the PDP, closing letters shall be sent to the offender, victim(s) and arresting law enforcement agency notifying them of the disposition of the case. The letter to the arresting law enforcement agency shall state that any evidence need not be preserved any longer.
8. If the offender does not successfully complete the program requirements, the PDP officer shall terminate the offender from the PDP and refer the matter to the filing deputy for filing consideration. Relevant violations include, but are not limited to: the commission of a new offense, a violation of a protective or stay-away order, failure to pay full

restitution within the period instructed by the PDP officer, and failure to participate in a required program. When returning a case for prosecution, the PDP officer shall:

- a. Include a brief explanation regarding the nature of the offender's non-compliance with the terms of the PDP.
 - b. Notify the victim(s) and law enforcement agency in writing that the offender has been terminated from the PDP and the case has been referred for prosecution.
9. If the case involves the violation of a local city ordinance, the procedures described in [LPM 10.18](#) (Prosecution of Local City Ordinances) shall be followed.

Additional guidance and specific procedures, including forms to be utilized, may be found in the Pre-Filing Diversion (PDP) Manual.

6.01.02 ELIGIBILITY FOR THE PRE-FILING DIVERSION PROGRAM

Each offender who is eligible for the PDP shall be evaluated for acceptance to the PDP on a case-by-case basis. The primary consideration shall be the offender's conduct related to the current offense.

There may be exceptional cases in which the Office may choose to deviate from the enumerated eligibility criteria. However, no deviation is permitted in cases involving: family or domestic violence (Penal Code § 13700); elder and/or dependent adult abuse (Penal Code §§ 368, et seq.); or child abuse (Penal Code §§ 273a, et seq.). Without exception, those types of cases are strictly ineligible for the PDP. In all other cases, the Filing Deputy shall obtain the approval of his or her Deputy-in-Charge of the relevant area office or Head Deputy (or his or her designee) of the branch office prior to deviating from the following criteria:

1. The case shall meet the filing criteria described in the Legal Policies Manual.
2. The offender shall be at least 18 years of age at the time of the commission of the offense(s).
3. The offender shall not have suffered a prior felony conviction, nor have any criminal charge(s) pending in any court in any jurisdiction. The offender shall not be on an active grant of diversion, probation, Post-Release Community Supervision (PRCS), or parole to any other court or agency at the time of the commission of the current offense(s), or at any time during the term of the PDP. (*See "Commentary" below.*)
4. The offender shall not have suffered a sustained juvenile petition for an offense enumerated in Welfare & Institutions Code § 707(b), nor have served a commitment to the Division of Juvenile Justice (formerly the California Youth Authority).
5. The offender's record shall not indicate that he or she has participated in a misdemeanor or felony diversion program within five years prior to the commission of the alleged offense. These diversion programs include, but are not limited to: the PDP, drug court or pretrial diversion for narcotics offenders pursuant to PC §§ 1000 et seq.
6. The offender shall not have a criminal protective order or civil emergency, temporary, or permanent restraining order in effect against him or her.
7. The offender shall not have exhibited criminal sophistication in the conduct underlying the current offense(s).

8. The conduct underlying the current offense(s) shall not constitute a felony enumerated in Penal Code §§ 667.5(c) or 1192.7(c).
9. The conduct underlying the current offense(s) shall not require mandatory registration under any of the following registration sections:
 - a. Penal Code § 290(c), et seq. (Sex Offender);
 - b. Penal Code § 457.1 (Arson); or
 - c. Penal Code § 186.30 (Gang).
10. The conduct underlying the current offense(s) shall not qualify to deny a potentially dangerous person the right to possess a firearm within ten years of the date of conviction pursuant to Penal Code § 29805(a) or a lifetime ban pursuant to § 29805(b). The current offense(s) shall not be enumerated in Welfare & Institutions Code §6600(b).
11. Restitution shall not exceed \$2,500.00, except in unusual circumstances.
12. The conduct underlying the current offense(s) shall not involve:
 - a. A hate crime (Penal Code §§ 422.55, et seq.);
 - b. Human trafficking (Penal Code §§ 236.1, et seq.);
 - c. Stalking (Penal Code §§ 646.9, et seq.);
 - d. Family or domestic violence (Penal Code §13700) – *no exceptions*;
 - e. Elder and/or dependent adult abuse (Penal Code §§ 368, et seq.) – *no exceptions*;
 - f. Child abuse (Penal Code §§ 273a, et seq.) – *no exceptions*;
 - g. Sexual intercourse by a person over 21 upon a minor under the age of 16 (Penal Code § 261.5(d));
 - h. Gang activity;
 - i. Dissuading or intimidating witnesses (Penal Code §§ 136.1, et seq.);
 - j. Infliction of, or intent to inflict, serious bodily injury as defined in Penal Code § 243(f)(4), or great bodily injury as defined in Penal Code § 12022.7(f);
 - k. Driving under the influence of alcohol or drugs (Vehicle Code §§ 23152 or 23153);
 - l. Personal use, possession of, or principal armed with, a firearm or other weapon (*see Commentary below*);
 - m. Sale, transportation for sale, or possession for sale of a controlled substance (*see “Commentary” below*);
 - n. A quantity of a controlled substance sufficient to establish a weight enhancement allegation enumerated in the Health and Safety Code (*see “Commentary” below*);
or
 - o. Animal cruelty (Penal Code §§ 597(a), et seq.) (*see “Commentary” below*).

Commentary

Where an offender is on an active grant of PRCS, the filing of a new case may render the offender ineligible for flash incarceration for the related violation.

Where a weapon is merely possessed without having been displayed or otherwise used in any manner, the circumstances may justify a deviation from the eligibility criteria.

With the approval of the Head Deputy or Deputy-in-Charge, individuals arrested for low level sales, transportation for sale, or possession for sale of narcotics charges may be eligible for

participation in the PDP where there is clear evidence that the sales activity is driven by a documented history of narcotics addiction.

Charges involving any form of animal abuse, including dog and cock fighting, require prior approval from the Animal Cruelty Case Coordinator (ACCC) and Head Deputy or Deputy-in-Charge pursuant to [LPM 10.13.01](#).

6.01.03 PROCEDURE FOR CONDUCTING PRE-FILING DIVERSION PROGRAM HEARINGS

PDP hearings shall be conducted in District Attorney facilities and be treated as informal proceedings, not restricted by technical rules of evidence or procedure. Separate meeting times for the victim and the offender are preferred. However, there may be circumstances in which a joint hearing may be appropriate. The PDP officer shall exercise his or her careful judgment on a case-by-case basis in determining whether to hold a joint hearing. The safety of the participants and office staff shall be the paramount consideration.

Attorneys for a party shall be permitted to attend in an advisory role only. The parties must speak for themselves during the hearing. Witnesses and other concerned individuals shall be excluded until their participation is needed.

At the conclusion of the hearing, the PDP officer shall state his or her recommended resolution and provide an explanation for the decision. PDP officers have discretion to fashion a resolution that fairly addresses the concerns of the parties and public safety. Outcomes include, but are not limited to: payment of restitution, stay-away directives, community service, education, and referrals to various counseling and treatment services.

If the offender is required to pay restitution to the victim, the payment shall be in the form of a cashier's check or money order. The PDP officer shall not accept cash. The PDP officer shall send the payment to the victim only after the victim has agreed in writing that the money order or cashier's check may be mailed to him or her. In all other cases, arrangements shall be made with the victim to collect the restitution at the branch or area office at a date and time mutually convenient to the victim and PDP officer. A copy of the check or money order along with the victim's driver license or any other photo identification shall be included in the case file with a written acknowledgment by the victim that restitution has been received.

6.01.04 VICTIMS' RIGHTS AND THE PRE-FILING DIVERSION (PDP) PROGRAM

California law gives crime victims the right to be treated with fairness and respect as to both their dignity and their privacy. Office policies related to these laws are detailed more thoroughly in Legal Policies Manual § [11.21](#), et seq., and the PDP Manual.

A victim's personal and contact information shall not be provided to offenders enrolled in the PDP.

PDP officers shall maintain communication with victims at each stage of PDP proceedings. Victims shall be informed in writing when a case has been: 1) referred to the PDP, 2) accepted into the PDP, 3) successfully completed pursuant to the terms of the PDP; 4) terminated from the PDP, and 5) referred for prosecution.

The PDP requires participating offenders to make restitution to the victim, as would have been required in the event of a conviction.

6.01.05 PDP STATISTICAL INFORMATION AND FILE RETENTION POLICY

In order to evaluate the efficacy of the PDP, the PDP officer shall utilize the PDP database to track each offender's referral to, and participation in, the PDP. The PDP officer shall be responsible for updating the PDP database. The system shall include statistical information both for offenders whose cases are referred to the PDP and for the program overall, as set forth in the PDP Manual.

Additionally, PDP officers shall input case information into the Prosecutors' Information Management System (PIMS).

PDP officers shall enter statistical data into the PDP database on a daily basis. At the end of the month, a report summarizing the data shall be generated.

In all cases, PDP officers shall retain a copy of the file at the appropriate branch or area office. The case files shall be retained for a minimum period of three years.

6.02 REQUESTS FOR INFORMAL HEARING BEFORE CHARGING

Requests are sometimes received from attorneys representing an accused to present the accused's side of a case at an informal hearing before a complaint is filed.

A pre-filing request for an informal hearing shall be referred to the Head Deputy or Deputy-in-Charge. When the case is presented for filing by a law enforcement agency, it should be referred to the Head Deputy or Deputy-in-Charge for processing.

If the request is granted, the attorney shall be advised that time is of the essence and unless the attorney can appear within a reasonable time, a filing may be considered without the hearing.

At the hearing, the deputy shall advise the attorney generally of the charges under consideration and that the hearing was granted solely to provide an opportunity to present information the attorney feels is relevant to the determination of whether a complaint should be issued. The deputy shall advise the attorney that this hearing is not a discovery proceeding, an opportunity to learn the facts of the case, or an opportunity to cross-examine any prosecution witnesses.

If the attorney desires to have his or her client present at the hearing, prior Head Deputy approval is required. If approved, a district attorney investigator or an investigator from the law enforcement agency must be present in addition to the prosecutor.

Taping or transcribing the hearing is not required unless the accused is present and expected to make a statement. Should formal statements be taken, the deputy can place a witness or the accused under oath pursuant to Government Code §§ 24000 and 24057. At the conclusion of the hearing, the deputy shall memorialize the substance of the hearing in a memorandum. In the event of a filing, the memorandum shall be placed in the case file. In the event of a rejection, the memorandum shall be attached to the reject form.

Suspects without counsel can also be granted pre-filing hearings. The same policies set forth above shall be followed. If a hearing is held, an investigator and a deputy shall be present. The interviewer shall make the suspect aware that he or she is welcome to be represented by counsel if he or she so desires.

If a defense attorney's request for a pre-filing hearing is directed to a filing deputy's Deputy-in-Charge, Head Deputy, or a supervisor higher in the chain of command and the request is approved, that supervisor shall notify the filing or assigned deputy and the deputy an opportunity to attend the hearing. The supervisor should inform the defense attorney that these conditions (notification and opportunity to attend) are prerequisites to granting a hearing.

6.03 VOLUNTARY COMPLIANCE

In some cases involving minor violations of consumer protection, environmental/workplace safety, administrative regulations, zoning and business license laws, voluntary compliance may be an acceptable alternative to criminal prosecution.

6.03.01 CONSUMER AND ENVIRONMENTAL CASES

In some cases involving minor violations of consumer protection or environmental/workplace safety laws, voluntary compliance may be an acceptable alternative to criminal prosecution. Voluntary compliance is an acceptable alternative to prosecution in consumer protection cases when:

- The incident is the first offense involving this type of conduct.
- The violation was not deliberate.
- The incident appears to be isolated and not part of a pattern of conduct or conspiracy.
- Complete restitution is made to all known victims.

Voluntary compliance is an acceptable alternative to prosecution in environmental cases when:

- The deputy is reasonably satisfied voluntary compliance will compensate the victim or complainant for damage done.
- The deputy is reasonably satisfied that the accused will not repeat the conduct in question.
- There is no pattern of continuing violations of the law in question.
- The violation was neither deliberate nor was the damage significant.

6.03.02 REGULATIONS, ORDINANCES, AND PUBLIC NUISANCE CASES

Voluntary compliance is an acceptable alternative to prosecution for violations of administrative regulations, zoning, building and safety, health, or other similar county ordinances, or a violation of Penal Code § 370 when:

- Voluntary compliance will compensate for past damage or is satisfactory with the victim or complainant.
- The deputy is reasonably satisfied that the accused will not repeat the conduct in question.
- There is no pattern of continuing violations of the ordinance or statute in question.

6.03.03 BUSINESS LICENSE VIOLATIONS

Voluntary compliance is an acceptable alternative to prosecution for business license violations when:

- The accused, upon request, promptly obtains the proper license.
- There is no pattern of continuing violations of the statute or ordinance in question.
- The violation was not deliberate.

6.04 CIVIL ACTION

In some cases involving minor violations of consumer protection, environmental/workplace safety, administrative regulations, zoning and business license laws, a deputy may seek civil penalties or injunctive relief without filing criminal charges.

6.04.01 CONSUMER AND ENVIRONMENTAL CASES

In some cases involving violations of consumer protection or environmental/workplace safety laws, a deputy may seek civil penalties or injunctive relief without filing criminal charges in the following situations:

- Money damages, civil penalties, or injunctive relief will be an effective deterrent to the accused and others.
- The conduct is likely to cease as a result of a successful civil suit.
- The accused's conduct does not involve a single or occasional violation for which criminal prosecution would be more expeditious and effective.

6.04.02 CIVIL ABATEMENT - PUBLIC NUISANCE CASES

When the prosecution has the right to seek a civil injunction to abate a public nuisance, a deputy may use this remedy whenever practical. Civil abatement actions are often more effective than criminal prosecutions in public nuisance cases because they are designed to correct ongoing situations rather than specific past acts.

Commentary

The primary consideration in deciding to seek an injunction is a tactical one. A deputy should select the best available means to accomplish the four goals of deterrence, protection, punishment, and rehabilitation. The legislature has given prosecutors additional tools to accomplish these goals: the right to proceed civilly as well as criminally in certain types of cases.

There are conflicting considerations a deputy should weigh. A civil lawsuit offers certain advantages that may make it the only practical remedy. The potential monetary damages are greater. Due to the lack of stigma, civil suits may lead to faster correction of the problem and resolution of the lawsuit. A deputy is generally not limited by the Fifth Amendment so the right to discovery is more effective and meaningful. The burden of proof is less than the burden in a criminal case. A civil lawsuit may, however, unnecessarily overburden the resources of the Office in lengthy litigation. All these factors should be weighed in deciding which course of action will accomplish the overall goal of remedying the interference with the freedom of others to live in a just and lawful society.