



Montana Legislative Services Division
Legal Services Office

TO: Task Force on State Public Defender Operations
FROM: Julie Johnson, Legal Services Office
RE: Options for Diversion Prior to Charges Being Filed (29, H)
DATE: May 11, 2016

At the February 2016 meeting, I was asked to identify options for diverting a person from court prior to charges being filed against that person to reduce caseload on OPD.

A prosecutor has the discretion to charge or not charge a crime. Pretrial diversion, including diversion prior to the filing of a charge, is available and codified. Not until after a prosecutor has charged a person with a crime that carries the possibility of jail time as a penalty, however, can OPD be appointed to represent that person if the person is indigent.

Pretrial diversion is addressed in § 46-16-130, MCA:

46-16-130. Pretrial diversion. (1) (a) Prior to the filing of a charge, the prosecutor and a defendant who has counsel or who has voluntarily waived counsel may agree to the deferral of a prosecution for a specified period of time based on one or more of the following conditions:

- (i) that the defendant may not commit any offense;
- (ii) that the defendant may not engage in specified activities, conduct, and associations bearing a relationship to the conduct upon which the charge against the defendant is based;
- (iii) that the defendant shall participate in a supervised rehabilitation program, which may include treatment, counseling, training, or education;
- (iv) that the defendant shall make restitution in a specified manner for harm or loss caused by the offense; or

(v) any other reasonable conditions.
(b) The agreement must be in writing, must be signed by the parties, and must state that the defendant waives the right to speedy trial for the period of deferral. The agreement may include stipulations concerning the admissibility of evidence, specified testimony, or dispositions if the deferral of the prosecution is terminated and there is a trial on the charge.

(c) The prosecution must be deferred for the period specified in the agreement unless there has been a violation of its terms.

(d) The agreement must be terminated and the prosecution automatically dismissed with prejudice upon expiration and compliance with the terms of the agreement.

(2) A condition of pretrial diversion may be for the court to refer a defendant for evaluation to determine the appropriateness of proceedings pursuant to Title 53, chapter 21.

(3) Except as provided in 46-1-1104 and 46-1-1204, after a charge has been filed, a deferral of prosecution may be entered into only after the prosecutor provides notice to the court.

(4) A prosecution for a violation of 61-8-401, 61-8-406, 61-8-410, 61-8-411, or 61-8-465 may not be deferred.¹

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¹ All statutes listed in 46-16-130(4) are driving while under the influence crimes. 61-8-401=DUI, 61-8-406=.08 BAC, 61-8-410=.02 BAC for minor, 61-8-411=THC level, 61-8-465=aggravated DUI