STATE OF KANSAS

Tenth Judicial District

OFFICE OF THE DISTRICT ATTORNEY

STEPHEN M. HOWE, DISTRICT ATTORNEY

Adult Diversion Program

**GENERAL POLICY**

1. The Diversion program is intended to give a “second chance” to offenders who commit a relatively minor criminal offense.
2. Diversion is a privilege and not a right. There is no guarantee Diversion will be granted in any given case. The needs of the offender are less important than those of public safety and the rights of the victim.
3. It is not required that a defendant have an attorney for the purpose of Diversion. However, a defendant has the right to employ an attorney and have him/her present throughout the Diversion application process.
4. A defendant is required to reimburse the court when represented by court appointed counsel. Additionally, if a defendant wants to participate in the Diversion program and must serve jail time, the defendant may be asked to sign a waiver of counsel form.
5. The District Attorney makes all decisions regarding Diversion policy. He appoints a Diversion Chief to enforce such policies and determine Diversion eligibility including conditions of Diversion contracts. The District Attorney has the final authority to approve or deny any Diversion application.
6. A defendant’s application for diversion will be rejected if not submitted within 90 days of the defendant’s first appearance. Additionally, if the defendant has pursued substantive motions, trial, or preliminary hearing in a “CR” or “DV” case the application will be rejected. The District Attorney’s Office may accept an application for Diversion, outside of this policy on a case-by-case basis.
7. Diversion Agreements not signed by the defendant within 60 days of the acceptance letter will be withdrawn. Defendants who have tested positive for alcohol or controlled substances while on bond will be required to submit a negative drug/alcohol screen before signing a Diversion Agreement. If a defendant does not submit a negative drug /alcohol screen within 60 days of the acceptance letter, the Diversion Agreement will be withdrawn.
8. The Diversion program will be administered in accordance with K.S.A. 22-2907, K.S.A. 22-2908, K.S.A. 22-2909, K.S.A. 22-2910 and K.S.A. 22-2911.

**DIVERSION FEES/COSTS**

1. Diversion Application (Exact cash or money order only):
2. Misdemeanor - $30.00
3. Felony - $50.00
4. Diversion Fee:
	1. Misdemeanor - $100.00 (direct diversion); $125.00 (informal conference);
	2. Felony - $150.00
5. Court Costs:
	1. Misdemeanor (non-DUI) - $159.50;
	2. Felony - $194.50;
	3. DUI - $909.50
6. Additional Diversion Costs may include, but are not limited to:
	1. Fingerprinting fee
	2. Pre-Trial Supervision fees
	3. Urinalysis testing
	4. Lab fees
	5. Witness fees
	6. Extradition costs
	7. Court appointed attorneys fees
	8. Restitution

**ELIGIBILITY**

*Current Offense*

1. A defendant is prohibited from applying for Diversion if charged with the following:
2. Felonies - Level 1-6
3. Aggravated Domestic Battery
4. Residential Burglaries
5. Mistreatment of a Dependent Adult
6. Felony Sex Offenses
7. Person Felony Offenses where victim is under the age of 18
8. Drug Cases - Level 1 - 4
9. DUI cases with any prior DUI diversions and/or convictions
10. DUI cases involving any injuries of any severity, excluding the driver
11. DUI cases with children present in the vehicle
12. DUI cases when the driver was a CDL holder at the time the violation was committed or at any subsequent time prior to being considered for diversion
13. Any case involving a financial loss over $25,000
14. Any case involving a financial loss over $10,000 AND the defendant has a prior felony conviction OR the period of theft is greater than one year OR there are 5 or more victims OR the defendant was in fiduciary relationship with the victim.

1. Applications in cases involving the offenses of Identity Theft or Identity Fraud will be reviewed for acceptance on a case-by-case basis. Applications will not be accepted in cases involving allegations that the defendant has opened or attempted to open a financial account in the name of the victim OR obtained or attempted to obtain financing/credit in the name of the victim OR obtained or attempted to obtain employment in the name of the victim OR caused an individual or business to suffer a financial loss. Further, applications will not be accepted if the defendant has a prior diversion or conviction for Identity Theft or Identity Fraud.
2. The input of any victim shall be taken into consideration when determining whether to grant or deny diversion.
3. The assigned Assistant District Attorney (ADA) may request that a case be denied for Diversion even though otherwise eligible.
4. Final approval of Diversion lies with the Diversion Chief in conjunction with the District Attorney.

*Prior Criminal History*

1. A defendant with the following criminal history is ineligible to apply **(5/10 Rule)**:
	1. Misdemeanor charges with sentence, probation, suspended sentence, or diversion ending within the last 5 years.
	2. Felony charges with sentence, probation, suspended sentence, or diversion ending within the last 10 years.
2. Traffic misdemeanors will not be subject to the 5/10 Rule except as described below in paragraphs Nos. 3 and 4. The District Attorney’s Office reserves the right to consider any prior offense as a basis to deny diversion on a case by case basis.
3. The following traffic misdemeanors are subject to the 5/10 Rule:
	1. Any class ‘A” misdemeanor
	2. DUI
	3. Fleeing and Eluding
	4. PBT Refusal
	5. Reckless Driving
4. In addition to the offenses listed above, if currently charged with a DUI, the following traffic misdemeanors are also subject to the 5/10 Rule:
	1. Minor in Possession of Alcohol,
	2. Transporting an Open Container,
	3. DWS (if basis for suspension was alcohol related)
5. Juvenile adjudications are not subject to the 5/10 Rule. The District Attorney’s Office reserves the right to consider the nature, quantity, and timing of juvenile adjudications as a basis to deny diversion on a case by case basis.
6. A defendant who has had a prior diversion contract with the District Attorney’s Office as an adult may not apply until 10 years after the dismissal date of the prior diversion. A defendant shall not be placed on diversion a second time for an offense which is the same or similar to the first diversion contract.
7. A defendant who has more than one pending case in Johnson County District Court will not be considered for diversion.
8. A defendant with criminal charges pending in any other municipal, state, or federal jurisdictions will not be considered for Diversion. Any outstanding traffic warrants must be resolved prior to any defendant applying for diversion.
9. Defendants charged with Severity Level 5 Drug Felonies may still apply for diversion if they have a misdemeanor conviction or diversion within the last 5 years. However, the District Attorney’s Office reserves the right to deny diversion based upon criminal history, to include misdemeanor convictions or diversions within the last 5 years.

**ADDITIONAL REQUIREMENTS**

1. All DUI and felony drug cases require that a substance use evaluation, from a Diversion approved provider, be completed and accompany the application for Diversion or be sent separately prior to making application to the Diversion unit.
2. A defendant may be required to submit additional evaluations prior to determining whether to offer a Diversion contract.
3. A defendant charged with a felony domestic violence offense must obtain a Domestic Violence Assessment prior to making application for Diversion. A defendant charged in a Domestic Violence case which has been designated as “high risk” per the lethality assessment may be required to participate in and complete Batterer’s Intervention counseling as a condition of Diversion. Unless directed otherwise, in all other Domestic Violence cases, a defendant will be required to obtain a Domestic Violence Assessment after signing the Diversion agreement and must follow the recommendations of that assessment as a condition of Diversion. All Domestic Violence Assessments and counseling must be obtained from a Diversion approved provider.
4. A defendant diverted on a felony offense may be required to serve jail shock time prior to signing the Diversion agreement.
5. A defendant charged with Lewd and Lascivious Behavior, Sexual Battery or other sexual related offense shall be required to obtain a non-violent sex-offender evaluation and submit said evaluation with the application for Diversion.
6. A defendant diverted on cases involving financial loss of over $10,000 may be required to serve jail shock time prior to signing the Diversion agreement. A defendant may be required to submit a restitution payment of 25% prior to signing the Diversion agreement.

**DIRECT DIVERSION**

1. Direct Diversion may be offered to a defendant with absolutely no prior diversions or convictions and is charged with one of the following misdemeanor offenses:
2. Assault
3. Battery
4. Criminal Damage to Property
5. Criminal Trespass
6. Disorderly Conduct
7. Domestic Battery (no injuries)
8. DUI with all of the following conditions:
	* 1. Defendant has no prior convictions
		2. Defendant submitted to testing of breath or bodily fluid
		3. Defendant had a BAC under .20
		4. Defendant not involved in an accident
9. Possession of Marijuana
10. Possession of Drug Paraphernalia
11. Telephone Harassment
12. Violation of Protection Orders
13. Misdemeanor Giving a Worthless Check
14. A Direct Diversion is not always automatically approved. A conference may be set at a later date after the application is reviewed. If more information is required, a conference will be set with a Diversion Case Manager.
15. If a case falls within the guidelines for Direct Diversion, it may be approved or denied by a Diversion Case Manager without staffing with the Diversion Chief.

**INFORMAL DIVERSION CONFERENCE**

1. Diversion conferences are scheduled with a Diversion Case Manager for the following reasons:
2. All felony charges
3. All theft charges
4. DUI with one of the following conditions:
	1. Defendant refused to submit to testing of breath or bodily fluid
	2. Defendant under the age of 21 at time of DUI.
	3. Defendant’s BAC was greater than .20
	4. Defendant was involved in an accident
	5. Excessive speed
	6. Evaluator determines the defendant to be chemically dependent
5. Misdemeanor sex offenses including but not limited to Sexual Battery, Lewd and Lascivious Behavior, Prostitution and Patronizing a Prostitute
6. Unemployment Fraud, Welfare Fraud and Insurance Fraud
7. Any charges involving children
8. Any injuries to victim
9. Any charges involving a weapon
10. Any prior arrests, diversions and/or convictions
11. Any Domestic Violence case classified as high risk
12. All cases that fall within the guidelines for an Informal Diversion Conference must be staffed with the Diversion Chief prior to granting/denying Diversion.

**FORMAL DIVERSION CONFERENCE**

1. A formal Diversion conference will be set with the Diversion Chief under the following circumstances:
	1. Any case involving a person crime involving a firearm or other weapon
	2. The Diversion Chief approved a request for a formal conference after a defendant was denied Diversion after the initial conference. Such a request must be submitted in writing to the assigned Diversion Case Manager within 2 weeks of the original denial notification
	3. At the request of the Diversion Chief for any reason

**FAILURE TO FULFILL THE TERMS OF DIVERSION**

1. After a defendant is placed on Diversion, the State reserves the right to file a Motion to Revoke Diversion upon discovering that the defendant has failed to fulfill any term of the specific Diversion Agreement.
2. Upon discovering that the defendant has failed to fulfill any term of the specific Diversion Agreement, the District Attorney’s Office, in its sole discretion, may offer a defendant an internal sanction in lieu of filing a Motion to Revoke Diversion. Such internal sanctions may include, but are not limited to, one or more of the following:
	1. Completion of (additional) community service hours;
	2. Obtaining a substance abuse, domestic violence, mental health, or other assessment and completing any recommended counseling/treatment; or
	3. Extension of the term of diversion.

Nothing in this policy shall require the District Attorney’s Office to offer any defendant an internal sanction. Internal sanctions will not be offered once a Motion to Revoke Diversion has been filed.

**MENTAL HEALTH DIVERSION PROGRAM**

1. Mental Health Diversion may be available to defendants whose offense is correlated with a Serious Mental Illness (SMI). Symptoms of a SMI are generally defined as functional impairments in one or more major area of life, occurring on either a continuous or intermittent basis over the last two years and are a direct result of the individual’s mental illness. The objective of Mental Health Diversion is to direct defendants to comply with mental health treatment through a licensed provider in lieu of further prosecution.
2. Examples of functional impairments resulting from SMI would include:
3. Inability to maintain gainful employment or manage finances
4. Shows severe inability to establish or maintain a personal support system
5. Requires help in attending to basic health care regarding hygiene, grooming, nutrition, dental and medical care, and taking medications
6. Exhibits inappropriate social behavior not easily tolerated in the community
7. Engages in unsafe or self-harming behavior
8. Basic Requirements:
	1. **Johnson County Residents**
		1. In order for a Johnson County Resident to be placed on Mental Health Diversion, he/she must be approved by the District Attorney’s Office, as well as meet the SMI criteria as determined by JCMH or another licensed mental health treatment provider. JCMH or the defendant’s mental health treatment provider must also find that the underlying offense is correlated with the defendant’s SMI.
		2. The eligibility criteria for the District Attorney’s Office’s Adult Diversion Program will generally apply to applications for Mental Health Diversion. The DA’s Office may approve or deny any diversion application in their sole discretion for any lawful reason, including criminal history (arrests, convictions, prior diversions, police contact, etc.). Applicants will be evaluated on a case by case basis.
		3. The defendant must submit an application for Mental Health Diversion to the DA’s Office. A Release of Information (ROI) must be submitted along with the application. Upon receipt of the application and the ROI, the DA’s Office shall screen the defendant’s application for further review by JCMH.
		4. JCMH will contact the defendant directly in order to schedule an initial review. The defendant must complete the initial review within 2 weeks of being contacted by JCMH. The defendant must fully participate in services, as well as attend all subsequent mental health appointments while the application is being reviewed. Final eligibility for Mental Health Diversion will be determined by the DA’s Office.

* + 1. All Johnson County Residents approved for Mental Health Diversion will be required to participate in case management services through JCMH and remain engaged in mental health treatment for the entire term of diversion. Any defendant engaged in mental health treatment with a licensed mental health treatment provider may continue treatment with that provider, so long at the provider is willing to participate with the compliance reporting requirements of the Mental Health Diversion program. Any defendant who is not engaged in mental health treatment may receive mental health treatment through JCMH.
	1. **Out-of-County Residents**
		1. In order for an Out-of-County Resident to be placed on Mental Health Diversion, he/she must be approved by the District Attorney’s Office, and he/she must meet the SMI criteria as determined by a licensed mental health treatment provider. The defendant’s mental health treatment provider must also find that the underlying offense is correlated with the defendant’s SMI.
		2. The eligibility criteria for the District Attorney’s Office’s Adult Diversion Program will generally apply to applications for Mental Health Diversion. The DA’s Office may approve or deny any diversion application in their sole discretion for any lawful reason, including criminal history (arrests, convictions, prior diversions, police contact, etc.). Applicants will be evaluated on a case by case basis.
		3. The defendant must submit an application for Mental Health Diversion to the DA’s Office. A completed Out-of-County Resident Mental Health Diversion Information Form (“OOCR Form”) must be submitted along with the application. Upon receipt of the application and OOCR Form, final eligibility for Mental Health Diversion will be determined by the DA’s Office.
		4. All Out-of-County Residents approved for Mental Health Diversion will be required to remain engaged in mental health treatment for the entire term of diversion. In addition, the defendant’s mental health treatment provider must be willing to participate with the monthly compliance reporting requirements of the Mental Health Diversion program.