

## CHAPTER 8 DIVERSION

### 801. DEFINITIONS

#### Rule 801 DEFINITIONS

1. "Nation Prosecutor" means the prosecutor for the Oneida Indian Nation.
2. "Complaint" means the criminal complaint charging the defendant with an offense.
3. "Diversion" means referral of a defendant in a criminal case to a supervised performance program prior to adjudication.
4. "Diversion agreement" means the specification of formal terms and conditions which a defendant must fulfill in order to have the charges against him or her dismissed.

### 802. DIVERSION AGREEMENT AUTHORIZED; POLICIES AND GUIDELINES BY NATION PROSECUTOR; BACKGROUND INFORMATION

#### Rule 802 DIVERSION AGREEMENT AUTHORIZED; POLICIES AND GUIDELINES BY NATION PROSECUTOR; BACKGROUND INFORMATION

- a. After a complaint has been filed charging a defendant with commission of a crime and prior to conviction thereof, and after the Nation Prosecutor has considered the factors listed in Section 803, if it appears to the Nation Prosecutor that diversion of the defendant would be in the interests of justice and of benefit to the defendant and the community, the Nation Prosecutor may propose a diversion agreement to the defendant. The terms of each diversion agreement shall be established by the Nation Prosecutor in accordance with section 804.
- b. The Nation Prosecutor shall adopt written policies and guidelines for the implementation of a diversion program in accordance with these Rules. Such policies and guidelines shall provide for a diversion conference and other procedures in those cases where the Nation Prosecutor elects to offer diversion in lieu of further criminal proceedings on the complaint.
- c. Each defendant shall be informed in writing of the diversion program and the policies and guidelines adopted by the Nation Prosecutor. The Nation Prosecutor may require any defendant requesting diversion to provide information regarding prior criminal charges, education, work experience and training, family, residence in the community,

medical history, including any psychiatric or psychological treatment or counseling, and other information relating to the diversion program. In all cases, the defendant shall be present and shall have the right to be represented by counsel at his own expense at the diversion conference with the Nation Prosecutor.

### **803. GRANT OF DIVERSION; FACTORS TO CONSIDER**

#### **Rule 803 GRANT OF DIVERSION; FACTORS TO CONSIDER**

In determining whether diversion of a defendant is in the interests of justice and of benefit to the defendant and the community, the Nation Prosecutor shall consider at least the following factors among all factors considered:

- a. The nature of the crime charged and the circumstances surrounding it;
- b. any special characteristics or circumstances of the defendant;
- c. whether the defendant is a first-time offender and if the defendant has previously participated in diversion.
- d. whether there is a probability that the defendant will cooperate with and benefit from diversion;
- e. whether the available diversion program is appropriate to the needs of the defendant;
- f. the impact of the diversion of the defendant upon the community;
- g. recommendations, if any, of the involved law enforcement agency;
- h. recommendations, if any, of the victim;
- i. provisions for restitution; and
- j. any mitigating circumstances.

**804. PROVISIONS OF DIVERSION AGREEMENT; WAIVER OF SPEEDY TRIAL AND JURY TRIAL, WHEN; ALCOHOL AND DRUG RELATED OFFENSES; STAY OF CRIMINAL PROCEEDINGS; FILING OF AGREEMENTS**

**Rule 804 PROVISIONS OF DIVERSION AGREEMENT; WAIVER OF SPEEDY TRIAL AND JURY TRIAL, WHEN; ALCOHOL AND DRUG RELATED OFFENSES; STAY OF CRIMINAL PROCEEDINGS; FILING OF AGREEMENTS**

- a. A diversion agreement shall provide that if the defendant fulfills the obligations of the program described therein, as determined by the Nation Prosecutor, the Nation Prosecutor shall act to have the criminal charges against the defendant dismissed with prejudice. The diversion agreement shall include specifically the waiver of all rights under Nation law to a speedy arraignment and a speedy trial. The diversion agreement may include, but is not limited to, provisions concerning payment of restitution, including court costs and diversion costs, residence in a specified facility, maintenance of gainful employment, and participation in programs offering medical, educational, vocational, social and psychological services, corrective and preventive guidance and other rehabilitative services.
- b. The diversion agreement shall state: (1) The defendant's full name; (2) the defendant's full name at the time the complaint was filed, if different from the defendant's current name; (3) the defendant's sex, race and date of birth; (4) the crime with which the defendant is charged; (5) and, the date the complaint was filed.
- c. If a diversion agreement is entered into in lieu of further criminal proceedings on a complaint alleging a violation of alcohol and substance abuse laws, the diversion agreement shall include a stipulation, agreed to by the defendant and the Nation Prosecutor, of the facts upon which the charge is based and a provision that if the defendant fails to fulfill the term of the specific diversion agreement and the criminal proceedings on the complaint are resumed, the proceedings, including any proceedings on appeal, shall be conducted on the record of the stipulation of facts relating to the complaint. In addition, the agreement shall include a requirement that the defendant:
  1. Perform community service specified by the agreement; and
  2. Enroll in and successfully complete an alcohol and drug program or a treatment program, or both.
- d. If a diversion agreement is entered into in lieu of further criminal proceedings on a complaint alleging a violation of driving under the influence, the diversion agreement may restrict the defendant's driving privileges, in addition to any suspension and to driving only under the following circumstances: (1) In going to or returning from

the person's place of employment or schooling; (2) in the course of the person's employment; (3) during a medical emergency; (4) in going to and returning from probation or parole meetings, drug or alcohol counseling or any place the person is required to go to attend an alcohol and drug safety action program; (5) at such times of the day as may be specified by the diversion agreement; and (6) to such places as may be specified by the diversion agreement.

Restrictions imposed pursuant to this subsection shall be for a period of not less than 90 days nor more than one year, as specified by the diversion agreement.

#### **805. CONDITIONING DIVERSION ON PLEA PROHIBITED; INADMISSIBILITY OF AGREEMENT**

##### **Rule 805     CONDITIONING DIVERSION ON PLEA PROHIBITED; INADMISSIBILITY OF AGREEMENT**

No defendant shall be required to enter any plea to a criminal charge as a condition for diversion. No statements made by the defendant or counsel in any diversion conference or in any other discussion of a proposed diversion agreement shall be admissible as evidence in criminal proceedings on crimes charged or facts alleged in the complaint.

#### **806. FAILURE TO FULFILL DIVERSION AGREEMENT; SATISFACTORY FULFILLMENT; RECORDS**

##### **Rule 806     FAILURE TO FULFILL DIVERSION AGREEMENT; SATISFACTORY FULFILLMENT; RECORDS**

- a. If the Nation Prosecutor finds at the termination of the diversion period or any time prior thereto that the defendant has failed to fulfill the terms of the specific diversion agreement, the Nation Prosecutor shall inform the court of such finding and the court, after finding that the defendant has failed to fulfill the terms of the specific diversion agreement at a hearing thereon, shall resume the criminal proceedings on the complaint.
- b. If the defendant has fulfilled the terms of the diversion agreement, the court shall dismiss with prejudice the criminal charges filed against the defendant.

#### **807. TERM OF DIVERSION**

##### **Rule 807     TERM OF DIVERSION**

An agreement for diversion shall not exceed one (1) year.