

UNIVERSITY OF MINNESOTA

PROFILES IN PROBATION REVOCATION:

Examining the Legal Framework in 21 States

A publication by the Robina Institute of Criminal Law and Criminal Justice
Volume 1 in the Probation Revocation Project Series



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This publication was produced by law students, faculty, and staff of the University of Minnesota Law School's Robina Institute of Criminal Law and Criminal Justice. Thank you to all who contributed to the first publication of the Probation Revocation Project.

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The Robina Institute of Criminal Law and Criminal Justice brings legal education, legal and sociological research, theory, policy, and practice together to solve common problems in the field of criminal justice. Through this work, we initiate and support coordinated research and policy analysis and partner with multiple local and state jurisdictions from across the nation to provide recommendations and build links between researchers, practitioners, lawmakers, governing authorities, and the public.

The Robina Institute's focus is to build these connections through three program areas: Criminal Justice Policy, Criminal Law Theory, and Sentencing Law and Policy. The emphasis in all three areas is on new ways of conceptualizing criminal law and its roles, and new ways of thinking about responses to crime. The Robina Institute is currently working on several research projects, including four in the Sentencing Law and Policy Program Area that take a close look at issues states and jurisdictions face in sentencing policy and guidelines: the Probation Revocation Project; the Parole Release and Revocation Project; the Criminal History Project; and the Sentencing Guidelines Repository Project.

The Robina Institute of Criminal Law and Criminal Justice was established in 2011 at the University of Minnesota Law School thanks to a generous gift from the Robina Foundation. Created by James H. Binger ('41), the Robina Foundation provides funding to major institutions that generate transformative ideas and promising approaches to addressing critical social issues.

The Probation Revocation Project

The Probation Revocation Project explores probation revocation in the United States, particularly in the context of the growing debate about the appropriate use of incarceration in a just and effective criminal justice system.

This project includes a number of phases, such as the profiling of the legal context surrounding revocation in twenty-one states and the model penal code, the development of statistical and ethnographic profiles of existing practice in a sample of jurisdictions, and the undertaking of experiments in newly-designed approaches to probation violations in jurisdictions interested in reform. This work will culminate in the issuance of a series of publications aimed at rethinking and reconfiguring probation revocation practice.

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PROFILES IN PROBATION REVOCATION:

Examining the Legal Framework in 21 States

Ronald P. Corbett, Jr. and Kevin R. Reitz¹

Introduction

This report compiles—in a convenient format—the results of a yearlong research project on the laws relating to probation revocation in 21 American states.² By leafing through the four-page “legal profiles” presented in this volume, readers can easily see how much variation exists in statewide laws of probation and probation revocation, while zeroing in on issues of greatest interest. Whether a reader’s jurisdiction is included in the report’s 21 states or not, the legal profiles contain a wealth of information that will allow for comparison with one’s own system. We think every reader—no matter how experienced in the field—will come across practices or ideas in this study that they never heard of before.

The report assumes that American states have much to learn from one another. Justice Louis Brandeis famously believed that the states can serve as “laboratories” for innovations in law and policy, so that best practices can emerge and be brought to the attention of other states for possible adoption or adaptation.³ In order for Brandeis’s laboratory to be a reality, however, the states must have some way of learning about the practices of other jurisdictions. In an increasingly complex and specialized world, this is a daunting task—and one that often requires a heavy investment in research. The Robina Institute of Criminal Law and Criminal Justice has made such an investment in this report. We hope it will allow readers to see their home jurisdictions in new perspective, and will further the nationwide process of dialogue and improvement that Justice Brandeis envisioned.

This introduction gives a short overview of why the subject matter is important and how the report fits within a larger Probation Revocation Project launched by the Robina Institute in 2013. The introduction will also discuss the ambitions, scope, limitations, and uses of the state legal profiles.

I. Why Probation Revocation Matters

Simply put, probation revocation is where probation policy meets prison policy. Every aspect of the Robina Institute’s Probation Revocation Project has unfolded against the backdrop of “mass incarceration” in America.⁴ The U.S. incarceration rate, even with slight reductions in the past four years, remains the highest in the world. With 5 percent of the world’s population, the U.S. has nearly 25 percent of the world’s incarceration population.⁵ Not as widely known, probation revocations have been important contributors to the nation’s incarcerated populations. Estimates suggest that one-half of the people admitted to U.S. jails, and more than one-third of those admitted to prisons, are there as a result of revocation from community supervision, including both probation and parole.⁶ Depending on how probation systems are run, they can act as feeders of prison and jail populations.⁷

While probation and other intermediate punishments have often been promoted as “alternatives” to incarceration, the history of the last several decades is to the contrary. Community supervision systems have expanded alongside the nation’s prisons and jails since the 1970s, and at a comparable pace. Instead of one sanction substituting for another, the major forms of criminal punishment in the United States have grown in tandem, sustaining each other in “feedback loops.” Today, about one of every 50 adults in America is under community supervision on any given day, while nearly one in 100 is confined.⁸ The absolute numbers are staggering. At year-end 2013, daily prison and jail populations in the United States numbered more than 2.3 million and, by most recent counts, an additional 3.9 million offenders were serving sentences of probation and more than 851,000 were on parole.⁹ Recently, the terms “mass probation” and “mass supervision” have begun to enter the academic and policy lexicons alongside the more familiar terminology of mass incarceration.¹⁰

Just as the U.S. states can learn from one another, this country can learn from the probation laws and policies of other developed nations. Recent research indicates that rates of probation supervision in America are just as exceptional by international standards as U.S. incarceration rates. In 2011, the nationwide probation rate for the U.S. was seven times the average rate among European countries,¹¹ four times the Canadian rate,¹² five times that in England and Wales,¹³ and seven times that in Australia.¹⁴ No other country for which we have statistical data casts the net of social control through probation as widely as the United States.¹⁵

Community supervision in the U.S. generates enormous inflow to the prisons by transnational standards. In 2011, the average among reporting European states was only 6.3 percent of prison admissions attributable to "recalls" from community supervision—compared with 30 to 40 percent in this country over the past 20 years.¹⁶ These data have policy implications. The fact that community supervision is not a major contributor to prison populations in other developed nations shows that there is room for experimentation and change in the U.S.

Institutions of probation are of critical importance to the millions of individuals who are subject to supervision, their families and communities, and the interests of society generally. In a majority of all criminal cases, probation is the mechanism relied upon to achieve the goals of American sentencing systems. While probation is often seen as "leniency," its effects can be punitive, demoralizing, and can work to increase crime rather than furthering public safety.¹⁷ Probationers who struggle with intrusive sentence conditions, for example, may have difficulty holding a job. Required meetings with a probation officer can make it hard to keep regular hours at work—especially if the probation department is far away, public transportation is lacking, etc. (A probation officer who shows up at a client's place of work may not be much better.) Also, the burden of unrealistic economic sanctions can make it difficult for offenders to get on a stable course financially. As the recent ethnographic work of sociologist Alice Goffman has shown, probationers or parolees who are in arrears in the payment of fines, restitution, correctional fees, or other rules of supervision, can become fugitives within their own communities—avoiding work, their homes and families, medical care, and important events like weddings and funerals.¹⁸ This is hardly the path to successful reintegration into the community—or the reduction of recidivism.

II. The Probation Revocation Project

The Probation Revocation Project is one of four projects currently underway in the Sentencing Law and Policy program area at the Robina Institute of Criminal Law and Criminal Justice, University of Minnesota Law School. The project received funding in 2013 from the Robina Foundation as multi-year initiative to encourage a rethinking of probation revocation policy across the United States. The project will engage directly with a number of jurisdictions to better understand their philosophies and daily practices of probation revocation—and to explore possibilities for experimentation and change in collaboration with responsible officials in a number of sites.

The project includes three related initiatives. The first is to achieve a better understanding of the laws and rules that govern probation and probation revocation. In many instances, this legal "superstructure" determines what can and cannot be done in the field. We will have more to say below about the project's study of the legal context of probation revocation.

The project also includes plans to involve a number of jurisdictions over the course of two phases. In the "Alpha phase," already well underway, we are in the processes of identifying six-to-eight local jurisdictions—in four states—that are willing to work with us in an examination of their extant practices, successes, and challenges. This group will reflect a variety of different practices, and will include both urban jurisdictions and counties with smaller populations. In the second "Beta phase," we expect to identify four-to-six sites that are receptive to technical assistance and collaboration in the area of revocation reform. We will work closely with each site to generate specific and workable options to improve their systems, and will assist them in adoption and implementation. The project will then follow the Beta sites over a period of time to learn from their experiences. The goal in each jurisdiction will be to work toward long-lasting reforms that will remain in place beyond times of perceived crisis or acute budgetary stress.

Ultimately, we hope the Probation Revocation Project will be useful to a larger number of states and counties who are exposed to our work, including jurisdictions we have not worked with directly. Dissemination of our work, in a report such as this one, is therefore a crucial part of the endeavor. This report will be the first in a series of publications intended to make the benefits of the project widely available to policymaker and practitioner audiences. Future reports, for example, will document and disseminate our work in the Alpha and Beta sites. If successful, the Probation Revocation Project will significantly inform the direction of

the sentencing reform movements in America, providing “road tested” models for successful practice in the handling of probation violators.

III. This Report: Ambitions, Scope, Limitations, Uses

The focus of this report is probation revocations and what leads up to them. Each legal profile describes a particular state’s approach to issues collected under twelve headings concerning probation. These are: Definition and Purpose, Forms of Probation, Term, Early Termination, Supervision, Conditions, Modification of Conditions, Extension of Probation Term, Revocation Procedures, Legal Standard for Revocation, Revocation and Lesser Sanctions and Appeal. The selected topics embrace aspects of the use of probation that may contribute to (or, conversely, reduce) revocation rates or the numbers of probationers who enter revocation proceedings. We begin with the nature of the probation sanction itself, including lengths of term and the burdens placed on probationers through sentence conditions. These are the early precursors of revocation rates. We also focus on what happens during the probation term, and how the law allows the terms of conditions of probation to lighten or grow more restrictive in individual cases. For example, legal arrangements during the probation period that encourage probationers to succeed—or at least do not impede their success—will have an impact on revocation numbers. Finally, we give close attention to each state’s probation revocation process itself, including the legal grounds for revocation, the identity of the ultimate decisionmaker (judicial versus administrative), rules for hearings, procedural rights that accrue to the probationer, and the range of sanctions that may be imposed after a sentence violation is proven or admitted.

This report relies on official legal source materials such as statutes, court rules, caselaw, administrative rules and policies, and publicly-available documents. The report seeks to describe, more or less, the “law-on-the-books,” with realization that the official sources do not necessarily reflect actual practices of probation supervision and revocation on the ground. Even so, the report provides new and valuable comparative information about statewide legal superstructures for probationary sentences. While not a full portrait of what happens in individual states (far from it!), the report illuminates crucial legal boundaries within which local and case-specific discretion must be exercised. For example, a state that caps the maximum length of probation terms at five years by statutory command will likely have a different overall experience of probation revocation than a state that allows probation terms of several decades or more.

One recurring theme of this report is that there is tremendous variety in the formal law of probation across American states—and the amount of diversity would grow exponentially if one tried to account for all the differences in the law’s application across the thousands of probation agencies and local court systems in the country. It is important to keep in mind—or to know that the authors of the report have kept in mind—that the realities of probation and probation revocation are geographically different *within* states. The statewide legal frameworks described in the report are almost certainly implemented in vastly different ways from district to district, or county to county.

Scope and Limitations of the Report

This report focuses on probation as an original sentence following a criminal conviction, however it is named. (The word “probation” has different legal meanings across the states—and occasionally is not used at all.) The report does not address the use of pre-conviction probation (e.g., through deferred adjudication agreements or diversions from prosecution) in much depth. While the availability of such dispositions is noted, no comprehensive research into their workings has been done. In addition, the report does not survey the use of specialized or “therapeutic” courts like drug courts, mental health courts, domestic violence courts, DUI courts, and veterans’ courts. These are complicated subjects in their own right—and much larger numbers of offenders are on unadorned probation as defined in this report.

Although probation is sometimes used for supervision of prison releasees, that type of probation is not the focus of this report. We are primarily concerned with offenders who, at least at the time of original sentencing, were deemed good candidates for supervision and return to the community. This is a population for whom sentencing judges felt prison was not a just or required sentence. The revocation decision thus represents a fundamental change from that original judgment.

In one respect, all states must follow the same rules of probation revocation. All states are required to abide by federal constitutional constraints on the revocation process. The most important cases are *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and *Morrissey v. Brewer*, 408 U.S. 471 (1972).¹⁹ These decisions are well known, and we do not see added value in discussing them in detail. Also, in the spirit of the report as a whole, it does not try to address how faithfully the states have implemented the applicable constitutional requirements.

IV. Examples of the Report's Findings

The best way to digest the report's substantive content is to flip through the state reports, which are organized so it is possible to focus in on whatever issues are of most interest. (With every two turns of page, one arrives at a new state; subject matters are clearly indicated in separate headings.) The discussion below gives several examples of the kinds of observations that are made possible by having so much raw comparative information in one place.

Forms of Probation

The legal conception and status of probation sentences is one of the most difficult things to determine accurately when looking at states across the country. In a majority of states surveyed in this report, probation is understood to be a component of a suspended (or stayed) prison sentence—and usually states have more than one way to suspend a sentence. Less commonly, probation is considered to be a free-standing sanction in its own right, and may be imposed by sentencing courts without pairing it with a suspended prison term. Some states allow for both suspended sentences and free-standing probation.

The legal status of probation carries implications for things like length of term and available penalties for sentence violations. For instance, in some states, following revocation of probation granted via a suspended prison sentence, the law requires that the original sentence must be executed without change. A revoking court cannot elect any other sanction—except by choosing not to revoke in the first place. In a greater number of states surveyed in this report, revocation does not mandate imposition of the originally suspended sentence, but allows for resentencing. In some jurisdictions, the range of available sanctions depends on what kind of suspended sentence was used by the sentencing judge (e.g., suspended execution versus suspended imposition). To add to the picture of diversity in legal approach: Jurisdictions that do not define probation as concomitant to a suspended sentence, but as a free-standing sentence, must approach the question of available sanctions in a completely different way.

Lengths of Term (and Early Termination)

States have taken wildly different approaches to maximum statutory limits on the durations of probation terms. Many states permit probation sentences to be meted out in decades, depending on the offense, a good number provide for "lifetime" probation in designated cases, especially for serious sex offenses. A few have no limits on probation terms at all. At the opposite extreme, there are states that do not allow probation terms, for any offense, to run longer than one year, or a maximum of several years—depending

on the state. In at least one state, probation is not even a sentencing option for less-serious felonies, which add up to the majority of all felonies. This amounts to a maximum probation term of zero for those crimes.

Supervision Fees

Most states require probationers to pay supervision fees, and many have additional fees or surcharges. The extent of statutorily-authorized fees is very different from state to state. At least one state allows for no fees at all, except in DUI cases. This is the low end of the spectrum for the 21 states in this report, although the American Law Institute's Model Penal Code recommends that states end the practice of collecting supervision fees from probationers entirely. Among states that impose fees, there are many subsidiary variations in practice: Sometimes payment of fees is a condition of probation and sometimes not; sometimes probation can be revoked for nonpayment and sometimes not; some states consider the defendant's ability to pay at the sentencing stage, when first imposing fees, while others do not consider ability to pay until much further down the road, at enforcement proceedings.

The report's catalog of fees to which probationers are subject is far from complete. In some states, fees, assessments, surcharges, and penalties are imposed by local jurisdictions, private service providers, and collection agencies.²⁰ These forms of financial penalties would not show up in research limited to statewide law. Further, even at the state level, statutory authorizations of specialized fees are often scattered throughout the sentencing code, and are not consolidated in the provisions dealing with probation. There are many such financial obligations that our research would not have discovered.

Grounds for Probation Revocations

The great majority of state's laws in this survey provide that *any* violation of probation conditions is ground for revocation, without qualification as to the seriousness of the violation, and that commission of a new offense is also a basis for revocation. There are examples of much different approaches, however. In at least two of the states in the survey, probation violators may never be "revoked" to the state prisons, and must be dealt with at the local level. In at least one state, a new criminal offense is not a probation violation and cannot lead to revocation or other sanctions; the corrections department must instead refer such cases for prosecution. Finally, a handful of state laws say that the mere fact of a violation cannot support revocation, and the presiding official (usually a judge) must make additional findings before revocation is permissible.

Probation Revocation Process

There are many approaches to procedural issues during the revocation process in the report's 21 states. Most importantly, perhaps, some states provide appointed counsel in all revocation proceedings, while many provide counsel only in designated circumstances. Those that provide counsel some of the time employ different standards to decide when counsel must be provided. On this issue, states have many different ways of responding to the federal constitutional command that legal representation is *sometimes* required at probation revocation. States also differ on the relevant standard of proof of contested facts, and whether victims have the right to be present and express their views at revocation proceedings. At least one state provides for pre-hearing discovery that gives probationers access to nearly all of the probation department's files. All states provide for administrative and/or judicial review of revocations, although the particulars vary a great deal across jurisdictions. Judicial review is almost always limited to a petition process as opposed to an appeal as of right, or is reposed in the specialized arena of postconviction remedies.

Sanctions for Probation Violators

There is impressive diversity on the question of penalties, as with most other fundamental issues concerning probation revocation. In many states, revocation results in a resentencing of the defendant, so that any penalty that could have been imposed at the original sentencing can be used as a revocation sanction. As mentioned earlier, some states in some circumstances require that a previously suspended sentence be executed without alteration. Either approach could make the stakes of revocation long incarceration periods for some offenses. At the other end of the spectrum, the maximum penalty for a probation violation is capped at 60 days in one jurisdiction. Under one of the Model Penal Code's recommendations, confinement as a revocation sanction could never exceed three years.

All states allow for sanctions short of revocation after a violation has been proven or admitted. Most make this a discretionary choice of the judge (or administrative decisionmaker), although some regulate the decision statutorily or through sanctions guidelines. In most states, a revoking judge has great latitude and discretion in deciding what sanction to impose.



Every reader will have their own thoughts about what observations stand out in the 21 state legal profiles, and which are of importance. We must stress that the report does not try to evaluate or pass judgment on the legal arrangements in any of the 21 states. The goal is to provide solid, objective information, so that readers can form their own opinions and conclusions. We are confident that any person knowledgeable in community corrections will find much food for thought in the state profiles, and we do not want to bias that process. Indeed, we are quite interested to see where the fruits of the research may lead.

END NOTES

¹ Ronald P. Corbett, Jr., is the Project Director of the Probation Revocation Project at the Robina Institute of Criminal Law and Criminal Justice, University of Minnesota Law School. Kevin R. Reitz is the Co-Director of the Robina Institute and James Annenberg La Vea Land Grant Chair in Criminal Procedure Law, University of Minnesota Law School.

² We thank the University of Minnesota law students who served on the original legal-research team for this project, and contributed much of the state-by-state research: Gauri Samant, Ethan Scrivner, Carla Virlee, and Shuangqi (Joy) Wang. The writing and editing team was spearheaded by Kelly Mitchell, Executive Director of the Robina Institute of Criminal Law and Justice and Robina Co-Director Professor Kevin R. Reitz, and included Alexis Watts, University of Minnesota J.D., 2014, University of Minnesota law students Catherine A. Ellis and Joy Wang. Professor Cecelia Klingele, University of Wisconsin Law School, consulted closely and assisted at every stage of the research and writing of the report. We have also been helped by dozens of knowledgeable officials and practitioners in every state included in this report, who have answered questions at every stage of the research, by email or phone call, or have reviewed drafts of the profiles for their states. The quality and accuracy of the profiles have benefited enormously from the donation of their time and expertise.

³ *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting opinion).

⁴ See, e.g., David Garland ed., MASS IMPRISONMENT (2001); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006); Jonathan Simon, *Mass Incarceration: From Social Policy to Social Problem*, in Joan Petersilia and Kevin R. Reitz eds., THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS (2012).

⁵ The U.S. prison rate peaked at year-end 2009. In 2010 national prison populations dropped by 0.6 percent (the first decline since 1972), in 2011 they decreased 0.9 percent, in 2012 they decreased by 1.8 percent, and in 2013 they decreased by 0.6 percent. Bureau of Justice Statistics, *Prisoners in 2013* (2014), at 6 table 5; Bureau of Justice Statistics, *Prisoners in 2012: Trends in Admissions and Releases, 1991-2012* (2013), at 1, 23 table 17; Bureau of Justice Statistics, *Prisoners in 2011* (2012), at 1; Bureau of Justice Statistics, *Prisoners in 2011* (2012), at 1; Bureau of Justice Statistics, *Prisoners in 2010* (2011), at 1. As with prison populations, probation populations have been in modest decline for the past several years, see Bureau of Justice Statistics, *Probation and Parole in the United States, 2012* (2013), at 1. On worldwide comparisons, see, e.g., Carolyn W. Deady, *Incarceration and Recidivism: Lessons from Abroad* (Pell Center for International Relations and Public Policy, 2014); Dan Roberts and Karen McVeigh, *Eric Holder Unveils New Reforms Aimed at Curbing US Prison Population*, The Guardian, August 12, 2013.

⁶ Pew Center on the States, *When Offenders Break the Rules: Smart Responses to Parole and Probation Violations* (2007); see also Alfred Blumstein & Allen J. Beck, *Reentry as a Transient State between Liberty and Recommitment*, in Jeremy Travis and Christy Visher, eds., PRISONER REENTRY AND CRIME IN AMERICA (2005).

⁷ See Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. Crim. L. & Criminology 1015 (2013); Michelle Phelps, *Mass Probation: Toward a More Robust Theory of State Variation*, University of Minnesota, Minnesota Population Center Working Paper No. 2014-4 (2014).

⁸ Bureau of Justice Statistics, *Probation and Parole in the United States, 2012* (2013), at 1; Pew Center on the States, *One in 100: Behind Bars in America 2008* (2008).

⁹ See Bureau of Justice Statistics, *Prisoners in 2012: Trends in Admissions and Releases, 1991-2012* (2013); Bureau of Justice Statistics, *Jail Inmates at Midyear 2012—Statistical Tables* (2013); Bureau of Justice Statistics, *Probation and Parole in the United States, 2012* (2013). These counts do not include hundreds of thousands of individuals in diversion programs or serving deferred adjudications, which are often used as alternative routes to probation or programs such as drug courts and other specialized courts. See Faye S. Taxman, Matthew L. Perdoni, and Lana D. Harrison, *Drug Treatment Services for Adult Offenders: The State of the State*, 32 J. of Substance Abuse Treatment 239 (2007) (estimating more than one million adults enrolled in community-supervision programs not formally classified as probation).

¹⁰ See Michelle S. Phelps, *The Paradox of Probation: Understanding the Expansion of an “Alternative” to Incarceration during the Prison Boom*, Doctoral Dissertation, Princeton University (2013), at 30 (suggesting and defining the term “mass probation” to describe the rapid build-up (and racial disproportionality) of probation supervision rates.”).

¹¹ As of this writing, the most recent statistics from Europe are from 2011. For that year, the Council of Europe reported an average probation rate among 39 reporting countries of 179 per 100,000 general population. See Council of Europe Annual Penal Statistics, *Space II: Persons Serving Non-Custodial Sanctions and Measures in 2011* (2013), at 18-23; Council of Europe Annual Penal Statistics, *Space II: 2011: Main Indicators* (2012). The U.S. probation rate for 2011 was reported by the Department of Justice as 1,662 per 100,000 adults, which recalculates to 1,263 per 100,000 general population. See Bureau of Justice Statistics, *Probation and Parole in the United States, 2011* (2012), at 16 app. table 2.

END NOTES

¹² Canada's probation rate for 2010-2011 was 393 per 100,000 adults, compared with the U.S. rate of 1662 per 100,000 adults. See Statistics Canada, *Average Counts of Adults on Probation, by Province, 2010/2011*, at <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715/c-g/desc/desc10-eng.htm> (last visited Oct. 5, 2014).

¹³ England and Wales' reported probation rate in 2011 was 290 per 100,000 general population, compared with the U.S. rate of 1263 per 100,000 general population, See Council of Europe Annual Penal Statistics, *Space II: Persons Serving Non-Custodial Sanctions and Measures in 2011* (2013).

¹⁴ In Australia, the total community supervision rate in 2011 was 314 per 100,000 adults. Sixty percent were on probation, another 17 percent on community service, and 22 percent on parole. See Australian Bureau of Statistics, *Community Based Corrections: Adult Community-Based Orders*, at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Community-based%20corrections~72> (last visited Sept. 16, 2013). If we combine both probation and community-service populations in Australia to derive a "probation" rate comparable to that reported in the U.S., the Australian probation rate in 2011 was 242 per 100,000 adults. That is roughly one-seventh the national U.S. rate for the same year, and well below the probation supervision rate of any American state.

¹⁵ For discussions of comparative probation and postrelease supervision practices, see § 6.03, Comment e and Reporters' Note to Comment e; § 6.09, Comment d and Reporters' Note to Comment d.

¹⁶ See Dirk van Zyl Smit and Alessandro Corda, American Exceptionalism in Parole Release and Supervision, in Kevin R. Reitz, ed., *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* (forthcoming, Oxford University Press); Bureau of Justice Statistics, *Prisoners in 2012: Trends in Admissions and Releases, 1991-2012* (2013), at 2-3.

¹⁷ See Ronald P. Corbett, Jr., *The Burdens of Leniency: The Changing Face of Probation*, 99 Minn. L. Rev. (forthcoming 2014).

¹⁸ ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2013) (using the term "legally-precarious persons").

¹⁹ Although the *Morrissey* case dealt with parole revocations, the Supreme Court said in *Gagnon* that the constitutionally-required procedures laid out in *Morrissey* are also applicable to probation revocations. See *Gagnon*, 411 U.S. at 782.

²⁰ Ruback.



PROBATION IN ALABAMA



**Probation Rate (per 100,000):
1,563**

Rank: 33 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

The purposes of probation are “to ameliorate the harshness of the law’s judgment and give the convict a chance to show that he or she is a fit subject and may be rehabilitated and become an acceptable citizen.”¹

Forms of Probation

Probation for felons and misdemeanants is defined as an element of a prison sentence, imposed when execution of a prison term is suspended. It is available only to defendants who receive prison sentences of 15 years or less.²

Term

The term of probation is discretionary with the court and may be extended at any time, but must remain within statutory limits. For a misdemeanor, a probation term may not exceed two years; for a felony, it may not exceed five years.³ Municipal courts with jurisdiction over violations of municipal ordinances may suspend sentences for up to two years.⁴

Early Termination

The sentencing court may absolutely discharge the probationer at any time during the probation term on motion of the probationer, the probation officer, or on the initiative of the court.⁵ The probation officer may also

recommend termination of probation based on satisfactory compliance with conditions of probation “over a sufficient portion of the period of probation,” with the necessary period of compliance—and what counts as satisfactory compliance—left to the discretion of the probation officer and the court in individual cases.⁶

Supervision

Probation and parole officers of the Alabama Board of Pardons and Paroles, a legislative agency, supervise the significant majority of adult probationers in the state.⁷ However, legislation has been proposed that would transfer the responsibility for supervision of probationers to a “Division of Probation and Paroles” within the Alabama Department of Corrections.⁸ Some probationers attend a transitional residential program that offers education, vocational training, and counseling to those not otherwise eligible for probation.⁹

All supervised probation carries a mandatory monthly fee of \$40 for those who have an income of any amount.¹⁰ However, unsupervised probation is available to some individuals.¹¹ The Board of Pardons and Paroles is authorized to collect up to 25% of a probationer’s gross monthly income as an program fee when they receive intensive supervision.¹²

Conditions

The court has discretionary power to impose probation conditions as enumerated in statute or "any other conditions." Courts may require the probationer to avoid bad habits, disreputable people or places, report to a probation officer, permit the officer to visit the home or elsewhere, work at suitable employment, remain in a specified place, pay fines or costs in installments that the court may direct, make reparations or restitution to victims, or support dependents to the best of his or her ability.¹³ Probation officers may also issue instructions to probationers that are consistent with the court's conditions.¹⁴

However, the courts have held that "any condition imposed by the trial court must be designed to meet the ends of rehabilitation and the protection of the public." Consideration must be given to the purposes served by probation, the extent to which constitutional rights enjoyed by law-abiding citizens should be given to probationers, and the legitimate needs of law enforcement.¹⁵ Probationers have the power to accept or reject the conditions of probation and may instead elect to serve out their prison sentences. An order of probation is not in effect until accepted.¹⁶

There is no statutory authority to impose a period of confinement as a condition of probation. Under the "Split Sentence Act," for prison sentences of 15 years or less, courts can order that the first 3 will be served in prison, or the first 90 to 180 days in boot camp, with the remainder of the prison sentence suspended and the offender sentenced to a term of probation as determined by the court. For sentences of more than 15 years but less than 20, the defendant may be sentenced to a minimum of 3 years in prison, with a maximum of 5 years.¹⁷

Modification of Conditions

The court may modify or clarify probation conditions at any time at the request of a probationer or probation officer. A court may also modify or clarify any instructions issued by the probation officer.¹⁸

Extension of Probation Term

Alabama Rule of Criminal Procedure 27.3 provides the court authority "[a]t any time during a term of probation" and "for good cause shown" to "extend the term of probation up to the maximum period established by law." Probation may continue until conditions of probation, such as restitution, are fulfilled, but may not exceed the maximum statutory term.¹⁹

Grounds for Probation Revocation

The court may revoke probation if it finds a violation of the conditions or regulations of probation or instructions of a probation officer occurred.²⁰

OF INTEREST

The Birmingham field office of the Alabama Board of Pardons and Paroles runs a 6-month "Woman to Woman" program for female probationers that meets one evening a week. The program's goal is to "facilitate life change in the women who participate, encouraging them to assess, progress, and live clean, sober lives that make them and their families proud."

Source: St. Ala. Board of Pardons & Paroles, *supra* note 9, at 6.

Revocation Procedures

The prosecutor, probation officer, or sentencing court can initiate probation revocation proceedings.²¹ The sentencing court then issues a summons or an arrest warrant, or alternatively, the probation officer may arrest the probationer.²² Initial appearances are made before the judge who issued the warrant or, if the defendant is arrested without a warrant, before the original sentencing judge (if available). At the initial hearing, a probationer is informed of the violation in writing, given a warning that his statements may be used against him in the probation hearing, given an opportunity to request counsel, given a date for the revocation hearing, and either released on bail or ordered held without bond.²³ The probationer may waive the revocation hearing and the judge may make a final disposition of the issue.²⁴

The probationer is entitled to be at the hearing, and may be represented by counsel though this is "not an unqualified right."²⁵ At the revocation hearing, indigent probationers are appointed counsel only if they can make a colorable claim that they have not committed the alleged violation or if there are substantial reasons that justify or mitigate the violation.²⁶ Before an admission of guilt can be made, the court must determine that the probationer understands the nature of the violation, the right to be represented by counsel (if criteria are met), the right to testify, present witnesses and

evidence, and to cross examine state witnesses. The court must also warn the probationer that statements about alleged crimes can be used in future proceedings.²⁷

There is no express provision for victim participation in probation revocation proceedings,²⁸ although victims have the statutory right to participate and present evidence at any pre-sentencing, sentencing, or restitution proceeding.²⁹

Grades of Offenses in Alabama

- A felony is an offense for which a term of imprisonment greater than one year is authorized by statute. A misdemeanor is an offense for which a sentence not more than one year may be imposed.

Sources: Ala. Code § 13A-1-2(8) (2014);
Ala. Code § 13A-1-2(9) (2014).

Legal Standard for Revocation

Courts may find that a probation violation or new crime has occurred if they are "reasonably satisfied from the evidence" produced by the state.³⁰ By statute, the court shall not revoke probation or other community-based punishment in favor of confinement unless the court finds that either: (a) no measure short of confinement will adequately protect the community from further criminal activity; or (b) no measure short of confinement will avoid depreciating the seriousness of the violation.³¹ Mere arrest or filing of new charges against a probationer is not sufficient to revoke probation, but a final conviction is not required.³²

Revocation and Lesser Sanctions

If the court finds a defendant has violated any condition of probation, the court may continue probation, issue a warning, conduct an informal conference to reemphasize conditions, modify conditions, or revoke probation. Modification of conditions can include a period of up to 90 days of confinement.³³

If probation is revoked, the court is not bound to impose the original suspended sentence in full; rather, the court may "impose the sentence that was suspended at the original hearing or any lesser sentence."³⁴

If revocation results in a sentence of confinement, credit shall be given for all time spent in custody prior to revocation; the court will also give "significant weight" to time spent in substantial compliance with probation terms.³⁵

Appeal

The availability of appeal from revocation decisions is established by case law rather than statute, and requires the offender to petition for review through a certiorari process.³⁶ Appeals in criminal cases generally are only available to defendants.³⁷ Review is limited to "whether the act in question was supported by any substantial evidence, or whether findings and conclusions are contrary to uncontradicted evidence, or whether there was an improper application of the findings viewed in a legal sense."³⁸

END NOTES

- ¹ *Wray v. State*, 472 So.2d 1119, 1121 (Ala. 1985).
- ² Ala. Code § 12-14-13(a); 15-22-50 (2014).
- ³ Ala. Code § 15-22-54 (a) (2014).
- ⁴ Ala. Const. Art. VI, § 145 (2012); § 12-14-13(a), *supra* note 2.
- ⁵ Ala. R. Crim. P. 27.3(b) (2014).
- ⁶ Ala. Code § 15-22-54(b) (2014).
- ⁷ Ala. Code § 15-22-53 (2014).
- ⁸ S.B. 412, 2014 Leg., Reg. Sess. (Ala. 2014).
- ⁹ St. Ala. Board of Pardons & Paroles Ann. Rep. Fiscal Year 2012-2013 1, 7 (2013), <http://www.pardons.alabama.gov/PDFs/Annual%20report%202012-2013.pdf>.
- ¹⁰ Ala. Code § 15-22-2(a)(1) (2014).
- ¹¹ Ala. Code § 12-25-36(2) (2014).
- ¹² Ala. Code § 15-22-56(b) (2014).
- ¹³ Ala. Code § 15-22-52 (2014).
- ¹⁴ Ala. R. Crim. P. 27.6(c) (2014).
- ¹⁵ Ala. R. Crim. P. 27.1 (2014); *Bowers v. State*, 565 So.2d 1203, 1205 (Ala. Crim. App. 1990).
- ¹⁶ *Dixon v. State*, 912 So.2d 292, 298 (Ala. Crim. App. 2005).
- ¹⁷ Ala. Code § 15-18-8(a) (2014). The Alabama Supreme Court has held that the court may suspend the term of imprisonment imposed under § 15-18-8. “[Section] 15-18-8(c) plainly authorizes a trial court to suspend “the minimum sentence” required to be imposed by § 15-18-8(a) including “the minimum period of confinement” that § 15-18-8(a)(1) requires for sentences greater than 15 years but not more than 20 years.” *Ex parte McCormick*, 932 So.2d 124, 132-33 (Ala. 2005).
- ¹⁸ Ala. Code § 15-22-52 (2014); Ala. R. Crim. P. 27.2 (2014).
- ¹⁹ *Sherer v. State*, 486 So.2d 1330, 1332 (Ala. Crim. App. 1986).
- ²⁰ Ala. R. Crim. P. 27.6(d) (2014).
- ²¹ Ala. R. Crim. P. 27.4(a) (2014).
- ²² Ala. R. Crim. P. 27.4 (2014).
- ²³ Ala. R. Crim. P. 27.5(a) (2014).
- ²⁴ Ala. R. Crim. P. 27.5(b) (2014).
- ²⁵ *Dean v. State*, 57 So.3d 169, 174-75 (Ala. 2010).
- ²⁶ Ala. R. Crim. P. 27.6(b) (2014).
- ²⁷ 27.6(c), *supra* note 14.
- ²⁸ Ala. Code § 15-23-75 (2014).
- ²⁹ Ala. Code § 15-23-74 (2014).
- ³⁰ Ala. R. Crim. P. 27.6(d)(1) (2014).
- ³¹ Ala. Code §§ 15-22-54(d)(4); 15-18-175(d)(3)(d) (2014).
- ³² *Mitchell v. State*, 462 So.2d 740, 742 (Ala. Crim. App. 1984).
- ³³ Ala. Code § 15-22-54(d)(1) (2014).
- ³⁴ Ala. Code § 15-22-54(d)(1)(e) (2014).
- ³⁵ Ala. Code § 15-22-54(d)(3) (2014).
- ³⁶ *Stokley v. State*, 709 So.2d 84, 95 (Ala. Crim. App. 1997).
- ³⁷ Ala. R. App. P. 3 (2014).
- ³⁸ *Ellard v. State*, 474 So.2d 743, 750 (Ala. Crim. App. 1984), *aff'd*, 474 So.2d 758 (Ala. 1985).



PROBATION IN ARIZONA



Probation Rate (per 100,000):

1,459

Rank: 31 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

Probation is a form of criminal sentence in which the defendant agrees to comply with specified court-ordered conditions rather than being sentenced to jail or prison.¹ The purpose of probation is to make the punishment fit the offender.²

Forms of Probation

Following conviction of an offense eligible for probation, a court may suspend either the imposition or execution of a prison sentence and may grant intensive probation, supervised probation, or unsupervised probation.³ Intensive probation is defined as "highly structured and closely supervised probation which emphasizes the payment of restitution."⁴

Following voter-approved propositions, courts are required to suspend the imposition or execution of prison sentences for first and second time non-violent drug offenders convicted of possession of a personal quantity and place them on probation. The law is intended to direct individuals into drug treatment and education within the community.⁵

Term

The length of probation depends on the type of crime committed. Generally, for the following levels of offense, maximum terms of probation are:

- Class 2 felony: 7 years.
- Class 3 felony: 5 years.
- Class 4 felony: 4 years.
- Class 5 or 6 felony: 3 years.
- Class 1 misdemeanor: 3 years.
- Class 2 misdemeanor: 2 years.
- Class 3 misdemeanor: 1 year.

DUI violations carry up to 5 years of probation, while aggravated DUI offenders may receive up to 10 years.

Terrorism, stalking, child or vulnerable adult abuse, or violation of sex offender registration laws carry mandatory minimum probation sentences (if the judge elects to sentence to probation rather than prison) that correspond to the maximum terms listed above, depending on the class of offense, and up to lifetime probation when the court "believes [this] is appropriate for the ends of justice."⁶

Early Termination

The court, on its own initiative or through the application of the probationer can terminate the period of probation if justice will be served and the probationer's conduct warrants it. However, this requires notice and an opportunity to be heard for the prosecutor and, on request, the victim.⁷

Supervision

Probation is administered at the state level by the Adult Probation Services Division within the Administrative Office of the Courts (AOC). Supervision is provided at the county level by one of 15 probation departments. Fourteen of the fifteen departments are funded by the AOC; adult probation in Maricopa County, which is where Phoenix is located, is funded by the county.⁸

Conditions

The court may set terms and conditions of probation as the law requires and the court deems appropriate.⁹ Whether a condition is valid or not depends on whether there is a nexus between the conditions imposed and the goals achieved by probation.¹⁰

The court may require the defendant to serve time as part of a probation sentence, up to one year in jail or the maximum period of imprisonment permitted under statute, whichever is shorter. The periods of incarceration may be consecutive or concurrent.¹¹ Probationers who have accepted plea agreements including probation are barred in some cases from opting instead to serve their term of incarceration if they find the conditions to be too onerous.¹²

Adult probationers must pay a fee for supervision of at least \$65 per month as a condition of probation, although the court may assess a lesser fee based on the probationer's inability to pay. In municipal and justice courts, unsupervised probation carries no fee.¹³

Probationers on intensive probation must also pay any restitution and a \$75 per month minimum probation fee.¹⁴

Modification of Conditions

The court may issue a warrant for the arrest of the defendant and, in a hearing, may modify or add conditions.¹⁵ Modifications may be made where the court has failed to obtain revocation, but the probationer must be given due process protections.¹⁶

Extension of Probation Term

A court may extend probation at any time before the expiration or termination of probation if restitution has not been paid, so long as there has been proper notice and a hearing that guarantees due process protections.¹⁷ The extension may be up to five years on a felony conviction, or up to two years on a misdemeanor.¹⁸

OF INTEREST

Some Arizona probation officers use a Field Reassessment Offender Screening Tool (FROST) to assess probationers' risks and needs based on information gained from a carefully conducted personal interview, file information, and professional judgment. The goal of FROST is to refine knowledge of the relationship between offender lifestyles and recidivism.

Sources: Arizona Supreme Court, Field Reassessment Offender Screening Tool (FROST), Azcourts.gov: Ariz. Jud. Branch (2014), <http://www.azcourts.gov/apsd/EvidenceBasedPractice/RiskNeedsAssessment/FieldReassessmentOffenderScreeningTool%28FROST%29.aspx>.

Grounds for Probation Revocation

Probation may be revoked at any time prior to the expiration or termination of the probation period if a defendant commits an additional offense or violates the terms of probation.¹⁹ Probation may not be revoked for violation of a condition or regulation of which the probationer has not received a written copy.²⁰

Revocation Procedures

An initial appearance must be made in which the court advises the probationer of the right to counsel and right against self-incrimination, sets a date for a revocation hearing, and makes a release determination.²¹ This arraignment hearing must occur no more than 7 days after an initial appearance or the service of a summons, and must inform the probationer of the basis of the violation and provide an opportunity to admit or deny each allegation. If no acceptable admission is made, a revocation hearing is set.²²

A revocation hearing occurs within 7-20 days after the arraignment, and the probationer must be present. Each party may present evidence, including hearsay and all other non-privileged evidence, and may cross examine witnesses. If a violation is found, a disposition hearing is set within another 7-20 days to decide whether or not probation should be revoked. This hearing may be waived by the probationer.²³

Victims have the right to be present and to be heard at any proceeding involving the termination of probation or intensive probation; probation revocation dispositions; modifications of probation or intensive probation terms that will substantially impact the probationer's contact with or safety of the victim or that affects restitution or incarceration status; or transfers of probation jurisdiction.²⁴

Legal Standard for Revocation

A violation must be established by a preponderance of the evidence, and the court must make specific findings on the facts that establish the violation.²⁵ Although revocation lies with the sound discretion of the trial court, the discretion does not allow capriciousness or arbitrariness.²⁶

Revocation and Lesser Sanctions

If a violation is found, the court may revoke, modify or continue probation.²⁷

If the court elects to revoke probation, then the court must pronounce a new sentence on the original charge. The court is not required to impose the terms of a sentence whose execution was suspended at the original sentencing, but may choose any sentence that would have been available at that time.²⁸ The sentence imposed must be based on the original underlying offense, although the fact of the probation violation may be treated as an aggravating factor.²⁹

Short of revocation, the court may increase the term of probation up to the statutory maximum.³⁰ Technical violations, not chargeable as criminal offenses, can result in intensive probation, which is a highly structured and closely supervised form of probation.³¹ A defendant on lifetime probation can be incarcerated for up to a year as a condition of returning to probation after a violation has been found.³²

Appeal

The defendant may appeal a probation revocation decision, but the appeals court will uphold a trial court's finding that a probationer has violated probation unless the finding is "arbitrary and unsupported by any theory of evidence."³³ Appellate courts will not interfere with the terms of probation unless they violate fundamental rights or bear "no reasonable relationship whatever" to the purposes of incarceration.³⁴ Issues not raised in the initial probation hearing may be considered waived.³⁵

Grades of Offenses in Arizona

Offense Category	Maximum Punishment
Murder 1	Capital punishment
Felony class 1	10 - 25 years
Felony* class 2	4 (minimum) - 10 (maximum) years
Felony class 3	2.5 - 7 years
Felony class 4	1.5 - 3 years
Felony class 5	.75 - 2 years
Felony class 6	.5 - 1.5 years
Misdemeanor class 1 ³	Maximum of 6 months
Misdemeanor class 2	Maximum of 4 months
Misdemeanor class 3	Maximum of 30 days

Sources: Ariz. Rev. Stat. Ann. § 13-1105(D) (2014); Ariz. Rev. Stat. Ann. § 13-710(A) (2014); Ariz. Rev. Stat. Ann. § 13-702(D) (2014). NB: new legislation, if passed, may affect Arizona sentencing statutes, making penalties harsher in length and creating maximum and minimum presumptive penalties only. Current law also considers mitigated (below the minimum) and aggravated (above the maximum) sentences. H.B. 2372, 51st Legis., 1st Reg. Sess. (Ariz. 2014); Ariz. Rev. Stat. Ann. § 13-707(A) (2014); For punishment of recidivist offenders, see Ariz. Rev. Stat. Ann. § 13-703 (2014). "Dangerous offenders" are also sentenced differently under Ariz. Rev. Stat. Ann. § 13-704 (2014), "dangerous crimes against children" under Ariz. Rev. Stat. Ann. § 13-705 (2014) and "serious, violent, or aggravated offenders" under Ariz. Rev. Stat. Ann. § 13-706 (2014).

END NOTES

- ¹ Kathy Waters, J.L. Doyle & Maria Aguilar-Amaya, *FY 2013 Annual Report*, Admin. Off. Ct.: Adult Probation Services Division 7 (2013), http://www.azcourts.gov/Portals/25/AnnRepPop/FY13_REPORT.pdf.
- ² *State v. Oliver*, 452 P.2d 529, 532 (Ariz. Ct. App. 1969).
- ³ Ariz. Rev. Stat. Ann. § 13-901(A) (2014).
- ⁴ Ariz. Rev. Stat. Ann. § 13-913 (2014).
- ⁵ Ariz. Rev. Stat. Ann. § 13-901.01(A), (F) (2014); *State v. Gomez*, 127 P.3d 873, 874, 878-79 (Ariz. 2006).
- ⁶ Ariz. Rev. Stat. Ann. § 13-902 (2014).
- ⁷ Ariz. Rev. Stat. Ann. § 13-901(E) (2014).
- ⁸ Waters, *supra* note 1, at 7.
- ⁹ Ariz. Rev. Stat. Ann. § 13-901(A) (2014).
- ¹⁰ *State v. Davis*, 579 P.2d 1110, 1112 (Ariz. Ct. App. 1978).
- ¹¹ Ariz. Rev. Stat. Ann. § 13-901(F) (2014).
- ¹² *Demarce v. Willrich*, 56 P.3d 76, 80 (Ariz. Ct. App. 2002).
- ¹³ Ariz. Rev. Stat. Ann. § 13-901(A) (2014).
- ¹⁴ Ariz. Rev. Stat. Ann. § 13-914 (2014).
- ¹⁵ Ariz. Rev. Stat. Ann. § 13-901(C) (2014).
- ¹⁶ *Green v. Superior Court in and for Cochise County*, 647 P.2d 166, 168-69 (Ariz. 1982).
- ¹⁷ *State v. Korzuch*, 920 P.2d 312, 314-15 (Ariz. 1996).
- ¹⁸ Ariz. Rev. Stat. Ann. § 13-902(C) (2014).
- ¹⁹ Ariz. Rev. Stat. Ann. § 13-901(C) (2014).
- ²⁰ Ariz. R. Crim. P. 27.8(c)(2) (2014). The purpose of this requirement is to “reduce evidentiary disputes over what probationers are told and to protect probationers against probation officers’ arbitrary acts.” *State v. Robinson*, 869 P.2d 1196, 1197 (1994).
- ²¹ Ariz. R. Crim. P. 27.7 (2014).
- ²² Ariz. R. Crim. P. 27.8(a) (2014).
- ²³ Ariz. R. Crim. P. 27.8(b)-(d) (2014).
- ²⁴ Ariz. R. Crim. P. 27.11 (2014).
- ²⁵ Ariz. R. Crim. P. 27.8(b)(3)-(4) (2014).
- ²⁶ *State v. Sanchez*, 506 P.2d 644, 645 (Ariz. Ct. App. 1973).
- ²⁷ Ariz. R. Crim. P. 27.8(c)(2) (2014).
- ²⁸ Ariz. R. Crim. P. 27.8(c)(2) (2014).
- ²⁹ *State v. Baum*, 893 P.2d 1301, 1303 (Ariz. App. 1995).
- ³⁰ *State v. Quintana*, 987 P.2d 811, 814 (Ariz. Ct. App. 1999).
- ³¹ Ariz. Rev. Stat. Ann. §§ 13-913, 13-914 (2014).
- ³² Ariz. Rev. Stat. Ann. § 13-901(G) (2014).
- ³³ *State v. Thomas*, 996 P.2d 113, 114 (Ariz. Ct. App. 1999).
- ³⁴ *State v. Turner*, 688 P.2d 1030, 1036 (Ariz. Ct. App. 1984).
- ³⁵ E.g. *State v. Alves*, 851 P.2d 129, 131 (Ariz. Ct. App. 1992).



PROBATION IN CALIFORNIA



Probation Rate (per 100,000):

1,027

Rank: 13 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

Probation is described as follows in California case law: "A grant of probation is not a matter of right; it is an act of clemency designed to allow rehabilitation. It is also, in effect, a bargain made by the People, through the Legislature and the courts, with the convicted individual, whereby the latter is in essence told that if he complies with the requirements of probation, he may become reinstated as a law-abiding member of society."¹

By statute, probation sentences are to be fashioned "to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer."²

Forms of Probation

"Probation" in California is achieved by the suspension of the imposition or execution of a sentence to confinement and the order of conditional and revocable release in the community under the supervision of a probation officer. There is also a form of unsupervised probation called a "conditional sentence," which also requires a suspended confinement sentence.³

For most defendants who successfully fulfill conditions for the entire period of probation, or who are discharged

prior to the termination of the period of probation, the court is statutorily required to expunge the defendant's record of conviction. Expungement is also available "in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief." Expungement is seen as a legislatively-authorized certification of complete rehabilitation based on a prescribed showing of exemplary conduct during the entire period of probation.⁴ Offenses not eligible for mandatory expungement include designated sexual, child pornography, and motor vehicle offenses.⁵

The Criminal Justice Realignment Act of 2011 created "mandatory supervision," to be administered by county probation officers. Mandatory supervision is imposed when the court partially suspends imposition or execution of a jail sentence, so that the first part of the sentence is served in confinement and the latter portion is served in the community.⁶ This is referred to as a "split sentence." The Realignment Act did not alter the availability of probation sentences.⁷

Term

The length of a probation term may be up to the maximum possible confinement term for the offense except that, if the maximum prison or jail term is five years or less, the court is authorized to impose up to five years of probation.⁸

Early Termination

The court may terminate the period of probation at any time and discharge the probationer when the ends of justice will be served and the good conduct of the probationer warrants it.⁹

Supervision

Probationers are supervised by county probation departments and their officers.¹⁰ Offenders with conditional sentences are unsupervised by a probation officer and report only to the court.¹¹

Conditions

The trial court has broad discretion to set the terms and conditions of probation. Some standard terms include payment of fines, restitution to victims and public agencies, community service, working and earning money to support dependents, participation in work detail, and staying away from victims.¹²

In addition, the court may order "other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer."¹³ Conditions will not be deemed to be invalid unless they: (1) have no relationship to the crime; (2) relate to conduct that is not itself criminal; and (3) require or forbid conduct not reasonably related to future criminality. This has been interpreted to mean that if a condition serves the purpose of reformation or rehabilitation, it follows that the condition is reasonably related to criminality.¹⁴

Incarceration in county jail may imposed "in connection with granting of probation" for a period not exceeding the maximum incarceration term fixed by law for the offense.¹⁵

Defendants eligible under the Realignment Act may be sentenced to jail followed by a term of mandatory supervision. This is called a "split sentence." The custody portion of the split sentence can be as little as one day or as much as the maximum allowable confinement term for the offense.¹⁶ Offenders on mandatory supervision are supervised by the county probation office and are subject to probation revocation procedures. In contrast to probation, however, a term of mandatory supervision may not be terminated early by the court.¹⁷

Probationers may be ordered to pay a number of costs to compensate counties and county probation departments for expenses they have incurred during pre- and post-sentencing time periods. Such costs are deemed "collateral" and their payment cannot be made a condition of probation.¹⁸

OF INTEREST

In 2011, California made one of the most significant changes in its criminal justice law in state history when it enacted Criminal Justice Realignment.⁴³ Probation departments in California are now responsible for monitoring many low-risk offenders released from state prison under "Post Release Community Supervision" (PRCS). On revocation, those released onto PRCS are subject to the same procedure as standard probationers, and appear before a trial court. The law encourages community-based punishment as an alternative to revocation; one example is flash incarceration, in which the PRCS participant serves up to 10 days in jail as a warning.

Sources: Judicial Counsel of Cal., Criminal Justice Realignment, Cal. Jud. Branch (2014), <http://www.courts.ca.gov/partners/realignment.htm>; J. Richard Couzens & Tricia A. Bigelow, Felony Sentencing After Realignment, Cal. Ct. Jud. Branch Cal. (Mar. 4, 2014), http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf.

Consistent with a defendant's ability to pay as determined by the court, the defendant must be ordered to pay the county probation department all or a portion of the reasonable cost of any probation supervision or a conditional sentence, of conducting any preplea investigation and preparing any preplea report, of conducting any presentence investigation and preparing any presentence report, and of processing a jurisdictional transfer, and of processing a request for interstate compact supervision. The reasonable cost of these services and of probation supervision or a conditional sentence shall not exceed the amount determined to be the actual average cost thereof. The defendant is entitled to a hearing that includes the right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. If the court determines that the defendant has the ability to pay all or part of the costs, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. In making a determination of whether a defendant has the ability to pay, the court shall take into account the amount of any fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution. The court may hold additional hearings during the probationary or conditional sentence period to review the defendant's financial ability to pay the amount, and in the manner, as set by the probation officer,

or his or her authorized representative, or as set by the court pursuant to this section. All sums paid by a defendant pursuant to this section shall be allocated for the operating expenses of the county probation department.¹⁹

For probationers ordered to undergo drug testing, who have the financial ability to pay all or part of the costs associated with that testing, the court must order the defendant to pay a reasonable fee, which shall not exceed the actual cost of the testing.²⁰

Grades of Offenses in California

- There is no comprehensive grading scheme for felonies and misdemeanors in California. Available penalties are set out in the law defining each crime. When not otherwise prescribed, a felony may be punished with up to 3 years of incarceration. A misdemeanor is a crime punishable by imprisonment in county jail. Misdemeanors may be punished by up to 1 year of confinement.

Sources: Cal. Penal Code §§ 17, 18 (2014); Cal. Penal Code §§ 19, 19.2 (2014).

For probationers ordered to serve jail time as a term of probation, there is provision for reimbursement of the costs of incarceration to cities and counties who have enacted ordinances to administer such a payment system.²¹

Modification of Conditions

By statute, courts "have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence."²² Under case law interpreting this provision, a change in circumstances is required before a court has jurisdiction to extend or otherwise modify probation, but no finding of a probation violation is required. An order modifying the terms of probation based on the same facts as the original order is considered to be in excess of the jurisdiction of the court, because there are no new circumstances to support it.²³

Modification requires a hearing in open court and the judge must state reasons on the record for any modification. Before the hearing, advance notice must be given to the prosecuting attorney.²⁴

Extension of Probation Term

By statute, a court has "authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence."²⁵ The state courts have held that this includes the power to extend

the term of probation up to the maximum allowable period. A court may extend probation only when there has been a change in circumstances since the original probation order, but no finding of a probation violation is required.²⁶

Grounds for Probation Revocation

Grounds for revocation exist "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses." Failure to pay restitution must be willful in order to constitute a violation.²⁷

Revocation Procedures

The court, the district attorney, or a probation officer may petition to begin revocation proceedings. The petitioner must give notice to the probationer and attorney of record, as well as to the district attorney and/or probation officer, depending on who files.²⁸ California courts have interpreted federal rulings to mean that a court can summarily revoke probation to acquire physical custody of the offender and preserve jurisdiction, as long as the probationer is given a hearing after being taken into custody.²⁹

Minimum safeguards at the hearing must include the ability to present witnesses and evidence, as well as to cross-examine adverse witnesses unless there is good cause to prevent confrontation.³⁰ A probationer is entitled to representation by retained or appointed counsel at formal proceedings for revocation of probation or at the hearing following summary revocation.³¹

Under the state constitution, victims have the right to reasonable notice upon request of all public proceedings at which the defendant and the prosecutor are entitled to be present and of all parole or other post-conviction release proceedings, and to be present at all such proceedings.³² Victims also have the right to be heard at any post-conviction release proceeding or any proceeding at which a right of the victim is at issue.³³

Legal Standard for Revocation

The court must find a violation or new offense by a preponderance of the evidence.³⁴ Because of the different burden of proof, revocation may be based on an offense that cannot be prosecuted due to lack of proof beyond a reasonable doubt.³⁵

Revocation and Lesser Sanctions

Upon finding a violation, the court may modify, revoke, or terminate probation.³⁶

The available sanctions on revocation differ for cases in which the imposition of sentence was suspended and cases in which sentence was imposed but execution was suspended. If the imposition of sentence was suspended, a revoking court may pronounce judgment for any sentence the probationer could originally have received. If the judgment was imposed but its execution suspended, revocation brings the former judgment "into full force and effect;" the trial court must order "the exact sentence" that had been previously imposed into effect.³⁷ Credit will be given at sentencing for time spent in custody such as jail, treatment, or work programs.³⁸

Appeal

Defendants have a statutory right to appeal revocation decisions.³⁹ The Court of Appeals Probation reviews revocation decisions under "the substantial evidence standard of review." Great deference is accorded the trial court's decision, which will not be disturbed in the absence of a showing of abusive or arbitrary action. The burden of demonstrating an abuse of the trial court's discretion rests squarely on the defendant.⁴⁰

END NOTES

¹ *People v. Smith*, 174 Cal.Rptr.3d 103, 113 (Cal. Ct. App. 2014).

² Cal. Penal Code § 1203.1(j) (2014).

³ Cal. Penal Code § 1203(a) (2014).

⁴ Cal. Penal Code § 1203.4(a)(1) (2014). The courts have held that expungement is a matter of right for eligible defendants, and the courts have no discretion to deny it. *Smith*, 174 Cal. Rptr.3d at 108. Dismissal of charges under § 1203.4 does not bar the use of the prior conviction in a later prosecution, nor does it relieve the offender of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission.

⁵ Cal. Penal Code § 1203.4(b) (2014).

⁶ Cal. Penal Code §§ 19.9, 1170(h)(5)(B) (2014).

⁷ Cal. Penal Code § 1170(h)(4) (2014) ("Nothing in this subdivision shall be construed to prevent ... an order granting probation pursuant to Section 1203.1.").

⁸ Cal. Penal Code § 1203.1(a) (2014).

⁹ Cal. Penal Code § 1203.3(a) (2014).

¹⁰ Cal. Penal Code § 1202.8(a) (2014).

¹¹ Cal. Penal Code § 1203b (2014).

¹² Cal. Penal Code § 1203.1 (2014).

¹³ § 1203.1(j), *supra* note 2.

¹⁴ *People v. Lent*, 541 P.2d 545, 548 (Cal. 1975). *Accord. People v. Hughes*, 136 Cal.Rptr.3d 538, 542 (Cal. Ct. App. 2012).

¹⁵ Cal. Penal Code § 1203.1(a), (a)(2) (2014).

¹⁶ Rebecca Sullivan Silbert, *Thinking Critically About Realignment in California*, Chief Just. Earl Warren Inst. On L. & Soc. Pol'y 4 (Feb. 2012), https://www.law.berkeley.edu/files/bccj/Thinking_Critically_3-14-2012.pdf.

¹⁷ Cal. Penal Code § 1170(h) (2014).

¹⁸ *Brown v. Superior Court*, 124 Cal.Rptr.2d 43, 49 (Cal. Ct. App. 2002).

¹⁹ Cal. Penal Code § 1203.1b (2014).

²⁰ Cal. Penal Code § 1203.1ab (2014).

²¹ Cal. Penal Code § 1203.1c(a), (d) (2014).

²² § 1203.3(a), *supra* note 9.

²³ *People v. Cookson*, 820 P.2d 278, 281 (Cal. 1991).

²⁴ Cal. Penal Code § 1203.3(b)(1) (2014).

²⁵ § 1203.3(a), *supra* note 9.

²⁶ *Cookson*, 820 P.2d at 280 n. 2, 283-84.

²⁷ Cal. Penal Code § 1203.2(a) (2014).

²⁸ Cal. Penal Code § 1203.2(b)(1) (2014).

²⁹ *People v. Woodall*, 157 Cal.Rptr.3d 220, 230 (Cal. Ct. App. 2013).

³⁰ *People v. Gomez*, 104 Cal.Rptr.3d 683, 686-87 (Cal. Ct. App. 2010).

³¹ *People v. Vickers*, 503 P.2d 1313, 1321 (Cal. 1972).

³² Cal. Const. art. I, § 28(b)(7).

³³ Cal. Const. art. I, § 28(b)(8).

³⁴ *People v. Urke*, 128 Cal.Rptr.3d 405, 410-11 (Cal. Ct. App. 2011).

³⁵ *People v. McGavock*, 81 Cal.Rptr.2d 600, 603-04 (Cal. Ct. App. 1999).

³⁶ § 1203.2(b)(1), *supra* note 28.

³⁷ Cal. Penal Code § 1203.2(c) (2014); *People v. Gipson*, 153 Cal. Rptr.3d 428, 432 (Cal. Ct. App. 2013).

³⁸ Cal. Penal Code § 2900.5(a) (2014).

³⁹ Cal. Penal Code §§ 1237(b), 1466(a)(6) (2014).

⁴⁰ *Urke*, 128 Cal.Rptr.3d at 411.



PROBATION IN COLORADO



**Probation Rate (per 100,000):
1,459**

Rank: 31 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

Probation is a criminal sentence, and its basic purpose is to provide a defendant with an opportunity for rehabilitation without confinement.¹ In Colorado, with the exception some DUI and DWAI (driving while ability impaired) convictions, defendants must apply for probation to avoid a more punitive prison sentence, and receipt of probation is deemed a privilege, not a right.²

Forms of Probation

There are two routes to a probationary sentence in Colorado following conviction, but there is little practical difference between them. Probation may be imposed as a distinct and separate sentencing alternative that need not be accompanied by a suspended prison sentence.³ Alternatively, the court may suspend a prison sentence as a means of imposing probation.⁴

Some defendants may agree to conditions "similar in all respects to the conditions of probation" as part of a deferred adjudication agreement with the prosecution, but these individuals are not technically on probation.⁵

Term

There is a maximum five-year term for any misdemeanor or petty offense. For felonies, the length of probation is not limited by the maximum term of incarceration for the offense or any other statutory maximum, but instead is left to the discretion of the court.⁶ Lifetime probation is expressly made available for some sex offenders.⁷

Early Termination

The term of probation may be decreased by the court at any time for good cause shown.⁸ Probation for a drunk driving offense may be terminated early upon a probationer's petition to the court if treatment is complete, the terms and conditions of probation were followed, and the termination will not endanger public safety.⁹

Supervision

Probationers are supervised by District Probation Departments within the Judicial Branch.¹⁰ Under standard probation, they are required to report to probation officers at a frequency based on their assessed risk level or to receive visits from officers at reasonable times.¹¹ Intensive supervision probation is geared primarily towards monitoring and the delivery of treatment and services for high risk populations including sex offenders. It may include severely restricted activities, daily contact with a probation officer, monitored curfew, home visitation, employment visitation and monitoring, as well as many other terms. It is designed to address defendants' most serious criminogenic needs and to minimize risk to the public.¹²

Drinking and driving offenses may result in probation that requires an evaluation of a probationer's alcohol-related behaviors and attendance at treatment or educational programs based on the outcome of the evaluation and the degree of the charge.¹³ Under new legislation, many DUI law reforms are proposed, but this type of probation would remain an option.¹⁴

Conditions

Conditions of probation may be imposed in the court's discretion if "reasonably necessary to ensure that the defendant will lead a law-abiding life and to assist the defendant in doing so."¹⁵ However, probation conditions must relate to the crime and may not regulate non-criminal conduct that is not reasonably related to possible future criminality.¹⁶ The court may not impose a sentence of probation without the offender's acceptance of probation or conditions, although the court may sentence the offender to imprisonment if the offender rejects probation.¹⁷

It is a required condition that the probationer not commit another offense. Standard conditions of probation may include work or school attendance, medical or psychiatric treatment (including placement in an institution), participation in restorative justice programs, child support, court costs, fines, and fees, reporting to an officer, receiving probation visits, answering probation questions, notifying probation of changes in residence, remaining in the court's jurisdiction, house arrest, electronic monitoring, and/or no contact with victims. Where the defendant is required to make payments, the order of priority for the payments is listed in the statute, with child support payments first.¹⁸

The court may impose incarceration as a condition of probation, but the term may not exceed 90 days for a single felony, 60 days for a misdemeanor, or 10 days for a petty offense.¹⁹

The court must order the probationer to pay a supervision fee of \$50 per month, or a lower amount depending on the probationer's ability to pay. Based on assessment, lower risk defendants may be ordered to serve their probation sentence under the supervision of a private probation vendor. These defendants are required to pay the \$50 per month supervision fee to the private probation vendor.²⁰

Modification of Conditions/ Extension of Probation

The court may reduce or increase the term of probation, alter the conditions, or impose new conditions for good cause shown after notice to the defendant, the district attorney, and the probation officer, and after a hearing if the defendant or the district attorney requests it.²¹

Grounds for Probation Revocation

Probation revocation may be based on any violation of probation conditions or the commission of a new crime.²²

Revocation Procedures

The revocation process is no different for violations of probation as a free-standing sentence or when part of a suspended prison sentence.²³

OF INTEREST

Restorative justice has become a philosophical component of Colorado's probation system. In general, people who practice restorative justice believe that crime damages individual and community relationships and that the safety and the restoration of those relationships through either voluntary or mandated actions of the offender should be the primary goal of the criminal justice system. Restorative justice practices are facilitated meetings attended voluntarily by the victim or victim's representatives, the victim's supporters, the offender, and the offender's supporters and may include community members.** They provide an opportunity for the offender to accept responsibility, perhaps apologize to the victim, and engage in efforts to make the victim whole, and are intended to promote the healing of the victim and community.*

Sources: Colo. Judicial Branch, Probation FAQS - What is Restorative Justice: <http://www.courts.state.Colo.us/Probation/FAQs.cfm>; Colo. Rev. Stat. Ann. §18-1-901(3)(o.5) (2014).

A probationer is arrested or summoned and brought before the court for either a revocation hearing or a first appearance.²⁴ At the first appearance or revocation hearing, whichever is first in time, the court must advise the probationer that a guilty plea waives other procedural rights.²⁵ If the probationer is in custody, the hearing must be held within 14 days of the filing of the complaint.²⁶

The Colorado courts have held that "only the following due process requirements at probation revocation hearings are required": (1) written notice of the alleged probation violations; (2) disclosure to the probationer of evidence against him; (3) an opportunity to be heard in person and

to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; and (5) a written or oral statement on the record made by the fact finder as to the evidence relied on and the reasons for revoking probation.²⁷

Revocation is a two-step process. First, the trial court must determine that the defendant has violated conditions of probation. If this determination is made, the trial court then has the discretion to revoke probation.²⁸ Victims have a right to receive notice and an opportunity to participate in revocation hearings.²⁹

Legal Standard for Revocation

The prosecution has the burden of establishing by a preponderance of the evidence that a violation of probation conditions has occurred.³⁰ However, the commission of a criminal offense must be proven beyond a reasonable doubt.

If the court finds a violation, it must determine in its discretion "whether continuing probation is effective in rehabilitating the probationer or whether the probationer should be resentenced to confinement." The court must "balance the probationer's interest in demonstrating a responsible lifestyle with society's interest in seeking protection against the possibility of recidivism."³¹

Revocation and Lesser Sanctions

Upon a finding of a violation, the decision to revoke or continue probation is discretionary with the trial court. Upon revocation, the court may impose any sentence that could have been imposed at the original sentencing; this is true regardless of whether probation was imposed as a free-standing sentence or as a part of a suspended prison sentence.³² The only difference between the two forms of probation is therefore a matter of their psychological effects on offenders. The Colorado Supreme Court has said that, "[t]he psychological impact of warning a defendant what the sentencing court considers to be an appropriate prison term, should he violate his probation, remains a significant reason for permitting the imposition and suspension of prison sentences."³³

No credit is applied to a sentence upon revocation for time spent on probation.³⁴

Appeal

Probation orders are reviewable by direct appeal of the defendant,³⁵ but the decision to revoke probation will not be disturbed unless the trial court's judgment is against the manifest weight of the evidence.³⁶

Grades of Offenses in Colorado	
Offense Category	Maximum Punishment
Class 1 Felony	Life imprisonment; death
Class 2 Felony	8 - 24 years; \$5,000 - \$1,000,000 fine
Class 3 Felony	4 - 12 years; \$3,000 - \$750,000 fine
Class 4 Felony	2 - 6 years; \$2,000 - \$500,000 fine
Class 5 Felony	1 - 3 years; \$1,000 - \$100,000 fine
Class 6 Felony	1 year - 18 months; \$1,000 - \$100,000 fine
Class 1 Misdemeanor/Drug Misdemeanor	6 months - 18 months; \$500 - \$5,000 fine
Class 2 Misdemeanor	3 months - 12 months; \$250 - \$1,000 fine
Class 2 Drug Misdemeanor	Up to 12 months; \$50 - \$750 fine
Class 3 Misdemeanor	Up to 6 months; \$50 - \$750 fine

Sources: Colo. Rev. Stat. Ann. §§ 18-1.3-401; 18-1.3-501 (2014); Sentences for first-time offenders.

END NOTES

- ¹ *People v. Milne*, 690 P.2d 829, 837 (Colo. 1984).
- ² *People v. Smith*, 318 P.3d 472, 475 (Colo. 2014).
- ³ Colo. Rev. Stat. Ann. § 18-1.3-104(1) (2014). See also *People v. Flenniken*, 749 P.2d 395, 399 (Colo. 1988) (holding that “the criminal code permits a court to choose between a sentence of imprisonment and a sentence of probation”).
- ⁴ Colo. Rev. Stat. Ann. § 18-1.3-401(11) (2014). The power to impose probation via a suspended sentence was abolished by the Colorado legislature in 1972 and reinstated in 1988. *Fierro v. People*, 206 P.3d 460, 462-65 (Colo. 2009).
- ⁵ Colo. Rev. Stat. Ann. § 18-1.3-102(2) (2014); *Finney v. People*, 325 P.3d 1044 (Colo. 2014).
- ⁶ Colo. Rev. Stat. Ann. § 18-1.3-202(1) (2014).
- ⁷ Colo. Rev. Stat. Ann. § 18-1.3-1004 (2014) (“a maximum of the sex offender’s natural life”).
- ⁸ Colo. Rev. Stat. Ann. § 18-1.3-204(4)(a) (2014).
- ⁹ Colo. Rev. Stat. Ann. § 42-4-1307(7)(d) (2014).
- ¹⁰ Colo. Judicial Branch, Probation Departments By County, <http://www.courts.state.co.us/Probation/Index.cfm>.
- ¹¹ Colo. Rev. Stat. Ann. § 18-1.3-204(2)(a) (2014).
- ¹² Colo. Rev. Stat. Ann. § 18-1.3-1007 (2014).
- ¹³ Colo. Rev. Stat. Ann. § 42-4-1307 (2014).
- ¹⁴ H.B. 1036, 69th Gen. Assemb., 2d. Reg. Sess (Colo. 2014).
- ¹⁵ Colo. Rev. Stat. Ann. § 18-1.3-204(1) (2014).
- ¹⁶ *People v. Brockelman*, 933 P.2d 1315, 1319 (Colo. 1997) citing *People v. Lent*, 15 Cal.3d 481 (Cal. 1975).
- ¹⁷ *People v. Smith*, 318 P.3d 472, 475 (Colo. 2014).
- ¹⁸ Colo. Rev. Stat. Ann. § 18-1.3-204(2)(a), (2.5) (2014).
- ¹⁹ Colo. Rev. Stat. Ann. § 18-1.3-202(1) (2014).
- ²⁰ Colo. Rev. Stat. Ann. § 18-1.3-204(a)(V) (2014).
- ²¹ Colo. Rev. Stat. Ann. § 18-1.3-204(4)(a) (2014). See also *People v. Romero*, 198 P.3d 1209, 1211 (Colo. App. 2007) (“[T]he “crucial factor[s]” for initiating probation extension proceedings . . . are (1) showing good cause to extend the term; (2) giving notice to the defendant, the district attorney, and the probation officer; and (3) providing a hearing, if the defendant or the district attorney requests one.”).
- ²² Colo. Rev. Stat. Ann. § 16-11-206(3) (2014).
- ²³ *Fierro v. People*, 206 P.3d 460, 465 (Colo. 2009).
- ²⁴ Colo. Rev. Stat. Ann. § 16-11-205 (1)-(2) (2014).
- ²⁵ Colo. Rev. Stat. Ann. § 16-7-206 (2014). See also Colo. Rev. Stat. Ann. § 16-11-206(2) (at the hearing, the probationer is required to plead guilty or not guilty).
- ²⁶ Colo. Rev. Stat. Ann. § 16-11-206(4) (2014).
- ²⁷ *Byrd v. People*, 58 P.3d 50, 55-56 (Colo. 2002).
- ²⁸ *People v. Elder*, 36 P.3d 172, 173 (Colo. App. 2001).
- ²⁹ Colo. Rev. Stat. Ann. §§ 24-4.1-302(2)(k); 24-4.1-302.5(1)(b) (2014).
- ³⁰ Colo. Rev. Stat. Ann. § 16-11-206(3) (2014).
- ³¹ *Byrd v. People*, 58 P.3d 50 (Colo. 2002).
- ³² Id.; *Fierro v. People*, 206 P.3d 460, 465 (Colo. 2009). Prior to *Fierro* in 2009, the Colorado courts had held that, if probation was ordered via a suspended prison sentence, the revoking court “must simply reinstate the original sentence.” *People v. Frye*, 997 P.2d 1223, 1226 (Colo. App. 1999).
- ³³ *Fierro v. People*, 206 P.3d 460, 465 (Colo. 2009).
- ³⁴ Colo. Rev. Stat. Ann. § 18-1.3-405 (2014).
- ³⁵ *People v. Carr*, 524 P.2d 301, 302 (Colo. 1974).
- ³⁶ *People v. Elder*, 36 P.3d 172, 174 (Colo. Ct. App. 2001).



PROBATION IN FLORIDA



Probation Rate (per 100,000):

1,561

Rank: 32 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2, Adults on probation, 2012).

Definition and Purpose

Probation is a form of community supervision requiring specified contacts with probation officers and other terms and conditions.¹ "Community control" is a more intensive form of supervised custody following a felony conviction.² The purpose of probation is to rehabilitate and not primarily to punish.³ Probation is a matter of grace and not a right.⁴

Forms of Probation

Community supervision may be ordered in three ways: probation, community control, or as a split sentence with a probation or community control component. Probation is appropriate if it appears "the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law."⁵ Probation in Florida is not considered a sentence. Therefore, although the court can place a defendant on probation before or after adjudication of guilt, when placing an offender on probation, the court must withhold the pronouncement and imposition of sentence.⁶

Community control is an appropriate disposition for felony cases when in light of the offender's prior record or the seriousness of the offense it appears that "probation is an unsuitable dispositional alternative to imprisonment."⁷

A split sentence is one that comprises a term of confinement and probation or community control.⁸ A split sentence can take several forms, the most common of which are true and probationary. "A 'true split' sentence is one that consists of a total period of confinement with a portion suspended and the defendant placed on probation for that suspended portion." A "probationary split sentence" consists of a period of confinement, none of which is suspended, followed by a period of probation or community control.⁹

Term

Community supervision terms can be as follows:

- Defendants placed on probation for a felony: Up to 2 years unless otherwise specified by the court.¹⁰
- Defendants placed on community control for a felony: Not longer than the sentence that could have been imposed if the offender had been committed for the offense or a period not to exceed 2 years, whichever is less.¹¹
- Defendants placed on probation for a misdemeanor: Up to 6 months unless otherwise specified by the court, and unless the offense was one in which the use of alcohol was a significant factor, in which case the probation term can be up to one year.¹²

The above limits do not apply to the probation terms of convicted felons who receive split sentences.¹³ The law does not specify whether there are limits on the probation or community control terms for misdemeanants or convicted felons placed on community control who receive split sentences.

Early Termination

If the probationer has performed satisfactorily, has not been found in violation of any terms or conditions of supervision, and has met all financial sanctions imposed by the court, including, but not limited to, fines, court costs, and restitution, the Department of Corrections may recommend early termination to the court.¹⁴ Additionally, the court can hold a hearing at any time for the purpose of admonishing or commending the offender, and in this context, is permitted to discharge the probationer or offender in community control from further supervision in the "best interests of justice and the welfare of society."¹⁵

Supervision

Misdemeanor probation is supervised at the county level by court-approved public or private entities,¹⁶ but felony probation or community control is overseen by the Florida Department of Corrections.¹⁷ Administrative probation, the least supervised form, places individuals on non-reporting status upon satisfactory completion of half of the probation term.¹⁸ On the opposite end of the spectrum, some offenders may only be released on community control, which places severe geographical restrictions on individuals and includes surveillance on weekends and holidays.¹⁹ Drug offenders face intensive supervision that emphasizes drug treatment and assigns individuals to officers with relatively small caseloads.²⁰ Sex offender probation entails possible electronic monitoring, a treatment plan, and polygraph examinations.²¹

Conditions

The court determines the terms and conditions of probation and community control.²² There are several standard probation conditions that do not require oral pronouncement at sentencing such as reporting to the probation supervisor, maintaining employment, and submitting to random substance abuse testing.²³ For community control, all of the standard probation conditions apply, and additional conditions that do not require oral pronouncement include residential confinement during non-work hours, mandatory public service, and electronic monitoring.²⁴ For both probation and community control, the court may add other conditions as it deems proper.

OF INTEREST

The country's first private probation program, run through the Salvation Army, began in Florida in the 1970s. Private probation has come under criticism in the media because companies profit by adding fees onto probation that lower income probationers may have difficulty paying.

Sources: Hannah Rappleye & Lisa Riordan Seville, *The Town that Turned Poverty Into a Prison Sentence*, *The Nation* (Apr. 14, 2014), available at <http://www.thenation.com/article/178845/town-turned-poverty-prison-sentence#>; Ethan Bronner, *Probation Fees Multiply as Companies Profit*, *N.Y. Times* (July 2, 2012), <http://www.nytimes.com/2012/07/03/us/probation-fees-multiply-as-companies-profit.html>.

The court can impose a period of incarceration up to 364 days as a condition of probation or community control, but the incarceration is limited to the following locations: a county facility, a probation and restitution center under the jurisdiction of the Department of Corrections, a residential drug treatment facility, or a community residential facility.²⁵

Felony probationers and individuals on probation or under community control must pay fees equal to the total month or portion of a month times the court ordered supervision amount, not to exceed the actual per diem cost of probation. In addition, there is a monthly \$2 surcharge payable to the department of corrections.²⁶ Misdemeanor probationers must be charged at least \$40 per month.²⁷ Probationers required to submit to urinalysis may be required to pay for the cost of such testing.²⁸ The Department of Corrections may waive payment of all or part of the fees under certain circumstances, including insufficient income even though the probationer has made diligent efforts to obtain employment, or when "[t]he offender is responsible for the support of dependents, and the payment of such contribution constitutes an undue hardship on the offender."²⁹

Modification of Conditions

The court may rescind or modify the conditions imposed on the probationer or offender under community control at any time during the supervision period.³⁰

Extension of Probation Term

Florida law does not permit extension of the probation or community control term unless a violation is found.³¹

Grounds for Probation Revocation

Probation or a period of community control may be revoked when there are reasonable grounds to believe that the probationer or offender in community control has violated the conditions of probation or community control in a material respect.³²

Revocation Procedures

When there are reasonable grounds to believe the conditions of probation or community control have been violated, a law enforcement officer may arrest the individual, or a judge may issue an arrest warrant or notice to appear.³³ At a first appearance, the probationer must be informed of the alleged violation, and can choose to admit or deny the violation.³⁴ If the probationer does not admit to the violation, the probationer may be committed or released with or without bail pending a revocation hearing.³⁵ As soon as practicable, the probationer should have an opportunity to be heard in person or through counsel.³⁶ There is an absolute right to counsel in a probation revocation hearing.³⁷ There is no provision in Florida law to notify crime victims of probation revocation proceedings.³⁸

Legal Standard for Revocation

In order to revoke probation or community control based on violation of a condition, the state must show by a preponderance of the evidence that the violation was willful and substantial.³⁹

Revocation and Lesser Sanctions

A judge may revoke, modify, or continue probation or community control, or place a defendant who was on probation on community control.

If probation or community control is revoked, the court can adjudicate the defendant guilty if not previously done, and impose any sentence that would have originally been imposed upon the defendant.⁴⁰ The defendant will be given credit for time served; however, time for good behavior is lost upon revocation.⁴¹

When a defendant violates a true split sentence the court can "revoke probation and impose either the suspended portion of incarceration or any sentence that could originally have been imposed." The defendant is entitled to credit for time served "only if the court imposes the original period of incarceration."⁴² If the defendant violates a probationary split sentence, the defendant may be resentenced to any term up to the maximum which could have been originally imposed.⁴³ A defendant resentenced to prison is entitled to credit for "all time actually served in prison prior to his release on probation unless such credit is waived".⁴⁴

Appeal

A defendant may appeal from an order revoking probation.⁴⁵ The standard of review is whether the trial court abused its discretion.⁴⁶ The state may appeal an order dismissing an affidavit charging the violation of probation.⁴⁷

Grades of Offenses in Florida

Offense Category	Maximum Punishment
Capital Felony	40 years - capital punishment
Life Felony	40 years - life; Up to \$15,000 fine
First Degree Felony	30 years - life; Up to \$10,000 fine
Second Degree Felony	Up to 15 years; Up to \$10,000 fine
Third Degree Felony	Up to 5 years; Up to \$5,000 fine
First Degree Misdemeanor	Up to 1 year; Up to \$1,000 fine
Second Degree Misdemeanor	Up to 60 days; Up to \$500 fine

Source: Fla. Stat. §§ 775.082, 775.083(1) (2014).

END NOTES

- ¹ Fla. Stat. § 948.001(8) (2014).
- ² Fla. Stat. § 948.001(3) (2014).
- ³ *Kominsky v. State*, 330 So.2d 800, 801-02 (Fla. Dist. Ct. App. 1976).
- ⁴ *Loeb v. State*, 387 So.2d 433, 436 (Fla. Dist. Ct. App. 1980).
- ⁵ Fla. Stat. § 948.01(2) (2014).
- ⁶ Fla. R. Crim. P. 3.790(a) and Committee Note 1968 Adoption (2014); *Landeverde v. State*, 769 So.2d 457, 462 (Fl. Dist. Ct. App. 2000).
- ⁷ Fla. Stat. § 948.01(2) - (3) (2014).
- ⁸ Fla. Stat. § 948.012 (2014).
- ⁹ *Poore v. State*, 531 So.2d 161, 164 (Fla. 1988).
- ¹⁰ Fla. Stat. § 948.04 (2014).
- ¹¹ Fla. Stat. § 948.01(4) (2014).
- ¹² Fla. Stat. § 948.15(1) (2014).
- ¹³ Fla. Stat. § 948.04(1) (2014).
- ¹⁴ Fla. Stat. § 948.04(3) (2014).
- ¹⁵ Fla. Stat. § 948.05 (2014).
- ¹⁶ Fla. Stat. § 948.15(2) (2014).
- ¹⁷ Fla. Dep't Corr., *Florida Felony Probation Information*, Fla. Dep't Corrections (last visited Sept. 28, 2014), <http://www.dc.state.fl.us/probation.html>.
- ¹⁸ Fla. Stat. § 948.001(1) (2014).
- ¹⁹ Fla. Stat. § 948.001(3) (2014).
- ²⁰ Fla. Stat. § 948.001(5) (2014).
- ²¹ Fla. Stat. § 948.001(13) (2014).
- ²² Fla. Stat. §§ 948.03(1), 948.101(1) (2014).
- ²³ Fla. Stat. § 948.03(1)(a)-(p) (2014).
- ²⁴ Fla. Stat. § 948.101(1) (2014).
- ²⁵ Fla. Stat. §§ 948.03(2), 948.101(2) (2014).
- ²⁶ Fla. Stat. § 948.09(1)(a) (2014).
- ²⁷ Fla. Stat. § 948.09(1)(b) (2014).
- ²⁸ Fla. Stat. § 948.09(6) (2014).
- ²⁹ Fla. Stat. § 948.09(3) (2014).
- ³⁰ Fla. Stat. §§ 984.03 (2), 948.101(2) (2014).
- ³¹ See *Gearhart v. State*, 885 So.2d 415, 417 (Fla. Dist. Ct. App. 2004) (holding that an extension of probation without proof of a violation violates double jeopardy).
- ³² Fla. Stat. § 948.06(1) (2014).
- ³³ Fla. Stat. § 948.06(1)(a)-(c) (2014).
- ³⁴ Fla. Stat. § 948.06(1)(d) (2014).
- ³⁵ Fla. Stat. § 948.06(1)(d)(2) (2014).
- ³⁶ Fla. Stat. § 948.06(2)(d) (2014).
- ³⁷ *State v. Hicks*, 478 So.2d 22, 23 (Fla. 1985).
- ³⁸ See Fla. Stat. § 960.0021(2) (2014) (requiring notice to the victim of the right to be present at all "crucial stages of criminal proceedings"); *but see* § 960.001 (2014) (defining the proceedings for which the victim has the right to be present to include sentencing, but failing to mention revocation proceedings).
- ³⁹ *Hanania v. State*, 855 So.2d 92, 94 (Fl. Dist Ct. App. 2003) (probation); *Anthony v. State*, 854 So.2d 744, 747 (Dist. Ct. App. 2003) (community control) (finding of willful and substantial violation must be supported by "the greater weight of the evidence").
- ⁴⁰ Fla. Stat. § 948.06(2)(a), (e) (2014).
- ⁴¹ Fla. Stat. § 948.06(7) (2014); *Mann v. State*, 109 So.3d 1202, 1203 (Fla. Dist. Ct. App. 2013).
- ⁴² Mann, 109 So.3d at 1203.
- ⁴³ *Coney v. State*, 941 So.2d 592, 593 (Fla. Dist. Ct. App. 2006).
- ⁴⁴ *Mann*, 109 So.3d at 1203.
- ⁴⁵ Fla. Stat. § 924.06(1)(c) (2014).
- ⁴⁶ *Hanania*, 855 So.2d at 94 (probation); *Anthony*, 854 So.2d at 747 (community control).
- ⁴⁷ Fla. Stat. § 924.07(1)(a) (2014).



PROBATION IN INDIANA



**Probation Rate (per 100,000):
2,441**

Rank: 45 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2, Adults on probation, 2012).

Definition and Purpose

Probation is a conditional liberty during which the probationer must follow certain restrictions "designed to ensure that probation serves as a period of genuine rehabilitation and that the public is not harmed by the probationer living within the community."¹

Forms of Probation

Probation for both felonies and misdemeanors is achieved after conviction through suspension of the sentence. For Level 1 felons or for certain Level 2 or Level 3 felons who have a previous felony conviction, the court may only suspend time in excess of the statutory minimum prison sentence.²

Additionally, for felony offenders sentenced to prison, in the first 365 days of incarceration, after considering a conduct report from the prison, the court may suspend the remainder of the sentence and grant probation. This is referred to as "shock probation."³ A convicted defendant may petition the court for suspension of sentence once per year, but not more than two times during any consecutive period of incarceration. Victims must be notified of the defendant's request for a suspended sentence.⁴

Term

Prior to July 2014, the maximum probation term for felony convictions was equal to the statutory maximum sentence that could be imposed for the offense.⁵ This language was repealed, and now the applicable statute is silent on this matter.⁶ Misdemeanants may be sentenced to a term of probation up to one year, unless the defendant's crime was related to substance abuse, in which case the court can impose a term of up to two years if the court finds a longer term is necessary to allow the defendant to complete substance abuse treatment.⁷

Early Termination

While there is no explicit process in Indiana law for early termination of probation, a defendant may earn credit towards a reduction in the term if the defendant receives home detention as a condition of probation.⁸ A defendant may be assigned to one of four classes based on the offense of conviction, each of which earns credit time at a different rate.⁹

Supervision

Probation officers are employees of the courts.¹⁰ Probation departments are established by a supervising judge, who is responsible for appointing a chief probation officer and developing rules for the department.¹¹

Conditions

Indiana law sets out a non-exclusive list of 23 conditions the court may impose on probationers, including things such as attending medical or psychiatric treatment, performing community service, maintaining employment, payment of fines and restitution, and maintaining contact with a probation officer.¹² Sex offenders must also register with law enforcement, allow law enforcement to search their personal computer, and avoid living within 1000 feet of a school unless they obtain written authorization from the court.¹³ Courts may impose additional conditions as long as they serve the dual purpose of rehabilitating the probationer and protecting society.¹⁴

The court can order a consecutive or intermittent term of imprisonment at an appropriate facility as a condition of probation.¹⁵ While the statute does not specify a limit on the consecutive term of imprisonment, a term of intermittent imprisonment must be served in a county jail on dates specified by the court, cannot exceed a total of 60 days, and must be served within a calendar year.¹⁶

Felons are required to pay fees to offset the cost of supervision as a condition of their probation. Indiana law sets a range within which the court sets the fee based on an assessment of the defendant's ability to pay. The required fees for persons convicted of a felony include an initial probation user's fee of \$25 to \$100, a monthly probation user's fee of \$15 to \$30, the cost of performing HIV tests and/or alcohol abuse deterrent programs as applicable, and an administrative fee of \$100. Misdemeanants may be required to pay similar fees, but the fee ranges are lower.¹⁷ The defendant's responsibility to pay continues even after probation ends.¹⁸

Modification of Conditions

The court may modify the conditions of probation at any time during the probation term, either on a motion by the probation department, or on its own, regardless of whether a violation has occurred.¹⁹ While a hearing is required, the defendant's due process rights are more limited than in a revocation hearing.²⁰ The court must specify the modified conditions in the record, and must inform the defendant that a violation of the modified conditions could result in revocation.²¹

Extension of Probation Term

There is no statutory provision allowing the court to extend probation except in the context of a violation proceeding.²²

OF INTEREST

Indiana law allows defendants to petition to have their records expunged. This right is available to those convicted of felonies and misdemeanors, but the defendant must have completed his/her sentence without incident. The Indiana Court of Appeals has held that even a technical violation will disqualify a defendant from having his/her record expunged.

Sources: Ind. Code §§ 35-38-9-2, -4 (2014); Wall v. Plummer, No. 85C01-1309-MI-578, 2014 WL 2881055, at *2 (Ind. Ct. App. June 25, 2014).

Grounds for Probation Revocation

The court may revoke a defendant's probation if a violation has occurred and the petition to revoke is filed either during the probation period or before the earlier of one year after probation ends or 45 days "after the state receives notice of the violation." The violation must have occurred before termination of the probation period, which includes the time between sentencing and the beginning of the probation term.²³ Failure to pay fees or fines may not be the sole basis for revocation unless the court finds that the defendant recklessly, intentionally, or knowingly failed to pay.²⁴

Revocation Procedures

The court must first determine that a violation of a condition of probation has occurred, and then decide whether revocation is warranted.²⁵ If the defendant admits the violation and waives the right to an evidentiary hearing, the court may skip the factual determination step.²⁶ The defendant is entitled to confrontation, cross-examination, and representation by counsel.²⁷ Victims may request notification of any proceeding in which probation may be revoked or terminated.²⁸

Legal Standard for Revocation

The state must prove that a violation occurred by a preponderance of the evidence presented in open court.²⁹

Revocation and Lesser Sanctions

The court may impose one or more of the following consequences for a violation: (1) continue probation with or without modifying the conditions; (2) extend probation; or (3) execute all or part of the suspended sentence.³⁰ If the motion to revoke was filed after the probation period ended, the court may: (1) reinstate the person's probationary period if the sum of the length of the original probationary period and the reinstated probationary period does not exceed the

length of the maximum sentence allowable for the original conviction offense; or (2) execute all or part of the sentence that was suspended at the time of the initial sentencing.³¹

Appeal

A defendant may petition for post-conviction relief on the grounds that probation was unlawfully revoked.³² A trial court's sentencing decision for a probation violation is reviewable using the abuse of discretion standard. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances.³³ The petitioner bears the burden of establishing the grounds for relief by a preponderance of the evidence.³⁴

Grades of Offenses in Indiana	
Offense Category	Maximum Punishment
Level 1 Felony	20-40 year fixed prison term, with an advisory term of 30 years; fine up to \$10,000
Level 1 Felony Child Molesting Offense	20-50 year fixed prison term, with an advisory term of 30 years; fine up to \$10,000
Level 2 Felony	10-30 year fixed prison term, with an advisory term of 17.5 years; fine up to \$10,000
Level 3 Felony	3-16 year fixed prison term, with an advisory term of 9 years; fine up to \$10,000
Level 4 Felony	2-12 year fixed prison term, with an advisory term of 6 years; fine up to \$10,000
Level 5 Felony	1-6 year fixed prison term, with an advisory term of 3 years; fine up to \$10,000
Level 6 Felony	6 months-2.5 year fixed prison term, with an advisory term of 1 year; fine up to \$10,000
Class A Misdemeanor	Not more than 1 year; fine up to \$5,000
Class B Misdemeanor	Not more than 180 days; fine up to \$1,000
Class C Misdemeanor	Not more than 60 days; fine up to \$500

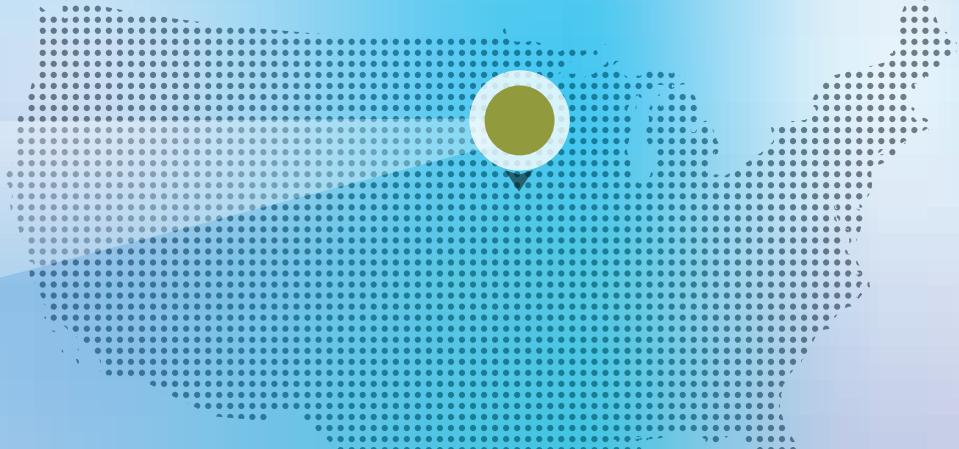
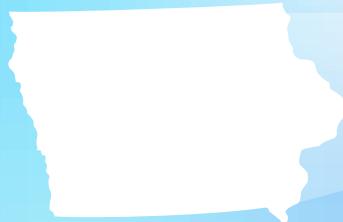
Source: Ind. Code §§ 35-50-2-4 to -7 (felonies), 35-50-3-2 to -4 (misdemeanors) (2014).

END NOTES

- ¹ *Bonner v. State*, 776 N.E.2d 1244, 1247 (Ind. Ct. App. 2002).
- ² Ind. Code §§ 35-50-2-2.2, 35-50-3-1 (2014).
- ³ *State v. Harper*, 8 N.E.3d 694, 696 (Ind. 2014).
- ⁴ Ind. Code § 35-38-1-17(b), (d), (h) (2014).
- ⁵ Ind. Code § 35.50-2-2 (repealed eff. July 1, 2014).
- ⁶ See Ind. Code § 35-50-2-2.2 (2014).
- ⁷ Ind. Code § 35-50-3-1 (2014).
- ⁸ Ind. Code § 35-38-2.5-5 (2014).
- ⁹ Ind. Code §§ 35-50-6-3 (applying to defendants convicted before July 1, 2014), 35-50-6-3.1(b)-(e) (applying to defendants convicted after June 30, 2014), 35-50-6-4 (2014) (establishing earned credit time classes).
- ¹⁰ Ind. Code § 11-13-1-1(c) (2014).
- ¹¹ 34 Ind. Admin. Code 18 (2014).
- ¹² Ind. Code § 35-38-2-2.3 (2014).
- ¹³ Ind. Code § 35-38-2-2.2 (2014).
- ¹⁴ *Hale v. State*, 888 N.E.2d 314, 319 (Ind. Ct. App. 2008); *Fitzgerald v. State*, 805 N.E.2d 857, 864–65 (Ind. Ct. App. 2004).
- ¹⁵ Ind. Code § 35-38-2-2.3 (c), (d) (2014).
- ¹⁶ Ind. Code § 35-38-2-2.3 (d) (2014).
- ¹⁷ Ind. Code § 35-38-2-1(b), (d), (e) (2014).
- ¹⁸ Ind. Code § 35-38-2-1.7(2014).
- ¹⁹ Ind. Code §§ 35-38-2-1.8(b)(1), (d)(1) (2014).
- ²⁰ *Collins v. State*, 911 N.E.2d 700, 711 (Ind. Ct. App. 2009).
- ²¹ Ind. Code § 35-38-2-1.8(c)(1)–(2) (2014).
- ²² Ind. Code § 35-38-2-1.8 (2014).
- ²³ Ind. Code § 35-38-2-3(a) (2014); *Hardy v. State*, 975 N.E.2d 833, 838 (Ind. Ct. App. 2012).
- ²⁴ Ind. Code § 35-38-2-3(g), (m) (2014). See *Brandenburg v. State*, 992 N.E.2d 951, 953 (Ind. Ct. App. 2013).
- ²⁵ *Alford v. State*, 965 N.E.2d 133, 134–35 (Ind. Ct. App. 2012).
- ²⁶ Alford, 965 N.E.2d at 134–35.
- ²⁷ Ind. Code § 35-38-2-3(f) (2014).
- ²⁸ Ind. Code § 35-40-8-1 (2014).
- ²⁹ Ind. Code § 35-38-2-3(f) (2014)
- ³⁰ Ind. Code § 35-38-2-3(h) (2014); *Puckett v. State*, 956 N.E.2d 1182, 1186 (Ind. Ct. App. 2011).
- ³¹ Ind. Code § 35-38-2-3(j) (2014).
- ³² Ind. Post Conv. R. 1 §§ 1, 7 (2014).
- ³³ *Prewitt v. State*, 878 N.E.2d 184, 187 (Ind. 2007).
- ³⁴ *Truitt v. State*, 853 N.E.2d 504, 506 (Ind. Ct. App. 2006).



PROBATION IN IOWA



Probation Rate (per 100,000):

1,459

Rank: 31 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

Iowa law defines probation as the procedure under which a defendant against whom a judgment of conviction has or may be entered is released by the court subject to supervision.¹ The purposes of probation are "to provide the maximum opportunity for the rehabilitation of the defendant and to protect the community from further offenses."²

Forms of Probation

Individuals reach probation through one of three paths: deferred judgment, deferred sentence, or suspended sentence. Under deferred judgment, the court defers both the adjudication of guilt and the imposition of a sentence and may impose probation with conditions.³ The defendant's record will be expunged if he or she successfully completes probation.⁴ Under a deferred sentence, guilt is adjudicated but the court does not impose a sentence, and the defendant must comply with conditions.⁵ Under a suspended sentence, the court adjudicates guilt and imposes a sentence, which it then suspends to place the defendant on probation. Iowa law sets out separate eligibility criteria for each route to probation.⁶ The court is also required to consider several factors, including the defendant's age, criminal record, family circumstances, and employment when determining which type of probation to grant.⁷

Term

Probation for a misdemeanor must be 1 to 2 years. Probation for a felony must be 2 to 5 years. In setting the term of probation, the court must determine what period will provide the maximum opportunity for the defendant's rehabilitation and for the court to determine if rehabilitation has been successful while also protecting the community from further offenses.⁸

Early Termination

The sentencing court may reduce the probation term or discharge a defendant from probation if it finds that the "purposes of probation have been fulfilled" and any fees or court debt have been paid.⁹ Probation officers may also order early discharge after making the same findings and notifying the prosecutor and sentencing court. The sentencing court may order or the prosecuting attorney may request a hearing to review the probation officer's discharge, but if no hearing is ordered within 30 days after notification by the probation officer, the defendant is automatically discharged.¹⁰

Supervision

Probation supervision is typically provided by judicial departments of correctional services, which are community-based correctional programs supported by a combination of state and local funding.¹¹ Probation officers "supervise, assist, and counsel" the defendant.¹² They are also empowered to "use all suitable methods prescribed by the judicial district department of correctional services to aid and encourage the person to bring about improvements in the person's conduct and condition."¹³

Conditions

Conditions are imposed by the judicial district departments of correctional services subject to the approval by the court. There is no enumeration of general or special conditions in statute. The court may impose "additional reasonable" conditions "to promote rehabilitation of the defendant or protection of the community."¹⁴ Conditions are considered reasonable when the statutory goals of probation are reasonably addressed.¹⁵

When establishing conditions of probation in conjunction with a suspended sentence, the court can order commitment to an alternate jail facility or a community correctional residential treatment facility to be followed by a period of probation. But the court is not authorized to order such confinement as a condition of a deferred judgment or deferred sentence.¹⁶

Probationers are required to pay an enrollment fee of \$300 to offset the costs of supervision. The enrollment fee cannot be waived by the sentencing court but the department of corrections has authority to adopt rules allowing for waiver for probationers determined unable to pay.¹⁷

Modification of Conditions

Although there is no formal procedure in statute or court rule for modifying the conditions of probation outside of a violation hearing, it appears that defendants routinely bring motions before the court for this purpose.¹⁸ Iowa law provides that restitution can be modified without a violation proceeding; the probation officer may submit a revised restitution payment plan to the sentencing court based on a change in the defendant's circumstances.¹⁹

Extension of Probation Term

Iowa law does not provide for term extensions except as a sanction for a probation violation.²⁰

Grounds for Probation Revocation

Violations of any condition of probation may be grounds for revocation.²¹

OF INTEREST

Iowa law creates a "corrections continuum" of five levels ranging from self-supervision to prison sentences. Courts and departments of corrections are encouraged to develop guidelines that allow defendants to move between levels two and four, with level two being probation, level three being a treatment program or facility or electronic monitoring and level four being 21-day shock incarceration or a similar period in a "violators' facility." This continuum is designed to promote community-based sanctions for violations in order to reduce revocations.

Source: Iowa Code § 901B.1(1)–(3) (2014).

Revocation Procedures

Revocation proceedings in Iowa have three parts: an initial appearance, a probable cause hearing, and a probation revocation hearing. The three parts may be merged into one hearing "when it appears that the alleged violator will not be prejudiced."²² Indigent defendants are entitled to appointed counsel.²³ Iowa law does not provide for victim notification of revocation proceedings.²⁴

Legal Standard for Revocation

The state must prove a violation by a preponderance of the evidence.²⁵ Once the violation has been established, the court has discretion to decide what should be done as a result of the violation.²⁶

Revocation and Lesser Sanctions

After determining a probation violation has occurred, the court may: (1) continue probation with or without modifying the conditions; (2) hold the defendant in contempt of court and impose a term in jail while continuing probation; (3) order the defendant to be placed in a violator facility²⁷ and continue probation; (4) extend probation for up to one year, not to exceed one year beyond the maximum probation term allowed by law; or (5) revoke probation and require the defendant to serve the sentence imposed or any lesser sentence or, if imposition was deferred, impose any sentence that might originally have been imposed.²⁸

Appeal

A defendant whose probation has been revoked may seek postconviction relief alleging the revocation was unlawful.²⁹ The postconviction court must determine whether there was sufficient evidence to support the district court's revocation of probation and review the resulting sentence for abuse of discretion.³⁰

Grades of Offenses in Iowa

Offense Category	Maximum Punishment
Class A Felony	Life imprisonment without parole
Class A Felony Delivery of Methamphetamine to a Minor	Up to 99 years in prison
Class B Felony	Up to 25 years in prison
Class C or D Felony - Habitual Offender	Up to 15 years in prison
Class C Felony	Up to 10 years in prison; \$1,000-\$10,000 fine
Class D Felony	Up to 5 years in prison; \$750-\$7,500 fine
Aggravated Misdemeanor	Up to 2 years in prison (anything over 1 year will be an indeterminate term); \$625-\$6,250 fine
Serious Misdemeanor	Up to 1 year incarceration; \$315-\$1,875 fine
Simple Misdemeanor	Up to 30 days incarceration; \$65-\$625 fine

Source: Iowa Code §§ 902.1(1), 902.9(1), 903.1(1)-(2) (2014). Confinement for more than one year will be in state prison. Id. § 901.7.

END NOTES

- ¹ Iowa Code § 907.1(5) (2014).
- ² Iowa Code § 907.7(3) (2014).
- ³ Iowa Code § 907.1(1) (2014).
- ⁴ Iowa Code § 907.9(4)(b) (2014).
- ⁵ Iowa Code §§ 907.1(2), 907.3(1)(a) (2014).
- ⁶ Iowa Code § 907.3 (2014).
- ⁷ Iowa Code § 907.5(1) (2014).
- ⁸ Iowa Code § 907.7 (2014).
- ⁹ Iowa Code §§ 907.7(3), 907.9(1) (2014).
- ¹⁰ Iowa Code § 907.9(2), (3) (2014).
- ¹¹ See Iowa Code §§ 905.1–15, 907.8 (2014). It should be noted that Iowa law also permits supervision by “any suitable resident of this state.” *Id.* § 907.8.
- ¹² Iowa Code § 907.8(1) (2014).
- ¹³ Iowa Code § 907.2 (2014).
- ¹⁴ Iowa Code § 907.6 (2014); *State v. Rogers*, 251 N.W.2d 239, 242 (Iowa 1977).
- ¹⁵ *State v. Valin*, 724 N.W.2d 440, 446–47 (Iowa 2006).
- ¹⁶ See Iowa Code § 907.3 (2014). An alternate jail facility is halfway house established by the county for detention or confinement purposes under Iowa Code ch. 356A.
- ¹⁷ Iowa Code § 905.14 (2014).
- ¹⁸ See, e.g., *State v. Wentland*, No. 11-1266, 2013 WL 105340 (Iowa Ct. App. Jan. 9, 2013); *State v. Pierce*, No. 07-0496, 2008 WL 2039314 (Iowa Ct. App. May 14, 2008) (referencing the defendants’ motion to modify probation conditions).
- ¹⁹ Iowa Code § 910.4(2)(c)–(d) (West 2014).
- ²⁰ Iowa Code § 908.11(4) (2014).
- ²¹ Iowa Code § 908.11(1) (2014).
- ²² Iowa Code § 908.11(3) (2014).
- ²³ Iowa R. Crim. P. 2.28 (2014).
- ²⁴ Iowa Code § 908.11 (West 2014).
- ²⁵ *State v. Kline*, No. 12-0366, 2013 WL 3291865, at *2 (Iowa Ct. App. June 26, 2013).
- ²⁶ *State v. Workman*, 736 N.W.2d 267 (Iowa Ct. App. 2007).
- ²⁷ A violator facility is for the temporary confinement of offenders who have violated the conditions of work release or probation. Iowa Code § 904.207 (2014).
- ²⁸ Iowa Code § 908.11(4) (2014).
- ²⁹ Iowa Code § 822.2(1)(e) (2014).
- ³⁰ *State v. Allen*, 402 N.W.2d 438, 443 (Iowa 1987).
- ³¹ Iowa Code § 901B.1(1)–(3) (2014).



PROBATION IN MAINE



**Probation Rate (per 100,000):
652**

Rank: 5 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2, Adults on probation, 2012).

Definition and Purpose

Probation is designed to assist individuals in reintegrating into society, and it has aspects of both punishment and rehabilitation; it creates substantial limits on individual liberties and cannot be seen as entirely benignly rehabilitative. Probation helps serve the general purposes of sentencing, including the effort to prevent crime through the rehabilitation of convicted persons and to encourage differentiation among offenders with a view to a just individualization of sentences.¹ An offender may be sentenced to a sentencing alternative that includes a period of probation if the person is in need of the supervision, guidance, assistance or direction that probation can provide.²

Forms of Probation

The court may suspend an entire term of incarceration and place the defendant on probation.³ The court may also suspend the latter part of a confinement term, with the first portion of the sentence served in prison or jail followed by a period of probation; this is called a "split sentence."⁴

A sentencing court must separately, even if briefly, explain why a period of probation was selected in the particular case before it. The courts view probation as a limited resource that serves the function of providing supervision, guidance, assistance or direction to a convicted person reintegrating into society, and have stated that the rationale for imposing a specific period of probation may not be identical to the rationale for imposing a term of imprisonment.⁵

Maine also has a pre-conviction procedure known as "deferred disposition," under which sentencing is deferred following the court's acceptance of a guilty plea. The defendant is not deemed convicted unless the court later imposes a sentence. During the period of deferment, the court may impose requirements upon the offender considered by the court to be reasonable and appropriate to assist the person to lead a law-abiding life. Deferment requirements must include a requirement that the person refrain from criminal conduct and may include a requirement that the person pay to the appropriate county an administrative supervision fee of not more than \$50 per month.⁶

Term

Maximum authorized probation terms in Maine depend on the class of the crime and sometimes also on characteristics of the victim,⁷ as presented in the table below:

Class	Maximum Period of Probation	Maximum Period if Victim Under 12	Maximum Period for Certain Crimes Against Household Members
A	4 years	18 years	6 years
B	3 years	12 years	4 years
C	2 years	6 years	4 years
D, E	1 year	--	--

The default position of the criminal code is that probation is not available for Class D and E offenses. There are a number of exceptions that involve domestic violence offenses, sex offenses, certain drug offenses, drunk driving offenses, and violations of certain protective orders and bail conditions.⁸ Certain repeat sexual assault offenders may face probation for "any term of years."⁹ Life supervision is expressly authorized for the most serious repeat sex offenders.¹⁰

Early Termination

On its own motion, or on a motion of the probation officer or probationer, a court may terminate a period of probation at any time earlier than that provided in the sentence. The termination must be warranted by the conduct of the probationer.¹¹

Supervision

The Department of Corrections administers all probation in Maine, with three regional Adult Community Corrections divisions in the state.¹²

Administrative release is a type of unsupervised probation reserved for less serious crimes, with conditions such as community service and payment of restitution or fines but without a requirement to report to a probation officer. It may not exceed a period of one year.¹³

Supervised release is an intensive form of probation specifically designed to monitor sex offenders using "the best available monitoring technology," and normally follows a term of imprisonment. For the most serious sex offenders, a life term of supervised release is authorized.¹⁴

Conditions

The court may set reasonable and appropriate conditions to assist the probationer in leading a law-abiding life, provided that in every case it shall be a condition that the convicted person refrains from criminal conduct.¹⁵ Probation conditions must be reasonably related to the crime of conviction, further the probationer's rehabilitation, or protect public safety.¹⁶ The probationer is given a chance to address the court on the conditions of probation before they are set.¹⁷

The court may also require that the probationer support dependents and meet family responsibilities, make restitution, work, undergo medical or psychiatric treatment that may include inpatient care, pursue education, refrain from frequenting certain places or associating with certain people, refrain from owning a weapon, remain within the

court's jurisdiction, refrain from drug use and drunkenness, report to a probation officer, answer reasonable questions from the officer, and permit the officer to visit, pay a monetary penalty, do community service work, or participate in electronic monitoring.¹⁸

OF INTEREST

In some parts of Maine, Community Reparations Boards have been created. The boards are authorized to set several conditions of probation, including restitution, community service, education or counseling, refraining from frequenting specified places or consorting with certain individuals, complying with reparative sanctions such as writing an apology letter or fulfilling crime-impact education measures, and reporting to the board. Except for restitution, conditions imposed by the board may only last 6 months; however, failure to abide by these conditions is a violation of probation.

Source: ?

Jail terms are not authorized by statute as conditions of probation, but split sentences may be imposed that combine incarceration and probation through partially-suspended prison or jail sentences.¹⁹

Some probationers are required as a condition of probation to appear before a community reparations board and abide by requirements set by the board.²⁰

The court is required to order payment of a supervision fee of at least \$10 a month as a condition of probation or supervised release, and may order a fee of up to \$50 a month depending on the financial resources of the convicted person and the nature of the burden the fee's payment imposes.²¹ The \$10 minimum fee is nonwaivable. In addition, upon request of the Department of Corrections, the court must attach as a condition of probation an electronic monitoring fee, a substance testing fee, or both. In determining the amount, the court must take into account the financial resources of the defendant and the nature of the burden the payment imposes.²²

The court may order an administrative supervision fee of up to \$50 a month. In setting the amount, the court is required to take into account the financial resources of the defendant and the nature of the burden the payment imposes.²³

Modification of Conditions

The court may modify or add to the requirements imposed by a court or by a community reparations board at any time during the period of probation. Modification requires notice to the probationer and probation officer and a hearing. One exception is for modifications that are immediately necessary for safety reasons, where an ex parte motion by the probation officer may be granted subject to a later hearing on any added requirements.²⁴ Change in circumstances or an action by the defendant does not need to be shown in order to modify probation.²⁵

Extension of Probation Term

There are no statutory grounds explicitly stating that the original term of probation may be extended, however, in no case may the probation period exceed the limits set by statute.²⁶

The term of probation cannot be extended, but its running may be stayed, effectively extending the term. The running is stayed from the time a motion to revoke is filed until any incarceration pursuant to that motion has been served.²⁷ The pre-disposition time can be extensive as cases are often continued to allow the probationer to come into compliance with certain probation requirements in return for a lighter ultimate sanction. As a result, the total time from the imposition of the original sentence to the end of probation can often significantly exceed the stated "term" of the probation.²⁸

Grounds for Probation Revocation

Probation may be revoked based on the commission of a new crime or an "inexcusable" failure to comply with a condition of probation.²⁹

Revocation Procedures

A motion for probation revocation must be filed within the first three days of arrest based on a probation violation,³⁰ or as soon as practicable after the probation officer has delivered a summons ordering the probationer to appear at a hearing on the alleged violation.³¹ At the initial appearance, the court must advise the probationer of the right to a hearing with representation by counsel and the right to appointed counsel. The probationer must admit or deny the violation. If a denial is entered, the probationer may be committed with or without bail pending a hearing.³² Unless the court orders otherwise, or in the interests of

justice, the revocation hearing must be held in the court that ordered probation.³³ A hearing must give the probationer an opportunity to confront and cross-examine witnesses and to present evidence.³⁴ The rules of evidence do not apply to probation revocation proceedings, so hearsay is admissible unless "unreasonably abundant" or "its substantive reliability [is] highly suspect."³⁵

While victims have the right to comment on early termination of probation or reduction of probation supervision, there is no explicit statutory right to notification or participation in revocation hearings.³⁶

Legal Standard for Revocation

Where a violation constitutes a crime for which the probationer has not yet been convicted, the court must find that the crime was committed by a preponderance of the evidence. Inexcusable failure to comply with the conditions of probation must also be shown by a preponderance of the evidence.³⁷

Revocation and Lesser Sanctions

The Maine statute gives the court a number of sanctions options, as quoted below:

Upon a finding of a violation of probation, the court may vacate all, part or none of the suspension of execution as to imprisonment or fine specified when probation was granted, considering the nature of the violation and the reasons for granting probation. The remaining portion of the sentence for which suspension of execution is not vacated upon the revocation of probation remains suspended and subject to revocation at a later date. During the service of that portion of the sentence imposed for which the suspension of execution was vacated upon revocation, the running of the period of probation must be interrupted and resumes again upon release. If the court finds a violation of probation but vacates none of the suspended sentence, the running of the period of probation resumes upon entry of that final disposition. The court may nevertheless revoke probation and vacate the suspension of execution as to the remainder of the suspended sentence or a portion thereof for any criminal conduct committed during the service of that portion of the sentence for which the suspension of execution was vacated upon revocation.³⁸

Where probable cause exists for violations other than a new crime, the probation officer may offer the probationer the option of accepting additional conditions in lieu of revocation proceedings. These include participation in a public restitution or treatment program or residing at a correctional facility for up to 90 days. If the probationer agrees in writing, the conditions are implemented. If there is no agreement, the probation officer may initiate the revocation process.³⁹

If a probationer is detained pending a probation revocation proceeding, that period of detention must be deducted from the time to be served as a result of revocation. No credit is given for time spent on supervision.⁴⁰

Appeal

If probation is revoked by a District Court, the probationer may appeal as of right to the Superior Court. If probation is revoked by a Superior Court, the probationer may request review by the Supreme Court, which has discretion to grant or deny a full appeal.⁴¹ The standard on appeal is whether the finding of probation violation was made in the exercise of a sound judicial discretion from the evidence before

the court or whether it was the result of whim or caprice.⁴² Prosecution appeals from courts' decisions during revocation proceedings are not mentioned in the statute.⁴³

Grades of Offenses in Maine	
Offense Category	Maximum Punishment
Class A	30 years, \$50,000 fine
Class B	10 years, \$20,000 fine
Class C	5 years, \$5,000 fine
Class D	364 days, \$2,000 fine
Class E	Six months, \$1,000 fine

Source: Me. Rev. Stat. tit. 17-A, §§ 1252(2), 1301(1-A) (2014).

END NOTES

¹ *State v. Black*, 914 A.2d 723, 726 (Me. 2007) (internal citations omitted).

² Me. Rev. Stat. tit. 17-A, § 1201(2) (2014).

³ Me. Rev. Stat. tit. 17-A, § 1203-C (2014).

⁴ Me. Rev. Stat. tit. 17-A, § 1152(2)(B) (2014).

⁵ *Black*, 914 A.2d at 727.

⁶ Me. Rev. Stat. tit. 17-A, § 1348-A (2014).

⁷ The table is based on Me. Rev. Stat. tit. 17-A, § 1202 (2014).

⁸ Me. Rev. Stat. tit. 17-A, § 1201(A-1) (2014).

⁹ Me. Rev. Stat. tit. 17-A, § 1202(A-1)(B) (2014). For a list of repeat sexual assault offenders covered by this provision, see Me. Rev. Stat. tit. 17-A, § 1252(4-B)(A) (2014).

¹⁰ Me. Rev. Stat. tit. 17-A, § 1231(2)(C) (2014).

¹¹ Me. Rev. Stat. tit. 17-A, § 1202(3) (2014).

¹² Me. Rev. Stat. tit. 34-A, § 5401 (2014); Me. Dep't Corr., *Adult Community Corrections*, Maine.gov (2013), <http://www.maine.gov/corrections/adult/index.htm>.

¹³ Me. Rev. Stat. tit. 17-A, ch. 54-G (2014).

¹⁴ Me. Rev. Stat. tit. 17-A, §§ 1231, 1202(A-1)(B) (2014); *State v. Cook*, 26 A.3d 834 (Me. 2011).

¹⁵ Me. Rev. Stat. tit. 17-A, § 1204(1) (2014).

¹⁶ *State v. Nolan*, 759 A2d. 721, 723-24 (Me. 2000).

¹⁷ Me. Rev. Stat. tit. 17-A, § 1204(3) (2014).

¹⁸ Me. Rev. Stat. tit. 17-A, § 1204(2-A) (2014).

¹⁹ Me. Rev. Stat. tit. 17-A, § 1203(1-A) (2014)

²⁰ Me. Rev. Stat. tit. 17-A, § 1204-A(1) (2014).

²¹ Me. Rev. Stat. tit. 17-A, §§ 1204(1-A), 1232 (2014).

²² Me. Rev. Stat. tit. 17-A, § 1204(1-B) (2014).

²³ Me. Rev. Stat. tit. 17-A, § 1349-C(1) (2014).

²⁴ Me. Rev. Stat. tit. 17-A, § 1202(2) (2014).

²⁵ *State v. Collins*, 681 A.2d 1168, 1170-71 (Me. 1996).

²⁶ Me. Rev. Stat. tit. 17-A, §§ 1202, 1203-C (2014).

²⁷ Me. Rev. Stat. tit. 17-A, § 1206(7-C) (2014).

²⁸ Email from John D. Pelletier, Executive Director, Maine Commission on Indigent Legal Services, Sept. 17, 2014.

²⁹ Me. Rev. Stat. tit. 17-A, § 1206(5)-(6) (2014).

³⁰ Me. Rev. Stat. tit. 17-A, § 1205-C(1) (2014).

³¹ Me. Rev. Stat. tit. 17-A, § 1205-B(2) (2014).

³² Me. Rev. Stat. tit. 17-A, § 1205-C(4) (2014). The bail decision is governed by post-conviction bail standards that are stricter than pre-conviction bail standards. Compare Me. Rev. Stat. tit. 15, §§ 1026 and 1051 (2014).

³³ Me. Rev. Stat. tit. 17-A, § 1206(2) (2014).

³⁴ Me. Rev. Stat. tit. 17-A, § 1206(4) (2014).

³⁵ *State v. Caron*, 334 A.2d 495, 498 (Me. 1975); *State v. James*, 797 A.2d 732, 736 (Me. 2002).

³⁶ Me. Rev. Stat. tit. 17-A, § 1172(1)(F) (2014).

³⁷ Me. Rev. Stat. tit. 17-A, § 1206(5)-(6) (2014).

³⁸ Me. Rev. Stat. tit. 17-A, § 1206(7-A) (2014).

³⁹ Me. Rev. Stat. tit. 17-A, § 1208 (2014).

⁴⁰ Me. Rev. Stat. tit. 17-A, § 1206(8) (2014).

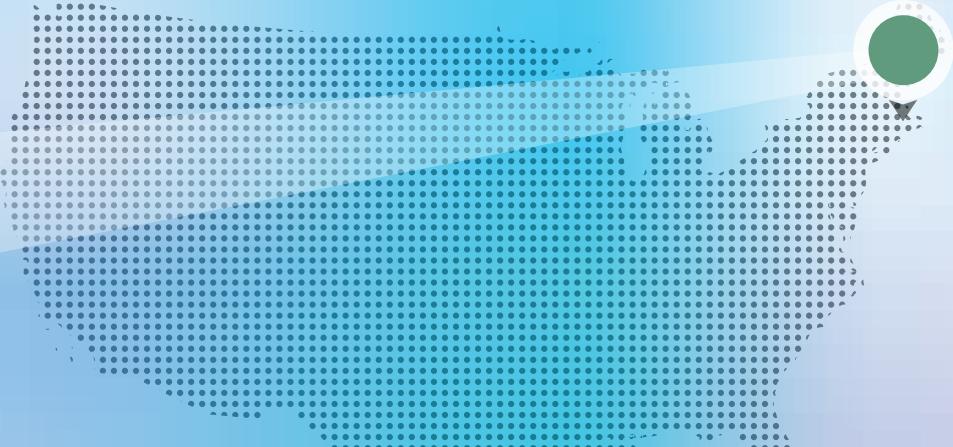
⁴¹ Me. Rev. Stat. tit. 17-A, § 1207(1)-(2) (2014).

⁴² *Dow v. State*, 275 A.2d 815, 824 (Me. 1971).

⁴³ Me. Rev. Stat. tit. 15, § 2115-A (2014).



PROBATION IN MASSACHUSETTS



**Probation Rate (per 100,000):
1,303**

Rank: 26 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

Probation affords individuals "an opportunity to remain in the community with specific conditions instead of being sentenced to jail or a house of correction."¹ The purpose of probation is "in large part to enable the [convicted person] to get on his feet, to become law abiding and to lead a useful and upright life under the fostering influence of the probation officer."²

Forms of Probation

There are two forms of probation following conviction in Massachusetts. First, probation may be imposed in conjunction with a suspended prison sentence.³ Second, with the defendant's consent, the court may order "straight probation" following conviction, without imposing a formal sentence.⁴ Caselaw explains that straight probation is not a final sentence, but is "simply the deferral of a sentencing decision."⁵

Sentencing courts may also order probation before trial or before a guilty plea, if the defendant consents (called "pretrial probation").⁶

Term

There is no statutory limit on the length of probation terms in Massachusetts. The court may direct that a defendant be placed on suspended-sentence probation "for such time and on such terms and conditions as it shall fix."⁷ The court may order straight probation "for such time and upon such conditions as it deems proper."⁸

Termination of probation is not automatic, even when the period of probation has run.⁹ At the end of the designated term, the probation officer must make a written report to the court of the result of probation, and the court may terminate probation or order a hearing at which the court may extend the probation period.¹⁰

Early Termination

No statute expressly authorizes the early termination of probation terms, but courts exercise common law authority to do so.¹¹

Supervision

All probation is supervised through the Office of Community Corrections.¹² Intensive probation integrates services with sanctions, structuring 40-70% of a probationer's free time at Community Corrections Centers and allowing more high-risk offenders to live in the community.¹³ Electronic Monitoring through GPS bracelets or Radio Frequency bracelets can track an offender's location in real time, and are more often used in serious cases, especially with sex offenses.¹⁴ Probationers may be placed on administrative probation, which requires minimal supervision and does not involve reporting directly to any probation officer.¹⁵

Conditions

Defendants may be placed on probation upon such conditions as the court deems proper,¹⁶ and judges have significant latitude in creating conditions. Where these conditions affect constitutional rights, they must be reasonably related to the goals of sentencing and probation.¹⁷ Probationers are entitled to reasonably specific conditions that provide clear guidelines as to what and when their actions or omissions will constitute a violation of probation.¹⁸

Rehabilitative programs and community service may be required in some instances. "Family trouble" (i.e. domestic violence or abuse) cases may require restrictions on travel and contact with victims, as well as special restitution based on past abuse.¹⁹

Probationers supervised by the Superior Court for more serious crimes must, at a minimum and unless otherwise specified: "(1) comply with all orders of the court, including any order for the payment of money, (2) report promptly to the probation officer as required by him, (3) notify the probation officer immediately of any change of residence, (4) make reasonable efforts to obtain and keep employment, (5) make reasonable efforts to provide adequate support for all persons dependent upon him, and (6) refrain from violating any law, statute, ordinance, by-law or regulation, the violation whereof is punishable."²⁰

Jail may not be imposed as a condition of probation in Massachusetts. However, the court may order probation to follow a period of incarceration by suspending the latter part of a prison sentence. This is called a "split sentence" in Massachusetts.²¹

The court is required to order all probationers to pay a probation fee of \$60 per month for supervised probation or \$45 per month for administrative probation (plus an additional \$5 victim service surcharge). Probation fees may be not be waived by the court "unless it determines after a hearing and upon written finding that such payment would constitute an undue hardship on said person or his family due to limited income, employment status or any other factor."²²

OF INTEREST

The Massachusetts Probation Agency was established in 1878, and was the first probation program in the United States. It was based on the work of John Augustus, the "Father of Probation." Augustus worked in the mid-1800s to persuade courts to release to his supervision offenders he felt he could work with. He helped them find housing, gain employment, and maintain sobriety.

Sources: Probation's Firsts, Mass. Ct. Sys., <http://www.mass.gov/courts/court-info/probation/probation-firsts-gen.html> (last visited Aug. 21, 2014); Charles B. Fields, John Augustus, Encyclopedia of Community Corrections 17-18 (Shannon M. Barton-Bellessa ed. 2012), available at <http://www.sagepub.com/hanserintro/study/materials/reference/ref6.1.pdf>.

Modification of Conditions

Although there is no express statutory power to modify conditions of probation after the term has begun, the Massachusetts courts have held that this authority exists under "well-established common law." On this basis, courts may amend conditions of probation to serve the ends of justice and the best interests of both the public and the defendant. Probation terms and conditions "may be subject to modification from time to time as a proper regard for the welfare, not only of the defendant, but of the community, may require."²³

Extension of Probation Term

Extension of probation can occur after the finding of a violation.²⁴ It can also occur at the end of a probation term, following a written report by the probation officer and a hearing.²⁵

Grounds for Probation Revocation

Probation may be revoked after a hearing in which a violation has been found. Probation may be revoked "with reasonable promptness" after the end of the probation term.²⁶

Revocation Procedures

When a probation officer determines that a probation violation has occurred, a probationer may turn themselves in based on notice of surrender or may be arrested on a warrant.²⁷ After the probationer has received written notice of the factual allegations of the violation, a preliminary hearing may be held in front of a judge or magistrate. This hearing must determine whether probable cause to believe a violation has occurred exists.²⁸

Grades of Offenses in Massachusetts

- A felony is a crime punishable by death or imprisonment in the state prison. All other crimes are misdemeanors.

Source: Mass. Gen. Laws ch. 274 § 1 (2014).

Probation violation hearings must be conducted by a judge in open court, and require two steps.²⁹ The factual issue of whether or not a violation has occurred must be adjudicated after the probation officer makes a statement describing the violation and evidence supporting it. The probationer has a right to counsel and the opportunity to present evidence (including hearsay), as well as cross-examine the state's witness. If the judge finds that a violation has occurred, the dispositional portion of the hearing begins. Notably, "a criminal conviction adequately protects the probationer's right to due process and may serve as the basis for a summary finding of a probation violation even though the judge lacks factual information to make an independent determination" that a violation has occurred.³⁰ The court must list the reasons for revocation in writing.³¹

Victims of crime have no right to participate in revocation hearings. However, testimony of a victim given at the trial phase with proper confrontation clause protections can be introduced at a revocation hearing.³²

Legal Standard for Revocation

The court may revoke probation at its discretion after finding based on a preponderance of the evidence that a probation violation has occurred.³³

Revocation and Lesser Sanctions

Upon a finding of a probation violation, the court has four options: continuance of probation, termination of probation, modification (the addition of reasonable conditions) or revocation. Probation violation proceedings may also be terminated at the court's discretion.³⁴

If "suspended-sentence" probation is revoked, the original suspended prison sentence must be imposed in full. The Massachusetts Supreme Judicial Court has held that revoking courts are not free to impose a different sentence.³⁵

When "straight probation" is revoked, the defendant may be sentenced to any penalty that could have been imposed at the time of original sentencing. The courts have said defendants may receive the maximum sentence on each count, and sentences for multiple counts may be imposed consecutively, just as at the original sentencing.³⁶

Appeal

A probationer may directly appeal a probation revocation order by filing a notice of appeal within thirty days of the imposition of a previously suspended sentence.³⁷ Subsequent conviction or guilty pleas can render moot a claim that a judge erred in finding a probation violation based on a new charge. Even in these circumstances, a probationer can raise a constitutional violation on appeal. Probationers may not use Mass. R. Crim. P. 30(a) (entitled "Post Conviction Relief") to challenge the result of a revocation hearing as it is intended only for challenges of the legality or technical basis of the underlying sentence.³⁸

END NOTES

¹ *What is Probation?*, Mass. Ct. Sys., <http://www.mass.gov/courts/court-info/probation/ocp-faq-gen.html#WhatisProbation> (last visited Aug. 21, 2014).

² *Commonwealth v. Wilcox*, 841 N.E. 2d 1240, 1245 (Mass. 2006).

³ Mass. Gen. Laws ch. 279, § 1A (2014) ("When a person convicted before a court is sentenced to imprisonment, the court may direct that the execution of the sentence, or any part thereof, be suspended and that he be placed on probation for such time and on such terms and conditions as it shall fix.").

⁴ Mass. Gen Laws ch. 276, § 87 (2014); *Commonwealth v. Ventura*, 987 N.E.2d 1266, 1272 n. 9 (Mass. 2013).

⁵ *Commonwealth v. Buzzese*, 773 N.E.2d 921, 928 (Mass. 2002).

⁶ Mass. Gen Laws ch. 276, § 87 (2014).

⁷ Mass. Gen. Laws ch. 279, § 1A (2014).

⁸ Mass. Gen Laws ch. 276, § 87 (2014).

⁹ *Commonwealth v. Sawicki*, 339 N.E. 2d 740, 742 (Mass. 1975).

¹⁰ Mass. Super. Ct. R. 57 (2014).

¹¹ Cf. *Commonwealth v. Hunt*, 900 N.E.2d 121, 124 (Mass. App. 2009) (trial judge assured defendant that "he would be happy to terminate her probation early" if she resolved her problems and got "back on her feet"); *Buckley v. Quincy Div. of Dist. Ct. Dept.*, 482 N.E. 2d 511, 512 (Mass. 1985) (holding that courts have common-law authority to amend terms and conditions of probation).

¹² Mass. Off. of Community Corrections, <http://www.mass.gov/courts/court-info/probation/overview-community-corrections-gen.html> (last visited Aug. 21, 2014).

¹³ *Intensive/Enhanced Supervision at Community Corrections Centers*, Mass. Off. Of Community Corrections, <http://www.mass.gov/courts/docs/admin/occ/five-ws-of-supervision.pdf> (last visited Aug. 21, 2014).

¹⁴ *Electronic Monitoring Program*, Mass. Ct. Sys., <http://www.mass.gov/courts/court-info/probation/electronic-monitoring-program.html> (last visited Aug. 21, 2014); Mass. Gen. Laws ch. 265 § 47 (2014).

¹⁵ *What Does Administrative Probation Mean?*, Mass. Ct. Sys., <http://www.mass.gov/courts/court-info/probation/ocp-faq-gen.html#WhatdoesAdministrativeProbationmean> (last visited Sept. 8, 2014).

¹⁶ Mass. Gen. Laws ch. 276 § 87 (2014).

¹⁷ *Commonwealth v. Rousseau*, 990 N.E. 2d 543, 558 (Mass. 2013).

¹⁸ *Commonwealth v. Lally*, 773 N.E.2d 985, 988 (Mass. App. Ct. 2002).

¹⁹ Mass. Gen. Laws ch. 276 § 42a (2014).

²⁰ Mass. R. Super. Ct. R. 56 (2014).

²¹ *Commonwealth v. Juzba*, 691 N.E.2d 604 (Mass. App. 1998); Mass. Gen. Laws ch. 279, § 1 (2014).

²² Mass. Gen. Laws ch. 276 § 87a (2014).

²³ *Buckley v. Quincy Div. of Dist. Ct. Dept.*, 482 N.E. 2d 511, 512-13 (Mass. 1985).

²⁴ Mass. R. S. Dist. Ct. Prob. Violation R. 7 (2014),

²⁵ Mass. Super. Ct. R. 57 (2014).

²⁶ *Commonwealth v. Odoardi*, 489 N.E. 2d 674, 679 (Mass. 1985).

²⁷ This is a special form provided by the Commissioner of Probation.

²⁸ Mass. R. S. Dist. Ct. Prob. Violation R. 8 (2014); Mass. R. Mag. Rule 6 (2014).

²⁹ Mass. R. S. Dist. Ct. Prob. Violation R. 5 (2014).

³⁰ *Commonwealth v. Joyner*, 4 N.E. 3d 282, 295 (Mass. 2014) (citing *Commonwealth v. Maggio*, 605 N.E. 2d 1247 (Mass. 1993)).

³¹ Mass. R. S. Dist. Ct. Prob. Violation R. 7(d)(iv) (2014).

³² *Commonwealth v. Janovich*, 769 N.E. 2d 286 (Mass. App. Ct. 2002).

³³ *Commonwealth v. Wilcox*, 841 N.E. 2d 1240 (Mass. 2006).

³⁴ Mass. R. S. Dist. Ct. Prob. Violation R. 7(d) (2014).

³⁵ *Commonwealth v. Holmgren*, 656 N.E.2d 577, 579 (Mass. 1995) ("[I]f the suspension of a sentence is revoked, 'the sentence shall be in full force and effect.' The judge had no choice, once he decided that the suspension of sentence should be revoked.") (citation omitted); Mass. Gen Laws ch. 279, § 3 (2014) ("If [a suspended prison sentence] is revoked, the sentence shall be in full force and effect").

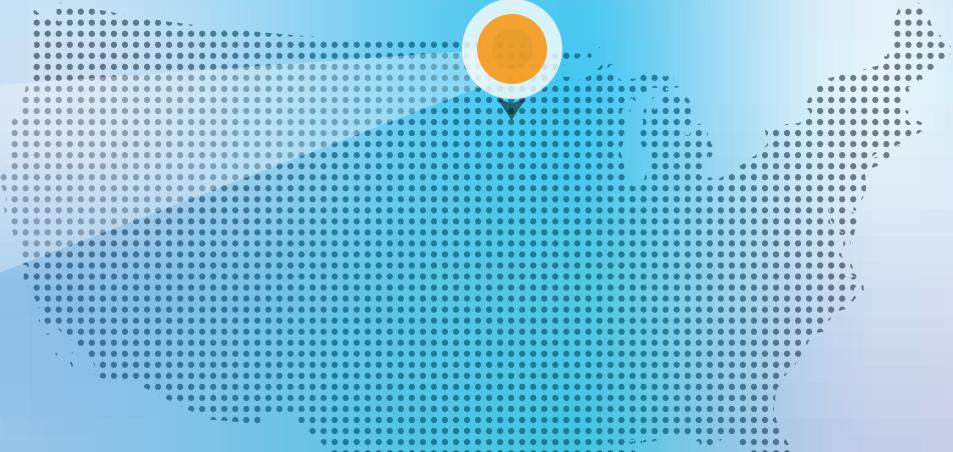
³⁶ *Commonwealth v. Buzzese*, 773 N.E.2d 921, 929 (Mass. 2002).

³⁷ *Commonwealth v. Christian*, 712 N.E. 2d 573, 574 (Mass. 1999).

³⁸ *Commonwealth v. Pena*, 967 N.E. 2d 603, 608-09 (Mass. 2012). See also Mass. R. Crim. P. 30 (2014).



PROBATION IN MINNESOTA



Probation Rate (per 100,000):

2,625

Rank: 46 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

Probation is a court-ordered sanction imposed as either an alternative to confinement or in conjunction with confinement or intermediate sanctions. There are several stated purposes of probation, including to punish the offender, deter future criminal behavior, and to provide an opportunity for rehabilitation and time to pay restitution.¹

Forms of Probation

Following conviction, probation may be ordered when the judge has stayed the imposition or execution of a prison sentence.² There is no free-standing sentence of probation, unaccompanied by a stayed prison sentence.³

The courts are given no express statutory authorization in Minnesota to place an offender on probation as part of a deferred adjudication agreement (that is, the use of probation where no formal conviction has been entered); however courts routinely do so as an exercise of "inherent judicial power."⁴

Term

Except when the law requires a sentence of life imprisonment or a mandatory minimum prison sentence, the court can impose probation for any level of offense for the following terms:

- Felony: Up to 4 years, or up to the maximum prison term that could be imposed, whichever is longer. The maximum possible probation term under state law is 40 years, which is the longest possible prison sentence short of a life term.
- Gross misdemeanor DWI or certain felony criminal vehicular offenses: Up to 6 years.
- All other gross misdemeanors or certain domestic assault-related misdemeanors: Up to 2 years.
- All other misdemeanors: Up to 1 year.⁵

Early Termination

There is no statute or rule that expressly sets forth a procedure for early discharge from probation but the courts in some counties routinely do so, in the exercise of their discretion, for probationers who are doing well.

Supervision

The court can order that probation be supervised or unsupervised, and conditions can be imposed in either case. Probation services are provided through three delivery systems: the Department of Corrections (DOC), county probation offices, and community corrections agencies. The DOC provides all probation supervision in 28 of Minnesota's 87 counties. The full cost of DOC supervision is born by the State. In an additional 27 counties, DOC provides adult felony probation supervision, but adult misdemeanants and juveniles are supervised by county probation officers who work at the pleasure of the county's chief judge. Counties with a population exceeding 30,000 may operate under the Minnesota Community Corrections Act (CCA), and 32 counties, including those where the cities of Minneapolis and Saint Paul are located, have done so. Under the CCA, the county provides all levels of community supervision, which is funded by a combination of state subsidy and county tax dollars.⁶

Conditions

Judges have broad discretion to establish a wide range of probation conditions.⁷ There is no statutory provision in Minnesota that articulates a general limit on permissible conditions. Setting the conditions of probation is considered part of the pronouncement of sentence, and is therefore exclusively a judicial function that cannot be delegated to the probation agency.⁸ The conditions of probation must be clearly articulated in the sentencing order or else they cannot later be a basis for revocation, especially when the condition proscribes non-criminal conduct.⁹

A jail term of up to one year in a county facility may be imposed as a condition of probation.¹⁰

In addition to jail, typical conditions include electronic monitoring, chemical dependency or mental health treatment, payment of restitution, and community work service.¹¹ Through practice and experience, judges typically develop standard sets of conditions that they will impose for specific offenses. Specific conditions are mandated by law for a few offenses, such as DWI and certain domestic assault offenses.¹²

Both the DOC and local probation agencies may establish a schedule of correctional fees to be paid by probationers. They are not statutorily required to do so. No dollar limitation is set by statute, but the fees must be "reasonably related to offenders' abilities to pay and the actual cost of correctional services." The fees may be waived if it is

determined that "the offender does not have the ability to pay the fee, the prospects for payment are poor, or there are extenuating circumstances justifying waiver of the fee."¹³

Modification of Conditions

There is no express authority in statute or rule for the judge to modify probation conditions after they are imposed.

OF INTEREST

Minnesota allows the probation revocation process to be initiated within six months after a probation term has been completed.

Source: Minn. Stat. Ann. § 609.14, subdiv. 1(b) (West 2014).

Extension of Probation Term

The court has authority to extend the probation term up to two years – one year at a time – if the probationer has failed not completed court-ordered treatment prior to expiration of the original term.¹⁴

Grounds for Probation Revocation

Grounds for a probation revocation proceeding exist when it appears a probationer has violated any condition of probation or has committed a new offense.¹⁵

Revocation Procedures

To initiate a probation revocation proceeding, the prosecutor or probation officer must submit a written report to the court showing probable cause to believe a probationer violated probation. The court must then issue a summons unless the court believes a warrant is necessary to secure the probationer's appearance or to prevent harm to the probationer or another.¹⁶ This can be done up to six months after the end of the stay.¹⁷

There is no provision in Minnesota law to notify crime victims of probation revocation proceedings.¹⁸

At the initial appearance on the violation, the court must assign an interpreter if necessary, advise the probationer of the alleged grounds for revocation, advise the probationer of his or her rights, including the right to representation by counsel at all stage of the proceedings, and set conditions of release. The revocation hearing must be held within a

reasonable time following the initial appearance, but if the probationer is in custody, the hearing must be held within seven days unless waived by the probationer. If the violation alleges a new crime, the revocation hearing may be postponed pending disposition of the criminal case.¹⁹

For technical violations, the probation officers have the option of scheduling a sanctioning conference with the offender.²⁰ If the offender agrees to participate, a conference is held and the probation officer issues a recommended probation violation sanction that must be confirmed by a court. If the court does not confirm the sanction, the probation officer may ask the court to initiate formal revocation proceedings.²¹

Grades of Offenses in Minnesota

- A felony is a crime for which a prison sentence of more than a year may be imposed.
- A gross misdemeanor is any crime that is not a felony or misdemeanor. The maximum fine that may be imposed is \$3,000.
- A misdemeanor is a crime for which a sentence of not more than 90 days or a fine of not more than \$1,000, or both, may be imposed.

Source: Minn. Stat. Ann. § 609.02, subdiv. 2-4 (West 2014).

Legal Standard for Revocation

Before revoking probation, the court must make findings on the following three “*Austin* factors,” so named because they were established by the Minnesota Supreme Court in its decision in *State v. Austin*. The court must: (1) Specifically identify the condition or conditions violated; (2) Find that the violation was intentional or inexcusable; and (3) Find that the policies favoring probation no longer outweigh the need for confinement.²² If a violation is not found, the court must dismiss the proceedings and place the individual back on probation under the terms previously ordered.²³

There are no formal probation revocation guidelines in use in Minnesota.

Revocation and Lesser Sanctions

The court has several options if a violation is found. If imposition of sentence was previously stayed (the court accepted a finding or plea of guilty but did not pronounce a sentence), the court may (1) Continue the stay of imposition and either continue or amend the conditions of probation; (2) Impose sentence but stay execution of that sentence, and establish new or amended conditions of probation; or (3) Impose and execute a jail or prison sentence.

If a sentence was previously imposed but execution of the sentence was stayed, the court may: (1) Continue the stay of execution and either continue or amend the conditions of probation; (2) Execute the previously imposed sentence; or (3) Modify the previously imposed sentence and execute it.²⁴

In revocation proceedings, the court has the same broad discretion to establish probation conditions as when the sentence was originally pronounced. There is no limit on the cumulative amount of local jail time that may be imposed as a consequence of probation violations.²⁵

The court can modify the sentence during a stay of imposition or execution of sentence so long as the court does not increase the period of confinement.²⁶ Practically, this means that when executing a previously stayed sentence, the court can decrease, but not increase, the length of confinement. When a felony sentence is executed, noncustodial probation time cannot be credited toward the executed prison term.²⁷

Appeal

The defendant or prosecutor may appeal the probation revocation decision.²⁸ The grounds for appeal are “whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the sentencing court’s findings of fact.”²⁹

END NOTES

¹ Minn. Stat. Ann. § 609.02, subdiv. 15 (§2014).

² Minn. Stat. Ann. § 609.135, subdiv. 1(a)(2) (2014).

³ Minn. Stat. Ann. §§ 609.10; 609.125 (2014).

⁴ *State v. Krotzer*, 548 N.W.2d 252, 254–55 (Minn. 1996).

⁵ Minn. Stat. Ann. § 609.135, subdiv. 2 (2014);

⁶ Minn. Dep’t of Corr., *Fact Sheet: Correctional Delivery Systems* (last visited Sep. 10, 2014), <http://www.doc.state.mn.us/PAGES/files/5613/9878/6654/DeliverySystemsFactSheet.pdf>.

⁷ See *State v. Friberg*, 435 N.W.2d 509, 515–16 (Minn. 1989) (stating that district courts have discretion in fashioning conditions of probation so long as they are “reasonably related to the purposes of sentencing and must not be unduly restrictive of the probationer’s liberty or autonomy. ... The discretion of the trial court in establishing conditions of probation is reviewed carefully, however, when the conditions restrict fundamental rights.”).

⁸ *State v. Henderson*, 527 N.W.2d 827, 829 (Minn. 1995).

⁹ *State v. Ornelas*, 675 N.W.2d 74, 80 (Minn. 2004).

¹⁰ Minn. Stat. Ann. § 609.135, subdiv. 4 (2014).

¹¹ See Minn. Stat. Ann. § 609.135, subdiv. 1(b) (2014) (defining intermediate sanctions that may be imposed during probation).

¹² E.g., Minn. Stat. Ann. § 169A.283 subdiv. 1 (2014) (requiring a person convicted of DWI to submit to the level of care recommended in the chemical use assessment report), and § 609.135, subdiv. 5 (2014) (requiring counseling if convicted of assaulting a spouse).

¹³ Minn. Stat. Ann. § 241.272 (2014); Minn. Stat. Ann. § 244.18 (2014).

¹⁴ Minn. Stat. Ann. § 609.135, subdiv. 2(g)-(h) (2014). But see *State v. Barrientos*, 837 N.W.2d 294, 300–301 (Minn. 2013) (holding that probation may also be continued under § 609.14, which in combination with § 609.135 would allow the court to extend the defendant’s probation up to the statutory maximum for his or her offense).

¹⁵ Minn. Stat. Ann. § 609.14, subdiv. 1 (2014).

¹⁶ Minn. R. Crim. P. 27.04, subdiv. 1 (2014).

¹⁷ Minn. Stat. Ann. § 609.14, subdiv. 1(b) (2014).

¹⁸ Minn. Stat. Ann. § 609.14 (2014).

¹⁹ Minn. R. Crim. P. 27.04, subdiv. 2 (2014).

²⁰ Minn. Stat. Ann. § 244.197 (2014).

²¹ Minn. Stat. Ann. § 244.198 (2014).

²² *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980).

²³ Minn. R. Crim. P. 27.04, subdiv. 3(2)(a) (2014).

²⁴ Minn. R. Crim. P. 27.04, subdiv. 3(2)(b) (2014).

²⁵ *State v. Johnson*, 743 N.W.2d 622, 626 (Minn. Ct. App. 2008).

²⁶ Minn. R. Crim. P. 27.03, subdiv. 9 (2014).

²⁷ Minn. R. Crim. P. 27.03, subdiv. 4(E)(2) (2014).

²⁸ Minn. R. Crim. P. 27.04, subdiv. 3(4) (2014).

²⁹ Minn. R. Crim. P. 28.05, subdiv. 2 (2014).



PROBATION IN MISSISSIPPI



Probation Rate (per 100,000):

1,370

Rank: 30 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

Probation is imposed when the ends of justice and the best interest of the defendant and the public will be served, as an alternative to incarceration.¹

Forms of Probation

An individual may be placed on probation in two ways. First, following conviction, the court may suspend the imposition or execution of sentence and place the defendant on probation. A fully suspended sentence may not be modified without revocation proceedings once the court session ends. Defendants convicted of offenses carrying maximum penalties of death or life imprisonment are not eligible to receive a fully suspended sentence.²

Second, on its own motion and with the advice of the Department of Corrections, between 30 days and one year after the defendant begins serving a sentence of confinement, the sentencing court may suspend the remainder of the sentence and place the defendant on "earned probation." Defendants convicted of offenses carrying death or life imprisonment as the maximum penalties, whose offenses carry a mandatory sentence, or who have two or more felony convictions or one conviction involving the use of a deadly weapon are not eligible for earned probation.³

Term

The term of probation is fixed by the court, but normally cannot exceed five years. There is an exception for cases of desertion or failure to support minor children, where the court may fix or extend the period of probation for as long as the duty to support such minor children exists.⁴ Maximum probation sentences for individual crimes may be lower; for example, the maximum term of probation for misdemeanor shoplifting is currently one year.⁵

Early Termination

The court has discretion to terminate probation at any time during the period of probation.⁶

In 2014, Mississippi passed legislation allowing for earned discharge from probation. After an initial full month of compliance with probation conditions, defendants may receive earned discharge credits equal to the number of days in the month, but they are not eligible to earn any credits for a month in which a violation occurs or for months between submission of a violation report and final action on that. The defendant will be discharged once the time served plus the earned credits equals the original term.⁷

Supervision

Defendants granted probation under a suspended sentence or earned probation are supervised by the Department of Corrections.⁸

Conditions

By statute, Mississippi provides a list of conditions that may be imposed including: committing no new crimes, avoiding injurious habits and persons or places of disrepute, remaining within a set area, working, permitting visits by a probation officer, submitting to drug or alcohol testing, paying fines, and supporting dependents. The statute also includes catch-all language that gives the court broad authority to impose "any other" probation condition.⁹

The statute does not expressly authorize courts to impose a period of jail confinement as a condition of probation.

All defendants are required to pay a monthly fee for supervision of \$55 to the Department of Corrections, unless a "hardship waiver" is granted by the court or department.¹⁰ A hardship waiver may not be granted for a period exceeding ninety (90) days. There is an additional monthly fee for employed offenders under house arrest who are subject to electronic monitoring, when they are released for some part of the day to go to work. The fee is capped at \$50 for juvenile offenders, but there is no statutory cap for adults. The department may waive the monthly fee if the offender is a full-time student or is engaged in vocational training.¹¹

In felony cases, the court may also order the offender to pay a "state assessment" of the greater of \$1,000 or the maximum fine authorized for the offense. State assessments are deposited in the Crime Victims' Compensation Fund.¹²

Modification of Conditions

The sentencing court may modify conditions at any time during the period of probation.¹³

Extension of Probation Term

Courts have the discretion to extend probation terms, but the total time served must remain within the 5 year maximum. The statute makes an exception for cases of desertion or failure to support minor children, where probation may continue for so long as the duty to support such minor children exists.¹⁴

Grounds for Probation Revocation

Any violation of probation conditions that occurs after sentencing may be grounds to initiate the revocation process.¹⁵

Revocation Procedures

At any time during probation, the court or a judge in vacation (between regular court sessions) may issue an arrest warrant based on an alleged probation violation.¹⁶ Defendants are entitled to a preliminary hearing to determine whether probable cause exists to hold them until the final revocation hearing, but defendants may waive this right.¹⁷ Sex offenders must be held until the final revocation hearing unless the court explicitly finds that the defendant does not pose a danger to the community.¹⁸

OF INTEREST

Legislation passed in 2014 created a grid of disciplinary options for probation officers to impose when a defendant commits common types of technical violations. Probation officers "are required to conform to the sanction grid." Sanctions, in order from lightest to harshest, include: verbal warnings, increased reporting, increased drug and alcohol testing, mandatory substance abuse treatment, loss of earned-discharge credits, and incarceration in jail for no more than two days up to twice a month. Probation officers are also encouraged to provide positive incentives under this system including verbal recognition, reduced reporting, and credit towards an earned discharge.

Sources: Miss. Code Ann. § 47-7-38 (2014); Miss. Code Ann. § 47-7-38(2) (2014); Miss. Code Ann. § 47-7-38(5) (2014); Miss. Code Ann. § 47-7-38(6) (2014).

Final revocation hearings must be held within 30 days of the defendant's arrest or the charge(s) will be dismissed.¹⁹ Some due process protections must be provided at a hearing, including a right to written notice of the alleged violation, the opportunity to appear in person, cross examine witnesses, a neutral and detached magistrate, and a written statement by the fact finder as to the evidence relied on and reasons for revoking probation.²⁰ Defendants do not have a right to counsel at revocation hearings unless the issues are "complex or otherwise difficult to develop."²¹

Legal Standard for Revocation

The state courts have ruled that, in order to revoke probation, it must be shown that the defendant "more likely than not" violated the terms of probation.²² Because this is a lower standard of proof than at a criminal trial, courts may find violations where the defendant was not found guilty of the alleged conduct in a separate trial or even where the charges related to the alleged conduct were dismissed.²³ To revoke a defendant's probation for failure to pay fees, fines or restitution, the court must find that the defendant failed to pay as a result of "neglect or willful disobedience." The defendant carries the burden of proving they are unable to pay.²⁴

Grades of Offenses in Mississippi

- Mississippi has no general classification scheme for the grading of felonies and misdemeanors. A felony is any crime punishable by death or imprisonment in the penitentiary. Misdemeanors are punishable by up to 6 months in jail and a fine of up to \$1,000.

Sources: Miss. Code Ann. § 1-3-11 (2014); Miss. Code Ann. § 21-13-19 (2014).

Revocation and Lesser Sanctions

Upon revocation, the court may impose part or all of the suspended sentence, but may not increase the original sentence.²⁵ If revocation occurs, the court is allowed to deal with the case as if there had been no probation.²⁶ The court also has the authority to continue probation after finding a violation.²⁷ A defendant who commits a technical violation (rather than a new crime) will be required to serve time in a technical detention or restitution center, the length of which ranges from 90 days for a first technical violation to 180 days for a third violation. Four or more violations are treated as a non-technical violation.²⁸

Granting a probation violator the opportunity to be confined for a relatively brief time under the RID Program with the opportunity to earn an early release by successful completion of the program requirements is, in our view, an appropriate exercise by the circuit court of the discretion afforded it under Section 47-7-37 of the Mississippi Code. The opportunity to participate in the RID Program necessarily carries with it the possibility that the participant will not successfully complete the program and thereby forfeit his chance for an early release from confinement.

One alternative sanction is the "Regimented Inmate Discipline Program" (RID), a "boot camp" program, which gives probation violators an opportunity to be confined for a relatively brief time and to earn an early release by successful completion of the RID program requirements.²⁹

Appeal

An order revoking probation is not appealable. The courts have said that the proper venue for complaints about probation revocation is a motion for post-conviction relief, where the offender can raise a claim that his probation "was unlawfully revoked."³⁰

END NOTES

¹ Miss. Code. Ann. 47-7-33(1) (2014).

² *Id.*

³ Miss. Code Ann. § 47-7-47 (2014).

⁴ Miss. Code Ann. § 47-7-37(1) (2014).

⁵ Miss. Code Ann. § 97-23-93 (2014).

⁶ Miss. Code Ann. § 47-7-35(1) (2014).

⁷ Miss. Code Ann. § 47-7-40 (2014).

⁸ Miss. Code Ann. § 47-7-5(6) (2014).

⁹ Miss. Code Ann. § 47-7-35(1) (2014).

¹⁰ Miss. Code Ann. § 47-7-49(1) (2014).

¹¹ Miss. Code Ann. § 47-5-1007 (2014).

¹² Miss. Code Ann. § 47-7-49(1) (2014).

¹³ Miss. Code Ann. § 47-7-35(1) (2014).

¹⁴ Miss. Code Ann. § 47-7-37(1) (2014).

¹⁵ Miss. Code Ann. § 47-7-37(2) (2014); *Johnson v. State*, 925 So.2d 86, 92 (Miss.2006); *Smith v. State*, 742 So.2d 1146, 1148 (Miss. 1999).

¹⁶ Miss. Code Ann. § 47-7-37(2) (2014).

¹⁷ Miss. Code Ann. § 47-7-37(3) (2014).

¹⁸ Miss. Code Ann. § 47-7-37(4) (2014).

¹⁹ Miss. Code Ann. § 47-7-37(10) (2014).

²⁰ *Livingston v. State*, 800 So. 2d 532 (Miss. Ct. App. 2001).

²¹ *Riely v. State*, 562 So.2d 1206, 1210 (Miss. Ct. App. 2002).

²² See, e.g., *Jones v. State*, 976 So. 2d 407 (Miss. Ct. App. 2008).

²³ See, e.g., *Fairley v. State*, 138 So.3d 280, 282 (Miss. Ct. App. 2014); *Graham v. State*, 952 So.2d 1040, 1042 (Miss. Ct. App. 2007); *Hubbard v. State*, 919 So. 2d 1022, 1028 (Miss. Ct. App. 2005).

²⁴ *Bradford v. State*, 832 So.2d 1288, 1290 (Miss. Ct. App. 2002).

²⁵ Miss. Code Ann. § 47-7-37(6) (2014); *Brunson v. State*, 796 So. 2d 284, 287 (Miss. Ct. App. 2001).

²⁶ Miss. Code Ann. § 47-7-37(5)(b),(6) (2014).

²⁷ *Id.*

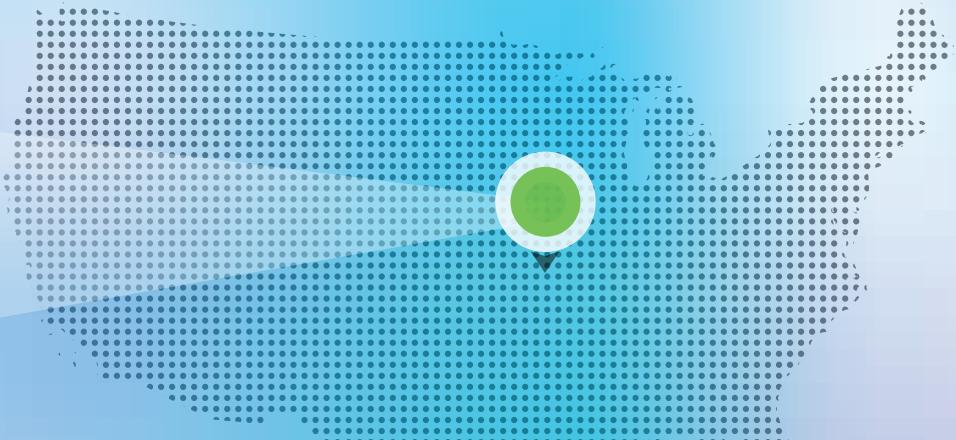
²⁸ Miss. Code Ann. § 47-7-37(5) (2014).

²⁹ Miss. Code Ann. § 47-5-110 (2014); *Curry v. State*, 855 So. 2d 452, 454 (Miss. Ct. App.2003)

³⁰ *Beasely v. State*, 795 So.2d 539, 540 (Miss. 2001).



PROBATION IN MISSOURI



Probation Rate (per 100,000):

1,197

Rank: 19 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2, Adults on probation, 2012).

Definition and Purpose

"Probation is a power granted by the General Assembly to the judiciary to lessen the impact of a criminal sentence on the defendant," and probation operates "independently of the criminal sentence."¹ The court may place a person on probation if, having regard to the offense and the defendant, the court is of the opinion that confinement is not necessary for the protection of the public; and the defendant is in need of guidance, training, or other assistance which, in his case, can be effectively administered through probation supervision.²

Forms of Probation

Probation may be granted after a defendant is found guilty of a felony, misdemeanor, or infraction. The court may either suspend the imposition of a sentence and place the person on probation or pronounce a sentence, suspend its execution, and place the person on probation.³ A probationer can reject the terms of probation and instead accept the punishment for the crime.⁴

The Missouri courts have held that no conviction or final judgment is entered when a judge chooses to suspend the imposition of sentence. The Missouri Supreme Court has stated that "[t]he obvious legislative purpose of the sentencing alternative of suspended imposition of sentence [as distinct from suspended execution] is to allow a defendant to avoid the stigma of a lifetime conviction and the punitive collateral consequences that follow."⁵

The judge may close the defendant's record to the general public after successful completion of the probation term.⁶

Term

For felonies, probation terms must be between one and five years.⁷ Exceptions exist for the most serious sex offenses, where lifetime supervision is mandatory, along with mandatory electronic monitoring as a condition of probation, although there is provision for termination of offenders after they reach the age of 65.⁸ For misdemeanors, probation terms must be between six months and two years. For an infraction, probation terms must be between six months and one year.⁹

Early Termination

The court may terminate probation at any time before completion of the term if warranted by the conduct of the defendant and the ends of justice.¹⁰ Offenders on probation for a drug offense under Chapter 195 or an eligible Class C or D felony can earn early release through earned compliance credits. Earned compliance credits reduce the term of probation by thirty days for each full calendar month in which there is no violation report or motion to revoke probation; however, all credits earned are rescinded upon revocation. The probationer will be discharged once the combination of time served on probation (and in custody, if any) plus the earned compliance credits equals the term of probation and the offender has completed at least 24 months of supervision.¹¹

Supervision

The Board of Probation and Parole provides probation services in all felony cases and for certain class A misdemeanors.¹² By statute, misdemeanor probation may be provided by the board, a private entity contracted by the court to provide supervision services, or the court.¹³ Probation for a felony may be supervised or unsupervised; most misdemeanor probation is unsupervised.¹⁴

Conditions

The court has discretion to impose conditions that are reasonably necessary to ensure that the defendant remains law abiding.¹⁵ All probationers supervised by the Board of Probation and Parole receive a standard list of eleven conditions from the sentencing court including things like obeying the law, maintaining employment, and obtaining permission to associate with convicted felons or misdemeanants.¹⁶ The court may order conditions that serve to compensate the victim or society such as payment of restitution or the performance of free work for a public or charitable purpose.¹⁷ Moreover, the conditions may include "restorative justice methods" that provide structured opportunities for local communities to determine effective local sentencing options to assure that individual community programs are specifically designed to meet local needs.¹⁸

The court may require as a condition of probation that the offender submit to a period of detention up to forty-eight hours after the determination by a probation officer that the offender violated a condition of probation. The period of detention may not exceed 120 days in a felony case and may not exceed the shorter of 30 days or the maximum authorized term of imprisonment for misdemeanors. The court cannot impose a period of detention as a condition of probation for an infraction.¹⁹

The Board of Probation and Parole has authority to charge a supervision fee of up to \$60 a month, and also has authority to waive the fee. The board may contract with a private entity for fee collections services.²⁰ Misdemeanor probation fees must be between \$30 and \$50 per month. However, the court may exempt misdemeanants from the fee based on a number of different factors including disability, age, and educational status.²¹

Modification of Conditions

The court may modify or enlarge the conditions of probation at any time prior to the expiration or termination of the probation term.²²

OF INTEREST

The Missouri Division of Probation and Parole publishes books for probationers and parolees that provide useful overviews of the probation system. For example, the "White Book" is a guide to the rules and regulations governing conditions of probation, and the "Red Book" covers rights of probationers in preliminary and revocation hearings.

Sources: Mo. Dep't Corr., Division of Probation and Parole (last visited Sept. 26, 2014), <http://doc.mo.gov/PP/>.

Extension of Probation Term

The court may extend the period of probation once without a finding of violation, for a total time not to exceed the maximum allowable term for the offense. However, if the defendant admits a violation of the conditions probation or a violation is found by the court, the court may extend the term by an additional year, with the total term not to exceed the otherwise available maximum probation term for the offense plus one year.²³

Grounds for Probation Revocation

Violation of a condition of probation is grounds for revocation.²⁴

Revocation Procedures

A probationer detained based on an alleged violation has a right to a preliminary hearing as soon as possible after arrest, and to immediate written notification regarding details of the allegation. Probationers may choose to waive this hearing.²⁵ While probationers may testify and present evidence at this stage, this is an informal hearing to determine probable cause and most requests to have legal counsel present are denied.²⁶

At a revocation hearing, probationers have a right to present personal testimony, witnesses and evidence, as well as to cross-examine adverse witnesses. A probationer has a right to a representative, which may be a family member, friend, employer, or legal counsel.²⁷ The court must inform the probationer prior to the revocation hearing that the probationer may have the right to request the appointment of counsel if the probationer is unable to retain counsel. If the probationer requests counsel, the court must determine whether counsel is necessary to protect the probationer's due process rights. If the court determines that counsel is not necessary, the judge must state the grounds for the decision in the record.²⁸

Upon request, victims have a right to be informed of and heard at probation revocation proceedings unless the court determines that the interests of justice require otherwise.²⁹

A statutory alternative to revocation proceedings allows the probation officer to impose short-term incarceration of 48 hours for the first violation and over 48 hours for subsequent violations in lieu of revocation, with a limit of 360 days per year.³⁰ The probationer must be furnished with a written report detailing the violation and be advised of the right to a hearing.³¹

Legal Standard for Revocation

In order to revoke probation, the hearing judge must be reasonably satisfied from the evidence that a violation has occurred.³²

Revocation and Lesser Sanctions

If a violation is found, the court can continue the probationer on the existing conditions, with or without modifying or enlarging the conditions or extending the term.³³ With regard to extension, the court can extend probation up to the maximum term noted previously plus one additional year.³⁴ If execution was previously stayed, the court can revoke probation and order that any sentence previously imposed be executed. If imposition was previously suspended, the court can revoke probation and impose any sentence available under law.³⁵ Offenders on probation for a drug offense under Chapter 195 or a Class C or D felony who have not committed a new crime or violated a weapons possession condition may also be eligible for a 120-day Department of Corrections program, which may include shock incarceration or institutional placement. A probationer who successfully completes the program must be released back to probation on its original terms.³⁶

Appeal

There is no right of direct appeal from a probation revocation; errors in probation revocation proceedings may be contested by the appropriate writ, including a writ of habeas corpus.³⁷

Grades of Offenses in Missouri	
Offense Category	Maximum Punishment
Class A Felony	10 years -30 years or life
Class B Felony	5 years – 15 years
Class C Felony	Up to 7 years, up to \$5,000
Class D Felony	Up to 4 years, up to \$5,000
Class A Misdemeanor	Up to 1 year, up to \$1,000
Class B Misdemeanor	Up to 6 months, up to \$500
Class C Misdemeanor	Up to 15 days, up to \$300
Infraction	Fine, forfeiture, or civil penalty
Misdemeanor class 2	Maximum of 4 months
Misdemeanor class 3	Maximum of 30 days

Sources: Mo. Rev. Stat. § 557.016 (2014). N.B.: Proposed legislation may add class D felonies and class E misdemeanors and increase penalties for class C and D felonies . S.B. 491, 2014 Leg., 2d Reg. Sess. (Mo. 2014); Mo. Rev. Stat. § 558.011 (2014); Mo. Rev. Stat. § 560.011 (2014); Mo. Rev. Stat. § 560.016 (2014); Mo. Rev. Stat. § 556.021(2), (6) (2014).

END NOTES

¹ *State v. Fernow*, 328 S.W.3d 429, 432 (Mo. Ct. App. 2010).

² Mo. Rev. Stat. § 559.012 (2014).

³ Mo. Rev. Stat. § 557.011(2)–(3) (2014).

⁴ *State v. Welsh*, 853 S.W.2d 466, 470 (Mo. Ct. App. 1993).

⁵ The court further stated that, “Worthy offenders have a chance to clear their records by demonstrating their value to society through compliance with conditions of probation under the guidance of the court.” *Yale v. City of Independence*, 846 S.W.2d 193, 195 (Mo. 1993).

⁶ The records remain available to certain law enforcement, criminal justice, and government agencies for defined purposes, are sometimes available to crime victims in child abuse, neglect, and sex trafficking cases, and may be provided to qualified researchers under procedures to protect offenders’ confidentiality. Mo. Rev. Stat. §§ 610.105(1), (2); 610.120(1); 43.507 (2014).

⁷ Mo. Rev. Stat. § 559.016(1)(1) (2014).

⁸ Appropriate cases for termination among offenders who are 65 or older must be “determined by risk assessment.” Mo. Rev. Stat. § 559.106(1), (4) (2014).

⁹ Mo. Rev. Stat. § 559.016(1)(2), (3) (2014).

¹⁰ Mo. Rev. Stat. § 559.036(2) (2014).

¹¹ Mo. Rev. Stat. § 217.703 (2014).

¹² Mo. Rev. Stat. § 217.750 (2014).

¹³ Mo. Rev. Stat. § 559.600 (2014).

¹⁴ Robert H. Dierker, 28 Mo. Prac. § 37:2 (2014).

¹⁵ Mo. Rev. Stat. § 559.021(1) (2014); *Welsh*, 853 S.W.2d at 470.

¹⁶ Mo. Code Regs. Ann. tit. 14, § 80-3.010 (2014).

¹⁷ Mo. Rev. Stat. § 559.021(2) (2014).

¹⁸ *Id.*; Mo. Rev. Stat. § 217.777(1) (2014).

¹⁹ Mo. Rev. Stat. §§ 557.011(2)(5), 559.026 (2014).

²⁰ Fees may be used to pay the costs of contracted collections services. The fees may otherwise be used to provide community corrections and intervention services for offenders. Such services include substance abuse assessment and treatment, mental health assessment and treatment, electronic monitoring services, residential facilities services, employment placement services, and other offender community corrections or intervention services designated by the board to assist offenders to successfully complete probation, parole, or conditional release. Mo. Rev. Stat. § 217.690(3) (2014).

²¹ Mo. Rev. Stat. § 559.604 (2014).

²² Mo. Rev. Stat. § 559.021(7) (2014).

²³ Mo. Ann. Stat. § 559.016(3) (2014).

²⁴ Mo. Ann. Stat. § 217.722(1) (2014).

²⁵ Mo. Rev. Stat. § 217.722(2) (2014); see, also Mo. Code Regs. Ann. tit. 14 § 80-4.030 (2014).

²⁶ Bd. Prob. & Parole, *Rights of Offender To Preliminary and Revocation Hearing*, Dep’t Corr. 1, 2 (Sept. 2012), <http://doc.mo.gov/Documents/prob/Red%20book.pdf>.

²⁷ Mo. Code Regs. Ann. tit. 14, § 80-4.030 (2014).

²⁸ Mo. Rev. Stat. § 559.036(6) (2014).

²⁹ Mo. Const. art. 1, § 32, cl. 2.

³⁰ Mo. Rev. Stat. § 217.718(1)–(2) (2014).

³¹ Mo. Rev. Stat. § 217.718(3) (2014).

³² *Sincup v. Blackwell*, 608 S.W.2d 389, 392 (Mo. 1980).

³³ Mo. Rev. Stat. § 559.036(3) (2014).

³⁴ Mo. Rev. Stat. § 559.016(3) (2014).

³⁵ Mo. Rev. Stat. § 559.036(5) (2014).

³⁶ Mo. Rev. Stat. §§ 559.036(4), 559.115(3)–(4) (2014).

³⁷ *State v. Burnett*, 72 S.W.3d 212 (Mo. Ct. App. 2002); *State v. Stewart*, 14 S.W.3d 671, 672 (Mo. Ct. App. 2000).

³⁸ Mo. Rev. Stat. § 557.016 (2014). N.B.: Proposed legislation may add class D felonies and class E misdemeanors and increase penalties for class C and D felonies . S.B. 491, 2014 Leg., 2d Reg. Sess. (Mo. 2014).

³⁹ Mo. Rev. Stat. § 558.011 (2014).

⁴⁰ Mo. Rev. Stat. § 560.011 (2014).

⁴¹ Mo. Rev. Stat. § 560.016 (2014).

⁴² Mo. Rev. Stat. § 556.021(2), (6) (2014).

⁴³ Mo. Dep’t Corr., *Division of Probation and Parole* (last visited Sept. 26, 2014), <http://doc.mo.gov/PP/>.



PROBATION IN NEW YORK



**Probation Rate (per 100,000):
701**

Rank: 6 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

The court may sentence a person to probation if it determines that institutional confinement may not be necessary for the protection of the public, the defendant is in need of guidance, training, or other assistance which can be effectively administered through probation supervision, and a probation disposition is not inconsistent with the ends of justice.¹

Forms of Probation

Upon conviction, the court can impose a sentence of probation or conditional discharge.² Probation is a free-standing sentence that requires a period of supervision and court-ordered conditions.³ It is not imposed in conjunction with a suspended prison term.

Conditional discharge is a variant in which the defendant is released without imprisonment or probation supervision, but is still subject to court-ordered conditions. Like probation, conditional discharge is a free-standing sentence. Conditional discharge may be ordered when the court "is of the opinion that neither the public interest nor the ends of justice would be served by a sentence of imprisonment and that probation supervision is not appropriate."⁴

For some low-seriousness offenses, with the consent of both parties, an offender may be released on his own recognizance before trial or entry of a guilty plea, subject to conditions imposed by the court. This is called an "adjournment in contemplation of dismissal." The case will be dismissed automatically after a period of 6 months or one year, depending on the offense, if the government does not apply within that time for a determination that charges should not be dismissed.⁵

Term

Probation terms vary based on the seriousness of the conviction offense as follows:

- Class A-II felony drug offender or class B felony committed by a second felony drug offender: lifetime probation.⁶
- Class B felony sale of controlled substance to a child: 25 years.
- Felony sex offenses: 10 years.
- Other felonies: 3-5 years.
- Class A misdemeanor sex offenses: 6 years.
- Class A misdemeanor: 2-3 years.
- Class B misdemeanor public lewdness: 1-3 years
- Class B misdemeanor: 1 year.
- Unclassified misdemeanor: 2-3 years if authorized imprisonment is greater than 3 months; otherwise 1 year.⁷

For conditional discharge, the term is 3 years for a felony and 1 year for a misdemeanor.⁸

Early Termination

The court can terminate a period of probation (other than lifetime probation) or a period of conditional discharge at any time. The court may terminate probation if it finds the probationer is no longer in need of such guidance, training, or other assistance administered through probation, the probationer has diligently complied with the terms and conditions of probation, and termination is not adverse to the protection of the public. The court may terminate a period of lifetime probation if the person's probation has been unrevoked for at least five consecutive years. The court may terminate conditional discharge if it finds the defendant has diligently complied with the terms and conditions of conditional discharge and termination is not adverse to protection of the public.⁹

Supervision

In New York, probation is administered as an executive agency at the county level, except within the city of New York, which is authorized to establish its own probation department.¹⁰ A probationer is in the legal custody of the court that imposed the probation sentence until it is terminated.¹¹

Conditions

The court has discretion to impose conditions of probation or conditional discharge that are "reasonably necessary to ensure that the defendant will lead a law-abiding life or conditions that assist the defendant in doing so."¹² Probation conditions need not be fundamentally rehabilitative to be valid.¹³ When imposing a sentence of probation or conditional discharge, the court must consider restitution or reparation, and may also impose additional conditions ranging from avoiding bad habits and performing community service to undergoing medical or psychiatric treatment (including institutionalization) and participating in alcohol or substance abuse programming.¹⁴

The court may impose a sentence of imprisonment of up to 60 days for a misdemeanor and up to 180 days for a felony as a condition of probation or conditional discharge. The period of confinement and the subsequent period of probation or conditional discharge, added together, may not exceed the maximum term of probation or conditional discharge permitted by law.¹⁵

Any county or city may require DWI offenders to pay a monthly probation administration fee of \$30 to the local probation department. The department must waive all or part of the fee for indigent offenders when payment would

work an unreasonable hardship on the offender, his or her immediate family, or any other person who is dependent on the offender for financial support. The fee may not be imposed as a condition of probation; instead, payment may be enforced by the county or city "in any manner permitted by law for enforcement of a debt."¹⁶

OF INTEREST

The Neighborhood Opportunity Network (NeON) is focused on providing resources to probationers (and especially to young men) in neighborhoods of New York City, including Brownsville, East New York, Bedford-Stuyvesant, Staten Island, Central Harlem, South Jamaica and the South Bronx. Network member organizations, businesses, and government agencies provide literacy services, technical education, academic support, employment preparation, mentoring, healthcare, and other programs to probationers close to where they live. The network believes that probation clients who find work, continue their education, support their families, and contribute to the well-being and stability of their neighborhoods help build stronger, safer and more vibrant communities.

Sources: N.Y.C. Dept. Prob., Neighborhood Opportunity Network City N.Y. (2014), <http://www.nyc.gov/html/prob/html/neon/neon.shtml>.

Current state legislation authorizes supervision fees only for DWI offenses. A state attorney general opinion clarified that counties cannot impose supervision fees without specific statutory authorization.¹⁷

Modification of Conditions

The court may modify or enlarge the conditions of probation or conditional discharge at any time during the sentence. The probationer must be present unless the modification serves to eliminate or relax the conditions of probation.¹⁸

Extension of Probation Term

New York law does not provide for extension of the probation term except as a sanction for a probation violation.¹⁹ For conditional discharge, if the court required that the defendant pay restitution or make reparations and the condition is not satisfied, the court may impose an additional period of conditional discharge of up to two years.²⁰

Grounds for Probation Revocation

Probation may be revoked for conviction of a crime or violation of conditions.²¹

Revocation Procedures

If during the period of a sentence of probation or of conditional discharge the court has reasonable grounds to believe that the defendant has violated a condition of the sentence, the court may issue a warrant or notice to appear to bring the defendant before the court without unnecessary delay.²² At the defendant's initial appearance on the violation, the court must ask the defendant whether he or she wishes to make a statement, and if the defendant does, the court can accept it and base its decision on that statement. If the court does not accept it or if no statement is given, the matter will proceed to a hearing. At the hearing, the defendant may present evidence and witnesses, and cross-examine adverse witnesses. The defendant is entitled to counsel at all stages of the proceeding, and must be advised of the right to counsel.²³ Individual localities may consider the presence of victims when evaluating probation violations,²⁴ but there are no specific victim notification rules.

Legal Standard for Revocation

The court may not revoke a sentence of probation or conditional discharge unless the court has found that the defendant has violated a condition of the sentence

and the defendant has had an opportunity to be heard.²⁵ The people must prove that a violation has occurred by a preponderance of the evidence.²⁶

Revocation and Lesser Sanctions

At the conclusion of a revocation hearing, the court may decide to revoke, continue, or modify the sentence of probation or conditional discharge.²⁷ If probation is revoked, the court must sentence the offender to imprisonment or to a "split sentence" of probation beginning with a term of confinement as a condition of probation—all within statutory limits for the offense of conviction. Following revocation of a sentence of conditional discharge, the court may sentence the offender to probation or a split sentence, as authorized for the offense of conviction.²⁸ If sentenced to incarceration, a probationer will not receive credit for time spent on probation, but will receive credit for any period of incarceration already served.²⁹ The probation period is stayed ("interrupted") during the pendency of violation proceedings and, upon a finding of a violation, if the court continues or modifies the probation sentence, the court may extend the probation term up to the period of interruption, although any time in custody must be credited against the probation term.³⁰ If the court continues probation, it may also extend the term up to the maximum statutory length, with credit given for time already served on probation.³¹

Appeal

A defendant may appeal a resentence following a revocation of a sentence of probation or conditional discharge if the revocation was improper, or if the new sentence's terms are unauthorized, harsh, or excessive.³² Any appeal by the people must be based on a claim that the sentence is invalid as a matter of law.³³ Appeals are based on an abuse of discretion standard.³⁴

Grades of Offenses in New York

Offense Category	Maximum Punishment
Class A-I Felony	15 years to life without parole; up to \$100,000 fine
Class A-II Felony	3 years to life; up to \$50,000 fine
Class B Felony	25 years; up to \$30,000 fine
Class C Felony	15 years; up to \$15,000 fine
Class D Felony	7 years; up to \$5000, or double defendant's gain in commission of crime
Class E Felony	4 years; same as above
Class A Misdemeanor	1 year; up to \$1000 fine
Class B Misdemeanor	3 months; up to \$500 fine
Unclassified Misdemeanor	Incarceration and fine vary depending on crime
Violation	15 days; up to \$250 fine

Sources: N.Y. Penal Law § 70.00 (2014). Note: life without parole sentence authorized only in some murder cases; N.Y. Penal Law § 80.00 (2014); N.Y. Penal Law § 70.15 (2014); N.Y. Penal Law § 80.05 (2014).

END NOTES

¹ N.Y. Penal Law § 65.00(1)(a) (2014).

² N.Y. Penal Law § 60.01(2)(a)(ii) (2014). Two additional options not discussed in this profile are intermittent prison and unconditional discharge. Intermittent imprisonment, often referred to as a “weekend sentence,” is a revocable sentence of imprisonment to be served on days or during certain periods of days, or both, specified by the court as part of the sentence. N.Y. Penal Law § 85.00 (2014). Unconditional discharge is a determination that, apart from conviction, no further sanction or condition on the defendant’s release is warranted. The court can order unconditional discharge in any case in which conditional discharge is authorized “if the court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant’s release.” N.Y. Penal Law § 65.20 (2014).

³ N.Y. Penal Law § 65.00(2) (2014).

⁴ N.Y. Penal Law § 65.05(1) (2014).

⁵ N.Y. Crim. Proc. Law § 170.55(1)-(3) (2014) (available “[u]pon or after arraignment in a local criminal court upon an information, a simplified information, a prosecutor’s information or a misdemeanor complaint”).

⁶ Lifetime probation is possible only where a district attorney has recommended that sentence because the defendant provided material assistance in the investigation, apprehension, and prosecution of a related case and an administrative judge has concurred with the recommendation. N.Y. Penal Law § 65.00(1)(b) (2014); *People v. David*, 477 N.Y.S.2d 384, 385 (N.Y. App. Div. 1984).

⁷ N.Y. Penal Law § 65.00(3) (2014).

⁸ N.Y. Penal Law § 65.05(3) (2014).

⁹ N.Y. Crim. Proc. Law § 410.90(1) (2014).

¹⁰ N.Y. Exec. Law §§ 255-56 (2014).

¹¹ N.Y. Crim. Proc. Law § 410.50 (2014).

¹² N.Y. Penal Law § 65.10(1) (2014).

¹³ *People v. Myatt*, 681 N.Y.2d 114, 116 (N.Y. App. Div. 1998).

¹⁴ N.Y. Penal Law § 65.10(2) (2014).

¹⁵ N.Y. Penal Law § 60.01(2)(d) (2014).

¹⁶ N.Y. Exec. Law § 257-c(1), (4) (2014).

¹⁷ Office of the Attorney General, State of New York, Informal Opinion No. 2003-4 (2003).

¹⁸ N.Y. Crim. Proc. Law § 410.20 (2014).

¹⁹ N.Y. Crim. Proc. Law § 410.70(1) (2014).

²⁰ N.Y. Penal Law § 65.05(3) (2014).

²¹ N.Y. Penal Law § 65.00(2) (2014).

²² N.Y. Crim. Proc. Law § 410.40(2) (2014).

²³ N.Y. Crim. Proc. Law § 410.70(2) (2014).

²⁴ N.Y. Comp. Codes. R. & Regs. tit. 9, §352.4(a)(1) (2014).

²⁵ N.Y. Crim. Proc. Law § 410.70(1) (2014).

²⁶ N.Y. Crim. Proc. Law § 410.70(3) (2014); *People v. Bevilaccqua*, 936 N.Y.S.2d 397, 398 (N.Y. App. Div. 2012).

²⁷ N.Y. Crim. Proc. Law § 410.70(5) (2014).

²⁸ N.Y. Penal Law § 60.01(3)(e), (4) (2014).

²⁹ *People ex. Rel Fancher v. Wasser*, 676 N.Y.S.2d 289, 81 (N.Y. App. Div. 1998).

³⁰ N.Y. Penal Law § 65.15(2) (2014); N.Y. Crim. Proc. Law § 410.70(5) (2014).

³¹ N.Y. Penal Law § 65.00(4) (2014).

³² N.Y. Crim. Proc. Law § 450.30(1) (2014).

³³ N.Y. Crim. Proc. Law § 450.30(2) (2014).

³⁴ *E.g. People v. Hemphill*, 501 N.Y.S.2d 503, 505 (N.Y. App. Div. 1986); *People v. Provost*, 825 N.Y.S.2d 580, 582 (N.Y. App. Div. 2006).



PROBATION IN NORTH CAROLINA



**Probation Rate (per 100,000):
1,280**

Rank: 24 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2, Adults on probation, 2012).

Definition and Purpose

Probation programs have the following principal purposes: to hold offenders accountable for making restitution, to ensure compliance with the court's judgment, to effectively rehabilitate offenders by directing them to specialized treatment or education programs, and to protect the public safety.¹

Forms of Probation

In order to impose probation following a conviction, the court must impose a suspended sentence of imprisonment, which may be activated upon violation of conditions of probation.²

The court may place a defendant who has entered a deferred prosecution agreement on probation. Deferred prosecution is available only for class H or I felonies or misdemeanors, when certain other conditions are met and any known victim has been given an opportunity to be heard.³

Term

Probation terms in North Carolina may not exceed five years for convicted offenders, or two years if prosecution has been deferred.⁴ The standard length of probation depends on the crime and type of probation. Unless the court makes

specific findings that longer or shorter terms are necessary, presumptive lengths of original periods of probation are as follows:⁵

- Misdemeanants sentenced to community punishment: 6-18 months
- Misdemeanants sentenced to intermediate punishment: 12-24 months
- Felons sentenced to community punishment: 12-30 months
- Felons sentenced to intermediate punishment: 18-36 months

Early Termination

The court may terminate a defendant's probation and discharge the defendant at any time earlier than the statutory periods if warranted by the ends of justice and by the defendant's conduct.⁶

For probationary periods greater than three years, the court must review the case file of offenders who have served three years to determine whether to terminate probation at that time. It is the probation officer's responsibility to bring the case before the court at the three-year mark, and the probationer must be given the opportunity to appear.⁷

Supervision

The court may place the defendant on supervised or unsupervised probation.⁸ There is also a category of “special probation,” which may include periods of continuous or intermittent confinement in a correctional or treatment facility during the probation term.⁹

The probation officer has authority to transfer certain low-risk misdemeanants from supervised to unsupervised probation once they have made all required payments to the clerk of court, and may be given similar authority by the court for some felony probationers.¹⁰

Under the state’s “structured sentencing” scheme (called sentencing guidelines in other states), there is a distinction between “community punishment,” which is less onerous, and “intermediate punishment,” which may include stricter terms and greater intensity of supervision. For example, special probation or assignment to a drug treatment court may be ordered only as part of an intermediate punishment.¹¹

Conditions

Courts may set conditions of probation reasonably necessary to ensure that the defendant will lead a law-abiding life and that assist him or her in doing so.¹² Regular conditions of probation are presumptively valid. However, if a court imposes an *ad hoc* special condition of probation, the condition must be reasonably related to the defendant’s rehabilitation.¹³

Standard conditions include: committing no crime, remaining within the jurisdiction of the court, reporting to a probation officer, making whereabouts known if placed on supervised probation, satisfying child and family obligations, not possessing a weapon without permission, paying a supervision fee, remaining employed or in school and notifying probation of lack of employment, paying court costs, fines, and restitution, paying the costs of appointed counsel, attending treatment, submitting to warrantless searches, refraining from use of controlled substances, and supplying samples of blood, urine, or breath.¹⁴ Special conditions may include institutional medical or psychiatric treatment, residence in a facility, restrictions and programs related to alcohol or substance abuse, and community service.¹⁵

Enumerated conditions differ for various types of probation such as community punishment, intermediate punishment, and special probation.¹⁶

For all community and intermediate punishment sentences, the court may impose short sentences of 2-3 days in jail, adding up to no more than 6 days in any month, and no more than 18 days overall. These short sentences are known as “quick dips.” The court may delegate authority to probation officers to impose quick dips for violations of court-ordered conditions without judicial review, although confinement may be imposed only after administrative review and approval by a Chief Probation Officer, and a number of other procedural protections have been followed. Unless waived, probationers must be notified of their right to seek review in court.¹⁷

OF INTEREST

If a probationer has served three years of a probationary period greater than three years, North Carolina requires mandatory judicial review of the probationer’s case file. This requires notice to the probationer, who may appear at the hearing. The court may terminate probation after the review.

Source: N.C. Gen. Stat. § 15A-1342(d) (2014).

When special probation is an authorized sentence, the court may order that probationers serve periods of continuous or noncontinuous confinement during their probation terms. The total of all periods of confinement may not exceed one-quarter of the maximum incarceration sentence for the offense.¹⁸

Offenders on supervised probation are required to pay a supervision fee of \$40 per month, but the fee may be waived for good cause on motion of the probationer. The court may delegate to the probation officer the responsibility to determine the payment schedule.¹⁹

Under the state’s Crime Victims’ Rights Act, victims have the right to be notified of the defendant’s regular conditions of probation or post-release supervision, special or added conditions, supervision requirements, and any subsequent changes. Victims also have the right to be notified of the date when the defendant is terminated or discharged.²⁰ The Division of Adult Corrections also provides services to victims of offenders on probation.²¹

Modification of Conditions

Probation may be reduced, terminated, continued, or modified at any time by a judge entitled to sit in the court which imposed probation. Modification of probation in response to a violation requires notice and a hearing, but this hearing may be held without the probationer present if sufficient efforts have been made to give notice.²² A probationer must be given a written statement setting forth the modification.²³

Grades of Offenses in North Carolina

- North Carolina grades felonies in a “felony punishment chart,” which many other states would call a sentencing guidelines grid. The punishment chart has been enacted into statutory law. Authorized penalties are determined according to the grade of felony (A to I) and the offender’s “prior record level” (I to VI). At each offense level and prior record score, presumptive, mitigated, and aggravated sentencing ranges are set out. The punishment chart sets forth only minimum sentencing ranges, however; maximum sentences must be computed with reference to separate tables. For the lowest grade of felonies, for offenders with no or modest criminal histories, the felony punishment chart authorizes only community punishments or intermediate punishments. That is, prison sentences are impermissible by statute in such cases.

For misdemeanors, sentence ranges are established by a “misdemeanor punishment chart,” enacted as a statute, which sets out minimum and maximum authorized penalties according to class of misdemeanor offense (A1, 1, 2, or 3) and “prior conviction level” (I to III). Authorized punishment durations range from 1 to 150 days. For most first offenders, and some offenders with low criminal history scores, the misdemeanor chart authorizes only community punishments or intermediate punishments.

Sources: N.C. Gen. Stat. Ann. § 15A-1340.17 (2014); N.C. Gen. Stat. Ann. § 15A-1340.23 (2014).

Extension of Probation Term

With notice and a hearing, the court may also extend the period of probation for good cause up to the maximum time allowable.²⁴ With consent of the defendant, the court may extend the period of probation so that the defendant may complete a program of restitution or to allow the defendant to continue medical or psychiatric treatment ordered as a condition of probation. This period cannot exceed three years beyond the original period of probation, and must be ordered only in the last six months of the original probation period.²⁵

Grounds for Probation Revocation

Violation of select conditions, but not all, may result in revocation of probation. Violations that trigger revocation include commission of a new crime or absconding or avoiding supervision. For violation of other conditions of probation, revocation may only occur after two 90-day periods of incarceration have been imposed for previous violations.²⁶

Revocation Procedures

If a probationer is arrested for a violation, he must be taken without unnecessary delay before a judicial official to have conditions of release pending a revocation hearing set. A preliminary probable cause hearing must also be conducted, at which the probationer has a right to appear and speak on his own behalf, present relevant information and, on request, personally question adverse informants. This hearing, and the revocation hearing that follows it, may be waived.²⁷

At the revocation hearing, evidence must be disclosed to the probationer, the probationer may speak on his or her own behalf, present evidence, and cross-examine witnesses. The probationer has a right to retained or appointed counsel.²⁸

Under the state constitution, victims have the right to be informed of and to be present at court proceedings of the accused.²⁹ Under the state’s Crime Victims’ Rights Act, victims have the right to be notified of any hearing to revoke, continue, modify, or terminate probation, and to be informed of the outcome of the hearing.³⁰

Legal Standard for Revocation

To support revocation, the evidence of a violation must "reasonably satisfy" the judge in the exercise of his or her sound discretion that the defendant has willfully or without lawful excuse violated a valid condition of probation. The court's decision must take account of the law and the particular circumstances of the case, and be directed by "the reason and conscience" of the judge to a "just result." The court is required to make findings of fact demonstrating that it considered the evidence offered at a probation revocation hearing, although a failure to make findings does not constitute an abuse of discretion.³¹

Revocation and Lesser Sanctions

If a probationer violates a condition of probation, the court may continue the defendant on probation, with or without modifying the conditions, may place the defendant on special probation or, if continuation, modification, or special probation is not appropriate, may revoke the probation and activate the suspended sentence imposed at the time of

initial sentencing, if any, or may order that charges as to which prosecution has been deferred be brought to trial. The court has authority to reduce the originally suspended prison sentence before it is activated, but must do so within the constraints of the state's structured sentencing laws (called "sentencing guidelines" in other states).³² For most conditions of probation, a first or second violation may result in confinement for a period of up to 90 days.³³

Appeal

When a district court judge finds a violation of probation and activates a sentence or imposes special probation, the defendant may appeal for a de novo revocation hearing. However, if the defendant waives a revocation hearing, the findings and revocation consequences cannot be appealed.³⁴ When a superior court judge revokes the defendant's probation, the defendant may appeal to the Court of Appeals.³⁵ The court's finding of a violation, if supported by competent evidence, will not be overturned absent a showing of manifest abuse of discretion.³⁶

END NOTES

¹ N.C. Gen. Stat. Ann. § 15A-1343.2(b) (2014).

² N.C. Gen. Stat. Ann. § 15A-1342(c) (2014).

³ N.C. Gen. Stat. Ann. § 15A-1341(a1) (2014).

⁴ N.C. Gen. Stat. Ann. § 15A-1342(a) (2014).

⁵ N.C. Gen. Stat. Ann. § 15A-1343.2(d) (2014).

⁶ N.C. Gen. Stat. Ann. § 15A-1342(b) (2014).

⁷ N.C. Gen. Stat. Ann. § 15A-1342(d) (2014).

⁸ N.C. Gen. Stat. Ann. § 15A-1341(b) (2014).

⁹ N.C. Gen. Stat. Ann. § 15A-1351(a) (2014).

¹⁰ N.C. Gen. Stat. Ann. § 15A-1343(g) (2014).

¹¹ N.C. Gen. Stat. Ann. § 15A-1340.11 (2014).

¹² N.C. Gen. Stat. Ann. § 15A-1343(a) (2014).

¹³ N.C. Gen. Stat. § 15A-1343(b1)(10); *State v. Lambert*, 553 S.E.2d 71, 77 (N.C. App. 2001).

¹⁴ N.C. Gen. Stat. Ann. § 15A-1343(b) (2014).

¹⁵ N.C. Gen. Stat. Ann. § 15A-1343(b1) (2014).

¹⁶ N.C. Gen. Stat. Ann. §§ 15A-1343(a1) and (b4); 15A-1351 (2014).

¹⁷ N.C. Gen. Stat. §§ 15A-1343(a1)(3); 15A-1343.2(e)(5), (f)(6) (2014). See also Jamie Markham, *Quick Dips*, N.C. Crim. L.: U.N.C. Sch. Gov't Blog (Nov. 3, 2011), <http://nccriminallaw.sog.unc.edu/?p=3023>.

¹⁸ N.C. Gen. Stat. § 15A-1351 (2014).

¹⁹ N.C. Gen. Stat. Ann. § 15A-1343(c1), (g) (2014).

²⁰ N.C. Gen. Stat. Ann. § 15A-837(a)(1), (8) (2014).

²¹ N.C. Adult Correction Victim Unit, *Victim Services for Prison, Probation, and Parole*, N.C. Dep't Pub. Safety (2014), <https://www.ncdps.gov/Index2.cfm?a=000003,002144,002150>.

²² N.C. Gen. Stat. Ann. § 15A-1344 (2014).

²³ N.C. Gen. Stat. Ann. § 15A-1343(c) (2014).

²⁴ N.C. Gen. Stat. § 15A-1344 (d) (2014).

²⁵ N.C. Gen. Stat. § 15A-1342(a) (2014).

²⁶ N.C. Gen. Stat. § 15A-1344(a) (2014).

²⁷ N.C. Gen. Stat. Ann. § 15A-1345 (2014).

²⁸ N.C. Gen. Stat. Ann. § 15A-1345 (2014).

²⁹ N.C. Const. art. I, § 37(1)(a).

³⁰ N.C. Gen. Stat. Ann. § 15A-837(a)(2)-(3) (2014).

³¹ E.g., *State v. Belcher*, 619 S.E.2d 567, 570 (N.C. Ct. App. 1982).

³² N.C. Gen. Stat. Ann. § 15A-1344 (2014).

³³ N.C. Gen. Stat. Ann. § 15A-1344(d2) (2014).

³⁴ N.C. Gen. Stat. Ann. § 15A-1347 (2014).

³⁵ N.C. Gen. Stat. § 15A-1347 (2014).

³⁶ *State v. Young*, 660 S.E.2d 574, 576 (N.C. Ct. App. 2008) (citing *State v. Guffey*, 116 S.E.2d 148 (N.C. 1960)).



PROBATION IN OHIO



**Probation Rate (per 100,000):
2,886**

Rank: 49 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2, Adults on probation, 2012).

Definitions and Purpose

The goals of probation (sometimes included in the term "community control" in Ohio) are "doing justice, rehabilitating the offender, and insuring good behavior."¹

Forms of Probation

When a defendant is convicted of a felony or misdemeanor for which a prison term is not mandatory, the court may "directly impose" community control sanctions. This is a free-standing sentence that is not conjoined with a suspended sentence of incarceration. For misdemeanors only, the court may impose a jail term, suspend part or all of the term, and place the offender under a community control sanction.²

Prior to conviction, eligible offenders may be placed on supervision pursuant to a pre-trial diversion agreement with the prosecutor.³

Term

For both felonies and misdemeanors, the duration of all community control sanctions imposed on an offender cannot exceed five years. The term is tolled if the defendant absconds, leaves the jurisdiction, or is confined in an institution for committing an offense.⁴

The court may extend a defendant's term of community control as sanction for a violation without revocation

proceedings, but may not extend the term beyond the 5-year maximum.⁵ When extending a probation term, due process procedures attending revocation proceedings "need not be strictly complied with" because, in the view of the Ohio courts, "the extension of probation is of lesser imposition on a probationer's liberty than either revocation or termination of probation."⁶

Early Termination

The court has authority to reduce the defendant's term of community control if a defendant "fulfills the conditions of a community control sanction . . . in an exemplary manner" for a "significant" period of time.⁷

Supervision

Departments of probation are established and supervised by the county court of common pleas.⁸ Misdemeanants may be placed under the supervision of the department of probation or the court itself, but only the department of probation may supervise felons.⁹ The Ohio Department of Rehabilitation and Correction provides courtesy supervision for a sizeable number of counties, mainly rural counties, across the state, through the Adult Parole Authority.¹⁰

Conditions

Ohio statutes list suggested residential, nonresidential, and financial sanctions, but courts may set other conditions at their discretion.¹¹ Residential sanctions may include time in

jail, prison, a halfway house, or a treatment center, but no prison time may be imposed for a misdemeanor and no jail time may be imposed for a minor misdemeanor.¹² The maximum time an offender may serve in a community-based treatment facility is 6 months.¹³ Nonresidential sanctions may include such conditions as curfews, electronic monitoring, drug treatment, or a requirement to seek work.¹⁴ Additionally, a minimum requirement that the defendant "abide by the law" automatically applies.¹⁵ There are no mandatory financial sanctions, but Ohio law lists a maximum amount based on the offense.¹⁶ Defendants who can prove they are indigent may not be required to pay financial sanctions, but the court may require community service instead.¹⁷

The Ohio Supreme Court has developed a test to evaluate whether a condition other than those suggested in statute is appropriate: "courts must 'consider whether the condition (1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation."¹⁸

Supervision fees are not mandatory, and may not in any case exceed \$50 per month.¹⁹

Modification of Conditions

In misdemeanor cases, the court may modify a defendant's conditions on the motion of either party or on its own, with or without a violation.²⁰ There is no parallel statute for felony probationers. For felons, courts may make community control less restrictive for offenders who have fulfilled sentence conditions for a significant period of time and in an exemplary manner, but may not increase the level of supervision or add conditions without a finding of a violation.²¹

Extension of Probation Term

Ohio law does not provide for a probation term to be extended for either a misdemeanor or a felon unless the defendant has committed a violation.²²

Grounds for Probation Revocation

Any violation of conditions may be grounds for revocation.²³ Failure to pay monthly supervision fees may not be the sole basis for revocation.²⁴

Revocation Procedures

The court must hold a preliminary hearing followed by a final revocation hearing at which the defendant must be present and allowed to present evidence and cross-examine witnesses.²⁵ The court must also make a statement, preferably written, describing the evidence it relied on in reaching its decision.²⁶ Additionally, the courts have held that the right to confront and cross-examine adverse witnesses means that the state must present the individual who supervised the defendant's probation or prepared the violation report, unless the state can show good cause as to why the witness was unavailable.²⁷ Defendants may be represented by their own attorney, and the state is required by law to provide an attorney for defendants convicted of serious crimes. The state is not required to appoint an attorney for defendants convicted of petty crimes.²⁸ Victims may request notification from the state of any proceeding at which the defendant's community control may be terminated, revoked, or modified.²⁹ Revocation proceedings must be initiated before the end of the community control term, but there is no time limit on when those proceedings must be completed.³⁰

OF INTEREST

Ohio law provides grant incentives for counties that successfully reduce the number of defendants whose community control terms are revoked.⁴¹

Source: Colo. Stat. § 609.14, subd. 1(b) (2013)

Legal Standard for Revocation

At the preliminary hearing, the state must show that there is "probable cause" that the violation occurred.³¹ Conversely, at the final hearing the state must present "substantial" evidence that a violation occurred, and this evidence may not be solely hearsay testimony.³² The "substantial" standard has been described by the courts as "highly deferential" and "akin to a preponderance-of-the-evidence burden of proof."³³ If a defendant is charged with a separate violation, the sentencing court is not required to wait for a conviction on that charge to revoke the defendant's community control.³⁴

Revocation and Lesser Sanctions

The sentencing court has wide discretion in imposing sanctions for a violation. The court may decide to continue the defendant's term of community control, extend that term, modify the conditions, impose a combination of jail or prison time and continued community control, or revoke community control altogether and impose a jail or prison term for the original conviction.³⁵ In setting a sentence of imprisonment, the court may choose any sentence within the range of sentences allowed by statute for the original offense. The court may also reduce the sentence by any time the defendant has successfully served on community control, although it is not required to do so.³⁶

Appeal

Defendants may appeal a revocation order, but they must do so within 30 days of the order to revoke.³⁷ If the prosecutor wishes to appeal, they must do so within 7 days.³⁸ The appellate court will review the sentence based on an abuse of discretion standard, which requires a finding that "the trial court's decision was unreasonable, arbitrary, or unconscionable."³⁹

Grades of Offenses in Ohio ⁴⁰	
Offense Level	Maximum Punishment
Aggravated Murder	Death plus a fine of up to \$25,000
Murder	Indefinite term of 15 years to life plus a fine of up to \$15,000
Sexually motivated murder, victim under 13	Indefinite term of 30 years to life plus a fine of up to \$15,000
Sexually motivated murder, victim 13 and over	Life without parole plus a fine of up to \$15,000
First Degree Felony	Definite term of 3-11 years
Second Degree Felony	Definite term of 2-8 years
Third Degree Felony meeting certain conditions	Definite term of 1-5 years
Third Degree Felony	Definite term of 9-36 months
Fourth Degree Felony	Definite term of 6-18 months
Fifth Degree Felony	Definite term of 6-12 months
First Degree Misdemeanor	Not more than 180 days
Second Degree Misdemeanor	Not more than 90 days
Third Degree Misdemeanor	Not more than 60 days
Fourth Degree Misdemeanor	Not more than 30 days

END NOTES

¹ *State v. Talty*, 814 N.E.2d 1201, 1204 (Ohio 2004).

² Ohio Rev. Code Ann. §§ 2929.15(A)(1), 2929.25(A)(1) (2014); *State v. Vlad*, 790 N.E.2d 1246, 1247 (Ohio Ct. App. 2003) (holding that option to suspend a felony prison term was “no longer be available to a sentencing court”).

³ Ohio Rev. Code Ann. § 2935.36 (2014)

⁴ Ohio Rev. Code Ann. §§ 2929.15(A)(1), 2929.25(A)(2) (2014).

⁵ Ohio Rev. Code Ann. §§ 2929.25(A)(3)(a), 2929.15(B)(1)(a) (2014)

⁶ *State v. Zeiszler*, 483 N.E.2d 493, 497 (Ohio Ct. App. 1984) (holding that, in absence of finding of good cause, probationer was denied right to confront witnesses against him at hearing to extend probation term, but probationer did not have a right to counsel).

⁷ Ohio Rev. Code Ann. §§ 2929.15(C), 2929.25(E) (2014).

⁸ Ohio Rev. Code Ann. § 2301.27(A)(1)(a) (2014).

⁹ Ohio Rev. Code Ann. §§ 2929.15(A)(2)(a), 2929.25(C)(1) (2014).

¹⁰ Communication from Edward E. Rhine, former Deputy Director, Office of Offender Reentry, Ohio Department of Rehabilitation and Correction (Sept. 9, 2014).

¹¹ Ohio Rev. Code Ann. §§ 2929.15 (A)(3)-(4), (D)(3), 2929.16-18, 2929.24, 2929.25(C)(2), 2929.26-28, 2951.021, (2014).

¹² Ohio Rev. Code Ann. § 2929.26(A), (D) (2014).

¹³ Ohio Rev. Code Ann. §§ 2929.26(A)(1), 2929.16(A)(1) (2014).

¹⁴ Ohio Rev. Code Ann. §§ 2929.27(A), 2929.17 (2014).

¹⁵ Ohio Rev. Code Ann. § 2929.25(C)(2); Communication from Rhine.

¹⁶ Ohio Rev. Code Ann. §§ 2929.28(A)(2), 2929.18(A)(3) (2014).

¹⁷ Ohio Rev. Code Ann. §§ 2929.18(B)(1), 2929.28(B) (2014).

¹⁸ *Talty*, 814 N.E.2d at 1204.

¹⁹ Ohio Rev. Code Ann. § 2951.021(A)(1) (2014).

²⁰ Ohio Rev. Code Ann. § 2929.25(B), (D)(2) (2014)

²¹ Ohio Rev. Code Ann. § 2929.15(C).

²² Ohio Rev. Code Ann. §§ 2929.15(B), 2929.25(B) (2014).

²³ Ohio Rev. Code Ann. §§ 2929.25(D)(2), 2929.15(B)(1) (2014).

²⁴ Ohio Rev. Code Ann. § 2951.021(A)(1) (2014).

²⁵ Ohio Crim. R. 32.3(A) (2014); *State v. Eversole*, No. 23444, 2010 WL 1410727, at *3 (Ohio Ct. App. Apr. 9, 2010).

²⁶ *State v. Delaney*, 465 N.E.2d 72, 76 (Ohio 1984); *Columbus v. Bickel*, 601 N.E.2d 61, 68-69 (Ohio Ct. App. 1991).

²⁷ *State v. Miller*, 326 N.E.2d 259, 262 (Ohio 1975); *Columbus v. Lacy*, 546 N.E.2d 445, 447-48 (Ohio Ct. App. 1988); *State v. Savoia*, 601 N.E.2d 193, 196 (Ohio Ct. App. 1991).

²⁸ Ohio Crim. R. 32.3(B) (2014).

²⁹ Ohio Rev. Code Ann. § 2930.12 (2014).

³⁰ *State v. Simpson*, 440 N.E.2d 617, 619 (Ohio Ct. App. 1981); *State v. O’Leary*, 539 N.E.2d 634, 636 (Ohio Ct. App. 1987).

³¹ *Eversole*, No. 23444, 2010 WL 1410727, at *3.

³² *State v. Ball*, No. 2008 CA 070046, 2009 WL 1145268, at *2-3 (Ohio Ct. App. Apr. 27, 2009).

³³ *State v. Ohly*, 853 N.E.2d 675, 681 (Ohio Ct. App. 2006); *State v. Hayes*, No. WD-00-075, 2001 WL 909291, (Ohio Ct. App. Aug. 10, 2001).

³⁴ *Bickel*, 601 N.E.2d at 66.

³⁵ Ohio Rev. Code Ann. §§ 2929.25(D)(2), 2929.15(B)(1) (2014).

³⁶ Ohio Rev. Code Ann. §§ 2929.25(D)(3), 2929.15(B)(2) (2014).

³⁷ Ohio R. App. P. 4(A) (2014).

³⁸ Ohio R. App. P. 4(B)(4) (2014).

³⁹ *State v. Diaz*, No. WD-12-019, 2013 WL 1792729, at *2 (Ohio Ct. App. Apr. 26, 2013).

⁴⁰ Ohio Rev. Code Ann. §§ 2929.02, 2929.14, 2929.24 (2014).

⁴¹ This must be vehicular manslaughter, aggravated vehicular assault, sexual battery, unlawful sexual conduct with a minor, robbery, burglary or trespass in a habitation when people are present or like to be present. The defendant must also have been convicted of 2 or more instances or aggravated robbery, robbery, aggravated burglary, or burglary.

⁴² Ohio Rev. Code Ann. § 5149.311(B)(1), (C)(1) (2014).



PROBATION IN OREGON

Probation Rate (per 100,000):

1,216

Rank: 20 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

Oregon's sentencing guidelines speak to the goals of probation. When probation is optional, the court may impose probation if it finds: "(a) An appropriate treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; (b) The recommended treatment program is available and the offender can be admitted to it within a reasonable period of time; and (c) The probationary sentence will serve community interests by promoting offender reformation."¹

Forms of Probation

Felony sentencing is governed by presumptive sentencing guidelines.² For most felonies, probation is a free-standing sentence and may not be imposed in conjunction with a suspended prison sentence.³ For certain sex offenses, however, the court may suspend the imposition or execution of a prison sentence and impose probation.⁴ For misdemeanors, the court may suspend the imposition or execution of any part of the sentence and place the defendant on probation.⁵ In most misdemeanor cases, following a guilty plea and upon motion of the district attorney and with the defendant's consent, the court may grant a disposition of "probation without entering a judgment of guilt." The statute provides that, "Upon the person's fulfillment of the terms and conditions of probation, the court shall discharge the person and dismiss the proceedings against the person."⁶

Term

For the least serious grades of felonies, the presumptive length of active supervision is 18 months, with a minimum period of 9 months. For most felonies (except serious sex offenses, see below), the presumptive active supervision term is 5 years, with a minimum period of 30 months. Judges may deviate from the presumptive guidelines term in a specific case for "when necessary to ensure the conditions and purposes of probation are met," but for most felonies the active supervision period may not exceed 5 years. For serious sex offenses, the courts may suspend the imposition or execution of a prison sentence, or impose probation as a free-standing sentence, with a term of at least 5 years, or any longer term up to the statutory maximum prison sentence for the offense.⁷ Misdemeanor probation is limited to a definite or indefinite period of not more than 5 years.⁸

Early Termination

Felony probation may be shortened, terminated, or transferred to bench probation upon a finding that supervision is no longer necessary to accomplish the purposes of the imposed sentence.⁹ The court has discretion to discharge a person from probation at any time.¹⁰ Department of Corrections rules provide incentives to probationers on active supervision to move to inactive status once their minimum terms of active supervision have been served. They recommend that the supervisory authority consider "a reduction in the period of active probation for [offenders'] compliance with conditions of probation and their supervision plan."¹¹

Supervision

Supervised probation is monitored through the Department of Corrections or a community corrections agency.¹² Inactive supervision is “[a] reduced level of supervision that does not include any direct supervision by a supervising officer or regular reporting; however, the offender remains subject to arrest by a supervising officer for violations of condition of supervision and return to active supervision at any time until expiration of the term of probation.”¹³ The court may order that probation be supervised by the court, sometimes called “bench probation.”¹⁴ Offenders are unsupervised by probation officers, but must follow any conditions specified by the court in a timely manner and advise the court as necessary about change of address or other circumstances.¹⁵

Conditions

General conditions of probation apply “unless specifically deleted by the court.” These include: payment of fines, restitution, or fees, use of only prescribed controlled substances, submitting to a risk and needs assessment, participation in substance abuse evaluation, remaining in the state of Oregon, maintaining school or employment full-time if possible, gaining permission to move or change jobs, consenting to searches, obeying laws, truthfully answering inquiries made by the probation authority, not possessing weapons, participating as directed in a sex offender program or a mental health evaluation, reporting to a probation officer, and if necessary, registering as a sex offender. Sex offenders may face additional geographical restrictions. The court has wide discretion to impose special conditions reasonably related to the crime of conviction, to public protection, or to the reformation of the probationer.¹⁶ The courts have said that conditions more restrictive than necessary to achieve the goals of probation are invalid.¹⁷

Sentencing courts may order jail time as a part of probationary sentences. Felony probationers’ jail terms are limited according to the number of “sanction units” assigned by sentencing guidelines, with one unit equal to one day in custody. For the most serious felonies, the guidelines impose up to 180 sanction units.¹⁸ Misdemeanor probationers may be required to serve a term in county jail not to exceed one year or one-half of the maximum term possible, whichever is less.¹⁹

Probationers on active supervision must pay monthly supervision fees of at least \$25, or a greater amount when ordered by the court. The fee may be waived “[i]n cases of financial hardship or when otherwise advisable in the interest of the released person’s rehabilitation.”²⁰ Inactive

probation supervision requires no fee.²¹ Court supervision or “bench probation” requires payment of a one-time \$100 fee.²² In order to be placed on probation without entering judgment of guilt, offenders must agree to pay a \$100 fee.²³

OF INTEREST

In Oregon, probationers may be required by the court to sell their assets in order to make restitution to victims. For example, the court may appoint a receiver to sell a defendant’s personal property or force the defendant to convey monetary instruments.

Sources: Or. Rev. Stat. § 137.540(2)(c) (2014); State v. Plumb, 87 P.3d 676, 679 (Or. Ct. App. 2004).

Modification of Conditions

The court may modify the conditions of probation at any time. A supervising probation officer may also propose modifications of special conditions; if the district attorney raises no objection, no hearing is held and the modification goes into effect five days after filing.²⁴

Extension of Probation Term

The court may extend the term of felony probation without finding a violation “when necessary to ensure that the conditions of probation are completely satisfied,” but the term may not exceed five years.²⁵ Misdemeanor probation may be extended by the court for a violation of probation and “in lieu of revocation” for a period of “not more than six years from the date of original imposition of sentence.”²⁶

Grounds for Probation Revocation

The court may revoke probation upon a finding that the offender has violated one or more of the conditions of probation or that the offender has participated in new criminal activity.²⁷

Revocation Procedures

The probation officer may make an arrest with or without a warrant based on the officer’s “judgment” that the offender has violated a sentence condition. With the offender’s agreement, the probation officer or supervisory personnel may impose structured, intermediate sanctions in accordance with Department of Corrections rules (see “Revocation and Lesser Sanctions” below). If a probationer

wishes to contest the sanction, there must normally be a determination by a court within the first 36 business hours of whether or not the individual will be held or released pending a further hearing, or no later than five days when authorized by supervisory personnel. After this, a revocation hearing must occur within 14 days.²⁸

At a revocation hearing, the defendant is entitled to due process protections, including the right to confront and cross-examine witnesses. A defendant's due process protections are fewer than at trial, however, and the right to present evidence may be modified based on expense and other factors.²⁹ Probationers are entitled to representation by counsel.³⁰

If a timely request has been filed, victims of felonies or Class A misdemeanors have a right to notice of a revocation hearing, to be present at the hearing, and to express any views relevant to issues before the court.³¹

Legal Standard for Revocation

The government must prove a violation of probation by a preponderance of the evidence.³² When grounds for revocation are established, the decision to revoke probation is discretionary with the court.³³

Revocation and Lesser Sanctions

In Oregon, many violations are sanctioned administratively, short of going to the courts. The Department of Corrections is required by statute to adopt rules establishing a "system of structured, intermediate probation violation sanctions," including jail confinement, that may be imposed by the department or a county community corrections agency on probationers who waive a probation violation hearing, admit or affirmatively choose not to contest the alleged violations, and consent to the sanctions. The system must

include procedures for notifying district attorneys and the courts of probation violations admitted by probationers and the sanctions imposed. The system must also address the level and type of violation behavior warranting a recommendation to the court that probation be revoked.³⁴ Jail confinement imposed under the above system is limited to 60 days per violation report, and the total number of days of jail confinement for all violation reports per conviction is limited by sentencing guidelines (which set forth a maximum number of "jail custody units" as part of the original sentence).³⁵

For felony probation violations that proceed to court, Oregon has sentencing guidelines that set out "presumptive punishments," subject to judicial discretion to deviate for substantial and compelling reasons.³⁶ Short of revocation, sanctions for violations of probation include the extension or modification of probation terms.³⁷

For felony probationers who are revoked, authorized sanctions vary depending on their original sentences. If the original presumptive sentence was probation, "the sentence upon revocation shall be to the supervisory authority for a term up to a maximum of six months." If the probation term was imposed as a departure from the guidelines, or as optional probation, "the sentence upon revocation shall be a prison term up to the maximum presumptive prison term which could have been imposed initially, if the presumptive prison term exceeds 12 months. For those presumptive prison terms of 12 months or less, the sentence upon revocation shall be to the supervisory authority, up to the maximum presumptive prison term." If revocation is based on commission of a new crime, the revoking court must impose the presumptive prison term for that offense under the guidelines.³⁸

Grades of Offenses in Oregon

Offense Category	Maximum Punishment
Class A Felony	20 years; up to \$500,000 (murder) or \$375,000 (other Class A Felonies)
Class B Felony	10 years; up to \$250,000 fine
Class C Felony	5 years; up to \$125,000 fine
Unclassified Felony	Incarceration length and/or fine amount determined by statute
Class A Misdemeanor	1 year; up to \$6,250 fine
Class B Misdemeanor	6 months; up to \$2,500 fine
Class C Misdemeanor	30 days; up to \$1,250 fine
Unclassified Misdemeanor	Incarceration length and/or fine amount determined by statute

Sources: Or. Rev. Stat. § 161.605(1) (2014); Or. Rev. Stat. § 161.625(1) (2014); Or. Rev. Stat. § 161.615 (2014); Or. Rev. Stat. § 161.635(1) (2014).

For misdemeanants, if probation was effected by the imposition and suspension of a prison term, the revoking court "shall cause the rest of the sentence imposed to be executed." If probation was ordered along with the suspended imposition of sentence, the revoking court may impose any sentence that could have originally been imposed for the offense.³⁹

When a court determines that a defendant has violated the terms of probation, the court must impose a \$25 fee from the defendant. The fee becomes part of the judgment and may be collected in the same manner as a fine.⁴⁰

Appeal

The defendant may appeal revocation, modification, or extension of probation if they show a colorable claim of error.⁴¹ The state may also appeal a hearing finding that a defendant did not violate the conditions of probation.⁴² For defendants, the grounds of appeal are limited to whether the court's sentence exceeds the maximum allowable by law or is unconstitutionally cruel and unusual.⁴³

END NOTES

¹ Or. Admin. R. 213-005-0006(1) (2014).

² Or. Admin. R. 213-002-0001(2) (2014).

³ *State v. Hamlin*, 950 P.2d 336, 339 (Or. Ct. App. 1997).

⁴ Or. Admin. R. 213-005-0008(2)(c) (2014).

⁵ Or. Rev. Stat. § 137.010(4) (2014).

⁶ Or. Rev. Stat. § 137.533 (2014).

⁷ Or. Admin. R. 213-005-0008(1), (2) (2014).

⁸ Or. Rev. Stat. § 137.010(4) (2014).

⁹ Or. Admin. R. 213-005-0010(1) (2014).

¹⁰ Or. Rev. Stat. § 137.545(1) (2014).

¹¹ Or. Admin. R. 291-206-0005 (2014).

¹² Dep't Corr., *Community Corrections in Oregon*, Oregon.gov, <http://www.oregon.gov/DOC/CC/pages/index.aspx> (last visited Sept. 19, 2014).

¹³ Or. Admin. R. 291-206-0010(4) (2014).

¹⁴ Or. Rev. Stat. § 137.540(7) (2014); Or. Admin. R. 213-003-0001(1) (2014).

¹⁵ E.g. Lane Cnty. Circuit Court, *Probation Violations*, Oregon Judicial Department (2014), <http://courts.oregon.gov/Lane/CriminalandTraffic/pages/probation.aspx>.

¹⁶ Or. Rev. Stat. § 137.540 (2014).

¹⁷ *State v. Donahue*, 259 P.3d 981, 984 (Or. Ct. App. 2011).

¹⁸ Or. Admin. R. 213-005-0011(1-2) (2014), Or. Rev. Stat. § 137.540(2)(b) (2014).

¹⁹ Or. Rev. Stat. § 137.540(2)(a) (2014).

²⁰ Or. Rev. Stat. §§ 137.540(1)(a), 423.570 (2014).

²¹ Or. Admin. R. 291-206-0010(4)(a) (2014).

²² Or. Rev. Stat. § 137.540(7) (2014).

²³ Or. Rev. Stat. § 137.533(1)(e) (2014).

²⁴ Or. Rev. Stat. § 137.540(8)(a-b) (2014).

²⁵ Or. Admin. R. 213-005-0008(2) (2014).

²⁶ Or. Rev. Stat. § 137.010(4) (2014).

²⁷ Or. Admin. R. 213-010-0001 (2014).

²⁸ Or. Rev. Stat. § 137.545(2), (3), (6) (2014).

²⁹ *State v. Harris*, 316 P.3d 405, 407 (Or. Ct. App 2013).

³⁰ E.g., *State v. Blanchard*, 236 P.3d 845, 847 (Or. Ct. App. 2010).

³¹ Or. Rev. Stat. § 137.545(11) (2014).

³² *State v. Donovan*, 751 P.2d 1109, 1110 (Or. 1988).

³³ Or. Admin. R. 213-010-0001 (2014).

³⁴ Or. Rev. Stat. § 137.595 (2014).

³⁵ Or. Rev. Stat. § 137.595(3), (4) (2014).

³⁶ Or. Admin. R. 213-002-0001(2), (3)(a) (2014).

³⁷ Or. Rev. Stat. § 137.540(6) (2014), Or. Admin. R. 213-005-0011(6-7) (2014).

³⁸ Or. Admin. R. 213-010-0002 (2014).

³⁹ Or. Rev. Stat. § 137.545(5)(a) (2014).

⁴⁰ Or. Rev. Stat. § 137.540(11) (2014).

⁴¹ Or. Rev. Stat. § 138.053 (2014).

⁴² Or. Rev. Stat. § 138.060(1)(f) (2014).

⁴³ Or. Rev. Stat. § 138.040(1)(b) (2014).



PROBATION IN PENNSYLVANIA



Probation Rate (per 100,000):

1,768

Rank: 38 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2, Adults on probation, 2012).

Definition and Purpose

In Pennsylvania, probation is a less restrictive alternative to imprisonment directed at rehabilitating the defendant without recourse to confinement during the probationary period.¹ Probation is "primarily concerned with the rehabilitation and restoration to a useful life of the parolee or probationer."²

Forms of Probation

Probation is a free-standing sentence in Pennsylvania, and is imposed without a suspended prison sentence.³ The state has a pre-adjudication form of probation called "probation without verdict."⁴

Most individuals who are placed on probation are supervised by the county Adult Probation and Parole departments, which operate in 65 of the 67 Pennsylvania counties.⁵ Courts can explicitly order special probation, supervised by the Pennsylvania Board of Probation and Parole⁶ (PBPP) and in 2012, 13.3% of probationers were supervised in this way.⁷ This PBPP "special probation" is governed by a different statute, and demands specific conditions.⁸

In 1990, Pennsylvania enacted county intermediate punishment as a sentencing alternative distinct from probation, targeting certain non-violent offenders who would otherwise receive a sentence of partial or total confinement. Residential rehabilitative centers, intensive supervision, electronic home monitoring, and several other programs are examples of county intermediate punishment programs.⁹

Term

The term of probation is discretionary with the sentencing court. It may not exceed the maximum term for which the defendant could be confined under statute for the crime sentenced.¹⁰

Early Termination

"The court may at any time terminate continued supervision.... Probation may be eliminated or the term decreased without hearing" at the discretion of the court.¹¹

Supervision

Probationers may be supervised by the county probation department or the PBPP. The many types of probation offered and the variation of services available from county to county make it difficult to generalize about degrees of supervision.¹²

Conditions

Under 42 Pa.C.S. § 9754, the court can require that a defendant meet family responsibilities, "devote himself to a specific occupation or employment," participate in community service, undergo medical or psychiatric treatment, "pursue a secular course of study or vocational study," "attend or reside in a facility established for the instruction, recreation, or residence of persons on probation," refrain from frequenting certain locations, obtain written permission to have any firearms or other weapons, make restitution or reparations, remain in the jurisdiction and notify the court about changes of address or employment, report to a probation officer, pay fines, participate in chemical dependency treatment, and obey a curfew. The statute contains a catch-all provision allowing the court to impose "any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience."¹³ The Pennsylvania Supreme Court has held that § 9754 "empowers sentencing courts to impose reasonable conditions of probation [...] to assist the defendant in leading a law-abiding life, so long as the conditions do not result in a violation of the defendant's essential constitutional liberty and freedom of conscience."¹⁴

No jail or prison term may be imposed as a condition of probation.¹⁵ However, sentencing courts may impose a sentence of "total confinement" to be followed by a consecutive sentence of probation.¹⁶ The courts may also sentence a defendant to "partial confinement" followed by an intermediate punishment.¹⁷

Individuals placed on probation or county intermediate punishment must pay a supervision fee of at least \$25, imposed by the court as a condition of supervision.¹⁸ However, the court can lessen, waive, or defer the fee if defendant is unable to pay.

Modification of Conditions

The court may change conditions upon which a probation order has been imposed at any time. No hearing is required if the court chooses to lighten sentence conditions. However, an *increase* in conditions of probation requires a hearing in which the court considers "the record of the sentencing proceeding together with evidence of the conduct of the defendant while on probation."¹⁹

Extension of Probation Term

There is no provision in Pennsylvania law for the court to extend probation outside the context of a violation hearing.²⁰

OF INTEREST

In 2007-2008, the National Institute of Justice conducted a Low-Intensity Community Supervision Experiment in Philadelphia. Low-risk offenders were randomly assigned to probation officers with large, less intensive caseloads of around 400 offenders. Supervision consisted of biannual, staggered office and telephone reporting as well as court-ordered drug testing in some cases. The results of the program, however, did not produce a noticeable difference in recidivism rates as was predicted.

Sources: Geoffrey C. Barnes et al. Low-intensity Community Supervision for Low-risk Offenders: A Randomized, Controlled Trial, 6 J. Experimental Criminology 159 (2010).

Grounds for Probation Revocation

Probation can be revoked "upon proof of the violation of specified conditions of probation."²¹

Revocation Procedures

To initiate a probation revocation proceeding, a written request for revocation is filed with the clerk of courts.²² The county probation department and/or a state parole agent can detain defendants alleged to have violated probation.²³ After this, a *Gagnon I* hearing determines if there is probable cause for continued detention of a probation violator. This hearing may be waived. Where a finding of probable cause has been made, a second hearing, known as a *Gagnon II* hearing, is triggered.²⁴ At this hearing, probation violations must be proven by a preponderance of the evidence.²⁵ A *Gagnon II* hearing must be held "as speedily as possible." The defendant has the right to be present at the hearing and to be represented by counsel.²⁶

There is no provision for victim notification or participation in revocation hearings, however a victim does have a right to be present and to offer comment at resentencing following revocation.

Legal Standard for Revocation

In order to revoke probation, a *Gagnon II* hearing must be held. First, the court must find that the probationer has violated conditions of probation by a preponderance of the evidence. After that, a sentencing determination must be made.²⁶

Where the hearing is triggered by an alleged new crime, the focus is "whether the conduct of the probationer indicates that the probation has proven to be an effective vehicle to accomplish rehabilitation and a sufficient deterrent against antisocial conduct." Arrest *alone* may not trigger revocation.²⁷ Probation may be revoked on technical grounds, but the court must make reasonable allowances for inability to pay fines, costs, or restitution.²⁸

Revocation and Lesser Sanctions

Probation violations may result in the imposition of sanctions such as short terms of imprisonment (e.g., three days for a first violation) or other penalties short of revocation as determined by state and local laws.²⁹

Upon revocation, the sentencing alternatives are the same as at initial sentencing,³⁰ with "due consideration being given to time spent serving the order of probation."³¹ This can include imposition of probation, confinement, or other sentencing alternatives provided for in the general sentencing statute.³² The maximum term of the new sentence (i.e., re-sentence) may not exceed the maximum term for which the defendant could be confined under statute for the original conviction offense.³³

A sentencing court may not order total confinement upon revocation unless it finds that "(1) the defendant has been convicted of another crime; (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or (3) such a sentence is essential to vindicate the authority of the court."³⁴

Appeal

Judicial review of discretionary aspects of a sentence is available in the Superior Court, but appellants must conform the plea to the Rules of Appellate Procedure.³⁵ Sentencing issues must be preserved through proper pleading.³⁶ The Supreme Court may also review the validity of revocation proceedings.³⁷ Appellate courts have more limited review authority.³⁸

Grades of Offenses in Pennsylvania

Offense Category	Maximum Punishment
First-degree felony	More than 10 years
Second-degree felony	Not more than 10 years
Third-degree felony	Not more than 7 years
First-degree misdemeanor	Not more than 5 years
Second-degree misdemeanor	Not more than 2 years
Third-degree misdemeanor	Not more than 1 year
Summary offense	Not more than 90 days

Sources: Pa. R. Crim. P. 708(B)(1) (2014); 18 Pa. C.S. § 106(a)-(c) (2014); "A crime declared to be a felony, without specification of degree, is of the third degree." 18 Pa. C.S. § 106(b)(5) (2014).

END NOTES

¹ Commonwealth v. Crosby, 568 A.2d 233, 235 (Pa.Super. 1990).

² Commonwealth v. Quinlan, 412 A.2d 494, 496 (Pa. 1980).

³ 42 Pa. C.S. §§ 9721(a)(1), 9754 (2014).

⁴ 35 Pa. Stat. § 780-117 (2014).

⁵ Pa. Board Probation & Parole, County Adult Probation and Parole Reports (CAPP) (2012).

⁶ 61 Pa. Cons. Stat. § 6133(a) (2014).

⁷ See CAPP Report, at 1.

⁸ 37 Pa. Code §§ 65.1-65.7 (2014).

⁹ 37 Pa. Code § 451.2 (2014).

¹⁰ 42 Pa. C.S. § 9754(a) (2014).

¹¹ 42 Pa. C.S. § 9771(a), (d) (2014).

¹² See, e.g., Pa. Board Probation & Parole, County Probation Services (list), at: http://www.pbpp.state.pa.us/portal/server.pt/community/countyparole_services/17308 (linking to documentation about services provided in each probation department location).

¹³ 42 Pa. C.S. § 9754(c) (2014).

¹⁴ Commonwealth v. Hall, 80 A.3d 1204, 1212 (Pa. 2013).

¹⁵ Commonwealth v. Basinger, 982 A.2d 121, 130 (Pa. Super. 2009).

¹⁶ 42 Pa. C.S. § 9721(a) (2014); see also § 9721(b) (general standards for sentencing).

¹⁷ *Id.*; 42 Pa. C.S. § 9755(h) (2014).

¹⁸ 18 Pa. C.S. § 11.1102 (2014).

¹⁹ 42 Pa. C.S. § 9771(a), (d) (2014).

²⁰ 42 Pa. C.S. § 9771 (2014).

²¹ 42 Pa. C.S. § 9771(b) (2014).

²² Pa. R. Crim. P. 708(A) (2014).

²³ Commonwealth v. Kelly, 931 A.2d 694, 697 (Pa. Super. Ct. 2007), appeal denied 945 A.2d 168.

²⁴ Commonwealth v. Sims, 770 A.2d 346, 349-50 (Pa. Super. Ct. 2000) citing Commonwealth v. Ferguson 761 A.2d . See Gagnon v. Scarpelli, 411 U.S. 778 (1973).

²⁵ Commonwealth v. Castro, 856 A.2d 178, 180 (Pa. Super. Ct. 2004).

²⁶ "A crime declared to be a misdemeanor, without specification of degree, is of the third degree." 18 Pa. C.S. § 106(b)(9) (2014).

²⁷ Commonwealth v. Sims, 2001 Pa. Super 69 (Pa. Super. Ct. 2000) citing Gagnon, *supra*.

²⁸ Commonwealth v. Kates, 305 A.2d 701, 708 (Pa. 1973).

²⁹ Lawson v. Commonwealth, 524 A.2d 1053, 1056 (Pa. Commw. Ct. 1987)

³⁰ 42 Pa. C.S. § 9771.1(g) (2014).

³¹ One limitation is that the court cannot use a fresh sentencing hearing to impose a mandatory minimum sentence that was not available at the time of initial sentencing. Commonwealth v. Mazzetti, 44 A.3d 58, 64 (Pa. 2012).

³² 42 Pa. Cons. Stat. § 9771.1(i)(2) (2014).

³³ 42 Pa. Cons. Stat. § 9721(a) (2014).

³⁴ 42 Pa. Cons. Stat. § 9754(a) (2014).

³⁵ 42 Pa. C.S. §§ 9756; 9771(c) (2014).

³⁶ See Pa. Ct. Order 0026, May 28, 2014 (amending Pa. R. App. P. 2119(f), which governs arguments made by appellants challenging discretionary sentences).

³⁷ Commonwealth v. Cartrette, 83 A.3d 1030, 1042-43 (Pa. Super. Ct. 2013).

³⁸ See, e.g., Commonwealth v. Infante, 888 A.2d 783, 790 (Pa. 2005).

³⁹ Commonwealth v. Danforth, 608 A.2d 1044, 1045 (Pa. 1992); Commonwealth v. Sims, 770 A.2d 346 (Pa. Super. Ct. 2001).



PROBATION IN TEXAS



Probation Rate (per 100,000):

2,107

Rank: 41 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

Probation in Texas is called “community supervision,” and is the court-ordered placement of a defendant under a continuum of programs and sanctions, with conditions, for a specified period.¹ The courts have said that probation is an exercise of clemency and “creates a relationship that is, in a way, contractual.” The court agrees with the convict that clemency by way of probation will be extended if he will keep and perform certain requirements and conditions.²

Forms of Probation

There are three types of community supervision: regular, shock community supervision, and deferred adjudication.³ For regular community supervision, the defendant is found or pleads guilty but imposition of sentence is suspended. For shock community supervision, the defendant is found or pleads guilty, and the sentence is imposed and executed; however, within 180 days of execution, the court on its own motion or upon motion of one of the parties can suspend further execution of the sentence and place the offender on community supervision. For felony offenses, only the judge who originally sentenced the defendant can suspend it and impose community supervision in this manner. Under deferred adjudication, community supervision is imposed prior to a finding of guilt. Each form of probation has specific eligibility requirements.⁴

Term

The court can impose community supervision terms as follows:

- Felony: A period equal to the minimum term of imprisonment up to a maximum of 10 years.
- Certain third-degree felonies: A period equal to the minimum term of imprisonment up to a maximum of 5 years.
- State jail felony (certain drug possession offenses): A minimum of 2 up to a maximum of 5 years.
- Misdemeanors: Up to 2 years.⁵

Early Termination

For regular and shock probation, once a defendant has “satisfactorily completed one-third of the original community supervision period or two years of community supervision, whichever is less,” the court can reduce or terminate the defendant’s term of community supervision. If not reduced or terminated by two years or one-half of the term of community supervision, whichever is greater, the court *must* conduct a review of the defendant’s record to determine if reduction or termination is appropriate. Defendants who have failed to pay required restitution, fines, costs, or fees despite having the ability to pay, or who have not completed court-ordered counseling or treatment are not eligible for this review. If the court discharges the defendant from community supervision, the court can also “set aside the verdict or permit the defendant to withdraw

the defendant's plea, and ... dismiss the accusation, complaint, information or indictment against the defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense."⁶

Defendants who are convicted of a DWI or a sex offense that requires sex offender registration are not eligible for reduction or early termination.⁷

Defendants on community supervision for certain third degree or state jail felonies may earn time credits towards completion of the community supervision term. Credit may be earned for completing certain treatment programs, vocational or career training, parenting classes, or anger management programs and for paying certain fines and fees.⁸

The court can grant early termination from deferred adjudication community supervision at any time; there is no minimum time to serve.⁹ If the term expires and if the court has not proceeded to adjudication of guilt, the court must dismiss the proceedings and discharge the defendant.¹⁰

Supervision

Community supervision is provided by community supervision and corrections departments, which are established by district and county court at law judges.¹¹ Community supervision agents are not state employees; the community supervision and corrections department contracts for employee benefits with one of the counties served by the department.¹²

Conditions

Texas law lays out a long list of potential conditions that may be ordered, ranging from remaining law abiding to submitting for alcohol testing or electronic monitoring.¹³ Specific conditions apply to defendants convicted of DWI offenses, offenses committed because of bias or prejudice, certain violent offenses, domestic violence offenses, and offenses involving substance abuse.¹⁴ In addition, the court can impose "any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant."¹⁵ Conditions are invalid if they have no relation to the crime, relate to conduct that is not itself criminal, regulate conduct that is not reasonably related to future criminality, and do not serve statutory ends of probation.¹⁶

The court can impose confinement as a condition of community supervision. For a misdemeanor, confinement must not exceed 30 days.¹⁷ For a felony, it must not exceed 180 days.

The court must order all defendants granted community supervision to pay a fee of \$25 to \$60 per month. The judge may make payment of the fee a condition of granting or continuing the community supervision. The judge may waive or reduce the fee or suspend a monthly payment of the fee if the judge determines that payment would cause the defendant a significant financial hardship. Sex offenders must be ordered to pay an additional mandatory \$5 supervision fee.¹⁸

OF INTEREST

The jury participates in the punishment as well as guilt phase. A jury imposing confinement may recommend that the judge suspend the confinement sentence and place the defendant on community supervision. If the defendant meets the statutory criteria for jury recommended community supervision, the judge must follow the jury's recommendation. In order to be eligible for regular community supervision via a jury's recommendation, the offender's sentence cannot exceed ten years.

Source: Tex. Code Crim. Proc. art. 42.12 § 4 (2013).

Modification of Conditions

The court may modify conditions at any time during the period of community supervision.¹⁹ In addition, a judge who places a defendant on community supervision may authorize the officer supervising the defendant or a magistrate to modify the conditions of community supervision "for the limited purpose of transferring the defendant to different programs within the community supervision continuum of programs and sanctions."²⁰

Extension of Probation Term

There is no general provision allowing the court to extend probation except in the context of a violation.²¹ For certain sex offenders—on all forms of community supervision—the court may extend the period of supervision for a period not to exceed 10 additional years, even without finding a violation, if the judge determines that "the defendant has

not sufficiently demonstrated a commitment to avoid future criminal behavior and that the release of the defendant from supervision would endanger the public." The defendant must be provided a hearing with all the same rights as provided at a violation hearing. The judge is only free to order such an extension once during a supervision term.²²

Grounds for Probation Revocation

Revocation can be triggered by any violation of conditions of community supervision, including commission of a new offense.²³

Revocation Procedures

If a defendant is alleged to have violated probation, a judge issues an arrest warrant. The defendant must be brought before the court within 48 hours for a bail hearing. If not released on bail, a full hearing on the violation must be held within 20 days. For deferred adjudication community supervision, the full hearing is limited to a determination of whether to proceed with adjudication on the original charge.²⁴ A defendant has the right to counsel unless affirmatively waived, and counsel must be appointed for indigent defendants.²⁵ The allegations in a revocation motion merely need to "give the probationer fair notice of the allegations against him so that he may prepare a defense."²⁶

Victims must be notified of the date, time and location of any hearing at which community supervision may be modified, revoked, or terminated.²⁷

Legal Standard for Revocation

The court can revoke community supervision "when a preponderance of the evidence supports one of the State's allegations that the defendant violated a condition of community supervision."²⁸ If the violation is solely based on a failure to pay attorney fees, fines, or court costs, the state must prove by a preponderance of the evidence that the defendant was able to pay and did not.²⁹

Revocation and Lesser Sanctions

For defendants under regular or shock community supervision, the court may continue, extend, modify, or revoke community supervision based on a finding of a violation of a condition of supervision. If supervision is continued or modified, the court may impose any other condition deemed appropriate, including community service, an increased period of supervision, increased fines, or placement in a substance abuse felony punishment program. If the term of community supervision is extended, the term for a first, second, or third degree felony cannot exceed ten years. For a misdemeanor, an extension may not cause the defendant's term to exceed three years unless the extension is based on the defendant's failure to pay fines, costs, or restitution, in which case the term may be extended for a further two years if the court finds an extension would increase the likelihood of payment.³⁰

If the court revokes probation, "the judge may proceed to dispose of the case as if there had been no community supervision, or if the judge determines that the best interests of society and the defendant would be served by a shorter term of confinement, reduce the term of confinement originally assessed to any term of confinement not less than the minimum prescribed for the offense of which the defendant was convicted." With regard to regular community supervision where imposition of sentence was suspended, the court can consider the full range of punishment.³¹ But in the shock probation context, where punishment was originally imposed and partially executed, this has been interpreted to mean that the court can reduce the sentence to be as short as the minimum, if any, but cannot impose a sentence greater than the punishment originally assessed. Time served on probation is generally not credited towards the confinement sentence.³²

For defendants under deferred adjudication community supervision, if the court adjudicates guilt, the matter proceeds to sentencing as if the deferral had not occurred.³³

Grades of Offenses in Texas*	
Offense Category	Maximum Punishment
Capital Felony	Life without parole or death.
First Degree Felony	Five years to life; up to \$10,000 fine.
Second Degree Felony	Two to twenty years in prison; up to \$10,000 fine.
Third Degree Felony	Two to ten years in prison; up to \$10,000 fine.
State Jail Felony	180 days to two years; up to \$10,000 fine.
Class A Misdemeanor	Up to one year in jail; up to \$4,000 fine.
Class B Misdemeanor	Up to 180 days in jail' up to \$2000 fine.
Class C Misdemeanor	Up to \$500 fine.

Source: Tex. Penal Code §§12.21–12.23, 12.31–12.35 (2013).

Appeal

The defendant can appeal the revocation decision, but there is no provision for prosecutor appeal.³⁴ Probation revocation is appealed on an abuse of discretion standard.³⁵

END NOTES

¹ Tex. Code Crim. Proc. art. 42.12 § 2(2) (2013).

² *Speth v. State*, 6 S.W.3d 530, 533 (Tex. Crim. App. 1999); *Ivey v. State*, 277 S.W.3d 43, 56 (Tex. Crim. App. 2009).

³ George E. Dix & John M. Schmolesky, 43A Texas Practice Series TM: Criminal Practice and Procedure § 47:3 (3d ed. 2013).

⁴ Tex. Code Crim. Proc. art. 42.12 §§ 3(a), 4(a), 5(a), 6-7, 10(a) (2013). There is a second type of shock probation for state jail felony offenses. Tex. Code Crim. Proc. art. 42.12, § 15(f)(2) (2013) states that the court retains jurisdiction over the defendant for the period during which the defendant is confined in a state jail. At any time after the 75th day after the date the defendant is received into the custody of a state jail, the judge on the judge's own motion, on the motion of the attorney representing the state, or on the motion of the defendant may suspend further execution of the sentence and place the defendant on community supervision.

⁵ Tex. Code Crim. Proc. art. 42.12 §§ 3(b), 4(b), 5(a), 6(a), 15(b) (2013). Note that for certain sex felony offenses, the minimum term of community supervision must be 5 years. *Id.* § 5(a). Also, for state jail felony offenses, the minimum term of two years up to a maximum of 5 years only applies to regular community supervision. For deferred adjudications, the maximum community supervision term can be ten years. Tex. Code Crim. Proc. art. 42.12 § 5(a) (2013).

⁶ Tex. Code Crim. Proc. art. 42.12 § 20(a) (2013).

⁷ Tex. Code Crim. Proc. art. 42.12 § 20(b) (2013).

⁸ Tex. Code Crim. Proc. art. 42.12 § 20A (2013).

⁹ Tex. Code Crim. Proc. art. 42.12§ 5(c); *State v. Juvrud*, 187 S.W.3d 492 (Tex. Crim. App. 2006).

¹⁰ Tex. Code Crim. Proc. art. 42.12 § 5(c) (2013).

¹¹ Tex. Gov't Code § 76.002(a) (2011).

¹² Tex. Gov't Code § 76.006 (2011).

¹³ Tex. Code Crim. Proc. art. 42.12 §19(a) (2013).

¹⁴ Tex. Code Crim. Proc. art. 42.12 §§ 13, 13A, 13D, 14 (2013).

¹⁵ Tex. Code Crim. Proc. art. 42.12 § 11(a) (2013).

¹⁶ *Richardson v. State*, 957 S.W. 2d 854, 858-59 (Tex. Ct. App. 1997).

¹⁷ Tex. Code Crim. Proc. art. 42.12 § 12(a) (2013).

¹⁸ Tex. Code Crim. Proc. art. 42.12 §19(a), (e) (2013).

¹⁹ Tex. Code Crim. Proc. art. 42.12 § 11(a) (2013); *Stevens v. State*, 938 S.W. 2d 517, 520 (Tex. Ct. App. 1997).

²⁰ Tex. Code Crim. Proc. art. 42.12 § 10(d) (2013).

²¹ See Tex. Code Crim. Proc. art. 42.12 § 22 (2013).

²² Tex. Code Crim. Proc. art. 42.12 § 22A (2013).

²³ Tex. Code Crim. Proc. art. 42.12 § 21(a); *Pierce v. State*, 113 S.W. 3d 431 (Tex. Ct. App. 2003).

²⁴ Tex. Code Crim. Proc. art. 42.12 § 5(b) (2013). Probationers on felony regular community supervision are not entitled to bail upon arrest for a motion to revoke. Felony probationers on deferred adjudication community supervision are entitled to reasonable bail upon arrest for a motion to proceed to adjudication. See *Ex parte Laday*, 594 S.W. 2d 102 (Tex. Cr. App. 1980).

²⁵ Tex. Code Crim. Proc. art. 42.12 § 21(d); *Eubanks v. State*, 11 S.W. 3d 279, 280-81 (Tex. Ct. App. 1999).

²⁶ *Ablon v. State*, 537 S.W. 2d 267, 269 (Tex. Crim. App. 1976).

²⁷ Tex. Govt. Code §76.016 (2013).

²⁸ *Leonard v. State*, 385 S.W. 3d 570, 576 (Tex. Crim. App. 2012).

²⁹ Tex. Code Crim. Proc. art. 42.12 § 21(c) (2013).

³⁰ Tex. Code Crim. Proc. art. 42.12 §§ 21(b-2), 22 (2013). Additionally, the court can extend the term for probationers convicted of certain sex offenses for a further 10 years if the probationer "has not sufficiently demonstrated a commitment to avoid future criminal behavior and that the release of the defendant from supervision would endanger the public." *Id.* § 22A.

³¹ *Weed v. State*, 891 S.W.2d 22, 24-25 (Tex. Ct. App. 1995).

³² Tex. Code Crim. Proc. art 42.12 § 23 (2013). The only exception to this rule is that Tex. Code Crim. Proc. art 42.03 § (2)(a)(2) (2013) requires a court to give credit on a revoked or imposed sentence if the person successfully completed a drug treatment program at a substance abuse treatment facility or other court-ordered residential program.

³³ Tex. Code Crim. Proc. art. 42.12 § 5(b) (2013).

³⁴ Tex. Code Crim. Proc. art. 42.12 § 23(b) (2013).

³⁵ *Allbright v. State*, 13 S.W. 3d 817, 818-19 (Tex. Ct. App. 2000).



PROBATION IN UTAH



Probation Rate (per 100,000):

575

Rank: 3 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

Probation is defined as "an act of grace by the court suspending the imposition or execution of a convicted offender's sentence upon prescribed conditions."¹

Forms of Probation

Following conviction, defendants may be sentenced to probation when the court imposes but suspends execution of a prison sentence.² Probation is not a free-standing sanction in Utah.

Defendants may effectively be placed on probation supervision under a "plea in abeyance agreement." The court has power to approve such an agreement on motion of both the prosecutor and defendant, following the acceptance of a plea of guilty or no contest, but before entry of judgment of conviction or the imposition of sentence.³ Although technically not a sentence of probation, the terms of the agreement may include "an order that the defendant comply with any other conditions which could have been imposed as conditions of probation upon conviction and sentencing for the same offense."⁴ If the defendant successfully completes the term of supervision, the charges are withdrawn; if not, the defendant is sentenced.⁵

Term

The maximum probation term is 36 months for a felony or class A misdemeanor and 12 months for class B or C misdemeanors or infractions.⁶ The probation term for sex offenders may be up to 10 years.⁷ For pleas in abeyance, the term must not exceed three years for a felony conviction or 18 months for a misdemeanor.⁸

Early Termination

The court may terminate a defendant's probation at any time at its discretion or upon completion without violation of 36 months probation in felony or class A misdemeanor cases, or 12 months in cases of class B or C misdemeanors or infractions.⁹

Supervision

The sentencing court may assign supervision of the defendant to the department of corrections, an agency of local government, a private agency, or place the defendant under bench supervision under the jurisdiction of the sentencing court.¹⁰ The court retains continuing jurisdiction over all defendants on probation.¹¹ The department of corrections is not required to supervise those convicted of class B and C misdemeanors or infractions but may supervise class B misdemeanants in accord with department standards.¹² The court may require the department of corrections to assist in the administration of a plea in abeyance as though a defendant were on probation.¹³

Conditions

In the court's discretion, probation may include statutorily enumerated conditions or "other terms and conditions the court considers appropriate."¹⁴ Suggested conditions include fines, restitution, participation in treatment programs, home confinement, electronic monitoring, payment of child support, and participation in compensatory service restitution programs.¹⁵ Defendants convicted after May 5, 1997 may be required to complete high school coursework and obtain a diploma, GED, or vocation certificate unless they can show their inability to do so because of a diagnosed learning disability or another justified cause.¹⁶

As a condition of probation, defendants may be required to serve a term of up to a year in county jail.¹⁷

Conditions of probation may include the payment of defense costs and the costs of investigation, probation, and treatment services.¹⁸ There is no statutory limitation on the amount of the costs that may be assessed.

The terms of a plea in abeyance agreement may include an order that the defendant pay a nonrefundable plea in abeyance fee, with a surcharge based on the amount of the plea in abeyance fee, which cannot exceed the maximum fine and surcharge which could have been imposed upon conviction and sentencing for the same offense; and an order that the defendant pay the costs of any remedial or rehabilitative program required by the terms of the agreement.¹⁹ There is no statutory limitation on the amount of the costs that may be assessed for remedial or rehabilitative programs.

Modification of Conditions

The court may modify probation conditions only "upon a hearing and a finding in court that the probationer has violated the conditions of probation," unless the hearing is waived by the defendant.²⁰

Extension of Probation Term

The court may continue a defendant's probation as bench probation after the original term ends for the limited purpose of collecting any unpaid accounts receivable. The defendant may be required to reimburse the court for the cost of the continued supervision.²¹

Grounds for Probation Revocation

Any violation of probation conditions may be grounds for revocation.²² Violation of plea in abeyance agreements may result in their termination.

OF INTEREST

If a defendant successfully completes probation under a suspended sentence, that defendant may move the court to reduce the conviction to the next lower degree of offense. The prosecutor must attempt to notify any victim. Both the prosecutor and the victim have an opportunity to request a hearing to contest the motion. The court must also approve of the reduction through a determination that it is in the interest of justice. The conviction may be reduced by two degrees if the requirements listed above have been met and the prosecutor agrees in writing. Reduction may not occur if specifically precluded by law, if the defendant still owes restitution, or if the defendant is still required to register as a sex offender.

Source: Utah Code Ann. § 76-3-402 (2014).

Revocation Procedures

To revoke probation, the supervising agency must file an affidavit with the court. The court determines if the affidavit establishes probable cause for revocation, modification, or extension.²³ If probable cause is found, the matter will proceed to a full hearing on the violation, at which the defendant may call witnesses, appear and speak in the defendant's own behalf, and present evidence.²⁴ Defendants have a statutory but not a constitutional right to counsel at revocation hearings.²⁵ Failure to provide counsel is not reversible error where "the record as a whole" demonstrates that the defendant understood the nature of the hearing.²⁶ Defendants with plea in abeyance agreements must appear at a hearing to show cause why the court should not find a violation and why the agreement should not be terminated.²⁷

Victims who opt to receive notification must be notified of court proceedings to modify or determine the disposition of a defendant's sentence, fine, or restitution or any proceeding on whether or not to release a defendant.²⁸

Legal Standard for Revocation

The state must prove the violation and the required mens rea by a preponderance of the evidence. In order to revoke probation for the violation, "the violation must be willful, or if not willful, must presently threaten the safety of society."²⁹

Revocation and Lesser Sanctions

If the defendant's probation is revoked, the court must impose a new sentence or execute the sentence that was previously imposed and suspended.³⁰ Instead of revocation, the court can decide to modify, extend, or continue probation in the same manner. The court may also punish the violation by causing the entire term of probation to begin anew.³¹ In order for a trial court to retain its authority over the probationer beyond the original period of probation, the probationer must be served with notice of revocation proceedings *within* that probationary period.³²

Appeal

A defendant convicted and sentenced in justice court, which has jurisdiction over class B and C misdemeanors,³³ is entitled to a hearing de novo in the district court on an order revoking probation if the defendant files a notice of appeal within 30 days of the revocation.³⁴ Defendants convicted in a district court may appeal revocation decisions to the Utah Court of Appeals.³⁵ The Court of Appeals reviews decisions made at the trial court level for abuse of discretion.³⁶

Grades of Offenses in Utah	
Offense Category	Maximum Punishment
First Degree Felony	5 years-life in prison
Second Degree Felony	1-15 years in prison
Third Degree Felony	Not more than 5 years in prison
Class A Misdemeanor	Maximum of 1 year in jail
Class B Misdemeanor	Maximum of 6 months in jail
Class C Misdemeanor	Maximum of 90 days in jail
Infraction	No jail sentence allowed - may be subject to a fine, forfeiture, and/or disqualification

Source: Utah Code Ann. §§ 76-3-203, 204 (2014).

END NOTES

¹ *State v. Anderson*, 203 P.3d 990, 995 (Utah 2009), citing Utah Code Ann. § 76-3-201(2) (2014); Utah Code Ann. § 77-27-1(10) (2014)).

² Utah Code Ann. § 77-18-1(2)(a) (2014).

³ Utah Code Ann. § 77-2a-2 (2014).

⁴ Utah Code Ann. § 77-2a-3(5)(d) (2014).

⁵ Utah Code Ann. § 77-2a-4 (2014).

⁶ Utah Code Ann. § 77-18-1(10)(a)(i) (2014).

⁷ Utah Code Ann. § 76-5-406.5(2) (2014).

⁸ Utah Code Ann. § 77-2a-3(5) (2014).

⁹ Utah Code Ann. § 77-18-1(10)(a)(i) (2014).

¹⁰ Utah Code Ann. § 77-18-1(2)(a), (4) (2014).

¹¹ Utah Code Ann. § 77-18-1(2)(b)(iii) (2014).

¹² Utah Code Ann. § 77-18-1(4) (2014).

¹³ Utah Code Ann. § 77-2a-3(4) (2014).

¹⁴ Utah Code Ann. § 77-18-1(8) (2014).

¹⁵ *Id.*

¹⁶ Utah Code Ann. § 77-18-1(8)(b) (2014).

¹⁷ *Id.*

¹⁸ Utah Code Ann. § 77-18-1(8)(a) (2014).

¹⁹ Utah Code Ann. § 77-2a-3(5)(a) (2014).

²⁰ Utah Code Ann. § 77-18-1(12)(a)(1) (2014).

²¹ Utah Code Ann. § 77-18-1(10)(a)(ii)(A) (2014). Accounts receivable include all financial obligations that may be imposed as conditions of probation. See Utah Code Ann. § 77-18-1(8) (2014).

²² Utah Code Ann. § 77-18-1(12)(e)(ii) (2014).

²³ Utah Code Ann. § 77-18-1(12)(b)(i) (2014).

²⁴ Utah Code Ann. § 77-18-1(12) (2014).

²⁵ *State v. Byington*, 936 P.2d 1112, 1116 (Utah Ct. App. 1997), citing Utah Code Ann. § 77-18-1(12)(c)(3) (Supp. 1996).

²⁶ *Id.* at 1117.

²⁷ Utah Code Ann. § 77-2a-4(1) (2014).

²⁸ Utah Code Ann. §§ 77-38-2(5)(d),(f), 77-38-3 (2014).

²⁹ *State v. Hodges*, 798 P.2d 270, 276, 278 (Utah App. 1990).

³⁰ Utah Code Ann. § 77-18-1(12)(e)(iii) (2014).

³¹ Utah Code Ann. §§ 77-18-1(12)(a)(i), (e)(ii) (2014).

³² *Smith v. Cook*, 803 P.2d 788, 793 (Utah 1990), see also *State v. Call*, 980 P.2d 201, 203 (Utah 1999).

³³ Utah Code Ann. § 78A.7-106(1) (2014).

³⁴ Utah Code Ann. § 78A.7-118(4) (2014).

³⁵ Utah Code Ann. § 78A-4-103(2)(e) (2014); Utah R. App. P. 3 (2014).

³⁶ *State v. Brady*, 300 P.3d 778, 779 (Utah Ct. App. 2013).



PROBATION IN WASHINGTON



Probation Rate (per 100,000):

1,654

Rank: 35 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

Effective in 1984 with Washington's Sentencing Reform Act, the terms "probation" and "parole supervision" were for the most part retired and replaced for felony offenses. The term "community custody" now refers to the portion of an offender's sentence served in the community subject to controls placed on an offender's movement and activities.¹ The term refers to original sentences of supervision in the community (called "probation" in most states) as well as postrelease supervision (known as "parole supervision" in most states).² In Washington, "probation" as such is available only in misdemeanor and gross misdemeanor cases.³ Counties are free to choose whether or not to maintain probation services and personnel for the supervision of misdemeanants.⁴ For budgetary reasons, misdemeanor probation is rarely used.⁵

There is no statutory authority for deferred sentencing or adjudication in Washington as a route to community supervision.

Forms of Probation

Community custody is a free-standing sanction in Washington. The courts' power to suspend or stay prison sentences in felony cases has been abolished by statute for nearly all offenses.⁶ Community custody is not generally authorized for felony cases; by statute, it is most often available only following a term of confinement.⁷ As an

original sentence, not imposed to follow a prison or jail term, courts are permitted to order community custody only in designated circumstances. These include offenders who are sentenced to a "first-time offender waiver" or under the "parenting sentencing alternative."⁸

The first-time offender waiver is available to certain defendants convicted of non-serious felonies who have no prior felony convictions or deferred adjudications in a felony case in any jurisdiction. For eligible defendants, the court has discretion to impose a sentence of community custody of up to six months, or up to one year if treatment is ordered.⁹ The parenting sentencing alternative is an option for some offenders who have physical custody as parents or guardians of minor children at the time of the current offense. For eligible defendants, the court must impose a sentence of twelve months of community custody.¹⁰

Term

When community custody is imposed as an original probation-like sentence, not to follow a period of confinement in prison or jail, its maximum duration is six months or one year via the first-time offender waiver, and one year under the parenting sentencing alternative.¹¹

Early Termination

No statute provides for early termination of community custody.

Supervision

Felony offenders on community custody are generally supervised by the Department of Corrections.¹²

Conditions

Court-imposed conditions of community custody include "mandatory," "waivable," "discretionary," and "special" conditions. Mandatory conditions include informing the department of corrections of court-ordered treatment requiring the defendant to follow conditions imposed by the department, and additional conditions for certain offenses with child victims.¹³ Waivable conditions must be imposed unless expressly waived by the court, and include orders that the offender: report to and be available for contact with a community corrections officer; work at department-approved education, employment, or community restitution; refrain from possessing or consuming controlled substances; and obtain prior approval of the department for the offender's residence location and living arrangement.¹⁴ Discretionary conditions include orders that the offender: remain within, or outside of, a specified geographical boundary; refrain from contact with the victim or a specified class of individuals; participate in crime-related treatment or counseling; participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community; refrain from consuming alcohol; and comply with "any crime-related prohibitions."¹⁵ Special conditions and programs are authorized or mandated for some domestic violence offenders and persons convicted of an alcohol or drug-related traffic offense.¹⁶

In a catch-all provision, the courts are given discretion to order "any crime-related prohibition" as a condition of community custody.¹⁷ The Washington courts have said that "[t]he philosophy underlying the 'crime-related' provision is that '[p]ersons may be punished for their crimes and they may be prohibited from doing things which are directly related to their crimes, but they may not be coerced into doing things which are believed will rehabilitate them."¹⁸

Washington statutes do not authorize the courts to impose, as a condition of community custody, that the offender must obey all criminal laws,¹⁹ but community corrections officers must refer any arrest for a new felony offense to local law enforcement or local prosecution for consideration of new charges.²⁰

The Department of Corrections must place certain minimum requirements on offenders under its supervision, and may establish and modify "additional conditions" based

on an assessment of the offender's risk of reoffense. The department may not impose conditions that are contrary to those ordered by the court and may not contravene or decrease court-imposed conditions. It must notify the offender in writing of any additional conditions or modifications.²¹

OF INTEREST

After a successful term of probation or community custody, a defendant may move to withdraw a guilty plea or set aside a guilty verdict, clearing the conviction from his or her record. Only certain non-violent crimes are eligible for vacation of the record of conviction. The legislature intended to prohibit adverse consequences of a dismissed conviction, with the exception of its use in a subsequent criminal conviction.

Sources: Wash. Rev. Code § 9.94A.640(1) (2014), Wash. Rev. Code § 9.95.240(1)–(2)(a) (2014); In re Carrier, 272 P.3d 209, 216 (Wash. 2012).

The department is statutorily required to instruct offenders to: report as directed to a community corrections officer; remain within prescribed geographical boundaries; give notice of any change in the offender's address or employment; pay the supervision fee assessment; and disclose the fact of supervision to any mental health or chemical dependency treatment provider. At its discretion, the department may also require the offender to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws. It may require sex offenders to submit to special conditions, including electronic monitoring.²²

Jail not expressly authorized as a "condition" of community custody.

Probationers must pay a penalty assessment required by law. The assessment is in addition to any other penalty or fine and is \$500 for each case that includes one or more convictions of a felony or gross misdemeanor and \$250 for any case that includes convictions of only one or more misdemeanors.²³ Department-supervised defendants must pay a one-time supervision intake fee in an amount between \$400 and \$600, unless the fee is waived or deferred due to unemployment, student status, employment handicap, age, the need to meet family expenses, or other extenuating circumstances.²⁴ The department may also require offenders

to pay for special services rendered including electronic monitoring, day reporting, and telephone reporting, subject to the offender's ability to pay.²⁵ If the offender is found to have an alcohol or drug problem that requires treatment, the offender must pay all costs for any required evaluation, education, or treatment.²⁶ Additional fees may be assessed based on the conditions of release.²⁷

Modification of Conditions

The Department of Corrections may impose added conditions or modifications to community custody based on at offender's risk of reoffending as assessed by the department.²⁸

Extension of Probation Term

For most felonies, there is no provision for the extension of term of community custody. However, sex offenders' custody may be extended up to the maximum allowable sentence at any time prior to the completion or termination of the term if community safety would be enhanced.²⁹

Grounds for Probation Revocation

For individuals sentenced to community custody, violation of any condition imposed may lead to violation sanctions.³⁰

Revocation Procedures

Most violations proceedings are held by the Department of Corrections and are given the statutory name "offender disciplinary proceedings." The presiding official is a hearing officer. The department is required to adopt rules creating a structured violation process that includes presumptive sanctions, aggravating and mitigating factors, and definitions that distinguish "low level" and "high level" violations.³¹

For offenders on community custody not supervised by the Department of Corrections, alleged violations are heard by the court, which may modify its original sentence and impose further punishment if a violation is found.³² For misdemeanors, the courts administer probation, and may impose sanctions for violations.³³

Procedures vary depending on the nature of the violation, any history of past violations, and the classification of the alleged conduct as a "high level" or "low level" violation. A hearing is guaranteed for high level violations that may result in confinement for more than 72 hours. Repeat low level violations may result in short-term confinement of up to 72 hours without a full hearing, although the offender must be given the opportunity to respond to the alleged violation.³⁴

When a hearing is required in felony cases, defendants have statutory rights to: be present, have an interpreter, call and cross-examine witnesses, present evidence, and receive a written summary of the basis for the hearing officer's decision.³⁵ Counsel is not required at the hearings.³⁶ By contrast, at a misdemeanor probation revocation hearing that may result in incarceration, defendants have the right to be present, to have basic due process protections, and to be represented by retained or appointed counsel.³⁷

Legal Standard for Revocation

No traditional burden of proof applies to offender disciplinary proceedings, although the relevant statute provides that "the hearing officer may not rely on unconfirmed or unconfirmable allegations to find that the offender violated a condition."³⁸ For violations heard in court, the state has the burden of showing noncompliance with the conditions of community custody by a preponderance of the evidence.³⁹

Revocation and Lesser Sanctions⁴⁰

Authorized sanctions that may be imposed by the hearings officer include:

- First violation: A non-confinement sanction.
- Second or subsequent low level violation: Up to three days confinement.
- High level violation: Up to thirty days confinement per hearing.⁴¹
- For violation proceedings before the court, the court may impose up to sixty days of confinement per violation.⁴² In all cases, pre-hearing time served in custody must be credited toward any sanction of confinement.⁴³

Grades of Offenses in Washington

Most crimes in Washington carry penalties unique to the crime, listed in statutes. When not listed, the penalties are:

Class of Crime	Maximum Sentence	Maximum Fine
Class A Felony	Life	\$50,000
Class B Felony	10 years	\$20,000
Class C Felony	5 years	\$10,000
Gross Misdemeanor	364 days	\$5,000
Misdemeanor	90 days	\$1,000

Sources: Wash. Rev. Code tit. 9A (2014); Wash. Rev. Code § 9.94A.035 (2014); Wash. Rev. Code § 9A.20.021 (2014).

Appeal

An order revoking probation is appealable by the defendant.⁴⁴ Sanctions for low level violations that include confinement, or sanctions for high level violations, may be appealed to a panel of three reviewing officers. The panel may reverse, vacate, remand, or modify a sanction if they find it is not reasonably related to the crime of conviction,

the violation committed, the offender's risk of reoffending, or the safety of the community.⁴⁵ A "personal restraint" petition may be filed in the courts to challenge a sanction of incarceration, but the petition is limited to certain issues: for example, where there is a constitutional violation or there are new material facts not previously presented.⁴⁶

END NOTES

¹ See Wash. Admin. Code § 381-100-040 (2014) (defining community control).

² Wash. Rev. Code § 9.94A.707(1) (2014).

³ Wash. Rev. Code § 9.95.204(1) (2014), made inapplicable to felonies by Wash. Rev. Code § 9.95.900(1) (2014).

⁴ Wash. Rev. Code § 36.01.070 (2014).

⁵ Interview with David Boerner, former Chair, Wash. State Sentencing Guidelines Comm'n (Sept. 26, 2014).

⁶ *Id.* The one exception is offenders sentenced under the "special sex offender sentencing alternative," Wash. Rev. Code § 9.94A.670 (2014), whose sentences may be suspended.

⁷ Terms of community custody of up to three years are mandatory for certain serious offenses as a post-prison sanction. Wash. Rev. Code § 9.94A.701 (2014). Terms of community custody of up to one year may be imposed to follow jail terms of one year or less for sex offenses, violent offenses, crimes against a person, felony drug offenses, and failure to register as a sex offender. Wash. Rev. Code § 9.94A.702 (2014).

⁸ Wash. Rev. Code §§ 9.94A.701(7), 9.94A.702(2) (2014).

⁹ The court also has discretion to impose a sentence of confinement in a county facility for up to 90 days, but this is not mandatory. Wash. Rev. Code § 9.94A.650(1)-(3) (2014).

¹⁰ Wash. Rev. Code § 9.94A.655(1)(e), (4) (2014).

¹¹ *Id.*, § 9.94A.650(3), *supra* note 10. As a post-confinement sanction, community custody is generally capped at three years or less, depending on the case, although for some sex offenders it may be extended for "any period of time the person is released from total confinement before the expiration of the maximum sentence." Wash. Rev. Code §§ 9.94A.701(1), 9.94A.507(5) (2014).

¹² Wash. Rev. Code §§ 9.94A.501, 9.94A.704(1) (2014).

¹³ Wash. Rev. Code § 9.94A.703 (2014).

¹⁴ Wash. Rev. Code § 9.94A.703(2) (2014).

¹⁵ Wash. Rev. Code § 9.94A.703(3) (2014).

¹⁶ Wash. Rev. Code § 9.94A.703(4) (2014).

¹⁷ Wash. Rev. Code § 9.94A.703(3)(f) (2014).

¹⁸ *State v. Riley*, 846 P.2d 1365, 1373-74 (Wash. 1996), citing David Boerner, Sentencing in Washington § 4.5, at 4-6-4-7 (1985); *State v. Land*, 295 P.3d 782, 787 (Wash. Ct. App. 2013).

¹⁹ § 9.94A.703, *supra* note 15. Perhaps inconsistently, the Department of Corrections is given discretion to impose a requirement that the offender "obey all laws." Wash. Rev. Code § 9.94A.704(4) (2014).

²⁰ Wash. Rev. Code § 9.94A.716(3) (2014).

²¹ Wash. Rev. Code § 9.94A.704(2)(a), (6), (7)(a) (2014).

²² Wash. Rev. Code § 9.94A.704(3)-(5) (2014).

²³ Wash. Rev. Code § 7.68.035(1)(a) (2014).

²⁴ Wash. Rev. Code § 9.94A.780(1) (2014).

²⁵ Wash. Rev. Code § 9.94A.704(9) (2014).

²⁶ Wash. Rev. Code § 9.94A.703(4)(b)(i) (2014).

²⁷ See, e.g. Wash. Rev. Code § 9.94A.660(6)(a) (2014), imposing \$30 fee for chemical dependency monitoring.

²⁸ Wash. Rev. Code § 9.94A.704(2)(a) (2014).

²⁹ Wash. Rev. Code § 9.94A.709(1) (2014).

³⁰ Wash. Rev. Code § 9.94A.737 (2014).

³¹ Wash. Rev. Code § 9.94A.737(1)-(2), (6)(c)-(d) (2014).

³² Wash. Rev. Code § 9.94A.6333(1) (2014).

³³ Wash. Rev. Code § 9.94A.6332(8) (2014); *State v. Gamble*, 192 P.3d 399, 402 (Wash. Ct. App. 2008) (holding that the court may impose community custody sanctions even where the Department of Corrections is also authorized to do so).

³⁴ Wash. Rev. Code § 9.94A.737(3)(b), (4), (6) (2014).

³⁵ Wash. Rev. Code § 9.94A.737(6)(c) (2014).

³⁶ *In re McNeal*, 994 P.2d 890, 897-899 (Wash. Ct. App. 2000).

³⁷ Wash. Super. Ct. Crim. R. r.7.6 (2014), see, e.g. *State v. Spencer*, No. 31367-7-II, 2004 WL 1834292, at *1 (Wash. Ct. App. Aug. 17, 2004).

³⁸ Wash. Rev. Code § 9.94A.737(7) (2014).

³⁹ Wash. Rev. Code § 9.94A.6333(2)(b) (2014).

⁴⁰ Note that separate specialized procedures exist for sex offenders. See Wash. Admin. Code ch. 381-100 (2014).

⁴¹ Wash. Rev. Code § 9.94A.737(3)-(4) (2014). Any violation after 5 low level violations is automatically a high level violation. Wash. Rev. Code § 9.94A.737(2)(b) (2014).

⁴² Wash. Rev. Code § 9.94A.633(1)(a) (2014).

⁴³ Wash. Rev. Code § 9.94A.737(4)(b) (2014).

⁴⁴ Wash. R. App. Proc. r.2.2(13); *State v. Robinson*, 85 P.3d 376, 379-80 (Wash. Ct. App. 2004).

⁴⁵ Wash. Rev. Code § 9.94A.737(3)(b)(ii), (6)(d) (2014).

⁴⁶ Wash. R. App. Proc. r.16.4 (2014); see, e.g. *McNeal*, *supra* note 37.



PROBATION IN WISCONSIN



**Probation Rate (per 100,000):
1,047**

Rank: 14 out of 50

Source: BJS, Probation and Parole in the United States, 2012 (Appendix table 2. Adults on probation, 2012).

Definition and Purpose

The Wisconsin courts have recognized "dual purposes of probation, namely, rehabilitating the defendant and protecting society."¹ The Wisconsin Supreme Court has long held that probation is "presumed to be the appropriate disposition" of a criminal case unless the sentencing court makes findings that confinement is "necessary to protect the public, the offender needs correctional treatment available only in confinement, or [probation] would unduly depreciate the seriousness of the offense."²

Forms of Probation

After conviction, the court may place an offender on probation in one of two ways: (1) The court may impose a sentence and stay its execution; or (2) The court may withhold the imposition of sentence. These options are not available for crimes punishable by life imprisonment, or if probation is prohibited for a particular offense by statute.³

Offenders may enter deferred prosecution agreements with the prosecutor and Department of Corrections that provide for supervision in the community by the department. Offenders must admit, in writing, all of the elements of the crimes charged, although no conviction is entered and the charges are dismissed if the offender successfully completes the terms of the agreement.⁴ Although not technically probation, offenders under deferred prosecution agreements may be subject to short-term sanctions developed by the department for probation violators.⁵

Term

The term of probation to which a defendant may be sentenced is determined by the number and type of offense(s) of which the defendant is convicted as follows:⁶

- One misdemeanor: Up to 2 years, with a minimum of 6 months for some offenses and a maximum of one year for others.
- Between 2 and 4 misdemeanors: The term of probation may be increased by one year.
- Five or more misdemeanors: The term may be increased by 2 years.
- One felony: A minimum of 1 year up to the "term of confinement in prison for the crime or 3 years, whichever is greater."
- Two or more felonies: The term of probation may be increased by one year for each felony conviction.

Early Termination

The statute permitting the court to extend the probation term "at any time" (see below) does not grant courts similar authority to reduce the probation term at any time.⁷ A defendant who is not required to register as a sex offender may be discharged early from probation after completing at least 50 percent of the probation term if the defendant has satisfied all conditions and rules of probation and has fulfilled all financial obligations.⁸

Supervision

Defendants sentenced to probation are supervised by Community Corrections Officers employed by the Department of Corrections. Wisconsin law requires supervision to include incentives as well as sanctions. The department is required to promulgate rules to determine how to reward offenders for compliance with conditions of probation.⁹

Conditions

Wisconsin courts may impose "any conditions [of probation] which appear to be reasonable and appropriate."¹⁰ The Wisconsin Supreme Court has held that "[t]he validity and reasonableness of a condition of probation must be measured by how well it serves to effectuate the objectives of probation."¹¹ The court has also said that "conditioning probation on the satisfaction of requirements which are beyond the convicted person's control undermines the rehabilitation of the offender."¹²

Conditions are often tailored to the specific defendant and crime, such as requiring that the defendant stay away from certain properties, persons, or areas. However, the court must require the defendant to pay restitution as a condition of probation, or articulate the reasons for not doing so on the record.¹³

The court may require as a condition of probation that the probationer be confined during such period of the term of probation as the court prescribes, but not to exceed one year.¹⁴ If a defendant is convicted of an offense with a "mandatory or presumptive minimum period of one year or less of imprisonment," the defendant is required to serve the presumptive minimum period in prison as a condition of probation.¹⁵

All probationers must pay a "reimbursement fee" to the Department of Corrections for the costs of providing supervision and services. The department must set rates for probationers based on ability to pay and with the goal of receiving at least \$1 per day.¹⁶ The department may decide not to charge the fee to a probationer who is unemployed, pursuing a full-time education, undergoing treatment and unable to work, or has a statement from a physician excusing the probationer from work for medical reasons.¹⁷ The court must also impose a "victim and witness assistance surcharge" on all probationers, which may not be waived. The surcharge is calculated by adding up the counts of conviction: \$67 per misdemeanor; \$92 per felony count.¹⁸ The court may also require that probationers pay any costs for defense representation, but only if the county or state public defender provides a statement of the costs of legal representation within a time period set by the court.¹⁹

Modification of Conditions

The court may modify probation conditions "for cause" at any time before the end of the probation period.²⁰

OF INTEREST

By administrative rule, probation revocation hearings are closed to the public in Wisconsin. The stated rationale for this practice is that the hearings are typically held in a jail or other secure detention facility, and the belief that the hearings are not "meetings" of a "governmental body" for purposes of the state's Open Meetings law.

Sources: Wis. Adm. Code § HA 2.05, app (2014); Wis. Stat. § 19.82 (2014).

Extension of Probation Term

The court may extend the term of probation "for cause" at any time before the end of the probation period.²¹ Term extensions are expressly authorized for the following reasons: The defendant has not made a "good faith" effort to pay any fines, surcharges, or correctional fees; is unable to pay restitution and the party to whom the payments are due agrees to allow the defendant to discharge the debt through community service; or the defendant agrees to the extension (typically in lieu of serving time in prison) and the court finds the extension would serve "the purposes for which probation was imposed."²² The Wisconsin Court of Appeals has held that there is no limit to the term a probationer may serve as a result of extensions.²³

An extension may also be achieved through "tolling" of the probation term. Upon a finding of a probation violation (see below), the Administrative Law Judge has authority to toll all or any part of the period between the date of the violation and the date an order is entered, subject to credit for time the probationer has spent in custody.²⁴

Grounds for Probation Revocation

A defendant's probation may be revoked "if the offender violates a rule or condition of supervision," which may include failure to pay restitution.²⁵

Revocation Procedures

Violations proceedings are handled administratively in Wisconsin, in the Division of Hearings and Appeals of the

state's Department of Administration. The process is governed primarily by the state's Administrative Code. Hearings are held before an Administrative Law Judge (ALJ).²⁶

The Department of Corrections initiates revocation proceedings when "there are provable violations of the rules of supervision." A preliminary hearing may be held to determine whether there is probable cause that the violation occurred; and whether the defendant should be held in custody pending the revocation hearing. The preliminary hearing is not required if the defendant is not in custody, waives the right to a preliminary hearing, admits the violation, is awaiting trial for a felony charge involving the same conduct as the violation, or has been found guilty for the conduct underlying the alleged violation.²⁷

If the probationer is placed in custody pending disposition of the hearing, a revocation hearing must be held within 50 calendar days. Otherwise, the hearing must begin within a reasonable time from the date the Division of Hearings receives a hearing request.²⁸ The Department of Corrections is required give notice to the offender of the revocation hearing that includes a list of evidence and witnesses to be considered at the hearing (unless otherwise confidential), and a statement that the probationer may inspect any information or evidence in the possession of the department (unless confidential).²⁹

Offenders have the following rights at the revocation hearing: the right to attend the hearing, to deny the allegation, to be heard and to present witnesses, to present evidence, to question witnesses, and to the assistance of counsel. The rules of evidence do not apply at the hearing.

Hearsay and illegally-obtained evidence are admissible.³⁰ Victims receive notification of revocation proceedings if they have requested such notification.³¹

The ALJ must issue a written decision with findings of fact and conclusions of law, and the reasons for decision.³² If the probationer waives the final administrative hearing, the secretary of corrections shall enter an order either revoking or not revoking probation.³³

Legal Standard for Revocation

The Department of Corrections has the burden of proof to establish by a preponderance of the evidence that the offender violated the rules or conditions of supervision. A violation may also be proven by a conviction arising from the conduct underlying the alleged violation.³⁴

Upon finding a violation, the ALJ must decide whether revocation should result or whether there are appropriate alternative sanctions. By rule and judicial decision, revocation is not permitted unless the ALJ finds, on the basis of the original offense and the intervening conduct of the probationer, that: (a) Confinement is necessary to protect the public from further criminal activity by the offender; (b) The offender is in need of correctional treatment which can most effectively be provided if confined; or (c) It would unduly depreciate the seriousness of the violation if supervision were not revoked.³⁵

Revocation and Lesser Sanctions

If probation is revoked under a stayed execution of sentence, the defendant must serve the full sentence that

Grades of Offenses in Wisconsin

A felony is any crime punishable by imprisonment in the state prisons; all other crimes are misdemeanors. Penalties for different grades of offense are as follows:

Offense Category	Maximum Punishment
Class A Felony	Life imprisonment
Class B Felony	Prison not to exceed 60 years
Class C Felony	Prison up to 40 years; fine up to \$100,000
Class D Felony	Prison up to 25 years; fine up to \$100,000
Class E Felony	Prison up to 15 years; fine up to \$50,000
Class F Felony	Prison up to 12 years and 6 months; fine up to \$25,000
Class G Felony	Prison up to 10 years; fine up to \$25,000
Class H Felony	Prison up to 6 years; fine up to \$10,000
Class I Felony	Prison up to 3 years and 6 months; fine up to \$10,000
Class A misdemeanor	Prison up to 9 months; fine up to \$10,000
Class B misdemeanor	Prison up to 90 days; fine up to \$1,000
Class C misdemeanor	Prison up to 30 days; fine up to \$500

Sources: Wis. Stat. § 939.60 (2014); Wis. Stat. §§ 939.50(3)(a); 939.51(3)(a) (2014).

was previously stayed.³⁶ If probation is revoked in a case in which the judge originally withheld imposition of sentence, the defendant will be sent to court for sentencing.³⁷

As part of its statutory authority to administer probation, the department is required to develop a system of short-term sanctions for violations of conditions of probation and deferred prosecution agreements that sets forth a list of sanctions to be imposed for the most common violations.³⁸ If a probationer signs a statement admitting a violation of a condition or rule of probation, the department may, as a sanction for the violation, confine the probationer for up to

90 days in a regional detention facility or, with the approval of the sheriff, in a county jail.³⁹

Appeal

Upon the request of either party, the Administrator of the Division of Hearings and Appeals must review the ALJ's order. The administrator may modify, sustain, reverse, or remand the ALJ's decision.⁴⁰ Defendants may also petition for a writ of certiorari to the court of conviction without exhausting their options for administrative review,⁴¹ but the court will only review whether the action was "arbitrary and capricious."⁴²

END NOTES

¹ *State v Heyn*, 456 N.W.2d 157, 161 (Wis. 1990).

² *State v. Bokenyl*, 848 N.W.2d 759, 770 (Wis. 2014); *Bastian v. State*, 194 N.W.2d 687, 690-91 & n. 1 (Wis. 1972).

³ Wis. Stat. § 973.09(1) (2014). The court may also sentence eligible offenders to "intensive sanctions programs," although this option is currently little-used. See Wis. Stat. §§ 301.048(1)(a-c) (2014); Email from Cecelia Klingele, Sept. 28, 2014.

⁴ Wis. Stat. § 971.39 (2014).

⁵ Wis. Stat. §§ 971.375, 301.03(3)(a) (2014).

⁶ Wis. Stat. § 973.09(2) (2014).

⁷ *State v. Dowdy*, 808 N.W.2d 691, 694 (Wis. 2012).

⁸ Wis. Stat. § 973.09(2)(c)(3) (2014).

⁹ Wis. Stat. § 301.03(3)(a) (2014); Wisconsin Department of Corrections, DOC Operations Manual, Revocation (2014), at 10.01.01.

¹⁰ Wis. Stat. § 973.09(1) (2014).

¹¹ *Huggett v. State*, 266 N.W.2d 403, 407 (Wis. 1978).

¹² *State v Heyn*, 456 N.W.2d 157, 161 (Wis. 1990).

¹³ Wis. Stat. § 973.09(1)(b) (2014). An indigent defendant may still be required to pay restitution where the court finds the defendant's ability to pay will improve during the probationary term. *State v. Gerard*, 205 N.W.2d 374, 380-81 (Wis. 1973).

¹⁴ Wis. Stat. § 973.09(4)(a) (2014).

¹⁵ Wis. Stat. § 973.09(1) (2014).

¹⁶ Wis. Stat. § 304.074(2) (2014).

¹⁷ Wis. Stat. § 304.074(3) (2014).

¹⁸ Wis. Stat. § 3973.045(1) (2014).

¹⁹ Wis. Stat. § 973.09(1g) (2014).

²⁰ Wis. Stat. § 973.09(3)(a) (2014).

²¹ Wis. Stat. § 973.09(3)(a) (2014).

²² Wis. Stat. § 973.09(3)(c) (2014).

²³ *State v. Luu*, 769 N.W.2d 125, 129 (Wis. Ct. App. 2009).

²⁴ Wis. Adm. Code § HA 2.05(7)(b)(4) (2014); Wis. Stat. § 973.155 (2014).

²⁵ Wis. Stat. § 973.10(2) (2014).

²⁶ See Wis. Stat. § 973.10(2) (2014); Wis. Adm. Code § HA 2.01 et seq. (2014).

²⁷ Wis. Stat. § 973.10(2) (2014); Wisconsin Department of Corrections, *supra* note 9, at 10.01.11, 10.02.01, 10.03.01, and 10.03.01.

²⁸ Wis. Stat. § 973.10(2) (2014); Wis. Adm. Code, § HA 2.05(4) (2014); Wisconsin Department of Corrections, *supra* note 9, at 10.01.11

²⁹ Wis. Adm. Code, § HA 2.05(1) (2014).

³⁰ Wis. Adm. Code, § HA 2.05(6) (2014).

³¹ Wis. Stat. § 973.09(3m)(b) (2014).

³² Wis. Adm. Code § HA 2.05(7)(d) (2014).

³³ Wis. Stat. § 973.10 (2) (2014).

³⁴ Wis. Adm. Code § HA 2.05(6)(f) (2014).

³⁵ Wis. Adm. Code § HA 2.05(7)(b)(3) (2014). These criteria were taken from *State ex rel. Plotkin v. Department of Health and Social Services*, 217 N.W.2d 641, 645-46 (Wis. 1974).

³⁶ Wis. Stat. § 973.10(2)(b) (2014).

³⁷ Wis. Stat. § 973.10(2)(a) (2014).

³⁸ Wis. Stat. § 301.03(3)(a) (2014).

³⁹ Wis. Stat. § 973.10(2s) (2014).

⁴⁰ Wis. Stat. § 973.10 (2) (2014); Wis. Adm. Code § HA 2.05(8), (9) (2014).

⁴¹ *State ex rel. Mentek v. Schwarz*, 624 N.W.2d 150, 153-54 (Wis. 2001).

⁴² *State ex rel. Johnson v. Cady*, 185 N.W.2d 306, 310-11 (Wis. 1971).

► PROBATION IN THE MODEL PENAL CODE

In 2014, the American Law Institute (ALI) approved new Model Penal Code provisions concerning probation and probation revocation.¹ The MPC is a compendium of recommended statutory provisions addressed to state legislatures nationwide, with extensive commentary that explains the rationale of each provision. It is not a "restatement" of the criminal law as it currently exists, but is intended to be aspirational—collecting best practices from around the country and offering innovative reform proposals of its own.²

The MPC has no force of law, but historically its recommendations have significant impact on the development of state legislation. In the last 50 years, more than two-thirds of the states have enacted one or more of the MPC's recommended provisions—usually with some changes in terminology or substance. In addition, the MPC has played an important role in judicial decisionmaking even when not adopted in legislation, has been cited and relied upon by many federal courts, and has influenced the constitutional jurisprudence of the U.S. Supreme Court.³

Definition and Purpose

The MPC states that "The purposes of probation are to hold offenders accountable for their criminal conduct, promote their rehabilitation and reintegration into law-abiding society, and reduce the risks that they will commit new offenses."⁴ A newly-proposed provision, not yet approved by the ALI, would add that, "It is the legislature's intent that probation should not be viewed as a default sanction by sentencing courts, that community corrections resources shall not be used to carry out unjustified probation sentences, and that probation should be imposed on an individual offender only when it serves one or more of the purposes of the sanction." According to this new proposal, the MPC would advocate greater use of the sanction of "unconditional discharge."⁵

Forms of Probation

Probation is authorized as a stand-alone sanction, and there is no requirement that the court suspend the imposition or execution of a prison sentence in order to grant probation.⁶ In addition, the MPC leaves it up to individual states whether to authorize the suspended execution of a prison term as a route to probation. If authorized, the suspended sentence would be an additional form of probation and would not subtract from the availability of probation as a free-standing sentence.⁷

Although not technically a sentence of "probation," probation-like supervision is permitted in the MPC as part of a deferred-prosecution agreement or deferred adjudication.⁸ Deferred prosecutions and adjudications in the MPC are designed to be routine dispositions of criminal cases that do not carry the stigma of a criminal conviction, and do not trigger the many collateral consequences of conviction that exist in state and federal law.⁹

Term

Probation terms are limited to a maximum of three years for felonies and one year for misdemeanors; consecutive probation terms are prohibited.¹⁰ The MPC leaves open the possibility that longer probation terms may be authorized by the legislature for particular offenses. There was consensus within the ALI that three years was a sensible maximum probation term for the vast majority of felony offenders.¹¹

Early Termination

Early termination is authorized and encouraged. The MPC provides that the court may discharge the defendant from probation at any time if it finds that the purposes of the sentence no longer justify continuation of the probation term.¹² Indeed, early termination is treated as the norm rather

than an exception. The MPC recommends that, for felony offenders, probation sanctions should ordinarily provide for early discharge after successful completion of a minimum term of no more than 12 months.¹³

The MPC also suggests that sentencing judges use the prospect of early termination as an incentive to probationers to succeed, as part of a broader strategy to use "carrots" rather than "sticks" to encourage behavioral change. Subsection 6.03(12) provides:

The court should consider the use of conditions that offer probationers incentives to reach specified goals, such as successful completion of a rehabilitative program or a defined increment of time without serious violation of sentence conditions. Incentives contemplated by this subsection include shortening of the probation term, removal or lightening of sentence conditions, and full or partial forgiveness of economic sanctions [other than victim compensation].¹⁴

Supervision

Because the MPC addresses numerous states and probation systems, it does not specify what agency or level of government should have responsibility to administer probation sanctions. Instead, the MPC speaks generically of the "supervising agency" and "supervising agent."¹⁵

Conditions

The MPC discourages the proliferation of probation conditions. General and special conditions may only be imposed "when necessary to further the [statutory purposes of probation]." When deciding whether to impose probation, the length of a probation term, and what conditions of probation to impose, the court should consult reliable risk-and-needs-assessment instruments, when available, and must apply any relevant sentencing guidelines.¹⁶ By statute, "No condition or set of conditions may be attached to a probation sanction that would place an unreasonable burden on the offender's ability to reintegrate into the law-abiding community."¹⁷

General conditions that may be used in appropriate cases include: Compliance with the criminal law, completion of a rehabilitative program that addresses the risks or needs presented by an individual offender, performance of community service, drug testing for a substance-abusing offender, technological monitoring of the offender's location, through global-positioning-satellite technology or other means, but only when justified as a means to reduce the risk that the probationer will reoffend, reasonable efforts to find and maintain employment, except it is not a permissible condition of probation that the offender

must succeed in finding and maintaining employment, intermittent confinement in a residential treatment center or halfway house, good-faith efforts to make payment of victim compensation (but compliance with any other economic sanction is not a permissible condition of probation).¹⁸

OF INTEREST

There is a proposal (not yet approved by the ALI) to add to the MPC a provision that would allow a short prison sentence to be imposed in lieu of probation:

[W]ith the offender's consent, a sentence of imprisonment of no more than 60 days may be imposed as an alternative to a sentence of probation.

The provision is meant to reflect the reality that, from many offenders' perspective, a long probation sentence—including the risk of revocation and incarceration—is more punitive than a short confinement sanction.

Source:

A short term of confinement, not to exceed a total of [90 days], may be imposed as a condition of probation.¹⁹

The ALI adopted a two-part recommendation with respect to costs and fees that may be assessed against probationers and other convicted offenders. As a matter of principle, the MPC states as follows:

No convicted offender, or participant in a deferred prosecution under § 6.02A, or participant in a deferred adjudication under § 6.02B, shall be held responsible for the payment of costs, fees, and assessments.²⁰

The underlying policy of this provision was that criminal offenders should not be treated as a special class of taxpayer or revenue source to pay for criminal justice programs that have been underfunded by the legislature. The MPC saw offenders as largely disadvantaged and ill-equipped to be designated as a "special class of taxpayers."²¹

However, the ALI recognized that many states would consider this recommendation infeasible on budgetary grounds, so the MPC offers a series of second-order recommendations addressed to jurisdictions that chose to retain such fees. First, no costs or fees (or other economic sanctions) may be imposed unless the offender would retain sufficient means for reasonable living expenses and family obligations after their payment.²² Second, all costs and fees must be approved in advance by the sentencing courts, and may not be levied or increased or supplemented with surcharges at a later time. Third, no costs, fees, or assessments may be imposed in excess of actual expenditures in the offender's case.²³ Fourth, the agencies or entities charged with collection of the fees are barred from retaining the monies collected for their own use.²⁴

Modification of Conditions

The court may reduce the severity of probation conditions, or remove conditions previously imposed, at any time.²⁵ The court may increase the severity of probation conditions or add new conditions when there has been a material change of circumstances affecting the risk of criminal behavior by the offender or the offender's treatment needs, but only after a hearing that comports with the procedural requirements for revocation proceedings.²⁶

Extension of Probation Term

There is no provision for extension of a probation term, although an equivalent result is possible as a revocation sanction for probationers who were originally sentenced to a suspended prison term.²⁷

Grounds for Probation Revocation

Any violation of a condition of probation may be a ground for revocation, including the commission of a new criminal offense.²⁸

Revocation Procedures

When there is probable cause to believe that an individual has violated a condition of probation, there are a number of steps the supervising agent or agency may take without involving the courts. These include counseling the individual or issuing a verbal or written warning, increasing contacts with the individual to ensure compliance, and providing opportunity for voluntary participation in programs designed to reduce identified risks of criminal reoffense.

When such steps are insufficient, the agent or agency may petition the court to remove or modify conditions that are no longer required for public safety, or with which the individual is reasonably unable to comply; to impose additional conditions or make changes in existing conditions designed to decrease the individual's risk of criminal reoffense, including but not limited to inpatient treatment programs, electronic monitoring, and other noncustodial restrictions; or petition the court for revocation of probation or postrelease supervision. The agent or agency may ask the court to issue a warrant for the arrest and detention of the individual and, in exigent circumstances, may arrest the individual without a warrant.²⁹

When the supervising agent or agency petitions the court to modify conditions or revoke probation or postrelease supervision, the court must give written notice of the alleged violation to the individual under supervision, and must schedule a timely hearing on the petition unless the individual waives the right to a hearing. At the hearing, the accused must be afforded the following rights: The right to counsel; the right to be present and to make a statement to the court; the right to testify or remain silent; and the right to present evidence and call witnesses. The hearing must be recorded or transcribed.³⁰

Legal Standard for Revocation

In order to revoke probation, or impose a lesser sanction, the court must find by a preponderance of the evidence that a violation has occurred.³¹

When sanctioning a violation of a condition of probation or postrelease supervision, the supervising agent or agency and the court must impose the least severe consequence needed to address the violation and the risks posed by the offender in the community, keeping in mind the purpose for which the sentence was originally imposed.³²

The sentencing commission is encouraged but not required to study the desirability of regulating the use of revocation and other sanctions through statute, guidelines, standards, or rules.³³

Revocation and Lesser Sanctions

After finding a violation has occurred, the court may take any of the following actions: Release the individual with counseling or a formal reprimand; modify the conditions of supervision in light of the violation to address the individual's identified risks and needs; order the offender to serve a period of home confinement or submit to GPS monitoring; order the offender detained for a continuous or intermittent period of time not to exceed one week in a local jail or detention facility; or revoke probation or postrelease supervision and commit the offender to prison for a period of time not to exceed the full term of supervision, with credit for any time the individual has been detained awaiting revocation.

Because probation terms are limited to three years, the length of a confinement term upon revocation is limited to three years for offenders serving free-standing sentences of probation. For states that authorize the use of suspended sentences as a route to probation, and revocation of such a sentence occurs, the court may revoke supervision and impose the suspended sentence or any other sentence of lesser severity.³⁴ In such cases, confinement upon revocation could be considerably longer than three years.

Appeal

The MPC provision on appellate review of sentences and related decisions has not yet been finally drafted or approved, so it remains an open question what appeals from revocations or other sanctions will be allowed.

Grades of Offenses

The MPC speaks to many states at once, and those states are expected to have many different grading schemes for felonies and misdemeanors (some states have no comprehensive grading scheme at all). The MPC gives the following example of a workable scheme that would sort felonies into five classifications and misdemeanors into two:

Offense Category	Maximum Punishment
Felony of the 1st Degree	Life imprisonment; up to \$200,000 fine
Felony of the 2nd Degree	20 years; up to \$100,000 fine
Felony of the 3rd Degree	10 years; up to \$50,000 fine
Felony of the 4th Degree	5 years; up to \$25,000 fine
Felony of the 5th Degree	3 years; up to \$10,000 fine
Misdemeanor	1 year; up to \$5,000 fine
Petty Misdemeanor	6 months; up to \$1,000 fine

Source: AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING, TENTATIVE DRAFT NO. 2 (approved May 18, 2011), § 6.01(1), (4); 6.06(1), (2).

END NOTES

¹ AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING, TENTATIVE DRAFT NO. 3 (approved with amendments, May 19, 2014) [hereinafter "TD3"]. None of the amendments affect the law of probation surveyed in this profile.

² AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING, REPORT (2003), at 13-15.

³ See Gerald E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 Buffalo Crim. L. Rev. 297, 297-98 (1988); Herbert Wechsler, Foreword, AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES (1985), at xi.

⁴ TD3, § 6.03(2).

⁵ AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING, Preliminary Draft No. 10 (2014), § 7.02(2), (3). Section 7.02(2) states that, "Sentencing courts should impose a sentence of unconditional discharge when a more severe sanction is not necessary to serve the purposes of sentencing In assessing whether a sentence of unconditional discharge is proportionately severe in an individual case, the court should consider the stigma attached to the conviction itself, the fact that the instant conviction can be used as criminal history in a later prosecution of the offender, and the effects of collateral sanctions likely to be applied to the offender under state and federal law."

⁶ TD3, § 6.02(1)(a).

⁷ TD3, § 6.02(2). The main reason for the ALI's hesitancy to endorse the use of suspended sentences is that, under the Code's scheme and depending on the case, they might greatly increase the severity of sanctions that may be imposed upon revocation. See id. & Comment d, at 4-5.

⁸ TD3, §§ 6.02A(8), (10); 6.02B(7).

⁹ See TD3, §§ 6.02A & Comment a, at 15; TD3, 6.02B & Comment a, at 21.

¹⁰ TD3, § 6.03(5).

¹¹ In particular, the ALI has begun a separate project to rewrite the MPC's provisions on sexual assault and related provisions. As part of the drafting history of § 6.03, it was necessary to carve out serious sex offenses for separate consideration. See TD3, § 6.03 & Comment h, at 36.

¹² TD3, § 6.03(6).

¹³ TD3, § 6.03(7).

¹⁴ TD3, § 6.03(12).

¹⁵ See TD3, § 6.15(1).

¹⁶ TD3, § 6.03(4).

¹⁷ TD3, § 6.03(9).

¹⁸ TD3, § 6.03(8)(a-i).

¹⁹ TD3, § 6.03(8)(h).

²⁰ TD3, § 6.04D(1).

²¹ TD3, § 6.04 & Comment c; TD3, § 6.04D & Comment b (2014).

²² TD3, 6.04(6).

²³ TD3, 6.04D(3), (4).

²⁴ TD3, 6.04(8).

²⁵ TD3, 6.03(10).

²⁶ TD3, § 6.03(11).

²⁷ TD3, § 6.15(3)(e).

²⁸ TD3, §§ 6.15(3); 6.03(8)(a).

²⁹ TD3, § 6.15(1).

³⁰ TD3, § 6.15(2).

³¹ TD3, § 6.15(3).

³² TD3, § 6.15(4).

³³ AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING, TENTATIVE DRAFT NO. 1 (approved May 16, 2007), § 6A.05(3)(b) (stating that the commission "should" study such possibilities).

³⁴ TD3, § 6.15(3).

³⁵ AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING, TENTATIVE DRAFT NO. 2 (approved May 18, 2011), § 6.01(1), (4), 6.06(1), (2).

³⁶ AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING, Preliminary Draft No. 10 (2014), § 7.02(6).

This publication is the first in a series that will be produced by the Probation Revocations Project. The focus of this publication is the legal framework of probation: that is, how have the legislature and courts defined the purpose and functions of probation in each state? The focus of the second publication will be how probation actually works within that legal framework. It will detail the range of practice related to probation revocations in six to eight county level probation jurisdictions in states such as Minnesota, Texas, Pennsylvania, and California. And it will include a profile of these jurisdictions built from a mix of readily available data and interviews with local officials.

Information and data that is planned to be collected includes: county demographics; information about the probation agency (number of staff, average caseload, case types supervised, etc.); probation caseload demographics (level of offense, gender, age, race, employment, etc.); number and type of violations in a typical month; probation revocation rates; offender outcomes; and policy or procedural manuals relating to probation violations. In addition, we will interview probation officers, judges, prosecutors, and defense attorneys in each jurisdiction about their philosophies and practices for handling probation violations.

The second publication will result from Alpha phase of the Probation Revocations Project as detailed in the project mission statement. Each of these publications lays the groundwork for the Beta phase of the project, which will be to provide technical assistance to selected sites with the goal of reducing probation revocations to prison through the implementation of procedures and practices that serve public safety by reducing probationer recidivism and better encouraging probationer success on supervision.





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