

Gary Kula
Bar No. 012507
Maricopa County Public Defender's Office
620 W. Jackson, Suite 4015
Phoenix, AZ 85004
602 506-7711
gary.kula@maricopa.gov

ARIZONA SUPREME COURT

In the Matter of:

ACJA 6-207 Uniform Conditions of Supervised Probation

Comment by the Maricopa County Public Defender's Office on the Proposed Modifications to the Uniform Conditions of Supervised Probation

The Maricopa County Public Defender's Office supports the Committee in their efforts to modify the Uniform Conditions of Probation in accordance with the conclusions drawn by the PEW Charitable Trusts' comprehensive research on effective community supervision practices. The proposed changes are generally consistent with the PEW Charitable Trusts' recommendations. Specifically, the reduction and simplification of probation terms will make them easier for probationers to understand and decrease the number of petitions filed for "technical violations." Technical violations are defined as all violations of probation terms except for the commission of a new crime. Technical violations tax limited resources and research suggests they often do not promote rehabilitation. With that context in mind, the modifications contained in the proposal are

a clear step in the right direction. However, certain words and phrases in the proposed terms are confusing and could lead to an increase in technical violations. The Public Defender's Office requests the Court incorporate modifications to the proposed terms as presented and explained in this comment.

I. The Proposed Term 1 is Contrary to Established Evidence-Based Practices.

The Proposed Term 1 reads, "I will obey all criminal laws and I will comply with the APD written regulations/directives/behavior contracts to help me establish a law-abiding lifestyle."

This language is confusing, as "regulations/directives/behavior contracts" are all unique and undefined concepts that are explicitly different from a requirement to obey all laws. Adding this language creates a probationary system that attempts to change a person's non-criminal behavior based on threats of incarceration. Using punishment and sanctions to manage a probationer's behavior runs contrary to evidenced-based practices, including the PEW Charitable Trusts' research, on how to effectuate behavioral change. This proposed idea is in stark contrast to current training trends presented in EPICS, Motivational Interviewing, and the Carey Guides, all of which are generally presented through the Administrative Office of the Courts or respective county probation departments.

For the reasons stated above, the phrase "and I will comply with the APD written regulations/directives/behavior contracts to help me establish a law-abiding lifestyle" should be removed.

II. The Proposed Term 3 is Insufficient for Obtaining Consent from Probationers to Allow Exchange of Their Treatment Information.

Proposed Term 3 reads, “I will actively participate in treatment and other programs of assistance and consent to allow the APD to exchange information related to my progress.”

The portion of this term covering “consent” is problematic. The language is confusing because it could be interpreted as a term that automatically gives consent from the probationer to exchange medical information, as opposed to directing the probationer to sign releases of information or consents to exchange information. There is a distinction. Medical providers require HIPAA compliant releases signed by the patient to share the patient’s information with third parties. A term of probation affirming consent would not be considered HIPAA compliant nor is it compliant with any ethical standard of practice related to any medical, psychological, or behavioral health board.

The proposed term should be modified to state, “I will actively participate in treatment and other programs of assistance and will sign a release or consent document to allow the APD to exchange information related to my progress.”

III. The Proposed Term 7 Introduces Unnecessary Ambiguity About Items Probationers Are Prohibited from Possessing and Could Result in Technical Violations for Blameless Conduct.

The Proposed Term 7 reads, “I will not possess weapons, including firearms, ammunition or anything used to inflict bodily harm or physical damage.”

This language potentially prohibits the possession of any object, including ordinary household items, depending on how the object is used, thus creating ambiguity for the probationer and APO. For example, a pencil or a car could be used to inflict bodily harm. The conduct resulting in the infliction the bodily harm may be criminal behavior covered under Term 1, an act of self-defense, or an accident. Yet the plain language of the proposed term does not allow for that distinction. In addition, the section “used to inflict . . . physical damage” is subject to the same odd applications and could create an increase in technical violations. To the extent physical damage or bodily harm would rise to the level of criminal conduct, a petition to revoke may be filed under Term 1. The additional language as stated in proposed Term 7 is therefore confusing and unnecessary.

For those reasons, the language in the proposed Term 7 should be replaced with the language suggested by the PEW Charitable Trusts: “I will not possess weapons, including firearms, ammunition or any other device **designed to inflict injury or harm.**” (emphasis added).

IV. The Proposed Term 10 is Redundant Because a Probationer’s Restitution Payments are Already Ordered by the Court, and it Needlessly Introduces an Ambiguous, Subjective Requirement to “Prioritize” Certain Conduct.

Proposed Term 10 reads, “I will prioritize payment of restitution to the victim(s).” It is unclear how a probationer would be responsible for prioritization of restitution payments towards victims. Payments are sent to the clerk of the court and partitioned in

accordance with the orders of the court and Arizona law. In fact, priority of payments is established by A.R.S. 13-809(A), which states restitution payments take priority over other fines and costs payable to the state. There are also statutory mechanisms for enforcement related to restitution. For example, under A.R.S. 13-805 the trial court retains jurisdiction over all restitution orders “for purposes of ordering, modifying, and enforcing the manner in which [restitution] payments are made until paid in full.”

To the extent this proposed term is intended to more broadly require probationers to focus their spending on restitution payments in lieu of other undefined expenses, the term would result in arbitrary enforcement leading to violations for some and not others based on an APO’s own subjective determination of what it means to “prioritize” something. This proposed term appears to serve no additional purpose other than, perhaps, creating a reminder to pay restitution. There is no evidence-based showing that this language would have any effect on increasing restitution payments beyond the enforcement mechanisms already at the court’s disposal. For those reasons, the proposed Term 10 should be deleted.

V. The Proposed Term 13 Creates Due Process Concerns and It Would be Impractical in its Application.

The Proposed Term 13 reads, “I will comply with the following intermediate sanctions if imposed by the APD based on my future behavior: Up to ____ community restitution hours Up to ____ days in the county jail.”

Though a portion of this term appears to mirror Term 20 of the current standard rules of probation, current Term 20 recognizes community restitution or jail shall be imposed at the recommendation of the APD but ordered “at the discretion of the Court.” The proposed Term 13, however, removes the Court’s role and gives the APD the unilateral discretion to impose the jail term. Outside of the practical problems this creates, such as a jail not accepting someone without a court order, it raises due process concerns. Permitting the APD unfettered discretion, without judicial oversight, to determine the length and timing of a person’s jail term is unprecedented and likely violates the 14th Amendment’s due process provision. See *State v. Korzuch*, 186 Ariz. 190, 193 (1996). Further, providing this discretion to individual probation officers would lead to arbitrary enforcement, such as one probation officer who uses the incarceration in a more punitive fashion versus another probation officer’s more lenient discretion.

The proposed Term 13 should be modified to state, “I will comply with the following intermediate sanctions imposed in the court’s discretion based on my future behavior and at the recommendation of the APD: Up to ____ community restitution hours Up to ____ days in the county jail.”

VI. Conclusion

The reduction of terms and simplification of phrasing will make the probation terms clear and their application more consistent, lessening the strain of resources resulting from technical violations and promoting rehabilitation.

DATED this __4th__ day of October 2021.

Gary Kula
Director, Maricopa County Public Defender's Office
AZ Bar No. 012507