****

PART I. GENERAL PROVISIONS

***

ARTICLE 6. AUTHORIZED DISPOSITION OF OFFENDERS

PROPOSED NEW PROVISION

1 **§ 6.02. Authorized Dispositions for Individuals.**

2 **(1) Following an individual's conviction of one or more offenses, the court may**
3 **sentence the offender to one or more of the following sanctions:**

4 **(a) probation as authorized in § 6.03;**

5 **(b) economic sanctions as authorized in §§ 6.04 through 6.04D;**

6 **(c) imprisonment as authorized in § 6.06;**

7 **(d) postrelease supervision as authorized in § 6.09; and**

8 **(e) unconditional discharge, if a more severe sanction is not required to**
9 **serve the purposes of sentencing in § 1.02(2)(a).**

10 **[(2) The court may suspend the execution of a sentence that includes a term of**
11 **imprisonment and order that the defendant be placed on probation as authorized in**
12 **§ 6.03 and/or satisfy one or more economic sanctions as authorized in §§ 6.04**
13 **through 6.04D.]**

14 **(3) When choosing the sanctions to be imposed in individual cases, the court**
15 **shall apply any relevant sentencing guidelines.**

16 **(4) The court may not impose any combination of sanctions if their total severity**
17 **would result in disproportionate punishment under § 1.02(2)(a)(i). In evaluating the**
18 **total severity of punishment under this subsection, the court should consider the**
19 **effects of collateral sanctions likely to be applied to the offender under state and**
20 **federal law, to the extent these can reasonably be determined.**

21 **(5) Authorized dispositions under this Article include deferred prosecutions as**
22 **authorized in § 6.02A and deferred adjudications as authorized in § 6.02B.**

23

24 **Comment:**

25 *a. Scope.* This Section is based on Model Penal Code (First) § 6.02. One significant
26 change from the original Code is that the provision now speaks both to criminal sentences
27 following convictions and other "dispositions" of criminal matters. The expanded scope

© 2014 by The American Law Institute

accommodates resolutions of criminal matters prior to conviction (deferred adjudications under § 6.02B) or even prior to charging (deferred prosecutions under § 6.02A).

The Section speaks of dispositions "for individuals." Organizational sanctions are not included in the Model Penal Code: Sentencing revision project.[1]

b. Rejection of jury sentencing. In identifying "the court" as the sentencing authority, subsection (1) continues the original Code's rejection of the practice of jury sentencing, which still occurs in a handful of states. Long experience has shown that the use of jurors as sentencers is antithetical to policies of rationality, proportionality, and restraint in the imposition of criminal sanctions, and is fundamentally inconsistent with the Code's philosophy that the public policies of sentencing should be applied consistently and even-handedly in all cases, see § 1.02(2) (Tentative Draft No. 1, 2007).

The principle that lay jurors should not impose sentences is consistent with the rule that jurors are sometimes required to make factual findings at sentencing under the Sixth Amendment and Due Process Clause, and some state constitutions. See § 7.07B(6) (Tentative Draft No. 1, 2007) ("Determination of the existence of a jury-sentencing fact [when constitutionally required] shall not control the court's decision as to whether a specific penalty is appropriate under applicable legal standards. Discretion as to the weight to be given the jury-sentencing fact remains with the court.").

c. Authorized sanctions. Subsection (1) catalogs the menu of authorized sanctions under the revised Code, and states that they may be imposed separately or in combination. Each sanction type in subsection (1) may be employed as a free-standing sanction or as a complete sentence, with the exception of postrelease supervision in subsection (1)(d), which by definition can only be ordered to follow a term of incarceration. For example, the sentencing court may order probation as a complete sentence in a case, without imposing and suspending a prison term. (The option of a suspended prison term may also be available to the court, see bracketed language in subsection (2), but is never the required route to a probation sanction.) Similarly, in an appropriate case, the court may order an economic sanction as a stand-alone penalty.

One important feature of § 6.02(1) is that prison terms are not all followed by a period of postrelease supervision, or even the possibility of a postrelease term, unless specifically ordered by the court. This configuration reflects two policy judgments. First, while most prison inmates require a period of supervision and aftercare following release, experience has shown that this is not always the case. It is wasteful of scarce resources to dispense supervision terms without examination of the purposes that may realistically be

[1] The original Code included a provision on "Penalties Against Corporations and Unincorporated Associations," see Model Penal Code (First) § 6.04. The subject has become hugely complex since the 1962 Code was approved, and is outside the scope of the current revision effort.

© 2014 by The American Law Institute

served. Second, when postrelease supervision is warranted, the duration of supervision terms should be set in relation to the facts of each case, including the risks and needs of individual releasees, and not by an arbitrary yardstick such as the unserved balance of a prison term, see § 6.09(2) and Comment *c*.

Subsection (1)(e), new to the revised Code, authorizes an offender's "unconditional discharge" following conviction if a more severe sanction is not required to serve the statutory purposes of sentencing. The provision is modeled on similar laws in force in several states. It reflects the conclusion that a criminal conviction by itself carries significant retributive force, and may be sufficient to also further the utilitarian purposes of sentencing in some cases. Indeed, it is possible for criminal sanctions, when meted out unnecessarily, to be "criminogenic," that is, to increase the likelihood that a defendant will reoffend in the future. In order for more severe dispositions to be justified under the Code, they must aim toward identifiable purposes and, when those objectives are utilitarian in nature, there must be at least a reasonable basis for belief that the goals can be achieved through the selected disposition, see § 1.02(2)(a)(ii) (Tentative Draft No. 1, 2007).

Subsection (1)(e) is consistent with the Code's policy that probation sanctions are frequently overused, and that scarce community-corrections resources should be conserved for cases in which they will serve identifiable purposes, see § 6.03(3) and Comments *b* and *e*. An unneeded probation term, for example, commits state or local resources, and risks the even-more-expensive prospect of sentence revocation.

In evaluating the policy desirability of subsection (1)(e), it is important to consider that the process of being charged and convicted is inherently punitive and increasingly carries with it a lasting stigma, particularly in an era in which criminal records are easily accessed electronically by potential employers and members of the public. The collateral consequences of conviction can include deportation, disenfranchisement, limits on occupational licensing, loss of public-benefits eligibility, and many other restrictions that may last a lifetime. Although these collateral sanctions are classified as civil measures, their cumulative punitive force should inform criminal-sentencing policy. For many minor and first-time offenders, no formal sanction beyond conviction may be needed.

d. Suspended execution of sentences. The bracketed language in subsection (2) reflects the Institute's policy ambivalence toward the authorization and use of suspended prison sentences as a route to probationary sentences. The use of brackets signals the Code's preference that the suspended prison sentence should not be authorized in a state's criminal code. This comports with the position of the original Code, see Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), § 6.02, Explanatory Note at p. 45. Considered more than 50 years after the 1962 Code was approved, however, the Institute now reaches a more qualified conclusion.

© 2014 by The American Law Institute

1 There are colorable arguments for and against the use of suspended prison sentences.
2 Some of these depend on assumptions about how judges, prosecutors, and offenders will
3 behave under one regime versus another. The validity of these assumptions cannot be
4 tested in advance or for all systems. Indeed, the balance of advantages and disadvantages
5 of the suspended sentence may vary across the states, given different offender
6 populations, penalty structures, and courtroom cultures. Ultimately the revised Code
7 reposes the question in the judgment of the legislature in each jurisdiction.

8 Leaving out the bracketed language in subsection (2), § 6.02(1)(a) authorizes
9 sentencing courts to impose probation as a free-standing sanction, without reference to a
10 suspended prison term. The permissible contours of a probation sanction are governed by
11 § 6.03. Upon violations of conditions of probation, the available sanctions are catalogued
12 in § 6.15 (with the exception of bracketed language in § 6.15(3)(e), which is included
13 only for jurisdictions that choose to authorize the use of suspended prison sentences).
14 With free-standing probation as envisioned in subsection (1)(a), there is no suspended
15 prison sentence that determines or limits the penalties that may be imposed on offenders
16 who violate conditions of probation. The maximum term of incarceration upon probation
17 revocation is fixed by the length of the probation term itself, which is limited to three
18 years under § 6.03(5), see § 6.15(3)(e).

19 The bracketed subsection (2), if adopted, would give sentencing judges a second
20 route to the imposition of probation sanctions. It authorizes courts to impose and suspend
21 execution of a sentence that includes a term of imprisonment, and instead place the
22 defendant on probation, impose an economic sanction, or both. (An example of a
23 sentence that "includes" a term of imprisonment is a prison term followed by a period of
24 postrelease supervision.) The duration and conditions of probation are governed by
25 § 6.03, while economic sanctions are controlled by §§ 6.04 through 6.04D. Under the
26 revised Code's approach, the authorization and use of suspended prison sentences has no
27 impact on the substantive requirements of probation and economic penalties. These
28 remain regulated by § 6.03, which likewise regulates free-standing probation. Perhaps the
29 most important consequence of this policy choice is that, no matter how long a suspended
30 prison term may be, the attendant probation term may not exceed the three-year
31 maximum in § 6.03(5).

32 The feature of the suspended prison sentence that differentiates it from stand-alone
33 probation is the range of remedies available for sentence violations. If the defendant
34 successfully completes probation and economic sanctions imposed by the court, the
35 original suspended sentence is lifted. If the defendant fails to comply with conditions of
36 probation, however, probation may be revoked under the Code's provision on revocation
37 of community supervision, § 6.15. On revocation, the court may impose the sentence it
38 had originally suspended, or any other sentence of lesser severity, see § 6.15(3)(e)
39 (bracketed language applicable only to jurisdictions that adopt § 6.02(2)). Thus, for

© 2014 by The American Law Institute

suspended prison terms longer than three years, the maximum available sanctions upon revocation are greater than for stand-alone probation.

The Institute's skepticism about the use of suspended prison sentences stems from two concerns. First, in many U.S. jurisdictions, a suspended prison sentence predetermines the sanction for an offender whose probation is revoked. In effect, it becomes a mandatory penalty for any future revocation, even if the revoking judge would choose a different penalty. In some instances, this produces needless over-punishment of revoked offenders. It can also result in under-punishment of probation violators, if a sanctioning judge cannot in good conscience order the full force of the suspended sentence, and therefore is forced to choose among sanctions short of revocation. For these reasons, even if a state elects to authorize the use of suspended prison sentences, the revised Code recommends that a revocation judge should also have discretion to impose a lesser penalty, see § 6.15(3)(e) (bracketed language).

Second, even when suspended sentences do not predetermine penalties for revocation, their use undermines the revised Code's general policy approach to probation and probation revocation. Under § 6.15(3)(e) (omitting bracketed language), the maximum possible confinement term on revocation of free-standing probation is three years. If probation via a suspended prison sentence is added to the mix, however, confinement terms on revocation are not so limited. Instead, a revocation sanction can be whatever prison sentence was given in the suspended sentence—or any prison term authorized in the state's criminal code, see § 6.15(3)(e) (bracketed language included). For example, in the extreme case of a 20-year suspended prison sentence, the term of confinement upon probation revocation could be many times longer than any term authorized for stand-alone probation.

Viewed in this light, authorization of suspended sentences under subsection (2) would provide an end run around the Code's controls on revocation sanctions. This also carries direct implications for a jurisdiction's prison policy. Roughly one-third of state prison admissions in the United States are for community-sentence revocations, including a majority of admissions in some states. Given the widespread use of suspended sentences in American criminal courtrooms today, their impact on community-supervision and prison policy is not marginal or remote. A legislature that chooses to adopt subsection (2) should do so only if it is satisfied that the benefits of the suspended sentence outweigh its liabilities.

Three important arguments are made in favor of authorization of suspended prison sentences.

First, some judges report that they would impose fewer probationary sentences if they were unable to pair probation with a suspended prison term. Similarly, it is argued that prosecutors would be reluctant to agree to such outcomes. Across many cases and

© 2014 by The American Law Institute

many courtrooms, these tendencies could result in a greater use of incarcerative penalties overall. Whether or not this would happen in some or all jurisdictions is an empirical question. There is a possibility that unavailability of the suspended prison term as a sentencing tool would result in more prison sentences in borderline cases, and would frustrate the Code's policy of prioritizing the use of prison spaces for offenders who pose the greatest risks to public safety.

Second, and closely related to the first point, some judges and scholars assert that a suspended sentence helps the legal system express to victims and the public that the case has been taken seriously, when a "bare" probation sentence might appear unduly lenient. This argument draws on the symbolic force of criminal punishments. In theory, a suspended sentence can signify the full measure of deserved punishment for a particular crime, even though the impact of the sentence is provisionally withheld for reasons of forbearance, mercy, or the desire to give the defendant a chance to repair his life. Under this view, the suspended sentence makes room for actual penalties more lenient than those that would be called for on grounds of strict retribution.

Third, it is posited that suspended sentences aid offenders in the rehabilitative process through the mechanism of specific deterrence. A suspended sentence is articulated in clear and vivid terms, for a definite period of months or years, and may therefore appear a more credible threat to probationers than the abstract possibility of revocation, with no revocation penalty named in advance. Research suggests that certainty and swiftness are elements of an effective deterrent policy. It is plausible to think that the threat of a suspended sentence will motivate some offenders to comply with their terms of probation, work harder than they otherwise would in treatment programs, and put more effort into the avoidance of temptations to reoffend.

e. Sentencing guidelines. Under the sentencing-guidelines system envisioned in the revised Code, the sentencing commission has an ongoing duty to promulgate guidelines that speak to the full range of criminal sanctions. See § 6B.02(6) (Tentative Draft No.1, 2007) ("The guidelines shall address the use of prison, jail, probation, community sanctions, economic sanctions, postrelease supervision, and other sanction types as found necessary by the commission.").

f. Overall severity of sanctions in combination. Subsection (4) incorporates the tenet of proportionality of punishment in § 1.02(2)(a)(i) (Tentative Draft No. 1, 2007), and encourages the courts to apply the principle with reference to the total package of sanctions imposed in each case. The subsection further recognizes that collateral sanctions applied to the offender, even if denominated as civil measures, are experienced by the offender as additional punishments, see Article 6x, §§ 6x.01 through 6x.06. Thus, in assessing the total impact of sanctions for proportionality purposes, the courts are permitted to consider the impact of any collateral consequences likely to be applied to the offender under state and federal law. Subsection (4) envisions that the burden should rest

© 2014 by The American Law Institute

1 with defendants to make a showing of the likely effects of collateral sanctions in their
2 particular cases.

3 *g. Deferred prosecutions and adjudications.* The revised Code recognizes that many
4 criminal cases are now disposed before reaching the formal stages of conviction and
5 criminal sentencing. In some instances, cases are diverted by prosecutors' offices before
6 charges are filed. It is the intention of subsection (5), and later provisions on deferred
7 prosecution and deferred adjudication, see §§ 6.02A and 6.02B, to encourage the use and
8 development of such mechanisms, while imposing minimal statutory controls to ensure
9 their fairness and procedural regularity.

10 *h. Consolidation of authorized sanctions.* Subsection (6) continues the original
11 Code's view that all forms of criminal sentences should be authorized in one consolidated
12 provision. Although no statute can control future legislation, subsection (6)'s injunction
13 reduces the possibility that such authorizations will be dispersed throughout the Code or,
14 worse yet, be placed outside the Penal Code entirely. In many states, statutory provisions
15 governing sentencing are overly complex, disorganized, and scattered. In some
16 jurisdictions, sentencing codes are such a morass that few lawyers or judges fully
17 understand their operation. It is an aim of the revised Code that sentencing laws in all
18 jurisdictions should be accessible and understandable.

19 *i. Specialized courts.* The dispositions described in this Section apply to all criminal
20 cases, regardless of the forum in which those cases are adjudicated. Increasingly,
21 jurisdictions across the country are using specialized programs and procedures for
22 defendants with shared needs who may benefit from more intensive or directed
23 intervention than can be easily accommodated by traditional courts. These specialized
24 programs are known by many names, including treatment courts, problem-solving courts,
25 and therapeutic courts. They have been formed around many different needs and
26 problems, including drug and alcohol addiction, mental illness, homelessness, veterans,
27 re-entering prisoners, and domestic violence. The best of these courts are characterized
28 by a rehabilitative approach to justice that include trained judges and court staff, access to
29 a variety of well-resourced treatment programs, and procedural protections for
30 participants. In cases where specialized courts operate as a form of pre-conviction
31 diversion, subsection (5) governs, while subsections (1)-(4) apply in cases where the
32 specialized court is charged with administering a traditional sentence in a nontraditional
33 forum.

34 *j. Capital sentences.* The original Code's reference to the death penalty in this
35 Section, see Model Penal Code (First) § 6.02(2), has been deleted in the revised edition.
36 In 2009, the death-penalty provision of the 1962 Code, former § 210.6, was withdrawn
37 based on analysis in the Report of the Council to the Membership of The American Law
38 Institute On the Matter of the Death Penalty (April 15, 2009), including an extensive
39 "Report to the ALI Concerning Capital Punishment, Prepared at the Request of ALI

© 2014 by The American Law Institute

Director Lance Liebman" by Professors Carol S. Steiker (of Harvard Law School) and Jordan M. Steiker (of University of Texas School of Law) (November 2008). The following resolution was adopted by the ALI membership in May 2009 and by the ALI Council in October 2009:

> For reasons stated in Part V of the Council's report to the membership, the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.

REPORTERS' NOTE

b. Rejection of jury sentencing. Original § 6.02 was intended to convey "an explicit rejection of the practice of jury sentencing that still prevails in some states." See Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), § 6.02, Comment 3, at 48-49 (1985). See also American Bar Association, Standards for Criminal Justice, Sentencing, Third Ed. (1994), Standard 18-1.4(a) ("The jury's role in a criminal trial should not extend to determination of the appropriate sentence."). Juries are still empowered to determine sentences in noncapital cases in six states: Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. For policy analyses, see Nancy J. King and Rosevelt L. Noble, Felony Jury Sentencing in Practice: A Three-State Study, 57 Vand. L. Rev. 885 (2004); Nancy J. King, How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared, 2 Ohio St. J. Crim. L. 195 (2004); Robert A. Weninger, Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas, 45 Wash. Univ. J. of Urban & Contemp. Law. 3 (1994).

Although the number of states that employ jurors as sentencers in non-death-penalty cases is small, the Code's statement of policy remains relevant to contemporary debate. Jury sentencing is not without current-day proponents. See Morris B. Hoffman, The Case for Jury Sentencing, 52 Duke L.J. 951 (2003); Jenia Iontcheva, Jury Sentencing as Democratic Practice, 89 Va. L. Rev. 311, 346 (2003); Adriaan Lanni, Note, Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?, 108 Yale L.J. 1775 (1999). Inspired by the Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), which recognized a constitutional right to jury factfinding during some sentencing proceedings, interest in the jury's role at sentencing has increased. See Erik Lillquist, The Puzzling Return of Jury Sentencing: Misgivings about Apprendi, 82 N.C. L. Rev. 621 (2004); Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33 (2003).

c. Authorized sanctions. The terminology in subsection (1)(e) is borrowed from New York law, which provides that, "The court may impose a sentence of unconditional discharge in any case where it is authorized to impose a sentence of unconditional discharge … if the court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release." The effect of unconditional discharge is detailed as follows: "When the court imposes a sentence of unconditional discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed

© 2014 by The American Law Institute

1 without imprisonment, fine or probation supervision. A sentence of unconditional discharge is for all
2 purposes a final judgment of conviction." See N.Y. Penal Law § 65.20(1), (2) ("sentence of unconditional
3 discharge"). See also Pa. C.S. § 9723 (authorizing sentence of "guilt without further penalty"); Conn. Gen.
4 Stat. § 53a-34(a) ("The court may impose a sentence of unconditional discharge in any case where it is
5 authorized to impose a sentence of conditional discharge … if the court is of the opinion that no proper
6 purpose would be served by imposing any condition upon the defendant's release."); N.H. Rev. Stat.
7 § 651:2(I) ("A person convicted of a felony or a Class A misdemeanor may be sentenced to imprisonment,
8 probation, conditional or unconditional discharge, or a fine.").

9 *d. Suspended execution of sentences.* A representative state provision is Mass. Gen. Laws, Ch. 279 § 1
10 ("When a person convicted before a court is sentenced to imprisonment, the court may direct that the
11 execution of the sentence, or any part thereof, be suspended and that he be placed on probation for such
12 time and on such terms and conditions as it shall fix. When a person so convicted is sentenced to pay a fine
13 and to stand committed until it is paid, the court may direct that the execution of the sentence, or any part
14 thereof, be suspended for such time as it shall fix and in its discretion that he be placed on probation on
15 condition that he pay the fine within such time."). On the question of whether probation is legally defined
16 as an independent sentence in its own right, or as an incident of a suspended prison sentence, compare
17 People v. Daniels, 130 Cal. Rptr. 2d 887, 891 (Cal. Ct. App. 2003) ("Although courts sometimes refer to it
18 as a 'sentence,' probation is not a sentence even if it includes a term in the county jail as a condition. In
19 granting probation, the court suspends imposition or execution of sentence and issues a revocable and
20 conditional release as an act of clemency."); State v. Hamlin, 950 P.2d 336 (Ore. App. 1997) ("With the
21 passage of the sentencing guidelines, … [p]robation is no longer the suspension of a sentence; probation is
22 the sentence.").

23 On the merits of suspended prison sentences, see Richard Frase, Just Sentencing: Principles and
24 Procedures for a Workable System (2013), at 19-20 (encouraging the authorization and use of suspended
25 sentences for several reasons: "they are more parsimonious—less costly and less harmful to offenders and
26 their families—than an immediately executed sentence; they have expressive value, conveying the degree
27 of seriousness of the offender's crimes; they give offenders a strong incentive to comply with required
28 conditions; and they leave substantial room for later tightening sanctions in case of noncooperation or new
29 evidence of offender risk."); Joan Petersilia, Probation in the United States, in Michael Tonry ed., 22 Crime
30 and Justice: A Review of Research 149-200 (1997) ("Offenders are presumed to be more motivated to
31 comply with conditions of probation by knowing what awaits should they fail to do so."). In some
32 community-supervision settings, the "Sword of Damocles" of a suspended prison sentence has been found
33 important to securing compliance by program participants. See, e.g., Shelli B. Rossman et al., The Multi-
34 Site Adult Drug Court Evaluation: Executive Summary (Urban Institute 2011).

35 *h. Consolidation of authorized sanctions.* On the original Code's strategy of collecting statutory
36 provisions on the array of sentencing dispositions in a single Article of the Code, see Model Penal Code
37 and Commentaries, Part I, §§ 6.01 to 7.09 (1985), § 6.02, Comment 1, at 46 (provision designed to
38 "prevent the ad hoc growth of sentencing law in many different titles of a penal code, which . . . is one

© 2014 by The American Law Institute

reason for the chaos in sentencing that existed in so many states at the time the Model Code was drafted.”). This recommendation has been widely adopted, id., at 46 n.1.

i. Specialized courts. The first documented specialty court in the United States was the Miami-Dade County (Florida) Drug Court, started in 1989. Today there are more than 2400 drug courts nationwide—roughly half of which serve adult offenders—with an estimated participant population of about 70,000. Steven Belenko, Nicole Fabrikant & Nancy Wolff, The Long Road to Treatment: Models of Screening and Admission Into Drug Courts, 38 Criminal Justice & Behavior 1222, 1222-1223 (2011). Other examples of specialized courts include community courts, mental-health courts, domestic-violence courts, gun courts, prostitution courts, homeless courts, driving-under-the-influence (DUI) courts, tobacco courts, teen courts, gambling courts, veterans’ courts, and reentry courts. See James L. Nolan, Problem-Solving Courts: An International Comparison, in Joan Petersilia and Kevin R. Reitz eds., The Oxford Handbook of Sentencing and Corrections (2012), at 154.

The subject of problem-solving courts provokes strong disagreement among criminal-justice stakeholders. Specialized courts, while responsive to the needs of defendants, often eschew an adversary approach to litigation, instead promoting a “team approach” to resolving cases that is more flexible and less attentive to procedural regularities than are traditional courts. That difference has been heralded by proponents of treatment-oriented sanctioning policies, and attacked by advocates for safeguarding the procedural rights of the accused. Thus, the public debate of specialty courts includes the most laudatory and hopeful of accounts, as well as the skeptical and condemnatory. For examples of the latter viewpoint, see National Association of Criminal Defense Lawyers, America’s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform (2009), at 53 (“What began 20 years ago in Miami as a revolutionary and laudable opportunity for defendants to receive much-needed treatment and avoid costly and ineffective incarceration has evolved into something much different and dangerous. As detailed throughout this report, problem-solving courts often create far more problems than they attempt to solve—for defendants, lawyers, judges, and the public at large”); Richard Boldt, A Circumspect Look at Problem-Solving Courts, in Paul Higgins and Mitchell B. Mackinem eds., Problem-Solving Courts: Justice for the Twenty-First Century? (2009), at 13-32 (“From the point of view of the defendant . . . problem-solving courts may be ‘more difficult to complete, more onerous and far more intrusive on liberty’ than traditional criminal court dispositions”); Nolan at 160 (“Therapeutic nomenclature cloaks the essentially punitive nature of certain sanctions. . . . [I]n the enthusiasm to act therapeutically, concern about the preservation of traditional court processes and due process rights fade into the background.”). Despite their origins as places where individual needs can be addressed, some critics assert that large, high volume specialized courts have themselves been reduced to “out-of-control case-processing machine[s].” Morris B. Hoffman, The Drug Court Scandal, 78 N.C. L. Rev. 1437, 1533 (2000).

The case in favor of drug courts and other specialized tribunals turns largely on the empirical claim that they are effective at reducing recidivism, and substance use. As Ronald Corbett put it at the “Future of the Model Penal Code Conference” held in December 2011 at the University of Minnesota, “In the field of correctional treatment, where obtaining positive results is difficult, drug courts stand out for their record for recidivism reduction. How can we be against them?” Evaluations of drug-court programs have yielded

© 2014 by The American Law Institute

positive or promising results across multiple sites, including reduced reoffending and substance abuse among participants, with some findings of reduced recidivism extending beyond the program period. See Shelli B. Rossman, John K. Roman, Janine M. Zweig, Michael Rempel, and Christine H. Lindquist eds., The Multi-Site Adult Drug Court Evaluation, Final Report (Urban Institute, Center for Court Innovation, and RTI International, 2011) (study of 23 drug-court sites collected in four volumes and executive summary); Steven Belenko, Nicole Fabrikant & Nancy Wolff, The Long Road to Treatment: Models of Screening and Admission Into Drug Courts, 38 Crim. J. & Behavior 1222, 1222 (2011); U.S. Government Accountability Office, Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes (2005). Moreover, research indicates that specialty courts can achieve positive results across many categories of offenders. For example, offenders with violent criminal histories showed greater reductions in reoffending than other classes of offenders. See Douglas B. Marlowe, Evidence-Based Policies and Practices for Drug-Involved Offenders, 91 Prison Journal 27S-47S (2011), at 34S ("The average effect of drug court, for example, is nearly twice the magnitude for high-risk offenders than for low-risk offenders. Drug courts that serve high-risk offenders also return roughly 50% greater cost benefits to their communities") (citations omitted).

The Institute considered the possibility of including a separate provision in the revised Code on the subject matter of problem-solving or therapeutic courts, see Council Draft No. 4 (September 25, 2013) § 6.13 (draft provision on "Specialized Courts"). Ultimately this approach was rejected because specialty courts nationwide are still experimental and are increasingly diverse in focus. There was little that could be said in model legislation that would be helpful and not unduly limiting to the continuing growth and evolution of such courts.

ORIGINAL PROVISION

§ 6.02. Sentence in Accordance with Code; Authorized Dispositions.

(1) No person convicted of an offense shall be sentenced otherwise than in accordance with this Article.

[(2) The Court shall sentence a person who has been convicted of murder to death or imprisonment, in accordance with Section 210.6.]

(3) Except as provided in Subsection (2) of this Section and subject to the applicable provisions of the Code, the Court may suspend the imposition of sentence on a person who has been convicted of a crime, may order him to be committed in lieu of sentence, in accordance with Section 6.13, or may sentence him as follows:

(a) to pay a fine authorized by Section 6.03; or

(b) to be placed on probation [, and, in the case of a person convicted of a felony or misdemeanor to imprisonment for a term fixed by the Court not exceeding thirty days to be served as a condition of probation]; or

© 2014 by The American Law Institute

1 **(c) to imprisonment for a term authorized by Section 6.05, 6.06, 6.07, 6.08,**
2 **6.09, or 7.06; or**

3 **(d) to fine and probation or fine and imprisonment, but not to probation**
4 **and imprisonment [, except as authorized in paragraph (b) of this Subsection].**

5 **(4) The Court may suspend the imposition of sentence on a person who has been**
6 **convicted of a violation or may sentence him to pay a fine authorized by Section**
7 **6.03.**

8 **(5) This Article does not deprive the Court of any authority conferred by law to**
9 **decree a forfeiture of property, suspend or cancel a license, remove a person from**
10 **office, or impose any other civil penalty. Such a judgment or order may be included**
11 **in the sentence.**

12 [*End of Original Provision*]

13 ________________

14 **PROPOSED NEW PROVISION**

15 **§ 6.02A. Deferred Prosecution.**

16 **(1) For purposes of this provision, deferred prosecution refers to the practice of**
17 **declining to pursue charges against an individual believed to have committed a**
18 **crime in exchange for completion of specified conditions, with the exception of an**
19 **agreement to cooperate in the prosecution of any criminal case.**

20 **(2) The purpose of deferred prosecution is to facilitate offenders' rehabilitation**
21 **and reintegration into the law-abiding community and restore victims and**
22 **communities affected by crime. Deferred prosecution should be offered to hold the**
23 **individual accountable for criminal conduct when justice and public safety do not**
24 **require that the individual be subjected to the stigma and collateral consequences**
25 **associated with formal charge and conviction.**

26 **(3) When a prosecutor has probable cause to believe that an individual has**
27 **committed a crime and reasonably anticipates that sufficient admissible evidence**
28 **can be developed to support conviction at trial, the prosecutor may decline to charge**
29 **the individual or dismiss already-filed charges without prejudice, and forgo**
30 **prosecution completely, contingent on the individual's willingness to comply with**
31 **specified conditions.**

32 **(4) When the prosecution offers to defer prosecution in a case involving an**
33 **identified victim, the government shall make a good-faith effort to notify the victim**
34 **of the conditions of the proposed deferred-prosecution agreement.**

35 **(5) Before agreeing to the terms of a deferred-prosecution agreement, an**
36 **individual shall have a right to counsel.**

© 2014 by The American Law Institute

1 **(6) Entry of a deferred-prosecution agreement does not relieve the prosecuting**
2 **agency of any duty to disclose exculpatory evidence or bar the individual from**
3 **seeking otherwise discoverable information about the alleged crime.**

4 **[(7) A deferred-prosecution agreement may be conditioned on an individual's**
5 **consent to a tolling of any applicable statutes of limitations during the period of a**
6 **deferred-prosecution agreement.]**

7 **(8) A prosecutor's office may seek the cooperation of [correctional and court-**
8 **services agencies] to provide services and supervision for the execution of deferred-**
9 **prosecution agreements, or may contract with qualified service providers.**
10 **No assessments of costs or fees may be collected from the individual subject to the**
11 **deferred-prosecution agreement in excess of actual expenditures incurred by the**
12 **prosecutor's office in the case.**

13 **(9) The deferred-prosecution agreement should extend for a specified duration**
14 **that is reasonable in light of the stipulated condition(s) and the potential charge(s)**
15 **available for prosecution.**

16 **(10) A deferred-prosecution agreement may be presented to the trial court for**
17 **approval if needed to secure funding for or access to agreed-upon programs or**
18 **services. If the court approves the agreement, it may order any conditions or**
19 **services consistent with the agreement, that might be ordered for a defendant for**
20 **whom adjudication is deferred pursuant to § 6.02B.**

21 **(11) If the terms of the deferred-prosecution agreement are materially satisfied,**
22 **no criminal charges shall be filed in connection with the conduct known to the**
23 **prosecution that led to deferred prosecution. Completion of the terms of a deferred-**
24 **prosecution agreement shall not be considered a conviction for any purpose.**

25 **(12) A deferred-prosecution agreement may be terminated only when the**
26 **individual materially breaches the terms of the agreement. When such a breach**
27 **occurs, sanctions short of termination should be used when reasonably feasible.**

28 **(13) If a deferred-prosecution agreement is terminated pursuant to subsection**
29 **(12), the prosecutor may file any charge against the accused supported by fact and**
30 **law. An individual's failure to comply with the agreement should not bear on the**
31 **severity of the ultimate charge pursued or sentence imposed.**

32 **(14) Each prosecutor's office shall adopt and make written standards for its use**
33 **of deferred-prosecution agreements publicly available. The standards should**
34 **address:**

35 **(a) The criteria for selection of cases for the program;**

© 2014 by The American Law Institute

(b) The content of agreements, including the number and kinds of conditions required for successful completion;

(c) The grounds and processes for responding to alleged breaches of agreements, and the possible consequences of noncompliance; and

(d) The benefits afforded upon successful completion of agreements.

(15) Each prosecutor's office shall maintain records and data relating to its use of deferred prosecution in a manner that allows for monitoring and evaluation of the practice while protecting the confidentiality of participants. Demographic information shall be maintained, including the economic status, race, gender, ethnicity, and national origin of individuals who participated in the program, or were offered the option of participating, and shall be matched against demographic information concerning crime victims, if any, in each case.

Comment:

a. Scope. This provision, new to the Code, provides structure for the use of deferred prosecution, a long-standing practice by which the prosecution agrees to forgo charges in exchange for the accused individual's compliance with certain requirements, such as the payment of restitution or completion of a treatment program. (This is distinct from the practice of deferred adjudication, discussed in § 6.02B, which allows courts to resolve without conviction criminal cases in which charges have already been filed.) When there is probable cause to believe an individual has committed a crime, the prosecutor possesses largely unfettered discretion to decide whether to issue formal charges. Often, and for many reasons both legal and nonlegal, a prosecutor will decline to charge even when there is legal authority to do so. This provision addresses those decisions not to prosecute that arise from a prosecutor's decision not to pursue charges against an individual believed to have committed a crime in exchange for completion of specified conditions. The sole exception, made clear by § 6.02A(1), are cases in which a prosecutor decides not to pursue criminal charges in exchange for an individual's cooperation with law enforcement. Such agreements fall outside the scope of § 6.02A, since the use of such deferred-prosecution agreements requires more secrecy than the publication provisions of subsections (14)-(15) would require.

The provision acknowledges that deferred prosecution is a legitimate practice, but one that benefits from transparency and structure. It recognizes that deferred prosecution may be used to rehabilitate individuals who have committed crimes, make reparation to crime victims, and advance public safety. At the same time, by placing restrictions on how pre-charge diversion programs may be arranged, and requiring monitoring of their use, § 6.02A also represents a new way of regulating prosecutorial discretion.

© 2014 by The American Law Institute

By requiring that deferred prosecution be used only in cases where the state could prove a defendant's guilt at trial, the provision bans the use of conditional deferral as a way to "punish" individuals who would not be found guilty in a court of law because of weak or tainted evidence. See § 6.02A(3). The provision permits and encourages the use of deferred prosecution in cases where guilt could be proven, but the individual can nonetheless be fairly held accountable without resort to formal charge and conviction.

Under this provision, the decisions to defer and determine the conditions of the deferred-prosecution agreement lie solely with the prosecutor. In jurisdictions where the prosecutor is unable, however, to arrange for necessary services or adequately monitor compliance with the terms of the agreement, subsection (9) allows the prosecution, with approval from the court, to draw upon the court's resources, including community supervision and access to publicly funded treatment programs.

A central objective of this provision is to encourage prosecutors to use their legal authority parsimoniously and, when appropriate, in ways that avoid the often severe collateral consequences imposed on individuals who have been charged with a crime or who have made an admission of guilt in open court. For example, pre-charge diversion may be an effective way for a noncitizen to avoid deportation for a relatively minor offense, or for a youthful offender to avoid the stigma of a criminal record based on an anomalous indiscretion.

b. Purposes of deferred prosecution. As an alternative to traditional prosecution, deferred prosecution lacks many of the procedural safeguards that accompany criminal prosecution. Deferred prosecution is not intended to be an extrajudicial mechanism by which the prosecutor exacts punishment without first proving guilt. Although conditions of a deferred-prosecution agreement may have a subjectively punitive element, the purpose of deferred prosecution should be the rehabilitation and reintegration of the accused individual and the restoration of direct and indirect victims of the crime.

Subsection (2) addresses the goals pursued by deferred-prosecution agreements, but it is not a full statement of their external benefits. High among these is the conservation of prosecutorial and judicial resources.

c. The problems of net-widening and relinquishment of rights. The Institute recognizes that a number of dangers attend the practice of pre-charge diversion. Among the most salient is the risk that individuals who would not otherwise be prosecuted or convicted will be convinced to enter into deferred-prosecution agreements, thus expanding the net of social control in the name of "diversion." The psychological pressure to resolve the matter as quickly as possible may also prevent accused individuals from invoking constitutional rights and other protections they would possess in a formal prosecution. Consequently, the decision to offer deferred prosecution should be made thoughtfully, with sensitivity to the danger of net-widening. The draft provision addresses

© 2014 by The American Law Institute

these concerns in several of its subsections, including subsection (3), which limits deferred prosecution to cases in which "a prosecutor has probable cause to believe that an individual has committed a crime and reasonably anticipates that sufficient admissible evidence can be developed to support conviction at trial."

Subsection (5) provides that "[b]efore agreeing to the terms of a deferred-prosecution agreement, an individual shall have a right to counsel." Although the opportunity to consult with counsel is not constitutionally mandated before the initiation of formal charges, providing counsel to individuals offered a deferred-prosecution agreement serves many purposes. One responsibility of defense counsel at this juncture is to provide the accused with information and advice concerning the prospects and likely consequences of a formal prosecution, and the costs and benefits of the agreement offered by the government. In some states, it may be necessary to revise the legal prerequisites for appointment of defense counsel so that representation may begin early enough to assist the accused's decision of whether to enter a deferred-prosecution agreement. While individuals may waive the right to counsel, providing access to an attorney helps ensure that conditions imposed are proportional to the suspected offense and that the individual understands the positive and negative ramifications of choosing to enter into the agreement.

In order to ensure that only culpable individuals are made the subject of deferred-prosecution agreements, subsection (6) further states that the existence of a deferred-prosecution agreement "does not relieve the prosecuting agency of any duty to disclose exculpatory evidence" or prevent an individual subject to such an agreement from "seeking otherwise discoverable information about the alleged crime." Without the initiation of formal criminal proceedings, the accused has no constitutional right to discovery, and consequently the prosecution may not be required to disclose any information under this standard. In some jurisdictions, however, local rules or codes of ethics may impose obligations on the prosecution or provide a limited right of discovery to the accused individual even when the constitutional right to disclosure of exculpatory evidence has not yet attached. Requiring disclosure under these circumstances reinforces the common-sense notion that when the prosecutor comes into possession of evidence suggesting the accused has committed no crime, the deferred-prosecution agreement should be revisited by the parties.

Finally, subsection (9) requires that the deferred-prosecution agreement specify a reasonable duration for the agreement to continue that takes account of the severity of the potential charges and the nature of the stipulated conditions. This provision encourages the prosecution to use its leverage parsimoniously, being attentive to proportionality when setting the length of time in which an accused but uncharged individual is subject to the conditions set forth in the deferred-prosecution agreement.

© 2014 by The American Law Institute

1 *d. Cases appropriate for deferred prosecution*. For reasons discussed above, no case
2 should be selected for deferred prosecution unless the prosecution reasonably anticipates
3 that, by the time of trial, the state will be able to prove guilt beyond a reasonable doubt.
4 Deferred prosecution is appropriate in cases where (1) guilt is clear and provable; (2) an
5 individual has sufficient culpability to be held accountable for his or her criminal
6 conduct; and (3) neither justice or public safety demand that the individual be
7 stigmatized by formal charge and conviction, with their attendant collateral
8 consequences. Such cases might include first-time or youthful offenders, nonviolent
9 offenders, and individuals with substance-abuse or mental-health problems that can be
10 safely treated in the community.

11 *e. Eligibility.* No offense- or offender-based restrictions on admission to deferred-
12 prosecution programs are set out in this provision. Under subsection (14), eligibility must
13 be determined with reference to objective criteria that are formulated and publicized by
14 the prosecutor's office.

15 *f. Victim notification.* Recognizing that victims of crime often have a stake in the
16 outcome of a charging decision and may have rights under state law relevant to the
17 charging decision, subsection (4) requires the prosecution to make good-faith efforts to
18 inform any identified victim of the terms of any deferred-prosecution agreement.

19 *g. Conditions of the agreement.* This provision does not place a limit on the number
20 or kind of conditions that may be imposed on an individual who is the subject of a
21 deferred-prosecution agreement. Subsection (8) contemplates that prosecutors may
22 require, as a condition of deferral, that individuals participate in treatment programs or
23 submit to some level of supervision for a specified period of time. Prosecutors imposing
24 conditions should take care to ensure that any burdens imposed by the agreement are
25 proportional to the suspected offense and in light of the formal punishments that would
26 be available upon conviction.

27 Bracketed language in subsection (8) makes reference to the common practice
28 among prosecutors' offices to assess costs or fees against those who participate in pre-
29 charge diversion programs. Under § 6.04D, the Code recommends that assessments of
30 this kind not be permitted under state law, and that those suspected or even convicted of
31 criminal offenses should not be treated as special sources of revenue for agencies of the
32 criminal-justice system. The Code recognizes that the elimination of costs and fees is a
33 difficult policy question, however, and includes an Alternative § 6.04D for jurisdictions
34 that cannot accept the Code's primary recommendation. The bracketed language in
35 § 6.02A(8) speaks only to those states that follow the approach in Alternative § 6.04D. It
36 prohibits prosecutors from using deferred prosecution as a means of generating revenue
37 for their offices by barring cost and fee assessments "in excess of actual expenditures
38 incurred by the prosecutor's office."

© 2014 by The American Law Institute

h. Sources of supervision and services. Ideally, participants in deferred-prosecution programs should have access to the same state-funded resources as individuals on probation, or defendants in deferred-adjudication programs under § 6.02B. Subsection (10) achieves this result for selected cases. When the prosecutor's office lacks the resources to provide the supervision, services, or programs that may be required as part of a deferred-prosecution agreement, the parties may petition the court to order the full panoply of supervision and treatment services that would be available under § 6.02B. At the same time, § 6.02A anticipates that a large group of individuals who enter deferred-prosecution programs will not require supervision or services—or no more than may be administered by prosecutors' offices themselves.

i. Tolling of statute of limitations. The language concerning the tolling of applicable limitations periods is presented in brackets on the assumption that the law in some jurisdictions will not allow for tolling by agreement of the parties.

j. Termination. Subsection (11) allows for termination of the agreement only when an individual materially breaches the terms of the agreement. When a deferred-prosecution agreement is terminated, the prosecutor retains the discretion to file any and all charges supported by the evidence. In determining whether to terminate the agreement, consideration should be given for an individual's good-faith attempt to comply with the deferred-prosecution agreement. The accused's failure to comply with the deferred-prosecution agreement should not serve as a basis for the ultimate charge pursued in the event that the agreement is breached

k. Monitoring and evaluation. A central concern surrounding pre-charge diversion is the risk that it will be used in a discriminatory way. Even in the absence of conscious discrimination, the benefits of deferred prosecution may be extended disparately to individuals of different races, genders, ethnicities, national origins, and social and economic stature. The revised Code has adopted as a fundamental goal of the sentencing system "to eliminate inequities in sentencing across population groups," § 1.02(2)(b)(iii) (Tentative Draft No. 1, 2007). This principle must be understood to extend across all dispositions of criminal cases, even if a technical "sentencing" has not occurred. The best antidote to inequities of this kind is transparency, as required in subsections (14)-(15), and the ability to evaluate a program's implementation in light of its own published standards.

REPORTERS' NOTE

a. Scope. This Section, while new to the Code, has analogues in a variety of state procedures and rules governing "pre-charge diversion." For an example of one state that gives express statutory authorization to prosecutors to create diversion programs that engage before charges have been filed, see Okla. Stat., Title 22, § 305.1 (reprinted in the Statutory Note below). For a discussion of federal

© 2014 by The American Law Institute

1 immigration law, and its treatment of deferred adjudication—a closely related practice—see N.Y. City Bar,
2 The Immigration Consequences of Deferred Adjudication Programs in New York City (2007), available at
3 http://www.nycbar.org/pdf/report/Immigration.pdf.

4 *c. The problems of net-widening and relinquishment of rights.* The standard adopted by subsection (3)
5 is modeled on the American Bar Association Standards for Criminal Justice: Prosecution and Defense
6 Function, 3d ed. (1993), Standard 3-3.9(a) ("A prosecutor should not institute, or cause to be instituted, or
7 permit the continued pendency of criminal charges when the prosecutor knows that the charges are not
8 supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the
9 continued pendency of criminal charges in the absence of sufficient admissible evidence to support a
10 conviction.").

11 *g. Conditions of the agreement.* Deferred prosecution can be a useful tool for minor cases and
12 instances in which traditional prosecution is unnecessary or might impose unwarranted collateral
13 consequences, it is also a practice that can be abused. Nevertheless, because the exercise of prosecutorial
14 discretion is hidden from public view, and because the threat of criminal prosecution is so powerful, it is
15 also a tool that is subject to abuse. For an example of the ways in which financial incentives can affect the
16 use of pretrial diversion programs administered by prosecutors, see Nathan Koppel, Probation Pays Bills
17 for Prosecutors, The Wall Street Journal, January 20, 2012 (describing Oklahoma's programs of "DA
18 supervision," which are "larger than the state prison system's traditional probation program," and generate
19 fees in excess of actual expenses that have been used to offset a $1.2 million drop in state funding).

20 ________________

21 **NO ORIGINAL PROVISION**

22 ________________

23 **PROPOSED NEW PROVISION**

24 **§ 6.02B. Deferred Adjudication.**

25 **(1) For purposes of this provision, deferred adjudication refers to any practice**
26 **that conditionally disposes of a criminal case prior to the entry of a judgment of**
27 **conviction. Courts are encouraged to defer adjudication in ways consistent with this**
28 **provision.**

29 **(2) The purposes of deferred adjudication are to facilitate offenders'**
30 **rehabilitation and reintegration into the law-abiding community and restore victims**
31 **and communities affected by crime. Deferred adjudication should be offered to hold**
32 **the individual accountable for criminal conduct through a formal court process, but**
33 **justice and public safety do not require that the individual be subjected to the**
34 **stigma and collateral consequences associated with formal conviction.**

© 2014 by The American Law Institute

(3) The court may defer adjudication for an offense that carries a mandatory-minimum term of imprisonment if the court finds that the mandatory penalty would not best serve the purposes of sentencing in § 1.02(2).

(4) The court may defer adjudication upon motion of either party, or on its own motion. Deferred adjudication shall not be permitted unless the court has given both parties an opportunity to be heard on the motion and has obtained the consent of the defendant. Before deciding to grant deferred adjudication, the court shall direct the prosecution to make a good-faith effort to notify the victim, if any, of any judicial proceedings that may occur in connection with the motion, and provide an opportunity for comment.

(5) Deferred adjudication shall not be conditioned on a guilty plea but may be conditioned on an admission of facts by the accused.

(6) Deferred prosecution may be conditioned on a waiver of the right to a speedy trial during the period in which the conditions of deferred adjudication are being satisfied.

(7) As a condition of deferred adjudication, the court may order, separately or in combination, any condition that would be authorized under § 6.03, along with victim restitution.

(8) If the defendant materially satisfies the conditions for deferred adjudication, the court shall dismiss the underlying charges with prejudice. A disposition under this Section shall not be considered a conviction for any purpose.

(9) If there is probable cause to believe a defendant who has been offered deferred adjudication has materially breached one or more conditions of deferral, the court may require the defendant to appear for a hearing, at which the defendant is entitled to the assistance of counsel.

(a) If, after hearing the evidence, the court finds by a preponderance of the evidence that a material breach has occurred, it may take any of the following actions:

(i) Modify the conditions of deferral in light of the violation to address the offender's identified risks and needs; or

(ii) Revoke the opportunity for deferred adjudication, and resume the traditional adjudicative process.

(b) When sanctioning a violation, the court should impose the least severe consequence needed to address the violation and the risks posed by the offender in the community, in light of the purpose for which the condition was originally imposed.

(10) The sentencing commission shall develop guidelines identifying the kinds of cases and offenders for which deferred adjudication is a recommended disposition.

© 2014 by The American Law Institute

Comment:

a. Scope. Like § 6.02A, this provision is new to the Code, but not to practice. As the number of people charged with crimes has risen, courts and prosecutors have developed numerous ways of managing certain criminal cases, particularly those committed by youthful or first-time offenders, that do not result in a record of conviction. These practices go by many names ("pre-trial diversion," "deferred entry of judgment," "deferred sentencing," "probation before judgment," etc.), and are administered by different actors (sometimes the prosecutor, sometimes the court). In most cases, participation requires the entry of a guilty plea or an admission of guilt. Some practices referred to as "deferred adjudication" involve the entry of a guilty plea that is later expunged upon completion of conditions by the convicted person.

This provision defines deferred adjudication as any practice that conditionally disposes of a criminal case prior to the entry of a judgment of conviction. The provision vests administrative responsibility over deferred adjudication in the trial courts, which set the conditions of deferral, see § 6.02B(7), and resolve questions of compliance, see § 6.02B(9). The provision is the post-charge judicial analog to the prosecutor's pre-charge power to defer prosecution under § 6.02A.

Section 6.02B reverses the Institute's former policy that "[t]he Model Code does not provide for the imposition of probation without conviction" because "[t]he Institute . . . was unwilling to approve a procedure so likely to put pressure on the innocent to submit to correctional restraints." Model Penal Code and Commentaries, Part I, §§ 6.01 to 7.09 (1985), § 6.02, Comment 9 at p. 56. The original Code championed a postconviction version of deferred adjudication under the title "deferred imposition of sentence." Section 6.02(3) of the 1962 Code provided that "the Court may suspend the imposition of sentence on a person who has been convicted of a crime." During the period of suspended imposition, former § 301.1(1) authorized trial courts to attach supervision conditions identical to those available for a sentence of probation. For defendants who fully satisfied these conditions, § 301.5(1) gave courts discretion to order that "so long as the defendant is not convicted of another crime, the judgment shall not constitute a conviction for the purpose of any disqualification or disability imposed by law upon conviction of a crime." Many existing state provisions have followed the original Code's approach.

Proposed § 6.02B responds to many of the same concerns, but pauses the normal flow of case processing at an earlier juncture—before a conviction has occurred. The most compelling reason for this change is that the annulment of conviction in former § 301.5(1) is no longer an effective bar to some of the most serious collateral consequences of conviction. (The revised Code contains a separate set of provisions that seek to mute the impact of excessive collateral consequences following conviction and sentence, see §§ 6x.01-6x.06 (this volume).) In addition, because mandatory-minimum sentencing laws have proliferated since the first Code's adoption—despite the Institute's

© 2014 by The American Law Institute

categorical disapproval—it is helpful to give courts a pathway to disposition that bypasses the force of those laws.

b. Purposes. Like deferred prosecution, deferred adjudication is intended to promote the rehabilitation and reintegration of the accused individual and the restoration of direct and indirect victims of the crime. Although conditions imposed by the court may be subjectively punitive, the court should make every effort to be parsimonious in the imposition of conditions.

c. Eligibility. Similar to deferred prosecution, cases should not be selected for deferred adjudication unless neither justice nor public safety demand that the individual be stigmatized by formal conviction, with its attendant collateral consequences. Such cases might include first-time or youthful offenders, nonviolent offenders, and individuals with substance-abuse or mental-health problems that can be safely treated in the community.

This provision does not impose any offense- or offender-based restrictions on admission to deferred-prosecution programs. Subsection (3) allows courts to make use of deferred adjudication in cases where mandatory-minimum sentences would otherwise apply. Under subsection (10), eligibility may turn on guidelines developed by the sentencing commission.

d. Process. The main significance of subsection (4) is that a deferred adjudication does not require the approval of the prosecutor, though it always requires the consent of the defendant. The majority of existing state provisions interpose prosecutors as gatekeepers to deferred adjudications, and the revised Code would disapprove of this arrangement in all cases. While the views of the prosecutor and crime victims, if any, may be heard on the question, full dispositional authority resides in the courts.

The draft provision does not impose a requirement of a presentence report before a deferred adjudication may be granted. While a report will often—perhaps usually—be desirable, the Code would allow court systems flexibility on this point.

The Model Code has not yet developed an overall framework for the role of crime victims in the many stages of the sentencing process. This subject is slated for the drafting cycle that will culminate in Tentative Draft No. 4 (one cycle ahead of the current drafting effort). Subsection (4), which requires courts to direct the prosecution to give notice to victims and an opportunity to be heard, may therefore be revisited at a later date.

e. Offenses that carry mandatory penalties. The revised Code would prohibit the use of mandatory prison sentences in every instance, but also includes numerous provisions designed to mute the impact of such laws where they exist despite the Institute's longstanding disapproval. See § 6.06, Comments *a* and *d* (Tentative Draft No. 2, 2011). Subsection (3) continues this approach. It is also an explicit disavowal of state laws that

© 2014 by The American Law Institute

1 exclude offenses carrying mandatory penalties from eligibility for deferred adjudication.
2 In the absence of the prospect of statutory exclusion, subsection (3) would be
3 uncontroversial. Mandatory punishments follow upon convictions, and § 6.02B interrupts
4 the flow of case processing before convictions have occurred. For other Code provisions
5 carving out exceptions to the operation of mandatory penalties, see § 6.11A(f) (Tentative
6 Draft No. 2, 2011); § 6B.03(6) (Tentative Draft No. 1, 2007); § 6B.09(3) (Tentative Draft
7 No. 2, 2011); § 7.XX(3)(b) (Tentative Draft No. 1, 2007); § 7.ZZ(6)(b) (Tentative Draft
8 No. 1, 2007) (provision not yet approved; submitted for informational purposes only);
9 § 305.1(3) (Tentative Draft No. 2, 2011); § 305.6(5) (Tentative Draft No. 2, 2011);
10 § 305.7(8) (Tentative Draft No. 2, 2011).

11 *f. Guilty plea not required.* Subsection (5) adopts a pre-plea model of deferred
12 adjudication. Because § 6.02B is intended to serve as a full-fledged alternative to
13 conviction and sentences short of imprisonment, it is reasonable to expect that some
14 defendants may be required to make admissions of fact to be granted deferred
15 adjudication. Subsection (5) vests discretion in the courts to determine whether such a
16 prerequisite is desirable in individual cases.

17 *g. Waiver of speedy-trial rights.* Subsection (6) responds to the self-evident
18 necessity of obtaining a waiver from the defendant of the right to a speedy trial.

19 *h. Repeat eligibility.* The draft rejects the common practice among the states of
20 allowing an individual only one opportunity to participate in a deferred-adjudication
21 program. Instead, it leaves the decision to the discretion of the trial court, guided by the
22 sentencing commission, see § 6B.03(4), (10).

23 *i. Benefits of completion.* Insofar as possible, the deferred-adjudication program
24 should attempt to restore defendants to the legal and social position of someone who has
25 never been charged with a crime. For individuals who successfully complete the terms
26 imposed by the court, subsection (8) provides that the charges be dismissed with
27 prejudice, the disposition not be considered part of the defendant's criminal record, and
28 that collateral consequences should not be triggered by the disposition.

29 The Reporters have heard competing views on the question of whether expungement
30 of records of arrests and charges ought to be authorized as part of any deferred-
31 adjudication provision. The current draft follows the original Code's practice of
32 ameliorating the harms that flow from conviction rather than attempting the difficult—
33 and perhaps inadvisable—step of trying to hide the fact of past arrest or charge—in an
34 era of electronic records.

35 Proponents of expungement want defendants to be permitted to "truthfully"
36 represent to government officials and private parties that they have never been arrested or
37 convicted. There is some existing statutory precedent for this approach. Others argue that
38 records of criminal-case processing are so widely available on the Internet, often on

© 2014 by The American Law Institute

private websites, that expungement is simply not feasible. Even were the law to allow individuals to state "truthfully" they had never been arrested or convicted, these representations would often be viewed as concealments or lies in the broader world. On this view, some form of "certificate of rehabilitation" is preferable to ineffectual attempts at erasure of the past. See § 6x.06.

j. Violations of conditions. Subsection (9)(a) provides that, upon proof of a material breach of the conditions of deferred adjudication, the court may either modify the conditions of the original offer of deferred adjudication, or revoke the opportunity for deferred adjudication. When an offer of deferred adjudication is revoked, the case resumes its processing through the traditional adjudicative process. Subsection (9)(b) encourages judges, when responding to material breaches, to impose the least severe consequence needed to address the violation and the risks posed by the offender in the community.

k. Sentencing guidelines. Under the revised Code, sentencing guidelines may take the form of presumptively enforceable rules, subject to trial-court discretion to depart from those rules, or advisory recommendations. See § 6B.04 (Tentative Draft No. 1, (2007)). Guidelines for deferred adjudications do not currently exist in any jurisdiction, but in theory they could supply valuable information and direction, and could foster uniformity of analysis, for decisions on admission and appropriate sanctions. Accordingly, subsection (10) encourages, but does not mandate, that sentencing commissions create such guidelines.

REPORTERS' NOTE

a. Scope. State provisions authorizing deferred adjudications exist in many states, although there is a wide variety in terminology and approach across jurisdictions. See Ark. Code § 16-93-1206 ("suspended imposition of sentence"); Cal. Penal Code §§ 1000 & 1000.8 ("deferred entry of judgment"); Colo. Rev. Code § 18-1.3-102 ("deferred sentencing"); 11 Del. Cod. § 4218 ("probation before judgment"); N.D. R. Crim. Proc. 32.2 ("pretrial diversion"); Conn. Gen. Stat. § 54-56e ("accelerated pretrial rehabilitation"); Hawaii Rev. Stat. § 853-1 ("deferred acceptance of guilty plea"); Ill. Compiled Stat. § 5/5-6-1 ("disposition of supervision"); Maryland Code, Criminal Procedure § 6-220 ("probation before judgment"); N.Y. Crim. Proc. Law § 170.55 ("adjournment in contemplation of dismissal"); Ohio Rev. Code § 2935.36 ("pretrial diversion"); Ohio Rev. Code § 2951.041 ("intervention in lieu of conviction" for defendants in need of drug or alcohol treatment); Wis. Stat. § 971.39 ("deferred prosecution" after charges have been filed).

For background on deferred-adjudication processes across the states, see Margaret Colgate Love, Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences, 22 Fed. Sent'g Rep. 6, 7 (2010) (noting that "[d]eferred adjudication schemes are statutorily authorized in over half the states"). Love credits the provisions of the original Code for spawning much of the state legislation that

© 2014 by The American Law Institute

now exists on deferred adjudications. See id. ("In the 1970s, many states adopted deferred adjudication laws that were evidently inspired by the corrections articles of the Model Penal Code.").

d. Process. Deferred-adjudication provisions that do not require the consent of the prosecutor are relatively rare, but not unknown. See N.Y. Crim. Proc. Law § 170.56 ("Adjournment in contemplation of dismissal in cases involving marihuana"); Vt. Stat., title 13, § 7041 (trial court has authority to defer adjudication without agreement of prosecutor in specified circumstances). See also Ohio Rev. Code § 2935.36 (prosecutor must initiate pretrial diversion process based on prosecutor's belief that the defendant "probably will not offend again," although case law grants judges nonstatutory authority to devise their own similar programs, see Lane v. Phillabaum, 912 N.E.2d 113 (Ohio Ct. App. 2008)).

There is no general deferred-adjudication statute in New York, but courts have created a deferred-adjudication process under their own rules, allowing guilty pleas to be withdrawn with the consent of the prosecutor following successful completion of a period of probation. See N.Y. City Bar, The Immigration Consequences of Deferred Adjudication Programs in New York City (2007), at 2-3, available at http://www.nycbar.org/pdf/report/Immigration.pdf; N.Y. Crim. Proc. Law §§ 160.5, 160.55.

Some codes require that the prosecutor or court consider the victim's views before consenting to a deferred adjudication or sentencing, see, e.g., N.D. R. Crim. P. 32.2(a)(1). Subsection (4) of the proposed provision requires the court to order the prosecution to provide the victim with notice of proceedings and the opportunity to comment on the decision to defer adjudication of any given case.

f. Guilty plea not required. Massachusetts law closely mirrors the framework of subsection (5), requiring neither a conviction nor a guilty plea to support a deferred adjudication with probation. See Mass. Gen. Laws, Ch. 276, § 87 (reproduced in the Statutory Note below).

i. Benefits of completion. Subsection (8) goes further than the law of many states in providing that a deferred adjudication may not be considered a part of the accused's criminal history in later proceedings. See Rudman v. Leavitt, 578 F. Supp. 2d 812 (D. Md. 2008) (holding that probation before judgment under Maryland law is considered a prior conviction for purposes of federal sentencing); United States v. Morillo, 178 F.3d 18 (1st Cir. 1999) (holding that a "continuance without finding" disposition under Mass. Gen. Law, Ch. 278, § 18, counts as a prior sentence for federal sentencing purposes because it is an admission of guilt).

ORIGINAL PROVISION

PART III. TREATMENT AND CORRECTION

ARTICLE 306. LOSS AND RESTORATION OF RIGHTS INCIDENT TO CONVICTION OR IMPRISONMENT

§ 306.6. Order Removing Disqualifications or Disabilities; Vacation of Conviction; Effect of Order of Removal or Vacation.

© 2014 by The American Law Institute