Conditions of Supervision in Federal Criminal Sentencing: A Review of Recent Changes

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I. Introduction

IN LATE 2016, several changes related to the conditions of probation and supervised release in federal criminal sentencing went into effect. These were (1) revisions to the national judgment forms that list the conditions imposed by the sentencing court; (2) the release of a public document on the conditions of supervision as a resource for the courts, criminal justice practitioners, and defendants; and (3) changes to policy guidance for probation officers on the recommendation and implementation of the conditions.

These changes were the result of the most exhaustive review of the conditions since the Sentencing Reform Act of 1984 went into effect, which was prompted by several developments. First, in recent years there have been an increasing number of appellate court opinions raising concerns about the conditions. Additionally, individual federal judicial districts have reacted to these opinions by adopting a wide variety of practices for the conditions' wording and procedures. Finally, national stakeholders have expressed interest in re-examining the conditions and providing more information to assist the courts and parties with applying conditions that satisfy legal requirements. This article describes the developments that led to the recent review and changes, provides an overview of the review process, and summarizes the specific changes.

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II. General Legal Framework

Defendants sentenced to federal probation or supervised release are required by statute to be supervised by a probation officer "to the degree warranted by the conditions specified by the sentencing court."[2] The conditions of supervision set the parameters of supervision by the probation officer and establish behavioral expectations for defendants. They also assist in satisfying the probation officer's statutory duty to keep informed of, report to the court about, and bring about improvements in the defendant's conduct and condition.[3] Violations of conditions may lead to a variety of court responses, including modification of the conditions and revocation of probation or supervised release.[4]

When imposing a sentence of probation or supervised release, the court is statutorily required to impose certain "mandatory conditions."[5] The court may also impose additional "discretionary conditions" when certain requirements are met.[6] Specifically, the court may impose discretionary conditions to the extent that they: (1) are reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and applicable statutory sentencing purposes[7]; (2) involve only such deprivations of liberty or property as reasonably necessary for the applicable statutory sentencing purposes[8]; and (3) are consistent with any

[2] 18 U.S.C. § 3601. United States probation officers also supervise persons released on parole or mandatory release by the U.S. Parole Commission or military authorities. The Parole Commission has a direct policy and decision-making role in the supervision of those under its jurisdiction. Probation officers are required to follow the Parole Commission's rules relating to supervision, and the Parole Commission has the responsibility and authority for all decisions relating to the imposition and modification of conditions of release and for the revocation of parole supervision.

[3] *See* 18 U.S.C. § 3603 (directing a probation officer to, among other requirements, "instruct a probationer or a person on supervised release, who is under his supervision, as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions"; "keep informed, to the degree required by the conditions specified by the sentencing court, as to the conduct and condition of a probationer or a person on supervised release, who is under his supervision, and report his conduct and condition to the sentencing court"; and "use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition.").

[4] *See* 18 U.S.C. §§ 3563, 3565, and 3583.

[5] 18 U.S.C. §§ 3563(a) and 3583(d). Depending on the nature of the conviction, these conditions include not committing another crime, not unlawfully possessing a controlled substance, submitting to drug testing, sex offender registration, cooperating with collection of DNA samples, and domestic violence counseling.

[6] 18 U.S.C. §§ 3563(b) and 3583(d).

[7] For supervised release cases, these sentencing purposes are: (1) deterrence, (2) protection of the public, and (3) providing needed correctional treatment to the defendant. 18 U.S.C. §§ 3583(d)(1) and § 3553(a)(2)(B)-(D). For probation cases, these sentencing purposes are the same as in supervised release cases and also include reflecting the seriousness of the offense, promoting respect for the law, and providing just punishment for the offense. 18 U.S.C. §§ 3563(b) and 3553(a)(2).

[8] For supervised release cases, conditions must involve "no greater deprivation of liberty than is

pertinent policy statements issued by the Sentencing Commission.[9]

Discretionary conditions of supervision are further divided into "standard" and "special" conditions. Standard conditions are those that have been established by policy of the Judicial Conference of the United States or policy statements of the United States Sentencing Commission as applicable to all sentenced defendants.[10] Most of the standard conditions imposed in federal criminal sentencing are similar to those in state jurisdictions.[11] Special conditions provide for additional restrictions, correctional interventions, monitoring tools, or sanctions as necessary to achieve the purposes of sentencing in the individual case.[12]

III. Roles of Federal Judiciary Entities in Developing and Implementing Conditions

The federal judiciary, including the probation and pretrial services system, has a highly decentralized structure involving numerous entities at the district and national levels. Each district court in the 94 federal judicial districts has the authority to issue local judgment forms and policies. The judgment forms include both mandatory and standard conditions of supervision as well as space for the sentencing court to list any special conditions. Each probation or pretrial services office, with the approval of the chief judge of the district, is responsible for developing local probation office policies, including those related to the recommendation and implementation of conditions by probation officers.

Within this decentralized structure, there are four national judiciary entities with policy and/or administrative responsibility related to the conditions of probation and supervised release. First, the Judicial Conference of the United States was created by Congress in 1922 to make policy for the administration of the federal courts, including the probation and pretrial services system.[13] It operates through a network of policy advisory committees. One of the committees, the Criminal Law Committee, reviews issues relating to the administration of the criminal law and oversees the federal probation and pretrial services system.[14] Among the national committees, it has primary jurisdiction over the content of the national judgment forms used in criminal proceedings. It has had an active and ongoing role in developing, monitoring, and recommending revisions of the conditions of supervision in the national judgment forms for decades. The Criminal Law Committee also has primary jurisdiction over program policies regarding the recommendation and implementation of conditions by probation officers; these policies are contained in the *Guide to Judiciary Policy*.

Second, the Administrative Office of the U.S. Courts ("the Administrative Office") is responsible for developing national judgment forms and program policies for consideration by the Judicial Conference and its Criminal Law Committee.[15] The process for the development of judgment forms and policies normally involves consultation with experts from individual districts, such as judges and probation officers, and providing "exposure drafts" to the districts and national stakeholders for their feedback. Policies endorsed by the Criminal Law Committee are then forwarded to the Judicial Conference for final approval.

Third, the United States Sentencing Commission is directed by statute to promulgate general policy statements regarding application of the federal sentencing guidelines or any other aspect of sentencing that in the view of the Sentencing Commission would further the statutory purposes of sentencing, including the appropriate use of the conditions of probation and supervised release.[16] It has implemented this directive in Section 5B1.3 (Conditions of Probation) and Section 5D1.3 (Conditions of Supervised Release) of its *Guidelines Manual*. Finally, the Federal Judicial Center provides education, training, and research services to the federal judiciary, including judges and probation officers.[17]

IV. Developments Prompting Review of Conditions

The recent review of the conditions of probation and supervised release was prompted in large part by a series of opinions from the United States Court of Appeals for the Seventh Circuit questioning the wording of certain standard and special conditions and

reasonably necessary" for the purposes of deterrence, protection of the public, and providing needed correctional treatment to the defendant. 18 U.S.C. §§ 3583(d)(2) and 3553(a)(2)(B)-(D). For probation cases, they must "involve only such deprivations of liberty or property as are reasonably necessary" for the purposes of deterrence, protection of the public, providing needed correctional treatment to the defendant, and promoting respect for the law, and providing just punishment for the offense. 18 U.S.C. §§ 3563(b) and 3553(a)(2).

[9] 18 U.S.C. § 3583(d)(3).

[10] Standard conditions are basic behavioral expectations for the defendant and minimum tools required by probation officers to adequately monitor the conduct and condition of all defendants under supervision. The expectations set by these conditions include avoidance of risk-related factors and the strengthening of prosocial factors. The standard conditions allow officers to employ basic supervision strategies such as requiring the defendant to report to the probation officer as directed, to provide notification of changes in residence or employment, and to seek permission to travel outside of the federal judicial district.

[11] *See* Travis, L. and Stacey, J. "A half Century of Parole Rules: Conditions of Parole in the United States, 2008." *Journal of Criminal Justice*, at 604 (2010) ("The most common conditions . . . imposed in at least forty jurisdictions were: comply with the law, restrictions on changing residence, prohibition on weapons possession, requirement of regular reporting, restrictions on out of state travel, allowing home and work visits by the parole officer, and restrictions on possession/use of controlled substances. . . . Other conditions imposed in at least three-quarters of the jurisdictions . . . require parolees to maintain employment or educational program participation, report any arrest, comply with medical/drug testing, make a 'first arrival' report (making contact with the supervising officer soon after release from prison), and pay fees and restitution, and prohibitions against contact with undesirable associates. The remaining conditions imposed in over half of the jurisdictions included obeying the instructions/directions of the supervising officer, controls on the consumption of alcohol, and avoidance of undesirable associates or locations.").

[12] The most common special conditions impose restrictions on location, movement, and/or associations (e.g., community confinement, home confinement); interventions (e.g., substance abuse or mental health treatment, financial counseling); additional monitoring tools (e.g., substance abuse testing, financial disclosure); or sanctions (e.g., community service). Other specifically crafted conditions may be imposed to address particular types of risks or needs in the individual case.

[13] The Judicial Conference is directed by statute to "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business." 28 U.S.C. § 331.

[14] The meetings of the Criminal Law Committee are attended by representatives from the Sentencing Commission, the Department of Justice, the Bureau of Prisons, the Federal Defenders, and the U.S. probation and pretrial services system.

[15] Congress established the Administrative Office of the U.S. Courts in 1939 to provide administrative support to federal courts. *See* 28 U.S.C. §§ 601-613.

[16] 28 U.S.C. 994(a)(2)(B). Established by the Sentencing Reform Act of 1984, the United States Sentencing Commission is an independent agency in the judicial branch of government. *See* 28 U.S.C. §§ 994 and 995.

[17] The Federal Judicial Center was established by Congress in 1967 on the recommendation of the Judicial Conference of the United States. *See* 28 U.S.C. §§ 620-629.

the manner in which they are imposed.[18] To be sure, defendants in all of the circuits have increasingly challenged conditions of supervision, particularly special conditions, for several decades.[19] Moreover, not all of the circuits have expressed a similar level of concern about the language of and procedures regarding the conditions.[20]

In 2014, however, the Seventh Circuit began issuing an unusually large number of opinions discussing problems with the standard and special conditions, including that they are too vague; are overbroad; do not including a knowledge requirement for violation of a condition; implicate the Fifth Amendment privilege against self-incrimination; implicate the Fourth Amendment right against unreasonable searches and seizures; are not disclosed to the parties in advance of sentencing to allow for informed objections and judicial determinations; and do not have an adequate justification for how the conditions are reasonably related to the individual defendant/offense characteristics, how they are reasonably related to the relevant statutory sentencing factors, and how they involve a minimal deprivation of liberty.[21]

In the most noteworthy Seventh Circuit opinion, *United States v. Siegel*, 753 F.3d 705 (7th Cir. 2014), the court described "common but largely unresolved problems in the imposition of . . . conditions . . . as a part of federal criminal sentencing." One of the most serious problems identified by the court is that the conditions are often too vague and inadequately defined to place the defendant on notice of what conduct is prohibited and may lead to revocation of supervision. A second problem is that the probation office's presentence report or sentencing recommendation generally suggests conditions to the sentencing judge with only brief justifications. Judges then often merely repeat the recommendations and do not explain how they comport with the applicable sentencing factors, which, the court notes, is an independent determination judges are required to make. Furthermore, according to the court, judges are limited in their ability to look behind the probation office's recommendations because the academic studies of recidivism are unfamiliar to most judges, and it can be difficult for a judge who lacks a social-scientific background to evaluate them. Finally, because conditions are imposed at the time of sentencing, the sentencing judge has to guess what conditions are likely to make sense when the defendant is released from prison. The longer the sentence, the less likely that guess is to be accurate. Conditions that may seem sensible at sentencing may not be sensible many years or decades later.[22]

After listing these concerns with the conditions of supervision generally, the *Siegel* court vacated a number of the conditions imposed by the sentencing court that were "inappropriate, inadequately defined, or imposed without the sentencing judge's having justified them by reference to the sentencing factors." For instance, it held that the standard condition prohibiting the "excessive use of alcohol" was too vague and in need of further definition because it was not clear whether the term "excessive" is defined by number of drinks consumed or by another measure. Similarly, it found the special condition prohibiting the

[18] For an overview of the developments leading to the review of conditions and a description of the review process from the perspective of the Criminal Law Committee, *see Public Hearing on Compassionate Release and Conditions of Supervision*, U.S. Sentencing Commission (February 17, 2016) [hereinafter *Conditions Public Hearing*] (statement of Judge Ricardo S. Martinez, Member, Judicial Conference Criminal Law Committee), available at: http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and meetings/20160217/CLC.pdf.

[19] U.S. Sentencing Commission, *Case Law Update: Recent Supreme Court and Circuit Courts of Appeals Decisions* (2016) (listing circuit court opinions in 2015 and 2016 upholding or vacating conditions of supervision), available at: http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/backgrounder_case-law.pdf.; U.S. Sentencing Commission, *Supervised Release Primer* 6 (2014) ("A number of supervised release conditions have been challenged on appeal. Although circuit courts often uphold the conditions imposed, there are a number of reported cases in which circuit courts have reversed conditions. In those cases, circuit courts have provided a variety of reasons for reversing conditions imposed by sentencing courts. For example, circuit courts have reversed certain conditions, among other reasons, as vague and overbroad, insufficiently explained, not reasonably related to relevant statutory sentencing factors, and a greater deprivation of liberty than reasonably necessary."); U.S. Sentencing Commission, *Federal Defendants Sentenced to Supervised Release* 11 (2010) ("Defendants often challenge conditions of supervised release as not 'reasonably related' to the relevant factors in 18 U.S.C. § 3553(a), as required by 18 U.S.C. § 3583(d)(1), or as unconstitutional under the First, Fourth, or Fifth Amendments to the United States Constitution. Defendants also challenge procedural aspects of supervised release, such as lack of presentence notice of special conditions of supervised release and allegedly improper implementation of conditions by a probation officer.").

[20] The Tenth Circuit has rejected challenges to the wording of the standard conditions of supervision based on vagueness and other grounds. *United States v. Llantada*, 815 F.3d 679, 682 (10th Cir. 2016) (applying a "common sense approach to interpreting the conditions" and noting that "[n] either a [defendant] or [probation] officer would have trouble understanding and applying these conditions in a real world setting."); *United States v. Muñoz*, 812 F.3d 809, 815 (10th Cir. 2016) ("In our view, the district court did not err, for we use common sense to guide our interpretation of supervised release conditions.").

[21] *See, e.g.*, *United States v. Hollins*, 847 F.3d 535 (7th Cir. 2017); *United States v. Anglin*, 846 F.3d 954 (7th Cir. 2017); *United States v. Warren*, 843 F.3d 275 (7th Cir. 2016); *United States v. Flournoy*, 842 F.3d 524 (7th Cir. 2016); *United States v. Thomas*, 840 F.3d 920 (7th Cir. 2016); *United States v. Miranda-Sotolongo*, 827 F.3d 663 (7th Cir. 2016); *United States v. Sainz*, 827 F.3d 602 (7th Cir. 2016); *United States v. Bickart*, 825 F.3d 832 (7th Cir. 2016); *United States v. Gill*, 824 F.3d 653 (7th Cir. 2016); *United States v. Sweeney*, 821 F.3d 893 (7th Cir. 2016); *United States v. Hernandez*, 633 Fed.Appx. 868 (7th Cir. 2016); *United States v. Hill*, 818 F.3d 342 (7th Cir. 2016); *United States v. Guidry*, 817 F.3d 997 (7th Cir. 2016); *United States v. Taylor*, 633 Fed.Appx. 348 (7th Cir. March 21, 2016); *United States v. Miller*, 641 Fed. Appx. 563 (7th Cir. 2016); *United States v. Liles*, 640 Fed.Appx. 513 (7th Cir. Feb 22, 2016); *United States v. Campbell*, 813 F.3d 1016 (7th Cir. 2016); *United States v. Henry,* 813 F.3d 681 (7th Cir. 2016); *United States v. Hall*, 634 Fed.Appx. 593 (7th Cir. 2016); *United States v. Evans*, 630 Fed.Appx 635 (7th Cir. 2016); *United States v. Armand*, 638 Fed.Appx. 504 (7th Cir. Jan. 29, 2016); *United States v. Boros*, 636 Fed.Appx. 688 (7th Cir. Jan 20, 2016); *United States v. Speed*, 811 F.3d 854 (7th Cir. 2016); *United States v. Brown*, 628 Fed.Appx 447 (7th Cir. 2016); *United States v. Plada*, 628 Fed.Appx 443 (7th Cir. 2016); *United States v. Poulin*, 809 F.3d 924 (7th Cir. 2015); *United States v. Sandidge,* 784 F.3d 1055 (7th Cir. 2015); *United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015); *United States v. Sewell*, 780 F.3d 839 (7th Cir. 2015); *United States v. McMillan*, 777 F.3d 444 (7th Cir. 2015); *United States v. Thomson*, 777 F.3d 368 (7th Cir. 2015); *United States v. Cary*, 775 F.3d 919 (7th Cir. 2014); *United States v. Hinds*, 770 F.3d 658 (7th Cir. 2014); *United States v. Johnson*, 765 F.3d 702 (7th Cir. 2014); *United States v. Johnson,* 756 F.3d 532 (7th Cir. 2014); *United States v. Farmer*, 755 F.3d 849 (7th Cir. 2014); *United States v Benhoff*, 755 F.3d 504 (7th Cir. 2014); *United States v. Baker,* 755 F.3d 515 (7th Cir. 2014); *United States v. Bryant*, 754 F.3d 443 (7th Cir. 2014); *United States v. Siegel,* 753 F.3d 705 (7th Cir. 2014).

[22] While conditions of supervised release can be modified at any time under 18 U.S.C. § 3583(e)(2), modification is, according to the court, a bother for the judge, especially when, as must be common in cases involving very long sentences, modification becomes the responsibility of the sentencing judge's successor because the sentencing judge has retired in the meantime. The court emphasized that noting the problems with imposing conditions of supervision at the time of sentencing is not a criticism that can be made of the sentencing judge. Rather, it is a flaw in the Sentencing Reform Act.

purchase, possession, or use of any "mood altering substances" to be vague because the term could include coffee, cigarettes, sugar, and chocolate, among many other substances that are not causal factors of recidivist behavior. The court also vacated the special condition prohibiting the possession of any material that "contains nudity," reasoning that the term "contains" is vague because, unless "contains" only means "provides a visual depiction of," the prohibition would forbid reading the Bible. It further reasoned that the term "nudity" is overbroad because it would apply to nudity or partial nudity that is in no respect prurient such as an adult wearing a bathing suit, and the district court did not explain why the condition should not be limited to visual depictions of material that depicts nudity in a prurient or sexually arousing manner.[23]

Finally, the *Siegel* court recommended a series of "best practices" for the imposition of conditions of supervised release within the Seventh Circuit. First, the probation office should be required to provide notice to defense counsel about the conditions it will recommend to the sentencing court at least two weeks before the sentencing hearing. Second, the sentencing judge should make an independent judgment of the appropriateness of the recommended conditions—independent, that is, of agreement between prosecutor and defense counsel (and defendant) on the conditions, or of the failure of defense counsel to object to the conditions recommended by the probation office.

Third, the sentencing judge should determine the appropriateness of the conditions with reference to the particular conduct and character of the defendant, rather than on the basis of loose generalizations about the defendant's crime of conviction and criminal history, and, where possible, with reference also to the relevant criminological literature. Fourth, the sentencing judge should make sure that each condition imposed is simply worded, bearing in mind that, with rare exceptions, neither the defendant nor the probation officer is a lawyer and that when released from prison the defendant will not have a lawyer to consult. Finally, the sentencing judge should require that just prior to release from prison, the defendant attend a brief hearing before the sentencing judge (or his or her successor) in order to be reminded of the conditions. That would also be a proper occasion for the judge to consider whether to modify one or more of the conditions in light of any changed circumstances brought about by the defendant's experiences in prison.

In another significant opinion, *United States v. Thomson*, 777 F.3d 368 (7th Cir. 2015), the Seventh Circuit reiterated and expanded upon the concerns introduced in *Siegel*. For instance, it noted the defendant is often given no notice in advance of the sentencing hearing of the conditions that the judge is considering imposing, "which can make it difficult for his lawyer to prepare arguments in opposition." Furthermore, it questioned whether most of the standard conditions were required in every case.[24] The court also rejected on vagueness grounds the standard conditions requiring the defendant to "support his or her dependents and meet other family responsibilities," forbidding the defendant to "associate with any person convicted of a felony, unless granted permission to do so by the probation officer," requiring the defendant to "notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics," mandating notification of any "change in . . . employment," and prohibiting the defendant from "frequent[ing] places where controlled substances are illegally sold, used, distributed, or administered." Finally, the court noted that the standard conditions requiring the defendant to "answer truthfully all inquiries by the probation officer" might implicate the Fifth Amendment privilege against self-incrimination and that the standard condition requiring the defendant to "permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contra-band observed in plain view of the probation officer" might implicate the Fourth Amendment right against unreasonable searches and seizures.[25]

A final opinion worth noting is *United States v. Kappes*, 782 F.3d 828 (7th Cir. 2015), where the Seventh Circuit rejected as vague the standard condition that "the defendant shall not leave the judicial district without . . . permission," noting the condition would be improved by explicitly adding a requirement of intent or knowledge of wrongdoing, particularly in a case where it is foreseeable that a defendant will reside near the boundary of two judicial districts within the same state. With regard to providing advance notice of conditions, the *Kappes* court clarified: "In most instances, this principle fits into the category of recommended 'best practice' rather than mandatory requirement. Advance notice is only *required* of . . . conditions that are not listed in a statute or the guidelines." This, according to the court, is because defendants and defense counsel are charged with knowledge of the sentencing guidelines, which list the standard conditions along with a number of special ones.

Despite this charged knowledge, the court continued, the Seventh Circuit has suggested that sentencing judges require the probation office to include any recommended conditions of supervised release—and the reasons for the recommendations—in the presentence report that is disclosed to the parties prior to the sentencing hearing.[26] The court concluded, "It is our hope that the combination of advance notice, timely objections, and appropriate judicial response to the objections will result in conditions better tailored to fulfill the purposes of supervised release, less confusion and uncertainty, and perhaps . . . fewer appeals."

In July 2014, the Department of Justice recommended that the Sentencing Commission remedy vagueness problems with the language of the conditions in the *Guidelines Manual* and that it be amended to direct sentencing courts

[23] The court also expressed concern about three conditions—substance abuse treatment; installation of computer filtering software in order to block access to sexually oriented websites; and the sex offender treatment program, including physiological testing—because they required the defendant to bear the expense of complying with those conditions, without explicitly stating that supervised release would not be revoked if the defendant could not pay the entire cost. Additionally, the court pointed out an "oddity" in the condition requiring the defendant to undergo substance abuse treatment that includes tests to determine whether alcohol was used. Yet, the defendant was allowed to consume alcohol. Presumably the purpose of the tests was to see how much he has consumed, but the court wrote that the condition should explicitly state this.

[24] The court listed four standard conditions as examples of administrative requirement in every case: that the defendant report to his or her probation officer; that the defendant answer the probation officer's questions; that the defendant follow the probation officer's instructions; and that the defendant not leave the judicial district without permission.

[25] The court held that, regardless of any possible constitutional concern, both of these conditions were "too broad in the absence of any effort by the district court to explain why they are needed."

[26] An exception to this suggestion would be conditions of supervised release that are "administrative requirements applicable whenever a term of supervised release is imposed."

to specifically address the need for the conditions.[27] In July 2015, it again requested that the Sentencing Commission amend the *Guidelines Manual* to address the concerns expressed by the Seventh Circuit and to ensure that sentencing courts have the necessary guidance.[28] The Department of Justice reasoned that "[c]ourts and litigants within the [Seventh] Circuit are addressing those concerns . . . in a variety of ways. They are spending a great deal of time and effort proposing and reviewing responses to conditions prior to sentencing and justifying those conditions at sentencing case-by-case, often struggling to find the appropriate support and justifications for various conditions of release."[29] In August 2015, as part of its ongoing multi-year review of sentencing practices pertaining to probation and supervised release, the Sentencing Commission included as a policy priority the consideration of amendments to the provisions of its *Guidelines Manual* relating to the imposition of conditions of supervision.[30]

In late 2014 and early 2015, judicial districts in the Seventh Circuit and other circuits began to adopt a wide variety of practices concerning the recommendation and imposition of standard and special conditions. Some districts changed the wording of the conditions, reduced the number of standard conditions, and included the recommended conditions along with a comprehensive justification in the presentence report. In late 2014 and early 2015, the Criminal Law Committee discussed the importance of some level of national uniformity in the practices surrounding the conditions, particularly the standard conditions, of probation and supervised release. First, standard conditions represent core supervision practices required in every case. Second, approximately 20 percent of defendants under supervision were sentenced in districts other than the district of supervision. Finally, some level of uniformity ensures efficient policy development and training at the national level.[31]

In February 2015, the Criminal Law Committee requested that the Administrative Office, with the assistance of a group of probation officers from throughout the country, conduct a comprehensive review of the standard and most common special conditions. The goals were to determine whether: (1) all of the standard conditions were required for supervision in all cases; (2) the language for some of the standard and common special conditions could be refined; and (3) additional information could be provided concerning the appropriate language and the legal and/or criminological purposes of the standard and most common special conditions to assist courts with providing the necessary support or justification for the conditions. The review included an exhaustive analysis of national case law and numerous discussions between Administrative Office staff and probation officers concerning the legal, policy, and practical issues surrounding the recommendation, imposition, and execution of conditions of supervision. As discussed below, the Administrative Office also collaborated with and sought feedback from other stakeholders at the national and district levels.

V. Changes Related to Conditions of Supervision

In September 2016, on recommendation of the Criminal Law Committee, the Judicial Conference of the United States approved: (1) revisions to the national judgment forms including amendments to the standard conditions that were endorsed by the Criminal Law Committee and approved by the Sentencing Commission; (2) the release of a public document on the conditions of supervision as a resource for defendants, the courts, and other criminal justice practitioners; and (3) amendments to the policy guidance for probation officers concerning the disclosure of recommended special conditions in or with the presentence report, the timing for recommendations of special conditions, and the privilege against self-incrimination during interviews of defendants by probation officers.[32]

1. Revisions to National Judgment Forms

The first component of the review of conditions was to assess whether all of the standard conditions are required for supervision in all cases and whether the language for the standard conditions could be refined. The Criminal Law Committee and Administrative Office staff, with the assistance of a group of probation officers from throughout the country, collaborated closely with the Sentencing Commission and its staff with the intent of harmonizing the standard conditions listed on the national judgment forms with those in the *Guidelines Manual*.[33] In November 2015, the Administrative Office distributed exposure drafts of proposed revisions to the national judgment forms to judges, probation offices, the Department of Justice, and the federal defenders for feedback. At its December 2015 meeting, the Criminal Law Committee considered the stakeholder comments, finalized proposed changes to the national judgment forms including the standard conditions, and shared the proposed amendments to the standard conditions with the Sentencing Commission for it to consider whether to include in its *Guidelines Manual*.[34]

In January 2016, the Sentencing Commission issued a public notice of and a request for comment regarding proposed amendments to revise, clarify, and rearrange the conditions of probation and supervised

[27] Letter from Jonathan J. Wroblewski, U.S. Department of Justice, to Hon. Patti B. Saris, Chair, U.S. Sentencing Commission (July 29, 2014).

[28] Letter from Jonathan J. Wroblewski, U.S. Department of Justice, to Hon. Patti B. Saris, Chair, U.S. Sentencing Commission (July 24, 2015).

[29] *Id.*

[30] *See* U.S. Sentencing Commission, "Notice of Final Priorities" (Aug. 14, 2015).

[31] *See Conditions Public Hearing*, *supra* note 18, at 5 (statement of Judge Ricardo S. Martinez).

[32] JCUS-SEP 16, p. 14-15. The Judicial Conference of the United States meets each March and September. A Report of the Proceedings is issued after each meeting that details the actions taken. Reports dating back to the beginning of the Judicial Conference are available at http://www.uscourts.gov/about-federal-courts/reports-proceedings-judicial-conference-us.

[33] Statements by Chief Judge Patti B. Saris of the District of Massachusetts, then-Chair of the U.S. Sentencing Commission, describe the collaboration between the Sentencing Commission and the Criminal Law Committee, which was then chaired by Judge Irene M. Keeley of the Northern District of West Virginia. At a February 17, 2016, public hearing (transcript available at: http://www.ussc.gov/sites/default/files/Transcript_6.pdf), Judge Saris stated that "the Commission's proposed amendment[s] . . . on supervised release [were] a result . . . of collaboration with the Criminal Law Committee, which has studied the current conditions in light of recent court precedent, as well as the Commission's own multi-year review." Similarly, at an April 15, 2016, public meeting (transcript available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20160415/Chairs-Remarks.pdf), Judge Saris remarked that "both the Commission and the Criminal Law Committee reviewed the conditions of supervision. . . . [O]ur staff worked closely with the Criminal Law Committee's staff to obtain helpful input from all of the stakeholders in the federal criminal justice system."

[34] As stated above, the meetings of the Criminal Law Committee are attended by representatives from various agencies including the Sentencing Commission.

release in the *Guidelines Manual*.[35] As explained in the Sentencing Commission's public notice, the proposed amendments were a result of the Commission's multi-year review of federal sentencing practices relating to the conditions of probation and supervised release and were also informed by a series of opinions issued by the Seventh Circuit.[36] In February 2016, the Sentencing Commission held a public hearing to receive testimony from invited witnesses on the proposed amendments.[37] The witnesses included Judge Ricardo S. Martinez, chief judge of the United States District Court for the Western District of Washington and current chair of the Criminal Law Committee.[38] At the hearing, Judge Martinez expressed the Criminal Law Committee's support for the proposed amendments, which were consistent with the conditions previously endorsed by the Criminal Law Committee.[39]

In April 2016, the Sentencing Commission submitted its proposed amendments to its *Guidelines Manual* to Congress.[40] Absent congressional action to the contrary, the amendments went into effect on November 1, 2016. As explained in the Sentencing Commission's public notice, these amendments responded to many of the legal concerns raised in the case law and were consistent with the proposed changes to the conditions in the national judgment forms.[41] At its September 2016 meeting, upon recommendation of the Criminal Law Committee, the Judicial Conference approved the revisions to the national judgment forms including the standard conditions.[42] The revised judgment forms became available to courts on November 1, 2016 to coincide with the effectiveness date of the amendments to the *Guidelines Manual*.[43]

While individual judicial districts have been free to adopt local judgment forms with different standard conditions, the Administrative Office has emphasized the policy benefits for adopting the standard conditions in the national judgment forms. First, the revised conditions were the result of collaboration and were based on feedback from numerous national and district-level stakeholders. Second, approximately 20 percent of defendants are sentenced in one judicial district but supervised in another district, and differences in standard conditions between districts can create confusion for supervisees and administrative burdens for courts and probation offices. Third, national uniformity aids in the development of national policies and training curricula. Fourth, the standard conditions in the revised national judgment forms track the amended standard conditions in the *Guidelines Manual* and in the new public document on the conditions of supervision. Finally, as discussed further below, the new public document on the conditions of supervision contains information clarifying and defining wording used in the revised standard conditions.

The most significant changes to the national judgment forms are described below.[44]

1. Clarifying and Structural Changes

- The standard conditions in the revised national judgment forms use the terminology "you must" in lieu of "the defendant shall" to use more plainly worded language and because judgment forms are directed toward defendants.[45]
- The revised national judgment forms include an introductory paragraph prior to the list of standard conditions explaining the role of the standard conditions in satisfying the probation officer's statutory duties under 18 U.S.C. § 3603.[46]
- The standard conditions in the revised national judgment forms are reordered to be consistent with the supervision timeline (i.e., the list of conditions begins with initial requirements to report to the probation office and probation officer and then describes subsequent obligations such as not leaving the judicial district without permission, allowing visits from the probation officer, maintaining employment, etc.).
- The revised national judgment forms include a reference to the new public document on conditions after the list of standard conditions to provide the defendant with further information regarding the conditions' scope, purposes, and method of implementation.[47]
- The revised national judgment forms clarify whether certain requirements are mandatory conditions or standard conditions. First, it specifically labels and lists the mandatory conditions for probation and supervised release, which are described in 18 U.S.C. §§ 3563(a) and 3583(d), respectively. Next, the requirement that the defendant report to the probation office within 72 hours of release from the Bureau of Prisons or of the date of sentencing for probation cases (formerly listed in an undesignated paragraph on the national

[35] U.S. Sentencing Commission, "Notice of Proposed Amendments" (Jan. 15, 2016).

[36] *Id.*

[37] *See supra* note 18.

[38] The other witnesses represented the views of the Department of Justice, the Federal Public and Community Defenders, and the Victims Advisory Group to the Sentencing Commission.

[39] *See also* USSG App. C, amend. 803 (effective Nov. 1, 2016) ("The changes in the amendment are consistent with proposed changes to the national judgment form recently endorsed by the CLC and Administrative Office of the U.S. Courts, after an exhaustive review of those conditions aided by probation officers from throughout the country.").

[40] *See* U.S. Sentencing Commission, "Notice of Submission of 2016 Amendments to Congress" (April 28, 2016).

[41] *Id.*

[42] JCUS-SEP 16, p. 14-15.

[43] USSG App. C, amend. 803 (effective Nov. 1, 2016).

[44] The national judgment forms are available at: http://www.uscourts.gov/forms/criminal-judgment-forms. For the official description of the recent amendments to the *Guidelines Manual* related to the conditions of probation and supervised release, *see* USSG App. C, amend. 803 (effective Nov. 1, 2016).

[45] The revised standard conditions in the national judgment forms and in the *Guidelines Manual* are identical in all but one respect. Specifically, the *Guidelines Manual* continues to use the terminology "the defendant shall" when listing the standard conditions that may be imposed by judges or recommended by the parties or probation officers. The national judgment forms, which are directed toward defendants, now use the terminology "you must" when describing the conditions. *See also* 18 U.S.C. § 3603(1) (requiring that a probation officer "instruct a probationer or a person on supervised release . . . as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions."); 18 U.S.C. §§ 3563(d) and 3583(f) (requiring the court to direct that the probation officer provide the defendant with a written statement that sets forth all the conditions of probation and supervised release and is "sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.").

[46] The new paragraph states: "[Y]ou must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition."

[47] Specifically, the revised judgment forms state: "A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov."

judgment forms) is explicitly classified as a standard condition. Finally, the requirement that the defendant not "possess a firearm, ammunition, destructive device, or other dangerous weapon" (formerly listed in an undesignated paragraph in the national judgment forms) is explicitly classified as a standard condition.[48]

2. Elimination of Standard Conditions Not Applicable in Every Case

- The conditions that the defendant shall "support his or her dependents" and "meet other family responsibilities" have been removed as standard conditions because they may not be reasonably related to the nature and circumstances of the offense or the history and characteristics of the defendant in every case. If a probation officer or court determines that these types of conditions are necessary, they may recommend and impose them as special conditions.[49]
- The condition prohibiting the "excessive use of alcohol" has been removed as a standard condition because it may not be reasonably related to the nature and circumstances of the offense or the history and characteristics of the defendant in every case. If a probation officer or court determines that this type of condition is necessary, they may recommend and impose it as a special condition.[50]

3. Elimination of Standard Conditions Addressed by Other Conditions

- The condition that the defendant "shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician" is removed as a standard condition. A review of national case law revealed that this condition does not serve a distinct supervision purpose and is addressed by the mandatory condition prohibiting the defendant from unlawfully possessing or using a controlled substance. If a probation officer or court determines that these types of conditions are necessary, the probation officer and court may recommend and impose them as special conditions.[51]
- The condition that the defendant "shall not frequent places where controlled substances are illegally sold, used, distributed, or administered" has been removed as a standard condition. A review of national case law revealed that this condition does not serve a distinct supervision purpose and is addressed by other conditions including the mandatory condition prohibiting unlawful possession/use of a controlled substance, the mandatory drug testing condition, and the standard condition prohibiting association with those involved in criminal activity. If a probation officer or court determines that these types of conditions are necessary, the probation officer and court may recommend and impose them as special conditions.[52]

4. Adding a Knowledge Requirement for Violating Certain Standard Conditions

- The condition requiring that the defendant not leave the federal judicial district without permission of the court or probation officer now requires that the defendant not knowingly leave the judicial district.[53]

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[48] *See also Conditions Public Hearing*, *supra* note 18, at 8 (statement of Judge Ricardo S. Martinez) ("[T]he [Criminal Law] Committee agrees with the proposal to add as a standard condition the requirement that the defendant 'not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon.' This condition promotes the public safety and reduces safety risks posed to the probation officer. To the extent that the nature and circumstances of the offense or the history and characteristics of the defendant indicate that a prohibition on possessing other types of weapons is necessary, probation officers may recommend a special condition.").

[49] *See also id.* at 7 (statement of Judge Ricardo S. Martinez) ("[T]he [Criminal Law] Committee supports the proposal to remove the current standard condition requiring that the defendant 'support his or her dependents and meet other family responsibilities.' This condition would not be reasonably related to the history and characteristics of the defendant if the defendant had no dependents or family obligations. Additionally, the scope of the term 'meet other family responsibilities' is unclear. In fact, the group of probation officers that assisted with the review of standard conditions unanimously agreed that the term is vague and leads to uncertain and inconsistent enforcement. Of course, if a probation officer or court determines that a condition requiring support of dependents or the satisfaction of other family responsibilities is necessary, the probation officer and court may recommend and impose such a requirement as a special condition."); USSG App. C, amend. 803 (effective Nov. 1, 2016) ("These changes address concerns expressed by the Seventh Circuit that the current condition—which requires a defendant to 'support his or her dependents and meet other family responsibilities'—is vague and does not apply to defendants who have no dependents. . . . The amendment uses plainer language to provide better notice to the defendant about what is required. The Commission determined that this condition need not apply to all defendants but only to those with dependents.").

[50] *See also Conditions Public Hearing*, *supra* note 18, at 7 (statement of Judge Ricardo S. Martinez) ("[T]he [Criminal Law] Committee is in favor of the proposal to remove the current standard condition requiring that the defendant 'shall refrain from excessive use of alcohol.' The Senate report accompanying the Sentencing Reform Act made clear that '[i]t is not intended that this condition . . . be imposed on a person with no history of excessive use of alcohol,' and that '[t]o do so would be an unwarranted departure from the principle that conditions . . . should be reasonably related to the general sentencing [factors].' To be sure, alcohol use may in individual cases have a criminogenic effect or inhibit the satisfaction of other conditions such as maintaining employment or supporting families. If a probation officer or court determines that an alcohol restriction condition is necessary, the probation officer and court may recommend and impose such a requirement as a special condition in the individual case. It is also noteworthy that the probation officers that assisted with the review of standard conditions unanimously agreed that the current standard condition prohibiting excessive use of alcohol is vague, difficult to enforce, and not valuable as a supervision tool. In fact, the officers opined that it is more common and effective to request alcohol treatment and a complete alcohol ban if it is determined in the individual case that such a condition is reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant."); USSG App. C, amend. 803 (effective Nov. 1, 2016) ("[T]he standard condition[] requiring that the defendant refrain from excessive use of alcohol ha[s] been deleted. The Commission determined that th[is] condition[] [is] . . . best dealt with as special conditions or are redundant with other conditions. Specifically, to account for the supervision needs of defendants with alcohol abuse problems, a new special condition that the defendant 'must not use or possess alcohol' has been added.").

[51] *See also* USSG App. C, amend. 803 (effective Nov. 1, 2016) ("[T]he standard conditions requiring that the defendant . . . not possess or distribute controlled substances or paraphernalia . . . ha[s] been deleted. The Commission determined that th[is] condition[] [is] either best dealt with as special condition[] or [is] redundant with other conditions. Specifically, . . . [t]he requirement that the defendant abstain from the illegal use of controlled substances is covered by the 'mandatory' conditions prohibiting commission of additional crimes and requiring substance abuse testing.").

[52] *See also* USSG App. C, amend. 803 (effective Nov. 1, 2016) ("[T]he standard condition[] requiring that the defendant . . . not frequent places where controlled substances are illegally sold . . . ha[s] been deleted. The Commission determined that th[is] condition[] is either best dealt with as [a] special condition[] or [is] redundant with other conditions. Specifically, . . . the . . . [condition] is encompassed by the 'standard' condition that defendants not associate with those they know to be criminals or who are engaged in criminal activity.").

[53] *See also* USSG App. C, amend. 803 (effective Nov. 1, 2016). ("Testimony received by the

- The condition prohibiting communication or interaction with those engaged in criminal activity or those with felony convictions now requires that the defendant know the person is engaged in criminal activity or that the defendant know that the person has a felony conviction. For interactions and communications with those convicted of a felony, the condition now requires that the defendant's communication or interaction be with knowledge.[54]

5. Ensuring that Standard Conditions do not Contain Multiple Requirements

- The requirements that the defendant follow the instructions of the probation officer and answer truthfully the officer's inquiries, which were combined in one standard condition, are now divided into two separate standard conditions individually requiring the defendant to answer truthfully the inquiries of officers and following the instructions of officers related to the conditions of supervision.

6. Making Standard Condition Language more Clear and Precise

- The requirement that the defendant "report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons" is amended to provide clearer instructions to the defendant about where and when to report to the probation office and to ensure that the defendant is assigned to a probation office for supervision. The revised condition states: "You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame."[55]
- The condition requiring the defendant to "report to the probation officer in a manner and frequency directed by the court or probation officer" has been amended to use clearer language. The new condition states: "After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed."
- The condition requiring the defendant to notify the probation officer at least ten days prior to any "change in residence" is clarified. The new condition states: "You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least ten days before the change."[56] The condition also now clarifies what the defendant must do if there is an unanticipated change of residence (e.g., due to eviction). The new condition states: "If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change."
- The condition requiring the defendant to "work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons" is amended to use clearer language and to specify that a defendant does not violate the condition if there is an attempt to find employment. The new condition states: "You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so."[57]
- The condition requiring the defendant to notify the probation officer at least ten days prior to any "change in employment" is clarified. The new condition states: "If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change." The condition also now clarifies what the defendant must do if there is an unanticipated change in employment (e.g., due to termination by the employer). The new condition states: "If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change."
- The condition requiring the defendant to permit the probation officer to visit him or her at any time at home or elsewhere and to permit confiscation of any "contraband" observed in plain view is clarified. The new condition states that the defendant is required to permit the probation officer to take any "items prohibited by the conditions of your supervision" observed in plain view.[58]

[Sentencing] Commission has observed that a rule prohibiting a defendant from leaving the district without permission of the court or probation officer may be unfairly applied to a defendant who unknowingly moves between districts.").

[54] *See also* USSG App. C, amend. 803 (effective Nov. 1, 2016) ("These revisions address concerns expressed by the Seventh Circuit that the condition is vague and lacks a mens rea requirement. . . . The revision adds an express mental state requirement and replaces the term "associate" with more definite language.").

[55] For defendants sentenced to probation, the revised condition states: "You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced, unless the probation officer instructs you to report to a different probation office or within a different time frame."

[56] While the primary purpose of amending this and other conditions was to make the condition language less vague, it is noteworthy that many stakeholders, including the group of probation officers from throughout the country assisting with the review of the conditions, opined that many of the clarifying changes also improved the effectiveness of supervision. For instance, they opined that the supervision process is improved if defendants inform the probation officer about, not just changes in place of residence, but changes in other living arrangements such as cohabitants.

[57] *See also Conditions Overview*, *infra* note 64, at 30 (defining full-time employment to be consistent with benchmarks set by federal regulations and providing examples of reasons for excusing a defendant from attempting to find full-time employment); USSG App. C, amend. 803 (effective Nov. 1, 2016) ("The Commission determined that these changes are appropriate to ensure that defendants are made aware of what will be required of them while under supervision. These requirements and associated benchmarks (e.g., 30 hours per week) are supported by testimony from the [Criminal Law Committee] as appropriate to meet supervision needs.").

[58] Some stakeholders recommended to the Criminal Law Committee that the scope of this condition should be narrowed to allow probation officer visits during certain daytime hours or only "at a reasonable time." The Criminal Law Committee determined that effective supervision required visits by probation officers at a broader range of times and that limiting visits to "reasonable" times posed vagueness concerns. For a detailed description of the purpose and method of implementation of the condition allowing probation officer visits, including a description of the importance of visiting defendants during a wide range of hours, *see Conditions Overview*, *infra* note 64, at 25. *See also* USSG App. C, amend. 803 (effective Nov. 1, 2016) ("[T]he Commission has determined that, in some circumstance, adequate supervision of defendants may require probation

- The condition stating that the defendant "shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer" is amended to clarify what type of association is prohibited. The new condition states: "You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer."[59]
- The requirement that the defendant not "possess a firearm, ammunition, destructive device, or other dangerous weapon" is amended to clarify the scope of "possession" and to define "dangerous weapon." The revised condition states: "You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers)."[60]
- The former standard condition regarding risk posed by the defendant to other persons stated: "As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement." This condition is revised to use clearer language. The new condition states: "If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk."[61]
- The condition requiring the defendant to "follow the instructions of the probation officer" is amended to clarify that the defendant is required to follow the instructions of the probation officer "related to the conditions of supervision."[62]

2. New Public Document on Conditions of Supervision

An additional component of the review of conditions was to determine whether the language for the most commonly imposed special conditions could be refined and whether additional information could be provided concerning the legal and/or criminological purposes of the standard and most common special conditions. Between February 2015 and November 2015, Administrative Office staff, with the assistance of a group of probation officers from throughout the country, developed a document titled *Overview of Probation and Supervised Release Conditions* ("*Conditions Overview*"). In November 2015, an exposure draft of the *Conditions Overview* was distributed to judges, probation offices, the Department of Justice, and Federal Defenders for feedback, which was considered when making revisions. At its June 2016 meeting, the Criminal Law Committee revised, finalized, and endorsed the document. In September 2016, upon recommendation of the Criminal Law Committee, the Judicial Conference approved the public release of the *Conditions Overview*.[63]

The *Conditions Overview* is intended to serve several primary purposes. First, it may assist the courts and parties in recommending or imposing conditions that are tailored to the individual case, that address the relevant statutory factors, and that are accompanied by adequate support or justification. Second, it may help with recommending and imposing special conditions with wording that is clear and legally sound. Third, it may assist in providing advance notice to defendants of the conditions of supervision that may be imposed. The document may also serve other secondary purposes, including describing the purposes and method of implementation of the conditions for appellate courts and serving as a training document for probation offices at the national and district levels.

The *Conditions Overview* comprises three chapters. Chapter 1 provides an overview of the relevant legal framework concerning the imposition of conditions and describes the social science research, theories, and perspectives underlying many of the conditions. Chapter 2 lists and describes the revised standard conditions approved by the Judicial Conference and Sentencing Commission. Chapter 3 lists and describes the most commonly imposed special conditions. For each condition in Chapter 2 and Chapter 3, the document discusses the: (1) statutory authority for imposing the condition; (2) standard condition language or sample special condition language; (3) purpose; and (4) method of implementation.

With regard to the statutory authority, the document lists the subsection from 18 U.S.C. § 3563 authorizing the court to impose the condition.[64] As to the condition language, the sample special condition language is based

officers to have the flexibility to visit defendants at off-hours, at their workplaces, and without advance notice to the supervisee. For example, some supervisees work overnight shifts and, in order to verify that they are in compliance with the condition of supervision requiring employment, a probation officer might have to visit them at their workplace very late in the evening.").

[59] *See also* USSG App. C, amend. 803 (effective Nov. 1, 2016) ("These revisions replace[] the term 'associate' with more definite language.").

[60] *See also Conditions Overview*, *infra* note 64, at 35 (defining "firearm," "ammunition," and "destructive device"); USSG App. C, amend. 803 (effective Nov. 1, 2016) ("The amendment . . . defines 'dangerous weapon' as 'anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers.'").

[61] *See also Conditions Overview*, *infra* note 64, at 39 (describing specific guidelines regarding when disclosure of risk by a probation officer is necessary); USSG App. C, amend. 803 (effective Nov. 1, 2016) ("The Commission determined that this revision is appropriate to address criticism by the Seventh Circuit regarding potential ambiguity in how the condition is currently phrased.").

[62] *See also Conditions Overview*, *infra* note 64, at 41 (describing instances when the probation officer may instruct the defendant to abide by rules that are required to satisfy other conditions of supervision. These may include, for example, instructing the defendant to provide tax returns or other documentation to ensure that the defendant is complying with the condition to not commit another crime; enforcing the condition restricting travel by instructing a defendant permitted to travel outside of the district to call the probation officer upon his or her return; and enforcing the condition requiring lawful employment by instructing defendants to report daily or weekly on their job search activities).

[63] The *Conditions Overview* is available at: http://www.uscourts.gov/services-forms/overview-probation-supervised-release-conditions.

[64] The statutory authority for imposing discretionary conditions of probation is set forth at 18 U.S.C. § 3563(b). The statutory authority for imposing discretionary conditions of supervised release is set forth at 18 U.S.C. § 3583(d), which incorporates section 3563(b) by reference. While section 3563(b) lists optional conditions that may be imposed, section 3563(b)(22) also states that the court may provide that the defendant "satisfy such other conditions as the court may impose." This catchall provision "makes clear that the enumeration [in section 3563(b)] is suggestive only, and not intended as a limitation on the court's authority to consider and impose any other appropriate conditions." S. Rep. No. 98-225, at 93 (1983).

on a review of the most common conditions currently being used by individual districts and an analysis of national case law. While the sample language for special conditions is intended to be clear and legally sound, there may be cases where the court or the parties determine that different condition language is necessary to account for the individual circumstances of the case. There may also be circuit-specific case law requiring variations from the sample special condition language. Each judicial district, therefore, should fashion special conditions that comport with circuit case law requirements.

Next, to assist the courts and the parties with applying the conditions in the individual cases and providing the necessary support or justification, the document describes the purposes of the condition, including satisfying relevant statutory purposes of sentencing under 18 U.S.C. § 3553 and fulfilling the statutory duties of probation officers under 18 U.S.C. § 3603. In addition to describing the statutory purposes of the conditions, the document identifies the social science basis for the individual standard and special conditions.[65] Finally, to assist the courts and the parties with applying the conditions in the individual cases and providing the necessary support or justification, the *Conditions Overview* provides the courts and the parties with a specific description of how the conditions are implemented by probation officers after they are imposed by sentencing courts.

3. Related Policy Changes

In September 2016, upon recommendation of the Criminal Law Committee, the Judicial Conference approved changes to the policy guidance developed for probation officers in the *Guide to Judiciary Policy* concerning the recommendation and implementation of conditions of probation and supervised release. Specifically, it approved changes related to the (a) disclosure of recommended special conditions; (b) the timing for recommending special conditions; and (c) the privilege against self-incrimination during interviews of persons on supervision.

A. Disclosure of Special Conditions

As discussed above, courts have recently suggested that defendants be provided notice of conditions that may be imposed prior to sentencing.[66] The goals of advance notice include allowing the parties to object and present an informed response to the recommended conditions at the sentencing stage rather than after remand from the appellate court.[67] This process is ultimately intended to result in conditions that are tailored to the individual case, satisfy the relevant statutory sentencing factors, produce less confusion and uncertainty, and perhaps, fewer appeals.[68] The amendment to the *Guide to Judiciary Policy* recently approved by the Judicial Conference recommends that the probation officer attach any recommended special conditions and the reasons for them when the presentence report is initially disclosed and when the final report is disclosed, unless such disclosures are limited by the court.[69]

B. Timing for Recommending Special Conditions

The Seventh Circuit has recently suggested as a "best practice" that a court hearing be held prior to the defendant's release to the community to assess the appropriateness of conditions that were imposed at the time of sentencing in light of any changed circumstances during the period of imprisonment.[70] It has also suggested that any uncertainty about the appropriateness of conditions at the time of reentry to the community may be accommodated by 18 U.S.C. § 3583(e)(2), which allows a sentencing court to modify conditions of supervised release at any time.[71]

An illustration of the use of 18 U.S.C. § 3583(e)(2) to modify conditions is in the rapidly changing area of computer-related restrictions. In recent years, courts in several circuits have suggested that, where technological considerations prevent specifying at the time of sentencing how a computer-related condition is to be implemented following years of imprisonment, a modification of conditions after sentencing or a postponement in imposing conditions should be considered to ensure that they remain both narrowly tailored and effective as technology and other

[65] There has been little discussion in the criminological literature regarding the purposes of conditions. *See e.g.,* Edward J. Latessa and Harry E. Allen, *Corrections in the Community*, at 481 (2003) (noting there is little empirical or theoretical discussion in the criminological literature of the purposes of supervision conditions); Sarah Turnbull and Kelly Hannah-Moffat, "Under these Conditions: Gender, Parole, and Governance of Reintegration," British Journal of Criminology, at 523 (2009) ("Despite the widespread use of conditions in various phases of the criminal justice system (e.g. bail, probation, parole), there has been little theoretical examination of their purposes or the implications associated with their use.").

[66] *See, e.g., United States v. Kappes*, 782 F.3d 828, 842 (7th Cir. 2015) ("The first general principle sentencing judges should consider when imposing conditions of supervised release is that it is important to give advance notice of the conditions being considered."). An exception to this "best practice" suggestion would be conditions of supervised release that are "administrative requirements applicable whenever a term of supervised release is imposed" such as "requiring the defendant to report to his probation officer, answer the officer's questions, follow his instructions, and not leave the judicial district without permission." *United States v. Thompson,* 777 F.3d 368, 378 (7th Cir. 2015).

[67] *See, e.g., United States v. Siegel*, 753 F.3d 705, 710 (7th Cir. 2014) ("[T]he sentencing hearing may be the first occasion on which defense counsel learns of the probation service's recommendation for conditions of supervised release. With no advance notice, counsel may have nothing to say about the conditions. . . . With therefore no adversary challenge to the conditions of supervised release, the judge, being habituated to adversary procedure, is unlikely to question the conditions recommended by the probation service."); *United States v. Bryant,* 754 F.3d 443, 446 (7th Cir. 2014) ("[I]t is difficult to prepare to respond to every possible condition of supervised release that the judge may impose without any advance notice, given that the judge is empowered to impose special conditions that are not listed in the [sentencing] guidelines, or anywhere else for that matter."); *United States v. Scott,* 316 F.3d 733, 735 (7th Cir. 2003) ("Knowledge that a condition of this kind was in prospect would have enabled the parties to discuss such options intelligently.").

[68] *United States v. Kappes*, 782 F.3d 828, 843 (7th Cir. 2015).

[69] Rule 32 of the Federal Rules of Criminal Procedure provides for the disclosure of the presentence report and the sentencing recommendation. Under the rule, the report is initially disclosed to the parties at least 35 days before sentencing (unless the defendant waives this minimum period). The final report is provided to the court and the parties at least 7 days before sentencing. Additionally, under Rule 32, the court may, by local rule or by order in a case, direct the probation officer not to disclose the probation officer's sentencing recommendation to anyone other than the court.

[70] *United States v. Siegel*, 753 F.3d 705, 717 (7th Cir. 2014).

[71] *See, e.g., United States v. Neal*, 810 F.3d 512, 519 (7th Cir. 2016) ("[P]redictions about appropriate conditions of supervised release are imperfect . . . Section 3583(e)(2) accommodates these uncertainties by allowing changes to a defendant's conditions of supervised release at any time."); Under Federal Rule of Criminal Procedure 32.1(c)(2), the court may modify the conditions of probation or supervised release without a hearing if (1) the defendant waives the hearing, or (2) the modification is "favorable to the [defendant]" and does not extend the term of probation or of supervised release, and the U.S. Attorney has received notice of the modification sought and has had a reasonable opportunity to object and has not done so.

circumstances change.[72]

Prior to the September 2016 amendments, the *Guide to Judiciary Policy* recommended that in some cases it might be appropriate for probation officers to avoid recommending special conditions to the court until the defendant is preparing to re-enter the community from prison.[73] It has further recommended that, for defendants facing lengthy terms of imprisonment, probation officers should consider whether the risks and needs present at the time of sentencing will be present when the defendant returns to the community.[74] The recently approved amendments add two examples to illustrate when it may be appropriate for probation officers to defer recommending conditions.[75] In the first example, if a defendant begins contacting the victim of the crime for which the defendant was convicted during the period of supervision, the probation officer may consider recommending a special condition prohibiting contact with the victim.[76] In the second example, if the probation officer is considering recommending a special condition limiting, filtering, or monitoring the defendant's use of computers and the internet, it may be appropriate to avoid recommending such a condition until the defendant is preparing to re-enter the community, because monitoring and filtering technology may change or become obsolete during the period of imprisonment.[77]

C. Privilege against Self-Incrimination

In January 2016, when it requested public comment on proposed amendments to the standard conditions in its *Guidelines Manual*, the Sentencing Commission sought feedback on whether the standard condition requiring that the defendant "answer truthfully" the probation officer's questions should be retained or, instead, whether the defendant should be required to "be truthful when responding to" the questions of the probation officer.[78] In the February 2016 public hearing before the Sentencing Commission, Judge Ricardo S. Martinez testified on behalf of the Criminal Law Committee and noted that the purpose of the current "answer truthfully" condition is to build positive rapport and facilitate an open and honest discussion between the probation officer and the person on supervision.[79] As he explained, accurate and complete information about the nature and circumstances of the offense and the history and characteristics of the defendant is necessary to implement effective supervision practices. Judge Martinez expressed the Criminal Law Committee's belief that a condition requiring that the defendant "answer truthfully" the questions of probation officer, along with policy guidance directing the officer how to ensure that Fifth Amendment rights are not violated, satisfies constitutional requirements without negatively affecting the ability to effectively supervise defendants.[80]

In its January 2016 request for public comment, the Sentencing Commission also asked whether it should clarify in the commentary to the *Guidelines Manual* (rather than in the language of the standard condition itself) that a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of the condition requiring the defendant to "answer truthfully" questions of the probation officer.[81] At the February 2016 hearing, Judge Martinez conveyed the Criminal Law Committee's support for including such a clarification, and he noted that the Criminal Law Committee intended to recommend to the Judicial Conference that similar guidance be added to the *Guide to Judiciary Policy* and the new public document on the conditions of supervision.

Indeed, as Judge Martinez testified, the Criminal Law Committee already supported this type of guidance in 2011 for defendants convicted of sex offenses when it endorsed a new sex offender management procedures manual for probation officers. Under that guidance, if the defendant refuses to answer a specific question during an interview on the grounds that it is incriminating, the probation officer is instructed not to compel (e.g., through threat of revocation) the defendant to answer the question. If there is uncertainty about whether the invocation of the privilege against self-incrimination is valid (i.e., whether the specific question may lead to a realistic chance of incrimination), the probation officer is instructed to refer the matter to the court to make this determination.[82] In his testimony before the Sentencing Commission, Judge Martinez expressed the Criminal Law Committee's belief that adding this guidance to policies concerning all types of offenses rather than just sex offenses would address any Fifth Amendment concerns without having unintended consequences on the ability of probation officers to effectively supervise defendants.

The revised guidance to probation

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[72] *See, e.g.*, *United States v. Kent*, 554 Fed.Appx 611 (9th Cir. 2014) (noting that if technology has changed by the time the defendant is released from prison, and the defendant believes that the probation office has not met its continuing obligation to ensure not only the efficacy of the computer monitoring methods, but also that they remain reasonably tailored so as not to be unnecessarily intrusive, he may seek relief from the district court at that time); *United States v. Quinzon*, 643 F.3d 1266, 1273 (9th Cir. 2011) ("[A]s new technologies emerge or circumstances otherwise change, either party is free to request that the court modify the condition of supervised release . . . In situations like this one, where technological considerations prevent specifying in detail years in advance how a condition is to be effectuated, district courts should be flexible in revisiting conditions imposed to ensure they remain tailored and effective."); *United States v. Balon*, 384 F.3d 38, 47 (2d Cir. 2004) (stating that changing technology "is an appropriate factor to authorize a modification of supervised release conditions under Section 3583(e))."); *United States v. Lifshitz*, 369 F.3d 173, 193, n.11 (2d Cir. 2004) ("Because [the defendant] is being sentenced to probation, it seems necessary to determine, at this time, the conditions of that probation and to base that determination, in the first instance, on the state of technology and other practical constraints as they currently exist. Were this, however, a case involving supervised release, or if there were any reasons why the commencement of the defendant's term of probation would be substantially delayed, it might well be prudent for the district court to postpone the determination of the supervised release or probation conditions until an appropriate later time, when the district court's decision could be based on then-existing technological and other considerations."). *See also* Stephen E. Vance, *Supervising Cybercrime Offenders Through Computer-Related Conditions: A Guide for Judges* (Federal Judicial Center 2015).

[73] *Guide to Judiciary Policy*, Vol. 8D, § 530.20.30(b)(3).

[74] *Id*. at Vol. 8D, § 530.20.30(b)(2).

[75] *Id*. at Vol. 8D, § 530.20.30(b)(4).

[76] *Id*.

[77] *Id*.

[78] U.S. Sentencing Commission, "Notice of Proposed Amendments" (Jan. 15, 2016).

[79] *Conditions Public Hearing*, *supra* note 18, at 8 (statement of Judge Ricardo S. Martinez).

[80] For an overview of Fifth Amendment issues in the context of federal supervision, including an analysis of the seminal Supreme Court case—*Minnesota v. Murphy*, 465 U.S. 420 (1984)—*see* David N. Adair, *The Privilege against Self-Incrimination and Supervision*, 63 Fed. Probation 73 (June 1999).

[81] U.S. Sentencing Commission, "Notice of Proposed Amendments," (Jan. 15, 2016).

[82] For a more thorough description of the guidance in the Sex Offender Management Procedures Manual, *see* Stephen E. Vance, *Looking at the Law: An Updated Look at the Privilege Against Self-Incrimination in Post-Conviction Supervision*, 75 Fed. Probation 33, 37 (June 2011).

officers approved by the Judicial Conference in September 2016 states that "[i]f the defendant refuses to answer a specific question on the grounds that it is incriminating, the officer should not compel (e.g., through threat of revocation) the defendant to answer the question. If there is uncertainty about whether the invocation of the privilege against self-incrimination is valid (i.e., whether the specific question may lead to a realistic chance of incrimination), the probation officer should refer the matter to the court to make this determination."[83]

[83] *Guide to Judiciary Policy*, Vol. 8E, § 190.45. This new section also states: "This guidance applies to interviews or interactions between officers and defendants in a 'non-custodial' setting (i.e., a setting where someone in the defendant's position would not feel like he or she is restrained, prohibited from leaving the interview, or otherwise in an 'arrest-like' situation). In 'custodial' settings, additional safeguards such as *Miranda* warnings may be required. In these situations, it is recommended that officers consult with their court to determine the appropriate procedures." *Id*. *See also Conditions Overview*, *supra* note 64, at 23 (describing recently approved guidance in *Guide to Judiciary Policy* regarding the privilege against self-incrimination); USSG App. C, amend. 803 (effective Nov. 1, 2016) ("The amendment [to the *Guidelines Manual*] also adds commentary to clarify that a defendant's legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of the 'answer truthfully' condition. The [Sentencing] Commission determined that this approach adequately addresses Fifth Amendment concerns raised by some courts, . . . while preserving the probation officer's ability to adequately supervise the defendant.").