



## **Driver Diversion Program**

DATE: Tuesday, November 1, 2022  
Instructor(s): Al Chapleau, Esq., Cynthia Dort  
MCLE: 1.0 Professional Practice

This program has been approved for credit in  
New York State for all attorneys  
including those who are Newly Admitted  
(less than 24 months) and administered by  
the Onondaga County Bar Association.



## Presenters

**Al Chapleau, Esq.**, Professor Chapleau is both a Visiting Professor of Law at Albany Law School where he teaches Evidence and Constitutional Criminal Procedure and an Associate Professor of Criminal Justice and Law at the College of Saint Rose where he teaches criminal justice, constitutional law and criminal procedure. From 2007 to 2021 he served as Instructor and Educational and Curriculum Consultant to the New York State Office of Court Administration's Office of Justice Court Support. OJCS is responsible for the continuing judicial education (CJE) training and initial certification to assume the bench of approximately 2100 Town and Village Justices in New York. In 2018 his role with OJCS was expanded to cover the development and delivery of mandatory court clerk certification and training (CCCE).

While teaching at various times as an adjunct professor at Albany Law School, Siena College and UAlbany, Professor Chapleau served 22 years in the Schenectady County District Attorney's Office with 18 years as the Chief Assistant District Attorney. Professor Chapleau began his legal career as a judicial law Clerk to several NYS Superior Court Judges. He also served from 1984-89 as a NYS Assistant Attorney General handling complex construction contract litigation.

B.A. Siena College • J.D. Albany Law School • M.A. SUNY Albany

Bio for Cynthia Dort:

- Eastern Nazarene College- Education, Empire State College- Psychology
- Married and Mother of 4 Boys
- NYS Fire Instructor since 1996- Education Instructor for Instructor Development, Teaching Children Fire Safety Programs
- Occupant Protection Educator for Cornell University since 2006- Works in Saratoga County on all traffic safety initiatives:
- Nationally Certified Child Passenger Safety Instructor since 1998
- NYS Defensive Driving Instructor since 2010
- NYS Distracted Driving Instructor since 2012
- Nationally Certified Alive At 25 Instructor since 2010
- Educator for DWI Victim Impact Panel



# Driver Education Programs

## *Sentencing Options Designed to Educate, Reduce Injuries and Save Lives*

*Presented by:  
Cynthia Dort*

*Occupant Protection Educator, Cornell University Extension*

*Alfred D. Chapleau, Esq.*

*Visiting Professor of Law Albany Law School*

*Associate Professor of Criminal Justice and Law*

## YOUR SENTENCING DECISION

*WHAT IS YOUR PURPOSE IN SENTENCING AN OFFENDER?*

*PUNISH (RETRIBUTION)*

*STOP THE CONDUCT FROM HAPPENING AGAIN (DETERRANCE)*

*HOW DOES YOUR SENTENCE ACCOMPLISH THESE GOALS?*

## Why Driver Education Programs?

*Provide the court with additional sentencing options in certain vehicle and traffic offenses*

*Driver's provided opportunity to understand how and why their driving choices can have life altering consequences not only for themselves, but for others.*

## What are Driver Education Programs?

### **EVIDENCE BASED EDUCATION PROGRAMS**

#### **DESIGNED TO:**

- *Identify and target poor driving decisions and habits*
- *Stress driver's responsibility to obey the law*
- *Educate drivers on how to make good choices when driving*

## Driver Education Programs

- *Alive at 25*
- *Broken Heart Panels*
- *Defensive Driving*
- *Distracted Driving*
- *Victim Impact Panel*
- *Repeat offender classes*

## Alive at 25

- *National Safety Council Course*
- *Instructors must go through a standardized certification program*
- *Yearly requirements must be obtained to keep instructor certification*
- *Court ordered, but parent/guardian can request young driver attendance*

## Alive at 25

*DESCRIPTION OF WHAT IS COVERED IN COURSE*

*TIME COMMITMENT*

*COST*

## Alive at 25

### *VEHICLE AND TRAFFIC OFFENSES:*

- 1. Speeding*
- 2. Failure to Yield*
- 3. Disobeying traffic signal*
- 4. DWI/Zero tolerance violation*
- 5. Drugged Driving*
- 6. Reckless Driving*
- 7. Driving w/suspended license*
- 8. Trying to evade police/police chase*



## Broken Heart Panels

- *Developed by Cindy in 2007 .*
- *10 Saratoga County families shared their most horrific moment in hopes no other family should have to ever experience what they went through*

## Broken Heart Panels

- *Reality based program*
- *Participants relate to the locations where the crashes occurred, as these are the very roads they travel to work, school, and play.*

# Broken Heart Panels

*The Broken Heart panels are a deeply moving memorial that details the tragic deaths of 9 Saratoga County residents and their families Broken Hearts caused by destructive decisions.*

*TIME COMMITMENT: 1-2 hours to view all 30 panels and 18 "Story" boxes*

*COST: Total Project (\$24,000) – Cost: At schools/community events - \$0.00*



## Defensive Driving

- *National Safety Council Course*
- *Instructors must go through a standardized certification program*
- *Yearly requirements must be obtained to keep instructor certification*
- *Can be court mandated*
- *Open to all licensed drivers to reduce points or receive automobile insurance discount*

## Defensive Driving

*Refreshes knowledge of traffic laws and teaches safe driving strategies. It reduces points from your driving record and qualifies you for car insurance discount.*

*TIME COMMITMENT: 6 hours*

*COST: \$40-\$80*

## Defensive Driving

- *Virtual (asynchronous) and in-person*
  - *In person does allow participant to be actively engaged*
  - *Guarantee they are the actual person taking the course*
  - *Benefit from hearing additional information presented by instructors*
  - *Benefit from questions from other participants within the class*



## Distracted Driving

- *Program created by using national resources and Cornell University's evidence-based curriculum theory.*
- *This program educates drivers on what distracted driving is:*
  - *Visual*
  - *Manual*
  - *Cognitive*

## Distracted Driving

*This program educates drivers on what constitutes distracted driving*

*TIME COMMITMENT: 2.5 hours*

*COST: \$25*

## Distracted Driving

- *This program can be court mandated to reduce points.*
- *This program can be also be offered to companies that employ drivers, to health classes in high school or to any organization concerned with distracted driving.*

## Victim Impact Panel

- *Panels are mandated.*
- *NYS will assign a driver assessment fee for attendance.*
- *Program is mandatory for the first time DWI offender that has not caused serious injury or death.*
- *Counties offer this program in different formats.*

## Victim Impact Panel Saratoga County

- *Saratoga County program:*
  - *DA's office*
  - *Law enforcement*
  - *DWI Educator(s)*
  - *DWI Offenders*
  - *DWI Victims*

## Victim Impact Panel

- *Saratoga County victims and offenders meet with DWI Educator(s) prior to speaking, to help organize their presentations.*
- *Offenders who are interested in presenting, must meet with victims for their approval.*

## Victim Impact Panel

- *Offenders are required to complete survey/evaluation at the end of the program.*
- *The collected information is reviewed with the speakers*

## Victim Impact Panel

*Participants listen to offenders, assistant district attorneys, police officers and victims on how driving under the influence of alcohol and/or drugs changes lives forever.*

*TIME COMMITMENT: 2 hours*

*COST: \$25*



## Repeat DWI Offender Program

- *Surveys indicate 33% of all attendees at victim impact panels re-offend.*
- *For these offenders, return to the initial victim impact panel may not be appropriate*
- *A more intensive intervention may be appropriate*

## Repeat DWI Offender Program

- *Program to discuss issues repeat offender's have: Alcoholism, Mental Health, Family etc.*
- *Requires attendees to interact, write thoughts, hear different perspectives that can relate to their issues*
- *Introduce services available to attendees after successful completion of repeat offender program.*

## Repeat DWI Offender Program

*This course is for the 2nd, 3rd, 4th, or 5th time offender that has already completed the victim impact panel. Participants will complete journals, and hear from Alcoholics Anonymous staff, mental health counselors and Cornell Cooperative Extension educator.*

*TIME COMMITMENT: 6 hours – 2 Night Program 3hours/night*

*COST: \$75*

## How to Stay Alive After 25

- *Address dangerous decisions that drivers over 25 make and/or repeatedly make.*
- *How to make better decisions behind the wheel.*

## How to Stay Alive After 25

*This program is highly interactive that educates adult offenders over 25 how to make safe, respectful and legal driving decisions. The goal is to teach participants how to maintain control of driving situations by taking personal responsibility for their own actions, attitudes and driving behaviors.*

*TIME COMMITMENT: 4 hours*

*COST: \$50*

## SENTENCING

- *TERM OF CONDITIONAL DISCHARGE*
- *TERM AND CONDITION OF PROBATION*
- *CONDITION OF PLEA REDUCTION ACCEPTANCE BY COURT*

## SENTENCING

### *CONDITIONAL DISCHARGE - P.L. Article 65*

*P.L. 65.05 conditional discharge may be imposed for any allowable offense if the court is of the opinion that the ends of justice would be served and that imprisonment is not appropriate.*

*P.L. 65.10 (1)(5) condition must be reasonably necessary to ensure that the offender will lead a law-abiding life or assist them in doing so and must be related to the goal of rehabilitation*

## SENTENCING

### *CONDITION OF PROBATION- P.L. Article 65*

*P.L. § 65.00(1)(a) (ii) (iii) Probation may be imposed for any misdemeanor if the court determines that the offender needs guidance, training or assistance and it is not inconsistent with the ends of justice.*

## SENTENCING

### *PRE-CONDITION OF COURT'S ACCEPTANCE OF PROPOSED PLEA DISPOSITION*

*The court has authority to require pre-conditions (that are not extralegal) as a requirement of the court's consent to a proposed plea disposition and to require proof of the fulfilling of the conditions prior to acceptance of a proposed plea disposition.*


## SENTENCING

### *DIVERSION PROGRAMS*

*May be required as part of court ordered diversion however dismissal of the pending offense upon successful completion of the ordered diversion must be subject to a motion for and granting of a dismissal in the interest of justice pursuant to CPL § 170.40*

§ 65.00 Sentence of probation, NY PENAL § 65.00

---

 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated  
Penal Law (Refs & Annos)  
Chapter 40. Of the Consolidated Laws (Refs & Annos)  
Part Two. Sentences  
Title E. Sentences  
Article 65. Sentences of Probation, Conditional Discharge and Unconditional Discharge (Refs & Annos)

McKinney's Penal Law § 65.00

§ 65.00 Sentence of probation

Effective: February 9, 2014

[Currentness](#)

1. Criteria. (a) Except as otherwise required by [section 60.04](#) or [60.05](#) of this title, and except as provided by paragraph (b) hereof, the court may sentence a person to a period of probation upon conviction of any crime if the court, having regard to the nature and circumstances of the crime and to the history, character and condition of the defendant, is of the opinion that:

(i) Institutional confinement for the term authorized by law of the defendant is or may not be necessary for the protection of the public;

(ii) the defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision; and

(iii) such disposition is not inconsistent with the ends of justice.

(b) The court, with the concurrence of either the administrative judge of the court or of the judicial district within which the court is situated or such administrative judge as the presiding justice of the appropriate appellate division shall designate, may sentence a person to a period of probation upon conviction of a class A-II felony defined in article two hundred twenty, the class B felony defined in [section 220.48](#) of this chapter or any other class B felony defined in article two hundred twenty of this chapter where the person is a second felony drug offender as defined in [paragraph \(b\) of subdivision one of section 70.70](#) of this chapter, if the prosecutor either orally on the record or in a writing filed with the indictment recommends that the court sentence such person to a period of probation upon the ground that such person has or is providing material assistance in the investigation, apprehension or prosecution of any person for a felony defined in article two hundred twenty

§ 65.00 Sentence of probation, NY PENAL § 65.00

---

or the attempt or the conspiracy to commit any such felony, and if the court, having regard to the nature and circumstances of the crime and to the history, character and condition of the defendant is of the opinion that:

- (i) Institutional confinement of the defendant is not necessary for the protection of the public;
- (ii) The defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision;
- (iii) The defendant has or is providing material assistance in the investigation, apprehension or prosecution of a person for a felony defined in article two hundred twenty or the attempt or conspiracy to commit any such felony; and
- (iv) Such disposition is not inconsistent with the ends of justice.

[Eff. until Sept. 1, 2023, pursuant to L.1995, c. 3, § 74, par. d. See, also, closing par. below.] Provided, however, that the court shall not, except to the extent authorized by [paragraph \(d\) of subdivision two of section 60.01](#) of this chapter, impose a sentence of probation in any case where it sentences a defendant for more than one crime and imposes a sentence of imprisonment for any one of the crimes, or where the defendant is subject to an undischarged indeterminate or determinate sentence of imprisonment which was imposed at a previous time by a court of this state and has more than one year to run.

[Eff. Sept. 1, 2023. See, also, closing par. above.] Provided, however, that the court shall not, except to the extent authorized by [paragraph \(d\) of subdivision two of section 60.01](#) of this chapter, impose a sentence of probation in any case where it sentences a defendant for more than one crime and imposes a sentence of imprisonment for any one of the crimes, or where the defendant is subject to an undischarged indeterminate or reformatory sentence of imprisonment which was imposed at a previous time by a court of this state and has more than one year to run.

2. Sentence. When a person is sentenced to a period of probation the court shall, except to the extent authorized by [paragraph \(d\) of subdivision two of section 60.01](#) of this chapter, impose the period authorized by subdivision three of this section and shall specify, in accordance with [section 65.10](#), the conditions to be complied with. The court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of probation.

3. Periods of probation. Unless terminated sooner in accordance with the criminal procedure law, the period of probation shall be as follows:

- (a)(i) For a felony, other than a class A-II felony defined in article two hundred twenty of this chapter or the class B felony defined in [section 220.48](#) of this chapter, or any other class B felony defined in article two hundred twenty of this chapter committed by a second felony drug offender, or a sexual assault, the period of probation shall be a term of three, four or five years;

§ 65.00 Sentence of probation, NY PENAL § 65.00

---

(ii) For a class A-II felony drug offender as defined in [paragraph \(a\) of subdivision one of section 70.71](#) of this chapter as described in paragraph (b) of subdivision one of this section, or a class B felony committed by a second felony drug offender described in paragraph (b) of subdivision one of this section, the period of probation shall be life and for a class B felony defined in [section 220.48](#) of this chapter, the period of probation shall be twenty-five years;

(iii) For a felony sexual assault, the period of probation shall be ten years.

(b)(i) For a class A misdemeanor, other than a sexual assault, the period of probation shall be a term of two or three years;

(ii) For a class A misdemeanor sexual assault, the period of probation shall be six years.

(c) For a class B misdemeanor, the period of probation shall be one year, except the period of probation shall be no less than one year and no more than three years for the class B misdemeanor of public lewdness as defined in [section 245.00](#) of this chapter;

(d) For an unclassified misdemeanor, the period of probation shall be a term of two or three years if the authorized sentence of imprisonment is in excess of three months, otherwise the period of probation shall be one year.

For the purposes of this section, the term “sexual assault” means an offense defined in article one hundred thirty or two hundred sixty-three, or in [section 255.25](#), [255.26](#) or [255.27](#) of this chapter, or an attempt to commit any of the foregoing offenses.

4. If during the periods of probation referenced in subparagraph (i) of paragraph (a), subparagraph (i) of paragraph (b) and paragraph (d) of subdivision three of this section an alleged violation is sustained following a hearing pursuant to [section 410.70 of the criminal procedure law](#) and the court continues or modifies the sentence, the court may extend the remaining period of probation up to the maximum term authorized by this section. Provided, however, a defendant shall receive credit for the time during which he or she was supervised under the original probation sentence prior to any declaration of delinquency and for any time spent in custody pursuant to this article for an alleged violation of probation.

5. In any case where a court pursuant to its authority under [subdivision four of section 60.01](#) of this chapter revokes probation and sentences such person to imprisonment and probation, as provided in [paragraph \(d\) of subdivision two of section 60.01](#) of this chapter, the period of probation shall be the remaining period of the original probation sentence or one year whichever is greater.



§ 65.00 Sentence of probation, NY PENAL § 65.00

---

**Credits**

(L.1965, c. 1030. Amended L.1971, c. 1097, § 73; L.1973, c. 276, § 7; L.1973, c. 277, § 5; L.1973, c. 278, §§ 2, 3; L.1973, c. 676, § 29; L.1973, c. 1051, § 2; L.1974, c. 835, § 2; L.1979, c. 410, §§ 4, 5; L.1980, c. 471, §§ 19, 20; L.1985, c. 79, § 1; L.1995, c. 3, § 1-a; L.2000, c. 1, § 10, eff. Feb. 1, 2001; L.2003, c. 264, § 5, eff. Nov. 1, 2003; L.2004, c. 568, § 1, eff. Nov. 1, 2004; L.2004, c. 738, § 25, eff. Jan. 13, 2005; L.2004, c. 738, § 26, eff. Dec. 27, 2004; L.2006, c. 320, § 3, eff. Nov. 1, 2006; L.2009, c. 56, pt. AAA, §§ 19, 20, eff. April 7, 2009; L.2013, c. 556, §§ 1 to 4, eff. Feb. 9, 2014; L.2014, c. 17, § 1, eff. Feb. 9, 2014.)

**Editors' Notes**

**SUPPLEMENTARY PRACTICE COMMENTARY**

by William C. Donnino

**Probation for Cooperation**

In 2009, there was a revision of the sentences which apply to persons convicted of a crime defined in Penal Law article 220 (controlled substances) and Penal Law article 221 (marihuana). L. 2009, c. 56. Included in that revision were amendments of the laws which relate to the classification of offenses for which a sentence of probation in return for cooperation may be granted. Those amendments are set forth and explained in the Supplementary Practice Commentary to [Penal Law § 60.04](#). *See also* McKinney's "Sentence and Related Law Charts" for an updated chart of sentences authorized for felony drug offenses.

**Periods of Probation and Conditional Discharge**

In one of the most significant sentencing reforms of recent years, effective January 10, 2014, a sentencing court was given the discretion to vary the length of the period of probation for most crimes. L. 2013, c. 556.

For felonies, (except for a sexual assault, a class A-II drug felony or a class B drug felony defined in [Penal Law § 220.48](#) or committed by a second felony drug offender), a sentencing court may, in lieu of the traditional mandatory period of five years, impose a period of probation of three, four, or five years. [Penal Law § 65.00(3)(a)(i)]. For a class A misdemeanor (except a sexual assault), and for a qualifying "unclassified misdemeanor," a sentencing court may, in lieu of the traditional three-year period, impose a period of probation of two or three years. [Penal Law § 65.00(3)(b)(i) and (d)].

As the Legislative Memorandum explained, the former law, in denying judges discretion in determining the lengths of probation sentences, prevented those judges "from distinguishing among convicted individuals on the basis of their prior criminal history; degree of culpability ... ; the risk level they pose to public safety; and their actuarially determined risk of re-offense." Legislative Memorandum to Senate Bill 4664A. A side effect of the

§ 65.00 Sentence of probation, NY PENAL § 65.00

---

fixed periods was to burden the probation rolls with those who had demonstrated prior to the expiration of the fixed period of probation that they had achieved the maximum benefit that probation supervision had to offer.

In addition to providing judicial discretion in fixing the periods of probation, the legislation provided judges “with a new tool to impose graduated sanctions when the terms of probation are violated.” Legislative Memorandum, *supra*. Thus, for those probationers who receive less than the maximum period of probation and violate the terms of the probation, the sentencing court's arsenal of appropriate responses was enlarged by authorizing the court to “extend the remaining period of probation up to the maximum term.... ” Penal Law § 65.00(4); CPL 410.70.

The New York State Sentencing Commission agreed that graduated periods of probation “would improve justice and public safety.... ” Letter of the Chairs of the Commission to the Legislature (May 15, 2012).

Although the law was effective on January 10, 2014, by its terms it applies both to offenses committed on or after that date and to offenses committed before that date “where the sentence upon conviction for such offense has not yet been imposed.” L. 2013, c. 556, § 7. The Ex Post Facto clause does not interdict legislation which is ameliorative of the consequences of a criminal conviction. *People ex rel. Lonschein v. Warden of Queens House of Detention*, 15 N.Y.2d 663, 255 N.Y.S.2d 876, 204 N.E.2d 206 (1964); *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), as modified by *California Department of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). A period of probation of less than the required fixed term in effect prior to this legislature is ameliorative; the increase in the period for a violation of probation, while not ameliorative, cannot result in a period of probation greater than that authorized at the time of the commission of the offense.

In approving the legislation, the Governor was of the opinion that the legislation “does not make it clear that before a court modifies a sentence by lengthening it, ... it must afford a defendant due process. Nor does the bill make it clear that if a probation term is so extended, an offender must receive credit for any time he or she spent under supervision or while incarcerated for an alleged violation of probation.” Governor's Approval Memorandum No. 18. And the Governor indicated that he had secured the Legislature's commitment to pass an amendment expressly addressing and clarifying those issues. *Id.*

## Conditions

### Ignition interlock device

In 2010 and 2015, significant amendments were made to the laws governing the imposition of the ignition interlock device as a condition of probation or conditional discharge. For commentary on those amendments, see Practice Commentary to Penal Law § 60.21, which supersedes the commentary on the ignition interlock device set forth in the main volume to Penal Law § 65.00.

In 2020 (c. 56), the Legislature added to the list of authorized conditions of a sentence of probation or conditional discharge in subdivision (2) of Penal Law § 65.10. The added condition is set forth in paragraph (k-2) and is limited to those persons convicted of: (1) a crime involving unlawful sexual conduct against a Metropolitan Transportation Authority (MTA) “passenger, customer, or employee” [see Michael Gold, Serial

§ 65.00 Sentence of probation, NY PENAL § 65.00

---

Sex Offenders Are a Big Problem on Subways. Should They Be Banned for Life? NY Times, March 20, 2019], or (2) a crime of assault [Penal Law art. 120] that causes injury to an “employee.” The crime has to be committed “in or on” any “facility or conveyance” of the MTA or a subsidiary, including its related NYC Transit Authority or its subsidiary. The authorized condition is to “refrain” from “using or entering” the transit authorities' conveyances or facilities, subject to permission to do so, for a specified, necessary purpose, for a period of three years or the period of probation or conditional discharge, whichever is less.

### Interim Probation

As part of the 2009 revision of the sentences which apply to those convicted of a crime defined in Penal Law article 220 (controlled substances) and Penal Law article 221 (marihuana) [L. 2009, c. 56], the interim probation provisions were amended in two important respects.

First, with respect to the one-year limit on the period of interim probation, the law was amended to permit upon “good cause” and the defendant's consent, an extension of an additional year “where the defendant has agreed to and is still participating in a substance abuse treatment program in connection with a court designated a drug court by the chief administrator of the courts” [CPL 390.30(6)].

Second, if a defendant “satisfactorily completes” interim probation supervision, the defendant is entitled to “credit for the time served under the period of interim probation supervision toward any probation sentence that is subsequently imposed in that case” [CPL 390.30(6)].

## PRACTICE COMMENTARY

by William C. Donnino

### Table of Contents

Introduction

Limitations

Probation for Cooperation

Manner of Imposition

Periods of Probation and Conditional Discharge

Conditions

In general

§ 65.00 Sentence of probation, NY PENAL § 65.00

---

Community service

Electronic monitoring

Ignition interlock device

Sex Offenders

Calculation of Periods

Interim Probation

### Introduction

Penal Law Article 60 sets forth the rules governing whether a sentence of probation, conditional discharge, or unconditional discharge may be imposed upon a person convicted of an offense, absent a limitation set forth in Penal Law article 65. Penal Law article 65 includes those limitations, and, more significantly, specifies the details of a sentence of unconditional discharge, conditional discharge, and probation.

The sentence of probation “is a method of offering an offender an opportunity to rehabilitate himself, without institutional confinement, under the supervision of a probation officer and the continuing power of the court to use a more stringent sanction in the event the opportunity is abused” [Penal Law § 65.00]. Staff Notes of the Commission on Revision of the Penal Law. Proposed New York Penal Law. McKinney's Spec. Pamph. (1964), p. 260.

The sentence of conditional discharge seeks to provide the offender the same opportunity for rehabilitation, without institutional confinement, by imposing one or more of the same conditions that may be imposed as incident to a sentence of probation, but without requiring the supervision of the offender by a probation officer [Penal Law § 65.05].

A sentence of probation or a conditional discharge is a “revocable sentence.” Depending on the circumstances, particularly the offender's conduct, the sentence may be modified or revoked entirely and a new sentence imposed. Procedures for modification or revocation are set forth in CPL article 410. The sentence which may be imposed upon revocation is set forth in Penal Law § 60.01(3) and (4). See Practice Commentary to Penal Law article 60.

A sentence of unconditional discharge constitutes the imposition of a final judgment upon conviction of an offense, but is a determination that, apart from the judgment of conviction of the offense itself, no further sanction or condition on the defendant's release is necessary or appropriate [Penal Law § 65.20].

Penal Law article 65 sets forth some general criteria for consideration by the court in determining whether to impose probation or conditional discharge in those cases in which probation or conditional discharge is an authorized sentence [Penal Law §§ 65.00(1); 65.05(1); 65.20(1)].

### Limitations

Probation may not be imposed upon a conviction of a petty offense (violation or traffic infraction) or upon a corporation [Penal Law §§ 60.20, 60.25, 65.00(1)]; it may only be imposed upon a person convicted of a “crime” for which imprisonment is not a mandated sentence [Penal Law §§ 65.00(1), 60.05, 60.06, 60.10]. On the other hand, conditional discharge or unconditional discharge may be imposed upon a person convicted of any “offense” for which imprisonment is not a mandated sentence [Penal Law § 65.05(1), 60.05, 60.06, 60.10], and may be imposed upon a corporation [Penal Law § 60.25]. However, for a person adjudicated a youthful offender for a drug felony defined in Penal Law article 220, a court must not impose a sentence of conditional discharge or unconditional discharge [Penal Law § 60.02(2)].

Penal Law § 65.00(1) (last paragraph) precludes a sentence of probation in two situations:

- (1) if the court is sentencing the defendant for multiple crimes and imposes a sentence of imprisonment for any one of those crimes, unless the sentence of imprisonment is part of a “split sentence” of both imprisonment and probation [Penal Law § 60.01(2)(d)], or
- (2) if the defendant is subject to an undischarged indeterminate or determinate sentence of imprisonment in New York which has more than one year to run. *People v. Cerilli*, 80 N.Y.2d 1016, 592 N.Y.S.2d 660, 607 N.E.2d 807 (1992). This limitation does not apply if the undischarged sentence of imprisonment exists in another jurisdiction. *People v. Etcheverry*, 37 N.Y.2d 853, 378 N.Y.S.2d 40, 340 N.E.2d 473 (1975)

That first limitation on imposing probation, as applied to a definite or intermittent sentence, has been of less significance since the introduction in 1974 of the “split sentence” (definite or intermittent imprisonment coupled with probation or conditional discharge), because, as noted, the first restriction does not preclude imposition of the “split sentence” when otherwise authorized [L.1974, c. 835; see Penal Law § 60.01(2)(d)]. See *People v. Cerilli*, *supra*. However, in sentencing a defendant for multiple convictions, the court may not impose a definite or intermittent sentence of imprisonment for one conviction and probation or conditional discharge for another; rather, the court may impose the “split sentence” for each count to run concurrently. When the imprisonment portion of the “split sentence” must be less than would be authorized were only imprisonment imposed, the first restriction retains some significance.

The second limitation was designed to avoid the “confusion and duplication of services” which would result from a person's being on parole and probation supervision at the same time. Preiser, Practice Commentary to Penal Law § 65.00, McKinney's Penal Law (1967). The exception for a prior sentence that had a year or less to serve was enacted because it was believed that the need for permitting probation in that instance would outweigh the disadvantage of supervision by two agencies. *Id.* This limitation was enacted prior to the inclusion of mandatory prison sentences for most multiple felony offenders. Thus, under the current law, state prison will in most instances be mandatory for a defendant who is to be sentenced for a conviction of a felony and has an undischarged indeterminate or determinate sentence of imprisonment of any length. If that defendant, however, is to be sentenced on a conviction for a misdemeanor and has an undischarged term of less than a year, then that defendant may be sentenced to probation.

### Probation for Cooperation

One special form of probation was introduced in 1973. In that year the Legislature prescribed mandatory imprisonment for certain felonies, including drug felonies, as well as for multiple felony offenders. Law enforcement officials were particularly concerned that they would be unable to offer probation to certain drug offenders as an inducement to cooperate in the investigation and prosecution of other drug offenders. Thus, the Legislature initially provided for “lifetime probation” as a sentencing option for the cooperating drug offender who otherwise faced mandatory imprisonment [L.1973 c. 278 (class A-III felony); L.1979, c. 410 (class A-II or class B drug felony)]. In 2004, the drug laws were again revised [L.2004, c.738], and an alternative sentence of probation was authorized for a cooperating defendant who is convicted of a class A-II or B felony and is not a “second felony drug offender” with a prior conviction for a violent felony [Penal Law §§ 65.00(1)(b), 70.71]. The period of probation is life for a conviction of a qualifying class A-II drug felony [Penal Law §§ 60.04(2), 70.71(2)(c), 65.00(3)(a)(ii)]. The period of probation for a person convicted of a class B drug felony who is not a “second felony drug offender” is 25 years; if the defendant is convicted of a class B drug felony and is a “second felony drug offender” with a prior conviction for a non-violent felony, the period of probation is life [Penal Law § 65.00(3)(ii), § 70.70(2)(b) and (3)(c)].

Concerned that lifetime probation not become a facile way of avoiding mandatory imprisonment, the Legislature required that the sentence be recommended by the district attorney and concurred in by a local administrative judge before the sentencing court could impose the sentence. Requiring the recommendation of the district attorney as a prerequisite to imposition of the sentence has been held constitutional. *People v. Eason*, 40 N.Y.2d 297, 386 N.Y.S.2d 673, 353 N.E.2d 587 (1976). Further, the requisite recommendations of the district attorney and administrative judge may not be ignored, nor waived by the district attorney's failure to object to their non-fulfillment at the time of the initial sentence. *People v. David*, 65 N.Y.2d 809, 493 N.Y.S.2d 118, 482 N.E.2d 914 (1985).

### Manner of Imposition

On imposing a sentence of probation or conditional discharge, the court must specify the period of the sentence prescribed by statute and the conditions to be complied with during the period of the sentence [Penal Law §§ 65.00(2); 65.05(2)]. This requirement was intended to “make the sentence more meaningful to the defendant and also provide a clear specification of the conditions in the event of a revocation proceeding.” Staff Notes of the Commission on Revision of the Penal Law. Proposed New York Penal Law. McKinney's Spec. Pamph. (1964), p. 263.

The court is also required, when imposing a sentence of conditional or unconditional discharge for a felony, to set forth in the record the reasons for its action [Penal Law §§ 65.05(1)(b); 65.20(1)]. “The reason for retaining this requirement is that in the case of a grievous offense, such as a felony, law enforcement officers and the public should not be left in the dark as to the reasons for discharging the defendant without a [more serious] sanction or supervision.” Staff Notes of the Commission on Revision of the Penal Law. Proposed New York Penal Law. McKinney's Spec. Pamph. (1964), p. 265.

### Periods of Probation and Conditional Discharge

The periods of probation and conditional discharge are set forth in the statute and the court is required to impose the specified periods [Penal Law §§ 65.00(3); 65.05(3)].

Initially, for all felonies the period of probation was five years, and for all misdemeanors the period was three years. In 2000, the Legislature extended the periods of probation for a “sexual assault.” A “sexual assault” was defined to mean an offense defined in Penal Law article 130 (sex offenses), or Penal Law article 263 (sexual performance by a child), or [Penal Law § 255.25](#), [255.26](#), [255.27](#) (incest), or an attempt to commit any such offense [Penal Law § 65.00(3)]. The period of probation for a “sexual assault” felony was extended from 5 to 10 years, and the period of probation for a “sexual assault” misdemeanor was extended from 3 to 6 years [Penal Law § 65.00(3)].

In 2004, the Legislature lengthened the authorized period of probation for “public lewdness,” a class B misdemeanor [[Penal Law § 245.00](#)]. Until November 1, 2004, the period of probation authorized for that crime was one year. Effective as of that date, the Legislature authorized the court to impose a period of probation in excess of the one year but not more than three years [Penal Law § 65.00(3)(c)]. L.2004, c. 568. The reason for that amendment was the Legislature's belief that persons who engage in public lewdness may, if not properly treated, eventually engage in more serious sex offenses, and that treatment would be more effective if it were a condition of a longer period of probation. *See* Legislative Memorandum. Thus, the court was authorized to extend the probation to three years. This is the first time that the Legislature has provided a sentencing court with the discretion to vary the period of probation.

If restitution is a condition of a conditional release and it has not been completed within the applicable period, the court, at any time prior to the expiration or termination of the period of conditional discharge, may impose an additional period of not more than two years to allow for payment of the restitution [[Penal Law § 65.05\(3\)](#)].

The court may at any time terminate either a period of probation or a period of conditional discharge, except that if lifetime probation is imposed, the court may not terminate it before the passage of five consecutive years of unrevoked probation [[CPL 410.90](#)].

### Conditions

#### In general

On imposing a sentence of probation or conditional discharge, the court may impose one or more requirements of behavior upon the defendant as a condition of the defendant's release. It should be emphasized that the setting and modifying of the conditions of probation or conditional discharge must be done by the court, not by a probation officer or by rules of a probation department; a probation department exists to supervise and enforce the conditions set by the court, not to determine and impose the conditions. [Penal Law § 65.10](#). [CPL 410.10](#) and [410.20](#). See *People v. Fuller*, 57 N.Y.2d 152, 455 N.Y.S.2d 253, 441 N.E.2d 563 (1982); *People v. Walts*, 34 A.D.3d 1043, n. 1, 824 N.Y.S.2d 479 (3rd Dept., 2006) (“an expansion or modification of the probationary terms must come from the court”); *People v. K.D.*, 781 N.Y.S.2d 856 (Supreme Court, Kings County, 2004).

§ 65.00 Sentence of probation, NY PENAL § 65.00

---

Penal Law § 65.10 contains a list of permissible conditions. The list “is not intended to be exhaustive of the permissible conditions and, obviously, no legislative specification could enumerate all of the reasonable measures that may be appropriate in dealing with the problems involved in the rehabilitation of individual offenders.” Staff Notes of the Commission on Revision of the Penal Law. Proposed New York Penal Law. McKinney's Spec. Pamph. (1964), p. 266. Thus, at least two of the provisions would seem to provide some flexibility concerning the type of conditions that may be imposed:

(1) the provision permitting the court to require the defendant to: “Satisfy any other conditions reasonably related to his rehabilitation” [Penal Law § 65.10(2)(1); *see also* Penal Law § 65.10(1)]. Requiring a defendant to affix to his license plate a fluorescent sign stating “convicted DWI” was, however, punitive, not rehabilitative, and thus not authorized. *People v. Letterlough*, 86 N.Y.2d 259, 631 N.Y.S.2d,105, 655 N.E.2d 146 (1995).

(2) the provision added in 1996 permitting the court to impose “any other reasonable condition as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant” [Penal Law § 65.10(5)]. L.1996, c. 653. That statutory language was drawn from Family Court Act § 353.2(h). The Legislature recognized that this added authorization “will afford sentencing judges with greater flexibility in imposing other conditions of probation.” Legislative Memorandum for Assembly Bill 10473A. *See People v. Hale*, 93 N.Y.2d 454, 692 N.Y.S.2d 649, 714 N.E.2d 861 (1999) (a condition of probation which authorized the defendant's probation officer to search the defendant's person, vehicle, and home for illegal drugs and narcotic implements during the period of probation, was reasonably related to the rehabilitative goal of keeping the defendant free of drugs). However, the Chair of the Assembly Committee on Codes and principal Assembly sponsor of the legislation, in writing to the Governor to urge his approval of the legislation, specifically indicated that this provision was “not intended to authorize the predominantly punitive conditions described in *People v. Letterlough*,” 86 N.Y.2d 259, *supra* (requiring the defendant to affix to his license plate a fluorescent sign stating “convicted DWI”).

At the time of imposing the sentence, the court must specify the “conditions” which the defendant must abide by during his or her period of probation or conditional discharge [Penal Law §§ 65.00(2); 65.05(2); CPL 410.10(1)].

Revocation of the sentence may be based on the commission of an additional offense (other than a traffic infraction) “or” a violation of a condition [Penal Law §§ 65.00(2); 65.05(2); CPL 410.10(2)]. By statute, therefore, the commission of an “additional offense” (other than a traffic infraction) is a basis for revocation, irrespective of whether it is specified as a condition [CPL 410.10(2)]. Undoubtedly, the Legislature believed it self-evident that the commission of an additional offense could lead to revocation.

Some of the conditions added by the Legislature over the years include the following:

#### Community service

In 1996, the Legislature amended the subdivision embodying what is commonly referred to as the “community service” condition. Penal Law § 65.10(h). The Legislature decided to reverse the trend towards defining the types of community service that would apply on conviction of certain crimes by amending the statute to return to the generic authorization of community service for any crime, with a listing of illustrative (“including but not limited to”) types of community service. L.1996, c. 186.



### Electronic monitoring

Also in 1996, an amendment was made to expressly authorize the imposition of electronic monitoring as a condition of probation or conditional discharge [Penal Law § 65.10(4)]. L.1996, c. 653.

For years before electronic monitoring was expressly authorized by statute, sentencing courts had been imposing it as part of a condition of probation. Generally, the defendant would be required to stay or be in a particular location, usually his or her home, for a specified period of time during a day or week. To insure compliance with that requirement, the defendant would wear an electronic band that would send an electronic signal to a monitor at a remote location if and when the defendant left the designated area. On a practical level, that did not appear to many to be a particularly remarkable requirement. Before (and since) the introduction of electronic monitoring, the movements of probationers have been traditionally regulated in the interests of their rehabilitation. *See, e.g., Penal Law § 65.10(2)*, paragraph (b) requiring a probationer to avoid certain locations and people; paragraph (c) requiring a probationer to attend school or engage in work; paragraph (d) requiring a probationer who needs substance abuse treatment to submit to same; paragraph (h) requiring the performance of community service; and paragraph (i) requiring a probationer under the age of twenty-one to reside with his or her parents. Most of those requirements mandate that the probationer be in certain locations (home, school, work, community service site) for a given and appreciable period of time. At the same time, probation officers have been required to monitor the probationer's compliance with those requirements--at best, by spot visits to the location. *Penal Law § 65.10(3)(a)*. Electronic monitoring appeared to be a far more reliable, safe, and efficient way of simply fulfilling that requirement.

However, in *People v. McNair*, 87 N.Y.2d 772, 642 N.Y.S.2d 597, 665 N.E.2d 167 (1996), a sharply divided Court of Appeals invalidated the use of electronic monitoring. In that case, a defendant had been convicted of driving while intoxicated, sentenced to probation, ordered as a condition of probation to remain at home for a given period of time and incident to that condition the defendant was ordered to submit to electronic monitoring. That condition of probation was ordered pursuant to the generic statutory provision that the probationer satisfy any other condition reasonably related to his or her "rehabilitation." *Penal Law § 65.10(1)*. For the majority of the Court, the electronic monitoring condition was exclusively to advance "public safety and surveillance, not rehabilitation" and was thus invalid. For the minority, the condition plainly had rehabilitative elements, and as long as the punitive elements that exist in all restrictive or directory probationary conditions did not "overshadow" the rehabilitative components, the condition was valid.

Within months of that decision, the Legislature amended the statute to overrule *McNair* by permitting electronic monitoring when the sentencing court determines that compliance with that condition "will advance public safety, probationer control, or probationer surveillance." For the Legislature, therefore, "public safety and surveillance" are indeed appropriate criteria for the imposition of the condition.

While the statutory reasons for electronic monitoring are sufficient to permit its use, the truth is that no single reason usually dominates the rationale for such a requirement. As with most sentences specially designed to fit the crime, the rationale for a probationary sentence and imposition of special conditions will often partake of several of the multitude of reasons for any sentence--from rehabilitation to deterrence to public safety to even a form of punishment which itself can be rehabilitative.

§ 65.00 Sentence of probation, NY PENAL § 65.00

---

### Ignition interlock device

If a person is convicted of a violation of [Vehicle and Traffic Law 1192\(2\), \(2-a\) or \(3\)](#), or any crime defined by the Vehicle and Traffic Law or Penal Law of which an alcohol-related violation of any provision of [Vehicle and Traffic Law 1192](#) “is an essential element”, the sentencing court may require, as a condition of probation or conditional discharge, that the defendant install and maintain a functioning “ignition interlock device” [defined in [Vehicle and Traffic Law § 119-a](#)] in any vehicle owned or operated on a regular basis by the defendant if such is necessary to ensure the public safety [[Penal Law § 65.10\(k-1\)](#)]. L.1997, c. 181, effective July 8, 1997. The installation and operation of an ignition interlock device is governed by [Vehicle and Traffic Law § 1198](#). That statute, among its various provisions, permits the defendant to operate a motor vehicle owned by the defendant's employer “in the course and scope of his or her employment” without installation of an ignition interlock device provided the employer has been notified that the defendant's driving privilege has been restricted and verification of that notification has been provided the court and probation department. [Vehicle and Traffic Law § 1198\(8\)](#).

### Sex offenders

In 2000, the Sexual Assault Reform Act added a mandatory condition of probation or conditional discharge. The condition applies (1) to a person convicted of an offense included in the definition of a “sexual assault” (*i.e.*, an offense defined in Penal Law article 130 (sex offenses) or 263 (sexual performance by a child), or any degree of incest, or an attempt to commit any such offense [[Penal Law § 65.00\(3\)](#)]), or an offense defined in Penal Law article 235 (obscenity) where the victim of the offense was under the age of 18 at the time of the offense, and (2), as added in 2005, to a person designated a level three sex offender pursuant to [Correction Law § 168-l\(6\)](#) [L.2005, c. 544].

The condition is that the offender “refrain from knowingly entering into or upon any school grounds, as that term is defined in [Penal Law § 220.00\(14\)\(a\)](#), or any other facility or institution primarily used for the care or treatment of persons under the age of 18 while one or more of such persons” are present. An exception is provided for an offender who is a student, participant, or employee of such institution or has a family member enrolled in such institution, provided that the offender has obtained written permission from the probation officer or the court and from the head of the institution [[Penal Law § 65.10\(4-a\)](#)].

In 2008, the Legislature enacted the “Electronic Security and Targeting of Online Predators Act”. L.2008, c. 67, § 2. Various provisions of the Correction Law and Executive Law, as well as the Penal Law, were amended to protect people, particularly children, by limiting a sex offender's access to the internet. As explained in the “Legislative purpose and findings” [L.2008, c. 67, § 1]:

... existing law has failed to keep pace with rapid advances in computer technology, particularly the internet. People meet, socialize and exchange ideas through online services such as social networking websites. Such websites are accessible to minors who may easily be presented with obscene or indecent material and be subjected to unlawful sexual advances from adults. Therefore, in the hands of a sexual predator intent on harming minors, social networking websites and other similar services pose a clear and present danger to New Yorkers. Behind a computer screen, convicted sex offenders are able to hide their identity while attempting to engage children in illicit activity. Additionally, given the secrecy, manipulation and

§ 65.00 Sentence of probation, NY PENAL § 65.00

---

deception that often accompanies sex offending behavior, the internet--with its promise of anonymity--can provide an opportunity for convicted sex offenders on probation or parole to circumvent supervision, thereby undermining their treatment and increasing the risk of recidivism....

This groundbreaking legislation enables New York to combat misuse of the internet by convicted sex offenders by requiring sex offenders to register their internet identifiers with law enforcement, permitting social networking websites to access the internet identifiers of convicted sexual predators in order to prescreen or remove them from services used by children and notify law enforcement of potential violations of law, and prohibiting certain high risk sex offenders from using the internet to victimize children.

The amendments to the Penal Law related to the conditions of probation and conditional discharge. In certain instances, the law requires specified restrictions on a sex offender's internet access [Penal Law § 65.10(4-a)(b)], and permits a sentencing court to add “necessary or appropriate [conditions] to ameliorate the conduct which gave rise to the offense or to protect public safety, provided that the court shall not prohibit such sentenced offender from using the internet in connection with education, lawful employment or search for lawful employment” [Penal Law § 65.10(5-a)]. And, irrespective of whether the restrictions are mandatory, the sentencing court is authorized to impose such “necessary or appropriate” conditions [Penal Law § 65.10(5-a)].

The mandatory conditions apply to a defendant who is required to register as a sex offender, *and* (a) the defendant is a level three sex offender, *or*, (b) the defendant's victim was under 18 years of age at the time of the offense, *or*, (c) the defendant utilized the internet “to facilitate the commission of the crime” [Penal Law § 65.10(4-a)(b)]. The mandatory conditions include prohibiting internet access to pornographic material or to a “commercial social networking website,” as that term is defined in the statute. *Id.* Also, an internet communication with others “for the purpose of promoting sexual relations” with a person under 18 years of age is prohibited, as well as *any* communication with a person under 18 when the defendant is over 18, unless the defendant is the parent of the minor and is not otherwise prohibited from communicating with the minor. *Id.*

### Calculation of Periods

A period of probation or conditional discharge commences, and is thus calculated from, the day it is imposed. Multiple periods run concurrently [Penal Law § 65.15(1)]. “The reason for requiring multiple periods to always run concurrently is that the period of probation or of conditional discharge is not a penal period; its purpose is to give the court an opportunity to ascertain whether its confidence has been misplaced and, in the case of probation, to give probation supervision an adequate opportunity to be effective. The requirement of concurrency will not, however, prevent a combined period for two or more sentences in excess of the statutory period for a single sentence, if the second sentence is imposed after the first has commenced.” Preiser, Practice Commentary to Penal Law § 65.15, McKinney's Penal Law (1967).

A period of probation or conditional discharge may be tolled by a “declaration of delinquency” when the court has reasonable cause to believe that the defendant has violated a condition of the sentence. The declaration of delinquency tolls the period as of the date of the alleged violation until a final determination as to the delinquency has been made by the court. If the court sustains the violation, but continues or modifies the sentence, it may extend

§ 65.00 Sentence of probation, NY PENAL § 65.00

---

the sentence for the period of the interruption [Penal Law § 65.15(2); CPL 410.30]. See *People v. Douglas*, 94 N.Y.2d 807; 701 N.Y.S.2d 305; 723 N.E.2d 54 (1999).

Ordinarily, service of an indeterminate or determinate sentence of imprisonment imposed by a New York court will satisfy a sentence of probation or conditional discharge imposed for some other offense, unless one of the statutory exceptions applies [see Penal Law § 65.15(3); Staff Notes of the Commission on Revision of the Penal Law. Proposed New York Penal Law. McKinney's Spec. Pamph. (1964), pp. 268-69].

Upon revocation of a sentence of probation, a court may impose a “split sentence” of imprisonment and probation [Penal Law § 60.01(4)]. In such circumstance, the period of probation shall be equal to the period remaining on the initial, revoked sentence of probation, or one year, whichever is greater. In effect, the probationer is given credit against the period of probation for the time served under the initial sentence of probation, except that such credit may not reduce the period of probation to be served on the split sentence to less than one year [Penal Law § 65.00 (last paragraph)]. However, if a split sentence of imprisonment and probation is imposed upon revocation of a sentence of conditional discharge, no credit is provided for the period of time on conditional discharge.

#### Interim Probation

By an amendment to the Criminal Procedure Law, the Legislature authorized “interim probation,” *i.e.*, during the “interim” between a conviction and the imposition of sentence, the court is permitted to place the defendant on probation for a period not to exceed a year [CPL 390.30(6)]. L.1998, c. 159. The defendant must be eligible for a sentence of probation, and must consent to the interim probation. The interim probation can have the effect of extending the period of time the defendant will ultimately serve on probation, and if the defendant does not successfully complete the interim probation, an enhanced sentence of imprisonment may be the consequence. The prosecutor must be consulted, but the prosecutor's consent is not required, undoubtedly because whether to impose a sentence of probation on a person eligible for that sentence is in the discretion of the court. Of course, in those instances where probation is not an option unless there is a plea of guilty to a lesser offense, the prosecutor's required consent for the lesser plea may be conditioned on the granting or denying of “interim probation.”

The legislation was recommended by the Advisory Committee on Criminal Law and Procedure to the Chief Administrative Judge, and was designed to supply the statutory authority for interim probation that *People v. Rodney E.*, 77 N.Y.2d 672, 569 N.Y.S.2d 920, 572 N.E.2d 603, (1991) had found missing. In the Committee's view:

Interim supervision would enable a sentencing court to make a more informed decision concerning whether a defendant, including one eligible for youthful offender status, is a suitable candidate for probation. It would provide an opportunity to extend and enlarge the presentence investigation and to have an actual demonstration of a defendant's conduct in the community. The additional time available to investigate and prepare the presentence report would produce a more thorough examination of the defendant's circumstances, which in turn would better enable the court to assess whether the defendant would benefit from a sentence other than incarceration. 1998 McKinney's Session Law News of New York, A-77.

§ 65.00 Sentence of probation, NY PENAL § 65.00

---

In 1999, the interim probation supervision provision was amended to expand the authorized conditions of interim probation to include electronic monitoring [Penal Law § 65.10(4)] and “any other reasonable condition ... necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant” [Penal Law § 65.10(5)]. Penal Law § 65.10(6); L.1999, c. 216. Thus, the court may now impose the same conditions on a person placed on interim probation that it could impose on a person sentenced to probation.

Notes of Decisions (73)

McKinney's Penal Law § 65.00, NY PENAL § 65.00

Current through L.2022, chapters 1 to 485. Some statute sections may be more current, see credits for details.


---

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

§ 65.05 Sentence of conditional discharge, NY PENAL § 65.05

---

 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated  
Penal Law (Refs & Annos)  
Chapter 40. Of the Consolidated Laws (Refs & Annos)  
Part Two. Sentences  
Title E. Sentences  
Article 65. Sentences of Probation, Conditional Discharge and Unconditional Discharge (Refs & Annos)

McKinney's Penal Law § 65.05

§ 65.05 Sentence of conditional discharge

Currentness

1. Criteria. (a) Except as otherwise required by [section 60.05](#), the court may impose a sentence of conditional discharge for an offense if the court, having regard to the nature and circumstances of the offense and to the history, character and condition of the defendant, is of the opinion that neither the public interest nor the ends of justice would be served by a sentence of imprisonment and that probation supervision is not appropriate.

(b) When a sentence of conditional discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

2. Sentence. Except to the extent authorized by [paragraph \(d\) of subdivision two of section 60.01](#) of this chapter, when the court imposes a sentence of conditional discharge the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment or probation supervision but subject, during the period of conditional discharge, to such conditions as the court may determine. The court shall impose the period of conditional discharge authorized by subdivision three of this section and shall specify, in accordance with [section 65.10](#), the conditions to be complied with. If a defendant is sentenced pursuant to [paragraph \(e\) of subdivision two of section 65.10](#) of this chapter, the court shall require the administrator of the program to provide written notice to the court of any violation of program participation by the defendant. The court may modify or enlarge the conditions or, if the defendant commits an additional offense or violates a condition, revoke the sentence at any time prior to the expiration or termination of the period of conditional discharge.

3. Periods of conditional discharge. Unless terminated sooner in accordance with the criminal procedure law, the period of conditional discharge shall be as follows:

(a) Three years in the case of a felony; and

§ 65.05 Sentence of conditional discharge, NY PENAL § 65.05

---

(b) One year in the case of a misdemeanor or a violation.

Where the court has required, as a condition of the sentence, that the defendant make restitution of the fruits of his or her offense or make reparation for the loss caused thereby and such condition has not been satisfied, the court, at any time prior to the expiration or termination of the period of conditional discharge, may impose an additional period. The length of the additional period shall be fixed by the court at the time it is imposed and shall not be more than two years. All of the incidents of the original sentence, including the authority of the court to modify or enlarge the conditions, shall continue to apply during such additional period.

**Credits**

(L.1965, c. 1030. Amended L.1971, c. 1097, § 74; L.1972, c. 157, § 2; L.1973, c. 276, § 8; L.1973, c. 277, § 6; L.1973, c. 1051, § 20; L.1974, c. 835, § 3; L.1980, c. 471, § 21; L.1981, c. 742, §§ 1, 2; L.1992, c. 618, § 14.)

**Editors' Notes**

**PRACTICE COMMENTARY**

by William C. Donnino

See Practice Commentary at the end of [Penal Law § 65.00](#).


[Notes of Decisions \(15\)](#)

McKinney's Penal Law § 65.05, NY PENAL § 65.05

Current through L.2022, chapters 1 to 485. Some statute sections may be more current, see credits for details.

§ 65.10 Conditions of probation and of conditional discharge, NY PENAL § 65.10

---

 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

McKinney's Consolidated Laws of New York Annotated  
Penal Law (Refs & Annos)  
Chapter 40. Of the Consolidated Laws (Refs & Annos)  
Part Two. Sentences  
Title E. Sentences  
Article 65. Sentences of Probation, Conditional Discharge and Unconditional Discharge (Refs & Annos)

McKinney's Penal Law § 65.10

§ 65.10 Conditions of probation and of conditional discharge

Effective: July 2, 2020

[Currentness](#)

1. In general. The conditions of probation and of conditional discharge shall be such as the court, in its discretion, deems reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so.
2. Conditions relating to conduct and rehabilitation. When imposing a sentence of probation or of conditional discharge, the court shall, as a condition of the sentence, consider restitution or reparation and may, as a condition of the sentence, require that the defendant:
  - (a) Avoid injurious or vicious habits;
  - (b) Refrain from frequenting unlawful or disreputable places or consorting with disreputable persons;
  - (c) Work faithfully at a suitable employment or faithfully pursue a course of study or of vocational training that will equip him for suitable employment;
  - (d) Undergo available medical or psychiatric treatment and remain in a specified institution, when required for that purpose;
  - (e) Participate in an alcohol or substance abuse program or an intervention program approved by the court after consultation with the local probation department having jurisdiction, or such other public or private agency as the court determines to be appropriate;



§ 65.10 Conditions of probation and of conditional discharge, NY PENAL § 65.10

---

(e-1) Participate in a motor vehicle accident prevention course. The court may require such condition where a person has been convicted of a traffic infraction for a violation of article twenty-six of the vehicle and traffic law where the commission of such violation caused the serious physical injury or death of another person. For purposes of this paragraph, the term “motor vehicle accident prevention course” shall mean a motor vehicle accident prevention course approved by the department of motor vehicles pursuant to article twelve-B of the vehicle and traffic law;

(f) Support his dependents and meet other family responsibilities;

(g) Make restitution of the fruits of his or her offense or make reparation, in an amount he can afford to pay, for the actual out-of-pocket loss caused thereby. When restitution or reparation is a condition of the sentence, the court shall fix the amount thereof, the manner of performance, specifically state the date when restitution is to be paid in full prior to the expiration of the sentence of probation and may establish provisions for the early termination of a sentence of probation or conditional discharge pursuant to the provisions of [subdivision three of section 410.90 of the criminal procedure law](#) after the restitution and reparation part of a sentence of probation or conditional discharge has been satisfied. The court shall provide that in the event the person to whom restitution or reparation is to be made dies prior to the completion of said restitution or reparation, the remaining payments shall be made to the estate of the deceased.<sup>1</sup>

*(g-1) Repealed by L.2018, c. 480, § 2, eff. June 26, 2019.*

(h) Perform services for a public or not-for-profit corporation, association, institution or agency, including but not limited to services for the division of substance abuse services, services in an appropriate community program for removal of graffiti from public or private property, including any property damaged in the underlying offense, or services for the maintenance and repair of real or personal property maintained as a cemetery plot, grave, burial place or other place of interment of human remains. Provided however, that the performance of any such services shall not result in the displacement of employed workers or in the impairment of existing contracts for services, nor shall the performance of any such services be required or permitted in any establishment involved in any labor strike or lockout. The court may establish provisions for the early termination of a sentence of probation or conditional discharge pursuant to the provisions of [subdivision three of section 410.90 of the criminal procedure law](#) after such services have been completed. Such sentence may only be imposed upon conviction of a misdemeanor, violation, or class D or class E felony, or a youthful offender finding replacing any such conviction, where the defendant has consented to the amount and conditions of such service;

(i) If a person under the age of twenty-one years, (i) resides with his parents or in a suitable foster home or hostel as referred to in [section two hundred forty-four of the executive law](#), (ii) attends school, (iii) spends such part of the period of the sentence as the court may direct, but not exceeding two years, in a facility made available by the division for youth pursuant to article nineteen-G of the executive law, provided that admission to such facility may be made only with the prior consent of the division for youth, (iv) attend a non-residential program for such hours and pursuant to a schedule prescribed by the court as suitable for a program of rehabilitation of youth, (v) contribute to his own support in any home, foster home or hostel;

§ 65.10 Conditions of probation and of conditional discharge, NY PENAL § 65.10

---

(j) Post a bond or other security for the performance of any or all conditions imposed;

(k) Observe certain specified conditions of conduct as set forth in an order of protection issued pursuant to [section 530.12](#) or [530.13 of the criminal procedure law](#).

(k-1) Install and maintain a functioning ignition interlock device, as that term is defined in [section one hundred nineteen-a of the vehicle and traffic law](#), in any vehicle owned or operated by the defendant if the court in its discretion determines that such a condition is necessary to ensure the public safety. The court may require such condition only where a person has been convicted of a violation of [subdivision two, two-a or three of section eleven hundred ninety-two of the vehicle and traffic law](#), or any crime defined by the vehicle and traffic law or this chapter of which an alcohol-related violation of any provision of [section eleven hundred ninety-two of the vehicle and traffic law](#) is an essential element. The offender shall be required to install and operate the ignition interlock device only in accordance with [section eleven hundred ninety-eight of the vehicle and traffic law](#).

(k-2) (i) Refrain, upon sentencing for a crime involving unlawful sexual conduct committed against a metropolitan transportation authority passenger, customer, or employee or a crime involving assault against a metropolitan transportation authority employee, committed in or on any facility or conveyance of the metropolitan transportation authority or a subsidiary thereof or the New York city transit authority or a subsidiary thereof, from using or entering any of such authority's subways, trains, buses or other conveyances or facilities specified by the court for a period of up to three years, or a specified period of such probation or conditional discharge, whichever is less. For purposes of this section, a crime involving assault shall mean an offense described in article one hundred twenty of this chapter which has as an element the causing of physical injury or serious physical injury to another as well as the attempt thereof.

(ii) The court may, in its discretion, suspend, modify or cancel a condition imposed under this paragraph in the interest of justice at any time. If the person depends on the authority's subways, trains, buses, or other conveyances or facilities for trips of necessity, including, but not limited to, travel to or from medical or legal appointments, school or training classes or places of employment, obtaining food, clothing or necessary household items, or rendering care to family members, the court may modify such condition to allow for a trip or trips as in its discretion are necessary.

(iii) A person at liberty and subject to a condition under this paragraph who applies, within thirty days after the date such condition becomes effective, for a refund of any prepaid fare amounts rendered unusable in whole or in part by such condition including, but not limited to, a monthly pass, shall be issued a refund of the amounts so prepaid.

(l) Satisfy any other conditions reasonably related to his rehabilitation.

3. Conditions relating to supervision. When imposing a sentence of probation the court, in addition to any conditions imposed pursuant to subdivision two of this section, shall require as conditions of the sentence, that the defendant:

§ 65.10 Conditions of probation and of conditional discharge, NY PENAL § 65.10

---

(a) Report to a probation officer as directed by the court or the probation officer and permit the probation officer to visit him at his place of abode or elsewhere;

(b) Remain within the jurisdiction of the court unless granted permission to leave by the court or the probation officer. Where a defendant is granted permission to move or travel outside the jurisdiction of the court, the defendant shall sign a written waiver of extradition agreeing to waive extradition proceedings where such proceedings are the result of the issuance of a warrant by the court pursuant to [subdivision two of section 410.40 of the criminal procedure law](#) based on an alleged violation of probation. Where any county or the city of New York incurs costs associated with the return of any probationer based on the issuance of a warrant by the court pursuant to [subdivision two of section 410.40 of the criminal procedure law](#), the jurisdiction may collect the reasonable and necessary expenses involved in connection with his or her transport, from the probationer; provided that where the sentence of probation is not revoked pursuant to [section 410.70 of the criminal procedure law](#) no such expenses may be collected.

(c) Answer all reasonable inquiries by the probation officer and notify the probation officer prior to any change in address or employment.

4. Electronic monitoring. When imposing a sentence of probation the court may, in addition to any conditions imposed pursuant to subdivisions two and three of this section, require the defendant to submit to the use of an electronic monitoring device and/or to follow a schedule that governs the defendant's daily movement. Such condition may be imposed only where the court, in its discretion, determines that requiring the defendant to comply with such condition will advance public safety, probationer control or probationer surveillance. Electronic monitoring shall be used in accordance with uniform procedures developed by the office of probation and correctional alternatives.

4-a. Mandatory conditions for sex offenders. (a) When imposing a sentence of probation or conditional discharge upon a person convicted of an offense defined in article one hundred thirty, two hundred thirty-five or two hundred sixty-three of this chapter, or [section 255.25, 255.26 or 255.27](#) of this chapter, and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to [subdivision six of section 168-l of the correction law](#), the court shall require, as a mandatory condition of such sentence, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds, as that term is defined in [subdivision fourteen of section 220.00](#) of this chapter, or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen while one or more of such persons under the age of eighteen are present, provided however, that when such sentenced offender is a registered student or participant or an employee of such facility or institution or entity contracting therewith or has a family member enrolled in such facility or institution, such sentenced offender may, with the written authorization of his or her probation officer or the court and the superintendent or chief administrator of such facility, institution or grounds, enter such facility, institution or upon such grounds for the limited purposes authorized by the probation officer or the court and superintendent or chief officer. Nothing in this subdivision shall be construed as restricting any lawful condition of supervision that may be imposed on such sentenced offender.

§ 65.10 Conditions of probation and of conditional discharge, NY PENAL § 65.10

---

(b) When imposing a sentence of probation or conditional discharge upon a person convicted of an offense for which registration as a sex offender is required pursuant to [subdivision two](#) or [three of section one hundred sixty-eight-a of the correction law](#), and the victim of such offense was under the age of eighteen at the time of such offense or such person has been designated a level three sex offender pursuant to [subdivision six of section one hundred sixty-eight-l of the correction law](#) or the internet was used to facilitate the commission of the crime, the court shall require, as mandatory conditions of such sentence, that such sentenced offender be prohibited from using the internet to access pornographic material, access a commercial social networking website, communicate with other individuals or groups for the purpose of promoting sexual relations with persons under the age of eighteen, and communicate with a person under the age of eighteen when such offender is over the age of eighteen, provided that the court may permit an offender to use the internet to communicate with a person under the age of eighteen when such offender is the parent of a minor child and is not otherwise prohibited from communicating with such child. Nothing in this subdivision shall be construed as restricting any other lawful condition of supervision that may be imposed on such sentenced offender. As used in this subdivision, a “commercial social networking website” shall mean any business, organization or other entity operating a website that permits persons under eighteen years of age to be registered users for the purpose of establishing personal relationships with other users, where such persons under eighteen years of age may: (i) create web pages or profiles that provide information about themselves where such web pages or profiles are available to the public or to other users; (ii) engage in direct or real time communication with other users, such as a chat room or instant messenger; and (iii) communicate with persons over eighteen years of age; provided, however, that, for purposes of this subdivision, a commercial social networking website shall not include a website that permits users to engage in such other activities as are not enumerated herein.

5. Other conditions. When imposing a sentence of probation the court may, in addition to any conditions imposed pursuant to subdivisions two, three and four of this section, require that the defendant comply with any other reasonable condition as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant.

5-a. Other conditions for sex offenders. When imposing a sentence of probation upon a person convicted of an offense for which registration as a sex offender is required pursuant to [subdivision two](#) or [three of section one hundred sixty-eight-a of the correction law](#), in addition to any conditions required under subdivisions two, three, four, four-a and five of this section, the court may require that the defendant comply with a reasonable limitation on his or her use of the internet that the court determines to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to protect public safety, provided that the court shall not prohibit such sentenced offender from using the internet in connection with education, lawful employment or search for lawful employment.

**Credits**

(L.1965, c. 1030. Amended L.1973, c. 676, § 30; L.1974, c. 930, § 3; L.1975, c. 667, § 35; L.1978, c. 500, § 1; L.1980, c. 270, § 1; L.1980, c. 284, § 1; L.1980, c. 471, § 22; L.1980, c. 530, § 16; L.1981, c. 583, § 1; L.1981, c. 742, § 3; L.1982, c. 782, §§ 1, 2; L.1984, c. 335, § 2; L.1984, c. 417, § 1; L.1985, c. 672, §§ 1, 2; L.1986, c. 552, § 1; L.1989, c. 443, § 1; L.1992, c. 465, § 51; L.1992, c. 618, § 15; L.1995, c. 536, § 2; L.1996, c. 186, § 1; L.1996, c. 653, § 1; L.1997, c. 181, § 1, eff. July 8, 1997; L.2000, c. 1, § 7, eff. Feb. 1, 2001; L.2001, c. 508, § 1, eff. Jan. 20, 2002; L.2005, c. 544, § 1, eff. Sept. 1, 2005; L.2006, c. 320, § 4, eff. Nov. 1, 2006; L.2006, c. 571, § 6, eff. Nov. 1, 2006; L.2007, c. 669, § 1, eff. Oct. 27, 2007; L.2008, c. 67, §§ 7, 8, eff. April 28, 2008; L.2008, c. 406, § 2, eff. Aug. 5, 2008; L.2010, c. 56, pt. A, § 46, eff. June 22, 2010;

§ 65.10 Conditions of probation and of conditional discharge, NY PENAL § 65.10

---

L.2010, c. 56, pt. D, § 8, eff. Sept. 20, 2010; L.2018, c. 480, § 2, eff. June 26, 2019; L.2020, c. 56, pt. VV, § 1, eff. July 2, 2020.)

**Editors' Notes**

**PRACTICE COMMENTARY**

by William C. Donnino

See Practice Commentary at the end of [Penal Law § 65.00](#).

[Notes of Decisions \(165\)](#)

**Footnotes**

<sup>1</sup> So in original. Probably should be a semicolon.

McKinney's Penal Law § 65.10, NY PENAL § 65.10

Current through L.2022, chapters 1 to 485. Some statute sections may be more current, see credits for details.

---

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.

# Trial Waiver and Plea Agreement

STATE OF NEW YORK  
COUNTY OF SARATOGA

JUSTICE COURT  
CITY/TOWN/VILLAGE OF \_\_\_\_\_

THE PEOPLE OF THE STATE OF NEW YORK

-against-

DOB: \_\_\_\_\_

Defendant.

## Original Charge(s)

- A. \_\_\_\_\_ (reduced to) \_\_\_\_\_  
B. \_\_\_\_\_ (reduced to) \_\_\_\_\_  
C. \_\_\_\_\_ (reduced to) \_\_\_\_\_  
D. \_\_\_\_\_ (reduced to) \_\_\_\_\_  
E. \_\_\_\_\_ (reduced to) \_\_\_\_\_

The People consent to such disposition for the following reasons:

- No Prior Record       Prior Record       Interest of Justice       Difficulties in Proof

I, the Defendant in the above-referenced action, depose and state as follows:

I have been advised that the People have agreed to allow me to plead guilty as shown above in full satisfaction of the original charge(s). I have also been advised that I have the right to a trial, and the right to confront and cross-examine any witnesses against me. I am also aware that I have the right to request an adjournment to obtain the aid of counsel.

That after due deliberation, I believe that it would be in my best interest to dispose of the case as set forth above with the conditions set forth below. I fully understand my rights and have not been forced by anyone to plead guilty in this matter. I accept the offer of the People and do **not** request a Trial on the charges. I also acknowledge that:

- Pursuant to CPL §245.00, Discovery was timely provided for my defense.  
 Pursuant to CPL §245.00, Discovery was not a legal prerequisite for entry of this plea.

Accordingly, I hereby waive those rights and plead guilty as shown above in full satisfaction of the original charge(s).

The following promise/recommendation made as to sentence and/or conditions of the agreement/sentence:

- Jail: \_\_\_\_\_  Fine TBT By Court: \_\_\_\_\_  Probation: \_\_\_\_\_  Conditional Discharge  No promise made to sentence.

## Conditions:

- Restitution: \_\_\_\_\_;  
 Order of Protection:  Stay Away from: or  Refrain from: Protected Person(s): \_\_\_\_\_;  
 CPL §530.11(1)/§370.15 relationship exists and defendant stipulates such fact has been proven beyond a reasonable doubt;  
 Proof of Valid License/Registration/ Insurance or Inspection to Court;  
 Victim Impact Panel       Impaired Driver Program       No Accident / Personal Injury  
 Approved Ignition Interlock Device (CD / Probation);  
 Mandatory License Suspension per DMV;  
 Alcohol? Drug Evaluation at CASAC certified agency & Comply with any Recommended Treatment;  
 Defensive Driving Course       Alive at 25 Course / Distracted Driving Course  Risk and Responsibility/ Prevention;  
 Provide Proof to Court by \_\_\_\_\_ for items checked above;  
 Other(s): \_\_\_\_\_

The above constitutes the agreement between the People, and the Defendant for acceptance by the Court as to the disposition of the above original charge(s), and the Defendant by signing below, affirms that (s)he consents thereto with the full appreciation of his/her rights and being fully aware of the terms of this Agreement and **hereby knowingly and voluntarily waives all rights to appeal the above disposition**. *If any misrepresentation is made concerning Defendant's record, the People may void and terminate the proposed disposition.*

It is expressly agreed that the Defendant authorizes the Court, as a condition of the Plea Bargain, to review the Defendant's prior criminal history and driving record in determining acceptance of the Plea Bargain. The Defendant voluntarily and unconditionally waives the requirement that the Court not look at prior records before plea. The Court reserves the right to accept or reject this agreement.

\_\_\_\_\_  
Prosecutor      Dated: \_\_\_\_\_

\_\_\_\_\_  
Defendant

\_\_\_\_\_  
Justice      Dated: \_\_\_\_\_

\_\_\_\_\_  
Attorney for Defendant