
Probation Condition Setting in Johnson County, Kansas

A REPORT IN A SERIES ON ALIGNING SUPERVISION
CONDITIONS WITH RISK AND NEEDS



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

Acknowledgements

This report is part of the Aligning Supervision Conditions with Risk and Needs project, a multi-state project aimed at improving the way supervision conditions are set for people on probation and parole. The report was prepared with support from Arnold Ventures.

Thanks to Erin Harbinson, Director of the Criminal Justice Institute in Hawaii, for helping to conceive of this project when she was a Research Scholar at the Robina Institute. Thanks also to Erin Harbinson, Julia Laskorunsky, Ebony Ruhland, and Lily Gleicher, for conducting the interviews that supported this report.

Special thanks to the individuals who participated in interviews for this report, including judges, prosecutors, defense attorneys, and probation officers from the Johnson County Corrections Department and Johnson County Court Services. This report is extremely rich because of the time these individuals took to talk with us about their processes.

Table of Contents

Executive Summary.....	i
Introduction	1
Legal Framework.....	2
System Orientation	4
Purpose of Probation	5
Expectations for What Would Happen on Probation	6
Purpose of Probation Conditions.....	8
Setting Probation Conditions.....	11
Condition-Setting Process	11
Important Information for Setting Conditions.....	13
Standard vs. Special Conditions.....	15
Most Important Conditions.....	16
Modifying Conditions.....	17
Perceptions About Probation Conditions.....	19
Number of Probation Conditions.....	19
Unnecessary Conditions	20
Conditions as Barriers or Helpful	23
Risk Assessment	25
Use of Risk Assessment.....	25
Perceptions of Risk Assessment Tools or Process.....	27
Handling Violations.....	29
Successful Completion	33
Conclusions.....	35

Executive Summary

This report is one in a series of reports for the Aligning Supervision Conditions with Risk and Needs (ASCRN) project, the goal of which is to reduce probation and parole revocations and reorient community supervision toward promoting success by changing the way probation and parole conditions are imposed. Conditions are requirements that a person on probation or parole must adhere to while serving a period of community supervision. For people on parole, this occurs after the person has served time in prison and is released into the community for a post-prison period of supervision. For people on probation, this period of supervision occurs in the community in lieu of incarceration. The hypothesis for this project was that if probation and parole conditions targeted individuals' criminogenic needs and were based upon risk level, individuals on supervision would be more successful.¹ However, to move to this form of condition setting, we first needed to understand how conditions were being determined and what role, if any, risk and needs assessments played in the condition-setting process.

This report sets forth our findings on the parole condition-setting process utilized by the judges when sentencing a person to probation in Johnson County, Kansas. The report also explores what role, if any, risk and needs assessments play in the condition-setting process. The findings in this report are based primarily on a legal and policy review, and interviews conducted in 2021 with relevant stakeholders who we presumed would have a hand in recommending or imposing probation conditions, including judges, prosecutors, defense attorneys, court services probation officers, and community corrections probation officers. From this study, we make the following conclusions.

Conclusions

1

Prosecutors appear to be the most influential party in setting probation conditions. The condition-setting process appears to revolve primarily around the plea agreement. Prosecutors seem to have the largest role in determining the conditions of probation because conditions are often included in the plea agreement offer. Defense attorneys bargain to temper the conditions to set their clients up for the best chance for success, or to minimize their chances for failure or future incarceration, but they are already working from the baseline established by prosecutors in the plea offer. Probation officers said they had no role in recommending conditions to the court, and judges indicated that they often accept the terms of the plea agreement when sentencing.

2

Probation conditions are not tailored to the risk and needs of the individual. Because prosecutors drive the plea agreement it is fair to say that the information they consider to be most important for setting probation conditions is paramount, and as prosecutors explain, that includes information about the offense as described in police reports, the person's criminal history, and input

¹ See Christopher T. Lowenkamp, Edward J. Latessa, and A.M. Holsinger, *The Risk Principle in Action: What Have We Learned From 13,676 Offenders and 97 Correctional Programs?*, 52(1) *Crime & Delinquency* 77-93 (2006) (suggesting that supervision conditions should be aligned with a person's risk and needs).

from the victim. Prosecutors do not utilize risk and needs information because risk assessments are completed too late in the process, after the plea agreement process has already unfolded.

3

Mechanisms are in place to individualize probation conditions, but conditions appear instead to be fairly standardized based on the conviction offense. The law sets forth required and optional conditions for probation, but judges have full authority to modify conditions. As a result, the standard probation forms used in Johnson County, Kansas, do not mirror the requirements in statute, and people across the system have lost sight of which conditions are required by statute and which are not. Rather than viewing “standard” conditions as the ones that are required to be ordered in every case, system actors understand standard conditions to be conditions that are routinely ordered for specific case types (e.g., the conditions typically ordered in a driving under the influence case). The court’s ability to modify any condition opens the door for conditions to be individualized in each case, and respondents indicated this does happen on occasion (e.g., when the no alcohol condition is modified to allow a person to enter restaurants that serve alcohol). Additionally, the probation order includes a standard probation condition requiring people on probation to comply with the probation case plan and any further written conditions by the probation officer. This also opens the door for individualizing conditions because it gives probation officers discretion to offer services or impose requirements that address a person’s criminogenic needs. But more research would be needed to determine how this condition is used in practice. Thus, the legal framework currently in place allows for individualization of probation conditions, but our interviews indicated that probation conditions tend to be fairly standardized based on the conviction offense rather than the needs of the individual.

4

Judges, prosecutors, and defense attorneys lack a feedback mechanism to understand what works in condition setting. Judges, prosecutors, and defense attorneys all admitted that they do not know how to judge whether probation is successful because after a person has been sentenced, they primarily only see the failures – that is, the people who return to court on a violation. They also stated that they lack specific feedback about whether the probation conditions they recommend or impose relate to success or failure. Thus, probation condition setting in Johnson County, Kansas is a fairly rote process based on the offense rather than the individual needs of the person.

Introduction

This report is one in a series of reports for the Aligning Supervision Conditions with Risk and Needs (ASCRN) project. The goal of the project is to reduce probation and parole revocations and reorient community supervision toward promoting success by changing the way probation and parole conditions are imposed. Conditions are requirements that a person on probation or parole must adhere to while serving a period of community supervision. For people on parole, this occurs after the person has served time in prison and is released into the community for a post-prison period of supervision. For people on probation, this period of supervision occurs in the community in lieu of incarceration. The hypothesis for this project was that if probation and parole conditions targeted individuals' criminogenic needs and were based upon risk level, individuals on supervision would be more successful.² However, to move to this form of condition setting, we first needed to understand how conditions were being determined and what role, if any, risk and needs assessments played in the condition-setting process.

This report sets forth our findings on the condition-setting process for probation in Johnson County, Kansas. The findings in this report are based primarily on the legal and policy review of relevant statutes, administrative rules, and policies, as well as interviews with stakeholders we presumed would have a role in recommending or imposing supervision conditions. In 2021, we conducted 25 interviews with judges, prosecutors, defense attorneys, court services probation officers, and community corrections probation officers.³

² See Christopher T. Lowenkamp, Edward J. Latessa, and A.M. Holsinger, *The Risk Principle in Action: What Have We Learned From 13,676 Offenders and 97 Correctional Programs?*, 52(1) *Crime & Delinquency* 77-93 (2006) (suggesting that supervision conditions should be aligned with a person's risk and needs).

³ Though we intended to interview people on probation, we were unsuccessful in doing so because protocols in place during the pandemic made recruiting more difficult.

Legal Framework

In Kansas, there are three types of sentencing dispositions under which a person could be subject to community supervision: probation, assignment to a community correctional services program, or suspension of sentence. Probation is defined as a non-confinement sentence during which the person is “subject to conditions imposed by the court and subject to the supervision of the probation service of the court or community corrections.”⁴ A community correctional services program is “a program which operates under the community corrections act and to which a defendant is assigned for supervision, confinement, detention, care or treatment, subject to conditions imposed by the court.”⁵ Suspension of sentence is defined as “a procedure under which a defendant, convicted of a crime, is released by the court without imposition of sentence,” and the release may be with or without supervision.⁶ Within this section, all three types of supervision will be referred to as probation.

For felonies, the period of probation is generally 12 to 36 months, depending on the severity level (seriousness) assigned to the offense in the Kansas Sentencing Guidelines.⁷ Felony probation terms can be extended if there is a finding of “judicial necessity,” and so long as the total period does not exceed five years or the length of the prison sentence the person could have received, whichever is longer.⁸ The length of probation for misdemeanors is more discretionary, with the law providing that such sentences “shall not exceed two years...subject to renewal and extension for additional fixed periods of two years.”⁹

While on probation, an individual must comply with conditions of probation, which are requirements set by the court. Regardless of whether the crime was a felony or misdemeanor, Kansas law mandates six conditions for any person on probation:

- Obey all laws;
- Pay restitution;
- Pay supervision fees—\$60 for misdemeanors and \$120 for felonies—unless waived;
- Reimburse the state general fund for all or part of defense counsel services, unless waived;
- Submit to searches by probation officers or law enforcement personnel; and
- Submit to random drug and alcohol testing.¹⁰

In addition to the six mandated conditions, there are 14 conditions that the court may impose, which generally apply to both felonies and misdemeanors.¹¹ Some of them include avoiding dangerous activities, avoiding people and places of disreputable character, maintaining employment, checking in with a probation officer, remaining in the state of Kansas, paying child support, obtaining treatment or other programming, doing community service, participating in house arrest, and paying other fees.¹² For those on probation for a felony, the court can also impose up to 60 days in jail, and another

4 Kan. Stat. Ann. §§ 21-6603(a), (g) (2022).

5 Kan. Stat. Ann. § 21-6603(b) (2022).

6 Kan. Stat. Ann. § 21-6603(h) (2022).

7 Kan. Stat. Ann. § 21-6608(c)(2) (2022).

8 Kan. Stat. Ann. §§ 21-6608(c)(6), (c)(8) (2022).

9 Kan. Stat. Ann. § 21-6608(a) (2022).

10 Kan. Stat. Ann. § 21-6607(c)(1)-(6) (2022).

11 Kan. Stat. Ann. § 21-6607(b)(1)-(14) (2022).

12 *Id.*

statute allows for assignment to a “conservation camp”—a highly structured work program within correctional facilities¹³—for up to six months as a condition of probation.¹⁴

The conditions listed in the statute are not an exhaustive list. The court has the authority to impose any condition,¹⁵ limited only by the requirement that the conditions must “bear a reasonable relationship to the rehabilitative goals of probation, the protection of the public, and the nature of the offense.”¹⁶ Importantly, the statute explicitly states that the judge can modify, or essentially edit, any condition, which would include the conditions that are mandated by the statute.¹⁷

For this study, the Robina Institute received a sample of probation orders for people convicted of misdemeanor and felony sentences.¹⁸ Johnson County uses standard probation orders which vary slightly for felonies and misdemeanors. Neither form directly mirrors the conditions listed in statute. Both forms include five of the six mandated conditions; only the condition to submit to searches by probation officers or law enforcement was not included on the forms. Interestingly, the forms exclude seven of the statutorily defined optional conditions,¹⁹ but include conditions requiring the defendant to avoid certain persons, report to their probation officer, remain at the same address unless a move is approved, and pay all financial obligations. Both forms also include about 10 additional conditions that are not identified in statute, which cover topics such as reporting to probation intake and completing an orientation, complying with the probation case plan, abstaining from alcohol and drugs, and banning the use or possession of firearms. The misdemeanor form includes a condition to complete specific treatment programs while the felony form does not include any treatment conditions. The felony form also includes requirements such as providing a DNA sample, completing offender registration requirements, and serving up to 60 days in jail. Interestingly, though jail time cannot be a condition of probation for misdemeanors,²⁰ jail time is listed on the form as a sanction a person might be ordered to serve prior to reporting for probation. Every condition on the misdemeanor form has a line next to it that can be checked to indicate whether the condition applies, and this is true even for the statutorily mandated conditions. In contrast, on the felony probation form, some conditions had a line next to them and some did not, indicating that some conditions are standard (i.e., imposed in every case) while some conditions are applied on a case-by-case basis.

Supervision may be provided by two types of probation agencies: Court Services or Community Corrections. A risk-needs assessment tool determines what level of supervision a person receives, and accordingly, which type of probation agency will supervise them.²¹ Supervision by Community Corrections is reserved for those convicted of felonies who score highest on the risk-needs assessment.²² Court Services handles all other probation.

¹³ Kan. Stat. Ann. § 75-52-127 (2022).

¹⁴ Kan. Stat. Ann. § 21-6604(a)(4) (2022).

¹⁵ Kan. Stat. Ann. § 21-6607(b) (2022).

¹⁶ *State v. Evans*, 796 P.2d 178, 179 (Kan. Ct. App. 1990).

¹⁷ Kan. Stat. Ann. § 21-6607(a) (2022).

¹⁸ Robina was given three slightly varying forms for both misdemeanors and felonies which substantively remained the same, and accordingly, the most recent form was used for this analysis.

¹⁹ The excluded conditions required the person to avoid “injurious or vicious habits,” permit home visits by probation officers, support dependents, reside in a residential facility, perform community service, satisfy financial obligations through day fines, or participate in house arrest. The misdemeanor form also includes the optional condition of maintaining employment, but the felony form does not.

²⁰ See Kan Stat. Ann. §§ 21-6603(g) (2022) (defining probation as a sentence “without imprisonment except as provided in felony cases”); 21-6607(b)(14) (2022) (listing jail as a potential condition of probation only for felonies); *State v. Kohlman*, 854 P.2d 318 (1993) (explaining that jail cannot be ordered as a condition of probation for misdemeanors).

²¹ Kan. Stat. Ann. § 75-5291(a)(2)(A) (2022).

²² Kan. Sentencing Commission, *Memorandum: New Probation Placement Tools and Criteria* (July 1, 2021), https://cdn.oits.ks.gov/media/docs/sentencinglibraries/2021-drm/web-announcement-for-probation-placement-criteria-changes-7.1.21.pdf?sfvrsn=2bb6fc97_3.

System Orientation

To better understand the context within which conditions are set in each jurisdiction, we asked three questions aimed at system orientation: 1) what is the purpose of parole; 2) what are your expectations for what will happen during parole; and 3) what is the purpose of parole conditions? Table 1 provides a simplified overview of the responses. As discussed further in this section, actors across the criminal justice system saw probation as serving the twin goals of reducing recidivism and rehabilitating the person on probation. They saw this primarily occurring through compliance with probation conditions, and the majority said the purpose of probation conditions was to create an outline for appropriate behavior or a path for achieving success on probation. System actors thought the community expected the person to be surveilled and monitored while on probation. Judges, prosecutors, and defense attorneys also thought the community wanted to see probationers' behavior corrected while probation officers thought the community wanted swift incarceration responses to violations.

Table 1. Overview of Responses to System Orientation Questions

	Purpose of Probation	Expectations of What Will Happen on Probation	Community Expectations (as perceived by system actors)	Purpose of Probation Conditions
Judges	Reduce recidivism Promote rehabilitation	Follow the plan outlined in their order	Surveillance and monitoring Payment of restitution/making victims whole	Provide structure Provide a path for success Means of accountability
Prosecutors	Reduce recidivism Promote rehabilitation	Follow through with the terms of the plea agreement	Adherence to requirements Correct behavior	Outline appropriate behavior Correct behavior Promote rehabilitation
Defense Attorneys	Provide supervision Make the person better	Give clients a chance to succeed		Provide assistance
Probation Officers	Promote rehabilitation Protect the community	Client honesty Working the program Compliance with conditions	Surveillance and monitoring Swiftly responding to violations with incarceration	Outline appropriate behavior (i.e., get people to “follow the rules of society”) Provide treatment or services Impose punishment and keep the community safe

Purpose of Probation

Across the board, system actors in Johnson County, Kansas saw probation as a means of attaining accountability and promoting rehabilitation. Both prosecutors and judges spoke about there being two purposes of probation. The first was to reduce recidivism. Several prosecutors talked about probation as being a period during which a person could be offered programming to help correct harmful behavior, and at least one prosecutor saw probation as a format for requiring people to engage in treatment. Similarly, a judge described probation as an opportunity to “improve their mechanisms to deal with their life in some other way than what led them to be going through criminal court.” Thus, closely linked with the concept of reducing recidivism was that the purpose of probation was to promote rehabilitation.

Generally speaking, the people who get put on probation, there is some sort of a probationary need. They are needed to be supervised in order to get some sort of type of care. Like they need to have drug or alcohol treatment, mental health treatment, or both. They have some sort of a need for treatment and wishing and hoping that they will get treatment doesn't work, so they need to be supervised. They need to have some sort of a carrot and stick effect in order to make them get treatment. You hope that they actually get the treatment that they need in order to keep them from reoffending. It's to reduce recidivism ultimately. – Prosecutor

One prosecutor saw the purpose of probation as being more nuanced, stating it differed according to the type of crime. For crimes that are driven by addiction, such as drugs, property, and theft crimes, the prosecutor thought the purpose should be rehabilitation. For crimes that involve victims, the prosecutor thought the goal should be public safety and to “closely watch[] over them, and make sure they are staying on track.” In contrast, the prosecutor thought the goal for economic crimes should be restitution.

Defense attorneys focused on probation as a means of supervising the person and making sure they are doing the treatment or programming they've been ordered to do, or to reform the person so they can live a law-abiding life.

To supervise the offender. To provide structure and sometimes just feedback that they need for what they are doing. To monitor their drug or alcohol use. To supervise and monitor if they have to do a treatment, for example. Any sort of treatment—anger management, drug, and alcohol—to help keep them on track really. – Defense Attorney

One defense attorney said the purpose of probation is to reduce the jail population but still impose some form of punishment. This same person said more focus is needed on using data so that the needs of a person drive probation rather than taking a one-size-fits-all approach.

There has to be some risk involved with this analysis and acceptance of some amount of risk. I think that the purpose, from my perspective of probation, is not to make somebody perfect, but to make somebody better. – Defense Attorney

All of the court services probation officers talked about probation serving the twin goals of rehabilitation and protecting the community. As they explained, both could be achieved by providing services to the person such as substance abuse treatment, anger management, or domestic violence treatment, through which they could “teach [people] different skills and different ways of handling things rather than committing crimes.”

Community corrections officers had a similar view, though most described probation as an opportunity for people to “get back on track.” Like court services officers, community corrections officers said probation is a time when people can gain services to address addiction and other needs. One officer noted that their goal is to “motivate positive behavior change” while another saw their role as much more impactful, stating probation is a chance to “help people save their own lives.” As the officer elaborated, “The meaning behind is that I think it's my job, or our job as an agency, to get folks to a place where they are self-capable of managing without the criminal justice system being involved in any form or fashion.”

Across the system, everyone stated that the purpose of probation did not differ between probation services provided by court service versus community corrections. Instead, they said the intensity differed, with the probation services provided by community corrections being more intense than those provided by court services.

Expectations for What Would Happen on Probation

We asked each of the system actors what they expected would happen when a person is on probation as well as what they thought the community expected. This provided an opportunity to gauge how these different actors perceived their responsibility to community and victims. It also provided insight as to whether there appeared to be any conflict or tension between what the actors expected to happen during the probation period and what they thought community and victims expected.

Judges said they simply expected people on probation to follow the plan outlined by their sentencing order.

Really, it's the basics of no new law violations and work your program that we've set out here, whatever that is. If it's a substance abuse evaluation and treatment, if it's do community service, or if it's stay clean. I think that's probably it. – Judge

For the most part, prosecutors said that they want people on probation to succeed. But they viewed success as meaning that people would carry through with the terms of their plea agreement, that they would not use drugs and attend treatment, or that they would take advantage of the programs offered and prove that they can move away from the criminal justice system.

Two prosecutors were less optimistic. One person who primarily prosecuted sex crimes typically only saw people sentenced to probation when the prosecutor lacked the necessary evidence to seek a prison sentence, so this prosecutor expected people to fail. Another prosecutor expected failure because many violations seemed to be driven by addiction. As this prosecutor said, “If the primary issue is substance abuse or mental health, I think expecting perfection is setting people up to fail.” Thus, this prosecutor also expected people to violate, but thought the response should be different when the underlying issue was addiction.

Defense attorneys had a less positive view of what might happen on probation. They hoped that probation would help their clients and give them a chance to succeed, but most seemed to expect that their clients would not be successful. One defense attorney advised their clients to keep a spiral notebook to record every communication with the probation officer so there would be a record for that person's defense if they were ever violated. Another stated that for clients with prior criminal history, they would routinely give a stern lecture urging compliance with all the conditions of probation.

What I tell my clients is, “You’re going to have to report. You’re going to have to take UAs. You’re going to have to pass UAs. You’re going to have to maintain contact with your probation officer. You can’t get into any more trouble.” ...Those are generally kind of the expectations that I set forth, sort of the big picture things that they need to understand for what they have to do on probation. “Pay off your court costs and fees, do whatever else your probation officer says, and hopefully this will be past you.” – Defense Attorney

Probation officers voiced three main expectations for what would happen on probation. First, most probation officers said they expected people on probation to be honest with them, explaining that they needed honesty in order to understand the issues people on probation faced and to work through those issues with them.

If they are honest with me, I can set up some resources with them. For example, if they drink or they use, be honest with me. That is the only way I am going to be able to get the help we need to ensure that this behavior does not continue. Also, really address the underlying root causes as to why they are using. Is it stress? Is it trauma? What is that underlying cause that’s leading them to use? I try to explain that to them and let them know that I am here to help them. I am not by no means here to put them in custody. There are times when that needs to be done and they understand that, but I would really like to address the underlying root cause of why they are in this situation and what’s causing them to continue the behavior.
– Probation Officer

Second, they said they expected people on probation to work the program. As one probation officer said, “I don’t want to be working harder on their probation than they are.” But those who raised this point expected that people on probation would take advantage of the resources made available to them to address the issues that resulted in them being put on probation in the first place.

Third, probation officers said they expected compliance. This meant that people on probation were following conditions, completing programming, refraining from drug and alcohol use, and not committing more crimes. Interestingly, the officers who expressed this expectation were different from the officers who said they expected people on probation to maintain honesty and work the program, indicating there may be a divide in the way that probation officers approach their work.

When asked their thoughts about what the community expects for probation, there was an interesting divide between the perceptions of probation officers and other system actors (judges, prosecutors, and defense attorneys). Probation officers were almost perfectly uniform in their responses. Nearly every probation officer said they thought community and victims expected them to take a surveillance and monitoring approach with people on probation and to respond swiftly with incarceration when they failed to do the things they were supposed to do or engaged in criminal activity or wrongdoing. These perceptions may be why compliance with conditions was the third most talked about expectation for probation officers (above).

I think they think that we are just here to watch them and lock them up when they commit another crime. They don’t understand that we are here to help the defendants to change their life and to hopefully make a better decision the next time they are faced with the same situation. – Probation Officer

I think probably victims expect us to be more of a cop and to have their best interests, and just basically be monitoring, and making sure, and laying down the hammer, and keeping the community safe, and reporting if there is any violations whatsoever. – Probation Officer

In contrast, the other actors in the system talked about several different expectations that they thought community or victims had about probation. No group was uniform in their responses, but members from each of the three groups—judges, prosecutors, and defense attorneys—mentioned the same variety of expectations. Similar to the perceptions that probation officers had, these other actors perceived that community and victims expected probation to involve surveillance and monitoring. But these actors went further, mentioning the expectation that people on probation would pay restitution and make victims whole, that they would be given requirements to adhere to, and that the probation department would work to correct their behavior. Across all interviews, however, including those with probation officers, there was a perception that the community and victims do not have a good understanding of what happens on probation.

I don't think that the community really has a good understanding and they just want people locked up because they don't understand all the resources and programming that we are able to do to help offenders out. Victims, I think also just want people locked up because they think that that will better everyone's situation just because they don't know what the evidence shows and all of that. They are not informed. – Probation Officer

I mean, I'm not sure what people honestly think about it or really even know about it. I just feel like most people don't pay really much attention to the criminal justice system until it hits their lives...they have this high expectation that probation officers are not overworked and that they can actually pay attention to every offender, which isn't true... [Then if somebody] re-offends while on probation and they become a victim of somebody who was on probation while they are reoffending, then it's an outrage. – Prosecutor

Purpose of Probation Conditions

When asked about the purpose of probation conditions, a common thread that ran through the responses of system actors was that they provide a roadmap or outline of expectations for behavior during the period of probation. But system actors also articulated additional purposes for probation conditions such as keeping the community and victims safe.

Judges saw probation conditions as providing structure, providing a path for what a person would need to do in order to be successful, and providing a means of accountability.

To give them some structure. To say, "Here are the rules that you have to go by," and not just to get it done, but in a very altruistic and maybe a very naive way of, "Here is a way to get you on a path back to being employed, not committing crimes, dealing with your substance problems, your mental health problems, whatever that is," and should be more holistic. But that's far from what most are I know. Like I said, it's kind of pollyannaish in a way. – Judge

Prosecutors articulated multiple purposes for probation conditions. The first echoed that of judges, with three prosecutors indicating that the purpose of probation conditions is to clearly state what the probationer needs to comply with.

I mean, I think it's just in fairness to the defense and also to make sure everybody is on the same page. If we don't really on the front end make a very clear list of, "These are the expectations. These are the things you can do, the things you can't do, and the things you have to do," if we are not clear about that, that's not fair to the defendant. But it's also not fair to us if this person is messing up and doing things that they should not be doing, illegal things, whatever it may be, that we then wouldn't have a remedy to really argue that they are in noncompliance if we didn't spell that out clearly. I think that's the reason we have to...and I'm saying this as a lawyer, too, which, of course, we're like, "I want it in writing. I want it clear. I want everyone to know." But I think it's in fairness to all parties, whether it's for the defense or the state. We all just need to be on the same page. – Prosecutor

Another prosecutor indicated that probation conditions help to correct behavior by providing tangible goals.

I think that instead of saying, "Do better," you need to sit there and have tangible, achievable goals for folks. That way you can say, "Hey, you did this." "You did this well." "You did this great." "Good job." "Here you're kind of falling behind." For me, I think that's the best way to handle that situation. – Prosecutor

Two prosecutors indicated that the purpose of probation conditions is to promote rehabilitation. But for one of these prosecutors, there was more nuance, with different conditions serving different purposes. For example, a treatment program would serve the purpose of rehabilitation. But if the person was convicted of a domestic violence offense, the prosecutor would recommend a no contact order for the victim, and the purpose of that condition would be community and victim safety.

One prosecutor also indicated that when probation is given to someone who they believe should have received a prison sentence, probation conditions are intended to place tight restrictions on the person so that if they fail, they will end up in prison anyway.

I try not to set people up to fail on purpose, but there are cases where I don't...there are cases where I don't care if that happens to be honest. Where you give them a really [strict] probation to set them up and if they fail, then, "Oops, I guess they failed." Then they end up...but the real purposes of those conditions are to keep the victim safe and to give community safety. Those are really big reasons to have those conditions on probation. – Prosecutor

Defense attorneys described the purpose of probation conditions as a means of assisting a person become more successful or functional in the community and to address potential issues such as substance abuse. But one defense attorney was bothered by the demand for perfection in following probation conditions, stating that the goal should be to make someone better, even if they haven't met all of their goals.

Personally, I think that kind of setting those goals, trying to get them to that particular point, and then measuring it by that one goal is problematic. I think the goal of probation should be to make somebody better. If they are getting better, even if they haven't met all of the goals, I don't think that's necessarily a failure. In fact, I think that could be really good for society. I mean, man, if you and I got better over the next year, but I didn't meet somebody's goal, I'm not sure that's a bad thing. If everybody in the world did that, we would have a better world and probation officers would be trying to revoke all of us because we didn't meet our goals. – Defense Attorney

Two defense attorneys noted that there is a difference in the purpose of standard versus additional conditions. One said that some standard conditions are meant to be a deterrent, and act as a warning to the person that if they commit another crime, the penalty will be ratcheted up. This same defense attorney noted that other standard conditions—like reporting to the probation officer—are just there to make probation work. In contrast, both attorneys said that additional conditions serve a different purpose because they are tailored to the individual. As one defense attorney said, additional conditions are “a more direct reflection of the vulnerabilities of that particular defendant or probationer and extra things that need to be added.” A second defense attorney noted that additional conditions should be targeted to achieve the greatest benefit.

Those are the things that I view as being tailored to the individual because it's a matter of allocating scarce resources. You don't need or want to have every single person on probation get every single evaluation possible. It costs too much. It would be ineffective. It actually would probably harm the effectiveness of the things that they actually need. To me, the special conditions or the specific conditions need to be tailored to the case and to the individual in order to provide the greatest benefit for them, and, by doing so, the greatest benefit for society. – Defense Attorney

Probation officers described four purposes of probation conditions. The first purpose, which was articulated most frequently by both court services and community corrections officers, was to set an outline for probation, both in terms of the rules and the expectations of the court and probation officers. Probation officers described this outline as the rubric against which the person would be held accountable during probation.

I think that gives us a great outline as far as what the court expects and what we expect. Obviously, we work for the court, so being able to just show that to the clients, as far as just some of the basic outlines of what they should anticipate with probation, what the court is going to hold them to, and also some of those obligations that they are going to need to complete to get through that successfully. – Probation Officer

From there, court services and community corrections probation officers diverged when describing other purposes of probation conditions. Court services probation officers described probation conditions as a means of getting people to “follow the rules of society,” stating that most conditions are things that people should already be doing anyway. Conditions, then, could serve as a guide for getting out of the system. Additionally, they noted that conditions are a means of providing treatment or other programming or services that a person might need. Community corrections probation officers described probation conditions as a means of imposing punishment and keeping the community safe.

Setting Probation Conditions

The condition-setting process appears to revolve primarily around the plea agreement. As explained in this section, prosecutors seem to have the largest role in determining the conditions of probation because conditions are often included in the plea agreement offer. Defense attorneys bargain to temper the conditions to set their clients up for the best chance for success, or to minimize their chances for failure or future incarceration. Probation officers said they had no role in recommending conditions to the court, though some acknowledged that the presentence investigation (PSI) typically does include recommendations. Because prosecutors drive the plea agreement it is fair to say that the information they consider to be most important for setting probation conditions is paramount, and as prosecutors explain, that includes information about the offense as described in police reports, the person's criminal history, and input from the victim. Though the law does set forth required and optional conditions for probation, because judges have full authority to modify conditions, the system is not bound by these requirements. Instead, system actors understand standard conditions to be conditions that are routinely ordered for specific case types.

Condition-Setting Process

Prosecutors said that the plea agreement is the main vehicle through which they influence probation conditions. As one prosecutor said, "If I wanted something specific, it would be written in the plea agreement itself." However, prosecutors had different opinions about how much influence they wielded with regard to conditions. One prosecutor perceived that the plea agreement is so pivotal in the condition-setting process that prosecutors essentially dictate the terms of probation through the plea agreement.

I mean, I guess, to answer your question, now that I think about it, the state kind of dictates exactly what the terms are essentially. I mean, it really starts with our plea negotiations or plea deal. Ultimately, whatever is in that plea deal, it starts with us. I'll send a plea offer saying, "These are the things I... If you take this plea, this is what I want you to have to do on probation to address whatever the issues are." There may be some back and forth. We renegotiate. The defense maybe asks for extra things or wants to take things out. But ultimately, whatever is entered into the plea agreement has been negotiated and first offered by me and then has the seal of approval, both the defense attorney and myself. Really, I mean, it's the attorneys that kind of dictate exactly what the terms are. The judge can, I guess, "break" the plea deal, which could mean a lot of things. They could just not follow it at all. Or they could say, "I agree." Or they could say, "I'm going to take this out, but I'm going to add this in." Or, "I'm going to keep it, but I'm going to add additional things on top of it." We are essentially setting the tone for the case. Most judges don't really...they may add something to it, but generally they will follow whatever we have agreed to. That kind of, I guess, in essence means the state is kind of dictating what the terms are. – Prosecutor

Though not every prosecutor held this extreme view of the importance of the plea agreement, the majority said they routinely provide input on conditions through the plea agreement, often based on information they have gained from the victim, from police reports, or based on the conviction offense.

I think in a lot of our cases, since they do result in pleas, the judges don't have a lot of interaction with them. I think that my responsibility is to try to figure out what caused the situation that caused this person to commit the crime that they did and how I can address that. For example, in domestic violence cases, by statute and by practice, we have to contact the victims. I always ask them, like, "What do you think this person needs? What's the issue?" They'll say, "I think they have an anger issue or usually substance abuse issue." Then I think it's...even though they may not be intoxicated in this particular case, if what the victim is experiencing is when they drink I get abused, I have issues, then a substance abuse evaluation needs to be put in that case because it is an issue. – Prosecutor

In contrast, defense attorneys saw themselves in more of a defensive role with regard to probation conditions. In some cases, defense attorneys are seeking to temper the conditions offered by prosecutors to prevent future incarceration.

From my perspective, I want any probation conditions that are negotiated, to frankly, help my client complete probation and to safeguard their liberty and their freedom in the future. Sometimes it has to do with not the right now, but the future. Restitution is a great example. If somebody starts probation, a 24-month probation, and has \$100,000 in restitution, they are not going to ever get off probation. It's going to get extended until the day they die. If I can say to the state, "Why don't we order \$10,000 in restitution and let the rest get a civil case be filed. Or let it go to Collections, etc. so there is not a prison sentence hanging over his head?" Well, that's a life-changing event for my client. That's a probation condition and that seems to me to be something where I can help him succeed. I can help him get off probation in the future and I can help him have a life after that. – Defense Attorney

In other cases, defense attorneys are seeking to establish conditions that can help their clients. In the following two examples, the first defense attorney spoke of this role in altruistic terms—seeking to help the client—while the second spoke of this role as trying to achieve a “positive-sum” outcome. In both examples, though, the defense attorney is working to achieve conditions that can lead to a better long-term outlook for the defendant.

The first role is to try and get what the client would like. The second role for me is to talk my clients into thinking they want what they get, which is to assist them in making better choices and asking for help, and getting help that will be right in front of them because a lot of them can't. They don't come from a family structure, or any kind of a structure, to understand how to get help, or know how to do it, or stick to it. My role is to try and reduce the amount of things they get, the impact. – Defense Attorney

I see them [conditions] as bargaining tools... A zero-sum is that I give something and the other side gets something. If you sum it up, all the total, the two of us we are at zero. But one person got a benefit and the other person got a detriment. These aren't zero-sum... It should be, "Yes, we are giving something up. They are getting something because they are getting what they want. But what they want is also good for my client." My client has a drug addiction to heroin... It should be a positive-sum. He gets a substance abuse evaluation, he goes to treatment, and he doesn't die. Or he doesn't waste his money on drugs. He lives a better life. That's what it should be. It should be positive-sum. But it's also a negotiating chip because it's making the deal look better and better. Frankly, when people are at that stage, they need the incentive in order to reform. That's where I wish that the prosecutors would view me more as a partner in that, they are like, "Okay. Well, yeah. Let's give this person a powerful incentive to go ahead and do this." – Defense Attorney

Ultimately, the defense attorney's role in condition-setting is led by the wishes of the defendant. Thus, defense attorneys may not advocate for every condition they think may be appropriate because the goal is to secure a plea agreement that aligns with what the defendant believes is important.

I may think it's really important that somebody get a not guilty in a case. But they are not really concerned about that. What they are concerned about is the restitution amount. We judge a win differently. In a client-centered approach, we figure out what's important to the client and that factors into how we negotiate. If there is an issue as far as a particular condition of probation, then that can factor in. – Defense Attorney

Judges confirmed the strong role of the plea agreement in setting probation conditions. Though there was some discussion by judges and other actors in the system about times that judges added to or slightly amended conditions, the general consensus seemed to be that the plea process was the stronger determinant in setting conditions.

Interviewer: What percentage of cases that are sentenced to probation end up having the conditions kind of figured out through plea negotiations?

Judge: I would think more than 90% and it may be a lot higher than that. Like I said, it's not very often that I will change something one way or the other.

Important Information for Setting Conditions

When setting the conditions of probation, judges said they are informed by numerous factors, including the plea agreement, the arguments made by the prosecutor and defense, victim input, the presentence investigation (PSI) (which is generally only present in felony cases), the person's criminal record, and the offense for which the person was convicted. The PSI was described as an extensive document covering much of the information judges highlighted as important.

One judge acknowledged, however, that in most cases, the plea agreement will already contain the conditions typically ordered in similar cases. Another noted that because judges are not as knowledgeable about the case, they look to the attorneys to emphasize the information that is most important and that should drive their consideration when establishing the conditions of probation. Interestingly, two prosecutors echoed these sentiments, stating they thought judges should follow the plea agreement because the plea agreement process involves sifting through a large amount of information and uncovering the factors that caused the person to commit the crime, and that the conditions in the plea agreement are therefore designed to address those factors.

I think they should follow plea agreements because plea agreements are made by the parties who have access to all the discovery and all the police reports that the judges don't have access to...the judges don't have to follow the plea agreement, but they should because we have made these recommendations jointly together. Both parties agree this is what should be the condition of the probation, so the judge should do that. – Prosecutor

When you're setting your conditions, I think, a good background or understanding of what led them to be there is going to be important. Typically, that's going to be already done through a plea agreement. They [judges] are not doing much usually unless it's some sort of open-argue type of situation. – Prosecutor

Though probation officers stated they do not have a role in setting probation conditions, they did have opinions about the information judges should consider when doing so. For the most part, probation officers thought judges should be considering the severity of the offense, the person's criminal history, and victim input when setting probation conditions, indicating that these factors offer clues about the person's needs (e.g., a driving under the influence offense would necessitate a chemical use evaluation) and the degree to which the person poses a risk to public safety thereby necessitating more restrictions. One probation officer also thought judges should consider the person's ability to pay.

I think finances needs...is probably the top priority just because that's the problem that I tend to have my clients run into, is they can't afford doing like 3 different assessments plus all the recommendations that come from those assessments. I would say that's probably the top one. – Probation Officer

Interestingly, three probation officers thought judges should look at risk and needs assessment information in setting conditions because that information could help them craft conditions to address the areas that lead to offending.

I think that if they are not aware of that [information on risk/needs assessments], that would be important, especially if you want to do a specialized order of probation to know the areas that the people they are sentencing are struggling in... I realize LSI-R or LS/CMI is not supposed to be a sentencing tool, but if the judges wanted to get specific or have specific orders to help those weak areas, that would be one way of going about it. – Probation Officer

Prosecutors indicated that they typically focus on the crime itself, information about the offense as described in police reports, the person's criminal history, and input from the victim when deciding which probation conditions to recommend to the court or include in the plea agreement. These considerations seemed to be aimed both at understanding the person's risk to public safety, in which case more restrictive conditions might be in order, and the underlying factors leading to the crime, in which case conditions to address those factors might be in order.

If it's a high public safety issue, then we need to take action. I also think we need to look at the individual themselves and what they're going through and what they have experienced. Is this an ongoing situation? Or is this a one-time thing that they got caught up in or whatever that is? But I think we really need to take into consideration their substance abuse history, their mental health history, and what it is that we need to implement to assist this individual in going through the criminal justice system. – Prosecutor

Prosecutors seem to rely heavily on sources like police reports and victim input to provide information about the defendant that might explain their criminal behavior.

They [the conditions] would be listed in the plea offer that we send the defense attorney. Then either they agree to it or sometimes they'll say, "There wasn't alcohol in this case, and they don't need an alcohol evaluation." I say, "Well, that's cool, but the victim tells me that he drinks a lot and abuses her, so I think they do." Or we'll be open on that. Then there is sometimes where we can't agree and I'll say, "Well, I'm going to ask the judge to order it. You can ask the judge not to order it," and then that will be their decision. But I at least I feel like I have a responsibility to advocate for that position. – Prosecutor

Prosecutors do not, however, look to risk assessment information when deciding which conditions to recommend or include in the plea agreement, and most indicated that the more detailed information from the assessment is not available to them; they only receive the final score. But the risk assessment score does determine which probation department should oversee probation supervision, and prosecutors stated they generally follow that.

Defense attorneys were clear that their role is to represent their client's interests, so the information most important to them was what the client wanted. A couple indicated that they try discerning what the underlying issue is with the defendant so they can hopefully address it.

The first thing I look at is what their priors are, what their prior criminal history is, and what their ability to comply with prior probations. I look and see if they have had revocations, if I can see what they were for. That will help me understand the places that they fail. I listen to them to hear where they are at in their life right now, what's their job situation, and their support structure situation. What trauma are they dealing with? Is it a past trauma that keeps breaking open and causing them to fail? Is it a new one? What's going on? Is it one that they can remedy if they're given some support? – Defense Attorney

Additionally, defense attorneys state that they would draw from a variety of sources of information including family input and any assessments done before sentencing. Like prosecutors, they do not draw from risk assessment information when negotiating probation conditions. One said this is because they do not receive anything other than the raw score; another said they do not trust how the risk assessment tool is administered.

Standard vs. Special Conditions

Kansas law sets forth a short list of standard conditions that are mandatory in every case, as well as a longer list of special conditions that court may impose.²³ We therefore asked criminal justice actors to explain their understanding of these statutorily-based conditions, and whether courts could amend or remove them.

Judges did not seem to distinguish between standard and special conditions. Instead, they tended to talk about the conditions they would routinely order by case type. For example, one judge said it was "standard" to order that a person attend a MADD (Mothers Against Drunk Driving) victim panel and complete a substance abuse evaluation in a driving under the influence case. Judges did however confirm that they can amend or remove any of the standard conditions of probation. As one judge said, "I can cross all of them out if I wanted to and just say don't violate the law." Two judges specifically described that they routinely amend the no alcohol condition to permit a person to work in or go to restaurants where alcohol is served.

²³ Kan. Stat. Ann. § 21-6607(b) and (c) (2022).

Prosecutors seemed to have more awareness that some probation conditions are standard (required by law), and some are not. But like judges, they also referred to some conditions as “standard” when they were talking about conditions that would typically be ordered for certain case types.

For certain like lower-level crimes, they might change or amend and take some out. But, yes, by and large, I think there is just a set that are across the board. Then I am sure there are probably some, like for sex crimes and things like that, very specific ones for those. Yes. But, by and large, there is at a minimum required ones that are across the board. – Prosecutor

One prosecutor who reviewed the probation order during the interview, thought that only three of the conditions were required: the prohibition for possessing a firearm if convicted of a felony, registering as a violent offender, and the no alcohol condition. Another described the standard conditions as “things to maybe not do... Just saying like, ‘Don’t drink.’ ‘Don’t do drugs.’ ‘Don’t drive unless you’ve got a valid license.’” But interestingly, none of the conditions noted by these two prosecutors are among the six conditions required by statute,²⁴ indicating that what is considered standard are the conditions that are routinely imposed. All prosecutors were aware that judges have the authority to amend or remove any of the conditions.

Defense attorneys described standard conditions as the basic rules of behavior a person on probation should adhere to and special conditions as requirements that are more tailored to the individual's needs. While this description also did not align with statute, it offered an interesting contrast to the way that judges and prosecutors thought about conditions. Defense attorneys seemed to distinguish the conditions based on how they affected defendants whereas judges and prosecutors seemed to distinguish conditions based on whether they were routinely or non-routinely ordered for specific case types.

Similar to the other actors in the system, probation officers saw the distinction between standard and special conditions in two ways. Some saw standard conditions as general expectations for behavior while special conditions were requirements that required defendants to take specific actions, such as attending treatment. Others saw standard conditions as those that are typically applied to everyone, and this encompassed a much broader list of conditions than the six required by statute. All probation officers understood that judges had wide discretion in imposing conditions, having the ability to amend the standard language, cross out conditions, or write in conditions that were not preprinted on the probation order forms.

Most Important Conditions

Probation officers were asked what they thought the most important conditions were. Court Services probation officers' responses were fairly uniform. Three officers said that the conditions requiring a person to obey all laws and submit to random UAs were the most important. Two more said that the treatment conditions were important. One officer said they frequently tell people to follow the “big five” to reach their goals: no new arrests, reporting regularly, following through with UAs, following through with drug or alcohol treatment, and paying court costs.

Community Corrections probation officers' responses exhibited more variation. Two officers indicated that the reporting condition was most important. Two officers focused on drug and alcohol use, with one saying the condition to complete UAs was most important, and the other saying the no use

²⁴ See Kan. Stat. Ann. § 21-6607(c) (2022).

condition was most important. One officer thought the condition requiring people on probation to sign releases of information was most important so the officer could monitor how the person was doing in treatment.

Across the board, these responses focused on the types of conditions that set the parameters for probation rather than the conditions that are focused on changing behavior. The officers were looking for conditions that made it easier for them to obtain compliance from people on probation rather than conditions that focused on addressing the person's criminogenic behavior. Only one probation officer deviated from this pattern, stating the most important condition was the one that offered the officer the most flexibility to help the person address their behavior.

I think a good one is to allow the probation officer to make the necessary changes to be able to supervise the client appropriately, and move them forward, and change their circumstances that got them here. I think conditions like that to give the probation officer the autonomy to make decisions for the best interests of the client. – Probation Officer

Modifying Conditions

Probation officers explained that they do not often need to ask the court to impose additional probation conditions because they have that authority. The probation order includes a standard probation condition requiring people on probation to comply with the probation case plan and any further written conditions by the probation officer.²⁵ This broad condition gives probation officers the authority they need to require people on their caseloads to complete additional assessments, comply with treatment recommendations, and complete other requirements as they direct.

I would say that we can't take away from the order, but we can add to it all day long. We can put it in a curfew if we want. We can put people on house arrest. We can do 2- or 3-day jail sanctions. We can add those conditions or those sanctions if we need, just like that example of the mental health eval. If somebody comes in and they are clearly in some sort of mental health crisis or they clearly can't focus, maybe we will get them in for like a mental health eval. – Probation Officer

Most probation officers talked about using their authority to add requirements in terms of addressing the person's needs. In some cases, they were referring to addressing the person's criminogenic needs; in others, they were referring to addressing other needs that might impact the person's quality of life.

When you meet someone the first time, you don't know everything that's going on. The more you get to know them, the more you might realize that, "Hey, there is another area that they need help in," not only to have them be accountable, like the rehab part as well, but just to get them help in any way possible that we can, if we see fit. – Probation Officer

The additional requirements imposed by the probation officer can serve as the basis for a probation violation.

²⁵ The probation order states, "Defendant is referred to the following agency and level of supervision, and shall comply with the LSI-R Case Plan (Supplemental Probation Contract), all rules and regulation of the assigned programs, and further written conditions the Probation Officer (PO) may require:" (followed by check boxes for each agency and level of supervision).

I can include those things. If someone has failed to...if I have directed someone to obtain a RADAC evaluation, or a drug and alcohol evaluation, or whatever, and they say there are not doing that, they are testing positive, and I have directed them on the phone to go do a UA tomorrow and they don't go do it, yes, I can include that in my report to the court to violate them. – Probation Officer

The probation officer's power is not unlimited, however. Probation officers would have to go back to the court to change the level of supervision (i.e., reduce it from intensive to standard supervision) or extend the person's probation term.

Perceptions About Probation Conditions

As explained in this section, respondents had mixed views about whether there were too many probation conditions or just the right amount. When asked if any are unnecessary, judges, prosecutors, defense attorneys, and probation officers tended to have concerns with different conditions. But nearly all indicated that the no alcohol condition is over applied while the no drug use condition is unclear now that marijuana is legal in some areas. When asked if conditions were barriers or helpful, prosecutors had mixed views, seeing conditions as both barriers and aids, while defense attorneys primarily saw conditions as barriers.

Number of Probation Conditions

When asked about the number of conditions, most indicated that the number is about right, though a few had other views. Judges were split, with some indicating that there are too many and some indicating the number is just right. Nearly every prosecutor said that the number of conditions imposed in probation cases is about right. Only one said they would “lean slightly toward too many.” One prosecutor explained that the conditions differ primarily by offense type (i.e., DUI, sex offense), and within each of those categories, the number of conditions is about right. But another prosecutor explained that conditions are developed on a case-by-case basis, and because of this, the number is about right in every case.

We don't treat all drug cases, all economic crimes cases, all rapes or murders all the same. We start completely with an empty slate and say, “Okay. Given the facts of the case, the victim, the defendant's history, and all of that, what makes the most sense for this case?” ...Since every single case is treated on a case-by-case basis, in terms of plea agreements, that I feel like whatever are the requirements of probation for that particular case were specifically crafted for that whole scenario for that person to make them the most successful. I think it's the right amount because of the way we handle it... It should be very appropriate and no more burdening than necessary to make that person successful and keep the community safe.

– Prosecutor

The same prosecutor indicated that even the standard conditions can be removed when not applicable.

Because if it's something that the defendant doesn't feel like they need or isn't appropriate for the facts of the case, then I have rarely seen a time where they asked to take some of those out and the judge says no to that. Judges are more than willing to do that. They don't want to overburden the defendant either and impose unnecessary restrictions or some sort of unnecessary tasks that they have to do. – Prosecutor

Defense attorneys had mixed views about the number of probation conditions. One said there were too many; two said the number was just right. Another thought that the number was about right but

that the way in which conditions were enforced created issues. For example, this defense attorney explained that the condition requiring random UAs could require testing up to four times a week while the condition to report as directed could mean meeting with the probation officer twice a week or once a month.

Probation officers differed in their views about the number of conditions. Nearly all court services probation officers thought the number of conditions was about right, though one officer noted that for people who are high risk, the number of conditions imposed might be overwhelming, so it would be up to the officer to space out the timing of when to address different conditions. Community corrections probation officers were split. Two officers said that the conditions were “just about doing what you were supposed to be doing anyway with somebody watching to make sure you're doing it,” and in that way, shouldn't be burdensome. But another officer noted that conditions were not individualized, with, for example, first-time felons often receiving the same conditions as repeat offenders, and people convicted of theft offenses receiving the same conditions as people convicted of sex offenses. In that way, the officer thought there were often conditions imposed that did not really apply. A third community corrections officer thought the number of conditions could be reduced and that the wording of conditions could be simplified.

Unnecessary Conditions

When asked whether there are any unnecessary or outdated probation conditions, people that we interviewed from across the system spoke most often about two conditions: the condition related to alcohol use, and the condition relating to drug use. With regard to alcohol, the condition states, “Defendant shall not possess or consume alcohol or cereal malt beverages, and shall not go to places where such items are sold for consumption on the premises, except in the course of employment.”²⁶ One judge indicated that the no alcohol condition is standard for everyone, even when drinking is not an issue for the person, and that maybe application of the condition should be more limited. But the primary concern with the condition was that it prohibited people from going into premises where alcohol is served, which, interviewees explained, could include Chipotle, Applebee's, and even a baseball game. Placing this condition on people limits what they can do with family and friends and reduces their opportunity for engaging in prosocial activities. As one probation officer said, “I feel like they should be able to go to Outback with their family...for prosocial activity.” Thus, interviewees seemed to indicate support for narrowing the condition to allow people to attend sporting events or go to restaurants, but to perhaps continue prohibiting them from entering bars.

A second condition that was discussed across system actors was the condition relating to drug use. Several people brought up the fact that marijuana—at least medical marijuana—is now legal in Missouri, and so it raises issues because though people can cross the border to obtain it legally, they are prohibited from using drugs under the conditions of probation. One defense attorney questioned whether marijuana use should ever result in revocation to prison.

I am not a marijuana proponent, but I recognize that you know what, not everybody is like me. Society is changing. Marijuana has some usages. I am a little stricter in how I view it, but I just don't think you should send people to prison for smoking it. – Defense Attorney

But most interviewees were unclear about whether they thought the condition should be revised to allow or disallow marijuana use, stating instead that the issue needed clarity.

²⁶ Johnson County, *Order for Misdemeanor Probation / Order for Felony Probation*, on file with author.

Two prosecutors raised additional conditions they thought could be modified. One thought the condition requiring a person to report to their probation officer should be broadened to allow for more virtual reporting. Another thought that in some situations the condition prohibiting no contact with the victim did not need to be imposed if the issues (e.g., domestic violence) had been addressed.

Three defense attorneys questioned the condition to attend “Changing Lives Through Literature,” which appears to be assignable only for felony probation.²⁷ Two of the three attorneys thought the program was well-intentioned but did not think a person should be revoked for failing to attend or complete the program. A third did not think the program was effective.

Probation officers had a broader range of views about conditions that could be updated or eliminated. In addition to talking about the no alcohol or drugs conditions as explained above, probation officers talked about the conditions requiring a person to satisfy outstanding warrants, to obtain a GED or employment, to pay financial obligations or complete community service, and conditions prohibiting certain associations or prohibiting a person from obtaining a driver’s license. In each of these situations, probation officers seemed to be desiring a more individualized approach regarding the condition.

One standard condition requires a person to satisfy all outstanding warrants. But probation officers noted several issues with this requirement, occurring primarily with warrants from other jurisdictions. First, probation officers sometimes have been unable to get the other jurisdiction to respond when they make an inquiry about the warrant. When this occurs, the probation officer cannot discharge the person from probation, even when they have satisfied all other conditions. Second, addressing the warrants can disrupt the good things the person has going in their life, as described in the following scenario where a person had an outstanding warrant in Washington.

Verifying all outstanding warrants within 90 days is ridiculous because that even applies to maybe a warrant that they have got 20 years ago in Washington State, and they are not going to extradite. Or you have someone that’s got a really good job, and they are doing really well, and they are doing what they are supposed to. They have a warrant in Washington, but they can’t leave because if they do they are going to lose their job. It happened way back in Washington, and they are not going to extradite. If there is a warrant that’s basically saying to them go back up there. There are things that I don’t necessarily always agree with.

– Probation Officer

Two probation officers also questioned the condition requiring a person to obtain their GED. One thought the condition needed to be individualized, and only applied when a person might benefit from the GED whereas the other thought that although obtaining a GED was a good goal, it should not necessarily be required as a condition of probation.

I had a woman—she was late 50s, early 60s—and that was one of the conditions that [obtain GED] was checked on her probation. I’m like, “Okay. She is at the end of her time in the workforce. I don’t know what it would do to benefit her realistically for her to get her GED.” She likes the warehouse jobs, the forklift jobs... I don’t know how that would really benefit her all that much... She was so mad. But she ended up doing it and going through, and she got off probation early. That is one condition that while I think that it is good for them to get their GED or some sort of education, I think that that’s a condition that does not need to be checked in all cases. – Probation Officer

²⁷ Johnson County, *Felony Probation Order*, on file with author.

I don't think it's necessarily our place to tell someone, "Hey, you need a GED." Again, that might be a goal. That might be something that they are interested in, but it might not be, and it might be something that they are doing just fine without. That being a condition of probation is not so great or not necessary in my opinion. – Probation Officer

Similarly, one probation officer thought that the condition to maintain employment was overapplied and did not make sense in every case.

For example, one of them on there is maintain full-time employment. We have got retired people on our caseload. We have got stay-at-home moms on our caseloads and students on our caseloads, so that really doesn't apply and that doesn't...I don't hold anybody accountable for that condition, especially with the pandemic, COVID, and people losing their jobs and stuff. They are kind of bouncing from job to job from trying to find something. There are some conditions that are on the order of probation that we don't really pay much attention to. We kind of focus on the other conditions that we tend to hold people more accountable to. – Probation Officer

With regard to financial obligations, probation officers were primarily concerned that when a person had otherwise satisfied the conditions of probation, but still owed courts costs, it was more difficult to get them discharged from probation. Probation officers explained that in these situations, they would have to go back to court in order to gain release. They indicated that judges nearly always discharged individuals from probation, but it required this extra step that probation officers did not feel was necessary. Community service was discussed by one defense attorney and one probation officer. The defense attorney questioned whether it was appropriate in many cases while the probation officer was concerned because people engaged in community service only earned \$5 an hour towards their financial obligations. The probation officer thought people should be earning the equivalent of at least minimum wage.

Multiple probation officers brought up the condition prohibiting a person from associating with other people who have criminal records. Probation officers explained that the condition is unenforceable because they cannot monitor a person's every interaction, they cannot reasonably know who does and does not have a criminal record, and in many cases, strict compliance with the order would be unrealistic because it would require a person to break ties with the family and friends in their social support network.

A lot of times my clients are with people...they are married to people that also committed crimes or their family members or that. I honestly don't think people really follow it. How am I supposed to know who people are hanging out with in their free time? That one I don't think is necessary or maybe they can reword it differently. – Probation Officer

But I just say doing all these assessments you'll learn that 9 times out of 10 the people in an offender's life are people who have been in trouble themselves too. You can't expect them to go from these people in their life and just to cut everyone completely out, friends, family, or whatever. I just don't think that's a reasonable expectation. I think the focus should be on modifying how they behave or think when they are with these people. You can't just expect to just cut all those people out of their life cold. I mean, it's just not...it's not going to happen. – Probation Officer

Finally, one probation officer indicated that the condition prohibiting a person from driving without a license is unnecessary because that activity is already prohibited by law.

Conditions as Barriers or Helpful

Only prosecutors and defense attorneys were asked if probation conditions served as barriers or were helpful to people on probation. Prosecutors had mixed views, seeing conditions as both barriers and aids, while defense attorneys primarily saw conditions as barriers.

Prosecutors saw conditions as helpful because the conditions offered the opportunity to identify issues such as addiction and mental health and help people address them.

Absolutely...if somebody has got a lot of these underlying issues and they are getting a drug and alcohol assessment, and they are following the recommendations of that, and going to meetings, and dropping the UAs, if they are seeing Corrections staff to try to get employment, I think all of those are extremely beneficial to our probationers. – Prosecutor

I mean, I think of the additional ones as those that are targeted conditions. We're specifically putting for you a condition that we think will help you be successful because of what we see. Those are the most important, of course. I mean, treatment that's #1. You're never going to be successful if you don't identify the problem and get help for it because most people we deal with cannot do it on their own. – Prosecutor

They saw even standard conditions as helpful, noting that each condition is there for a reason. In this example, one prosecutor explained their perception on how the requirement to report to the probation officer was useful for checking a person's progress.

If somebody is not reporting, there is no way to know how they are doing. I think there is tremendous value, even if it's just once a month, to see how probationers present. Like are they unkempt? Do they look like they might be struggling with substance abuse or maybe mental health to the point where they just really look unkempt and dirty, and stuff like that? – Prosecutor

Conversely, prosecutors explained that conditions could be barriers when, for example, a person did not have the financial means to attend a class or pay restitution. But throughout this discussion, prosecutors also perceived that some of the barriers were created because people on probation either did not take responsibility for their actions or were unwilling to address their underlying issues.

Now, the biggest thing and here is what I would say, those barriers can always be addressed. The problem is communication. I hear this all the time from defense attorneys at revocation hearings as well. "My car broke down. I couldn't get a ride." "Okay. Well, did you call your probation officer the minute you knew your car broke down and you couldn't get a ride?" "Well, no, I didn't." Or, "I called, and I tried, but they weren't there. They wouldn't take my call." Or, "I didn't leave a message." Barriers are a problem, but excuses are also a problem. But those can be solved if someone is proactive and wants to solve the barrier. – Prosecutor

I see it both ways where I think they do create barriers and they can be difficult and challenging, and the accommodations should be made, but I would also say that life is full of barriers... I have had people say, "Hey, they lost a loved one," which is why they used meth that night. Or something like that. Which is terrible. I get it and I feel really bad for him, but I'm also like, "Hey, man. This isn't going to be the last time something bad is going to happen in your life. You need to find ways of not avoiding obstacles, but finding ways to overcome them without breaking the law or hurting somebody else." It's only a barrier if the defendant is unwilling to address the issue. – Prosecutor

One prosecutor had the view that because the system is set up to allow conditions to be amended or changed—even the standard ones—conditions should never be a burden to defendants.

I think because it's not set in stone, it's not just a rigid thing where it can never be changed or amended. If that were the case, yes. I think that it could create barriers. But judges have recognized that, and it's very fluid. Because of that, I don't see how it can disadvantage a defendant if a judge is objecting or a judge is saying, "You know what? No. I think this defendant needs to be able to stay away from restaurants, bars, or whatever." There is probably a reason for their own good, to keep them on a good track and keep them to be successful on probation. I don't see any way that it would be overburdening or whatever. If a judge feels it's appropriate, they are going to order it. If not, they'll take it out. I think everything is in support of making the defendant successful, but not overly burdening them or making their lives harder and things like that. – Prosecutor

Defense attorneys primarily saw conditions as barriers. In most cases, this was because they thought the conditions were overly broad. For example, defense attorneys noted that the condition prohibiting a person from entering establishments where alcohol was served kept their clients from obtaining work as food servers in places like Olive Garden. Another noted that they had clients who were revoked for having lunch at Applebee's. Similarly, the condition disallowing people on probation from associating with people who had criminal records meant that their clients would also have to stay away from people who had reformed and could be a good influence, or people who could serve as their AA sponsor.

Defense attorneys described several other instances where conditions created barriers. For example, the condition to pay restitution could create a barrier to being discharged from probation. Defense attorneys thought this was unfair when the person followed all conditions and made a concerted effort to pay restitution but could not pay the full amount before their probation expired. In these situations, probation was often extended. Additionally, conditions could create barriers when the combination of conditions made it extremely difficult to complete all of the requirements of probation, as described in the next quotation.

Not always. I think sometimes they hinder. Community service is the example that I like to go to. Community service could help you feel better about something. But sometimes if you're asking somebody to take drug tests to meet with somebody multiple times a week, to have a family to not have to steal to pay their bills, giving them 100 hours of community service is almost impossible for that. They cheat other areas of their life that rip away quality of life just to get those stupid community service hours done and does nothing but hurt their criminogenic needs as well as make them resentful. Now, on paper, 100 hours of community service should be a good thing. But in actuality, for a lot of people, that's a terrible thing.
– Defense Attorney

Only two defense attorneys came up with examples where they thought conditions were helpful. The first said that no contact with the victim could be helpful in breaking off harmful relationships. The second said that Batterer's Intervention courses were effective.

Risk Assessment

Because risk assessment is one possible source of information when setting probation conditions, we asked about how risk assessment is used in the Kansas sentencing process. For the most part, prosecutors and defense attorneys do not rely on risk assessment information in recommending conditions because the assessment is performed too late in the process (after plea bargaining). While some appeared to be intrigued by the possibility of having risk assessment information to inform condition-setting, most acknowledged that there is little relationship between a person's risk and needs and the conditions of probation.

Use of Risk Assessment

Actors across the system explained the use of risk assessment in the sentencing process. In felony cases, the court orders a pretrial assessment, and Court Services administers a risk assessment²⁸ as part of that process. The court is provided with the overall score from the risk assessment, and this is used to determine whether probation supervision will be provided by Court Services or Community Corrections. The court does not receive the domain scores from the assessment. In misdemeanor cases, risk assessments are not administered prior to sentencing. As one defense attorney put it, "On a misdemeanor plea, however, you don't do the LSI-R before sentencing. You just show up, you plead, and you get sentenced."

As explained earlier (see *Condition Setting Process*), conditions are often worked out before sentencing during the plea-bargaining process. Prosecutors said they do not use risk assessment information to determine what probation conditions to include in the plea offer because they do not receive the risk assessment until much later in the process. But one prosecutor acknowledged that it might be helpful to have risk assessment information earlier.

I get, too, you definitely don't want a defendant worrying about when they are answering those questions how is this going to be used against me later? I get that, but if...I don't know. If substance abuse is a huge issue and that's part of how the LSI-R are scored, that would be nice to know because then I could set conditions that way so that I don't really get that opportunity the way the system is set up now. – Prosecutor

Similarly, defense attorneys do not use risk assessment information when engaging in the plea-bargaining process because that information is not available to them. One defense attorney seemed to view the availability of risk assessment information as a point of contention.

²⁸ At the time of the interviews, most were using the LSI-R. However, the state was transitioning to using the LS/CMI for men and the WRNA for women.

Yeah. Just the overall score. There was a huge fight—I really could go on forever and I know you don't want that—about how just how that information has been disseminated in the past. The agreement has been we don't need to see it, we want the raw score, and that's become part of the statute. But, obviously, we can talk about the criminogenic needs in the various domains, and we can do our own analysis to figure out what their score...if they have a huge, high score, we can say, "What did you say about the people you hang around with?"
– Defense Attorney

Probation officers stated they do not have a role in recommending conditions to the court at sentencing. However, they do utilize risk assessment information when developing a case plan with the person on probation, and to determine the appropriate level of supervision. For felonies, probation officers noted that in addition to the risk assessment done at the time of the pretrial assessment, they are required to reassess individuals within 45 days of the start of their probation term and at least once a year after that. For misdemeanors, assessment is done during intake, but because the probation terms are much shorter (generally about a year), reassessments are rarely done. In both cases, reassessments are done following significant events such as absconding for a long period of time or gaining stable housing and employment.

Most probation officers talked about the importance of using risk assessment to identify the person's areas of needs and establishing a case plan to address those needs.

We are really focusing on those assessments and what they tell us, and not just what our assumption is for risk and needs on clients. We have been really trying to be mindful in doing the assessments correctly, gathering the information that we need, and using those assessments to drive our case plans and our supervision strategy. – Probation Officer

I mean, it's supposed to be the main driving factor for what we are doing. Your whole case plan is supposed to be based on the risks identified in the evaluation. I think it's what, top three? We pick the top three risk areas and then set a case plan to help address those top three areas and go from there. – Probation Officer

But one probation officer did not think the assessment was necessary to identify those need areas, noting instead that they could rely on their experience.

I'm not tooting my own horn, but anybody that's been doing this for very long, it doesn't take a rocket scientist to see if somebody has an issue in a certain area. The risk/needs assessment, as far as I am concerned, just...it will 99.9% of the time confirm that or point it out if you don't have enough time to meet with them in the beginning. We usually have them from the get-go, so it's an area to keep an eye on or at least be aware of. – Probation Officer

Only one probation officer talked specifically about tying the case plan to probation conditions, noting that they would tie the person's case plan goals to complying with conditions if the areas the person scored high on coordinated with those conditions. This dialogue indicates, however, that the conditions may not always be related to the person's criminogenic needs.

We will do that risk assessment tool to determine if there are high-risk areas that we want to address. Typically, if those coordinate with some of the court conditions, then I will kind of use those as some of our goal settings and some of the obligations that we want to complete. For example, if they set that they score high in drugs and alcohol, and they have been, obviously, a drug and alcohol case for me, they have been ordered to do an assessment, then that's going to be something that I include in their case plan. That's kind of piggybacking off of those conditions that have been set as well. – Probation Officer

Perceptions of Risk Assessment Tools or Process

For the most part, judges and prosecutors did not have perceptions to report about the risk assessment tools used in Johnson County, and this is likely because they do not utilize any information from the assessment. One defense attorney who had worked long enough to see the use of risk assessment evolve over time was skeptical about its value.

The other is that the LSI-R, as I have seen over time, is subjective based on the location where they are at, at the time they're evaluated. The LSI-R will take into consideration if you are in custody, you're going to get a point for being around criminals. Well, yeah. "I can't bond out. Why are you giving me a point for that?"... They also go after financial information, so they get an extra point for being double poor. Or if you're going to treatment, being around people...it's on there, some extra questions that are added that just to me were just arbitrary and stupid. Then also, depending on the person giving the test, so that's the arbitrariness of it for me. I have also not seen...and this is what's odd. I have seen the numbers change dramatically over the years. They used to have a real wide range of things they do and now they are changing. Those numbers all seem to come into the same number. Well, everybody is very different, and my clients are very distinctly different. It doesn't make a lot of sense to me. – Defense Attorney

Kansas was transitioning from using the LSI-R to the LS/CMI and WRNA when we interviewed probation officers. Probation officers seemed to be generally positive about the transition though some did express some trepidation about the change. The majority of negative comments were about the older tool rather than the tools they were transitioning to.

The only concern is that we are just getting used to it. We are not as proficient as we will eventually be. But it's just a matter of working out all those important specifics that you need to know. – Probation Officer

I actually am not a huge fan of the LSI-R that we've used. I love the WRNA. The LS/CMI, I haven't used it really yet. I just haven't had anybody come through. I like them both because they are lengthier. They catch more in the assessments. The LSI-R, I don't want to say it's generic, but there is just a lot that it doesn't look into. It doesn't look into the trauma. It doesn't look into anything. It's just very surface. I am excited for both LS/CMI to be used and the WRNA. I think it's going to shed a whole lot more light on a lot of our offenders. – Probation Officer

Two probation officers expressed concern about risk assessment in general. The first perceived that risk assessment tools did not provide any information they did not already know from experience. The second thought that people on probation had learned how to "beat" the assessment to gain more favorable terms of supervision.

One of the concerns that's been going on for years is, I think, our clients have been coached on how to answer and they kind of know this is how it determines how many times a month I have to report or what level I am going to get sentence to. They have learned how to work the system, which is a little frustrating with the tools as they figured them out and can work them to their benefit sometimes. – Probation Officer

Handling Violations

There were varying views across the system about how probation violations should be handled. Most of the tension seemed to arise from differing opinions as to the timing of filing violations with the court. Prosecutors and judges seemed to want violations to be filed sooner, while probation officers wanted to work with people longer before filing violations.

Some of them [judges] expect us, as soon as they violate their probation, to notify the court and bring them back to court. I think Court Services expects us to do everything we can to keep from taking them back to court before we actually do. – Probation Officer

Community Corrections probation officers talked frequently about the fact that judges will impose a “no internal sanctions” limitation, which means that the probation officer cannot informally work with a person to address behavior that technically violates the conditions of probation without first clearing it with the court.

Then we have the no internal sanction, which is like, “No internal sanction, I want to be notified.” We can notify them informally, “Hey, this is what happened. This is what we can do to put these sanctions in place and redirect the client, and hopefully get them back on track. If you’re okay with that, let’s do that and not bring them back in front of you.”
– Probation Officer

Probation officers saw the “no internal sanction option” as tying their hands; making it difficult to respond to violative behavior quickly, and thereby change the person's trajectory.

There are some judges that utilize it in certain situations, and I don't know the reasonings for it, if it's because of the crime or of the severity of the crime, or the victims involved, or the criminal history. I don't know why they impose them... We would definitely like to eliminate that altogether because it ties our hands on being able to assist our clients in a timely manner.
– Probation Officer

One probation officer explained that expectations can vary by judge and by case. In some cases, judges will give probation officers leeway to informally address behavior that is violative of probation conditions. But in others, judges keep the case on a shorter leash, expecting every violation to be brought back before them because they have a specific history with the case, or at least expecting the probation officer to run the case by them to confirm whether it is okay to handle the violation less formally.

Several prosecutors said that while they share the same goals for probation as probation officers, they differ in their expectations about how to address violations. As one explained, “prosecutors are going to want to hold people more accountable than probation officers would and there’s nothing wrong with that.” This sentiment came through repeatedly from prosecutors. For example, one prosecutor noted that they are “less empathetic” towards people who repeatedly violate probation, especially because people on probation are provided services (i.e., housing, addiction counseling, etc.) and multiple opportunities to avoid revocation.

We are not afraid if somebody is on a second or third revo to recommend prison where sometimes they [probation officers] want to give them multiple more chances. – Prosecutor

Another noted that it's a matter of timing. For example, in the following quote, the prosecutor explained their expectation that drug and alcohol use would be brought before the judge sooner but admitted that revocation did not always need to result from that.

But I guess the biggest issue that I have seen in my career is just going to be how do we handle violations of your probation. For me, as a prosecutor, if someone is testing positive for methamphetamine, my thought is, "We need to get back in front of the judge and address it." I don't think it's any surprise. If you've talked to prosecutors, you probably know that there are situations where I can finally get notice of some sort of violation. But it includes, "Oh, look. They have been testing positive for methamphetamine for the last five months. They haven't taken UAs for the last 10 times. They haven't done all of this." Well, my expectation is we would have...and, again, it doesn't mean they have to be revoked. It doesn't even mean that I'm trying to put them in jail. It's just we should be addressing that sooner. The court should be addressing that sooner. Because what I have found is the longer you wait, the longer you let that hang out there, and by the time we get into court, nothing is going to happen that first time. Then it's going to be another six months, maybe, before the problems continue and then we are back in front of the judge. – Prosecutor

Another prosecutor indicated their differences of opinion sometimes result from the fact that they are reviewing the behavior on paper and do not really know the person or the efforts that person has been putting into the probation process.

On paper, when I see updates about this person just messing up a bunch of their terms on probation and it looks really bad, but then I talk to the probation officer, and they are like, "Yeah. It does look bad, but they're trying really hard. I can tell. They keep in constant contact with me. They're doing their best yada, yada." When I get some context from them directly, I'm like, "Okay. Yeah, I agree." I think we all have the same goal. But if there is ever a question about what path should we...if we are at a fork in the road, a lot of times I defer to them, and if they say, this is what we should do, I am going to agree with them. But I think we all agree on the goal, but sometimes the execution maybe is where we kind of differ. – Prosecutor

In contrast, defense attorneys saw probation officers as being overly punitive. One defense attorney related a story in which their client was unable to report to their probation officer because they kept being taken into custody to resolve holds from other counties. The officer in that case wanted to move right to violating the person even though the person had never had the opportunity to report. Another defense attorney noted that probation officers can have different expectations for what compliance means.

I think the big-picture expectations are the same. I think the probation officers at times, however, may ask a lot more of my clients than I think maybe should be required of them. I mean, it's by order. It's a written court order and it's a standard form. What you have to do on probation is universally really the same from one court to another. But what a probation officer considers to be compliance on occasion can be more petty than what I think the court should look at. – Defense Attorney

Probation officers consistently reported that they handle technical probation violations differently than violations involving allegations of a new crime and it may be that this difference in approach accounts for some of the tension described above. For technical violations, most probation officers

said that they first talk to the person to try to gain an understanding of why the person committed the violation. The discussion provides an opportunity to uncover whether there might be any barriers, such as lack of transportation, interfering with the person's ability to comply with conditions. If the violation warrants a sanction, several probation officers explained that they take a graduated sanctions approach and try to match the severity of the sanction to the number and severity of the violation(s).

Sometimes it starts out with a warning, then maybe it's an increase in drug testing frequency, and then it gets a little bit more serious if we are continuing to have problems. Then it would potentially be some time on house arrest, a couple of days in jail...it's kind of a graduated process. – Probation Officer

When asked when they would file a technical violation with the court, probation officers articulated a few different scenarios. One officer said they would file for substance use when the person's use was interfering with their daily life, meaning the person was no longer going to work, showing up for meetings, or engaging in basic self-care. A few officers said they would file technical violations with the court if the person kept repeating the same behavior and had already been through several graduated sanctions. Another said they would file "if I'm putting in more effort into the person's probation than the person that's actually on probation." Thus, for technical violations, probation officers seemed to largely agree that it would take several repeated instances of violations before they would file the violation with the court.

One probation officer noted that once the decision is made to file a violation with the court, they would report all behavior, including behavior that had previously been handled less formally.

I always tell my people if you're going to file on someone file on everything. Don't just do it for one thing. Normally if they're going downhill, they're going downhill on everything. Besides UAs, what you see common is not reporting and just kind of disappear on us, and we have to do what we have to do. – Probation Officer

New crimes are different, however, and by policy must be reported to the court unless the offense is merely a traffic violation.

I always tell clients, like that's the one condition that—you get convicted of a crime or at least even commit a new a crime—that seriously, the judge has to hear that. That's not something I can say, "Oh, we'll just do a jail sanction." That's not up to me. – Probation Officer

However, the timing of when the violation is filed may depend on the seriousness of the new offense. Most probation officers indicated that if the offense is less serious, they may wait until the case is resolved before taking the violation to court. But if the violation is more serious, such as a new domestic violence offense, then they would file it right away because it presents more of a public safety issue.

The decision whether to revoke or continue a person's probation sentence is ultimately up to the judge. Judges said probation violation dockets were some of the most difficult because they were often presented with so many competing facts and interests. Judges acknowledged that others in the system were sometimes frustrated with their decisions, which aligns with the probation officers' perception that they already delay filing until the person has violated probation multiple times.

But my first week as a judge... Fridays at 10 o'clock I do a probation revocation docket. It was my toughest docket my first week and it still is eight and a half years later. You get in so many situations. I am sure you've seen where they have screwed up multiple times on probation, so we are here on a motion to revoke and put them...serve their time. Then the defense attorney is saying they have got mental health issues, they have got no money, and they have got no transportation. They have got all kinds of issues. Then they just throw it up to the judge kind of thing. You are trying to strike some balance rather than just cookie-cutter make it black and white. You can tell sometimes that it frustrates the probation officers, because they are the boots on the ground, people that are with these people every day trying to get them through probation. They are in a better position, obviously, than us, but I don't know. It's a tough balance and that's still a tough docket to do. – Judge

Prosecutors also perceived that the way judges sometimes handled probation violations was a point of disagreement between prosecutors and the bench.

I would say where we do maybe differ with the judges would be on revocations. Where I feel like, again, depending on the judge, they might give defendants a lot more leeway when they are not doing the right thing. They are not in compliance than the state would be willing to do. That's, I think, then, a lot of our frustration. Again, I think a lot of it is due to COVID. There is only so much these judges can do anyway. But I do feel like a lot of the judges now in Johnson County, at least, are very much kind of skewed towards the pro-defendant side and always kind of giving them the benefit of the bargain too many times. – Prosecutor

Successful Completion

When asked to describe what they think a person needs to succeed on probation, judges, prosecutors, and probation officers focused on motivation. When judges recounted why they saw people in court for violations, their tone suggested they often saw these reasons as excuses—or lack of motivation—rather than actual barriers.

It's like, "Okay. You had an opportunity to not go to jail and to complete this, and you screwed it up, and we are back here." Now there is every excuse you've ever heard: no transportation, no money, they got in jail in another jurisdiction, they lost their job... I mean, everything that you can think of and we're back here again. – Judge

Prosecutors were more direct, stating, "I think the biggest factor is you have to want to successfully complete probation...there is a personal responsibility aspect. It's on you." Probation officers also focused on motivation, but several said that in addition to having motivation, people on probation had to be open and honest with their probation officer. They seemed to discount the fact that some people on probation may be less forthcoming out of fear for potential consequences.

Motivation and some sort of relationship with the person that they are working with. Somebody that is going to work with them and them being open enough to work with us, and not just saying, "You all are going to put me in jail. It doesn't matter what I do. You're just going to put me in jail." I guess an open mind. We'll work with people. And I guess honesty. "What are your barriers? Because I can't help you if I don't know how to help you. Talk with me. Tell me what you need. Let's work on this together. This isn't just you completing probation. This is us assisting you. We have so many resources." If people would just tell us like, "Hey, I need some steel-toed boots. That's why I'm not working," I can get you some steel-toed boots tomorrow. We can make this happen. We have a bunch of creative people here who have kind of figured out ways to work around the system or to locate resources to make things happen. But I think generally that's the crux of it. It's just relationship, communication, and just being open. – Probation Officer

When asked what barriers a person might face, judges, prosecutors, and probation officers pointed to concrete things such as transportation, housing, and substance abuse issues. Prosecutors and probation officers also acknowledged the difficulty that someone with a criminal record has in getting a job, which affects their ability to meet their basic needs. And judges acknowledged that lacking financial means might affect one's ability to obtain transportation, to pay fines and fees, or to pay for required activities such as drug testing while on probation. But although all three groups described real barriers, they also saw the solution as primarily requiring motivation to overcome these barriers.

For defense attorneys, there was much more overlap between what they perceived people needed to succeed on probation and the barriers they faced. Thus, for defense attorneys, factors like housing stability, employment, having a stable support system, and addressing substance abuse issues were viewed as both being important for success and presenting barriers for people on probation.

Despite having strong views about what is needed for success on probation, judges, prosecutors, and defense attorneys all admitted that they do not know how to judge whether probation is successful

because after a person has been sentenced, they primarily only see the failures – that is, the people who return to court on a violation. The exceptions are the cases where probation recommends early discharge, or people who return to court seeking an expungement.

We are a slanted view because we think...day to day, week by week here, and you're seeing people, not that everybody is a repeat, but it just feels like this is just a turnstile. Just different people coming in, they all kind of go through, and how many other times it takes them to get out. But like we never see the success unless they are just not here. Now, probation officers get to see that. They can see when they are successful. – Judge

And just as judges, prosecutors, and defense attorneys have little feedback on the success or failure of people sentenced to probation in general, they also lack specific feedback about whether the probation conditions they recommend or impose relate to success or failure.

But that's a thing, that as prosecutors, we only deal with the constant problems. The people who come in, have contact with the justice system, and never have contact again, you never see it...I don't know what is successful or not, or what is working, because I don't deal with them on a day-to-day basis. I know it's successful only because I think our recidivism rate is relatively low. It's working. I just don't know what it is. I don't know if it's the specific conditions or not, or just the people. – Prosecutor

I don't see what succeeds most of the time...I see stuff that comes back and so I can...but if every single one of my possession cases is "substance abuse evaluation and comply," then they are all like that. I don't know what distinguishes the ones that succeed or the ones that don't...I kind of fall into what the courts do and just chalk it up to this person is bad, therefore they didn't succeed. – Defense Attorney

Conclusions

This report draws upon interviews with multiple stakeholders to detail how parole conditions are set in Johnson County, Kansas, and what role, if any, risk and needs assessments play in the condition-setting process. From this study, we make the following conclusions.

1

Prosecutors appear to be the most influential party in setting probation conditions. The condition-setting process appears to revolve primarily around the plea agreement. Prosecutors seem to have the largest role in determining the conditions of probation because conditions are often included in the plea agreement offer. Defense attorneys bargain to temper the conditions to set their clients up for the best chance for success, or to minimize their chances for failure or future incarceration, but they are already working from the baseline established by prosecutors in the plea offer. Probation officers said they had no role in recommending conditions to the court, and judges indicated that they often accept the terms of the plea agreement when sentencing.

2

Probation conditions are not tailored to the risk and needs of the individual. Because prosecutors drive the plea agreement it is fair to say that the information they consider to be most important for setting probation conditions is paramount, and as prosecutors explain, that includes information about the offense as described in police reports, the person's criminal history, and input from the victim. Prosecutors do not utilize risk and needs information because risk assessments are completed too late in the process, after the plea agreement process has already unfolded.

3

Mechanisms are in place to individualize probation conditions, but conditions appear instead to be fairly standardized based on the conviction offense. The law sets forth required and optional conditions for probation, but judges have full authority to modify conditions. As a result, the standard probation forms used in Johnson County, Kansas, do not mirror the requirements in statute, and people across the system have lost sight of which conditions are required by statute and which are not. Rather than viewing "standard" conditions as the ones that are required to be ordered in every case, system actors understand standard conditions to be conditions that are routinely ordered for specific case types (e.g., the conditions typically ordered in a driving under the influence case). The court's ability to modify any condition opens the door for conditions to be individualized in each case, and respondents indicated this does happen on occasion (e.g., when the no alcohol condition is modified to allow a person to enter restaurants that serve alcohol). Additionally, the probation order includes a standard probation condition requiring people on probation to comply with the probation case plan and any further written conditions by the probation officer. This also opens the door for individualizing conditions because it gives probation officers discretion to offer services or impose requirements that address a person's criminogenic needs. But more research

would be needed to determine how this condition is used in practice. Thus, the legal framework currently in place allows for individualization of probation conditions, but our interviews indicated that probation conditions tend to be fairly standardized based on the conviction offense rather than the needs of the individual.

4

Judges, prosecutors, and defense attorneys lack a feedback mechanism to understand what works in condition setting. Judges, prosecutors, and defense attorneys all admitted that they do not know how to judge whether probation is successful because after a person has been sentenced, they primarily only see the failures – that is, the people who return to court on a violation. They also stated that they lack specific feedback about whether the probation conditions they recommend or impose relate to success or failure. Thus, probation condition setting in Johnson County, Kansas is a fairly rote process based on the offense rather than the individual needs of the person.



ROBINA INSTITUTE
OF CRIMINAL LAW AND CRIMINAL JUSTICE

The Robina Institute of Criminal Law and Criminal Justice is a research institute within the University of Minnesota Law School. We perform interdisciplinary research, bringing legal and social science research together with policy analysis and practice to develop policy-focused solutions to issues within the field of criminal justice.