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Public Defender Services

e-Mitigation News VOLUME 1, Issue 2

By Stephanne Thornton, Criminal Justice Specialist, Public Defender Corporation Resource Center

I recently learned that drug courts in West Virginia would only allow participants to attend a Recovery Point substance abuse treatment program if the participants successfully complete that program first, prior to entering the drug court program, or attend as aftercare following successful completion of drug court. While a variety of substance abuse treatment programs exist in West Virginia, Recovery Point is one of the few long-term (12-month) treatment programs in the state. This restriction by drug courts limits options for some criminal defendants in need of long-term treatment who also hope for case dismissal. An alternative to drug court now exists for felony and misdemeanor offenders that opens the door to potential case dismissal. This alternative, in effect since June, is deferred adjudication and only requires the defense attorney's motion, the court's acceptance, and the client's participation.



H.B. 2494: Deferred Adjudication

Deferred adjudication, W.V. Code §61-11-22a, is an alternative disposition that took effect June 10, 2016, ninety days after Governor Tomblin signed it into law. This new law allows the defense attorney, upon motion, to ask the court to defer adjudication for persons charged with felony and misdemeanor offenses. The court is authorized to defer acceptance and adjudication of entered guilty pleas for a certain period of time while imposing terms and conditions that constitute successful participation. If successful, the final disposition may be case dismissal or a plea to a lesser charge. If a client violates the terms and conditions, then it may result in conviction on the original offense.

Deferred adjudication is a great option for defense attorneys who are seeking alternative outcomes for their clients. Introducing and advocating for deferred adjudication is in the best interest of many clients and reduces the collateral consequences resulting from felony convictions. Case restrictions do not exist for deferred adjudication, as long as the court accepts the motion. Deferred adjudication covers a specific duration that cannot exceed three years for felony offenses or two years for misdemeanor offenses.

Because many aspects of deferred adjudication are not specified, it is incumbent upon the defense attorney to establish parameters and discuss expectations with the prosecutor prior to making the deferred adjudication motion before the court. For example, not specified in the code section is whether or not incarceration periods during deferment receive time credit or if dismissal upon successful deferment is with or without prejudice. These are necessary conditions to clarify in advance.

Making Deferred Adjudication Work

When I presented deferred adjudication to the Chief Defenders at the 2016 Indigent Defense Conference, most Chiefs indicated they (and their attorneys) have used some form of deferred adjudication even prior to it being signed into law.

The key to making deferred adjudication work in practice seems to be evaluating your client and working out the specific details with the prosecuting attorney in advance of making the motion. An example of this comes from a Harrison County public defender whose client faced a felony child pornography charge and entered into deferred adjudication. A June 28, 2016 article from "The Exponent Telegram" (link found under Resources) notes the defendant's "age…lack of prior criminal history and her lesser culpability were considered" to allow her to enter a deferred adjudication agreement with case dismissal as her condition upon successful completion of

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the court's terms. Identifying the positive and unique qualities your client possesses in order to advocate a positive case resolution is part of what can make deferred adjudication work.

While the prosecuting attorney technically has no bearing on whether or not the court will accept the motion for deferred adjudication, the prosecutor can make it difficult for your client to be successful on deferred adjudication. For example, the prosecuting attorney can argue for a dismissal to be without prejudice, potentially risking a client's hard work during deferment.

With respect to client compliance with the terms and conditions of deferred adjudication, the prosecuting attorney may file a motion asking the court to set a hearing if the defendant is believed to be non-compliant. Once a hearing is set, the court decides, based on reasonable cause, if the defendant is out of compliance. With the prosecuting attorney pointing out to the court the defendant's non-compliance, and with such a low threshold for non-compliance being decided, it seems prudent to have components of the deferred adjudication motion clarified in advance. Specifically, determine through negotiations with the prosecutor issues of prejudice, jeopardy, disposition recommendations if successful or not, if the prosecution plans to stand silent, and what alternative negotiation exists if the court rejects the deferred adjudication motion.

The court sets the terms and conditions of deferred adjudication as well as the duration of deferred adjudication (up to three years for felony offenses and up to two years for misdemeanor offenses). Having a plan in advance, preferably one discussed with the prosecutor, most benefits the client. Three years is a long time for many clients to be under some form of supervision and scrutiny, so creating a plan for success based on the client's needs and abilities is critical. For example, the client may want to attend outpatient substance abuse treatment but has unreliable transportation that will prevent the client from complying with the program's requirement of three outpatient visits a week. Transportation issues also create barriers for clients referred to Day Report. Matching the client's needs with the client's ability to meet possible terms and conditions is part of setting up the client for successful deferment.

Possible Terms and Conditions

The West Virginia Community Corrections Act (article 11C of Chapter 62) outlines community correction programs that may be considered as possible terms and conditions under deferred adjudication. Community corrections programs may include but are not limited to drug courts, day report, home confinement, substance abuse treatment programs, probation, educational or counseling programs, community beautification and reclamation programs, community service, sex offender containment programs, and domestic violence offender treatment programs. Specifically, one of the goals of the Community Corrections Act is to provide "appropriate sentencing alternatives with the goal of reducing the incidence of repeat offenders." Achievement of that same goal is what ensures a successful disposition under deferred adjudication.

The programs outlined in the Community Corrections Act are not the sole programs able to be considered as part of the deferred adjudication process. While the court decides the period of deferment and the specific terms and conditions during deferment, nothing precludes the defense attorney from independently suggesting terms and conditions for the court to adopt. Because a possible three-year period of deferment is lengthy, especially when specific treatment goals and conditions must be met, some clients may respond better to a series of goals pursued over the course of their deferment (rather than trying to accomplish three years of day report, for example). A combination of programs including outpatient substance abuse treatment, GED classes, anger management classes, and 12-step meetings – especially if staggered over time – can appropriately address a client's needs while also satisfying obligations the court expects.

Most community mental health centers offer outpatient treatment options for addiction and mental health treatment. More community healthcare providers are offering these services as well as medical services (and medical service compliance is a thoughtful condition to suggest for deferred adjudication, given untreated or interwoven medical needs underlie many clients' addiction issues). The Help4WV website and toll-free hotline (http://www.help4wv.com/our-services.html) include inpatient treatment bed and outpatient appointment information they update daily. Clients can

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call themselves, even calling collect from jail, to seek the kind of treatment they need. Attorneys can call on behalf of their clients to identify the best kind and combination of treatment for deferred adjudication recommendations.

Alcoholics Anonymous meetings (http://aawv.org/site/meetings.htm) are free and readily available in most West Virginia communities; Narcotics Anonymous meetings (http://www.angelfire.com/wv2/mrscna/meeting.html) are also free and growing in number offered.

Literacy is another issue that deferred adjudication can help tackle. Many regions offer adult literacy assistance through a local library (http://librarycommission.lib.wv.us/html/literacy/index_literacy.html) and West Virginia has other resources for GED classes (http://wvde.state.wv.us/abe/). The West Virginia Division of Rehabilitation Services (http://www.wvdrs.org/data/DRS_Location_Map_2015.pdf) can assist some clients with employment-readiness to help overcome their past conviction status, and others can receive assistance towards applying for Social Security benefits. Workforce West Virginia (http://workforcewv.org/) also has services for job seekers with some services that are specific to the recently incarcerated.

Not all clients have deficits and treatment areas that require such thorough attention or intervention. Without having to pile on a number of conditions to present to the court, consider whether your client may possess "good person" character evidence. Good person evidence is a summary of all the positive characteristics your client possesses that mitigate the single moment of bad judgment that comprises the underlying criminal offense. Good person evidence is not typically the sole source of mitigation for most clients, but it is an important component to remember (whether alone or combined with treatment needs).

Did I Just Make a Treatment Plan?

With deferred adjudication, the best plan is to go to court *with* a plan. There are countless options and alternatives to incarceration that exist based on your clients' strengths and needs. These alternatives extend beyond home confinement or day report. Remember the goal is to reduce future incarceration by addressing the underlying issues of the crime. Plan accordingly and consult with your client to determine what will make your client's efforts successful.

The plan for a client's deferred adjudication period is akin to creating a treatment plan. As a defense attorney, taking information from your client (strengths and deficits) and knowing some community resources, you can create a treatment plan for your client and provide this plan to the court. To formalize it, a treatment plan for court blends the client's reason for being in the criminal justice system with a plan to receive treatment and address the underlying criminal behavior. Treatment plans should be agreed upon by the client, on-point in addressing the criminal justice issue, and measurable enough to determine attainment. Treatment plans should represent to the court the problem area and the proposed solution, the latter which will fit into the court's mandate. The proposed solution should be measurable (e.g. attending three 12-step meetings a week) and sufficient to address the underlying problem while having the client's buy-in and willingness to participate.

Be sure the steps outlined in the treatment plan are attainable. If a client needs inpatient substance abuse treatment, first be sure a program exists that can and will accept the client. If a client is committed to attending three 12-step meetings weekly but only one 12-step meeting operates in his or her community each week, then discuss with the client whether transportation to other community meetings during the week is realistic. Attempting to rework the terms and conditions of deferred adjudication may negatively affect your client, so plan well and plan in advance.

Collateral Consequences: What to Avoid

It is apparent to anyone who has spent time working in criminal defense that consequences of a felony conviction have lasting effects beyond the end of probation or the incarceration sentence. These additional penalties are also known as collateral consequences and millions of convicted Americans experience their lasting impact even when the consequences have no direct correlation to the underlying conviction or the public's safety. Yet as broadly impactful as these collateral consequences are for our clients, the court (and many lawmakers) do not realize the extent of their reach. It may be pertinent for defense counsel to argue avoidance of collateral consequences in order to bolster the court's acceptance of a deferred adjudication motion.

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The American Bar Association (ABA) has taken up this issue and created the National Inventory of the Collateral Consequences of Conviction. The ABA's concern was (and is) that particular restrictions have no apparent regulatory rationale and are static: they cannot be "avoided or mitigated" and deny clients' due process protections while serving up additional punishment (retrieved from http://www.abacollateralconsequences.org/description/).

In West Virginia, for example, persons with felony convictions cannot have a commercial driver's license, serve as an auctioneer or teacher (or a host of other professions), embalm people or fit hearing aids. While it may make sense why persons convicted of a felony cannot teach children, what is the public safety benefit from not allowing a felon to embalm? Access to some public benefits like food stamps and subsidized housing are also restricted for felony drug and other felony offenders – restrictions that further serve to disenfranchise the ex-offender from society. West Virginia is one of six states left in the nation that has a lifetime ban on food stamps and one of thirteen states with a ban on TANF (welfare) for drug felons (retrieved from https://www.themarshallproject.org/2016/02/04/six-states-where-felons-can-t-get-food-stamps#.GcHS9WMs4). The public services needed most to help some clients get back on their feet are least available after these clients have served their sentence.

The existence of collateral consequences is not likely to change in West Virginia any time soon, but the opportunity to help your clients avoid these consequences is possible through deferred adjudication. Avoiding a felony conviction means your client has the opportunity to engage in the same rights as the greater society, through a range of opportunities for employment, housing, student loans, and public benefits like food stamps.

Research shows that employment is associated with lower rates of recidivism, and higher wages are associated with lower rates of criminal activity (retrieved from http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411289-Understanding-the-Challenges-of-Prisoner-Reentry.PDF). Reminding the court that opportunities for employment and public benefits decrease recidivism by helping formerly incarcerated persons return to a more normalized and legitimate life incentivizes acceptance of a deferred adjudication motion. Ensuring the preservation of certain rights and benefits can be the difference in law-abiding citizenry and future recidivism.

Deferred adjudication is not just an option to see what "sticks" with the court. It is a thoughtful approach to understanding a client's issues and addressing client needs in an intentional manner more cost-effectively than incarceration. With judicial oversight intact and the ability to specify a defendant's terms and conditions, the court can still be 'tough on crime.' Yet, if the client is successful, the court may have granted an opportunity to address and reduce future recidivism. National figures indicate that 90% of criminal defense clients take a plea to resolve their case. Deferred adjudication is a plea that can have positive and lasting effects if the defense attorney plans intentionally and the client performs successfully.

Resources:

Link to June 28, 2016 "Exponent Telegram" article on use of Deferred Adjudication by 15th Circuit assistant public defender Beth Gross:

http://www.theet.com/news/court_and_police/harrison-county-defendant-gets-chance-to-wipe-slate-clean-under/article_768b03c0-b2af-55bb-abfe-e1aa55f6db7b.html

Link to the ABA database of collateral consequences in West Virginia:

http://www.abacollateralconsequences.org/search/?jurisdiction=49

Link to §61-11-22a (to ensure accurate link please copy and paste whole URL):

http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=hb2494ENR.htm&yr=2016&sesstype=RS&billtype=B&houseorig=H&i=2494

For more information on this and any mitigation topic, please contact Stephanne Thornton, Criminal Justice Specialist, at the Public Defender Corporation Resource Center (304) 558-3905
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WEST VIRGINIA LEGISLATURE
2016 REGULAR SESSION
ENROLLED
House Bill 2494

(BY DELEGATES WELD, FAST, SPONAUGLE, SKINNER AND SHOTT)

[Passed March 12, 2016; in effect ninety days from passage.]

AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section, designated §61-11-22a, relating to codifying deferred adjudication process for persons charged with felony and misdemeanor offenses in circuit and magistrate court; authorizing courts, upon motion, to defer acceptance and adjudication of entered guilty pleas for certain periods based upon severity of offense; authorizing court to impose such conditions and terms as it deems just and necessary as a condition of participation; authorizing periods of incarceration and participation in referenced programs as conditions of participation in the deferred adjudication process; authorizing acceptance of previously entered guilty plea upon violation of the terms and conditions of deferral; authorizing court to impose additional terms and conditions upon defendant if violation occurs; and clarifying that procedure hereby authorized is distinct from conditional plea under Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended, by adding thereto a new section, designated §61-11-22a to read as follows:

CHAPTER 61. CRIMES AND THEIR PUNISHMENT.

ARTICLE 11. GENERAL PROVISIONS CONCERNING CRIMES.

§61-11-22a. Deferred adjudication.

(a) Upon the entry of a guilty plea to a felony or misdemeanor before a circuit or magistrate court of this state entered in compliance with the provisions of West Virginia Rule of Criminal Procedure 11 or Rule 10 of the West Virginia Rules of Criminal Procedure for Magistrate Courts and applicable judicial decisions, the court may, upon motion, defer acceptance of the guilty plea and defer further adjudication thereon and release the defendant upon such terms and conditions as the court deems just and necessary. Terms and conditions may include, but are not limited to, periods of incarceration, drug and alcohol treatment, counseling and participation in programs offered under articles eleven-a, eleven-b and eleven-c, chapter sixty-two of this code.

(b) If the offense to which the plea of guilty is entered is a felony, the circuit court may defer adjudication for a period not to exceed three years. If the offense to which the plea of guilty is entered is a misdemeanor, the court may defer adjudication for a period not to exceed two years.

(c) If the defendant complies with the court-imposed terms and conditions he or she shall be permitted to withdraw his or her plea of guilty and the matter dismissed or, as may be agreed upon by the court and the parties, enter a plea of guilty or no contest to a lesser offense.

(d) In the event the defendant is alleged to have violated the terms and conditions imposed upon him or her by the court during the period of deferral the prosecuting attorney may file a motion to accept the defendant's plea of guilty and, following notice, a hearing shall be held on the matter.

(e) In the event the court determines that there is reasonable cause to believe that the defendant violated the terms and conditions imposed at the time the plea was entered, the court may accept the defendant's plea to the original offense and impose a sentence in the court's discretion in accordance with the statutory penalty of the offense to which the plea of guilty was entered or impose such other terms and conditions as the court deems appropriate.

(f) The procedures set forth in this section are separate and distinct from that set forth in West Virginia Rule of Criminal Procedure 11(a)(2).