



National District Attorneys Association

The Voice of America's Prosecutors

Deferred Adjudication

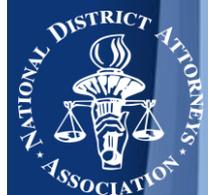
**A Survey of Existing State
Laws & Best Practices**



NDAA

About Us

- The National District Attorneys Association is the oldest and largest national organization representing state and local prosecutors in the country
- With more than 5,000 members nationwide, NDAA is recognized as the leading source of national expertise on the prosecution function and is a valuable resource for the media, academia, government, and community leaders



Survey of State Laws

Overview

- NDAA conducted a review of 4 differing statutory approaches to deferred sentences: New Mexico, Virginia, New Jersey, & Colorado
- A review of these State statutes, general trends and best practices were reviewed to provide input on approaches that effectively balance rehabilitation, public safety, and the rights of victims



Virginia Deferred Adjudication



Survey of State Laws

Virginia

- The Commonwealth has two separate approaches to deferred adjudication resulting from a law enacted in 2021
- Section § 19.2-298.02., adopted in 2021, provides that a trial court presiding in **any** criminal case, with the agreement of the defendant and the Commonwealth can impose a deferred disposition with conditions to be met
- Prior to last year's changes, deferred dispositions were only allowed for **certain offenses**, and could be mandated by the Court without agreement from the Commonwealth (i.e.; Section § 18.2-57.3 DV)



Survey of State Laws

Virginia

- For example, Virginia Code §18.2-57.3 provides:

A. When a person is charged with a simple assault in violation of subsection A of § 18.2-57 where the victim was a family or household member of the person or a violation of § 18.2-57.2, the court may defer the proceedings against such person, without a finding of guilt, and place him on probation under the terms of this section.

B. For a person to be eligible for such deferral, the court shall find that (i) the person was an adult at the time of the commission of the offense; (ii) the person has not previously been convicted of any offense under this article or under any statute of the United States or of any state or any ordinance of any local government relating to an assault or assault and battery against a family or household member; (iii) (a) the person has not previously been convicted of an act of violence as defined in § 19.2-297.1 or (b) if such person has been previously convicted of such an act of violence, the attorney for the Commonwealth does not object to the deferral; (iv) the person has not previously had a proceeding against him for violation of such an offense dismissed as provided in this section; (v) the person pleads guilty to, or enters a plea of not guilty or nolo contendere and the court finds the evidence is sufficient to find the person guilty of, simple assault in violation of subsection A of § 18.2-57 where the victim was a family or household member of the person or a violation of § 18.2-57.2; and (vi) the person consents to such deferral and to a waiver of his right to appeal a finding of facts sufficient to justify a finding of guilt under this section entered pursuant to subsection F for a violation of a term or condition of his probation. If the court defers further proceedings, at that time the court shall determine whether the clerk of court has been provided with the fingerprint identification information or fingerprints of the person, taken by a law-enforcement officer pursuant to § 19.2-390, and, if not, shall order that the fingerprints and photograph of the person be taken by a law-enforcement officer. A person may file a motion to withdraw his consent to the deferral and waiver of his right to appeal within 10 days of the entry of the order deferring proceedings on a form prescribed by the Office of the Executive Secretary of the Supreme Court of Virginia. The court shall schedule a hearing within 30 days of receipt of the motion and shall provide reasonable notice to the attorney for the Commonwealth and to the person and his attorney, if any. If the person appears at the hearing and requests to withdraw his consent, the court shall grant such request, enter a final order adjudicating guilt, and sentence the person accordingly. If the person does not appear at the hearing, the court shall deny his request to withdraw his consent.



Survey of State Laws

Virginia

- However, the new provision, § 19.2-298.02., enacted in 2021 provides the following:

A trial court presiding in a criminal case may, with the agreement of the defendant and the Commonwealth, after any plea or trial, with or without a determination, finding, or pronouncement of guilt, and notwithstanding the entry of a conviction order, upon consideration of the facts and circumstances of the case, including (i) mitigating factors relating to the defendant or the offense, (ii) the request of the victim, or (iii) any other appropriate factors, defer proceedings, defer entry of a conviction order, if none, or defer entry of a final order, and continue the case for final disposition, on such reasonable terms and conditions as may be agreed upon by the parties and placed on the record, or if there is no agreement, as may be imposed by the court. Final disposition may include (a) conviction of the original charge, (b) conviction of an alternative charge, or (c) dismissal of the proceedings



Survey of State Laws

Virginia

- These defined deferred adjudication provisions now work in tandem, with the Commonwealth's Attorney deciding whether to use the previous existing statutes or relying on the new law adopted last year
- Most notably, the previous deferred adjudication statutes were limited in scope, but did not require agreement from the Commonwealth's Attorney
- Further, the previous code sections did not allow for expungement, even if deferral is successful. The 2021 provision allows for expungement based on a recommendation from the Commonwealth's Attorney



New Mexico Deferred Adjudication



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New Mexico

- The statute in New Mexico, § NMSA 31-20-3, provides broad discretion to judges in applying deferred adjudication or imposition of sentence in any cases not involving a capital or first degree felony
- Unlike other States, New Mexico does not provide the State's Attorney with determinative authority to agree with or oppose the deferment. This has been reaffirmed by State Courts
- Of the sentencing alternatives available, a suspended or deferred sentence is within the discretion of the trial court – State v Madrigal, 85 N.M. 496, 513 P.2d. 1278 (Ct. App.), cert. denied, 85 N.M. 483, 513 P.2d 1265 (1973)



Survey of State Laws

New Mexico

- Specifically, the statute provides

Upon entry of a judgement of conviction of any crime not constituting a capital or first degree felony, any court having jurisdiction when it is satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may either:

- 1. Enter an order deferring the imposition of sentence;*
- 2. Sentence the defendant and enter an order suspending in whole or in part the execution of the sentence; or*
- 3. Commit the convicted person, if convicted of a felony and not committed for diagnostic purposes within the twelve-month period immediately preceding that conviction, to the department of corrections for an indeterminate period not to exceed 60 days for the purpose of diagnosis, with direction that the court be given a report when the diagnosis is complete as to what disposition appears best when the interest of the public and the individual are evaluated*



New Jersey Deferred Adjudication



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New Jersey

- The state provides a framework for deferred adjudication through pretrial intervention based on offense type, deferment for juvenile offenders depending on offense, and provides the opportunity for courts to suspend the imposition of a sentence or provide for alternatives in lieu of incarceration
- New Jersey requires input from prosecutors, victims, and defense attorneys prior to the deferment of any sentences, granting each party in the criminal justice system input in the process



Survey of State Laws

New Jersey

- For example, subsection § 2C:43-12 of the State Code addresses the pre-trial intervention program specifically:

Policy –

The purpose of N.J.S.2C:43-12 through N.J.S.2C:43-22 is to effectuate a Statewide program of Pretrial Intervention. It is the policy of the State of New Jersey that supervisory treatment should ordinarily be limited to persons who have not previously been convicted of any criminal offense under the laws of New Jersey, or under any criminal law of the United States, or any other state when supervisory treatment would:

(1) Provide applicants, on an equal basis, with opportunities to avoid ordinary prosecution by receiving early rehabilitative services or supervision, when such services or supervision can reasonably be expected to deter future criminal behavior by an applicant, and when there is apparent causal connection between the offense charged and the rehabilitative or supervisory need, without which cause both the alleged offense and the need to prosecute might not have occurred; or



Survey of State Laws

New Jersey Cont'd.

(2) Provide an alternative to prosecution for applicants who might be harmed by the imposition of criminal sanctions as presently administered, when such an alternative can be expected to serve as sufficient sanction to deter criminal conduct; or

(3) Provide a mechanism for permitting the least burdensome form of prosecution possible for defendants charged with "victimless" offenses, other than defendants who were public officers or employees charged with offenses that involved or touched their office or employment; or

(4) Provide assistance to criminal calendars in order to focus expenditure of criminal justice resources on matters involving serious criminality and severe correctional problems; or

(5) Provide deterrence of future criminal or disorderly behavior by an applicant in a program of supervisory treatment

Eligibility:

Admission decision considers applicant's amenability to correction, responsiveness to rehabilitation and the nature of the offense

There shall be a presumption against admission into a program of supervisory treatment for: (a) a defendant who was a public officer or employee whose offense involved or touched upon his public office or employment; and (b) a defendant charged with any crime or offense involving domestic violence, if the defendant committed the crime or offense while subject to a temporary or permanent restraining order or if the crime or offense charged involved violence or the threat of violence.

A crime or offense involves violence or the threat of violence if the victim sustains serious or significant bodily injury or the actor is armed with and uses a deadly weapon or threatens by word or gesture to use a deadly weapon or threatens to inflict serious or significant bodily injury.



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New Jersey Cont'd.

- *Factors:*

Prosecutors and program directors shall consider in formulating their recommendation of an applicant's participation in a supervisory treatment program, among others, the following criteria:

- (1) The nature of the offense;*
- (2) The facts of the case;*
- (3) The motivation and age of the defendant;*
- (4) The desire of the complainant or victim to forego prosecution;*
- (5) The existence of personal problems and character traits which may be related to the applicant's crime and for which services are unavailable within the criminal justice system, or which may be provided more effectively through supervisory treatment and the probability that the causes of criminal behavior can be controlled by proper treatment;*
- (6) The likelihood that the applicant's crime is related to a condition or situation that would be conducive to change through his participation in supervisory treatment;*
- (7) The needs and interests of the victim and society;*
- (8) The extent to which the applicant's crime constitutes part of a continuing pattern of anti-social behavior;*
- (9) The applicant's record of criminal and penal violations and the extent to which he may present a substantial danger to others;*
- (10) Whether or not the crime is of an assaultive or violent nature, whether in the criminal act itself or in the possible injurious consequences of such behavior;*
- (11) Consideration of whether or not prosecution would exacerbate the social problem that led to the applicant's criminal act;*



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New Jersey Cont'd.

(12) The history of the use of physical violence toward others;

(13) Any involvement of the applicant with organized crime;

(14) Whether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution;

(15) Whether or not the applicant's involvement with other people in the crime charged or in other crime is such that the interest of the State would be best served by processing his case through traditional criminal justice system procedures;

(16) Whether or not the applicant's participation in pretrial intervention will adversely affect the prosecution of codefendants; and

(17) Whether or not the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory treatment program. The prosecutor and the court, in formulating their recommendations or decisions regarding an applicant's participation in a supervisory treatment program, shall give due consideration to the victim's position on whether the defendant should be admitted

- *Further limitations:*

Supervisory treatment may occur only once with respect to any defendant and any person who has previously received supervisory treatment under section 27 of P.L.1970, c. 226 (C.24:21-27)

a conditional discharge pursuant to N.J.S.2C:36A-1

a conditional dismissal pursuant to P.L.2013, c. 158 (C.2C:43-13.1 et al.),

or was granted a dismissal due to successful participation in the Veterans Diversion Program



Colorado Deferred Adjudication



Survey of State Laws

Colorado

- Under State statute, individuals facing certain criminal offenses may be offered a deferred judgment and sentence. In exchange for pleading guilty, defendants are required to meet certain conditions during a probationary period. If they complete the terms of the deferred sentence, the case against them is dismissed
- Further, the process mandates input and agreement between the District Attorney and Defense Counsel, finalized with signoff from the trial judge
- Defendants who successfully meet the conditions of deferment do not receive automatic expungement



Survey of State Laws

Colorado

- The statute reads under § CRS 18-1.3-102:

(1) (a) In any case in which the defendant has entered a plea of guilty, the court accepting the plea has the power, with the written consent of the defendant and his or her attorney of record and the district attorney, to continue the case for the purpose of entering judgment and sentence upon the plea of guilty for a period not to exceed four years for a felony or two years for a misdemeanor or petty offense or traffic offense. The period shall begin to run from the date that the court continues the case

(b) The period may be extended for an additional time:

(I) Up to one hundred eighty-two days if the failure to pay restitution is the sole condition of supervision which has not been fulfilled, because of inability to pay, and the defendant has shown a future ability to pay. During such time, the court may place the defendant under the supervision of the probation department; or

(II) Up to two years if the deferred judgment is for an offense listed in section 16-11.7-102 (3), C.R.S., good cause is shown, and the district attorney and defendant consent to the extension



Survey of State Laws

Colorado Cont'd

(2) Prior to entry of a plea of guilty to be followed by deferred judgment and sentence, the district attorney, in the course of plea discussion as provided in sections 16-7-301 and 16-7-302, C.R.S., is authorized to enter into a written stipulation, to be signed by the defendant, the defendant's attorney of record, and the district attorney, under which the defendant is obligated to adhere to such stipulation. The conditions imposed in the stipulation shall be similar in all respects to conditions permitted as part of probation []

(3) When a defendant signs a stipulation by which it is provided that judgment and sentence shall be deferred for a time certain, he or she thereby waives all rights to a speedy trial, as provided in section 18-1-405

(4) A warrant for the arrest of any defendant for breach of a condition of a deferred sentence may be issued by any judge of a court of record upon the report of a probation officer, or upon the verified complaint of any person, establishing to the satisfaction of the judge probable cause to believe that a condition of the deferred sentence has been violated and that the arrest of the defendant is reasonably necessary. The warrant may be executed by any probation officer or by a peace officer authorized to execute warrants in the county in which the defendant is found



Best Practices: Deferred Adjudication



Best Practices

Front End vs. Back End

- When contemplating a draft statute, one of the first considerations should be the scope of the deferred process
- Courts should receive clarification on whether the deferred adjudication should apply only on the front-end of the judicial process (prior to trial) or be extended post trial
- Applying post-trial deferred adjudication without significant input from the prosecuting agency and victims runs a significant risk of re-traumatizing the harmed parties and wasting the resources expended by the government

Best Practices

Prosecutor Input

- States have taken differing approaches to the weight of Government input in applying deferred adjudication
- Virginia, for example, previously did not require the court to receive approval from the Commonwealth's Attorney to apply a deferred adjudication when the laws were narrower in approach
- The 2021 change now mandates the Commonwealth's Attorney and Defense Counsel provide approval – however all criminal offenses are eligible for deferral
- New Mexico, meanwhile, does not mandate the court view the prosecution's position as determinative



Best Practices

Scope

- Each State further included a varying scope of offenses that can be captured in the deferred adjudication process
- For example, Virginia and Colorado both allow deferred adjudication for nearly all offense types, but mandate the prosecution agree to such deferment
- New Jersey, on the other hand, focuses a majority of its deferred disposition statutes on juvenile and first-time offenders, while only limiting eligibility for this class of individuals if they committed certain violent felonies

Best Practices

Expungement

- Further considerations should be given to expungement for offenders who successfully complete adjudication
- States like Colorado, do not allow for any expungement regardless of offense type or offender status (such as juvenile vs. adult)
- Meanwhile, Virginia has a split approach, with its previous statutes denying expungement (for example, when deferment is granted in a domestic battery case), while the law allows expungement for all offense types

Best Practices

Plea Requirements

- Another consideration for lawmakers is what specific requirements should the defendant meet prior to eligibility for deferment
- Virginia, on the other hand, does not require guilty pleas, but many Commonwealth's Attorneys will not sign-off on deferment without the plea
- New Mexico requires that the defendant to admit guilt, plea nolo contendere, or be found guilty after trial to at least one of the charges brought forward



Best Practices

Details for Compliance

- Drafters of the statute should also consider how detailed the law should be in regards to compliance with the deferment
- Questions arise such as: should probation be supervised, unsupervised, or case specific? Should judges operate in a framework when setting the conditions for compliance must meet a minimum threshold
- For example, Colorado places limits on the timing of the conditions (four years for felonies, two for misdemeanors) while also stipulating compliance should be predicated requirements such as treatment and community service. For example, in New Jersey max 3 years, New Mexico is max 5 years (felonies), and Colorado is max 4 years felonies (can extend in certain situations)



Best Practices

Suspension of Rights

- States must also consider the interplay of suspension and reinstatement of certain rights, such as voting and firearm possession
- New Mexico provides an example of a temporary suspension of voting rights and the right to hold office for individuals convicted of “a felonious crime” which can be reinstated upon completion of a court-ordered deferment
- In comparison, Virginia does not suspend the firearm possession of all offenders, therefore those without such a suspension do not need to rely on a successful deferment for reinstatement



Best Practices

Additional Considerations

- Deferred adjudication statutes should also contemplate the role of the aggrieved or harmed parties in a criminal proceeding. Victim input and notification are vital to the success of a deferment
- Further, the statute can also contemplate what failure to complete a deferment means for the imposition of a prison sentence or if additional options should be considered (such as further treatment for mental health or substance abuse offenders should a relapse occur during deferment)





Questions?