



# SUPREME COURT OF APPEALS OF WEST VIRGINIA

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## Probation Drug Testing Policy and Protocol Division of Probation Services

### 1. Introduction.

#### 1.1 Overview.

The Supreme Court of Appeals of West Virginia (“Court”) through its Division of Probation Services (“DPS”) establishes this policy to prescribe the protocol for Probation Officers throughout the State of West Virginia to follow when testing persons for controlled substances. DPS is entrusted with providing probation services throughout the State, including the responsibility of supervising Probation Officers who are tasked by the Circuit Court to collect urine and oral fluid screens. This policy only provides guidance for Probation Officers, and does not create or confer any right, privilege, or benefit for any person, party or entity.

The details of this policy are subject to modification by the Court at any time as situations, standards, and legal requirements may change. The Court will ensure that all employees are notified of any such modification in a timely fashion.

Breaches of this policy may result in disciplinary or other corrective action. Probation Officers are to address any questions regarding this policy to the Director of Probation Services.

#### 1.2 Terms. This policy uses the following defined terms:

- (a) *Adulteration.* Intentional interference with the analysis of a specimen by introducing a known or unknown substance.
- (b) *Cause for testing.* 1) Court-ordered pursuant to the probation contract, bond supervision, or pretrial diversion; 2) random screenings to ensure compliance; 3) suspected use of drugs or alcohol.
- (c) *Chain of Custody.* Documenting the identity and integrity of the probationer’s specimen from the time the specimen is collected through transport, screening, and reporting of the results; to ensure through the proper specimen identification, security, and documentation of the Chain of Custody form.
- (d) *Collector.* The Probation Officer or person supervising the specimen collection.
- (e) *Confirmation.* Testing performed by GC/MS (Gas Chromatography / Mass Spectrometry) or LC/MS/MS (Liquid Chromatography/Mass Spectrometry/Mass Spectrometry) which authenticates the presence of a particular substance.
- (f) *Cut Off Level.* The dividing line between a positive and negative result. Body fluid samples that register equal to or above the designated cut off level are reported as positive.

- (g) *Diversion*. When a person sells a prescribed drug or does not use the drug the way it was prescribed.
- (h) *Probationer*. Person providing the specimen to be tested.
- (i) *pH*. Determines the degree of acidity or alkalinity of a urine specimen. A normal pH is between 5 and 8, and the confirming laboratory typically extends this range to 3.1 to 10.9. Anything reported outside this range is an adulteration.
- (j) *Positive Screen Results*. A urine specimen that has a concentration of prescribed or illegal drugs / or drug metabolites at a concentration level equal to or greater than the predetermined cut off levels.
- (k) *Qualitative*. Descriptive of qualities. In the context of drug testing, qualitative results describe whether the test is positive or negative; whether a substance can or cannot be detected.
- (l) *Quantitative*. Descriptive of number or amount. In the context of drug testing, quantitative results describe how much or what amount of a substance is detected.
- (m) *Quantity Not Sufficient*. Specimen submitted is less than the amount required by a laboratory for testing.
- (n) *Shy Bladder*. When the probationer reports he/she cannot produce a urine specimen.
- (o) *Specific Gravity*. The amount of solid particles dissolved in a urine specimen. A normal urine sample has a specific gravity of greater than > or equal to 1.003. If the specimen results have a creatinine level reported as less than 20 mg/dl and the specific gravity is less than 1.003, the specimen is then considered diluted.
- (p) *Temperature Strip*. The temperature strip on the collection bottle should read not less than 90 degrees nor greater than 100 degrees and maintain that temperature for two minutes.

## **2. Policy Standards.**

Persons who are placed under supervision by a circuit court judge and ordered to submit to substance abuse testing, shall, in the absence of a specific court directive or court order, submit to substance abuse testing in compliance with the provisions of this Protocol. Probation testing for any other entity should be approved by the Chief Circuit Judge.

Substance abuse testing serves as an effective means of detecting and suppressing substance abuse, enhancing offender accountability, reducing recidivism, and determining treatment referrals.

### **3. Testing Supplies and Services.**

The DPS utilizes various methods to test for illicit substances, including instant-test urine cups, oral swabs, and urine collection cups. The most common methods are the instant-test urine cup and the oral swab.

DPS also utilizes the urine collection cups which do not provide instant results. Rather, the Collector shall use these cups to collect a urine specimen and then return the cup to the laboratory for testing in circumstances where an instant-test cup is inappropriate or not warranted. With these urine collection cups, the laboratory will automatically submit any positive result for confirmatory testing. For the Collector, he or she will follow the same collection procedure for the instant-test cups and the urine collection cups.

Sweat patches are also an option; however, due to the expense these must have prior approval from the Director of Probation Services or designee.

It is the responsibility of the Administrative Office of the Court through its DPS to contract with a company who supplies the devices and / or a federally recognized laboratory certifying agency(ies). It is the responsibility of the DPS through the Administrative Office of the Court to contract with a manufacturer and federally recognized and certified laboratory for the purchase and testing of these devices.

Devices will be ordered by Circuit Probation offices, after approval from the Director of Probation Services or designee. The Chief Probation Officer, or designee, shall be responsible for ensuring adequate supplies are available at all times while remaining conscious of the expiration dates.

### **4. Medical Information.**

#### **4.1 Medicines**

Probationers and other persons to be tested shall provide the Probation Officer and Collector with a complete list of prescription and non-prescription medications currently being used, as well as verification from their physician or pharmacy for any prescribed

medication in advance of testing. This includes prescribed Medically Assisted Treatment (MAT) controlled substances.

Mandatory pill counting of prescription drugs shall be maintained on the West Virginia Offender Case Management System (OCMS) and shall be updated regularly. Probation Officers may conduct pill counting or other monitoring of prescriptions during home visits of probationers, or during other visits. Probation Officers must routinely and randomly monitor the probationer's prescription use. This will help ensure the probationer is not diverting or abusing their medication.

## **5. Collection Process.**

The Probation Officer shall briefly explain these drug testing procedures to the specimen donor (probationer or otherwise) prior to the collection of the initial specimen. The explanation shall generally include a description of the collection process. Consistent with the terms and conditions of the person's supervision—bond, probation, or otherwise—the Probation Officer shall also explain that a refusal to test, or production of an adulterated, diluted, or positive test could be deemed a violation of probation or other form of supervision, and could result in criminal penalty or a revocation of alternative sentencing.

The Probation Officer shall then ask the probationer if he/she has used any substances which may result in a positive drug test. If the probationer admits to using a substance that may cause a positive indication on the drug test, he/she is to sign the Admission Form (see attachment) in the presence of the Probation Officer. This shall be considered an "offender admission." An instant urine test shall then be performed. If the admission and the instant test concur, there is no need to continue with confirmation, unless requested by the Judge. Please note that the completion of the Voluntary Admission Form by the probationer must be obtained **knowingly and voluntarily**, and that the Probation Officer shall not in any way force, persuade, threaten, or coerce the specimen donor into completing it.

### **5.1 Urine Testing.**

The collection site must be a restroom with a toilet and a sink, or source of water, for washing hands immediately prior to the probationer providing a urine specimen, both of which must be done in the presence of the Collector.

1. If possible, a bluing agent should be used in the toilet bowl to discourage the probationer from adulterating the specimen by "dipping" the collection cup into the toilet.

2. The area must permit the collector to witness the probationer voiding a urine specimen into the collection bottle. Urine is not to be provided by probationers unobserved by the Probation Officer or other collection agent. Strategically placed mirrors can aid in the observation process, which may be installed in the corners of the bathroom.
3. Female probationers will not be excused from providing a urine specimen during their menstrual cycle.
4. Collectors of the same biological gender will always enter into the collection room with the probationer. If a person of the same gender is unavailable, or in the instance of shy bladder, an oral fluid device may be used.
5. Probation secretaries shall not be used to collect body fluid specimens for substance abuse testing.
6. To ensure the Probation Officer's safety, urine tests performed outside the office shall be conducted with two Probation Officers or a Probation Officer and another adult present.
7. The collector must take the collection kit into the collection site and hand the probationer the collection device. The collector must have an unobstructed view of any bodily fluids passing from the probationer into the collection device.
8. Once the probationer has been escorted to the collection area he/she shall not be allowed to leave that area.
9. The probationer shall not be permitted to take any personal belongings into the collection site, i.e. purses, jackets, etc. Additionally, the probationer shall be instructed to remove any unnecessary outer clothing that might allow for smuggling of contraband, as well as any contents from his/her clothing.
10. To ensure no urine or adulterants have been smuggled into the collection site, the collector, wearing gloves, shall conduct a pat down search of the probationer and their possessions.
11. The Officer shall then instruct the probationer to allow their pants and undergarments to fall to the floor and to then lift his/her shirt to show skin around the waist.
12. The collector shall make every effort not to touch the specimen bottle once it has been delivered to the probationer. Collectors are required to wear latex / nitrile gloves at all times during the testing process.

13. If the probationer produces bodily fluids less than the amount required for the test, per the manufacturer's instructions, it should be discarded. *Under no circumstances shall multiple specimens from one probationer be combined and submitted as one specimen.*
14. Once the specimen has been collected, and, in the instance of a urine specimen, the temperature is determined to be within the appropriate range, the collector shall follow the instructions provided by the contractor for securing and mailing the collection device, if necessary.
15. If the probationer produces a urine specimen suspected to be a substitution or adulteration, it should be processed pursuant to the chain of custody and submitted with the notation "suspect adulteration" in the Remarks section on the sample collection form.
16. If the probationer tests positive for any drug on the urine instant test, he/she may confirm these results and sign the Admission form. If they admit to using the drug, the test is not to be sent for confirmation unless requested by the Judge. If the probationer denies using the drug(s) then the specimen shall be sent to the lab for confirmation.
17. The collector must remain in the probationer's presence throughout the collection process in order to maintain the chain of custody. All chain of custody forms must be completed to the specifications of the contractor.
18. Specimen collection and paperwork on one probationer must be completed prior to beginning collection and paperwork on the next probationer in order to prevent mixing of specimens and creating errors in the chain of custody.

## **5.2 Oral Test.**

The Oral Testing Device should **only** be used in these two circumstances: shy bladder or cross-gender testing, unless otherwise determined by the Chief Probation Officer. Keep in mind that this method of testing has a shorter detection time and may not test for the same drugs as the urine tests.

1. In order for accurate reporting, the probationer must have not used any tobacco within 15 minutes of the oral screened being employed.
2. The probationer shall immediately be given the oral screening device once it has been unwrapped from the container.
3. The probationer shall then insert the oral screening device, with the cylindrical testing end, into his or her mouth, and the Probation Officer shall instruct the probationer to fully saturate the test with saliva.

4. The oral screen should reside within the probationer's mouth for a time frame of no less than five (5) minutes and no more than thirty (30) minutes to ensure proper saturation.
5. Upon completion of saturation, the probationer will remove the oral screening device from his or her mouth and shall properly cap the oral screen as directed by the Probation Officer.
6. The Collector shall then follow the instructions provided by the manufacturer for securing and mailing the collection device to the laboratory for testing.
7. The Collector must remain in the probationer's presence throughout the collection process in order to maintain the chain of custody. All chain of custody forms must be completed to the specifications of the device manufacturer and the laboratory.
8. Specimen collection and paperwork on one probationer must be completed prior to beginning collection and paperwork on the next probationer. This will prevent mixing of specimens or other errors in the chain of custody.

## **6. Shy Bladder Procedures.**

### **6.1 Process.**

1. If a probationer claims that he/she cannot produce a urine specimen, the collector is to proceed with the collection process regardless of the reason given.
2. In the event of a court ordered urine test, the probationer is to be advised that he/she has no more than two hours to provide a specimen for testing. The probationer shall be permitted to drink no more than 8 ounces of fluid every thirty (30) minutes, but *not to exceed a maximum of 24 ounces, during the two hour time period.*
3. In the absence of a specific court ordered urine test, an oral fluid testing device may be substituted, at the Probation Officer's discretion.
4. Failure to provide a court ordered specific urine specimen within the time frame will be considered as a refusal and reported to the prosecuting attorney and/or supervising judge. Probation Officers should also consider a refusal as a violation of the probationer's terms and conditions of probation if the Circuit's terms and conditions allow.

## **7. Excessive fluids or clear urine specimen.**

In this instance, the probationer has more than likely consumed a large quantity of fluids. Excessive fluids will impact the test results as the drug will be diluted to the same degree as the urine is diluted. An oral fluid device may then be implemented as an alternative testing device.

## **8. In the event of spills.**

While wearing gloves, absorb the spill with paper towels. Wipe the spill area with a diluted solution (5-10%) of household bleach.

## **9. Specimen collection storage.**

Each probation office shall have a secure designated place to store the specimens to which the general public does not have access.

## **10. Collection Log.**

Each probation office shall maintain a collection log of both urine and oral specimens. The Collection Log shall contain the date, time, and location of where the specimen was collected, the probationer's name, supervising Probation Officer and Collector's name, and the date the specimen was sent to the laboratory. A copy of the Collection Log template is available on the Intranet.

*The Collection Log shall be reviewed by the Chief Probation Officer, or designee, upon receipt of the monthly invoice to ensure accurate billing has been submitted to the Administrative Office. Any invoice discrepancies shall be reported immediately to the Director of the Division of Probation Services.*

## **11. Requesting confirmation for contracted drug panels.**

**11.1** Confirmatory testing presents the following:

- a. 100% confirmation of substance
- b. report of the specific substance(s) confirmed (i.e., under Opiates: Morphine or Codeine; under Opioid: Oxycodone, Hydrocodone, Fentanyl, Methadone, Tramadol or Buprenorphine)
- c. possible details on dilution

**11.2** Confirmations will be automatic for specimens showing positive on both the Urine Screen/Rescreen Specimen Validity Lab Test initial screen and the oral testing device.

**If using the instant urine test cup and need a confirmation, you shall check the “Confirm For” box and write in the drug you are requesting to be confirmed (only what they tested positive for on the device). This will confirm only for that drug.**

## **12. Rejected Specimens.**

Specimens may be rejected by the contractor for the following reasons:

- no chain of custody form received with the urine bottle
- no urine bottle received with chain of custody form
- no probationer identification or chain of custody form
- no signature(s)
- quantity of fluid insufficient for analysis
- requisition number on specimen does not match chain of custody form number

## **13. Minimum Time Standards for Substance Abuse Testing.**

### **A. When to test**

In the absence of a specific court order or judicial directive indicating otherwise, the Probation Officer shall perform an oral or urine drug test:

1. At the time a pre-sentence/pre-disposition investigation report is ordered by the Court, and
2. After the defendant has been placed under supervision:
  - a. an initial drug test shall be performed no later than five (5) judicial days after probation is assigned.
  - b. the probationer shall be randomly re-tested no later than thirty (30) calendar days following the initial test if the initial test is positive for any drug tested. Should the probationer at that time fail to produce a negative test, the Probation Officer shall submit a report to the presiding judge or prosecuting attorney (depending on the circuit) informing him/her of the test results and requesting direction for further action.

- c. if the initial test, in (a) above, is negative, a random drug test shall then be conducted at the discretion of the Probation Officer, but no less than every six (6) months.
3. If the probationer refuses to submit to substance abuse testing as directed by the circuit court judge or the Probation Officer, this action shall be considered a violation of probation and dealt with according to the practice of the local circuit court.
4. Those individuals participating in our Drug Courts shall be tested randomly in accordance with the Adult or Juvenile Drug Court Policy.

#### **14. Quantitative levels.**

Probation Officers are not to interpret quantitative controlled substance concentration levels. Confirmatory testing results yield a numeric value for present controlled substances, but this level lacks forensic merit.<sup>1</sup> While it may seem that this numeric value could indicate whether a specimen donor has recently ingested controlled substances or, in the case of multiple tests, his/her usage is decreasing, this is not the case. There are a number of factors which affect a specimen donor's quantitative levels (e.g., initial dosage, rate of absorption, general health, dehydration, time of last ingestion). In other words, **courtroom use of quantitative levels generally produces interpretations that are inappropriate, factually unsupportable, and without scientific foundation. Again, these interpretations have little, if any, forensic merit.**

The DPS shall contract with laboratories who will provide expert witnesses to the circuit courts in the event of question or litigation over the controlled substance screening results.

#### **15. Fees.**

When so ordered, the drug testing fees shall be paid by the probationer directly to the Circuit Clerks' Office. The probationer will then provide a receipt from the Circuit Clerks' Office to the Probation Officer showing proof of payment.

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<sup>1</sup> Paul L. Cary, M.S., "Urine Drug Concentrations: The Scientific Rationale For Eliminating The Use Of Drug Test Levels In Drug Court Proceedings", *National Drug Court Institute Drug Court Practitioner Fact Sheet*, Vol. IV, No. 1, January 2004, p. 2.