Massachusetts District/ Municipal Court

Rules for Probation Violation Proceedings

Effective

September 8, 2015

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District/Municipal Court Rules for Probation Violation

Rules effective September 8, 2015.

Proceedings Rule 1: Scope and Purpose

These rules prescribe procedures in the Boston Municipal Court and the District Court to be followed upon the allegation of a violation of an order of probation issued in a criminal case after a finding of guilty or after a continuance without a finding. These rules do not apply to an alleged violation of pretrial probation, as the latter term is defined herein.

The purpose of these rules is to ensure that judicial proceedings undertaken upon the allegation of a violation of probation are conducted in full compliance with all applicable law, promptly and with an appropriate degree of procedural uniformity.

Added December 2, 1999, effective January 3, 2000; amended February 25, 2015, effective September 8, 2015.

Commentary

(2015)

In recognition of the advisability of having uniform procedures, to the extent practical, within the Trial Court, a single set of Rules for Probation Violation Proceedings has been promulgated for use in both the Boston Municipal Court and the District Court. These rules are largely modeled on the District Court Rules for Probation Violation Proceedings, made effective in 2000, with changes made both to account for legal and technological developments since 2000 and to account for the respective needs of each department.

(2000)

Probation violation proceedings are among the most important matters within District Court jurisdiction. The timely and proper conduct of these proceedings is essential to protect the rights of probationers as set forth in federal and state law, as well as to maintain the credibility, and thus the effectiveness, of probation orders. Just as fundamentally, the proper and timely conduct of probation violation proceedings is necessary to vindicate the public trust. Failure of the court to take appropriate action when a convicted defendant who has been given the benefit of probation is then alleged to have violated that order erodes public confidence in the judicial system.

These rules are intended to codify the provisions of applicable case law and to provide clarity in areas of long-standing ambiguity. Their purpose is to provide a clear and predictable process whereby probation violation proceedings are to be commenced, conducted and completed.

One area of ambiguity involves terminology. These rules are entitled "Rules for Probation Violation Proceedings" and not "Rules for Probation Revocation Proceedings." This is an important distinction involving the essential difference between adjudication and disposition. Ambiguity concerning this distinction appears occasionally in the relevant case law, which almost uniformly refers to "probation revocation hearings." The problem is that when a probationer is alleged to have violated his or her probation order, the first purpose of the subsequent hearing is to adjudicate the factual question of whether that violation occurred. The decision to revoke probation, or order any other disposition, can proceed only if a violation is found. Most of the due process requirements that have evolved for these hearings relate to the process by which the court is to

determine the factual issue. The nature of the alleged violation is essentially irrelevant to the factual determination of whether it occurred. In contrast, the issue of whether the probation order should be revoked (in many instances requiring the execution of a sentence of incarceration) focuses directly on the nature of the violation, among other factors. In addition, the issue of violation is essentially a factual matter whereas the dispositional decision of whether to revoke probation is essentially one of discretion.

Confusion on this distinction can affect proceedings significantly. For example, the preponderance of the evidence test at a probation violation hearing has nothing to do with the revocation decision; it is the evidentiary test by which the court must determine if a violation occurred. Conversely, the seriousness of the alleged violation has nothing to do with whether it occurred, but is an important consideration regarding revocation.

It is believed that often probation violation proceedings are not initiated because the Probation Department has no intention of recommending revocation and the incarceration it may require. As long as the proceeding is referred to, and believed to be for the purpose of, revocation and incarceration, there can be reluctance to allege a violation if the appropriate disposition is not revocation but rather the imposition of more stringent or intense probation requirements. The concept of a probation revocation hearing promotes a mistaken "all or nothing" perception. It implies that revocation is the purpose of the hearing and that if a violation is found, revocation must follow. In fact, the purpose of the hearing is to adjudicate the allegation, with the court having broad discretionary authority if a violation is found.

These rules seek to clarify the important difference between adjudicating the factual issue of whether a violation has occurred and the court's dispositional decision following such adjudication, not only by referring to the proceedings as "probation violation proceedings," but also by requiring a two-step procedure (Rule 5) and expressly defining the different purpose and procedures required for each step (Rule 7).

Throughout these rules the person who is the subject of probation violation proceedings is usually referred to as the "probationer" rather than the "defendant." With respect to the probation proceedings, such a person is not a defendant; he or she has either been convicted, after trial or based on a plea of guilty, or has formally submitted an admission to the facts of a criminal charge. Use of the term "probationer" is intended to underscore the legal status of the individual charged with a probation violation, which is fundamentally distinct from the status of a person who is a criminal defendant, particularly in terms of procedural rights.

Rule 2: Definition of Terms

As used in these rules, the following terms shall have the following meanings:

"Continuance without a finding:" the order of a court, following a formal submission and acceptance of a plea of guilty or an admission to sufficient facts, whereby a criminal case is continued to a date certain without the formal entry of a guilty finding. A continuance without a finding may include conditions imposed in an order of probation (1) the violation of which may result in the revocation of the continuance, entry of a finding of guilty, and imposition of sentence, and (2) compliance with which will result in dismissal of the criminal case.

"District Attorney:" the criminal prosecuting authority including the Attorney General if the criminal case in which probation was ordered was prosecuted by the Office of the Attorney General.

"General conditions of probation:" the conditions of probation that are imposed as a matter of course in every order of probation, as set forth in the official form promulgated for such orders.

"Probation order:" the formal, written court order whereby a defendant is placed on probation and which expressly sets forth the conditions of probation. A probation order is not a contract.

"Pretrial probation:" the probationary status of a defendant pursuant to a probation order issued prior to a trial or the formal submission and acceptance of a plea of guilty or an admission to sufficient facts, as provided in G.L. c.276, § 87 .

"Revocation of probation:" the revocation by a judge of an order of probation as a consequence of a determination that a condition of that probation order has been violated.

"Special conditions of probation:" any condition of probation other than one of the general conditions of probation.

"Surrender:" the procedure by which a probation officer requires a probationer to appear before the court for a judicial hearing regarding an allegation of probation violation.

Added December 2, 1999, effective January 3, 2000; amended February 25, 2015, effective September 8, 2015.

Commentary

(2015)

The "general conditions of probation" are set forth in standard probation forms, promulgated after consultation with the Office of the Commissioner of Probation. In the Boston Municipal Court, this is form BMCD-CR-104. In the District Court, this is form DGCR-27.

A sentence has been added to the definition of "probation order" that existed in the 2000 District Court Rule to address the recurring error of probation orders being referred to as probation "contracts." A probation order is not a contract. Commonwealth v. MacDonald, 435 Mass. 1005 , 1007 (2001).

In the definition of "pretrial probation," a reference to the relevant statute has been added.

(2000)

This rule provides definitions for six terms that are important for a clear understanding of various provisions of these rules.

The definition of "continuance without a finding" is provided to make clear that, as used in these rules, the term presupposes that the defendant whose case has been so continued has formally submitted, and the court has accepted, a plea of guilty or an admission to sufficient facts. Thus there is no "continuance without a finding" unless a guilty plea or admission has been properly tendered and accepted.

This definition also makes clear that the conditions of the continuance may be set forth in an order of probation. Thus, upon violation of one or more conditions of probation, the court may proceed to enter a guilty finding and impose sentence, as provided in Rule 9. It may be possible for a court to continue a case without a finding without imposing the conditions of the continuance as probation conditions, but these rules have no application in such a circumstance. If the conditions of a continuance without a finding, whether or not imposed as conditions of probation, are not violated, the criminal case may be dismissed. See Commonwealth v. Pyles, 423 Mass. 717 , 672 N.E.2d 96 (1996).

"Probation order" is defined as a written court order that specifies the conditions imposed. Fundamental fairness requires that if a probationer is to be subject to sanctions for failure to obey probation conditions, those conditions must be clearly specified. And proof of a violation will require evidence that the defendant was made aware of the conditions he or she allegedly violated. Conditions of probation must not be vague. See Commonwealth v. Power, 420 Mass. 410 , 650 N.E.2d 87 (1995). A written order is conducive to clarity. The probation order also fulfills a statutory requirement for written conditions: "Every person released upon probation shall be given by the probation officer a written statement of the terms and conditions of the release." G.L. c. 276, s. 85 .

The definition of "pretrial probation" makes clear that this term includes probation orders issued before a trial, a plea or an admission. A defendant placed on pretrial probation under G.L. c. 276, s. 87 , is formally on probation, but violation of such probation would not appear to subject the probationer to any sanction other than the resumption of the criminal proceeding. Having not admitted guilt or been tried, and having waived no rights, such a probationer would not appear to be subject to any sentencing, let alone any loss of liberty, even if a violation of such probation were alleged and proved. As a result, the due process requirements that are the central focus of these procedural rules do not apply to an alleged violation of a pretrial probation order, and Rule 1 expressly so provides.

The definition of "revocation of probation" makes clear that this is an order that must be preceded by a judicial determination that a condition of a probation order has been violated.

Special conditions of probation are defined simply as any condition other than the "general conditions." A violation of such a special condition (or a general condition other than the prohibition against any violation of law) has traditionally, and perhaps unfortunately, been referred to as a "technical" violation.

"Surrender" is defined in accordance with Commonwealth v. Durling, 407 Mass. 108 , 111, 551 N.E.2d 1193, 1195 (1990):

"When a violation is alleged, the probation officer "surrenders" the defendant to the court, subjecting the defendant to possible revocation of his probation.".

This definition is intended to clarify that surrender is the process by which the Probation Department brings the probationer before the court to answer for an alleged violation. It may be effected by arrest with or without a warrant under G.L. c. 279, s. 3 , or by a notice requiring the defendant to appear before the court. If a defendant is already before the court on a separate matter (for example, following an arrest on a new alleged crime, with or without a warrant, or on a summons on a new alleged crime), he or she may be notified at that time of the probation violation and ordered to appear at, or held in custody until, a probation violation hearing. In such cases no actual surrender by the Probation Department is required, since the defendant is before the court for a different reason when violation proceedings are commenced.

This definition of "surrender" clarifies any confusion caused by the use of the term to mean the process following a revocation of probation where a sentence is executed or imposed. See, e.g., Commonwealth v. Duro, No. 95-P-2 186 (Appeals Court, March 28, 1997) (summary disposition) (court refers to "order revoking the defendant's probation and surrendering him to the custody of the State...").

Rule 3: Charged Criminal Conduct

(a) General. This rule prescribes the procedures to be undertaken upon the issuance of a criminal complaint against a probationer.

(b) When Probation Order and New Criminal Charge Involve Same Court Division.

(i) Issuance and Service of Notice of Violation; Termination of Proceedings; Withdrawal of Notice of Violation. When a criminal complaint is issued by a court division against a defendant who is the subject of a probation order previously issued by that same court division, the Probation Department shall commence violation proceedings against that probationer. Such proceedings shall be commenced by the issuance by the Probation Department of a Notice of Probation Violation and Hearing at or before the arraignment on the criminal charge, or as soon thereafter as possible. The notice shall be served on the probationer in hand following the assignment of a date and time for a probation violation hearing, as provided in Rule 3(b)(ii), and such service shall be recorded on the case docket, provided that, if such in-hand service is not possible, the notice shall be served on the probationer by first-class mail, unless the court orders otherwise. Service of the notice by first-class mail shall be recorded on the case docket. Out-of-court service other than by mail shall require a written return of service. The Probation Department shall provide a copy of each notice of violation to the District Attorney forthwith upon its issuance.

At any time during violation proceedings, the court, upon review of the notice of violation and as a matter of its discretion, may order termination of the proceedings. A notice of violation may be withdrawn only with the permission of the court and such withdrawal and. permission shall be set forth on the record and entered on the case docket.

(ii) Contents of Notice of Violation. The Notice of Probation Violation and Hearing shall set forth the criminal behavior alleged to have been committed by the probationer as indicated in the criminal complaint, and shall set forth any other conditions of the probation order that the Probation Department alleges have been violated with a description of each such alleged violation. The notice shall also state the date, time, and place of the hearing.

(iii) Scheduling of Hearing. The probation violation hearing shall be scheduled to be commenced on the date of the pretrial hearing for the criminal charge, unless the court expressly orders an earlier hearing. The hearing shall be scheduled for a date certain no less than seven days after service on the probationer of the notice of violation unless the probationer waives the seven-day notice period. The hearing date shall not be later than 30 days after service of the notice of violation, except in extraordinary circumstances. In scheduling the pretrial hearing on the new criminal charge together with the probation violation hearing, the court shall give primary consideration to the need for promptness in conducting the probation violation hearing.

(c) When Probation Order and New Criminal Charge Involve Different Court Divisions within the Same Court Department.

(i) Issuance and Service of Notice of Violation. When a criminal complaint is issued by a court division (hereinafter the "criminal court") against a defendant who is the subject of a probation order issued by a different division of the same court department (hereinafter a "probation court"), the Probation Department at the criminal court shall issue a Notice of Probation Violation and Hearing to the probationer at or before arraignment on the criminal charge, or as soon thereafter as possible. The notice shall be served on the probationer in hand and such service shall be recorded on the case docket. Nothing in this rule shall preclude the later issuance and service on the probationer of a notice of violation by the Probation Department of a probation court.

(ii) Contents of Notice of Violation. The notice of violation shall set forth the name of the court division at which the probationer is on probation and the criminal behavior alleged to have been committed by the probationer as indicated the criminal complaint and shall order the probationer to appear at a specific date and

time at the probation court for the express purpose of appointment of counsel, if necessary, and scheduling of a probation violation hearing.

(iii) Transmission of Notice of Violation and Other Documents to Probation Court. Prior to the service of the notice of violation on the probationer, the Probation Department at the criminal court shall send to the Chief Probation Officer at the probation court, by electronic transmission, copies of the following documents: the notice of violation; the criminal complaint and related police report on the new criminal charge that constitutes the alleged probation violation; and a request for the following information: whether the probation court recommends that the probationer to be transported in custody, and, if not, the date and time for the non-custodial appearance of the probationer at the probation court.

(iv) Response by the Probation Court. At the probation court, the Chief Probation Officer, an Assistant Chief Probation Officer, or a probation officer designated by either shall respond by electronic transmission to the request for information no later than one hour from receipt thereof. The response shall include a recommendation on whether the probationer should be transported to the probation court in custody, and, if not, the date and time for the probationer's non-custodial appearance at the probation court.

(v) The Decision to Transport. A judge at the criminal court shall decide whether the probationer is to be transported in custody to the probation court. The judge shall provide the probationer an opportunity to be heard and, unless exceptional circumstances require otherwise, shall wait at least one hour for receipt of the recommendation from the probation court before making such decision. If the criminal court orders custodial transport, it shall issue a probation warrant on behalf of the probation court, and the probation court shall be so notified. The probationer promptly shall be transported in accordance with the warrant, provided that, if the probationer is held in custody in the criminal proceeding, the warrant shall be lodged with custodial authority to ensure that the probationer will be detained and transported to the probation court. The Probation Department at the criminal court shall so notify the Probation Department at the probation court.

If the criminal court decides not to order custodial transport, it shall enter the probation court appearance date and other required information on the notice of violation and serve it on the probationer in accordance with Rule 3(c)(i). For good cause, the criminal court may hold the probationer in custody pending its decision regarding custodial transport. Nothing in this rule shall preclude the issuance of a probation warrant by the probation court to secure the appearance of a probationer for a probation violation proceeding.

(vi) Probationer's Appearance at Probation Court; Service of a New Notice. Upon appearance of the probationer at the probation court, that court shall appoint counsel, if necessary, and shall schedule a probation violation hearing for a date certain, the date to be no less than seven days later unless the defendant waives the seven-day period. The hearing date shall not be later than 30 days after the appearance, except in extraordinary circumstances. If the probation department at the probation court alleges additional violations, it shall prepare and serve on the probationer a new notice of violation which shall set forth all alleged violations. A new notice of violation shall also include the date, time, and place of the violation hearing, and shall be served on the probationer in hand while the probationer is before the court, or as soon thereafter as possible. Such service shall be recorded on the case docket. The Probation Department shall provide a copy of the notice of violation to the District Attorney at the time of, or before, such service on the probationer. At any time during the proceedings, the probation court, upon review of the notice of violation and as a matter of its discretion, may order termination of the proceedings. A notice of violation may be withdrawn only with the permission of the court and such withdrawal and permission shall be set forth on the record and entered on the case docket.

(vii) Procedure When a Defendant Is a Probationer at More than One Other Court Division within the Same Court Department. When a defendant appearing in a court division on a new criminal charge is on probation at more than one other court division within the same court department, the criminal court shall select one of the latter divisions to be the probation court and shall issue a notice of violation for that division. The criminal court shall interact as provided in this rule with the selected probation court. The other probation court or courts each shall be responsible for the issuance and service on the probationer of a notice of violation based on the new criminal charge, and for securing the presence of the probationer for a violation hearing by means of such notice or by means of a warrant or other process.

(viii) Unified Proceedings Permitted by Standing Order. Each department may provide, by standing order, for the hearing of probation violation matters pending in any of the several divisions of that department at any one division.

(d) When Probation Order and New Criminal Charge Involve Different Court Departments. When a criminal complaint is issued by a court against a defendant who is the subject of a probation order issued by a court in a different court department, the Probation Department at the criminal court shall notify the Probation Department at the probation court of the new complaint as soon as may be done, but in any event prior to the new matter being heard in the criminal court.

Added December 2, 1999, effective January 3, 2000; amended February 25, 2015, effective September 8, 2015.

Commentary

(2015)

This rule involves cases in which an alleged probation violation consists of a new criminal charge against the probationer. Such cases can arise in two contexts: where the probationer is on probation at the same court division that issued the new criminal complaint (the "same court" situation), and where the criminal complaint was issued by a court division or department other than the one where the probationer is on probation (the "different court" situation).

For both situations, this rule contains a provision not included in the 2000 District Court Rules by which a Notice of Probation Violation and Hearing may be "withdrawn." Such withdrawals have been a method by which probation violation proceedings maybe terminated. Withdrawal has been held to be within the discretion of a Probation Department. Commonwealth v. Milton, 427 Mass. 18 , 21 (1998). There has been no requirement for court approval or permission. The new provision imposes two new requirements: (1) that such withdrawals must receive the permission of the court, and (2) that such permission and the fact of the withdrawal must be entered on the case docket. By requiring judicial permission and entry on the record, the new provision reflects the importance of a process by which a probation violation proceeding that has been formally commenced may be terminated without adjudication.

The new provision regarding withdrawal appears both in section (b)(i) (for the "same court" situation) and in section (c)(vi) (for the "different court" situation). Sections (b)(i) and (c)(vi) also now make clear that the Probation Department is responsible for providing a copy of the notice of violation to the District Attorney.

The last paragraph of section (b)(i) continues to authorize the termination of a probation violation proceeding as a matter of judicial discretion, on the court's own initiative or otherwise. The reference to such termination occurring "at arraignment" has been deleted because such termination may be ordered at any stage of the proceeding. A similar provision has been added to section (c)(vi) to address the "different court" situation.

New subsections (iii) - (v) have been added to section (c) of the rule that did not appear in the 2000 District Court Rule. Former section (iii) from the 2000 District Court Rule has been retained, but renumbered section (vi). See below. The purpose of the three new subsections is to provide a detailed process by which, in the "different court" situation, the "criminal court" must interact with the "probation court." The purpose of this interaction is to effect the transfer of the probation proceeding and, in some instances, the custodial transfer of the probationer, to the probation court.

Section (c)(iii) specifies the documents that must be sent by the criminal court to the probation court, including the request that the probation court make a recommendation on whether the probationer should be transported in custody. This section also provides that the criminal court may hold the probationer in custody pending this decision. This is important because, if not held on bail on the new criminal charge, the probationer may be otherwise free to leave the court. Such a departure would render moot the process of determining custody in the different-court situation. The legal bases for temporary custody of a probationer for good cause are set forth in the Commentary to Rule 6(h).

Section (c)(iv) describes the response required of the probation court to the criminal court. This response, including the recommendation regarding transport, is the responsibility of the Chief Probation Officer, an Assistant Chief Probation Officer, or a designated probation officer of the probation court and must be transmitted to the criminal court within one hour after receipt of the criminal court's request for information.

Section (c)(v) provides that the judge at the criminal court is responsible for the decision on whether the probationer will be transported to the probation court. The judge must give the probationer an opportunity to be heard and is not bound by the probation court's recommendation. The probation officer must provide the criminal court with a recommendation within one hour, and the judge must wait for that recommendation, absent exceptional circumstances. If a recommendation is not received within that hour, the judge at the criminal court may, but need not, wait longer before deciding whether to transport. If the decision is made to transport the probationer, the court will issue a probation warrant on behalf of the probation court. It is not necessary for the probation court to take any action in this regard. For this decision, the judge, for jurisdictional purposes, will be sitting at a session of the probation court held at the location of the criminal court, by designation of the Chief Justice of the relevant department under G.L. c. 211B, § 10 and G.L. c. 218, § 43A .

Under the former procedure, the decision to transport a probationer was to be made at the probation court and a warrant issued there and sent to the criminal court. This meant that a probation officer had to seek the issuance of a warrant by a judge of that court, a judge who was otherwise unaware of the matter and was usually engaged in that court's daily business. This would often delay the process, particularly in those cases where the judge at the probation court required a more detailed description of the underlying allegations before issuing the warrant.

This rule has been changed because the judge in the criminal court is in a superior position, both substantively and practically, to make the transport decision. That judge will be addressing an issue in a case that is before the court at that time, will be immediately aware of the criminal case which constitutes the alleged probation violation, and will have all relevant information regarding the probationer's criminal record and pending probation status.

Section (c)(vi) of the rule, corresponding to section (c)(iii) of the 2000 District Court Rule, has been amended to clarify and simplify the requirement that, if the probation court wishes to allege additional probation violations, it must issue and serve a new notice of violation.

Section (c)(vii) has been added to address a circumstance that the rules did not previously address, namely, where the defendant before the criminal court is currently on probation in more than one other court division

within the same court department. It provides that in such cases the judge at the criminal court must decide the probation court with which the criminal court will interact. This decision will determine which of the probation courts will be "first in line" to address the probationer's alleged violation based on the new criminal charge. The rule provides that the other courts at which the individual is on probation are responsible for charging the new crime as an alleged violation, and initiating a violation proceeding by issuing a notice of violation and mailing it to the probationer or obtaining the appearance of the probationer by means of a probation warrant or other process such as a writ of habeas corpus.

Section (c)(viii) has been added to acknowledge the practice in Boston Municipal Court of allowing probation violation matters in several different divisions to be adjudicated in a single division. Each department may, by standing order, authorize and regulate such practices as will promote the orderly dispatch of probation matters in its department.

Section (d) addresses the circumstance where a defendant is on probation in one department (for example, the District Court or the Superior Court) and is arrested in another department (for example, the Boston Municipal Court). In such circumstances, the Probation Department in the criminal court must notify the Probation Department in the probation court as soon as possible and always before the case is heard in the criminal court. Such notification should ordinarily occur as soon as the Probation Department becomes aware that the defendant is on probation. Although the criminal court lacks the authority to issue a notice of violation or warrant for the probation court, the Probation Departments should coordinate, especially if the Probation Department in the probation court wishes to issue a warrant under G.L. c. 279, § 3 .

(2000)

This rule sets forth procedures for a specific circumstance, namely, where a probationer is charged with a crime by the issuance of a criminal complaint. It is based on the premise that when a formal criminal charge is issued against a person on probation, this constitutes a basis for an alleged violation of the first general condition of every probation order (that the probationer must obey all local, state and federal laws) and the court must address such an alleged violation.

Note that it makes no difference whether the criminal complaint was issued after an arrest, or after a hearing on a criminal complaint application with no arrest having occurred. Note also that the rule does not apply to alleged criminal conduct that has not yet resulted in a criminal complaint. Probation violation proceedings based on alleged criminal conduct where no criminal complaint has yet issued are governed by Rule 4.

Commencement of Proceedings in Every Case

The rule requires the commencement of a probation violation proceeding in every case where a criminal complaint is issued against a probationer. No attempt is made to discriminate between those criminal charges that are "serious enough" to warrant violation proceedings and those that are not. The charge of a crime against a person who has been given the benefit of probation is serious enough per se to require action by the Probation Department. If the violation is found to have occurred, it is important to document that finding. The seriousness of the violation is properly addressed by the court's dispositional discretion, which is extremely flexible: a serious violation may result in revocation; a minor violation may result in simply a warning. See Rule 7(d) . Nor must an alleged minor violation require protracted proceedings. In appropriate cases, the defendant may admit to the probation violation resulting in a simple continuance of the current probation terms and consent to a disposition at arraignment on the new charge. Of course, a defendant's rights to oppose any alleged violation and to demand trial on any criminal charge remain inviolate.

Whenever a new crime is charged, commencement of probation violation proceedings may not be delayed solely to await the conclusion of the new criminal case. Rules 5(e) and 7(a) similarly preclude such "tracking" of the new criminal case as a basis for delaying the conduct and conclusion of probation violation proceedings. The commentary to Rules 5(e) provides the rationale for the requirement. Continuances are available on specific grounds under Rules 5(e) .

Where the court "treats" a criminal charge as a civil infraction, as provided by G.L. c. 277, s. 70C , the rule requiring the initiation of probation proceedings does not apply since the criminal charge, as such, can be considered no longer to exist. However, the underlying alleged behavior may constitute a violation of probation subject to possible violation proceedings under Rule 4.

Judicial Discretion to Terminate Proceedings After Commencement

It should be noted that the rule acknowledges the court's discretion to terminate a proceeding once it has been commenced. That is, the rule provides that proceedings are commenced "by the issuance by the Probation Department of a Notice of Probation Violation and Hearing at or before arraignment on the criminal charge." Usually such "issuance" will consist of the probation officer tendering the notice form to the court before the arraignment begins. (The notice will not be formally served on the probationer until and unless a hearing date is determined and recorded on the form.) At that time the judge is free as a matter of discretion to order that the proceedings be terminated. Such an order must be entered on the probation record and on the docket of the case in which probation was ordered to ensure accountability. While alleged probation violations based on new criminal charges, even minor ones, generally should proceed to a factual conclusion to vindicate the credibility of probation and to establish a proper record, there may be circumstances where, in the opinion of the court, the violation proceedings should be terminated at the outset.

Where the court at which the probationer is on probation is different from the court where the new criminal charge is brought, the judicial authority to order no further proceedings resides at the former court, and section (c) (iii) so states.

Same Court

There are two different circumstances in which proceedings under the rule can arise: where the criminal complaint is issued (1) by the same court that issued the probation order, or (2) by a different court. These situations are addressed separately in sections (b) and (c).

Section (b), the "same court" circumstance, requires the probationer to be served in hand with the Notice of Probation Violation and Hearing when he or she appears before the court for arraignment whenever possible. This requires administrative attention by the Probation Department at each court so as to ensure each day that all new arrestees and others appearing for arraignment are screened for probation status. Notices for all those who are on probation must be prepared for in-court service. Where necessary, these defendants can be scheduled last for arraignment to ensure preparation of the Notice and in-hand service. The issuance of the Notice constitutes "commencement" of action by the Probation Department. The prepared Notice should include any other violations that can properly be alleged in addition to the charged criminal conduct. For example, a probationer charged with a new crime may also have a history of failure to report as ordered. The date, time and place of the violation hearing should be left blank, to be recorded on the form when the hearing is scheduled along with the pretrial hearing on the criminal charge, as required in section (b)(iii). After this information is added, the Notice is to be served in hand on the probationer.

If the probationer defaults at arraignment, the Notice can be prepared and left in the case file.

When the court fails to make in-hand service at arraignment, the rule provides for other methods of service. In such cases, the goal should be to schedule the hearing on the same date as the pretrial hearing on the criminal charge, assuming this will not violate the seven-day minimum notice requirement.

There is no requirement that counsel in the original criminal case represent the probationer at the violation hearing. On the contrary, if appointment of counsel is required, it is appropriate to appoint the same attorney for the violation hearing and for the new criminal charge that also constitutes the alleged probation violation.

Different Courts

Section (c) of the rule addresses the circumstance where a person against whom a criminal complaint has issued is on probation in a different court. Under section (c)(i) the Probation Department of the court that issued the complaint must prepare and serve a Notice of Probation Violation and Hearing on the probationer in hand at arraignment, just as in the "same-court" situation. However, in addition to specifying the alleged violation, the Notice will order the probationer to appear on a date certain at the court where he or she is on probation. The purposes of that appearance will be to appoint counsel and schedule the violation hearing. The Probation Department of the court where the defendant is on probation may amend the notice to include additional violation allegations. Presumably the court where the probationer is on probation will schedule a prompt hearing date, consistent with the seven-day minimum notice period for the probationer. (See below.).

The requirement that copies of the Notice, criminal complaint and police report be sent "forthwith" to the probation court is most effectively satisfied by the use of facsimile ("fax") transmission.

Scheduling

Notice of the probation violation hearing "must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded." Commonwealth v. Odoardi, 397 Mass. 28 , 31-32, 489 N.E.2d 674, 676 (1986), quoting In re Gault, 387 U.S. 1 , 33, 87 S.Ct. 1428, 1446 (1967). The rule provides a minimum of seven days notice in both the same-court and different-court situations. This is the minimum notice period previously provided by regulations of the Office of the Commissioner of Probation and should be minimally adequate in most cases given the narrow focus of these hearings. If either party desires more time than is allowed by the scheduled date, a continuance may be sought under Rule 5(e) .

The rule also provides that the hearing may not be scheduled for a date more than 30 days after service of the Notice if the probationer objects to such date. This is to protect the probationer from undue delay, which is a particular concern if the probationer is being held in probation detention. Finally, the rule provides that even if the hearing date is beyond the 30-day limit and the probationer objects, such delay may nonetheless be justified on the basis of "extraordinary circumstances.".

The purpose of requiring the probation violation hearing to be scheduled along with the pretrial hearing on the new criminal case in the same-court situation (section (b)(iii)) is not only to avoid delay of the probation hearing, but also to create an opportunity for a disposition of the criminal case that takes into account the probation disposition. Most criminal cases, in fact, are disposed of by plea or admission. It is appropriate to provide the defendant an opportunity to consider whether to submit a plea or admission that may take into account the outcome of the probation violation hearing. The defendant's right to a trial on the new criminal charge remains unaffected.

The last sentence of section (b)(iii) is intended to indicate that the prompt scheduling of the probation violation hearing should drive the scheduling of the pretrial hearing on the new charge. Thus, in a court in which the next regularly available date for a pretrial hearing is not consistent with the need for a prompt hearing on the

alleged probation violation in terms of public safety implications, a prompt date (even a minimum seven-day date where appropriate) should be given even if this means scheduling the pretrial hearing on the new criminal charge prior to the date it would otherwise receive.

In the different-court situation, the date of the Pretrial Hearing on the criminal charge should be indicated on the copy of the Notice sent to the probation court. This will allow the probation court to schedule the violation hearing before that date.

Under G.L. c. 258B, s. 3(o) , victims have a right to be notified by a probationer's supervising probation officer if a probationer "seeks to modify a restitution order." This does not appear to require a supervising probation officer to send a copy of the Notice of Probation Violation and Hearing to a victim, even if modification of a restitution order is a possible outcome of the hearing.

Notice to District Attorney

In both the same-court and the different-court situations, the rule requires that a copy of the Notice of Probation Violation and Hearing be provided to the District Attorney. The relevant law, G.L. c. 279, s. 3 , gives the District Attorney the right to receive a copy of the notice and appear at such hearings only where the original conviction for which the probationer is on probation involves at least one felony. However, the rule reflects the position that the District Attorney should be allowed to appear at all such hearings. It allows the District Attorney to decide which hearings to attend and provides as an alternative the submission of a written statement. (Rule 5(f)) This is appropriate, given the fact that some misdemeanor charges may have greater public safety implications than felony charges, e.g., drunk driving, domestic assault and battery and violation of restraining orders. Also, the District Attorney has certain obligations to victims of crime regarding probation violation hearings that can be met only if the District Attorney is informed of the scheduling of such hearings. G.L. c. 258B, s. 3 . See Rule 5(f) and related commentary.

Rule 4: Commencement of Violation Proceedings: Violations Other Than a New Criminal Complaint

(a) General. This rule prescribes the procedures to be undertaken regarding alleged violations of probation that do not involve or include criminal conduct charged in a criminal complaint.

(b) Issuance and Service of Notice; Termination of Proceedings; Withdrawal of Notice. When a probation officer of a court that has issued a probation order determines that a probationer has violated any condition of that order other than the alleged commission of a crime as charged in a criminal complaint, that probation officer shall decide whether to commence probation violation proceedings. Such decision shall be made in accordance with the rules and regulations of the Office of the Commissioner of Probation, provided, however, that probation violation proceedings shall be commenced (1) upon the issuance of an indictment, (2) when the judge issuing the probation order orders that such proceedings are to be commenced upon an alleged violation of one or more conditions of probation, or (3) when the commencement of such proceedings is required by statutory mandate. In any case, a judge of the court may order the commencement of violation proceedings.

Violation proceedings shall be commenced by the issuance by the Probation Department of a Notice of Probation Violation and Hearing, which shall be served on the probationer in hand or by first-class mail, unless the court orders otherwise. Service of the notice in hand or by first-class mail shall be noted in the court record. Out-of-

court service other than by first-class mail shall require a written return of service. The Probation Department shall provide a copy of each notice of violation to the District Attorney forthwith upon its issuance.

If deemed appropriate, because of the seriousness of the alleged violation or for other good reason, the court may issue a violation of probation warrant. The clerk shall forthwith enter such warrant in the warrant management system. Upon the probationer's first appearance before the court, the probationer shall be served in hand with the notice of violation.

At any time during the proceedings, the court, upon review of a notice of the violation and as a matter of its discretion, may order termination of the proceedings. A notice of violation may be withdrawn only with the permission of the court and such withdrawal and permission shall be set forth on the record and entered on the case docket.

(c) Contents of Notice. The Notice of Probation Violation and Hearing shall set forth the conditions of the probation order that the Probation Department alleges have been violated and shall order the probationer to appear at a specific date and time for the express purpose of the appointment of counsel, if necessary, and the scheduling of a probation violation hearing.

(d) Scheduling of Hearing. Upon appearance of the probationer in accordance with the Notice required by Rule 4(c), the court shall appoint counsel, if necessary, and schedule a probation violation hearing for a date certain, the date to be no less than seven days later unless the probationer waives the seven-day notice period. The hearing date shall not be later than 30 days after the appearance, except in extraordinary circumstances.

Added December 2, 1999, effective January 3, 2000; amended February 25, 2015, effective September 8, 2015.

Commentary

(2015)

Section (b) differs from the 2000 District Court Rule in the addition of the last paragraph, which is identical to the last paragraph of Rule 3(b)(i) and (c)(vi). This paragraph refers to the authority of the court to terminate a violation proceeding and adds new requirements governing the withdrawal of a notice of violation by the Probation Department. This paragraph has been added to ensure that the same provisions that apply to violation proceedings involving charged criminal conduct (the subject of Rule 3), also apply to proceedings covered by Rule 4, i.e., proceedings that do not involve a new criminal complaint. The purpose of the new provisions governing the withdrawal of a notice of violation are discussed in the Commentary to the Rule 3 amendments.

Section (b) also makes clear that the Probation Department is responsible for providing a copy of the notice of violation to the District Attorney.

Section (b) specifies that the judge may issue a violation of probation warrant if the seriousness of the alleged violation or other good reason makes that advisable. For example, a probationer convicted of a sex crime may remove a global positioning system bracelet, demanding immediate action despite the absence of a new crime. Nothing in this grant of authority detracts from the statutory power of a probation officer to issue a violation of probation warrant without court approval under G.L. c. 279, § 3 . The careful exercise of that power is essential to effective and efficient probation supervision.

The title of section (b) differs from the 2000 District Court Rule in referring to the two new topics that have been added to that section.

(2000)

This rule provides the procedures to be followed when it is alleged that a probationer has violated any probation conditions that do not include criminal behavior as alleged in a criminal complaint, that is, any violation not governed by Rule 3. This includes allegations of criminal acts that are not the subject of a criminal complaint, allegations of a crime set forth in an indictment, any alleged violation of general probation conditions 2 (to report to the probation officer as required), 3 (to notify the probation officer of any change of employment or address) or 4 (to obtain permission to leave the Commonwealth), and any alleged violation of any special condition of probation.

Section (b) of the rule defers to the Rules and Regulations of the Office of the Commissioner of Probation (OCP) regarding the commencement of such proceedings. Unlike charged criminal acts, it is appropriate that other alleged violations be the subject of violation proceedings only in accordance with professional probation policies and standards. These policies provide an appropriate degree of discretion and also provide a procedure for administrative proceedings where the alleged violation does not warrant the commencement of court proceedings. Such policies require collaboration with the Presiding Justice at each court. Notwithstanding a probation officer's decision, in accordance with Probation Department regulations, not to commence proceedings in a particular case, a judge may order such proceedings to be commenced.

There are three exceptions to the reliance on OCP regulations and policies under section (b). The first requires commencement of proceedings upon the issuance of an indictment. The rationale for this is the same as for the required commencement of proceedings upon the issuance of a criminal complaint. See commentary to Rule 3. The second allows the sentencing judge to require in the probation order that upon certain alleged violations, a probation violation hearing must be commenced. The third exception is that a violation hearing must be commenced if required by law. Perhaps the most notable example of the last is G.L. c. 209A, s. 7 , which provides as follows:

"If the defendant ordered to undergo treatment [after being convicted of a violation of a restraining order issued under G.L. c. 209A] has received a suspended sentence, the original sentence shall be reimposed if the defendant fails to participate in said program as required by the terms of his probation".

The statute would appear to require that probation violation proceedings be commenced upon an allegation of such a violation, and that revocation be ordered if the violation is found.

The rationale for providing a copy of each Notice of Probation Violation and Hearing to the District Attorney is the same as for notices in proceedings under Rule 3. It allows the District Attorney to decide which hearings to appear at and permits the District Attorney to fulfill certain legal obligations to victims and witnesses involved in the original criminal case in which the probation order was issued. See Rule 5(f) and related commentary.

Sections (c) and (d) provide for notice to the probationer of the alleged violation and ordering him or her to appear in court on a specific date and time so that the issue of counsel may be addressed and the violation hearing scheduled. The minimum notice period for the hearing is seven days, unless waived.

In cases where custody of a probationer is warranted pending the hearing, the probationer may be arrested with or without a warrant pursuant to G.L. c. 279, s. 3 , and held if probable cause is found at a preliminary violation hearing following the arrest. See Rule 8.

Rule 5: Probation Detention Hearings

The new rules have been reordered. For the new rule on Conduct of Violation Hearings, see Rule 6.

(a) Purpose. A probation detention hearing may be conducted to determine whether a probationer shall be held in custody pending the conduct of a probation violation hearing. The issues to be decided at a probation detention hearing are whether probable cause exists to believe that the probationer has violated a condition of the probation order, and, if so, whether the probationer should be held in custody.

(b) Notice of Hearing. The probationer shall be given a written notice indicating the purpose of the hearing and referring to the probation violations alleged in the notice of violation which is required to be served on the probationer under these rules. The detention proceeding shall be commenced by the service of such notice on the probationer. The court may, for good cause, order that the probationer be taken into custody pending the completion of the proceeding. The notice shall be served in hand when the probationer is before the court having been arrested on a new criminal charge, having been arrested for a probation violation, or for any other reason. The notice shall be prepared and served by the Probation Department at the discretion of a probation officer or as directed by the court.

(c) Conduct of Hearing. Probation detention hearings shall be conducted by a judge or, if there is no judge at the court, by a magistrate. When a magistrate conducts a probation detention hearing, a resulting custody order shall not extend beyond the date on which a judge will next be present at the court. On such date, the probationer shall be brought before the court and any further custody order will require the conduct of a detention hearing by a judge.

Probation detention hearings shall be conducted in a courtroom on the record. The probationer shall be entitled to counsel. Following service of notice, as provided in Rule 5(b), and the appointment of counsel, the appearance of private counsel, or the knowing and voluntary waiver of the right to counsel, the probationer shall be allowed a reasonable time to prepare for the hearing. At the hearing, the probation officer shall be required to present evidence to support a finding of probable cause. The District Attorney may assist in the presentation of such evidence. The probationer shall be entitled to be heard in opposition. Testimony, including testimony of a probation officer, shall be taken under oath. The court shall admit such evidence as it deems relevant and appropriate. The scope of the inquiry shall be limited to the issue of whether there is probable cause to believe that the alleged violation of probation has occurred.

If probable cause is found, the court may order the probationer to be held in custody pending the conduct and completion of the violation hearing. The court's decision whether to order such custody shall include, but not necessarily be limited to, consideration of the following:

i. the probationer's criminal record;

ii. the nature of the offense for which the probationer is on probation;

iii. the nature of the offense or offenses with which the probationer is newly charged, if any;

iv. the nature of any other pending alleged probation violations;

v. the likelihood of probationer's appearance at the probation violation hearing if not held in custody; and

vi. the likelihood of incarceration if a violation is found following the probation violation hearing.

If probable cause is found and the court does not order the probationer held in custody, the court may order the probationer released upon such conditions as maybe provided for in standing orders promulgated by that court's department.

If no probable cause is found, the court may terminate the proceedings or schedule a probation violation hearing, serving the probationer with notice thereof, but the probationer may not be held in custody pending the hearing based on the alleged probation violation.

Added December 2, 1999, effective January 3, 2000; amended February 25, 2015, effective September 8, 2015.

Commentary

(2015)

This rule differs from its antecedent, 2000 District Court Rule 8, both in its placement and the replacement throughout of the terms "preliminary probation hearing" and "final [or 'full'] probation hearing" with the terms "probation detention hearing" and "probation violation hearing," respectively. The purpose of these changes was to use terms that more accurately describe and clearly differentiate these proceedings.

Section (b) contains a new sentence indicating that a probation detention proceeding is commenced when the notice thereof is served on the probationer. Another new sentence indicates that the court has the authority to hold the probationer in custody pending the completion of the proceedings for good cause. The bases for the latter authority are the same as those set forth for the authority to hold a probationer in custody after the probationer's arrival at court pending the commencement and completion of a probation violation hearing. See the Commentary to Rule 6(h). Where an alleged probation violation consists of a new criminal charge, the probationer may already be in custody prior to the conduct of a detention hearing, e.g., while awaiting a bail hearing on that charge.

Section (b) contains a new, final sentence indicating that a probation detention hearing may be conducted at the direction of the court as well at the initiative of the Probation Department. In other words, the court may initiate a detention hearing.

The first paragraph of section (c) recognizes the authority of magistrates to conduct probation detention hearings. Such authority is specifically provided in G.L. c. 221, § 62C(g) . The rule provides conditions for the exercise of this authority by requiring that it be used only when there is no judge at the court and by limiting the duration of any resulting custody order.

The first sentence of the second paragraph of section (c) corresponds to the first paragraph of section (c) in the 2000 District Court Rule 8. The second paragraph also contains a new, express reference to the requirement that a waiver by a probationer of the right to counsel at these hearings must be made knowingly and voluntarily.

The remainder of section (c) differs from its antecedent in the deletion of surplus language, especially references to the court's obligation to issue and serve a notice of violation and to schedule a violation hearing. These requirements are set forth in Rules 3 and 4.

One question that the rule does not address involves the effect, if any, on the *probation detention* probable cause determination when the alleged violation consists of a *new criminal charge*. In such cases, a probable cause determination will already have been made as a prerequisite for issuance of the criminal complaint for that charge. However, it would appear that a court conducting a probation detention hearing is not "bound" by

the earlier probable cause ruling. While the same evidence that was considered for probable cause on the criminal complaint may also be presented to the court in the probation detention proceeding (e.g., a police report), new probable cause ruling is nonetheless required. Under the principle of res judicata and the doctrine of "issue preclusion," an earlier ruling on a legal issue is binding in a subsequent proceeding only if several requirements are met. These requirements are not met in the situation at issue. For example, the issue must have involved a final judgment on the merits in the prior proceeding. See Kobrin v. Bd. of Registration in Medicine, 444 Mass. 837 , 843-44 (2005), and cases cited therein. A probable cause ruling for the issuance of a criminal complaint is not a final judgment on the merits. Moreover; the party against whom preclusion would be asserted must have had a meaningful opportunity to have been heard in the prior proceeding. Id. In criminal cases, the accused is not entitled to be heard on the issue of probable cause (except in those cases where a criminal complaint hearing precedes an arrest).

The 2000 District Court Rule 8(d) prohibited conditions of release, including bail. This provision is not included in the District/Municipal Courts Rule. Instead, when probable cause is found, the court is authorized to impose conditions of release. Violation of such a condition would ordinarily result in detention until the violation hearing. Recognizing the differing needs of the various court departments in the orderly processing of probation detention matters, the rule permits each court department to specify the allowable conditions of release in a standing order applicable to that department. Although bail as authorized by G.L. c. 276, § 58 is not permissible, see Commonwealth v. Puleio, 433 Mass. 39 , 42 (2000), a department, by standing order, may authorize release based on a monetary condition. A probationer released on a monetary condition would not be able to seek bail review under G.L. c. 276, § 58 . Puleio, 433 Mass. at 42.

When the court does not find probable cause, the court must exercise its discretion whether to terminate proceedings or to schedule a probation violation hearing nonetheless. Because of the need for dispatch in conducting a detention hearing, the absence of evidence, witnesses, or assistance from the District Attorney may result in the probationer officer's being unable to establish probable cause for the purpose of detention but still having a reasonable prospect of proving the probation violation at a full hearing. The court will decide whether further proceedings are in the interests of justice, but in no event may the probationer be held or subject to conditions of release on the probation matter pending a probation violation hearing.

(2000 Commentary to Rule 5)

Probation revocation hearings are not part of a criminal prosecution, and for this reason a probationer need not be provided with the full panoply of constitutional protections applicable at a criminal trial. Gagnon v. Scarpelli, 411 U.S. 778 , 782, 93 S. Ct. 1756, 1759 (1973). Indeed, case law has sought to preserve the flexible, informal nature of probation revocation hearings. See Black v. Romano, 471 U.S. 606 , 105 S. Ct. 2254 (1985).

On the other hand, the probationer's liberty is potentially at stake in violation proceedings, and therefore certain due process protections are required. As set forth for parole revocation in Morrissey v. Brewer, 408 U.S. 471 , 92 S. Ct. 2593 (1972) and made applicable to probation revocation by Gagnon v. Scarpelli, 411 U.S. 778 , 93 S. Ct. 1756 (1973), there are six such fundamental due process requirements: (1) written notice of the claimed violations of probation, (2) disclosure to the probationer of the evidence against him, (3) opportunity to be heard in person and to present witnesses and documentary evidence, (4) the right to confront and cross-examine adverse witnesses (unless a hearing officer specifically finds good cause for not allowing confrontation), (5) a neutral and detached hearing body, members of which need not be judicial officers or lawyers, and (6) a written statement by the fact finder as to the evidence relied on and reasons for revoking probation.

This rule is intended to provide an orderly, relatively informal and flexible procedure for probation violation hearings, but one in which all required and appropriate due process safeguards are ensured.

General Requirements

Section (a) requires several fundamental procedural elements: a judicial procedure in open court, testimony under oath and the creation of a record. With regard to the record, Rule 211 of the Special Rules of the District Courts of Massachusetts, "Recording of Court Proceedings," requires that such proceedings be electronically recorded. Any District Court judge may conduct the hearing; the original sentencing judge is not required.

One of the six fundamental due process requirements for probation violation hearings, as provided in Gagnon v. Scarpelli, 411 U.S. 778 , 93 S.Ct. 1756 (1973), is "a neutral and detached hearing body." This requirement would appear to preclude the model by which a judge would take the initiative in the proceeding, as in an inquest, and the probation officer remain essentially passive in the role of a witness. Accordingly, the rule requires the probation officer, who is the "accuser," to present the case, with the judge remaining in the traditional neutral role. This does not prevent the judge from asking appropriate questions, nor is it inconsistent with the role of the probation officer as witness. The probation officer must provide evidence under oath and is subject to cross-examination.

It should be noted that in probation violation hearings the exclusionary rule does not apply if the police were unaware that the defendant was a probationer. Commonwealth v. Olsen, 405 Mass. 491 , 541 N.E.2d 1003 (1989) (evidence seized in violation of Fourth Amendment was admissible in probation violation proceeding, where police who seized evidence neither knew nor had reason to know of probationary status of person whose property was seized). There is no Massachusetts decision on whether the exclusionary rule applies in these proceedings where police are aware that the person is on probation.

Regarding the right to counsel, the rule goes beyond current law by providing the right to counsel regardless of whether the probationer faces the possibility of imprisonment if probation is revoked. See Commonwealth v. Faulkner, 418 Mass. 352 , 638 N.E.2d 1 (1994) (probationer at probation violation hearing has right to counsel if revocation might result in imprisonment).

Two-step Proceeding

Section (b) imposes the critical requirement of a two-stage proceeding. As observed by the Supreme Court of the United States,

"the decision to revoke probation typically involves two distinct components: (1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation".

Black v. Romano, 471 U.S. 606 , 611, 105 S.Ct. 2254, 2257 (1985), as quoted in Commonwealth v. Marvin, 417 Mass. 291 , 295, 629 N.E.2d 1317, 1320 (1994) (Liacos, C.J., dissenting).

This dichotomy is further reflected in Massachusetts law:

> "At the revocation hearing, the judge must determine, as a factual matter, whether the defendant has violated the conditions of his probation. If the judge determines that the defendant is in violation, he can either revoke the probation and sentence the defendant or, if appropriate, modify the terms of his probation".

Commonwealth v. Durling, 407 Mass. 108 , 111, 551 N.E.2d 1193, 1195 (1990).

This distinction is an important one. The factual decision that a probation violation has occurred in no way compels an order of revocation. The court has wide dispositional latitude if a violation is found. See Rule 7(d) . However, even if an alleged violation is relatively minor and, in all likelihood will not warrant revocation, it is important that it be adjudicated. It is essential for effective probation that a record of compliance and noncompliance with probation orders be maintained.

In addition, the distinction between the factual determination and the disposition must be maintained because different legal requirements are invoked. For example, the factual issue of whether an alleged violation has occurred must be decided based on a preponderance of the evidence, Commonwealth v. Holmgren, 421 Mass. 224 , 656 N.E.2d 577 (1995), while the dispositional decision is a matter of judicial discretion. McHoul v. Commonwealth, 365 Mass. 465 , 469-470, 312 N.E.2d 539, 543 (1974). Similarly, the "seriousness" of the alleged violation is irrelevant to whether it occurred, while it is relevant to the question of appropriate disposition.

Adjudication of Violation

Section (c) sets out the basic requirements for how the first step of the hearing, adjudication of the alleged violation, should proceed. It ensures both parties the right to present evidence and cross-examine adverse witnesses. The court has some discretion in limiting cross-examination involving irrelevant or redundant questioning. See Commonwealth v. Odoardi, 397 Mass. 28 , 34, 489 N.E.2d 674, 678 (1986). Section (c) also entitles both parties to make a closing statement. In Commonwealth v. Marvin, 417 Mass. 291 , 295, 629 N.E.2d 1317, 1320 (1994), the court declined "to impose a universal due process requirement that a defendant in a probation revocation hearing has an absolute right to make a closing argument." However, that case goes on to state that it would be a "better practice" to permit a probationer to present at least a brief closing argument. The provision in this rule is intended to ensure that this better practice is provided for both parties.

Disposition

Section (d) provides that both parties may be heard regarding disposition, assuming the court finds that one or more alleged violations was committed. The court's dispositional options are provided in Rule 7. The probationer's right to be heard and present evidence regarding disposition implicate due process considerations. See Commonwealth v. Odoardi, 397 Mass. 28 , 489 N.E.2d 674 (1986).

Continuances

Section (e) sets out certain requirements for continuances. It expressly eliminates "tracking," i.e., continuing a probation violation hearing to await disposition of the criminal case involving the charge that is also the alleged probation violation. The reason for this rule is that, on the one hand, there is no basis in law or in terms of fairness to the probationer for such a continuance, and, on the other hand, proceeding without delay on the alleged violation is of great importance in terms of the primary goals of probation, which are rehabilitation of the probationer and protection of the public. Commonwealth v. LaFrance, 402 Mass. 789 , 795, 525 N.E.2d 379, 383 (1988) (citations omitted). The rule does provide for continuances where good cause is shown and the reason for the continuance is stated by the judge and set forth on the record.

The Supreme Judicial Court has long made clear that there is no prerequisite that the probationer be convicted of a criminal charge to permit that criminal conduct to be used as the basis of a probation revocation.

"If the act alleged to be a violation of probation is made the subject of a criminal complaint, the commencement of the criminal prosecution does not preclude the revocation of the earlier probation nor does it require that the revocation proceedings be deferred until the completion of the new criminal proceeding.". Rubera v. Commonwealth, 371 Mass. 177 , 181, 355 N.E.2d 800, 803 (1976) and cases cited.

After analyzing the federal constitutional law relevant to the point and the precedents from other states, the court in Rubera went on to explain the policy reasons that favor proceeding with revocation proceedings and not awaiting the outcome of the criminal case:

"We are aware that the practice which was followed in revoking the petitioner's probation in this case was not in accord with the procedure suggested by the ABA Project on Standards for Criminal Justice, Standards Relating to Probation § 5.3, at 62-63 (Approved Draft 1970), that "[a] revocation proceeding based solely upon commission of another crime ordinarily should not be initiated prior to the disposition of that charge." [citation omitted] That standard seems to impose an unreasonable and unfair burden on law enforcement authorities by placing them in the dilemma of having to decide between (a) having to forgo criminal prosecution of a person who is on probation and who appears to have committed another offense until they have first pursued steps to revoke his probation on the basis of his conduct in ordinary proceedings without reliance on any subsequent criminal conviction, or (b) having to start criminal prosecution promptly on the later offense and then being prevented from trying to revoke his earlier probation until after the later prosecution has run its full course which, in the present state of our criminal dockets, would amount to arming the defendant with the weapon of potential delay with which he could forestall termination of the proceeding by endless appeals. We decline to impose the burden of such a choice on either probation officers or prosecutors.". Rubera v. Commonwealth, supra, at 184-185 , 355 N.E.2d 800, 805 (1976).

See also, Commonwealth v. Holmgren, 421 Mass. 224 , 656 N.E.2d 577 (1995), which held that a probation violation hearing may proceed on a charge of a new crime, even if the defendant has been acquitted of that crime, because the standard of proof at a probation hearing is lower than the standard at a criminal trial. In other words, an acquittal, or the possibility of an acquittal, is irrelevant to a probation violation proceeding because failure to convict under the "reasonable doubt" standard neither precludes nor is inconsistent with a finding of a probation violation under the "preponderance of the evidence" standard.

The only legal relationship between a probation violation hearing and a criminal prosecution for the same alleged criminal conduct is that, if the criminal case does go forward before the probation hearing and results in a conviction, that conviction will be evidence of a probation violation and no independent finding of the underlying facts is required of the judge. Commonwealth v. Maggio, 414 Mass. 193 , 605 N.E.2d 1247 (1993).

District Attorney Participation

Section (f) addresses the subject of participation by the District Attorney. Rules 3 and 4 require the court to provide a copy of every Notice of Probation Violation and Hearing to the District Attorney. Section (t) of this rule is intended to clarify the involvement of the District Attorney in those cases where he or she decides to participate, consistent with the statutory provisions of G.L. c. 279, s. 3 .

It should be noted that as a constitutional matter, probation functions are within the judicial branch, and the office of the District Attorney is considered within the executive branch. Commonwealth v. Tate, 34 Mass. App. Ct. 446 , 447-448, 612 N.E.2d 686, 688 (1993) and cases cited. Under the Massachusetts Constitution, Pt. 1 Art. 30 , the branches must maintain a separation of governmental powers.

> "That separateness does not, however, lead to the conclusion that a district attorney's office may not assist the probation service in presenting evidence in support of a position that the probation service had decided upon.".
>
> * * *
>
> "[P]robation officers are only aided, not interfered with, when district attorneys, upon invitation, conduct examination of witnesses and present evidence.".

Id. at 448, 612 N.E.2d at 688, and cases cited.

Thus the right of District Attorneys to present evidence and witnesses, and to examine and cross-examine witnesses at these proceedings would appear to be constitutionally acceptable as long as it does not fundamentally interfere with probation.

(2000 Commentary to former Rule 8)

Preliminary probation hearings are required only when the probationer is to be held in custody for an alleged probation violation pending the conduct of a full hearing.

> "The purpose of the preliminary hearing is to protect the rights of the ... probationer who, being at liberty, is taken into custody for alleged violation of his ... probation conditions, and detained pending a final revocation hearing.".

Fay v. Commonwealth, 379 Mass. 498 , 504, 399 N.E.2d 11, 15 (1980) (citations omitted).

Thus, for example, there is no requirement of a preliminary hearing if the alleged probation violator already has received a probable cause hearing on the new crime and has been bound over to the grand jury. Stefanik v. State Board of Parole, 372 Mass. 726 , 363 N.E.2d 1099 (1977). See also Commonwealth v. Odoardi, 397 Mass. 28 , 33, 34, 489 N.E.2d 674, 677 (1986) (no preliminary hearing where probationer already incarcerated at the time of the proceeding on the alleged violation).

The issue of whether a probationer should be held in custody pending the conduct of a probation violation hearing can arise when a defendant is before the court on a separate matter (e.g., on arrest for a new criminal charge) or having been arrested with or without a warrant for a violation of probation. G.L. c. 279, s. 3 .

The probationer is entitled to a preliminary hearing "at the time of his arrest and detention..." Commonwealth v. Odoardi, 397 Mass. 28 , 33, 489 N.E.2d 647, 677 (1986). That arrest can take place while the probationer is at liberty or when a probation officer takes custody of a probationer who is before the court on another matter, such as the charge of a new crime. Written notice must be given to the probationer at that time and the probationer and counsel must be given time to prepare for this hearing. If a continuance is requested and allowed, the custody resulting from the arrest will continue until the preliminary hearing (or a final hearing if the preliminary hearing is waived) is conducted.

The rule does not provide for notice of a preliminary probation violation hearing to be served on a probationer who is at liberty. If it is believed that a probationer who is at liberty has violated probation and should be in custody pending a hearing on that violation, custody should be effected by an arrest with or without a warrant, under G.L. c. 279, s. 3 . If it is believed that a probationer who is at liberty has violated probation, but there is no need to hold him or her in custody pending a final hearing, there is no need to serve a notice of a preliminary hearing. Rather, a notice of a final hearing should be served.

At the preliminary probation violation hearing, the question of revocation or other disposition is not at issue, only the question of probable cause for the alleged violation. Of course, the preliminary hearing can be transformed into a "final" hearing if the defendant waives the minimum seven-day notice period and both the probationer and the Probation Department are willing to proceed immediately with either an admission or a hearing. Only in such instances will the issue of revocation or other disposition be appropriately addressed.

The rule provides no qualifications on the evidence that may be admitted at preliminary hearings, other than to state that the court may hear such evidence as it deems appropriate. The rules of evidence do not apply. There appears to be no law categorically disqualifying a judge who has conducted a preliminary hearing from conducting the subsequent final hearing. When no judge is available, a magistrate may conduct the preliminary hearing. See G.L. c. 221, ss. 62Band 62C(g) , and Uniform Magistrate Rule 6.

Section (c) of the rule also provides that upon a finding of probable cause, the court may order the probationer to be held in custody pending the final hearing. A finding of probable cause does not require a custody order. The rule lists six factors that the court must consider when deciding whether to release the probationer notwithstanding the finding of probable cause on the alleged violation. The list is not exclusive and the rule does not attempt to assign relative weight to the factors.

Section (d) makes clear that bail and other terms of pretrial release have no application regarding a probationer's custody pending the conduct and completion of a final probation violation hearing. Bail and other conditions of pretrial release, including pretrial detention based on "dangerousness," under G.L. c. 276, ss. 58 and 58A , have no legal or conceptual relevance to custody on an alleged probation violation. They relate solely to a newly alleged crime. If the court finds probable cause for a probation violation, it may order the defendant into custody pending the final hearing on the violation. If the court does not find probable cause, the probationer cannot be held in custody on the alleged violation. Even if the probationer is held on the probation allegation, if he or she is also before the court on a new criminal charge, the court must address the terms of pretrial release. This issue is unrelated to custody on the probation charge. The prosecutor may want to be heard on the issue of bail or dangerousness because if the probation matter is promptly resolved, the defendant may be released from custody on the probation matter well before the criminal case is concluded.

Conversely, the issue of probation custody should be addressed regardless of whether or not the prosecutor plans to ask for high bail or pretrial detention based on dangerousness.

There appears to be no basis in statutory or case law for Superior Court review of a District Court probable cause decision resulting in custody pending a final probation violation hearing.

Rule 6: Conduct of Violation Hearings

The new rules have been reordered. For the new rule on Hearsay Evidence, see Rule 7.

(a) In General. Probation violation hearings shall be conducted by a judge, in open court, on the record. All testimony, including that of a probation officer, shall be taken under oath. The presentation of the case against the probationer shall be the responsibility of the probation officer assigned by the Chief Probation Officer of the court. The probationer shall be entitled to the assistance of counsel, including the appointment of counsel for probationers determined by the court to be indigent. A waiver by the probationer of the right to counsel shall be accepted by the court only if the court determines that such waiver is being made knowingly and voluntarily.

(b) Requirement of Two-Step Procedure. Probation violation hearings shall proceed in two distinct steps: the first to adjudicate the factual issue of whether the alleged violation or violations occurred, the second to determine the disposition of the matter if a violation of probation is found to have occurred.

(c) Adjudication of Alleged Violation. Probation violation hearings shall commence with a statement by the probation officer describing the violation or violations alleged in the notice of violation, and shall proceed with a presentation of the evidence supporting the allegations. The probationer shall be permitted to present evidence relevant to the issue of the alleged violation. Each party shall be permitted to cross-examine witnesses produced by the opposing party. Hearsay evidence shall be admitted by the court, in accordance with Rule 7, provided that the court shall enforce any statutory privileges and disqualifications. The probation officer shall have the burden of proving the alleged violations with or without the participation of the District Attorney as provided below. The standard of proof at such hearings shall be the preponderance of the evidence. After the presentation of evidence, both parties or their counsel shall be permitted to make a closing statement.

(d) Dispositional Decision. If the court finds that the probationer has violated one or more conditions of probation as alleged, the probation officer shall recommend to the court a disposition consistent with the dispositional options set forth in Rules 8(d) and 9(b) and may present argument and evidence in support of that recommendation: The probationer shall be permitted to present argument and evidence relevant to disposition and to propose a disposition.

(e) Continuances; "Tracking" Prohibited. Probation violation hearings shall be continued only by a judge and only for good cause shown. The reason for any continuance shall be stated by the judge and set forth on the record. No continuance shall be ordered other than to a date certain and for a specific purpose, and as provided in Rule 8(a). When a criminal charge is the basis for an alleged violation of probation, no continuance of the violation hearing or disposition shall be allowed solely to "track" or await the disposition of the criminal charge.

(f) Participation of the District Attorney.

(i) In general. The District Attorney may participate in probation violation hearings as provided in G.L. c. 279, § 3 , and such participation shall be permitted in any such proceeding regardless of whether the criminal case in which the probation order was issued involved a felony charge.

(ii) Coordination with the Probation Department. If the District Attorney intends to appear at a probation violation hearing, he or she shall confer prior to the hearing with the probation officer responsible for presenting the matter to the court, for the purpose of coordinating the District Attorney's involvement in the hearing with the planned presentation of the probation officer.

(iii) Presentation. of Evidence. The District Attorney may present and examine witnesses at the hearing, may examine witnesses presented by the probation officer, and may cross-examine witnesses presented by the probationer. The probationer may cross-examine all witnesses, whether presented by the District Attorney or the probation officer. The District Attorney shall be responsible for the attendance of every witness he or she wishes to present, and for the summoning of such witnesses.

(iv) Finding and Disposition. After the presentation of evidence, the District Attorney may be heard on the strength of that evidence in supporting a finding of violation. If the court finds that the probationer has violated one or more of the conditions of probation as alleged in the notice of violation, the District Attorney may be heard regarding the court's disposition of the matter. The District Attorney may present a recommendation on disposition orally or in writing.

(g) Admission to Violation and Waiver of Right to Hearing. The court may accept an admission to an alleged probation violation and a waiver of the right. to a violation hearing only upon a determination that the admission and waiver have been made knowingly and voluntarily.

Such an admission and waiver shall not be accepted by the court subject to any condition regarding the disposition of such violation or the disposition of any other probation violation or any pending criminal charge. A probationer shall not be entitled to withdraw an admission as of right after it has been accepted by the court.

(h) Ensuring Probationer's Presence in Courtroom. For good cause, the court may order that the probationer be taken into custody pending the commencement and completion of the violation hearing.

Added December 2, 1999, effective January 3, 2000; amended February 25, 2015, effective September 8, 2015.

Commentary

(2015)

Section (a) differs from its antecedent, 2000 District Court Rule 5, in the deletion of the last portion of the first sentence. This provision referred to the permissible "flexibility and informality" of violation hearings. While accurate, this reference was deemed unnecessary and the possible source of inappropriate informality.

Section (a) also contains a requirement that a waiver by a probationer of the right to counsel at a probation violation hearing requires a judicial determination that such waiver is being made knowingly and voluntarily.

Section (e) contains a different last sentence than the 2000 District Court Rule. The new sentence is meant to clarify and emphasize the prohibition in the rule against "tracking," i.e., the delay of a probation violation proceeding in order to await the disposition of a criminal charge when the criminal behavior involved constitutes the alleged probation violation. The disposition of an underlying criminal case is irrelevant to the issue at the probation violation hearing, that is, whether a violation can be proved by a preponderance of the evidence. The rationale for this prohibition and the case law on which it is based are set forth in the original commentary to this rule. The rule also has been amended to expressly prohibit "tracking" as a means of delaying dispositions as well as hearings. See also Rule 8(d). The caption of section (e) also is different..

Section (f) is modified from the 2000 District Court Rule to clarify its meaning.

Section (g) is new. It addresses the procedure whereby a probationer offers to admit to an alleged violation. The rule refers to the two components of such an admission. First, the probationer must admit. to the commission of one or more of the violations charged in the notice of violation, and second, the probationer must waive the right to a violation hearing. See Commonwealth v. Sayyid, 86 Mass. App. Ct. 479 , 489, rev. denied, 470 Mass. 1103 (2014). Although the term "stipulation" is commonly used, the rule uses the term "admission" because it more accurately and appropriately describes this legal event.

Section (g) also provides that, unlike a guilty plea or admission to sufficient facts to a criminal charge, an admission to a probation violation may not be accompanied by conditions which, if not accepted by the court, would allow the probationer to withdraw the admission. In other words, there is no equivalency to the "defendant-capped plea" which can be tendered in the context of a criminal proceeding. The court may allow a probationer to withdraw a probation violation admission based on the court's intended disposition as a matter of its discretion. The probationer may not withdraw an admission as a matter of right once an admission is submitted and accepted by the court. A defendant would be entitled to withdraw an admission that was not made knowing and voluntarily. Sayyid, 86 Mass. App. Ct. at 490-92.

The prohibition in section (g) against "conditioned" probation violation admissions also precludes admissions conditioned by proposed dispositions "agreed to" by the probation department or by a prosecutor. Such an agreement does not bind the court or permit the withdrawal of the admission if the court's disposition is other than that "agreed upon" by a probation officer or prosecutor. The court may consult with probation regarding the disposition after finding a probation violation. See Rule 8(d). But for probation violation admissions there is no equivalent to the tender of criminal guilty pleas which may include dispositional terms agreed to by the prosecution.

It should also be noted that section (g) does not require the conduct of a specific colloquy as the means by which the court is to determine that a probationer's admission to a violation is being made knowingly and voluntarily. The colloquy required for the acceptance of a guilty plea to a criminal charge is not required for the acceptance of a probation violation admission. See Sayyid, 86 Mass. App. Ct. at 488-89, 492-93. Rather, the court is left to conduct such questioning of the probationer and his or her counsel as it deems adequate for this determination. See Sayyid, 86 Mass. App. Ct. at 489, 492-93.

Section (g) does not require that a probationer's admission to a violation and waiver of the right to a hearing be set forth on a particular form. However, an approved form is available for this purpose on the internet at www.mass.gov/courts/courtsandjudges/courts/districtcourt/forms.html. At a minimum, the court's questioning of a probationer on this issue and the probationer's responses should be memorialized on the audio recording of the proceedings, and the facts that the questioning occurred and that the court accepted the admission and waiver should be entered on the court's written record.

Section (h) is new. It refers to the court's authority to secure the presence of a probationer pending the commencement and completion of a probation violation hearing. This rule addresses the problem of a probationer who, having arrived in court for a violation hearing while not in custody (in response to a notice of violation or otherwise), simply decides to exit the courtroom and the court house. This can occur if a probationer, while awaiting his or her hearing, observes a hearing that results in a finding of violation, revocation, and immediate execution of sentence.

The basis of the court's authority to secure the presence of a probationer, which includes custody, if necessary, pending the conduct of his or her hearing is threefold:

1. First, as a matter of constitutional law, a person on probation has a conditional liberty interest. The restricted scope of this liberty interest is perhaps best illustrated by the statutory authority of a probation officer *to issue an arrest warrant or to arrest a probationer without a warrant* to bring him or her before the court to answer to a possible probation violation. G.L. c. 279, § 3 . If a probationer maybe arrested by a probation officer without a warrant to be brought to court on an alleged violation, then it would appear to follow that a probationer charged with a violation may be held by the court for good cause upon his or her non-custodial arrival in court for a hearing on that alleged violation.

2. Such a custody order merely enforces the existing order requiring the probationer's presence at the court. A probationer who has arrived in court in response to a notice of violation has been formally accused in that notice of one or more specific probation violations and ordered to appear in court. The notice informs the probationer that he or she is "HEREBY ORDERED AS FOLLOWS: YOU MUST APPEAR IN THIS COURT" on a specific date at a specific time. Thus, the probationer is under court order to be in court for the conduct of the violation hearing. He or she is not free to leave. Custody of the probationer pending the conduct and completion of the hearing ensures compliance with that court order.

3. The authority of the court to secure the presence of a probationer for the conduct of a scheduled hearing also has a constitutional bias in the court's inherent power. "Of necessity, a judge's inherent power must

encompass the authority to exercise 'physical control over his courtroom.' " Commonwealth v. O'Neil, 418 Mass. 760 , 764 (1994) (quoting Chief Admin. Justice of the Trial Ct. v. Labor Relations Commission, 404 Mass. 53 , 57 (1989)); see id. (" '[t]he power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice' ") (quoting Chief Admin. Justice of the Trial Ct., 404 Mass. at 57). Perhaps nothing could be viewed as more fundamental or essential to the court's ability to function than the power to prevent a probationer who has been ordered to appear for a hearing on an alleged violation from simply leaving the court prior to the conduct of that hearing.

In order to secure the presence of the probationer, the rule requires that the court have "good cause," that is, some reason to believe that the probationer may attempt to leave the courtroom to avoid the proceeding (e.g., the probationer's in-court behavior, history of defaults, and history of previous probation violations; the seriousness of the underlying crime; the potential sentence if revocation is ordered; etc.).

The custody provision in this rule is relevant only when the violation hearing will proceed that same day. If a probationer arrives at court and is seen as a flight risk, but the actual hearing will be scheduled for a later date, the probation department may immediately request a detention hearing under Rule 5 (formerly Rule 8). That rule also provides for custody of a probationer prior to the conduct of such a hearing. If detention is ordered, it will result in the probationer's continued custody until the conduct and completion of the violation hearing.

(2000 Commentary to Rule 6)

Probation violation hearings often involve evidence in the form of records, documents and statements that constitute hearsay, that is, "an extrajudicial statement offered to prove the truth of the matter asserted." Commonwealth v. Keizer,377 Mass 264 , 269 n.4, 385 N.E.2d 1001, 1004 (1979). Common examples of hearsay evidence used at these hearings are police reports used as evidence of the probationer's criminal behavior, and correspondence from programs such as batterers' treatment programs used as evidence of the probationer's failure to complete the program in compliance with the probation order.

This rule is based almost exclusively on the opinion in Commonwealth v. Durling, 407 Mass. 108 , 551 N.E.2d 1193 (1990), the leading case on the use of hearsay evidence at probation violation hearings. It is divided into separate sections, one on the admissibility of hearsay, the other on the sufficiency of hearsay as a matter of law when it is the only evidence presented against the probationer.

Admissibility

Section (a) states simply that hearsay is admissible at probation violation hearings. The Supreme Judicial Court "has always allowed the use of hearsay at probation revocation hearings." Commonwealth v. Durling, supra, at 114 , 551 N.E.2d at 1197. The admissibility of hearsay is based on the principles set forth in Morrissey and Gagnon. The revocation process "should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." Morrissey v. Brewer, 408 U.S. 471 , 489, 92 S. Ct. 2593, 2604 (1972). Similarly, the Supreme Court has sanctioned the "use where appropriate of the conventional substitutes for live testimony including affidavits, depositions and documentary evidence." Gagnon v. Scarpelli, 411 U.S. 778 , 782 n.5, 93 S. Ct. 1756, 1760 n.5 (1973).

It has been held that if hearsay evidence qualifies under any of the legal exceptions to the hearsay rule (e.g., business record, excited utterance, dying declaration) it is presumptively reliable. Durling, supra, at 118 , 551 N.E.2d at 1198. However, in keeping with the informal nature of these hearings and the fact that the case against the probationer is the responsibility of a probation officer rather than a trained criminal prosecutor, it would appear that the court should make a determination of the reliability of any hearsay, rather than engage

in an argument on whether the hearsay qualifies as an exception to the hearsay rule so as to merit presumptively reliable status. In other words, if the court determines that a record of a drug treatment center is reliable, it is irrelevant as to whether it qualifies as a "business record." An example of hearsay that might be found unreliable, and thus not worthy of the court's consideration, would be a second- or third-hand out-of-court statement, or a statement that is vague or internally contradictory or inconsistent.

Sufficiency

Section (b) of the rule addresses an issue quite different from admissibility, namely, the legal sufficiency of hearsay evidence where hearsay is the only evidence of the probationer's alleged violation. In such cases, the probationer has no opportunity to confront a witness with personal knowledge and test the reliability of that evidence by cross-examination. This deprivation of the right to confrontation of witnesses implicates due process considerations. However, the Supreme Court in Durling made clear that since a probationer's liberty interest is conditional, so too is the probationer's right to confront witnesses, and that right can be denied for "good cause."

The court's description of "good cause," in Durling is somewhat unclear. On the one hand, the court indicates that "good cause" for denying the probationer the right to confront witnesses "has thus far been defined in terms of difficulty and expense of procuring witnesses in combination with 'demonstrably reliable' or 'clearly reliable' evidence." Durling, supra, at 120 , 551 N.E.2d at 1200 (emphasis added).

In fact, the court defines the question in Durling in terms of this two-pronged issue:

> "The judge in this case relied solely on hearsay in revoking the defendant's probation. The judge did not make any express determination that there was good cause for denying the defendant the right to confront a witness with personal knowledge. Nor did the judge make any determination whether the proffered hearsay was reliable."
> Durling, supra, at 115 , 551 N.E.2d at 1197.

However, in contrast to this two-pronged definition, the Durling court also defines "good cause" solely in terms of the reliability of the hearsay evidence:

> "In our view, a showing that the proffered evidence bears substantial indicia of reliability and is substantially trustworthy is a showing of good cause obviating the need for confrontation."
> Durling, supra, at 118 , 551 N.E.2d at 1199.

Despite this apparent conflict, the opinion appears to settle on the two-pronged definition of good cause:

> "On the whole, the resolution of the confrontation issue depends on the totality of the circumstances in each case... If the Commonwealth has "good cause" for not using a witness with personal knowledge, and instead offers reliable hearsay or other evidence, then the requirements of due process are satisfied.".
> Durling, supra, at 118-119 , 551 N.E.2d at 1199 (emphasis added).

> Also, "The substantial reliability of the police reports in this case, coupled with the practical difficulty of presenting live testimony, discussed earlier, convinces us that the District Court judge could properly base his order of revocation on the evidence presented."
> Durling, supra, at 122 , 551 N.E.2d at 1201 (emphasis added).

In Commonwealth v. Calvo, 41 Mass. App. Ct. 903 , 668 N.E.2d 846 (1996) (rescript), the Appeals Court interpreted Durling to require only a showing that hearsay evidence bears substantial indicia of reliability and is

substantially trustworthy in order to meet the "good cause" test, obviating the right to confrontation. In Calvo, "good cause" was held not to require any showing that a live witness was unavailable.

This rule takes a middle ground, requiring that in all cases where the only evidence of an alleged probation violation is hearsay there must be a finding that the hearsay is substantially trustworthy and demonstrably reliable, and requiring a showing of why a live witness is unavailable when the alleged probation violation is based on charged or uncharged criminal behavior.

Trustworthiness and Reliability of Hearsay

There are at least five criteria for the court's determination of whether a given piece of hearsay evidence is "substantially trustworthy" and "demonstrably reliable," namely, whether the out-of-court statement:

(1) is factually detailed, rather than generalized and conclusory;

(2) is based on personal knowledge and direct observation by the source;

(3) is corroborated by evidence submitted by the probationer;

(4) was provided under circumstances that support the veracity of the source (e.g., was provided under the pains and penalties of perjury or subject to criminal penalties for providing false information);

(5) was provided by a disinterested witness.

This list of factors for determining reliability is taken directly from Durling, except item (5), which is taken from Commonwealth v. Delaney, 36 Mass. App. Ct. 930 , 932 n.4, 629 N.E.2d 1007, 1009 n.4 (1994) (rescript), a case applying the Durling test.

Good Cause for Absence of Witness

There are three factors mentioned in Durling for determining good cause for the absence of a live witness, namely,

(1) the distance a witness would have to travel to get to court,

(2) the costs the witness (or his or her public or private employer) would have to incur if the witness were compelled to appear, and.

(3) the difficulty in scheduling the probation violation hearing at a time convenient to the witness and all other participants.

Hearsay Test Where the Alleged Violation Is Criminal Conduct

One of the most common alleged violations of probation is alleged criminal conduct. In many of these cases, evidence of the alleged violation will be a police report. Under the rule, there are two issues if the police report is the only evidence presented: reliability of the report and the reason for the absence of a live witness.

In establishing the requisite reliability of the police reports in Durling, the Court stressed that the two police reports related facts observed by the officers personally, and were factually detailed rather than general statements or conclusions. "We think the factual detail is indicative of reliability." Durling, supra, at 121 , 551

N.E.2d at 1200 (citation omitted). The Court also mentioned the similarity of the two reports and the fact that the two officers were from different departments. Thus, in Durling, the police reports corroborated each other.

The Durling Court also stressed that in determining "good cause" to justify a finding of violation solely on hearsay, the court had to balance the interests of the probationer and those of the Commonwealth and look to the "totality of the circumstances." It would appear that such balancing includes the concept that the more reliable the hearsay evidence, the less stringent the test regarding the practical reasons for absence of a live witness. Conversely, where the reliability of the hearsay is not as high as it was in Durling, (which involved the unusual circumstance of two separate police reports) it would appear that the justification for the absence of a witness would have to be that much stronger.

Hearsay Test Where the Alleged Violation Is Something Other Than Criminal Conduct

The rule does not require a showing of why the live witness is unavailable where the alleged violation is something other than criminal conduct. Thus, for example, if the alleged violation were failure to attend a rehabilitation program, a report from the program, though hearsay, would be sufficient evidence if it met the reliability test of Durling, without regard to why the live witness were not present.

For cases applying the Durling test, see Commonwealth v. Delaney, 36 Mass. App. Ct. 930 , 629 N.E.2d 1007 (1994) (finding of violation based on hearsay statement reversed; statement did not meet reliability standard comparable to police reports in Durling and witness was available to testify); and Commonwealth v. Joubert, 38 Mass. App. Ct. 943 , 647 N.E.2d 1238 (1995) (revocation order reversed because hearsay statements of a child were not sufficiently reliable and findings indicate judge may have relied on them as the basis of decision).

(2000 Commentary to Former Rule 5)

Probation revocation hearings are not part of a criminal prosecution, and for this reason a probationer need not be provided with the full panoply of constitutional protections applicable at a criminal trial. Gagnon v. Scarpelli, 411 U.S. 778 , 782, 93 S. Ct. 1756, 1759 (1973). Indeed, case law has sought to preserve the flexible, informal nature of probation revocation hearings. See Black v. Romano, 471 U.S. 606 , 105 S. Ct. 2254 (1985).

On the other hand, the probationer's liberty is potentially at stake in violation proceedings, and therefore certain due process protections are required. As set forth for parole revocation in Morrissey v. Brewer, 408 U.S. 471 , 92 S. Ct. 2593 (1972) and made applicable to probation revocation by Gagnon v. Scarpelli, 411 U.S. 778 , 93 S. Ct. 1756 (1973), there are six such fundamental due process requirements: (1) written notice of the claimed violations of probation, (2) disclosure to the probationer of the evidence against him, (3) opportunity to be heard in person and to present witnesses and documentary evidence, (4) the right to confront and cross-examine adverse witnesses (unless a hearing officer specifically finds good cause for not allowing confrontation), (5) a neutral and detached hearing body, members of which need not be judicial officers or lawyers, and (6) a written statement by the fact finder as to the evidence relied on and reasons for revoking probation.

This rule is intended to provide an orderly, relatively informal and flexible procedure for probation violation hearings, but one in which all required and appropriate due process safeguards are ensured.

General Requirements

Section (a) requires several fundamental procedural elements: a judicial procedure in open court, testimony under oath and the creation of a record. With regard to the record, Rule 211 of the Special Rules of the District Courts of Massachusetts, "Recording of Court Proceedings," requires that such proceedings be electronically recorded. Any District Court judge may conduct the hearing; the original sentencing judge is not required.

One of the six fundamental due process requirements for probation violation hearings, as provided in Gagnon v. Scarpelli, 411 U.S. 778 , 93 S.Ct. 1756 (1973), is "a neutral and detached hearing body." This requirement would appear to preclude the model by which a judge would take the initiative in the proceeding, as in an inquest, and the probation officer remain essentially passive in the role of a witness. Accordingly, the rule requires the probation officer, who is the "accuser," to present the case, with the judge remaining in the traditional neutral role. This does not prevent the judge from asking appropriate questions, nor is it inconsistent with the role of the probation officer as witness. The probation officer must provide evidence under oath and is subject to cross-examination.

It should be noted that in probation violation hearings the exclusionary rule does not apply if the police were unaware that the defendant was a probationer. Commonwealth v. Olsen, 405 Mass. 491 , 541 N.E.2d 1003 (1989) (evidence seized in violation of Fourth Amendment was admissible in probation violation proceeding, where police who seized evidence neither knew nor had reason to know of probationary status of person whose property was seized). There is no Massachusetts decision on whether the exclusionary rule applies in these proceedings where police are aware that the person is on probation.

Regarding the right to counsel, the rule goes beyond current law by providing the right to counsel regardless of whether the probationer faces the possibility of imprisonment if probation is revoked. See Commonwealth v. Faulkner, 418 Mass. 352 , 638 N.E.2d 1 (1994) (probationer at probation violation hearing has right to counsel if revocation might result in imprisonment).

Two-step Proceeding

Section (b) imposes the critical requirement of a two-stage proceeding. As observed by the Supreme Court of the United States,

"the decision to revoke probation typically involves two distinct components: (1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination by the sentencing authority whether violation of a condition warrants revocation of probation".

Black v. Romano, 471 U.S. 606 , 611, 105 S.Ct. 2254, 2257 (1985), as quoted in Commonwealth v. Marvin, 417 Mass. 291 , 295, 629 N.E.2d 1317, 1320 (1994) (Liacos, C.J., dissenting).

This dichotomy is further reflected in Massachusetts law:

> "At the revocation hearing, the judge must determine, as a factual matter, whether the defendant has violated the conditions of his probation. If the judge determines that the defendant is in violation, he can either revoke the probation and sentence the defendant or, if appropriate, modify the terms of his probation".

Commonwealth v. Durling, 407 Mass. 108 , 111, 551 N.E.2d 1193, 1195 (1990).

This distinction is an important one. The factual decision that a probation violation has occurred in no way compels an order of revocation. The court has wide dispositional latitude if a violation is found. See Rule 7(d) . However, even if an alleged violation is relatively minor and, in all likelihood will not warrant revocation, it is

important that it be adjudicated. It is essential for effective probation that a record of compliance and noncompliance with probation orders be maintained.

In addition, the distinction between the factual determination and the disposition must be maintained because different legal requirements are invoked. For example, the factual issue of whether an alleged violation has occurred must be decided based on a preponderance of the evidence, Commonwealth v. Holmgren, 421 Mass. 224 , 656 N.E.2d 577 (1995), while the dispositional decision is a matter of judicial discretion. McHoul v. Commonwealth, 365 Mass. 465 , 469-470, 312 N.E.2d 539, 543 (1974). Similarly, the "seriousness" of the alleged violation is irrelevant to whether it occurred, while it is relevant to the question of appropriate disposition.

Adjudication of Violation

Section (c) sets out the basic requirements for how the first step of the hearing, adjudication of the alleged violation, should proceed. It ensures both parties the right to present evidence and cross-examine adverse witnesses. The court has some discretion in limiting cross-examination involving irrelevant or redundant questioning. See Commonwealth v. Odoardi, 397 Mass. 28 , 34, 489 N.E.2d 674, 678 (1986). Section (c) also entitles both parties to make a closing statement. In Commonwealth v. Marvin, 417 Mass. 291 , 295, 629 N.E.2d 1317, 1320 (1994), the court declined "to impose a universal due process requirement that a defendant in a probation revocation hearing has an absolute right to make a closing argument." However, that case goes on to state that it would be a "better practice" to permit a probationer to present at least a brief closing argument. The provision in this rule is intended to ensure that this better practice is provided for both parties.

Disposition

Section (d) provides that both parties may be heard regarding disposition, assuming the court finds that one or more alleged violations was committed. The court's dispositional options are provided in Rule 7. The probationer's right to be heard and present evidence regarding disposition implicate due process considerations. See Commonwealth v. Odoardi, 397 Mass. 28 , 489 N.E.2d 674 (1986).

Continuances

Section (e) sets out certain requirements for continuances. It expressly eliminates "tracking," i.e., continuing a probation violation hearing to await disposition of the criminal case involving the charge that is also the alleged probation violation. The reason for this rule is that, on the one hand, there is no basis in law or in terms of fairness to the probationer for such a continuance, and, on the other hand, proceeding without delay on the alleged violation is of great importance in terms of the primary goals of probation, which are rehabilitation of the probationer and protection of the public. Commonwealth v. LaFrance, 402 Mass. 789 , 795, 525 N.E.2d 379, 383 (1988) (citations omitted). The rule does provide for continuances where good cause is shown and the reason for the continuance is stated by the judge and set forth on the record.

The Supreme Judicial Court has long made clear that there is no prerequisite that the probationer be convicted of a criminal charge to permit that criminal conduct to be used as the basis of a probation revocation.

"If the act alleged to be a violation of probation is made the subject of a criminal complaint, the commencement of the criminal prosecution does not preclude the revocation of the earlier probation nor does it require that the revocation proceedings be deferred until the completion of the new criminal proceeding.". Rubera v. Commonwealth, 371 Mass. 177 , 181, 355 N.E.2d 800, 803 (1976) and cases cited.

After analyzing the federal constitutional law relevant to the point and the precedents from other states, the court in Rubera went on to explain the policy reasons that favor proceeding with revocation proceedings and not awaiting the outcome of the criminal case:

"We are aware that the practice which was followed in revoking the petitioner's probation in this case was not in accord with the procedure suggested by the ABA Project on Standards for Criminal Justice, Standards Relating to Probation § 5.3, at 62-63 (Approved Draft 1970), that "[a] revocation proceeding based solely upon commission of another crime ordinarily should not be initiated prior to the disposition of that charge." [citation omitted] That standard seems to impose an unreasonable and unfair burden on law enforcement authorities by placing them in the dilemma of having to decide between (a) having to forgo criminal prosecution of a person who is on probation and who appears to have committed another offense until they have first pursued steps to revoke his probation on the basis of his conduct in ordinary proceedings without reliance on any subsequent criminal conviction, or (b) having to start criminal prosecution promptly on the later offense and then being prevented from trying to revoke his earlier probation until after the later prosecution has run its full course which, in the present state of our criminal dockets, would amount to arming the defendant with the weapon of potential delay with which he could forestall termination of the proceeding by endless appeals. We decline to impose the burden of such a choice on either probation officers or prosecutors.".
Rubera v. Commonwealth, supra, at 184-185 , 355 N.E.2d 800, 805 (1976).

See also, Commonwealth v. Holmgren, 421 Mass. 224 , 656 N.E.2d 577 (1995), which held that a probation violation hearing may proceed on a charge of a new crime, even if the defendant has been acquitted of that crime, because the standard of proof at a probation hearing is lower than the standard at a criminal trial. In other words, an acquittal, or the possibility of an acquittal, is irrelevant to a probation violation proceeding because failure to convict under the "reasonable doubt" standard neither precludes nor is inconsistent with a finding of a probation violation under the "preponderance of the evidence" standard.

The only legal relationship between a probation violation hearing and a criminal prosecution for the same alleged criminal conduct is that, if the criminal case does go forward before the probation hearing and results in a conviction, that conviction will be evidence of a probation violation and no independent finding of the underlying facts is required of the judge. Commonwealth v. Maggio, 414 Mass. 193 , 605 N.E.2d 1247 (1993).

District Attorney Participation

Section (f) addresses the subject of participation by the District Attorney. Rules 3 and 4 require the court to provide a copy of every Notice of Probation Violation and Hearing to the District Attorney. Section (t) of this rule is intended to clarify the involvement of the District Attorney in those cases where he or she decides to participate, consistent with the statutory provisions of G.L. c. 279, s. 3 .

It should be noted that as a constitutional matter, probation functions are within the judicial branch, and the office of the District Attorney is considered within the executive branch. Commonwealth v. Tate, 34 Mass. App. Ct. 446 , 447-448, 612 N.E.2d 686, 688 (1993) and cases cited. Under the Massachusetts Constitution, Pt. 1 Art. 30 , the branches must maintain a separation of governmental powers.

> "That separateness does not, however, lead to the conclusion that a district attorney's office may not assist the probation service in presenting evidence in support of a position that the probation service had decided upon.".
>
> * * *

"[P]robation officers are only aided, not interfered with, when district attorneys, upon invitation, conduct examination of witnesses and present evidence.".

Id. at 448, 612 N.E.2d at 688, and cases cited.

Thus the right of District Attorneys to present evidence and witnesses, and to examine and cross-examine witnesses at these proceedings would appear to be constitutionally acceptable as long as it does not fundamentally interfere with probation.

Rule 7: Hearsay Evidence

The new rules have been reordered. For the new rule on Finding and Disposition, see Rule 8.

(a) Admissibility of Hearsay Evidence. Hearsay evidence shall be admissible at probation violation hearings.

(b) Legal Sufficiency of Hearsay Evidence. The court may rely on hearsay as evidence of a probation violation only if the court finds in writing that the hearsay is substantially reliable. In determining if hearsay evidence is substantially reliable, the court may consider, among any other relevant factors, whether that evidence

(1) is based on personal knowledge and/or direct observation, rather than on other hearsay;

(2) involves observations recorded close in time to the events in question;

(3) is factually detailed, rather than generalized and conclusory;

(4) is internally consistent;

(5) is corroborated by any evidence provided by the probationer;

(6) was provided by a disinterested witness; or

(7) was provided under circumstances that support the veracity of the source (e.g., was provided under the pains and penalties of perjury or subject to criminal penalties for providing false information).

Added December 2, 1999, effective January 3, 2000; amended February 25, 2015, effective September 8, 2015.

Commentary

(2015)

Section (a) is the same as the 2000 District Court Rule 6(a). It provides that hearsay evidence "shall be admissible" in Boston Municipal Court and District Court probation violation hearings. In Commonwealth v. Durling, 407 Mass. 108 , 114 (1990), the Supreme Judicial Court stated that only "reliable" hearsay is admissible in these proceedings. The rule does not impose reliability as a formal precondition to admission, but rather requires that, in effect, hearsay evidence be admitted *de bene*. This avoids the potential bifurcation of each proceeding into a preliminary "suppression" hearing followed, if necessary, by a separate hearing on the factual issue of the alleged violation. Instead, the court commences the violation hearing and receives all proffered evidence, including hearsay. As set forth in section (b), any hearsay challenged as, and found by the court to be, unreliable may not be used as evidence of a violation. Moreover, if the court finds hearsay to be reliable it must provide written reasons. After resolving any issue of hearsay reliability, the court then rules on

the alleged violation based on any competent evidence. Thus, the rule provides appropriate procedural clarity and simplicity while ensuring compliance with the constitutionally-based limitation on the use of hearsay in these proceedings, as set forth in Durling.

Nothing in these Rules precludes the judge from allowing a continuance to give either party an opportunity to summons witnesses if the judge deems it necessary to resolve facts in dispute.

Section (b) has been amended to conform to case law decided after the rule was initially promulgated. That case law has made it clear that there is a "one-pronged" test for determining whether hearsay evidence is legally sufficient as proof of a violation. Specifically, such evidence must be found by the court, in writing, to be "substantially reliable."Commonwealth v. Maggio, 414 Mass. 193 (1993); see also Commonwealth v. Negron, 441 Mass. 685 (2004).

The previous version of this rule imposed a two-pronged test, namely, for evidence to be legally adequate as a basis for finding a probation violation the rule required that it be both "substantially reliable," and, when the alleged violation was new criminal behavior, there had to be "good cause" for the absence of the percipient witness, i.e., the source of the hearsay. Current case law holds that where the hearsay is substantially reliable, this satisfies the good cause requirement. This paragraph and the previous paragraph of this Commentary were cited with approval by the Supreme Judicial Court. in Commonwealth v. Bukin, 467 Mass. 516 , 522 n.10 (2014).

The new rule also makes it clear that the single "substantial reliability" test applies regardless of whether the alleged violation consists of a new criminal charge.

Section (b) and its caption require that hearsay be found by the court to be "substantially reliable" before it can serve as evidence of a violation, *even when the court also has relied on non-hearsay evidence*. The previous rule imposed the substantial reliability test only when hearsay was the only evidence relied upon by the court. In doing so it followed case law, Commonwealth v. Durling, 407 Mass. 108 (1990). Under the rule as amended, the court need not attempt to distinguish between hearsay that is "reliable" (and thus may be used if other, non-hearsay evidence is also relied upon by the court), and hearsay that is "substantially reliable" (and thus may be used when it is the only evidence of a violation). See Commonwealth v. Durling, 407 Mass. 108 , 117-19 (1990).

Finally, section (b) lists the seven indicia set forth in case law that the court may consider in determining whether the "substantial reliability" test has been met.

It should be noted that, even if the court finds that hearsay is "substantially reliable" and thus may be used as evidence of an alleged violation, this is not conclusive on the issue whether a violation has occurred. The court's finding on an alleged violation must be based on whether, based on all the competent evidence submitted by both parties, the violation has been proved by a preponderance of that evidence.

(2000 Commentary to Rule 7)

Requirement of a Finding

This rule addresses the court's two separate tasks upon completion of the violation hearing. Section (a) requires the court to adjudicate the factual issue of whether a violation has occurred. It expressly eliminates as an option a "general continuance."

The requirement that a finding be made on the issue of violation is based on several considerations. First, and most important, it is essential for the credibility of the probation order that the issue raised by the alleged violation be resolved. Even if the alleged violation involves a relatively minor matter, the likelihood of successful change in the probationer's behavior is diminished if the court temporizes in its role as finder of fact. If a violation has occurred, the probationer should be confronted with that fact. If no violation is found, the probationer is entitled to that finding on the record. No useful judicial or probation purpose is served by failure to adjudicate after the evidence has been presented. A failure by the court to decide the issue can foster the perception on the part of the probationer that if the court does not take the matter seriously, neither should he or she.

Second, adjudication of the violation charge does not limit the court's wide discretion regarding disposition. As addressed further in the rule, if a violation is found, the court's options range from a simple warning with the current terms of probation continued, to a revocation of probation, which in many instances will result in incarceration.

Third, the adjudication of a violation will establish an appropriate record of the probationer's non-compliance, which can be essential to an appropriate disposition if a subsequent violation occurs. Minor violations, even if they do not warrant significant sanctions in themselves, may provide important information in any subsequent proceedings.

It should be noted that the "seriousness" of the violation, its impact or lack of impact on any victim and the nature of the underlying crime are irrelevant to whether the alleged violation occurred. Those matters relate solely to the court's disposition if a violation is found.

In referring to the situation where the court finds no violation, section (b) of the rule reiterates three important points: the probation officer bears the burden of proof, the standard of proof is a preponderance of the evidence, and only a violation that has been formally alleged in the Notice of Probation Violation and Hearing may be found.

Section (c) of the rule repeats these three points regarding the finding of a violation and adds that a violation may be found based on the probationer's admission. It also adds the requirements of findings of fact and a statement of the evidence relied on, which are due process requirements. Morrissey v. Brewer, 408 U.S. 471 , 489, 92 S.Ct. 2593, 2604 (1972). Failure to make findings and a statement of the evidence relied on appears to be reversible error. See Fay v. Commonwealth, 379 Mass. 498 , 504-505, 399 N.E.2d 11, 15-16 (1980). The Court in Fay also ruled that written findings were not required as a matter of due process, where such findings were announced orally on the record in the presence of the probationer and the probationer subsequently obtained a written copy in the form of a transcript. Fay v. Commonwealth, 379 Mass. at 504-505 , 399 N.E.2d 11, 15-16 (1980). The rule, however, requires that the findings and evidence relied on be stated in writing.

Disposition

Section (d) of the rule sets out four specific types of dispositions that are available to the court if a violation is found. These are expressly described as an exclusive list of the court's options, though they provide a comprehensive range of sanctions. The rule also provides factors that the court should consider on disposition, namely:

- the recommendation of the Probation Department.
- public safety.

- seriousness of the crime of which the probationer was found guilty.
- nature of the violation.
- record of any previous violation.
- impact on a victim of the underlying crime.

Counsel is free to argue, and the court is free to consider, any relevant mitigating factors.

Regarding the choice of disposition, two factors are essential: (1) disposition is a matter of the court's discretion. McHoul v. Commonwealth, 365 Mass. 465 , 469-470, 312 N.E.2d 539, 543 (1974); Commonwealth v. Durling, 407 Mass. 108 , 111, 551 N.E.2d 1193, 1195 (1990); and (2) disposition is not a punishment for the new crime, but rather relates to the underlying offense. Commonwealth v. Odoardi, 397 Mass. 28 , 30, 489 N.E.2d 674, 675 (1986).

Section (d)(i) provides for continuance of probation. This may be appropriate where the violation is minor and the probationer has no history of previous violations. It can be completely appropriate for a probation officer to commence and successfully prosecute a probation violation proceeding and then recommend that the current probation terms merely be continued. This may reflect the probation officer's judgment that, though minor, the offense should be adjudicated to impress upon the probationer the importance of compliance, that a warning from the court is necessary to prevent more serious violations and that the violation should be a matter of record. The continuance of current probation terms despite a finding of violation is sometimes referred to as "reprobating" the probationer.

Section (d)(ii), provides for termination of probation. This outcome can be appropriate where the offense is minor and the court determines that the purpose of probation has been accomplished. It can also be appropriate in conjunction with the disposition of a new offense, where the probationer is already serving a sentence, and where the probationer is on probation in another court.

Under section (d)(iii), the court has the dispositional option of modifying the probationary terms after a finding of violation. It has been held that it is "a matter of well-established common law, that courts do possess [the authority to modify probation conditions], and that conditions of probation may be amended to serve 'the ends of justice and the best interests of both the public and the defendant.' " Buckley v. Quincy Division of the District Court Dept., 395 Mass. 815 , 817, 482 N.E.2d 511, 512 (1985), citing Burns v. United States, 287 U.S. 216 , 221, 53 S. Ct. 154, 156 (1932).

The addition of reasonable conditions to an individual's probation does not constitute a revision or revocation of a sentence under Mass. R. Crim. P. 29. Buckley, supra, at 818-819 , 482 N.E.2d at 513. The Court did not "define that point at which the modification is so drastic that it becomes the revision of a sentence subject to the requirements of rule 29," noting that the modification in Buckley was a nonpunitive rehabilitative measure, designed to facilitate the successful reintegration of the plaintiff into the community. Buckley, supra, at 818-819 n.5, 482 N.E.2d at 513 n.5.

It should be noted that the Court in Buckley was addressing a situation where conditions were added to a probation order without any finding of a violation, but rather based on an assessment by a probation officer. The Court ruled that a supervising court (as distinguished from a sentencing court) may not modify the conditions of probation without a material change in circumstances such as a violation of probation. It also indicated that a violation of probation is a material change in circumstances:

"Our holding does not limit whatever authority is held by the supervisory court to modify conditions where there has been a material change in circumstances (such as a violation of a condition of probation). Nor need we outline those situations in which the sentencing court might modify the terms of probation.".

Buckley v. Quincy Div. of Dist. Court Dept., supra, at 820 , 482 N.E.2d at 514.

Section (d)(iii) addresses issues left unaddressed in Buckley by affirmatively authorizing the court conducting a probation violation hearing to modify the conditions of probation upon a finding of violation.

Revocation: Stay after Revocation

Section (d)(iv) provides for the most serious sanction upon a finding of probation violation, namely, revocation of probation. Under Commonwealth v. Holmgren, 421 Mass. 224 , 656 N.E.2d 577 (1995), any sentence that was imposed, but its execution suspended pending probation, must be ordered executed in its entirety upon revocation of probation. This ruling was based on an unambiguous statutory requirement in G.L. c. 279, s. 3 .

The requirement of executing a suspended sentence upon revocation of probation is reflected in section (e), which also provides two specific bases for a stay of execution. This provision precludes any stay other than for (1) appeal or (2) a brief time for a probationer to attend to personal matters. A stay simply to avoid the execution of sentence, with or without the addition of new terms, is not allowed under the rule. There are several reasons for this. First, there appears to be no established legal basis for such a stay. Second, such a stay is inconsistent with the plain language of Holmgren. Third, the terms of such a stay are unenforceable. Conditions on the person's behavior during the stay cannot be ordered as probation -- probation has been revoked. On the other hand, the court cannot condition the stay on unstated or vague conditions (e.g., "stay out of further trouble"), since a termination of the stay presumably requires incarceration, which, in turn, requires an opportunity for the person to be notified and heard regarding the factual issue of whether he or she violated the stay. One element of such a process would be specificity of the alleged violation. Even if conditions on such a stay were expressly stated in writing, they could not be enforced without a due process procedure similar to the same probation revocation procedure that has just been concluded. Since the person would not be on probation, there would be no one with authority to "prosecute" the alleged violation of the stay conditions. Perhaps most important, such a stay is impermissible because it implies that if the person successfully completes the stay, on whatever terms are imposed, written or unwritten, the sentence that had to be ordered executed pursuant to Holmgren somehow disappears.

Section (d)(iv) requires that, if the court decides to revoke probation, it must provide the reasons for that decision. A statement of reasons for deciding to revoke probation is a requirement of due process. Gagnon v. Scarpelli, 411 U.S. 778 , 93 S. Ct. 1756 (1973). While the reasons need not be put in writing to ensure due process, Fay v. Commonwealth, 379 Mass. 498 , 399 N.E.2d 11(1980), the rule requires them in writing to ensure a clear and accessible record.

Disposition Where No Sentence Originally Imposed

Section (f) addresses the situation where the probationer was sentenced with "straight probation" on the underlying conviction. On the one hand, this means that upon a revocation of probation, there is no suspended sentence to be executed. On the other hand, the probationer is subject to any sentence for the underlying crime that is provided by law. Though it may appear illogical, this would appear to include a sentence involving probation, even though the triggering event for the imposition of such a sentence is a violation and revocation of the "straight" probation originally ordered. Presumably, if such post-revocation probation is imposed, the conditions and the consequences for any violation will take into account the fact that probation has already been violated.

(2000 Commentary to Former Rule 6)

Probation violation hearings often involve evidence in the form of records, documents and statements that constitute hearsay, that is, "an extrajudicial statement offered to prove the truth of the matter asserted." Commonwealth v. Keizer,377 Mass 264 , 269 n.4, 385 N.E.2d 1001, 1004 (1979). Common examples of hearsay evidence used at these hearings are police reports used as evidence of the probationer's criminal behavior, and correspondence from programs such as batterers' treatment programs used as evidence of the probationer's failure to complete the program in compliance with the probation order.

This rule is based almost exclusively on the opinion in Commonwealth v. Durling, 407 Mass. 108 , 551 N.E.2d 1193 (1990), the leading case on the use of hearsay evidence at probation violation hearings. It is divided into separate sections, one on the admissibility of hearsay, the other on the sufficiency of hearsay as a matter of law when it is the only evidence presented against the probationer.

Admissibility

Section (a) states simply that hearsay is admissible at probation violation hearings. The Supreme Judicial Court "has always allowed the use of hearsay at probation revocation hearings." Commonwealth v. Durling, supra, at 114 , 551 N.E.2d at 1197. The admissibility of hearsay is based on the principles set forth in Morrissey and Gagnon. The revocation process "should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." Morrissey v. Brewer, 408 U.S. 471 , 489, 92 S. Ct. 2593, 2604 (1972). Similarly, the Supreme Court has sanctioned the "use where appropriate of the conventional substitutes for live testimony including affidavits, depositions and documentary evidence." Gagnon v. Scarpelli, 411 U.S. 778 , 782 n.5, 93 S. Ct. 1756, 1760 n.5 (1973).

It has been held that if hearsay evidence qualifies under any of the legal exceptions to the hearsay rule (e.g., business record, excited utterance, dying declaration) it is presumptively reliable. Durling, supra, at 118 , 551 N.E.2d at 1198. However, in keeping with the informal nature of these hearings and the fact that the case against the probationer is the responsibility of a probation officer rather than a trained criminal prosecutor, it would appear that the court should make a determination of the reliability of any hearsay, rather than engage in an argument on whether the hearsay qualifies as an exception to the hearsay rule so as to merit presumptively reliable status. In other words, if the court determines that a record of a drug treatment center is reliable, it is irrelevant as to whether it qualifies as a "business record." An example of hearsay that might be found unreliable, and thus not worthy of the court's consideration, would be a second- or third-hand out-of-court statement, or a statement that is vague or internally contradictory or inconsistent.

Sufficiency

Section (b) of the rule addresses an issue quite different from admissibility, namely, the legal sufficiency of hearsay evidence where hearsay is the only evidence of the probationer's alleged violation. In such cases, the probationer has no opportunity to confront a witness with personal knowledge and test the reliability of that evidence by cross-examination. This deprivation of the right to confrontation of witnesses implicates due process considerations. However, the Supreme Court in Durling made clear that since a probationer's liberty interest is conditional, so too is the probationer's right to confront witnesses, and that right can be denied for "good cause."

The court's description of "good cause," in Durling is somewhat unclear. On the one hand, the court indicates that "good cause" for denying the probationer the right to confront witnesses "has thus far been defined in terms of difficulty and expense of procuring witnesses in combination with 'demonstrably reliable' or 'clearly reliable' evidence." Durling, supra, at 120 , 551 N.E.2d at 1200 (emphasis added).

In fact, the court defines the question in Durling in terms of this two-pronged issue:

> "The judge in this case relied solely on hearsay in revoking the defendant's probation. The judge did not make any express determination that there was good cause for denying the defendant the right to confront a witness with personal knowledge. Nor did the judge make any determination whether the proffered hearsay was reliable."
> Durling, supra, at 115 , 551 N.E.2d at 1197.

However, in contrast to this two-pronged definition, the Durling court also defines "good cause" solely in terms of the reliability of the hearsay evidence:

> "In our view, a showing that the proffered evidence bears substantial indicia of reliability and is substantially trustworthy is a showing of good cause obviating the need for confrontation."
> Durling, supra, at 118 , 551 N.E.2d at 1199.

Despite this apparent conflict, the opinion appears to settle on the two-pronged definition of good cause:

> "On the whole, the resolution of the confrontation issue depends on the totality of the circumstances in each case... If the Commonwealth has "good cause" for not using a witness with personal knowledge, and instead offers reliable hearsay or other evidence, then the requirements of due process are satisfied.".
> Durling, supra, at 118-119 , 551 N.E.2d at 1199 (emphasis added).

> Also, "The substantial reliability of the police reports in this case, coupled with the practical difficulty of presenting live testimony, discussed earlier, convinces us that the District Court judge could properly base his order of revocation on the evidence presented."
> Durling, supra, at 122 , 551 N.E.2d at 1201 (emphasis added).

In Commonwealth v. Calvo, 41 Mass. App. Ct. 903 , 668 N.E.2d 846 (1996) (rescript), the Appeals Court interpreted Durling to require only a showing that hearsay evidence bears substantial indicia of reliability and is substantially trustworthy in order to meet the "good cause" test, obviating the right to confrontation. In Calvo, "good cause" was held not to require any showing that a live witness was unavailable.

This rule takes a middle ground, requiring that in all cases where the only evidence of an alleged probation violation is hearsay there must be a finding that the hearsay is substantially trustworthy and demonstrably reliable, and requiring a showing of why a live witness is unavailable when the alleged probation violation is based on charged or uncharged criminal behavior.

Trustworthiness and Reliability of Hearsay

There are at least five criteria for the court's determination of whether a given piece of hearsay evidence is "substantially trustworthy" and "demonstrably reliable," namely, whether the out-of-court statement:

> (1) is factually detailed, rather than generalized and conclusory;
>
> (2) is based on personal knowledge and direct observation by the source;
>
> (3) is corroborated by evidence submitted by the probationer;
>
> (4) was provided under circumstances that support the veracity of the source (e.g., was provided under the pains and penalties of perjury or subject to criminal penalties for providing false information);

(5) was provided by a disinterested witness.

This list of factors for determining reliability is taken directly from Durling, except item (5), which is taken from Commonwealth v. Delaney, 36 Mass. App. Ct. 930 , 932 n.4, 629 N.E.2d 1007, 1009 n.4 (1994) (rescript), a case applying the Durling test.

Good Cause for Absence of Witness

There are three factors mentioned in Durling for determining good cause for the absence of a live witness, namely,

(1) the distance a witness would have to travel to get to court,

(2) the costs the witness (or his or her public or private employer) would have to incur if the witness were compelled to appear, and.

(3) the difficulty in scheduling the probation violation hearing at a time convenient to the witness and all other participants.

Hearsay Test Where the Alleged Violation Is Criminal Conduct

One of the most common alleged violations of probation is alleged criminal conduct. In many of these cases, evidence of the alleged violation will be a police report. Under the rule, there are two issues if the police report is the only evidence presented: reliability of the report and the reason for the absence of a live witness.

In establishing the requisite reliability of the police reports in Durling, the Court stressed that the two police reports related facts observed by the officers personally, and were factually detailed rather than general statements or conclusions. "We think the factual detail is indicative of reliability." Durling, supra, at 121 , 551 N.E.2d at 1200 (citation omitted). The Court also mentioned the similarity of the two reports and the fact that the two officers were from different departments. Thus, in Durling, the police reports corroborated each other.

The Durling Court also stressed that in determining "good cause" to justify a finding of violation solely on hearsay, the court had to balance the interests of the probationer and those of the Commonwealth and look to the "totality of the circumstances." It would appear that such balancing includes the concept that the more reliable the hearsay evidence, the less stringent the test regarding the practical reasons for absence of a live witness. Conversely, where the reliability of the hearsay is not as high as it was in Durling, (which involved the unusual circumstance of two separate police reports) it would appear that the justification for the absence of a witness would have to be that much stronger.

Hearsay Test Where the Alleged Violation Is Something Other Than Criminal Conduct

The rule does not require a showing of why the live witness is unavailable where the alleged violation is something other than criminal conduct. Thus, for example, if the alleged violation were failure to attend a rehabilitation program, a report from the program, though hearsay, would be sufficient evidence if it met the reliability test of Durling, without regard to why the live witness were not present.

For cases applying the Durling test, see Commonwealth v. Delaney, 36 Mass. App. Ct. 930 , 629 N.E.2d 1007 (1994) (finding of violation based on hearsay statement reversed; statement did not meet reliability standard comparable to police reports in Durling and witness was available to testify); and Commonwealth v. Joubert, 38 Mass. App. Ct. 943 , 647 N.E.2d 1238 (1995) (revocation order reversed because hearsay

statements of a child were not sufficiently reliable and findings indicate judge may have relied on them as the basis of decision).

Rule 8: Finding and Disposition

The new rules have been reordered. For the new rule on Preliminary Violation Hearings, see Rule 5.

(a) Requirement of Finding. Upon the completion of the presentation of evidence and closing arguments on the issue of whether the probationer has violated one or more conditions of a probation order, as alleged, the court shall make a determination of that issue. The court shall decide the matter promptly and shall not continue the proceeding generally.

(b) Finding of No Violation. If the court determines that probation has failed to prove by a preponderance of the evidence that the probationer committed a violation alleged in the notice of violation, the court shall expressly so find and the finding shall be entered on the record.

(c) Finding of Violation; Written Finding of Fact. If the court determines that probation has proved by a preponderance of the evidence that the probationer has violated a condition of probation as alleged in the notice of violation, or if the probationer waives the hearing and admits such violation and the court accepts such admission in accordance with Rule 6(g), the court shall expressly so find, and such finding shall be entered on the record. In a contested proceeding, the court shall make written findings of fact to support the finding of violation, stating the evidence upon which the court relied. A finding of violation based on an admission may be recorded as such.

(d) Disposition After Finding of Violation. After the court has entered a finding that a violation of probation has occurred, the court may order any of the following dispositions set forth below, as it deems appropriate. These dispositional alternatives shall be the exclusive options available to the court. The court shall proceed to determine disposition promptly following the entry of a finding of violation. General continuances are prohibited. Awaiting the disposition of an underlying criminal charge shall not constitute such good cause for any continuance. In determining its disposition, the court shall give such weight as it may deem appropriate to the recommendation of the Probation Department, the probationer, and the District Attorney, if any, and to such factors as public safety; the circumstances of any crime for which the probationer was placed on probation; the nature of the probation violation; the occurrence of any previous violations; and the impact of the underlying crime on any person or community, as well as any .mitigating factors.

(i) Continuance of Probation. The court may decline to modify or revoke probation and, instead, issue to the probationer such admonition or instruction as it may deem appropriate.

(ii) Termination. The court may terminate the probation order.

(iii) Modification. The court may modify the conditions of probation. Such modification may include the addition of reasonable conditions and the extension of the duration of the probation order.

(iv) Revocation, Statement of Reasons. The court may order that the order of probation be revoked. If the court orders revocation, it shall state the reasons therefor in writing.

(e) Execution of Suspended Sentence; Stay of Execution. Upon revocation of a probation order, any sentence that was imposed for the crime involved, the execution of which was suspended, shall be ordered executed

forthwith; provided, however, that such execution maybe stayed (1) pending appeal in accordance with Mass. R. Crim. P. 31, or (2) at the court's discretion, and upon the probationer's motion, to provide a brief period of time for the probationer to attend to personal matters prior to commencement of a sentence of incarceration. The execution of such sentence shall not be otherwise stayed.

(f) Imposition of Sentence Where No Sentence Previously Imposed. Upon revocation of probation in a case where no sentence was imposed following conviction, the court shall impose a sentence or other disposition as provided by law.

Added December 2, 1999, effective January 3, 2000; amended February 25, 2015, effective September 8, 2015.

Commentary

(2015)

Section (c) differs from its antecedent, 2000 District Court Rule 7(c), in the addition of a reference to a probationer's waiver *of the violation hearing* as being part of the violation admission procedure. The sentence also differs in the deletion of the term "stipulates." Although an admission of a violation is often referred to as a "stipulation," it was concluded that the latter term inadequately describes the legal event at issue, and that the term "admission" is preferable. These amendments are consistent with Rule 6(g), which specifically addresses the violation admission procedure. Section (c) includes a reference to Rule 6(g).

Section (c) makes it clear that written findings stating the evidence relied upon are not required when a finding of violation is based on an admission. Section (d) differs from its antecedent in the addition of its third sentence, which prohibits the "continuance for disposition" without good cause, and expressly eliminates delay to await the outcome of an underlying new criminal charge as constituting such good cause. The latter provision is intended to eliminate the possibility of post-finding "tracking." Delay in the form of "tracking" at the *outset* of a violation proceeding, before a violation is found, is expressly prohibited by *Rule 6(e)*.

Section (d) contains some minor improvements in terminology that are of no critical legal or procedural significance.

Section (f) reflects the addition of the phrase "or other disposition" in recognition of the fact that, following the revocation of probation, the court's options where no sentence was imposed at the time probation was ordered are not limited to the imposition of a sentence. For example, where straight probation (which is not a "sentence") had been ordered, the court, after finding violation and revoking probation, may once again order straight probation.

(2000 Commentary to Rule 8)

Preliminary probation hearings are required only when the probationer is to be held in custody for an alleged probation violation pending the conduct of a full hearing.

> "The purpose of the preliminary hearing is to protect the rights of the ... probationer who, being at liberty, is taken into custody for alleged violation of his ... probation conditions, and detained pending a final revocation hearing.".

Fay v. Commonwealth, 379 Mass. 498 , 504, 399 N.E.2d 11, 15 (1980) (citations omitted).

Thus, for example, there is no requirement of a preliminary hearing if the alleged probation violator already has received a probable cause hearing on the new crime and has been bound over to the grand jury. Stefanik

v. State Board of Parole, 372 Mass. 726 , 363 N.E.2d 1099 (1977). See also Commonwealth v. Odoardi, 397 Mass. 28 , 33, 34, 489 N.E.2d 674, 677 (1986) (no preliminary hearing where probationer already incarcerated at the time of the proceeding on the alleged violation).

The issue of whether a probationer should be held in custody pending the conduct of a probation violation hearing can arise when a defendant is before the court on a separate matter (e.g., on arrest for a new criminal charge) or having been arrested with or without a warrant for a violation of probation. G.L. c. 279, s. 3 .

The probationer is entitled to a preliminary hearing "at the time of his arrest and detention..." Commonwealth v. Odoardi, 397 Mass. 28 , 33, 489 N.E.2d 647, 677 (1986). That arrest can take place while the probationer is at liberty or when a probation officer takes custody of a probationer who is before the court on another matter, such as the charge of a new crime. Written notice must be given to the probationer at that time and the probationer and counsel must be given time to prepare for this hearing. If a continuance is requested and allowed, the custody resulting from the arrest will continue until the preliminary hearing (or a final hearing if the preliminary hearing is waived) is conducted.

The rule does not provide for notice of a preliminary probation violation hearing to be served on a probationer who is at liberty. If it is believed that a probationer who is at liberty has violated probation and should be in custody pending a hearing on that violation, custody should be effected by an arrest with or without a warrant, under G.L. c. 279, s. 3 . If it is believed that a probationer who is at liberty has violated probation, but there is no need to hold him or her in custody pending a final hearing, there is no need to serve a notice of a preliminary hearing. Rather, a notice of a final hearing should be served.

At the preliminary probation violation hearing, the question of revocation or other disposition is not at issue, only the question of probable cause for the alleged violation. Of course, the preliminary hearing can be transformed into a "final" hearing if the defendant waives the minimum seven-day notice period and both the probationer and the Probation Department are willing to proceed immediately with either an admission or a hearing. Only in such instances will the issue of revocation or other disposition be appropriately addressed.

The rule provides no qualifications on the evidence that may be admitted at preliminary hearings, other than to state that the court may hear such evidence as it deems appropriate. The rules of evidence do not apply. There appears to be no law categorically disqualifying a judge who has conducted a preliminary hearing from conducting the subsequent final hearing. When no judge is available, a magistrate may conduct the preliminary hearing. See G.L. c. 221, ss. 62Band 62C(g) , and Uniform Magistrate Rule 6.

Section (c) of the rule also provides that upon a finding of probable cause, the court may order the probationer to be held in custody pending the final hearing. A finding of probable cause does not require a custody order. The rule lists six factors that the court must consider when deciding whether to release the probationer notwithstanding the finding of probable cause on the alleged violation. The list is not exclusive and the rule does not attempt to assign relative weight to the factors.

Section (d) makes clear that bail and other terms of pretrial release have no application regarding a probationer's custody pending the conduct and completion of a final probation violation hearing. Bail and other conditions of pretrial release, including pretrial detention based on "dangerousness," under G.L. c. 276, ss. 58 and 58A , have no legal or conceptual relevance to custody on an alleged probation violation. They relate solely to a newly alleged crime. If the court finds probable cause for a probation violation, it may order the defendant into custody pending the final hearing on the violation. If the court does not find probable cause, the probationer cannot be held in custody on the alleged violation. Even if the probationer is held on the probation allegation, if he or she is also before the court on a new criminal charge, the court must address the terms of pretrial release. This issue is unrelated to custody on the probation charge. The prosecutor may want to be

heard on the issue of bail or dangerousness because if the probation matter is promptly resolved, the defendant may be released from custody on the probation matter well before the criminal case is concluded.

Conversely, the issue of probation custody should be addressed regardless of whether or not the prosecutor plans to ask for high bail or pretrial detention based on dangerousness.

There appears to be no basis in statutory or case law for Superior Court review of a District Court probable cause decision resulting in custody pending a final probation violation hearing.

(2000 Commentary to Former Rule 7)

Requirement of a Finding

This rule addresses the court's two separate tasks upon completion of the violation hearing. Section (a) requires the court to adjudicate the factual issue of whether a violation has occurred. It expressly eliminates as an option a "general continuance."

The requirement that a finding be made on the issue of violation is based on several considerations. First, and most important, it is essential for the credibility of the probation order that the issue raised by the alleged violation be resolved. Even if the alleged violation involves a relatively minor matter, the likelihood of successful change in the probationer's behavior is diminished if the court temporizes in its role as finder of fact. If a violation has occurred, the probationer should be confronted with that fact. If no violation is found, the probationer is entitled to that finding on the record. No useful judicial or probation purpose is served by failure to adjudicate after the evidence has been presented. A failure by the court to decide the issue can foster the perception on the part of the probationer that if the court does not take the matter seriously, neither should he or she.

Second, adjudication of the violation charge does not limit the court's wide discretion regarding disposition. As addressed further in the rule, if a violation is found, the court's options range from a simple warning with the current terms of probation continued, to a revocation of probation, which in many instances will result in incarceration.

Third, the adjudication of a violation will establish an appropriate record of the probationer's non-compliance, which can be essential to an appropriate disposition if a subsequent violation occurs. Minor violations, even if they do not warrant significant sanctions in themselves, may provide important information in any subsequent proceedings.

It should be noted that the "seriousness" of the violation, its impact or lack of impact on any victim and the nature of the underlying crime are irrelevant to whether the alleged violation occurred. Those matters relate solely to the court's disposition if a violation is found.

In referring to the situation where the court finds no violation, section (b) of the rule reiterates three important points: the probation officer bears the burden of proof, the standard of proof is a preponderance of the evidence, and only a violation that has been formally alleged in the Notice of Probation Violation and Hearing may be found.

Section (c) of the rule repeats these three points regarding the finding of a violation and adds that a violation may be found based on the probationer's admission. It also adds the requirements of findings of fact and a statement of the evidence relied on, which are due process requirements. Morrissey v. Brewer, 408 U.S. 471 , 489, 92 S.Ct. 2593, 2604 (1972). Failure to make findings and a statement of the evidence relied on appears

to be reversible error. See Fay v. Commonwealth, 379 Mass. 498 , 504-505, 399 N.E.2d 11, 15-16 (1980). The Court in Fay also ruled that written findings were not required as a matter of due process, where such findings were announced orally on the record in the presence of the probationer and the probationer subsequently obtained a written copy in the form of a transcript. Fay v. Commonwealth, 379 Mass. at 504-505 , 399 N.E.2d 11, 15-16 (1980). The rule, however, requires that the findings and evidence relied on be stated in writing.

Disposition

Section (d) of the rule sets out four specific types of dispositions that are available to the court if a violation is found. These are expressly described as an exclusive list of the court's options, though they provide a comprehensive range of sanctions. The rule also provides factors that the court should consider on disposition, namely:

- the recommendation of the Probation Department.
- public safety.
- seriousness of the crime of which the probationer was found guilty.
- nature of the violation.
- record of any previous violation.
- impact on a victim of the underlying crime.

Counsel is free to argue, and the court is free to consider, any relevant mitigating factors.

Regarding the choice of disposition, two factors are essential: (1) disposition is a matter of the court's discretion. McHoul v. Commonwealth, 365 Mass. 465 , 469-470, 312 N.E.2d 539, 543 (1974); Commonwealth v. Durling, 407 Mass. 108 , 111, 551 N.E.2d 1193, 1195 (1990); and (2) disposition is not a punishment for the new crime, but rather relates to the underlying offense. Commonwealth v. Odoardi, 397 Mass. 28 , 30, 489 N.E.2d 674, 675 (1986).

Section (d)(i) provides for continuance of probation. This may be appropriate where the violation is minor and the probationer has no history of previous violations. It can be completely appropriate for a probation officer to commence and successfully prosecute a probation violation proceeding and then recommend that the current probation terms merely be continued. This may reflect the probation officer's judgment that, though minor, the offense should be adjudicated to impress upon the probationer the importance of compliance, that a warning from the court is necessary to prevent more serious violations and that the violation should be a matter of record. The continuance of current probation terms despite a finding of violation is sometimes referred to as "reprobating" the probationer.

Section (d)(ii), provides for termination of probation. This outcome can be appropriate where the offense is minor and the court determines that the purpose of probation has been accomplished. It can also be appropriate in conjunction with the disposition of a new offense, where the probationer is already serving a sentence, and where the probationer is on probation in another court.

Under section (d)(iii), the court has the dispositional option of modifying the probationary terms after a finding of violation. It has been held that it is "a matter of well-established common law, that courts do possess [the authority to modify probation conditions], and that conditions of probation may be amended to serve 'the ends

of justice and the best interests of both the public and the defendant.' " Buckley v. Quincy Division of the District Court Dept., 395 Mass. 815 , 817, 482 N.E.2d 511, 512 (1985), citing Burns v. United States, 287 U.S. 216 , 221, 53 S. Ct. 154, 156 (1932).

The addition of reasonable conditions to an individual's probation does not constitute a revision or revocation of a sentence under Mass. R. Crim. P. 29. Buckley, supra, at 818-819 , 482 N.E.2d at 513. The Court did not "define that point at which the modification is so drastic that it becomes the revision of a sentence subject to the requirements of rule 29," noting that the modification in Buckley was a nonpunitive rehabilitative measure, designed to facilitate the successful reintegration of the plaintiff into the community. Buckley, supra, at 818-819 n.5, 482 N.E.2d at 513 n.5.

It should be noted that the Court in Buckley was addressing a situation where conditions were added to a probation order without any finding of a violation, but rather based on an assessment by a probation officer. The Court ruled that a supervising court (as distinguished from a sentencing court) may not modify the conditions of probation without a material change in circumstances such as a violation of probation. It also indicated that a violation of probation is a material change in circumstances:

> "Our holding does not limit whatever authority is held by the supervisory court to modify conditions where there has been a material change in circumstances (such as a violation of a condition of probation). Nor need we outline those situations in which the sentencing court might modify the terms of probation.".

Buckley v. Quincy Div. of Dist. Court Dept., supra, at 820 , 482 N.E.2d at 514.

Section (d)(iii) addresses issues left unaddressed in Buckley by affirmatively authorizing the court conducting a probation violation hearing to modify the conditions of probation upon a finding of violation.

Revocation: Stay after Revocation

Section (d)(iv) provides for the most serious sanction upon a finding of probation violation, namely, revocation of probation. Under Commonwealth v. Holmgren, 421 Mass. 224 , 656 N.E.2d 577 (1995), any sentence that was imposed, but its execution suspended pending probation, must be ordered executed in its entirety upon revocation of probation. This ruling was based on an unambiguous statutory requirement in G.L. c. 279, s. 3 .

The requirement of executing a suspended sentence upon revocation of probation is reflected in section (e), which also provides two specific bases for a stay of execution. This provision precludes any stay other than for (1) appeal or (2) a brief time for a probationer to attend to personal matters. A stay simply to avoid the execution of sentence, with or without the addition of new terms, is not allowed under the rule. There are several reasons for this. First, there appears to be no established legal basis for such a stay. Second, such a stay is inconsistent with the plain language of Holmgren. Third, the terms of such a stay are unenforceable. Conditions on the person's behavior during the stay cannot be ordered as probation -- probation has been revoked. On the other hand, the court cannot condition the stay on unstated or vague conditions (e.g., "stay out of further trouble"), since a termination of the stay presumably requires incarceration, which, in turn, requires an opportunity for the person to be notified and heard regarding the factual issue of whether he or she violated the stay. One element of such a process would be specificity of the alleged violation. Even if conditions on such a stay were expressly stated in writing, they could not be enforced without a due process procedure similar to the same probation revocation procedure that has just been concluded. Since the person would not be on probation, there would be no one with authority to "prosecute" the alleged violation of the stay conditions. Perhaps most important, such a stay is impermissible because it implies that if the person successfully completes the stay, on whatever terms are imposed, written or unwritten, the sentence that had to be ordered executed pursuant to Holmgren somehow disappears.

Section (d)(iv) requires that, if the court decides to revoke probation, it must provide the reasons for that decision. A statement of reasons for deciding to revoke probation is a requirement of due process. Gagnon v. Scarpelli, 411 U.S. 778 , 93 S. Ct. 1756 (1973). While the reasons need not be put in writing to ensure due process, Fay v. Commonwealth, 379 Mass. 498 , 399 N.E.2d 11(1980), the rule requires them in writing to ensure a clear and accessible record.

Disposition Where No Sentence Originally Imposed

Section (f) addresses the situation where the probationer was sentenced with "straight probation" on the underlying conviction. On the one hand, this means that upon a revocation of probation, there is no suspended sentence to be executed. On the other hand, the probationer is subject to any sentence for the underlying crime that is provided by law. Though it may appear illogical, this would appear to include a sentence involving probation, even though the triggering event for the imposition of such a sentence is a violation and revocation of the "straight" probation originally ordered. Presumably, if such post-revocation probation is imposed, the conditions and the consequences for any violation will take into account the fact that probation has already been violated.

Rule 9: Violation of Conditions of a "Continuation Without a Finding"

(a) Notice, Conduct of Hearing, Adjudication. The procedures set forth in these rules regarding notice for, and the conduct and adjudication of, probation violation hearings shall also apply where the Probation Department alleges a violation of one or more conditions of probation imposed together with a continuance without a finding.

(b) Disposition. The dispositional options available to the court following a determination that one or more conditions of probation imposed together with a continuance without a finding have been violated shall be as follows:

(i) Termination of Probation. The court may terminate the order of probation and the continuance without a finding and enter a dismissal on the underlying criminal case.

(ii) Continuation of the Continuance Without a Finding With No Probation Modification. The court may continue the continuance without a finding and issue to the probationer such admonition or instruction as it may deem appropriate.

(iii) Continuation of the Continuance Without a Finding With Modification of Probation. The court may continue the continuance without a finding and modify the conditions of probation including the duration of the continuance.

(iv) Termination of the Continuance Without a Finding and No Revocation of Probation. The court may terminate the continuance without a finding without revoking probation and, if a finding of sufficient facts was entered at the time the continuance without a finding was ordered, shall proceed to enter a guilty finding. The order of probation, with or without modifications, may thereupon constitute the disposition on the guilty finding if the probationer consents.

(v) Termination of the Continuance Without a Finding and Revocation of Probation. The court may terminate the continuance without a finding and revoke the order of probation. If the court orders revocation, it shall state the evidence relied upon in writing, and, if a finding of sufficient facts was entered at the time the

continuance without a finding was ordered, the court shall enter a guilty finding and impose. a sentence or other disposition as provided by law.

Commentary

(2015)

The order of sections (b)(i) and (b)(ii) differs the 2000 District Rule to more accurately reflect the increasingly severe "hierarchy" of this list of dispositional options. Other, minor changes exist as well.

Section (b)(iii) reflects the fact that, where a probation order is modified after a finding of violation, there is no need to mention in the rule that a "material change of circumstance" is a prerequisite to such modification. This is so because a violation of probation constitutes per se sufficient grounds for a modification. See Buckley v. Quincy Div. of the Dist. Ct. Dept, 395 Mass. 815 , 820 (1985).

New section (b)(iv) has been added to acknowledge the court's option of terminating a CWOF, *but not revoking probation*. In such cases, the court, if a finding of sufficient facts had been made at the time the CWOF was ordered, may enter a guilty finding with the probation order, with or without modification, serving as the criminal sentence.

Section (b)(v) is based on the 2000 District Court Rule 9(b)(iv) and includes the requirement that when the court orders a revocation of probation it *must state in writing the evidence relied upon.* This has been held to be a requirement of fundamental due process. Morrissey v. Brewer, 408 U.S. 471 , 488-89 (1972) (due process requirements for parole revocation hearings); accord Gagnon v. Scarpelli, 411 U.S. 778 , 782 (1973) (same due process rights apply in probation revocation hearings).

Section (b)(v) also indicates that, if a violation of probation is found in the context of a continuance without a finding and probation is then revoked, the entry of a guilty finding and sentencing in the underlying case is possible only if the court that ordered the CWOF had entered a finding of sufficient facts.

Section (b)(v) also reflects the addition of a reference to the court's obligation to "impose a sentence or other disposition as provided by law" when it finds a violation and orders revocation in the context of a CWOF. This phrase formerly appeared in 2000 District Court Rule 9(d), which has been deleted, as explained below.

Section (c) of the 2000 District Court Rule has been deleted. It limited stays of execution following the imposition of sentence upon revocation of probation and entry of a guilty finding. The only stays permitted by the rule were those provided by rule (stay pending appeal, Mass. R. Crim. P. 31) and stays to allow a defendant to attend to personal matters prior to commencement of an incarceration sentence, as provided under common law. It was concluded that, since there is no other legal ground for such stays, the express limitation in the rule was unnecessary.

Section (d) of the 2000 District Court Rule has also been deleted. It involved admissions to sufficient facts seeking a CWOF tendered by defendants and accepted by the court with no sentencing conditions included in the tender. In such cases, the court that later revokes probation is free to impose any sentence provided by law. The implication in this provision was that, if sentencing terms *had been included* with the tender, the court that later found a violation of the CWOF and revoked probation would be limited to imposing a sentence consistent with the terms set forth in the tender. It was concluded that this provision was unnecessary because such conditioned tenders seeking CWOFs are, in fact, not made, or, if made, are not accepted by the courts. In any event, Rule 9(b)(v) adequately addresses the issue in general terms: when the court terminates a CWOF and revokes probation, "the court must impose a sentence or other disposition *as provided by law*."

(Emphasis added.) This obviates the need for these rules to resolve the question of whether the tender of a plea or admission seeking a CWOF may be conditioned on specific sentencing terms, and, if accepted by the sentencing court, whether such sentencing terms are "binding" on the court that subsequently revokes probation and terminates the CWOF.

(2000)

Continuance Without a Finding with Probation

This rule addresses the situation where the allegation of a probation violation involves a probation order issued together with a continuance without a finding. In such cases, the conditions of probation are also the conditions whereby the underlying criminal case has been continued without the entry of a finding of guilty, following submission and acceptance of a formal plea or admission.

The rule makes clear that the procedure in these cases for commencing, conducting and disposing of probation violation proceedings is the same as in cases where a finding of guilty has been entered following a plea, admission or trial. The only differences from the latter involve the court's dispositional options if a probation violation is found.

Specifically, if the court finds a probation violation and decides as a matter of its discretion to revoke probation, the continuance is thereby terminated, a finding of guilty must be entered and sentence must be imposed. The court will be bound by whatever dispositional terms were set by the probationer and accepted by the court as formal conditions of his or her plea or admission, if any.

The rule takes the position that upon revocation of probation in a case continued without a finding, a sentence that was conditioned on probation compliance should be ordered executed in its entirety. This is parallel to the ruling in Commonwealth v. Holmgren, 421 Mass. 224 , 656 N.E.2d 577 (1995), a case which involved execution of a suspended sentence upon violation of probation.

In cases where the defendant submitted his or her plea or admission conditioned only by a requirement that the case be continued without a finding, with no sentencing terms specified in the tender of plea or admission, the court may have indicated what sentence should be imposed if probation is violated and revoked (sometimes referred to as "a Duquette alternative"). Such a sentence should be given great deference but is not binding on the judge who enters the guilty finding and then imposes sentence. This parallels the "straight probation" situation. That is, if a violation is found and the court decides to revoke probation, the sentence to be imposed following entry of the guilty finding may be any sentence provided by law.

Continuance Without a Finding Without Probation

This rule does not address the situation where the court has ordered a case continued without a finding, but has not placed the defendant on probation, that is, where the conditions of the continuance are not conditions of probation.

In Commonwealth v. Rivera, No. SJ-96-0578, (Supreme Judicial Court, Single Justice Decision, November 29, 1996), the Single Justice held that.

> "like the procedure for probation revocation, the procedure for revocation of a continuance without a finding may result in the loss of the defendant's liberty, [thus] for purposes of due process it is appropriate to analyze the revocation of a continuance without a finding the same as this court does a revocation of probation.".

Apparently, in Rivera the defendant's case had been continued without a finding, but he had not been placed on probation.

One problem with such cases involves the need for conditions of the continuance to be set forth in writing and given to the defendant. Where a case is continued without a finding, but the defendant not placed on probation, it is not clear how and by whom those conditions are reduced to writing and given to the defendant. Similarly, if the defendant is not on probation, it is not clear who presents the allegation of an alleged violation of the conditions of the continuance. In any event, the Court in Rivera, applying the due process requirements of probation violation proceedings, found that the proceedings were inadequate in terms of notice of the alleged violation, time to prepare for the hearing, and the reliability of the hearsay evidence submitted, and vacated the revocation of the continuance.