

Massachusetts Trial Court -- Restorative Justice Pilot Program

I. Pilot Overview and Purpose

The Massachusetts Trial Court's Restorative Justice Pilot Program (the "program") is a three-year pilot to provide individuals who have not yet resolved their cases with the opportunity to participate in an in-depth, victim-centered restorative justice ("RJ") process. The pretrial and presentence models described herein will be available in cases pending in the Plymouth and Suffolk Superior Courts, the Brockton District Court, and the Roxbury and Dorchester Divisions of the Boston Municipal Court.

The program offers victims who have suffered harm and defendants who have caused harm an alternative process for repair and accountability to the traditional criminal legal system. Under the program, any named victim may be offered the opportunity, but has no obligation, to participate in an RJ process. The prosecutor and the named victims (if any)¹ must agree to the defendant's participation, and the defendant must be willing to accept responsibility for their conduct. During the RJ process, the pending criminal proceedings generally will be put on hold. (In certain cases, individuals on probation may also be offered RJ services.)

Under the program, the RJ services will be provided or coordinated by a third-party RJ provider,² but the program will be managed by the Trial Court.

Data collection to facilitate evaluation of the program will be key. After three years, the Trial Court will evaluate the program and determine whether to continue or expand it.

The goals of the program are to:

- Promote rehabilitation and relational healing with self and others;
- Provide opportunities for victims and survivors (together "victim" or "victims"), offenders, and communities affected by a crime to communicate (directly or indirectly) about the causes, circumstances, and impact of that crime, to address their related needs, and to explore who has the responsibility to meet those needs;
- Foster offenders' understanding and acceptance of responsibility for their offending behavior(s), the harm done to others, and the consequences to

¹ Generally, the named victim is the person identified as the victim in the charging document.

² It is possible that a single RJ provider will be unable to provide all of the services required to run the program. There are many groups in the community with knowledge of RJ processes, victim counseling and services, and advising individuals who are preparing to sit in RJ circles, or who have deep ties to relevant communities. The RJ provider may choose to affiliate with other groups to meet the requirements of the program.

- themselves;
- Develop meaningful, alternative, victim-centered accountability and repair of the harm caused, depending on the needs of the victim and the community; and
 - Enhance public safety, reduce recidivism, and strengthen communities.

For the pilot, two models are proposed:

Version A: District and Municipal Court defendants would be eligible to participate in the program under G.L. c. 276B, which requires mandatory dismissal of certain charges upon the successful completion of a community-based restorative justice program. See G.L. c. 276B, § 2. For a defendant to be eligible to participate in this version, the prosecutor and any named victim must consent to the defendant's participation in the program and to dismissal of the case upon successful completion. See *id.* Under G.L. c. 276B, defendants are excluded from participating in Version A if they are charged with (i) a sexual offense as defined in G.L. c. 123A, § 1, (ii) an offense against a family or household member as defined in G.L. c. 265, § 13M, or (iii) an offense resulting in serious bodily injury or death. See G.L. c. 276B, § 3.

Version B: If the prosecutor and any named victims agree that the defendant may participate in the program, but do not agree to the outcome of a mandatory dismissal, defendants may still participate in the RJ process in anticipation of resolving the case prior to trial. In this version, dismissal is not guaranteed, but the defendant will be given an opportunity to obtain a material benefit (including a charge reduction) for their successful participation in the program where they would not otherwise be eligible under G.L. c. 276B, § 2. Version B contains no charge restrictions and specifically contemplates that defendants charged with an offense carrying a mandatory minimum penalty will be considered eligible for participation. Although dismissal is not contemplated in Version B, nothing prohibits a case from ultimately being dismissed upon completion of the program, if the prosecutor consents at that point.

This document is intended to advance the purposes of the program. It is not to be construed as a standard, statute, or regulation.

II. Voluntariness

Participation in the program is voluntary. The defendant, prosecutor, and any named victims must agree to the defendant's participation in the program before the case can be referred to the RJ provider. Victims may participate in the RJ process, or they may choose not to participate, but the defendant may only participate with the consent of the named victims.

Because one of RJ's primary tenets is willing and voluntary participation, any participant, including the defendant, can choose to withdraw from the RJ process at any time without

penalty. Withdrawal from the program or a failure to complete the program shall not be considered against the defendant for any purpose, including setting of bail, conditions of release, or ultimate disposition of the case.

A victim who chooses to participate in the program may withdraw at any time, but a victim's withdrawal once a defendant begins the program with the victim's consent will not terminate the defendant's participation.

III. The Restorative Justice Process

The RJ process will vary depending on the needs of the victim and the person who caused the harm. The RJ process will ultimately involve the defendant and the victim (or surrogate victims),³ others who have been harmed by the defendant's actions,⁴ members of the defendant's community, unaffiliated community members, and others who have caused harm in the past, meeting over time in RJ circles or otherwise to explore the nature of the harm caused, the reasons the harm was caused, and how the defendant can repair the harm. Preparation for sitting in RJ circles is crucial. The program will generally involve the following common components:

- A referral, evaluation, and intake process during which the RJ provider evaluates the appropriateness of the case for the RJ process. This may occur at the courthouse at an early stage of the case, or later on referral by one party or another or both. It may involve review of records provided by the court, meetings with the defendant, and meetings with any named victim to assess the named victim's needs and hear how they would like an RJ process to proceed.
- A process to prepare the participants for sitting in circle. This may involve the RJ provider or others knowledgeable about RJ practices separately meeting with the defendant, and with the victim, multiple times; recruiting and training victim surrogates and community members; and selecting culturally appropriate, trained circle keepers.

³ A surrogate victim is an individual who has experienced actual harm related to the type of offending behavior committed by the defendant and who has received training in restorative justice practices, but is not the actual victim in the case. The participation of a surrogate victim allows a crucial victim's voice into the RJ process without depending on the actual victim's participation. A surrogate victim stands in the shoes of, but does not role-play as, the person who was harmed. A surrogate may be used at the victim's request, when the crime has no identifiable victim, or when the victim chooses not to participate.

⁴ Many people may have been harmed by the defendant's conduct: family members of the named victim, defendant's family, people who live in the area, first responders, etc. Depending on the facts of a particular case, various harmed parties should be invited to participate in the RJ process.

- The development of an individualized, culturally-appropriate circle, including designating relevant participants (e.g., community members, the victim or a surrogate victim, other harmed parties, and other people who have caused harm in the past).
- A first circle or opening workshop, with a focus on education about the restorative process as well as identification of the various layers of harm that has occurred.
- Subsequent circles to explore the reasons the harm was caused and how the person who caused harm can repair the harm. The number of circles and the duration of the program in any particular case will depend on the needs of the harmed party and the party who caused the harm.
- Generation of an RJ plan, which details how the defendant has agreed to repair the harm they caused, as well other agreed-upon specific goals focused on the victim’s needs and defendant’s rehabilitation and prevention of recidivism where appropriate.
- A series of facilitator-led workshops and individualized sessions, as necessary, as often as weekly, that focus on deeper learning and understanding of RJ principles.
- The development of an individualized work plan for the defendant to achieve in between sessions.
- A closing circle.

IV. Access to Related Resources and Services

The pilot program contemplates that the RJ provider will be able to tap into resources through the Probation Department, the Community Justice Support Centers, and public or private victim services offices, to provide the defendant and any named victims with other services, treatment, or support as may be necessary. The RJ provider shall discuss such needs with the defendant and victim and may refer and assist the defendant or victim in “self-reporting” to a provider to access treatment or other services. Any additional services or treatment accessed by the defendant or victim through the RJ process is voluntary. There will be no penalty for a defendant’s or victim’s failure to participate or complete any treatment or services. However, based on the discussion between the RJ provider and the defendant, a failure or inability to access certain services or treatment may contribute to the RJ circle’s determination of whether the defendant successfully completed the RJ process.

V. Court Management

Courts participating in the program will create a mechanism to manage the cases involved in the

program in that court. This will help reduce administrative inefficiency, facilitate communication, and prevent cases from being delayed longer than necessary.

VI. Confidentiality

One of the hallmarks of RJ is confidentiality. Participation in the program shall not be used as evidence or as an admission of guilt, delinquency, or civil liability in current or subsequent legal proceedings against any participant. Any statement made by a defendant or victim during the course of their participation in the program (including during the intake process), shall be confidential, shall not be subject to disclosure, and may not be used in any later judicial or administrative proceeding. No information obtained during the course of a person's participation in the program shall be used in any stage of a criminal investigation or prosecution or civil or administrative proceeding; provided, however, that nothing in this section shall preclude any evidence obtained through an independent source or that would have been inevitably discovered by lawful means from being admitted at such proceedings. All parties must be notified that this general confidentiality does not negate the legal obligations on mandatory reporters.

An individual confidentiality agreement or memorandum of understanding will have to be signed by all participants or stakeholders in any individual case referred to the program.

VII. Eligibility to Participate

As described in Section II, under either version of the program, the prosecutor and any named victim must agree to the defendant's participation in the RJ pilot in order for the defendant to be eligible. In a case where there are multiple named victims, all victims must consent to the defendant's participation. A named victim is not required to participate in the RJ process. If the named victim does not participate, the RJ provider will provide one or more surrogate victims. If a named victim cannot be located, the absence of their consent will not bar a defendant's participation in either version of the pilot. Similarly, the absence of a named victim in a complaint or indictment will not bar the defendant's participation in the pilot (e.g., where the defendant is charged with a possessory or trafficking offense).

In an appropriate case, the prosecutor will consult with any named victims, through or with the assistance of a victim witness advocate, to discuss the possibility of the defendant participating in the program and will convey the results of that outreach to the court and defense counsel. The RJ provider may meet with the named victim to discuss the program so that the named victims may decide whether to consent to the defendant's participation and whether the victim wishes to participate. The Trial Court, in conjunction with the RJ provider, will promulgate and make available informational pamphlets explaining the program that can be used in connection with any outreach or discussions between defense counsel and their clients, or between the district attorney's office and victims.

In discussing participation in the program, it must be clearly communicated to the defendant and any named victim which version of the pilot program is contemplated for the defendant, and the specific considerations involved, e.g. that Version A will require dismissal upon successful completion of the RJ process, while Version B may not end in dismissal, but may instead be considered a positive factor taken into account by the court at sentencing. The prosecutor's office must inform any named victim of their right to object to the defendant's participation in the pilot, as well as the options regarding their own direct participation in any RJ programming.

As described in the introduction, there are no charge restrictions to participate in Version B of the program. Under Version A, certain charges are ineligible.

Nothing in this pilot prohibits pre-arraignment participation in RJ programs consistent with available programs sponsored by law enforcement or other pretrial diversion options available through the trial court as outlined in G.L. c. 276A.

VIII. Method for Referring Cases

The prosecutor, any named victims, the defendant, the court, or a member of the probation department may suggest participation in the RJ program. If the defendant, the named victims, and the prosecutor agree that the case is appropriate for the program, the prosecutor and defendant will jointly prepare a short referral document to be sent to the RJ provider for screening.

The referral document shall include a one-to-two paragraph statement describing the case, indicating why the case is a good fit for the program, and identifying the version of the program in which the defendant intends to participate. The referral document will also indicate whether each named victim consents to defendant's participation in the program and whether any named victim would like to participate in the RJ process (or if they would prefer a surrogate victim). The referral document will include contact information for the defendant and each named victim so that the RJ provider can reach out in accordance with its own internal screening process. The contact information for the victim will not be shared with the defendant. Defense counsel and the prosecutor will work with the RJ provider to convey any additional relevant information that may be necessary for the provider to determine the case's eligibility. Any information communicated to the RJ provider will be subject to the provider's confidentiality policies and the confidentiality policy of this pilot.

Unable to participate

If the referral is not accepted by the RJ provider, the criminal case will continue in the normal course. The court may not draw any adverse inference against the defendant because the RJ provider did not accept the referral and may not inquire into any case-

specific reasons for the provider's decision not to accept the referral.

Accepted for participation

If the referral is accepted by the RJ provider, the prosecutor and defense counsel will inform the court in accordance with the process established by the court. The court will consider the parties' joint proposal to admit the case to the program. Any defendant accepted into the program will have to waive the time limits under Mass. R. Crim. P. 36 ("Rule 36") during the course of the program. The court may, in its discretion, refuse to send the case into the program after a guilty plea, notwithstanding consent and a positive screening of the case by the RJ provider. Capacity limitations may mean that some cases cannot be accommodated during the pilot program.

Before the court may accept the case into the program, it must conduct a colloquy with the defendant on the record to ensure that the defendant is voluntarily agreeing to participate in the program. In either version of the program, the judge will inform the defendant that if the program is not completed, the case will be returned to the regular session or to the original plea judge and continue in the normal course, and that the court is prohibited from drawing any negative inference from the noncompletion of the program for any purpose, including setting of bail or ultimate disposition of the case.

Version A: The judge will inform the defendant that the successful completion of RJ will result in dismissal of the case.

Version B: The judge will inform the defendant that the successful completion of RJ will be considered at a disposition, including a plea or sentencing, although unlike in Version A, there is no guarantee that the case will be dismissed upon the successful completion of the program.

A defendant may participate in Version B of the program prior to a plea, or after a plea and before sentencing. If a defendant enters into the program prior to a plea, the defendant must waive Rule 36, but the prosecutor's duty to provide automatic, mandatory discovery under Mass. R. Crim. P. 14 will remain in effect. (In certain cases, a defendant may participate in the program after sentencing while on probation if ordered by the court and with the possibility of reducing the duration of the defendant's term of probation.)

If a defendant participates in the program after a guilty plea, but before sentencing, the defendant must agree to defer sentencing for the purpose of engaging in the program and will have to waive the right to be sentenced without unreasonable delay under Mass. R. Crim. P. 28(b). The judge must inform such a defendant that the case will be returned to the original sentencing judge for sentencing upon completion of or termination from the program. The judge will also inform the defendant that if they do not complete the program, the court will

not draw any negative inference from the noncompletion of the program and it will not be considered in sentencing.

Upon a defendant's completion of or termination from the program, the case will be transferred back to the regular session for further proceedings, or to the original plea judge for sentencing, whichever is appropriate. If the original plea judge has retired or is otherwise unavailable at that time, the case may be reassigned by the First Justice or the Regional Administrative Justice for further proceedings or for sentencing.

IX. Successful Completion

Whether a defendant has successfully completed the program will be determined by the community, embodied by the RJ circle convened for the case. Relevant considerations may include the parties' sense of agency, the defendant's sensitivity and responsiveness to the harm caused, the defendant's efforts to meet the needs of those affected by the criminal conduct, whether the parties observe meaningful change occurring as a result of the RJ process, and the satisfaction of the named victim with the RJ process. The details of the defendant's participation and certification of completion of the RJ process will come directly from the RJ provider, subject to the confidentiality restrictions noted above. Before the pilot begins, the Trial Court will work with the RJ provider and community stakeholders to determine what information is appropriate to include in such reporting.

If a defendant successfully completes the program, the RJ provider shall provide a completion memo to the court, the prosecutor, any named victim, and defense counsel. Consistent with the confidentiality policy, the memo will summarize the primary participants and the restorative agreement obligations of the defendant and note whether the defendant completed those obligations. The form of the memo will be created by the RJ provider and the Trial Court.

Version A: Upon receipt of the notice of successful completion from the RJ provider, the judge will order the case dismissed pursuant to G.L. c. 276B, § 2.

Version B: Upon receipt of the notice of successful completion from the RJ provider, the case will proceed in the normal course, taking into consideration the defendant's successful RJ program completion. Some options include but are not limited to:

- The prosecutor may move to dismiss the case;
- If program participation precedes a plea, the prosecutor may move to amend a charge to a lesser offense;
- The defendant may tender a plea;
- The case may return to the regular pretrial session in anticipation of trial; or
- In the case of a participant who has entered a guilty plea, the case will return before the plea judge for sentencing.

No matter what course the case takes after completion of the program, the court shall consider the defendant's successful completion of the program and any input from any named victims after the RJ process.

X. Non-Completion

If the RJ program is not completed, the RJ provider shall provide a termination memo in compliance with the confidentiality requirements of the program to the prosecutor, any named victim, defense counsel, and the court notifying them of the termination of the defendant's participation in the program.

Failure to complete the program shall not be considered against the defendant for any purpose, including setting of bail or ultimate disposition of the case. If the defendant does not complete the RJ program, the case shall be returned to the regular pretrial session or shall return to the original sentencing judge in the normal course.

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