

**TRIAL COURT GUIDELINES
FOR
PRETRIAL CONDITIONS OF RELEASE
*Effective November 2016***

Preamble

The Executive Office of the Trial Court is pleased to provide you with the Pretrial Conditions of Release Guidelines developed by the Probation Pretrial Services Task Force. The Guidelines, which can be found at the link below are intended to assist judges, clerk magistrates, assistant clerk magistrates and others authorized to set bail when determining whether to set pretrial conditions of release, and if released, which conditions to impose.

Presently there are approximately 11,000 defendants on pretrial conditions of release across court departments. The goal of these Guidelines is to promote consistency in procedures relating to the setting of pretrial conditions of release on criminal defendants. These Guidelines are **not** intended to interfere with the discretion of those setting conditions of release.

The Guidelines were prepared with the assistance of the members of the Trial Court Pretrial Services Committee, whose members include: Hon. Paul C. Dawley, Co-chair, Commissioner Edward J. Dolan, Co-Chair, Hon. Kenneth Fishman, Hon. Andrew Mandell, Hon. Lawrence Moniz, Hon. Richard Savignano, Hon. Raymond Veary, Anthony Beneditti, Esq, Sheriff Frank Cousins, Sheriff Peter Koutoujian, Tara McGuire, Esq., Clerk Magistrate Keith McDonough, District Attorney Michael O'Keefe, Dr. Debra Pinals, and Chief Probation Officer Vincent Piro, Jr. In addition, the Committee received numerous comments reviewing the proposed Guidelines from court staff and others, including representatives from the Committee for Public Counsel Services and the Massachusetts District Attorney's Association.

Pretrial Conditions of Release Definition

Although the legal presumption for all criminal charges excluding capital cases is that an individual will be released on personal recognizance, pretrial conditions of release are conditions that may be ordered in addition to, or in lieu of, cash bail under any of the following bail statutes: G.L. c. 276, § 42A, § 57, § 58, § 58A, § 58B, or § 87.¹ Pretrial conditions of release may be ordered by any person authorized to take bail prior to arraignment or at arraignment, or by a judge at or after arraignment. Unless otherwise ordered or modified, pretrial conditions of release remain in effect until the case pursuant to which they are ordered is disposed.

Conditions ordered pursuant to G.L. c. 276, § 87 as a conditional disposition ("pre-trial probation"), anticipating dismissal of the criminal charges upon compliance with the conditions for a set period of time, are *not* considered pretrial conditions of release.

The Purposes of Pretrial Conditions of Release

1. To ensure the defendant's return to court while the criminal charges are pending.
2. To restrict or compel the defendant's conduct in a manner authorized by the bail statute under which release is ordered.
3. To protect alleged victims, other individuals, and the community through the imposition of appropriate pretrial conditions and / or supervision.
4. To prevent, as appropriate, any negative collateral consequences of pretrial incarceration.

Considerations in Setting Pretrial Conditions of Release

1. Pretrial conditions of release should be imposed only when personal recognizance without conditions is determined to be insufficient to ensure the defendant's return to court, or pretrial conditions of release satisfy a purpose set forth in one of the bail statutes.ⁱⁱ
2. Ordering pretrial conditions of release is entirely within the court's discretion.
3. The court should impose only pretrial conditions of release that, if violated, the court reasonably would expect to enforce.
4. The pretrial conditions of release should be tailored to address the particular characteristics of the defendant and the charged offense(s).ⁱⁱⁱ
5. The number and type of pretrial conditions and / or supervision should correlate with the risks a defendant poses to default and / or to commit criminal offenses or otherwise endanger others.
6. The imposition of pretrial conditions of release does not detract from the defendant's presumption of innocence.
7. Pretrial conditions of release are not subject to supervision fees under G.L. c. 276, § 87A.^{iv}
8. Probation shall supervise the pretrial conditions of release as necessary to implement the orders of the court.
9. The court may require the probation department to be heard at the time the court considers the imposition of pretrial conditions of release.^v

Violations of Pretrial Conditions of Release

Alleged violations of pretrial conditions of release are subject to arrest by the police if the violation is the allegation of a new criminal act for which the police have a right of arrest, by a probation officer on a warrant for temporary custody pursuant to G.L. c. 279, § 3, ¶ 3,^{vi} or by any officer upon the issuance of a warrant either by the court or by a probation officer pursuant to G.L. c. 279, § 3, ¶ 3. Notice of a hearing for a violation may also be given to a defendant by letter or summons.

Alleged violations of pretrial conditions of release may be brought before the court by the prosecution in a motion to revoke or modify bail or pretrial conditions of release. In addition, a probation officer may arrange for the appearance of the defendant before the court pursuant to G.L. c. 279, § 3, ¶¶ 1, 3 for an alleged violation of pretrial conditions of release. When the court is notified or becomes aware of an alleged violation of pretrial conditions of release, the court shall conduct a hearing pursuant to G.L. c. 276, § 58, ¶ 6^{vii} or G.L. c. 276, § 58B.

Violations of pretrial conditions of release based on a new criminal charge are subject to bail revocation in the Superior Court pursuant to G.L. c. 276, § 57, and in the District Court, the Boston Municipal Court, and the Juvenile Court pursuant to G.L. c. 276, § 58, ¶ 6 for up to 60 days, or pursuant to G.L. c. 276, § 58B for up to 90 days. Violations of pretrial conditions of release that are not based on a new criminal charge are subject to bail revocation pursuant to G.L. c. 276, § 58B for up to 90 days. Bail revocation and incarceration are not the only alternatives in the case when a violation of pretrial conditions of release has been found. Following a hearing on an alleged violation, upon a finding of violation, the court may release the defendant on the same conditions, alter or add pretrial conditions of release,^{viii} set a cash bail,^{ix} or revoke the defendant's bail and detain the defendant for up to 90 days.

END NOTES

ⁱ The legislature has provided in six separate statutes the specific circumstances under which pretrial release may be made subject to certain conditions.

G.L. c. 276, § 42A: “the court may, in lieu of or in addition to any terms of personal recognizance, and after a hearing and finding, impose such terms as will insure the safety of the person allegedly suffering the physical abuse or threat thereof, and will prevent its recurrence. Such terms and conditions shall include reasonable restrictions on travel, association or place of abode of the defendant as will prevent such person from contact with the person abused.”

G.L. c. 276, § 58, ¶ 1: “the defendant may be ordered to abide by specified restrictions on personal associations or conduct including, but not limited to, avoiding all contact with an alleged victim of the crime and any potential witness or witnesses who may testify concerning the offense, as a condition of release.”

Pursuant to **An Act Relative to Domestic Violence**, G.L. c. 276, §§ 42A, 57, and 58 state, “Any person authorized to take bail for such [domestic abuse] violation may impose conditions on a person's release in

order to ensure the appearance of the person before the court and the safety of the alleged victim, any other individual or the community.”

Conditional release, pursuant to **G.L. c. 276, § 58A**, may be ordered, on a motion by the prosecutor, for certain categories of defendants who have been charged with felonies that have as an element of the crime “the use, attempted use, or threatened use of physical force against the person of another, or any other felony that by its nature involves a substantial risk that physical force against the person of another may result” or with certain specified charges. See *Commonwealth v. Dodge*, 42 Mass 860, 864 n.7 (1999). **G.L. c. 276, § 58B, ¶ 2**: “if the judicial officer finds that there are conditions of release that will assure that the person will not pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, the judicial officer shall treat the person in accordance with the provisions of this section and may amend the conditions of release accordingly.”

G.L. c. 276, § 87: “The superior court, any district court and any juvenile court may place on probation in the care of its probation officer any person before it charged with an offense or a crime for such time and upon such conditions as it deems proper, with the defendant’s consent, before trial and before a plea of guilty.” Conditions ordered pursuant to G.L. c. 276, §87 as a conditional disposition (“pre-trial probation”), anticipating dismissal of the criminal charges upon compliance with the conditions for a set period of time, are not considered pretrial conditions of release.

ⁱⁱ The preferred disposition under the bail statute (G.L. c. 276, § 58) is release on personal recognizance. *Commonwealth v. Dodge*, 428 Mass. 860, 865 (1999), citing *Mendonza v. Commonwealth*, 423 Mass. 771, 774 (1996). See *Commonwealth v. Perito*, 417 Mass. 674, 678 (1994); *Delaney v. Commonwealth*, 415 Mass. 490, 495 (1993) (“Our Legislature intended § 58 to protect the rights of the defendant by establishing a presumption that he or she will be admitted to bail on personal recognizance without surety and by delineating carefully the circumstances under which bail may be denied”).

ⁱⁱⁱ “The goals of probation ‘are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime.’ ” *Commonwealth v. Gomes*, 73 Mass. App. Ct. 857, 859 (2009), citing *Commonwealth v. Pike*, 428 Mass. 393, 403 (1998). Although a probationary condition is not necessarily invalid simply because it affects constitutional rights, the condition must be reasonably related to legitimate probationary goals in order to withstand constitutional scrutiny. *Id.*, citing *Commonwealth v. Lapointe*, 435 Mass. 455, 459 (2001); *Commonwealth v. Power*, 420 Mass. 410, 416-417 (1995), *cert. denied*, 516 U.S. 1042 (1996) (“As long as the condition meets the ‘reasonably related’ test, it is not per se unconstitutional even if it restricts a probationer’s fundamental rights”). “Ordering a defendant to submit to random drug or alcohol testing as a condition of probation, therefore, is not permissible unless it is reasonably related to one or more of the goals of probation: punishment, deterrence, retribution, protection of the public, or rehabilitation.” *Gomes*, 73 Mass. App. Ct. at 859. “This is a fact-intensive inquiry, dependent on the circumstances and characteristics of the particular defendant and his offenses.” *Id.*

^{iv} G.L. c. 276, § 87A dictates that “[t]he court shall assess upon every person placed on supervised probation, including all persons placed on probation for offenses under c. 90 § 24, a monthly probation supervision fee, hereinafter referred to as ‘probation fee’, in the amount of \$60 per month. Said person shall pay said probation fee once each month during such time as said person remains on supervised probation. Said person shall pay said probation fee once each month during such time as said person remains on supervised probation. The court shall assess upon every person placed on administrative supervised probation a monthly administrative probation supervision fee, hereinafter referred to as ‘administrative probation’, in the amount of \$45 per month. Said person shall pay said administrative probation fee once each month during such time as said person remains on administrative supervised probation.”

^v This guideline applies the probation clause of District & Municipal Courts Rules of Criminal Procedure 4(c) to the pretrial context. Dist./Mun. R. Crim. P. 4(c): “if the proposed dispositional terms involve any4

probationary terms or conditions, the parties shall consult with the probation department, so as to enable the probation department to be heard as may be required by the court at the time the court considers the tendered plea or admission.”

^{vi} Pursuant to G.L. c. 279, § 3, ¶ 3, “if a probation officer has probable cause to believe that a person placed under probation supervision or in the custody or care of a probation officer pursuant to sections 42A, 58A or 87 of chapter 276 or any other statute that allows the court to set conditions of release, has violated the conditions set by the court, the probation officer may arrest the probationer or may issue a warrant for the temporary custody of the probationer for a period not to exceed 72 hours or until the next sitting of the court, during which period the probation officer shall arrange for the appearance of the probationer before the court pursuant to [G.L. c. 279, § 3, ¶ 1].”

^{vii} G.L. c. 276, § 58, ¶ 6 provides in part that “[t]he hearing shall be held upon the person’s first appearance before the court before which the person is charged with committing an offense while on release pending adjudication of a prior charge, unless that person, or the attorney for the commonwealth, seeks and the court allows, a continuance because a witness or document is not immediately available.” Said person has the right to be represented by counsel at the hearing. If the court “finds probable cause to believe that the person committed a crime during said period of release, the court shall then determine, in the exercise of its discretion, whether the release of said person will seriously endanger any person or the community.”

^{viii} Pursuant to G.L. c. 276, § 58B, ¶ 2, if there is probable cause to believe that, while on release, the defendant committed a federal or state crime or clear and convincing evidence that the defendant violated any other condition of release, but “the judicial officer finds that there are conditions of release that will assure that the person will not pose a danger to the safety of any other person or the community, and that the person will abide by such conditions, the judicial officer shall treat the person in accordance with the provisions of this section and may amend the conditions of release accordingly.”

^{ix} Pursuant to G.L. c. 276, § 58, ¶ 9, “if any court, in its discretion, finds that changed circumstances or other factors not previously known or considered, make the order of bail or recognizance ineffective to reasonably assure the appearance of said defendant before the court, the court may make a further order of bail, either by increasing the amount of the recognizance or requiring sufficient surety or both, which order will not revoke the order of bail or recognizance previously in force and effect. The court may also review such changed circumstances or other factors not previously known or considered in accordance with [G.L. c. 276, § 58, ¶ 6].”