CHAPTER 41

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Probation Revocation

Written by Eva S. Nilsen

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§ 41.1 INTRODUCTION

After conviction,[1] a defendant may have all or part of her sentence suspended[2] and be placed on probation, subject to certain reasonable conditions, or may receive what is sometimes called straight probation.[3] Those convicted of certain crimes may be ineligible for probation.[4] A violation of any probationary term may lead the probation officer to "surrender" the defendant for a revocation proceeding,[5] at which a judge will

[1] The procedures discussed in this chapter generally refer to convicted defendants. However, G.L. c. 276, § 87 permits the court to grant probation to unconvicted defendants. *See* Commonwealth v. Taylor, 428 Mass. 623 (1999) (pre-trial probation must be more than simply a continuance for the ultimate purpose of dismissal). This is similar to pretrial diversion in that if a person violates a condition of pretrial probation, probation may be revoked and the case set for trial, so long as no trial rights have been waived. G.L.c. 278, s.18 permits the court to place a defendant on probation after the disposition of continuance without a finding. See discussion in Commmonwealth. v. Rotonda, Third, 434 Mass. 211 (2001).

[2] *See* G.L. C. 279, § 1 ("Suspension of execution; payment of fine, etc., revocation of suspension; exceptions"); and G.L. c. 279, § 1A ("Suspension of execution of sentence; probation; revocation of suspension, etc."). See infra 41 2B3 for probation after a continuance without a finding disposition.

[3] Conditions must be reasonable and bear a relationship to the probationer's needs or the crime for which he was convicted. *See* Commonwealth v Rotonda, *supra*. holding that court cannot give unrelated financial condition. The court also reminds litigants of the longstanding public policy objection to a defendant paying money to a victim when the sum is not directly related to the offense or harms incurred by the defendant. Standard conditions of probation stated in the probation contract are (1) obedience to the law, (2) regular reporting to the assigned probation officer, (3) notification of address changes, and (4) permission from the probation officer to leave the Commonwealth of Massachusetts. *See* Super. Ct. R. 56 and standard probation forms. The court may impose special conditions on the probationer which will be added to the contract. Examples of these are restitution payments, drug, alcohol, or psychiatric counseling, continued employment, and "stay away" orders. But conditions of probation must be drawn carefully so as not to tread on a defendant's right to freely associate. Commonwealth v. Pike, 428 Mass. 393 (1998) (invalidating probation condition that banished defendant from the state during length of his suspended sentence). *See also* Commonwealth v. Cotter, 415 Mass. 183 (1993) (upholding imposition of previously suspended sentence on defendant's refusal to abide by probationary condition that defendant refrain from participating in any unlawful activities of Operation Rescue; strongly worded dissent suggests that trial court punished defendant for his beliefs and for "refusing to promise not to violate" law).

[4] G.L. c. 276, §§ 87, 87A. Defendants convicted under G.L. c. 265, § 22A (rape of a child), § 24B (assault of child with intent to commit rape), and G.L. c. 272, § 35A (unnatural acts with a child) are eligible only if they have not been previously convicted under these sections while over the age of 18. Note that G.L. c. 279, § lA, precludes a suspended sentence "for a person convicted of a crime punishable by imprisonment for life or of a crime an element of which is being armed with a dangerous weapon, or for any person convicted of any other felony if it shall appear that he has been previously convicted of any felony." There are other criminal statutes that specifically preclude probation such as G.L. c. 90, § 24D (second offense driving under the influence).

[5] See District Court Rules for Probation Violation Proceedings, 2000 (hereafter "Probation Rules."). Probation Rule 3 requires probation officers to initiate proceedings when a probationer has been arrested on a new offense. See Probation Rule 3b and commentary. Probation Rule 4 covers situations where a probationer has failed to comply with other court-ordered conditions. There appears to be some discretion toward handling violations where no new criminal conduct is charged.

decide whether a violation has occurred and if so whether probation should be revoked and the sentence served. (This is also called a "VTP hearing" — violation of the terms of probation.) If the court revokes the probation, the defendant is subject to incarceration on the original sentence.[6]

A defendant may alternatively be placed on probation without a suspended sentence ("straight probation").[7] Upon revocation, the defendant may be given the maximum sentence that could have been given at the time of conviction.[8]

This chapter first examines the procedural steps involved in the probation revocation process and then suggests steps that may be taken to avoid surrender or, if necessary, prepare for and defend against a violation proceeding.

§ 41.2 PROCEDURAL STEPS

The process for hearing probation violations is governed by a welter of court decisions, procedural rules, standing orders, and historical practices that vary from court to court. The practitioner must therefore determine the exact timing of events and specific procedures in a given court. Most importantly, the District Court Rules for Probation Violation Proceedings (2000), which are referenced throughout this chapter, both changed and clarified the procedure for addressing allegations of a probation violation. An example of this is found in the Commentary to Rule 1, which notes that the fact that the rules are entitled "Rules for Probation Violation Proceedings" and not "Rules for Probation Revocation Proceedings" reflects an important distinction involving the "essential difference between adjudication and disposition." As described more fully below, most of the due process requirements that have evolved for probation violation hearings relate to the process for determining whether a violation of probation has occurred. In contrast, the issue of whether probation *should* be revoked focuses directly on the nature of the violation, along with other factors. The issue of violation, according to the Commentary, is "essentially a factual matter whereas the dispositional decision of whether to revoke probation is essentially one of discretion." In an attempt to clarify this distinction and to reform probation practices, the rules require a two-step judicial procedure.

While the Probation Rules are captioned "District Court" rules, it appears that they are applicable to all probation violation hearings unless there is a specific Superior Court rule to the contrary, *see e.g*. Superior Court Rules 56 and 57.

§ 41.2A. SURRENDER [8.5]

[6] G.L. c. 279, § 3. "When taken before the court, it may, if he has not been sentenced, sentence him or make any lawful disposition of the case, and if he has been sentenced, it may continue or revoke the suspension of the execution of his sentence. If such suspension is revoked, the sentence shall be in full force and effect." As will be repeated throughout this chapter, the judge may revoke probation and sentence the offender to serve his sentence, but the judge may also choose to give the offender another chance at rehabilitation. This course of action is the national trend due to a variety of factors such as shifts in punishment philosophy and economic considerations. See e.g. Changing Direction: State Sentencing Reforms, 2004-2006, Ryan King, The Sentencing Project, March, 2007.

[7] G.L. c. 276, § 87.

[8] G.L. c. 279, § 3.

If the probation officer has reason to believe that a probationer has violated a condition of probation, she may issue an arrest warrant, arrest the probationer without a warrant, or send a summons or written notification to the probationer requesting her to appear in court.[9] If the violation consists of a new arrest in the court where the defendant is a probationer, the defendant will receive a notice of surrender at the arraignment on the new charges.[10] In District Court, the issuance of such a notice is mandatory in the event of new criminal charges.[10.3] If a criminal complaint has been issued against a defendant who is the subject of a probation order issued by a different court, the Probation rules mandate that the Probation Department in the court that issued the criminal complaint shall issue a Notice Of Probation Violation and Hearing at or before arraignment on the criminal charge.[10.5] The new charges may be the sole basis for the surrender or one of a series of violations that could include failure to keep appointments or to observe other conditions in the probation agreement. The clerk or probation officer will tender the above notice stating the alleged violations, the hearing date, and the defendant's rights at that hearing. The probationer is entitled to at least seven days' notice of the hearing, but this may be waived.[11] If the probation officer wants the defendant to be held until the hearing, she may either request that bail be set or that the judge hold the probationer without bail. See Commonwealth v. Puleio, 433 Mass. 39 (2000) and B.M.C. standing order 2-04.

Surrender may occur following completion of the probation term in some circumstances.[12] Moreover revocation may be based on conduct that occurred after sentencing but before the probationary term commenced.[13]

[8.5] Surrender is defined in Probation Rule 2 as "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."

[9] Probation Rule 3 requires a probation officer to commence violation proceedings against a defendant against whom a new complaint issues. See also G.L. c. 279, § 3 that "[n]otwithstanding any restriction contained in the preceding paragraph, stating that "…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 as the result of being convicted of a crime punishable by incarceration, has violated the conditions of his probation, 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, during which period the probation officer shall arrange for the appearance of the probationer before the court at the court's next sitting pursuant to the first paragraph of this section. Such warrant shall constitute sufficient authority to a probation officer and to the superintendent, jailer, or any other person in charge of any jail, house of correction, lockup, or place of detention to whom it is exhibited, to hold in temporary custody the probationer detained pursuant thereto."

[10] In District Court, if the probation order and the new charge involve the same court, the probation violation hearing is to be scheduled for the date of the pretrial hearing or sooner, but no less than seven days and no later than thirty days after service of notice over objection of the probationer. Probation Rule 3. If the arrestee is on probation in another court, the probation department is expected to notify that court of the new arrest. G.L. c. 276, § 85.

[10.3] Probation Rule 3.

[10.5] Probation Rule 3(c).

[11] Probation Rule 3.

[12] Massachusetts courts have held that violation proceedings initiated after the expiration of that term for an alleged violation during the probationary term did not abridge due process as long as the delay was reasonable and not prejudicial to the probationer. Commonwealth v. Sawicki, 369 Mass. 377 (1975); Commonwealth v. Ward, 15 Mass. App. Ct.

§ 41.2B. THE REVOCATION HEARING

In 1973 the U.S. Supreme Court held that certain procedures were necessary to protect a probationer facing the loss of liberty entailed by probation revocation.[14] The Court distinguished the revocation hearing from a criminal trial, holding that only some of the standard due process protections were necessary. At a minimum, the Court said, probationers were entitled to notice of the alleged violations and both a preliminary hearing and a two-stage final hearing at which a neutral magistrate would determine whether or not to revoke probation. In the first stage, the magistrate decides whether probable cause exists to believe there has been a violation. In the second stage, the magistrate again considers, under a higher standard, whether there has been a violation and, if so, whether revocation is warranted. Massachusetts courts have adopted this process but have interpreted *Morrissey*'s preliminary hearing requirement to be applicable only if the probationer is held in custody as a result of the alleged probation violation.[14.5] For instance, a preliminary hearing need not be held (1) if the probationer is detained on a new charge for reasons other than his probationary status[15] or (2) if the probationer is released on bail or personal recognizance after in-court notification of his final revocation hearing. The sole issues to be determined at a preliminary hearing are whether probable cause exists to believe that the probationer has violated a condition of probation and, if so, whether the probationer should be held in custody.[15.3]

388, 393 (1983) (defendant entitled to a hearing to determine whether probation officer acted with reasonable promptness in his post-term surrender). In Commonwealth. v. Sheridan, 51 Mass.App.Ct.74 (2001) the court found no prejudice or impact on liberty when probation commenced 5 years after expiration of state prison sentence where defendant serving commitment at treatment center for sex crimes during the 5 year span. *Cf.* Commonwealth v. Mitchell, 46 Mass. App. Ct. 921 (1999) (order extending probation vacated where lapse was two and one-half years).

[13] Commonwealth v. Phillips, 40 Mass. App. Ct. 801 (1996).

[14] Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (no relevant difference in due process required for probationers and parolees); Morrissey v. Brewer, 408 U.S. 471, 488 (1972). *See* Commonwealth v. Durling, 407 Mass. 108 (1990), for application of these cases to Massachusetts practice.

[14.5] Probation Rule 8.

[15] See Fay v. Commonwealth, 379 Mass. 498, 504 (1980) ("The purpose of the preliminary hearing is to protect the rights of the parolee or probationer who, being at liberty, is taken into custody for alleged violation of his parole or probation conditions, and detained pending a final revocation hearing"). There the defendant was not entitled to a preliminary hearing where the revocation was based on a finding of guilt on new charges. *See also* Commonwealth v. Odoardi, 397 Mass. 28, 33 (1986) (probationer serving sentence of incarceration not entitled to preliminary revocation hearing).

The issue is whether the probationer is being deprived of liberty because of the alleged probation violation before there has been a final determination. If so, he is entitled to a preliminary hearing; if not, he need only have the final hearing. This appears to be a reasonable interpretation of *Morrissey* because its discussion of the two-stage hearing assumes the parolee is being held pending the final revocation decision. Morrissey v. Brewer, 408 U.S. 471, 485–88 (1972). Counsel seeking more time to prepare for the final hearing or further discovery of the case against the probationer may request a preliminary bearing. Unless the client is detained, the court is not obliged to grant the hearing.

[15.3] Probation Rule 8 (a).

1. Preliminary Revocation Hearing

As noted above, the procedures for the preliminary revocation hearing are found in Probation Rule 8. These Rules distinguish the factual question (whether a violation has occurred) from the discretionary determination (what should flow from such a finding). The probationer's rights at the preliminary hearing are as follows:

1. Written notice of the factual allegations comprising the violation(s);[16]
2. Right to counsel and appointed counsel if necessary;[17]
3. Appearance before a judge or clerk magistrate;[18]
4. Recorded proceedings;
5. Witnesses under oath;
6. A limited right to confrontation;
7. The right to present evidence;
8. A written statement of the finding and the reasons; and
9. *Bail:* At the preliminary hearing, the court decides whether probable cause exists to believe the probationer has violated the terms of his probation. If "probable cause" is found that a condition of probation was violated, District Court Rule 8(e) empowers the court to order custody and precludes the possibility of "any terms of release such as bail."[18.7] This Rule limits judicial discretion to fashion intermediate action short of full custody: a probationer must either be incarcerated or released unconditionally. The S.J.C. has upheld this provision and also held that there is no right to bail review under these circumstances.[18.9] At the preliminary hearing, the court decides whether probable cause exists to believe the probationer has violated the terms

[16] Probation Rule 8. The notice provision is designed to afford the probationer reasonable time for consultation with counsel and preparation for the hearing. *See* Commonwealth v. Faulkner, 418 Mass. 352 (1994).

[17] *See* Probation Rule 8(c). In *Commonwealth v. Faulkner, supra*, the defendant, who was on probation, was arraigned on new charges. A probation officer asserted that the defendant was in violation of the terms of probation, that a probation violation notice had been sent to him some months earlier, and that he had failed to appear on the date of the scheduled hearing. The court ordered an immediate revocation hearing. Defense counsel requested a continuance because she had just received notice of it and had no time to prepare. The judge heard the matter, found the defendant in violation, revoked probation, and imposed sentences that had been previously suspended. The S.J.C. reversed the order of revocation, holding that there is a right to counsel at a probation surrender hearing, as it is "a point in the process of sentencing" (at 359–60). The Court also specifically rejected the Commonwealth's argument that by failing to appear for the earlier scheduled hearing, the defendant waived his right to counsel at the subsequent hearing (at 360 n.9). Furthermore, the mere presence of counsel "who could know almost nothing about the cases and who had no reasonable opportunity to prepare them" was not the assistance of counsel to which the defendant was entitled, and so the judge erred in denying counsel's request for a continuance (at 364–65). *But see* Commonwealth v. Woods, 427 Mass. 169 (1998), where the court stated in dicta that a post conviction probationary evaluation is not a criminal proceeding, entitling a defendant to protection under either the Sixth Amendment or art. 12.

[18] In District Court, a judge must conduct such proceedings in open court, on the record, under oath. Probation Rule 5(a).

[18.7] Probation Rule 8(e).

[18.9] Commonwealth v. Puleio, 433 Mass. 39 (2000).

of his probation. The parties are not bound by the rules of evidence.[19] Although hearsay is admissible, it must be reliable.[20] The evidentiary standard in District Court is "relevant and appropriate."[20.1] The probationer's statements to the police or a probation officer are admissible,[21] even in some circumstances where the *Miranda* rule was violated.[22] Also, in District Court, the District Attorney may "assist in the presentation of evidence."[22.1]

2. Final Revocation Hearing

The court decides in the final revocation hearing whether the probationer deserves to remain on probation.[23] The final hearing was envisaged by the Supreme Court as a somewhat more formal proceeding because it is at this stage that the ultimate decision whether to revoke probation is made.[24] In the District Court system, the final hearing is explicitly bifurcated into a factual and a discretionary component: asking respectively, was there a violation? and, if so, what are the dispositional

[19] Morrissey v. Brewer, 408 U.S. 471, 489, ("the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not he admissible in an adversary criminal trial").

[20] See discussion of what constitutes reliable hearsay in Commonwealth v. Durling, 407 Mass. 108 (1990).

[20.1] ProbationRule 8(c).

[21] *See* Brown, Petitioner, 395 Mass. 1006 (1985); Commonwealth v. Brown, 23 Mass. App. Ct. 612 (1987).

[22] In Commonwealth v. Vincente, 405 Mass. 278 (1989), the court allowed defendant's probation to be revoked based on statements excludable from his trial on *Miranda* grounds. The court said the exclusionary rule's purpose of deterring unlawful police conduct would be unaffected by allowing such statements to be introduced at probation revocation hearings. It reasoned that a police officer's interest is primarily in convicting a defendant, not in revoking his probation, and to exclude such evidence from the revocation hearing would have only marginal deterrent effect on police misconduct. *Vincente, supra,* 405 Mass. at 280. If a probationer offered evidence that a police officer knew him and knew his status as a probationer, an issue of police overreaching could he raised and a different result is possible. *Vincente, supra,* 405 Mass. at 281 n.3. *See also* Commonwealth v. Olsen, 405 Mass. 491 (1989) (exclusionary rule does not apply where police officer did not know of probationary status). For a related case see Minnesota v. Murphy, 465 U.S. 420 (1984), where a probationer's statements to his probation officer about previous unrelated criminal conduct were not protected by *Miranda* and his confession was therefore admissible in a new trial. The court said the obligation to appear before the probation officer and answer questions truthfully was not compulsory in the *Miranda* sense. In *United States v. Gravina,* 906 F. Supp. 50 (D. Mass. 1995), the court held that the exclusionary rule does not apply to bar admission of unlawfully seized evidence in a hearing to revoke a convicted defendant's supervised release. *See also* Pennsylvania Board of Probation and Parole v. Scott, 118 S. Ct. 2014 (1998) (federal exclusionary rule does not bar introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights.)

[22.1] Probation Rule 8(c).

[23] Under Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Morrissey v. Brewer, 408 U.S. 471 (1972), the final revocation hearing must "lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *Morrissey, supra,* at 408 U.S. 488

[24] Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973).

consequences?[24.5] The procedural requirements are similar to those of the preliminary hearing except that (1) the standard of proof is preponderance of the evidence,[25] (2) the probationer is entitled to disclosure of the evidence against him prior to the hearing, and (3) the right to confrontation is more expansive.[26] The defendant has the right to be physically present.[26.1] Hearsay is admissible but the Rules provide that where the sole evidence to prove a violation is hearsay, that evidence is sufficient only if the court finds in writing (1) that such evidence is substantially trustworthy and demonstrably reliable and (2) if the alleged violation is charged or uncharged criminal behavior, that the probation officer has good cause for proceeding without a witness with personal knowledge of the evidence presented.[26.5]

[24.5] ProbationRule 5(b).

[25] Probation Rules 4(c) and 7(c) (setting the preponderance standard and requiring the court to make written findings of fact, stating the evidence relied upon in finding a violation); Commonwealth v. Holmgren, 421 Mass. 224, 226 (1995); There is a strong argument for a higher standard of proof at revocation hearings, particularly when the alleged violation consists of new criminal charges. The ABA STANDARDS: SENTENCING ALTERNATIVES AND PROCEDURES, Standard 18-7.5 (e)(iii), affords the probationer the right to proof of the violation by clear and convincing evidence. The Commentary to that Standard takes the position that "a liberty interest should not be sacrificed simply on the 'preponderance' standard, which is normally applicable only to civil trials. Otherwise, an unfortunate incentive might arise to use the revocation hearing as a substitute for a criminal prosecution with its higher standard of proof." The risk of such overreaching in weak cases has not escaped notice in the S.J.C.; *see* Commonwealth v. Vincente, 405 Mass. 278, 280, 281 (1989); Commonwealth v. Olsen, 405 Mass. 491, 494 (1989). Additionally, as *Morrissey* noted, revocation of a probationer's conditional liberty constitutes a grievous loss and should not be undertaken without the more rigorous fact finding that is necessitated by a higher standard of proof. *Morrissey, supra*, 408 U.S. at 482. *But see* United States v. Czajak, 909 F.2d 20 (1990) (no constitutional requirement that charge forming basis for revocation need be proved beyond a reasonable doubt).

[26] This can be inferred from *Morrissey*, wherein the court accords more protections for the final hearing than for the preliminary hearing because it is at this stage that probationer's liberty is determined, Morrissey v. Brewer, 408 U.S. 471, 487, 498 (1972). *Morrissey* also notes that this confrontation right can be denied for good cause, such as the need to protect the identity or safety of the witness. Counsel should be alert to the concerns expressed by the Massachusetts courts about the reliance on hearsay evidence. Brown, Petitioner, 395 Mass. 1006, 1007 (1985); Commonwealth v. Brown, 23 Mass. App. Ct. 612 (1987).

In Commonwealth v. Maggio, 414 Mass. 193, 194 (1993), evidence at the revocation hearing failed to meet the standards established by *Gagnon.* The defendant was indicted on new charges while on probation. The only evidence at his revocation hearing was the allegation in an indictment, unsupported by any facts. The court said the hearing was deficient because, based on the record of the hearing, the defendant did not have actual notice of the evidence against him and, therefore, he was unable to adequately prepare his defense. Furthermore, this deficiency made it impossible for the judge to make an independent finding that the defendant had violated the terms of his probation. The court noted the absence of grand jury minutes, detailed police reports, and testimonial evidence. *See also* Commonwealth v. Michaels, 39 Mass. App. Ct. 646 (1996) (issuance of restraining order and revocation of probation by another court held insufficient to justify revocation).

[26.1]Commonwealth v. Harrison, 429 Mass. 866 (1999) (revocation of probation vacated where defendant was serving federal sentence and federal authorities refused to bring him to probation revocation hearing)..

[26.5] Probation Rule 6. *See* Commonwealth v. Durling, 407 Mass. 108 (1990) where the court upheld a revocation based exclusively on hearsay. In doing so the court stressed the

Violation based on new criminal conduct: If a new conviction forms the basis for the surrender, proof of that conviction is sufficient evidence for the court. If a new criminal charge constitutes the alleged violation of probation, the Rules dictate that the revocation hearing be set on the date of the pretrial hearing on the new charge. The Rules prohibit postponing the proceeding until the resolution of the new charge.[27]

Although evidence of a criminal conviction is very damaging, mitigating factors may be present and should be introduced by the defendant. In *Morrissey* the Supreme Court emphasized the complexity of a court's role at this stage to not merely make a factual determination that violations exist but to make the predictive and discretionary decisions about steps short of incarceration that may be taken to protect society and strengthen the probationer's chances of rehabilitation.[28]

If the court finds a violation of probation it may (1) extend the term of probation, (2) modify the conditions of probation, (3) continue the client under the same probation agreement, or (4) impose the original sentence.[29] However minor the violation, reducing the length of the (formerly) suspended sentence since *Holmgren* is

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importance of a reliability determination. Here probationer was charged with two distinct crimes in different jurisdictions. The evidence relied on consisted of two very detailed police reports, narrating strikingly similar conduct by police officers from different jurisdictions. Counsel facing the admission of hearsay at a revocation hearing should insist that unless Durling's high standard for reliability is met, such evidence may not be the sole basis for revocation. *See also* Commonwealth v. Wilson, 47 Mass. App. Ct. 924 (1999) (police report insufficient without other indicia of reliability); Commonwealth v. Podoprigora, 48 Mass. App. Ct. 136(1999) (police officer's recitation of conversation with child insufficient); Commonwealth v. Joubert, 38 Mass. App. Ct. 943 (1995); Commonwealth v. Delaney, 36 Mass. App. Ct. 930 (1994). *But see* Commonwealth v. Cates, 57 Mass.App.Ct. 759 (further refining restrictions on hearsay by citing the standard articulated in Rule 6, requiring both trustworthiness and good cause for proceeding without a witness; and finding the child rape victim's post-incident recording trustworthy and its admission justified to avoid further trauma to the child).

[27] Probation Rule 4(e).

[28] Morrissey v. Brewer, 408 U.S. 471, 480 (1972). *See also* Commissioner of Probation Standards for Supervision (Jan. 1989) noting that "the purpose of probation supervision is the promotion of law-abiding behavior by the offender in the community." Counsel may be able to argue that the dictates of *Morrissey* and this statement support stricter supervision and/or new conditions of supervision more closely tailored to the probationer's needs.

[29] See discussion of court's options in Probation Rule 7. Regarding the imposition of the original sentence, see Commonwealth v. Holmgren, 421 Mass. 224 (1995) (a judge who revokes a suspended sentence has no discretion to impose anything but the original sentence, if the time within which the sentence may be revised and revoked under Dist.Ct. Rule 29 has expired. Commonwealth v. Chirillo, 53 Mass. App. Ct. 75 (2001) (extension of probation that resulted in probationer's incarceration for a violation that occurred after the original period of probation should have expired was improper; "fair play and finality" require that once probation is revoked the court must impose the original suspended sentence.) When a defendant has been sentenced to straight probation, on revocation he may be given any sentence allowed by law. Commonwealth v. Sawicki, 369 Mass. 377 (1975). *Accord* Probation Rule 7(f)and G.L. c. 279, § 1A (stating that a probationer "may also be committed for the term of imprisonment fixed in the original sentence.") The judge who revokes probation may sentence the defendant to terms concurrent with sentences he is then serving; and if the defendant filed a motion to revise and revoke within the 60-day deadline, he may ask that the case be returned to the sentencing judge for disposition..

not an option.[30] In response to this withdrawal of judicial discretion, some judges have sentenced a defendant convicted on multiple charges to a range of sentences, thereby allowing a subsequent judge to choose the count on which to find the defendant in violation based on the disposition he should receive. However, on the larger issue of whether to revoke probation at all and impose a sentence of incarceration, the judge retains discretion, and an appeal lies only if there has been an abuse of discretion or an error of law. A judge who presided at the preliminary hearing may not preside at the final hearing unless the probationer consents.[31] However, for most probationers the final hearing will be the only revocation hearing.

3. Revocation of CWOF

A single justice of the Supreme Judicial Court has clarified the procedures required for the revocation of probation imposed pursuant to a Continuance Without a Finding (CWOF). In *Commonwealth v. Rivera*,[32] a judge of the Boston Municipal Court (BMC) had revoked probation following an exceedingly summary proceeding.[33] A single justice found the process defective and held that "it is appropriate to analyze the revocation of a continuance without a finding the same as this court does a revocation of probation." This view has been codified in the Probation Rules.[34] If, pursuant to the continuance without a finding, the defendant agreed to conditions that if violated would result in a specific alternative sentence, then upon revocation the judge must impose that sentence.[35]

§ 41.2C. ADDITIONAL PRACTICE POINTS

The Probation Rules reflect case law and statutory requirements. However, they tilt strongly toward uniformity and expediency and away from judicial discretion and flexibility. Most significantly, they eliminate the defendant's putting off a probation revocation hearing until the resolution of the new criminal matter. One implication of this is the incarceration of a person who is ultimately acquitted.[36]The fast timetable for a probation hearing may preclude adequate investigation, discovery, and preparation which increases the pressure on attorneys to seek more time from the court.

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[30] Commonwealth v. Holmgren, 421 Mass. 224 (1995). Rule 30 may be used to appeal the imposition of a sentence after revocation of probation. A defendant may not use Rule 30(a) to challenge the revocation order itself.

[31] Commissioner of Probation Surrender and Revocation Standards, Standard V(C) (May 1981).

[32] S.J. 96-0578 (11/29/96 (O'Connor, Associate J.) (unreported opinion)

[33] The defendant was immediately sentenced, following his arrest on new charges, pursuant to the *Duquette* alternative sentence which had been imposed as part of a prior CWOF. His attorney had informed the judge that her client did not speak English, was mentally impaired, and was unable to explain what had occurred in connection with his prior case. The judge gave defense counsel 15 minutes, then allowed a police officer to testify from a police report of a new arrest quoting statements of a victim to the effect that she had been beaten by the probationer.

[34] Probation Rule 9.

[35] Com. v. Duquette, 386 Mass. 834 (1982).

The rules also involve prosecutors in probation matters, restrict various types of dispositions, and attempt to codify the rules for admission of hearsay by adopting a strict interpretation of *Commonwealth v. Durling*.[37]

Points worth repeating:

1. The Probation Rules apply only to alleged violations of probation orders following either a finding of guilty or a continuance without a finding. They do not apply to an alleged violation of pretrial probation. *See* Probation Rule 1.

2. The commentary to Probation Rule 1 states that the rules seek to distinguish clearly the factual question of whether probation has been violated from the discretionary question of whether it should be revoked. See Rule 5(b). Although judges of course have often made such a practical distinction in the past, it is especially important due to the sentencing restrictions imposed by *Commonwealth v. Holmgren.*[38] As noted above, these are distinct parts of the hearing and counsel should wait for a decision by the court on whether or not the alleged violation has been proved before addressing the desired disposition.

3. The Rules require the probation department to commence violation proceedings against a probationer against whom a new criminal complaint issues, and to issue notice to the defendant at or before arraignment on the criminal charge. A copy of the notice is to be provided to the district attorney forthwith. *See* Probation Rule 3.

4. If the probation order and the new criminal charge involve the same court, the probation violation hearing is to be scheduled for the date of the pretrial hearing on the new criminal charge, or sooner if the court so orders (but no less than seven days and no later than thirty days after service of notice over the objection of the probationer). If the courts differ, then the probationer will be ordered to appear at the court that issued the probation order at a specific date and time for appointment of counsel and at a probation violation hearing to be held no less than seven days and no later than thirty days after service of notice over the objection of the probationer. *See* Probation Rule 3.

5. If new charges are dismissed at arraignment, then it is within the discretion of the probation department whether or not to proceed with a hearing. See Probation Rule 3.

6. For violations other than charged criminal conduct, the decision whether to proceed is generally made by the probation officer, although "a judge may order commencement of violation proceedings." As above, hearings are to be scheduled no less than seven days and no later than thirty days after service of notice over the objection of the probationer.

7. Continuances are strictly regulated, and according to Rule 5(e)must be "to a date certain and for a specific purpose." This does not mean, of course, that a continuance for another legitimate purpose, such as the need to investigate or prepare for a case, is prohibited,as described *infra* at ch. 27.

8. The participation of the district attorney is permitted "regardless of whether the criminal case in which the probation order issued involved a felony charge." *See* Probation Rule 5(f). This provision raises questions about the scope of the authority of

[37] 407 Mass. 108 (1990).Probation Rule 6.

[38] 421 Mass. 224 (1995) (a judge who revokes a suspended sentence has no discretion to impose a sentence other than the original suspended sentence, if the time within which the sentence may be revised and revoked has expired).

the probation department and the limits of separation of powers mandated by article 30 of the Massachusetts Declaration of Rights.[39]

9. Hearsay is admissible at violation hearings, but if it is the sole evidence of a violation it will not be sufficient unless the court finds in writing that it is "substantially trustworthy and demonstrably reliable." If the alleged violation is charged or uncharged criminal conduct the Court must find that the probation officer has good cause for proceeding without a witness with personal knowledge of the evidence presented. *See* Probation Rule 6.[40]

10. Statutory privileges and "legally required disqualifications" are to be enforced. *See* Probation Rule 5(c).

11. If the court finds by a preponderance of the evidence that the probation officer has proved a violation, or if a violation is admitted, the court shall make written findings of fact, stating the evidence relied on. *See* Probation Rule 7(c) .

12. After making written findings, the court may continue, terminate, modify, or revoke probation. If the court orders revocation it must state the reasons in writing. *See* Probation Rule 7(d). If revocation is ordered and there was a previously imposed suspended sentence, it shall be imposed forthwith,[41] and may be stayed only pending appeal or for "a brief period of time for the probationer to attend to personal matters prior to commencement of the sentence of incarceration." The rule mandates that, "the execution of such sentence shall not be otherwise stayed." *See* Probation Rule 7(e). If no sentence was imposed following conviction (i.e. the defendant received a disposition of straight probation), the court, on revocation of probation, "shall impose a sentence as provided by law." *See* Probation Rule 7(f). The commentary states that the new sentence could still be probation, perhaps with new conditions.

13. One of the most controversial provisions of the Probation Rules involves the possible detention of probationers pending a full hearing. A "preliminary violation hearing" is to be held when the probation department seeks to hold a probationer in custody pending the conduct of a full hearing. Rule 8(d). If probable cause is found that a condition of probation was violated, the rule empowers the court to order custody and precludes the possibility of "any terms of release such as bail." *See* Probation Rule 8(d). The rule limits judicial discretion to fashion intermediate action short of full custody. Thus, under the rule, a probationer must either be incarcerated or released unconditionally. The due process and other concerns with such a rule[42] have been noted by many commentators but the system has been upheld by the S.J.C.[43]

14. The rules apply similarly to violations of conditions of a continuance without a finding. *See* Probation Rule 9.

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[39] *See* Commonwealth v. Milton, 427 Mass. 18 (1998) (analyzing the permissible limits of participation by the district attorney in probation surrender hearings).

[40] Commonwealth v. Durling, 407 Mass. 108, 118 (1990) ("We caution, however, that when hearsay is offered as the only evidence of the alleged violation, the indicia of reliability must be substantial . . ."). See Com. v. Cates, 57Mass.App.Ct. 759 (2003) (finding both good cause and reliability in tape recorded report of the victim.). Com. v. Ortiz, 58 Mass.App.Ct. 904 (2003), (finding that admission of hearsay can be a violation of confrontation rights).

[41] Presumably, under Commonwealth v. Holmgren, 421 Mass. 224 (1995), a timely motion to revise and revoke could still be considered in this context.

[42] *See generally* Aime v. Commonwealth, 414 Mass. 667 (1993) (due process of law prohibits arbitrary and standardless decisions that result in the deprivation of the fundamental right to liberty). *See supra* ch. 8.

[43] Commonwealth v. Puleio, 433 Mass. 39 (2000).

§ 41.3 STRATEGIC CONSIDERATIONS

§ 41.3A. PREVENTIVE STEPS AT SENTENCING AND AFTER

Actions by counsel at the time of the original sentencing may prevent a revocation in the future and limit the client's exposure should a revocation occur:

1. Consider seeking a short suspended sentence rather than straight probation at the initial sentencing because the latter leaves the defendant exposed to the maximum sentence permitted under the statute should probation later be revoked.

2. Consider filing a motion to revise and revoke pursuant to Mass. R. Crim. P. 29 within sixty days of imposition of sentence in every case, with a request that it not be heard until supplemental materials are filed. This ensures a full opportunity to argue for the most appropriate sentence should revocation later occur. It may also allow the sentencing judge to reconsider unduly harsh or inappropriate conditions. The sixty-day jurisdictional deadline is strictly applied.[44]

3. Ensure that the terms and conditions on the probation agreement are those ordered by the court and that the defendant understands them. Counsel should stress to the client (and to close associates or family members present at the sentencing) the importance of adhering to these conditions and of maintaining a good relationship with the probation officer.

4. If it becomes difficult or impossible to meet a condition (such as adhering to a payment schedule), discuss this with the probation officer to arrange new terms. Probation officers usually are trained social workers who understand the personal and social difficulties faced by their clients. When a client fails to comply with a term of probation and makes no effort to explain this to the probation officer or seek modification of the terms or conditions, the probation officer acts in accordance with his other duties as an enforcement officer of the court and may issue a violator's warrant.[45]

§ 41.3B. TIMING OF THE HEARING

Generally the hearing is scheduled either on the date of the pretrial hearing on the new charges or within 7 to 30 days after notice according to Probation Rule 3.[46] Although the probationer is entitled to written notice of the surrender hearing, he may waive this notice and proceed to a hearing at his first appearance on the matter.[47]

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[44] *See supra* § 44.3.

[45] *See* Gagnon v. Scarpelli, 411 U.S. 778, 783–85 (1973), for a discussion of this dual role. If a modification of the conditions of probation is necessary or desirable, counsel may be able to arrange with the probation officer to do this informally, or in the case of more substantial modifications, to have the case brought before the court. *See* Commonwealth v. Christian, 46 Mass. App. Ct. 477 (1999) *overruled in part* 429 Mass. 1022 (1999).

[46] Massachusetts has not adopted the recommendation of the ABA Standards that revocation proceedings based on subsequent criminal conduct not be held until after the disposition of the new charges. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE SENTENCING ALTERNATIVES AND PROCEDURES, Standard 18-7.5(1)(1980).

[47] Commonwealth v. Odoardi, 397 Mass. 28, 31–32 (1986). If a probationer is incarcerated he is entitled to be brought into court for an early disposition of the revocation

Usually it is in the probationer's interest to wait until a later date so that counsel has an opportunity to prepare for the hearing.[48] It is permissible to hold the hearing after the term of probation has expired.[49]

Counsel must consider the effect of a probation revocation on the client's pending cases in other courts. It is generally advisable for counsel to contact the attorney in the other case, if there is another attorney, and try to coordinate strategies.[50]

§ 41.3C. INVESTIGATION AND DISCOVERY

Usually counsel will learn of an alleged probation violation at the client's arraignment on new charges.[51] The revocation hearing, which will be a final hearing if the defendant is not in custody based on the alleged violations, will often be set for the same day as the next court appearance on the new charges Thus counsel will prepare for both matters during the time allotted.

Counsel should immediately gather as much information as possible about the defendant's probation. This includes (1) the charges that led to the underlying conviction, (2) the defendant's actual role in that crime and the exact sentence, including the conditions of probation, (3) the name of the client's probation officer, (4) detailed information about compliance or lack of it, (5) the relationship between the

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matter. This may be to his advantage because if there is no defense to the violation, counsel can argue for the new sentence to run concurrently with the one he is serving..

[48] *See* Commonwealth v. Faulkner, 418 Mass.352 (1994) (noting a probationer's right to adequately prepared counsel). *Cf.* Commonwealth v. Joubert, 38 Mass. App. Ct. 943 (1995) (four days' notice held sufficient where counsel permitted to interview witnesses in the morning for an afternoon hearing).

[49] In Commonwealth v. Sawicki, 369 Mass. 377, 380 (1975), the court stated that "termination of probation, or rather of the court's power over the probationer, is not automatic when the stated period of probation has run even when no steps leading to revocation of probation have been previously taken.") *Cf.*, Commonwealth v. Mitchell, 46 Mass. App. Ct. 921 (1999)(order extending probation vacated where lapse was two and one-half years); Commonwealth v. Ward, 15 Mass. App. Ct. 388, 392 (1983) (Court only has the power to revoke if a probation officer has acted with reasonable promptness in bringing the defendant to Court). *But see* Commonwealth v. Collins, 31 Mass. App. Ct. 679 (1991) (neither a due process nor a double jeopardy violation to commence a revocation hearing more than five years after commission of the new offenses and nearly four years after probation would have expired where defendant was serving a sentence in a neighbor state).

[50] It is not a double-jeopardy violation for the Court to revoke a defendant's probation based on new convictions for which the defendant is serving a sentence. *See* Commonwealth v. Odoardi, 397 Mass. 28, 30 (1986).

[51] If the client has been notified by the probation department to appear in court on a probation violation and appears, this should be argued as evidence against likely flight in a subsequent bail hearing. Counsel may also wish to underscore helpful information about the charges and defendant's overall adjustment to probation as they may be relevant to the bail decision. The probation officer may not learn of the new arrest, either through oversight or because the new charges arise in another court. If this is the case counsel will want to discuss with the client her reporting the new arrest to the probation officer. How this is handled depends in part on the relationship between the client and the probation officer. If the client is convicted and sentenced to incarceration on the new offense, it may be in the client's interest to waive his rights to notice and a hearing on the probation case and seek to have the two sentences run concurrently.

client and the probation officer, (6) the prior record, (7) whether the client was represented by counsel in the underlying case,[52] and (8) whether there are other pending charges. This information is generally found in the court file and the probation file. If the alleged violations are technical ones, such as failure to keep a job or remain in a rehabilitative program, inquire whether the client was unable to perform the condition.

It is important that counsel get as much information as possible about the new charges before meeting with the probation officer. Sources of this information include police reports, the defendant's statements to the police about the new charges, discussions with the client, family members, and any witnesses known to counsel, and the varieties of other discovery and investigation detailed elsewhere in this volume.[53] If the client has other pending matters, these should be investigated to ascertain whether they have a bearing on the case.

Counsel should meet with the client's probation officer (and any other probation officer that has been involved in the case) well in advance of the hearing. It is important for counsel to review the client's probation file with the probation officer, specifically noting the client's record of compliance with any of the probation conditions and any letters, reports, or notations about the client. Since due process demands that the probationer be apprised of the evidence supporting the violation counsel should be able to get the probation officer's cooperation in reviewing the file.[54] The files may contain evidence that either supports a legal challenge to the alleged violations or that mitigates the violations by showing some compliance. Such evidence would support another attempt at rehabilitation by an extended probationary period or modifications in the conditions.

§ 41.3D. DISCUSSIONS WITH THE PROBATION OFFICER

If the interview with the probation officer occurs well in advance of the hearing, counsel may be able to provide the court with valuable input regarding the client's efforts to comply with probation and his personal situation. Probation officers are often willing to work with counsel to give the probationer an opportunity to demonstrate his good faith prior to the hearing. If the violations are technical or due to personality differences, misunderstandings, or logistics, these can be corrected and the probation officer might consider recommending that the client remain on probation.

If the client is not contesting the violation, counsel should present the probation officer with reasons that probation should not be revoked. For instance, if the client is a

[52] *See* discussion *infra* at § 41.3F(9).

[53] *See supra* chs. 11, 6.

[54] *See* Commonwealth v. Wilcox, 446 Mass. 61, 66 (2006) and Commonwealth v. Brown, 23 Mass. App. Ct. 612, 616 (1987) (allowance of such a motion within court's discretion). Arguably one is entitled to exculpatory evidence in the hands of the state under the due process principles articulated in Brady v. Maryland, 373 U.S. 83 (1963). There the Court required such disclosure where it was material to guilt or punishment. Morrissey v. Brewer, 408 U.S. 471 (1972), lends support to this argument in its mandate that evidence submitted at the revocation hearing be reliable and that the probationer must have an opportunity to confront the evidence against him, at 484. To test its reliability counsel needs to know of its existence in advance of the hearing. Further support for discovery may be found in the Public Records Act, G.L. c. 66. The entire record, or at least parts of the record, may be discoverable with the appropriate release signed by the client.

drug addict and the new crime is a larceny that can be linked to the drug problem, counsel may be able to emphasize the client's voluntary return to a drug program.[55] Client lapses in drug and alcohol programs are endemic, but continued participation in such programs is likely to be more rehabilitative than incarceration. At a minimum, counsel should discuss with the probation officer a sentencing plan that includes treatment. Counsel may want to include the district attorney handling the new case in any negotiations.

The court gives the probation officer's recommendation great weight because he or she is familiar with the case and trained to evaluate the client's progress toward rehabilitation.

§ 41.3E. EVIDENCE AT THE HEARING

In the usual case witnesses against the probationer may include the probation officer, an arresting officer on a new charge, or a victim on the new charge.[55.6] The district attorney may take an interest in the case and perform a portion of the witness examination..[56] Even if the probation officer is recommending that the probationer be allowed to continue on the original probation order or on an amended order, she will be sworn to testify regarding the violations. If hearsay statements are being offered instead

[55] Counsel should try to get the client back into a program before the hearing, particularly if his absence from the program is the basis of the surrender. It is usually helpful to have counselors from the program at the hearing or at least to present letters from them.

[55.6] Probation Rule 6; Commonwealth v. Durling, 407 Mass. 108 (1990). Both the rules and case law favor live witnesses at the hearing. If witness statements are the sole evidence relied on by the probation officer, *Durling* demands a high degree of reliability. There the evidence was deemed to be "self-corroborating" and therefore reliable because the reports were by two police officers from different departments concerning very similar and detailed allegations of operating under the influence occurring on two entirely separate occasions. This level of corroboration would be lacking in most cases. *See also* Commonwealth v. King, 71 Mass.App.Ct. 737, 740-42 (2008) reiterating good cause showing for absence of live testimony. If letters and calls from counselors form the basis of the violation, a hearsay problem may be present. *See* Brown, Petitioner, 395 Mass. 1006 (1985). Counsel should request written findings from the court to determine the evidence relied on, citing Probation Rule 6. It is unlikely that the exclusionary rule will successfully block the introduction of evidence at a surrender hearing, though the issue has not been definitively decided. *Cf.* United States. v. Gravina, 906 F. Supp. 50 (D. Mass. 1995) (district court may receive and consider such evidence.) *See also* Pennsylvania Board of Probation and Parole v. Scott, 118 S. Ct. 2014 (1998) (federal exclusionary rule does not bar introduction at parole revocation hearings of evidence seized in violation of parolees' Fourth Amendment rights).

[56] In Commonwealth v. Tate, 34 Mass. App. Ct. 446 (1993), the court rejected a challenge based on violation of the separation of powers where an assistant district attorney examined and cross-examined witnesses at the hearing. The court said this was assistance to and not usurpation of the judicial function by a member of the executive branch. *See also* Commonwealth v. Milton, 427 Mass. 18 (1998) (district attorney may provide legal representation to the probation department without interfering with internal functioning). Note that G.L. c. 279, § 3 was amended in 1996 to provided that "in all cases where the probationer is served with notice of surrender and at least one of the underlying crimes for which he is on probation is a felony, then the probation office shall provide a duplicate copy of the notice to surrender to the district attorney, and the court shall provide to the district attorney the opportunity to be heard and present evidence at the surrender hearing." St.1996, c. 151, § 498, approved June 30, 1996. *See also* District Court Rules discussed *supra* at § 41.2C.

of live witnesses, counsel must object if there is any question at all of their reliability.[57]This is particularly important if hearsay is the sole evidence being offered. However, the approach counsel adopts in cross-examination depends on the probation officer's position regarding revocation and her views on the client's likely rehabilitation. If the probation officer has not committed herself to a position prior to the hearing, counsel's job throughout the hearing is both to defend the client and to persuade both the court and the probation officer that continued probation is the best path to rehabilitation. Counsel should consider calling witnesses on behalf of the probationer. Desirable witnesses may include counselors, employers, doctors, clergy, and family members. These witnesses may be able to provide evidence to rebut the alleged violations in part one of the hearing or to mitigate the importance of the violations as it relates to probationer's overall efforts at rehabilitation in the disposition phase.[58] Because of the relative informality of revocation hearings the issues may become blurred at the hearing. If counsel is contesting the violation it is important to keep separate the issue of mitigation. This is particularly important since *Holmgren* has removed any doubt about the duty of the court to impose the entire sentence once probation is revoked.

Counsel may submit a memorandum similar to the memorandum in aid of disposition normally offered at sentencing, including salient factors regarding the client's social history, treatment plan, and efforts at compliance. Letters from counselors and other involved parties can be attached and counsel can outline recommendations for disposition to the court.[59]

In some cases it may be desirable for the probationer to testify at the hearing. For instance, it may be that the client's own testimony about changed personal circumstances will be most persuasive in mitigation of charges that he failed to meet his restitution schedule or that he abandoned alcohol treatment. In some cases it may be necessary for the probationer to rebut statements attributed to him that form the basis of the allegations, such as statements allegedly told to a witness concerning criminal

[57] *See* Commonwealth v. Wilson, 47 Mass. App. Ct. 924 (1999) (police report insufficient without other indicia of reliability); Commonwealth v. Podoprigora, 48 Mass. App. Ct. 136 (1999) (police officer's recitation of conversation with child insufficient); Commonwealth v. Joubert, 38 Mass. App. Ct. 943 (1995) (revocation order reversed where based in part on hearsay where there was no finding of substantial reliability); Commonwealth v. Delaney, 36 Mass. App. Ct. 930 (1994) (revocation order based on hearsay statements of child reversed). *But see* Commonwealth v. Calvo, 41 Mass. App. Ct. 903, 904 (1996) (upholding probation revocation despite admission of signed statement of mother-in-law who did not testify and was not shown to be unavailable; the Court found "substantial indicia of reliability" because the mother-in-law was a percipient witness and signed under the penalties of perjury); Commonwealth v. Mejias, 44 Mass. App. Ct. 948 (1998) (affirming probation revocation based in part on hearsay).

[58] If the evidence consists of drug and alcohol tests, the probationer may wish to submit his own test results.

[59] In Commonwealth v. Marvin, 417 Mass. 291 (1994), the judge at a surrender hearing barred final argument by counsel. The S.J.C. "decline[d] to impose a universal due process requirement that a defendant in a probation revocation hearing has an absolute right to make a closing argument." The Court said the defendant should have argued that the judge erred by not making written findings of fact and not setting forth his reasons for the revocation. (Former Chief Justice Liacos dissented vigorously, arguing that the judge's refusal to hear argument was a denial of due process.)

activities. However, it may be inadvisable for a probationer to testify where such testimony could be harmful in a future trial..[60]

§ 41.3F. POTENTIAL DEFENSES

The bases for revocation usually fall into three categories:
- New criminal charges;[61]
- Failure to report; and
- Failure to comply with special conditions, such as treatment, court costs, restitution, counseling, or stay away orders.

Counsel must decide first whether there are any legal or factual challenges to the allegations (and also whether such challenges may run into waiver, harmless error, or mootness problems[62]). Second, counsel must be prepared to argue that even if there has been a violation, revocation does not best serve the interests of the client or society. Among the issues that may be raised in particular cases are:

1. Defective Notice of Surrender

Under state and federal law, a probationer is entitled to timely notice of whether the hearing is to be a preliminary or final hearing and the specific allegations that form the basis of the surrender.[63]

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[60] Probationers are advised prior to revocation hearings that they have a right to remain silent and will not be prejudiced by the assertion of this right. *See* Notice of Surrender and Hearings for Alleged Violation of Probation (form given to probationer). Of course there may be circumstances when a probationer's failure to testify will result in revocation because, for example, he has not presented is thereby unable to present rebuttal evidence to new criminal charges. As noted above, Massachusetts has rejected proposals endorsed by the American Bar Association to require postponement of the revocation hearing until after trial on the new charges. See Probation Rule 3, One commentator suggests adoption of a "postponement or use immunity" rule which has been accepted by most of the jurisdictions that have considered this dilemma, *see* Note, *Due Process in Probation Revocation v. Self Incrimination: A Comparative Perspective for the Massachusetts Probationer*, 17 J. CRIM. CIV. CONFINEMENT 181 (1991).

[61] *See* Commonwealth v. Smith, 38 Mass. App. Ct. 324 (1995) (offense that occurs after the end of probationary period cannot form the basis for surrender).

[62] The Appeals Court has stated that probationers' due process rights are subject to both waiver and harmless error analysis. Commonwealth v. Morse, 50 Mass. App. Ct. 582 (2000). A probationer who seeks to appeal a revocation decision will also likely face arguments of mootness, if he has served his term by the time his appeal is heard. See Blake v. Massachusetts Parole Bd., 369 Mass. 701 (1976) (influence of denial of early parole on future criminal proceedings found to be insignificant, but distinguishing parole and probation revocations.) In Commonwealth v. Streeter, 50 Mass. App. Ct. 128 (2000), the Court allowed such an appeal, however, noting that pursuant to Mass. R.Crim.P.28(D), 378 Mass. 898 (1979), a sentencing judge shall be informed of all prior criminal dispositions of a defendant. For general coverage of the subject of Appeals see chapter 45, infra.

[63] *See* Commonwealth v. Odoardi, 397 Mass. 28, 32 n.3 (1986) (upholding the adequacy of the notice but noting a deficiency wherein defendant was not told whether the hearing was to be a preliminary or final one. Counsel did not object to the final hearing on one week's notice, and the court found no prejudice to the defendant in the record);; *See also* Commonwealth v. Faulkner, 418 Mass. 352 (1994); Commonwealth v. Streeter, 50 Mass. App.

2. Defective Probationary Terms

Probation violations must be based solely on terms set by the judge; agreements between the probationer and his probation officer are not enforceable.[64] Counsel should compare the clerk's docket entries from the original sentencing with the probation contract. If the conditions allegedly violated were added ex parte by the probation officer, they should be challenged.

Moreover, neither a probation officer nor an intervening judge may add special conditions, such as an order to seek counseling, to the original probation contract.[65] To seek a material change in the probation order the case must be brought back to the original sentencing judge.

3. Unreasonable Conditions or Inability to Comply

If time has proved the original conditions unreasonable or onerous to the probationer, counsel should raise this at the hearing as this may be a powerful equitable argument against revocation.[66] Additionally, neither a court nor a probation department may impose conditions of probation that unreasonably impinge on fundamental constitutional rights.[67]

Ct. 128 (2000) (revocation violated due process where none of three separate notices stated basis upon which defendant's probation was revoked).

[64] Commonwealth v. Lally, 55 Mass.App.601,603 (2002) (no violation where probation officer varied the terms set by the judge). Commonwealth v. MacDonald, 435 Mass. 1005 (2001) ("the enforceability of probation is derived not from the agreement of the defendant, but from the force of the judge's order").

[65] Buckley v. Quincy Div. of Dist. Court, 395 Mass. 815 (1985) (supervisory court has no power to modify terms of probation set by a judge where no material change in the probationer's circumstances). However Rule 7(d)(iii) considers a probation revocation hearing to be a material change that permits the judge to modify the terms of probation.

[66] *See* United States v. Williams, 787 F.2d 1182, 1185–86 (7th Cir. 1986), on the necessity of reasonableness. *See also supra* note 3. It may be worth noting to the court in this regard that appeals of probation revocation only lie if there is an abuse of discretion or an error of law. The revocation hearing provides the only forum for raising the issue of the reasonableness of the conditions, and what may have seemed reasonable at the time of sentencing may prove otherwise. Because the court at all times maintains oversight power Commonwealth v. Sawicki, 369 Mass. 377, 381 (1975), a change in conditions may be an appropriate way to encourage the probationer's rehabilitation. Of course, a probationer retains the right to file for an alteration of the sentence under Mass. R. Crim. P. 29 but she must do this within 60 days of the sentence.

In Commonwealth v. Tate, 34 Mass. App. Ct. 446 (1993), the court rejected the defendant's claim that his post release contact with the victim was accidental. The conduct forming the basis of the revocation was several public encounters with the victim a short distance from his residence. Here the defendant spoke to the victim several times, but the defendant's mere presence on the same street would not have been enough. Counsel at sentencing should tailor conditions to those that can be met by a client who may live or work near the victim. At a subsequent revocation hearing, counsel should be prepared to ask for modification of conditions that appear impossible to meet for reasons unforeseen at sentencing.

[67] *See, e.g.,* Commonwealth v. Pike, 428 Mass. 393 (1998) (invalidating probation condition that banished defendant from the state during length of his suspended sentence);

4. Restitution Payments

There are at least four approaches for the defense. *First,* counsel may be able to challenge a restitution order on grounds that it was not set by the court. Special conditions of probation must be court-ordered to be lawful. *Second,* if there was a court order but no agreement as to the amount of money to be paid or the payment schedule, the client is entitled to a hearing to determine both the amount of the restitution and the payment schedule.[68] *Third,* the amount of restitution must conform to the victim's actual loss, and the probationer's ability to pay must be taken into account.[69] *Fourth,* counsel may be able to argue that the failure to pay was not willful but rather a result of the client's recent unemployment, medical problems or other extenuating circumstances.[70] It is necessary to have documentation of such claims at the hearing. Allegations of the client's failure to comply with other conditions, such as failure to remain in a drug treatment program, can be approached in a similar manner.

5. Acquittal on the New Charge

Probation may have been revoked based on a new charge that later results in an acquittal.[71] If an acquittal occurs before or after revocation, a strong argument against

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Commonwealth v. LaFrance, 402 Mass. 789 (1988) (unreasonable to order probationer to "consent" to be searched at any time or place with neither justification nor warrant)

[68] A defendant sentenced to restitution is entitled to a hearing to determine an appropriate amount. Commonwealth v. Nawn, 394 Mass. 1, 6–9 (1985). At the hearing probationer is given an opportunity to rebut the amount of restitution sought by the victim. The Commonwealth has the burden of proving by a preponderance of the evidence the amount of the victim's losses, and the defendant is entitled to counsel, cross-examination, and consideration by the court of his ability to pay. *Nawn* emphasizes the difference between this hearing and a civil trial for damages. "The amount of restitution is not merely the measure of the value of the goods and money stolen from the victim by the defendant; . . . the judge must also decide the amount that defendant is able to pay and how such payment is to be made . . . (taking into consideration) the defendant's employment history and financial prospects." *Nawn, supra,* 394 Mass. at 7–8. But see Com. v. Yeshulas, 51 MassAppCt 486 (2001) where trial judge ordered restitution at sentencing. Court on appeal said lack of separate hearing was not fundamentally unfair so long as probation considered probationer's resources when determining payment schedule…)

[69] Commonwealth v. Nawn, *supra* at 7–8. Under G.L. C. 276, § 87A, supervised probationers are assessed a "probation day fee" or one to three days' pay per month of supervision. The law excuses nonpayment if the cost poses an undue hardship on a probationer.

[70] There are limits on the court's ability to revoke probation based on the defendant's failure to pay a fine or make restitution. In Bearden v. Georgia, 461 U.S. 660 (1983), the U.S. Supreme Court held that the defendant's probation could not be revoked for nonpayment of a fine and restitution without a preliminary showing that the defendant had the means to make such payments. *See also* G.L. c. 279, § lA, where in the event of nonpayment of a fine the probation officer must make a finding that the "person is unwilling or unable to pay it" before the court takes action on the matter. *Cf.* G.L. c. 279, §§ 1, 7, which authorize incarceration for nonpayment of fines in some circumstances.

[71] *See, e.g.* Rubera v. Commonwealth, 371 Mass. 177 (1976) (permissible to revoke probation based on bench trial conviction even though a de novo appeal was pending).

revocation may be made, since an acquittal raises doubts about the sufficiency of any evidence against the probationer. However this is not the position taken by the Rules.[72]

Moreover, in cases where the evidence offered at the revocation hearing is the same as that offered in a trial that resulted in an acquittal, counsel should argue against its admissibility based on principles of collateral estoppel and basic fairness. However, as noted previously, evidence taken in violation of *Miranda* or the Fourth Amendment may be admissible at the revocation hearing. Such evidence would likely be found to justify a revocation. Conversely neither collateral estoppel nor double jeopardy bars criminal prosecution of a defendant for offenses following a finding in his favor at a probation revocation hearing triggered by the alleged commission of the same offenses.[73]

6. Mitigation of the charges

Counsel must be prepared to cross-examine not only on whether the allegations are true but also on whether there are mitigating factors.[74] For example, if the allegations consist of a failure to report to a probation officer or to participate in a program or job, counsel should be prepared to present documentation and witnesses not only where evidence to the contrary exists but also where there is evidence that mitigates the lapse in compliance.

7. Alternatives to Revocation

In the typical case, counsel's advocacy will consist in large part of persuading the probation officer (prior to the hearing) and the court (during the hearing) that even if there is a finding that the defendant has violated the conditions of his probation, he should be allowed to remain on probation. This plea for a second chance, and in some cases a third chance, will be successful only if counsel is fully prepared on the relevant legal and factual issues. For instance, if the probationary period is nearly over, counsel may request an extended period of probation with stricter conditions than were set previously. Such conditions could include more intensive supervision, such as daily or

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[72] See Probation Rule 5 and commentary, citing Commonwealth v. Holmgren, 421 Mass.2274 (1995) *But see* In re: A.W., 353 A.2d 686, 695 n.22 (1976), which states:

> When probation is revoked solely on the basis of the commission of a new offense, and the probationer is subsequently acquitted of that offense after a trial, the Court might well consider, upon application by the probationer, whether to set aside its order of revocation. Although the standard of proof at the trial of a criminal charge is greater than at the revocation hearing, "it would be unseemly for the probation court to conclude counter to the result of a criminal trial, that an offense has occurred and that it could provide the basis for revocation." ABA. Project on Standards for Criminal Justice, Standards Relating to Probation, s. 5.3 Commentary at 64 (Approved Draft, 1970).

See also Commonwealth v. Royster, 524 Pa. 333, 572 A.2d 683 (1990) (probation revocation based solely on subsequently reversed criminal conviction was invalid)

[73] Krochta v. Commonwealth, 429 Mass. 711 (1999).

[74] Commonwealth v. Odoardi, 397 Mass. 28, 34 (1986) (trial court did not unduly limit defendant's cross-examination rights since it is permissible to limit "irrelevant" and "redundant" questions so long as defendant is allowed to "present evidence in mitigation of his probation violations").

weekly contact with the probation officer; proof of attendance at alcohol or drug programs; drug testing; a psychiatric examination with a further hearing to determine appropriate counseling; an intensive job search or proof of employment; and so on.[75]

If incarceration is indicated counsel should be creative in providing options for the court, such as a split sentence or weekend incarceration to enable the probationer to continue working. If the client has complied to some degree with the conditions, ask the court to credit these in deciding an appropriate sentence. Because the goal of probation is rehabilitation of the offender, the following arguments should be considered:

a. The new offense is not as serious or the same type of crime as the earlier offense;

b. The probationer's partial compliance of his probationary conditions offsets his violations;

c. The probationer's problems are long standing and it will take time to rehabilitate him; if the problem stems from substance abuse, counsel might note that relapse is endemic to drug addiction, and that addicts often need numerous chances and/or individualized treatment plans before recovery efforts bear fruit.

d. The probationer's violations are not dangerous, so continued probation will not endanger the community.

8. Defective Waiver of Appeal at Imposition of Sentence

Normally the defendant signs a waiver form that would remain in the court file as evidence of a valid waiver. An oral waiver in response to the court's colloquy is sufficient to meet the constitutional requirement. Where the defendant relinquished his right to a trial by accepting a sentence, the trial court was required to conduct a colloquy to ensure that the defendant waived his rights knowingly and voluntarily. [76]

9. Defendant Not Represented by Counsel in Underlying Conviction

If the defendant was not represented by counsel in the case forming the basis for the surrender hearing, there is strong constitutional authority against revocation and incarceration.[77] Judges are authorized to deny appointed counsel to indigents if they announce incarceration will not result, and in such a circumstance ultimate incarceration after a probation revocation should be barred.[78] But even if counsel was

[75] Most commentators argue in favor of probation over incarceration even when violation is proven. *See e.g.* JUDITH GREENE,DOWNSCALING PRISONS: LESSONS FROM FOUR STATES (The Sentencing Project, March 2010); RYAN KING, CHANGING DIRECTION? STATE SENTENCING REFORMS, 2004-2006 (The Sentencing Project, March, 2007); Clear, Harris & Baird, *Probationer Violations and Officer Response*, 20 J. CRIM. JUST. 1 (1992), arguing that the relatively minor nature of most violations suggests that severe sanctions are usually inappropriate and costly to the system.

[76] See Commonwealth v. Hubbard, 457 Mass.24 (2010), citing G.L. c. 263, sec. 6 and Mass.R.Crim.P. 19(a).

[77] See e.g., Alabama v. Shelton, 122 S. Ct. 1764 (2002) (Sixth Amendment does not permit activation of a suspended sentence upon an indigent defendant for violation of terms of probation where the state did not provide counsel during the prosecution of the underlying offense.)

declined and a waiver form is in the file, review of the taped proceedings may be necessary to determine whether the waiver of counsel was knowing and voluntary.

[78] *See* 1991 amendment to G.L. c. 211D. In United States v. Reilley, 948 F.2d 648 (10th Cir. 1991), the Court cites other courts that have relied on this principle. Massachusetts courts have found that use of uncounseled convictions for any purpose in SDP hearings violates due process. Commonwealth v. Proctor, 403 Mass. 146, 147–49 (1988). Both the U.S. Constitution (Fifth and Sixth Amendments) and the Mass. Declaration of Rights (arts. 11 and 12) provide ample grounds for a challenge to the use of uncounseled convictions.