CHAPTER 7

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Arraignment and Related Issues

Written by Eric Blumenson (1st edition)
and David Rossman (this revision) [*]

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§ 7.1 ARRAIGNMENT GENERALLY

Massachusetts Rule of Criminal Procedure 7 governs the arraignment process.[1] In the district courts and the Boston Municipal Court, arraignments are controlled by Dist./Mun. Cts. R. Crim. P. 3.[2]

A defendant appears at the arraignment via one of two routes, summons or arrest. A summons requires a defendant to appear on a date certain and trusts the defendant to show. A defendant who has been arrested and released prior to being taken to court is treated as if he was summonsed and is also ordered to appear at arraignment on a date certain.[3] Alternatively, the defendant may be arrested and must then be immediately arraigned in the district court if then in session, or otherwise brought to the next session.[4] In a 1993 ruling particularly affecting weekend arrestees, the Supreme Judicial Court held that "a warrantless arrest must be followed by a judicial

[1] In 2012, an amendment to Rule 7 of the MA R. Crim. Pro. eliminated the initial appearance as a step prior to the arraignment.

[2] These rules apply in criminal actions commenced in the District Court or the BMC on or after January 1, 1996 and in certain cases commenced prior to that date.

[3] As detailed *infra* in chapter 9, the defendant has an opportunity to be bailed out at the station house prior to arraignment.

[4] Mass. R. Crim. P. 7(a)(1); G.L. c. 276, § 58; Standards of Judicial Practice, *The Complaint Procedure*, Standard 2.00 (District Court Administrative Office, Sept. 2008) (an accused person who has been arrested without a warrant must be brought before the court "forthwith" if the court is then in session, or if it is not in session, then at the next session.); Commonwealth v. Hodgkins, 401 Mass. 871 (1988) (several-hour delay would be unreasonable had police contrived it or defendant not consented); Commonwealth v. Cote, 386 Mass. 354 (1982). Prior case law required that the defendant be brought before a court as soon as possible following arrest. Commonwealth v. DuBois, 353 Mass. 223 (1967); Keefe v. Hart, 213 Mass. 476 (1913); Tubbs v. Tukey, 57 Mass. (3 Cush.) 438 (1849) (arresting officer must bring arrestee to court as soon as reasonably possible). Arraignment the morning after a late afternoon arrest was found reasonable in United States v. Connell, 213 F. Supp. 741, 743 (D. Mass. 1963); Commonwealth v. Daniels, 366 Mass. 601, 610 (1975); *Dubois, supra. See also* Commonwealth v. Banuchi, 335 Mass. 649, 656 (1957) (two-and-one-half-day delay not unreasonable).

At least one of a juvenile's parents and the probation officer must be notified when a juvenile is arrested. Mass. R. Crim. P. 7(a)(1); G.L. c. 119, § 67.

determination of probable cause no later than reasonably necessary," defined as within twenty-four hours.[5] These rules might lead to suppression of a statement taken during the unlawful period.[6]

[5] Jenkins v. Chief Justice of the District Court Dep't, 416 Mass. 221 (1993). Earlier the U.S. Supreme Court had required a judicial determination of probable cause be made within 48 hours of arrest. Riverside County v. McLaughlin, 500 U.S. 44 (1991). *See* further discussion *supra* § 2.1B(4). The related issue of whether a defendant's postarrest, prearraignment statements are admissible if the police deliberately delay arraignment was considered in Commonwealth v. Rosario, 422 Mass. 48 (1996). The S.J.C. held that statements elicited after the police had deliberately delayed the defendant's arraignment for interrogation purposes would not be suppressed as violative of Mass. R. Crim. P. 7(a)(1). The Court adopted a presumptively permissible "6-hour rule," which allows the admission of statements made during police questioning for a six-hour period following a defendant's arrest, whether or not court is in session, provided the statements are otherwise admissible. The Court also held that an informed and voluntary waiver of prompt arraignment would excuse delay in arraigning an arrestee. Absent such a waiver, statements taken after the six-hour period will be barred from admission into evidence. However, if the arrestee is "incapacitated because of a self-induced disability," such as intoxication, the six-hour period will begin "when the disability terminates."

It should be noted that the defendant in *Rosario* did not base his argument on the denial of his constitutional right to counsel. Moreover, the Court made clear that, apart from the intentional delay itself, there appeared to have been "no arguably official misconduct." In dissent, Justice Liacos disagreed with two aspects of the Court's opinion. First, Justice Liacos stated that the practice of allowing a waiver of prompt presentment (a term that Justice Liacos stated is more accurate for an initial appearance than "arraignment") will "undoubtedly eviscerate the six-hour rule announced by the Court." Indeed, Justice Liacos argued that any waiver is antithetical to the notion of safe harbor. He further disagreed with the majority's reasoning as to remedy, arguing that because the police deliberately violated Rule 7, the motion judge's suppression order should have been affirmed. Justice O'Connor concurred in the Court's decision but agreed with Justice Liacos on the question of waiver after the six-hour period has run.

In Commonwealth v. Ortiz, 422 Mass. 64 (1996), decided the same day as *Rosario,* the Court held that the "safe harbor rule" of *Rosario* will also apply to an arrested but unarraigned defendant's statements that concern matters relevant to a crime for which a complaint was already pending. *See also* Commonwealth v. Fryar, 414 Mass. 732 (1993). For an example of how *Rosario* may be used to justify otherwise disfavored forms of interrogation, *see* Commonwealth v. Hunter, 426 Mass. 715 (1998). *See also* Commonwealth v. Jean, 76 Mass.App.Ct. 1115 (2010).

In Commonwealth v Beland, 436 Mass. 273, 283 (2002), the Court rejected *Rosario's* six-hour safe harbor in favor of examining the reasonableness of any delay between arrest and arraignment in light of the circumstances,

Massachusets requires that a magistrate determine whether probable cause exists to authorize each offense charged, and any person arrested without a warrant is entitled to an ex parte *Jenkins* hearing before being held in custody for more than 24 hours. If no probable cause is found, the arrested person must be released, but if probable cause is found for further detention, the magistrate may hold the arrested person for the next court session. Standards of Judicial Practice, *The Complaint Procedure*, Standard 2:02 (District Court Administrative Office, Sept. 2008). *See also*, Mass. R. Crim. P. 3(g).

After 2004, Mass. R. Crim. P.3(g) also requires that a magistrate make a probable cause finding for persons arrested without a warrant. See Standards of Judicial Practice, *The Complaint Procedure*, Standard 2:02 (District Court Administrative Office, Sept. 2008).

[6] See Commonwealth v. Judd, 25 Mass. App. Ct. 921 (1987); Commonwealth v. Cote, 386 Mass. 354 (1982); Commonwealth v. Banuchi, 335 Mass. 649, 656–57 (1957) (no

Prior to arraignment, the defendant will be interviewed by a probation officer who gathers information bearing on indigency, bail, outstanding warrants, and the defendant's true identity and age.[7] At the arraignment, business conducted may include: (1) appointment of counsel; (2) entry of counsel's appearance; (3) bail determination; (4) motions or orders for pretrial examination of competency, drug dependency, or pretrial diversion; (5) reading of the complaint or indictment and the taking of a plea; and, (6) the setting of a continuance date It is now quite common for a defendant to be served with a notice of a probation revocation hearing at the arraignment on a new charge.[8] Also, there have been increasing reports of defendants being arrested by INS agents for deportation due to former convictions at arraignment for (or even dismissal of) new charges.[9]

Additionally, as caseloads and incarceration conditions have become unmanageable, some courts have used the arraignment to dismiss minor cases [10] on payment of court costs, which can be an appealing prospect to a defendant who would otherwise have to pay additional attorney fees and assessments, risk conviction and sentence, and miss additional work. If a defendant in district court is bound over, she will be arraigned a second time in the superior court.

Arraignments frequently take less than a minute to complete and counsel may feel pressured not to "gum up the works." However, arraignment is a "critical stage" to which the right of counsel applies,[11] and counsel should ensure that the record is clear, necessary consultation time is taken,[12] and necessary issues are raised. Although the arraignment is tape recorded in district court, in special circumstances the defendant may wish a stenographer present.[13] Additionally, prior to arraignment counsel should be fully familiar with the laws and court practices governing (1) prevention of

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suppression because delay did not cause statement); Fikes v. Alabama, 352 U.S. 191, *rehearing denied,* 352 U.S. 1019 (1957) (one-week delay rendered confession inadmissible). *Cf.* Commonwealth v. Cunningham, 405 Mass. 646, 655–656, & n.2 (1989) (raising and avoiding the question of suppression for illegal detention due to improper bail procedure under G.L. c. 276, § 57); Commonwealth v. Hilton, 450 Mass. 173 (2007).

[7] Standards of Judicial Practice: Arraignment, Standard 2:01 (District Court Administrative Office, Aug. 1977); S.J.C. Rule 3:10, § (4); Mass. R. Crim. P. 7(a)(1).

[8] *See* Dist./Mun. Cts. R. Crim. P. 3(b). *See also infra* ch. 41. Commentary by the District Court Administrative Office also notes that it is "appropriate to check the arrestee's probation record for outstanding defaults or other pending matters" before release. Standards of Judicial Practice, *The Complaint Procedure*, Standard 2:04 (District Court Administrative Office, Sept. 2008).

[9] *See infra* ch. 42.

[10] *E.g.,* trespass, disorderly, minor motor vehicle, shoplift, traffic and similar cases. Generally, this may not be done over the objection of the Commonwealth. *See infra* § 7.8.

[11] Boyd v. Dutton, 405 U.S. 1 (1972); Hamilton v. Alabama, 368 U.S. 52 (1961). *See also* Commonwealth v. White, 362 Mass. 193 (1972).

[12] Lack of time to confer violates the right to counsel at arraignment (*see supra* note 12). *See also* Geders v. United States, 425 U.S. 80, 88–91 (1976) (17-hour sequestration that prevented lawyer-consultation time violated Sixth Amendment).

[13] G.L. c. 221, § 91B gives the defendant a right to record the arraignment stenographically but at his own expense. In misdemeanor trials, counsel's request for a stenographer is presumed to be a good faith representation of necessity and therefore sufficient (Blazo v. Superior Court, 366 Mass. 141 (1974)), but to obtain a court appointed stenographer at arraignment an indigent would probably have to persuade the court of a particular need. *See also* G.L. c. 261, § 27A–G (fees and costs for indigents); and *infra* ch. 29.

government identification witnesses from observing the defendant at arraignment,[14] (2) bail, and (3) competence to stand trial.[15]

§ 7.2 SUMMONS FOR ARRAIGNMENT/WAIVER OF ARRAIGNMENT

§ 7.2A. SUMMONS PREFERRED

If a defendant is not in custody, Mass. R. Crim. P. 6(a) favors a summons as sufficient to obtain the presence of the defendant.[16] Except in the case of a juvenile under age twelve, however, the Rule permits the prosecutor to obtain a warrant on his representation that the defendant may not appear unless arrested.[17] The Reporter's Notes suggest that reliance will often be placed on the nature of the crime charged as an indicator of which process should be used.[18]

The defendant who receives a summons is advised to report to the court on a specified day. It is on this date that the defendant's speedy trial rights under Rule 36(b)(1) attach.[19] A defendant who is summoned should have little trouble retaining his release status (though this can never be guaranteed).

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[14] For example, it is not uncommon for witnesses to meet police the day after the crime at the courthouse and to be interviewed by the prosecutor. If identification could be an issue, counsel might ask the judge to order that any witnesses leave the courtroom prior to arraignment, or that the defendant be permitted to remain out of view, or in a high-profile case that news photographers be barred from photographing the defendant. The burden is on defense counsel to take steps necessary to avoid a suggestive courtroom identification, and failure to do so constitutes a waiver. Commonwealth v. Napolitano, 378 Mass. 599, 604 & n.8 (1979). *See also* Moore v. Illinois, 434 U.S. 220, 229–30 (1977), and discussion *infra* §§ 18.1, 18.2.

[15] *See* CPCS Performance Guidelines 2.1. Competence is addressed *infra* at ch. 10.

[16] The reasons for the change are to place minimal restraints on the accused during the pretrial stage, reduce the costs on the judicial system stemming from unnecessary court appearances, and conserve the resources of police officers. Reporter's Notes, Mass. R. Crim. P. 6(a). *See also* Standards of Judicial Practice, *The Complaint Procedure*, Standard 3:25 (District Court Administrative Office, Sept. 2008) (a summons is preferable to a warrant unless there is reason to believe the accused will not appear).

[17] Thus, although Rule 6 adopts the philosophy of the Bail Reform Act (G.L. c. 276, § 58) in its presumption in favor of pretrial release, it differs from that act in that the Commonwealth's representation without underlying facts seems to be enough to obtain custody. The Reporter's Notes to Rule 6 point out that at this early stage, the court will be far more ignorant concerning the defendant and should not be forced by lack of knowledge to tolerate the flight of a defendant whom it would later be able to demonstrate met the criteria for pretrial custody.

[18] Reporter's Notes, Mass. R. Crim. P. 6(a).

[19] Federal constitutional speedy trial rights may attach earlier than the return day. *See* United States v. Marion, 404 U.S. 307, 320 (1971) ("it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment"); Commonwealth v. Horan, 360 Mass. 739 (1972). Moreover, prejudicial precharge delay may violate due process. *See* full discussion *infra* § 23.1.

§ 7.2B. FAILURE TO APPEAR AT ARRAIGNMENT

If the defendant fails to appear for arraignment, the court may default the defendant and assess costs against him.[20] Mass. R. Crim. P. 6(a)(2) provides that the court may either resummon him or issue a warrant.

Although unlikely to occur at arraignment, Rule 6(d)(2) also permits preservation of testimony in the absence of a defaulting defendant in extraordinary circumstances, a constitutionally problematic procedure.[21]

§ 7.3 APPOINTMENT OF COUNSEL

The rights and procedures relating to the appointment of counsel are detailed *infra* in Chapter 8. In brief, the right to counsel extends to all criminal or juvenile cases where incarceration may result,[22] although it may be waived in writing.[23] If the defendant falls within the statutory definitions of either indigency or marginal indigency, counsel must be appointed.[24]

Prior to arraignment, the defendant will be *interviewed by a probation officer,* in part to determine indigency status. The probation officer submits a report to the judge, who may also interrogate the defendant as to financial ability to retain counsel. Obviously, these interrogations must include no discussion of the merits of the case itself, which are irrelevant,[25] and information elicited cannot generally be used at trial.[26]

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[20] Mass. R. Crim. P. 6(d). The defendant's failure to appear must have been willful and the costs allowed must be actual expenses incurred. Mass. R. Crim. P. 6(d). *See also* Reporter's Notes, Mass. R. Crim. P. 10(b). Although it is extremely unlikely that the Commonwealth will not be ready for the formality of an arraignment, it should be noted that Rule 10(b) permits assessment of costs against the Commonwealth in this situation.

[21] This issue is discussed *infra* at § 28.1B.

[22] Argersinger v. Hamlin, 407 U.S. 25 (1972); In re Gault, 387 U.S. 1 (1967) (juvenile); Marsden v. Commonwealth, 352 Mass. 564 (1967) (juvenile).

[23] *See* discussion *infra* at § 8.2.

[24] *See infra* § 8.3A for indigency criteria.

[25] Mass. R. Crim. P. 7(a)(1) requires the probation department to "make a report to the court of the pertinent information reasonably necessary to determination of the issues of bail and indigency." S.J.C. Rule 3:10, § 8 prescribes a form containing the questions relevant to indigency. Standards of Judicial Practice: Arraignment, Standard 2:01 (District Court Administrative Office, Aug. 1977), and accompanying commentary require questioning only on relevant matters and stress the use of prescribed forms. Yet, an indigent person who has not been arrested has no right to counsel at public expense at show cause hearings. *See* Commentary to Standards of Judicial Practice, *The Complaint Procedure*, Standard 3:17 (District Court Administrative Office, Sept. 2008).

[26] S.J.C. Rule 3:10, § 9. The prohibition excludes prosecutions for perjury or contempt committed while providing the information. Statements to probation officers outside the arraignment interview context may be used. Minnesota v. Murphy, 465 U.S. 420 (1984); Fare v. Michael C., 442 U.S. 707 (1979). *But see* Commonwealth v. Bandy, 38 Mass. App. Ct. 329 (1995) (defendant's admission to a probation officer in court, while filling out his indigency report, held not to have been taken in violation of his Sixth Amendment right to counsel).

The court must comply with statutory *indigency criteria,* and a court rejecting a defendant's indigency claim must make written findings.[27] If the court finds the defendant indigent or "indigent but able to contribute," it will assign counsel as detailed *infra* in chapter 8. Appointment of a clinical student requires the written authorization of the client.[28]

On occasion, counsel may not ethically accept a client. The most frequent instance will be appointment to represent codefendants, which raises a likely *conflict of interest* in conflicting trial defenses or sentencing arguments. The best course is to request that the court appoint another lawyer to represent the codefendant because of the likelihood of a conflict of interest.[29] Other instances include cases in which the lawyer's judgment may be affected by financial, business, property, or personal interests, or where the lawyer should know he is likely to be a witness.[30] Also, new Rule 6.2 of the Massachusetts Rules of Professional Conduct permits a lawyer to "seek to avoid appointment" if, among other reasons, "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."

§ 7.4 ENTRY OF APPEARANCE

Counsel may enter her appearance in person or by mailing the clerk an appearance slip with her name, address, and telephone number, with a copy to the prosecutor.[31] If counsel is appearing for an organization, such as a corporation or partnership, as the defendant, then the appearance must be accompanied by proof of the attorney's authorization to represent the organization.[32] In general, an appearance will lock counsel into representation through trial and appeal,[33] unless withdrawal is

[27] *See infra* § 8.3A.

[28] The court may appoint a senior law student to represent an indigent defendant under supervision and without compensation in district court pursuant to S.J.C. Rule 3:03. The client must agree to the student representation by signing an authorization form that is then signed by the supervising attorney. An entry of appearance, signed by the student and by his supervisor, must also be prepared. Order Implementing S.J.C. Rule 3:03 (June 26, 1980), ¶ 2.

[29] Comment 7 to Mass. R. Prof. C. 1.7 states that ordinarily a lawyer should decline representation of codefendants. *See also* Mass. R. Prof. C. 3.8 (prosecutor has specific obligation to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence). *See also* Standards of Judicial Practice: Arraignment, Standard 5:03 and Commentary (District Court Administrative Office, Aug. 1977) (court should respect legitimate claim that codefendants' interests will conflict or at least promote appearance of divided loyalty). *See also* Mass. R. Prof. C. 1.7, 1.8, and 1.9, which govern conflicts of interest. *See* further discussion *infra* at § 8.6.

[30] Mass. R. Prof. C. 3.7; *see also* former S.J.C. Rule 3:07, DR 5-101. Mass. R. Prof. C. 3.7(a) which governs when a lawyer advocate may appear as a witness, applies to the lawyer who is of counsel.

[31] Mass. R. Crim. P. 7 (c). Special requirements apply to clinical students: The appearance requires a supervisor's signature and must be accompanied by client authorization. S.J.C. Rule 3:03; Order Implementing S.J.C. Rule 3:03 (June 26, 1980), ¶ 2.

[32] Mass. R. Crim. P. 7©(1).

[33] Mass. R. Crim. P. 7(b)(2) states that a superior court appearance represents that counsel will represent the defendant for trial or plea, and Mass. R. App. P. 3(e) binds trial

permitted by the court.[34] The district courts have been advised that withdrawal should be permitted only on written motion and on good cause and should generally not be permitted on the day of trial.[35] However, Rule 7(c)(2) permits a provisional appearance at arraignment, allowing the attorney to withdraw without permission within fourteen days provided the successor attorney simultaneously files her appearance. In the district court a rule allows the appointment of one attorney to represent all defendants at an arraignment session without binding her to future representation.[36]

Some courts ask an attorney to advise a defendant at arraignment. In this case, if counsel is unwilling or unable to represent the client further she should ensure on the record that the appointment is "for arraignment only" and so note on the appearance.[37]

Counsel assigned by the Committee for Public Counsel Services must file an appearance within forty-eight hours of notice of the assignment.[38]

§ 7.5 NOTICE OF THE CHARGES AND DISCOVERY ORDER

The defendant has a right to a reading of the complaint. Counsel may waive a formal reading of the charge pursuant to Mass. R. Crim. P. 7(b)(1)(A; it is freely available in written form to the defendant.

In district courts and the Boston Municipal Court, the defendant is also entitled, at or before arraignment, to be provided by the prosecution with a copy of the defendant's record and a copy of the police statement required by Dist./Mun. Cts. R. Crim. P. 2 ("a written statement describing the facts constituting the basis for the arrest," or, if there was no arrest, "the police report, if any, relating to the alleged crime"). The Rule further provides that at arraignment the judge shall issue a written order to the parties to engage in a pretrial conference and to "provide, permit, and obtain discovery in accordance with G.L. c. 276, § 26A, and Mass. R. Crim. P. 14," in advance of the scheduled pretrial hearing.

§ 7.6 ENTRY OF PLEA [39]

counsel to prosecute the appeal unless he files a motion to withdraw along with the notice of appeal, and the trial court permits it (which is routine). *See also* Super. Ct. R. 65 (obligation to prosecute appeal until withdrawal permitted). No rule similarly describes the future obligation of retained counsel appearing at arraignment in district court, but Dist. Ct. Dep't Suppl. R. Crim. P. 8(4) binds *appointed* attorneys to represent the defendant throughout all district court proceedings, and Mass. R. App. P. 3(e) (appellate responsibilities of trial attorneys) applies to the district court as well. *Accord* G.L. c. 211D, § 9. *See* S.J.C. Rule 3:10, § 8(b) (withdrawal of assigned counsel).

[34] Mass. R. Crim. P. 7(c)(2).

[35] Standards of Judicial Practice: Arraignment, Standard 5:05 (District Court Administrative Office, Aug. 1977).

[36] Dist. Ct. Dep't Suppl. R. Crim. P. 8(8).

[37] Although there is no explicit provision for this in the rules, Mass. R. Crim. P. 7 says nothing about the duration of an appearance in the district court, and in any event such a provisional appointment should be construed as a court order permitting subsequent withdrawal.

[38] S.J.C. Rule 3:10, § 10.

[39] Extensive discussion regarding pleas is contained *infra* in ch. 37.

Mass. R. Crim. P. Rule 12 states that the defendant may plead not guilty, guilty, or (with the consent of the judge) nolo contendere. The latter plea is equivalent to a guilty plea in that the defendant does not contest the charges and receives a criminal conviction and sentence, but it is not an admission of guilt and may not be introduced into evidence at other civil or criminal trials.[40] No defendant has a right to have a guilty plea accepted,[41] although the court has discretion to accept a guilty plea even from a defendant who claims innocence.[42] Additionally, the legislation that abolished the trial de novo system and implementing rules provides a right for a defendant, under certain circumstances, to tender a "plea, admission, or other requested disposition" that may be withdrawn if the court refuses to accept it.[43] The implementing rule applies to the tender of such a plea at the pretrial hearing, but the statute sets no limit on when such a plea may be tendered. Therefore, in the (rare) appropriate case, counsel might consider tendering such a plea at arraignment.

The plea must be taken in open court and recorded.[44] If the defendant refuses to plead, a not guilty plea is entered.[45] A plea of guilty from an unrepresented defendant requires a waiver of counsel if incarceration is a possible penalty [46] and may be withdrawn at any time before sentence is imposed.[47]

Except under very unusual circumstances, the defendant should be told by counsel to plead not guilty at the arraignment stage. Obviously, a guilty plea waives almost all the defendant's trial rights, sometimes cannot be withdrawn,[48] and leaves only very limited appeal rights (e.g., on sentencing, the voluntariness of the plea, and the adequacy of counsel's representation). A guilty plea at this early stage also eliminates later opportunities for plea bargaining.

Additionally, in district court a guilty plea is rarely entered at arraignment or any other time, because Rule 12 also provides that the defendant may "*admit to sufficient facts* to warrant a finding of guilty" without changing his plea.[49] This stipulation to the elements of the crime leaves it in the judge's discretion whether to enter a conviction or a dismissal. *Thus, counsel should ordinarily have the defendant enter a not guilty plea at arraignment, and in the district court if a plea bargain is later struck, it will likely include the defendant's admission to sufficient facts rather than guilty plea.*

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[40] *See* discussion of a plea's impact on subsequent civil cases *infra* at §§ 43.2 and 43.4. *See also* discussion of immigration consequences *infra* ch. 42.

[41] Santobello v. New York, 404 U.S. 257 (1971).

[42] North Carolina v. Alford, 400 U.S. 25 (1970).

[43] *See* G.L. c. 278, § 18, Dist./Mun. Cts. R. Crim. P. 4; *see infra* chs. 14, 15.

[44] Mass. R. Crim. P. 12(a)(1).

[45] Mass. R. Crim. P. 12(a)(1). The taking of a plea ordinarily occurs at the initial appearance, but may be continued to permit meaningful consultation with counsel. *See* Reporter's Notes to Rule 7(a).

[46] Standards of Judicial Practice: Arraignment, Standard 4:00 (District Court Administrative Office, Aug. 1977). *See infra* ch. 8.

[47] G.L. c. 278, § 29B.

[48] *But see* Standards of Judicial Practice: Arraignment, Standard 4:03 (District Court Administrative Office, Aug. 1977) ("leave to withdraw or change a plea should be freely given"); G.L. c. 278, § 29B (withdrawal of plea entered without counsel is defendant's right any time before imposition of sentence).

[49] *See* full discussion of "admissions to sufficient facts" *supra* at § 3.6B.

Although historically some motions were waived if not made prior to a not guilty plea, this is no longer the case.[50]

§ 7.7 PRETRIAL EXAMINATION AND/OR DIVERSION [51]

§ 7.7A. DRUG ACT EXAMINATION

If the defendant is charged with a drug offense,[52] the judge must inform him of his right under G.L. c. 111E, § 10, to an examination to determine whether he is a "drug dependent person who would benefit from treatment." The defendant must request such an examination in writing within five days of notice of the rights. A finding that he is drug dependent may allow a stay of the criminal proceedings during treatment, leading to dismissal of the charges.[53] However, in more minor drug cases, going the "drug act" route may result in a more intrusive disposition so counsel should consider the issue carefully.

If the defendant requests examination, neither the request nor any statements made during the examination are admissible against the defendant in any court proceedings.[54]

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[50] Standards of Judicial Practice: Arraignment, Standard 4:02 (District Court Administrative Office, Aug. 1977); G.L. c. 277, § 47A (motions to be filed before trial).

[51] *See also* discussion *infra* at ch. 10 regarding competency requirements.

[52] "Drug offense" is defined in G.L. c. 111E, § 1, as an offense under G.L. c. 90, §§ 21 and 24(1) (operating motor vehicle under influence), c. 90B, § 8 (motorboating or waterskiing under influence, c. 94C (controlled substance act), or c. 131, § 62 (hunting or target shooting under influence).

[53] G.L. c. 111E, § 10, further specifies in part:

> (1) If the examiner determines that the defendant is not drug dependent, the defendant is entitled to a court hearing to determine the issue, and to appointment of an independent examining psychiatrist (or if unavailable, physician).
>
> (2) If the defendant is charged solely with drug offenses, the court *must* assign a defendant to a drug treatment facility upon his request if the defendant (a) is a drug dependent person who would benefit from treatment; (b) is charged with a drug offense for the first time which does not involve "sale or manufacture of dependency-related drugs"; and (c) has no continuances outstanding under section 10. (If no appropriate treatment is available, the case must be stayed until it becomes available.) Otherwise the court determines whether to assign the defendant to drug treatment based on factors including but not limited to (a) the report; (b) the defendant's past criminal record; (c) the availability of treatment; and (d) the nature of the offense charged, including whether it charges sale or sale to a minor.
>
> Any assignment to a drug treatment facility must specify the period, which must not exceed 18 months or the maximum sentence on the crimes charged, whichever is shorter. If the facility certifies that treatment was successfully completed, or if the defendant completes the treatment ordered by the court, the court must dismiss the charges.
>
> (3) If the defendant is charged with non-drug offenses as well as drug offenses, the court *may* vacate the stay for all offenses and consider a treatment disposition following trial.

[54] G.L. c. 111E, § 10.

§ 7.7B. FIRST OFFENDER DIVERSION

Under G.L. c. 276A, certain first offenders [55] between seventeen and twenty-two years old with no additional charges or warrants pending may be offered a fourteen-day continuance by the court to be assessed by a pretrial diversion program.[56] The court has discretion to waive some of these requirements.[57] If the defendant is accepted into the program, and the court orders diversion, the case will be stayed for ninety days.[58] Successful completion of the program may result in dismissal of the charges.[59]

No admission to sufficient facts is required of an eligible defendant. However, such defendants may have been able to obtain a continuance followed by a dismissal without entering any program, so the advisability of pretrial diversion depends on the client's wish to enter a program and the likely consequences of going through the criminal process instead.

The defendant's decision whether to undergo assessment for the program, and any statements made during it, are not admissible against the defendant in any criminal proceeding.[60]

§ 7.7C. REFERRAL TO MEDIATION

If the complainant and defendant agree to it, the court may refer the case to mediation.[61] The case will be continued while the parties meet with the mediator and attempt to come to an agreement leading to a dismissal of the charges.[62] There is no cost to the defendant or complainant for this service.

Cases most amenable to mediation include assaults, threats, trespass, destruction of property and other cases arising from ongoing relationships such as neighborhood, domestic, tenancy, and employment relationships. Financial disputes may also be appropriate for mediated resolution. If the defendant would benefit from diverting the case to mediation, counsel might seek agreement from the complainant personally prior to the call of the case for arraignment. (Indeed, in many courts mediation referrals may occur at the show-cause hearing.) Complainants may be

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[55] The defendant cannot have been convicted in any state or federal court (excluding traffic violations where no imprisonment resulted) after reaching age 17. G.L. c. 276A, § 2. Under G.L. c. 276A, § 4, an otherwise eligible defendant cannot obtain pretrial diversion if charged with *certain* offenses involving controlled substances, sexual conduct, or victims over 65 years old.

[56] G.L. c. 276A, § 3.

[57] G.L. c. 276A, §§ 3,

[58] If the court wishes to hear evidence, it may substitute a 90-day continuance without a finding for the stay. G.L. c. 276A, § 5. The stay or continuance without a finding can be extended an additional 90 days if necessary to successfully complete the program. G.L. c. 276A, § 7.

[59] G.L. c. 276A, § 7.

[60] G.L. c. 276A. § 5.

[61] This is sometimes done pursuant to the pretrial diversion statute, discussed immediately above. Although a court will usually require a prosecutor's agreement before sending a case to mediation, cases have been mediated over the prosecutor's objection.

[62] Typically, the case is continued for fourteen days for mediation, then stayed for an additional 90 days so that terms may be fulfilled.

attracted by the chance to bind the defendant to concrete obligations, the flexible scheduling, the greater control they may exercise as compared to a court hearing, and the opportunity to send the case back to court for trial if dissatisfied.Mediation projects now exist in some of the district courts, and procedures differ among them.

Mediators' files are protected by a statutory work-product privilege, and any communication in the mediator's presence is confidential and "not subject to disclosure" in any judicial or administrative proceeding.[63] Additionally, mediations conducted pursuant to the pretrial diversion statute benefit from that statute's prohibition on any use of the defendant's statements at trial.[64] However, because incriminating statements may have detrimental effects beyond testimonial use, in some cases counsel should advise the defendant to be circumspect in discussing the facts of the case, or should arrange for such discussion to take place in a private session with the mediator, outside the presence of the complainant.

§ 7.7D. COMPETENCY EXAMINATION

If counsel believes that the defendant is incompetent to stand trial, she may move for a psychiatric examination under G.L. c. 123, § 15. The decision to move for such an examination should not be made lightly because it may result in up to forty days of commitment for observation and possibly a long term civil commitment. This issue is addressed *infra* in chapter 10.

§ 7.7E. DETOX COMMITMENT

Under G.L. c. 123, § 35, the district court may commit an alcoholic or substance abuser to Bridgewater or Framingham for up to thirty days if he poses a substantial risk of harm. This provision may be useful if the defendant would otherwise be held on bail, and it may be a route into a drug or alcohol treatment program.[65]

§ 7.8 DISMISSAL ON MOTION OF PROSECUTOR OR COURT / FAILURE TO PROSECUTE [66]

The Commonwealth may move to dismiss the charges for such reasons as lack of evidence, the complainant's desire to drop the charges, a plea bargain, or the

[63] G.L. c. 233, § 23C. The statement must have been made in the course of mediation.

[64] G.L. c. 276A, § 5.

[65] Placement directly from court-ordered "detox" into a residential treatment program is possible if the program will interview the defendant at the detox facility, or will accept him without a personal interview. However, the treatment program may not agree to take responsibility for transporting the defendant from court, or from detox, to the program, and judges will often balk at the notion of releasing the defendant on his own (or in counsel's custody) to go to the program. Therefore, counsel should ask the court under G.L. c. 37, § 24(c) to order the sheriff's department to deliver the defendant from court to the program.

[66] *See* discussions *infra* at §§ 39.5D (dismissal as dispositional option), 39.5F (disposition of nolle prosequi) and, regarding double jeopardy consequences, 21.6B (nolle prosequi), and 21.4 (dismissal).

defendant's agreement to testify for the Commonwealth.[67] The reason for the dismissal must be entered on the case papers.[68]

Sometimes the dismissal will be offered on condition that the defendant release the police from civil liability for the arrest or charge. A release executed at the request of a judge or prosecutor is void as a matter of state law,[69] but might effectively bar a federal claim if found by a federal court to be voluntarily executed.[70]

The court is not bound by the prosecutor's dismissal motion, must inquire into the reasons for it, and where the grounds are the complainant's wish to drop the charges, the district courts have been instructed to inquire into the propriety and voluntariness of the decision.[71] If the court does not grant the motion, the prosecution may by right end the case by filing a nolle prosequi with written reasons,[72] which acts as an acquittal for jeopardy purposes if jeopardy has attached;[73] or if it fails to do so and ultimately does not proceed, the defendant is entitled to a not guilty.[74]

Dismissal of minor charges. As caseloads and incarceration conditions have become unmanageable, some courts have used the arraignment to dismiss minor cases [75] on payment of court costs, which can be an appealing prospect to a defendant who

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[67] A dismissal at arraignment is envisioned by Standards of Judicial Practice: Arraignment Standards 6:00 and 6:02 (District Court Administrative Office, Aug. 1977), and by the Reporter's Notes to Mass. R. Crim. P. 7(a).

An accused may also challenge a complain by filing a timely motion to dismiss. The motion may be based on a claim that the evidence did not support the magistrate's finding of probable cause, or alternatively, on a claim that the magistrate utilized a defective procedure. Standards of Judicial Practice, *The Complaint Procedure*, Standard 4:00 (District Court Administrative Office, Sept. 2008).

[68] Standards of Judicial Practice: Arraignment, Standard 6:00 (District Court Administrative Office, Aug. 1977), requires this in all cases except dismissal following a continuance without a finding.

[69] Foley v. District Court of Lowell, 398 Mass. 800 (1986). *Cf.* Commonwealth v. Klein, 400 Mass. 309 (1987) (entry of conviction following cwof approved when based on defense counsel's reneging on his own proposal to abstain from suit against police).

[70] Town of Newton v. Rumery, 480 U.S. 386 (1987). *Cf.* Hall v. Ochs, 817 F.2d 920, 923–24 (1st Cir. 1987) (release signed by unrepresented defendant to obtain release from lockup was per se involuntary). *See also infra* §§ 37.2D, 43.4C, 43.5.

[71] Standards of Judicial Practice: Arraignment, Standard 6:01 (District Court Administrative Office, Aug. 1977). The accompanying Commentary states that (1) where the complainant may have been threatened, the court should bring this to light, attempt to convince the complainant to testify, and consider a criminal complaint on the threats; and (2) where the complainant commenced the case simply to collect a debt or satisfy a personal grievance, the court should consider a variety of measures, including no witness fee to the complainant pursuant to G.L. c. 262, § 64, ordering the complainant to come to court, and (oddly considering the misuse of the criminal process), imposing court costs on the defendant or refusing to dismiss the complaint.

A complainant is a witness, not a party, "without a judicially cognizable interest in the prosecution or non-prosecution of another." Witley v. Commonwealth, 369 Mass. 961, 962 (1975) (quoting Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973)).

[72] Mass. R. Crim. P. 16(a); G.L. c. 278, § 15 (city solicitor's right to nolle prosequi).

[73] Mass. R. Crim. P. 16(b); Commonwealth v. Massod, 350 Mass. 745, 748–50 (1966).

[74] Standards of Judicial Practice: Arraignment, Commentary to Standard 6:01 (District Court Administrative Office, Aug. 1977).

[75] *E.g.,* trespass, disorderly, minor motor vehicle, shoplift, traffic, and similar cases.

would otherwise have to pay additional attorney fees and assessments, risk conviction and sentence, and miss additional work.

Dismissal by court. According to *Commonwealth v. Gordon,*[76] under the separation of powers provision of art. 30, a judge may not dismiss a charge unless the prosecutor consents or there is a "legal basis" for the dismissal. In *Gordon,* the court found that the acceptance of a plea to a "lesser included" offense over the prosecutor's objection was improper because it usurped the prosecutor's discretionary power to decide which cases to prosecute, but stressed that dismissals are appropriate if grounded on a legal basis.[77]

§ 7.9 BAIL

Ordinarily, bail may only be set in the amount necessary to ensure the defendant's presence at trial, and there is a statutory presumption of release on personal recognizance.[78] However, if the defendant was already released on bail or personal recognizance when she allegedly committed the current offense, or if the Commonwealth seeks pretrial detention on the ground of "dangerousness," the court may invoke a preventive detention procedure.[79] The issue of pretrial release is addressed *infra* in chapter 9.

§ 7.10 CONTINUANCE DATE

Under Mass. R. Crim. P. 11, the first continuance date after arraignment in either superior court or district court jury session will be for a pretrial conference. A defendant in district court who seeks an early date should invoke the thirty-day rule,[80] which requires that the continuance date of a defendant in custody [81] be no longer than thirty days away.[82] A defendant in custody will usually want an early trial, and in a

[76] Commonwealth v. Gordon, 410 Mass. 498 (1991).

[77] Regarding the varied "legal bases" of dismissals, *see* Index under "dismissal."

[78] G.L. c. 276, §§ 58, 58A. *See infra* ch. 9.

[79] G.L. c. 276, §§ 58, 58A.

[80] On July 31, 1996, Chapter 276 of the General Laws was amended by striking out § 35, as appearing in the 1994 Official Edition, and inserting in its place the following section: "Section 35. The court or justice may adjourn an examination or trial from time to time, and to the same or a different place in the county. In the meantime, if the defendant is charged with a crime that is not bailable, he shall be committed; otherwise, he may recognize in a sum and with surety or sureties to the satisfaction of the court or justice, or without surety, for his appearance for such examination or trial, or for want of such recognizance he shall be committed. While the defendant remains committed, no adjournment shall exceed thirty days at any one time against the objection of the defendant."

The former so-called "ten-day rule" is thus now a thirty-day rule. *See infra* § 49.4 (discussing St. 1996, c. 200, § 11).

[81] By amendment effective April 24, 1992, the then 10-day rule was first restricted to defendants in custody.

[82] The 30-day rule is found in G.L. c. 276, § 35. *See also* G.L. c. 276, § 38 (requiring an initial probable-cause examination "as soon as may be").

district court arraignment where the court will not take jurisdiction, an early probable-cause hearing date is advantageous because it leaves less time for the prosecutor to seek a direct indictment from the grand jury, which would eliminate the probable-cause hearing. Countervailing considerations are that a substantial delay allows for more preparation time and also allows for the defendant to enter programs or otherwise get his life together before disposition.

Finally, we note that even if the defendant will be tried in district court, statutory and constitutional authority exists for the expeditious scheduling of a probable-cause hearing, at least in the case of a detained defendant. [83]

§ 7.11 CHECKLIST OF INVESTIGATIVE POSSIBILITIES AT THE ARRAIGNMENT SESSION

Apart from the formal purposes of arraignment detailed above, the arraignment session is an early opportunity to investigate the case. Frequently counsel's first contact with the case is at arraignment, where not only the defendant but also the prosecutor and witnesses may be present. The following is a checklist of investigative opportunities at this session.

1. *Interview the defendant.* Important areas of inquiry are listed in the Bail Interview Checklist *infra* at § 9.10 and the Defendant Interview Checklist at § 11.9. Generally, counsel who is appointed at arraignment will want to obtain an initial detailing of the facts of the case as well as the defendant's personal situation for dispositional and bail purposes. After assuring the client that discretion will be used, counsel should obtain the telephone numbers and addresses for the client, witnesses, family, and employer — both to verify information for the bail hearing and for later use.

Counsel should also explain the purpose of the initial proceedings and attempt to establish some rapport with the client.

Counsel should inquire into any injuries the defendant may have received during the event, arrest, or since, so that they may be tended to and documented.

Finally, it is important to inform the defendant that communications with counsel are confidential and protected by the attorney-client privilege. The client should also be advised not to talk about the offense with anyone, including prisoners; and not to consent to any interrogation, searches, or lineups, but to refer the police to counsel.

2. *Inspect and copy court papers.* The court papers concerning the case will be with the clerk of the first session during the arraignment, but sometime thereafter will be returned to the Clerk's Office. Counsel should inspect and obtain copies of all these papers, including the complaint, the application for the complaint, and any search warrant and affidavit.[84] Appointed counsel may obtain free copies of these papers.[85]

See infra § 23.2G, more fully detailing the 30-day rule, § 27.1B, detailing other statutes requiring expeditiousness, and ch. 23 regarding other speedy trial rights.

[83] *See* full discussion *supra* at § 2.1B(3).

[84] The case file may not contain all the relevant papers, and a further request may be necessary. For example, warrants and affidavits are often kept separate from the defendant's complaint, which may be marked "warrant" or "s.w."

[85] Dist. Ct. Admin. Reg. 2-72.

Dist./Mun. Cts. R. Crim. P. 3(a) requires that the defense be given a copy of the police report at arraignment.

3. *Check the defendant's record.* The defendant's probation record will be with the probation officer in the session until sometime after the arraignment. The extensive use of abbreviations may make interpretation of this record difficult without the assistance of the probation officer. The entries are often inaccurate and should be verified with the defendant and/or the original court records.

4. *Use the arraignment itself for discovery where possible.* Where bail is an issue, a few courts require the police officer give a brief summary of the case. Counsel is entitled to ask questions but because the issue is bail, these questions should relate to such issues as the nature of the events and any mitigating aspects rather than open questioning on the merits.[86] Counsel should note the discovery requirements of G.L. c. 218, § 26A and Dist./Mun. Cts. R. Crim. P. 3(c).

However, most courts ignore case law requiring the arresting officer to appear at arraignment,[87] and a District Court Standard advises the court to proceed with arraignment where the officer is neither present nor necessary.[88] There is, as noted, a requirement that a probable-cause determination must be made before continued pretrial detention, if not at arraignment then soon afterward.[89]

5. *Informal interviews.* The police officer, the prosecutor, and possibly the complainant or other witness may be in court at the arraignment. Counsel should attempt to speak informally with all these people. Although the prosecutor will seldom know much about the case at this point, it may be possible to obtain an indication of the Commonwealth's plea-bargaining position in the particular type of case; or obtain from the prosecutor or police officer the police report and witnesses' statements. At the district court level, these discussions are quite informal, and since you are entitled to none of this discovery or interviewing as a matter of right at this stage, the best posture is one of friendly and brief discussion. Be a good listener.

[86] Additionally, the single most important question that could be asked at this stage is "Did the defendant make any statements to the police officer before or after arrest?" If testimony is obtained, counsel should note the tape recording identification numbers (reel number and index number) immediately following arraignment, and in some instances promptly order a copy of the tape.

[87] Keefe v. Hart, 213 Mass. 476 (1913), and Tubbs v. Tukey, 57 Mass. (3 Cush.) 438 (1849), *cited more recently in* Commonwealth v. DuBois, 353 Mass. 223 (1967), *and* Commonwealth v. Banuchi, 335 Mass. 649 (1957).

[88] Standards of Judicial Practice: Arraignment, Standard 7:04 (District Court Administrative Office, Aug. 1977).

[89] *See supra* § 2.1B(3).