PROPOSED AMENDMENTS
TO THE

MASSACHUSETTS DISTRICT COURT RULES FOR PROBATION VIOLATION PROCEEDINGS

DISTRICT COURT RULES
for
PROBATION VIOLATION PROCEEDINGS

Showing proposed amendments

[NOTE: A indicated above, it is proposed that the rules be renumbered, with current Rule 8, Probation Detention Hearings, renumbered as Rule 5, to insure that the rules reflect the chronological order of the proceedings involved, and subsequent rules renumbered accordingly.]

DISTRICT COURT RULES
FOR
PROBATION VIOLATION PROCEEDINGS

RULE 1

SCOPE AND PURPOSE

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

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

[There is no **Commentary** to this rule because no amendments are proposed.]

RULE 2

DEFINITION OF TERMS

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

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

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

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

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

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

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

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

"Surrender:" ~~means~~ 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.

“Transportation mittimus:” a court order, in a form promulgated by the Chief Justice of the District Court, that authorizes and directs the custodial transportation of a probationer from one district court to another district court for the purpose of conducting probation violation proceedings at the latter court.

Commentary

To amendments effective _____, 2013

The form referred to in the definition of the "general conditions of probation" is form DC-CR-27, which was promulgated by the Chief Justice of the District Court Department under the authority of G. L. c. 218, § 43, after consultation with the Office of the Commissioner of Probation.

A sentence has been added to the definition of "probation order" to address the recurring error of probation orders being referred to as probation "contracts." A probation order is not a contract. *Commonwealth v. MacDonald*, 50 Mass. App. Ct. 220, 223-224 (2000).

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

The term "transportation mittimus" and its definition have been added to this rule. This term appears in Rule 3(c).

RULE 3

COMMENCEMENT OF VIOLATION PROCEEDINGS: CHARGED CRIMINAL CONDUCT

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

(b) ~~Where~~ When Probation Order and New Criminal Charge Involve Same District Court.

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

At any time during violation proceedings, ~~T~~the court, upon review of the ~~Notice at arraignment~~ notice of violation and as a matter of its discretion, may order ~~no further~~ termination of the proceedings. ~~in the matter, and in such cases formal service of the Notice on the probationer shall not be required.~~ A notice of violation may be withdrawn only with the permission of the court and such withdrawal and permission shall be entered on the case docket.

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

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

(c) ~~Where~~ When Probation Order and New Criminal Charge Involve Different District Courts

(i) *Issuance and Service of Notice of Violation.* When a criminal complaint is issued by a district court (hereinafter "the criminal court") against a defendant who is the subject of a probation order issued by a different district court (hereinafter a "probation court"), the Probation Department at the criminal court ~~that issued the criminal complaint~~ shall issue a Notice of Probation Violation and Hearing to the probationer at or before arraignment on the criminal charge, or as soon thereafter as possible. Said notice shall be served on the ~~defendant~~ probationer in hand ~~at arraignment~~ and such service shall be recorded on the case docket. ~~The Probation Department forthwith shall send a copy of said Notice, indicating such in-hand service, to the Probation Department of the court that issued the probation order, together with a copy of the complaint and police report on the criminal charge that constitutes the alleged probation violation.~~ Nothing in this rule shall preclude the later issuance and service on the probationer of a ~~Notice of Probation Violation and Hearing~~ notice of violation by the Probation Department of ~~the~~ a probation court.~~ that issued the probation order.~~

(ii) *Contents of Notice of Violation.* The ~~Notice of Probation Violation and Hearing issued to and served on the probationer at the court that issued the criminal complaint~~ notice of violation shall set forth the name of the district court at which the probationer is on probation, the criminal behavior alleged to have been committed by the probationer as indicated in the criminal complaint and shall order the probationer to appear at a specific date and time at the probation court ~~that issued the probation order~~ for the express purpose of appointment of counsel, if necessary, and scheduling of a probation violation hearing.

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

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

(v) *The Decision to Transport.* A judge at the criminal court shall decide whether the probationer is to be transported in custody to the probation court. Said judge may await receipt of the recommendation from the probation court before making such decision. If the criminal court orders custodial transport, it shall issue a transportation mittimus and the probation court shall be so notified. The probationer promptly shall be transported in accordance with said mittimus, provided that if the probationer is held in custody in the criminal proceeding, the mittimus shall be lodged with custodial authority to ensure that the probationer will be detained and transported

to the probation court. The Probation Department at the criminal court shall so notify the Probation Department at the probation court.

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

~~(iii)~~ (vi) ~~*Scheduling of Hearing;*~~ *Probationer's Appearance at Probation Court; Service of a New Notice* ~~*by Probation Court*~~. Upon appearance of the probationer at the probation court, ~~that issued the probation order in accordance with the Notice served pursuant to subsection (ii),~~ that court shall appoint counsel, if necessary, and shall schedule a probation violation hearing for a date certain, said date to be no less than seven days later unless the defendant waives said seven-day period. ~~Except in extraordinary circumstances, said~~ The hearing date shall not be later than 30 days after said appearance if the probationer objects thereto, except in extraordinary circumstances. ~~The~~ If the probation department at the probation court ~~may revise the~~ alleges additional violations, it shall prepare and serve on the probationer ~~the~~ a new ~~Notice of Probation Violation and Hearing,~~ notice of violation which shall set forth all alleged violations. ~~by adding to it any additional alleged violations. Such additional allegations shall set forth the specific conditions of the probation order alleged to have been violated with a description of each such alleged violation. The Notice, with or without amendment,~~ A new notice of violation shall also include the date, time and place of the violation hearing, and shall be served on the probationer in hand while the ~~defendant~~ probationer is before the court, or as soon thereafter as possible. Such service shall be recorded on the case docket. The Probation Department shall provide ~~A~~ a copy of the notice of violation ~~shall be provided~~ to the District Attorney at the time of, or before, such service on the probationer.

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

(vii) *Procedure When a Defendant Is a Probationer at More than One Other District Court.* When a defendant appearing in a district court on a new criminal charge is on probation at more than one other district court, the criminal court shall determine which of the latter shall be the court whose probation order the probationer shall be charged with violating. The criminal court shall interact as provided in this rule with the selected probation court. The other probation court or courts each shall be responsible for the issuance and service on the probationer of a notice of violation based on the new criminal charge, and for securing the presence of the probationer for a violation hearing by means of such notice or by means of a warrant or other process.

Commentary

To amendments effective _____, 2013

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

For both situations, a new provision has been added regarding the procedure by which a Notice of Probation Violation and Hearing may be "withdrawn." Such withdrawals have been a method by which probation violation proceedings may be terminated. Withdrawal has been held to be within the discretion of a Probation Department. *Commonwealth v. Milton*, 456 Mass. 337 (1998). There has been no requirement for court approval or permission. The new provision imposes two new requirements: (1) that such withdrawals must receive the permission of the court, and (2) that such permission and the fact of the withdrawal must be entered on the case docket. By requiring judicial permission and entry on the record, the new provision reflects the importance of a process by which a probation violation proceeding that has been formally commenced may be terminated without adjudication.

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

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

New subsections (iii) – (v) have been added to section (c) of the rule. Former section (iii) has been renumbered section (vi). See below. The purpose of the three new subsections is to provide a detailed process by which, in the "different court" situation, the "criminal court" must interact with the "probation court." The purpose of this interaction is to effect the transfer of the probation proceeding and, in some instances, the custodial transfer of the probationer, to the probation court.

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

Section (c) (iv) describes the response required of the probation court to the criminal court. This response, including the recommendation regarding transport, is the responsibility of

the Chief Probation Officer, an Assistant Chief Probation Officer or a designated probation officer of the probation court and must be faxed to the criminal court within one hour after receipt of the criminal court's request for information.

Section (c) (v) provides that the judge at the criminal court is responsible for the decision on whether the probationer will be transported to the probation court. The judge is not bound by the probation court's recommendation and need not await its receipt. If the decision is made to transport the probationer, the court must issue a "transportation mittimus." No warrant will be required from the probation court. For this decision, the judge, for jurisdictional purposes, will be sitting at a session of the probation court held at the location of the criminal court, by designation of the Chief Justice of the District Court under G. L. c. 218, § 43A.

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

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

There are several reasons for the requirement of a mittimus rather than a warrant as the basis for custodial transport of a probationer. First, the customary purpose of a warrant in terms of obtaining the custody of an individual is to authorize the out-of-court seizure of that person in order to bring him or her before the court. In the circumstance at issue here, however, the probationer is already before the court. The situation is legally analogous to that in which a person is before the court to be criminally sentenced. Upon sentencing to incarceration, no warrant is required to effect that person's custody or transport. Rather, a mittimus is issued. Even if there were a legal rationale for the use of a warrant in the circumstance at issue, its use is not possible given the change in the rule authorizing a judge at the criminal court to order custodial transport. This is because it appears that a warrant may not be "entered" into the current electronic data system in a case that is not pending at the court that is issuing that warrant. In the different court situation, the probation matter is not pending in the court in which the probationer is appearing on a new criminal charge. Thus a warrant in the probation case may not be entered at the criminal court using the MassCourts system.

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

Section (c) (vii) has been added to address a circumstance that the rules did not previously address, namely, where the defendant before the criminal court is currently on probation *in more than one other district court.* It provides that in such cases the judge at the criminal court must decide the probation court with which the criminal court will interact. This decision will determine which of the probation courts will be "first in line" to address the

probationer's alleged violation based on the new criminal charge. The rule provides that the other courts at which the individual is on probation are responsible for charging the new crime as an alleged violation, and initiating a violation proceeding by issuing a notice of violation and mailing it to the probationer or obtaining the appearance of the probationer by means of a probation warrant or other process such as a writ of habeas corpus.

RULE 4

COMMENCEMENT OF VIOLATION PROCEEDINGS: VIOLATIONS OTHER THAN CHARGED CRIMINAL CONDUCT

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

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

Violation proceedings shall be commenced by the issuance by the Probation Department of a ~~The~~ Notice of Probation Violation and Hearing, which shall be served on the probationer in hand or by first-class mail, unless the court orders otherwise. Service of the notice in hand or by first-class mail shall be noted on the docket. Out-of-court service other than by first-class mail shall require a written return of service. The Probation Department shall provide ~~A~~ a copy of each ~~N~~notice of ~~V~~violation ~~and Hearing shall be provided~~ to the District Attorney forthwith upon its issuance.

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

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

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

Commentary

To amendments effective _____, 2013

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

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

The title of section (b) has been amended to refer to the two new topics that have been added to that section.

RULE ~~8~~ 5

~~PRELIMINARY VIOLATION~~ PROBATION DETENTION HEARINGS

(a) Purpose. A ~~preliminary~~ probation detention hearing ~~shall~~ may be conducted ~~only when the Probation Department seeks to hold a probationer in custody on the basis of an alleged violation of probation~~ to determine whether a probationer shall be held in custody pending the conduct of a ~~full~~ probation violation hearing. The ~~two~~ issues to be ~~determined~~ decided at a ~~preliminary~~ probation detention hearing ~~shall be~~ are whether probable cause exists to believe that the probationer has violated a condition of the probation order, and, if so, whether the probationer should be held in custody.

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

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

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

If probable cause is found, ~~a probation violation hearing shall be scheduled, the probationer shall thereupon be served in hand with a notice of said violation hearing, and~~ the court may order the probationer to be held in custody pending the conduct and completion of the ~~scheduled final~~ violation hearing. The court's decision whether to ~~release the probationer or~~

order ~~the probationer held in~~ such custody ~~pending the conduct and completion of the final probation violation hearing, notwithstanding a finding of probable cause on an alleged violation,~~ shall include, but not necessarily be limited to, consideration of the following:

i. the probationer's criminal record;
ii the nature of the offense for which the probationer is on probation;
iii the nature of the offense or offenses with which the probationer is newly charged, if any;
iv the nature of any other pending alleged probation violations;
v the likelihood of probationer's appearance at the ~~final~~ probation violation hearing if not held in custody; and
vi the likelihood of incarceration if a violation is found following the ~~final~~ probation violation hearing.

If no probable cause is found, a probation violation hearing may be scheduled and the probationer thereupon served with notice thereof, but the probationer may not be held in custody pending said hearing based on the alleged probation violation.

(d) Bail. Upon a finding of probable cause and an order of custody, the court shall not consider or impose any terms of release such as bail, personal recognizance or otherwise as an alternative to such custody. Notwithstanding such order of probation custody, the court shall proceed to determine the issues of bail and pretrial detention ("dangerousness") on any newly charged offense, as provided by law.

Commentary

To the amendments effective _____, 2013

This rule has been amended throughout to replace the terms "preliminary probation hearing" and "final [or "full"] probation hearing" with the terms "probation detention hearing" and "probation violation hearing," respectively. The purpose of these changes was to use terms that more accurately describe and clearly differentiate these proceedings.

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

Section (b) has also been amended by the addition of the final sentence indicating that a probation detention hearing may be conducted at the direction of the court as well at the initiative of the Probation Department. In other words, the court may require the conduct a detention hearing "on its own motion."

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

The first sentence of the second paragraph of section (c) is not new. It has been moved from its former location in the first paragraph. The second paragraph also been amended by the addition of an express reference to the requirement that a waiver by a probationer of the right to counsel at these hearings must be made knowingly and voluntarily.

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

One question that the rule does not address involves the affect, if any, on the *probation detention* probable cause determination when the alleged violation consists of a *new criminal charge*. In such cases, a probable cause determination will already have been made as a prerequisite for issuance of the criminal complaint for that charge. However, it would appear that a court conducting a probation detention hearing is not "bound" by the earlier probable cause ruling. While the same evidence that was considered for probable cause on the criminal complaint may also be presented to the court in the probation detention proceeding (e.g., a police report), a new probable cause ruling is nonetheless required. Under the principle of *res judicata* and the doctrine of "issue preclusion," an earlier ruling on a legal issue is binding in a subsequent proceeding only if several requirements are met. These requirements are not met in the situation at issue. For example, the issue must have involved a final judgment on the merits in the prior

proceeding. See *Kobrin v. Board of Registration in Medicine*, 444 Mass.837, 843-844 (2005) and cases cited therein. A probable cause ruling for the issuance of a criminal complaint is not a final judgment on the merits. Moreover, the party against whom preclusion would be asserted must have had a meaningful opportunity to have been heard in the prior proceeding. *Id.* In criminal cases, the accused is not entitled to be heard on the issue of probable cause (except in those cases where a criminal complaint hearing precedes an arrest).

Section (d) has not been amended, but two points warrant mention. First, this provision has withstood appellate challenge. *Commonwealth v. Puleio,* 433 Mass. 39, 739 N.E.2d 1132 (2000). Second, this provision does not prohibit the court from *modifying an existing probation order* in a way that, in the court's opinion, would obviate the need to hold the probationer in custody in order to ensure an appearance at the violation hearing. The " 'terms and conditions' [of probation] may be subject to modification from time to time [by the sentencing court] as a proper regard for the welfare, not only of the defendant but of the community, may require." *Commonwealth v. McGovern,* 183 Mass. 238, 240 (1903), as quoted in *Buckley v. Quincy Division of the District Court Department,* 395 Mass. 815, 818 (1985). However, a modification of a probation order *based on an alleged violation*, as an alternative to detention or otherwise, does not eliminate the requirement of a hearing and adjudication on that alleged violation.

RULE ~~5~~ 6

CONDUCT OF VIOLATION HEARINGS

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

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

(c) Adjudication of Alleged Violation. Probation violation hearings shall commence with a statement by the probation officer describing the violation or violations alleged in the Notice of Violation and Hearing, and shall proceed with a presentation of the evidence supporting said allegations. The probationer shall be permitted to present evidence relevant to the issue of the alleged violation. Each party shall be permitted to cross-examine witnesses produced by the opposing party. Hearsay evidence shall be admitted by the court, in accordance with Rule 6, provided that the court shall enforce any statutory privileges ~~unless waived and any legally required~~ and disqualifications. The probation officer shall have the burden of proving the alleged violations with or without the participation of the District Attorney as provided below. The standard of proof at such hearings shall be the ~~civil standard of~~ preponderance of the evidence. After the presentation of evidence, both ~~the probation officer and the probationer~~ parties or their counsel shall be permitted to make a closing statement.

(d) Dispositional Decision. If the court finds that the probationer has violated one or more conditions of probation as alleged, the probation officer shall recommend to the court a disposition consistent with the dispositional options set forth in Rules ~~7~~ 8(d) and 9(b) ~~below,~~ and may present argument and evidence in support of that recommendation. The probationer shall be permitted to present argument ~~and evidence~~ relevant to disposition and to propose a disposition~~al terms~~.

(e) Continuances; "Tracking" Prohibited. Probation violation hearings shall be continued only by a judge and only for good cause shown. The reason for any continuance shall be stated by the judge and set forth ~~in~~ on the record ~~of the case~~. No continuance shall be ordered other than to a date certain and for a specific purpose, and as provided in Rule 7(a). ~~The pendency of a criminal action on a charge which also constitutes an alleged violation of probation shall not be grounds for a continuance of the probation violation hearing.~~ When a criminal charge is the basis for an alleged violation of probation, no continuance of the violation hearing or disposition shall be allowed solely to "track" or await the disposition of said criminal charge.

(f) Participation of the District Attorney.

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

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

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

(iv) *Finding and Disposition.* After the presentation of evidence, the District Attorney may ~~make a statement regarding the factual issue of whether one or more violations of probation has occurred.~~ be heard on the strength of that evidence in supporting a finding of violation. If the court finds that the probationer has violated one or more of the conditions of probation as alleged in the Notice of Violation and Hearing, the District Attorney may be heard regarding the court's disposition of the matter. The District Attorney may present ~~his or her dispositional recommendations~~ a recommendation on disposition orally or in writing.

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

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

(h) Ensuring Probationer's Presence in Courtroom. For good cause, ~~T~~the court may order that the probationer be taken into custody pending the commencement and completion of the violation hearing.

Commentary

To amendments effective _____, 2013

Section (a) has been amended by the deletion of the last portion of the first sentence. This provision referred to the permissible "flexibility and informality" of violation hearings. While accurate, this reference was deemed unnecessary and the possible source of inappropriate informality.

Section (a) also has been amended by the addition of the last sentence. It refers to the requirement that a waiver by a probationer of the right to counsel at a probation violation hearing requires a judicial determination that such waiver is being made knowingly and voluntarily.

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

Section (f) has been amended to clarify its meaning.

Section (g) has been added to the rule. It addresses the procedure whereby a probationer attempts to admit to an alleged violation. The rule refers to the two components of such an admission. First, the probationer must admit to the commission of one or more of the violations charged in the notice of violation, and second, the probationer must waive the right to a violation hearing. Although the term "stipulation" is commonly used, the rule uses the term "admission" because it more accurately and appropriately describes this legal event.

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

The prohibition in section (g) against "conditioned" probation violation admissions also precludes admissions conditioned by proposed dispositions "agreed to" by the probation department or by a prosecutor. Such an agreement does not bind the court or permit the withdrawal of the admission if the court's disposition is other than that "agreed upon" by a probation officer or prosecutor. The court may consult with probation regarding the disposition

after finding a probation violation. See Rule 8 (d). But for probation violation admissions there is no equivalent to the tender of criminal guilty pleas which may include dispositional terms agreed to by the prosecution.

It should also be noted that section (g) does not require the conduct of a specific colloquy as the means by which the court is to determine that a probationer's admission to a violation is being made knowingly and voluntarily. Nor does it appear that any other rule or statute requires a specific colloquy. The colloquy required for the acceptance of a *guilty plea to a criminal charge* is not required for the acceptance of a probation violation admission. See *Commonwealth v. Paul*, Mass. App. Ct. Docket No. 04-P-1309, September, 29, 2006 (Rule1:28). Rather, the court is left to conduct such questioning of the probationer and his or her counsel as it deems adequate for this determination. See also, *U.S. v. Correa-Torres,* 326 F.3d 18 (1st Cir. 2003). The District Court Committee on Criminal Proceedings has prepared a model colloquy that may be helpful to judges in conducting such questioning. It can be found on the District Court intranet site at http://trialcourtweb/courtsandjudges/courts/districtcourt/modelcolloquies.pdf.

Section (g) does not require that a probationer's admission to a violation and waiver of the right to a hearing be set forth on a particular form. However, an approved form is available for this purpose on the internet at

www.mass.gov/courts/courtsandjudges/courts/districtcourt/forms.html.

At a minimum, the court's questioning of a probationer on this issue and the probationer's responses should be memorialized on the audio recording of the proceedings, and the facts that the questioning occurred and that the court accepted the admission and waiver should be entered on the court's docket.

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

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

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

2. Such a custody order merely enforces the existing order requiring the probationer's

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

3. The authority of the court to secure the presence of a probationer for the conduct of a scheduled hearing also has a constitutional basis in the court's inherent power. "Of necessity, a judge's inherent power must encompass the authority to exercise 'physical control over his courtroom.'" *Commonwealth v. O'Neil*, 418 Mass. 760, 764 (1994), citing *Chief Admin. Justice of the Trial Court v. Labor Relations Comm'n,* 404 Mass. 53, 57 (1989) ("The power of the judiciary to control its own proceedings, the conduct of its participants, the actions of officers of the court and the environment of the court is a power absolutely necessary for a court to function effectively and do its job of administering justice."). Perhaps nothing could be viewed as more fundamental or essential to the court's ability to function than the power to prevent a probationer who has been ordered to appear for a hearing on an alleged violation from simply leaving the court prior to the conduct of that hearing.

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

The custody provision in this rule is relevant only when the violation hearing will proceed that same day. If a probationer arrives at court and is seen as a flight risk, but the actual hearing will be scheduled for a later date, the probation department may immediately request a detention hearing under Rule 5 (formerly Rule 9). That rule also has been amended to provide for custody of a probationer prior to the conduct of such a hearing. If detention is ordered, it will result in the probationer's continued custody until the conduct and completion of the violation hearing.

RULE ~~6~~ 7

HEARSAY EVIDENCE

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

(b) Legal Sufficiency of Hearsay Evidence. ~~When Case Rests Solely on Hearsay.~~ ~~Where the sole evidence submitted to prove a violation of probation is hearsay, that evidence shall be sufficient as proof of that violation 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~~.

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

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

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

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

(4) is internally consistent;

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

(6) was provided by a disinterested witness; or

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

Commentary

To amendments effective _____, 2013

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

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

The previous version of this rule imposed a two-pronged test, namely, for evidence to be legally adequate as a basis for finding a probation violation the rule required that it be both "substantially reliable," and, when the alleged violation was new criminal behavior, there had to be "good cause" for the absence of the percipient witness, i.e., the source of the hearsay. Current case law holds that where the hearsay is substantially reliable, this satisfies the good cause requirement.

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

Section (b) and its caption also have been amended to require that hearsay be found by the court to be "substantially reliable" before it can serve as evidence of a violation, *even when the court also has relied on non-hearsay evidence.* The previous rule imposed the substantial reliability test only when hearsay was the only evidence relied upon by the court. In doing so it followed case law, *Commonwealth v. Durling*, 407 Mass. 108, 551 N.E.2d 1193 (1990). Under the rule as amended, the court need not attempt to distinguish between hearsay that is "reliable" (and thus may be used if other, non-hearsay evidence is also relied upon by the court), and hearsay that is "substantially reliable" (and thus may be used when it is the *only* evidence of a violation). See *Commonwealth v. Durling*, 407 Mass. 108, 117-118, 551 N.E.2d 1193 (1990). In this regard, the rule imposes a higher standard than that imposed by case law.

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

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

RULE ~~7~~ 8

FINDING AND DISPOSITION

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

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

(c) Finding of Violation; Written Finding of Fact. If the court determines that ~~the~~ probation ~~officer~~ has proved by a preponderance of the evidence that the probationer has violated ~~one or more~~ a condition~~s~~ of probation as alleged in the Notice of Probation Violation and Hearing, or if the probationer waives the hearing and admits ~~or stipulates to~~ such violation and the court accepts such admission in accordance with Rule 5(g), the court shall expressly so find, and such finding shall be entered on the record. In a contested proceeding, ~~T~~the court shall make written findings of fact to support the finding of violation, stating the evidence ~~relied~~ upon which the court relied. A finding of violation based on an admission may be recorded as such.

(d) Disposition After Finding of Violation. After the court has entered a finding that a violation of probation has occurred, the court may order any of the following dispositions set forth below, as it deems appropriate. These dispositional alternatives shall be the exclusive options available to the court. The court shall proceed to determine disposition promptly following the entry of a finding of violation and shall not generally continue the matter for disposition without good cause. Awaiting the disposition of an underlying criminal charge shall not constitute such good cause. In determining its disposition, the court shall give such weight as it may deem appropriate ~~weight~~ to the recommendation of the Probation Department, the probationer and the District Attorney, if any, and to such factors as public safety; the ~~seriousness~~ circumstances of any crime ~~of~~ for which the probationer was ~~convicted~~ placed on probation; the nature of the probation violation; the occurrence of any previous violations and the impact ~~on any victim~~ of the underlying crime on any person or community, as well as any mitigating factors.

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

(ii) *Termination.* The court may ~~order that the probation be considered completed and~~ terminate the probation order.

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

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

(e) Execution of Suspended Sentence; Stay of Execution. Upon revocation of a probation order, any sentence that was imposed for the crime involved, the execution of which was suspended, shall be ordered executed forthwith; provided, however, that such execution may be stayed (1) pending appeal in accordance with Mass. R. Crim. P. 31, or (2) at the court's discretion, and upon the probationer's motion, to provide a brief period of time for the probationer to attend to personal matters prior to commencement of a sentence of incarceration. The execution of such sentence shall not be otherwise stayed.

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

Commentary

To amendments effective _____, 2013

Section (c) has been amended by the addition of a reference to a probationer's waiver *of the violation hearing* as being part of the violation admission procedure. The sentence also was amended by the deletion of the term "stipulates." Although an admission of a violation is often referred to as a "stipulation," it was concluded that the latter term inadequately describes the legal event at issue, and that the term "admission" is preferable. These amendments are consistent with amendments to Rule 5 (g), which specifically address the violation admission procedure. Section (c) has been amended to include a reference to Rule 5 (g).

Section (c) also has been amended to make it clear that written findings stating the evidence relied upon are not required when a finding of violation is based on an admission.

Section (d) has been amended by the addition of its third sentence, which prohibits the "continuance for disposition" without good cause, and expressly eliminates delay to await the outcome of an underlying new criminal charge as constituting such good cause. The latter provision is intended to eliminate the possibility of post-finding "tracking." Delay in the form of "tracking" at the *outset* of a violation proceeding, before a violation is found, is expressly prohibited by Rule 6(e).

Section (d) also has been amended by some minor improvements in terminology that are of no critical legal or procedural significance.

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

RULE 9

VIOLATION OF CONDITIONS OF A "CONTINUANCE WITHOUT A FINDING"

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

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

~~(ii)~~ (i) *Termination of Probation.* The court may ~~order that the continuance without a finding be considered completed,~~ terminate the order of probation and the continuance without a finding and enter a dismissal on the underlying criminal case.

~~(i)~~ (ii) *Continuation of the Continuance Without a Finding With No Probation Modification.* The court may ~~decline to modify or revoke the probation order and instead may~~ continue the continuance without a finding and issue to the probationer such admonition or instruction as it may deem appropriate.

(iii) Continuation of the Continuance Without a Finding With Modification of Probation. ~~If the violation consists of a criminal act, or if the court determines that the violation constitutes a material change in circumstance, it~~ The court may continue the continuance without a finding and modify the conditions of probation including the duration of the continuance.

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

~~(iv)~~ (v) *Termination of the Continuance Without a Finding and Revocation of Probation.* The court may terminate the continuance without a finding and revoke the order of probation. ~~,whereupon~~ If the court orders revocation, it shall state the evidence relied upon in writing, and, if a finding of sufficient facts was entered at the time the continuance without a finding was ordered, the court shall enter a guilty finding ~~shall be entered following such revocation of probation~~ and impose a sentence or other disposition as provided by law.

~~**(c) Execution of Sentence; Stay of Execution**. Upon revocation of probation, any sentence that was specified as a condition of the plea or admission and accepted by the court that ordered the continuance shall be imposed and executed forthwith; provided, however, that such execution may be stayed (1) pending appeal in accordance with Mass. R. Crim. P. 31, or (2) at the court's discretion, and upon the probationer's motion, to provide a brief period of time for the~~

~~probationer to attend to personal matters prior to commencement of a sentence of incarceration. The execution of such sentence shall not be otherwise stayed.~~

~~**(d) Imposition of Sentence When No Sentence Previously Specified.** Upon revocation of a probation order where no sentence was specified as a condition of the plea or admission and accepted by the court that ordered the continuance, the court shall impose sentence as provided by law.~~

Commentary

To amendments effective _____, 2013

The order of sections (b) (i) and (b) (ii) has been reversed to more accurately reflect the increasingly severe "hierarchy" of this list of dispositional options. Other, minor amendments have been made to these sections.

Section (b) (iii) has been amended to reflect the fact that where a probation order is modified after a finding of violation, there is no need to mention in the rule that a "material change of circumstance" is a prerequisite to such modification. This is so because a violation of probation constitutes per se sufficient grounds for a modification. See *Buckley v. Quincy Division of the District Court Department,* 395 Mass. 815, 820 (1985).

Section (b) (iv) has been renumbered (b) (v) and has been amended to include the requirement that when the court orders a revocation of probation it *must state in writing the evidence relied upon*. This has been held to be a requirement of fundamental due process. *Morrissey v. Brewer,* 408 U.S. 471, 488-489 (1972) (due process requirements for parole revocation hearings); *Gagnon v. Scarpelli,* 411 U.S. 778, 782 (1973) (same due process rights apply in probation revocation hearings).

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

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

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

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

Section (d) has been deleted. It involved admissions to sufficient facts seeking a CWOF tendered by defendants and accepted by the court with no sentencing conditions included in the tender. In such cases, the court that later revokes probation is free to impose any sentence provided by law. The implication in this provision was that if sentencing terms *had been included* with the tender, the court that later found a violation of the CWOF and revoked probation is limited to imposing a sentence consistent with the terms set forth in the tender. It was concluded that this provision was unnecessary because such conditioned tenders seeking

CWOFs are, in fact, not made, or, if made, are not accepted by the courts. In any event, the proposed amendment to section (b) (v) (formerly (b) (iv)) adequately addresses the issue in general terms: when the court terminates a CWOF and revokes probation, "the court must impose a sentence or other disposition *as provided by law*". This obviates the need for these rules to resolve the question of whether the tender of a plea or admission seeking a CWOF may be conditioned on specific sentencing terms, and, if accepted by the sentencing court, whether such sentencing terms are "binding" on the court that subsequently revokes probation and terminates the CWOF.