



Committee for Public Counsel Services Youth Advocacy Division

COURTROOM PRACTICE GUIDE TO BAIL REVOCATION

There are **two different statutory** procedures for bail revocation in Massachusetts. [Part I](#) of this guide addresses the procedure for bail revocation under GL c. 276 §58, commonly used when a person is released on bail and is alleged to have committed a *new offense*. [Part II](#) of this guide addresses the procedure for bail revocation under GL c. 276 §58B based on a *violation of conditions* of bail which are ordered pursuant to GL c.276 §58, §58A or §87.

PART I: Revocation Pursuant to c. 276 §58 - NEW OFFENSE

The Bail Warning

A Judge or Magistrate must warn any person released on personal recognizance or bail that if they commit a new offense, bail may be revoked and they may be held for a **period not to exceed 60 days**. The court cannot order a lesser or greater time period than 60 days. *Commonwealth v. Pagan*, 445 Mass. 315, 322 (2005).

Proof of Bail Warning: c.276 §58 requires that a bail warning be given at arraignment. At a revocation hearing, the docket entry indicating that a bail warning was provided is prima facie evidence that the warning was given. §58, par. 1.

When Can the Commonwealth Move to Revoke Bail?

The Commonwealth may move to revoke bail when a juvenile commits a new offense while released on bail or personal recognizance. The motion must be filed at the **juvenile's first appearance** in the Court with jurisdiction over the new offense. The Commonwealth does not have to charge a defendant with a crime in order to show that there is probable cause that a new offense has been committed. *Delaney v. Commonwealth*, 415 Mass. 490 (1993).

Continuance of Hearing: If the juvenile seeks a continuance, it shall not exceed seven days, unless good cause is shown. The Commonwealth's request for a continuance shall not exceed three business days, unless good cause is shown. If a continuance is granted, the juvenile **may** be detained. §58, par. 3.

Practice Tip: If the Commonwealth does not move to revoke bail at the first appearance, they cannot "reserve" a motion to revoke bail for a later date.

What Must a Court Find in Order to Revoke Bail?

In order to revoke bail, the Court must find:

- Probable cause for the new offense (while on release for another charge); **and**
- "The release of said person will seriously endanger any person or the community and detention of the person is necessary to reasonably assure the safety of the person or the community."

A court is not required to revoke bail - the court **may** revoke bail on the prior charge and **may** order said person held without bail pending the adjudication of said prior charge, for a period not to exceed sixty days" § 58, par. 3.

Practice Tip: Revocation based on a new offense should be limited to cases "involving defendants who have been charged with committing a subsequent *serious* offense and, because of the nature of the offense, constitute a danger." *Commonwealth v. Paquette* 404 Mass, 121 128 (2003). Counsel should argue against revocation where the crime (whether charged or not charged) is not serious, there is no danger to the community, or alternatively, that new conditions would assure the safety of a person or the community.

Evidentiary Issues at the Hearing

There is no *right* to an evidentiary hearing at revocation. Hearsay, including police reports and witness statements are admissible. Representations of counsel can be offered to establish probable cause. *Paquette* at 134. However, the Court has the *discretion* to hold an evidentiary hearing, including cross-examination of witnesses, if warranted. *Paquette* at 133.

Findings: The Court must state in writing the reasons for revoking bail. §58, par. 3. *Paquette* at 135.

What Factors Does the Court Have to Consider ?

In determining whether detention is necessary to protect persons or the community, the Court *must* consider the following factors pursuant to 276 § 58 par. 3.

- The gravity, nature and circumstances of the offense charged
- Person's record of convictions, if any
- Whether convictions involve the use or threatened use of physical force or violence against any person
- Whether the person is on probation, parole, or other release pending completion of sentence for any conviction
- Whether the person is on release pending sentence or appeal for any conviction
- Person's mental condition
- Any illegal drug distribution or drug dependency

Issues Relating to Revocation

Timing of Trial: If bail is revoked the trial should be held "as soon as reasonably possible." *Pagan* at 323. Counsel should argue that the juvenile is entitled to a trial within the 60 day revocation period, if the juvenile is prepared for trial.

Bail Revoked in District Court on Delinquency Case: If bail is revoked on a delinquency case for a new offense in the District Court, make sure the mittimus reflects that the youth should be detained at DYS, not held in an adult jail, and that she is brought back to juvenile court in 15 days.

Review of Revocation

- There is no right to Superior Court bail review if bail is revoked. *Commonwealth v. Delaney* 415 Mass. 490 (1993).
- The bail order "shall" be reviewed if any of the cases on which bail was revoked have been dismissed, or the juvenile has been acquitted. *c. 276 §58 par. 3*. The bail order must be reviewed by the judge who revoked bail. *Pagan* at 320.
- There is no right to habeas corpus relief. *Commonwealth v. Pires* 438 Mass. 96 (2003).
- Revocation may be reconsidered if the juvenile or the Commonwealth can show that "a manifest injustice will result if a bail revocation order is not revisited." *Pagan*, at 324. The hearing must be before the judge who issued the revocation order. *Id.*

15 Day Return Date for Juveniles: Any juvenile who is in custody must be returned to court every 15 days. *c. 119 §56*. Bail revocation does not invalidate the 15 day rule. The 15 days should almost never be waived, as it provides an opportunity to share new information with the court that may be relevant to whether a "manifest injustice" exists. If your client wishes, it can also be used to resolve the underlying case.

Appeal of Revocation: The juvenile may file an appeal to the single justice on errors of law pursuant to *c. 211 §3*.

Expiration of the 60 Day Revocation Period

There is no extension of the bail revocation period. On the 60th day a juvenile must appear in court for a new bail hearing. The original bail is not automatically reinstated. *Pagan* at 323. At this bail hearing the court may consider the new arrest which triggered the bail revocation. *Pagan* at 324.

Case Resolved: Resolving the new offense, which triggered the bail revocation, does not lead to expiration of the bail revocation order.

Practice Tip: Counsel should make sure that the client is scheduled for a new bail hearing on the 60th day, and counsel should represent the client at that hearing.

Bail on the New Charge

Bail must be set at arraignment on the new case. The Commonwealth cannot "reserve" its request for a bail hearing on the new charge until after the 60 days are up. *Paquette* at 135.

PART II: BAIL REVOCATION PURSUANT TO 276 § 58B - VIOLATION OF CONDITIONS

When Can the Court use the Procedures Outlined in c. 276 §58B to Revoke Bail?

The Court may follow procedures outlined in §58B under the following circumstances -

- When a client released on bail pursuant to a “dangerousness hearing” (§58A) violates conditions or commits a new offense,
- When a client released on conditions under the pre-trial probation statute (c. 276 §87) violates conditions,
See Jake J. v. Commonwealth 433 Mass. 70,(authorizing the juvenile court to follow the procedures outlined in §58A)
- When a client released on the narrow conditions specified under the following clause of §58 violates conditions:
 “the defendant may be ordered to abide by specified restrictions on personal associations or conduct including, but not limited to, avoiding all contact with an alleged victim of the crime and any potential witness or witnesses who may testify concerning the offense, as a condition of release.” (276 §58, par. 1)

What Must the Court Find to Revoke Bail under MGL c.276 § 58B?

The court “shall” enter a revocation order if:

Probable cause exists to believe that person has committed a **federal or state crime** while on release, or
 There is *clear and convincing evidence* that the person has violated any **other condition** of release

AND

The court finds that there are no conditions of release that will reasonably assure the person will not pose a danger to the safety of any other person or the community, or
 The person is unlikely to abide by any condition or combination of conditions of release.

A Court is not required to revoke bail under this section unless it specifically finds that the juvenile is unlikely to abide by conditions or poses a danger. An alternative to revocation of bail is to craft additional conditions that will alleviate the court’s concerns.

Practice Tip: A court can revoke bail for a new offense under §58 or §58B. Argue that bail revocation for a *new offense* should be under §58 since the revocation period (60 days) is shorter, and time in detention is harmful to kids.

Time Limit for Pre-trial Detention under §58B

“A person shall not be detained for a period exceeding **90 days** excluding any period of delay as defined in Mass. R. Crim. P 36(b)(2).” If bail is revoked your client should be brought to trial “**as soon as reasonably possible.**” §58B, par. 2. Periods of delay, which toll the 90 days, may include agreed upon continuances and incompetency. In order to keep the clock running you must state unequivocally that you are ready for trial and object to any continuances.

Practice Tip: When bail is revoked under this section, be prepared for the possibility that the juvenile may be held until trial. The Commonwealth may request that the §58A detention order be extended for good cause.

Does 90 days mean 90 days? There is no case that specifically address whether the juvenile must be held for the full 90 day period, however, in *Commonwealth v. Pagan* the court addressed the length of time for detention under §58, and held that “not to exceed 60 days” meant 60 days exactly.

PART II: BAIL REVOCATION PURSUANT TO 276 § 58B - VIOLATION OF CONDITIONS**The Revocation Hearing**

The hearing should be held upon the juvenile's *first appearance* unless there is a request for a continuance.

Continuance of the Hearing: The Commonwealth may request a continuance for up to three days. The juvenile may request a continuance for up to seven days. Any continuance that exceeds these time periods must be for "good cause." The juvenile *may be released* on conditions during the continuance, if the Court determines that there are conditions that the juvenile will abide by, and that will not pose a danger to another person or the community. *§ 58B, par. 2.*

Evidence at the Hearing: There are no cases on the type of evidence that can be submitted during a §58B revocation hearing. The standard of proof for finding a violation of conditions (not a new offense) is "clear and convincing evidence." Counsel may argue that the hearing should be similar to a hearing on revocation for a new offense, or that an evidentiary hearing may be necessary if the proof offered at the hearing is not reliable or if due process requires confrontation.

Revocation for a New Offense

If the revocation is for a new offense, and there is probable cause to believe that a new crime was committed, there is a rebuttable presumption that no conditions "will assure that the person will not pose a danger to the safety of any other person or the community." *§ 58B, par.2.*

Practice Tip: You can argue that the presumption is overcome if the offense is not serious, the crime did not involve the threat or infliction of bodily harm, or your client is involved in community programs that would assure the safety of the community. You should argue that the more appropriate procedure for revocation due to a new offense is under c. 276 §58, since the revocation period is for a shorter amount of time, and time in detention is harmful to kids.

Amending Conditions of Release

If the Court finds that the juvenile has violated a condition of release or committed a new offense, the Court is not required to revoke bail. The Court may amend conditions of release if the juvenile will abide by new conditions, and those conditions provide assurance that the person will not be a danger to any person or the community. *§58B, par. 2.*

Practice Tip: You may argue that bail should not be revoked for a violation of conditions of release because it is less serious than committing a new offense. The statute allows for the court to amend or add conditions of release. Instead of revoking bail under this section courts will often amend the conditions of release by adding more restrictive or different conditions. If the new offense or violation of conditions is not dangerous, you can argue that your client does not pose a danger. Also note that if a violation of conditions of release is alleged—the standard is clear and convincing evidence, a higher standard of proof than probable cause.

Appeal of Revocation:

The juvenile may file an appeal to the single justice on errors of law pursuant to c. 211 §3.

Dangers of Detention for Kids

Remember to cite c. 119 53

" the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents and that, as far as practicable, they should be treated, not as criminals, but as children in need of aid, encouragement and guidance."

Detention has been shown to be harmful to kids. (See JDN page, "Key Issues - Overuse of Detention, www.youthadvocacydepartment.org). Revocation requires that kids spend at least 60 or 90 days in detention and restricts the judge's ability to release kids to the community if programs or services become available. Options such as setting a cash bail allow the judge more flexibility to comply with the juvenile court's mandate to provide "aid, encouragement and guidance."