

MULTNOMAH COUNTY JUSTICE REINVESTMENT PROGRAM
Standards of Excellence Task Force

BEST PRACTICES: PROBATION VIOLATIONS

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Best Practices at Probation Violations Hearings – Probation Officers

I. PV Arraignments/JC2

GOAL: To provide as much information as possible regarding alleged violations to DAs and defense lawyers as quickly as possible so they can adequately prepare for hearings.

- If client is brought into custody on an outstanding warrant, order reports and determine if there are any additional violations to allege.
- When detaining clients after police contact, be sure to compose a detailed detainer. Violations in the detainer should include additional information. For example:
 - Failure to obey all laws: include pending charges, date, and available information.
 - Failure to report-date client last reported.
 - Failure to report address- last home visit date, attempt to complete home visit or date letter sent.
- Detainers returning to court should include “hold for hearing” and the following additional information when applicable:
 - Recommending revocation.
 - Available sanctioning units have been exhausted.
 - MCJRP case- No administrative sanctions.
 - Recommending a sanction outside the grid that only the court can impose.
 - Refusing the administrative sanction.

- Case expired or is past expiration date (this is being considered for a change by the court).

II. Preparation

- Order police reports if applicable. Contact DDA for assistance when needed.
- Allege all possible violations and forward written report to supervisor three days prior to hearing.
- If revocation is not being recommended, order any assessments needed for treatment referrals prior to hearing when applicable.
- Prepare file and electronic chronological log for hearing.
- Notify DDA of witnesses and contact information as soon as possible in anticipation of a contested hearing.
- Verify the hearing date and time prior to the scheduled date.
- Attempt to attend all scheduled hearings in person. If coverage is needed, update the PO covering the hearing on all pertinent information to the case.

III. Determining appropriate recommendation

- How does the recommendation serve public safety, short and long term?
- How does the recommendation address the offender's criminogenic risk factors?
- Consider what law/sentencing guidelines/department policy allows.
- What is the least restrictive sanction to the desired outcome?
- What are you hoping to accomplish: removing the offender from the community for as long as possible, get the offender's "attention", develop long-term treatment or program plan?

- Will alternative sanctions, such as community service, electronic monitoring, change center etc., be as effective as jail? What alternative sanctions have either been used or considered?
- Is the recommended sanction available to the offender? Is treatment, housing, electronic monitoring etc., available, and is the offender an appropriate referral?
- Does the recommendation follow logically from the violations and conformance section?
- Make sure there are custody units available if you are recommending jail as a sanction.
- If to address the needs of a victim, are there plans in place for the victim and is the available remaining custody time adequate in light of that plan. What would be the impact of the recommendation on the interest of existing victims?
- Address each case in the recommendation, even if you are asking for no action on a particular case.

IV. PV Hearing

- Appear on time and in person for scheduled hearing.
- Be prepared to discuss all alleged violations, conformance, and substantiation for recommendation being made.
- If applicable, give reporting instructions.
- Have client sign any needed releases of information for referrals if applicable.
- Avoid editorializing and unprofessional opinions. Be objective and include only the facts while describing behavior.
- Express professional opinions about how best to achieve the required objective, but avoid unprofessional judgments while making a persuasive argument in support of an opinion. If the point is that repeated efforts haven't worked, make that point. If the point is that the offender represents a continuing danger to

specific persons or the community, make that point. Useful opinions are those based on the facts, the literature, and experience undistorted by frustration.

V. Post Hearing

- Document the hearing and outcome in chrono notes. If revoked, indicate in chrono notes that the client will not be returned to MCJRP caseload upon release from custody, and close file.
- Make any appropriate or court ordered referrals.
- Schedule releases with jail when applicable.

Best Practices at Probation Violation Hearings - Defense Attorneys

I. Prior to the Hearing

A. Reviewing the File

- Contact JA. Determine if date and time set at arraignment is available for both the court and attorney. Verify that hearing will happen within 14 days of arrest and/or detainer. ORS 137.545(6). (JA will then contact PO and DA Control if time of hearing is changed. JA will order transport).
- Have staff interview client as soon as possible. Determine if client knows what violation might be alleged. Get basic contact information and what they have accomplished on probation.
- Review court records. Determine if probation is still viable (*i.e.* court still has jurisdiction over the probation); conviction date, charge and grid, prior PV's (pull old files or download previous judgments). If M57, determine what the presumptive prison sentence would be. If the probation is a downward, departure, determine if a natural or stipulated grid. Note: if a departure from Measure 11, if the proved violation is a new criminal conviction, the court MUST revoke the probation. ORS 137.712(5). Verify probation department has not already sanctioned client for the same conduct on this probation. (ORS 137.593(3)).
- Review custody status. Does client have any holds, warrants, other pending cases (open or probations) in this or any other jurisdiction?
- Get PO report. If haven't received report three days before hearing time, contact PO via phone or email to get report or its status.
- Review report. Can the state prove the allegations?
 - What State witnesses are needed/available?
 - Did client admit violations to PO? (Was client in custody? Miranda? Attorney appointed?)
 - Does client agree probation was violated?
 - What witnesses/evidence does client want to present. Is it practicable to get witnesses/evidence before scheduled hearing time, need ROI, etc.? Can PO verify information without need to request the records?
- Review recommendation.

- Is the court likely to follow the recommendation?
- Determine alternative to recommendation.
- Is it a legal recommendation? Determine maximum sanction units per guidelines, verify previously used sanction units. Is the sanction being recommended within the guideline range? If revocation recommendation, is PO asking for consecutive terms? Must have more than one violation of probation. (OAR 213-012-0040). Is the term of PPS appropriate to the grid?
- Is the allegation a new law violation? Did it get no complained/indicted? What are the next dates? If in Multnomah, contact attorney on that case. Notify attorney of pending PV hearing and if appropriate set PV to track with new case. Periodically remind other attorney that PV should be negotiated with new charges.

B. Consult with client

- Does client agree with the violation? If not, can the state prove it?
- Does client agree with the recommendation?
- Discuss possible outcomes with client. Always remind client, even if PO recommending continuation of probation, that judge can revoke and what the maximum sentence could be.
- Discuss viability of what client wants to happen. If client wants to present evidence, determine if it can be obtained before set hearing date. If not, discuss client waiving right to a hearing within 14 days. If client is willing to waive, contact JA about moving hearing. Verify that court is willing to take attorney's representation of waiver (most do, some require written waiver).
- Consider using Motivational Interviewing techniques.
- If client disagrees with recommendation, consider contacting PO to explore options:
 - START
 - Mental Health Court
 - Veteran's Court
 - Inpatient treatment
 - GPS/SCRAM

II. Attend the Hearing

- Prior to client's arrival, consider discussing with PO/DDA the recommendations and goals of the probation, and how to accomplish these goals. Consider proposing an in chamber discussion to make Court aware of potential issues.
- Indicate if client will stipulate to violation, or is requesting a contested hearing.
- **Contested Hearings:** Be Aware of the following
 - Must be provided with **written notice** of the allegations, *State v. Eckley*, 34 Or App 563 (1978).
 - **Standard of proof:** preponderance of the evidence, *State v. Fortier*, 20 Or App 613 (1975).
 - **Exclusionary Rule Applies:** *St ex rel Juv Mult Co v. Rogers*, 314 Or 114 (1992).
 - **Hearsay:** rules of evidence do not apply, but constitutional right of confrontation means you can object to hearsay. See *State v. Harris*, 260 Or App 154 (2013)(lab tech), *State v. Monk*, 244 Or App 152 (2011)(PO testifying to contents of police report – reversed), *State v. Terry*, 240 Or App 330 (2011) (PO testifying that defendant to an officer who told the PO – reversed), *State v. Wibbens*, 238 Or App 737 (2010)(PO testifying that officer told him defendant smelled of alcohol – reversed).
 - **Right to testify, call witnesses:** *Gagnon v. Scarpeli*, 411 US 778 (1973).
 - **Collateral Estoppel** may apply to the state. *State v. McAllister*, 72 Or App 611 (1985)(this is the reason the state seldom proceeds on a PV allegation when there is a pending charge based on the same facts).
 - PO's generally cannot impose conditions of probation except as provided for under ORS 137.540(8) for crimes committed on or after August 1, 2013 with written notice to the court and DA's office. PO may characterize added conditions of probation as "abide by PO directive." Clients can challenge conditions of probation not judicially imposed, *State v. Maack*, 270 Or App 400 (2015).
- Present client's position to the court.
- If probation is continued, PO may ask for additional conditions of probation. Those probation conditions need to be reasonably related to the crime of conviction. ORS 137.540(2). There is quite a bit of case law on this, sometimes striking, sometimes affirming. Here are a few of the most recent cases: *State v. Bell*, 276 Or App 21

(2016), *State v. Hurita*, 276 Or App 58 (2016), *State v. Gallo*, 275 Or App 868 (2015), *State v. Gaskill*, 250 Or App 100 (2012), *State v. Olson*, 246 Or App 785 (2011).

- Fill out and file Notice and Advise of Right to Appeal

III. Post Hearing

After hearing follow up with client requests to call family, obtain Releases of Information, etc.

Best Practices at Probation Violation Hearings-District Attorneys

I. PV Arraignments / JC2

- Review files in coordination with probation officer attending JC2 for PV allegations.
- Ensure probation reports (if available) are placed in the file.
- If the only allegation is a new law violation that has not yet been adjudicated, consult with JC2 PO or case PO about whether any other violations have occurred that could be added to an amended report.
- After the PV arraignments are complete for the day, the contested PV cases will be assigned to a DDA as soon as possible to the Unit responsible for the prosecution.
- Assigned case DDA (Sr. DDA will distribute if unassigned) will be responsible for prepping the case for the PV hearing.

II. Preparation

- Assess victim rights issues and obtain victim input (if any).
- DDA should review CRIMES notes for assigned PV file as soon as they learn of the PV assignment.
- Review prior history of the case, number of PVs, and OECl record of prior sanctions.
- Contact PO and discuss case even if report is not yet ready.
- If the only allegation is a new law violation that has not yet been adjudicated, consult with PO about whether there are other violations that could be added to an amended report.
- Assess the strength of the violations and what proof would be required to substantiate them.
- Determine whether defendant made any admissions to PO concerning the allegations.
- Determine whether proof of one or more allegations are sufficient to obtain the appropriate level of sanctioning and whether it is warranted to forgo more difficult to prove allegations.

- Begin to assess whether revocation or continuation of probation is warranted (offender accountability, intent of parties in negotiations, victim safety, community safety, likelihood of recidivism, number and quality of prior sanctions, prior recommendations by DDAs, previous judicial statements etc.)
- Generate subpoenas for necessary witnesses.
- For substantive hearsay that may be admissible, examine case law and determine whether a showing can be made that the hearsay should be admitted.
- Email or call the assigned defense attorney to inform them of your assignment to the case and request information concerning which allegations are to be contested or stipulated at the hearing.
- Negotiate PV if appropriate.
- Consider victim rights issues and ensure victim has been notified of the hearing.

III. PV Hearing

- Discuss the PV allegations with the defense attorney. Determine which allegations are stipulated and which are contested.
- If the victim wishes to participate in the hearing, then consult with the victim before negotiating any probation violation resolution.
- Negotiate PV outcome if appropriate.
- Discuss strengths and weaknesses of probationer's compliance with supervision conditions.
- Discuss the appropriate case plan if continued on probation. (What tools are left to try? What increases likelihood of success by continuation?)
- Discuss revocation and whether the purposes of probation are being served.
- Determine which allegations the State will seek to prove, whether continuances will be requested on any allegations and the defendant's 14 day custody status.

- Do not request a continuance past the 14th day without proving/stipulating at least one allegation unless absolutely necessary.
- Determine whether revocation or continuation is appropriate given the allegations that can (or will) be proved.
- Factors weighing in favor of revocation include but are not limited to: seriousness of underlying conduct, negotiation intent of the parties settling the case, prior sanctioning history, low likelihood of rehabilitation, prior statements of the court expressing intent to revoke, lengthy or egregious criminal history of offender, prior recommendations of DA's to revoke, offender accountability, victim input aligns with revocation, severity of violations, exhaustion of sanctioning authority etc.
- Factors weighing against revocation include but are not limited to: PO/defense present a strong case plan for future success, lesser sanctions have not been tried and/or found ineffective, victim input aligns with probation continuance, mitigation presented by PO or defense, offender showing success in other areas of probation, work/family/housing history and other pro-social strengths, accountability shown by offender concerning the violations, etc.
- If revocation is contemplated, advocate for an appropriate revocation sentence based on the following considerations: the underlying facts of the case, seriousness of the violations, danger to the community, need to incapacitate defendant from future offenses, danger to victim, offender accountability and possible reformation/rehabilitation issues within prison.
- For allegations of new law violations that have not yet been adjudicated, determine whether any other allegations – unrelated to the new law violation – have occurred and seek either a stipulation or to prove those violations.
- For allegations of new law violations that have not yet been adjudicated, consider whether ultimate sanctioning should be left until after adjudication has occurred and, if appropriate, request the court hold defendant in custody on other proven/stipulated allegations until adjudication occurs.
- When calling case, inform the court whether the hearing is to be contested and whether the parties have reached any stipulations.

- If seeking a continuance for any allegation(s) inform court and explain rationale and effect of any 14-day issues for the request.
- Present evidence on each allegation sought to be proved, including sworn testimony of PO.
- Ensure any admissions of defendant are presented in evidence.
- If sufficient evidence has been presented, argue in favor of a finding of violation.
- If the victim wishes to participate in the probation violation hearing, inform the Court and offer the victim the opportunity to share with the Court the victim's input on the disposition.
- Present recommendation to court for appropriate sanction and explain the rationale for the recommendation.

IV. Post Hearing

- If the victim participated in the hearing, explain what happened at the hearing and assist the victim with any questions they have with the case.
- Update the victim's contact information for future notifications and provide that information to the probation officer.
- Write detailed notes concerning the PV allegations, and document which allegations were stipulated, proved, dismissed or continued.
- Write detailed notes concerning the hearing itself and any statements by the offender which show amenability to, or opposition of, future supervision efforts.
- Document the State's recommendation and the Court's actual sanction imposed.
- Document any judicial statements concerning expectations, likelihood of revocation if judicial order is not followed, or other similar thoughts for future PV hearings.
- Summarize log note in CRIMES for electronic record keeping.

Best Practices at Probation Violation Hearings--Judges

I. PV Hearings—In General

- Judges may have distinct roles in a PV hearing. The judge must be a neutral adjudicator, consistently following the law and applying fair procedures in deciding whether the probationer is in violation, whether revocation is warranted, and what sanction should be imposed. However, if probation is continued, the judge's role may be different. A PV hearing provides an opportunity for a judge to help the probationer get back on track and avoid further violations.
- Remember that POs have limited resources and difficult jobs. Judges should use POs as a resource, without disparaging their efforts or attempting to micromanage their work.
- Under ORS 137.545(6), a probationer must be released from custody if the hearing is not held within 14 days of the probationer's arrest except for good cause shown.
- Under Article I, section 42 of the Oregon Constitution, crime victims have a right to be present at any critical stage of the proceedings. The DA's office has a process for notifying victims of their rights. Ask the DA if the victim has requested an opportunity to be heard at the PV hearing.

A. Determining Whether Probationer is in Violation

- If probationer stipulates to one or more violations and you are satisfied that the probationer understands that he/she has a right to a contested hearing and wants to waive that right, accept the stipulation and proceed to sanction stage. Consider reviewing the probationer's rights with the probationer before accepting the stipulation.
- If probationer does not stipulate and the parties are ready to proceed to a contested PV hearing, conduct the hearing and make appropriate findings. Judges should strive to follow applicable procedures and legal requirements consistently so that procedures and outcomes do not vary depending on which judge is conducting the hearing.
- If necessary, address any evidentiary issues, such as the extent to which hearsay evidence will be offered at the hearing. See *State v. Harris*, 260 Or App 154 (2016); *State v. Wibbens*, 238 Or App 737 (2010).

- Avoid rescheduling PV hearings for a date earlier than the date scheduled at arraignment; that can cause problems for other participants. Encourage communication among DAs, defense counsel and POs regarding scheduling and the scope and necessity of a PV hearing. If the parties are not ready for a contested hearing, set over the PV hearing if appropriate.

B. Determining the Appropriate Sanction

- Review the PO's report and recommended sanction; review the LS/CMI and the original assessment report. POs should be prepared to discuss the probationer's conformance on probation, what strategies have been attempted, what worked, what didn't work, and what plan might best address the probationer's needs in ways that will minimize the risk of recidivism. Consider modifying/adding to conditions of probation if appropriate. If the PO is recommending revocation, discuss reasons for that recommendation.
- Determine what the DA's recommendation is and why. If the DA is recommending revocation, the DA should be prepared to explain why probation with MCJRP conditions will not work. If the DA is recommending continuing on probation, the DA should recommend an appropriate sanction and participate in the discussion of what plan might best address the probationer's needs in ways that will minimize the risk of recidivism and ensure victim safety.
- Obtain input from the defense attorney. If the State is recommending revocation, consider defense arguments for continuing probation. If the court is satisfied that continuing probation is the best option, consider recommendations from defense attorney regarding sanction and any modification of terms and conditions of probation.
- Determine whether the probationer has other pending cases or open probations, including cases in other jurisdictions. Consider the effect a sanction in this case will have on other cases, and vice versa.
- Obtain input, if any, from victim.

II. Revocation Sanctions

- Stipulated sanctions: if the parties previously stipulated to a particular sanction if probation is revoked, the court should impose the agreed-upon prison sanction absent good reasons to deviate from the agreement. If defendant stipulated to a higher grid block and a revocation sentence based on that grid block as part of the plea agreement,

the state expects the court to hold the parties to their agreement. Judges should not deviate from the agreement unless there are good reasons to do so.

- Presumptive prison cases: the court may impose up to the presumptive prison sentence upon revocation. The court has discretion to impose less than the presumptive prison sentence. Consider whether the presumptive prison sentence or a lesser prison sentence is appropriate under the circumstances. Don't forget to impose the appropriate term of post-prison supervision (PPS) based on the sentencing guidelines.
- Misdemeanors and presumptive probation cases: for presumptive probation felonies, the court may impose up to 6 months in prison (local control) upon revocation. OAR 213-010-0002. For Class A misdemeanors, the court has authority to impose up to 1 year in jail. Consider whether the amount of jail time imposed is appropriate in light of limited jail beds and the 6-month maximum for presumptive probation felonies. Consider whether the resources used to carry out a jail sanction imposed by the court after revoking bench probation might be better used for other purposes. Use your judgment in determining the length of a jail sanction, taking into account the purposes of just punishment, fair treatment of similarly-situated offenders, vindication for and safety of victims, the effect a jail sanction will have on the defendant's family and community, and the incentive the sanction will serve in reducing recidivism.
- Remember that sanctions must be concurrent if revocation is based on a single probation violation. See OAR 213-012-0040; *State v. Stokes*, 133 Or App 355 (1995). Remember that, under *State v. Denson*, 280 Or App 225 (2016), the court's authority may be limited to a grid block sanction if the judgment does not specify a presumptive sentence under ORS 137.717 that is different than the presumptive sentence under the sentencing guidelines.
- If appropriate, engage in a dialogue with defendant even if probation is revoked and defendant is sentenced to prison. The discussion might be a "therapeutic opportunity" that can help the defendant deal with prison and succeed on post-prison supervision and beyond. Use "motivational interviewing" techniques, if appropriate.
- If defendant is on probation in multiple cases or for multiple counts, and you decide to revoke probation on some counts and continue probation on others, consider which probations should be revoked and which should be continued. Then consider the best practices for continuing probations after a PV (below).

III. Continuing Probation After a PV—Felony/Supervised Probations

- If the plan is to continue probation, discuss with the attorneys and the PO the levels of risks and needs that apply to the probationer. Use the information obtained through the LS/CMI assessment and any drug, alcohol, mental health, or other evaluations. Ask the PO to review the LS/CMI domains of risk, need, and the current case plan. Review the probationer’s progress in achieving goals and case plan objectives.
- Assess why the current case plan is not working and attempt to determine what changes need to be made to the case plan. Don’t just try the same things that have not worked. Ask the PO for input regarding the potential to change the probationer’s behavior through structured and motivational interviews and other supervision techniques.
- Don’t tell the probationer that this is his/her “last chance.” This is generally discouraged as counter-productive.
- Address any other pending cases, if appropriate, and other open probations, including cases in other jurisdictions.
- Engage in a dialogue with defendant if probation will be continued, if appropriate. Treat the discussion as a “therapeutic opportunity” that can help the probationer succeed on probation and minimize risk of recidivism. Use “motivational interviewing” techniques. Try to get the probationer to describe his treatment or other needs; get probationer to commit to the treatment plan and other terms and conditions of probation.
- Learn about risk/needs assessments and attempt to understand where the probationer fits in Doug Marlowe’s risk/needs quadrant (see appendix for a summary).
- Use jail sparingly, as a tool to get the probationer back on track and to punish inappropriate behavior. A short jail sanction will often be sufficient to get the probationer’s attention and get him/her back on track. Use the sentencing guidelines to determine the custody units that are available; consider the time the probationer has already served in custody. Address the use of structured sanctions.

IV. Continuing Probation After a PV—Misdemeanor/Bench Probationers

- Consider the primary goals you hope to achieve through probation. In DUII cases, the probationer needs to complete treatment if at all possible. Consider using positive incentives—early termination of probation, suspension of all or part of a fine, etc.—if the

probationer accomplishes specified goals, such as completing treatment, community service, or paying restitution to the victim.

- Use jail sparingly, as a tool to get the probationer back on track and to punish inappropriate behavior. A short jail sanction will often be sufficient to get the probationer's attention and get him/her back on track.
- Remember that, for many probationers, getting off probation may be extremely important. Don't automatically extend probation; help find a way for the probationer to complete probation. Consider deleting or revising probation conditions, such as Theft Talk, that create financial obstacles that the probationer is unlikely to overcome.
- Be creative; consider alternative programs or probation conditions that will serve the purposes of probation, encourage compliance, and help the probationer successfully complete probation.
- If the probationer is on formal probation in another case, convert the bench probation to formal. There is no need to have two separate open probation files with different enforcement mechanisms. Allow DCJ to supervise all open probations.

APPENDIX

Summary of Doug Marlowe's Risk/Needs Quadrant

High Risk/High Needs Probationers

- “High risk/high needs” probationers will require immediate action when they violate the terms of their probation. Flexibility will be required in coming up with a case plan that works. If something is not working, try something else.
- The fact that the probationer is in court for a probation violation hearing likely means that the current plan is not working and will need to be changed if probation is continued. Try to determine what parts of the plan are not working and why. If the probation plan is not working because the plan does not adequately address the probationer's needs in order to minimize the risk of recidivism, work with the parties to come up with a better plan (unless probation is revoked).

High Risk/Low Needs Probationers

- “High risk/low needs” probationers will require immediate action when they violate the terms of their probation to avoid putting the public in danger. These probationers typically need swift and certain consequences when they violate the terms of their probation; flexibility in developing a case plan is not critical.
- These probationers may need mentoring, cognitive restructuring, and/or a plan for imposing swift and certain punishments for violations, but they typically do not need treatment. Consider authorizing the PO to make greater use of structured sanctions. Consider whether more frequent contacts with the PO and/or the court will be helpful. Make sure the probationer understands when revocation and imposition of a prison sentence will be the next step; follow through if the probationer fails after being given a “last chance.”

Low Risk/High Needs Probationers

- “Low risk/high needs” probationers may not demand immediate action for minor violations because the risk to the public is low. However, because their needs are high, POs and the court will need to be flexible in devising and revising case plans

that can work without using resources that would be better spent on high-risk probationers.

- These probationers typically need treatment, but the risk of recidivism is relatively low, so the risk may not justify using scarce treatment resources even though the need for treatment is obvious. If the probationer has resources to pay for an appropriate private treatment program, consider referring (or re-referring) the probationer to that program. Do not expect that DCJ's limited resources for supervision/treatment will be spent on these probationers even though the need for treatment is high. Remember that we may not be able to help everyone overcome their substance abuse addiction; helping them avoid violating the law will have to suffice. Impose sanctions and probation conditions that are designed to ensure that the probationer does not violate the law.

Low Risk/Low Needs Probationers

- "Low risk/low needs" probationers should not require aggressive supervision with imposition of immediate consequences for minor violations and development of flexible case plans.
- Typically, the threat of revocation and potential for imposing a prison or jail sentence may be enough to ensure that these probationers comply with the terms and conditions of their probation. Structured sanctions should be sufficient to address most violations. Consider imposing short jail sanctions (2 days) for any violations. Consider positive incentives such as early termination of probation for good behavior.