

BACE LAW REPORT

LEGAL NEWSLETTER

VOLUME 3, NO. 11 - DECEMBER 2009

Pre-trial Probation Explained

Pre-trial probation, as opposed to the more familiar *continuance without a finding* ("CWOFF"), is a flexible mechanism by which to potentially dispose of your criminal matter. A pre-trial probation outcome is essentially a written agreement formed between the accused and the prosecutor prior to trial. With judicial approval, a set of conditions or restrictions can be placed on the accused for a period of time, and the case is then removed from the court's docket. After the probationary period has passed and all the conditions have been met, the case is dismissed without further punishment to the accused, and more importantly, without a guilty finding.

Pre-trial probation agreements place the accused under the care of a probation officer for a period of either supervised probation, or unsupervised (administrative) probation. Some of the more common probation conditions include

community service, rehabilitation programs, or periodic "check-ins" with the officer.

One of the more beneficial aspects of pre-trial probation as opposed to a CWOFF, is the potential result after a violation. With respect to a disposition by CWOFF, if one violates the probationary period, one has forfeited her rights to a jury trial. At that juncture, a guilty verdict can be entered, and a sentence immediately imposed. Thus, a disposition by CWOFF automatically carries a significant and serious forfeiture of constitutional rights.

In distinct contrast, if one commits a violation of the terms of the pre-trial probation agreement, no guilty verdict can immediately result. By entering into the pre-trial probation agreement, no constitutional rights are waived, and no guilty plea is submitted. Therefore, upon a violation, a defendant cannot be immediately sentenced, as with a CWOFF. However, an accused who violates pre-trial probation can be held with or without bail depending on what the court decides at a bail determination hearing.

Probation is authorized by statute, the

relevant portions of which state, “The superior court, any district court and any juvenile court may place on probation in the care of its probation officer any person before it charged with an offense or a crime for such time and upon such conditions as it deems proper, with the defendant’s consent, before trial and before a plea of guilty...” *M.G.L. 276 § 87*.

Recent case law has limited the practical scope of the pre-trial probation as a disposition. If the Commonwealth refuses to negotiate a pre-trial probation agreement, or objects to the accused’s request for the court to offer pre-trial probation, it is generally unavailable. The court cannot unilaterally, over the prosecution’s objection, place an accused on pre-trial probation. *Commonwealth v. Cheney, 440 Mass. 568 (2003)*. In *Cheney*, a Superior Court judge disposed of indictments for rape of a child by placing the defendant on “pre-trial probation,” without an admission of guilt, for six months, even in the face of the prosecution’s objection. The Court concluded, "judicial power does not extend to authorize a judge to dismiss an otherwise legally adequate indictment, prior to verdict, finding, or plea [over the Commonwealth's objection], in the 'interests of public justice.'" The ruling was based on the principle of separation of

powers, set forth in Article 30 of the Massachusetts Declaration of Rights, that does not "permit judges to substitute their judgment as to whom and what crimes to prosecute, for the judgment of those who are constitutionally charged with that duty." *Id. at 575*. Thus, pre-trial probation is likely unavailable unless the prosecutor is also willing to negotiate this disposition. Whether or not the prosecutor is willing to negotiate a pre-trial probation agreement is going to depend on a myriad of factors; thus, retaining an attorney as soon as possible when you are facing a criminal charge is critical.

Recent case law further clarified the difference between the two dispositions, adding that once an admission of guilt, or an admission to sufficient facts have been entered, a pre-trial probation is unavailable. *Commonwealth v. Sebastian, 444 Mass 306 at 315 (2005)*.

Due to the complex nature of negotiating a favorable disposition of a criminal matter, it is always advisable to hiring an attorney as soon as possible.

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