

MAINE STATE LEGISLATURE

The following document is provided by the
LAW AND LEGISLATIVE DIGITAL LIBRARY
at the Maine State Law and Legislative Reference Library
<http://legislature.maine.gov/lawlib>



Reproduced from scanned originals with text recognition applied
(searchable text may contain some errors and/or omissions)

**This document is from the files of the Office of
the Maine Attorney General as transferred to
the Maine State Law and Legislative Reference
Library on January 19, 2022**

80-81

RICHARD S. COHEN
ATTORNEY GENERAL



STEPHEN L. DIAMOND
JOHN S. GLEASON
JOHN M. R. PATERSON
ROBERT J. STOLT
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

May 7, 1980

Ronald Martel, Associate Commissioner
Mental Health and Corrections
411 State Office Building
Augusta, Maine 04333

Dear Mr. Martel:

Pursuant to 5 M.R.S.A. § 195 we are pleased to respond to your request for an Opinion of the Attorney General. In your letter you state that there are instances in which there is a conflict of opinion between a probation officer who believes that an individual's probation should be revoked and the District Attorney who feels that probation should not be revoked. Your question is whether, under these circumstances, the District Attorney has the authority not to proceed with the petition to revoke or whether he is obligated to follow the recommendation of the probation officer. As will be more fully explained hereinafter, we conclude that the District Attorney has the authority to dismiss the petition for revocation of probation.

We begin our discussion with a brief overview of the statutory provisions relating to probation revocation. If a probation officer has probable cause to believe that a person under his supervision has violated a condition of his probation, or if a person on probation is charged with or convicted of a new offense and is incarcerated pursuant thereto, the probation officer may file a motion to revoke probation in the court which sentenced the person to probation. 17-A M.R.S.A. §§ 1205(1), (2), (5) and 1206(2). In many instances that individual would be entitled to a preliminary hearing before an official designated by the Director of Probation and Parole. 17-A M.R.S.A. §§ 1204(4), (5) and 1205-A. If after hearing the evidence and witnesses, the hearing officer determines that there is not probable cause, the proceedings are terminated. Id; see also 17-A M.R.S.A. § 1205(7). If there is probable cause a court may then entertain the motion to revoke. Id.

At this point, the court may in its discretion order a hearing on the allegations or dismiss the motion if the conduct alleged

does not constitute a violation of the conditions of probation. 17-A M.R.S.A. § 1206(1).^{1/} If after hearing all of the evidence the court finds by a preponderance of the evidence that the person has inexcusably failed to comply with a condition of probation or has committed or been convicted of a crime, the court may revoke probation. 17-A M.R.S.A. §§ 1206(5), (6), (7).

As this statutory overview indicates, the probation officer plays an integral and an important role in the revocation of probation. He is the only person that can make the initial determination of whether to file a motion to revoke probation with the court. Indeed, a proposed amendment, L.D. 611, which would have permitted the District Attorney or the Attorney General to initiate a petition to revoke probation was defeated in the first session of the 109th Legislature.

A probation officer is, of course, not an attorney. His duties, which include supervising individuals on probation and when necessary arresting and charging them with violations thereof, are set forth in 34 M.R.S.A. § 1502. Because he is not an attorney, he may not represent the State and prosecute in court petitions to revoke probation. The State, like a corporation, cannot proceed pro se but can appear in court only through a licensed attorney. Land Management, Inc. v. Department of Environmental Protection, Me., 368 A.2d 602 (1977) (corporation); State ex rel Frohmler v. Hendrix, 59 Ariz. 184, 124 P.2d 768, 772 (1942) (State); compare 4 M.R.S.A. § 807 (prohibiting unauthorized practice of law) with 14 M.R.S.A. § 7452 (exception to general rule which permits corporation, partnership, or governmental entity to appear in small claims court without attorney); see generally, 7 Am. Jur.2d Attorneys at Law §§ 73, et seq. (1963).

As a general rule, the State is represented in all court proceedings by either the District Attorney or the Attorney General. Essentially, the Attorney General and the District Attorney in whose prosecutorial district the action is brought have concurrent jurisdiction in all civil and criminal cases in which the State is a

^{1/} In those instances in which the individual is not entitled to a preliminary hearing, the matter is referred directly to the court which may likewise either hear or dismiss the motion.

party. 2/

The Law Court has previously stated that probation revocation, although it may be likened to a civil proceeding, is ultimately neither civil nor criminal but sui generis. Dow v. State, Me., 275 A.2d 815, 823-24 (1971); see State v. Foisv, Me., 384 A.2d 42 (1978) and State v. Caron, Me., 334 A.2d 495 (1975) (exclusionary rule inapplicable to probation revocation); Skidwell v. State, Me., 264 A.2d 8 (1970). In whatever manner it is classified, the District Attorney is authorized to dismiss civil and criminal cases by virtue of 30 M.R.S.A. § 503. This power is in conformity with the District Court and Superior Court Rules of Procedure which permit the prosecuting party to dismiss a civil or criminal action, typically with leave of court. M.R.Civ.P. 41(a); M.R.Crim.P. 48(a); D.C.Civ.R. 41; D.C.Crim.R. 48(a). Moreover the authority to dismiss an action is not of recent origin; these provisions are in large measure a codification and limitation of the far reaching right at common law for a plaintiff to take a nonsuit in a civil action and for the prosecutor to enter a nolle prosequi in a criminal proceeding. 9 Wright and Miller, Federal Practice and Procedure: Civil §2362 at 149 (1971); 3 Wright and Miller, Federal Practice: Criminal §§ 811 and 812 (1969); Field, McKusick, and Wroth, Maine Civil Practice §§ 41.1 and 41.2; Reporter's Notes to Rule 41 (2d ed. 1970).

Given the authority of the District Attorney or Attorney General to dismiss a probation revocation proceeding usually with court approval, it follows that the prosecuting attorney cannot be compelled by the probation officer to proceed with a petition if the attorney does not believe the petition should be brought. We would hope, however, that a conflict between the prosecuting

2/ The civil jurisdiction of the District Attorney is set forth in 30 M.R.S.A. § 501 which states that "he shall prosecute to final judgment and execution all civil cases in which the State is a party in any county within his prosecutorial district" The District Attorney's criminal jurisdiction is found in 30 M.R.S.A. § 502: "unless he makes an order of dismissal as provided, he or someone acting under his direction shall be responsible for the prosecution of all criminal cases . . . of any of the counties within his district" As for the Attorney General's jurisdiction, 5 M.R.S.A. § 191 provides that he "shall appear for the State . . . in all civil actions and proceedings in which the State is a party or interested" In criminal proceedings, the Attorney General is invested with the "rights, powers, and privileges" of the District Attorney, 5 M.R.S.A. § 199, has responsibility for prosecuting homicides and major crimes; 5 M.R.S.A. § 200-A, and may in his discretion act with or displace the District Attorney "in instituting and conducting prosecutions for crime . . ." 5 M.R.S.A. § 199.

Ronald Martel, Associate Commissioner

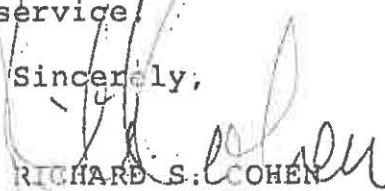
May 7, 1980

Page 4

attorney and probation officer would rarely develop. Needless to say, the State will be best served if the probation officer and the prosecutor can agree on the type of circumstances which warrant the initiation and prosecution of petitions to revoke probation.

I hope this information is helpful. Please feel free to contact me if I can be of any further service.

Sincerely,


RICHARD S. COHEN
ATTORNEY GENERAL

RSC/vv