

LEGEND — NA = Not applicable L = Lawyer LA = Legal assistant ACTION TO BE CONSIDERED	NA	L	LA	DATE DUE	DATE DONE
<p style="text-align: center;"><b>INTRODUCTION</b></p> <p><b>Purpose and currency of checklist.</b> This checklist is designed to be used with the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1) and CLIENT FILE OPENING AND CLOSING (A-2) checklists. It is intended for use by defence counsel, but item 2.14 (preparation of defence submissions) in this checklist is also a useful reference for Crown counsel. This checklist should also be used with the CRIMINAL PROCEDURE (C-1) checklist. This checklist is current to September 1, 2022.</p> <p><b>New developments:</b></p> <ul style="list-style-type: none"> <li> <p><b>COVID-19 pandemic.</b> Check the BC Courts website (bccourts.ca) to obtain up-to-date Practice Directions, Notices to the Profession, guides to remote proceedings, and announcements from all levels of court in response to the COVID-19 pandemic. Confirm procedures for pre-trial conferences, filing materials, in-person appearances, use of remote technology, and etiquette for video and telephone appearances.</p> <p>Check with provincial and federal institutions for rules governing visitation and court appearances for in-custody clients.</p> <p>For more information about the impact of COVID-19 on criminal practice (particularly bail and sentencing matters), see the presentation and materials from <i>Criminal Law and COVID-19</i> (CLEBC, 2020), available through CLEBC Courses on Demand.</p> </li> <li> <p><b>Forms of address.</b> The Supreme Court of British Columbia provided direction on how parties and counsel are to address a justice in a courtroom (see PD-60) and provided clarification on how to introduce themselves in proceedings (see PD-59).</p> </li> </ul> <p><b>Of note:</b></p> <ul style="list-style-type: none"> <li> <p><b>Additional resources.</b> Further information related to judicial interim release is available in the course presentation and materials from <i>Criminal Law Boot Camp 2009</i> (CLEBC, 2009) and <i>Criminal Practice 2014</i> (CLEBC, 2014), available through CLEBC Courses on Demand.</p> </li> <li> <p><b>Law Society of British Columbia.</b> For changes to the Law Society Rules and other Law Society updates and issues “of note”, see law society notable updates list (A-3). The Law Society’s resources related to procedures generally and issues arising from COVID-19 can be viewed at <a href="http://www.lawsociety.bc.ca/about-us/covid-recovery/">www.lawsociety.bc.ca/about-us/covid-recovery/</a>.</p> </li> </ul>					

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<p style="text-align: center;"><b>CONTENTS</b></p> <ol style="list-style-type: none"> <li>1. Interview Client</li> <li>2. Prepare for Bail Hearing</li> <li>3. Attend Bail Hearing</li> <li>4. After Bail Hearing</li> <li>5. Variation of Bail Terms</li> </ol> <p style="text-align: center;"><b>CHECKLIST</b></p> <p><b>1. INTERVIEW CLIENT</b></p> <p>1.1 Conduct a conflicts of interest check. Complete the CLIENT FILE OPENING AND CLOSING (A-2) checklist.</p> <p>1.2 Confirm compliance with Law Society Rules 3-98 to 3-110 for client identification and verification and the source of money for financial transactions, and complete the CLIENT IDENTIFICATION, VERIFICATION, AND SOURCE OF MONEY (A-1) checklist. Consider periodic monitoring requirements (Law Society Rule 3-110). Collect the following additional information:</p> <p>.1 Personal information:</p> <p>(a) Indigenous status, considering principles set out in <i>R. v. Gladue</i>, [1999] 1 S.C.R. 688. Section 718.2(e) of the <i>Criminal Code</i> sets out factors a judge must consider when setting bail for, or sentencing, an Aboriginal person (youth or adult). Judges must take into account that Indigenous offenders face special circumstances (residential schools, poverty in the communities, FASD), and should consider all options other than jail.</p> <p>Further information on Indigenous law issues is available on the “Aboriginal Law” page in the Practice Points section of the Continuing Legal Education Society of British Columbia website (<a href="http://www.cle.bc.ca">www.cle.bc.ca</a>) and in other CLEBC publications.</p> <p>(b) Citizenship and immigration status, including place and date of birth. If the client was 12 to 17 years old at the time of the commission of the offence, refer also to the <i>Youth Criminal Justice Act</i>, S.C. 2002, c. 1 (the “YCJA”).</p> <p>(c) Address(es) for the past 10 years, names of people the client lives with presently, and alternate means of contacting the client if they were to move (e.g., parents).</p> <p>(d) Education, including any current schooling or training, licences, or ticketed trade skills.</p> <p>(e) Employment history, including:</p> <p>(i) Current employment: employer’s name, address, and phone number (obtain permission to contact the employer); job title; length of employment with employer; name of immediate supervisor; hours regularly worked; approximate income; typical duties; and future prospects.</p> <p>(ii) Previous employment: same details as in (i); reasons for leaving.</p>					

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<p>(iii) If currently unemployed, employment prospects; likelihood that any prospective employer will hire the client.</p> <p>(f) Family:</p> <p>(i) Marital status: date and place of marriage; degree to which the spouse, partner, and any children rely on the client financially or emotionally.</p> <p>(ii) Children: names, ages, and custodial status.</p> <p>(iii) Dependants: whether the client is under an obligation to pay maintenance; if so, whether the client is current with payments.</p> <p>(iv) Parents: names, addresses, and occupations of any parents still living; nature of the client’s relationship with parents.</p> <p>(v) Persons who raised the client, if not the client’s parents: same information as for parents in (iv).</p> <p>(vi) Siblings: ages, addresses, and occupations.</p> <p>(vii) For Indigenous clients, consider whether the client or other family members are survivors of residential schools, have addictions, have FASD, or face other barriers that might have affected the client’s situation.</p> <p>(g) Names, addresses, and occupations of friends, employers, or family members who will attest to the client’s good character.</p> <p>(h) Roots in the community, such as:</p> <p>(i) Membership in clubs, participation in organized sports, etc.</p> <p>(ii) Financial roots (e.g., whether the client owns a home, has a business, has immovable assets).</p> <p>(iii) For Indigenous clients, consider their connection to a First Nations, Métis, or Inuit community.</p> <p>(i) The client’s future plans (e.g., education, career, marriage, family); whether there is any reason that the client needs to remain out of custody.</p> <p>(j) The client’s general behaviour and disposition, such as:</p> <p>(i) Addiction to alcohol or drugs or participation in any ongoing treatment program.</p> <p>(ii) Propensity for violence; if so, whether the violence is associated with alcohol or drugs.</p> <p>(k) State of health (e.g., whether the client has HIV, diabetes, or any condition that could be affected by potential custody).</p> <p>(l) Whether the client possesses any firearms or other specified items that they may be required to surrender pursuant to <i>Criminal Code</i>, s. 515(4.1), and what arrangements can be made for their surrender. (For Indigenous clients, consider whether there is an Aboriginal right to hunt that should be raised.)</p> <p>.2 Raising bail:</p> <p>(a) Client’s financial circumstances.</p> <p>(b) Names, addresses, and phone numbers of possible sureties.</p> <p>(c) Other sources of funds for raising cash bail, including an employer or family members.</p>					

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<p>.3 Pre-existing charge(s) and number of appearances to date. Review the particulars provided by the Crown.</p> <p>.4 Outstanding charge(s):</p> <p>(a) Details, including details of the arrest and any time spent in custody.</p> <p>(b) Details regarding bail. If the client is presently on bail, find out:</p> <p>(i) Where and when it was posted; who posted it.</p> <p>(ii) The form of bail.</p> <p>(iii) The terms of bail.</p> <p>(iv) Whether there have been any breaches of bail conditions; if so, the reasons. Note that under s. 515(6) of the <i>Criminal Code</i>, an allegation of the commission of an indictable offence (not a hybrid offence proceeded summarily) while the client is on bail for an indictable (not hybrid offence proceeded summarily) offence results in a reverse onus for release.</p> <p>.5 Criminal record:</p> <p>(a) Accuracy of the Crown’s information regarding: offences, places, dates, penalties (including convictions recorded in CPIC or provincial government data banks—sometimes these systems contain incorrect information, or provide information on individuals with the same or similar names).</p> <p>(b) Discuss the circumstances of the offences, especially any mitigating circumstances. (For Indigenous clients, find out whether <i>Gladue</i> principles were considered at previous sentencing.)</p> <p>(c) Discuss any breaches of probation or parole, escapes, failures to appear in court, and note why this will not happen again.</p> <p>(d) Whether the client is in prison now; if so, the release date.</p> <p>(e) Whether the client is on probation or parole now; if so, the expiry date.</p> <p>1.3 Advise the client on the likelihood and type of bail; discuss willingness and ability to comply with possible terms of release (e.g., no-contact orders, area restrictions, curfews, abstention from alcohol or drugs).</p> <p>1.4 For Indigenous clients, consider the importance of having a plan for release into the community that addresses the unique circumstances of an Indigenous client, including views of the community, elders, victim, and family members.</p> <p>1.5 Discuss and confirm your retainer. Refer to the CLIENT FILE OPENING AND CLOSING (A-2) checklist.</p>					
<p><b>2. PREPARE FOR BAIL HEARING</b></p> <p>2.1 Determine the forum of the bail hearing (whether before a judicial justice of the peace (e.g., at night or on the weekend) or before a judge). Under s. 522 of the <i>Criminal Code</i>, s. 469 offence bail hearings can only be held in Supreme Court, unless it is a <i>YCJA</i> matter. In this latter case, advise the client that bail is cancelled on the finding of guilt on such an indictment, even for a lesser or included charge. If the bail court is the Provincial Court, it is not</p>					

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<p>a court of competent jurisdiction for relief under the <i>Canadian Charter of Rights and Freedoms</i>, Schedule B to the <i>Canada Act 1982 (UK)</i>, 1982, c. 11 (the “<i>Charter</i>”): <i>R. v. Desjarlais</i>, 2017 BCSC 1412.</p> <p>2.2 Confirm that a bail hearing will actually be held. The client might prefer to remain in custody so as to delay the bail hearing and improve the chances for release (to set up treatment, arrange cash or surety, or obtain a pre-bail <i>Gladue</i> report, if appropriate). The Crown might apply for a delay of the bail hearing under <i>Criminal Code</i>, s. 516(1). In either case, the Crown may apply under s. 516(2) for an order preventing contact with named persons. Advise the client whether such an order has been made, and if it has, explain the possible consequences of a breach of the order. Consider as well that s. 525 bail “reviews” can be held even if no detention order has been made (<i>R. v. Khafizov</i>, 2019 BCSC 1088).</p> <p>2.3 Discuss with the Crown whether they are proceeding under <i>Criminal Code</i>, s. 515(10)(a) (to ensure attendance in court), s. 515(10)(b) (to protect the public), or s. 515(10)(c) (to maintain confidence in the administration of justice), or on any combination of the above. Attempt to get an agreement on:</p> <ol style="list-style-type: none"> <li>.1 Whether the Crown will be showing cause, and to what extent. If necessary, suggest terms which may address Crown concerns and avoid the need for detention.</li> <li>.2 What information, if any, regarding the offence and the client will be put in evidence.</li> <li>.3 The extent of prior offences the Crown will be alleging, including any offences that may appear in provincial data banks or systems (e.g., Corrections, ICBC—Driving Record, JUSTIN, CORNET), but are not recorded on CPIC.</li> <li>.4 Whether the Crown is proceeding summarily or by indictment for hybrid offences.</li> <li>.5 Whether there are “victims” whose safety and security will need to be addressed by the bail court under <i>Criminal Code</i>, s. 515(13).</li> <li>.6 Mutually agreeable bail terms.</li> </ol> <p>2.4 If the client is a young person, consider the special provisions of the <i>YCJA</i>, ss. 28 to 33, paying special attention to s. 28.1, which states that detention cannot be ordered as a substitute for caregiving or other social purposes, and s. 29(2), which sets out the conditions for detaining a young person, including that the charge is for a serious offence, or the young person has a history of offences, or that conditional release is not appropriate.</p> <ol style="list-style-type: none"> <li>.1 Determine whether there is any resource available as an alternative to custody (e.g., PLEA home, foster placement, group home).</li> <li>.2 Determine whether there is a responsible person who could assume care of the young person if so ordered by the court as an alternative to custody (<i>YCJA</i>, s. 31).</li> </ol> <p>2.5 Contact potential sureties:</p> <ol style="list-style-type: none"> <li>.1 Advise them that you represent the client who has asked you to make the request. Note restrictions on lawyers acting as sureties (<i>BC Code</i> rules 3.4-40 to 3.4-41) and Law Society Rules 3-59, regarding cash for bail, and 3-70, for records of cash transactions.</li> </ol>					

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<p>.2 Ascertain the type of security or maximum amount of cash that each surety could provide.</p> <p>.3 Advise them that they may have to provide specific proof of ownership of property.</p> <p>.4 Advise them of possible proceedings if the client breaches bail conditions.</p> <p>.5 Under <i>BC Code</i> rule 7.2-9, you must urge an unrepresented person to obtain independent legal representation. See the rule for more information.</p> <p>2.6 Where the client is on parole or probation, consult authorities regarding whether the client has complied with the conditions.</p> <p>2.7 Interview potential references, witnesses, and people who might provide release plans (e.g., employers, social workers, doctors, psychiatrists, relatives, staff at group homes, Native court workers, elders, Chief, Band Council, First Nation community members, bail supervisors, probation or parole officers, or service organization representatives).</p> <p>2.8 Contact possible accommodation, employment or social assistance agencies, drug or alcohol recovery centres, etc.</p> <p>2.9 Where possible, confirm information provided by the client (e.g., work situation, availability of treatment facility or a stable residence).</p> <p>2.10 Make a preliminary evaluation of the case. Consider the facts, law, the character of the client, and whether the circumstances warrant a reverse onus bail hearing.</p> <p>2.11 Witnesses:</p> <p>.1 Decide whether to call any witnesses. (Note: this is done infrequently, especially at the Provincial Court level; it generally means the hearing will be adjourned. Any information defence witnesses reveal may be used later.)</p> <p>.2 Prepare witnesses for hearing (e.g., discuss courtroom procedure, how to answer questions, etc.).</p> <p>.3 Advise witnesses of the hearing date, time, and place.</p> <p>.4 Advise the court clerk of any need for a translator.</p> <p>.5 Note <i>BC Code</i> rule 3.2-6 and commentaries [2] to [4] regarding a prohibition against inducement for withdrawal of criminal or regulatory proceedings. In particular, see commentary [4] with regard to when the complainant is unrepresented; as well, see rule 7.2-9 (the general rule about dealing with an unrepresented person).</p> <p>2.12 If facts will be alleged by the Crown, be ready to dispute any specific allegation with which the client disagrees (see <i>R. v. Cheung</i>, 2016 BCCA 221, for advice on this point). Note, however, that any questions as to the credibility of witnesses are left for the trial judge to determine - not the judge on the bail hearing.</p> <p>2.13 Prepare the client, discussing what will happen and what to do and say (generally it is advisable that the client speak only through counsel).</p>					

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<p>2.14 Prepare defence submissions, taking into consideration the “ladder principle” and approach to bail set out in <i>R. v. Antic</i>, 2017 SCC 27 and <i>R. v. Zora</i>, 2020 SCC 14, and probable Crown submissions:</p> <ul style="list-style-type: none"> <li>.1 Refer to <i>Criminal Code</i> Part XVI (especially s. 515(10)), for the factors a judge can take into account in determining whether to grant release. Remember that release is presumptively unconditional (unless there is a reverse onus): <i>R. v. Zora</i>.</li> <li>.2 For Indigenous clients, reference circumstances that must be considered when addressing the potential for loss of liberty of an Indigenous client (see item 1.2.1(a) in this checklist).</li> <li>.3 Summarize the client’s background, present circumstances, and future plans.</li> <li>.4 Consider <i>Criminal Code</i>, s. 515(10)(a): detention to ensure attendance in court, and assess: <ul style="list-style-type: none"> <li>(a) The probability the client will attend for court.</li> <li>(b) Age, education, etc.</li> <li>(c) Present environment and ties to the community: citizenship, permanency of client’s residence, family ties, employment, financial roots and assets in the community.</li> <li>(d) For Indigenous clients, consider ties to the Indigenous community. Consider the views of elders, Chief and Council, or First Nations community members. (There need not be ties to a First Nations community for Indigenous considerations established under <i>Gladue</i> to apply.)</li> <li>(e) Whether the client faces a substantial jail term if convicted of the offence charged.</li> <li>(f) Previous criminal convictions and outstanding charges of “failure to attend”; whether the client has lived up to conditions of probation or parole; any failures to appear in court.</li> <li>(g) Circumstances of the arrest, such as: <ul style="list-style-type: none"> <li>(i) Whether the client was fleeing prosecution elsewhere.</li> <li>(ii) Whether the client surrendered; if not, whether the client gave a reasonable explanation for the failure to do so.</li> </ul> </li> <li>(h) Distance from the client’s residence to court (if beyond 200 km, cash bail will likely be imposed under <i>Criminal Code</i>, s. 515(2)(e)).</li> </ul> </li> <li>.5 Consider <i>Criminal Code</i>, s. 515(10)(b) (detention to protect the public), and assess: <ul style="list-style-type: none"> <li>(a) The likelihood that the client will reoffend.</li> <li>(b) The client’s criminal record—particularly, the general trend of offences, the length of time since the last offence, and the number of convictions for breaches of court orders.</li> <li>(c) The client’s behaviour when released on prior occasions.</li> <li>(d) The client’s peer group (e.g., whether the client is a leader, the influence the client has on other persons, and the influence others have on the client).</li> </ul> </li> </ul>					

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<p>(e) The nature of the alleged offences and how they relate to past offences, e.g.:</p> <ul style="list-style-type: none"> <li>(i) Violence.</li> <li>(ii) Whether related to alcohol or drugs, and whether the client is less likely to reoffend if treatment is sought.</li> <li>(iii) Victims (e.g., relatives or strangers, and their relative vulnerability, including due to age).</li> <li>(iv) Whether children are involved. The safety of any victim or witness or other person related to the offence who is under 18 years old is a specific consideration for the court.</li> <li>(v) Property damage or loss: amount; whether the property was recovered and, if so, the circumstances; restitution.</li> </ul> <p>(f) Whether the alleged offence involved planning.</p> <p>(g) Whether the client has been co-operative with the police investigation.</p> <p>(h) Whether the police investigation is complete.</p> <p>(i) The offence and the community, for example:</p> <ul style="list-style-type: none"> <li>(i) Attitude of the community to the type of offence and the method by which the client allegedly committed the offence.</li> <li>(ii) Number of similar offences in the community.</li> </ul> <p>(j) Possible consequences of the client’s release:</p> <ul style="list-style-type: none"> <li>(i) Distribution of counterfeit money, drugs, stolen property, etc.</li> <li>(ii) Commission of violent crime.</li> </ul> <p>(k) Character witnesses.</p> <p>.6 Consider <i>Criminal Code</i>, s. 515(10)(c): detention to maintain confidence in the administration of justice. See <i>R. v. St-Cloud</i>, 2015 SCC 27 with respect to the proper analysis under s. 515(10)(c). Assess:</p> <ul style="list-style-type: none"> <li>(a) The apparent strength of the Crown’s case, including whether the identification evidence is weak, the client has an alibi, or the case is circumstantial.</li> <li>(b) The gravity of the alleged offence.</li> <li>(c) The circumstances surrounding the commission of the alleged offence, including whether a firearm was used.</li> <li>(d) The potential for a lengthy term of imprisonment.</li> <li>(e) Whether a minimum sentence of three years or more is required for an alleged offence with a firearm.</li> <li>(f) If the crime is serious or very violent, if there is overwhelming evidence against the accused, and if the victim or victims were vulnerable, pre-trial detention will usually be ordered.</li> </ul> <p>.7 Availability and financial limits of sureties.</p> <p>.8 Position on appropriate bail, considering alternatives (conditions, sureties, cash).</p> <p>2.15 Consider other factors:</p>					



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<p>.1 The proposed sentence.</p> <p>.2 Whether an early trial date is available.</p> <p>.3 Whether a reverse onus is involved (see <i>Criminal Code</i>, s. 515(6)).</p> <p>.4 <i>Charter of Rights and Freedoms</i>, ss. 9, 10(c), and 11(e).</p> <p>.5 Indigenous identity or status of the client—<i>Gladue</i> considerations.</p> <p><b>3. ATTEND BAIL HEARING</b></p> <p>3.1 Determine whether the client’s bail hearing will be conducted using video links, and, if so, where you can most effectively attend to conduct the hearing.</p> <p>3.2 Ask for a non-publication order (<i>Criminal Code</i>, s. 517).</p> <p>3.3 Decide whether to cross-examine Crown witnesses or respond to circumstances alleged by the Crown, or whether to call any witnesses. (See items 2.12 and 2.13 in this checklist.)</p> <p>3.4 Make submissions. (See item 2.14 in this checklist.)</p> <p>3.5 Note the terms of bail if granted by the court.</p> <p><b>4. AFTER BAIL HEARING</b></p> <p>4.1 If bail is set:</p> <p>.1 Check bail documents. Ask the court registry for a copy of the release order to confirm the terms of release.</p> <p>.2 Attend in lockup if the client signs the release order and explain its legal effect (courts sometimes dispense with signatures).</p> <p>.3 Advise the client of bail conditions and explain them; explain the consequences of failure to appear or of failure to abide by the conditions, etc.</p> <p>.4 Advise the client in writing of the next court appearance.</p> <p>.5 Advise the client in writing of the next office appointment, and what to bring (e.g., breathalyzer certificate, chronology of events).</p> <p>.6 Advise the client of the effect of committing offences while on bail. Simply being charged is not necessarily a breach of bail (<i>R. v. Moulton</i>, 2020 BCPC 38).</p> <p>.7 Advise the client that bail can be revoked by the court if there is a finding of guilt after trial (usually when the Crown applies for an order for same, but note that bail can also be revoked on the court’s own motion) (<i>R. v. Aheer</i>, 2020 ABCA 232).</p> <p>.8 Follow up with a letter to the client covering the matters set out above.</p> <p>.9 Diarize dates.</p> <p>4.2 If bail is not set:</p> <p>.1 Attend in lockup and advise the client of any reasons why bail was not granted.</p> <p>.2 Discuss whether the client should apply for a review; discuss the procedure and the time and cost involved. Also advise the client about the provisions of s. 525 of the <i>Criminal Code</i> (Time for application to judge).</p>					

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<p>.3 Offer to contact the client’s family, employer, etc.</p> <p>.4 Advise the client of the next court appearance, and discuss whether an early preliminary hearing or trial date is desirable.</p> <p>.5 Arrange to attend remand centre to discuss the case with the client.</p> <p>.6 Follow up with a letter.</p> <p>.7 Diarize dates, including the date of automatic bail review.</p> <p>4.3 Advise the client if a “no communication” order has been made under s. 515(12) or s. 516(2). If so, explain the possible consequences of a breach of such an order.</p> <p>4.4 Confirm compliance with the Law Society Rules on client identification and verification (see item 1.2 in this checklist).</p>					
<p><b>5. VARIATION OF BAIL TERMS</b></p>					
<p>5.1 If the client wishes or needs any bail term varied (e.g., curfew, “no contact”):</p> <p>.1 Determine why the variation is needed or desired. Consider obtaining third-party confirmation of the reason or need for variation (e.g., the employer might confirm that work hours require a curfew to be varied).</p> <p>.2 Before speaking to any party who is the subject of a “no contact” term, consider whether doing so might constitute indirect contact by the client.</p> <p>.3 If the Crown is consenting to a bail variation in Provincial Court, a bail variation by consent form can potentially be used, so there is no need for an application, but the client, and sureties, if any, will need to attend to sign the changed bail documents.</p> <p>.4 Determine the appropriate court in which to make your application, taking into account whether the application is made as of right with the Crown’s consent in Provincial Court, or by way of review application in Supreme Court.</p> <p>.5 Determine whether the Crown will consent to an application being heard in Provincial Court, even if the Crown opposes the variation.</p> <p>.6 Gather any available material to support the application (e.g., employer’s letter, information from bail supervisor, consent of surety, information relating to any party wishing a “no contact” term deleted).</p> <p>.7 Ensure that the client and any surety attend court on the date of the application, in order to sign any amended bail document.</p> <p>.8 Obtain copies of any amended bail document for your file and your client.</p> <p>.9 Advise the client to carry a copy of any amended bail document at all times, in order to show police or other authorities evidence of the amendments, if necessary.</p>					