Massachusetts Rules of Criminal Procedure

Including amendments effective

March 1, 2017

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Print sources for rules:

- Annotated Laws of Massachusetts: Court Rules, LexisNexis, annual.
- Massachusetts General Laws Annotated, v.43A-43C, West Group, updated annually with pocket parts.
- Massachusetts Rules of Court, West Group, annual.
- The Rules, Lawyers Weekly Publications, loose-leaf.

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Rule 1: Title; Scope

(Applicable to cases initiated after September 7, 2004)

(a) Title. These rules may be known and cited as the Massachusetts Rules of Criminal Procedure. (Mass.R.Crim.P.)

(b) Scope. These rules govern the procedure in all criminal proceedings in the District Court, in all criminal proceedings in the Superior Court, in all delinquency and youthful offender proceedings in the Juvenile Court, District Court and Superior Court consistent with the General Laws, and in proceedings for post-conviction relief.

Reporter's Notes (2004) : Rule 1 is drawn from and combines Fed. R. Crim. P. 60 and 1. The substance of the rule defines the scope and applicability of the remainder of the rules.

These rules are applicable to the criminal process in those courts having general criminal jurisdiction. This code represents an attempt to consolidate into a single document rules of procedure to apply with the fewest possible exceptions to the appropriate departments of the Trial Court of the Commonwealth. Those exceptions are delineated in each rule where different procedures must prevail. There is, of course, a limitation inherent in any comprehensive set of procedural rules. That is, a variety of special procedures or factual situations exist where the mechanical application of the rules would work an unnecessary hardship or an injustice. In those limited circumstances, sound judicial discretion will require a construction of the rules so as to secure simplicity in procedure, fairness in the administration of the criminal justice system, and the elimination of unnecessary expense and delay as required by Rule 2(a).

In order to be of broad application to criminal practice, it was necessary for the rules to prescribe general procedures suitable for all courts within their scope. It is necessary that the rules be general and flexible, prescribing only basic essentials, rather than rigid and detailed. It is also necessary that the Rules be reviewed periodically to assess their operation and to take account of changes in both law and society over time. Such a comprehensive review was undertaken

beginning in 1995, resulting in subsequent amendments to several of the rules, including a set of major revisions promulgated in 2004.

While these rules are intended to constitute a comprehensive code of criminal procedure for cases in the enumerated courts, nevertheless there are areas of criminal practice which were left unregulated. Among these matters are pretrial diversion, search-and arrest-warrant procedures, wire-tapping procedures, and other similar matters. As to some of these practices, it was determined that the state of the law, especially regarding constitutional issues, was so fluid as to defy codification. These matters were necessarily left to an ad hoc determination on specific facts by the courts. In other areas it was recognized that local practice in individual courts — whether by accepted usage or court rules — could give the criminal justice system some flexibility as required by special conditions not susceptible to general regulation.

These rules are not intended to pre-empt the adoption of rules by the several departments of the Trial Court to address specific problems which are inevitably encountered in those courts and which are not dealt with by these rules.

Nor are these rules intended to be a comprehensive guide or statement with respect to the procedures used by the clerks of court. It is expected that those offices will continue to develop efficient methods to assist in the expeditious disposal of criminal matters consistent with the letter and spirit of these rules.

By a 2004 amendment, Rule 1 was revised to explicitly state that the Rules of Criminal Procedure govern "all delinquency and youthful offender proceedings in the Juvenile Court." Thus the same rules apply to juvenile court proceedings that apply to delinquency and criminal proceedings in the other trial courts. This accords with M.G.L. c. 218, sec. 59, which provides that "Except as otherwise provided by law, the divisions of the juvenile court department shall have and exercise, within their respective jurisdictions, the same powers, duties, and procedure as the divisions of the district court department; and all laws relating to district courts or municipal courts in their respective counties or officials thereof or proceedings therein, shall, so far as applicable, apply to said divisions of the juvenile court department…" The application of the Rules of Criminal Procedure to juvenile proceedings does not, however, imply that they are identical to adult criminal cases in all other respects. Special procedures for the hearing of juvenile offenses have been established under G.L. c. 119 and are designed to treat juveniles as children in need of aid, encouragement and guidance, rather than as criminals. Metcalf v. Commonwealth, 338 Mass. 648, 156 N.E.2d 649 (1959). G.L. c. 119, § 53 directs that proceedings against juveniles under G.L. c. 119 shall not be deemed criminal proceedings, but such matters must still be governed by constitutional due process standards. In re Gault, 87 S.Ct. 1428, 387 U.S. 1, 18 L.Ed.2d 527 (1967). Therefore, these rules are intended to be construed liberally so as to comply with the goals and purposes of G.L. c. 119, while G.L. c. 119, § 53 is not to operate to deny the procedural safeguards contained within these rules.

Rule 2: Purpose; Construction; Definition of Terms

(Applicable to District Court and Superior Court)

(a) Purpose; Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of expense and delay.

(1) Words or phrases importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words importing the masculine gender may include the feminine and neuter.

(2) When in these rules reference is made to a subdivision of a rule, that reference is to that subdivision and to any subdivisions thereof.

(b) Definition of Terms. In construing these rules the following words and phrases shall have the following meanings unless a contrary intent clearly appears from the context in which they are used:

(1) "Indigent" means any defendant who is unable to procure counsel with his funds as defined in Supreme Judicial Court Rule 3:10.

(2) "Indigent but able to contribute" means any defendant who is unable to procure counsel with his funds but is able to contribute funds for the cost of counsel as defined in Supreme Judicial Court Rule 3:10.

(3) "Capital Crime" means a charge of murder in the first degree.

(4) "Commonwealth" includes the prosecuting office or agency and all officers or agents responsible thereto.

(5) "Court" includes a judge, special magistrate, or clerk.

(6) "District Attorney" or "Attorney General" include assistant district attorneys or assistant attorneys general and other attorneys specially appointed to aid in the prosecution of a case.

(7) "District Court" includes all divisions of the District Court Department of the Trial Court, the Boston Municipal Court Department of the Trial Court, and the Juvenile Court Department of the Trial Court, or sessions thereof for holding court.

(8) "Interested Person" includes the adverse party, a co-defendant, and a witness who is to be deposed.

(9) "Judge" includes a judge of a court or one properly assigned to a court or a special magistrate when in the performance of those duties imposed and authorized by these rules.

(10) "Juvenile Court" means a division of the Juvenile Court Department of the Trial Court, or a session thereof for holding court.

(11) "Mailing" means the use of regular mail and shall not require registered or certified mail.

(12) "Prosecuting Attorney" means the attorney general or assistant attorneys general, district attorney, assistant district attorneys, special assistant district attorneys, or legal assistants to the district attorney, or other attorneys specially appointed to aid in the prosecution of a case.

(13) "Prosecutor" means any prosecuting attorney or prosecuting officer, and shall include a city solicitor, a police prosecutor, or a law student approved for practice pursuant to and acting as authorized by the rules of the Supreme Judicial Court.

(14) "Related Offense" means one of two or more offenses which are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan.

(15) "Return Day" means the day upon which a defendant is ordered by summons to first appear or, if under arrest, does first appear before a court to answer to the charges against him, whichever is earlier.

(16) "Special Magistrate" means any person who is appointed pursuant to, and empowered to administer those functions authorized by, Rule 47 of these rules.

(17) "Summons" means

(A) criminal process issued to a person requiring him to appear at a stated time and place to answer to criminal charges; or

(B) process issued to a person requiring him to appear at a stated time and place to give testimony in a criminal proceeding; or

(C) process issued to a person requiring him to appear and produce at a stated time and place books, designated papers, documents, or other objects for use in a criminal proceeding.

"Superior Court" means the Superior Court Department of the Trial Court, or a session thereof for holding court.

Amended May 29, 1986, effective July 1, 1986.

Reporter's Notes :

Rule 2 is perhaps the most significant of the rules in advancing the trend toward a high degree of procedural fairness in the administration of criminal justice. This is so because the rule not only permits but requires the rules to be construed and applied in a manner which provides for fairness in their administration to the end that a just determination in every criminal proceeding shall be achieved. The rules must be approached with sympathy for this purpose; they must be interpreted with common sense.

The rules were not intended to be administered inflexibly without regard for the circumstances of the particular case. Where a literal interpretation of a rule and its application in a specific situation would lead to unnecessary expense or delay, would unduly complicate the proceedings,

or would operate unfairly or produce an unjust result, that interpretation is to yield to the principle enunciated in Rule 2(a).

This is not to imply that the rules were conceived as merely guidelines or suggested procedures to which the courts and counsel need adhere only as will further their particular interests. They have the force and effect of law.

The appellate courts have made it increasingly clear that abuse of power by the prosecution or by trial judges is not to be tolerated. See e.g., S.J.C. Rule 3:22A, Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer PF 1-14 (Feb. 14, 1979); Commonwealth v. St. Pierre, Mass. Adv. Sh. (1979) ___, ____ (March 30); Commonwealth v. Soares, Mass. Adv. Sh. (1979) 593; Commonwealth v. Ellison, Mass. Adv. Sh. (1978) 2072; Commonwealth v. Earltop, Mass. Adv. Sh. (1977) 532, 539 (Hennessey, C.J., concurring); Commonwealth v. Redmond, 370 Mass. 591 (1976); Commonwealth v. Sneed, Mass. Adv. Sh. (1978) 3156. It is equally apparent that a high standard of conduct is demanded of defense counsel. See S.J.C. Rule 3:22A, supra, DF 1-15. A disregard for these rules of court or a failure to adhere to their provisions are abuses of the system which can be expected to produce problems in the administration of justice and unfairness to the Commonwealth, defendants, and the public, and which, therefore, should not be tolerated by either the trial or appellate courts.

Subdivision (a). The language of the first paragraph is drawn virtually without change from Fed. R. Crim. P. 2. These rules are intended to minimize complicated proceedings and needless expense and delay and are to be construed so as to achieve that goal.

The principle of construction stated in subdivision (a)(1) is taken from G.L. c. 4, § 6, cl. fourth, which relates to the construction of the General Laws.

Subdivision (a)(2) is designed to avoid any confusion in reading references to subdivisions. Included in a reference to a subdivision are all paragraphs, subparagraphs, and clauses of that subdivision.

Subdivision (b). These definitions are to be used in construing these rules unless a contrary interpretation is clearly demanded by the context within which the term is used. See G.L. c. 4, § 7; c. 3, § 63.

(1) Appointed Counsel. This definition is suggested by Superior Court Rule 53(3) (1974); it is to be distinguished from “Assigned Counsel,” infra. [Editor’s Note: The term “appointed counsel” was eliminated by the 1986 amendment to Rule 2.]

(2) Assigned Counsel. The terms “appointed counsel” and “assigned counsel” have been used interchangeably in the case law. See e.g., Costarelli v. Municipal Court of the City of Boston, 367 Mass. 35 (1975). However, for the purposes of these rules, each term has been given a separate and distinct definition. In these rules, “assigned counsel” means a member of a publicly funded or charitable organization, such as the Massachusetts Defenders Committee (G.L. c. 221, § 34D. See Rule 8[b]), or a county defender. “Appointed counsel” denotes a private attorney who is designated by a judge or magistrate to represent a defendant who cannot afford counsel. Both assigned and appointed counsel may include senior law students appearing without compensation on behalf of indigent defendants as permitted by S.J.C. Rule 3:11 (1974: 366

Mass. 867, as amended, 1975: 367 Mass. 914). [Editor's Note: The term "assigned counsel" was eliminated by the 1986 amendment to Rule 2.]

(3) Capital Crime. This definition is drawn from existing case law, e.g., Commonwealth v. Capalbo, 308 Mass. 376 (1941); Commonwealth v. Ibrahim, 184 Mass. 255 (1903); Green v. Commonwealth, 94 Mass. (12 Allen) 155 (1866). Compare G.L. c. 278, § 33E (capital crime defined "for the purposes of . . . [appellate] review" only). General Laws c. 274, § 2 provides that, "Whoever aids in the commission of a felony, or is accessory thereto before the fact by counselling, hiring or otherwise procuring such felony to be committed, shall be punished in the manner provided for the punishment of the principal felon." Therefore, an indictment of a defendant as an accessory before the fact of first degree murder sets out a capital crime. Grady v. Treasurer of the County of Worcester, 352 Mass. 702, 704 (1967).

(4) Commonwealth. The definition of this term reflects the meaning of the word as commonly used in the case law and statutes.

(5) Court. This term is used in the rules to include those officials most intimately involved in the process of adjudicating cases. When so generically used, the word is not to be construed so as to expand or limit those duties traditionally or by law within the prerogative of certain officials.

(6) District Attorney or Attorney General. As with "Commonwealth," supra, these terms are used both in the sense of the office and the personnel thereof in their official capacity.

(7) District Court. General Laws c. 211B, § 1 (inserted by St. 1978, c. 478, § 110) established the Trial Court of the Commonwealth which consists in part of the Superior Court Department, the District Court Department, the Boston Municipal Court Department, and the Juvenile Court Departments. For ease of reference throughout these rules, the latter three Departments are included within the term "District Court."

It is in keeping with the policy of these rules to secure simplicity and uniformity in procedure to make the Juvenile Court Department subject to these rules, insofar as they are consistent with juvenile practice. See District Court Special Rule 2 (1974), which applies the rules of the District Court to juvenile proceedings insofar as they are "pertinent."

(8) Interested Person. This term specifies those persons who are entitled to notice of, for example, the filing of motions, Mass.R. Crim. P. 13, 32, or the taking of a deposition, Mass. R.Crim. P. 36.

(9) Judge. In addition to its accepted meaning, for purposes of these rules this term is to include a magistrate when used in reference to a function which that official is authorized to perform by Mass. R. Crim. P. 48.

(10) Juvenile Court. See G.L. c. 211B, § 1 (inserted by St. 1978, c. 478, § 110), c. 218, §§ 57-60 (St. 1978, c. 478, §§ 212-16).

The divisions of the Juvenile Court Department, within their respective jurisdictions, have and exercise the same powers, duties, and procedures as the District Court or Municipal Court Departments and are subject to the laws relating thereto, so far as applicable. G.L. c. 218, § 59 (as amended, St. 1978, c. 478, § 215).

(11) Mailing. It is intended that unless specifically provided for elsewhere in these rules, neither registered nor certified mailing is required.

(12) Prosecuting Attorney. This term includes those attorneys who prosecute the majority of criminal cases in the Commonwealth.

(13) Prosecutor. This definition is broader than that of "prosecuting attorney," and reflects the fact that many cases in the District Courts are prosecuted by a police prosecutor. Under these rules, some prosecutorial functions can be carried on only by a district attorney or attorney general. See e.g., Mass. R. Crim. P. 15(d)(1)(B). A prosecutor may include senior law students appearing on behalf of the Commonwealth pursuant to S.J.C. Rule 3:11 (1974: 366 Mass. 867, as amended, 1975: 367 Mass. 914).

(14) Related Offense. For further explanation of this definition, see Mass. R. Crim. P. 9 and Reporter's Notes.

(15) Return Day. The "return day" is the date upon which a defendant under arrest first appears in court or the date upon which a defendant not under arrest is scheduled to appear pursuant to summons. It is the date upon which speedy trial rights attach (Mass. R. Crim. P. 36[b][1]) and from which other time limits are measured.

(16) Special Magistrate. The office of "Special Magistrate" is defined in terms of its powers and duties. See Mass. R. Crim. P. 47. Special Magistrates are to be distinguished from "Magistrates in the Trial Court" under G.L. c. 211, §§ 62B-62C (inserted by St. 1978, c. 478, § 250).

(17) Summons. This definition includes process issued pursuant to Mass. R. Crim. P. 6 and 17. The definitions contained in subdivisions (b)(17)(B) and (C) of this rule replace the older term "subpoena."

(18) Superior Court. See G.L. c. 211B, § 1 (inserted by St. 1978, c. 478, § 110), c. 212 (as amended, St. 1978, c. 478, §§ 115-25).

Rule 3: Complaint and Indictment; Waiver of Indictment; Probable Cause Hearing

(Applicable to cases initiated on or after September 7, 2004)

(a) Commencement of Criminal Proceeding. A criminal proceeding shall be commenced in the District Court by a complaint and in the Superior Court by an indictment, except that if a defendant is charged in the District Court with a crime as to which the defendant has the right to be proceeded against by indictment and the defendant has waived the right to an indictment pursuant to subdivision (c), the Commonwealth may proceed in the Superior Court upon the complaint.

(b) Right to Indictment. A defendant charged with an offense punishable by imprisonment in state prison shall have the right to be proceeded against by indictment except when the offense

charged is within the concurrent jurisdiction of the District and Superior Courts and the District Court retains jurisdiction.

(c) Waiver of Indictment.

(1) Right to Waive Indictment. A defendant charged in a District Court with an offense as to which the defendant has the right to be proceeded against by indictment shall have the right, except when the offense charged is a capital crime, to waive indictment, unless the Commonwealth proceeds by indictment pursuant to subdivision (e) of this rule.

(2) Procedure for Waiving Indictment. The defendant may waive the right to be proceeded against by indictment by filing a written waiver of that right in the District Court prior to the determination to bind the case over to the Superior Court for trial. The District Court may for cause shown grant relief from that waiver. After the determination by the District Court to bind the case over to the Superior Court for trial, the defendant may waive the right to be proceeded against by indictment by filing a written waiver of that right, with the consent of the prosecutor, in the Superior Court.

(d) Transmission of Papers. If the defendant is bound over to the Superior Court for trial after a finding of probable cause or after the defendant waives a probable cause hearing, the clerk of the District Court shall transmit to the clerk of the Superior Court a copy of the complaint and of the record; the original recognizances; a list of the witnesses; a statement of the expenses and the appearance of the attorney for the defendant, if any is entered; the waiver of the right to be proceeded against by indictment, if any is executed; the pretrial conference report, if any has been filed; and the report of the department of mental health as to the mental condition of the defendant, if such report has been filed under the provisions of the General Laws.

(e) Indictment after Waiver. Notwithstanding the defendant's waiver of the right to be proceeded against by indictment, the prosecuting attorney may proceed by indictment.

(f) Probable Cause Hearing. Defendants charged in a District Court with an offense as to which they have the right to be proceeded against by indictment and defendants charged in a District Court with an offense within the concurrent jurisdiction of the District and Superior Courts for which the District Court will not retain jurisdiction, have the right to a probable cause hearing, unless an indictment has been returned for the same offense. If the District Court finds that there is probable cause to believe that the defendant committed the crime or crimes alleged in the complaint, the court shall bind the defendant over to the Superior Court. If the District Court finds that there is no probable cause to believe that the defendant committed the crime or crimes alleged in the complaint, the court shall dismiss the complaint.

(g) The Complaint Process

(1) Procedure for Obtaining a Complaint. Any person having knowledge, whether first hand or not, of the facts constituting the offense for which the complaint is sought may be a complainant. The complainant shall convey to the court the facts constituting the basis for the complaint. The complainant's account shall be either reduced to writing or recorded. The complainant shall sign the complaint under oath, before an appropriate judicial officer.

(2) Probable Cause Requirement. The appropriate judicial officer shall not authorize a complaint unless the information presented by the complainant establishes probable cause to believe that the person against whom the complaint is sought committed an offense.

Reporter's Notes

While drawn in part from the General Laws and incorporating many procedures dictated by the case law of the Commonwealth, Rule 3 alters present practice in some respects. As originally promulgated in 1979, Rule 3 was designed to force all noncapital defendants in the District Court who had a right to an indictment to make an election between having their cases considered by a grand jury or obtaining a probable cause hearing. This "forced waiver" provision was rarely used in practice because of concerns that it would infringe on a defendants constitutional right to indictment and statutory right to a probable cause hearing. A 2004 amendment to the Rule eliminated the "forced waiver" provision. The rationale for the "forced waiver" provision was based on a concern for efficiency. However, even without forcing a defendant to choose between a probable cause hearing and an indictment, the prosecutor can prevent unnecessary duplication of procedure simply by indicting the defendant prior to the probable cause hearing. If it is inefficient to have a probable cause hearing, the prosecutor is in the best position to recognize that fact and to take the steps necessary to avoid it. The 2004 amendment also eliminated a reference to juvenile procedure made irrelevant by statute and added provisions describing the complaint process.

Subdivision (a). This subdivision in part restates G.L. c. 263, § 4. Approximate parallels may be found in Rules of Criminal Procedure (ULA) Rule 23(a) (1974); ALI Model Code of Pre-Arraignment Procedure §§ 330.1(3), 340.1(2) (POD 1975).

General Laws c. 263, § 4 provides that "[n]o person shall be held to answer in any court for an alleged crime, except upon an indictment by a grand jury or upon a complaint before a district court…" It is only the issuance of a complaint or an indictment that begins the criminal process, initiates a defendant's right to counsel under the Sixth Amendment to the United States Constitution, and tolls the statute of limitations. See Commonwealth v. Valchuis, 40 Mass. App. Ct. 556, 560 (1996) (statute of limitations not tolled by application for complaint or citation, but by complaint itself).

The District Courts are empowered by G.L. c. 218, § 32, to "receive complaints and issue warrants and other processes for the apprehension of persons charged with crime…" and pursuant to G.L. c. 218, § 30, shall bind over for trial in the Superior Court defendants who appear to be guilty of crimes not within their final jurisdiction, and may bind over defendants appearing guilty of crimes within their final jurisdiction. Where the charge is by complaint and

the accused is under arrest not having been indicted by grand jury, he is entitled "as soon as may be" to a probable cause hearing to determine whether he should be held for trial. G.L. c. 276, § 38.

Subdivision (b). This subdivision in large part restates the essentials of prior practice. The right to indictment is not mentioned in the Constitution of the Commonwealth. It was not until 1857 that the Supreme Judicial Court defined that right, holding that "punishment in the state prison is an infamous punishment, and cannot be imposed without…indictment…" Jones v Robbins, 74 Mass. (8 Gray) 329, 349 (1857). Therefore, subdivision (b) affords the right to be proceeded against by indictment to "a defendant charged with an offense punishable by imprisonment in state prison…" that is, Massachusetts Correctional Institution, Cedar Junction. G.L. c. 125, § 1(o). The right to indictment is not extended to defendants charged with a crime within the concurrent jurisdiction of the District and Superior Courts if the District Court retains jurisdiction. Section 27 of chapter 218 of the General Laws provides in part: "[District Courts] may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to state prison." General Laws c. 279, § 23 states that "[n]o sentence of a male convict to imprisonment or confinement for more than two and one half years shall be executed in any jail or house of correction." General Laws c. 218, §§ 26-27 and c. 279, § 23, when construed together, have led to the settled practice of the District Court, although having jurisdiction of felonies punishable by less than five years at Cedar Junction, sentencing to a jail or house of correction for not more than two and one half years.

Because a defendant tried in District Court is not subject to a sentence to state prison, there is no right to be proceeded against by indictment.

Subdivision (c) (1). While intended to secure a benefit to the accused, a grand jury indictment is but the formal accusation or presentation of charges against the accused, see Commonwealth v. Woodward, 157 Mass. 516, 518 (1893), and may be waived. See DeGolyer v. Commonwealth, 314 Mass. 626, 632-33 (1943); e.g. Commonwealth v. Thurston, 419 Mass. 101 (1994). Statutory authorization for such waiver in instances of defendants committed or bound over to the Superior Court for trial was found in former G.L. c. 263, § 4A (St. 1934, c. 358).

A defendant who is bound over to the Superior Court after a finding of probable cause has the right to indictment and the right to waive indictment. However, a defendant charged with a capital crime cannot waive indictment. G.L. c. 263, § 4A (as amended).

If after a waiver of indictment, probable cause is found to bind the defendant over for trial, G.L. c. 218, § 30, the Superior Court shall have as full jurisdiction over the case on the complaint as if an indictment has been found. See DeGolyer v. Commonwealth, 314 Mass. 626, 632 (1943).

Subdivision (c) (2). Under the original version of the provision now contained in Rule 3 (c), the judge was required to advise a defendant who had a right to an indictment that he or she might waive indictment and proceed upon the complaint. In the 2004 revision of the rule, the elimination of the "forced waiver" provision made it unnecessary to require that a defendant receive such a warning. The right to waive indictment remains, however, except in a capital case where the General Laws prohibit it. See G.L. c. 263, § 4A. The defendant may exercise the option to waive indictment in the District Court, before being bound over, or afterward, in

Superior Court. In either event, the approval of the judge is not necessary, although the court must ensure that the waiver is valid. This means that it must be intelligent and voluntary, see DeGolyer v. Commonwealth, 314 Mass. 626, 632 (1943), and that the defendant either has counsel or has waived the right to the assistance of counsel. The waiver must be in writing.

A juvenile who would otherwise be entitled to an indictment by virtue of G.L. c. 263 § 4 may also waive indictment under the procedure established in this subdivision.

Subdivision (d). This subdivision was formerly Rule 3(c)(2) prior to the revision of the Rule in 2004. It generally governs the transmission of the papers in the case after a defendant is bound over to the Superior Court. It is implicit in the rule that the defendant may waive the probable cause hearing to which he or she is entitled thereby proceeding immediately to the Superior Court upon the complaint. E.g. Commonwealth v. Tanso, 411 Mass. 640 (1992). Subdivision (d) provides for that contingency.

Subdivision (e). If the defendant waives indictment and probable cause is found the case moves immediately to the Superior Court for trial or other disposition unless the Commonwealth chooses to seek an indictment. The prosecution may wish to so proceed because of defects in the complaint, because there are other chargeable crimes—e.g., related offenses arising out of the same criminal episode—or to avail itself of the investigative power of the grand jury.

The prosecutor also has the option of obtaining an indictment in cases where the defendant does not have the right to one and the District Court would otherwise exercise final jurisdiction over the offense. So long as the District Court has not already placed the defendant in jeopardy, cf. Commonwealth v. Aldrich, 21 Mass. App. Ct. 221 (1985) (indictment barred by jeopardy where defendant pled guilty to complaint in District Court), the return of an indictment for the same offense as alleged in a complaint is ordinarily sufficient reason for the court to dismiss the complaint. Compare Commonwealth v. Burt, 393 Mass. 703 (1985) (judge acted properly in dismissing complaint upon return of indictment) with Commonwealth v. Raposa, 386 Mass. 666 (1982) (where judge refused to dismiss complaint upon return of indictment, it was proper for prosecutor to nolle prosequi). The prosecutor should not abuse this power however, such as by waiting until the day of trial to obtain an indictment, see Raposa, 386 Mass. at 669 n. 8 ("We would not look with favor, however, on a prosecutors deliberate obstruction of the criminal process and waste of judicial resources by waiting until the day of trial in the District Court to seek indictments."), or by removing a case to Superior Court to avoid having to comply with a District Court order denying a continuance, see Commonwealth v. Thomas, 353 Mass. 429 (1967).

Subdivision (f). This subdivision was added by amendment in 2004.

Defendants whose cases are going to be ultimately disposed of in Superior Court, either because the District Court lacks or declines jurisdiction, are entitled to a probable cause hearing unless the prosecutor obtains an indictment for the same offense charged in the complaint. The return of an indictment constitutes a finding of probable cause and ordinarily renders unnecessary a probable cause hearing. See Lataille v District Court of Eastern Hampden, 366 Mass. 525, 531 (1974). There may be circumstances, however, where the prosecutors bad faith in obtaining an indictment entitles the defendant to a probable cause hearing in any event. Cf. Hadfield v.

Commonwealth, 387 Mass. 252, 257 (1982) (dicta) (circumventing probable cause hearing may be invalid where "effrontery to district court," "obstruction of criminal process," or "waste of judicial resources."); Commonwealth v. Spann, 383 Mass. 142, 145 (1981) (if prosecutor promised that defendant would not be indicted before a probable cause hearing and if defendant relied on promise to his detriment, promise would be enforced); Lataille v. District Court of Eastern Hampden, 366 Mass. 525, 531 n. 6 (1974) (agreement between counsel might entitle defendant to further pursuit of probable cause hearing which was in progress at time of indictment). Absent these unusual circumstances, however, the ordinary course of events after an indictment has been returned is for the District Court to dismiss the complaint, or for the prosecutor to enter a nolle prosequi, once the defendant has been arraigned in the Superior Court.

If an indictment has not already been returned, a defendant charged with a crime not within the jurisdiction of the District Court must be given a probable cause hearing "as soon as may be." See G.L. c. 276, § 38. The policy underlying this subdivision looks to liberal granting of continuances to the prosecution in order that indictments may be sought in cases that are scheduled for a probable cause hearing.

Even if the complaint charges a defendant with a crime within the jurisdiction of the District Court (which includes misdemeanors for which there would otherwise be no right to an indictment) the court may hold a probable cause hearing, see G.L. c. 218 § 30, if the judge in the exercise of discretion determines that the interest of justice would be served by having the Superior Court dispose of the defendant's case. This would typically be the case either to allow the consolidation of cases or in recognition of the exclusive power of the Superior Court to sentence defendants charged with a concurrent jurisdiction felony to state prison. Cf. Commonwealth v. Zannino, 17 Mass. App. Ct. 73, 79 (1983) (the power to exercise jurisdiction or to bind the defendant over for trial in the Superior Court "is not to be used arbitrarily, but in view of the circumstances of each particular case"). While it is ordinarily the prosecutor who institutes a request that a matter within the District Court's jurisdiction be treated as a probable cause matter rather than a trial on the merits, the ultimate decision is the judge's. See Commonwealth v. Zannino, 17 Mass. App. Ct. 73, 78-79 (1983) ("if the crime charged is within the final jurisdiction of the District Court, the threshold decision whether to conduct a full trial on the merits or only a probable cause hearing is, at least ordinarily, a question for the judge and not the prosecutor").

If a case is within the final jurisdiction of the District Court, the judge must announce that the court is going to decline jurisdiction prior to hearing sworn testimony from any witnesses, which is when jeopardy would otherwise attach in a non-jury trial. See Commonwealth v. DeFuria, 400 Mass. 485, 487 (1987); Crist v. Bretz, 437 U.S. 28, 37 n.15 (1978). If the court does not make a clear announcement that it is declining jurisdiction, any hearing that follows at which sworn testimony is received will be considered as a trial on the merits at which jeopardy has attached. See Commonwealth v. Clemmons, 370 Mass. 288, 291 n.2 (1976); Corey v. Commonwealth, 364 Mass. 137, 142 n. 7 (1973). Compare Commonwealth v. Crosby, 6 Mass. App. Ct. 679 (1978) (since judge failed to announce that he was declining jurisdiction prior to hearing sworn testimony offered in the course of an admission to sufficient facts, the proceedings constituted a trial on the merits and jeopardy barred the defendant's indictment) with Commonwealth v.

DeFuria, 400 Mass. 485 (1987) (judge's failure to announce declination of jurisdiction prior to prosecutor's recitation of facts at an admission to sufficient findings did not bar further prosecution since no sworn testimony taken). Cf. Commonwealth v. Mesrobian, 10 Mass. App. Ct. 355, 356 n. 2 (1980) ("fundamental fairness dictates that the Commonwealth ought to be required to state unequivocally at the outset of the hearing its intention [to proceed on the basis of probable cause rather than a trial on the merits]"). Since defense strategy at a probable cause hearing differs significantly from that at a trial, the judge should provide notice to the defendant of the decision to decline jurisdiction as far in advance of the hearing as possible. The District Court rules promulgated on January 1, 1996 contemplate that the pretrial hearing is the appropriate stage at which to make the decision. District/Municipal Courts Rules of Criminal Procedure, Rule 4(f).

Whether a probable cause hearing concerns an offense outside the jurisdiction of the District Court or results from a decision of the court to decline jurisdiction over an offense for which it could have held a trial, the standard that the court should apply at the probable cause hearing to determine whether to bind the case over to the Superior Court is the same. It is the test a trial judge uses to determine a motion for a required finding of not guilty. See Myers v. Commonwealth, 363 Mass. 843, 850 (1973) ("The examining magistrate should view the case as if it were a trial and he were required to rule on whether there is enough credible evidence to send the case to the jury. Thus, the magistrate should dismiss the complaint when, on the evidence presented, a trial court would be bound to acquit as a matter of law.") This standard is more stringent than the one that governs the grand jury's determination. See Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982) (an indictment cannot stand unless, at a minimum, it is supported by evidence sufficient to establish probable cause to arrest); Commonwealth v. O'Dell, 392 Mass. 445, 451-52 (1984) (grand jury requirement of sufficient evidence to establish the identity of the accused and probable cause to arrest him is considerably less exacting than a requirement of sufficient evidence to warrant a guilty finding).

At a probable cause hearing, the defendant must be given a meaningful opportunity to cross-examine witnesses and present evidence on his or her own behalf to assure an accurate appraisal of probable cause. See Myers v Commonwealth, 363 Mass. 843 (1973); Corey v Commonwealth, 364 Mass. 137 (1973). Following the lead of the United States Supreme Court in Coleman v Alabama, 399 U.S. 1 (1970), the Supreme Judicial Court held that a probable cause hearing is such a critical stage in criminal proceedings as to require the assistance of counsel. See Commonwealth v Britt, 362 Mass. 325 (1972). The rules of evidence at a probable cause hearing should in general be the same as are applicable at a trial, that is, a finding of probable cause to hold the defendant for trial "must be based on competent testimony which would be admissible at trial." Myers v Commonwealth, supra at 849 n 6. Further, the defendant may have the proceedings taken by a stenographer at his or her own expense, see G.L. c. 221, § 91B; Commonwealth v. Shea, 356 Mass. 358, 360-61 (1969); Commonwealth v. Britt, 362 Mass. 325, 328-29 (1972) and the transcript is admissible in subsequent proceedings when otherwise competent. See G L c 221, § 91B, c 233, § 80; Commonwealth v. DiDietro, 373 Mass. 369 (1977).

If the evidence meets the appropriate standard and the case is bound over to Superior Court, the District Court retains jurisdiction to rule on ancillary matters until an indictment is returned. See Commonwealth v. Tanso, 411 Mass. 640, 644 (1992). If the evidence presented at the probable cause hearing does not meet the appropriate standard, the complaint should be dismissed. See Commonwealth v. Ortiz, 393 Mass. 523, 524 (1984). Since jeopardy does not attach at a probable cause hearing, see Commonwealth v. Scala, 380 Mass. 500, 505 n. 3 (1980), nor is a finding of no probable cause subject to appeal, a District Court's dismissal based on a failure of the evidence to meet the standard does not bar a further proceedings, either by way of a subsequent indictment for the same offense, see Commonwealth v. Juvenile, 409 Mass. 49, 52 (1991); Burke v Commonwealth, 373 Mass. 157, 160 (1977), or holding another probable cause hearing based on a new complaint, see Juvenile v. Commonwealth, 375 Mass. 104, 106 (1978) ("Additional probable cause hearings may be held, especially if additional evidence is to be offered at the subsequent hearing."). However, if the institution of further proceedings constitutes harassment, the defendant is entitled to relief. See Juvenile v. Commonwealth, 375 Mass. 104, 106 n. 1 (1978); Maldonado, petitioner, 364 Mass. 359, 364-365 (1973).

Subdivision (g) (1). This subdivision and the one following were added to Rule 3 by a 2004 amendment.

The General Laws identify the appropriate judicial officers who play a role in the process of authorizing the issuance of a criminal complaint and administering the oath. See e.g., General Laws c. 218 § 7 (justices and special justices may administer oaths); c. 218 § 10A (deputy assistant clerks may administer oath); c. 218 § 33 (clerks, assistant clerks, temporary clerks, and temporary assistant clerks may receive complaints and administer the oath); c. 218 § 35 (justice or special justice may receive complaints); c. 218 § 37 (justices, special justices, clerks, assistant clerks, temporary clerks and temporary assistant clerks may issue process resulting from a hearing upon an application for a complaint).

General Laws c. 276, § 22 provides that a complainant is to be examined "on oath" and that the complaint is to be "subscribed by the complainant." The preferred procedure is to administer the oath to the complainant before he or she makes the statements which will serve as the basis for the complaint, but a complaint is still valid if the complainant swears to the truth of statements tendered to the appropriate judicial official after they have been made. See Commonwealth v. Cote, 15 Mass. App. Ct. 229, 236 (1983). There is no requirement that the statements offered in support of the issuance of a complaint be based on personal knowledge or observation. A complainant may properly present statements of which he or she has no first-hand knowledge. See Commonwealth v. Dillane, 77 Mass. (11 Gray) 67 (1858); Commonwealth v. Cote, 15 Mass. App. Ct. 229 (1983). Nor does a complainant have to have a personal stake in the matter. See Commonwealth v. Haddad, 364 Mass. 795, 797 (1974) ("anyone may make a criminal complaint in a District Court who is competent to make oath to it.") The practice in many courts where a single officer applies for complaints for offenses of which the officer has no first-hand knowledge is not only appropriate, but a sound administrative procedure. Cf. District Court Standards of Judicial Practice, The Complaint Procedure, standard 3:23, commentary at 41-42 (1975). Rule 3(g) (1) authorizes the signing of the complaint by persons other than the arresting officer in order to avoid requiring the officer's presence at any time prior to the probable cause

hearing or trial. The subdivision is grounded in the desire to avoid removing an officer from a regular work shift to execute the mere formality of personally signing the complaint.

The person against whom a complaint is sought does not have a right to be present at the procedure described in this subdivision. See Commonwealth v. Smallwood, 379 Mass. 878 (1980). However, in cases where no arrest has been made and all of the offenses the complainant seeks are misdemeanors, see Commonwealth v. Cote, supra, 15 Mass. App. Ct. at 235, as well as in certain felony cases, G.L. c. 218 § 35A provides for notice and a hearing before a complaint is authorized, subject to exceptions where there is a risk of bodily injury, commission of a crime, or flight from the jurisdiction.

"The implicit purpose of the § 35A hearings is to enable the court clerk to screen a variety of minor criminal or potentially criminal matters out of the criminal justice system through a combination of counseling, discussion, or threat of prosecution…." Snyder, Crime and Community Mediation — The Boston Experience: A Preliminary Report on the Dorchester Urban Court Program, 1978 Wis. L. Rev. 737, 746, quoted with approval in Gordon v. Fay, 382 Mass. 64, 69-70 (1980).

This subdivision changes existing practice by requiring that in all cases, the facts on which a complaint is based either be submitted in writing or, in the discretion of the appropriate judicial official, conveyed orally so long as the oral statement is transcribed or otherwise recorded. The facts on which the complaint is based may be memorialized in any of the following three ways. First is a written statement submitted by the complainant. The written account of the facts can come from a police report, from a motor vehicle citation, see G.L. c. 90C § 3(B)(2), from a statement memorialized on the form for an application for a complaint promulgated by the District Courts, see District/Municipal Courts Rules of Criminal Procedure, Rule 2 (effective Jan. 1, 1996), or from any other written source. Second is a written statement made by the appropriate judicial official based on information conveyed by the complainant. And third is to record an oral statement by the complainant. Nothing in this subsection is intended to require the recording of hearings under G.L. c. 218 § 35A.

A number of other jurisdictions follow the practice of requiring the basis for a criminal complaint to be memorialized. See Fed. Rules Crim. Pro., Rules 3 & 4; Colo. Rules Crim. Pro., Rule 4(a); Minn. Rules Crim. Pro., Rule 2.01; R.I. Rules Crim. Pro., Rule 3. The purpose of this requirement is twofold. First, requiring a record of the facts presented to the court will protect the integrity of the complaint process. And second, in those cases where a defendant has the right to litigate the basis on which a complaint was issued, see e.g., Commonwealth v. DiBennadetto, 436 Mass. 310 (2002), the existence of a record will facilitate judicial review.

Subdivision (g)(2). This subdivision changes the existing practice concerning the authorization of criminal complaints in some cases.

Under prior practice, where a complaint was sought against an individual who had been arrested, the appropriate judicial officer did not evaluate the justification for initiating criminal proceedings. It was only if the complainant applied for process to issue, either a summons or warrant, that a determination of probable cause was necessary. Standards of Judicial Practice: The Complaint Procedure, 2:03, Administrative Office of the District Courts (1975). Under this

subdivision, a finding of probable cause must be made for all cases, whether the defendant has been arrested or not. In requiring a probable cause determination in every case, this subdivision follows the federal model, see Fed. Rules Crim. Pro. 4(a) & 5(a), and that of a number of other states, e.g., Conn. Practice Book, § 617; Minn. Rules Crim. Pro., Rule 2.01; N.J. Rules Crim. Pro., Rule 3:4-1(a).

The consequence, if any, of the failure of the record in a particular case to demonstrate probable cause is a matter that the rule does not address. The Supreme Judicial Court, in Commonwealth v. DiBennadetto, supra at 313, has held, however, that where a complaint was authorized after a §35A hearing, "the issuance of [the] complaint…is not to be revisited by a further show cause hearing; the defendant's remedy is a motion to dismiss."

The purpose of a probable cause determination prior to the authorization of a complaint is to screen out cases that do not belong in the criminal justice system at the earliest possible stage. The standard of probable cause to authorize a complaint is the same as the standard that governs the grand jury's decision to issue an indictment. "[A]t the very least the grand jury must hear sufficient evidence to establish the identity of the accused…and probable cause to arrest him." Commonwealth v. O'Dell, 392 Mass. 445, 450 (1984), quoting Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982). As in the grand jury or arrest context, the probable cause determination at this stage of the process may be based on hearsay. All that is required is "reasonably trustworthy information…sufficient to warrant a prudent man in believing that the defendant had committed…an offense," O'Dell, 385 Mass. at 450. This standard is considerably less exacting than the one that a judge must apply at a probable cause hearing under subdivision (f). Id. at 451. If a case cannot even meet the standard necessary under subdivision (g), it would be a waste of judicial resources and an unnecessary burden on the individual for the case to move any further in the process.

This subsection does not alter existing case law that gives courts in circumstances where a private citizen is a complainant, the power to refuse to issue a complaint even though there is probable cause to do so. See Victory Distributors v. Ayer Division of the District Court Dept., 435 Mass. 136 (2001). Where the Commonwealth seeks a complaint, however, the court must issue it so long as it is legally valid. Id. Although there is no explicit provision in the Rules of Criminal Procedure for the process that follows from an initial denial of an application for a complaint, the Supreme Judicial Court has held that judges have inherent authority to rehear such applications. See Bradford v. Knights, 427 Mass. 748 (1998).

Rule 3.1: Determination of Probable Cause for Detention

(Applicable to cases initiated on or after September 7, 2004)

(a) No person shall be held in custody for more than twenty-four hours following an arrest, absent exigent circumstances, unless:

(i) a warrant or other judicial process authorizes the person's detention,

(ii) a complaint has been authorized under Rule 3 (g), or

(iii) a determination of probable cause for detention has been made pursuant to subsection (b).

(b) A determination of probable cause for detention shall be made by an appropriate judicial officer. The appropriate officer shall consider any information presented by the police, whether or not known at the time of arrest. The police shall present the information under oath or affirmation, or under the pains and penalties of perjury. The police may present the information orally, in person or by any other means, or in writing. If presented in writing, the information may be transmitted to the appropriate judicial officer by facsimile transmission or by electronic mail or by such other electronic means as may be found acceptable by the court. The determination of probable cause for detention shall be an ex parte proceeding. The person arrested has no right to appear, either in person or by counsel.

(c) Where subsection (a) requires a determination of probable cause for detention, the police shall present the information necessary to obtain such determination to the appropriate judicial officer as soon as reasonably possible after the arrest, but no later than twenty-four hours after arrest, absent exigent circumstances.

(d) The judicial officer shall promptly reduce to writing his or her determination as to probable cause and notify the police. A copy of the written determination shall be transmitted to the police, by facsimile transmission or by other means, as soon as possible.

(e) The judicial officer shall apply the same standard in making the determination of probable cause for detention as in deciding whether an arrest warrant should issue. If the judicial officer determines that there is probable cause to believe the person arrested committed an offense, the judicial officer shall make a written determination of his or her decision which shall be filed with the record of the case together with all the written information submitted by the police.

(f) If there is not probable cause to believe that the person arrested committed an offense, the judicial officer shall order the person's prompt release from custody. The order and a written determination of the judicial officer shall be filed in the District Court having jurisdiction over the location of the arrest, together with all the written information submitted by the police. These documents shall be filed separately from the records of criminal and delinquency cases, but shall be public records.

Reporter's Notes

Rule 3.1 was added in 2004 to implement the requirements described by the Supreme Judicial Court in Jenkins v. Chief Justice of the District Court Department, 416 Mass. 221 (1993), dealing with the topic of obtaining a judicial determination of probable cause for persons held in custody after a warrantless arrest. It is based on the procedure promulgated in 1994 by Trial

Court Rule XI. The only major substantive change that Rule 3.1 makes in the procedure dictated by Trial Court Rule XI is in the standard to use in determining if the custody of the individual is lawful. Trial Court Rule XI directed the "judicial officer [to determine whether]…there is probable cause to believe that such arrestee committed one or more of the offenses for which he or she was arrested." Rule 3.1 directs the judicial officer to determine if "there is probable cause to believe the person arrested committed an offense." The language of Rule 3.1 more accurately focuses on the appropriate issue that is crucial to the question of the legality of an individual's detention prior to being brought to court.

Subdivision (a). In Jenkins, the Court held that Article 14 of the Declaration of Rights requires the police to obtain a judicial determination of probable cause as soon as reasonably possible after they have made a warrantless arrest, which in the usual circumstances means no more than twenty-four hours. This subdivision identifies the only four exceptions to the police following the procedure that the balance of Rule 3.1 establishes. One is when the arrestee will not be held more than twenty-four hours. For example, if the police have arrested someone who is going to be bailed at the police station within twenty-four hours, Rule 3.1 is not applicable. Another is when the arrest was based on process issued by a judicial officer, such as an arrest warrant, or when process exists which authorizes the detention of an arrestee on another charge. In the former circumstance, the police are merely executing a judicial order rather than making an independent judgment to deprive someone of their liberty. In the latter circumstance, where for example the police arrest someone without a warrant and then discover that there is a pre-existing outstanding warrant for the arrestee, there is already judicial authorization to deprive the arrestee of his or her liberty. The third is when a complaint charging the arrestee with a crime has already been authorized under Rule 3(g), which independently requires a judicial officer to make the same sort of probable cause determination as Rule 3.1 contemplates. Last is when exigent circumstances exist which make it not possible to obtain judicial approval for an extended deprivation of the arrestee's liberty.

Subdivision (b). This subsection describes the procedure for a determination of probable cause for detention after a warrantless arrest. It requires the police to present the information that supports a deprivation of an arrestee's liberty to an appropriate judicial officer. These officials include judges and those individuals in the clerk-magistrate's office who are empowered to authorize complaints. See Reporters' Notes to Rule 3(g); G.L. c. 218 § 33. The Court held in Jenkins, 416 Mass. at 337-38 that: "like the issuance of a warrant, the postarrest determination need not necessarily be made by a judge. See Commonwealth v. Smallwood, 379 Mass. 878, 885, 401 N.E.2d 802 (1980) ("While District Court judges are authorized to receive complaints and issue warrants, G. L. c. 218, § 32, a clerk or assistant clerk may also receive complaints, administer the required oath, and issue warrants in the name of the court. G. L. c. 218, § 33. Commonwealth v. Penta, 352 Mass. 271, 273, 225 N.E.2d 58 [1967]")."

The police may present the appropriate judicial officer with the information providing probable cause for the arrestee's detention in writing or orally. This subdivision contemplates that the medium of providing the information be as flexible as possible. Physical submission of a written report, faxed copies or e-mail are all appropriate, as are telephone conversations. No matter how the police submit the information, however, it should be sworn to under oath or affirmation. The

arrestee has no right to appear or participate at this proceeding, either in person or through counsel. See Jenkins, 416 Mass. at 244-45.

Subdivision (c). This subsection directs the police to present the information justifying the detention of an arrestee's liberty within twenty-four hours of the arrest, unless there are exigent circumstances. The exception for exigent circumstances addresses situations such as communication failures and natural disasters and not exigencies that relate solely to the investigative needs of the police.

Subdivision (d). This subsection incorporates essentially the same requirement for reducing the results of a determination of probable cause for detention to writing and transmitting it to the police as contained in Trial Court Rule XI(e).

Subdivision (e). This subdivision deals with the standard that governs the determination of probable cause for detention and the consequence of an affirmative finding. As to the first of these issues, the subdivision addresses two questions: what the standard should be and the issues to which the standard should be applied. The Court in Jenkins held that the Declaration of Rights requires a postarrest determination of probable cause to be "governed by the same legal standards as apply to the issuance of a warrant." Jenkins, 416 Mass. at 239. Rule 3.1 follows Trial Court Rule XI (b), in adopting this same familiar standard as the measure of whether further detention of an arrestee is warranted. However, the subdivision differs from Trial Court Rule XI (b) in the question of what issues must meet this standard. The Trial Court Rule focused on whether the individual committed one or more of the offenses for which he or she was arrested. This subdivision focuses on whether there is probable cause to believe individual committed any offense.

The procedure that Rule 3.1 addresses is directed to the question of probable cause for the arrestee's detention, not whether probable cause existed to justify the persons arrest. Given the nature of the determination, the legality of the arrestee's detention should not depend on the ability of the police accurately to identify the precise offense for which the person should be held. For example, it is sometimes the case that police with probable cause to arrest someone for a particular crime put down the wrong offense on the documents they fill out afterwards. Under the language of Trial Court Rule XI (d), such a person would have to be released despite clear probable cause to charge him or her with the correct crime. Under Rule 3.1, the police could detain such an individual and charge him or her with the appropriate offense. The approach that Rule 3.1 takes to this issue is similar to the rules of other jurisdictions. See Fla. R. Crim. Pro., Rule 3.133(a)(3); Me. R. Crim. Pro., Rule 5(d); Minn. R. Crim. Pro., Rule 4.03.

The subdivision also addresses the issue of the consequence of a determination that there exists probable cause for detention. If probable cause exits, a written finding together with the supporting documents are to be filed with the record of the case. A defendant does not have the right to have the probable cause determination reviewed at arraignment. By the time a defendant subject to the process described in Rule 3.1 is arraigned, a judicial officer not only will have made a determination of probable cause for detention, but also a determination pursuant to Rule 3(g) that probable cause exists for each of the offenses with which the defendant has been

charged. There is no need for a judge at arraignment routinely to reconsider the matter of probable cause.

Subdivision (f). This subdivision deals with the issue of the consequence of a determination that there does not exist probable cause for detention. It is essentially the same in this regard as Trial Court Rule XI (e)(3).

Rule 4: Form and Contents of Complaint or Indictment; Amendment

(Applicable to District Court and Superior Court)

(a) Contents of Indictment or Complaint. An indictment and a complaint shall contain a caption as provided by law, together with a plain, concise description of the act which constitutes the crime or an appropriate legal term descriptive thereof.

(b) Subscription of Application for Issuance of Process. An application for issuance of process may be subscribed by the arresting officer, the police chief, or any police officer within the jurisdiction of a crime, a prosecutor, or a private person.

(c) Indictment Based Upon Secondary Evidence. An indictment shall not be dismissed on the grounds that the evidence presented before the grand jury consisted in whole or in part of the record from the defendant's probable cause hearing or that other hearsay evidence was presented before the grand jury.

(d) Amendment. Upon his own motion or the written motion of either party, a judge may allow amendment of the form of a complaint or indictment if such amendment would not prejudice the defendant or the Commonwealth.

Reporter's Notes

Subdivision (a). Rule 4(a) is a restatement of Massachusetts statutory law. A caption is required for indictments and complaints by G.L. c. 277, §§ 17, 79. See 30 MASS. PRACTICE SERIES (Smith) § 342 (1970). Although the indictment or complaint may contain more than one count (see Mass. R. Crim. P. 9[a][2], [b]), a single caption is sufficient. G.L. c. 277, §§ 17, 79.

The statement of the charges can be in the form of a description of the criminal act or in the form of a legal term descriptive of the act. "The words used in a statute to define a crime, or other words conveying the same meaning, may be used." G.L. c. 277, § 17. An indictment or complaint must, however, set forth all the elements of the crime charged and if a statute does not contain all those elements, an indictment or complaint drawn in terms of that statute is insufficient. G.L. c. 277, § 17; Commonwealth v. Palladino, 358 Mass. 28 (1970). The forms established by G.L. c. 277, § 79 contain sufficient descriptions of the crimes listed therein.

To survive a motion to dismiss, an indictment (together with a bill of particulars, if any. See Rule [13][b]) must describe the offense charged "'fully, plainly, substantially and formally,' with as much certainty as the known circumstances of the case . . . [will] permit." Commonwealth v.

Soule, Mass. App. Ct. Adv. Sh. (1979) 69 (Rescript). Accord Commonwealth v. Burke, 339 Mass. 521, 523 (1959); Commonwealth v. Gill, 5 Mass. App. Ct. ___, ___ (1977), Mass. App. Ct. Adv. Sh. (1977) 581, 582-83.

Subdivision (b). General Laws c. 276, § 22 provides that a complainant is to be examined "on oath" and that the complaint is to be "subscribed by the complainant." While this requirement has been strictly construed, Commonwealth v. Barhight, 75 Mass. (9 Gray) 113 (1857), there is no requirement that the statements offered in support of the issuance of process be based on personal knowledge or observation. A complainant may properly present statements of which he has no first-hand knowledge. Commonwealth v. Dillane, 77 Mass. (11 Gray) 67 (1858). The practice in many courts where a single officer presents applications for issuance of process for offenses of which he has no first-hand knowledge is not only appropriate, but a sound administrative procedure. District Court Standards of Judicial Practice, THE COMPLAINT PROCEDURE, standard 3:23, commentary at 4142 (1975). Rule 4(b) authorizes the signing of the complaint by persons other than the arresting officer in order to avoid requiring the officer's presence at any time prior to the probable cause hearing or trial. The subdivision is grounded in the desire to avoid removing an officer from his regular work shift to execute the mere formality of personally signing the complaint.

Subdivision (c). This subdivision of the rule refers to hearsay and other types of evidence which may be inadmissible at trial, but may properly be considered by a grand jury. Commonwealth v. Gibson, 368 Mass. 518 (1975), reaffirmed the long-recognized rule in the Commonwealth that evidence which is not legally competent at trial is sufficient upon which to base an indictment, and that an indictment which is in fact based exclusively upon hearsay will not be invalidated at trial for that reason. Commonwealth v. Woodward, 157 Mass. 516 (1893); Commonwealth v. Walsh, 255 Mass. 317 (1926); Commonwealth v. Ventura, 294 Mass. 113 (1936); Commonwealth v. Lammi, 310 Mass. 159 (1941); Commonwealth v. Geagan, 339 Mass. 487 (1959), cert. denied, 361 U.S. 895; Commonwealth v. Monahan; 349 Mass. 139 (1965); Commonwealth v. Beneficial Finance Co., 360 Mass. 188 (1971).

The United States Supreme Court, in Costello v. United States, 350 U.S. 359 (1956), disposed of constitutional arguments against the practice, holding "[a]n indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for a trial of the charge on the merits. The Fifth Amendment requires nothing more." Id. at 363. The Court affirmed and expanded upon this holding in United States v. Dionisio, 410 U.S. 1 (1973), in which it stated that: "A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge." Id. at 15. More recently, that Court has said, "[t]he grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered." United States v. Calandra, 414 U.S. 338, 344-45 (1974).

Subdivision (d). This subdivision for the most part restates prior Massachusetts practice. The substance of this subdivision was taken from G.L. c. 277, § 35A, but a significant modification of the statute has been effected. The change involves the expansion of the right to seek amendments. Under the statute, only the prosecutor could move for amendment of a complaint or

indictment; under the rule either party can seek amendments, and the court can allow amendments on its own motion.

It is preferable that a party seeking an amendment of the charges file a written motion to that effect in order that a sufficient record be preserved on that issue should there by an appeal. However, a court may allow an amendment upon oral motion. In such event, or in the event that the court amends the charges on its own motion, the court should make certain that the amendment, as well as the charges as originally framed, are made a part of the record.

The most common prejudice resulting from an amendment of the charges is that the amendment materially alters the substantive offense charged. See Commonwealth v. Gallo, 2 Mass. App. Ct. 636 (1974). Such an amendment would be one of substance and not of form and would thus be impermissible. Commonwealth v. Snow, 269 Mass. 598, 603 (1930). An unessential element of a crime charged in an indictment or complaint, such as the time of stealing in larceny, may be amended without prejudice to the defendant. Commonwealth v. Jervis, 368 Mass. 638, 643-44 (1975). See Commonwealth v. Grasso, Mass. Adv. Sh. (1978) 1162, 1164; Commonwealth v. Sitko, Mass. Adv. Sh. (1977) 668, 669-70.

One test for determining whether an amendment is one of substance or of form is whether an acquittal on the original charge would act as a bar on double jeopardy grounds to a prosecution of the defendant on the amended charges. If not, then the amendment would be deemed one of substance rather than of form. Commonwealth v. Snow, supra.

Although the power of the court to amend indictments under this rule and under existing statutory law is the same as its power to amend complaints, it should be noted that the restrictions on its power to allow amendment of indictments reaches constitutional dimensions. Since defendants charged with felonies have the constitutional right to indictment (Jones v. Robbins, 74 Mass. [8 Gray] 329 [1857]; see Reporter's Notes to Rule 3, supra.), an amendment which goes to the substance of the offense charged in an indictment so as to "materially change the work of the grand jury" interferes with the defendant's right to have a grand jury frame those charges upon which he is to be tried. Commonwealth v. Benjamin, 358 Mass. 672, 679 (1971); Commonwealth v. Ohanian, Mass. App.Ct. Adv. Sh. (1979) 14 (Rescript).

As to complaints, the power of the court is not so restricted. Therefore, the District Court judge should review each complaint carefully to assure that it fulfills the statutory requirements. If it does not, the judge should order it amended. This course of action will prevent defective complaints from entering the Superior Court system after a waiver of indictment. Further, if during a probable cause hearing it appears to the judge that the evidence would warrant charges of other or related offenses, he should order a new complaint to be prepared.

Rule 5: The Grand Jury

(Applicable to cases initiated on or after September 7, 2004)

(a) Summoning Grand Juries. As prescribed by law, the appropriate number of jurors shall be summoned in the manner and at the time required, from among whom the court shall select not more than twenty-three grand jurors to serve in said court as long as and at those specific times

required by law, or as required by the court. The regular grand jury shall be called upon and directed to sit by the Chief Justice of the Superior Court Department whenever within his or her discretion the conduct of regular criminal business and timely prosecution within a particular county so dictate. Notwithstanding the foregoing, special grand juries shall be summoned in the manner prescribed by the General Laws.

(b) Foreperson, Foreperson Pro Tem, Clerk, Clerk Pro Tem. After the grand jurors have been impanelled they shall retire and elect one of their number as foreperson. The foreperson and the prosecuting attorney shall have the power to administer oaths and affirmations to witnesses who appear to testify before the grand jury, and the foreperson shall, under his or her hand, return to the court a list of all witnesses sworn before the grand jury during the sitting. If the foreperson is unable to serve for any part of the period the grand jurors are required to serve, a foreperson pro tem shall be elected in the same manner as provided herein for election of the foreperson. The foreperson pro tem shall serve until the foreperson returns or for the remainder of the term if the foreperson is unable to return. The grand jury may also appoint one of their number as clerk to be charged with keeping a record of their proceedings, and, if the grand jury so directs, to deliver such record to the attorney general or district attorney. If the clerk is unable to serve for any part of the period the grand jurors are required to serve, a clerk pro tem may be appointed.

(c) Who May Be Present. Attorneys for the Commonwealth who are necessary or convenient to the presentation of the evidence, the witness under examination, the attorney for the witness, and such other persons who are necessary or convenient to the presentation of the evidence may be present while the grand jury is in session. The attorney for the witness shall make no objections or arguments or otherwise address the grand jury or the prosecuting attorney. No witness may refuse to appear because of unavailability of counsel for that witness.

(d) Secrecy of Proceedings and Disclosures. The judge may direct that an indictment be kept secret until after arrest. In such an instance, the clerk shall seal the indictment and no person may disclose the finding of the indictment except as is necessary for the issuance and execution of a warrant. A person performing an official function in relation to the grand jury may not disclose matters occurring before the grand jury except in the performance of his or her official duties or when specifically directed to do so by the court. No obligation of secrecy may be imposed upon any person except in accordance with law.

(e) Finding and Return of Indictment. An indictment may be found only upon the concurrence of twelve or more jurors. The indictment shall be returned by the grand jury to a judge in open court.

(f) No Bill; Discharge of Defendant. The grand jury shall during its session make a daily return to the court of all cases as to which it has determined not to present an indictment against an

accused. Each such complaint shall be endorsed "no bill" and shall be filed with the court. If upon the filing of a no bill the accused is held on process, he or she shall be discharged unless held on other process.

(g) Deliberation. The prosecuting attorney shall not be present during deliberation and voting except at the request of the grand jury.

(h) Discharge. A grand jury shall serve until the first sitting of the next authorized grand jury unless it is discharged sooner by the court or unless its service is extended to complete an investigation then in progress.

Reporter's Notes

Rule 5 is modeled in large part upon Fed. R Crim. P. 6 and substantially conforms to the General Laws.

Subdivision (a). This subdivision is drawn from Fed. R. Crim. P. 7(a) and G.L. c. 277, §§ 1, 2, 2A-2H. General Laws c. 277, § 3 provides that grand jurors are to drawn, G.L. c. 234, §§ 17-24C, summoned, GL c 234, §§ 10-14, 16, 24, and returned in the same manner as traverse jurors from a list compiled in compliance with G.L. c. 234, §§ 4-9. By a 2004 amendment, this subdivision was amended to eliminate a reference to a specific number of veniremen who must be summonsed, since the number differs from county to county. The statutes require that twenty-three jurors be selected to make up the grand jury, G.L. c. 277, §§ 1, 2, 2A-2H, and authorize the issuance of writs of venire facias to fill any deficiency in that number. G.L. c. 277, § 4. A number less than twenty-three is competent to return an indictment, however, so long as at least thirteen are present and twelve concur in the return. See Commonwealth v. Wood, 56 Mass. (2 Cush) 149 (1848). Accord, Crimm v Commonwealth, 119 Mass. 326 (1876).

Subdivision (a) generally governs the time of issuance of writs of venire facias and provides that such writs for special grand juries shall be issued pursuant to G.L. c. 277, § 2A. In addition to the statutory regular and special grand jury sitting, the Administrative Justice of the Superior Court is empowered to call a "regular" grand jury session whenever the amount of criminal business and the need for timely prosecution within a particular county requires. This provision is intended to provide the Superior Court with much needed flexibility in responding to the fluctuating demand for grand jury action among counties.

Subdivision (b). Although similar to Fed. R. Crim. P. 6(c), this subdivision is wholly adopted from former GL c 277, §§ 7-10. The federal rule provides for the simultaneous court appointment of a foreperson and deputy foreperson; under Rule 5 the foreperson is elected by the other jurors and a replacement, the foreperson pro tem, is chosen only if the first cannot serve Provision for a clerk pro tem is new with this rule.

Those parts of subdivision (b) dealing with the administration of oaths and listing of witnesses and with the appointment and duties of the clerk are restatements, respectively, of former G.L. c. 277, §§ 9 and 10.

Subdivision (c). This subdivision was patterned on Fed. R. Crim. P. 6(d), although it omitted the provision of the federal rule that excluded all persons other than jurors from deliberations or voting.

Grand jury proceedings are ordinarily secret and the presence of an unauthorized person will void an indictment. See Commonwealth v. Pezzano, 387 Mass. 69, 72-73 (1982). The importance of keeping the grand jury process from becoming public rests on several policy considerations: preventing individuals from facing the notoriety associated with a grand jury investigation unless probable cause is found against them and an indictment is returned; shielding the grand jury from any outside influences having the potential to distort their investigatory or accusatory functions; protecting witnesses from improper influence; encouraging the full disclosure of information to the grand jury; and facilitating the freedom of the grand jury's deliberations. See WBZ-TV4 v. District Attorney for Suffolk Dist., 408 Mass. 595, 600 (1990).

However, prior to the adoption of Rule 5, the Supreme Judicial Court recognized that grand jury secrecy would not be compromised by the presence of persons who were necessary to the work of the grand jury. For example, Commonwealth v. Favulli, 352 Mass. 95 (1967), held that a prosecutor has discretion as to the use of assistants and may have present such reasonable number as he or she deems appropriate to the efficient presentation of the evidence. Id. at 106. Accord, Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 207-09 (1971) (no greater number than is "necessary"). Besides the jury, the prosecutors and the witness under examination, other persons "necessary or convenient to the presentation of the evidence" may include counsel for a witness (G.L. c. 277, § 14A), an interpreter, an officer to guard a dangerous prisoner-witness, an attendant for a sick witness (see 30 Mass. Practice Series [Smith] § 812 [1970]), a stenographer (G.L. c. 221, § 86), or the operator of a recording device. It should be noted that G.L. c. 221, § 86, which permits the appointment of a stenographer to take notes of testimony given before a grand jury does not authorize the recording of any statement or testimony of a grand juror.

The provision in Rule 5(c) allowing the prosecutor to be present at request of grand jurors does not deny defendant due process. See Commonwealth v. Smith, Mass. 437 (1993).

Under this subdivision, it may be proper for a federal prosecutor who was involved in the investigation of the case, see Commonwealth v. Angiulo, 415 Mass. 502, 513 (1993) or a victim-witness advocate accompanying a child witness, see Commonwealth v. Conefrey, 410 Mass. 1, 7 (1991) to be present during testimony before the grand jury. However, it is ordinarily not proper for a police officer to be present, except as a witness. See Pezzano supra.

Subdivision (d). Adopted from Fed. R. Crim. P. 6(e), this subdivision incorporates the substance of former G.L. c. 277, §§ 12-13. Nothing in this rule nor in the General Laws prevents a witness before a grand jury from disclosing his or her testimony. See Commonwealth v. Schnackenburg, 356 Mass. 65 (1969); Silverio v. Mun. Court of Boston, 355 Mass. 623, cert. denied, 396 U.S. 878 (1969). The last phrase, "except in accordance with law" is intended to comprehend statute, court rule, rule or order of an administrative agency, and case law.

Subdivision (e). In order to return an indictment, the grand jury "must hear sufficient evidence to establish the identity of the accused…and probable cause to arrest him" (citations omitted). Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982).

Although an indictment may be based solely on hearsay, Commonwealth v. O'Dell, 392 Mass. 445, 450-51 (1984), the Supreme Judicial Court has expressed a "preference for the use of direct testimony," Commonwealth v. St. Pierre, 377 Mass. 650, 656 (1979). A prosecutor need not present the grand jury all the evidence available to the Commonwealth, even if some of it is exculpatory. See O'Dell, 392 Mass. at 447. However, if there is exculpatory evidence that would greatly undermine either the credibility of an important witness or likely affect the grand jury's decision, the prosecutor should inform the grand jury. Id.

Although there is no statute which mandates the concurrence of at least twelve jurors in the return of an indictment, the requirement expressed in this subdivision is long-established in Massachusetts practice. See Commonwealth v. Smith, 9 Mass. 107 (1812). Grand jurors voting to return an indictment need not hear all of the evidence presented against a defendant. See Commonwealth v. Wilcox, 437 Mass. 33 (2002).

Subdivision (f). General Laws c. 277, § 15, requiring daily reports of cases where no indictment is returned, is the basis of this subdivision.

Subdivision (g). Prior Massachusetts procedure permitted the prosecutor to be present, See Commonwealth v. Favulli, supra at 107. A major change is worked by this subdivision, pursuant to which the prosecuting officer may be present during deliberations and voting only if his or her presence is requested by the grand jurors. It is believed that this will operate to enhance the independence of the grand jury, thus alloying fears that it is merely "a tool of the prosecutor".

Subdivision (h). This subdivision essentially restates those provisions of G.L. c 277, §§ 1, 2, and 2A-2H relative to the duration of sittings of grand juries and of § 1A relative to extensions. Grand juries in Suffolk (§ 2), Middlesex (§ 2B), Worcester (§ 2E), Norfolk (§ 2F) and Bristol (§ 2H) counties are to serve for six months and in Hampden (§ 2C), Essex (§ 2G) and Plymouth counties (§ 2D) for four months "and until another grand jury has been impanelled in their stead." Notwithstanding these express statutory provisions, the summoning of the grand jury and the duration of its term is subject to the discretion of the Administrative Justice of the Superior Court pursuant to subdivision (a).

Rule 6: Summons to Appear; Arrest Warrant

(Applicable to District Court and Superior Court)

(a) Issuance of Process.

(1) Summons. A defendant not under arrest or otherwise in custody shall, except as provided in subdivision (a)(2) of this rule, be notified of the criminal proceedings against him and of the date of the return day by means of a summons. A copy of the complaint or indictment shall accompany the summons. If the accused is a juvenile, a summons and copy of the complaint or indictment shall also be served upon the parent or legal guardian of the juvenile or upon the

person with whom the juvenile resides. Such notice shall also advise the defendant to report in person to the probation department before the return day.

(2) Warrant. The District Court may authorize the issuance of a warrant in any case except where the accused is a juvenile less than twelve years of age. Upon the return of an indictment against a defendant, the Superior Court may authorize the issuance of a warrant. The decision to issue a warrant may be based upon the representation of a prosecutor made to the court that the defendant may not appear unless arrested. If a defendant fails to appear in response to a summons or for any reason is not amenable to service, the prosecutor may request that a warrant issue or may resummon the defendant.

(b) Form.

(1) Warrant. An arrest warrant issued pursuant to this rule shall be signed by the official issuing it and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. The warrant shall recite the substance of the offense charged in the complaint or indictment. It shall command that the defendant be arrested and brought before the court.

(2) Summons. A summons shall be in the same form as a warrant except that it shall summon the defendant to appear before the court at a stated time and place.

(c) Service or Execution; Return.

(1) By Whom. A summons may be served in the manner provided by subdivision (c)(3) of this rule by any person authorized by the General Laws to serve criminal process. A warrant shall be directed to and executed by an officer authorized by the General Laws to serve criminal process.

(2) Territorial Limits. A summons may be served or a warrant executed at any place within the Commonwealth.

(3) Manner. A summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by mailing it to the defendant's last known address. A warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant that a warrant has issued and of the offense charged, but if the officer does not then know of the offense charged, he shall inform the defendant thereof within a reasonable time after arrest.

(4) Return. On or before the return day, the person to whom a summons was delivered for service shall make return thereof to the issuing court. The clerk shall maintain a list of those summonses returned unserved which shall include a statement of the efforts made by the

person to whom the summonses were delivered for service to serve them. If a summons is mailed pursuant to subdivision (c)(3) of this rule and returned, the clerk shall record that fact upon the list. The officer executing a warrant shall make return thereof to the issuing court. At the request of the prosecutor any unexecuted warrant shall be returned to the issuing court and may be cancelled by that court upon its own motion or upon the motion of the prosecutor. At the request of the prosecutor made at any time while a complaint or an indictment is pending, a summons returned unserved or a warrant returned unexecuted and not cancelled may be delivered to an authorized person for service or execution.

(d) Default.

(1) Costs. A judge may order that expenses incurred as a result of the entry of a default against a defendant are to be assessed as costs against the defendant.

(2) Preservation of Testimony. If counsel for a defendant is present upon the entry of a default against the defendant and if the judge finds that to require the attendance at a later time of a witness then present in court would constitute a hardship upon the witness because of age, infirmity, illness, profession or other sufficient reason, the judge may order that the testimony of the witness be taken and preserved for subsequent use at trial or any other proceeding. The witness shall be examined in open court by the party on whose behalf he is present and the adverse party shall have the right of cross-examination. The expense of taking and preserving the testimony may be assessed as costs against the defendant.

Reporter's Notes

Rule 6 was drafted with the aim of dispensing with unnecessary appearances by defendants, their counsel, and witnesses and insuring that defendants who are unlikely to flee pending their initial appearance may be at liberty without restriction.

Subdivision (a). Under prior practice, after a finding of probable cause—whether upon an application for issuance of process or upon presentment to a grand jury—arrest warrants were to be issued in the majority of cases. G.L. c. 276, § 22. The issuance of a summons in lieu of a warrant was the exception under the law, if not in practice.

Under G.L. c. 276, § 24, a summons was to be issued only in those instances where the District Court had final jurisdiction over the offense charged and the court believed a summons would sufficiently guarantee the defendant's appearance in court.

Under this rule the permissible use of a summons is greatly expanded. Whenever it is determined that process shall issue upon an application, the District Court shall authorize the issuance of a warrant, except in cases where the accused is a juvenile less than twelve years of age. G.L. c. 119, § 54. Whenever a direct indictment is returned against a defendant, the Superior Court shall authorize the issuance of a warrant. In both instances, however, the warrant will not be immediately issued for execution unless the court determines that the defendant will not likely appear upon a summons alone.

This rule reflects the policy underlying current efforts to secure the release prior to trial of all defendants who have sufficient roots in the community to guarantee their presence at trial. Federal Rule of Criminal Procedure 4 requires a magistrate to issue a summons rather than an arrest warrant only "upon the request of the attorney for the government" after probable cause is found. Section 3.3 of the ABA Standards Relating to Pretrial Release (Approved Draft, 1968) provides for the use of a summons instead of a warrant except where specific grounds exist for the use of an arrest warrant. Accord Rules of Criminal Procedure (U.L.A.) rule 221(c) (1974); National Advisory Commission on Criminal Justice Standards & Goals, Courts, standard 4.2 (1973). See Vermont R.Crim.P. 4 (1974).

The preference for the issuance of summonses operates to conserve law enforcement resources by releasing the police for other duties, and conserves the resources of the court and parties.

The preference for the issuance of a summons instead of a warrant is based on the same policy mandating the release of arrested defendants on personal recognizance rather than on bail. That policy is bottomed on the belief that defendants should be burdened with the fewest restrictions on their pretrial liberty that will adequately assure their presence at trial.

There is, however, one significant difference between the decision made concerning the issuance of a summons and that concerning the appropriate conditions of release after arrest. When a decision on bail is made, the court or magistrate has more information concerning the defendant than when a summons or warrant is to be issued. In the former instance, the defendant is present before the court and can be questioned in order to establish a sufficient basis for a determination of the appropriate conditions of his release. In addition, under Mass. R. Crim. P. 28, the judge is authorized to review the probation report concerning the defendant prior to the bail determination.

In light of these considerations, it is intended that the court not be prohibited from issuing an arrest warrant where there is an absence of sufficient information to make an intelligent choice concerning the appropriate process to be issued. Where there is a dearth of information concerning the defendant, it is expected that the court will place much reliance upon the nature of the offense charged and will order the arrest of defendants charged with serious crimes. An arrest in such situations will not unduly prejudice a defendant, because, if he is suitable for pretrial release on his own recognizance, the court can so order when the defendant is initially brought before it after arrest.

Subdivision (a)(1) provides that, except when the issuance of a warrant is necessitated, the defendant is to be notified of the criminal proceedings against him and the date of his scheduled appearance by means of a summons coupled with a copy of the complaint or indictment. See Rules of Criminal Procedure (U.L.A.) rule 222(d) (1974). This notice shall also advise the defendant to personally report to the probation department before his scheduled appearance for the purpose of an interview to determine whether counsel need be assigned. If the defendant has retained counsel, and counsel has filed his appearance, the defendant need not attend until his next scheduled appearance.

Subdivision (a)(1) also deals with the requirement of G.L. c. 119, § 55 that notice to the parent or guardian of the defendant is necessary when the accused is a juvenile. Although notice to and

appearance by a parent or guardian is thus required, nothing in this rule is to be construed as making the parent or guardian of the juvenile a party defendant. Robinson v. Commonwealth, 242 Mass. 401, 403 (1922).

Subdivision (a)(2) provides that upon the prosecuting officer's recital to the court that the defendant will not appear unless arrested, a warrant may be issued. This is less restrictive than the guidelines provided by the ABA Standards Relating to Pretrial Release, § 3.3 (Approved Draft, 1968), which require an application for an arrest warrant to reveal the defendant's residence, employment, family ties, criminal record, and whether he had previously responded to a citation or summons. If a magistrate fails to issue a summons instead of an arrest warrant, he is required to state the reason therefor. Compare Rule 221(c) of the Uniform Rules of Criminal Procedure (U.L.A.) (1974).

The factors to be considered by the court in its decision upon the conditions necessary to assure the defendant's presence are reflected in the Rules of the Superior Court Governing Persons Authorized to Take Bail 2 (1972):

The purpose of setting terms for any pretrial release is to assure the presence at court of the person released. Any person charged with an offense, other than an offense punishable by death [sic], is required by law to be released on his personal recognizance pending trial unless the person setting the terms of release determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. In making a determination as to what form of release to set, the following factors shall be considered: (1) the nature and circumstances of the offense charged, (2) the accused's family ties, (3) his financial resources, (4) his length of residence in the community, (5) his character and mental condition, (6) his record of convictions and appearances at court proceedings or of any previous flight to avoid prosecution or (7) any failure to appear at any court proceedings.

Accord G.L. c. 276, § 58 (as amended, St. 1978, c. 478, § 286).

Moreover, this subdivision provides that if a defendant fails to respond to summons, then the court may order that a warrant issue, or may permit the defendant to be served with a new summons. This accords with practice under G.L. c. 276, § 26, which makes the willful failure to appear in response to criminal process a separate offense. See ABA Standards Relating to Pretrial Release § 1.3 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 221(e)(2) (1974).

Subdivision (b). General Laws c. 276, § 21, c. 218, § 33 (as amended, St. 1978, c. 478, § 191), and c. 218, § 35 (as amended, St. 1978, c. 478, § 192) enumerate those officials who are empowered to issue arrest warrants.

Subdivision (b)(1) restates the Massachusetts practice, dating from Commonwealth v. Crathy, 92 Mass. (10 Allen) 403 (1865), which requires that if the warrant does not contain a name by which the accused is known, it must contain a sufficient description by which the arresting officer will be able to identify the accused with reasonable certainty. This subdivision follows the practice in Massachusetts which mandates that the warrant shall recite the substance of the accusation, G.L. c. 276, § 22, a requirement fulfilled at common law by attaching the complaint or a copy thereof to the warrant. Commonwealth v. Dean, 75 Mass. (9 Gray) 283 (1857). General

Laws c. 276, § 22 details the procedure to be followed by the arresting officer when the accused is located.

Support for the rule that the warrant must be directed to an officer authorized to serve criminal process is found in In re Graves, 236 Mass. 493 (1920). In Graves, the court held that a warrant which by express direction would have permitted unqualified persons to execute it was invalid on its face.

Subdivision (c)(3) is also borrowed from ALI Model Code of Pre-Arraignment Procedure § 120.3(2) (P.O.D. 1975), and is similar to Rules of Criminal Procedure (U.L.A.) rule 223(c) (1974). The ALI Model Code, supra, § 120.4, permits service of the summons by mail.

It is well established in Massachusetts that an officer need not have the warrant authorizing the arrest in his possession when the accused is placed under arrest. This principle is grounded on the judicial determination that an arrest is valid if based on probable cause even if the warrant upon which the arrest was made is void. Commonwealth v. Bowlen, 351 Mass. 655 (1967). However, if the arrest is based upon a warrant, the accused should be afforded an opportunity to examine it within a reasonable time.

Subdivision (c)(4) complies substantially with Rule 225 of the Rules of Criminal Procedure (U.L.A.) (P.O.D. 1975) and with Fed. R. Crim. P. 4(c)(4).

General Laws c. 218, § 32 states that warrants are returnable before a court in the county where trial of the case is to be held. The only restrictions on the time in which a warrant must be executed is that a delay in its execution must not be unreasonable. See generally Commonwealth v. Sullivan, 354 Mass. 598 (1968). However, if execution of the warrant is wilfully delayed by the person to whom it was committed for service, that person is subject to the penalties provided by G.L. c. 268, § 22-23 irrespective of whether the warrant is valid.

Subdivision (d). This subdivision introduces two new practices. The first, in subdivision (1), allows the court to assess as costs against the defendant those expenses which result from the defendant's failure to appear. While the assessment is discretionary, it is intended to be exercised only upon the willful default of a defendant and as to those costs which directly result therefrom. As under Mass. R. Crim. P. 10(b), relating to assessment of costs upon a continuance, expenses which may be assessed under this rule include fees of witnesses then present, extra compensation of police officers, travel costs, and stenographer's attendance fees if one is appointed.

Subdivision (2) provides that if a witness is present in court and the trial cannot proceed because the defendant is absent, the testimony of that witness may be ordered taken and recorded by deposition. This is an extraordinary practice, and is to be utilized only when to require the later appearance of the witness would constitute a hardship due to his age, infirmity, profession or other sufficient reason. "Profession" in this context does not signify solely the recognized professions, but refers to the manner of earning a livelihood of one who will lose income or wages if required to attend further proceedings.

There is no issue as to confrontation in this situation. A defendant has the right to be present at the taking of a deposition, see Mass. R. Crim. P. 18(a), but "his failure to appear after notice and without cause shall constitute a waiver of the right to be present." Mass. R. Crim. P. 35(c). This

subdivision is but a logical extension of that provision. The defendant has had notice to appear for trial and has chosen to absent himself. It is assumed for purposes of this rule that defendant's counsel is present to examine or cross-examine the deponent and to preserve objections to his testimony. Thus the essential need of the defendant to be present is fulfilled.

The defendant is protected from a "default" by the Commonwealth by Mass. R. Crim. P. 10(c), pursuant to which the court may order that the taking of depositions of Commonwealth witnesses be made a condition upon the grant of a continuance.

Rule 7: Initial Appearance and Arraignment

(Applicable to cases initiated on or after September 7, 2004)

(a) Time of Arraignment; Probation Interview; Indigency and Bail Reports

(1) Upon Arrest or Summons. A defendant who has been arrested and is not released shall be brought for arraignment before a court if then in session; and if not, at its next session. A defendant who receives a summons or who has been arrested but is thereupon released shall be ordered to appear before the court for arraignment on a date certain.

(2) Arrest of a Juvenile. Upon the arrest of a juvenile, the arresting officer shall notify the parent or guardian of the juvenile and the probation office.

(3) Probation Interview. On the day of the arraignment, the probation department shall interview the defendant; the probation department shall report to the court the pertinent information reasonably necessary to determine the issues of bail and indigency.

(b) Arraignment Procedure.

(1) Notice; Plea; and Bail. The court shall:

(A) read the charges to the defendant in open court, except that the reading of the charges in open court may be waived by the defendant if he or she is represented by counsel;

(B) enter the defendant's plea to the charges;

(C) inform the defendant of all warnings and advisories required by law; and,

(D) determine the conditions of the defendant's release, if any.

(2) Appointment of Counsel. If the court finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived the right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide representation for the defendant.

(3) Provision of Criminal Record; Preservation of Evidence. The court shall ensure that at or before arraignment, (i) a copy of the defendant's criminal record, if any, as compiled by the Commissioner of Probation is provided to the defense and to the prosecution, and (ii) the parties are afforded an opportunity to move for the preservation of evidence pursuant to Rule 14(a)(1)(E).

(4) Order Scheduling Pretrial Proceedings. At a District Court arraignment on a complaint which is outside of the District Court's final jurisdiction or on which jurisdiction is declined, the court shall schedule the case for a probable cause hearing. In all other District and Superior Court cases the court shall issue an order at arraignment requiring the prosecuting attorney and defense counsel to (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.

(c) Appearance of Counsel.

(1) Filing. An appearance shall be entered by the attorney for the defendant and the prosecuting attorney on or before the arraignment. The appearance may be entered either by personally appearing before the clerk or by submitting an appearance slip, which shall include the name, Board of Bar Overseers number, address, and telephone number of the attorney. An attorney appearing on behalf of an organization shall also file with the court proof of the attorney's authorization to represent the organization.

(2) Effect; Withdrawal. An appearance shall be in the name of the attorney who files the appearance and shall constitute a representation that the attorney shall represent the defendant for trial or plea or shall prosecute the case, except that, if at the arraignment such a representation cannot be made and no contrary legal restriction applies, (1) the court may permit an appearance to be entered by an attorney to represent the defendant or prosecute the case for such time as the court may order, and (2) the court shall permit an appearance in the name of the prosecuting agency, which shall constitute representations that the agency will prosecute the case, will ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and upon request of the court or a party will identify the prosecutor assigned to the case. If the attorney who files an appearance for the defendant on or before the arraignment wishes to withdraw the appearance, he or she may do so within fourteen days of the arraignment, provided that the attorney who shall represent the defendant at trial files an appearance simultaneously with such withdrawal; thereafter no appearance shall be withdrawn without permission of the court. The appearance of the prosecuting officer shall be withdrawn only with permission of the court.

(3) Notice. A copy of all appearances and withdrawals of appearance shall be filed and shall be served upon the adverse party pursuant to Rule 32.

As amended February 27, 2012, effective June 1, 2012.

Reporter's Notes (2012). In 2012, Rule 7 was amended in several respects. These revisions are discussed below.

Subdivision (a)(1). Defendants who are released on bail prior to the issuance of a complaint or those who receive a summons must be ordered to appear in court for their arraignment on a date

certain. Courts may establish their own policy on whether that date falls on the same day of every week or within a particular time frame. The 2012 amendments eliminated the separate event of an initial appearance prior to arraignment. The widespread availability of counsel to represent defendants at arraignment made this separate event unnecessary. The 2012 amendments also eliminated the procedure that allowed a summonsed defendant who had retained counsel to be excused from appearing until the pretrial conference or trial.

Subdivision (b)(1). By referring to "the court" as the responsible agency for conducting all of the activities surrounding the arraignment, this subdivision is meant to include judges, special magistrates, and any Superior Court clerk-magistrates authorized to conduct arraignments.

Subdivision (b)(1)(A). This provision requires that the arraignment take place in open court. It restates accepted practice, reflected in the mandate of Foley v. Commonwealth, 429 Mass. 496, 498 (1999). The concept of an open court means that the public must be allowed access absent "'an overriding interest based on findings that closure is essential to preserve higher values arid is narrowly tailored to serve that interest.'" Boston Herald v. Superior Court, 421 Mass. 502, 505 (1995), quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984). Arraignments may take place outside of a courtroom, in settings such as correctional facilities, see Foley,supra, or hospitals, see Boston Herald, supra, so long as the public's right of access to the proceedings is as free as in a courthouse, subject to the same considerations that might lead a judge to close a courtroom to the public.

Subdivision (b)(1)(C). This provision is intended to alert all the participants at the arraignment of the provisions for notice that appear outside the Rules of Criminal Procedure, such as the bail warning mandated by G. L. c. 276, § 58, and the requirement of G. L. c. 111E, § 10; that defendants charged with drug offenses have a right to request an examination concerning drug dependency.

Subdivision (c)(1). When an attorney in a criminal case appears for an organization, whether incorporated or not, he or she must present the court with proof of authority to act on behalf of the defendant. The proof of authority that this subdivision requires can come in the form of a resolution by a board of directors in the case of a corporate defendant or a similar statement from the person or group authorized to make litigation decisions on behalf of an unincorporated organization. SJC Rule 1:21 already requires corporate defendants in criminal cases to file a disclosure form revealing the identity of any parent corporation or any publicly listed company that owns 10% or more of its shares.

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Rule 7 governs the initial appearance and arraignment. It is based in part upon Fed. R. Crim. P. 5, 5.1, and 10. See ALI Model Code of Pre-Arraignment Procedure § 310.1, .3, .5 (POD 1975); Rules of Criminal Procedure (ULA) rules 311-13, 321 (1974). In 2004, Rule 7 was amended in four respects. The revisions mandate: that in some circumstances counsel be permitted to enter a limited appearance; that the defendant receive a copy of his or her criminal record at arraignment; that the parties have an opportunity to move to preserve evidence at arraignment;

and that pretrial conference and hearing dates, or alternatively a probable cause hearing date, be assigned at the initial appearance. These revisions are addressed in detail infra.

Subdivision (a)(1). Subdivision (a) provides that when a defendant has been arrested, he or she is to be brought immediately to appear before a court if then in session, and if not, then at its next session.

Pursuant to G.L. c 119, § 67, notice of the arrest of a juvenile is required to be given to the parent of the juvenile and to the probation officer for the district in which the accused is arrested, unless the juvenile was arrested as a child in need of service pursuant to G.L. 119, § 39H, which contains alternative notification requirements. The purpose of this notice is to permit the prompt release of a juvenile, consistent with G.L. c 119, § 66, which discourages the detention of juvenile offenders, unless, in the opinion of the arresting officer or the probation department, cause exists to hold him or her.

Massachusetts case law requires that an arrested defendant be brought before a court for arraignment as soon after arrest as is reasonably possible. Commonwealth v. Dubois, 353 Mass. 223 (1967); Keefe v. Hart, 213 Mass. 476 (1913). Whether or not delay has been unreasonable is to be determined on a case-bycase basis, Commonwealth v. Banuchi, 335 Mass. 649 (1957), and in light of all the circumstances. Commonwealth v. Perito, 417 Mass. 674, 680 (1994); Commonwealth v. Hodgkins, 401 Mass. 871, 876-77 (1988). Generally, arraignment the next morning following arrest is not unreasonable when a defendant is arrested late in the day. United States v. Connell, 213 F. Supp. 741 (D. Mass. 1963); Commonwealth v. Daniels, 366 Mass. 601 (1975); Commonwealth v. Dubois, supra. Rule 7(a) codifies this case law by mandating that the defendant be brought before the court immediately if the court is in session, and if not, then at its next session. This requirement is primarily intended to prevent both unlawful detentions and unlawfully obtained statements. Commonwealth v. Cote, 386 Mass. 354, 361 n. 11 (1982). However, in Commonwealth v. Rosario, 422 Mass. 48 (1996), the S.J.C. established a bright line rule that an otherwise admissible statement taken within a six-hour period following arrest should not be excluded, even if the court was in session at the time.

This initial appearance before the court serves several functions. First, at this time, the defendant will be interviewed by the probation department. The results of this interview, together with an investigative report by the probation department as to prior criminal prosecutions and juvenile complaints, will be communicated to the court. See Mass. R. Crim. P. 28(d)(1)-(2). This information will form the basis of decisions as to pretrial release. Moreover, this information will be used to determine whether a defendant is indigent or indigent but able to contribute. If the court so determines, then it will assign the Committee for Public Counsel Services to represent him according to the requirements of G.L. c. 211D and Supreme Judicial Court Rule 3:10. If the defendant was arrested without a warrant, there must also be a judicial determination of probable cause within twenty-four hours, as provided in Rule 3.1. See Jenkins v. Chief Justice of the District Court Dep't, 416 Mass. 221 (1993). Finally, at this time the court shall establish a time for arraignment or other proceeding.

The initial appearance and arraignment, although distinguishable by their respective functions, need not be separate events. The preferred practice, however, is to postpone arraignment until

such time as the defendant has had a meaningful opportunity to consult with counsel. See District Court Initial Rule of Criminal Procedure 2, comment (1971).

The vital importance of the component parts of arraignment must not be lost in the tedium of repetition so as to foreclose inadvertently the rights of the uninformed defendant. Among the decisions to be made is whether to plead guilty or nolo contendere, or to admit to sufficient facts. Mass. R. Crim. P. 12. Representation by counsel is necessary to ensure that the defendant understands that by selecting among these alternatives he or she is exercising or waiving substantial rights. Counsel should also be available to advise the defendant whether to exercise "drug rights," G.L. c. 111E, § 10; whether to undergo examination for competence, G.L. c 123, § 15; whether he or she may qualify for diversion as a selected offender, G.L. c. 276A; whether arrangements should be made for a stenographer, G.L. c. 221, § 91B; whether to consider mediation in cases where it is offered; and whether the charges may be subject to dismissal. In addition, at arraignment the defendant may waive reading of the charges, subdivision (c), infra; and the case will be ordered to conference, Mass. R. Crim. P. 11. These considerations are all important to the ultimate rights of the defendant and decisions should not be casual or perfunctory. Therefore, if counsel is to be provided, there should be a prompt assignment or appointment, and time should be allowed for consultation. The initial appearance and arraignment can be held on the same day if assigned or appointed counsel is then present in court or is available without delay, and if there is an opportunity for adequate consultation.

The fact that a defendant is to be afforded time to discuss the case with counsel is not to be relied upon by the prosecution to justify undue delay in bringing the defendant before the court for arraignment.

Subdivision (a)(2). If a defendant is issued a summons instead of being arrested, a procedure different from that under subdivision (a)(1) prevails. In such an instance a defendant who has retained counsel need not be present at the scheduled initial appearance if his or her counsel enters an appearance prior thereto. This is required in order that the prosecution and any witnesses of the parties may be notified not to attend. When counsel enters an appearance, the clerk will set the time for the next scheduled event which will require the defendant's presence—usually the pretrial conference or pretrial hearing — and counsel will notify the defendant thereof.

Subdivision (a)(2) does not require the defendant's presence on the date specified on the summons (unless that is the date established by the clerk when counsel enters his or her appearance) because the purposes for the initial appearance outlined in subdivision (a)(1) have been fulfilled. See Rules of Criminal Procedure (ULA), supra, rule 312.

The purpose of this subdivision is to conserve judicial resources and those of the defendant by dispensing with unnecessary appearances. Further, the pretrial liberty of defendants who are likely to appear for arraignment is not compromised.

The defendant who cannot afford or who does not have retained counsel must attend at the initial appearance at the time set in the summons. Prior to that time, the defendant must have appeared at the probation department so that information relative to the issues of bail and indigency may be gathered.

If a defendant intends to waive counsel, the waiver should be executed at the initial appearance.

Subdivision (b). This subdivision governs the entry and withdrawal of appearances by counsel. It combines and revises former subdivisions (b) and (c), which had treated District Court and Superior Court appearances differently. Following the abolition of the district court de novo system, a 2004 amendment to this Rule instituted a uniform procedure for both trial courts. It also revised the rule to permit limited appearances in some circumstances — a more efficient option when fully competent counsel is present but unable to submit an appearance guaranteeing representation throughout the case. Assistant district attorneys often do not represent the Commonwealth in a case from beginning to end, and sometimes a public defender or bar advocate is on duty for bail and arraignment sessions only. The original formulation of this subdivision deflected progress in the case by generally barring the appearance of counsel for such limited purposes.

As amended, subdivision (b) provides that the entry of an appearance by defense counsel presumes that he or she will represent the defendant at the tender of a plea or at trial, but permits the court to order an appearance for a shorter period when no contrary constitutional, legislative or judicial restriction applies. For example, District Court Dept. Supplemental Rule of Criminal Procedure 8(8) authorizes the appointment of an attorney "for arraignment only," but prohibits any other kind of limited appointment. Rule 7(b) as amended is not intended to preempt such court rules, but to provide the flexibility necessary for courts to formulate and revise such rules over time. An appearance entered by defense counsel may only be withdrawn as of right within fourteen days after arraignment and provided substitute counsel has simultaneously entered an appearance.

A second revision introduces a responsible degree of flexibility with regard to appearances by the prosecution. An appearance entered by a prosecutor constitutes a representation that he or she will prosecute a case at trial and may only be withdrawn with permission of the court. However, if such a representation cannot be made, subdivision (b)(2) allows an appearance to be entered in the name of the prosecuting agency, but this requires the office (a) to ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and (b) upon request of the court or other counsel, to identify the prosecutor then assigned to the case. These requirements were added to the rule in 2004 to ameliorate a difficulty in then-existing district court practice: defense counsel was too often unable to speak with a district attorney about the case between arraignment and the next scheduled date because no assistant district attorney had yet been assigned to it. This revised procedure will facilitate early discussions between the parties, and also insure that notices delivered to the offices of the Attorney General or a District Attorney will be brought to the immediate attention of the assistant handling the case.

Subdivision (c). The major functions of the arraignment are to inform the defendant of the charge and to receive his or her plea thereto. Subdivision (c)(1) permits the defendant to waive the reading of the charges if represented by counsel. This is a restatement of District Court Initial Rule of Criminal Procedure 1 (1971); accord, Rules of the Municipal Court of the City of Boston Sitting for Criminal Business 1 (1971).

If the defendant's attendance at the initial appearance is excused, subdivision (c)(2) provides for the automatic entry of a plea of not guilty. Implicit in (c)(2) is a waiver of the reading of the charge. There is then no arraignment as defined in this Rule and the next event is usually the pretrial conference.

Subdivision (d). This subdivision mandates two additional procedures at arraignment. First it requires that the defendant be provided with his or her criminal record at arraignment. This was customarily the case long before the promulgation of this subdivision in 2004, and in district court was already mandated by Dist./ Mun. Cts. R. Crim. P. 3. (That Rule goes beyond this subdivision, however, by also requiring the prosecution to provide certain police statements to the defendant at a district court arraignment.) Second, subdivision (d) provides an opportunity at arraignment for the parties to seek an order to preserve evidence that is not subject to a Rule 14 discovery order. Rule 14 discovery reaches only items in the possession, custody or control of the prosecution, its team, or those working with it on the case. But private parties or government agencies not working on the case may have relevant evidence that could be destroyed absent court action. Such evidence should not be subject to an individual's unfettered decision to destroy it in cases where counsel for a party considers preservation important. Therefore, under Rule 14(a)(1)(E), the parties may move for an order preserving this evidence. Subdivision (d) of Rule 7 simply guarantees the parties an opportunity to be heard on this motion at the initial appearance, since expedition may be crucial in such cases.

When a preservation order is requested at arraignment, the nonparty custodian of the evidence is not likely to be present to assert its interests. However, the non-party may subsequently contest the order, or request the court to use its authority under subdivision 14(a)(1)(E)(ii) to "modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means."

Subdivision (e). This subdivision, promulgated in 2004, requires the District Court to issue an order at the initial appearance scheduling subsequent pretrial proceedings. For this purpose the subdivision distinguishes between a "probable cause track" and a "pretrial conference/pretrial hearing" track. The latter requires the court to schedule both a pretrial conference (between the attorneys) and a pretrial hearing, each further addressed in Rule 11. As to the former, some District Court arraignments are continued for probable cause hearings rather than pretrial conferences. Under the statutory mandate that probable cause hearings be held "as soon as may be", G.L. c 276 § 38, the Court should not assign any intervening pretrial conferences or hearings when it intends to, or by statute must, bind over the case. The subdivision's recognition of a separate "probable cause track" is necessary to effectuate this statutory requirement. However, nothing in Rule 7(e) prevents the court from subsequently continuing the probable cause hearing to another date, or (in concurrent jurisdiction cases) from ordering a short continuance of the initial hearing to permit counsel to prepare arguments on whether district court jurisdiction should be declined.

Rule 8: Assignment of Counsel

(Applicable to District Court and Superior Court)

If a defendant charged with a crime for which a sentence of imprisonment or commitment to the custody of the Department of Youth Services may be imposed initially appears in any court without counsel, the judge shall follow the procedures established in G. L. c. 211D and in Supreme Judicial Court Rule 3:10.

Reporter's Notes

This rule is in large part derived from former Supreme Judicial Court Rule 3:10 (1967: 351 Mass. 791, as amended, 1969: 355 Mass. 803), and District Court Initial Rules of Criminal Procedure 2, 10 (1971). See Fed.R.Crim.P. 44.

Subdivision (a).

The present state of the law is that counsel is required in all cases where the defendant faces possible imprisonment unless the defendant properly waives his right to the assistance of counsel. Argersinger v. Hamlin, 92 S.Ct. 2006, 407 U.S. 25, 32 L.Ed.2d 530 (1972).

The Supreme Court has held the right to assistance of counsel fundamental in certain juvenile proceedings as well:

A proceeding where the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.

In re Gault, 87 S.Ct. 1428, 387 U.S. 1, 36, 18 L.Ed.2d 527 (1967). There the Court concluded that in delinquency proceedings where the juvenile faces a risk of commitment, the juvenile and his parent must be notified of the juvenile's right to counsel and that counsel will be assigned by the court if the juvenile is indigent. In re Gault, supra, at 41; Marsden v. Commonwealth, 352 Mass. 564, 567, 227 N.E.2d 1 (1967); District Court Special Rule 207 (1974).

The stages of criminal proceedings at which the right to counsel has been held to apply include arraignment (Hamilton v. Alabama, 82 S.Ct. 157, 368 U.S. 52, 7 L.Ed.2d 114 [1961]; see Commonwealth v. White, 362 Mass. 193, 285 N.E.2d 110 [1972]), probable cause hearing (White v. Maryland, 83 S.Ct. 1050, 373 U.S. 59, 10 L.Ed.2d 193 [1963]; see Arsenault v. Massachusetts, 89 S.Ct. 35, 393 U.S. 5, 21 L.Ed.2d 5 [1968]), when the plea is tendered (Moore v. Michigan, 77 S.Ct. 150, 352 U.S. 907 [1956]), trial (Gideon v. Wainwright, 83 S.Ct. 792, 372 U.S. 335, 9 L.Ed.2d 799 [1963]), sentencing (Townsend v. Burke, 71 S.Ct. 286, 334 U.S. 736, 95 L.Ed. 661 [1948]), appellate proceedings (Douglas v. California, 83 S.Ct. 814, 372 U.S. 353, 9 L.Ed.2d 811 [1963]; see Arsenault v. Massachusetts, supra; compare Ross v. Moffitt, 94 S.Ct. 2437, 417 U.S. 600, 41 L.Ed.2d 341 [1975]), probation revocation proceedings (Williams v. Commonwealth, 350 Mass. 732, 216 N.E.2d 779 [1966]), lineups after the defendant has been formally charged (Kirby v. Illinois, 92 S.Ct. 1877, 406 U.S. 682, 32 L.Ed.2d 411 [1972];

Commonwealth v. Mendes, 361 Mass. 507, 281 N.E.2d 243 [1972] and cases cited), and transfer hearings to determine whether a juvenile is to be tried as an adult offender (Kent v. United States, 86 S.Ct. 1045, 383 U.S. 541, 561, 16 L.Ed.2d 84 [1966]; see Marsden v. Commonwealth, 352 Mass. 564, 567 n. 5, 227 N.E.2d 1 [1967]).

Counsel is also to be available to a defendant at the taking of a deposition pursuant to Mass.R.Crim.P. 32 (see 18 U.S.C. § 3503[c] [1970] from which Rule 32 derived) and during plea discussions under Mass.R.Crim.P. 12(b)(1).

In requiring that a defendant be advised of his right to, and provided with, counsel upon any appearance in court, Rule 8 is in accord with ABA Standards Relating to Providing Defense Services § 5.1 (Approved Draft, 1968), which directs that counsel should be provided "as soon as feasible."

General Laws c. 221, § 34D states in part that the Massachusetts Defenders Committee

> shall provide counsel at any stage of a criminal proceeding, other than capital, ... provided ... that [the] defendant is unable to obtain counsel by reason of his inability to pay.

Consistent with § 34D, for purposes of this rule, inability to obtain counsel is intended to include only financial inability. There are, however, no criteria supplied by statute or court rule to govern the judicial determination of who qualifies for assigned counsel, despite the fact that G.L. c. 261, § 27C(2), applicable to criminal cases, requires the clerk to "conspicuously post in that part of his office open to the public a notice specifying the indigency limits currently in force...."

In answering the question of whether, under G.L. c. 221, § 34D, the defendant is "unable to obtain counsel by reason of his inability to pay," the judge may choose to rely on the opinion of the probation department, which is required to be prepared by G.L. c. 221, § 34D. However, since the final decision on indigency is the responsibility of the judge, neither the probation department's opinion nor its report of relevant information can be considered conclusive. The judge or special magistrate must "interrogate the defendant to satisfy himself that the defendant is unable to procure counsel." District Court Initial Rule of Criminal Procedure 2 (1971) requires that the interrogation be conducted in open court, but its dimensions are left to the judge's discretion.

General Laws c. 119, § 29A states that the parent of an unemancipated minor is liable for the minor's legal expenses, not to exceed three hundred dollars. While the resources of the parents may be included in the determination of the juvenile's indigency, if the parents refuse to retain counsel, the juvenile is entitled to court-provided counsel. It is the practice in some courts of the Commonwealth to impose costs for legal expenses of a juvenile upon the parents, notwithstanding the three-hundred-dollar limit of § 29A, supra, on the grounds that services of counsel are a necessity for which the parents are liable.

The assignment of counsel for, or the election to proceed without counsel by, a juvenile is governed by these rules.

Subdivision (b). This subdivision is drawn from and restates the substance of former S.J.C. Rule 3:10, paragraph 2 (1967: 351 Mass. 791, as amended, 1969: 355 Mass. 803). It is thus intended that counsel shall be assigned from the Massachusetts Defenders Committee, G.L. c. 221, § 34D,

or from "a voluntary charitable group, corporation, or association," unless exceptional circumstances such as a conflict of interests or a need for foreign language speaking counsel justify appointing private counsel. See Superior Court Rule 53(3) (1974). Commonwealth v. Sheeran, 370 Mass. 82, 345 N.E.2d 362 (1976).

While the court in its discretion may appoint counsel other than from the Massachusetts Defenders Committee or similar organization, that discretion is to be exercised "sparingly" and not "unnecessarily." Abodeely v. County of Worcester, 352 Mass. 719, 227 N.E.2d 486 (1967).

The statutes provide compensation for appointed counsel only in capital cases (G.L. c. 276, § 37A: "reasonable compensation") and more particularly in murder cases (G.L. c. 277, § 55: "reasonable compensation" and § 56: "reasonable expenses"). Sections 55-56 provide that compensation is to be paid by the county where the indictment is found. The court in Abodeely v. County of Worcester, 352 Mass. 719, 227 N.E.2d 486 (1967), held that G.L. c. 213, § 8, which had been construed to compel the counties (now the Commonwealth: see G.L. c. 213, § 8, as amended, St.1978, c. 478, § 127) to pay the expense of prosecuting non-capital criminal cases, should be extended to cover also the costs of appointed defense counsel in such cases.

If we are to provide proper prosecution we must also provide appropriate defence under the Constitution.... [W]hen the court assigns counsel for the defence in cases of needy criminal defendants then counsel should be paid from the county treasury....

352 Mass. at 723-24. General Laws c. 276, § 37A and c. 277, §§ 55-56, provide for "reasonable" compensation and expenses. Superior Court Rule 53 imposes a maximum limit on what will be allowed unless an excess is authorized in advance, Rule 53(2), (3)(c), or is deemed necessary in extraordinary circumstances, Rule 53(3)(d).

Subdivision (c). Provision for an assignment docket to be maintained by the clerk is drawn from former S.J.C. Rule 3:10, paragraph 3 (1967: 351 Mass. 791, as amended, 1969: 355 Mass. 803) and is consistent with prior law.

Subdivision (d). If a defendant is found to be financially able to retain counsel at his own expense it is, of course, incumbent upon him to do so. If a defendant is dilatory in engaging counsel, the court is empowered to take reasonable steps to keep the proceedings moving, even if the defendant's failure to arrange representation leaves him without counsel. Commonwealth v. Jackson, 376 Mass. 790, 383 N.E.2d 835 (1978). See Ungar v. Sarafite, 84 S.Ct. 841, 376 U.S. 575, 588-91, 11 L.Ed.2d 921 (1964); United States v. White, 529 F.2d 1390, 1394 (8th Cir.1976); United States v. Sperling, 506 F.2d 1323, 1337 n. 19 (2d Cir.1974), cert. denied, 95 S.Ct. 1351, 420 U.S. 962 (1975); Glenn v. United States, 303 F.2d 536, 542-43 (5th Cir.1962), cert. denied sub nom., Belvin v. United States, 83 S.Ct. 737, 372 U.S. 922, 9 L.Ed.2d 726 (1963). Compare Commonwealth v. Cavanaugh, 371 Mass. 46, 51, 353 N.E.2d 732 (1976) (myopic insistence upon expeditiousness in the face of a justifiable request for delay can render right to counsel an empty formality).

Subdivision (e). If the defendant wishes to waive counsel and proceed pro se, that right is guaranteed by the sixth and fourteenth amendments to the United States Constitution. Faretta v. California, 95 S.Ct. 2525, 422 U.S. 806, 45 L.Ed.2d 562 (1975). The right to self-representation is recognized in Massachusetts in Article 12 of the Declaration of Rights: "every subject shall

have a right ... to be fully heard in his defense by himself or his counsel, at his election." Commonwealth v. Mott, 2 Mass.App. 47, 51, 308 N.E.2d 557 (1974).

However, the "waiver of counsel will not be presumed from a silent record." Williams v. Commonwealth, 350 Mass. 732, 734, 216 N.E.2d 779 (1966). Since the right to counsel is a constitutional right, the court should insure that a defendant's waiver of that right is both voluntary and intelligent. See Johnson v. Zerbst, 58 S.Ct. 1019, 304 U.S. 458, 464, 82 L.Ed. 1461 (1938). Section 7.2 of the ABA Standards Relating to Providing Defense Services (Approved Draft, 1968) is instructive on this issue:

The accused's failure to request counsel or his announced intention to plead guilty should not of itself be construed to constitute a waiver. An accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused's comprehension of that offer and his capacity to make the choice intelligently and understandingly has been made. No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of his mental condition, age, education, experience, the nature or the complexity of the case, or other factors.

The requirement of this rule that the waiver be in writing and signed by the defendant and certified by the judge or special magistrate is supportive of the notion that any waiver to be constitutional must be both voluntary and intelligent.

Both the United States Supreme Court and the Supreme Judicial Court of Massachusetts have made it clear that the right to proceed pro se is not unqualified. Under the Faretta decision, supra, although it is recognized that the right to proceed pro se is personal to the defendant and constitutionally guaranteed, nonetheless the trial judge must make an inquiry into whether the accused is choosing to proceed pro se in an intelligent and competent manner.

Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation.

Faretta, supra, at 835.

Massachusetts case law is in accord with this rule, and qualifies the waiver of counsel further. First, the request to proceed pro se must be unequivocal. Second, it should be asserted before trial. Finally, an inquiry as to the defendant's competence and intelligence in making the decision must be conducted and the motivation of the defendant examined. The defendant must also be told of the possible disadvantages of representing himself. Commonwealth v. Cavanaugh, 371 Mass. 46, 353 N.E.2d 732 (1976); Commonwealth v. Mott, supra. See Commonwealth v. Jackson, 376 Mass. 790, 383 N.E.2d 835 (1978).

The qualification that the waiver be unequivocal results in leaving a later request due to change of mind to the discretion of the trial judge--the defendant is no longer entitled to counsel as of right. Commonwealth v. Jackson, 376 Mass. 790, 383 N.E.2d 835 (1978). See Commonwealth v. Drolet, 337 Mass. 396, 149 N.E.2d 616 (1958).

Moreover, the assertion of the right to proceed pro se should be made before trial. “Once the trial has begun with the defendant represented by counsel, ... his right thereafter to discharge his lawyer and to represent himself is sharply curtailed.” Commonwealth v. Mott, 2 Mass.App. 47, 308 N.E.2d 557. The courts on both the federal and state levels have construed the language “sharply curtailed” very strictly. In United States ex rel. Maldonado v. Denno, 348 F.2d 12 (2d Cir.1965), it was held that after commencement of trial

> there must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance.

Id. at 15.

If a defendant is to proceed pro se, he must have waived counsel “knowingly and intelligently.” Faretta, supra, held that technical, legal knowledge is not the test, but rather whether the defendant is literate, competent, and understanding, and is voluntarily exercising his free will. Accord Commonwealth v. Jackson, 376 Mass. 790, 383 N.E.2d 835 (1978). Impliedly, if the court finds that the defendant fails this test after an inquiry, it may appoint counsel notwithstanding the defendant's motion to proceed pro se. See subdivision (f), infra.

In Von Moltke v. Gillies, 68 S.Ct. 316, 332 U.S. 708, 92 L.Ed. 309 (1948) the Supreme Court laid down a searching formula to be used by trial judges in making certain that a defendant understandingly waives his right to counsel. Massachusetts, however, has not strictly interpreted Von Moltke. A judge is not required literally to fulfill all elements of a formula describing his responsibilities for acceptance of waiver of counsel. Substance rather than form is the guiding criterion for reviewing courts.

Commonwealth v. Fillippini, 2 Mass.App. 179, 182, 310 N.E.2d 147 (1974). Moreover, the Faretta decision, which recognizes emphatically the right to proceed pro se, would seem to erode the need for use of any rigid formula as long as the waiver was knowing and intelligent.

In Mott, supra, the court stated:

We think that even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice with eyes open.

Mott, supra, at 52, quoting United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir.1965).

However, under Massachusetts law, which is more liberal than Von Moltke, it is necessary for the trial judge to inquire into the defendant's motivation. “The motivation of the accused in making the request should be examined, and the accused should be apprised of the pitfalls in proceeding pro se.” Mott, supra, at 52.

Subdivision (f). This subdivision is drawn from Rules of Criminal Procedure (U.L.A.) rule 711 (1974). See ABA Standards Relating to the Function of the Trial Judge § 6.7 (Approved Draft, 1972).

As long as the standby counsel assists only when called upon by the defendant and calls the attention of the court to matters favorable to the defendant upon which the court should rule upon

its own motion, there is no interference with the defendant's representing himself. See Illinois v. Allen, 90 S.Ct. 1057, 397 U.S. 337, 25 L.Ed.2d 353 (1970); Commonwealth v. Maynard, 2 Mass.App. 894, 319 N.E.2d 453 (1974) (Rescript).

A judge has broad discretion to appoint and order payment of ... counsel to represent or advise ... [an indigent defendant], to whatever extent he will accept representation, advice, and assistance, in an effort to ensure a fair, orderly and expeditious trial.

Jackson v. Commonwealth, 370 Mass. 855, 856, 346 N.E.2d 714 (1976) (Rescript).

Rule 9: Joinder of Offenses or Defendants

(Applicable to District Court and Superior Court)

(a) Joinder of Offenses.

(1) Related Offenses. Two of more offenses are related offenses if they are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan.

(2) Joinder of Related Offenses in Complaint or Indictment. If two or more related offenses are of the same or similar character, they may be charged in the same indictment or complaint, with each offense stated in a separate count.

(3) Joinder of Related Offenses for Trial. If a defendant is charged with two or more related offenses, either party may move for joinder of such charges. The trial judge shall join the charges for trial unless he determines that joinder is not in the best interests of justice.

(4) Joinder of Unrelated Offenses. Upon the written motion of a defendant, or with his written consent, the trial judge may join for trial two or more charges of unrelated offenses upon a showing that failure to try the charges together would constitute harassment or unduly consume the time or resources of the parties. The trial judge shall join the charges for trial unless he determines that joinder is not in the best interests of justice.

(b) Joinder of Defendants. Two or more defendants may be joined in the same indictment or complaint if the charges against them arise out of the same criminal conduct or episode or out of a course of criminal conduct or series of criminal episodes so connected as to constitute parts of a single scheme, plan, conspiracy or joint enterprise. The defendants may be charged separately or together in one or more counts; all of the defendants need not be charged in each count.

(c) Consolidation of Offenses or Defendants on Motion of Court. The trial judge may order two or more indictments or complaints to be tried together if the offenses and the

defendants, if more than one, could have been joined in a single indictment or complaint. The procedure shall be the same as if the prosecution were under a single indictment or complaint.

(d) Relief From Prejudicial Joinder.

(1) In General. If it appears that a joinder of offenses or of defendants is not in the best interests of justice, the judge may upon his own motion or the motion of either party order an election of separate trials of counts, grant a severance of defendants, or provide whatever other relief justice may require.

(2) Motion by the Defendant. A motion of the defendant for relief from prejudicial joinder shall be in writing and made before trial and shall be supported by an affidavit setting forth the grounds upon which any alleged prejudice rests, except that a motion for severance may be made before or at the close of all the evidence if based upon a ground not previously known.

(e) Conspiracy. An indictment or complaint for conspiracy to commit a substantive offense shall not be tried simultaneously with an indictment or complaint for the commission of the substantive offense, unless the defendant moves for joinder of such charges pursuant to subdivision (a) of this rule.

Reporter's Notes

The substance of Rule 9 is taken from several sources. These are Fed. R. Crim. P. 8 and 13, the ABA Standards Relating to Joinder and Severance (Approved Draft, 1968), Uniform Rules of Criminal Procedure (U.L.A.) rules 471-73 (1974), and ALI Model Penal Code §§ 1.07-1.09 (1962). See Commonwealth v. Gallarelli, Mass. Adv. Sh. (1977) 1013, 1023-24 (Kaplan, J., concurring). The language is drawn largely from the Uniform Rules.

Subdivision (a). Although subdivisions (a) and (b) of the rule are consistent with their statutory precedent, former G.L. c. 277, § 46 (St. 1861, c. 181), the rule is more explicit in defining what charges may be joined in a single indictment.

Related offenses are defined in (a)(1) as those which 1) are based on the same criminal conduct or episode, or 2) arise out of a course of criminal conduct or a series of criminal episodes connected together or constituting parts of a single scheme or plan. "Conduct" means an act or omission to act; "episode" means an occurrence or connected series of occurrences and developments which may be viewed as distinctive and apart although part of a larger or more comprehensive series. ABA Standards Relating to Joinder and Severance § 1.3(a), comment at 20-21 (Approved Draft, 1968).

Under Federal Rule 8, offenses may be joined if they 1) are based on the same transaction, 2) are parts of a common scheme or plan, or 3) are of the same or similar character. Offenses that are based on the same underlying facts or are each part of a larger plan are related in such a way as to insure an overlap in the evidence to be presented upon each offense.

Rule 9 takes the position that the goal of judicial economy will rarely be paramount to affording the defendant a trial as free from prejudice as possible; therefore, joinder of unrelated offenses is prohibited except at the instance of the defendant or with his written consent.

Rule 9 permits joint trial of offenses committed in furtherance of a common scheme or plan, but factually independent, and thus conforms to case law under former G.L. c. 277, § 46.

General Laws c. 277, § 46, which governed joinder of offenses, stated: "Two or more counts describing different crimes depending upon the same facts or transactions may be set forth in the same indictment if it contains an averment that the different counts therein are different descriptions of the same acts."

If read narrowly the statute would prohibit joint trial of offenses which were part of a joint scheme or plan, but not dependent upon the same underlying facts. The statute has, however, been interpreted more broadly, allowing joint trial of offenses related in ways other than as literally permitted by § 46. See e.g., Harding v. Commonwealth, 283 Mass. 369 (1933).

Subdivision (a)(3) allows the parties to request that the charges pending against the defendant be joined for trial. By granting the court discretionary power to deny the defendant's motion to join the charges, the rule protects the prosecution from being effectively "forced" to try charges on which it has not yet organized a sufficient case to warrant proceeding. See Mass. R. Crim. P. 37(a), (b)(2), which require the approval of the prosecutor for charges to be transferred for plea, sentence, or trial.

Subdivision (b). This subdivision is in form virtually identical to the corresponding federal rule provision, but substitutes "conduct" and "criminal episode" for the terms used in the federal rule, "act" and "transaction."

Although there is no statute in the Commonwealth analogous to the joinder of defendants provision contained in subdivision (b), it seems to be in harmony with former Massachusetts practice. Prior to the promulgation of these rules, such joinder was permitted in two instances: when the defendants were charged with joint participation in a single series of events based on identical facts, Commonwealth v. Nicholson, 4 Mass. App. Ct.____(1976), Mass. App. Ct. Adv. Sh. (1976) 170; Englehart v. Commonwealth, 353 Mass. 561 (1968), and when there existed sufficient evidence to indicate that the defendant and co-defendant were engaged in a common enterprise, and the issue of fact to be tried against each defendant was similar, as in Commonwealth v. Smith, 353 Mass. 442 (1968).

Subdivision (c). This subdivision allows otherwise permissive joinder of offenses or defendants to be accomplished by the trial court on its own motion. This provision is included in order to achieve the principle goal of the rule, judicial economy, while protecting the defendant's right to a reasonably prejudice-free trial. Although it is contemplated that joinder will be effected by the prosecution at the indictment or complaint stage in all possible cases, should the prosecution elect to proceed in a manner contrary to the goal of judicial economy this subsection empowers the court to rectify the situation on its own motion without having to depend on a motion by the defendant. Compare Commonwealth v. Benjamin, 358 Mass. 672, 678 (1971) (order for amendment of indictments).

Subdivision (d). Subdivision (d)(1) is essentially drawn from Fed. R. Crim. P. 14 and is consonant with prior Massachusetts practice. Subdivision (d)(2) is taken from ABA Standards Relating to Joinder & Severance § 2.1(a) (Approved Draft, 1968).

As a general proposition, the decision whether to allow a motion to sever two or more indictments which have been joined for purposes of trial rests in the sound discretion of the trial judge.

Commonwealth v. Jervis, 368 Mass. 638, 645 (1975). Accord, United States v. Luna, 585 F.2d 1, 4-5 (1st Cir. 1978); Commonwealth v. Cruz, Mass. Adv. Sh. (1977) 2395, 2411; Commonwealth v. Drew, 4 Mass. App. Ct. ____ , ____ (1976), Mass. App. Ct. Adv. Sh. 48, 52-53.

Where "substantially the same evidence, or evidence connected with a single line of conduct," Commonwealth v. Rosenthal, 211 Mass. 50, 54 (1912), substantiates two or more indictments for "offenses [which] are kindred and liable to punishment of the same general character," Commonwealth v. Veal, 362 Mass. 877 (1972) (Rescript), there is no abuse of discretion in denying the defendant's motion for severance. Commonwealth v. Drew, supra, at 53. The legal standards which must guide the exercise of the court's discretion in determining a motion to sever have been articulated as follows:

No sound reason can be given why several indictments charging different crimes arising out of a single chain of circumstances should not be tried together. Where several offenses might have been joined in one indictment, and would be proved by substantially the same evidence, or evidence connected with a single line of conduct, and grow out of what is essentially one transaction, and where it does not appear that any real right of the defendant has been jeopardized, it would be a refinement not demanded by the law or by justice to require in all instances a separate trial, simply because separate indictments have been found for each offense.

Commonwealth v. Cruz, Mass. Adv. Sh. (1977) 2395, 2411-12. Accord Commonwealth v. Blow, 362 Mass. 196, 200 (1972); Commonwealth v. Rosenthal, supra.

The assertion of prejudicial joinder does not challenge the propriety of the initial order for consolidation. Rather, the prejudice is found in facts peculiar to a defendant's case. Defendants may move for severance of their cases, or of counts therein, on the grounds of misjoinder and prejudicial joinder.

Misjoinder. It is important to know what the minimal grounds for joinder of defendants or offenses are when considering a claim of misjoinder because such a claim is an assertion that the minimal requirements have not been satisfied. Thus, when a motion for severance of defendants or for separate trials of more than one count is based on the ground that the consolidated offenses should not have been joined, i.e., that there has been a misjoinder, the standards upon which the motion is to be judged are stated in subdivisions (a)(1)-(2) of this rule.

A misjoinder can result in two ways. First, the offenses joined might have been improperly joined in one indictment and, secondly, two indictments may have been improperly consolidated for trial. In both cases, however, the same standard is to be used to determine the propriety of the joinder.

Two other aspects of this subdivision deserve mention. First, subdivision (d)(1) permits a court to grant a severance upon its own motion. Although this authorizes a court to review its initial order of consolidation of the charges for trial to see if the minimum grounds are satisfied, its primary significance is that it permits the court to exercise its discretion in deciding initially whether to proceed by joint or separate trials even though one of the minimum grounds for joinder is satisfied. In effect, this provision permits the trial judge to consider the prejudice to the defendant in his initial decision as well as at later stages of the trial.

Secondly, it is recommended in the ABA Standards Relating to Joinder and Severance § 2.1(c)-(d), comment at 28 (Approved Draft, 1968), that a motion by the prosecution for severance, unless consented to by the defendant, be required to be made prior to trial to avoid giving the defendant upon retrial the defense of double jeopardy. As is stated therein, however, this proposition does not derive from any judicial holdings to that effect. While this subdivision contemplates that prosecution motions for severance shall be limited to a pretrial posture, it is likely that if a severance upon the prosecution's motion after the commencement of trial is a "manifest necessity" such that the "ends of public justice would otherwise be defeated," United States v. Perez, 22 U.S. (9 Wheat.) 579, 580, (1824), courts of this Commonwealth would hold that the severance was not a bar to future prosecution on the severed charges, even if the defendant did not consent. Compare Price v. Slayton, 347 F.Supp. 1269 (W.D. Va. 1972).

Prejudicial Joinder. Satisfying the minimum joinder standards is only one consideration affecting a court's decision on consolidation. The court is lodged with the discretion to determine in each case whether justice would be served better by joint or separate trials. The countervailing considerations affecting this decision are the defendant's interests and the interests of the court and prosecution in having the adjudication as short and as inexpensive as possible. The merits of each side's claims will differ from case to case. Only the trial judge is in a position to balance effectively the competing interests, and, in most cases, his discretion is very broad.

In its initial decision upon the issue of consolidating charges for a single trial, in addition to determining whether minimum grounds for joinder exist, the court should consider whether the defendant would be adversely affected by joinder. If he would and if this prejudice overrides the interests of the prosecutor, the public, and the courts in an expeditious trial, joinder should not be ordered.

At any stage after joinder has been ordered, the court on motion of the defendant or on its own motion may wish to reconsider whether the interests of justice are better served by separate trials. At such time, the court should again weigh the competing interests as well as considering how far the prosecution of the charges has proceeded and whether a severance would involve an undue relitigation of issues already presented to the court. In both its initial decision and at any later reconsideration of prejudice to the defendant, the court is determining whether there exists a prejudicial joinder of charges.

The Supreme Judicial Court summarized the duty of the trial court in protecting a defendant's rights as follows:

It is the heavy obligation of the trial court sedulously to take care that the defendant is not confounded in his defense, that the attention of the jury is not distracted and that in no aspect are

the substantial rights of the defendant adversely affected by requiring him to proceed to trial on separate complaints for different offenses or on separate counts for different offenses in one complaint.

Commonwealth v. Slavski, 245 Mass. 405, 412-13 (1923). It is made clear by the court that the trial court's discretion is circumscribed by its duty to guarantee a fair trial.

A court may find prejudice on its own motion or the motion of either party. However, where a defendant initiates the motion for relief from prejudice, he has a strong burden or persuasion. Sagansky v. United States, 358 F.2d 195 (1st Cir. 1966), cert. denied, 385 U.S. 816. This heavy burden is placed upon the defendant because the trial judge has already determined once that the defendant was not likely to be prejudiced by consolidated trials.

A defendant first must make his motion at the appropriate time. If a motion is filed before the prejudicial grounds have materialized, the motion should be dismissed. The grounds of prejudice may become known to a defendant at any stage of the pretrial of trial proceedings. He has the duty to inform the court of these grounds whenever he first learns of them. If a motion is made at trial based upon grounds known prior to the commencement of the trial, the defendant has waived his opportunity to object. Subdivision (d)(2).

Secondly, a defendant has the related burden of showing a specific ground of prejudice. It is not enough for a defendant merely to claim that his chances of acquittal are reduced in a joint trial, or that a joint trial presents him with a number of potential dangers. The defendant must point to definite prejudice that presently exists.

One other class of cases deserves mention. In these, a separate trial must be granted because of an established principle of law; the decision is non-discretionary. In cases not of this class, the decision regarding a joint trial rests upon the peculiar arrangement of the facts, whereas here the facts are less significant. This class is composed mostly of claims that a defendant's constitutional rights will be infringed by a consolidated trial. Bruton v. United States, 391 U.S. 123 (1968), establishes the most significant principle in this area. Basing its decision on a defendant's sixth amendment right to confront adverse witnesses, the Supreme Court held that a severance was required where a codefendant's confession implicating the defendant is to be offered at trial. It had always been true that such a confession was inadmissible against the non-confessor, but prior to this decision a limiting instruction to the jury was deemed sufficient to protect the rights of the non-confessing defendant. The distinction between this decision and others where continued reliance on jury instructions is found is that a defendant's constitutional right is in issue here and less flexibility in balancing competing interests is tolerated.

The scope of the Bruton decision has been delimited since the time of its issuance, and a severance is not always required where one defendant's confession mentions other participants in the criminal acts. The following are examples where a severance is not required:

1. Commonwealth v. Scott, 355 Mass. 471 (1969), holds that a confession implicating the defendant may be admitted in a joint trial when the defendant does not contest his participation in the crime. This occurs when a defendant asserts a special defense, e.g., insanity.

2. When the statement refers to other participants without identifying them or when the statement can be cured of any constitutional defect by excision, it may be admitted at a joint trial. See Commonwealth v. French, 357 Mass. 356 (1970); ABA Standards, supra, § 2.3(a). But sufficient identification may be found even when names are not used. Commonwealth v. Sarro, 356 Mass. 100 (1969).

3. The confessing co-defendant can testify at trial, thereby giving the implicated defendant the opportunity to cross-examine the witness on any statements made by him that were admitted at trial. Santoro v. United States, 402 F.2d 920 (9th Cir. 1968). See Commonwealth v. Hicks, Mass. Adv. Sh. (1979) 1; Commonwealth v. Murphy, Mass. App.Ct. Adv. Sh. (1978) 533.

Another example of a severance being required because of the threat of impairing a defendant's constitutional rights is offered by DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962). Only one defendant took the stand, and his counsel commented upon the failure of his client's co-defendant to testify in an attempt to show that only an innocent defendant has the courage to deny his guilt at trial. The Court of Appeals held it error to permit one defendant to comment adversely upon his co-defendant's exercise of his fifth amendment privilege not to testify.

In sum, prejudice to a defendant is to be found in the facts of his case. Most claims of prejudice are to be decided by the trial court in the exercise of its discretion, and the majority of these claims are rejected. A severance is required in some cases because certain facts relating to either trial strategy or the nature of the offenses establish as a matter of law the existence of prejudice. In other cases, a severance is mandated by constitutional considerations.

Subdivision (e). This subdivision prohibits trial on an indictment or complaint for conspiracy to commit a substantive offense simultaneously with the trial on the substantive offense, except upon motion of the defendant. This provision is retained from former G.L. c. 278, § 2A (St. 1968, c. 721, § 2) pursuant to which the prohibition against joint trials of the conspiracy and substantive charges was absolute. See Commonwealth v. Gallarelli, Mass.Adv. Sh. (1977) 1013, 1017. Under this rule, however, the defendant may move for joinder of such charges.

The Supreme Judicial Court has noted that "[t]he legislative history affords no indication of why § 2A, which may add new complications to enforcement of the criminal law, was adopted at all . . . ." Commonwealth v. French, 357 Mass. 356, 375 n.20 (1970). Accord Commonwealth v. Gallarelli, Mass. Adv. Sh. (1977) 1013, 1024 (Kaplan, J., concurring). The intent of the rule is to guard against the possibility that a jury, if permitted to hear evidence on both the conspiracy and the substantive offense, might convict on the charge of the substantive offenses as a matter of course after convicting on the conspiracy charge, in spite of the court's instruction as to the distinct evidence required to establish a conspiracy. This is because of the much broader scope of admissibility of evidence permitted to prove the conspiracy charge.

The defendant should be allowed to proceed by a joint trial, however, so long as it is determined by the judge to be in the best interests of justice. This practice accords with that under Fed. R. Crim. P. 8(b), pursuant to which conspiracy and substantive charges may be joined. E.g., United States v. Graham, 548 F.2d 1302, 1310 (8th Cir. 1977); United States v. Beasley, 519 F.2d 233, 238 (5th Cir. 1975); United States v. Banks, 465 F.2d 1235, 1242-43 (5th Cir.), cert. denied, 401 U.S. 924 (1972); Gordon v. United States, 438 F.2d 858, 878 (5th Cir.), cert. denied sub nom.,

Crandall v. United States, 404 U.S. 828 (1971). See ABA Standards Relating to Joinder and Severance § 1.2(b), comment at 15 (Approved Draft, 1968).

Rule 10: Continuances

(Applicable to District Court and Superior Court)

(a) Continuances.

(1) After a case has been entered upon the trial calendar, a continuance shall be granted only when based upon cause and only when necessary to insure that the interests of justice are served.

(2) The factors, among others, which a judge shall consider in determining whether to grant a continuance in any case are:

(A) Whether the failure to grant a continuance in the proceeding would be likely to make a continuation of the proceeding impossible, or result in a miscarriage of justice.

(B) Whether the case taken as a whole is so unusual or so complex, because of the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation of the case at the time it is scheduled for trial.

(C) Whether the overall caseload of defense counsel routinely prohibits his making scheduled appearances, whether there has been a failure of diligent preparation by a party, and whether there has been a failure by a party to use due diligence to obtain available witnesses.

(3) An attorney who is to be otherwise engaged in a trial, evidentiary hearing, or appellate argument so as to require a continuance shall notify the court and the adverse party or the attorney for the adverse party of such conflicting engagement not less than twenty-four hours before the scheduled appearance, or within such other time as is reasonable under the circumstances.

(4) A motion for a continuance may include a request that the court rule on the motion without a hearing. If such a motion is filed at least three court days prior to the scheduled appearance or trial date and indicates that all parties have agreed to the continuance, the court shall, prior to the scheduled date, rule on the motion without a hearing unless it deems a hearing to be necessary. In any other case, the court may in its discretion rule on a continuance motion without a hearing, provided that all parties have had an adequate opportunity to file an opposition to the motion. If the court continues the case without a hearing, defendant's counsel shall inform the defendant of the revised date. Any motion filed pursuant to this subdivision shall provide one or more proposed continuance dates and state all supporting grounds, and any factual allegations shall be supported by affidavit.

(b) Assessment of Costs. When a continuance is granted upon the motion of either the Commonwealth or the defendant without adequate notice to the adverse party, causing the adverse party to incur unnecessary expenses, a judge may in his discretion assess those expenses as costs against the party or counsel requesting the continuance.

(c) Preservation of Testimony. A judge may order as a condition upon the granting of a continuance that the testimony of a witness then present in court be taken and preserved for subsequent use at trial or any other proceeding. The witness shall be examined in open court by the party on whose behalf he is present and the adverse party shall have the right of cross-examination. The expense of taking and preserving the testimony shall be assessed as costs against the party requesting the continuance.

Reporter's Notes (1997) : [Rule 10(a)]

(a)(4). In 1997, Rule 10 was amended by adding new subsection (a)(4). This amendment allows the judge to rule on a continuance motion without a hearing, provided all other parties have had a chance to file an opposition to the motion. Previously a continuance motion was often argued in court, even if it was agreed to by all parties, because no other formal procedure was available. Either the case was advanced for hearing on the motion, compounding client expense and court congestion; or the continuance motion was argued on the trial day, leaving parties uncertain whether it would be granted and requiring the defendant and witnesses to be present in case the motion was denied. Subsection (a)(4) is designed to rectify these problems and provide a more efficient procedure, while continuing to maintain ultimate authority in the court over whether to grant a continuance even when the parties are in agreement.

Criminal Rule 10 continues to provide for a ruling by the judge on a continuance motion in every case, consistent with Uniform Magistrate's Rule 2. Although this rule generally permits actions on uncontested, non-evidentiary motions by the magistrate, subdivision (c) prohibits the magistrate from acting on continuances.

As with Rule 7, when a case is continued in the absence of the defendant, defense counsel is charged with the responsibility of so notifying his or her client.

Reporter's Notes

This rule is modeled in part after 18 U.S.C. § 3161(h)(8)(B) (C) (Supp. 1, 1975). Subdivisions (b) and (c), while novel to Massachusetts criminal practice, are not without precedent, see Superior Court Rule 21 (1974); District Court Supplemental Rule of Civil Procedure 103 (1975); G.L. c. 276, § 50.

Subdivision (a). This subdivision is modeled after 18 U.S.C. § 3161(h)(8)(B)-(C) (Supp. 1, 1975). The controlling principle underlying this subdivision is that a continuance should be granted only when justice requires. See ABA Standards Relating to Speedy Trial § 1.3 (Approved Draft, 1968); the Defense Function § 1.2(b), (c) (Approved Draft, 1971); the Prosecution Function § 2.9(a), (c) (Approved Draft, 1971); Rules of Criminal Procedure (U.L.A.) rule 721(d) (1974). Consensual continuances and continuances which are helpful, but which fall

short of being necessary, are not to be granted, because in such cases justice is generally promoted by proceeding to trial without delay and because the need for prompt disposition of criminal cases transcends the desires of the immediate participants in the proceedings. Compare Commonwealth v. Silva, Mass. App. Ct. Adv. Sh. (1978) 374 (Rescript).

Whether a motion for a continuance should be granted traditionally lies within the discretion of the trial judge, whose action will not be disturbed unless there is a clear abuse of discretion. Commonwealth v. Jackson, Mass. Adv. Sh. (1978) 3062, 3064; Commonwealth v. Watkins, Mass. Adv. Sh. (1978) 1646, 1671; Commonwealth v. Grieco, 5 Mass. App. Ct. , (1977), Mass. App.Ct. Adv. Sh. (1977) 598, 604. In ruling on a motion for a continuance, the judge should balance the moving party's need for additional time against the possible inconvenience, increased costs, and prejudice which may be incurred by the opposing party, as well as giving due weight to the interest of the judicial system in avoiding delays which would not measurably contribute to the resolution of a particular controversy. Commonwealth v. Gilchrest, 364 Mass. 272, 276-77 (1973). Accord Commonwealth v. Greico, supra, at 605, Mass. App. Ct. Adv. Sh. (1977) 598.

Common grounds asserted by counsel as a basis for a requested continuance are: "Illness of the defendant or important witnesses or defense counsel, conflicting engagements of counsel, lack of time for preparation by counsel or prejudicial publicity or a combination of several of the factors. . . ." 30 MASS. PRACTICE SERIES (Smith) § 1013 (1970, Supp. 1978).

A determination of a motion for a continuance to secure the attendance of witnesses will depend upon a showing that the desired testimony is of more than "marginal significance" and not "merely cumulative" to or corroborative of other available testimony to the same effect. Commonwealth v. Watkins, Mass. Adv. Sh. (1978) 1646, 1670-71; Commonwealth v. Funderberg, Mass. Adv. Sh. (1978) 601, 605; Commonwealth v. Hanger, Mass. App. Ct. Adv. Sh. (1978) 633, 648, aff'd, Mass. Adv. Sh. (1979) 647; Commonwealth v. Darden, 5 Mass. App.Ct. ___, ____(1977), Mass. App. Ct. Adv. Sh. (1977) 891, 903. Where the adverse party would not be prejudiced by a continuance and the testimony is significant, a denial of the continuance constitutes an abuse of discretion, Commonwealth v. Silva, Mass. App. Ct. Adv. Sh. (1978) 374 (Rescript), assuming that the desired witness may be expected to become available within a reasonable time. Compare Commonwealth v. Ambers, 4 Mass. App. Ct.___ ,___ (1976), Mass. App. Ct. Adv. Sh. (1976) 1141, 1150 (witness missed ride) with Commonwealth v. Swenor, 3 Mass. App. Ct. 65, 66-67 (1975) (witness in federal custody; authorities would not honor writ of habeas corpus ad testificandum). See Commonwealth v. Hanger, Mass. App. Ct. Adv. Sh. (1978) 633, 647. Subdivision (a)(2)(C) adds as a consideration that the moving party must have exercised due diligence to obtain the presence of available witnesses.

As for conflicting engagements of counsel, subdivision (a)(2)(C) indicates that delays attributable to the heavy case load of desired defense counsel which would prevent the commencement of trial for an unreasonable time period do not establish good cause for a continuance. The right of a defendant to retain counsel of his choice does not include the right to choose an attorney who is unable to comply with the demands of the trial calendar. United States v. DiStefano, 464 F.2d 845, 846 n.1 (2d Cir. 1972) See United States v. Poulack, 556 F.2d 83, 86

(1st Cir. 1977); United States v. Tortora, 464 F.2d 1202, 1210 (2d Cir. 1972); Commonwealth v. Perry, Mass. App. Ct. Adv. Sh. (1978) 840, 850.

Other conflicting engagements of counsel afford no right to the continuance of any particular case. . . .[T]his is the only way in which the trial of causes can proceed in an orderly and expeditious way under present conditions. . . .No attorney can accept . . . a larger number of cases than he can try as and when they are reached and expect courts to continue any case for his convenience or that of his clients.

Commonwealth v. Festo, 251 Mass. 275, 277 (1925). See Commonwealth v. Dabrieo, 370 Mass. 728, 736-37 (1976) (counsel was engaged in court appearances in several counties and "unavailable for trial of this case" for seven months). There are those instances, however, where a conflicting engagement is unavoidable and justice would best be served by the granting of a continuance. In such an instance, subdivision (a)(3) requires counsel to notify the court and the adverse party of the conflict in order to minimize their inconvenience.

The sixth and fourteenth amendments to the United States Constitution, which afford a defendant the right to counsel in a prosecution which may result in a loss of liberty, Argersinger v. Hamlin, 407 U.S. 25 (1972), are not satisfied by the mere presence of a competent attorney if that attorney is not prepared. Commonwealth v. Cavanaugh, 371 Mass. 46, 57 (1976). In addition to the factors listed in subdivision (a)(2)(B) relative to the reasonableness of expecting adequate preparation, the court may consider the length of time the attorney has been assigned or appointed to the case. In ruling on a motion for a continuance on this ground, the judge's discretion cannot be exercised so as to impair the constitutional right to prepared counsel; a "myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right . . . an empty formality." Commonwealth v. Cavanaugh, supra, 371 Mass. at 51. On the other hand, where there is ample justification for the conclusion that a last-minute claim of lack of preparation is merely a dilatory tactic, is unsupported by the facts, or is the result of a failure of diligent preparation, a denial of a continuance is no abuse of discretion. Commonwealth v. Jackson, Mass. Adv. Sh.(1978) 3062, 3064, 3070; Commonwealth v. Perry, Mass. App. Ct. Adv. Sh. (1978) 840, 848-50; subdivision (a)(2)(C). See also Commonwealth v. Coward, Mass. App. Ct. Adv. Sh. (1979) 273 (Rescript).

Pursuant to Mass. R. Crim. P. 11(a)(2)(B) and (b)(2)(B), if the required pretrial conference report is not filed and a party does not appear at the scheduled time to explain the failure, "no request of that party for a continuance of the trial date . . . shall be granted. . . ."

Subdivision (b). This subdivision deviates from previous Massachusetts criminal procedure. Former practice dictated that if a continuance was granted, each party was to bear his own costs, unless the defendant was assessed the costs of prosecution. See generally G.L. c. 280, § 6. However, the courts have long applied a similar assessment rule to the costs of continuances in civil proceedings. Superior Court Rule 21 (1974) provides, and District Court Civil Rule 16 (1965) provided, that when a case is postponed on the motion of a party, that party may be responsible for the costs and expenses of the adverse party in addition to his own.

The decision to assess the costs rests solely within the discretion of the judge, and payment is to be made directly to the adverse party for the benefit of whomever incurred the expenses and not

to the court. The purposes of this rule are to discourage parties or their attorneys from requesting continuances on short notice and to reimburse parties for expenses they incur as a result of the tardiness of the adverse side in requesting a continuance. As stated in the District Court and Superior Court rules, supra, the court should not assess costs against a party in cases where his opponent has incurred expenses because of a requested continuance when: 1) the continuance is granted because of improper conduct of the adverse party; or 2) adequate notice was in fact given the adverse party (see [a][3], infra); or 3) grounds for the continuance were not discovered in time to give sufficient notice to prevent the expense to the adverse party.

Assessable costs under this rule are those costs directly caused by the insufficient notice. Assessable costs generally include witness fees, extra compensation paid to police witnesses, travel costs, costs of depositions pursuant to subdivision (c), infra, and perhaps stenographers' attendance fees in District Court. See Mass.R. Crim. P. 6(d)(1).

Subdivision (c). A new practice is instituted by this subdivision: if a witness is present in court and a party has requested a continuance, the judge may condition the grant of the continuance upon the taking and preservation of that witness' testimony for use at trial or other proceeding. While similar in many respects to a court-ordered deposition after a finding that a witness was unlikely to appear at the continued proceeding (former G.L. c. 276, § 50 [St. 1851, c. 71]), the procedure permitted under this rule is not termed a deposition. This is to avoid conflict with the formal summons and notice requirements of Mass. R. Crim. P. 35(b)(c)(h). In all other respects the procedure is compatible with Rule 35 deposition practice.

While utilization of the procedure established by this subdivision should be undertaken only in "exceptional circumstances" when "deemed to be in the interests of justice," Mass. R. Crim. P. 35(a), it is not intended to be so restricted as that under Mass. R. Crim. P. 6(d)(2), pursuant to which testimony may be taken upon the default of a defendant only if "to require the attendance at a later time of a witness . . . would constitute a hardship because of age, infirmity, illness, profession or other sufficient reason." Once taken and preserved, the witness' testimony may be used as substantive evidence in any subsequent proceeding as if the witness were "unavailable" under Mass. R. Crim. P. 35(g).

This procedure does not deny the defendant's right to confrontation of witnesses, since it is presumed that the defendant will be present when the continuance is requested and the witness will, of course, be in attendance. The witness is to be examined in open court by the party calling him and the adverse party is permitted to cross-examine. In these circumstances, the constitutional requirement is satisfied. Commonwealth v. DiPietro, Mass. Adv. Sh.(1977) 1971, 1978-84; aff'g Commonwealth v. DiPietro, 4 Mass.App. Ct. (1976), Mass. App. Ct. Adv. Sh. (1976) 1085 (Rescript).

Rule 11: Pretrial Conference and Pretrial Hearing

(Applicable to cases initiated on or after September 7, 2004)

(a) The Pretrial Conference. At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense

counsel to attend a pretrial conference on a date certain to consider such matters as will promote a fair and expeditious disposition of the case. The defendant shall be available for attendance at the pretrial conference. The court may require the conference to be held at court under the supervision of a judge or clerk-magistrate.

(1) Conference Agenda. Among those issues to be discussed at the pretrial conference are:

(A) Discovery and all other matters which, absent agreement of the parties, must be raised by pretrial motion. All motions which cannot be agreed upon shall be filed pursuant to Rule 13(d).

(B) Whether the case can be disposed of without a trial.

(C) If the case is to be tried, (i) the setting of a proposed trial date which shall be subject to the approval of the court and which when fixed by the court shall not be changed without express permission of the court; (ii) the probable length of trial; (iii) the availability of necessary witnesses; and (iv) whether issues of fact can be resolved by stipulation.

(2) Conference Report.

(A) Filing. A conference report, subscribed by the prosecuting attorney and counsel for the defendant, and when necessary to waive constitutional rights or when the report contains stipulations as to material facts, by the defendant, shall be filed with the clerk of the court pursuant to subdivision (b)(2)(i). The conference report shall contain a statement of those matters upon which the parties have reached agreement, including any stipulations of fact, and a statement of those matters upon which the parties could not agree which are to be the subject of pretrial motions. Agreements reduced to writing in the conference report shall be binding on the parties and shall control the subsequent course of the proceeding.

(B) Failure to File. If a party fails to participate in a pretrial conference or to cooperate in the filing of a conference report, the adverse party shall notify the clerk of such failure. If a conference report is not filed and a party does not appear at the pretrial hearing, no request of that party for a continuance of the trial date as scheduled shall be granted and no pretrial motion of that party shall be permitted to be filed, except by leave of court for cause shown. If the parties fail to file a conference report or do not appear at the pretrial hearing, the case shall be presumed to be ready for trial and shall be scheduled for trial at the earliest possible time. The parties shall be subject to such other sanctions as the judge may impose.

(b) The Pretrial Hearing. At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to appear before the court on a date certain for a pretrial hearing. The defendant shall be available for attendance at the hearing. The pretrial hearing may include the following events:

(1) Tender of Plea. The defendant may tender a plea, admission or other requested disposition, with or without the agreement of the prosecutor.

(2) Pretrial Matters. Unless the Court declines jurisdiction over the case or disposes of the case at the pretrial hearing, the pretrial hearing shall include the following events:

(i) Filing of Pretrial Conference Report. The prosecuting attorney and defense counsel shall file the pretrial conference report with the clerk of court.

(ii) Discovery and Pretrial Motions. The court shall hear all discovery motions pending at the time of the pretrial hearing. Other pending pretrial motions may be heard at the pretrial hearing, continued to a specified date for a hearing, or transmitted for hearing and resolution by the trial session.

(iii) Compliance and Trial Assignment. The court shall determine whether the pretrial conference report is complete, all discovery matters have been resolved, and compliance with all discovery orders has been accomplished. If so, the court shall obtain the defendant's decision on waiver of the right to a jury trial, and assign a trial date or trial assignment date. If completion of either the pretrial conference report or discovery is still pending, the court shall schedule and order the parties to appear for a compliance hearing pursuant to Rule 11(c) unless the aggrieved party waives the right to a compliance hearing.

(iv) The court may issue such additional orders as will promote the fair, speedy and orderly disposition of the case.

(c) Compliance Hearing. A compliance hearing ordered pursuant to Rule 11(b)(2)(iii) shall be limited to the following court actions:

(1) determining whether the pretrial conference report and discovery are complete and, if necessary, hearing and deciding discovery motions and ordering appropriate sanctions for non-compliance;

(2) receiving and acting on a tender of plea or admission; and

(3) if the pretrial conference report and discovery are complete, obtaining the defendant's decision on waiver of the right to a jury trial, and scheduling the trial date or trial assignment date.

Reporter's Notes

Rule 11 is designed to promote the speedy and orderly disposition of cases at a time certain which is most convenient to all parties, and to that end it calls upon defendants' counsel to aid the court in the disposition of all preliminary motions and other matters relative to pending cases. See Commonwealth v. Durning, 406 Mass. 485, 495 (1990). Although the title of the rule would appear to limit its application to those cases which are destined to be tried, it is intended that in

some cases the conference will result in the resolution of issues so as to make trial unnecessary. At the least the pretrial conference should assist the parties in channeling their attention and resources to matters genuinely in issue and aid the court in focusing the elaborate mechanism of a full trial upon the material issues in dispute.

The 2004 Amendments. In 2004, the Rule was substantially rewritten to mandate a uniform pretrial process in all criminal courts. Under the rule, at arraignment (except on a complaint regarding which the court will not exercise final jurisdiction, in which case a probable cause hearing will be scheduled as required by Rule 7), the court will schedule the case for both a pretrial conference and a pretrial hearing, to be held on separate dates. Following the pretrial conference, the parties will prepare a pretrial conference report, memorializing their agreements and disagreements. This report controls the scope of subsequent motions practice. Rule 11 also mandates a pretrial hearing on a subsequent date, at which a plea may be taken or pretrial matters may be raised and/or resolved. Rule 11 as revised reflects this three step process, setting out the functions of the pretrial conference, the report, and the pretrial hearing. Additionally, if discovery remains incomplete at the time of the pretrial hearing, a compliance hearing will be scheduled to insure that discovery is complete before the case proceeds.

Subdivision (a). The Pretrial Conference and Conference Report. Rule 11 originally required pretrial conferences in both Superior and District Court jury sessions, leaving the District Court primary session with the option of scheduling a conference or not. By a 2004 amendment, pretrial conferences are now mandatory in all cases, regardless of whether the case is docketed in a superior, juvenile, district, or municipal court. Under Rules 7 and 11, at arraignment the court will schedule the case for both a pretrial conference and a pretrial hearing. Regarding the pretrial conference, the rule allows but does not require the court to order that this conference take place before a judge or magistrate. The Boston Municipal Court practice of holding a conference before a magistrate has proven quite efficient, but because some district courts may not have adequate personnel and courtrooms for this purpose the subdivision leaves this issue to be determined by each court.

Subdivisions (a)(1)(A) -(C) outline suggested issues which may be discussed and resolved prior to the trial. The catalog is not to be considered exhaustive.

Subdivision (a)(1)(A), in conjunction with Mass. R. Crim. P. 13, seeks to reduce the number of "boiler plate" pretrial motions which are routinely filed. See Commonwealth v. Hall, 369 Mass. 715, 723 (1976). If the substance of a motion is agreed upon, that fact and the agreement are set out in the conference report [(a)(2)(A)], infra; only pretrial motions which are not agreed upon are permitted to be filed. Mass. R. Crim. P. 13(d).

While it is unlikely that a plea arrangement will immediately result from the conference, the defendant, following disclosure of the Commonwealth's case, may decide that a plea is the best alternative. Therefore, the subject is properly discussed at that time [(a)(1)(B)]. If an arrangement is in fact concluded, it should be stated in the conference report. See Mass. R. Crim. P. 12(b)(2), which requires counsel to notify the court of the existence of any agreement contingent upon the defendant's plea.

Among the matters to be discussed under subdivision (a)(1)(C)(i) is the setting of the trial date. It must be emphasized that one consequence of a failure to comply with this rule is that the case will be presumed to be ready for trial and a trial date will be set for the earliest available time, [a] [2] [B], infra. Agreements as to subdivision (C)(ii) will assist the court in the management of its docket, see Mass. R. Crim. P. 36(a)(2), and understandings as to the availability of necessary witnesses will reduce the need for continuances to secure their attendance, Mass. R. Crim. P. 10. If stipulations of fact are agreed upon after discussion under (C)(iv) they are to be recorded in the conference report, [a] [2] [A], infra.

The defendant may also request information concerning the Commonwealth's intended use of prior acts or convictions for proof of knowledge, intent, or modus operandi, and use of prior convictions to impeach the testimony of the defendant. This information, while not specifically mentioned in Rule 11, is a proper subject of discussion at the pretrial conference. It is contemplated that compliance with this subdivision will obviate the necessity for resorting to the more time-consuming procedures of Mass. R. Crim. P. 14 and 23, expedite the taking of testimony at the trial, and allow counsel to better prepare for trial.

Pursuant to Mass. R. Crim. P. 9(a)(3), either party may move for consolidation of pending charges. This matter, if resolved at conference, will avoid the time delay required for the court to conduct a hearing and act upon a motion for joinder. This is true also as to motions to transfer other pending charges for plea, sentence or trial. Mass. R. Crim. P. 37(b)(1) – (2).

It should be noted that a motion to take a deposition, not contemplated within subdivision (a)(1) of this rule, if considered at conference and agreed upon, need not be filed with the court, since the parties are permitted to depose witnesses by agreement pursuant to Mass. R. Crim. P. 35(i).

The parties may also wish to stipulate as to the application and effect of the excludable time provisions of Mass. R. Crim. P. 36(b), e.g., whether time should be excluded from the speedy trial limits due to the absence of an essential witness and, if so, how much. Mass. R. Crim. P. 36(b)(2)(B).

The 2004 revision eliminated a provision then numbered (a)(1)(C), which required the defendant to reveal "the nature of the defense" at the pretrial conference, and whether he or she intends to defend by alibi, insanity or privilege. Such discovery to the prosecution is now mandatory discovery under Rule 14, at a more realistic and constitutionally appropriate phase of the pretrial proceedings. The pretrial conference is generally held too early to expect the defendant to know and convey the defense, especially since full discovery may not yet have been provided by the prosecution. Indeed, because under the Fifth and Fourteenth Amendments to the United States Constitution the defense can only be compelled to disclose information it has decided to use at trial, Williams v. Florida, 399 U.S. 78 (1970), prosecutorial discovery should not be required before the defendant is in a position to make an informed decision.

Subdivision (a)(2)(A) outlines the contents of the pretrial conference report and establishes the requirement that it be signed by the defendant when it contains agreements which amount to waivers of constitutional right or stipulations to material facts. The defendant's signature should not be pro forma, but should be subscribed only after his counsel has explained the consequences of this act to him. To expedite this procedure, subdivisions (a) and (b) mandate that the defendant

"shall be available for attendance" at both the pretrial conference and the pretrial hearing. This requirement assures also that the defendant's assent to other agreements may readily be obtained.

The pretrial conference report must set out all agreements of the parties. Such agreements have the force of a court order, and are enforceable by the same sanctions. Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 228 (1992); Commonwealth v. Durning, supra at 495; Commonwealth v. Gallarelli, 399 Mass. 17, 20 (1987); Commonwealth v. Chapee, 397 Mass. 508, 517 (1986), habeas denied sub nom. Chappee v. Vose, 843 F.2d 25 (1st Cir. 1988); Commonwealth v. Delaney, 11 Mass. App. Ct. 398 (1981). Only pretrial motions whose subject matter could not be agreed on at the conference may be filed. The conference report is filed with the clerk, whose responsibility it is to monitor filing and advancement of cases for trial.

Subdivision (a)(2)(B) sets out the sanctions to be imposed upon a failure to file a report and to appear to explain that failure. If counsel refuse to cooperate in the conference procedure, the court may also invoke its authority under subdivision (a)(1) to require a conference be held at court under the supervision of a judge or clerk-magistrate.

Subdivision (b). The pretrial hearing. This subdivision originally concerned conference procedures in the District Court jury-waived sessions. By a 2004 amendment, Rule 11(a)'s pretrial conference requirements were made uniform for all sessions, and subdivision (b) is instead devoted to the pretrial hearing. New subdivision 11(b) allows a District Court judge to decline jurisdiction and schedule a probable cause hearing expeditiously (and in such case the judge may entertain discovery motions prior to the probable cause hearing, Commonwealth v. Silva, 10 Mass. App. Ct. 784, 791 (1980)). Otherwise a pretrial hearing is to be held in order to accomplish the pretrial matters enumerated in the subdivision. Subparagraph (b)(1) authorizes the court to receive a plea, admission, or other requested disposition. If there is no plea or disposition, subparagraph (b)(2)(i) requires the parties to file the pretrial conference report; (b)(2)(ii) requires the pretrial hearing judge to hear all pending discovery motions, and permits him or her to hear other pretrial motions as well; and (b)(2)(iii) requires the court to schedule the next court date. If the pretrial report or discovery is not complete, the court will schedule a compliance hearing unless waived by the aggrieved party (see subdivision (c)). If they are complete, the court will ask the defendant to elect or waive a jury trial, and then assign "the trial date or trial assignment date." Ideally, the rule would have simply required the assignment of a trial date, rather than offering the option of scheduling a "trial assignment date," which allows for yet another intermediate hearing date; but practical constraints require this option, as many courts are presently unable to guarantee a particular trial date as early as the pretrial hearing. Although the jury decision should be fully considered and resolved at this time, nothing in the rule prevents a defendant who elects a jury trial from waiving the right at a later date.

Subdivision (c). Compliance Hearing. This subdivision makes a compliance hearing mandatory if a party failed to complete a pretrial conference report or provide discovery, unless the aggrieved party waives such a hearing. Such a hearing was optional before this subdivision was promulgated in 2004, leading to routine inefficiencies this subdivision is designed to eliminate. In courts that did not have compliance hearings, the aggrieved party had confronted an unfair choice between the sometimes burdensome task of obtaining an expedited hearing simply to

obtain overdue discovery, or waiting until the trial date to receive discovery (which itself presented the prospect of either a continuance or an immediate trial with unprepared counsel). Moreover, municipal and district courts without compliance hearings had to defer jury waivers until the trial date pursuant to G.L. c. 218, § 28, which prohibits a waiver decision until discovery has been delivered. It promoted delays and inconvenience to witnesses for the court to remain ignorant up to the trial date as to whether a jury session would be required.

Therefore, this subdivision requires a compliance hearing when required discovery has not been forthcoming, and limits the hearing to certain enumerated matters mostly derived from Dist./Mun. Cts. R. Crim. P. 5. The court must determine whether the pretrial report and discovery are complete; must hear and decide pending discovery motions; and may order sanctions for non-compliance. If discovery is completed, it may receive a plea or admission; obtain the defendant's decision on whether to elect or waive a jury trial; and schedule the trial date or trial assignment date.

Rule 12: Pleas and Withdrawals of Pleas

(a) Pleas In General.

(1) Pleas That May Be Entered and by Whom. A defendant may plead not guilty, or guilty, or with the consent of the judge, nolo contendere, to any crime with which the defendant has been charged and over which the court has jurisdiction. A plea of guilty or nolo contendere shall be received only from the defendant personally except pursuant to the provisions of Rule 18(b) . Pleas shall be received in open court and the proceedings shall be recorded. If a defendant refuses to plead or if the judge refuses to accept a plea of guilty or nolo contendere, a plea of not guilty shall be entered.

(2) Admission to Sufficient Facts. In a District Court, a defendant may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty.

(3) Acceptance of Plea of Guilty, a Plea of Nolo Contendere, or an Admission to Sufficient Facts. A judge may accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts only after first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission. A judge may refuse to accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts.

(b) Plea Discussions; Pleas Without Plea Agreement and With Plea Agreement.

(1) In General. The defendant may tender a guilty plea, a plea of nolo contendere, or an admission to sufficient facts to warrant a finding of guilty without entering into a plea agreement with the prosecutor. Alternatively, if the defendant intends to tender a plea of guilty

or an admission to sufficient facts, the prosecutor and the defendant may enter into a plea agreement pursuant to Rule 12(b)(5).

(2) Plea Discussions. The judge may participate in plea discussions at the request of one or both of the parties if the discussions are recorded and made part of the record.

(3) Inquiry as to the Existence of a Plea Agreement. After being informed that a defendant intends to plead guilty or to admit to sufficient facts, the judge shall inquire as to the existence of a plea agreement.

(4) Pleas Without an Agreement. If the defendant intends to plead guilty or nolo contendere or to admit to sufficient facts and there is no agreement under Rule 12(b)(5), the judge shall follow the procedures set forth in Rule 12(c).

(5) Pleas Conditioned Upon an Agreement. The defendant may enter into a plea agreement with the prosecutor if the defendant intends to plead guilty or admit to sufficient facts but not if the defendant intends to plead nolo contendere.

(A) A plea agreement may specify both that the parties agree on a specific sentence, including the length of any term of probation, and that the prosecutor will make one or more of the following charge concessions: amend an indictment or complaint; dismiss, reduce, or partially dismiss charges; not seek an indictment; or not bring other charges. The judge shall follow the procedures set forth in Rule 12(d) when the parties enter into a plea agreement that includes both an agreement to a specific sentence and a charge concession. If the judge accepts the plea agreement and the defendant's plea, Rule 12(d) requires the judge to sentence the defendant according to the terms of the plea agreement.

(B) When the plea is conditioned on a plea agreement other than one described in Rule 12(b)(5)(A), the judge shall follow the procedures set forth in Rule 12(c).

(c) Procedure If No Plea Agreement or If Plea Agreement Does Not Include Both a Specific Sentence and a Charge Concession.

(1) Disclosure of the Terms of Any Plea Agreement. If the parties have entered into a plea described in Rule 12(b)(5)(B), the parties shall disclose the terms of that agreement on the record in open court unless the judge for good cause allows the parties to disclose the terms of the plea agreement in camera on the record.

(2) Tender of Plea. The defendant's plea or admission shall be tendered to the judge.

(3) Colloquy. The judge shall:

(A) Provide notice to the defendant of the consequences of a plea. The judge shall inform the defendant:

(i) that by a plea of guilty or nolo contendere, or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;

(ii) of the maximum possible sentence on the charge, and, if applicable,

(a) any different or additional punishment based upon subsequent offense provisions of the General Laws;

(b) that the defendant may be subject to adjudication as a sexually dangerous person and required to register as a sex offender;

(c) the mandatory minimum sentence on the charge; and

(d) that a conviction or plea of guilty for an offense listed in G.L. c. 279, § 25(b) implicates the habitual offender statute, and that upon conviction or plea of guilty for the third or subsequent of said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct;

(iii) of the following potential immigration consequences of the plea:

(a) that, if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere, or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization; and

(b) that, if the offense to which the defendant is pleading guilty, nolo contendere, or admitting to sufficient facts is under federal law one that presumptively mandates removal from the United States and federal officials decide to seek removal, it is practically inevitable that this conviction would result in deportation, exclusion from admission, or denial of naturalization under the laws of the United States.

(B) Factual basis for the charge. The prosecutor shall present the factual basis of the charge.

(C) Rights of Victims and Witnesses of Crimes. If applicable, the judge shall inquire of the prosecutor as to compliance with the requirements of G.L. c. 258B , Rights of Victims and Witnesses of Crimes. At any time prior to imposing sentence, the judge shall give any person entitled under G.L. c. 258B to make an oral and/or written victim impact statement the opportunity to do so.

(4) Disposition Requests.

(A) When there is no agreed-upon recommendation as to sentence. The judge shall give both parties the opportunity to recommend a sentence to the judge. In the District Court, the judge shall inform the defendant that the disposition imposed will not exceed the terms of the defendant's request without first giving the defendant the right to withdraw the plea. In the Superior Court, the judge shall inform the defendant that the disposition imposed will not exceed the terms of the prosecutor's recommendation without first giving the defendant the right to withdraw the plea. At any time prior to accepting the plea or admission, the judge may continue the hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination of a just disposition in the case.

(B) Where there is an agreed-upon recommendation as to disposition. The judge shall inform the defendant that the sentence imposed will not exceed the terms of the agreement without first giving the defendant the right to withdraw the plea. At any time prior to accepting the plea or admission, the judge may continue the hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination of a just disposition in the case.

(5) Findings of Judge; Acceptance of Plea. The judge shall inquire whether the defendant still wishes to plead guilty or nolo contendere or admit to sufficient facts. If so, the judge will then make findings as to whether the plea or admission is knowing and voluntary, and whether there is an adequate factual basis for the charge. The defendant's failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a guilty plea or admission. At the conclusion of the hearing, the judge shall accept or reject the tendered plea or admission.

(6) Sentencing. After acceptance of a plea of guilty or nolo contendere or an admission, the judge shall sentence the defendant.

(A) Conditions of Probation. If the judge's disposition includes a term of probation, the judge, with the assistance of probation where appropriate and after considering the recommendations of the parties, shall impose appropriate conditions of probation.

(B) Intent to Impose Sentence Exceeding Requested Disposition. In District Court, if the judge decides to impose a sentence that will exceed the defendant's request for disposition under Rule 12(c)(4)(A) or the parties' request for disposition under Rule 12(c)(4)(B), the judge shall, on the record, advise the defendant of that intent and shall afford the defendant the opportunity to withdraw the plea or admission. In Superior Court, if the judge decides to

impose a sentence that will exceed the prosecutor's request for disposition under Rule 12(c)(4)(A) or the parties' request for disposition under Rule 12(c)(4)(B), the judge shall, on the record, advise the defendant of that intent and shall afford the defendant the opportunity to withdraw the plea or admission. In both District and Superior Court, the judge may indicate to the parties what sentence the judge would impose.

(d) Procedure If Plea Agreement Includes Both a Specific Sentence and a Charge Concession.

(1) Disclosure of the Terms of the Plea Agreement. The parties shall disclose the terms of the plea agreement on the record in open court unless the judge for good cause allows the parties to disclose the terms of the plea agreement in camera on the record.

(2) Tender of Plea. The defendant's plea or admission shall be tendered to the judge.

(3) Colloquy. The judge shall:

(A) Provide notice to the defendant of the consequences of a plea. The judge shall inform the defendant:

(i) that by a plea of guilty or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;

(ii) of the maximum possible sentence on the charge, and, if applicable,

(a) any different or additional punishment based upon subsequent offense provisions of the General Laws;

(b) that the defendant may be subject to adjudication as a sexually dangerous person and required to register as a sex offender;

(c) the mandatory minimum sentence on the charge; and

(d) that a conviction or plea of guilty for an offense listed in G.L. c. 279, § 25(b) implicates the habitual offender statute, and that upon conviction or plea of guilty for the third or subsequent of said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation , parole, work release or furlough, or to receive any deduction in sentence for good conduct;

(iii) of the following potential immigration consequences of the plea:

(a) that, if the defendant is not a citizen of the United States, the guilty plea or admission may have the consequence of deportation, exclusion from admission, or denial of naturalization; and

(b) that, if the offense to which the defendant is pleading guilty or admitting to sufficient facts is under federal law one that presumptively mandates removal from the United States and federal officials decide to seek removal, it is practically inevitable that this conviction would result in deportation, exclusion from admission, or denial of naturalization under the laws of the United States.

(B) Factual basis for the charge. The prosecutor shall present the factual basis of the charge.

(C) Rights of Victims and Witnesses of Crimes. If applicable, the judge shall inquire of the prosecutor as to compliance with the requirements of G.L. c. 258B, Rights of Victims and Witnesses of Crimes. The judge shall give any person entitled under G.L. c. 258B to make an oral and/or written victim impact statement the opportunity to do so.

(4) Review; Acceptance or Rejection of Plea Agreement. The judge must accept or reject the plea agreement before the judge accepts a guilty plea or admission. The judge should not accept a plea agreement without considering whether the proposed disposition is just. At any time prior to the acceptance or rejection of the plea agreement, the judge may continue the plea hearing on the judge's own motion to ensure that the judge has been provided with, and has had an opportunity to consider, all of the facts pertinent to a determination whether the plea agreement provides for a just disposition in the case.

(A) Accepted Plea Agreement. If the judge accepts the plea agreement, the judge shall inform the defendant that the judge will impose the sentence, including the length of any term of probation, provided in the plea agreement.

(B) Rejected Plea Agreement. If the judge rejects the plea agreement, the judge shall, on the record and in open court (or, for good cause, in camera on the record):

(i) inform the parties that the judge rejects the plea agreement, but the judge may indicate to the parties what sentence the judge would impose or what additional information the judge will require before the judge may make this determination;

(ii) allow either party to withdraw from the plea agreement; and

(iii) allow the defendant to withdraw his or her plea or admission.

(5) Findings of Judge as to Plea Agreement and Plea; Acceptance of Plea. If the judge has accepted the plea agreement, the judge shall inquire whether the defendant still wishes to

plead guilty or admit to sufficient facts. If so, the judge will then make findings as to whether the plea agreement and plea or admission are knowing, voluntary, and supported by an adequate factual basis. The defendant's failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a guilty plea or admission. At the conclusion of the hearing, the judge shall accept or reject the tendered plea or admission.

(6) Sentencing. After accepting the plea agreement and the plea or admission, the judge shall impose sentence according to the terms of the plea agreement. If the plea agreement includes a term of probation, the judge, with the assistance of probation where appropriate and after considering the recommendations of the parties, shall impose appropriate conditions of probation.

(e) Availability of Criminal Record and Presentence Report.

Prior to sentencing under Rule 12(c)(6) or to the judge's decision to accept or reject a plea agreement under Rule 12(d)(4), the judge, prosecutor, and counsel for the defendant shall have an opportunity to review the defendant's criminal record and any report of the presentence investigation as described in Rule 28(d)(2) . In extraordinary cases, the judge may except from disclosure to the parties parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.

(f) Inadmissibility of Pleas, Offers of Pleas, and Related Statements.

Except as otherwise provided in this subdivision, evidence of a plea of guilty, or a plea of nolo contendere, or an admission, or of an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, later withdrawn, or statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceedings against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or a plea of nolo contendere, or an admission or an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, is admissible in a criminal proceeding for perjury if the statement was made by the defendant under oath, on the record, and in the presence of counsel, if any.

As amended January 29, 2015, effective May 11, 2015.

Statement of Opposition to the Adoption of Revised Mass. R. Crim. P. 12

LENK, J. Apart from changing the current Rule 12 of the Massachusetts Rules of Criminal Procedure to require that plea discussions with a judge be on the record, I am not persuaded that further, let alone extensive, revision to the rule is necessary or desirable . As then Justice Herbert P. Wilkins wrote in 1991, "I decline to join in the promulgation of a rule that apparently is intended to deal with a problem that is not shown to exist ." Statement of Opposition to the Adoption of Revised Supreme Judicial Court Rule 3:07, DR 7-108(D), August 26, 1991.

The key impetus for changing Rule 12 stems from our decisions in Commonwealth v . Rodriguez, 461 Mass. 256 (2012) and Commonwealth v. Dean-Ganek, 461 Mass. 305 (2012), "holding that former Rule 12 permitted a judge to impose a sentence more lenient than the sentence agreed to in a plea agreement accepted by the judge . . .[and that] jeopardy attaches when the judge accepts the plea . . . thus preventing the prosecution's withdrawal in such a case, even when the plea agreement included negotiated charge concessions." Reporter's Notes to Proposed Rule 12(b) - (e) of the Massachusetts Rules of Criminal Procedure. Apart from continuing to think both that these cases were correctly decided and that the current Rule 12 embodies highly desirable judicial discretion, I am unaware of any instance in which a judge has accepted a plea in the context of a charge concession and then imposed a sentence more lenient than that jointly recommended in a plea agreement.

The current rule has worked quite well for quite some time, and has the not inconsiderable virtue of being familiar to bench and bar. Although the rule as changed is narrower than earlier proposed versions and Rule 29 remains unchanged, it is still a solution in search of a problem. To the extent that the adopted Rule 12 seeks to circumscribe the exercise of judicial discretion, even in limited circumstances, it is misguided and most unfortunate.

Chief Justice Gants and Justice Hines have authorized me to say that they join in this statement .

Reporter's Notes

(January 2015).

Rule 12 Pleas and Plea Agreements

As the title of Rule 12 suggests, the 2015 revision of the rule resulted in a more carefully delineated and somewhat expanded role for plea agreements in the process of a judge's consideration and acceptance of a proffered guilty plea. The rule's amendment was in response to the Supreme Judicial Court's interpretation of Rule 12 in Commonwealth v. Rodriguez, 461 Mass. 256 (2012), and Commonwealth v. Dean-Ganek, 461 Mass. 305 (2012), holding that former Rule 12 permitted a judge to impose a sentence more lenient than the sentence agreed to in a plea agreement accepted by the judge. The Court further held that jeopardy attaches when the judge accepts a plea, see Dean-Ganek, 461 Mass. at 312-313, thus preventing the prosecution's withdrawal in such a case, even when the plea agreement included negotiated charge concessions.

As amended, Rule 12 provides that, if (1) the parties enter a plea agreement which includes both a specific, agreed sentence and a prosecutorial charge concession and (2) the judge accepts that agreement, then the judge is bound to impose the agreed sentence. If, on the other hand, the judge rejects such an agreement, either party may withdraw. In all other pleas or admissions,

whether conditioned on a plea agreement or not, the amended rule provides that the judge is not bound by the sentencing recommendations of the parties. However, in such cases, the amended rule permits the defendant to withdraw the plea if the judge indicates an intent to impose a sentence more severe than (1) an agreed recommendation (but without charge concessions), (2) the prosecutor's recommendation if there is no agreed sentencing recommendation, or (3) in District Court, the disposition requested by the defendant. Finally, in order to promote fair and efficient plea bargaining and to establish rules to govern the previously unregulated and widely varying practice of lobby conferences, amended Rule 12 provides for judicial participation in plea negotiations at the request of a party and requires that plea discussions with judicial participation be recorded.

Rule 12(a) Pleas in General

The 2015 amendments made no substantive changes to Rule 12(a). The only changes were stylistic, designed to make the rule more specific and clear.

Rule 12(b) Plea Discussions; Pleas Without Plea Agreement and With Plea Agreement

Rule 12(b)(1) In General

Rule 12(b)(1) makes it clear that the defendant may tender a guilty plea, a nolo contendere plea, or, in District Court, an admission to sufficient facts, without entering into a plea agreement. See Rule 2(b)(7) (defining "District Court" to include all divisions of the District Court, Boston Municipal Court, and Juvenile Court). However, the rule also provides that the parties may condition a guilty plea (or, in District Court, an admission to sufficient facts) on a plea agreement under Rule 12(b)(5), discussed below. Rule 12(b)(1) omits nolo contendere pleas from those that can be conditioned on a plea agreement, an omission that Rule 12(b)(5) makes explicit, thus limiting the benefits of a plea agreement to those defendants who take responsibility for the crimes to which they are pleading.

Rule 12(b)(2) Plea Discussions

Rule 12(b)(2) provides that the judge may participate in plea discussions at the request of either party provided that any such discussions are recorded and made part of the record. Such limited judicial participation in plea negotiations facilitates fair and efficient case management, particularly in courts with crowded dockets, and it has been a longstanding though largely unregulated practice in many courts. The rule maintains the recognized benefits of this practice while providing important safeguards to curb its potential for abuse.

Recognizing that judicial participation in plea negotiations can be coercive and leave the impression of unfairness, this provision addresses these concerns by conditioning such participation on the request of one or both parties and further requiring that these discussions be recorded and made a part of the record. See Murphy v. Boston Herald, Inc., 449 Mass. 42 , 57 n. 15 (2007) (stressing the importance of recording lobby conferences). The rule does not, however, preclude a judge's uninvited announcement that he or she is willing to participate in plea discussions if invited to do so by either party. The rule's requirement that the discussions be recorded and made part of the record is not meant to require that they invariably be conducted in open court. As with other potentially sensitive matters, judges have discretion under the

appropriate circumstances to conduct plea discussions in a manner that restricts immediate public access, most likely at sidebar, provided they are recorded. Judges are experienced in determining when sidebars or other such restrictions are appropriate, and the rule anticipates that they will continue to apply that experience in judiciously exercising this discretion.

Rule 12(b)(3) Inquiry as to the Existence of a Plea Agreement

Rule 12(b)(3) provides that, when a defendant indicates an intent to plead guilty or to admit to sufficient facts, the judge shall inquire if there is a plea agreement. Because plea procedures vary depending on whether there is an agreement that will bind the judge if accepted, such an inquiry is necessary in order to determine which procedure is applicable. Because Rule 12 does not permit a nolo contendere plea to be conditioned on a plea agreement, the rule does not require the judge to ask if there is a plea agreement in such a case. However, it may make sense for the judge nevertheless to make this preliminary inquiry in the case of a nolo plea, if only to ensure that the parties understand that any such plea agreement is outside the rule, constituting at best a joint recommendation that the judge is free to disregard.

Rule 12(b)(4) Pleas Without an Agreement

If there is no plea agreement under Rule 12(b)(5), Rule 12(b)(4) provides that the procedure for taking a plea or admission set forth in Rule 12(c) applies. In such a case, the parties are each free to make any dispositional request permitted by law.

Rule 12(b)(5) Pleas Conditioned Upon an Agreement

Rule 12(b)(5) provides that a defendant may condition an intended guilty plea or admission on a plea agreement with the prosecutor. As noted, the rule explicitly precludes a plea agreement if the intended plea is nolo contendere. The rule divides plea agreements into two categories. Rule 12(b)(5)(A) provides for a type of plea agreement that, if accepted by the judge, binds the judge to sentence in accordance with the agreement, and Rule 12(b)(5)(B) provides, in effect, that no other plea agreement binds the judge to impose a particular sentence.

Under Rule 12(b)(5)(A), an accepted plea agreement will bind the judge if the parties have agreed both to a particular charge concession(s) by the prosecutor and to a specific sentence, including the length of any probationary term. Rule 12(b)(5)(A)'s reach is intentionally narrow. The rule carves out an exception to judicial sentencing discretion, an exception applicable only to a plea bargain that expressly includes both a prosecutorial charge concession and an agreed sentence to a specific term of incarceration, to a specific period of probation, or to a specific term of incarceration coupled with a specific period of probation (e.g., a term of probation to be served in lieu of a suspended sentence of incarceration, or a term of probation to be served on and after a term of incarceration). If the parties enter into such an agreement, the rule requires the judge to follow the plea procedures set forth in Rule 12(d), noting that those procedures mandate imposition of the agreed sentence if the judge accepts the plea agreement and the plea. See Rule 12(d)(4)(A) and (6), discussed below. As discussed below, Rule 12(d) further provides that, if the judge rejects such a plea agreement, either party may withdraw from the agreement and thus from the plea. See Rule 12(d)(4)(B).

Even though Rule 12(b)(5)(A) permits the parties to include a specific period of probation within a binding plea agreement, the rule does not permit the parties to bind the judge to impose specific conditions of probation. Any agreement by the parties concerning conditions of probation is treated as a non-binding recommendation for the judge to consider, with the assistance of probation, in deciding what probationary conditions are appropriate in the case. See Rule 12(d)(6), discussed below. Finally, nothing in Rule 12 is intended to limit a judge's lawful discretion to modify probationary conditions during the course of probation or to adjust the probationary term upon a finding of a probation violation. In short, a plea agreement containing a charge concession and an agreed-upon period of probation will bind a judge who accepts that agreement to impose the agreed term of probation, but the parties may not by agreement trench upon the longstanding prerogative of the judge to determine and subsequently to modify any conditions of probation during that probationary term. See Commonwealth v. Goodwin, 458 Mass. 11 , 17-19 (2010).

Under Rule 12(b)(5)(B), pleas conditioned on plea agreements other than those described in Rule 12(b)(5)(A) are governed by the procedures set forth in Rule 12(c), the procedures that also govern pleas in which there is no plea agreement. As discussed below, Rule 12(c) treats any agreement contained in a Rule 12(b)(5)(B) plea agreement as a non-binding, joint recommendation. For example, if the parties agree to a specific sentence unaccompanied by a charge concession, to a charge concession unaccompanied by an agreement to a specific sentence, or to some other dispositional alternative such as incarceration in a particular facility, that agreement would not bind the judge in imposing sentence. As was true under former Rule 12(b), the parties are free to enter into an agreement to recommend any disposition, or kind of disposition, permitted by law in the case in question. However, unless the agreement provides for both a charge concession and a specific sentence, the judge cannot be bound to follow that recommendation.

Rule 12(c) Procedure If No Plea Agreement or If Plea Agreement Does Not Include Both a Specific Sentence and a Charge Concession

Rule 12(c) provides for the plea procedure in cases in which the parties have not entered a binding plea agreement under Rule 12(b)(5)(A). Rule 12(c)'s procedure is parallel to that set forth in Rule 12(d), which is applicable to pleas and admissions when there is a Rule 12(b)(5)(A) binding plea agreement. The two sections diverge in their respective timing of receipt of victim impact statements, *compare* Rule 12(c)(3)(C) *with* Rule 12(d)(3)(C), treatment of the parties' sentencing recommendations, *compare* Rule 12(c)(4) *with* Rule 12(d)(4), and sentencing, *compare* Rule 12(c)(6) *with*Rule 12(d)(6). Otherwise, the two plea procedures are substantively identical.

Rule 12(c)(1) Disclosure of Terms of Plea Agreement

As discussed above, if the plea is conditioned on a plea agreement, the applicability of Rule 12(c)'s procedures depends on the provisions of that agreement. If the agreement provides for both a prosecutorial charge concession and an agreed specific sentence, the procedures under Rule 12(d) apply; if not, Rule 12(c) applies. It is thus important for the parties and the judge to be clear about the terms of any agreement before the plea procedure begins.

Rule 12(c)(2) Tender of Plea

Because Rule 12(c) applies to pleas in which there is no agreement as well as to pleas conditioned on an agreement, Rule 12(c)(2) moves the tender of plea or admission to the beginning of the plea procedure so that from the outset the terms of the plea or admission are clear even if there is no agreement. Although the plea tender precedes Rule 12(c)(3)'s colloquy, which includes the notice of the consequences of the plea, Rule 12(c)(5) permits the defendant to withdraw the tendered plea or admission subsequent to the colloquy but prior to the judge's acceptance of the plea or admission. In a District-Court plea in which there will be a recommendation of probation, whether unagreed or agreed, the party(ies) must consult with the probation department before tendering the plea so that probation will be in a position to provide any assistance that the judge may require in sentencing. See Dist./Mun. Ct. R. Crim. P. 4(c) .

Rule 12(c)(3) Colloquy

Rule 12(c)(3)(A) requires the judge to begin the plea colloquy by notifying the defendant of the consequences of the tendered plea or admission. The notice of consequences is substantively identical to former Rule 12(c)(3)'s required notice of consequences with two exceptions. First, unlike its predecessor, Rule 12(c)(3)(A)(ii)(d) requires the notice mandated by the 2012 amendments to the habitual-offender statute. See G.L. c. 279, § 25(d) (requiring notice of potential habitual-offender consequences "prior to accepting a guilty plea for any qualifying offense listed in subsection (b) [of the statute]" but further providing that the failure to give such notice is not a basis to vacate an otherwise valid plea or conviction).

Second, Rule 12(c)(3)(A)(iii) expands former Rule 12(c)(3)(C)'s required noncitizen warning. As did former Rule 12(c)(3)(C), Rule 12(c)(3)(A)(iii)(a) requires the warning mandated by G.L. c. 278, § 29D , advising a defendant that, if he or she is a noncitizen, his or her plea or admission may result in deportation, exclusion from admission, or denial of naturalization. Rule 12(c)(3)(A)(iii)(b) advises further that, if (1) the offense to which the defendant is pleading is under federal law one that "presumptively mandates removal from the United States" (a so-called "removable offense," see Padilla v. Kentucky, 559 U.S. 356 , 363-364 (2010)) and (2) federal officials seek removal, it is "practically inevitable that [defendant's] conviction would result in deportation, exclusion from admission, or denial of naturalization."

This additional warning recognizes that under federal immigration law there are a substantial number of crimes – including "all controlled substances convictions except for the most trivial of marijuana possession offenses," see Padilla, 559 U.S. at 368; 8 U.S.C. § 1227(a)(2)(B)(i) (2008) – the conviction for which make "deportation practically inevitable" if federal officials seek the defendant's removal. See Commonwealth v. DeJesus, 468 Mass. 174 , 181 & n. 5 (2014). See also Moncrieffe v. Holder, 133 S. Ct. 1678 , 1682 (2013) (cited in DeJesus, noting that the federal Immigration and Nationality Act prohibits discretionary relief for deportations based on convictions for a wide range of crimes no matter how compelling the circumstances). Further, as the warning states, once deported due to such a conviction, a defendant would almost certainly be denied both re-admission to the United States and naturalization. See, e.g., L. Rosenberg, D. Kanstroom & J. Smith, Immigration Consequences of Criminal Proceedings, Massachusetts Criminal Practice § 42.2 (E. Blumenson & A. Leavens eds., 4th ed. 2012). It is important to

appreciate that Rule 12(c)(3)(A)(iii)(b)'s warning is limited to the consequences of a conviction for a "removable offense." The narrow focus of this enhanced warning is purposeful and should not be read to suggest that convictions for other crimes would have no serious immigration consequences. Under federal law, conviction for – or even an admission to conduct constituting – a broader range of crimes than those presumptively mandating removal can also result in denial of re-admission and of naturalization. Id. §§ 42.2- 42.3.

Finally, as Rule 12(c)(3)(A)(iii)'s warning provides, under federal immigration law, "convictions" include admissions to sufficient facts even when the result is a continuance without a finding (CWOF), if the continuance is conditioned on "some form of punishment, penalty or restraint" such as payment of costs or restitution. See DeVaga v. Gonzalez, 503 F.3d 45 , 49 (1st Cir. 2007) (holding that a CWOF conditioned on payment of restitution satisfies 8 U.S.C. § 1101(a)(48)(A)(ii) 's provision that an admission to sufficient facts constitutes a "conviction" if the admission results in "some form of punishment, penalty or restraint"); Matter of Cabrera, 24 I. & N. Dec. 459 , 462 (BIA 2008) (holding that imposition of costs and surcharges following a plea is a "penalty" or "punishment" for purposes of § 1101(a)(48)(A)(ii)).

This noncitizen warning is not meant to displace the critical role of counsel in providing more particular advice concerning the immigration consequences of a particular plea. Quite the contrary, the warning is meant to trigger that advice if, under circumstances best known by counsel, a defendant is risking serious immigration consequences by pleading guilty or admitting to sufficient facts. See Padilla v. Kentucky, 559 U.S. 356 , 368-369 (2010);Commonwealth v. Clarke, 460 Mass. 30 , 45-46, 48-49 & n. 20 (2011) (noting that then-Rule 12's requirement of "[immigration] warnings is not an adequate substitute for defense counsel's professional obligation to advise her client of the likelihood of specific and dire immigration consequences that might arise from such a plea"), partially abrogated on other grounds, Chaidez v. United States, 133 S. Ct. 1103 (2013); DeJesus, 468 Mass. at 182 (holding that counsel's advice to a noncitizen defendant that he would be "eligible for deportation" and would "face deportation" if he pled guilty to possession of cocaine with intent to distribute (a removable offense under the immigration statute) was constitutionally inadequate).

Rule 12(c)(3)(B) requires the prosecutor to present the factual basis of the charge. Unlike former Rule 12(c)(5)(A), Rule 12(c)(3)(B) does not exclude nolo contendere pleas from the requirement that the prosecutor present a factual basis for the tendered plea or admission. The factual basis of a nolo plea provides information essential to crafting an appropriate sentence, but, because the defendant is not called upon to acknowledge or admit those facts, they will not be admissible in any subsequent proceeding against the defendant. See, e.g., Mass. Guide to Evidence § 803(22)(2014) (explicitly excluding judgments based on nolo contendere pleas from the hearsay exception generally applicable to judgments of conviction).

The prosecutor can present the factual basis in the traditional manner, stating the facts that he or she expects to prove if the case goes to trial, but the rule also permits presenting sworn testimony, at the request of the judge or otherwise, as a way to satisfy this requirement. If the plea is an Alford plea, i.e., one in which the defendant declines to admit one or more elements of the offense to which he or she is nevertheless pleading guilty, the Supreme Court requires

"strong evidence of [the defendant's] guilt." See North Carolina v. Alford, 400 U.S. 25 , 37-38 (1970). In such a case, the prosecutor should give particular attention to this testimonial option. See E. Cypher, Procedure if Defendant pleads Guilty or Nolo Contendere but does not admit Participation in Crime, 30A Mass. Prac., Criminal Practice & Procedure, § 24:78 n. 4 (2014) ("[I]f an Alford plea is offered, the Commonwealth should . . . [offer] sworn testimony to show the case is strong against the defendant, his defense is non-existent, and the defendant has presented reasons why the plea should be accepted").

As the final part of the colloquy, Rule 12(c)(3)(C) requires the judge to inquire of the prosecutor as to compliance with G.L. c. 258B . However, the judge is granted discretion concerning when to hear any victim-impact statements. The judge does not need this input until deciding whether to accept or reject the plea and then to impose sentence. However, hearing victim-impact statements at this stage of the proceeding – just before hearing the parties' respective sentencing recommendations and arguments – may provide the judge with the proper perspective for considering those recommendations and deciding what is a just disposition in the case.

Rule 12(c)(4) Disposition Requests

Rule 12(c)(4) gives the parties the opportunity to make their respective sentencing recommendations. This section has two subdivisions: Rule 12(c)(4)(A) applies to cases in which there is no agreed-upon sentence recommendation, and Rule 12(c)(4)(B) applies to cases in which there is. Rule 12(c)(4)(A) requires a District Court judge to inform a defendant of the statutory right to withdraw the plea if the judge imposes a sentence that exceeds the defendant's request, see G.L. c. 278, § 18 , and a Superior Court judge to inform a defendant of the right to withdraw the plea if the disposition imposed exceeds the prosecutor's recommendation. If the parties have agreed on a sentence recommendation, Rule 12(c)(4)(B) requires the judge to inform the defendant that the plea may be withdrawn if the sentence imposed exceeds the agreed-upon recommendation. However, unlike Rule 12(d)(4)(B)(ii), which applies to binding plea agreements, Rule 12(c)(4)(B) does not give the prosecution the right to withdraw from the plea agreement and the plea if the judge announces an intent to impose a sentence more lenient than the sentence jointly recommended.

If in considering the parties' joint or respective recommendations the judge decides that he or she needs more information or time to determine a just disposition in the case, both subsections of Rule 12(c)(4) allow the judge to continue the plea hearing for that purpose. Among the factors pertinent to the judge's sentencing decision are the nature of the offense committed, the manner in which it was committed, the impact that the offense had on any victims, the defendant's criminal history, and the defendant's circumstances (e.g., his or her mental health, substance abuse, and/or psychological issues). The judge, in consultation with probation where appropriate, should take the time and consider the facts necessary to craft a sentence, including any term and conditions of probation, that is fair, appropriate to the crime, and designed to diminish the risk of recidivism.

Rule 12(c)(5) Findings of Judge; Acceptance of Plea

Rule 12(c)(5) requires the judge to inquire if the defendant still wishes to plead guilty or admit to sufficient facts. At this point, the defendant has received the notice of consequences of the plea

or admission, has heard the factual basis for the charged offense(s), and is aware of the respective sentencing recommendations of the parties. The defendant may have also heard the victim-impact statement(s), if any. The defendant must now elect to go forward with his or her tendered plea or admission, or choose to withdraw it and go to trial. If the defendant elects to go forward, the judge then makes the necessary inquiries to ensure that the plea or admission is knowing and voluntary. The amended rule is intended to make no change to former Rule 12(c)(5)'s provision for this voluntariness hearing, either in its form or substance.

The rule also requires the judge to find that there is an adequate factual basis for the plea or admission. As did its predecessor, Rule 12(c)(5) provides that the defendant's failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a guilty plea. The rule is not intended to work any change to former Rule 12(c)(5)(A) in this regard.

If the judge is satisfied that the plea or admission is knowing, voluntary, and supported by an adequate factual basis, the judge is then in a position to accept the tendered plea or admission. Of course, if the judge is not satisfied in this regard, or, if for some other reason the judge determines that the plea or admission would not result in a just disposition of the case, the judge is permitted to reject the plea or admission. Nothing in the rule is meant to deprive the judge of this longstanding discretion. See Commonwealth v. Dilone, 385 Mass. 281 , 285 (1982) (acceptance of a guilty plea is "wholly discretionary with the judge"), citing Santobello v. New York, 404 U.S. 257 (1971); E. Cypher, 30A Mass. Prac., Criminal Practice & Procedure, Judge may refuse to accept guilty plea, plea of nolo contendere or admission to sufficient facts, § 24:60 (4th ed. 2014).

Rule 12(c)(6) Sentencing

If the judge accepts the plea or admission, the judge then imposes sentence under Rule 12(c)(6). As required by G.L. c. 278, § 18 , Rule 12(c)(6)(B) explicitly permits a District Court defendant to withdraw his or her tendered plea or admission if the intended sentence exceeds the defendant's requested disposition. Similarly, in Superior Court a defendant may withdraw his or her plea if the intended sentence exceeds the parties' agreed-upon recommendation or, if there is no agreed-upon recommendation, the recommendation of the prosecutor. In either event, the judge may indicate to the parties what sentence the judge would impose if the plea were to go forward.

Rule 12(d) Procedure If Plea Agreement Includes Both a Specific Sentence and a Charge Concession

The procedure set out in Rule 12(d) applies to pleas and admissions conditioned on a plea agreement that includes both an agreed charge concession by the prosecutor and an agreement to a specific sentence. See Rule 12(b)(5)(A), discussed above. Under Rule 12(d)(6), discussed below, if the judge accepts such a plea agreement, the judge is bound to impose the agreed sentence. If, however, the judge rejects the plea agreement, either party may withdraw from the agreement. See Rule 12(d)(4)(B), discussed below. Because jeopardy attaches when the judge accepts a tendered plea or admission, at that point foreclosing the prosecutor's withdrawal from any plea agreement, see Commonwealth v. Dean-Ganek, 461 Mass. 305 , 312-313 (2012), the rule requires that the judge accept or reject a Rule 12(b)(5)(A) plea agreement prior to accepting

the plea or admission. And, because such a plea agreement binds the judge if accepted, Rule 12(d) is structured to ensure that, at the time the judge must accept or reject the agreement, the judge has the necessary information to determine if the agreed disposition would be just and appropriate for the case.

Rule 12(d)(1) Disclosure of the Terms of the Plea Agreement

Rule 12(d)(1) requires disclosure of the plea agreement at the beginning of the plea hearing. Because acceptance of the agreement binds the judge to sentence according to its terms, it is essential that this disclosure include a clear explanation on the record of those terms.

Rule 12(d)(2) Tender of Plea

Rule 12(d)(2) moves the tender of plea to the beginning of the plea procedure so that the terms of the plea or admission are clear at the outset. In District Court, if the plea agreement includes any probationary terms or conditions, the parties must consult with the probation department before tendering the plea so that probation will be in a position to provide any assistance that the judge may require in considering the plea or the plea agreement. See Dist./Mun. Ct. R. Crim. P. 4(c) . The plea tender precedes Rule 12(d)(3)'s colloquy, which includes the notice of the consequences of the plea or admission, but Rule 12(d)(5) permits the defendant to withdraw the tendered plea or admission subsequent to being informed of its consequences and prior to the judge's acceptance of it.

Rule 12(d)(3) Colloquy

Rule 12(d)(3)(A) provides for the notice of consequences in terms substantively identical to those of 12(c)(3)(A). The above discussion of Rule 12(c)(3)(A) thus applies here with equal force.

Rule 12(d)(3)(B) and (C) respectively require the prosecutor's presentation of the factual basis for the charge and any victim-impact statements mandated by G.L. c. 258B . As with Rule 12(c)(3)(B), the prosecutor can satisfy this obligation to inform the judge of the factual basis of the charge in the traditional manner, stating the facts that he or she expects to prove if the case goes to trial, but the rule also permits presenting sworn testimony, at the request of the judge or otherwise. Rule 12(d)(3)(C) provides for the receipt of any victim-impact statements at this time. While in some instances it may not be necessary for the judge to hear the victim-impact statements before deciding whether to accept the plea agreement, the judge should not defer hearing from the victims absent the most unusual circumstances. Victim-impact statements delivered after the judge accepts the plea agreement can have no effect on the sentence.

Rule 12(d)'s placement of the facts describing the offense and its impact on the victims at this point in the procedure is necessary because, as noted, the rule requires that the judge accept or reject the plea agreement prior to accepting the plea itself, and that, if accepted, the plea agreement binds the judge to sentence according to the agreement. It is thus essential that a judge have access to all of the facts pertinent to a just and appropriate disposition in the case prior to deciding whether to accept or reject the plea agreement under Rule 12(d)(4).

Rule 12(d)(4) Review; Acceptance or Rejection of Plea Agreement

As noted, to avoid the double-jeopardy bar to the prosecutor's withdrawal from a rejected plea agreement, the judge must accept or reject the plea agreement before accepting the plea or admission. See Dean-Ganek, 461 Mass. at 312-313. Rule 12(d)(4) imposes that timing requirement. At this point in the procedure, the judge has heard the facts of the charged offense and its impact on any victims. Moreover, in reviewing the plea agreement, the judge will hear from the parties concerning the agreed disposition and will have access to the probation department concerning the defendant, including any criminal history. See Rule 12(e), discussed below. However, if the judge believes that there might be other information pertinent to a just disposition in the case, the rule permits the judge sua sponte to continue the plea hearing in order to obtain and consider that information. Once the judge accepts the agreement, he or she is bound by its terms, and it is therefore essential that at this point the judge be fully satisfied that the agreed-upon sentence is fair, appropriate to the crime, and designed to diminish the risk of recidivism. The only timing requirement imposed by Rule 12(d)(4) is that the judge accept or reject such a plea agreement prior to accepting the guilty plea.

If the judge accepts the plea agreement, Rule 12(d)(4)(A) requires the judge to inform the defendant that the judge will impose the sentence provided in the agreement. If the judge rejects the agreement, Rule 12(d)(4)(B) requires that the judge so inform the parties and permit either party to withdraw from the plea agreement and further permit the defendant to withdraw the tendered plea. Rule 12(d)(4)(B)(i) here gives the judge discretion to inform the parties what sentence he or she would impose if the plea were to go forward. The judge's doing so gives the parties the opportunity to proceed on that basis without agreement under Rule 12(c), to re-fashion their plea agreement to conform to the judge's suggestion (thus binding the judge if the judge accepts that amended agreement), or to forego the plea and try the case. If the judge has doubts concerning the wisdom or fairness of the agreed disposition and believes that additional information might help to resolve those doubts, Rule 12(d)(4)(B)(i) permits the judge so to inform the parties. This gives the parties the opportunity, if one or the other has the requested information and is in a position to divulge it, to do so before the judge decides whether to accept or reject the agreement.

Rule 12(d)(5) Findings of Judge as to Plea Agreement and Plea; Acceptance of Plea

If the judge accepts the plea agreement, Rule 12(d)(5) provides that the judge ask the defendant if the defendant wishes to go forward with the tendered plea or admission. At this point, the judge has informed the defendant of the consequences of the plea, including what the sentence will be, and the defendant has heard the factual basis of the charged offense and any victim statements as to its impact. If the defendant elects to go forward with the plea, the judge must then make the necessary inquiries to satisfy the judge that the plea agreement and the plea or admission are knowing and voluntary. Rule 12(d)(5) is intended to make no change to former Rule 12(c)(5)'s provision for a voluntariness hearing except that the hearing also applies to the plea agreement on which the plea or admission is conditioned.

Rule 12(d)(5) requires the judge to find that there is an adequate factual basis for the plea or admission. Rule 12(d)(5) preserves the former Rule 12(c)(5)(A)'s provision that the defendant's

failure to acknowledge all aspects of the factual basis shall not preclude a judge from accepting a guilty plea, and the rule is not intended to work any change on its predecessor in this regard.

Once satisfied that the plea agreement and the plea or admission are knowing and voluntary, and that the plea or admission is supported by an adequate factual basis, the judge is in a position to accept the tendered plea or admission. Of course, if the judge is not satisfied in this regard, or, if for some other reason the judge determines that the plea or admission is not just, the judge is permitted to reject the plea or admission. Rule 12(d)(5) is not intended to deprive the judge of this longstanding discretion, even if the judge has accepted the plea agreement on which the plea or admission is conditioned. See Commonwealth v. Dilone, 385 Mass. 281 , 285 (1982) (acceptance of a guilty plea is "wholly discretionary with the judge"), citing Santobello v. New York, 404 U.S. 257 (1971); E. Cypher, 30A Mass. Prac., Criminal Practice & Procedure, Judge may refuse to accept guilty plea, plea of nolo contendere or admission to sufficient facts, § 24:60 (4th ed. 2014).

Rule 12(d)(6) Sentencing

If the judge accepts the plea or admission, the judge must impose a sentence according to the terms of the plea agreement, including any agreed-upon probationary term. It lies with the judge, however, in consultation with probation where appropriate, to decide what conditions of probation are appropriate. To the extent that the plea agreement contains agreed-upon recommended conditions of probation, they are not binding on the judge; rather, they are to be considered as joint recommendations for the judge to consider, and neither party has the right to withdraw the plea or from the agreement if the judge declines to follow such recommendations. Unlike Rule 12(c)(6), Rule 12(d)(6) does not provide for the defendant's right to withdraw his or her plea in District Court. That right, afforded by G.L. c. 278, § 18 , does not here apply. Under Rule 12(b)(5), the defendant agreed to and thus requested the sentence set forth in the plea agreement. A sentence that comports with that agreement therefore cannot exceed the defendant's requested disposition.

Rule 12(e) Availability of Criminal Record and Presentence Report

Rule 12(e) is amended to recognize an admission to sufficient facts in District Court as the equivalent of a guilty plea, see, e.g., Rule 12(a)(2), and to omit the requirement that the parties must file a written motion to obtain a presentence report. The former amendment conforms Rule 12(e) to Rule 12(a)(2) as it was amended in 2004, and the latter amendment achieves consistency between Rule 12(e) and Rule 28(d)(2) . Further, the rule is amended to ensure that a judge considering whether to accept a binding plea agreement under Rule 12(d)(4) has both an updated record of the defendant's criminal record and any presentence report prepared by probation under Rule 28(d)(2) .

Rule 12(f) Inadmissibility of Pleas, Offers of Pleas, and Related Statements

The 2015 amendments made no changes to Rule 12(f).

Rule 13: Pretrial Motions

(Applicable to cases initiated on or after September 7, 2004)

(a) In General.

(1) Requirement of Writing and Signature; Waiver. A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time allowed by subdivision (d) of this rule.

(2) Grounds and Affidavit. A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

(3) Service and Notice. A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision (3) may be waived by the court.

(4) Memoranda of Law. The judge or special magistrate may require the filing of a memorandum of law, in such form and within such time as he or she may direct, as a condition precedent to a hearing on a motion or interlocutory matter. No motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered by the judge or special magistrate.

(5) Renewal. Upon a showing that substantial justice requires, the judge or special magistrate may permit a pretrial motion which has been heard and denied to be renewed.

(b) Bill of Particulars.

(1) Motion. Within the time provided for the filing of pretrial motions by this rule or within such other time as the judge may allow, a defendant may request or the court upon its own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.

(2) Amendment. If at trial there exists a material variance between the evidence and bill of particulars, the judge may order the bill of particulars amended or may grant such other relief as justice requires.

(c) Motion to Dismiss or to Grant Appropriate Relief.

(1) All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.

(2) A defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.

(d) Filing. Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court.

(1) Discovery Motions. Any discovery motions shall be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown. A discovery motion filed after the conclusion of the pretrial hearing shall be heard and considered only if (A) the discovery sought could not reasonably have been requested or obtained prior to the conclusion of the pretrial hearing, (B) the discovery is sought by the Commonwealth, and the Commonwealth could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing, or (C) other good cause exists to warrant consideration of the motion.

(2) Non-discovery Pretrial Motions. A pretrial motion which does not seek discovery shall be filed before the assignment of a trial date pursuant to Rule 11(b)or (c) or within 21 days thereafter, unless the court permits later filing for good cause shown.

(e) Hearing on Motions. The parties shall have a right to a hearing on a pretrial motion. The opposing party shall be afforded an adequate opportunity to prepare and submit a memorandum of law prior to the hearing.

(1) Discovery Motions. All pending discovery motions shall be heard and decided prior to the defendant's election of a jury or jury-waived trial. Any discovery matters pending at the time of the pretrial hearing or the compliance hearing shall be heard at that hearing. Discovery motions filed pursuant to subdivision (d)(1) after the defendant's election shall be heard and decided expeditiously.

(2) Non-Discovery Pretrial Motions. A non-discovery motion filed prior to the pretrial hearing may be heard at the pretrial hearing, at a hearing scheduled to address the motion, or at the trial session. A non-discovery motion filed at or after the pretrial hearing shall be heard at the next scheduled court date unless otherwise ordered.

(3) Within seven days after the filing of a motion, or if the motion is transmitted to the trial session within seven days after the transmittal, the clerk or the judge shall assign a date for hearing the motion, but the judge or special magistrate for cause shown may entertain such motion at any time before trial. If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, and the moving party so notifies the clerk in writing at the time of the filing of the motion, the clerk shall mark up the motion for hearing at that time subject to

the approval of the court. The clerk shall notify the parties of the time set for hearing the motion.

Reporter's Notes

This rule establishes the form of, and manner for the presentation of, pretrial motions. Not every motion that is made in a pretrial posture is governed exclusively by this rule. For example, a continuance motion is subject to the provisions of Rule 10(a)(3) and (4), and the requirements of a motion for relief from prejudicial joinder are contained in Rule 9(d). Where, however, no other rules or statutes provide otherwise, pretrial motions should be made in conformity with the provisions of this rule.

The primary sources of this rule as originally formulated are Rule 3.190 of the Florida Rules of Criminal Procedure (1974) and the existing statutory law of the Commonwealth. The rule has an abbreviated counterpart in Rule 47 of the Federal Rules of Criminal Procedure. In 2004 the rule was revised with regard to its provisions governing filing, filing deadlines, and hearings. The formal requirements concerning motions, affidavits, supporting memoranda, service and notice were unchanged in all respects. So too were the specific provisions in 13(b) and 13(c) concerning bills of particulars and motions to dismiss respectively.

Subdivision (a). Motions in general. This subdivision is derived in large part from the Florida Rule, but essentially restates existing practice and is supported in large part by Rule 9 of the Superior Court Rules (1974). The references to pretrial motions are to include pleadings in response to a motion where such exist.

Subdivision (a)(1) requires a pretrial motion to be in writing. Although an oral motion may be considered, Commonwealth v. Geoghegan, 12 Mass. App. Ct. 575, 575-76 (1981), it need not be because it violates this requirement. Commonwealth v. Pope, 392 Mass. 493, 498 n. 8 (1984).

Subdivision (a)(2) is taken from Rules 9 and 61 of the Superior Court Rules (1974). The requirement of an affidavit in support of factual assertions is supported additionally by former G.L. c. 277, § 74. (RS [1836] c 136, § 31). The affidavit need not be signed by the defendant but must be signed by someone with personal knowledge of the facts therein, see Commonwealth v. Santosuosso, 23 Mass. App. Ct. 310 (1986) (affidavit by counsel), except for those affidavits accompanying a motion requesting a summons for the production of documentary evidence and objects, see Commonwealth v. Lampron, 441 Mass. 265, 270-71 (2004) (an affidavit accompanying a motion requesting a summons for production of documentary evidence or objects may be based on hearsay from a reliable source, which the affidavit must identify).

The reference in subdivision (a)(3) to opposing affidavits is to apply only if there are opposing affidavits. It is not intended to require them.

Subdivision (a)(4) is taken from Rule 9 of the Superior Court Rules (1974).

Subdivision (a)(5) provides that although a motion has been once heard and denied, it may be renewed if "substantial justice requires" that action. This is appropriate where new or additional grounds are alleged which could not reasonably have been known when the motion was originally filed. See (a)(2), supra. Moreover, at times it may be necessary to renew a motion in order to preserve it for appeal. For example, the Supreme Judicial Court has held that a

suppression motion was waived when counsel failed to renew it at the time the evidence was offered at trial. Commonwealth v. Acosta, 416 Mass. 279 (1993).

Subdivision (b). Bill of Particulars. Former G.L. c. 277, § 40 (St 1887, c 436, § 2) permitted the court to require the prosecution to file particulars in order to more fully apprise the defendant or the court of the nature of the charges. This subdivision incorporates that practice into this rule.

The distinction which was drawn in the statute between particulars ordered by a court with jurisdiction over the offense charged and those ordered by a court without jurisdiction of the offense charged has not been retained in this rule. However, the judge may in his discretion order whatever particulars he deems necessary under the circumstances, and this would permit him to order a more complete statement of particulars where it is required in the interests of justice. Indeed, particulars may be constitutionally required in some cases under article 12 of the Massachusetts Declaration of Rights, which protects a defendant from having to answer charges "until the same is fully and plainly, substantially and formally, described to him." See also Commonwealth v. Baker, 368 Mass. 58, 77 (1975) (suggesting a liberal standard for granting particulars).

If the specifications supplied in conformity with the court's order are irrelevant or prejudicial, defense counsel must file a motion to strike those deemed improper. 30 Mass. Practice Series (Smith) § 1296 (1983).

Although the rule requires motions for bills of particulars to be made before trial, it is not intended to be construed so as to limit the inherent power of the court in an appropriate situation to order a bill at any time.

Subdivision (c). Motions to Dismiss or Grant Appropriate Relief. This is a restatement of former G.L. c. 277, § 47A (St 1965, c 617, § 1). It should be noted that G.L. c. 277, § 47A abolished at least in name all the other pleas, demurrers, challenges, and motions to quash; it effectively consolidated all of them under the general heading of a motion to dismiss or grant appropriate relief, in effect retaining the statutory and common law of the Commonwealth governing such pleas. Section 47A (as amended) now provides for relief from the waiver of defenses not timely raised, upon a showing of cause.

In a criminal case, any defense or objection based upon defects in the institution of the prosecution or in the complaint or indictment, other than a failure to show jurisdiction in the court or to charge an offense, shall only be raised prior to trial and only by a motion in conformity with the requirements of the Massachusetts Rules of Criminal Procedure. The failure to raise any such defense or objection by motion prior to trial shall constitute a waiver thereof, but a judge or special magistrate may, for cause shown, grant relief from such waiver. A defense or objection based upon a failure to show jurisdiction in the court or the failure to charge an offense may be raised by motion to dismiss prior to trial, but shall be noticed by the court at any time.

Id. See also Commonwealth v. Chou, 433 Mass. 229 (2001). "Cause" should be read to include grounds of which the moving party was not previously aware. See Mass. R. Crim. P. 46(b); Commonwealth v. Bongarzone, 390 Mass. 326, 337-38 (1983). Additionally, case law and statutory law establish that certain motions and objections must be heard even if raised for the

first time at trial, such as claims that the complaint or indictment fails to state a charge, or is outside the court's jurisdiction, G.L. c. 277, s. 47A and Commonwealth v. Cantres, 405 Mass. 238, 239-40 (1989); that wiretap evidence should be suppressed, Commonwealth v. Picardi, 401 Mass. 1008 (1988); that a statement was taken in violation of the Miranda rule, Commonwealth v. Adams, 389 Mass. 265, 269-70 & n. 1 (1983); or that the defendant was not criminally responsible by reason of insanity, Mass. R. Crim. P. 14(b)(2).

Subdivision (d). Filing motions. This subdivision sets out the filing deadlines for pretrial motions. It was amended in 2004 to eliminate provisions relating to filing motions in the now-abolished de novo district court system, and to remove a conflict between this rule and the statutory filing deadlines subsequently established for district courts by the single-trial legislation, G.L. c. 278, § 18.

Under subdivision (d)(1), discovery motions are to be filed prior to the conclusion of the pretrial hearing, or after for good cause shown. The subdivision also specifies two specific, non-exhaustive circumstances which shall be deemed to constitute good cause. One self-evident basis is that the discovery sought could not reasonably have been requested or obtained prior to the pretrial hearing [(d)(1)(A)]. The other, specified in (d)(1)(B), allows later filing by the Commonwealth if it "could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing." This asymmetrical provision is necessary because under the rules, the Commonwealth must fulfill its discovery obligations in order to receive discovery. If the Commonwealth has been unable to provide discovery prior to the pretrial hearing for good reason, it should not be prejudiced by having its reciprocal discovery rights foreclosed. Provision 13(d)(1)(ii) is necessary to preserve the Commonwealth's discovery rights in such a situation. In any event, with the institution in 2004 of automatic and comprehensive discovery without motion under Rule 14, motions for discovery should be unnecessary in many cases.

Under subdivision (d)(2), non-discovery pretrial motions are to be filed no later than 21 days after the court's assignment of a trial date or trial assignment date, unless the court permits later filing for good cause shown. (Additionally, the defendant must also provide notice of intent to defend by reason of insanity, or by reason of license or privilege, within this time period. Rule 14(b)(2) and (3), respectively). In effect, this provides 21 days after the pretrial hearing or compliance hearing, whichever is later, since under Rule 11 it is there that the trial date or trial assignment date must be set (and, in district court, a jury election or waiver must be taken, the event that commences the 21-day deadline for motions mandated by the district court single trial legislation). The time limits provided in this rule for the filing of pretrial motions are intended to set the norm. Ample opportunity is left for the court to exercise its discretion in the interest of justice, however, by the inclusion of the "for cause shown" provision in subdivisions (d)(1) and (d)(2). See also Commonwealth v. Bongarzone, supra.

A clerk is not generally empowered to refuse to accept and docket a motion without the court's express approval, but if this occurs counsel may move to have the motion docketed. Bolton v. Commonwealth, 407 Mass. 1003, 1003-4 (1990).

Subdivision (d) also makes explicit what is already implicit in Mass. R. Crim. P. 11, namely, that the only pretrial motions which may be filed are those as to the substance of which counsel were

unable to agree. Counsel should ascertain whether the opposing party or parties will agree to all potential motions before or during the pretrial conference (or, if the motion could not have been anticipated until after the pretrial conference, promptly when the need for the motion becomes apparent). By requiring that the substance of any pretrial motions a party intends to file be discussed with the adverse party, this subdivision institutes a rule of judicial economy. It is contemplated that having parties compare all the motions they intend to file before trial at the pretrial conference will make the conference more productive by eliminating many "boiler plate" motions. If a conflict between this subdivision and the general filing and service of papers provisions of Rule 32 should arise, this subdivision is controlling as to motions to which it is applicable.

Subdivision (e). This subdivision provides the parties with a right to a hearing on a pretrial motion, and governs the scheduling of the hearing. Subdivision (e)(3) provides that within seven days of filing (or if the motion is transmitted to the trial session within seven days after the transmittal), the clerk should schedule the motion for hearing. However, the clerk will be guided by other provisions in subdivision (e). First, the court must afford the opposing party an adequate opportunity to prepare and submit a memorandum prior to the hearing. Second, discovery motions must be heard and decided prior to the defendant's election of a jury or jury waived trial; if any discovery motions are pending at the time of the pretrial hearing or the compliance hearing, they should be heard at that time [(e)(1)]. See Rule 11(b)(2)(iii) and (c)(3); Dist./Mun. Ct. Rule of Criminal Procedure 4(e). Third, non-discovery motions may be scheduled to be heard at the pretrial hearing, at a hearing scheduled to address the motion, or at the trial session, although the default date for motions filed at the pretrial hearing is the next scheduled court date [(e)(2)]. The clerk must notify the parties of the date assigned. This provision allows individual courts to decide how to schedule non-discovery motions. Finally, subdivision (e)(3) provides a method for the parties to agree to a mutually convenient time for hearing when the motion is filed.

Although not enumerated in the rule, precedent establishes that some motions may be heard ex parte, especially when they do not affect an interest of the opposing party or would reveal privileged or other information to which the opposing party is not entitled. For example, motions to fund indigent expenses need not be heard in the presence of the prosecution. Commonwealth v. Dotson, 402 Mass. 185, 187 (1988); Commonwealth v. Haggerty, 400 Mass. 437, 441 (1987).

Rule 14: Pretrial Discovery [Effective January 1, 2016]

(Applicable to cases initiated on or after September 7, 2004)

(a) Procedures for Discovery.

(1) Automatic Discovery.

(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and

is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:

(i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.

(ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.

(iii) Any facts of an exculpatory nature.

(iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department.

(v) The names and business addresses of prospective law enforcement witnesses.

(vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2). Such discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.

(vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the party intends to call as witnesses.

(viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

(ix) Disclosure of all promises, rewards or inducements made to witnesses the party intends to present at trial.

(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A)(vi), (vii), and (ix) which the defendant intends to offer at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to call as witnesses at trial.

(C) Stay of Automatic Discovery; Sanctions. Subdivisions (a)(1)(A) and (a)(1)(B) shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

(D) Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses. At arraignment the court shall order the Probation Department to deliver to the parties the record of prior complaints, indictments and dispositions of all defendants and of all witnesses identified pursuant to subdivisions (a)(1)(A)(iv) within 5 days of the Commonwealth's notification to the Department of the names and addresses of its witnesses.

(E) Notice and Preservation of Evidence. (i) Upon receipt of information that any item described in subparagraph (a)(1)(A)(i)-(viii) exists, except that it is not within the possession, custody or control of the prosecution, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case, the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it. (ii) At any time, a party may move for an order to any individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon the motion expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

(2) Motions for Discovery. The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery of other material and relevant evidence not required by subdivision (a)(1) within the time allowed by Rule 13(d)(1).

(3) Certificate of Compliance. When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

(4) Continuing Duty. If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) Work Product. This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff.

(6) Protective Orders. Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

(7) Amendment of Discovery Orders. Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered be available only to counsel for the defendant

(8) A party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and (a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

(b) Special Procedures.

(1) Notice of Alibi.

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to subdivision (a)(2) of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his or her intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant

claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defense intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. Within seven days of service of the defendant's notice of alibi, the Commonwealth shall serve upon the defendant a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(E) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule.

(F) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) Mental Health Issues.

(A) Notice. If a defendant intends at trial to raise as an issue his or her mental condition at the time of the alleged crime, or if the defendant intends to introduce expert testimony on the defendant's mental condition at any stage of the proceeding, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

(i) whether the defendant intends to offer testimony of expert witnesses on the issue of the defendant's mental condition at the time of the alleged crime or at another specified time;

(ii) the names and addresses of expert witnesses whom the defendant expects to call; and

(iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his or her mental condition.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition will be relied upon by a defendant's expert witness, the court, on its own motion or on motion of the prosecutor, may order the defendant to submit to an examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

(i) The examination shall include such physical, psychiatric, and psychological tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the relevant time. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer into evidence expert testimony based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical examinations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written report as to the mental condition of the defendant at the relevant time.

Unless the parties mutually agree to an earlier time of disclosure, the examiner's report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the relevant time or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) after the defendant expresses the clear intent to raise as an issue his or her mental condition, the judge is satisfied that (1) the defendant intends to testify, or (2) the defendant intends to offer expert testimony based in whole or in part on statements made by the defendant as to his or her mental condition at the relevant time.

At the time the report of the Commonwealth's examiner is disclosed to the parties, the defendant shall provide the Commonwealth with a report of the defense psychiatric or psychological expert(s) as to the mental condition of the defendant at the relevant time.

The reports of both parties' experts must include a written summary of the expert's expected testimony that fully describes: the defendant's history and present symptoms; any physical, psychiatric, and psychological tests relevant to the expert's opinion regarding the issue of mental condition and their results; any oral or written statements made by the defendant relevant to the issue of the mental condition for which the defendant was evaluated; the expert's opinions as to the defendant's mental condition, including the bases and reasons for these opinions; and the witness's qualifications.

If these reports contain both privileged and nonprivileged matter, the court may, if feasible, at such time as it deems appropriate prior to full disclosure of the reports to the parties, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(C) Discovery for the purpose of a court-ordered examination under Rule 14(b)(2)(B).

(i) If the judge orders the defendant to submit to an examination under Rule 14(b)(2)(B), the defendant shall, within fourteen days of the court’s designation of the examiner, make available to the examiner the following:

(a) All mental health records concerning the defendant, whether psychological, psychiatric, or counseling, in defense counsel’s possession;

(b) All medical records concerning the defendant in defense counsel’s possession; and

(c) All raw data from any tests or assessments administered to the defendant by the defendant’s expert or at the request of the defendant’s expert.

(ii) The defendant’s duty of production set forth in Rule 14(b)(2)(C)(i) shall continue beyond the defendant’s initial production during the fourteen-day period and shall apply to any such mental health or medical record(s) thereafter obtained by defense counsel and to any raw data thereafter obtained from any tests or assessments administered to the defendant by the defendant’s expert or at the request of the defendant’s expert.

(iii) In addition to the records provided under Rule 14(b)(2) (C)(i) and (ii), the examiner may request records from any person or entity by filing with the court under seal, in such form as the Court may prescribe, a writing that identifies the requested records and states the reason(s) for the request. The examiner shall not disclose the request to the prosecutor without either leave of court or agreement of the defendant.

Upon receipt of the examiner's request, the court shall issue a copy of the request to the defendant and shall notify the prosecutor that the examiner has filed a sealed request for records pursuant to Rule 14(b)(2)(C)(iii). Within thirty days of the court's issuance to the defendant of the examiner's request, or within such other time as the judge may allow, the defendant shall file in writing any objection that the defendant may have to the production of any of the material that the examiner has requested. The judge may hold an ex parte hearing on the defendant's objections and may, in the judge's discretion, hear from the examiner. Records of such hearing shall be sealed until the report of the examiner is disclosed to the parties under Rule 14(b)(2)(B)(iii), at which point the records related to the examiner's request, including the records of any hearing, shall be released to the parties unless the court, in its discretion, determines that it would be unfairly prejudicial to the defendant to do so.

If the judge grants any part of the examiner's request, the judge shall indicate on the form prescribed by the Court the particular records to which the examiner may have access, and the clerk shall subpoena the indicated record(s). The clerk shall notify the examiner and the defendant when the requested record(s) are delivered to the clerk's office and shall make the record(s) available to the examiner and the defendant for examination and copying, subject to a protective order under the same terms as govern disclosure of reports under Rule 14(b)(2)(B)(iii). The clerk's office shall maintain these records under seal except as provided herein. If the judge denies the examiner's request, the judge shall notify the examiner, the defendant, and the prosecutor of the denial.

(iv) Upon completion of the court-ordered examination, the examiner shall make available to the defendant all raw data from any tests or assessments administered to the defendant by the Commonwealth's examiner or at the request of the Commonwealth's examiner.

(D) Additional discovery. Upon a showing of necessity, the Commonwealth and the defendant may move for other material and relevant evidence relating to the defendant's mental condition.

(3) Notice of Other Defenses. If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(4) Self Defense and First Aggressor.

(A) Notice by Defendant. If a defendant intends to raise a claim of self defense and to introduce evidence of the alleged victim's specific acts of violence to support an allegation that he or she was the first aggressor, the defendant shall no later than 21 days after the pretrial hearing or at such other time as the judge may direct for good cause, notify the prosecutor in writing of such intention. The notice shall include a brief description of each such act, together with the location and date to the extent practicable, and the names, addresses and dates of birth of the witnesses the defendant intends to call to provide evidence of each such act. The defendant shall file a copy of such notice with the clerk.

(B) Reciprocal Disclosure by the Commonwealth. No later than 30 days after receipt of the defendant's notice, or at such other time as the judge may direct for good cause, the Commonwealth shall serve upon the defendant a written notice of any rebuttal evidence the Commonwealth intends to introduce, including a brief description of such evidence together with the names of the witnesses the Commonwealth intends to call, the addresses and dates of birth of other than law enforcement witnesses and the business address of law enforcement witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of additional evidence that, if known, should have been included in the information furnished under subdivision (b)(4)(A) or (B), that party shall promptly notify the adverse party or its attorney of such evidence.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the evidence offered by such party on the issue of the identity of the first aggressor.

(c) Sanctions for Noncompliance.

(1) Relief for Nondisclosure. For failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) Exclusion of Evidence. The court may in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

(d)] Definition.

The term "statement", as used in this rule, means:

(1) a writing made, signed, or by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.

As amended December 17, 2008, effective April 11, 2009; June 26, 2012, effective September 17, 2012; November 5, 2015, effective January 1, 2016.

Reporter's Notes 2015

(2015) Rule 12(b)(2)(C)

Rule 14(b)(2)(C) Discovery for the purpose of a court-ordered examination under Rule 14(b)(2)(B)

In Commonwealth v. Hanright , 465 Mass. 639, 648 (2013), the Supreme Judicial Court held that, when a judge orders a defendant under Rule 14(b)(2)(B) to submit to a forensic mental evaluation, the judge may also require the defendant to disclose to the court-appointed examiner ("Commonwealth's examiner" or "examiner") treatment records necessary to conduct that forensic evaluation. Rule 14(b)(2)(C) sets out the scope and sequence of that disclosure and the procedure by which it is implemented. Under the rule, both experts – the Commonwealth's examiner and the defendant's expert – must be given equal access to the information they collectively deem necessary to conduct an effective forensic examination and produce a competent report. The rule achieves this result, without involving the prosecutor, through a reciprocal discovery process that makes available to each expert (1) the defendant's pertinent medical and mental-health records and (2) the raw data from tests or assessments of the defendant administered during the course of the experts' respective examinations of the defendant. By ensuring that the experts are working from a common, comprehensive set of records and objective, test-generated data, the rule advances the reliability and fairness of the examinations and the ensuing reports, and it promotes efficiency in the examination process.

Rule 14(b)(2)(C)(i)

Rule 14(b)(2)(C)(i) outlines the defendant's disclosure obligation. The rule requires that the defendant make available to the Commonwealth's examiner, within 14 days of the examiner's appointment, three categories of information: (a) the defendant's mental-health records, broadly defined, that are possessed by defense counsel, (b) the defendant's medical records that are possessed by defense counsel, and (c) the raw data from any tests or assessments administered to the defendant in the course of the defense expert's examination of the defendant. This discovery obligation is intended to provide equal and full access for both parties to the defendant's pertinent mental-health and medical history at the time each expert is conducting his or her

examination of the defendant. Full discovery of pertinent source material at this point, when the examiners are forming their respective opinions concerning the defendant's mental health without yet having access to the opinions of the other, promotes the truth-seeking function of the trial, see Hanright, 465 Mass. at 644-645, while making the examination process more efficient.

In defining the scope of the mental-health and medical records to be produced as those possessed by defense counsel, the rule intends as wide a reach as is reasonably possible, covering every such record that the defense collected in the course of considering whether to assert this defense. At this point in the process, the defendant has waived any privilege that might preclude producing his statements and records to the Commonwealth's examiner, see Hanright, 465 Mass. 2 at 645-648, and the rule means to give both experts access to every record reasonably available, relying on the experts independently to decide which records are relevant to the inquiry. If, in examining the defendant and the records that the defendant produced, the Commonwealth's examiner identifies a mental-health or medical record that the defense overlooked, or chose not to collect, and thus did not produce, Rule 14(b)(2)(C)(iii), discussed below, provides for a process by which the examiner can seek that record. Any such records would, under the rule, be available to both experts.

The raw testing data that Rule 14(b)(2)(C)(i) requires the defendant to produce consists of objective, uninterpreted test results, for example, multiple-choice, bubble outputs from a psychological test with quantification on various scales. As discussed below, Rule 14(b)(2)(C)(iv) requires the same disclosure from the Commonwealth's examiner. The intent is to provide both experts with all of the relevant, objective testing data available at the time each writes his or her report, thus avoiding the need for supplemental reports or evaluations that consider pertinent testing data first revealed in the other expert's report. Not only would the necessity of such supplemental reports or evaluations extend the examination process, but these reports would necessarily be written after reviewing the opposing expert's report, thus putting in question the independence of this supplemental evaluation of these testing data. The rule's discovery obligation reaches only raw testing data; it does not apply to the defense expert's work product, such as notes interpreting this raw testing data or notes relating to a clinical interview of the defendant. This mandatory disclosure of raw testing data generated by the experts during the course of their respective examinations works no unfair advantage to either side. The discovery obligation is mutual. As with defendant's mental-health and medical records, the raw data resulting from tests administered to the defendant are essential to determining the defendant's mental-health at the time in question, and all of these data must be considered by both examiners if their respective reports are to serve their truth-seeking function. Finally, the test results will ultimately be released with the final reports under Rule 14(b)(2)(B)(iii); the only question Rule 14(b)(2)(C)(i) & (iv) address is the timing of that release.

Rule 14(b)(2)(C)(ii)

As noted, Rule 14(b)(2)(C)(i) requires the defendant to produce the mental-health and medical records and raw testing data within 14 days after the judge appoints the Commonwealth examiner. Under Rule 14(b)(2)(C)(ii), the defendant's duty to disclose records and raw testing data continues throughout the examination period provided under Rule 14(b)(2)(B). If the

defendant discovers records or raw testing data that was subject to production under Rule 14(b)(2)(C)(i) but was not produced, those records or data must be produced as soon as they are discovered. Moreover, if subsequent to the initial production under Rule 14(b)(2)(C)(i) defense counsel obtains records covered by the rule or the defense expert generates test data covered by the rule, Rule 14(b)(2)(C)(ii) requires that these materials be promptly produced to the Commonwealth's examiner.

Rule 14(b)(2)(C)(iii)

As noted, this subsection anticipates the possibility that the Commonwealth's examiner will learn of additional medical or mental-health records that he or she believes necessary to conducting a professionally competent examination. For example, a record provided by the defendant, or a comment by the defendant during the court-ordered examination, might refer to an earlier hospitalization of the defendant for which the defendant did not produce records. If the examiner concludes that there is a reasonable possibility that such records exist and should be reviewed, Rule 14(b)(2)(C)(iii) provides for a procedure by which the examiner can file with the court a prescribed form under seal identifying the requested records (with as much specificity as circumstances reasonably permit) and stating the reason(s) for the request. Because at this point the court has yet to find sufficient evidence of privilege waiver by the defendant to permit the prosecutor’s involvement in the examination process, see Rule 14(b)(2)(B)(iii), under Rule 14(b)(2)(C)(iii), the examiner may not inform the prosecutor of the document request or its contents, absent permission from either the defense or the court.

Upon receiving the sealed request, the court must issue a copy to the defendant, notifying the Commonwealth only that a sealed request for additional records has been filed. The defendant has 30 days to file ex parte a written objection to the requested production. If the defendant timely files such an objection, the judge has the discretion to hold an ex parte hearing on it, including, again in the judge’s discretion, permitting the Commonwealth's examiner to participate. If the judge grants any part of the examiner’s request, the judge must inform the clerk to which records the examiner may have access, and the clerk must then subpoena those records. When the records arrive at the clerk’s office, the clerk must notify the examiner and the defendant of the records’ availability for examination and copying, subject to a protective order forbidding their disclosure to the prosecutor unless the judge determines that the conditions set forth in Rule 14(b)(2)(B)(iii) for permitting prosecutorial access to the examiners’ reports are met. The clerk’s office must maintain the records under seal.

When the report of the Commonwealth's examiner is disclosed to the parties under Rule 14(b)(2)(B)(iii), the records related to the examiner’s Rule 14(b)(2)(C)(iii) request for additional records shall also be released to the parties, subject to the judge’s narrow discretion to forbid such release. At this point in the process, the defendant has effectively waived any claim of privilege concerning evidence relating to the mental-health defense. See Hanright, 465 Mass. at 645-647. The only reason for withholding from the prosecutor information concerning the examiner’s request for additional records would presumably be a concern that information there set forth would have little or no relevance to the mental-health defense and would cause unfair prejudice to the defendant in conducting the mental-health defense, a balancing of interests with

which judges are quite familiar. As is so with the release of the examiners' reports and supporting records, the release of records relating to a request for additional records would be confined to the parties; these records would remain sealed to the public. Granting the prosecutor access to the records relating to a denial of an examiner's request for records would not only 4 permit full communication between the prosecutor and the examiner in preparing for trial, but it would also allow the Commonwealth to weigh the possibility, however remote, of seeking appellate review of the denial.

Rule 14(b)(2)(C)(iv)

As noted above, once the Commonwealth's examiner completes his or her examination of the defendant, the examiner must disclose to the defendant all raw data from any tests or assessments that the examiner conducted or requested. This ensures full reciprocity between the parties. Presumably, the only mental-health or medical records available to the examiner would be those provided by the defendant or produced in response to a court order under Rule 14(b)(2)(C)(iii), making any reciprocal discovery of such records unnecessary. The production of raw testing data by the court-ordered examiner would result in both experts having full access to the same records and raw testing data before they complete and file their respective reports.

Reporter's Notes – 2012

In 2012, Rule 14 was amended in several respects. These revisions are discussed below.

Subdivision (b)(2). Mental health issues. This amendment responds to the Supreme Judicial Court's expansion of the Blaisdell procedure to analogous situations such as defenses based on an inability to form the requisite intent for an element of the crime, see Commonwealth v. Dias, 431 Mass. 822, 829 (2000), on an inability to premeditate, see Commonwealth v. Contos, 435 Mass. 19, 24 n.7 (2001), and where the defendant places at issue his or her mental ability voluntarily to waive Miranda rights, see Commonwealth v. Ostrander, 441 Mass. 344, 352 (2004). In addition, the Court has indicated in dicta that the same would hold true in the case of a defense based on battered woman syndrome, see Ostrander, 441 Mass. at 355 (2004).

There are two different dimensions to the problem that this subsection addresses. One concerns giving notice to the Commonwealth of a complex issue that the prosecutor otherwise would have no reason to expect to litigate. The other deals with redressing the unfairness of allowing a defense expert to testify based on statements obtained from the defendant without giving the prosecution an opportunity to obtain equivalent access for its expert.

The amendment addresses the first concern by expanding the scope of the notice provision beyond the context of Blaisdell to include all mental health defenses. A mental health defense is one that places in issue the defendant's mental condition at the time of the alleged crime, based on a claim that some mental disease or defect or psychological impairment, such as battered woman syndrome, affected the defendant's cognitive ability. These are complex issues for which the prosecutor should have time to prepare, whether an expert testifies for the defense or not. As used in this subsection, the term "mental health defense" does not include a claim that the

defendant's cognitive ability was affected by intoxication, an issue that arises more frequently and does not present the same level of complexity as do the former examples.

The amendment addresses the second concern by requiring notice whenever the defendant intends to rely on expert testimony concerning the defendant's mental condition at any stage of the process on any issue, whether it related to culpability, competency or because it concerns the admission of evidence. Thus, for example, if the defendant intends to introduce expert testimony in support of a claim that a confession was not voluntary, as in Ostrander, the notice would specify that the witness would testify as to the defendant's mental condition at the time of the confession. If it appears that the expert will rely on statements of the defendant as to his or her mental condition, then the judge may order the defendant to submit to an examination pursuant to subsection 14(b)(2)(B).

Subdivision (b)(2)(B)(i)

The amendment deletes "physiological tests" from those that may be included in a court-ordered examination. This deletion is not intended to work any substantive change to the rule but rather to eliminate a superfluous term. Under the rule, "physical tests" is meant to include "physiological tests," including but not limited to neurological tests and examinations such as magnetic resonance imaging (MRI) and positron emission tomography (PET) scans.

Subdivision (b)(2)(B)(iii)

The Rule applies not only to experts who are psychiatrists, but to psychologists as well.

The regime for disclosure of expert reports has been amended in light of Commonwealth v. Sliech-Brodeur, 457 Mass. 300 (2010). The timing of the release of the Commonwealth's expert's report was altered only to make clear that the parties can agree on its disclosure at a time earlier than previously set out in the Rule. See Sliech-Brodeur, 457 Mass. at 325 n.34 (2010). As required by Sliech-Brodeur, defense experts as well as the prosecution's must prepare and disclose reports. In order to avoid infringing on the defendant's privilege against self incrimination, the defense expert's report is released to the prosecution at the same time that the defendant receives the report of the Commonwealth's expert. The Rule also has been amended to address the timing of the exchange of reports. The latest date of exchange would be when the defendant expresses a "clear intent" to rely on mental impairment as an issue in the case, relying in part on the defendant's statements or testimony. This will often occur at the final pretrial conference or comparable event. The Rule attempts to avoid the delay and inconvenience of disclosing the reports only after the defendant's expert offers testimony on direct examination. Finally, the rule as amended makes clear the judge's discretion to review any expert report filed with and sealed by the court, and, if feasible and appropriate, to release to the parties any unprivileged material contained in the report prior to the report's full disclosure to the parties.

Once the reports have been released to the parties, they may be shared with the respective experts for each side.

The Rule has been amended to require more detail in the content of the report that both prosecution and defense experts must file. This portion of the Rule is patterned after 18 U.S.C.S. § 4247(c). In one major respect, however, the Rule goes beyond the federal model by requiring

the report to contain a complete account of the statements of the defendant that are relevant to the issue of his or her mental condition. This includes both statements relating to the underlying incident as well as any statements prior to or following it that are relevant to the defendant's mental condition. If the examiner considered written statements of the defendant, the report should contain the relevant portions. If the examiner considered oral statements of the defendant, the report should include the substance of what the defendant said that bears on the question of his or her mental condition. In reporting on the defendant's statements, examiners should not withhold relevant evidence contrary to their own position.

The protection of the work product doctrine and the principle that notes or preliminary drafts are not discoverable if they are incorporated into a final report, applicable elsewhere in the discovery regime that Rule 14 establishes, apply as well in this context.

Subdivision (b)(2)(C)

This provision gives trial judges the flexibility to require the parties to provide additional discovery beyond the information contained in the notice that the defendant must give and the reports that the experts must file. It is a very limited grant of discretion and should be reserved for cases presenting discovery issues that are out of the ordinary. In this respect, it is more restrictive than the analogous discovery provision in Rule 14(a)(2).

Subdivision (b)(4). Self Defense and First Aggressor.

This amendment implements the discovery obligation created by Commonwealth v. Adjutant, 443 Mass. 649 (2005). The procedure it mandates applies only to situations such as those in Adjutant, where the defendant intends to rely on self defense claiming that the victim was the first aggressor. The notice procedure established in this amendment does not apply to other instances where prior violent conduct by the victim may be admissible, such as where the defendant intends to introduce evidence of a violent act by the victim of which he or she was aware at the time of the incident that is the subject of the criminal case before the court. See Commonwealth v. Fontes, 396 Mass. 733, 735-36 (1986). However, in a case where the defendant wishes to introduce evidence of an act of prior violence by the victim to support a claim based on both Adjutant and Fontes, the notice provision of this subsection would apply.

Beyond notice of an intent to raise the issue of prior violent acts by the alleged victim as it bears on the identity of the first aggressor, the amendment also requires the defendant to provide specific information about each incident. Where the defendant lacks specific details as to the time and place of a prior incident, the notice should contain as much information as is available, subject to a continuing duty to supplement the notice as counsel becomes aware of further facts.

The reciprocal obligation on the Commonwealth extends to all evidence that it intends to introduce to rebut the defendant's claim that the victim was the first aggressor. This may concern the victim's role in the incidents of prior violence upon which the defendant may rely, or any other evidence the Commonwealth may introduce in rebuttal.

Nothing in this amendment is intended to derogate from the discovery obligations of Rule 14(a)(1)(A)-(B) concerning physical evidence or documents that either party may rely on with respect to prior acts of violence by the victim.

This subsection does not affect the ultimate decision the judge must make on the admissibility of the evidence contained in the defendant's notice, or of any rebuttal evidence the prosecution might offer. The rule does contemplate, however, that failure to provide notice in advance may bar a party from offering evidence that might otherwise be admissible.

Subdivision (d). Definition.

In 2012, Rule 23 was eliminated because the 2004 revision of Rule 14 largely made it irrelevant. Almost all of the statements that Rule 23 required a party to produce after a witness testified were made part of the automatic pretrial discovery mechanism of Rule 14. Because a small class of statements covered by Rule 23 was not included in the definition of a statement in the 2004 revision of Rule 14(d), an amendment to this subsection was made. The amendment brings within the confines of Rule 14 the remaining class of statements that were subject to the discovery provision of the former Rule 23.

Section 14(d)(1) was amended to include not only writings made by a witness, but also writings made by another and signed or otherwise adopted by the witness. A person otherwise adopts a statement when he or she approves it or accepts it as accurate. See, e.g., Smith v. United States, 31 F.3d 1294, 1301 (4thCir. 1994) ("[n]otes taken by prosecutors and other government agents during a pretrial interview of a witness may qualify as a 'statement' . . . if the witness has reviewed them in their entirety – either by reading them himself or by having them read back to him – and formally and unambiguously approved them – either orally or in writing – as an accurate record of what he said during the interview.")

Section 14(d)(2) was amended to remove the requirement that a witness's statement has been recorded contemporaneously. This is an issue that will only be relevant with respect to written accounts of what the witness said, since by their nature stenographic, mechanical, electrical or other means of recordings must be made contemporaneously. With respect to written accounts, Rule 14(d) includes substantially verbatim statements of a witness that are contained in a document written by someone else, whether the document consists solely of the witness's statement or the witness's statements appear only in part of the document. In the latter case, only that portion of the document that consists of the substantially verbatim account of the witness's statement must be produced. This provision is intended only to require the production of statements that can "fairly be deemed to reflect fully and without distortion" what the witness said. See Palermo v. United States, 360 U.S. 343, 352-53 (1959); United States v. Hodges, 556 F.2d 366 (5th Cir. 1977) cert. den. 434 US 1016 (1978) (that investigators' notes contained occasional verbatim recitation of phrases used by the person interviewed did not make such notes discoverable).

Reporter's Notes (2008) The definition of a statement was revised in 2008 to exempt the means by which hearing impaired attorneys gain access to an electronic display of the words a witness utters. Whether through a computer assisted real time translation or other means, so long as the witness' words are not transcribed or saved in electronic form, as in a computer file, the fact that a contemporaneous transcript of the witness' words appears on a screen to assist a hearing impaired attorney does not fit the definition of a statement under the terms of Rule 14. This

amendment does not affect any other aspect of an attorney's discovery obligations, such as the requirement that a prosecutor reveal exculpatory evidence.

Reporter's Notes (2004)

This rule is based on the concept of reciprocity and has as its aim full pretrial disclosure of items normally within the range of discovery. It is emphasized, however, that this rule establishes a formal discovery procedure and is not intended to discourage those disclosures which may take place at a pretrial conference under Mass. R. Crim. P. 11 or whatever other informal discovery may be agreed upon by the parties. See Commonwealth v. Delaney, 11 Mass. App. Ct. 398 (1981).

The 2004 amendments. The substance of the original version promulgated in 1979 was drawn from Fed. R. Crim. P. 12.1, 12.2 and 16, N.J. R. Crim. P. 3:13-3 (1972), Fla. R. Crim P. 3.220 (1975), and the ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1979). As more fully discussed infra, in 2004 the Rule was substantially revised to eliminate the requirement of pretrial motions in many routine areas of discovery, instead mandating that such discovery be (1) mandatory, and (2) provided automatically to both prosecution and defense. These automatic discovery obligations stem directly from the rule itself, but pursuant to subdivision (a)(1)(C) have all the force and effect of a court order. Discovery of items not included in the automatic discovery regime remains subject to the court's discretion, and may be requested by pretrial motion.

The decision to broaden the ambit of mandatory discovery reflects a conviction that full, automatic, and even-handed discovery to both sides will improve both the administration and delivery of justice. Comprehensive discovery affords counsel a full opportunity to prepare the case, rather than be hijacked by surprise evidence, as the Supreme Court has noted. See Wardius v. Oregon, 412 U.S. 470, 473-74 (1973) ("the end of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduce surprise at trial.") It also brings Rule 14 in line with the broad discovery requirements that have existed in district court since the abolition of trial de novo in 1994 under G.L. c. 218, § 26A and District Court/BMC Rule 3(c). Finally, the decision to afford mandatory discovery to the prosecution as well as the defense assures that one party will not be disadvantaged by a comparative inability to prepare.

A second major innovation – mandating discovery without the need for motions or argument — is designed to manage court events more efficiently. In areas where discovery is routinely afforded in practice, requiring motions and hearings simply delayed the case and absorbed court and counsel time and expense. The revision recognizes that it is far more efficient to provide automatic discovery of such items to both sides, so long as all parties have a full opportunity to argue against discovery of any of these items where special circumstances in the case warrant divergence from these presumptive procedures. Moreover, automatic discovery early in the case provides the defense with notice of the Commonwealth's case prior to plea negotiations or the filing of other pretrial motions. The grounds for such motions, and the advisability of a plea, may only be revealed through discovery.

The 2004 amendments made some additional, more minor changes to Rule 14. A revision to Rule 14(d) modified the definition of "statements" for purposes of this rule, as described below. Rule 14(e), which formerly specified the timing requirements for discovery motions, was deleted because revised Rule 13(d) now governs all pretrial motion deadlines, including discovery motions. The 2004 amendments did not make substantive changes to section (b), concerning notice of certain defenses to the prosecution, or section (c), concerning sanctions for non-disclosure.

Subdivision (a). Initially Rule 14(a) classified the items now included in sections (a)(1)(iv) through (ix) as "discretionary discovery," to be ordered within the sound discretion of the trial judge. In 2004, however, subdivision (a) was substantially revised to require these items to be produced to the opposing party automatically. However, if a party believes good cause exists for non-discovery of an item listed as automatic discovery, it may resist disclosure pursuant to Rule 14(a)(1)(C), providing for a mandatory stay of discovery of any item that the obligated party believes should not be disclosed, pending resolution by the court.

Subdivision (a)(1) of this rule details the parties' automatic discovery rights. 14(a)(1)(a) sets out the defendant's rights to certain mandatory discovery without motion, and (a)(1)(b) provides reciprocal automatic discovery rights to the prosecution. To a very large extent, the scope of disclosure called for by this subdivision is a codification of prior Massachusetts practice.

Subdivision (a)(1)(A). Mandatory Discovery for the Defendant. This provision lists the items that the prosecution must produce for discovery, with the qualification that the prosecutor's automatic discovery obligation is confined to ascertaining and delivering relevant material it and/or its agents already possess or control. The first paragraph of this subsection limits the Commonwealth's discovery obligation to material "in the possession, custody or control of the prosecutor, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case…" This language, inserted in 2004, is not intended to change existing case law but to reflect it. The language is specifically drawn from Commonwealth v. Daye, 411 Mass. 719, 734 (1992) (also stating that a prosecutor "cannot be said to suppress that which is not in his possession or subject to his control"). Daye and many cases since describe the prosecution's duty of disclosure as extending to all discoverable material existing in its own files and in the files of others who have participated with them in the prosecution. The latter officials are usually police, but may include others assisting in the prosecution. Thus in Commonwealth v. Martin, 427 Mass. 816, 823-24 (1998), the S.J.C. reversed a conviction because the prosecutor failed to turn over evidence he did not know existed, but which was known to the Commonwealth's crime lab, because "the prosecution had a duty to inquire" concerning the existence of such tests. Id. at 823. See also Commonwealth v. Bing Sial Liang, 434 Mass. 131, 135 (2001) (victim witness advocates are part of prosecution team and are subject to the same discovery rules); Commonwealth v. Gallarelli, 399 Mass. 17, 20 n. 4 (1987). It is also clear, however, that the scope of the prosecutor's duty of disclosure does not extend to complainants and independent witnesses who are not agents of the prosecution with regard to some aspect of the case. Commonwealth v. Lampron, 441 Mass. 265, 269 n. 4 (2004) (records of medical and social service providers, including D.S.S.); Commonwealth v. Beal, 429 Mass. 530 (1999)

(complainant); Commonwealth v. Wanis, 426 Mass. 639 (1998) (Rule 14 does not reach Internal Affairs Division records because the IAD is not part of the prosecution team).

Under (a)(1)(A), each of the following items must be produced for the defense at or before the pretrial conference, provided it exists and is (1) relevant to the case, (2) within the possession or control of the prosecution or its agents as just defined, and (3) not the subject of a motion for a protective order, which stays its production under subdivision (a)(1)(C)). Even before the 2004 revision, the prosecution was required to turn over most of these items in District Court and the Boston Municipal Court pursuant to Dist./Mun. Ct. Rule 3 and M.G.L. c. 218, sec. 26A, which eliminated trial de novo and mandated broad discovery to the defense.

(a)(1)(A)(i). Statements of the defendant(s). Rule 14 previously included the written or recorded statements of the defendant and any co-defendants in its category of mandatory discovery which must be disclosed. The 2004 revision includes these items as automatic discovery, and adds "the substance of any oral statements" of the defendant or co-defendants. This addition reflects the broader discovery requirement established by case law. The substance of the defendant's oral statements must be provided "as a matter of course to counsel for the defendant" according to Commonwealth v. Lewinski, 367 Mass. 889, 903 (1975). See also Commonwealth v. Gilbert, 377 Mass. 887, 892–94 (1979); Commonwealth v. Lopes, 25 Mass. App. Ct. 988 (1988); Commonwealth v. Lapka, 13 Mass. App. Ct. 24, 31 (1982); Commonwealth v. Janard, 16 Mass. App. Ct. 931, 933 (1983).

Subdivision (a)(1)(A)(ii). Grand jury minutes and statements of grand jury witnesses. The rule had developed in both the Massachusetts and federal courts that pretrial discovery of grand jury minutes was to be allowed when the defendant showed a "particularized need" that the release of a part or all of the minutes would serve. Dennis v. United States, 384 U.S. 855 (1966); Commonwealth v. Cook, 351 Mass. 231 (1966), cert denied, 385 U.S. 981. The Supreme Judicial Court in Commonwealth v. Stewart, 365 Mass. 99 (1974), announced a new rule mandating that the court routinely order discovery of "the grand jury testimony of any person called as a Commonwealth witness which is related to the subject matter of his testimony at trial. The defense will not be required to show 'particularized need.'" Id. at 105-06.

Superior Court Rule 63 (1974) mandates that stenographic notes of all testimony given before a grand jury shall be taken, but that transcripts thereof need be furnished only as required by the prosecuting officer unless the court orders otherwise. It is within the judge's discretion under this subdivision to order the transcription of a stenographic record. Compare Commonwealth v. Pimental, 5 Mass. App. Ct. 463 (1977) (no error in ordering trial to proceed despite Commonwealths failure to comply with order to supply defendant with copy of grand jury minutes where minutes not transcribed).

Commonwealth v. Stewart, supra, required production of the grand jury testimony of "any person called as a Commonwealth witness." 365 Mass. 106. However, since 1979 Rule 14 has required the pretrial production of the relevant "written or recorded statements of a person who has testified before a grand jury," whether or not the Commonwealth intends to call that person at trial. There is no requirement that the grand jury testimony have been given before the grand jury which returned the indictment against the defendant, Commonwealth v. Cavanaugh, 371

Mass. 46, 57-58 (1976), as long as that testimony is relevant to an issue at trial. See Commonwealth v. Barnett, 371 Mass. 87, 94 (1976). However, a 2004 amendment requires the prosecution to also provide automatic discovery of the minutes of the grand jury that brought the indictment in the case.

Although the relevant grand jury testimony must be routinely supplied by the Commonwealth, if the judge rules that the requested testimony is either not relevant or is to be the subject of a protective order, a motion for production under Mass. R. Crim. P. 23 must be made at the time the witness testifies on direct examination.

(a)(1)(A)(iii). Exculpatory evidence. This provision requires the prosecution to provide automatic discovery of "any facts of an exculpatory nature." It derives from the constitutional requirement established in Brady v. Maryland, 373 U.S. 83 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. Accord, United States v. Agurs, 427 U.S. 97 (1976); Moore v. Illinois, 408 U.S. 786, 794 (1972); Commonwealth v. Adrey, 376 Mass. 747, 753 (1978); Commonwealth v. Ellison, 376 Mass. 1, 21 (1978). This duty is also an ethical one, imposed on the prosecution by S.J.C.Rule 3:07, R. P.C. 3.8(d).

The term "exculpatory" is not intended to be technically construed as encompassing alibi or other complete proof of innocence. Rather, case law at present defines exculpatory evidence to include (but not necessarily be limited to) all information that is material and favorable to the accused because it tends to cast doubt on defendant's guilt as to any essential element of the crime charged, including the degree of the crime; or tends to cast doubt on the credibility of a Commonwealth witness, or on the accuracy of scientific evidence, that the government anticipates offering in its case-in-chief. In Commonwealth v. Ellison, 376 Mass. 1, 22 n. 9 (1978), the S.J.C. interpreted the Brady obligation as encompassing "evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendants version of facts, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key Commonwealth witness." See also United States v. Bagley, 473 U.S. 667, 676–77 (1985) (impeachment material); Commonwealth v. Hill, 432 Mass. 704 (2000); Commonwealth v. Tucceri, 412 Mass. 401, 414 (1992); Blumenson, Fisher and Kanstroom, Massachusetts Criminal Practice, Sec. 16.6 (1998) (defining exculpatory evidence and the legal consequences of non-disclosure). The S.J.C. has advised that even minor prior inconsistent statements are exculpatory in the case of an important witness, and urged prosecuting attorneys to "become accustomed to disclosing all material which is even possibly exculpatory, as a prophylactic against reversible error and in order to save court time arguing about it." Commonwealth v. St. Germain, 381 Mass. 256, 262 n. 10 (1980).

To establish a violation of the rule of Brady v. Maryland, supra, as incorporated herein, the defendant must demonstrate upon review that evidence actually existed, Commonwealth v. Adams, 374 Mass. 722, 732-33 (1978); that evidence would have tended to exculpate him, Commonwealth v. Pisa, 372 Mass. 590, 595 (1977), cert denied, 434 U.S. 869 (1977); and that

the Commonwealth failed to disclose it upon proper request, Commonwealth v. Gilday, 367 Mass. 474, 487 (1975). Accord, Commonwealth v. Adrey, 376 Mass. 747 (1978).

Evidence in possession of the police is Brady material even if the prosecutor is unaware of it, so the prosecutor has a constitutional duty of inquiry. Commonwealth v. Martin, 427 Mass. 816, 823-24 (1998); Commonwealth v. Baldwin, 385 Mass. 165, 177 n. 12 (1982); Kyles v. Whitley, 514 U.S. 419 (1995). However, there is no duty to search for exculpatory evidence outside the Commonwealth's possession.

Commonwealth v. Martinez, 437 Mass. 84 (2002); Arizona v. Youngblood, 488 U.S. 51 (1988) (police do not have a constitutional duty to perform any particular tests). Evidence in government hands but not within the possession, custody or control of the prosecution team presents a special problem. In Commonwealth v. Wanis, 426 Mass. 639 (1998), the Supreme Judicial Court found that particular evidence in the files of the Internal Affairs Division of the police could be exculpatory evidence to which the defendant was constitutionally entitled, but because the I.A.D. was not a part of the prosecution team it could not be reached by the discovery mechanisms of Rule 14. The proper mechanism in such cases is a subpoena. Id. at 644; Commonwealth v. Lampron, 441 Mass. 265, 269 n. 4 (2004) (records of medical and social service providers, including D.S.S.).

Although exculpatory evidence is included within automatic discovery, if the defense is aware of items that may be exculpatory that have not been delivered by the pretrial conference, it should file a discovery motion specifying that evidence under subdivision (a)(2), as the magnitude of the error in non-disclosure is in part a function of the specificity of the motion. Commonwealth v. Tucceri, 412 Mass. 401 (1992); Commonwealth v. Gallarelli, 399 Mass. 17, 21 n.5 (1987). In addition to preserving the issue for appeal, specificity can operate to avoid appeals by directing the attention of the prosecutor to those particular materials which the defendant believes would be helpful. A prosecutor cannot be expected to appreciate the significance of every item of evidence in his possession to any possible defense which the defendant may assert. Commonwealth v. Pisa, 372 Mass. 590, 595 (1977), cert denied, 434 U.S. 869 (1977). Assembly and disclosure of those materials — and thus the entire pretrial phase of the proceedings — is expedited by specific motions in such cases.

(a)(1)(A)(iv). Names, addresses, and dates of birth of the Commonwealth's prospective non-law enforcement witnesses. Names, addresses, and the criminal records of prospective witnesses were originally denominated discretionary discovery in Rule 14(a). However, some case law emerging around the time of the Rule's promulgation mandated such discovery. Commonwealth v. Adams, 374 Mass. 722, 732 (1978); Commonwealth v. Clark, 363 Mass. 467, 474 (1973); Commonwealth v. Ferrara, 368 Mass. 182 (1975) (confrontation right to juvenile records which indicate bias despite confidentiality of juvenile records). But see Halner v. Commonwealth, 378 Mass. 388, 390 (1979). Legislation since makes defense discovery of names and addresses of Commonwealth witnesses a matter of right in district courts, and also requires the court to order the Probation Department to produce the prior criminal record of these witnesses. G.L. c. 218, § 26A.

Therefore, in 2004 Rule 14 was amended to include this provision, which requires automatic discovery of the names, addresses, and birthdates (which are necessary to locate a witness' criminal record) of prospective witnesses other than law enforcement witnesses, which are covered by subdivision (a)(1)(v). It also requires the Commonwealth to provide this information to the Probation Department. A separate provision in this Rule, (a)(1)(D), requires the court to order the Probation Department to furnish the parties with the criminal record of all defendants and Commonwealth witnesses within five days of the Commonwealth's notification to the department of its prospective witnesses.

In some cases, there may be special circumstances warranting non-disclosure of a witness' address. For example, if a witness may be threatened or endangered by a defendant, disclosure should not be compelled. See e.g., Commonwealth v. Rivera, 424 Mass. 266, 269–72 (1997); Commonwealth v. French, 357 Mass. 356, 399 (1970). The identity of informants may be privileged against disclosure in some cases. Commonwealth v. Abdelnour, 11 Mass. App. Ct. 531. 538 (1981); Roviaro v. United States, 353 U.S. 53 (1957). There are several options available in such cases. Ordinarily the Commonwealth will move for a protective order under subdivision (a)(6), which stays automatic discovery of the contested item until the issue can be resolved by the court. If after a witness' identity and address have been disclosed, the court is advised that his safety is endangered, there is provision in Mass. R. Crim. P. 35 for the perpetuation of testimony. Once a witness' testimony is recorded, little reason remains for the defendant to attempt to intimidate him. Finally, subdivisions (a)(6) and (a)(7) provide specifically that the court can order information (including witnesses' names) to be disclosed only to defendant's counsel and not to the defendant himself. See also G.L. 258B, § 3(h), which allows a person to request non-disclosure of his or her address, telephone number, or place of employment or education, and if granted then prohibits disclosure of that information in open court.

If, after the initial phase of discovery, it is determined that additional witnesses will be called, the defendant may, in the discretion of the court, be granted time within which to investigate and interview that witness. See generally Commonwealth v. Lopez, 433 Mass. 406, 413-414 (2001); Commonwealth v. Baldwin, 385 Mass. 165, 176–77 (1982); Commonwealth v. Mains, 374 Mass. 733 (1978).

The Commonwealth's Probation Department records reveal with assurance only Massachusetts convictions; where known facts suggest that a witness has a record elsewhere, an inquiry as to out-of-state convictions may be a reasonable practice. Commonwealth v. Corradino, 368 Mass. 411, 422 (1975). See also Commonwealth v. Donahue, 396 Mass. 590, 599 (1986) (normally the state must produce the federal "rap sheet" of witnesses to the defendant).

(a)(1)(A)(v). Names and business addresses of prospective law enforcement witnesses. In the first two decades of practice under Rule 14, it had become routine for the Commonwealth to provide the business address of a police witness when ordered to provide all prospective witness addresses. The 2004 amendment recognized this, and the fact that felons are statutorily barred from serving as police officers, by creating this subdivision that modifies the Commonwealth's obligation with regard to prospective witnesses who are law enforcement officers. In such cases

the Commonwealth must provide automatic discovery of the name and business address of the witness. Further discovery concerning the witness, including home address and birthdate, may be pursued by motion under subdivision (a)(2). However, in the rare case where a prospective police witness has a criminal record which could be used for impeachment, the Commonwealth should provide automatic discovery of this fact under subdivision (a)(1)(A)(iii)(exculpatory evidence).

(a)(1)(A)(vi). Intended expert opinion evidence. The Commonwealth's intended expert opinion evidence was made part of automatic, mandatory discovery to the defense under this 2004 provision. The subdivision specifies that expert opinion evidence includes "the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case." Discovery of the prosecution's expert opinion is also a matter of statutory right in district court. G.L. c. 218, § 26A.

Subdivision (vi) does not apply to experts who may have been interviewed or retained but whose testimony or reports are not intended for use at trial. It also does not apply to expert evidence relevant to a defendant's criminal responsibility or to a mental impairment relevant to mens rea, which are governed by Rule 14(b)(2) as described infra.

Under the general automatic discovery provisions of subdivision (a)(1)(A), only evidence in the possession, custody or control of the prosecution at the time of the pretrial conference is due at that time. A party may discover or retain an expert later in the course of trial preparation, at which point it must provide discovery of its intended expert opinion evidence under the continuing duty requirement of subdivision (a)(4).

(a)(1)(A)(vii). Material and relevant police reports, photographs, tangible objects, intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the Commonwealth intends to call as witnesses. Most of these items were treated as "discretionary discovery" in the original provisions of Rule 14. The 2004 amendments to Rule 14 make discovery of these items mandatory and automatic. However, in district court defense discovery of these items had been mandated since 1994 under M.G.L. c. 218, § 26A par. 2, which requires the prosecution to provide discovery of certain specified items and also "any material and relevant evidence [and] documents." Because subdivision (vii) does not include the latter term but only specified items, the Commonwealth's mandatory discovery obligation remains broader in district courts than in courts where sec. 26A does not apply. Nevertheless, the items included in this subdivision are likely to exhaust the Commonwealth's evidence in many cases and therefore obviate the need for filing motions to obtain further discovery in those cases.

This provision encompasses "statements of persons," but with regard to this item limits the scope of discovery to statements of only those persons whom the Commonwealth intends to call as witnesses at trial. Rule 14(d), described infra, defines the term "statement." Mass. R. Crim. P. 23(b) affords an overlapping right to a testifying witness' statements prior to cross examination. Similarly, subdivision (iii) requires that a witness' prior inconsistent statement be provided to opposing counsel as exculpatory evidence, insofar as it would diminish the credibility of the witness. Commonwealth v. St. Germain, 381 Mass. 256, 262 (1980). Some statements of persons who may not be prospective witnesses must be produced for defense discovery pursuant to other

provisions, such as police reports included in this subdivision, co-defendants' statements pursuant to subdivision (i), grand jury minutes and relevant testimony pursuant to subdivision (ii), exculpatory statements pursuant to subdivision (iii), and statements made by or in the presence of an identifying witness relevant to the issue of identity pursuant to subdivision (viii).

This subdivision also mandates automatic discovery of any relevant reports of physical examinations or scientific tests or experiments. Often but not always, these will be in conjunction with expert opinion evidence, which must be produced pursuant to subdivision (vi). Under this provision such reports must be produced if relevant, whether or not intended for use at trial and whether or not prepared by an expert. When tests of physical evidence have been conducted by the Commonwealth, the defense also has a right of access to that evidence to conduct its own independent tests, at least unless the testing of another available item would be as probative on the issue. Commonwealth v. Neal, 392 Mass. 1, 10 (1984); Commonwealth v. Nicholson, 20 Mass. App. Ct. 9, 16 n.4 (1985). Regarding access to the government's evidence for investigation generally, see California v. Trombetta, 467 U.S. 479, 485 (1984) (Sixth Amendment right); Commonwealth v. Balliro, 349 Mass. 505 (1965) (art. 12 right).

(a)(1)(A)(viii). Identification procedures and statements. Under this subdivision promulgated in 2004, the Commonwealth must provide automatic discovery of any statements made by, or in the presence of, an identifying witness if relevant to the issue of identity or to the fairness or accuracy of the identification procedures. It must also provide a summary of identification procedures to the defense.

Many cases are not "wrong man" cases. In such cases, if there have been no identification procedures the prosecution is not required to do anything under this subdivision. But where identification is at issue and procedures have been used they should be disclosed. Commonwealth v. Dougan, 377 Mass. 303, 316 (1979) (the due process right to fair identification procedures "would mean little if it did not carry with it the right to be informed of the details of any out-of-court identification, even if it were not used at trial"). Prior Massachusetts case law (as well as the constitutional obligation to disclose exculpatory evidence) affords the defendant a right to discover whether the witness previously failed to identify him. Commonwealth v. Clark, 378 Mass. 392, 403 (1979).

(a)(1)(A)(ix). Promises, rewards or inducements made to prospective witnesses. Such inducements offered by the prosecution affect the credibility of the witness, and the defense is constitutionally entitled to discover it. See Commonwealth v. Hill, 432 Mass. 704, 715 (2000); Gigilo v. United States, 405 U.S. 150, 154–55 (1972); Commonwealth v. Luna, 410 Mass. 131, 139–40 (1991). An implicit quid pro quo may exist, and must be disclosed, even in the absence of any explicit promise. Even if there are no explicit promises, any implicit quid pro quo must be revealed. Commonwealth v. Johnson, 21 Mass. App. Ct. 28, 4041 (1985). Moreover, even if there is no quid pro quo by which consideration is given in return for testimony, any material understanding or agreement between the government and a key witness or his attorney must be revealed. Commonwealth v. Collins, 386 Mass. 1, 11-12 (1982); Commonwealth v. Gilday, 382

Mass. 166, 175-76 (1980) (promise to witness' attorney not known to witness must be disclosed); California v. Trombetta, 467 U.S. 479, 485 (1984).

This subdivision requires the Commonwealth to disclose promises, rewards or inducements to only those witnesses it intends to present at trial. However, this obligation does not exhaust the Commonwealth's constitutional obligation to disclose all exculpatory evidence, or its parallel obligation under subdivision (iii) of this Rule. Such exculpatory evidence could, for example, include a promise or inducement made to a hearsay declarant whom the Commonwealth does not intend to present at trial.

(a)(1)(B). Reciprocal discovery to the prosecution. Originally, Rule 14(a)(3) (as then numbered) provided that a court could order reciprocal discovery to the prosecution in its discretion. This provision derived from then-recent holdings of the Supreme Court relative to the rights of the prosecution to discover the defendant's case.

The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either *by the prosecution* or by the defense.

United States v. Nixon, 418 U.S. 683, 709 (1973) (emphasis supplied). Under these cases, the prosecution was empowered to call upon the power of the court to compel production of evidence which will facilitate full disclosure of all the relevant facts. United States v. Nobles, 422 U.S. 225 (1975). See Commonwealth v. Hanger, 377 Mass. 503 (1979); Blaisdell v. Commonwealth, 372 Mass. 753 (1977); Commonwealth v. Edgerly, 372 Mass. 337 (1977); Commonwealth v. Lewinski, 367 Mass. 889, 903 n. 10 (1975).

Revisions to Rule 14 in 2004 expanded the defense obligation by making reciprocal discovery mandatory, not discretionary. Under Rule 14(a)(1)(B), when the prosecution certifies that it has disclosed and made available the discoverable items it has, it is entitled to automatic reciprocal discovery of specified categories of defense evidence. Any differences between the obligations on the defense and prosecution result from asymmetrical constitutional requirements. There are two, deriving from the defendant's right to due process and privilege against self-incrimination. First, the defense obligation is limited to evidence it intends to introduce at trial, whereas the prosecution must turn over some evidence it may intend not to use (and in the case of exculpatory evidence, is constitutionally required to do so). Since its promulgation in 1979, Rule 14 has limited reciprocal discovery to "intended" defense evidence because the U.S. Supreme Court case of Williams v. Florida, 399 U.S. 78 (1970), upheld the constitutionality of prosecutorial discovery only on the basis of this limitation. According to Williams, the Fifth Amendment privilege limits prosecutorial discovery to evidence the defendant intends to introduce. Intention in this context is, of course, fluid as investigation and discovery progress and the defendant is subject to the continuing duty imposed by subdivision (a)(4), infra. The second difference between the prosecution and defense obligations is in the order of disclosure: the prosecution gets its discovery only after it has produced discovery for the defense. In Wardius v. Oregon, 412 U.S. 470 (1973), the Supreme Court found reversible error, in violation of due

process, for the prosecution to receive categories of discovery without discovery of those same categories to the defense. To assure against such reversible error, and to allow defendants to assess what evidence they should introduce as required by the Williams "intended evidence" constitutional limitation, the Rule provides for defense discovery to take place first.

Under subdivision (a)(1)(B), automatic reciprocal discovery to the prosecution commences only after the Commonwealth has delivered all defense discovery required pursuant to the automatic discovery provisions of (a)(1)(A) and any other extant discovery orders. After that point, and by a date agreed to by the parties or ordered by the court, the defense is obligated to provide the Commonwealth with discovery of the names, addresses, dates of birth, and statements of its intended witnesses; and of every relevant item described in subdivisions (a)(1)(A) (vi), (vii), and (ix) that it intends to use at trial. In Commonwealth v. Reynolds, 429 Mass. 388 (1999), a pretrial agreement signed by the parties obligated defense counsel to provide not only statements of witnesses it intended to introduce, but also statements of Commonwealth witnesses that it intended to use in cross examination. The specified obligations under this subdivision do not go so far. Just as subdivision (a)(1)(A)(vii) requires the Commonwealth to disclose the statements of its own intended witnesses, subdivision (a)(1)(B) requires the defense to provide discovery of the statements of its own witnesses, not all witnesses. Discovery of other statements must be pursued by motion.

A separate provision in this Rule affords the prosecution notice of certain defenses if the defendant intends to assert one of them at trial. As discussed infra, under subdivision (b), the defense must provide notice and/or discovery if it intends to defend on the basis of alibi, lack of criminal responsibility, or the existence of a license, claim of authority or ownership, or exemption.

(a)(1)(C). Stay of automatic discovery; sanctions. According to this subdivision, the automatic discovery provisions of subdivision (a)(1) which stem directly from the Rule "shall have the force and effect of a court order." If a party violates one of its automatic discovery obligations, the court may impose any of the sanctions permitted for non-compliance with a court order under subdivision 14(c). Id.

This provision also allows a party to seek a judicial determination of whether an item should not be subject to discovery, notwithstanding its inclusion in the automatic discovery regime. If a party has good cause for declining to provide such discovery, it should move for a protective order. This subdivision provides that the filing of such a motion stays production of the item pending a ruling by the court.

(a)(1)(D). Record of convictions of the defendant, codefendants and prosecution witnesses. Under this provision, at arraignment the court must issue an order to the Probation Department, directing it to deliver to all parties its record of all prior complaints, indictments, and dispositions of the defendants and all witnesses identified pursuant to subdivision (a)(1)(A)(iv). Under the latter provision, the Commonwealth must notify the Probation Department of its intended witnesses. The court's order must also require the Probation Department to provide this information no later than 5 days after it has been notified by the Commonwealth of its witnesses. See also Reporter's Notes to (a)(1)(A)(iv).

(a)(1)(E). Notice and preservation of evidence. Under this provision promulgated in 2004, if the prosecutor becomes aware of the existence of an item that would be subject to mandatory discovery but for the fact that it is not within the prosecutor's possession, custody or control, the prosecutor must notify the defendant of the existence (and if known, the location) of the item. The defendant may then move for an order requiring the individual or entity in possession of the item to preserve it for a specified period of time.

This subdivision does not require the prosecution to search for new evidence. It applies only to evidence already known to exist without inquiry; and only to evidence held by independent third parties who are not part of the prosecution team and thus not subject to rule 14 discovery. In addition to insuring that the defense is aware of potentially significant evidence known to the prosecution, this provision is intended to place the defendant in a position to move the court for an order preventing destruction of the evidence so that a subsequent defense subpoena may be effective. To provide a party or independent witness with recourse when a preservation order is inappropriate or unnecessary, the rule provides for motions to vacate or modify the preservation order, or to protect the probative value of the evidence by alternative means.

(a)(2). Motions for discovery. Although most discovery is made automatic under the rule, there may be additional items not encompassed by Rule (a)(1)(A) that are properly discoverable. Rule 14(a)(2) provides for motions to discover such material. Such a motion may only be made for discovery of material and relevant evidence that is not encompassed by the automatic discovery provisions; if items in the latter category are not produced, the proper response is to file a motion to compel discovery or, in an appropriate case, a motion for sanctions under (a)(1)(C).

The timing and deadlines for discovery motions are set out in Rule 13(d)(1). Additionally, because the Commonwealth must provide discovery before it can obtain reciprocal discovery, subdivision (a)(2) provides that the Commonwealth may file a motion for discovery only after it has filed a Certificate of Compliance under subdivision (a)(3).

Nothing in this Rule is intended to prohibit the court from ex parte consideration of discovery motions in appropriate circumstances, consistent with law.

(a)(3). Certificates of compliance. Under this subdivision, each party must file a certificate of compliance when it has met its automatic or court-ordered discovery obligations (other than disclosure of expert reports, which may be written late in the case). The certificate must identify each item provided.

The certificate is properly filed when, to the best of its knowledge and after reasonable inquiry, the party has provided discovery of all covered items it then has. The provision recognizes that additional discovery will likely occur as new information and witnesses are obtained, and mandates a supplemental certificate for that purpose.

(a)(4). Continuing duty. This is taken from Rule 3.220(f) of the Florida Rules of Criminal Procedure and has a counterpart in the Federal Rule, the New Jersey Rule and the ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970). This subdivision imposes a continuing duty to promptly provide court-ordered discovery as additional information is acquired. The duty continues throughout the trial, Commonwealth v. Costello, 392 Mass. 393 (1984), and includes an obligation to correct previous disclosures that have turned out

to be inaccurate. Commonwealth v. Borans, 379 Mass. 117, 153 (1979); Commonwealth v. Gilbert, 377 Mass. 887, 893 (1979).

(a)(5). Work product. Work product is protected under the federal rule and the ABA Standards, supra. The sanctity of a party's "work product" is a well recognized principle that was specifically approved by the Supreme Court relating to its application to discovery under the Federal Rules of Civil Procedure, Hickman v. Taylor, 329 U.S. 495 (1947). The principle has equal applicability to criminal discovery.

The definition of "work product" is drawn in part from Rules of Criminal Procedure (ULA) rule 421(b)(1)(1974). The subdivision defines "work product" as limited to portions of documents containing the "legal research, opinions, theories or conclusions of the adverse party or its attorney and legal staff" or statements of the defendant made to counsel or counsel's legal staff. Although witness statements obtained by counsel are not deemed work product under this definition, see Commonwealth v. Paszko, 391 Mass. 164, 186–88 & n.27 (1984) and Commonwealth v. Bing Sial Liang, 434 Mass. 131, 140 (2001), in some cases "witness statements may be so commingled with counsel's theories, or so revealing of counsel's mental processes by virtue of the areas covered, as to be unsegregable and constitute work product." Blumenson, Fisher and Kanstroom, Massachusetts Criminal Practice (1998), Sec. 16.2C, citing Commonwealth v. Lewinski, 367 Mass. 889, 902 (1975) and Upjohn v. United States, 449 U.S. 383, 400– 01 (1981).

(a)(6)(Protective orders) and (a)(7)(Amendment of discovery orders). Although Rule 14(a) provides for automatic, mandatory discovery, if danger or abuse can be shown, or a privilege preventing disclosure applies, discovery need not be granted. The power of the court to restrict the scope of otherwise permissible discovery is recognized in the Federal Rule, the New Jersey Rule, the Florida Rule, and the ABA Standards, supra.

Protective orders are designed for the unusual case in which the granting of discovery will work to the injury of the person whose material is to be discovered or to the injury of some third person. Although a party must move for such an order, this does not imply that the moving party always has the burden of proof. Ordinarily the party or person opposing discovery has the burden of showing why the discovery of requested materials must be denied or granted subject to restriction, but in certain cases including some privileges, statutory or case law may provide that the party seeking disclosure has the burden of proof. Therefore the 2004 revision added to this subdivision an explicit recognition that "nothing in this provision shall be deemed to alter the allocation of the burden of proof with regard to the matter at issue, including privilege."

With respect to automatic discovery mandated under subdivision (a)(1), a motion for a protective order stays the discovery obligation pending a ruling by the court. Subdivision (a)(1)(C). With respect to discretionary discovery sought by motion under subdivision (a)(2), a protective order may be sought only to restrict (and not prevent completely) the scope of discovery, because if reasons exist to wholly deny discovery ab initio, it is within the discretion of the court to deny the discovery motion, without requiring the opponent to the motion to seek a protective order. If what is sought is the modification of an existing discovery order the following subdivision, (a)(7), provides the appropriate remedy.

The provisions of these subdivisions that the court may, in certain situations, grant discovery to a defendant on condition that the material to be discovered be available only to counsel for the defendant, is merely a corollary to that sentence of subdivision (a)(6) which gives the court the power, upon a sufficient showing, to deny, restrict, or defer discovery or inspection. Fed. R. Crim. P. 16(d) and ABA Standards § 4.4 give the judge this same power. The commentary accompanying the ABA Standard indicates that this restriction on disclosure means "such adjustment of the time, place, recipient, and use of disclosures as may commend themselves in the particular case." ABA Standards, supra, comment at 102. Since it is constitutionally permissible to limit pretrial discovery in criminal cases, United States v. Randolph, 456 F.2d 132 (3d Cir. 1972), there should be no objection to the Commonwealth's giving material only to defendant's counsel in certain situations, which is preferable to denying discovery altogether. It is contemplated that this provision of Rule 14 will sometimes be used to prevent a defendant from seeing his own psychiatric report. In some instances, the mental well-being of the defendant could be adversely affected if he or she has access to such a report. United States v. Moody, 490 F.2d 866 (5th Cir. 1974). Although the defendant in Moody had been convicted, the same rationale is applicable to the defendant awaiting trial.

Nothing in this Rule is intended to prohibit the court from ex parte consideration of a motion for a protective order in appropriate circumstances, consistent with law.

(a)(8). Waivers and agreements to alter discovery rights. Rule (a)(8) allows the parties to change discovery requirements by waiver or agreement, including both the scope and timing of discovery. The waiver or agreement must be in writing, signed by the waiving party or the parties to the agreement, identify the specific items included, and be served upon all parties.

Subdivision (b). Special procedures. Rule 14(b), governing notice to the prosecution of certain intended defenses, was left essentially unchanged by the 2004 revision, except for the substitution of gender neutral language. Under this provision, the prosecution is entitled to notice, and in some cases discovery, when the defendant intends to defend on the basis of alibi, lack of criminal responsibility, or the existence of a license, claim of authority or ownership, or exemption.

The philosophy and provisions of this subdivision are drawn from Commonwealth v. Edgerly, 372 Mass. 337 (1977); Blaisdell v. Commonwealth, 372 Mass. 753 (1977); and a number of other sources. See Commonwealth v. Hanger, 377 Mass. 503 (1979); Commonwealth v. Lewinsky, 367 Mass. 889, 902-03 and n. 10 (1975); Fed. R. Crim. P. 12.1, 12.2; Fla. R. Crim. P. 3.200; Rules of Criminal Procedure (ULA) rule 423(a)(1) (2) (1974); National Advisory Commission on Criminal Justice Standards and Goals, Courts, standard 4.9 (1973).

The Supreme Court in Williams v. Florida, 399 U.S. 78 (1970), held that a prosecutor could obtain discovery from a defendant by requesting information pertaining to evidence which the defendant intended to offer at trial without violating the fifth amendment privilege against self-incrimination. Although the defense is compelled to make an accelerated determination of the evidence it is to introduce at trial, the nature of this compulsion is such that it is not unconstitutional. While the holding of the Supreme Court related only to the discovery of a defendant's prospective alibi defense, the decision indicates that the rule announced is applicable

to other forms or prosecutorial discovery as well. See Commonwealth v. Lewinsky, 367 Mass. 889, 903 n 10 (1975). The types of disclosures mandated by subdivision (b)(1)-(3) occur in those situations where in fairness the Commonwealth is entitled at least to notification.

(b)(1). Notice of alibi. Notice-of-alibi rules have been in existence at least since 1927 and as of 1978 at least half the states had such rules. See Williams v. Florida, 399 U.S. 78, 81-82 (1970). The substance of this subdivision is taken from Commonwealth v. Edgerly, 372 Mass. 337, 344-45 (1977).

In Gilday v. Commonwealth, 360 Mass. 170 (1971), the Supreme Judicial Court, mindful of the implications of the Supreme Court's decision in Williams v. Florida, 399 U.S. 78 (1970), held that discovery by the prosecution of the defendant's intent to interpose an alibi defense and of the names of any prospective witnesses in support of the alibi violated due process because in Massachusetts a defendant did not have an equal right to discovery from the prosecution. Nearly all a defendant's rights to discovery had been subject to judicial discretion under Massachusetts law. The Supreme Court in Wardius v. Oregon, 412 U.S. 470 (1973), specifically held that reciprocity in discovery rights was a constitutional prerequisite to the validity of prosecutorial discovery. That requirement is supplied by subdivisions (b)(1)(B)-(C).

The purpose of such a rule is two-fold. First, alibi defenses are the most frequently and easily fabricated defenses. See, for example, Commonwealth v. Harris, 364 Mass. 236, 238 (1973). By requiring the defendant to give the Commonwealth pretrial notice of his intent to interpose such a defense and a list of witnesses to be used in support of the alibi, the defendant is prevented from using an eleventh hour defense, and the Commonwealth is given the tools necessary to uncover fabrication. Fairness to the defendant is insured by granting him discovery of the identities of rebuttal witnesses. Second, the need to grant continuances on the basis of surprise at trial will no longer exist.

As the Edgerly court observes, if, in the court's discretion, no other order is appropriate to serve the purposes of this rule, it may exclude the testimony of any undisclosed witness offered by either party as to the defendant's absence from, or presence at, the scene of the alleged offense. 372 Mass. at 345. Exclusion of such alibi testimony, other than the defendant's, is authorized in subdivision (b)(1)(D). See Commonwealth v. Cutty, 47 Mass. App. Ct. 671, 673 (1999). If a defendant against whom a sanction is imposed is convicted, he or she may, of course, preserve for argument on appeal the issue of whether imposition of that sanction amounted to an abuse of discretion or the denial of any constitutional right. Commonwealth v. Edgerly, supra at 339 and 343. See generally Commonwealth v. Reynolds, 429 Mass. 388, 398-399 (1999); Commonwealth v. Durning, 406 Mass. 485, 496 (1990); Commonwealth v. Chappee, 397 Mass. 508, 518 (1986); Taylor v. Illinois, 484 U.S. 400 (1988). In Commonwealth v. Hanger, 377 Mass. 503 (1979), the procedure authorized by this subdivision was substantially approved in the absence of any rule, even though the Commonwealth's motion was not presented until the second day of trial.

(b)(2). Notice of intent to defend by lack of criminal responsibility or mental incapacity. The subject matter of this subdivision was treated by the Supreme Judicial Court in Blaisdell v. Commonwealth, 372 Mass. 753 (1977), and the procedures contained herein substantially restate

those dictated by the court in that opinion. At its inception, this subdivision governed only a prospective insanity defense, but since then the Supreme Judicial Court has extended its scope to govern other defense claims based on mental impairment or incapacity, including mental incapacity to entertain mens rea, Commonwealth v. Diaz, 431 Mass. 822 (2000), or to voluntarily waive Miranda rights, Commonwealth v. Ostrander, 441 Mass. 344 (2004).

Provisions requiring notice of an intent to rely upon a defense of lack of criminal responsibility or diminished mental capacity have a different purpose than notice-of-alibi provisions. The latter, as noted above, are directed at preventing "eleventh-hour" or fabricated alibis. On the other hand, because rebuttal of an insanity defense requires a degree of expertise on the part of a cross-examiner that can only be gained through pretrial research, this subdivision is intended to meet the need of a prosecutor to become familiar with the complex nature of this type of defense.

The Supreme Judicial Court in Gilday v. Commonwealth, 360 Mass. 170 (1971), upheld an order to the defendant to disclose his intent with regard to the interposition of a defense of not guilty by reason of insanity despite the fact that the system of discovery then in effect was non-reciprocal. Implicit in the court's opinion is the fact that due process did not require reciprocation by the Commonwealth because only notice of intent to interpose the defense, and not the identity of the defendant's witnesses nor the evidence intended to support of that defense, was required. In short, the only response by the Commonwealth would be that opposition to that defense would be presented, which does not reasonably require notice.

As the court recognized in Blaisdell v. Commonwealth, the privilege against self-incrimination is not implicated by a mere notice requirement. 372 Mass. at 767. Nor is there anything in that privilege which precludes

an order requiring a defendant to reveal on motion of the prosecution the information of (a) whether a defendant pursuant to such defense intends to offer expert testimony thereon; (b) the names and addresses of such expert witnesses as the defense intends to call; (c) whether a defendant's experts intend to rely in whole or in part on statements of the defendant pertaining to his mental state at or about the time of the commission of the alleged crime or as it may be otherwise relevant to the issue of his mental responsibility therefor.

Id. That information is required by subdivisions (b)(2)(A)(ii)-(iii) of this rule. If the defendant files the notice of intent, the Commonwealth is subject to the reciprocity requirements of this rule and as imposed by Commonwealth v. Edgerly, 372 Mass. 337, 342 (1977); Blaisdell v. Commonwealth, 372 Mass. 753 (1977).

If in answer to subdivision (b)(2)(A)(iii) the defendant responds that his expert witnesses intend to rely upon statements of the defendant as a foundation for their testimony, or if that fact becomes apparent from inquiry by the judge or developments in the case, the judge may order that the defendant submit to a psychiatric examination. (b)(2)(B).

If…a defendant voluntarily submits to psychiatric interrogation as to his inner thoughts, the alleged crime and other relevant factors bearing on his mental responsibility and, on advice of counsel, voluntarily proffers such evidence to the jury, we feel that the offer of such expert testimony based in whole or in part on a defendant's testimonial statements constitutes a waiver of the privilege [against self-incrimination] for such purposes….In short, by adopting this

approach, a defendant who seeks to put in issue his statements as the basis of psychiatric expert opinion in his behalf opens to the State the opportunity to rebut such testimonial evidence in essentially the same way as if he himself has testified….Under such a view there would be no violation of his privilege should the court then order him under c. 123, § 15, to submit to psychiatric examination so that the jury may have the benefit of countervailing expert views, based on similar testimonial statements of a defendant in discharging its responsibility of making a true and valid determination of the issues thus opened by a defendant.

Blaisdell v. Commonwealth, 372 Mass. 753, 765-766 (1977) (citation omitted). The privilege against self-incrimination does not bar the Commonwealth's use of evidence which incriminates the defendant, but rather the compelled production of such evidence by the defendant; yet it is clear that an examination pursuant to this subdivision constitutes compelled production. Blaisdell v. Commonwealth, supra, 372 Mass. at 758. See also Commonwealth v. Baldwin, 426 Mass. 105 (1997); Commonwealth v. Wayne W., 414 Mass. 218, 228–30 (1993). Therefore, if the psychiatric report contains evidence of a testimonial character, it is not to be made available to either party unless the defendant is to testify on his own behalf or is to offer expert testimony based on his statements ([b][2][B][iii][c]) or unless the defendant, by motion, requests that it be made available. ([b][2][B][iii][b]). Ordering the examination to be conducted prior to a defendant's formal waiver of the privilege against self-incrimination is justified on the basis that:

To require the Commonwealth to wait may…well cause it to be disadvantaged in meeting the issues raised by a defendant's evidence by virtue of the fact that its expert witnesses will lack adequate time to examine properly a defendant and his evidence in order to prepare for trial. Alternatively, a continuance of the trial may cause needless expense to the Commonwealth, unnecessary inconvenience to the court and to the jurors, and disruption of the progress of the trial which may cause harm to either the prosecution or the defense. To require the Commonwealth to wait until such a waiver occurs at trial seems not only inexpedient and unwise but also unnecessary.

Blaisdell v. Commonwealth, supra, 372 Mass. at 767.

(b)(3). Notice of defenses based on license, authority, ownership or exemption. This subdivision, promulgated in 1979, requires the defendant to furnish the prosecution with notice of his intent to rely upon a defense based upon a license, claim of authority or ownership, or exemption.

A "license" is defined as a right granted by the Commonwealth or other competent authority to do a particular act or carry on a particular business which, without such license, would be unlawful. A "claim of authority" is an assertion that the claimant has received an express or implied right to do an act from one lawfully empowered to grant such right. A "claim of ownership" is an assertion that the claimant has a right of possession enforceable in a court. An "exemption" is a release from a duty or obligation to which others are subject.

The requirement of disclosure in this subdivision is reasonable when considered in light of "the proposition that the end of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduce surprise at trial." Wardius v. Oregon, 412 U.S. 470, 473 (1973).

The concept of mandating notice of criminal defenses other than alibi and insanity, subdivisions (b)(1)-(2) supra, was advocated by the American Bar Association in the ABA Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970):

Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of the nature of *any* defense which defense counsel intends to use at trial…

Id., § 3.3 (emphasis supplied).

Considerations of reciprocity, dealt with by the United States Supreme Court in connection with notice-of-alibi statutes in Wardius v. Oregon, 412 U.S. 470 (1973) and Williams v. Florida, 399 U.S. 78 (1970), and by the Supreme Judicial Court in Gilday v. Commonwealth, 360 Mass. 170 (1971), are inapposite to subdivision (b)(3). The Williams-Wardius cases hold that state statutes requiring notice to be given the prosecution that an alibi defense is to be raised at trial, with the names of witnesses to be called in support of the alibi, are constitutionally valid only if the defendant is allowed reciprocal rights to receive the names of governmental rebuttal witnesses. The statutes in those decisions, unlike Rule 14(b)(3), involved the furnishing of prosecutors with both notice of, and information pertaining to, the intended defense. See subdivisions (b)(1) and (b)(2), supra. It was to this information gathering aspect of the Oregon and Florida statutes that the Supreme Court addressed itself:

It is fundamentally unfair to require the defendant to divulge *the details* of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.

Wardius, supra at 476 (emphasis added).

Subdivision (b)(3) involves the giving only of notice. The defendant is not required to divulge the details of his intended defense. Mere notification of intent to raise a defense without more does not trigger considerations of reciprocity. See Commonwealth v. Gilday, 360 Mass. 170 (1971); Blaisdell v. Commonwealth, 372 Mass. at 764, 767 (1977).

The sanction for failure to comply with the requirement of subsection (b)(3) is drawn from Fed. R. Crim. P. 12.1 and 12.2. See also ABA Standards, supra, § 4.7. The court may "for cause shown" ease or lift the requirements of this subdivision.

Subdivision (c). Sanctions for noncompliance. Sanctions may be issued under this subdivision for violations of discovery obligations established either by the court's order or by the automatic discovery provisions of the rule. The automatic discovery obligations of subsections (a)(1)(A)(discovery to the defense) and (a)(1)(B)(discovery to the prosecution) stem from the rule itself rather than an order issued by the court, but subdivision (a)(1)(C) provides that they "have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c)."

The general sanction provision of subdivision (c)(1) is paralleled by Fed. R. Crim. P. 16(d)(2) and New Jersey R. Crim. P. 3:13-3(f). The power to exclude alibi evidence other than the defendant's testimony is recognized in Commonwealth v. Edgerly, 372 Mass. 337, 342 (1977), and is express in subdivision (b)(1)(D), supra. See Federal Rule 12.1; ABA Standards Relating to

Discovery and Procedure Before Trial § 4.7(a) (Approved Draft, 1970). Subdivision (b)(2)(B), supra, provides the sanction for failure of the defendant to comply with a court-ordered psychiatric examination.

"Rights and duties are ephemeral indeed without remedies." ABA Standards, supra, comment at 107. Subdivision (c)(1) is intended to provide the general rule and is based on that assumption that the trial court is in the best situation to consider the opposing arguments concerning a failure to comply with a discovery order and to fashion an appropriate remedy. Remedies for non-compliance with discovery requirements could include a further order for discovery, a continuance, exclusion of certain testimony, or "such other order as [the Court] deems just under the circumstances." (c)(1). A continuance or in some cases a mistrial may be the proper remedy when delayed disclosure leaves the defendant unable to "make effective use of the evidence in preparing and presenting his case." See Commonwealth v. Baldwin, 385 Mass. 165, 175 & n.10 (1982); Commonwealth v. St. Germain, 381 Mass. 256, 262–63 (1980). (There is, it should be noted, a statutory limitation on the court's power to grant a continuance without the defendant's consent. When the defendant is in custody, General Laws c. 276, § 35 provides a thirty day limit in such instances.) A dismissal barring retrial may be required when a discovery violation has resulted in irremediable harm to the defendant's opportunity to obtain a fair trial.

Although the court may exercise its general sanction power under subdivision (c)(2) to exclude evidence, it is generally better to grant each party the freedom to present all relevant evidence at trial. However, in regard to alibi evidence, there is sufficient likelihood of abuse to require specifically empowering the court to exclude extrinsic alibi evidence other than the defendant's testimony, and this is specifically authorized by section (b)(1)(D). A court should only employ this sanction, however, when convinced that a failure to comply with an order was deliberate and prejudicial to the Commonwealth. Subdivision (c)(2) also provides that evidence concerning the defense of lack of criminal responsibility cannot be excluded except as provided by subdivision (b)(2).

Subdivision (d). Definition of "statement." The definition of the term "statement" was initially drawn from 18 USC § 3500(e)(1)-(2) (1969, Supp. 1976) and Commonwealth v. Lewinski, 367 Mass. 889 (1975). Definition (d)(1) defines "statements" which have been written by the percipient witness himself or herself. Definition (d)(2) defines "statements" which have been contemporaneously recorded by someone other than the speaker or writer.

The definition in (d)(1) was amended in 2004 to delete the requirement that writings by witnesses be signed or otherwise adopted by the author. In Commonwealth v. Lewinski, 367 Mass. 889, 901-903 (1975), the Court stated that without any showing of particularized need, a defendant was entitled to all "prior written statements of prosecution witnesses which are available to the prosecution and are related to the subject," and subdivided this into three categories of mandatorily discoverable statements: "any statement made by the witness and in some definite way approved by him, a transcript of a contemporaneous verbatim or substantially verbatim stenographic or other recording of an oral statement by the witness, and a written report consisting of a statement by the witness." The 2004 revision reflects a decision that the definition of written statements made by a witness should encompass written statements of a percipient

witness which have not been formally adopted by the witness, and the third category in Lewinsky, although not without ambiguity, implies as much. Under 14(d)(1), these will have been written by the percipient witness himself, and under 14(d)(2), such statements must still be "a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration" (emphasis added). In both cases, such evidence is generally relevant at trial; for example, one need not show a prior statement was adopted as accurate and complete by the writer in order to admit and demonstrate its inconsistencies. Prior informal statements, not intended for court, are not only often admissible at trial but often more probative than formal signed statements in anticipation of litigation. On this view, if the police have taken a statement of a witness who will testify, it should be discoverable to the defense.

However, the revised definition does not extend to "drafts or notes that have been incorporated into a subsequent draft or final report." It would be unnecessary and burdensome to require that every rough draft of a police report or other statement to be turned over in addition to the final one.

Subdivision (e), which formerly specified the time limits for discovery, was deleted as part of the 2004 revisions. In the amended rules, the deadlines for automatic, non-motion discovery are detailed in Rule 14(a)(1)(a) and (b), and the deadlines for discovery (and other) motions are found in Rule 13(d).

Rule 15: Interlocutory Appeal

(Applicable to District Court and Superior Court)

(a) Right of Interlocutory Appeal.

(1) Right of Appeal Where Pretrial Motion to Dismiss or for Appropriate Relief Granted. The Commonwealth shall have the right to appeal to the Appeals Court a decision by a judge granting a motion to dismiss a complaint or indictment or a motion for appropriate relief made pursuant to the provisions of Rule 13(c).

(2) Right of Appeal Where Motion to Suppress Evidence Determined. A defendant or the Commonwealth shall have the right and opportunity to apply to a single justice of the Supreme Judicial Court, in the form and manner prescribed by a standing order of that court, for leave to appeal an order determining a motion to suppress evidence prior to trial. If the single justice determines that the administration of justice would be facilitated, the justice may grant that leave and may hear the appeal or may order it to the full Supreme Judicial Court or to the Appeals Court for determination.

(3) Right of Appeal Where Delinquency Defendant Discharged. The Commonwealth shall have the right to appeal to the Appeals Court a decision by a judge discharging a person pursuant to G. L. c. 119, § 72A .

(4) Probable Cause Hearings. No interlocutory appeal or report may be taken of matters arising out of a probable cause hearing.

(b) Procedural Requirements.

(1) Time for Filing Appeal. An appeal under Rule 15(a)(1) shall be taken by filing a notice of appeal in the trial court within thirty days of the date of entry of the order being appealed. An application for leave to appeal under Rule 15(a)(2) shall be made by filing within thirty days of the date of entry of the order being appealed, or such additional time as either the trial judge or the single justice of the Supreme Judicial Court shall order, (a) a notice of appeal in the trial court, and (b) an application to the single justice of the Supreme Judicial Court for leave to appeal.

(2) Record. The record for an interlocutory appeal shall be defined and assembled pursuant to Massachusetts Rule of Appellate Procedure 8.

(3) Findings. The judge shall make all findings of fact relevant to the appeal or the application for leave to appeal within the period specified in Rule 15(b)(1) for filing the notice of appeal.

(c) Determination of Motions. Any motion the determination of which may be appealed pursuant to this rule shall be decided by the judge before the defendant is placed in jeopardy under established rules of law.

(d) Costs upon Appeal. If an appeal or application therefor is taken by the Commonwealth, the appellate court, upon the written motion of the defendant supported by affidavit, shall determine and approve the payment to the defendant of his or her costs of appeal together with reasonable attorney's fees to be paid on the order of the trial court upon the entry of the rescript or the denial of the application.

(e) Stay of the Proceedings. If the trial court issues an order which is subject to the interlocutory procedures herein, the trial of the case shall be stayed and the defendant shall not be placed in jeopardy until interlocutory review has been waived or the period specified in Rule 15(b)(1) for instituting interlocutory procedures has expired. If an appeal is taken or an application for leave to appeal is granted, the trial shall be stayed pending the entry of a rescript from or an order of the appellate court. If an appeal or application therefor is taken by the Commonwealth, the defendant may be released on personal recognizance during the pendency of the appeal.

Amended April 29, 1986, effective July 1, 1986; amended effective April 14, 1995; March 1, 1996; amended June 8, 2016, effective August 1, 2016; amended January 25, 2017, effective March 1, 2017.

Reporters Notes (2016) The 2016 amendments to Rule 15 respond to the Supreme Judicial Court's decision in Commonwealth v. Jordan , 469 Mass. 134 (2014), a case in which the Commonwealth sought interlocutory review of a suppression order through a late-filed notice of appeal and application for leave to appeal. In agreeing to consider the appeal in spite of the late filings, the Court acknowledged that the procedures governing the timeliness of such appeals lacked clarity, id. at 145, a problem that the Court addressed by announcing specific procedures prospectively applicable to Rule 15 filings seeking leave to appeal suppression orders. Id. at 147-148. In addition to this clarification of Rule 15 filing procedures, the Court expressed concern that then-Rule 15(b)(1)'s ten-day filing period for such appeals might be insufficient. Id. at 149-150. As discussed below, amended Rule 15 implements the procedural framework mandated in Jordan and expands to thirty days the time for filing a notice of appeal and an application for leave to appeal from an order determining a motion to suppress evidence. Amended Rule 15 also includes non-substantive changes that clarify its mandate and update it to reflect current law.

Rule 15(a)(1) Right of Appeal Where Pretrial Motion to Dismiss or for Appropriate Relief Granted. Amended Rule 15(a)(1) reflects longstanding case law, making it clear that the Appeals Court is the court to which the Commonwealth may appeal the allowance of a motion to dismiss or of a motion for appropriate relief other than to suppress evidence. See Commonwealth v. Friend , 393 Mass. 310, 314 (1984) (Commonwealth's appeal from allowance of a motion to dismiss must be to the Appeals Court).

Rule 15(a)(2) Right of Appeal Where Motion to Suppress Evidence Determined. Amended Rule 15(a)(2) implements the late-filing procedures mandated by the Supreme Judicial Court in Commonwealth v. Jordan , 469 Mass. 134 (2014) for interlocutory appeals of an order determining a motion to suppress. Former Rule 15(a)(2) did not specify what showing an applicant for such relief must make concerning the timeliness of the necessary filings, hampering the efforts of single justices to be consistent in addressing the threshold issue of whether the notice of appeal and application for leave to appeal were timely filed and, if not, whether they should nevertheless be considered. See Jordan, 469 Mass. at 145 (acknowledging a "lack of clarity" in the single justices' application of procedural rules governing timeliness of Rule 15(a)(2) filings).

Amended Rule 15(a)(2) cures this deficiency, incorporating by reference the Supreme Judicial Court's standing order prescribing with specificity the form and manner for making an application to a single justice for leave to appeal a suppression order. This standing order, Supreme Judicial Court Order Regarding Applications to A Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2) (2016), in effect codifies Jordan's procedural framework for addressing timeliness issues, including a requirement that an application for leave to appeal a suppression order contain an affirmative representation that the application and notice to appeal are, or are not, timely under Rule 15(b)(1). If the appeal or application is untimely, the standing order requires that the application be accompanied by a motion to enlarge time for filing, supported by an affidavit providing "in meaningful detail the reasons for the delay." See Supreme Judicial Court Order Regarding Applications to A Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2), § (a)(7) (2016). See also Commonwealth v. Jordan , 469 Mass. 134, 147-148 (2014) (setting out 2 "Rule 15 procedure in future cases").

The purpose of this provision is to permit the single justice to whom the application is made to decide (1) whether the application satisfies Rule 15's timing requirements, and, if it does not, (2) whether the application should nevertheless be considered, before proceeding to the merits of the application and, if appropriate, the appeal. This threshold determination by the single justice is intended to be final, foreclosing further consideration of this procedural issue by the full court or the Appeals Court if the single justice refers the appeal to either for determination. See Jordan, 469 Mass. at 148 (2014).

Rule 15(a)(3) Right of Appeal Where Transfer of Delinquency Proceeding is Denied. Rule 15(a)(3), permitting the Commonwealth to appeal a judge's denial of a requested transfer of a delinquency proceeding to Superior or District Court for criminal prosecution, is deleted. G. L. c. 119, § 61, which provided for such transfers, was repealed, making Rule 15(a)(3) obsolete. This section is reserved for possible amendment to reflect current law.

Rule 15(b)(1) Time for Filing Appeal. Rule 15(b)(1), as amended, increases the time to file a notice of appeal and an application for leave to appeal a suppression order to thirty days, clarifying that the starting point for that time period is the date that the order being appealed is entered by the lower court. This filing period is meant to balance the need for adequate time to consider and prepare an application for interlocutory review of a suppression order against the potential for unnecessary, widespread delays in resolving the many criminal cases which involve suppression orders. Thirty days, the filing period applicable to other interlocutory appeals under Rule 15 and presumptively applicable to all appeals in criminal cases, see Rule 4(b), Mass. R. A. P., as amended, 431 Mass. 1601 (2000), should ordinarily suffice. However, if in a particular case a party can demonstrate with specificity that thirty days is insufficient, the rule provides for leave to seek additional time from either the trial judge or single justice. If there is a timely motion to reconsider the suppression order in question, the thirty-day time period for filing an application for interlocutory review does not commence until the trial court enters its order deciding the motion to reconsider. See Jordan, 469 Mass. at 147 n. 24.

The SJC's standing order incorporated in amended Rule 15(a)(2) provides that the party opposing interlocutory appeal of the suppression order may file a memorandum in opposition to that application within fourteen days after the application for leave to appeal is entered. Supreme Judicial Court Order Regarding Applications to A Single Justice Pursuant to Mass. R. Crim. P. 15(a)(2), § (c) (2016). The order further permits the single justice to extend or shorten the time to file such opposition and provides that a party deciding not to file an opposition must serve notice of that intention within the time allowed for filing the opposition. Id.

Rule 15(b)(2) Record; Rule 15(b)(3) Findings. Rule 15(b)(2) and Rule 15(b)(3) contain the provisions of former Rule 15(b)(2), renumbered to separate former Rule 15(b)(2) into two parts, Rule 15(b)(2) providing for definition and assembly of the record and Rule 15(b)(3) requiring timely findings by the trial judge.

Rule 16: Dismissal by the Prosecution

(Applicable to District Court and Superior Court)

(a) Entry of a Nolle Prosequi. A prosecuting attorney may enter a nolle prosequi of pending charges at any time prior to the pronouncement of sentence. A nolle prosequi shall be accompanied by a written statement, signed by the prosecuting attorney, setting forth the reasons for that disposition.

(b) Entry of a Nolle Prosequi During Trial. After jeopardy attaches, a nolle prosequi entered without the consent of the defendant shall have the effect of an acquittal of the charges contained in the nolle prosequi.

Reporter's Notes

While similar to Fed. R. Crim. P. 48, this rule is a formalization of prior Massachusetts practice.

Subdivision (a). The decision to enter a nolle prosequi as to all or any distinct part of pending charges is discretionary with the prosecuting attorney.

Power to enter a nolle prosequi is absolute in the prosecuting officer from the return of the indictment up to the beginning of trial, except possibly in instances of scandalous abuse of the authority.

Commonwealth v. Dascalakis, 246 Mass. 12, 18 (1923). See Manning v. Municipal Court of Roxbury, Mass. Adv. Sh. (1977) 679, 682-83, Commonwealth v. Massod, 350 Mass. 745 (1966). This rule is consistent with the common law. See 30 MASS. PRACTICE SERIES (Smith) §§ 854, 858 (1970, Supp. 1978).

Rule 48(a) of the Federal Rules of Criminal Procedure permits dismissal by the prosecution only with leave of court. It did not seem advisable to engraft this additional requirement onto the Massachusetts rule, however, since it is doubted that the court has the power to compel the Commonwealth to proceed with a case which it does not believe warrants prosecution. See 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 812 at 304 (1969).

The term "prosecuting attorney" in this rule is intended to include municipal attorneys, e.g., city solicitors, prosecuting a case. See G.L. c. 278, § 15.

General Laws c. 277, § 70A is the basis for the second sentence of this subdivision which requires the prosecuting attorney to file a statement of his reasons for entering a nolle prosequi. 30 MASS. PRACTICE SERIES (Smith) § 857 (1970, Supp. 1978); see ABA Standards Relating to the Prosecution Function § 4.4 (Approved Draft, 1971).

Subdivision (b). Once a case has reached trial, the defendant has been placed in jeopardy and has the right to have the issue of his guilt adjudicated. Commonwealth v. Massod, 350 Mass. 745 (1966). If after commencement of trial, but before return of the verdict, the prosecuting attorney enters a nolle prosequi without the consent of the defendant, the defendant is effectually acquitted of those charges which are the subject of the nolle prosequi. Commonwealth v. Hart, 149 Mass. 7 (1889); Commonwealth v. Dascalakis, 246 Mass. 12 (1923); Commonwealth v. Sitko, Mass. Adv. Sh. (1977) 668; 30 MASS. PRACTICE SERIES (Smith) § 855 (1970). This comports substantially with Fed. R. Crim. P. 46(a), which prohibits the filing of a dismissal during trial without the consent of the defendant.

Rule 17: Summonses for Witnesses

(Applicable to District Court and Superior Court)

(a) Summons.

(1) For Attendance of Witness; Form; Issuance. A summons shall be issued by the clerk or any person so authorized by the General Laws. It shall state the name of the court and the title, if any, of the proceeding and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.

(2) For Production of Documentary Evidence and of Objects. A summons may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion may quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of rule 14. The court may direct that books, papers, documents, or objects designated in the summons be produced before the court within a reasonable time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, objects, or portions thereof to be inspected and copied by the parties and their attorneys if authorized by law.

(b) Defendants Unable to Pay. At any time upon the written ex parte application of a defendant which shows that the presence of a named witness is necessary to an adequate defense and that the defendant is unable to pay the fees of that witness, the court shall order the issuance of an indigent's summons. The witness so summoned shall be paid in accordance with the provisions of subdivision (c) of this rule. If the court so orders, the costs incurred shall be assessed to the defendant in accordance with the General Laws or the provisions of these rules.

(c) Payment of Witnesses. Expenses incurred by a witness summoned on behalf of a defendant determined to be indigent under this rule as well as expenses incurred by a witness summoned on behalf of the Commonwealth, as such expenses are determined in accordance with the General Laws, shall be paid after the witness certifies in a writing filed with the court the amount of his travel and attendance.

(d) Service.

(1) By Whom; Manner. A summons may be served by any person authorized to serve a summons in a civil action or to serve criminal process. A summons shall be served upon a witness by delivering a copy to him personally, by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by mailing it to the witness' last known address.

(2) Place of Service.

(A) Within the Commonwealth. A summons requiring the attendance of a witness at a hearing or a trial may be served at any place within the Commonwealth.

(B) Outside the Commonwealth or Abroad. A summons directed to a witness outside the Commonwealth or abroad shall issue and be served in a manner consistent with the General Laws.

(3) Return. The person serving a summons pursuant to this rule shall make a return of service to the court.

(e) Failure to Appear. If a person served with a summons pursuant to this rule fails to appear at the time and place specified therein and the court determines that such person did receive actual notice to appear, a warrant may issue to bring that person before the court.

Reporter's Notes

The prototype for this rule is found in Fed. R. Crim. P. 17. See Massachusetts and Federal Rule of Civil Procedure 45; Rules of Criminal Procedure (U.L.A.) rule 731 (1974). Rule 17 is for the most part in accord with prior Massachusetts law. Statutes which are consistent with this rule—e.g., G.L. c. 233, §§ 5-6, which authorize sanctions for a witness' failure to comply with a summons—are to remain in effect.

"Summons" as used in this rule (and Mass. R. Crim. P. 35[b]) is intended to refer to what has traditionally been expressed by the terms "summons" and "subpoena."

The right of a defendant to have process issued for the attendance of necessary witnesses is founded in the Constitution:

[I]t is the Sixth Amendment itself that in terms guarantees 'compulsory process for obtaining witnesses in [the accused's] favor,' and this is paralleled in substance by article 12 of our Declaration of Rights.

Blazo v. Superior Court, 366 Mass. 141, 145 (1974). A defendant's right to have summonses issued on his behalf may also be grounded in the sixth amendment right of confrontation.

Subdivision (a). This subdivision is drawn with little change from Fed. R. Crim. P. 17(a), (c); accord Rules of Criminal Procedure (U.L.A.) rule 731(a), (c) (1974).

Subdivision (a)(1). General Laws c. 233, § 1 provides that persons in addition to the clerk of court, i.e., notaries public and justices of the peace, may issue summonses for witnesses in criminal cases but only "upon request of the attorney general, district attorney or other person who acts in the case in behalf of the Commonwealth or of the defendant."

The proceedings contemplated by this subdivision include depositions to perpetuate testimony pursuant to Mass. R. Crim. P. 35.

Subdivision (a)(2). The provision of this subdivision authorizing the court to order the production of evidence prior to its use at trial or in other judicial proceedings is not intended to permit the use of summonses to subvert the discovery rule, Mass. R. Crim. P. 14. Rather, it is to permit the court to avoid delay where the production of many books, papers, documents, or other objects would delay the proceedings if not ordered until their commencement.

Subdivision (b). The subdivision, loosely modeled upon Fed. R. Crim. P. 17(b), is drafted in response to the Supreme Judicial Court's decision in Blazo v. Superior Court, 366 Mass. 141 (1974). There the court held that when indigency and the necessity for witnesses are shown, a defendant is to have the witnesses summonsed at the expense of the Commonwealth, suggesting the following procedure: "[A] defendant believing himself entitled will apply to the competent judge—ex parte if the defendant should so desire—supporting his application by affidavit showing his inability to pay the fees involved, setting out the names and addresses (if known) of the persons to be summoned, and stating why their attendance is necessary to an adequate

defence. The judge may require the submission of further data." Id. at 145-46 (footnote omitted). The court further explained that the reason for permitting ex parte application "is that, just as a defendant able to foot the costs need not explain to anyone his reasons for summoning a given witness, so an impecunious defendant should be able to summons his witnesses without explanation that will reach the adversary." Id. at 145 n. 8.

There is a significant difference between this subdivision and its counterpart under the federal rule. The summons that is to be issued under this rule is a prosecutor's summons, G.L. c. 277, § 68, and not a court summons, G.L. c. 233, § 1. This is because G.L. c. 233, § 3 provides that witnesses summonsed on behalf of the defendant are entitled to prepayment of some of their expenses. If this requirement were applicable to witnesses for indigent defendants, an added burden would be imposed on the court clerks. Therefore, witnesses for indigent defendants are to be summonsed by the Commonwealth pursuant to G.L. c. 277, §§ 68-69, and will not require prepayment. This procedure parallels that of Rules of Criminal Procedure (U.L.A.) rule 731(b) (1974). Compare Fed. R. Crim. P. 17(b), (d).

Subdivision (c). The expenses involved in securing the attendance of a witness on behalf of a defendant or the Commonwealth in a criminal proceeding consist of the fees of the officer serving the process and fees to the witness for travel and attendance. G.L. c. 233, §§ 2-3; c. 262, §§ 8(B)(3), 29.

General Laws c. 262, § 29 requires that a witness certify in writing the amount of his travel and attendance costs and serves as a basis for this subdivision. The statute additionally provides that where the witness has been summonsed by the Commonwealth, the certificate must be accompanied by a voucher signed by the attorney general or the district attorney stating that such fees are due the witness for his attendance. This rule adds witnesses summonsed by indigent defendants to this category and provides for the payment of their expenses in the same manner as the expenses of Commonwealth witnesses are paid. Where the district attorney is prosecuting the case, G.L. c. 12, § 24 (as amended, St. 1978, c. 478, § 10) authorizes the payment of expenses of government-summonsed witnesses from Commonwealth funds. See G.L. c. 213, § 8, which the Supreme Judicial Court in Blazo stated would authorize county payment (now the Commonwealth, § 8 as amended, St. 1978, c. 478, § 127) of witnesses ordered to attend on behalf of an indigent defendant. Blazo v. Superior Court, supra, at 146.

Under this rule, all witnesses are to be paid established witness fees. This is a departure from prior law, G.L. c. 277, § 69, which required prosecution witnesses to attend without pay unless the court directed the payment of their fees and expenses.

Subsection (d). The first sentence of subdivision (d)(1) embodies the substance of Mass. R. Civ. P. 45(c), which permits service "by any person who is not a party and is not less than 18 years of age." Compare Fed.R.Civ.P. 45(c) with Fed. R. Crim. P. 17(d). This procedure accords with that under G.L. c. 233, § 2, which provides that a summons for a witness may be served by an officer qualified to serve civil process or by some other disinterested person. Added is provision for service of summonses by persons authorized to serve criminal process. The rule would appear to allow service by counsel for the defendant or Commonwealth, although this practice has been criticized as perhaps "unwise." 8 MASS. PRACTICE SERIES (Smith & Zobel) Reporter's Notes

at 136 (1977); compare Supreme Judicial Court Rule 3:22, incorporating ABA Canons of Professional Ethics, Canon 19 (1972); ABA Code of Professional Responsibility DR 5-102, EC 5-9, 5-10 (1970).

The manner of service under this rule is for the most part consistent with procedure under prior law and the civil rules G.L. c. 233, § 2; Mass. R. Civ. P. 45(c), but adds that a summons may be served by mail. This last means of service is not available in cases of witnesses summonsed by non-indigent defendants, since tender or payment of fees to the witness is a prerequisite to compelling his attendance. G.L. c. 233, § 3.

Subdivision (d)(2)(A) is taken from the second sentence of Mass. R. Civ. P. 45(e).

General Laws c. 233, §§ 13A-13C; otherwise known as the Uniform Law to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings, provides a simple solution to the problem of obtaining out-of-state witnesses to appear in criminal proceedings. As long as the subject jurisdiction has adopted the Act the court will be able to secure attendance. Notwithstanding the provisions of G.L. c. 233, §§ 13A -13C and c. 277, § 66, it has been stated that the right of a defendant to compulsory process for witnesses who are necessary to his defense does not by statute automatically extend beyond the territory of the Commonwealth. Commonwealth v. Dirring, 354 Mass. 523 (1968). Accord Commonwealth v. Edgerly, Mass. App. Ct. Adv. Sh. (1978) 400.

Even though a defendant may not have the statutory right to compulsory process for necessary witnesses, the Constitution requires that the state make a good faith effort to obtain the presence of certain witnesses. In addition to the Uniform Act, state courts should avail themselves of two other avenues to secure the attendance of witnesses. The court in Barber v. Page, 390 U.S. 719 (1968), determined that where the defendant has a constitutional right to confront a witness, a state must seek his attendance via: (1) 28 U.S.C. § 2241(c)(5) (1971), which gives federal courts the power to issue writs of habeas corpus ad testificandum at the request of state prosecutors in the case of the prospective witnesses currently in federal custody; and (2) the issuance of a writ of habeas corpus ad testificandum by state courts. The existing policy of the United States Bureau of Prisons is to permit federal prisoners to testify in state court criminal proceedings pursuant to the issuance of such writs.

With respect to witnesses who are citizens or residents of the United States, but currently beyond its jurisdiction, the Court in Mancusi v. Stubbs, 408 U.S. 204 (1972), enunciated the limitations of the applicability of 28 U.S.C. § 1783 (1966), which provides in pertinent part:

(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice * * * *.

With respect to § 1783, the court stated: “We have been cited to no authority applying this section to permit subpoena by a federal court for testimony in the state felony trial, and certainly the statute on its face does not appear to be designated for that purpose.” Id. at 212. (Footnote omitted.)

The Mancusi court concluded that Tennessee was powerless to compel the attendance of the absent witness, then a resident of Sweden, and that, therefore, the state had not denied the respondent the right of confrontation as guaranteed by the sixth and fourteenth amendments.

Rule 18: Presence of Defendant

(Applicable to District Court and Superior Court)

(a) Presence of Defendant. In any prosecution for crime the defendant shall be entitled to be present at all critical stages of the proceedings.

(1) Defendant absenting himself. If a defendant is present at the beginning of a trial and thereafter absents himself without cause or without leave of court, the trial may proceed to a conclusion in all respects except the imposition of sentence as though the defendant were still present.

(2) Waiver of Presence in Misdemeanor Cases. A person prosecuted for a misdemeanor may at his own request, with leave of court, be excused from attendance if represented by counsel or an agent authorized by law and may be excused from attendance without leave of court if so authorized by the General Laws.

(3) Presence Not Required. A defendant need not be present at a revision or revocation of sentence pursuant to rule 29 or at any proceeding where evidence is not to be taken.

(b) Presence of Corporation. A corporation may appear by a duly authorized agent for the purposes of this rule.

Reporter's Notes

This rule is patterned primarily upon Rule 3.180 of the Florida Rules of Criminal Procedure and is a codification of accepted Massachusetts practice.

Unlike the Florida rule a defendant's presence is commanded at certain specifically enumerated "critical stages" of a criminal proceeding: arraignment, entry of plea, pretrial conference, all trial proceedings before the court, jury view, rendition of verdict, pronouncement of judgment and imposition of sentence. See Uniform Rule 713, which would grant the defendant the right to be present "at every stage of the trial . . . and at the disposition hearing" (emphasis supplied), and which would require his presence unless he is represented by counsel and has waived the right to be present, has voluntarily failed to be present, or has been justifiably excluded. Rules of Criminal Procedure (U.L.A.) rule 713 (1974). Rule 18 neither presumes to define those stages of a proceeding when the defendant's presence is constitutionally mandated, nor to compel his presence at every stage, rather it instructs that he is to be present at "all critical stages." The term "critical" is unrelated to its use for other purposes, e.g., assignment of counsel, and is to be interpreted in light of relevant judicial decision.

The defendant's presence is constitutionally required during all critical stages because fairness demands that the defendant be present when his substantial rights are at stake, and those instances are not limited to the specific proceedings listed in the Florida rule. Conversely, there are matters which the court and defendant's counsel can determine in the defendant's absence; to require the defendant's presence at all times could in some instances unduly prolong the disposition of the case. Thus, under this rule, the detailing of what stages are deemed critical is left to judicial determination.

The sixth amendment to the United States Constitution guarantees a defendant the right to confront witnesses at trial, which right is also guaranteed by article 12 of the Massachusetts Declaration of Rights and by statute, G.L. c. 278, § 6. However, the primary constitutional protection is afforded by the due process clause of the fourteenth amendment. "[T]he presence of the defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence. . . ." Snyder v. Massachusetts, 291 U.S. 97, 107-08 (1934). Thus, the Constitution requires the presence of the defendant at proceedings other than trial if his presence would be essential to preserve substantial rights.

Subdivision (a). Where a stage of the proceedings is deemed critical, the defendant's presence is required and the court is not to proceed in his absence without determining that he has effectively waived or forfeited the right to be present. Taylor v. United States, 414 U.S. 17 (1973). Most hearings either before or after trial do not require the defendant's presence. See Mass. R. Crim. P. 30. For example, his presence is not required at pretrial motions, including motions for a change of venue, Mass. R. Crim. P. 37, and motions for a continuance, Mass. R. Crim. P. 10, Commonwealth v. Robichaud, 358 Mass. 300 (1970). And his presence is not generally required at post-trial proceedings. Commonwealth v. Dupont, 1 Mass. App. Ct. 566 (1974); ____ ; Mass. R. Crim. P. 30. But the defendant's presence is required at all trial proceedings (See Commonwealth v. Robichaud, supra), at arraignment (Mass. R. Crim. P. 6), when a plea is made (Mass. R. Crim. P. 12), and at sentencing (Thompson v. United States, 495 F.2d 1304 [1st Cir. 1974]; Mass. R. Crim. P. 28).

(a)(1). Although a defendant is entitled to be present at critical stages, he may waive or forfeit that right. Commonwealth v. McCarthy, 163 Mass. 458 (1895). He may waive his right to be present at the trial of a felony in either of two ways. First, he may voluntarily absent himself from trial, in which case the trial may continue in his absence. Commonwealth v. Flemmi, 360 Mass. 693 (1971). Secondly, the defendant may become so obstreperous as to require his removal from court in order to preserve the orderliness of judicial proceedings. Illinois v. Allen, 397 U.S. 337 (1970); Commonwealth v. Senati, 3 Mass. App. Ct. 304 (1975); Mass. R. Crim. P. 45; See ABA Standards Relating to the Function of the Trial Judge § 6.8 (Approved Draft, 1972). However, trial cannot begin in the defendant's absence, Diaz v. United States, 223 U.S. 442, 455 (1912), thereby eliminating the possibility that a defendant, by voluntarily absenting himself can be deemed to have waived his right to be present at the inception of trial.

The defendant is not prohibited by this rule from waiving his right to be present at the trial of capital cases. The traditional rule enunciated in Diaz v. United States, supra, is that in capital crimes the defendant is not permitted to be tried in absentia because of the severity of the

potential punishment. The rule was recently reaffirmed in Taylor v. United States, supra. However, the prohibition against waiver of the right to be present in capital cases does not exist in Rule 43 of the Federal Rules of Criminal Procedure, nor is it suggested by Rule 713 of the Uniform Rules of Criminal Procedure (U.L.A.) (1974). As the Advisory Committee Note to Federal Rule 43 recognizes, the present state of the law on this issue is not clear. As with the federal rule, this rule does not attempt to resolve this disputed issue, but leaves the matter to future judicial decisions.

(a)(2). This is a restatement of G.L. c. 278, § 6. General Laws c. 274, § 1 defines felonies and misdemeanors.

(a)(3). See generally the discussion of when a defendant's presence is required, supra.

Subdivision (b). Federal Rule of Criminal Procedure 43(c)(1) provides that "a corporation may appear by counsel for all purposes." It is, therefore, unnecessary for an officer of the corporation to be present at arraignment, plea, trial, or sentencing (unless individually charged) in any case, whether misdemeanor or felony. 8B J. MOORE, FEDERAL PRACTICE para. 43.02[3] (Rev. ed. 1978). Under Mass. R. Crim. P. 18, the corporation may appear for all purposes by "duly authorized agent" which does not require counsel.

Rule 19: Trial by Jury or by the Court

(Applicable to Superior Court and jury sessions in District Court)

(a) General. A case in which the defendant has the right to be tried by a jury shall so be tried unless the defendant waives a jury trial in writing with the approval of the court and files the waiver with the clerk, in which instance he shall be tried by the court instead of by a jury. If there is more than one defendant, all must waive the right to trial by jury, and if they do not so waive, there must be a jury trial unless the court in its discretion severs the cases. The court may refuse to approve such a waiver for any good and sufficient reason provided that such refusal is given in open court and on the record.

(b) Less Than a Full Jury. If after jeopardy attaches there is at any time during the progress of a trial less than a full jury remaining, a defendant may waive his right to be tried by a full jury and request trial by the remaining jurors by signing a written waiver which shall be filed with the court. If there is more than one defendant, all must sign and file a waiver unless the court in its discretion severs the cases.

Reporter's Notes

The right to trial by jury, which is guaranteed by art. 3, § 2, cl. 3 of the United States Constitution and the sixth amendment, is applicable to the states through the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). The Massachusetts Constitution, part 1, art. 12, also guarantees defendants the right to trial by jury. Further, G.L. c. 278, § 2, applicable to the Superior Court, provides that "[i]issues of fact . . . shall . . . be tried by a jury . . . unless the person indicted or complained against elects to be tried by the court. . . ." General Laws c. 218, §

26A, inserted by St. 1978, c. 478, § 188, provides that trials in the District Court and the Boston Municipal Court "shall be by a jury of six, unless the defendant files a written waiver and consents to be tried by the court . . . ." Under prior law a juvenile defendant had no right to a trial by jury during the adjudicative phase of a delinquency proceeding. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); Commonwealth v. Page, 339 Mass. 313, 316 (1959). However, by G.L. c. 119, § 55A, inserted by St. 1978, c. 478, § 56, delinquency proceedings shall be by jury unless waived. If a juvenile appeals from an adjudication of delinquency in a jury waived session, his appeal to the jury session will be tried and determined in like manner as an appeal by an adult criminal defendant. G.L. c. 119, § 56 (as amended, St. 1978, c. 478, § 57). See Sylvester v. Commonwealth, 253 Mass. 244 (1925).

Subdivision (a). This subdivision is drawn from Fed. R. Crim. P. 23(a) and G.L. c. 119, § 55A; c. 218, § 26A; c. 263, § 6. The requirement that the waiver be in writing is not universal. See ABA Standards Relating to Trial by Jury, § 1.2(b) (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 511 (1974). In Boykin v. Alabama, 395 U.S. 238 (1969), the Court held that a waiver of a jury trial cannot be presumed from a silent record. While Boykin would be satisfied by an oral waiver when the proceedings are recorded, the requirement in Massachusetts is that the waiver be written and filed with the clerk. Commonwealth v. Hesser, 1 Mass. App. Ct. 850 (1973) (Rescript); Gallo v. Commonwealth, 343 Mass. 397, 402 (1961); G.L. c. 263, § 6. The federal rule imposes this stricter requirement "to ensure a greater probability of a defendant understanding what he is doing . . . ." Pool v. United States, 344 F.2d 943, 945 (9th Cir. 1966). Likewise, the Massachusetts rule seeks to "avoid unnecessary controversy and to provide a procedural safeguard . . . ." Gall v. Commonwealth, supra.

"A waiver is . . . an intentional relinquishment or abandonment of a known right . . . ." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Waiver of a constitutional right must be "intelligent and competent." Id. at 465. The waiver of the right to a jury trial must be "express and intelligent." Patton v. United States, 281 U.S. 276, 312 (1930).

Subdivision (a) incorporates that portion of the federal rule which provides that a waiver of trial by jury must be approved by the court. Although a defendant is free to waive his jury trial, Patton, supra, there is no constitutional impediment to conditioning that waiver upon the consent of the trial judge. Singer v. United States 380 U.S. 24, 36 (1965) (construing Fed. R. Crim. P. 23[a]). See ABA Standards Relating to Trial by Jury § 1.2(a), comment at 32-34 (Approved Draft, 1968). The defendant in a capital case may not waive a jury trial in any event. G.L. c. 263, § 6 (as amended); Commonwealth v. O'Brien, 371 Mass. 605 (1976). Accord Commonwealth v. Marshall Mass. Adv. Sh. (1977) 1530, 1532-33.

The decision whether to waive trial by jury is properly that of the defendant after full consultation with counsel. ABA Standards Relating to the Defense Function § 5.2 (Approved Draft, 1971).

If there are multiple defendants and one desires to waive the right to trial by jury, then all must waive. United States v. Farries, 459 F.2d 1057, 1061 (3d Cir.), cert. denied, 409 U.S. 888 (1972), 410 U.S. 912 (1973). In a rare case, severance may be the best course if not all defendants choose waiver. In Farries, however, the enormous expense and serious security problems

involved in a trial where the defendants and many witnesses were inmates of various federal penitentiaries was held to outweigh the interests of a defendant in severance.

Subdivision (b). This subdivision is in accord with current Massachusetts practice as stated in G.L. c. 234, § 26A. The provision authorizing the court to disallow a waiver of the right to be tried by a full jury is not inconsistent with prior law even though a similar provision does not appear in G.L. c. 234, § 26A. See Commonwealth v. Roby, 29 Mass. 496, 502 (1832). Compare United States v. Jorn, 400 U.S. 470 (1971).

Rule 20: Trial Jurors

(Applicable to Superior Court and jury sessions in District Court)

(a) Motion for Appropriate Relief. Either party may challenge the array by a motion for appropriate relief pursuant to Rule 13(c). A challenge to the array shall be made only on the ground that the prospective jurors were not selected or drawn according to law. Challenges to the array shall be made and decided before any individual juror is examined unless otherwise ordered by the court. A challenge to the array shall be in writing supported by affidavit and shall specify the facts constituting the ground of the challenge. Challenges to the array shall be tried by the court and may in the discretion of the court be decided on the basis of the affidavit filed with the challenge. Upon the hearing of a challenge to the array, a witness may be examined on oath by the court and may be so examined by either party. If the challenge to the array is sustained, the court shall discharge the panel.

(b) Challenge for Cause.

(1) Examination of Juror. The court shall, or upon motion, the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror in a case to learn whether he is related to either party, has any interest in the case, has expressed or formed an opinion, or is sensible of any bias or prejudice. The objecting party may, with the approval of the court, introduce other competent evidence in support of the objection.

(2) Examination upon Extraneous Issues. The court shall examine or cause a juror to be examined upon issues extraneous to the case if it appears that the juror's impartiality may have been affected by the extraneous issues. The examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issues of such examination, and shall be conducted individually and outside the presence of other persons about to be called or already called as jurors.

(3) Challenge of Juror. Either party may challenge an individual prospective juror before the juror is sworn to try the case. The court may for cause shown permit a challenge to be made after the juror is sworn but before any evidence is presented. When a juror is challenged for cause, the ground of the challenge shall be stated. A challenge of a prospective juror and the

statement of the grounds thereof may be made at the bench. The court shall determine the validity of each such challenge.

(c) Peremptory Challenges.

(1) Number of Challenges. Upon the trial of an indictment for a crime punishable by imprisonment for life, each defendant shall be entitled to twelve peremptory challenges of the jurors called to try the case; in any other criminal case tried before a jury of twelve, each defendant shall be entitled to four peremptory challenges; and in a case tried before a jury of six, each defendant shall be entitled to two peremptory challenges. Each defendant in a trial of an indictment for a crime punishable by imprisonment for life in which additional jurors are impaneled under subdivision (d) of this rule shall be entitled to one additional peremptory challenge for each additional juror. Each defendant in a case in which several indictments or complaints are consolidated for trial shall be entitled to no more peremptory challenges than the greatest number to which he would have been entitled upon trial of any one of the indictments or complaints alone. In every criminal case the Commonwealth shall be entitled to as many peremptory challenges as equal the whole number to which all the defendants in the case are entitled.

(2) Time of Challenge. Peremptory challenges shall be made before the jurors are sworn and may be made after the determination that a person called to serve as a juror stands indifferent in the case.

(d) Alternate Jurors.

(1) Impanelling Jury with Alternative Jurors. If a jury trial is likely to be protracted, the judge may impanel a jury of not more than sixteen members and the court shall have jurisdiction to try the case with that jury.

(2) Selection of Twelve Jurors. If at the time of the final submission of the case to the jury more than twelve members of the jury who have heard the whole case are alive and not incapacitated or disqualified, the judge shall direct the clerk to place the names of all the remaining jurors except the foreman in a box and draw the names of a sufficient number to reduce the jury to twelve members. Those jurors whose names are drawn shall not be discharged, but shall be known as alternate jurors and shall be kept separate and apart from the other jurors in some convenient place, subject to the same rules and regulations as the other jurors, until the jury has agreed upon a verdict or has been otherwise discharged.

(3) Disabled Juror: Selection of Alternate. If, at any time after the final submission of the case by the court to the jury but before the jury has agreed on a verdict, a juror dies, becomes ill, or is unable to perform his duty for any other cause, the judge may order him to be discharged and shall direct the clerk to place the names of all the remaining alternate jurors in a box and

draw the name of an alternate who shall take the place of the discharged juror on the jury, which shall renew its deliberations with the alternate juror.

(e) Regulation and Separation of Jurors.

(1) Sequestration. After the jurors have been sworn they shall hear the case as a body and, within the discretion of the trial judge, may be sequestered.

(2) After Submission of the Cause. Unless the jurors have been sequestered for the duration of the trial, the judge after the final submission of the case, may order that the jurors be permitted to separate for a definite time to be fixed by the judge and then reconvene in the courtroom before retiring for consideration of their verdict.

(3) After Commencement of Deliberations. After final submission of the case to the jury and after deliberations have commenced, the judge may allow the jurors, under proper instructions, to separate for a definite time to be fixed by the judge and to reconvene in the courtroom before retiring for further deliberation of their verdict.

Reporter's Notes

This rule is primarily a distillation of Massachusetts statutory law, G.L. c. 234, §§ 26B, 28-29; former G.L. c. 277, § 47A (St. 1978, c. 478, § 298). See e.g., Fed. R. Crim. P. 24; Fla.R.Crim.P. 3.370; ABA Standards Relating to Trial by Jury §§ 2.3-2.7 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rules 511-513, 532 (1974); National Advisory Commission on Criminal Justice Standards and Goals, Courts §§ 4.13-4.14 (1973).

Subdivision (a). Although G.L. c. 277, § 47A, inserted by St. 1965, c. 617, § 1, abolished in terms "challenges to the array and to the manner of selection of grand or traverse jurors," the relief formerly available thereunder remains available by a "motion to grant appropriate relief." Despite the statutory change in nomenclature, the courts continue to refer to such motions as challenges to the array. See e.g., Commonwealth v. Underwood, 3 Mass. App. Ct. 522, 535 (1975).

A motion for appropriate relief from trial by a jury allegedly not selected in accordance with law—that is, a motion for discharge of the panel—is properly made only before trial. G.L. c. 277, § 47A. Brunson v. Commonwealth, 369 Mass. 106 (1975); Commonwealth v. Rodriquez, 364 Mass. 87, 91 (1973); Commonwealth v. Underwood, 3 Mass. App. Ct. 522, 536 (1975). Mass. R. Crim. P. 13(c).

See ABA Standards Relating to Trial by Jury § 2.3 (Approved Draft, 1968), Rules of Criminal Procedure (U.L.A.) rule 511(d) (1974) (incorporating by reference Uniform Jury Selection and Service Act [U.L.A.] § 12 [1970]); Fed. R. Crim. P. 6(b)(1).

Subdivision (b).

(b)(1). This subdivision is based upon the first paragraph of G.L. c. 234, § 28. See Fed. R. Crim. P. 24(a); ABA Standards Relating to Trial by Jury § 2.4 (Approved Draft, 1968); ABA Standards Relating to the Prosecution Function § 5.3(c) (Approved Draft, 1971); ABA Standards Relating

to the Defense Function § 7.2(c) (Approved Draft, 1971); Rules of Criminal Procedure (U.L.A.) rule 512(b) (1974).

The purpose of G.L. c. 234, § 28 and of this rule is manifestly to determine whether prospective jurors are free from interest, bias, and prejudice in the case in which they are drawn to sit. Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 295 (1971), cert. denied, 407 U.S. 910, 914 (1972); accord Commonwealth v. Montecalvo, 367 Mass. 46, 50 (1975).

It has been consistently held that Federal Rule 24(a) permits the trial judge a large range of discretion in the latitude and manner of voir dire examination, subject to the essential demands of fairness. E.g., Eastern Renovating Corp. v. Roman Catholic Bishop of Springfield, 554 F.2d 4 (1st Cir. 1977); United States v. Desmarais, 531 F.2d 632, 633 (1st Cir. 1976). This comports with Massachusetts practice which has been uniformly stated to give the trial judge broad discretion "whether to refine or improve on the subjects of . . . § 28, by going into more detail." Commonwealth v. Lacy, 371 Mass. 363, 373 (1976); Commonwealth v. Harrison, 368 Mass. 366, 371 (1975). E.g., Commonwealth v. Kudish, 362 Mass. 627, 631-32 (1972). Because the trial judge has "a fair leeway in deciding how deep the probe should go, having in view the nature of the case as . . . [he] apprehends it at the start," Harrison, supra, there is no requirement that any particular form or number of questions be asked. See e.g., Commonwealth v. Hicks Mass. Adv. Sh. (1979) 1; Commonwealth v. Horton, Mass. Adv. Sh. (1978) 2548; Commonwealth v. McCants, 3 Mass. App. Ct. 596, 598 (1975).

The provision of this subdivision which requires the approval of the court for the introduction of extrinsic evidence is consistent with prior practice although not statutorily mandated. Commonwealth v. DiStasio, 294 Mass. 273 (1936).

Prior practice was to pose the so-called "statutory questions" to the jurors as a group in non-capital cases and individually, out of the presence of other prospective jurors, in capital cases. Commonwealth v. Ventura, 294 Mass. 113 (1936). Because the need to interrogate each juror regarding the death penalty no longer exists, there is likewise no reason in the usual case why the statutory questions may not be asked of the jurors as a group. Commonwealth v. Montecalvo, 367 Mass. 46, 48-49 (1975). See Commonwealth v. Harrison, 368 Mass. 366, 369 n.5 (1975). Individual questioning may be commanded, however, by the facts and circumstances of the particular case. Commonwealth v. Montecalvo supra at 50 n.2. Compare subdivision (b)(2), infra.

Whether the questions upon voir dire are to be posed by the judge or by the parties or their attorneys is another matter fully within the discretion of the trial judge. The sole purpose of the voir dire is to provide the parties with a means of discovering grounds for challenges for cause and to enable them to intelligently exercise peremptory challenges. The procedure is subject to abuse by counsel who utilize voir dire to influence jurors, however, ABA Standards Relating to Trial by Jury, § 2.4, comment at 64 (Approved Draft, 1968), and unless carefully regulated, can consume an inordinate amount of court time. For these reasons, it is suggested that the better practice when voir dire is confined to the subjects of G.L. c. 234, § 28 is for the judge to conduct the interrogation. If further questioning is desirable, it should be by the judge upon suggestion of counsel. Compare ABA Standards, supra (judge is to submit such additional questions as he

deems proper), and Rules of Criminal Procedure (U.L.A.) rule 512(b) (1974) (judge shall permit questioning by the parties).

(b)(2). The basis of this subdivision is found in the second paragraph of G.L. c. 234, § 28, as amended, St. 1975, c. 335. The amendment of § 28 conformed the statute to the Supreme Court's decision in Ham v. South Carolina, 409 U.S. 524 (1973), which recognized that some cases present circumstances in which an impermissible threat to the fair trial guaranteed by the due process clause of the fourteenth amendment is posed when a judge refuses to question prospective jurors specifically as to racial prejudice. Ham did not announce a universally applicable rule, however, but a standard requiring assessment of the facts of each case. Ristaino v. Ross, 424 U.S. 589 (1976).

General Laws c. 234, § 28 is not limited by its terms to racial prejudice, but is directed at any bias which may result from the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons . . . .

It should perhaps be noted that "community attitudes" or "exposure to potentially prejudicial material" may be so pervasive as to suggest a motion to transfer for prejudice if recognized prior to trial. Mass. R. Crim. P. 38(b)(1).

The procedure under § 28 is in two steps. It must first appear to the satisfaction of the court that a prospective juror or jurors may not be indifferent as a result of matters extraneous to the case. It is preferable that the court be apprised of the possibility of bias by a motion that prospective jurors be interrogated as to possible prejudice, see Commonwealth v. Lumley, 367 Mass. 213, 216 (1975); Commonwealth v. Rodriques, 364 Mass. 87, 92-93 (1973), and that the motion be accompanied by an affidavit specifying the facts which defendant alleges make him subject to bias. See Commonwealth v. Pinckney, 365 Mass. 70 (1974). In Commonwealth v. Harrison, 2 Mass. App. Ct. 775 (1975), affirmed, 368 Mass. 366 (1975), the court found inadequate an affidavit which "amounted to no more than an argument of law intended to persuade the court to adopt the defendant's position on the utility of the requested questions and in no way informed the judge as to the possible injection into the case of prejudice stemming from possibly disparate political views or cultural values." Id. at 779. Accord Commonwealth v. Pinckney, supra. See Commonwealth v. Peters, Mass. Adv. Sh. (1977) 684, 689 ("absence of even minimal substantiation").

If the court finds that there is a basis to the allegations, "the court *shall*, or the parties or their attorneys may . . . examine the juror specifically" as to the extraneous issues. G.L. c. 234 Mass. § 28 (emphasis added). Under prior case law, and pursuant to § 28 previous to its 1975 amendment, this specific examination was discretionary even if impaired indifference were shown.

Both under this subdivision and G.L. c. 234, § 28 the questioning of each venireman as to extraneous issues is to be conducted out of the presence of those not yet or already called.

(b)(3). The time for challenge of prospective juror is generally considered to end once the jury is impanelled. Commonwealth v. Galvin, 323 Mass. 205 (1948). It has been held, however, that the

right of a judge to dismiss a juror for cause and to provide for the selection of another juror in his place continues even after the jury is impanelled but before the trial actually starts. Commonwealth v. Monahan 349 Mass. 139 (1965); 30 MASS. PRACTICE SERIES (Smith) § 1047 (1970, Supp. 1978). See ABA Standards Relating to Trial by Jury § 2.5 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 512(d) (1974).

Subdivision (c). The substance of subdivision (c)(1) is taken from G.L. c. 234, § 29. See Superior Court Rule 6 (1974); ABA Standards Relating to Trial by Jury § 2.6 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 512(d) (1974).

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." Swain v. Alabama, 380 U.S. 202, 220 (1965). Therefore, it had been held that a claim of denial of trial by an impartial jury based on the fact that the Commonwealth utilizes its peremptory challenges to exclude a particular sex or race from the panel must fail. Commonwealth v. Mitchell, 367 Mass. 419, 420 (1975). However, in Commonwealth v. Soares, Mass. Adv. Sh. (1979) 593, decided under article 12 of the Declaration of Rights rather than the equal protection clause of the fourteenth amendment, the Supreme Judicial Court held that the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular, defined groupings in the community is proscribed. Id. at 624-25.

[The] exercise of peremptory challenges to exclude members of discrete groups, solely on the basis of bias presumed to derive from that individual's membership in the group, contravenes the requirement [of the jury drawn from a representative cross-section of the community] inherent in art. 12 of the Declaration of Rights. In so holding, we recognize that no defendant is entitled to a petit jury proportionally representing every group in the community; nor are members of particular groups insulated from the proper use of peremptory challenges to exclude any individual on any other ground. What both parties are constitutionally entitled to expect is "a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits.

Id. at 627, quoting People v. Wheeler, 22 Cal.3d 258, 277 (1978).

While the proper use of peremptory challenges may be presumed, that presumption is rebuttable by either party on a showing that: 1) a pattern of conduct has developed whereby several prospective jurors who have been challenged peremptorily are members of a discrete group, and 2) there is a likelihood that they are being excluded from the jury solely by reason of their group membership. Id. at 628-29.

If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted. Accordingly, the court must then conclude that the jury as constituted fails to comply with the representative cross-section requirement, and it must dismiss the jurors thus far selected. So too it must quash any remaining venire, since the complaining party is entitled to a random draw from an entire venire—not one that has been partially or totally stripped of members of a cognizable group by the improper use of peremptory challenges. Upon such dismissal a different venire shall be drawn and the jury selection process may begin anew.

Id. at 631-32, quoting People v. Wheeler, supra, at 282.

Subdivision (c)(2) is borrowed almost entirely from G.L. c. 234, § 29.

It should be noted that no irregularity in a writ of venire facias or in the drawing, summoning, returning, or impanelling of jurors is sufficient to set aside a verdict unless the objecting party has been "injured" by the irregularity and unless the objection is made before verdict. G.L. c. 234, § 32. Commonwealth v. Montecalvo, 367 Mass. 46, 51 (1975); Commonwealth v. McKay, 363 Mass. 220, 223-24 (1973).

Subdivision (d). This subdivision parallels G.L. c. 234, § 26B (as amended). Compare Rules of Criminal Procedure (U.L.A.) rule 511(c) (1974), which provides for "additional" jurors, with ABA Standards Relating to Trial by Jury § 2.7. (Approved Draft, 1968), which has provisions for both "alternate" and "additional" jurors. Under an alternate juror system, one or more persons specifically identified as alternates are chosen in advance of trial and will be designated to take the place of a juror who is discharged prior to the time the jury retires, or in some jurisdictions, prior to verdict. ABA Standards, supra, comment at 79. See Fed. R. Crim. P. 24(c). Massachusetts employs the additional juror system, G.L. c. 234, § 26B, approved in Uniform Rule 511(c), supra, and preferred by the ABA Standards, supra, comment at 80.

Subdivision (d)(3) adopts a procedure contained in Cal. Penal Code § 1089 (Deering, 1971). This practice has been rejected, however, by the ABA Standards, supra, comment at 82, and in the 1975 amendments to the Federal Rules of Criminal Procedure.

Subdivision (e).

(e)(1). This subdivision reiterates prior Massachusetts practice in leaving the decision whether to sequester the jury in the discretion of the trial judge. 30 MASS. PRACTICE SERIES (Smith) § 1042 (1970); Commonwealth v. Marshall, Mass. Adv. Sh. (1977) 1530. (e)(2)-(3). Drawn in part from Fla.R.Crim.P. 3.370 (1975), these subdivisions represent a significant departure from prior Massachusetts practice. In cases where sequestration is unnecessary, forcing the jury to remain in a body after submission of the case or the beginning of deliberations may cause hardship to jurors or their families which is not, in balance, necessary for protection of the defendant's interests, nor justified by the interests of justice. See Commonwealth v. Watkins, Mass. Adv. Sh. (1978) 1646, 1673-74 (defendant's motion to excuse jury from further deliberation for the evening within the discretion of judge).

Rule 21: Sequestration of Witnesses

(Applicable to District Court and Superior Court)

Upon his own motion or the motion of either party, the judge may, prior to or during the examination of a witness, order any witness or witnesses other than the defendant to be excluded from the courtroom.

Reporter's Notes

This rule is based upon former G.L. c. 276, § 39 (Rev.St. [1836] c. 135, § 14) which was applicable to the District Court.

The power of a judge to control the progress and, within the limits of the adversary system, the shape of a trial, is universally held to include the broad discretionary power to sequester witnesses before, during, and after their testimony. Geders v. United States, 425 U.S. 80 (1976); Holder v. United States, 150 U.S. 91, 92 (1893); United States v. Robinson, 502 F.2d 894 (7th Cir. 1974); United States v. Eastwood, 489 F.2d 818, 821 (5th Cir. 1973); Commonwealth v. Dougan, Mass. Adv. Sh. (1979) 380, 400; Commonwealth v. Watkins, Mass. Adv. Sh. (1977) 2626, 2627-28; Commonwealth v. Vanderpool, 367 Mass. 743 (1975); Commonwealth v. Blackburn, 354 Mass. 200 (1968); Commonwealth v. Follansbee, 155 Mass. 274 (1892); Commonwealth v. Parry, 1 Mass. App. Ct. 730, 736 (1974).

Although sequestration may be well used to prevent the occurrence of perjury, it serves an equally important function in preventing one witness' testimony from being inadvertently molded by the testimony of other witnesses. "The process of sequestration consists merely in preventing one prospective witness from being taught by hearing another's testimony . . . ." 6 J. WIGMORE, EVIDENCE § 1838 at 461 (Chadbourne rev. 1976). It additionally aids in detecting testimony which is less than candid, see WIGMORE, supra, and prevents improper attempts during recess to influence the witness' testimony in light of that already given. Geders v. United States, supra, at 87.

Since the sequestration of witnesses is within the discretion of the judge, the judge may order that only some of the witnesses be removed from the courtroom or kept separated. In Commonwealth v. Therrien, 359 Mass. 500 (1971), it was held proper for the trial judge to except from a general order of sequestration one witness deemed "essential to the management of the case." Id. at 508.

In conformity with prior practice, the court is to have discretionary power to exclude the testimony of a witness who remains in court in violation of a court order. In Commonwealth v. Crowley, 168 Mass. 121 (1897), a witness called by the defendant to impeach the testimony of a prosecution witness was not allowed to testify because he had remained in court in violation of a court order. Although at the time of the court order the defense had not intended to use that witness at trial, the exclusion of his testimony was upheld because during the progress of the trial it became apparent that he might be called for impeachment purposes. Conversely, the court may receive the testimony of a witness who is present at trial in violation of a sequestration order. Commonwealth v. Shagoury, Mass. App. Ct. Adv. Sh. (1978) 927; Commonwealth v. Hall, 86 Mass. (4 Allen) 305, 306 (1862). In addition, a trial judge may revoke or modify a previous sequestration order. Commonwealth v. Parry, 1 Mass. App. Ct. 730, 736 (1974).

The rule by its terms is inapplicable to a defendant. A sequestration order would affect a defendant quite differently from the way it affects a non-party witness, because of the defendant's need to consult with counsel. Geders v. United States, supra at 88.

In addition, the defendant as a matter of right can be and usually is present for all testimony, e.g., Mass. R. Crim. P. 18, unless removed for disruptive behavior, Mass. R. Crim. P. 45.

Rule 22: Objections

(Applicable to Superior Court and jury sessions in District Court)

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

If a party objects to a ruling or order of the court, he may state the precise legal grounds of his objection, but he shall not argue or further discuss such grounds unless the court calls upon him for such argument or discussion.

Reporter's Notes

Rule 22 restates Rule 51 of the Federal Rules of Criminal Procedure and is substantially similar to Rule 46 of both the Massachusetts and Federal Rules of Civil Procedure. See Superior Court Rule 8 (1974).

For generations of Massachusetts practitioners the relationship between the saving of an exception and the right of review was so firmly established in the appellate procedure of the Commonwealth and so universally understood and applied that discussion of the validity of the requirement was foreclosed. See e.g., Commonwealth v. Underwood, 358 Mass. 506, 509 (1970); SUPERIOR COURT RULES, 1974, ANNOTATED, 281-82 (Mass. Bar ed. 1975). The proper saving of an exception was the first and fundamental step to secure a review by bill of exceptions or by appeal, Commonwealth v. Underwood, supra; Commonwealth v. Dinnal, 366 Mass. 165 (1974), and the failure to seasonably except vitiated the right to review of the issue to which exception was not taken, Commonwealth v. Boudreau, 362 Mass. 378 (1972), save for the rare instance when an appellate court would review such questions because of a "substantial risk of a miscarriage of justice." Commonwealth v. Freeman, 352 Mass. 556, 564 (1967); Commonwealth v. Williams, Mass. App. Ct. Adv. Sh. (1979) 253 (Rescript); Commonwealth v. Harris, 371 Mass. 462, 471 (1976); Commonwealth v. Fields, 371 Mass. 274, 277 (1976).

It is felt that the requirement of exceptions exalts form over substance in an unnecessarily ritualistic and time-consuming procedure. The draftsmen of Mass. R. Civ. P. 46 followed the lead of both the federal civil and criminal rules in abolishing the exception. This rule eliminates the requirement from criminal trials. That decision is premised upon the practical observation that an objection by counsel or counsel's request for specific action is sufficient to indicate to the court counsel's position on any issue and that to additionally require an exception is superfluous. See Rules of Criminal Procedure (U.L.A.) rule 755 (1974).

It has been argued that the requirement of an exception should be retained to provide the trial judge with an opportunity to reconsider his ruling on an objection and to eliminate specious arguments by counsel. Commonwealth v. Foley, 358 Mass. 233 (1970). Realistically, however, the taking of an exception apprises the judge of nothing which is apt to affect his initial ruling,

nor does the requirement of an exception in any way compel counsel to take exception only to rulings on substantial matters.

The practice of requiring exceptions had led appellate courts to scrutinize records so as to determine whether holding that a defendant had waived objections by his failure to save exceptions could result in a miscarriage of justice. The scope of such review equates with that if no exceptions were required. See e.g., Commonwealth v. Williams, Mass. App. Ct. Adv. Sh. (1979) 253 (Rescript). Further, rigidly requiring that exceptions be saved led to "anomalous" results. In Commonwealth v. Nelson, Mass. App. Ct. 90, 101 (1975), the court reviewed the denial of a motion for a new trial to which denial no exception was taken because the appellant's co-defendant had properly saved an exception to a similarly-grounded motion.

Superior Court Rule 8 (1974) provides that in criminal cases, objections to evidence shall be decided without argument unless the presiding justice calls upon the parties to state the grounds on which the evidence is offered or objected to.

Having once stated the grounds, if so requested, counsel is not to further comment thereon unless the court requires elucidation. See Fed.R.Evid. 103(a). It is the intent of this rule that if a statement of grounds is requested, the court may allow such statement to be made in open court or at the bench and out of hearing of the jury. See Fed.R.Evid. 103(c).

Rule 23: Stipulations

(Effective July 1, 2015)

(a) Essential Elements. Any stipulation to an essential element of a charged offense entered by the parties before or during trial shall be in writing and signed by the prosecutor, the defendant, and defense counsel. Any such stipulation shall be read to the jury before the close of the Commonwealth's case and may be introduced into evidence.

(b) Other Stipulations. Any other stipulation shall be placed on the record before the close of evidence and may be read or otherwise communicated to the jury or introduced into evidence in the discretion of the court.

Added April 29, 2015, effective July 1, 2015.

Reporter's Notes

Rule 23 is intended to fill a gap in the Rules of Criminal Procedure identified by the Supreme Judicial Court inCommonwealth v. Ortiz , 466 Mass. 475 (2013). The rule provides for the manner in which stipulations of fact agreed to by the parties before or during trial are to be memorialized and used at trial. Rule 11 governs stipulations of fact agreed to at the pretrial conference, but prior to Rule 23 there were no rules that applied to such stipulations reached after the filing of the pretrial conference report at the pretrial hearing. Rule 23 remedies that deficiency, supplementing Rule 11's provisions concerning stipulations of fact.

Rule 23(a) Essential Elements

Rule 23(a) is modeled on Rule 11 in its treatment of stipulations of fact, but its coverage is narrower. Rule 11(a)(2)(A)requires that the pretrial conference report include "any stipulations of fact" agreed to by the parties at the pretrial conference and further provides that the report be "subscribed by the prosecuting attorney and counsel for the defendant, and . . . when the report contains stipulations as to material facts, by the defendant." Rule 11(a)(2)(A)requires the parties to file the pretrial conference report with the clerk of court and provides that agreements contained in the report, including stipulations, "shall be binding on the parties and shall control the subsequent course of the proceeding." These requirements for binding stipulations of fact are consistent with such rules of other states. See, e.g., Ark. R. Cr. P. 20.4, Pretrial Conference ; Vt. R. Cr. P. 17.1, Pretrial Conference; Ia. R. Cr. P. 2.16, Pretrial Conference;Haw. R. Cr. P. 17.1, Pretrial Conference .

Unlike Rule 11, Rule 23(a) is limited to stipulations to "an essential element of a charged offense," that is, a fact that the Commonwealth must prove beyond a reasonable doubt in order to secure a conviction. To take a common example, in a trial for operating a motor vehicle while under influence of intoxicating liquor, G.L. c. 90, § 24(1)(a)(1) , the Commonwealth must prove three elements, one of which is "that the defendant operated a motor vehicle."Commonwealth v. Cabral , 77 Mass. App. Ct. 909, 909, rev. denied, 458 Mass. 1107 (2010). See Criminal Model Jury Instruction for Use in the District Court 5.310, Operating Under the Influence of Intoxicating Liquor (2013). If the parties stipulate to such operation, the Commonwealth's burden of production for that element is satisfied, foreclosing the need for further proof in that regard. See Commonwealth v. Ortiz , 466 Mass. 475, 481 (2013). Rule 23(a) thus requires that a stipulation subject to its coverage be memorialized, that the defendant formally express his or her agreement to the stipulation, and that it be made a matter of record. Moreover, because the stipulated fact constitutes sufficient evidence, maybe the only evidence, of the element in question, the rule requires that the stipulation be read to the jury before the prosecution rests, affording the judge the discretion to decide whether it should further be entered into evidence and given to the jury as an exhibit. The model jury instructions for the charged crime set out its constituent elements, providing a ready reference for the facts subject to Rule 23(a).

Although a stipulated element under Rule 23(a) relieves the Commonwealth of its burden of producing evidence to prove that element, Ortiz, 466 Mass. at 481, it is distinct from a so-called stipulated trial, in which a defendant stipulates to all of the facts conclusive of guilt in order to preserve his or her right to appeal the judge's rulings on one or more pretrial issues. See, e.g., Commonwealth v. Brown , 55 Mass. App. Ct. 440 (2002). Because a stipulated trial is tantamount to a guilty plea, the defendant is entitled to the safeguards applicable in a guilty plea or admission to sufficient facts, informing him or her of the consequences of the stipulation and providing a hearing to ensure that the stipulation was entered into knowingly and voluntarily. Id. at 448-449. See Rule 12. In contrast, a stipulated element under Rule 23(a) occurs in the context of a contested trial, and it represents a considered, tactical decision by the defendant and defense counsel which is a part of the defendant's litigation strategy. In the ordinary case, Rule 23(a)'s requirement, following that of Rule 11(a)(2)(A), that the stipulation be written and signed by the defendant should adequately demonstrate that the defendant understands and agrees with the decision to stipulate. Requiring in addition a colloquy such as that required for a guilty plea or an

admission to sufficient facts seems unnecessary. Cf. Commonwealth v. Ramsey , 466 Mass. 489, 496 n. 8 (2013) (observing that plea colloquies required for stipulated trials had no application to a defendant's trial concession, as part of a litigation strategy, that he possessed crack and powder cocaine). Of course, if the judge thinks it appropriate in the circumstances of a particular case to inquire, on the record out of the presence of the jury, in order to make the record clear that the defendant understands the evidentiary consequences of the stipulation and/or that the defendant's agreement to the stipulation is voluntary, the judge has the discretion to do so. See, e.g., Commonwealth v. Walorz , 79 Mass. App. Ct. 132, 135-36, rev. denied, 460 Mass. 1103 (2011) (noting trial judge's detailed explanation to defendant of the effect of a stipulation to two elements of the charged offense in holding that a colloquy was not required).

A stipulated element subject to Rule 23(a) is also distinct from a defendant's concession that an essential element will be proved or that he or she is guilty of a lesser included offense. Unlike a stipulation of fact agreed to by the parties, the Commonwealth is not a participant in a defendant's strategic decision to concede that the evidence is sufficient to satisfy a portion of the charged offense. Nor does such a concession relieve the Commonwealth of its burden to prove every element of the charged offense beyond a reasonable doubt. See Commonwealth v. Charles , 456 Mass. 378, 383 (2010) (in a narcotics case, defense counsel's concession in opening and closing that defendant possessed "drugs" neither amounted to a tacit stipulation of that fact nor relieved the Commonwealth of its burden to prove each element beyond a reasonable doubt). Rather, a defendant's concession that some part of the Commonwealth's case is beyond dispute is a recognized trial tactic that, like other defense tactics, ordinarily requires no confirmation that the defendant understands its risks and agrees with its employment. The Supreme Judicial Court accordingly has declined to exercise its supervisory authority to require a colloquy to confirm that a defendant understands, and agrees with, a trial concession that he is guilty of a lesser included offense, deferring instead to the sound discretion of the trial judge concerning the need for any such inquiry. See Commonwealth v. Evelyn , 470 Mass. 765, 770 3 (2015). Similarly, Rule 23, including Rule 23(a)'s requirement of a signed writing, does not apply to a defendant's concession of some fact, element, or guilt of a lesser included offense.

Rule 23(b) Other Stipulations

The purpose of limiting Rule 23(a) to facts constituting an essential element of a charged offense is to avoid requiring a formal writing, subscribed by counsel and the defendant, to the variety of other factual stipulations that have long been a non-problematic part of criminal trials. Those stipulations are treated by the less formal provisions of Rule 23(b), which applies to stipulations during trial to evidentiary facts, such as those necessary to authenticate a document or to qualify a witness as an expert, and to facts that, while material, are not sufficient to prove an essential element of a charged offense. For example, in the above-hypothesized trial for operating under the influence, the fact that the defendant had told the police that he was driving a car at the time in question would certainly be material in determining whether he had operated a motor vehicle. However, standing alone, that confession would not be sufficient to prove the element of operation, see Commonwealth v. Leonard , 401 Mass. 470, 473 (1988), and the parties' stipulation that the defendant had so confessed would not be subject to Rule 23(a)'s requirements. Such stipulations of evidentiary and material facts have long been utilized to

expedite trials where – in the judgment of the parties – nothing would be gained by insisting on a formal mode of proof. Requiring a subscribed, written stipulation in such circumstances would undercut its utility without any apparent gain. Rule 23(b) does not require that stipulations subject to its coverage be written, mandating only that they be placed on the record before the close of evidence. The rule leaves it to the judge to decide how that is done and, for stipulations of a material fact, how the stipulation should be communicated to the jury. Nothing in the rule prohibits a judge, as a matter of discretion, from requiring that a particular stipulation of fact be reduced to writing, whether because of its complexity or for any other good cause.

Rule 24: Opening Statements; Arguments; Instructions to Jury

(Applicable to Superior Court and jury sessions in District Court)

(a) Opening and Closing Statements; Arguments.

(1) Order of Presentation. The Commonwealth shall present its opening statement first. The defendant may present an opening statement of his defense after the opening statement of the Commonwealth or after the close of the Commonwealth's evidence. The defendant shall present his closing argument first.

(2) Time Limitation. Counsel for each party shall be allowed fifteen minutes for an opening statement and thirty minutes for argument; but before the opening or the argument commences, the judge, on motion or sua sponte, may reasonably reduce or extend the time.

(b) Instructions to Jury; Objection. At the close of the evidence or at such earlier time during the trial as the judge reasonably directs, any party may file written requests that the judge instruct the jury on the law as set forth in the requests. The judge shall inform counsel of his proposed action upon requests prior to their arguments to the jury. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, specifying the matter to which he objects and the grounds of his objection. Upon request, reasonable time shall be given to each party to object to the charge before the jury retires. Where either party wishes to object to the charge or to request additional instructions, the objection or the request shall be made out of the hearing of the jury, or where appropriate, out of the presence of the jury.

Reporter's Notes

The language of this rule substantially parallels that of Mass. R. Civ. P. 51. See National Advisory Commission on Criminal Justice Standards and Goals, Courts, standard 4.15 (1973).

Subdivision (a). Drawn from Rules of Criminal Procedure (U.L.A.) rule 521 (1974), this subdivision (a)(1) establishes the order of presentation of opening statements and closing arguments.

The fifteen-minute limitation on opening statements and thirty-minute limitation on arguments of subdivision (a)(2) are carried over from earlier rules of court. Superior Court Rules 7, 68 (1974); Supreme Judicial Court rule 2:48 (1967: 351 Mass. 768). It is intended that under this rule only one attorney for each side is to participate, contrary to the provisions of Mass. R. Civ. P. 51 and Supreme Judicial Court Rule 2:48.

While placing time limits upon opening statements and arguments, and limiting arguments to a single counsel, Rule 24 does not otherwise affect their respective functions.

The proper function of an opening is to outline in a general way the nature of the case which counsel expects to be able to prove or support by evidence. He should not be allowed to state facts which are irrelevant or for any reason plainly incompetent.

Posell v. Herscovitz, 237 Mass. 513, 514 (1921); see Commonwealth v. Clark, 292 Mass. 409, 410 (1935); Commonwealth v. LePage, 352 Mass. 403, 409 (1967). The refusal by counsel to confine his opening statement within the established boundaries constitutes unprofessional conduct, S.J.C. rule 3:22A, Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer, PF 11, DF 12 (February 14, 1979), and may amount to such misconduct as to warrant his expulsion from the courtroom and subjection to disciplinary proceedings. United States v. Dinitz, 424 U.S. 600 (1976).

An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is fundamentally unfair to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, to present to the jury statements not susceptible of proof but intended to influence the jury in reaching a verdict.

A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop such professional misconduct.

United States v. Dinitz, supra, Burger, C.J. concurring at 612. See Commonwealth v. Fazio, Mass. Adv. Sh. (1978) 1617; ABA Standards Relating to the Prosecution Function § 5.5 (Approved Draft, 1971); ABA Standards Relating to the Defense Function § 7.4 (Approved Draft, 1971).

Although Massachusetts practice permits counsel "great latitude" in closing argument, Commonwealth v. Pettie, 363 Mass. 836, 840 (1973),

[i]t is the duty of a judge sitting with a jury to guard against improper arguments. . . . Whether he shall do this by stopping counsel in the course of such an argument, by instructing the jury to disregard such an argument, or by combining both methods, rests largely in the discretion of the judge.

Commonwealth v. Witschi, 301 Mass. 459, 462 (1938). Accord Commonwealth v. Montecalvo, 367 Mass. 46, 56 (1975). See Commonwealth v. Earltop, Mass. Adv. Sh. (1977) 532, 539 (Hennessey, C.J., concurring) and cases cited: ABA Standards Relating to the Function of the Trial Judge § 5.10 (Approved Draft, 1972).

Where counsel "repeatedly and deliberately sail[s] unnecessarily close to the wind . . . beyond permissible limits," Commonwealth v. Redmond, 370 Mass. 591, 597 (1976), thus bringing unsworn testimony to the attention of the jury, the cumulative prejudice may be such that curative instructions are insufficient. The remedy in such instance is an order for a new trial. Commonwealth v. Redmond, supra. Further, where counsel misstates the law, a request for a curative instruction is denied, and the judge's general instruction that arguments are not evidence to be weighed by the jury is insufficient to allay the resulting prejudice, a new trial is required. Commonwealth v. Killelea, 370 Mass. 638 (1976). Because of these serious consequences, it is obvious that overreaching in argument—as in openings—may constitute unprofessional conduct. S.J.C. Rule 3:22A, Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer, PF 13, PF 14 (February 14, 1979).

Subdivision (b). The incorporation of the civil practice form of requests for and objection to instructions into criminal practice is felt to be appropriate because the same basic principles apply to both types of proceedings. Compare Fed. R. Crim. P. 30 with Fed.R.Civ.P. 51. Subdivision (b) adopts what had been a long-standing practice before its formalization as a rule of the Superior Court. SUPERIOR COURT RULES, 1974, ANNOTATED 290-91 (Mass.Bar Ed. 1975); see e.g., Commonwealth v. Boutwell, 162 Mass. 230 (1894); Commonwealth v. Hassan, 235 Mass. 26, 31 (1920).20).

The rule differs from Mass. R. Civ. P. 51 in requiring that objections to the charge or requests for additional instructions be made out of the hearing or presence of the jury in all cases. This comports with Rules of Criminal Procedure (U.L.A.) rule 523(b) (1974) and ABA Standards Relating to Trial by Jury § 4.6(c) (Approved Draft, 1968). See Fed. R. Crim. P. 30.

Rule 25: Motion Required for Finding of Not Guilty

(Applicable to District Court and Superior Court)

(a) Entry by Court. The judge on motion of a defendant or on his own motion shall enter a finding of not guilty of the offense charged in an indictment or complaint or any part thereof after the evidence on either side is closed if the evidence is insufficient as a matter of law to sustain a conviction on the charge. If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, it shall be ruled upon at that time. If the motion is denied or allowed only in part by the judge, the defendant may offer evidence in his defense without having reserved that right.

(b) Jury Trials.

(1) Reservation of Decision on Motion. If a motion for a required finding of not guilty is made at the close of all the evidence, the judge may reserve decision on the motion, submit the case to the jury, and decide the motion before the jury returns a verdict, after the jury returns a verdict of guilty, or after the jury is discharged without having returned a verdict.

(2) Motion After Discharge of Jury. If the motion is denied and the case is submitted to the jury, the motion may be renewed within five days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of not guilty, or order the entry of a finding of guilty of any offense included in the offense charged in the indictment or complaint.

(c) Appeal.

(1) Right of Appeal Where Motion for Relief Under Subdivision (b) Is Allowed After a Jury Verdict of Guilty. The Commonwealth shall have the right to appeal to the appropriate appellate court a decision of a judge granting relief under the provisions of subdivisions (b)(1) and (2) of this rule on a motion for required finding of not guilty after the jury has returned a verdict of guilty or on an order for the entry of a finding of guilt of any offense included in the offense charged in the indictment or complaint.

(2) Costs Upon Appeal. If an appeal or application therefor is taken by the Commonwealth, the appellate court, upon the written motion of the defendant supported by affidavit, may determine and approve the payment to the defendant of his costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court upon the entry of the rescript or the denial of the application.

Reporter's Notes (1995) : Rule 25(c)(2)

The Reporter's Notes are reproduced in connection with the April, 1995 amendments to Rules 30(c)(8) and 30(c)(9).

Reporter's Notes

Rule 25 is derived with a minimum of change from former G.L. c. 278, § 11 (St. 1964, c. 108, §§ 1, 2) and conforms in substance to Fed. R. Crim. P. 29. See ABA Standards Relating to Trial by Jury § 4.5 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 522 (1974); Vt.R.Crim.P. 29; Me.R.Crim.P. 29.

The practical effect of this rule is to abolish the common law motion for a directed verdict and to substitute therefor a motion for a required finding of not guilty. This is essentially a change in terminology and does not presume to alter practice as it has developed relative to the directed verdict. The new term is not unknown in Massachusetts practice. See e.g., Commonwealth v. Coyne, Mass. Adv. Sh. (1977) 1062, 1068.

Motion for findings of not guilty are a part of Massachusetts practice in the context of nonjury cases, see e.g., Commonwealth v. Pursley, 2 Mass. App. Ct. 910 (1975) (Rescript), and are extended by this rule to include jury trials in recognition of the fact that juries have no proper function in this area. See ABA Standards Relating to Trial by Jury § 4.5(a), comment at 106-08 (Approved Draft, 1968).

Subdivision (a). The requirement that the court rule on a defendant's motion made at the close of the Commonwealth's case at the time such motion is made has recently been added to Massachusetts procedure. See Commonwealth v. Kelley, 370 Mass. 147, 149-50 (1976). This rule adopts this approach because of the difference between such a motion and a motion made at the close of all the evidence: in either case a defendant is requesting a judgment on the basis of evidence then before the court, but that evidence is very different at each of the two stages of trial. See ABA Standards Relating to Trial by Jury § 4.5(b), comment at 108 (Approved Draft, 1968).

On a defendant's motion for a directed verdict at the close of the Commonwealth's case, the defendant's rights become "fixed." If this motion is improperly denied on the basis of the condition of the case when the motion was made, the defendant is entitled to a reversal of the judgment, notwithstanding the introduction of further evidence. Of course, the Commonwealth's proof might deteriorate between the time the Commonwealth rests and the close of all the evidence. In such a case, on renewal of his motion, the defendant's rights would be reappraised in consideration of all the evidence. Commonwealth v. Kelley, supra, at n.1; Commonwealth v. Blow, 370 Mass. 401, 407 n.4 (1976); Commonwealth v. Aguiar, 370 Mass. 490, 498 (1976).

Under this rule the defendant may offer evidence in his defense without having reserved that right. Fairness requires this result. As the court stated in Jackson v. United States, 250 F.2d 897 (5th Cir. 1958), the motion "would be a futile thing if the court could reserve its ruling and force the defendant to an election between resting and being deprived of the benefit of his motion," Id. at 901, because the defendant would be compelled to forfeit either his right to move for acquittal or his right to present evidence in his defense.

Subdivision (b)(1). This subdivision permits the court to reserve a decision on a motion made at the close of all the evidence. The objection stated in the Jackson case, supra, is not present in this situation, and G.L. c. 278, § 11 in fact expressly condoned the propriety of what often is referred to as a judgment notwithstanding the verdict.

Subdivision (b)(2). By giving the court the power to enter a finding of guilty of any lesser included offense or, in the language of G.L. c. 278, § 33E, a lesser degree of guilt, after a verdict of guilty, this rule deviates sharply from prior criminal practice under G.L. c. 278, § 11. Commonwealth v. Jones, 366 Mass. 805 (1975). This has the practical effect of extending to the trial courts, post-verdict, a power in all cases much like that which had previously been reserved to the Supreme Judicial Court in capital cases under G.L. c. 278, § 33E (as amended). This increases the options available to the trial judge after verdict. It is anticipated that through this extension greater judicial economy will result where the evidence will not support the charge, but where the weight of the evidence clearly requires the conviction of a lesser included offense. See Jones, supra.

It should be noted that the motion for a new trial which may be made under this subdivision is in addition to those rights which a defendant has under Rule 30(b). Obviously the court should order a new trial pursuant to this rule only upon motion of a defendant since otherwise the subsequent proceeding would be subject to constitutional attack on double jeopardy grounds.

Rule 26: Requests for Rulings

(Applicable to jury waived trials in District Court and Superior Court)

Requests for rulings in the trial of a case shall be in writing and shall be presented to the court before the beginning of closing arguments, unless consent of the court is given to present requests later.

Reporter's Notes

Provisions comparable to Rule 26 are found in Fed. R. Crim. P. 23(c) and Rules of Criminal Procedure (U.L.A.) Rule 511(e) (1974). In addition, this rule reflects existing practice under District Court Rule 27 (1972) and Superior Court Rule 70 (1974), which deal with requests for rulings of law in non-jury trials. This rule is intended to secure for the purpose of review a separation of law from fact in cases where the trial judge acts both as factfinder and applier of law. See Caleb Pierce, Inc. v. Commonwealth, 354 Mass. 306 (1968).

Although much of the case law concerning requests for rulings has arisen out of the litigation of civil actions, see SUPERIOR COURT RULES, 1974, ANNOTATED 290-96 (Mass. Bar Ed. 1975), a rule which provides the court with adequate opportunity to pass upon the soundness of requested rulings is equally appropriate in criminal practice, Commonwealth vs. Hassan, 235 Mass. 26, 31 (1920).

Requiring the requests to be made before the beginning of closing arguments serves the function of apprising opposing counsel of the law under which the case will be decided. In Wilson v. United States, 250 F.2d 312, 324 (9th Cir. 1957), the court recognized that the failure to honor requests for rulings on the law could hinder the administration of justice, since there is no real difference between the giving of improper instructions in a jury trial and the judge in a non-jury trial effectually instructing himself improperly on the law.

The failure to present written requests seasonably, however, which results in a trial judge's refusal to allow such requests, vitiates any claim of error in the refusal. Commonwealth v. Lammi, 310 Mass. 159, 164 (1941). It is a matter within the sound discretion of the trial judge whether to grant special leave for requests. See Finkelman v. Kaufman, 337 Mass. 770 (1958) (Rescript).

It should be noted that under this rule requests are to be made for rulings of law only, and not for findings of fact. Neither this rule nor the prior practice in the Commonwealth requires a judge to honor requests for findings of fact. Stella v. Curtis, 348 Mass. 458, 461 (1965).

Rule 27: Verdict

(Applicable to jury trials in District Court and Superior Court)

(a) Return. The verdict shall be unanimous. It shall be a general verdict returned by the jury to the judge in open court. The jury shall file a verdict slip with the clerk upon the return of the verdict.

(b) Several Offenses or Defendants. If there are two or more offenses or defendants tried together, the jury may with the consent of the judge at any time during its deliberations return or be required by the judge to return a verdict or verdicts with respect to the defendants or charges as to which a verdict has been reached; and thereafter the jury may in the discretion of the judge resume deliberation. The judge may declare a mistrial as to any charges upon which the jury cannot agree upon a verdict; provided, however, that the judge may first require the jury to return verdicts on those charges upon which the jury can agree and direct that such verdicts be received and recorded.

(c) Special Questions. The trial judge may submit special questions to the jury.

(d) Poll of Jury. When a verdict is returned and before the verdict is recorded, the jury may be polled in the discretion of the judge. If after the poll there is not a unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

Reporter's Notes

This rule is patterned after Rule 31 of the Federal Rules of Criminal Procedure. Substantially, it reflects current Massachusetts practice as embodied in the common law and in statute. See former G.L. c. 278, § 11 (St. 1964, c. 108 §§ 1-2).

Subdivision (a). This subdivision requires that the verdict be unanimous. This is consistent with Fed. R. Crim. P. 31(a). Accord, Me.R.Crim.P. 31(a); Rules of Criminal Procedure (U.L.A.) rule 535(b) (1974). But see ABA Standards Relating to Trial by Jury § 1.1(b) (Approved Draft, 1968), which allows for less than a unanimous verdict.

The requirement that the jury return a verdict slip with the verdict is a change from existing practice. The verdict slip is a written recital of the verdict. This practice conforms to Rule 535(a) of the Uniform Rules of Criminal Procedure (U.L.A.) (1974). The use of a verdict slip will help reduce errors in the rendering and announcing of verdicts. See Commonwealth v. Brown, 367 Mass. 24, 27-29 (1975) (verdicts of not guilty returned, affirmed, and recorded and jury discharged; no error in permitting corrected verdicts to be entered since jury had remained undispersed, in custody, and had not been influenced), pet. for habeas corpus denied sub nom. Brown v. Gunter, 428 F. Supp. 889 (D. Mass. 1977), aff'd, 562 F.2d 122 (1st Cir. 1977).

Subdivision (b). This subdivision permits a jury in multiple-defendant or multiple-offense cases, with the consent of the court, to return a verdict at any time during their deliberations with respect to charges or defendants as to which a verdict has been reached. This rule also permits the court to require the return of such verdicts before the jury has reached a verdict as to all the defendants or charges. In either case, if the court directs, the jury is to continue its deliberations after rendering the verdicts under this subdivision. To the extent that this rule permits the jury to return such verdicts without having reached a decision on all the charges or defendants, it is consistent with Fed. R. Crim. P. 31(b)-(c). Accord Rules of Criminal Procedure (U.L.A.) rule 535(c)-(d) (1974).

This rule also provides that the court may declare a mistrial in cases where the jury is unable to reach a verdict. However, it must first receive and record the verdicts which the jury can agree

upon. (See ABA Standards Relating to Trial by Jury §§ 5.4-.5 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.), supra, rule 541.

Subdivision (b) does not prohibit retrial of those defendants as to whom the jury is unable to reach a verdict. This is consistent with Fed. R. Crim. P. 31(b), which provides that, in cases of multiple defendants, disagreements as to one or more defendants has no effect upon the verdict as to any other defendant, and such defendant may be retried without violating the protection of the double jeopardy clause. 8A J. MOORE, FEDERAL PRACTICE para. 31.02 [2] (1978 rev.). It has long been settled that jeopardy does not attach where the jury is discharged after inability to reach a verdict. United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Thames v. Commonwealth, 365 Mass. 477 (1974). It is within the discretion of the court to declare a mistrial where there is a "manifest necessity." United States v. Perez, supra at 580. Unless such "manifest necessity" exists, a second prosecution will be barred by the double jeopardy clause. Since Perez, it has been held that where the jury has been unable to agree upon a verdict, the declaration of a mistrial is a "classic example" of manifest necessity. United States v. Castellanos, 478 F.2d 749, 751 (2d Cir. 1973). Thus the defendant may be retried without twice being placed in jeopardy.

Subdivision (c). One change in Massachusetts law is the elimination of the special verdict. General Laws c. 278, § 11 had authorized the jury to return a special verdict, although this procedure was seldom used. This subdivision does, however, recognize the practice of submitting special questions to the jury. See Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 299-300 (1971), cert. denied, 407 U.S. 910 (1972). Special questions should, however, be used sparingly as they can "'catechize" a reluctant juror away from an acquittal and towards a seemingly more 'logical' conviction." Heald v. Mullaney, 505 F.2d 1241, 1245 (1st Cir. 1974), cert. denied, 420 U.S. 955 (1975).

Subdivision (d). This subdivision is based upon Fed. R. Crim. P. 31(d), but differs in that the polling of the jury is to be discretionary with the court rather than a right of the defendant so as to conform to existing Massachusetts practice. That this discretion is well-settled in the Commonwealth was recently reaffirmed in Commonwealth v. Stewart, Mass. Adv. Sh. (1978) 1521, 1533-34. See also Commonwealth v. Valliere, 366 Mass. 479, 497 (1974); Commonwealth v. Caine, 366 Mass. 366, 375 (1974); Commonwealth v. Fleming, 360 Mass. 404, 408 (1971) (jurors polled); Commonwealth v. Beneficial Finance Co., supra, at 300-301. Under Rule 31 of the Federal Rules of Criminal Procedure and under the ABA Standards Relating to Trial by Jury § 5.5 (Approved Draft, 1968), a jury is to be polled only at the request of a party or upon the court's own motion.

In any case, where a jury has been polled and there is not a unanimous concurrence, compare Commonwealth v. Fleming, supra, or it appears that the verdict was a compromise or other serious doubts are raised as to its integrity, see Commonwealth v. Stewart, supra, the court may declare a mistrial, or alternatively, order further deliberations. Accord, Rules of Criminal Procedure (U.L.A.) rule 535(e) (1974).

Rule 28: Judgment

(Applicable to District Court and Superior Court)

(a) Judgment. If the defendant has been determined to be guilty, a verdict or finding of guilty shall be rendered, or if he has been determined to be not guilty, a verdict or finding of not guilty shall be rendered, in open court, and shall be entered on the court's docket.

(b) Imposition of Sentence. After a verdict, finding, or plea of guilty, or a plea of nolo contendere, or an admission to sufficient facts, the defendant shall have the right to be sentenced without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail as provided by law. Before imposing sentence the court shall afford the defendant or his counsel an opportunity to speak on behalf of the defendant and to present any information in the mitigation of punishment.

(c) Notification of Right to Appeal. After a judgment of guilty is entered, the court shall advise the defendant of his right to appeal. In the District Court, upon the request of the defendant, the clerk of the court shall prepare and file forthwith a notice of appeal.

(d) Presentence Investigation.

(1) Criminal Record. The probation officer shall inquire into the nature of every criminal case or juvenile complaint brought before the court and report to the court information concerning all prior criminal prosecutions or juvenile complaints, if any, and the disposition of each such prosecution, except where the defendant was found not guilty. Such information is to be presented before a defendant is admitted to bail in court, and also before disposition of the case against him.

(2) Report. The report of the presentence investigation shall contain any prior criminal or juvenile prosecution record of the defendant, but shall not contain any information relating to criminal or juvenile prosecutions in which the defendant was found not guilty. In addition, the report shall include such other available information as may be helpful to the court in the disposition of the case.

(3) Availability to Parties. Prior to the disposition the presentence report shall be made available to the prosecutor and counsel for the defendant for inspection. In extraordinary cases, the judge may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.

(e) Filing. The court may file a case after a guilty verdict or finding without imposing a sentence if the defendant and the Commonwealth both consent. With the consent of both parties, the judge may specify a time limit beyond which the case may not be removed from the file, and may specify any events that may cause the case to be removed from the file. The defendant shall file a written consent with the court as to both the filing of the case and any time limit or events regarding removal from the file. Prior to accepting the defendant's consent, the court shall inform the defendant on the record in open court:

(i) that the defendant has a right to request sentencing on any or all filed case(s) at any time;

(ii) that subject to any time limit imposed by the court, the prosecutor may request that the case be removed from the file and sentence imposed if a related conviction or sentence is reversed or vacated or upon the prosecutor's establishing by a preponderance of the evidence either that the defendant committed a new criminal offense or that an event occurred on which the continued filing of the case was expressly made contingent by the court; and

(iii) that if the case is removed from the file the defendant may be sentenced on the case. In sentencing the defendant after the removal of a case from the file, the court shall consider the over-all scheme of punishment employed by the original sentencing judge.

As amended December 17, 2008, effective April 1, 2009.

Reporter's Notes to Rule 28(e)(2008) This section was added to meet the concerns the Supreme Judicial Court expressed in its opinion in Commonwealth v. Simmons, 448 Mass. 687 (2007). It addresses the procedure for placing a case on file without a sentence after a guilty verdict, a guilty finding or a plea of guilty. Before a court can place a complaint or indictment on file, both the defendant and the Commonwealth must consent. The defendant's consent is necessary because the suspension of the case deprives the defendant of the right to be sentenced in a timely fashion and the right to appeal. See Simmons, 448 Mass. at 698; Commonwealth v. Delgado, 367 Mass. 432, 438 (1975); Marks v. Wentworth, 199 Mass. 44, 45 (1908). The defendant's consent must be in writing and made part of the record in the case.

The Commonwealth's consent is necessary both because it accords with the historical practice, see Commonwealth v. Dowdican's Bail, 115 Mass. 133, 136 (1874) ("It has long been a common practice in this Commonwealth . . . to order, with the consent of the defendant and of the attorney for the Commonwealth, and upon such terms as the court in its discretion may impose, that the indictment be laid on file . . . .") (emphasis added), and because of the general public interest in seeing the timely imposition of a sentence.

If the judge does not otherwise specify, a filed case remains inactive indefinitely. The judge may, however, provide for the time frame within which the case may be brought forward as well as the occurrence of any events that would serve as the predicate for removing the case from the file. See, e.g., Commonwealth v. Marinucci Bros. & Co., 354 Mass. 743, 745 (1968) (defendant paying restitution); Commonwealth v. Pelletier, 62 Mass. App. Ct. 145, 146-147 (2004) (defendant serving a specified term in prison before being paroled). Since both the

Commonwealth and the defendant have a right to have the judge impose a sentence, by implication if the judge sets a time limit or establishes a contingency that would bring the case forward, both parties must agree.

The notice the defendant must receive about the implications of filing a case without imposing sentence is similar to a guilty plea colloquy in that it must occur in open court on the record. It is, however, not as detailed as a guilty plea colloquy nor must the judge specifically address the question of voluntariness, as would be the case with a guilty plea. Cf. Rule 12(a)(5). The defendant must, however, file with the court a signed statement agreeing to the filing of the case without a sentence and acknowledging the time frame within which the case can be removed from the file as well as the occurrence of any events that would serve as the predicate for its removal.

Subsection (i) requires the court to inform the defendant that he or she has the right to request that a case be removed from the file at any time. This reflects the historical practice surrounding the filing procedure, see Commonwealth v. Chase, Thacher's Crim. Cas. 267, 268-269 (Boston Mun. Ct. 1831) quoted in Commonwealth v. Simmons, 448 Mass. 687, 696 (2007) ("the [defendant] might at any time [appear] in court, and [demand] the judgment of law."); Commonwealth v. Dowdican's Bail, 115 Mass. 133, 136 (1874) ("[the practice of filing] leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward"). Since a defendant ordinarily cannot obtain appellate review of a filed case, see Commonwealth v. Delgado, 367 Mass. 432, 438 (1975), allowing the defendant to remove a case from the file is the only way to effectuate the right to appeal.

Subsection (ii) requires the defendant to receive notice of the reasons why the case can be removed from the file. One contingency that must be part of the notice in every case is the possibility that a related conviction was reversed or a related sentence vacated or modified. In the usual instance, a related conviction will be one that was joined for trial with the complaint or indictment that is being filed. See, e.g., Commonwealth v. Owens, 414 Mass. 595, 596 (1993). In some circumstances, however, a conviction that results from a separate proceeding may be based on the same course of criminal conduct as the filed case. In that situation, if the conviction or sentence in the separate case were reversed or vacated, the filed case could be brought forward.

Another element of the notice the defendant must receive under subsection (ii) is that the case may be removed from the file if the defendant commits a new criminal offense. The Supreme Judicial Court has recognized that historically, an implicit condition of a case remaining on file was the defendant's good behavior. See Commonwealth v. Simmons, 448 Mass. 687, 697 (2007). In Simmons itself, the Court approved the removal of an indictment from the file because the defendant was charged with a new offense. "Future criminal conduct" rather than "good behavior" is a more appropriate standard to incorporate into contemporary procedure given the existence of probation and the need to provide fair notice to the defendant of the reasons why a case might be brought forward for sentencing. If a defendant's future behavior has to be monitored on a long-term basis beyond the specific criterion of avoiding future criminal conduct, probation is a more appropriate vehicle than placing a case on file. The notice also informs the defendant that the issue of future criminal behavior is one that the prosecutor must establish by a

preponderance of the evidence in order to justify removing a case from the file and having the court impose a sentence. The preponderance standard is the one that governs a probation revocation hearing, which is the closest analogy to removing a case from the file. See Commonwealth v. Holmgren, 421 Mass. 224, 226 (1995). It is also the standard that a judge must apply in sentencing. See Nichols v. United States, 511 U.S. 738, 748 (1994); Commonwealth v. Nawn, Jr., 394 Mass. 1, 7 (1985).

Subsection (ii) also recognizes that in an individual case a judge may make bringing the case forward contingent upon a specific event, such as the defendant paying restitution, see e.g. Commonwealth v. Marinucci Bros. & Co., 354 Mass. 743, 745 (1968), or serving a specified term in prison before being paroled, see e.g. Commonwealth v. Pelletier, 62 Mass. App. Ct. 145, 146-147 (2004). The defendant must receive explicit notice of any such contingency.

Subsection (iii) requires the court to inform the defendant that if the case is removed from the file, the defendant can receive a sentence that entails additional punishment. Cf. Simmons, 448 Mass. at 695 n.9. This provision does not require the type of colloquy concerning the details of a maximum sentence that must accompany a guilty plea. Cf. Rule 12(c)(3)(B). The defendant must, however, be made aware of the possibility of additional punishment and the judge should tailor the amount of information on this topic to the needs of each specific case.

The last provision in this section addresses the power of a judge to impose a sentence after a case is removed from the file. The Supreme Judicial Court has made clear that when a case is brought forward from the file, the judge, in deciding on what sentence to impose, must conform the new sentence to "the over-all scheme of punishment employed by the trial judge." Simmons, 448 Mass. at 699. This requirement means the sentencing judge has to take into account two limitations. One is the length of the original sentencing scheme. In Simmons, for example, the Court determined that the disparity between the two sentences was too great where a defendant was originally sentenced to concurrent terms of eight to twelve years on six armed robbery indictments and five years later received a sentence of eighteen to twenty years on a single count of armed assault with intent to rob that had been removed from the file. See id. at 699. It may be appropriate in some cases for the judge who orders a case placed on file to indicate what type of sentence is contemplated if the case is ever removed from the file. The other limitation stems from the requirement of due process that a defendant not be punished for conduct other than that for which he or she was convicted. See Commonwealth v. Bianco, 390 Mass. 254, 259 (1983). Since an allegation of new criminal conduct will often be the occasion for bringing a case out of the file, the judge should take care not to impose a harsher sentence on the filed case because the defendant "has not demonstrated his innocence of [the] unrelated, pending charge." Commonwealth v. LeBlanc, 370 Mass. 217 (1976).

Reporter's Notes

The format and much of the language of this rule is derived from Rule 32 of the Federal Rules of Criminal Procedure. Subdivision (c) is taken from Rule 3.670 of the Florida Rules of Criminal Procedure (1975). The Federal Rule has been significantly modified so as to conform to existing Massachusetts practice.

Subdivision (a). This subdivision is a restatement of Rule 3.670 of the Florida Rules of Criminal Procedure (1975). It requires the verdict or finding, whether it is guilty or not guilty, to be rendered in open court and entered on the court's docket. See Fed. R. Crim. P. 32(b)(1); Rules of Criminal Procedure (U.L.A.) rule 621 (1974).

Subdivision (b). The defendant has the right to prompt sentencing. See G.L. c. 279, § 4; Commonwealth v. Kossowan, 265 Mass. 436 (1929); In re Lebowitch, 235 Mass. 357 (1920). See ABA Standards Relating to Sentencing Alternatives & Procedures § 5.4(a) (Approved Draft, 1968). However, the defendant can waive that right. When the defendant consents to a continuance of the case or a probationary term, he has by implication waived his right to prompt sentencing. Compare Fla.R.Crim.P. 3.670 (1975).

Pending the pronouncement of sentence, the court may commit the defendant, place him on probation, or release him on bail in a manner consistent with existing law. See G.L. c. 276, §§ 58, 65, 87. The terms of his release may subsequently be altered by the court. See ABA Standards Relating to Post Conviction Remedies § 5.21(b) (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 611 (1974); 18 U.S.C. § 3148.

Finally, this subdivision grants to the defendant or his counsel the opportunity to speak on behalf of the defendant and to offer any information which may serve to mitigate the sentence to be imposed. While there is no constitutional or other right to allocation, Commonwealth v. Curry, Mass. App. Ct. Adv. Sh. (1978) 977 (Rescript); Jeffries v. Commonwealth, 94 Mass. (12 Allen) 145, 153 (1866), this opportunity has traditionally been afforded the defendant at common law and may have therapeutic value for the defendant as well as potential for mitigation. 8A J. MOORE, FEDERAL PRACTICE para. 32.05 (1978 rev.). In Green v. United States, 365 U.S. 301 (1961), the Supreme Court indicated that the right to allocution was a personal one and could not be satisfied by only affording the opportunity to the defendant's counsel. "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." Id. at 304. For the procedure to be followed if a denial of the right to allocution is found, see Hill v. United States, 368 U.S. 424 (1962). See ABA Standards Relating to Sentencing Alternatives & Procedures § 5.4(a)(iii) (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 613(2) (1974).

Subdivision (c). This subdivision is meant to assure that the defendant is informed of his right to appeal following a finding of guilty, a finding of sufficient facts to warrant a finding of guilty, or imposition of sentence in a District Court jury-waived session or after a verdict or finding of guilt in a District Court jury session or the Superior Court. See Superior Court Rule 65 (1974), as amended, 1977).

General Laws c. 278, § 18 (as amended, St. 1978, c. 478, § 302) permits a defendant convicted in District Court jury-waived session to appeal either from a sentence or from a finding of guilty where no sentence is imposed. Rule 9 of the District Court Initial Rules of Criminal Procedure (1971) provides that either the judge or the sessions clerk may inform the defendant of his right to his de novo appeal to a jury session. That practice is in conformity with this rule. Compare Fed. R. Crim. P. 32(a)(2) with Rules of Criminal Procedure (U.L.A.) 613(4) (1974), both of which provide that the judge is to inform the defendant of his right to appeal.

This rule is much more limited in its operation than the Federal Rule, which requires notice of the defendant's right to appellate review to correct errors. This rule does, however, direct the District Court clerk to file the notice of appeal on behalf of the defendant upon his request, which is consistent with the federal rule.

Subdivision (d). This rule preserves the distinction between the defendant's criminal record and the full probation report which was emphasized in Commonwealth v. Martin, 355 Mass. 296 (1969).

Subdivision (d)(1) is essentially a restatement of existing law. See G.L. c. 276, § 85; G.L. c. 279, § 4A, pursuant to which the defendant is given the right to see his criminal record. This rule affords the court the important right to inspect probation records regarding a defendant's prior criminal convictions or other dispositions, exclusive of not guilty findings, prior to his release on bail. But see District Court Initial Rules of Criminal Procedure 8 (1971), which would prohibit the use of probation records for bail determination.

Support can be found for the position taken in this subdivision in G.L. c. 119, §§ 60, 61A (as amended, St. 1978, c. 478, § 64). Section 60 authorizes the consideration of juvenile delinquency records before imposition of sentence in criminal proceedings. Section 60A provides the same basic standard for the availability of juvenile records for inspection in appeals to a juvenile appeals session from adjudications of delinquency as does subdivision (d)(3), infra, for the availability of the records of criminal and juvenile prosecutions prior to sentencing in criminal proceedings.

Although G.L. c. 279, § 4A mandates that the criminal record is not to include information concerning prior charges of which the defendant was acquitted, it does not require exclusion of information as to other pending charges. Commonwealth v. Franks, Mass. Adv. Sh. (1977) 858 (Rescript); Commonwealth v. LeBlanc, 370 Mass. 217, 222 (1976); Commonwealth v. Settipane, 5 Mass. App. Ct. ___, ____ (1977), Mass. App. Ct. Adv. Sh. (1977) 1110, 1117. The consideration of other charges is appropriate as long as the judge makes clear that he is not passing on guilt or innocence on the untried charges, the resulting sentence is within statutory limits, and there is no basis in the record for apprehension of vindictiveness or retaliatory motivation. Settipane, supra. Accord Franks, supra.

There is no constitutional objection to a judge knowing of other pending charges, although due process would require resentencing if inaccurate, unreliable or misleading information had been considered at sentencing, or if the judge had undertaken to punish the defendant for conduct other than that of which he is immediately convicted. Commonwealth v. LeBlanc, supra at 221, and cases cited. For a similar example of factors beyond the scope of consideration for sentencing, see Commonwealth v. Murray, 4 Mass. App. Ct. (1976), Mass. App. Ct. Adv. Sh. (1976) 889.

Subdivision (d)(2) contemplates a probation report concerning the defendant which will include the criminal record of subdivision (d)(1) and also other information about the defendant which may assist the court in disposing of the case. The authorization for such reports is found in G.L. c. 276, § 100, as noted in Commonwealth v. Martin, supra. The probation report of this subdivision may be used by the court for purposes of sentencing as well as for other purposes,

such as the setting of bail. To the extent that this report is multiple-purpose, it is somewhat different than the presentence investigation report of Fed. R. Crim. P. 32(c)(1)-(2), which is used primarily for the purpose of sentencing following a determination of guilt. See Rules of Criminal Procedure (U.L.A.) rule 612 (1974). Other sources also recommend the use of presentence investigative reports following a guilty finding. See ABA Standards Relating to Sentencing Alternatives & Procedures §§ 4.1(b), 4.2(a), 4.3, 4.4(a)-(b) (Approved Draft, 1968); ALI Model Code of Pre-Arraignment Procedure § 320.4 (P.O.D. 1975); National Advisory Commission on Criminal Justice Standards & Goals, Corrections, standards 5.14(1), (3); 5.15(1); 5.16; 16.10 (1973).

Subdivision (d)(3) states that generally the report compiled by the probation department shall be made available to the defendant and his counsel and to the prosecutor. The court in Commonwealth v. Martin, supra, held that the defendant did not have a right to see the report, but stated that "the administration of justice would be improved by a liberal and generous use of the power to disclose." Id. at 303, quoting United States v. Fischer, 381 F.2d 509, 512-13 (2d Cir.), cert. denied, 390 U.S. 973 (1967). The court stated that the main consideration against full disclosure is the prospect that the revelation of certain material given the probation officer in confidence, would result in the destruction of the sources of such material and its availability. Commonwealth v. Martin, supra, at 303.

This subdivision further conditions availability upon the judge's determination that disclosure would not "result in harm, physical or otherwise, to the defendant or other persons." This qualification accords with Fed. R. Crim. P. 32(c)(3)(A). ABA Standards Relating to Sentencing Alternatives and Procedures § 4.4 (Approved Draft 1968), also recommends disclosure of presentence reports with certain exceptions, as does ALI, Model Code of Pre-Arraignment Procedure § 320.4 (P.O.D. 1975).

The next to last sentence of this subdivision provides that if any portion of the report is not made available, then the judge is not to rely upon any information contained in that portion in determining sentence. See Gardner v. Florida, 430 U.S. 349 (1977) (denial of due process to impose death sentence on basis of information contained in undisclosed presentence report which defendant could not deny or explain).

Rule 29: Revision or Revocation of Sentence

(Applicable to District Court and Superior Court)

(a) Revision or Revocation.

(1) Illegal Sentences. The trial judge, upon the judge's own motion, or the written motion of the prosecutor, filed within sixty days after imposition of a sentence, may revise or revoke such sentence if the judge determines that any part of the sentence was illegal.

(2) Unjust Sentences. The trial judge, upon the judge's own motion, or the written motion of a defendant, filed within sixty days after the imposition of a sentence or within sixty days after issuance of a rescript by an appellate court on direct review, may, upon such terms

and conditions as the judge shall order, revise or revoke such sentence if it appears that justice may not have been done.

(b) Affidavits. If a party files a motion pursuant to this rule, the party shall file and serve, and the other party may file and serve, affidavits in support of their respective positions. The judge may deny a motion filed pursuant to this rule on the basis of facts alleged in the affidavits without further hearing.

(c) Notice. The moving party shall serve the other party with a copy of any motion and affidavit filed pursuant to this rule. If the judge orders that a hearing be held on the motion, the court shall give the parties reasonable notice of the time set for the hearing.

(d) Place of Hearing. A motion filed pursuant to this rule may be heard by the trial judge wherever the judge is then sitting.

(e) Appeal. An appeal from a final order under this rule may be taken to the Appeals Court, or the Supreme Judicial Court in an appropriate case, by either party.

Amended June 8, 2016, effective September 1, 2016

Reporter's Notes

(2016) This amendment to Rule 29 is intended to fill a gap in the Rules of Criminal Procedure identified by the Supreme Judicial Court in Commonwealth v. Selavka , 469 Mass. 502 (2014), in which the Court upheld the Commonwealth's authority to move to correct an illegal sentence. After noting that neither former Rule 29(a) norRule 30(a) permitted a Commonwealth motion to revise or revoke an illegal sentence, the Court concluded that "rule 29(a), with its sixty-day time frame, is the proper vehicle by which the Commonwealth may challenge illegal sentences." Selavka, 469 Mass. at 508. This amendment to Rule 29 permits the Commonwealth to seek such relief.

Reporter's Notes

Rule 29 is drawn in part from Fed. R. Crim. P.35 and from former G.L. c. 278, §§ 29A (St. 1959, c. 167, § 1) and 29C (St. 1962, c. 310, § 2). See Rules of Criminal Procedure (U.L.A.) rule 633 (1974).

Subdivision (a). General Laws c. 278, § 29A, which was applicable to sentences imposed upon a plea without trial in the District Court, and § 29C, which was applicable to sentences imposed after plea or trial in the Superior Court provided the 60-day limit incorporated into this subdivision. It should be noted that under §§ 29A and 29C, a sentence could only be revised or revoked within 60 days after imposition; pursuant to this subdivision, a sentence may be revised or revoked at any time so long as the defendant's motion is filed within 60 days after imposition of the sentence, or within 60 days after the finality of the conviction is established upon direct appeal or after such review is denied or withdrawn. This subdivision enlarges the power of the

District Court so that it is commensurate with that of the Superior Court under former G.L. c. 278, § 29C so as to enable the judge to revise or revoke a sentence imposed after a trial in the District Court. Under prior practice, a de novo appeal to the Superior Court was deemed to vacate the District Court judgment and to "render immaterial . . . all . . . errors and irregularities in the proceedings" below. Commonwealth v. Holmes, 119 Mass. 195, 199 (1875). Accord Enbinder v. Commonwealth, 368 Mass. 214, 217 (1975). For that reason, G.L. c. 29A expressly did not apply to appealed cases. Now, under this rule, a claim of appeal from a District Court jury-waived session to a jury session divests the judge who imposed the original sentence of the power to revise or revoke that sentence.

The rule governs reductions of sentences motivated by demands of fairness. It is thus a rule which accords the trial judge broad discretion. As was stated in District Attorney for the Northern District v. Superior Court, 342 Mass. 119 (1961):

Occasions inevitably will occur where a conscientious judge,after reflection or upon receipt of new probation reports or other information, will feel that he has been too harsh or has failed to give due weight to mitigating factors which properly he should have taken into account.

Id. at 128. If within sixty days after sentence has been imposed, the trial judge for any reason feels the sentence that has been imposed is too harsh, he is permitted to reduce it sua sponte, although he is not permitted to consider events occurring after the original imposition. Commonwealth v. Sitko, Mass. Adv. Sh. (1977) 668, 676-78.

Subdivision (a) speaks only in terms of a motion by the defendant, although in prior practice motions of the Commonwealth to revise or revoke a sentence were not unknown. Commonwealth v. Sitko, supra.

The 60-day period established by the rule is absolute, and the trial judge has no power to extend the time within which the motion must be filed or within which the sentence may be altered sua sponte. Mass. R. Crim. P. 46(b); Commonwealth v. Burrone, 347 Mass. 451 (1964). However, under this rule, once the motion is filed, he may act on it at a time later than 60 days.

The view under the common law was that so long as nothing had been done to carry a sentence into execution, "it was, in contemplation of law, in the breast of the court, and subject to revision and alteration." Commonwealth v. Weymouth, 84 Mass. (2 Allen) 144, 145-46 (1862). The modern view is that a sentence may be reduced by judicial action even though the defendant has commenced serving it. District Attorney for the Northern District v. Superior Court, 342 Mass. 119, 126-28 (1961). That an increase in the sentence once execution has commenced is not permitted has, however, long been settled. United States v. Benz, 282 U.S. 304, 307-09 (1931); Ex parte Lange, 18 U.S. (Wall.) 163, 167-74 (1873).

A mistake in the mittimus under which a defendant is serving his sentence may be corrected at any time because such a revision does not change the sentence imposed, only the transcription of that sentence. Bolduc v. Commissioner of Correction, 355 Mass. 765 (1969).

Subdivision (b). The objective of subdivision (b) is to encourage the disposition of post-conviction motions upon affidavit. Presently, the rule in Massachusetts is that the use of affidavits in lieu of oral testimony is discretionary with the trial judge. Commonwealth v.

Coggins, 324 Mass. 552 (1949). The only change contemplated by this subdivision is that the use of this established procedure is to be extended to all cases where it is deemed appropriate by the trial judge. See Mass. R. Crim. P. 30(c)(3).

Subdivision (c). The provision of Mass. R. Crim. P. 32, relative to service and notice, are incorporated by this subdivision.

Subdivision (d). This provision is paralleled in subdivision (c)(7) of Mass. R. Crim. P. 30 and is intended to expedite the disposition of motions for post-conviction relief.

Rule 30: Postconviction Relief

(a) Unlawful Restraint. Any person who is imprisoned or whose liberty is restrained pursuant to a criminal conviction may at any time, as of right, file a written motion requesting the trial judge to release him or her or to correct the sentence then being served upon the ground that the confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts.

(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

(c) Post Conviction Procedure.

(1) Service and Notice. The moving party shall serve the office of the prosecutor who represented the Commonwealth in the trial court with a copy of any motion filed under this rule.

(2) Waiver. All grounds for relief claimed by a defendant under subdivisions (a) and (b) of this rule shall be raised by the defendant in the original or amended motion. Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion.

(3) Affidavits. Moving parties shall file and serve and parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions. The judge may on rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.

(4) Discovery. Where affidavits filed by the moving party under subdivision (c)(3) establish a prima facie case for relief, the judge on motion of any party, after notice to the opposing party and an opportunity to be heard, may authorize such discovery as is deemed appropriate, subject to appropriate protective order.

(5) Counsel. The judge in the exercise of discretion may assign or appoint counsel in accordance with the provisions of these rules to represent a defendant in the preparation and

presentation of motions filed under subdivisions (a) and (b) of this rule. The court, after notice to the Commonwealth and an opportunity to be heard, may also exercise discretion to allow the defendant costs associated with the preparation and presentation of a motion under this rule.

(6) Presence of Moving Party. A judge may entertain and determine a motion under subdivisions (a) and (b) of this rule without requiring the presence of the moving party at the hearing.

(7) Place and Time of Hearing. All motions under subdivisions (a) and (b) of this rule may be heard by the trial judge wherever the judge is then sitting. The parties shall have at least 30 days notice of any hearing unless the judge determines that good cause exists to order the hearing held sooner.

(8) Appeal. An appeal from a final order under this rule may be taken to the Appeals Court, or to the Supreme Judicial Court in an appropriate case, by either party.

(A) If an appeal is taken, the defendant shall not be discharged from custody pending final decision upon the appeal; provided, however, that the defendant may, in the discretion of the judge, be admitted to bail pending decision of the appeal.

(B) If an appeal or application therefor is taken by the Commonwealth, upon written motion supported by affidavit, the Appeals Court or the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees, if any, to be paid on the order of the trial court after entry of the rescript or the denial of the application. If the final order grants relief other than a discharge from custody, the trial court or the court in which the appeal is pending may, upon application by the Commonwealth, in its discretion, and upon such conditions as it deems just, stay the execution of the order pending final determination of the matter.

(9) Appeal Under G. L. c. 278, § 33E. If an appeal or application for leave to appeal is taken by the Commonwealth under the provisions of Chapter 278, Section 33E, upon written notice supported by affidavit, the Supreme Judicial Court may determine and approve payment to the defendant of the costs of appeal together with reasonable attorney's fees to be paid on order of the trial court after entry of the rescript or the denial of the application.

Reporter's Notes (2001) : This rule, which marks a significant departure from prior Massachusetts practice, is derived from a number of sources. See Fed. R. Crim. P., Rules 33, 35; ABA Standards Relating to Post-Conviction Remedies (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) Rule 632 (1974).

The moving party is to seek post conviction relief from the trial judge presiding at the initial trial. See Commonwealth v. Sullivan, 385 Mass. 497, 498 n. 1 (1981) (the judge who presided at a

defendant's trial normally should hear that defendant's motion for a new trial). The trial judge is familiar with the case which "may make for more efficient handling." ABA Standards, supra, § 1.4, comment at 30. See McCastle, Petitioner, 401 Mass. 105, 107 (1987) (Rule 30 "assigns the motion to the trial judge who heard the case, on the theory that [the judge's] familiarity with the case can assist in its effective handling.") However, for this same reason the trial judge may bring to the hearing a prejudice that another judge would not have. Recusal of the trial judge should thus be liberally exercised, particularly where it is requested by the moving party. See ABA Standards, supra, § 1.4(c). A second advantage to be gained from giving the trial court original jurisdiction to hear post conviction motions is that the necessary witnesses, if any, are likely to be convenient to the court.

Subdivision (a). When originally adopted in 1979, this subdivision consolidated the previously distinct procedures of habeas corpus and writ of error. The purpose of the revision was to simplify post conviction procedure, while maintaining the full scope of relief previously available. See ABA Standards Relating to Post-Conviction Remedies § 1.1 (Approved Draft, 1968). However, the writ of habeas corpus still has limited application in cases contending that the term of a lawfully imposed sentence has expired and basing a claim for relief on grounds distinct from issues arising at the indictment, trial, conviction or sentencing stages. See e.g., Averett, Petitioner, 404 Mass. 28, 30 (1988) (forfeiture of good time credits). A petition for a writ of habeas corpus is appropriate only where the petition alleges that the petitioner is entitled to immediate release. See Stewart, Petitioner, 411 Mass. 566, 568 (1991). On the other hand, a rule 30 (a) motion is not available to contest the legality of a sentence that the defendant has already completed. Cf. Commonwealth v. Lupo, 394 Mass. 644, 646 (1985) ("Rule 30 [a] is intended primarily to provide relief for defendants incarcerated in violation of Federal law or of the laws of the Commonwealth.")

In addition to permitting convicted defendants to seek release from illegal confinement or other restraint on their liberty, this subdivision permits them to seek the correction of an illegal sentence. A distinction is drawn between an illegal sentence and a sentence imposed in an illegal manner. See Fed. R. Crim. P., Rule 35.

The concepts of an illegal sentence and an illegally-imposed sentence are narrow and permit the trial judge no discretion in the decision to modify a sentence. Both concepts presume that a defendants conviction is in all ways valid and that only the sentence is in some manner defective. The difference between the two is that an illegal sentence is one that is not permitted by law for the offense committed by the defendant, e.g., a sentence that exceeds the permissible maximum. See e.g., Commonwealth v. Ambers, 397 Mass. 705 (1986) (challenge to legality of consecutive sentences); Commonwealth v. Harris, 23 Mass. App. Ct. 687, 691-92 (1987) (court sentenced defendant for an offense other than that for which the jury convicted). Illegality has been held to include not only facially illegal sentences, but sentences premised upon a major misunderstanding by the sentencing judge as to the legal bounds of the judge's authority. E.g., United States v. Lewis, 392 F.2d 440 (4th Cir. 1968) (sentencing judge believed parole permissible upon imposition of maximum sentence); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966) (sentence constituted penalty upon exercise of defendant fifth amendment rights); Robinson v. United States, 313 F.2d 817 (7th Cir. 1963) (sentencing judge recommended parole

when defendant ineligible). An illegally-imposed sentence is one where the irregularity lies with the procedure employed in imposing the sentence. See e.g., Hill v. United States 368 U.S. 424 (1962), where the trial court denied the defendant his right of allocution, which was held to be a procedural irregularity. In the context of a probation revocation order, a motion under Rule 30(a) would be appropriate only as a vehicle for challenging the legality of the sentence the defendant received and not the legality of the order revoking probation. Irregularities in the probation revocation process should be challenged through a direct appeal . See Commonwealth v. Christian, 429 Mass. 1022 (1999).

An illegal sentence must be corrected by the court at any time upon proper motion by the defendant. An illegally-imposed sentence can only be corrected upon a motion filed within the time permitted by Mass. R. Crim. P., Rule 29(a), that is, within 60 days after imposition. See Rules of Criminal Procedure (ULA) Rule 632 (1974). The only restriction upon the correction of an illegal sentence is that it cannot be increased if it has been partially executed. See United States v. Benz, 282 U.S. 304 (1931).

Subdivision (b). This subdivision was taken primarily from Fed. R. Crim. P., Rule 33. The standard established in the first sentence is, however, taken directly from former G.L. c. 278, § 29 (St. 1966, c 301).

Prior to 1964 a motion for a new trial under G.L. c. 278, § 29 could only be granted within one year after the end of the trial. See Fine v Commonwealth, 312 Mass 252 (1942); Commonwealth v Sacco, 261 Mass 12 (1927). However, a 1964 amendment rewrote the statute so that the court could consider such a motion filed at any time after judgment. St. 1964, c. 82.

In the absence of constitutional error, whether to grant a motion for a new trial on an issue that has been properly presented to the court is within the sound discretion of the trial judge. See Commonwealth v. Smith, 381 Mass. 141, 142 (1980). The basis for a new trial can either relate to the conduct of the trial, see e.g., Commonwealth v. Vaidulas, 433 Mass. 247, 250 (2001) ("The only means of revisiting after trial a matter raised in a motion in limine is through a motion for postconviction relief under rule 30."); Commonwealth v. Francis, 411 Mass. 579, 585-86 (1992) (improper jury instruction); Commonwealth v. Westmoreland, 388 Mass. 269, 271 (1983) (ineffective assistance of counsel); Commonwealth v. Schand, 420 Mass. 783, 787-88 (1995) (prosecutor's failure to disclose exculpatory evidence); Commonwealth v. Nickerson, 388 Mass. 246, 249-250 (1983) (defendant's mental incompetence); Commonwealth v. Ciminera, 11 Mass. App. Ct. 101, 107-110, affd 384 Mass. 807 (1981) (jury misconduct), or to the discovery of new facts that bear on the question of guilt, see e.g., Commonwealth v. Pires, 389 Mass. 657, 664-666 (1983) (newly-discovered evidence); Commonwealth v. Watson, 377 Mass. 814, 815 (1979) (recanted testimony).

A defendant seeking a new trial on the basis of newly discovered evidence must establish both that the evidence is newly discovered and that it casts real doubt on the justice of the conviction. See Commonwealth v. Pike, 431 Mass. 212, 218 (2000). The allegedly new evidence must be material and credible, and "carry a measure of strength in support of the defendants position." Commonwealth v. Grace, 397 Mass. 303, 305-06 (1986). A defendant must also show that the evidence was unknown to the defendant or the defendants counsel, and not discoverable through

"reasonable pretrial diligence" at the time of trial or at the time of the presentation of any earlier motion for a new trial. See Pike, 431 Mass. at 218. "The motion judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jurys deliberations. This process of judicial analysis requires a thorough knowledge of the trial proceedings and can, of course, be aided by a trial judges observation of events at trial." Commonwealth v. Moore, 408 Mass. 117, 126-27 (1990) quoting Commonwealth v. Grace, 397 Mass. 303, 305-06 (1986).

A new trial motion under Rule 30(b) is the appropriate vehicle to attack the validity of a guilty plea or an admission to sufficient facts. See Commonwealth v. Fanelli, 412 Mass. 497 (1992) (treating the defendant's postsentence motion to withdraw guilty pleas as a motion for a new trial pursuant to Mass. R. Crim. P. 30); Dunbrack v. Commonwealth, 398 Mass. 502 (1986) (the appropriate method for attacking the lawfulness of the admission to sufficient facts and the sentence imposed is a postconviction motion for new trial pursuant to rule 30 (b) and not a petition under c. 211 § 3). A Rule 30(b) motion is also appropriate where the defendant has been deprived of a constitutionally protected right by counsel's failure to appeal. See Commonwealth v. Cowie, 404 Mass. 119, 121 (1989). However, granting a new trial because the verdict is against the weight of the evidence should be done according to Rule 25(b)(2), not Rule 30. See Commonwealth v. Preston, 393 Mass. 318, 324 (1984).

The requirement that the trial judge make findings upon a motion for a new trial is contrary to the traditional rule in the Commonwealth, see Commonwealth v Morgan, 280 Mass 392 (1932), but is based upon the following language of the court in Earl v. Commonwealth, 356 Mass 181 (1969):

We recognize that the single justice has power to entertain writs of error in such cases but it is preferable that these questions be resolved in the first instance by the trial judge upon a motion for new trial. The effect of this practice will be to place in the hands of the trial judge, rather than in the hands of the single justice, the task of resolving factual disputes underlying alleged constitutional errors.

Id. at 183. Accord, Commonwealth v. Penrose, 363 Mass 677 (1973). Cf. Commonwealth v. Preston, 393 Mass. 318, 323 n. 4 (1984) (declining to address the issue whether findings are required in response to all rule 30 (b) motions regardless of outcome). The absence of a finding of fact hampers appellate review of the judge's decision on a new trial motion. See e.g., Commonwealth v. Caban, 48 Mass. App. Ct. 179, 184 (1999) (remanding case for finding of fact).

General Laws c. 279, § 41 provides that judgment should be entered against a corporation that fails to appear in court to answer charges against it. If the corporation can later show cause to excuse its prior neglect, it should be permitted to have the prior judgment vacated upon a motion for a new trial.

The original Reporter's Notes to Rule 30 intended that the remedy available under this subdivision be truly post-conviction, that is, not open to a defendant until the validity of the finding or verdict of guilt was conclusively established by an appellate court if an appeal was taken. This policy was designed to avoid complex and duplicitous proceedings and to protect the

interests of the defendant, who is ordinarily limited to a single motion for a new trial. In the years since this subdivision was first promulgated, however, it has not been unusual for defendants to file a rule 30(b) motion after a notice of appeal has been filed. If the motion is pending at the time the appeal is entered, counsel then request a stay of the appeal until the motion is disposed of so that any appeal from the ruling can be consolidated with that from the judgment. See Commonwealth v. Powers, 21 Mass. App. Ct. 570, 572 n. 2 (1986). The Supreme Judicial Court has recognized that a judge may rule on a new trial motion prior to the determination of an appeal from the conviction. See Commonwealth v. Hallet, 427 Mass. 552, 555 (1998) (describing considerations a judge should take into account in deciding whether to rule on the merits of a new trial motion presented prior to the determination of an appeal); Commonwealth v. Smith, 384 Mass. 519, 524 (1981) ("defendants appeal from his conviction should, when possible, be combined for review with his appeal from the denial of any motion for a new trial")

This rule does not limit access of a criminal defendant to review pursuant to G.L. c. 211, § 3, which grants the Supreme Judicial Court "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided . . . ." That power, however, should be and has been exercised only in exceptional circumstances, when necessary to protect substantive rights. See McGuinness v. Commonwealth, 420 Mass. 495, 497 (1995); Forte v. Commonwealth, 418 Mass. 98, 99 (1994); Commonwealth v. McCarthy, 375 Mass. 409, 414 (1978) and cases cited.

Subdivision (c)

(c)(1) In 2001, this subsection was amended to eliminate the requirement that the Attorney General be served in every case where a motion is filed under Rule 30(a). The subsection now requires service of a motion for a new trial, under either subsection (a) or subsection (b), upon the office of the prosecutor who represented the Commonwealth in the trial court, whether a District Attorney's Office or the Attorney General's Office. The prosecutor's office which maintains the original trial file is in the best position, and is responsible for, responding to motions for a new trial.

(c)(2) Subdivision (c)(2) was modeled after ME REV STAT ANN, tit. 14 § 5507 (1964), and was intended to establish finality of convictions and to eliminate "piecemeal litigation . . . whose only purpose is to vex, harass, or delay." Sanders v. United States, 373 US 1, 18 (1963). See Commonwealth v. Donahue, 6 Mass. App. Ct. 971 (1979) (defendants fourth motion for new trial). This rule is not intended to foreclose from future consideration grounds which were not known and could not have been found out with the exercise of due diligence. The constitutionality of the Maine statute from which this subdivision is taken was upheld by the Supreme Court in Murch v. Mottram, 409 U.S. 41 (1972). See ABA Standards Relating To Post Conviction Remedies § 6.2(b)(i) (Approved Draft, 1968).

The rule of waiver established in the subdivision applies, as a result of case law, to claims that were not preserved at trial or not raised in an appeal, as well as to claims that were not put forward in a prior new trial motion. See Rodwell v. Commonwealth, 432 Mass. 1016, 1017 (2000) ("If a defendant fails to raise a claim that is generally known and available at the time of trial or direct appeal or in the first motion for postconviction relief, the claim is waived.");

Commonwealth v. McLaughlin, 364 Mass. 211, 229 (1973), quoting from Commonwealth v. Dascalakis, 246 Mass. 12, 24 (1923) ("It has been the unbroken practice both under the statute [former G.L. c. 278 § 29 on which Rule 30 was based] and at common law respecting motions for new trial not to examine anew the original trial for the detection of errors which might have been raised by exceptions taken at the trial.") Waiver applies equally to constitutional and non-constitutional claims. See Commonwealth v. Deeran, 397 Mass. 136, 139 (1986).

Where a new trial motion presents a claim that could have been raised at trial but was not, the discretion a judge has to entertain the issue, as well as the scope of appellate review of the judge's decision, differs depending on the timing of the motion. Where the motion is presented to the court prior to the determination of an appeal, the motion judge, especially if the judge presided over the original trial, has wide discretion to consider an issue that was not raised at trial. See Commonwealth v. Hallet, 427 Mass. 552, 554-55 (1998). If the judge does consider the issue on its merits, it opens the issue up to full appellate review. Id. If the judge does not consider the issue on the merits, however, and denies relief based on the waiver doctrine, the standard on appellate review is confined to whether there was a substantial risk of a miscarriage of justice. Id. at 554. A judge should take into account in deciding to deny a new trial motion on the merits rather than on the basis of waiver, the advantage and disadvantage of making full appellate review available. Id.

Since it affects the scope of appellate review, if the judge is going to deny the motion, the judge should make clear whether the decision is based on a consideration of the merits, or on the basis that the error did not raise a substantial risk of a miscarriage of justice – which is the standard for considering issues that have been waived because they were not preserved at trial. See id. at 555. ("The judge should recognize that, unless the asserted error concerns a manifest injustice or created a substantial risk of a miscarriage of justice, she has wide discretion whether to consider any new trial issue fully on its merits.") Cf. Commonwealth v. Depace, 433 Mass. 379, 382 n.2 (2001) (where the judge considered the matter only on the threshold question whether the defendant raised a substantial issue necessitating an evidentiary hearing, the issue was not preserved for full appellate review); Commonwealth v. Oliveira, 431 Mass. 609, 612 (2000) (where the judge considered the matter only to determine if the issue raised an asserted error that created a substantial risk of a miscarriage of justice, the issue was not preserved for full appellate review).

If a new trial motion is presented after an appeal has been decided, the discretion the judge has to consider an issue that could have been raised earlier, is much more limited. In this posture, the Supreme Judicial Court has recommended restricting consideration of such ordinarily waived issues to "those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result." Commonwealth v. Watson, 409 Mass. 110, 112 (1991). In determining if a substantial risk of a miscarriage of justice warrants the judge in considering a claim that would otherwise be precluded because it was not raised earlier, the judge should take into account three factors, taken from Commonwealth v. Miranda, 22 Mass. App. Ct. 10, 21 n.22 (1986): whether there is a genuine question of guilt or innocence; whether the error was significant enough in the context of the trial to make it plausible to infer that the result might have been different but for the error; and, whether counsel's failure to object at trial was simply a

reasonable tactical decision. See Commonwealth v. Amirault, 424 Mass. 618, 647 (1997). However, where a new trial motion raises an issue for the first time whose constitutional significance was not established until after the trial and appeal, so that the defendant did not have a genuine opportunity to preserve the issue in the normal course of events, the judge may consider it. See Commonwealth v. Burkett, 396 Mass. 509, 511 (1986). The standard of review from the denial of a new trial motion filed after an appeal has been decided is the same whether the motion judge considered the issue or not, whether there was a substantial risk of a miscarriage of justice. See Commonwealth v. Curtis, 417 Mass. 619, 624 n. 4 (1994).

(c)(3). The primary purpose of subdivision (c)(3) is to encourage the disposition of post conviction motions upon affidavit. In accordance with prior practice, see Commonwealth v Hubbard, 371 Mass 160, 174 (1976) quoting Commonwealth v Coggins, 324 Mass 552, 556-57, cert. denied, 338 US 881 (1949), such motions should ordinarily be heard on the facts as presented by affidavit, although in particular circumstances, the judge may in the exercise of discretion receive oral testimony. See Commonwealth v. Figueroa, 422 Mass. 72, 77 (1996) (the decision whether to hold an evidentiary hearing on a new trial motion under Rule 30 is within the sound discretion of the judge). Where a substantial issue is raised, however, the better practice is to conduct an evidentiary hearing. See Blackledge v Allison, 431 US 63, 75-76 (1977). Compare Commonwealth v. Licata, 412 Mass. 654, 660 (1992) (error to refuse a hearing on new trial motion which raised a substantial issue of ineffective assistance of counsel) with Commonwealth v. Stewart, 383 Mass. 253, 257 (1981) (not error to refuse a hearing on new trial motion which failed to raise substantial issue concerning perjury by prosecution witness). In determining whether the motion raises a substantial issue which merits an evidentiary hearing, the judge should look not only at the seriousness of the issue asserted, but also to the adequacy of the defendants showing. See id. at 257-58. Whether or not a substantial issue is presented must, of course, be determined on the face of the motion and affidavit. The motion should specify the grounds for relief, see Commonwealth v. Saarela, 15 Mass. App. Ct. 403, 407 (1983), and the affidavit should provide the factual support necessary to determine the issue. The court is fully warranted in dismissing a motion unaccompanied by affidavit, see Commonwealth v Colantonio, 31 Mass. App. Ct. 299, 302 (1991); or one whose the factual allegations are “obscure,” cf. Sayles v. Commonwealth, 373 Mass 856 (1977), “impressionistic and conclusory,” cf. Commonwealth v. Coyne, 372 Mass. 599, 600 (1977), or untrustworthy, see Commonwealth v. Lopez, 426 Mass. 657, 662 (1998).

The only change contemplated by this subdivision is that the use of this established procedure is to be extended to all cases where it is deemed appropriate by the trial judge.

(c)(4) Discovery in the context of a new trial motion is not a matter of right. The motion must first establish a prima facie case for relief before discovery is available. However, where that hurdle is met and discovery would be appropriate to develop facts necessary to support the claim, it is within the judge’s discretion to allow discovery. Discovery is appropriate where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he or she is entitled to relief. Cf. Harris v. United States, 394 U.S. 286, 300 (1969). This subsection provides that the Commonwealth, as well as the defendant, may obtain discovery. Cf. Rules Governing §2254 Cases in the United States District

Courts, Rule 6(c) (recognizing the right of the respondent in a habeas corpus case to take the deposition of the petitioner). If, upon completion of discovery, the defendant is totally unable to make a reasonable proffer of evidence on a crucial element of the case, no hearing need be held and the motion may be dismissed.

In 2001, this subsection was amended to eliminate confusion arising from the reference to discovery in civil cases. The judge has wide discretion to allow the appropriate form of discovery, see Commonwealth v. Stewart, 383 Mass. 253, 261 (1981), which may include orders to produce evidence or statements, as provided in the Rules of Criminal Procedure, and in an unusual case may include depositions or other modes of discovery provided in the Rules of Civil Procedure. Where necessary, a party subject to discovery may seek an appropriate protective order.

In 2001, this subsection was also amended to require the opposing party to receive notice and an opportunity to be heard before the judge grants a discovery request. This provision is particularly important in the context of a request that evidence in the possession of the Commonwealth be made available to the defendant for scientific testing, such as DNA analysis. Before ordering such discovery, the judge must take into account a number of issues whose resolution requires the Commonwealth's participation, including the potential relevance of the results to the ground the motion advances for a new trial, the feasibility of successful testing, and the details of access to and testing of the evidence. See generally National Commission on the Future of DNA Evidence, Postconviction DNA Testing: Recommendations For Handling Requests (Nat'l. Inst. Justice 1999) at 52-53.

(c)(5) As a matter of constitutional obligation, the state need only ensure that indigent defendants have meaningful access to whatever post conviction proceedings are generally available. See Commonwealth v. Conceicao, 388 Mass 255 (1983). Counsel is not necessary in every case to ensure that end. Id at 261. The decision whether to appoint counsel on a motion for a new trial is within the discretion of the trial judge. However, where the motion raises a meritorious, or even colorable claim, "it is much the better practice to assign counsel." Id at 262. G.L. c. 211D §14 provides for the Committee for Public Counsel Services to represent indigent defendants in post conviction proceedings, and judges may refer requests for counsel to the Committee for initial screening.

If the motion is frivolous, repetitive, or the issues are so simple and easy that an attorney is not necessary to elucidate them, the judge may deny a motion for the appointment of counsel. See Conceicao, supra, 388 Mass. at 261-62. Where the motion is presented to the trial judge, the judge may take into account the fact of familiarity with the original record, or with that in prior new trial motions, in declining to appoint counsel. Id at 261.

By amendment in 2001, this subsection gave judges discretion to allow for the payment of costs associated with the preparation and presentation of a new trial motion. Such costs may include the preparation of a transcript, obtaining the services of an investigator, retaining the services of an expert, or paying for scientific testing. As with the decision to appoint counsel, there is no constitutional right to have the state pay for these types of costs associated with a new trial motion. See Commonwealth v. Davis, 410 Mass. 680, 684 n. 7 (1991). But where the defendant

seeks costs that are reasonably necessary to develop support for a well founded basis for granting a new trial, it is appropriate for the judge to exercise discretion and allow the request. In making the decision to allow costs associated with a new trial motion, the judge should take into account the likelihood that the expenditure will result in the defendant's being able to present a meritorious ground for a new trial. Where the request concerns scientific testing of evidence in the Commonwealth's possession, as with DNA analysis, the court should consider a request for funds in conjunction with the appropriate discovery motion under subsection (c)(4) seeking access to the evidence in question.

By amendment in 2001, this subsection required that the Commonwealth be given notice and an opportunity to be heard with respect to a request for costs in connection with a new trial motion. Unlike a request for costs prior to trial, in the context of a new trial motion there is no reason to deny the Commonwealth an opportunity to participate in a hearing on this type of request in order to avoid the prejudice that can result from the defendant's being forced to reveal trial strategy prematurely. Cf. McKinney v Paskett, 753 F. Supp. 861, 864 (D.C. Id. 1990). The sound exercise of a judge's discretion to allow the defendant costs will depend in part on an evaluation of the legal theory which the expenditure of funds would support. The Commonwealth's participation in this process will result in a better informed decision. This subsection, however, does not give the Commonwealth a right to participate in the determination of a request for the initial appointment of counsel.

(c)(6) Subdivision (c)(6) was originally taken from 28 USC § 2255 (1949) and authorizes the court to make a determination—with or without a hearing—without requiring the presence of the moving party.

The defendants presence is not required at a hearing on a motion for a new trial. See Commonwealth v. Owens, 414 Mass. 595, 604 (1993) citing Commonwealth v. Costello, 121 Mass. 371, 372 (1876). Where the defendants presence will be of little help to the court—e.g., at the determination of purely legal issues—a proper determination can be made in his absence. Sanders v. United States, 373 U.S. 1, 21 (1963); Howard v. United States, 274 F.2d 100, 104 (8th Cir. 1960). See Mass R. Crim. P., Rule 18 and Reporters' Notes. It is therefore appropriate to screen post-conviction motions carefully, and to utilize other than summary disposition only where an evidentiary hearing to resolve factual issues requires the presence of the defendant. ABA Standards Relating to Post-Conviction Remedies § 4.5(a); § 4.6, commentary at 74-75 (Approved Draft, 1968).

(c)(7) This subdivision is designed to expedite the determination of motions filed pursuant to this rule. In 2001, it was amended to give the parties at least 30 days notice of a hearing on a new trial motion, unless the judge determines that good cause exists to order the hearing held sooner. In light of the fact that the Commonwealth need not respond to every new trial motion, since some may be denied on their face as without merit, the primary objective of this provision is to avoid the problem of having the Commonwealth placed in the position of having to respond to a new trial motion without adequate time to prepare.

(c)(8) & (c)(9) Subdivision (c)(8) was originally patterned after CAL PENAL CODE § 1506 (Deering Supp 1976).

Appeals from new trial motions in cases subject to G.L. c. 278 § 33E go to the Supreme Judicial Court. In all other cases, the Appeals Court is the appropriate venue. Either party may appeal from an adverse determination on a new trial motion. A ruling in favor of a defendant on a motion for relief from unlawful restraint or for a new trial pursuant to this rule does not preclude a Commonwealth appeal, since a successful appeal would merely reinstate the verdict or finding of guilt and would not subject the defendant to re-prosecution or multiple punishment. United States v. Wilson, 420 U.S. 332 (1975).

A defendants request for release on bail pending appeal is a matter within the discretion of the trial judge. See Forte v. Commonwealth, 418 Mass. 98, 100 (1994). However, the provision giving the judge discretion to release a defendant on bail pending appeal applies only to appeals from an order for a new trial or an order determining that the defendant's sentence should be reduced to a term of imprisonment less than the time he already has served. See Stewart v. Commonwealth, 413 Mass. 664 (1992).

Under subdivisions (c)(8)(B) and (c)(9), the appellate court is to determine the defendants costs of appeal which are then to be paid to the defendant by the Commonwealth on the order of the trial court. In 1995, the Standing Advisory Committee on Criminal Procedure reconsidered the several rules concerning the payment of reasonable attorneys fees to insure that they were consistent. In Latimore v. Commonwealth 417 Mass 805 (1994), the Commonwealth filed an application for leave to appeal the allowance of the defendants motion for a new trial under the provisions of G.L. c. 278 § 33E. The application was denied by the single justice and the defendant moved for costs and attorneys fees. Because the application for appeal in a capital case was controlled by section 33E, rather than Rule 30(c)(8)(B), no specific provision for payment of fees and costs were available. The court observed that this situation, while rare, presented an anomaly in the rules.

The committee reconsidered the appropriate rules and added language to address the situation where the Commonwealth is making application for leave to appeal and adds directions for payment of fees and costs upon the denial of the application.

The Single Justice in the Memorandum of Decision in the County Court in Commonwealth v. Latimore, Supreme Judicial Court for Suffolk Co. 92-0469 said that in appropriate circumstances he would read the authority granted to the Appeals Court to include the Supreme Judicial Court. To confirm this authority to include both appellate courts, Rule 30(c)(8)(B) was amended to specifically include both courts.

The specific shortcoming of the rules addressed in Latimore was corrected by the addition of Rule 30(c)(9) which provides the Supreme Judicial Court with authority to award fees and costs in capital cases under the provision of G. L. c. 278, § 33E.

Reporter's Notes (1995) : [Rules 30(c)(8) and 30(c)(9)]

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Rule 31: Stay of Execution; Relief Pending Review Automatic Expiration of Stay

(Applicable to Superior Court and de novo trials in District Court)

(a) Imprisonment. If a sentence of imprisonment is imposed upon conviction of a crime, the entry of an appeal shall not stay the execution of the sentence unless the judge imposing it or, pursuant to Mass. R. App. P. 6, a single justice of the court that will hear the appeal, determines in the exercise of discretion that execution of said sentence shall be stayed pending the determination of the appeal. If execution of a sentence of imprisonment is stayed, the judge or justice may at that time make an order relative to the custody of the defendant or for admitting the defendant to bail.

(b) If the application for a stay of execution of sentence is allowed, the order allowing the stay may state the grounds upon which the stay may be revoked and, in any event, shall state that upon release by the appellate court of the rescript affirming the conviction, stay of execution automatically expires unless extended by the appellate court. Any defendant so released shall provide prompt written notice to the clerk of the trial court regarding the defendant's current address and promptly notify the clerk in writing of any change thereof. The clerk shall notify the appellate court that will hear the appeal that a stay of execution of sentence has been allowed. At any time after the stay expires, the Commonwealth may move in the trial court to execute the sentence. The court shall schedule a prompt hearing and issue notice thereof to the defendant unless the prosecutor requests, for good cause shown, that a warrant shall issue.

(c) Fine. If a reservation, filing, or entry of an appeal is made following a sentence to pay a fine or fine and costs, the sentence shall be stayed by the judge imposing it or by a single justice of the court that will hear the appeal if there is a diligent perfection of appeal.

(d) Probation or Suspended Sentence. An order placing a defendant on probation or suspending a sentence may be stayed if an appeal is taken.

Amended June 24, 2009, effective October 1, 2009.

Reporter's Notes (2009) This Rule was revised in 2009. As originally adopted in 1979, it codified existing practice under G.L. c. 279 § 4, which governed the procedure for a stay of execution pending appeal prior to the adoption of the Rules of Criminal Procedure.

Subdivision (a). Practice in the Commonwealth is that sentences are not routinely stayed pending appeal. See Hagen v. Commonwealth, 437 Mass. 374, 378 (2002). However, where a defendant meets the appropriate requirements, it has been a long standing tradition to grant a stay in the interest of justice, to avoid imprisoning one whose conviction may not survive appellate review. See Commonwealth v. Levin, 7 Mass. App. Ct. 501, 513 (1979).

A judge should order a stay only when the defendant has met the two concerns which guide the exercise of discretion in this area. The first and most important is the likelihood of the defendant establishing on appeal that the conviction will be overturned. Cf. Commonwealth v. Stewart, 413 Mass. 664 (1992) (bail pending appeal is not appropriate if the only consequence of the defendant's success would be reducing the term of his sentence and not immediate discharge). This requirement does not demand that the defendant establish that the appeal is more likely than not to be successful, only that it presents "an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal." See Commonwealth v. Hodge, 380 Mass. 851, 855 (1980); Commonwealth v. Allen, 378 Mass. 489, 498 (1979). In this respect, the Massachusetts practice is more liberal than its federal counterpart. Compare 18 U.S.C. 3143(b)(1)(B) (the defendant must establish that the appeal "raises a substantial question of law or fact likely to result in" a favorable outcome).

The other factor that informs a judge's exercise of discretion in granting a stay is the question of security: whether the defendant will flee, commit another crime or present a danger to the community. See Hodge, 380 Mass. at 855. The same facts that are relevant to the decision to grant a defendant bail prior to trial are pertinent in this context as well. See Allen, 378 Mass. at 498.

In granting a stay, a judge may impose appropriate conditions on the defendant's release. Cf. Commonwealth v. Beauchemin, 410 Mass. 181, 186 (1991) (defendant not leave his home and have no minor visitors). G.L. c. 276 § 87 can be used as a vehicle for having the probation department monitor the defendant's conduct during a stay.

The trial judge may entertain a motion for a stay either before or after the entry of an appeal. Whether the judge grants or denies the motion, no statement of reasons is necessary nor must the judge make any particular finding or certification. See Allen, 378 Mass. at 1034.

This Rule does not address stays of execution of a sentence when an appeal is not pending. See Commonwealth v. McLaughlin, 431 Mass. 506, 518 (2000) (raising but not deciding the question of a judge's inherent power to stay a sentence for other reasons).

Appellate Rule 6 establishes the procedure that is available after the trial judge acts on a motion for a stay. Either the defendant or the Commonwealth may seek relief from a single justice of the court that will hear the appeal concerning the trial judge's decision to deny, e.g., Commonwealth v. Aviles, 422 Mass. 1008 (1996), or grant, e.g. Commonwealth v. Hodge, 380 Mass. 851 (1980), a stay. In the ordinary course of events, for all but first degree murder cases a single justice of the Appeals Court is the appropriate forum.

Subdivision (b). Stay orders must inform the defendant of the conditions upon which they were issued. Mandatory conditions include the defendant's continuing obligation to provide the court in writing with a current address and to prosecute the appeal in a diligent manner. See Mass. R. A. P. 6 (b)(4). The court should craft whatever additional conditions are appropriate to each case.

The stay automatically expires when the appellate court considering the appeal releases a rescript affirming the conviction, unless the appellate court states otherwise. A rescript is "released" when it is announced to the public and the appellate court notifies the parties that the court has decided the case. Cf. Mass. R. App. P. 23 (requiring the clerk of the appellate court to mail the parties a copy of the rescript and the opinion, if any). In the ordinary course of events, the rescript "issues" twenty-eight days following the release date or upon the denial of any petition for rehearing or application for further appellate review, whichever is later. Id

The court that decided the appeal may exercise its discretion to extend a stay of execution pending a petition for rehearing, application for further appellate review, or petition for certiorari. Unless otherwise specified, an extended stay expires when the rescript issues. The appellate court may act sua sponte or pursuant to the defendant's motion, which may be filed before the appeal is decided or after the rescript is released. If the appeal is lodged in the Appeals Court, the defendant should file the motion with the panel that has the responsibility for deciding the merits of the appeal.

In order to ensure that the clerk of the appellate court can notify the parties that a stay has automatically expired, see Mass. R. App. P. 6 (b)(6), the clerk of the trial court must notify the appellate court whenever a stay is granted.

Once a rescript affirming the conviction is released, the burden is on the Commonwealth, not the defendant, to initiate the process for the sentence to be executed. See Commonwealth v. Ly, 450 Mass. 16, 20 (2007). This requires the prosecutor to file a motion with the trial court and for the court to schedule a hearing and notify the defendant. The court should schedule the hearing promptly. Id. at 22. If possible, the prosecutor should agree on a date for the hearing with the defendant's current counsel (in most cases that will be the lawyer who represented the defendant on appeal). The procedure for ensuring the defendant's appearance at the hearing to execute the sentence is modeled after the one described in Rule 6 (a). Ordinarily, the court should simply issue a notice to the defendant of the time and date of the hearing. The prosecutor, however, may accompany the motion for a hearing with a request that the court issue a warrant for the arrest of the defendant. If the prosecutor's submission establishes good cause to believe that a warrant is

necessary in order to ensure the defendant's appearance, the court may order the defendant's arrest. The defendant is not entitled to be heard on the question of whether a warrant should issue.

Subdivision (c). This subdivision departs from federal rule in that a stay of the payment of a fine is mandatory under this rule. This provision was adopted in recognition of the difficulty a defendant has, upon the successful appeal of his judgment, in recovering money he has paid in satisfaction of a fine. Subdivision (d). This subdivision was originally based, in part, on Fed. R. Crim. P. 38(a)(4) and upon G.L. c. 279 § 4.

Rule 32: Filing and Service of Papers

(Applicable to District Court and Superior Court)

(a) Service: When Required. Written motions other than those which are heard ex parte, written notices, and similar papers shall be served upon each of the parties.

(b) Service: How Made. Whenever under these rules or by order of court service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney, unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided for in civil actions.

(c) Notice of Orders and Judgments. If upon the entry of a judgment or order made on a written motion either or both of the parties are not present in court, the clerk shall immediately mail to the absent party or parties a notice of that entry and shall record the mailing in the docket.

(d) Filing. Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided for in civil actions.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, three days shall be added to the prescribed period.

(f) Protection of Personal Identifying Information. *Effective February 1, 2017.* Publicly accessible documents filed with the court shall conform to Supreme Judicial Court Rule 1:24, Protection of Personal Identifying Information in Publicly Accessible Court Documents.

Amended January 25, 2017, effective February 1, 2017

Reporter's Notes

This rule is closely patterned after Fed. R. Crim. P. 49. Subdivisions (a), (b) and (d) are identical to their federal counterparts and subdivision (c) has been adopted with slight revision. Subdivision (e) has been taken from Fed. R. Crim. P. 45(e) and Mass. R. Civ. P. 6(d).

Subdivision (a). This subdivision is similar to Fed.R.Civ.P. and Mass. R. Civ. P. 5(a). Service is required "upon each of the parties" to avoid the interpretive questions that arose under the

"adverse party" language of the federal rule prior to its 1966 amendment, such as the problem of when is a co-defendant an adverse party. The rule is also designed to promote full exchange of information among all parties. However, no restriction is intended upon agreements among co-defendants or between the defendant and the prosecutor restricting unnecessary expense. Advisory Committee note to Rule 49.

Service is required of motions, notices and similar papers. The latter category embraces opposing affidavits and the like. But this rule does not apply to service of a summons for a witness under Mass. R. Crim. P. 17, or the execution or service of a warrant or summons under Mass. R. Crim. P. 6. See 8B J. MOORE, FEDERAL PRACTICE para. 49.02 (1978 rev.).

Subdivision (b). The first sentence of this subdivision is the same as the first sentence of Mass. R. Civ. P. 5(b) and Fed. R. Civ. P. 5(b). When a party has appeared and is represented by an attorney, service is required to be made upon the attorney, unless the court orders service to be made upon the party himself in cases where the court deems such service necessary. An order, disobedience of which is punishable as a contempt, or an order to show cause why a party should not be punished for contempt, are papers which the court would, as a practical matter, generally order to be served upon the party himself. A civil contempt proceeding, however, is merely a continuance of the original action and a step in the enforcement of a previous order or judgment, so that service of papers to have a party adjudged in civil contempt may validly be made on his attorney of record, unless it is unreasonable to regard the attorney as a representative of the party at that time. 2 J. MOORE, FEDERAL PRACTICE para. 5.06 (2d ed. 1978).

The second sentence of Mass. R. Crim. P. 32(b) incorporates by reference Mass. R. Civ. P.4.

Subdivision (c). This subdivision is similar to Fed. R. Crim. P. 49(d) as it appeared prior to its 1966 amendment. The federal rule is an adoption for criminal proceedings of Fed. R. Civ. P. 77(d). No consequences are attached to the failure of that clerk to give the prescribed notice. However, it is intended that in a case where the losing party, in reliance upon the clerk's obligation to send a notice, fails to file a timely notice of appeal, the trial judge may, in the exercise of his discretion, vacate the judgment because of the clerk's failure to give notice and may enter a new judgment. The time period for appeal would then begin to run when the second judgment is entered. See Hill v. Hawes, 320 U.S. 520 (1944). Since oral motions are generally ruled on in the presence of the parties, there can be no reliance on the clerk's failure to send notice and the applicable time limits for appeal must be observed.

Subdivision (d). This subdivision incorporates by reference Mass. R. Civ. P. 5(d)-(e), which govern the procedure for filing papers. Under Mass. R. Civ. P. 5(e), papers must be filed with the clerk of the court "except that a judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk."

Subdivision (e). This subdivision is identical to Mass. R. Civ. P. 6(a) and Fed. R. Civ. P. 6(e) and to Fed. R. Crim. P. 45(e). The reason for this rule is that under Mass. R. Civ. P. 5(b), service by mail is complete upon mailing, and various prescribed time periods begin to run after service of notice or other papers. This subdivision adds three days to these prescribed periods since a day or more may intervene between the mailing of a pleading or paper and the actual receipt thereof.

Rule 33: Counsel for Defendants Indigent or Indigent but Able to Contribute

(Applicable to District Court and Superior Court)

The assignment of counsel for defendants determined to be indigent or indigent but able to contribute shall be governed by the provisions of G. L. c. 211D and Supreme Judicial Court Rule 3:10.

Rule 34: Report

(Applicable to cases initiated on or after September 7, 2004)

If, prior to trial, or, with the consent of the defendant, after conviction of the defendant, a question of law arises which the trial judge determines is so important or doubtful as to require the decision of the Appeals Court, the judge may report the case so far as necessary to present the question of law arising therein. If the case is reported prior to trial, the case shall be continued for trial to await the decision of the Appeals Court.

Reporter's Notes

Under prior practice, the authority of a judge to report a question of law for the decision of the full court was wholly a creature of statute, Commonwealth v. Cronin, 245 Mass. 163 (1923), and the procedure was expressly confined to instances where a person had been convicted, G.L. c. 278, § 30 (St. 1830, c. 113, § 4), or before trial had commenced. G.L. c. 278, § 30A (St. 1954, c. 528). The language of this rule is comprised of the statutory provisions of those two sections.

Prior to 1954, a trial judge was authorized to report a question of law only after the conviction of a defendant; no provision granted the court the authority to report an interlocutory question before trial. Commonwealth v. Baldi, 250 Mass. 528 (1925). The addition of § 30A by chapter 528 of the Statutes of 1954 gave the court the power to report and have decided a question arising prior to trial, and this procedure has been used increasingly in recent years with the expanded application of fourth, fifth and sixth amendment rights. See, e.g., Commonwealth v. Baker, 343 Mass. 162 (1961) (admission to bail); Commonwealth v. Mekalian, 346 Mass. 496 (1963) (motion to suppress evidence); Commonwealth v. O'Leary, 347 Mass. 387 (1964) (assignment of counsel).

Once trial has commenced, the court may not report a question until after a conviction of the defendant. The definition of "conviction" for purposes of this rule is that provided by the Supreme Judicial Court in Commonwealth v. Baldi, 250 Mass. 528 (1925), which may include the judgment of the court following a verdict of guilty or confession of guilt, or may mean a verdict of guilty against the defendant or his confession in open court, without judgment or sentence. Id. at 536-37.

Although a report may be made after trial if the defendant consents, it does not preclude the defendant from taking an appeal. See Commonwealth v. Giles, 350 Mass. 102 (1966), in which the judge found the defendant guilty and suspended the execution of sentence pending answer to his report from the Supreme Judicial Court. The defendant later appealed the entire case. Conversely, the procedure has also been used to afford a defendant as full a review as he could have obtained had his counsel properly filed an assignment of errors after notice of the completion of the summary of the record. In Commonwealth v. Pratt, 360 Mass. 708 (1972), the Supreme Judicial Court treated such a case as if it had been properly brought on appeal. See Commonwealth v. Dorius, 346 Mass. 323, 324 (1963).

The decision to report rests within the discretion of the trial judge. Commonwealth v. Eagleton, 402 Mass. 199, 208 (1988). This discretion is to be guided in part by the standard set out by the Supreme Judicial Court in Commonwealth v. Cavanaugh, 366 Mass. 277 (1974). This standard, though stated in connection with interlocutory appeals, is, as the court clearly states, applicable to decisions to report:

"An interlocutory appeal, *like a report*, may be appropriate when the alternatives are a prolonged, expensive, involved or unduly burdensome trial or a dismissal of the indictment."

Id. at 279. (Emphasis added). Accord Commonwealth v. Vaden, 373 Mass. 397 (1977).

A case may be reported if in the judge's opinion a question of law is so important or doubtful as to require a determination by a higher court, Commonwealth v. A Juvenile, 381 Mass. 727, 728 n.2 (1980). The judge must then refer facts sufficient to make intelligible the question of law reported. Commonwealth v. Yacobian, 393 Mass. 1005, 1005–06 (1984); Commonwealth v. O'Neil, 233 Mass. 535 (1919). In Commonwealth v. Ficksman, 340 Mass. 744 (1960), the Supreme Judicial Court decided that the record before it was insufficient to determine properly the question reported. The court therefore discharged the report and remanded the case to the lower court. The judge should refuse to report a case upon the defendant's motion if he finds there is no question of law so important as to require higher court resolution, Commonwealth v. McKnight, 289 Mass. 530 (1935), or because there is no issue of law. Commonwealth v. Chase, 348 Mass. 100 (1964).

The Supreme Judicial Court held in Commonwealth v. Henry's Drywall Co., Inc., 362 Mass. 552 (1972), that an interlocutory report was not appropriate under the circumstances of the case. Quoting John Gilbert, Jr. Co. v. C.M. Fauci Co., 309 Mass. 271, 273 (1941), Justice Quirico stated that: "Interlocutory matters should be reported only where it appears that they present serious questions likely to be material in the ultimate decision, and that subsequent proceedings in the trial court will be substantially facilitated by so doing." 362 Mass. at 557. The report was discharged since a decision would have avoided what appeared to the court to be only a short trial which might effectively resolve the issues reported. See Commonwealth v. Henry's Drywall Co., Inc., 366 Mass. 539 (1974). Interlocutory reports are not to "be permitted to become additional causes of the delays…which are already too prevalent." Commonwealth v. Vaden, 373 Mass. 397 (1977). However, in Commonwealth v. Shields, 402 Mass. 162, 163 (1988), the S.J.C. found questions concerning the constitutionality of sobriety roadblocks were appropriately reported because the answers were likely to be dispositive, the questions were likely to recur, and

an improper ruling by the trial court would have resulted in an unnecessary waste of judicial resources at trial.

To help the appellate court decide whether an interlocutory report is appropriate, the reporting court should explain its reasons for declining to wait until after the trial is completed. Commonwealth v. Wallace, 431 Mass. 705, 705 n.1 (2000). See also Commonwealth v. Vaden, 373 Mass. 397 (1977) ("the report itself, or … [an] accompanying stipulation or [the] record" should indicate why the issue is appropriate for interlocutory review).

After conviction of the defendant, the trial judge has the authority to make a report whether or not the trial was heard by a jury, so long as it is determined that the defendant is guilty. See Commonwealth v. Kemp, 254 Mass. 190 (1926), as to authority to report in a jury-waived trial.

The granting of jurisdiction to the Appeals Court concurrent with the Supreme Judicial Court conforms to existing statutory law. G. L. c. 211A, § 10 established the concurrent jurisdiction:

Subject to such further appellate review by the supreme judicial court as may be permitted pursuant to section eleven or otherwise, the appeals court shall have concurrent appellate jurisdiction with the supreme judicial court, to the extent review is otherwise allowable, with respect to a determination made in the appellate tax board and in the superior court department, the housing court department, the land court department, the probate and family court department, the Boston municipal court department in criminal session, the Boston municipal court department appellate division, the juvenile court department, the district court department in criminal session, and the district court department appellate divisions, except in review of convictions for first degree murder. A report from any such department of the trial court of any case, in whole or in part, or any question of law arising therein shall be deemed to be within the concurrent appellate jurisdiction of the supreme judicial court and the appeals court.

A trial judge is to report a case to the Appeals Court. Section 10 states further that appellate review, "if within the jurisdiction of the appeals court, shall be in the first instance by the appeals court…."

Previously a defendant in District Court, except in a jury session trial, was precluded from requesting the judge to report a question. By a 2004 amendment, however, the caption limiting application of this rule was removed. That amendment brings Rule 34 into conformity with legislation that abolished the de novo district court system and established that "review may be had directly by the appeals court, by appeal, report or otherwise in the same manner provided for trials of criminal cases in the superior court." G.L. c. 218, secs. 26A and 27A(g), applicable to judge and jury sessions respectively. Rule 34 now applies to all superior, juvenile, district and municipal courts.

The Supreme Judicial Court is also given general discretionary powers of superintendence under c. 211, §§ 3 and 4A, with which it can review significant interlocutory matters.

The supreme judicial court may…direct any cause or matter to be transferred from a lower court to it in whole or in part for further action or directions, and in case of partial transfer may issue such orders or direction in regard to the part of such cause or matter not so transferred as justice may require.

G.L. c. 211, § 4A. Under § 3, it may do so "to correct and prevent errors and abuses…if no other remedy is expressly provided," and in the interests of "the furtherance of justice and…the regular execution of the laws."

The broad statutory standard governing matters acceptable for review under §§ 3 and 4A has been narrowly interpreted by the Supreme Judicial Court. The Court has stated that "[o]nly in the most exceptional circumstances will we review interlocutory rulings in criminal cases under our general superintendence powers." Gilday v. Commonwealth, 360 Mass. 170, 171 (1971). To fulfill this requirement there must be a substantial claim of violation of a substantive right and irremediable error, such that the defendant cannot be placed in status quo in the regular course of appeal. Morrissette v. Commonwealth, 380 Mass. 197, 198 (1980). See also Gilday, supra, at 171; Mass. R. Crim. P. 30, Reporter's Notes, supra (collecting cases). Moreover, as in the case of a report, the fact that an appeal may be taken from a final judgment after the case has been tried does not prevent the court from acting within its powers of superintendence. Barber v. Commonwealth, 353 Mass. 236, 239 (1967).

In A Juvenile v. Commonwealth, 370 Mass. 272 (1976), the plaintiff filed a petition for relief in the nature of certiorari with the Supreme Judicial Court under c. 211, § 3. This procedure was sufficient to bring the matter to the court for review.

Rule 35: Depositions to Perpetuate Testimony

(Applicable to District Court and Superior Court)

(a) General Applicability. Whenever due to exceptional circumstances, and after a showing of materiality and relevance, it is deemed to be in the interest of justice that the testimony of a prospective witness of the defendant or the Commonwealth be taken and preserved, the judge may at any time after the filing of a complaint or return of an indictment, upon his own motion or the motion of either party with notice to all interested persons, order that the testimony of the witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the judge may direct that his deposition be taken. A copy of a deposition ordered upon the judge's own motion shall be transmitted to the court by the person administering the deposition. In determining a motion filed pursuant to this rule, the judge may order a hearing or may determine whether exceptional circumstances exist and the materiality and relevance of the testimony on the basis of the supporting affidavit.

(b) Summonses. An order to take a deposition shall authorize the issuance by the clerk of summonses pursuant to rule 17 for the persons and objects named or described in such order. A witness whose deposition is to be taken may be required to attend at any place designated by the trial court, taking into account the convenience of the witness and the parties.

(c) Notice of Taking of Deposition. The party on whose motion a deposition is to be taken shall give all interested persons reasonable written notice of the time and place for the taking of the deposition. If a defendant is in custody, the officer having custody of the defendant shall be notified by the court of the time and place set for the taking of the deposition and shall produce the defendant at that time and place and keep him in the presence of the witness during the taking of the deposition. A defendant not in custody shall have the right to be present at the taking of a deposition, but his failure to appear after notice and without cause shall constitute a waiver of the right to be present and of all objections based upon that right.

(d) Payment of Expenses. Whenever a deposition is taken upon the motion of the Commonwealth, the court shall direct that the reasonable expenses of travel and subsistence of the defendant and his counsel and the witness be paid for by the Commonwealth. Expenses for a deposition taken upon motion of a defendant may be assessed to the defendant to be paid forthwith or in such other manner as the judge may determine.

(e) Scope of Examination. Subject to such additional conditions as the judge may specify and except as otherwise provided in these rules, the taking of depositions in criminal cases shall be in the manner provided for in civil actions. The scope and manner of such examination and cross-examination at the taking of the deposition shall be such as would be allowed in the trial itself.

(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence or parts of thereof and the grounds for the objections shall be stated at the time of the taking of the deposition.

(g) Admissibility. At a trial or upon any hearing, a part or all of a deposition, so far as it is otherwise admissible under the law of evidence, may be used as substantive evidence if the judge finds that the deponent is unavailable or if the deponent gives testimony at the trial or hearing which is inconsistent with his deposition. Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. "Unavailable" as a witness includes situations in which the deponent:

(1) is exempt by a ruling of the judge on the ground of privilege from testifying concerning the subject matter of his deposition;

(2) persists in refusing to testify concerning the subject matter of his deposition despite an order of the judge to do so;

(3) lacks memory of the subject matter of his deposition;

(4) is unable to be present or to testify at the trial or hearing because of death or physical or mental illness or infirmity;

(5) is absent from the trial or hearing and the proponent of the deposition has been unable to procure the deponent's attendance by process or other reasonable means; or

(6) is absent from trial or hearing and his testimony was ordered taken and preserved pursuant to rule 6(d)(2).

A deponent is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his deposition for the purpose of preventing the deponent from attending or testifying.

(h) Notice.

(1) District Court. All interested parties shall be given reasonable notice by the clerk of the time set for hearing motions filed under this rule.

(2) Superior Court. The moving party shall notify all interested parties of the time set for hearing motions filed under this rule at least seven days prior to the hearing.

(i) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, by agreement of the parties with the consent of the judge.

Reporter's Notes

This rule was written in substantial conformity with 18 U.S.C. § 3503 (1970) and is to be governed by the provisions of Mass. R. Crim. P. 13 wherever the two rules are not inconsistent. See Rules of Criminal Procedure (U.L.A.) rules 431-32 (1974), Fed. R. Crim. P. 15.

Previous comparable statutory law in the Commonwealth concerning the taking of depositions in criminal proceedings was General Laws c. 277, § 76 (Rev. St. [1836] 136, § 32) which provided that:

[Where] an issue of fact is joined upon an indictment, the court may, upon application of the defendant, grant a commission to examine any material witnesses residing out of the commonwealth, in the same manner as in civil causes; and the prosecuting officer may join in such commission and may name any material witnesses to be examined on the part of the commonwealth.

Section 77 of that same chapter (Rev. St. [1836] c. 136, § 33) provided: "When such commission is issued . . . and the depositions taken thereon . . . [are] returned, [they] shall be read in the same manner and with the like effect . . . subject to the same exceptions, as in civil cases; but if the defendant on his trial declines to use the deposition so taken, the prosecuting officer shall not, without the defendant's consent, make use of any deposition taken on behalf of the commonwealth."

Although these statutes provide a basis for this rule, they are superseded by it. The statement that depositions are to be conducted and used "as in civil causes" formerly operated to incorporate by reference G.L. c. 233, §§ 46-63 and Superior Court Rule 37 (1954). This rule is to govern the taking of depositions in criminal cases, but should reference to civil practice be necessary it shall be to Mass. R. Crim. P. 27 and to Superior Court Rules 71-72 (1974), insofar as they are consistent with this rule. See SUPERIOR COURTRULES, 1974, ANNOTATED 297-309 (Mass. Bar Ed. 1975).

Subdivision (a). This rule has adopted the approach set out in the Federal Rules: A request to take a deposition in a criminal case will be granted only in exceptional situations. United States v. Whiting, 308 F.2d 537 (2d Cir. 1962). This is because criminal depositions are not for the discovery of information; rather they are intended to preserve evidence. United States v. Steffes, 35 F.R.D. 24 (1964).

While it is true that it is far more desirable to secure the actual presence of a potential witness in criminal cases, there are situations in which the use of depositions is required in order to assure that the ends of justice are met, e.g., when a witness' attendance cannot be secured because of sickness or infirmity. (See subdivision [g][4], infra). Or, notwithstanding the provisions of G.L.c. 233, § 13A and c. 277, § 66, the right of a defendant to compulsory process for witnesses who are necessary to his defense does not automatically extend beyond the territory of the Commonwealth. Commonwealth v. Dirring, 354 Mass. 523 (1968). Accord Commonwealth. Watkins, Mass. Adv. Sh. (1978) 1646, 1668-69. See subdivision(g)(5), infra.

The Supreme Judicial Court in Smith v. Commonwealth, 331 Mass. 585 (1954), specifically mentioned the availability of depositions in criminal cases. In Smith, a convicted defendant petitioned for a writ of error alleging that his alibi defense which was supported by affidavits and letters had not received sufficient recognition during the prosecution of his case. The court said that where the defendant's material allegations could have been supported by the testimony of known people residing out of state, the deposition procedure detailed in G.L. c. 277, §§ 76-77 could have been used advantageously. It is in such a case that the procedures detailed in this rule should be used.

Another set of exceptional circumstances warranting the taking of a deposition was established by statute. Former General Laws c. 276, § 50 (St. 1851, c. 71) provided that the deposition of a witness unable to provide sufficient sureties guaranteeing his appearance in court could be taken upon order of the court with the consent of the defendant. This subdivision does not require the defendant's consent when the court finds that exceptional circumstances justify an order that a witness' deposition be taken.

Subdivision (b). This subdivision conforms to Fed. R. Crim. P. 17(f) in explicitly empowering the clerk of the court to issue compulsory process in order to effect the taking of a deposition. It should be noted that it authorizes orders to produce documents, objects, etc., at the taking of the deposition as well. Summonses are treated in full under Mass. R. Crim. P. 17.

Subdivision (c). Whenever a defendant is incarcerated, the moving party is responsible for insuring that the defendant has the opportunity to be present while the deponent is being examined. This can be accomplished in either of two ways: by designating the detention facility where the defendant is incarcerated as the place where the deposition is to be taken, or by authorizing the defendant's temporary release for the purpose of attending the examination. The second alternative would require the issuance of a writ of habeas corpus or other similar judicial order.

A defendant not in custody has the responsibility of attending the taking of a deposition unless he has cause for not attending. Insufficient notice and not having been tendered expenses are examples of sufficient cause for non-attendance. By implication, the failure to attend after

sufficient notice and tendering of expenses constitutes a waiver of the right to be present unless other cause is shown. Where the defendant has established cause for non-attendance, the deposition should not be used over his objection.

Subdivision (d). The provision in this subdivision authorizing payment from public funds is supported by G.L. c. 12, § 24 (as amended, St. 1978, c. 478, § 10), which authorizes district attorneys to expend state monies for the necessary costs of prosecuting a case.

Subdivision (e). This subdivision conforms substantially to Fed. R. Crim. P. 15(d), although the Massachusetts rule makes no provision for discovery, a subject which is covered in depth by Mass. R. Crim. P. 14. For deposition practice in civil actions, see Mass. R. Civ. P. 27.

Subdivision (f). It is intended that objections to testimony and the grounds therefor are to be stated at the taking of the deposition, consistent with civil practice under Superior Court Rule 71 (1974). See SUPERIOR COURT RULES, 1974, ANNOTATED 302-03 (Mass. Bar Ed. 1975). The requirement that objections be stated at the taking of a deposition accords with Fed. R. Crim. P. 15(f).

Subdivision (g). For all or part of a deposition to be admissible as evidence, the deponent must be unavailable as that term is defined in this subdivision. Prior to the promulgation of this rule, there was no statute or rule which defined "unavailability" in the present context. Commonwealth v. DePietro, Mass. Adv. Sh. (1977) 1971, 1984. Further, the deposition must be otherwise admissible within the law of evidence, i.e., the former testimony exception to the hearsay rule. See Fed.R.Evid. 804(b)(1); Commonwealth v. McLaughlin, 364 Mass. 211, 219-23 (1973); Commonwealth v. DiPietro, supra, at 1984-92 (collecting cases); Commonwealth v. Canon, Mass. Adv. Sh. (1977) 2134, 2141.

As with other manifestations of the sixth amendment right to confrontation, the significant feature is whether the party against whom the deposition is offered had through counsel an adequate opportunity for cross-examination of the deponent. Pointer v. Texas, 380 U.S. 400, 406-07 (1965). Accord Commonwealth v. Canon, supra; Commonwealth v. DiPietro, 4 Mass. App. Ct. ____(1976), Mass. App. Ct. Adv. Sh. (1976) 1085 (Rescript), aff'd, Mass. Adv. Sh. (1977) 1971; Commonwealth v. Caine, 366 Mass. 366, 371-72 (1974); Commonwealth v. Clark, 363 Mass. 467 (1973); Commonwealth v. Mustone, 353 Mass. 490, 498 (1968). Actual cross-examination is not required, the constitutional requirement is satisfied if the party against whom the deposition is offered was afforded an adequate opportunity to cross-examine. Pointer v. Texas, supra; Commonwealth v. Canon, supra; Commonwealth v. DiPietro, supra; In re Andrews, 368 Mass. 468 (1975). That opportunity is to be afforded pursuant to subdivision (e), infra, under which the scope and manner of cross-examination is to be such as allowed in trials.

A deposition otherwise admissible may be introduced as substantive evidence of the matters contained therein if the deponent is unavailable. Any deposition may be used to impeach in accord with established rules of evidence.

Subdivisions (g)(1)-(g)(5) are essentially restatements of Fed.R.Evid. 804(a)(1)-(5). Subdivision (g)(6) is included to make this rule consistent with Mass. R. Crim. P. 6(d)(2).

Subdivision (g)(1) is consistent with Commonwealth v. Canon,Mass. Adv. Sh. (1977) 2134 (witness invoked fifth amendment privilege against self-incrimination) and Commonwealth v. DiPietro, Mass. Adv. Sh. (1977) 1971 (witness invoked marital privilege). The DiPietro court properly distinguished between the unavailability of a witness and the unavailability of the testimony of that witness:

"[T]he important element is whether the testimony of the witness is sought and is available and not whether the witness's body is available." The physical presence without the testimony contributes nothing to the later trial.

Mass. Adv. Sh. (1977) at 1987, quoting Mason v. United States, 408 F.2d 903, 906 (10th Cir. 1969), cert. denied, 400 U.S. 993 (1971).

Subdivisions (g)(2) and (3) are also concerned with the situation where the witness is present, but unable or unwilling to testify.

As to a deceased or incapacitated witness, subdivision (g)(4), see e.g., Commonwealth v. Richards, 35 Mass. (18 Pick.) 434 (1837); Temple v. Phelps, 193 Mass. 297 (1906).

For "unavailability" in terms of the witness who cannot be found or is not amenable to process, see e.g., Commonwealth v. Gallo, 275 Mass. 320, 324 (1931).

Mass. R. Crim. P. 6(d)(2) authorizes the court to order that the testimony of a witness present in court upon the default of a defendant be taken and preserved, and Mass. R. Crim. P. 10(c) permits the court to condition a continuance upon the taking of and preservation of the testimony of witnesses then present. It is presumed under the former that if a deposition of a witness then present in court is ordered upon the default of a defendant, defendant's counsel is present in court so as to protect the right of the defendant to confront his accusers under the sixth amendment and Pointer v. Texas, supra. The voluntary absence of a defendant from trial operates as a waiver of his sixth amendment right to confrontation. Taylor v. United States, 414 U.S. 17 (1973); Commonwealth v. Flemmi, 360 Mass. 693 (1971). See also Illinois v. Allen, 397 U.S. 337, 342-43 (1970); Commonwealth v. Snyder, 282 Mass. 401 (1933), aff'd sub nom., Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934). There is evident a clear analogy between the situation where the defendant voluntarily absents himself from trial and that contemplated by Mass. R. Crim. P. 6(d)(2) where the defendant is found in default.

The summons which is issued pursuant to Mass. R. Crim. P. 6(b)(2) is formulated to give the defendant adequate notice that his willful default may result in the taking of depositions so as to avoid the sixth amendment confrontation issues raised in Taylor v. United States, supra.

Subdivision (h). This subdivision, generally governing notice, is supplemental to Mass. R. Crim. P. 32.

Subdivision (i). Drawn from Fed. R. Crim. P. 15(g), this subdivision recognizes that the parties may find it to their joint advantage to preserve testimony by deposition, or to utilize a deposition at trial, and permits them to do so without having to call upon the court for authorization. If depositions are contemplated, that fact is appropriate for discussion at the pretrial conference. Mass. R. Crim. P. 11(a), (b), Reporter's Notes, supra.

Rule 36: Case Management

(Applicable to District Court and Superior Court)

(a) General Provisions.

(1) Order of Priorities. The trial of defendants in custody awaiting trial and defendants whose pretrial liberty is reasonably believed to present unusual risks to society shall be given preference over other criminal cases.

(2) Function of the Court.

(A) District Court. The court shall determine the sequence of the trial calendar.

(B) Superior Court. The court shall determine the sequence of the trial calendar after cases are selected for prosecution by the district attorney.

(b) Standards of a Speedy Trial. The time limitations in this subdivision shall apply to all defendants as to whom the return days is on or after the effective date of these rules. Defendants arraigned prior to the effective date of these rules shall be tried within twenty-four months after such effective date.

(1) Time Limits. A defendant, except as provided by subdivision (d)(3) of this rule, shall be brought to trial within the following time periods, as extended by subdivision (b)(2) of this rule:

(A) during the first twelve month period following the effective date of this rule, a defendant shall be tried within twenty-four months after the return day in the court in which the case is awaiting trial.

(B) during the second such twelve-month period, a defendant shall be tried within eighteen months after the return day in the court in which the case is awaiting trial.

(C) during the third and all successive such twelve-month periods, a defendant shall be tried within twelve months after the return day in the court in which the case is awaiting trial.

(D) If a retrial of the defendant is ordered, the trial shall commence within one year after the date the action occasioning the retrial becomes final, as extended by subdivision (b)(2) of this rule. The order of an appellate court requiring a retrial is final upon the issuance by the appellate court of the rescript. In the event that the clerk of the appellate court fails to issue the rescript within the time provided for in Massachusetts Rule of Appellate Procedure 23, retrial shall commence within one year after the date when the rescript should have issued.

If a defendant is not brought to trial within the time limits of this subdivision, as extended by subdivision (b)(2), he shall be entitled upon motion to a dismissal of the charges.

(2) Excluded Periods. The following periods shall be excluded in computing the time within which the trial of any offense must commence:

(A) Any period of delay resulting from other proceedings concerning the defendant, including, but not limited to:

(i) delay resulting from an examination of the defendant and hearing on his mental competency or physical incapacity;

(ii) delay resulting from a stay of the proceedings due to an examination or treatment of the defendant pursuant to section 47 of chapter 123 of the General Laws;

(iii) delay resulting from a trial with respect to other charges against the defendant, which period shall run from the commencement of such other trial until fourteen days after an acquittal or imposition of sentence;

(iv) delay resulting from interlocutory appeals;

(v) delay resulting from hearings on pretrial motions;

(vi) delay resulting from proceedings relating to transfer to or from other divisions or counties pursuant to rule 37;

(vii) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(B) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness. A defendant or an essential witness shall be considered absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. A defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(C) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(D) If the complaint or indictment is dismissed by the prosecution and thereafter a charge is filed against the defendant for the same or a related offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge.

(E) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is no cause for granting a severance.

(F) Any period of delay resulting from a continuance granted by a judge on his own motion or at the request of the defendant or his counsel or at the request of the prosecutor, if the judge granted the continuance on the basis of his findings that the ends of justice served by taking such action outweighed the best interests of the public and the defendant in a speedy trial. No period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subdivision unless the judge sets forth in the

record of the case, either orally or in writing, his reasons for finding that the ends of justice served by the granting of the continuance outweigh the best interests of the public and the defendant in a speedy trial.

(G) Any period of time between the day on which a defendant or his counsel and the prosecuting attorney agree in writing that the defendant will plead guilty or nolo contendere to the charges and such time as the judge accepts or rejects the plea arrangement.

(H) Any period of time between the day on which the defendant enters a plea of guilty and such time as an order of the judge permitting the withdrawal of the plea becomes final.

(3) Computation of Time Limits. In computing any time limit other than an excluded period, the day of the act or event which causes a designated period of time to begin to run shall not be included. Computation of an excluded period shall include both the first and the last day of the excludable act or event.

(c) Dismissal for Prejudicial Delay. Notwithstanding the fact that a defendant is not entitled to a dismissal under subdivision (b) of this rule, a defendant shall upon motion be entitled to a dismissal where the judge after an examination and consideration of all attendant circumstances determines that: (1) the conduct of the prosecuting attorney in bringing the defendant to trial has been unreasonably lacking in diligence and (2) this conduct on the part of the prosecuting attorney has resulted in prejudice to the defendant.

(d) Special Procedures: Persons Serving Term of Imprisonment.

(1) General Provisions. A person serving a term of imprisonment either within or without the prosecuting jurisdiction is entitled to all safeguards afforded him under subdivisions (a), (b), and (c) of this rule in the conduct of any criminal proceeding, subject to the limitations stated herein.

(2) Persons Detained Within the Commonwealth. Any person who is detained within the Commonwealth upon the unexecuted portion of a sentence imposed pursuant to a criminal proceeding is entitled to be tried upon any untried indictment or complaint pending against him in any court in this Commonwealth within the time prescribed by subdivision (b) of this rule.

(3) Persons Detained Outside the Commonwealth. Any person who is detained outside the Commonwealth upon the unexecuted portion of a sentence imposed pursuant to a criminal proceeding, and against whom an untried indictment or complaint is pending within the Commonwealth shall, subsequent to the filing of a detainer, be notified by the prosecutor by mail of such charges and of his right to demand a speedy trial. If the defendant pursuant to such notification does demand trial, the person having custody shall so certify to the prosecutor, who shall promptly seek to obtain the presence of the defendant for trial. If the prosecutor has unreasonably delayed (A) in causing a detainer to be filed with the official having custody of the defendant, or (B) in seeking to obtain the defendant's presence for trial,

and the defendant has been prejudiced thereby, the pending charges against the defendant shall be dismissed.

(e) Effect of a Dismissal. A dismissal of any charge ordered pursuant to any provision of this rule shall apply to all related offenses.

(f) Case Status Reports.

(1) District Court. The First Justice of each division of the District Court shall be advised periodically by the clerk of the status of all cases which have been pending in that court for six months or longer. The report shall be transmitted to the Administrative Justice for the District Court Department.

(2) Superior Court. The Administrative Justice for the Superior Court Department shall be notified by the clerk for each county of the status of all cases which have been pending in that court for six months or longer within the following time periods:

(A) for the first twelve-month period following the effective date of this rule, sixty days after the last day of a sitting;

(B) for the second such twelve-month period, forty-five days after the last day of a sitting;

(C) for the third and all successive such twelve-month periods, thirty days after the last day of a sitting.

Such notice shall include the number of the case, the name of the defendant, the offense charged, the name of defense counsel, if any, and the name of the prosecutor.

Reporter's Notes (1996) : …As to re-trials, the right accrues when the certainty of that trial is established, e.g., by a judicial order for a new trial. Subdivision (b)(1)(D). As originally drafted, the Rule left some ambiguity as to when this condition was satisfied in practice. See Commonwealth v. Levin, 390 Mass. 857, 860 n. 4 (1984) and Commonwealth v. Bodden, 391 Mass. 356, 357-58 (1984). A 1996 amendment settled this issue by declaring that a retrial order is final upon the issuance by the appellate court of the rescript or, if the clerk failed to issue the rescript as required, when it should have been issued.

Subdivision (b)(2). This is patterned after 18 USC § 3161(h) (Supp 1, 1975). See ABA Standards Relating to Speedy Trial §§ 2.1, 2.3 (Approved Draft, 1968); Rules of Criminal Procedure (ULA) rule 722(f) (1974).

The Supreme Judicial Court has stated that "in addition to periods of time specifically excluded by the rule, periods during which a defendant acquiesced in, is responsible for, or benefitted from a delay are also not counted." Commonwealth v. Lauria, 411 Mass. 63, 68 (1991). See also Commonwealth v. Conefrey, 410 Mass. 1, 4-5 (1991); Commonwealth v . Farris, 390 Mass. 300 (1983); Commonwealth v. Look, 379 Mass. 893 (1980); Commonwealth v. Alexander, 371 Mass. 726 (1977); Commonwealth v. Boyd, 367 Mass. 169, 178 (1975); Commonwealth v. Loftis, 361 Mass. 545, 549-50 (1972); Commonwealth v. McCants, 25 Mass. App. Ct. 735 (1988); Commonwealth v. Jones, 6 Mass. App. Ct. 750, 752-3 (1978) (interpreting G.L. c. 277 sec. 72A). But because the Commonwealth has the primary obligation for setting a trial date, a

thorough examination of the record is necessary to determine whether failure to object should be counted against the defendant. Commonwealth v. Spaulding, 411 Mass. 503, 507 (1992). The specific periods listed in this subdivision are those where the delay is not to be attributed to the prosecution.

(b)(2)(F). This subdivision excludes delay resulting from a continuance granted upon a finding that "the ends of justice…outweigh the best interests of the public and the defendant in a speedy trial." It is implicit that (b)(2)(F) does not countenance an after-the-fact appraisal of the causes of delay by a reviewing court; in order to be excluded, the delay must have been the subject of a formal continuance. This does not, of course, preclude the appellate court from considering whether the grant or denial of a continuance constituted an abuse of discretion. See Mass.R.Crim.P. 10. Since only a judge may grant a continuance under Rule 10, the Commonwealths failure to bring a case to trial without such a continuance, or its unilateral rescheduling a case to a later trial list, see M.G.L. c. 278 s. 1, will not toll the speedy trial clock under this subsection. Commonwealth v. Spaulding, 411 Mass. 503, 508-10 (1992) (failure of defendant to object to delay in scheduling did not toll period); Barry v. Commonwealth, 390 Mass. 285, 296 n. 13 (1983) (Commonwealth's setting of trial date does not toll period).

When a formal continuance is granted, this subdivision incorporates the procedure stated to be "advisable" under former G.L. c. 277, § 72A which requires the trial judge to state the reasons for any extension of time hereunder. Commonwealth v. Fields, 371 Mass. 274, 280 n. 8 (1976); Commonwealth v. Boyd, 367 Mass. 169, 179 (1975); Commonwealth v. Loftis, 361 Mass. 545, 549 (1972); Commonwealth v. Ambers, 4 Mass. App. Ct. 647 (1976).

Delay which is justified under this subdivision may include that required for the Commonwealth to comply with a discovery order, Commonwealth v. Anderson, 6 Mass. App. Ct. 492 (1978); that required by newly-appointed counsel to prepare the case, e.g., Commonwealth v. Campbell, 5 Mass. App. Ct. 571 (1977); or that occasioned by the illness of the defendant, a co-defendant, counsel—for the defendant or the Commonwealth, or the judge. Commonwealth v. Campbell, supra.

On the other hand, undue delay attributable to a defendant's desire to be represented by particular counsel is not justified. E.g., Commonwealth v. Dabrieo, 370 Mass. 728, 739 (1976). See Mass. R. Crim. P. 10(a)(2)(c) and Reporter's Notes, supra.

While the Supreme Judicial Court has indicated that court congestion will not be tolerated as an adequate ground for denying a "reasonably prompt trial," Commonwealth v. Beckett, 373 Mass. 329, 332, 335 (1977), delay "inherent in the general problems of the administration of justice in a congested county," Commonwealth v. Rego, 360 Mass. 385, 392 (1971), is an often-cited excuse for an extension of time limits. Commonwealth v. Gove, 366 Mass. 351, 362-63 (1974); Commonwealth v. Fontaine, 8 Mass. App. Ct. 51 (1979); Commonwealth v. Jones, 6 Mass. App. Ct. 750, 755-56 (1978) (interpreting G.L. c. 277 sec. 72A); Commonwealth v. Campbell, 5 Mass. App. Ct. 571 (1977); Commonwealth v. Ambers, 4 Mass. App. Ct. 647 (1976); Commonwealth v. Burhoe, 3 Mass. App. Ct. 590, 593 (1975). Although crowded dockets, lack of counsel, and other factors make some delays inevitable, Commonwealth v. Beckett, supra, a judge presented with a motion for a continuance on this ground is to carefully weight the interests of the

defendant and the public. See also Commonwealth v. Plantier, 22 Mass. App. Ct. 314 (1986) (dismissal within court's discretion where defendant prepared but case continued due to prosecutor's request or court congestion).

Although the Rule does not say so, caselaw since its promulgation has held that the defendant's failure to object to a continuance may render the continuance period excludable. Commonwealth v. Dias, 405 Mass. 131, 139 (1989); Commonwealth v. Farris, 390 Mass. 300 (1983); Commonwealth v. Fleenor, 39 Mass. App. Ct. 25, 27 (1995); Commonwealth v. Domingue, 18 Mass. App. Ct. 987 (1984), review denied 393 Mass. 1105 (1985). Moreover, as indicated in the Reporter's Notes supra at (b)(2), caselaw has enunciated a broader rule which may exclude some delays which the defense acquiesced in, is responsible for, or benefitted from.

Reporter's Notes

This rule is taken in part from the ABA Standards Relating to Speedy Trial (Approved Draft, 1968) and to a lesser extent from the Federal Speedy Trial Act, 18 U.S.C. §§ 3161-74 (Supp. 1, 1975), and former G.L. c. 277, §§ 72 (St. 1784, c. 72) and 72A (St. 1965, c. 343). See Rules of Criminal Procedure (U.L.A.) rule 722 (1974); ABA Standards Relating to Speedy Trial (2d ed., Approved Draft, 1978).

The Supreme Court held in Barker v. Wingo, 407 U.S. 514 (1972), that a defendant's constitutional right to a speedy trial cannot be established by any inflexible rule, but can be determined only on an ad hoc balancing basis in which the conduct of the defendant and the prosecution are weighed.

[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case . . . .

Barker v. Wingo, supra at 522. The Court refused to objectify a "fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial," 407 U.S. at 521, choosing not to engage in legislative or rulemaking activity.

We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. *The States, of course, are free to prescribe a reasonable period consistent with constitutional standards*, but our approach must be less precise.

407 U.S. at 523 (Emphasis supplied).

Since the Supreme Court's decision in Klopfer v. North Carolina, 386 U.S. 213 (1967), wherein the speedy trial guarantee secured by the sixth amendment was made applicable to and enforceable against the states by virtue of the due process requirements of the fourteenth amendment, three-quarters of the states have enacted, either by court rule or statute, speedy trial provisions. This would seem to indicate that the majority of states have experienced difficulty in affording uniformly fair justice on a case-by-case basis and are seeking to objectify the right so as to ease its application. The Supreme Court in Barker does not deny the states this prerogative so long as its exercise is consistent with constitutional standards. 407 U.S. at 530 n.29.

While Rule 36 does quantify the time limits beyond which a defendant's speedy trial rights shall be deemed to have been denied, it is, as its title makes clear, primarily a management tool, designed to assist the trial courts in administering their dockets.

Subdivision (a).

Subdivision (a)(1). This subdivision is taken from § 1.1 of the ABA Standards Relating to Speedy Trial (Approved Draft, 1968). See ABA Standards Relating to the Function of the Trial Judge, § 3.8(c) (Approved Draft, 1972); Rules of Criminal Procedure (U.L.A.) rule 721(b) (1974).

Incarcerated defendants under existing Massachusetts law are accorded certain rights. This subdivision is first a general restatement of the principles underlying prior law, rather than a substitute for former statutes, and secondly an aid in the continued implementation of the policy of former G.L. c. 277, § 72, which provided for the release of a defendant from pretrial detention if he had not been tried within the criminal session next following six months of incarceration.

Additionally, the preference given to the trial of criminal defendants held in jail for offenses not punishable by death or life imprisonment over the trial of civil cases by G.L. c. 212, § 29 is to retain its vitality though not expressly adopted by this rule. See G.L. c. 212, § 24. See ABA Standards Relating to Speedy Trial, Standard 12-1.1(a) (2d ed. Approved Draft, 1978), Fed. R. Crim. P. 50(a).

Subdivision (a)(2). This is modeled after Standard 12-1.2 of the ABA Standards Relating to Speedy Trial, supra, and is consonant with the policy of G.L. c. 278, § 1 in that the trial court is given ultimate control over the calendar. See Rules of Criminal Procedure (U.L.A.) rule 721(a) (1974). The guiding principle behind this section was enunciated by the Eighth Circuit:

The government and, for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases. The burden of trial promptness is not solely upon the defense.

Hodges v. United States, 408 F.2d 543, 551 (8th Cir. 1969). Accord United States v. Drummond, 511 F.2d 1049, 1053 (2d Cir. 1975). See Barker v. Wingo, 407 U.S. 514, 527 (1972).

(a)(2)(A). In District Court jury-waived sessions, the court is to prepare and control the trial lists consistently with prior practice.

(a)(2)(B). General Laws c. 278, § 1 requires the district attorney to submit a list to the court of defendants to be tried at each sitting of the Superior Court, and it states that the cases will be tried in the order of the list unless otherwise ordered by the court.

Practice remains unchanged by this rule—the district attorneys are to place cases on the list in the order of priority they believe appropriate; the court may re-order arrangement of the list once it is submitted—but this procedure is extended to District Court jury sessions. General Laws c. 218, § 26A (St. 1978, c. 478, § 188) provides for a jury trial in the first instance of all charges over which the District Court has original jurisdiction. If a defendant elects not to waive jury trial, or, having waived that right, claims an appeal to a jury session after conviction, G.L. c. 218, § 27A (g) (St. 1978, c. 478, § 189) mandates that a District Attorney shall appear and prosecute the case. Further, G.L. c. 278, § 27A (e) provides that District Court jury sessions shall proceed in accordance with jury trials in the Superior Court. Therefore, subdivision (a)(2)(B) is to be read

to empower the District Attorney to select those cases which are to be placed on the District Court jury session trial list. General Laws c. 278, § 1 establishes burdens on the prosecutor who is to keep current the list of cases to be tried and on the court which is to have the ultimate responsibility for the timely trial of those cases. See ABA Standards Relating to the Function of the Trial Judge, § 3.8(a) (Approved Draft, 1972). Practice under this rule will aid in the effective implementation of the speedy trial guarantee for there is a periodic check by the court on the prosecutor. Subdivision (f), infra.

Subdivision (b). General Laws c. 277, § 72 formerly provided for trial within six months after demand by an incarcerated defendant. This subdivision is an expansion of that statutory right, ultimately securing to all defendants the right to trial within twelve months after the filing of charges. Subdivision (b) is intended to insure that a defendant is not denied that right by providing for the dismissal of the charges for undue delay in bringing the defendant to trial.

The effect of this subdivision is not only to establish a specific time limit for commencement of trial, but also to shift the burden of proof concerning a deprivation of the defendant's right to trial within twelve months. The constitutional protection puts the burden on the defendant to show that the delay was undue and to his prejudice, whereas under this rule, once a twelve-month lapse has been shown, the burden shifts to the prosecutor to explain the delay.

General Laws c. 277, § 72 provided that a defendant held in custody upon an indictment had the right to be released on his own recognizance if not brought to trial by the time of the court's sitting next after six months from his commitment. General Laws c. 277, § 72A gave an incarcerated defendant the right to be tried on pending charges within six months after his application for a speedy trial or the charges would be dismissed. Those statutes were designed to alleviate hardships imposed upon particular defendants by pre-trial delay. This subdivision is founded upon the premise that all defendants are liable to suffer from undue delay and that a definite time limit should be made available to them on an equal basis.

Subdivision (b)(1). Unlike former G.L. c. 277, § 72A, this subdivision is phrased so that only a trial upon charges against the defendant will satisfy the requirements of this rule. General Laws c. 277, § 72A required either a prompt "trial or other disposition thereof" (emphasis supplied), thus permitting a defendant's demand to be satisfied by other than a trial upon the charges. Commonwealth v. Fields, 371 Mass. 274, 280 (1976); Commonwealth v. Stewart, 361 Mass. 857 (1972) (Rescript); Commonwealth v. Royce, 358 Mass. 597, 599 (1971); Commonwealth v. Ambers, Mass. App. Ct. Adv. Sh. (1978) 1141, 1145-46; Commonwealth v. Anderson, Mass. App. Ct. Adv. Sh. (1978) 775, 779. This change is intended to offer a defendant relief from pending charges and their attendant burdens, thereby giving substance to the speedy trial concept. A dismissal of charges on other grounds, a disposition of the charges by plea, or a filing of the case, of course, vitiates any need for trial, and in such an instance the rule does not apply.

For purposes of this rule, a trial is deemed to have commenced when jeopardy attaches. "In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn . . . . In a nonjury trial, jeopardy attaches when the court begins to hear evidence." Serfass v. United States, 420 U.S. 377, 388 (1975). Accord Commonwealth v. Ludwig, 370 Mass. 31, 33 (1976). See Commonwealth v. Brandano, 359 Mass. 332, 334-35 (1971); 30 MASS. PRACTICE SERIES

(Smith) § 563 at 290 (1970). If neither of these stages of prosecution has been reached within twelve months after the return day in the court in which the case is pending, the charges must be dismissed upon motion of the defendant. The mandatory sanction for failure to comply with the twelve-month time limit is dismissal of the charges, such dismissal to be a bar to any subsequent prosecution for the same offense or any related offenses, whether by later complaint in the District Court or indictment in the Superior Court. Commonwealth v. Fields, 371 Mass. 274 (1976); Commonwealth v. Ludwig, supra, at 35; subdivision (e), infra.

Under this rule, the right to a speedy trial attaches upon "the return day in the court in which the case is awaiting trial," that is, the date on which "a defendant is ordered by summons to first appear or, if under arrest, does first appear . . . to answer to the charges . . . ." Mass. R. Crim. P. 2(b)(15). Therefore, if a defendant is bound over to the Superior Court after a probable cause hearing (Mass. R. Crim. P. 3[c]) or the Commonwealth elects to proceed by direct indictment in a case commenced by complaint which is within the District Court's jurisdiction (Mass. R. Crim. P. 3[e]), the time limits of this rule begin anew upon the return day in the Superior Court. See ABA Standards Relating to Speedy Trial, Standard 12-2.2 (2d ed., Approved Draft, 1978); Rules of Criminal Procedure (U.L.A.) rule 722(d) (1974).

As to re-trials, the right accrues when the certainty of that trial is established, e.g., by a judicial order for a new trial. Subdivision (b)(1)(D).

Subdivision (b)(2). This is patterned after 18 U.S.C. § 3161(h) (Supp. 1, 1975). See ABA Standards Relating to Speedy Trial, Standards 12-2.2, 2.3 (2d ed., Approved Draft, 1978); Rules of Criminal Procedure (U.L.A.) rule 722(f) (1974).

Delays in the commencement of trial in which a defendant acquiesces, Commonwealth v. Jones, Mass. App. Ct. Adv. Sh. (1978)1218, 1219-21; Commonwealth v. Campbell, 5 Mass. App. Ct. _____, ____(1977), Mass. App. Ct. Adv. Sh. (1977) 969, 974, 976-78; Commonwealth v. Carr, 3 Mass. App. Ct. 654, 657 (1975); for which he is responsible, Commonwealth v. Loftis, 361 Mass. 545, 549-50 (1972); or from which he benefits, Commonwealth v. Alexander, 371 Mass. 726, 729 (1977); Commonwealth v. Boyd, 367 Mass. 169, 178 (1975); Commonwealth v. Jones, supra; are not to be included in the calculation of the time limits of this rule. The specific periods listed in this subdivision are those where the delay is not to be attributed to the prosecution.

Under prior cases in which the Barker v. Wingo sixth amendment analysis was applied, absent a showing of culpability on the part of the Commonwealth in delaying trial, the burden was on the defendant to demonstrate that the Commonwealth unreasonably caused prejudicial delay. Commonwealth v. Gilbert, 366 Mass. 18,22 (1974). Accord Commonwealth v. Campbell, 5 Mass. App. Ct.____, ____(1977), Mass. App. Ct. Adv. Sh. (1977) 969, 986; Commonwealth. Burhoe, 3 Mass. App. Ct. 590, 594 (1975); Commonwealth v. Jackson, 3 Mass. App. Ct. 511, 517 (1975). Under this rule, however, no demonstration of prejudice is necessary (except under subdivision[c] infra); once the defendant has established a prima facie case for dismissal—i.e., that twelve months have elapsed since the return day—the burden is on the Commonwealth to establish justification for the delay. The rule requires the court to dismiss the charges(rather than making the decision discretionary and dependent upon a balancing of all relevant considerations) unless an explanation is deemed sufficient to excuse the delay.

Under this subdivision, the court is given the discretion to consider and determine whether a proffered explanation for delay is a valid excluded period. But, once it is determined that a period of delay is within the contemplation of this subdivision, that period shall be excluded from computation of the twelve-month limit. The rationale underlying this subdivision is that the Commonwealth should not be penalized when the defendant elects to avail himself of those procedures which are certain to result in delay, or when the causes for delay are beyond its control.

(b)(2)(A)(i). This subdivision excludes delay due to a mental or physical examination of the defendant to determine his competency or physical capacity to stand trial and the resultant hearing on the matter. This delay is a common occurrence and often essential to a fair trial. See Commonwealth v. Boyd, 367 Mass. 169, 178-79 (1975); Commonwealth v. Rise, Mass. App. Ct. Adv. Sh. (1979) 254, 255-57. It is intended that the excluded period shall begin on the date the order for examination is given and shall extend until such date as the court finds the defendant mentally competent or physically able to stand trial. The court's finding should be made within 30 days after receipt by the court of the examiner's report ([b][2][A][vii], infra) and the excludable period shall continue until such finding is made. It should be noted that the actual time period under (b)(2)(A)(i) may be extended by (b)(2)(C) to exclude any delay resulting from the fact that the defendant is found mentally incompetent or physically unable to stand trial. Fairness requires that a balance be struck between the defendant's right to a speedy trial and those delays which of necessity accompany the examination process and which are beyond the control of the prosecution once the procedure has been ordered.

(b)(2)(A)(ii). It is intended by this subdivision that the excluded period shall begin when the defendant is advised by the court that he may request an examination to determine whether he is a drug dependent person pursuant to G.L. c. 123, § 47. The defendant is then given five days under § 47 in which to exercise his right to an examination. If an examination is not requested within the provided time limit, the excludable period shall terminate. However, if the defendant elects an examination, the period of time during which he is being examined shall be excluded. Once the defendant has requested examination, the court may, in its discretion, determine without an examination that the defendant would benefit from treatment and shall inform him that he may request treatment in a drug facility. The period of time during which the defendant is undergoing treatment for drug addiction will be excluded under (b)(2) (A)(ii). It is intended that the excluded period shall cover the entire period of delay generated by § 47 examination or treatment.

(b)(2)(A)(iii). This subdivision is intended to be inclusive of trials of the defendant on other charges in any state or federal court including the court where charges are then pending against the defendant. See Commonwealth v. Anderson, Mass. App. Ct. Adv. Sh. (1978) 775, 780-81; Commonwealth v. Fasano, Mass. App. Ct. Adv. Sh. (1978) 521. The period shall run from the date such other trial begins and it is intended that the period shall conclude 14 days after a verdict of acquittal or imposition of sentence in the case. For the purpose of this subdivision, trial shall include the impanelling of the jury, hearings on motions deferred to the trial date, and any periods during which trial is suspended. The 14-day period following acquittal or sentencing is included in order to provide defense counsel with adequate preparation time for the second trial.

(b)(2)(A)(iv). It is intended that the excluded period under this subdivision run from the date the notice of appeal is filed until the rescript is received by the clerk of the lower court. The period covers any time during which interlocutory appeals are pending. See Commonwealth v. Underwood, 3 Mass. App. Ct. 522, 528-29 (1975). Where delay is occasioned by the Commonwealth's successful interlocutory appeal under Mass. R. Crim. P. 15, such delay does not prejudice the defense nor deny the defendant his right to a speedy trial. See United States v. Rosenbloom, 511 F.2d 777 (D.C. Cir. 1974).

(b)(2)(A)(v). Delay attributable to the securing of a judicial resolution of issues raised by a defendant's pretrial motions are excluded from the running of the time limits. See Commonwealth v. Morgan, Mass. App. Ct. Adv. Sh. (1978) 1047 (Rescript); Commonwealth v. Fasano, Mass. App. Ct. Adv. Sh. (1978) 521, 531-32, Commonwealth v. Campbell, 5 Mass. App. Ct. ____, _____ (1977), Mass. App. Ct. Adv. Sh. (1977) 969, 980-81; Commonwealth v. Burhoe, 3 Mass. App. Ct. 590, 593 (1975); Commonwealth v. Underwood, 3 Mass. App. Ct. 522, 528-29 (1975); Commonwealth v. Jackson, 3 Mass. App. Ct. 511, 516-517 (1975).

The excludable period under this subdivision is intended to run from the date on which the request for hearing on the pretrial motion is filed, or, if no such request is filed, from the date the hearing is ordered, until the conclusion of the hearing.

(b)(2)(A)(vi). This subdivision provides that delay due to proceedings related to transfer under Mass. R. Crim. P. 37 shall be an excluded period. In cases transferred pursuant to Rule 37(a)(1) and (2), it is intended that the time limit begin to run on the date the clerk of the court in the transferee district receives the papers from the clerk of the court in the transferor district. In cases where the defendant moves for transfer of the case to another district pursuant to Rule 37(b), an excludable period shall run from the date of the hearing on the motion for transfer. If the motion is denied the period terminates at that time. If the motion is allowed and the case is subsequently transferred, the conclusion of the period will be determined by the court in that district to which the case is transferred. Under this rule, periods that are excluded are not restricted to the proceedings directly related to transfer pursuant to Rule 37, but are intended to provide as well for delays caused by the transfer of papers from one district to another in transfer proceedings. This is to account for reasonable administrative delays while the court awaits the transfer papers.

(b)(2)(A)(vii). This subdivision provides for those delays which are necessary for the court to pass on proceedings concerning the defendant, exclusive of those periods for consideration of pretrial motions under (2)(A)(v). It is intended by this rule that the excluded period run during the time that the matter is actually under advisement until an order or ruling is entered, but in no event shall the period exceed 30 days. See 18 U.S.C. § 3161(h)(1)(G). It is not the intent of (2)(A)(vii) to preclude a continuance under Mass. R. Crim. P. 10 after the 30-day time limit is expired, but it is believed that the 30-day limit is reasonable in most cases. Where the matter under advisement is complex, the court may continue the case upon its own motion under (b)(2)(F), infra.

(b)(2)(B). If a defendant has made himself unavailable for trial for the purpose of avoiding prosecution, the interests of justice require that he not be allowed to subsequently claim violation of his right to a speedy trial. Commonwealth v. Underwood, 3 Mass. App. Ct. 522, 527-28

(1975). Accord Commonwealth v. Jones, Mass. App. Ct. Adv. Sh. (1978) 1218, 1225. Similarly, delays granted to allow the defendant or the Commonwealth to locate a key witness are justified and not properly chargeable against the Commonwealth. See e.g., Commonwealth v. Daggett, 369 Mass. 790, 793-94 (1976); Commonwealth v. Boyd, 367 Mass. 169, 178 (1975); Commonwealth v. Jones, Mass. App. Ct. Adv. Sh. (1978) 1218, 1225; Commonwealth v. Alves, Mass. App. Ct. Adv. Sh. (1978) 912, 917 n.3 Commonwealth v. Campbell, 5 Mass. App. Ct. ____, ___ (1977), Mass. App. Ct. Adv. Sh. (1977) 969; Commonwealth v. Ambers, 4 Mass. App. Ct. ____ (1976), Mass. App. Ct. Adv. Sh. (1976) 1141. An exclusion under this subdivision will be established by a party on motion for a continuance. It is intended that the excludable period run from the date the motion for a continuance is filed until the date when the defendant or witness is found by the court to have become available for trial. Mass. R. Crim. P. 10 provides that a continuance shall not be granted if a party fails to exercise due diligence to obtain an available witness for trial. Therefore, a party moving for a continuance under this subdivision should set forth with particularity the reasons why a continuance will enable him to obtain the witness and should state those facts as to which the witness is expected to testify. This will enable the court to make the necessary determination, on the facts presented, whether the unavailable witness is so "essential" as to warrant a continuance.

It is intended by this subdivision that a motion for a continuance on the ground of the absence of the defendant explain the facts of the defendant's absence. Since such absence may occur at any time during the proceedings, it may become necessary for the court to determine how long the defendant has been absent and whether he is attempting to avoid prosecution or whether his whereabouts cannot be determined by due diligence. It is recommended practice under this rule that if a party learns or has reason to believe that a witness will be unavailable, and if the party does not wish to proceed to trial without that witness, that the party move for a continuance as far in advance of trial as is feasible. Counsel should inform the court and the adverse party promptly of the availability of the defendant or witness.

The definition of an absent defendant or witness has been adapted from the ABA Standards Relating to Speedy Trial § 2.3(e) (Approved Draft, 1968); accord Standard 12-2.3(e) (2d ed., Approved Draft, 1978).

(b)(2)(C). Subdivision (b)(2)(A)(i) provides for an excluded period during examination and hearing on the defendant's competency or ability to stand trial. It is intended that if the court should find the defendant unable to stand trial, a new period will begin under this subdivision, such excluded period to conclude upon a court finding that the defendant is competent and able to stand trial.

(b)(2)(D). This subdivision provides for an excluded period when the prosecution nol prosses the charges pending against the defendant pursuant to Mass. R. Crim. P. 16 and subsequently brings new charges for the same offense. Only the time period during which there are no charges pending against the defendant is to be excluded from the twelve-month limit under (b)(1). The excluded time period will run only from the time the prosecution dismisses the charges until the return day as to the subsequent charge. For example, if the return day as to certain charges is January 1 and those charges are dismissed by the prosecution six months later, followed by a

new complaint or indictment for the same offenses, as to which the return day is August 1, the prosecution has until February 1 to bring the defendant to trial. The one-month period during which no charges were pending is excluded, but the previous six months during which charges were outstanding is counted against the Commonwealth. See Commonwealth v. Gove 366 Mass. 351, 359 (1974).

(b)(2)(E). Under this subdivision, reasonable delay where no motion for severance has been granted and the time for trial has not run as to the joined defendant shall be an excluded period. See Commonwealth v. Beckett, Mass. Adv. Sh. (1977) 1922, 1925; Commonwealth v. Carr, 3 Mass. App. Ct. 654, 656-57 (1975). Situations may arise where the period of delay could prove unreasonable; for example, where the joined defendant is indefinitely unavailable for trial or cannot be brought into custody. In such a situation it is not intended that the trial of the defendant presently in custody pending trial be deferred.

(b)(2)(F). This subdivision excludes delay resulting from a continuance granted upon a finding that "the ends of justice . . . outweigh the best interests of the public and the defendant in a speedy trial." It is implicit that (b)(2)(F) does not countenance an after-the-fact appraisal of the causes of delay by a reviewing court; in order to be excluded, the delay must have been the subject of a for-mal continuance. This does not, of course, preclude the appellate court from considering whether the grant or denial of a continuance constituted an abuse of discretion. See Mass. R. Crim. P. 10.

This subdivision incorporates the procedure stated to be "advisable" under former G.L. c. 277, § 72A which requires the trial judge to state the reasons for any extension of time hereunder. Commonwealth v. Fields, 371 Mass. 274, 282 n.8 (1976); Commonwealth v. Boyd, 367 Mass. 169, 179 (1975); Commonwealth v. Loftis, 361 Mass. 545, 549 (1972); Commonwealth v. Ambers, Mass. App. Ct. ___, ____ (1976), Mass. App. Ct. Adv. Sh. (1976) 1141, 1150.

Delay which is justified under this subdivision may include that required for the Commonwealth to comply with a discovery order, Commonwealth v. Anderson, Mass. App. Ct. Adv. Sh. (1978) 775, 781; that required by newly-appointed counsel to prepare the case, e.g., Commonwealth v. Campbell, 5 Mass. App. Ct. ____, ____ (1977), Mass. App. Ct. Adv. Sh. (1977) 969, 974; or that occasioned by the illness of the defendant, a co-defendant, counsel for the defendant or the Commonwealth, or the judge, Commonwealth v. Campbell, supra, 5 Mass. App. Ct. at ___-___ Mass. App. Ct. Adv. Sh. at 977-78.

On the other hand, undue delay attributable to a defendant's desire to be represented by particular counsel is not justified. E.g., Commonwealth v. Dabrieo, 370 Mass. 728, 739 (1976). See Mass. R. Crim. P. 10(a)(2)(c) and Reporter's Notes, supra.

While the Supreme Judicial Court has indicated that court congestion will not be tolerated as an adequate ground for denying a "reasonably prompt trial," Commonwealth v. Beckett, Mass. Adv. Sh. (1977) 1922, 1928, delay "inherent in the general problems of the administration of justice in a congested county," Commonwealth v. Rego, 360 Mass. 385, 392 (1971), is an often-cited excuse for an extension of time limits. Commonwealth v. Gove, 366 Mass. 351, 362-63 (1974); Commonwealth v. Jones, Mass. App. Ct. Adv. Sh. (1978) 1218, 122526; Commonwealth v. Matson, Mass. App. Ct. Adv. Sh. (1978) 704 (Rescript); Commonwealth v. Campbell, 5 Mass.

App. Ct. ___, ___ (1977), Mass. App. Ct. Adv. Sh. (1977) 969, 979; Commonwealth v. Carrillo, 5 Mass. App. Ct. ___ (1977) (Rescript), Mass. App. Ct. Adv. Sh. (1977) 402, Commonwealth v. Ambers, 4 Mass. App. Ct. __, ___ (1976), Mass. App. Ct. Adv. Sh. (1976) 1141, 1149; Commonwealth v. Burhoe, 3 Mass. App. Ct. 590, 593 (1975). Although crowded dockets, a lack of judges, prosecutors, and defense counsel, and other factors make some delays inevitable, Commonwealth v. Beckett, supra, at 1925, a judge presented with a motion for a continuance on this ground is to carefully weigh the interests of the defendant and the public.

(b)(2)(G). This subdivision extends the rule that a valid plea of guilty constitutes a waiver of any claim to a denial of a speedy trial to the situation where, pursuant to Mass. R. Crim. P. 12(b), the defendant and the Commonwealth have concluded a plea arrangement, Becker v. Nebraska, 435 F.2d 157 (8th Cir. 1970), cert. denied, 402 U.S. 981 (1971); Fowler v. United States, 391 F.2d 276, 277 (5th Cir. 1968); United States v. Doyle, 348 F.2d 715, 718-19 (2d Cir.), cert. denied sub nom. Doyle v. United States, 382 U.S. 843 (1965). See Commonwealth v. L'Italien, 3 Mass. App. Ct. 763 (1975).

(b)(2)(H). The same principle which governs in subdivision (b)(2)(G) operates to exclude the time between which a plea is tendered and accepted by the court under Mass. R. Crim. P. 12(c)(5) and the time at which it is withdrawn by the defendant pursuant to Mass. R. Crim. P. 12(d).

It is intended that the excluded period run from the date the plea of guilty is first offered and accepted until the date the court permits withdrawal of the plea.

Subdivision (b)(3). The provision as to excluded periods is contrary to G.L. c. 4, § 7 and Mass. R. Crim. P. 46(a), which state that the day on which a limited period commences shall be excluded from the computation. This subdivision is in other respects consistent with prior law. See Commonwealth v. Daggett, 369 Mass. 790, 792 n.1 (1976). See ABA Standards Relating to Speedy Trial § 3.2 (Approved Draft, 1968), Standard 12-3.2 (2d ed., Approved Draft, 1978).

Subdivision (c). It is possible, although unusual, that a delay of less than twelve months could be deemed prejudicial and therefore violative of a defendant's right to be tried with reasonable dispatch. Under the subdivision a dismissal of charges would be warranted in such a situation.

For those defendants who are not yet entitled to the mandatory dismissal upon motion under subdivision (b)(1), this subdivision states the standard by which an allegation of a denial of a speedy trial may nonetheless be judged: it is a statement of the fundamental constitutional guarantee. The twelve-month rule sets a standard which is quantitative and whose limits are easily determined, whereas the constitutional standard is a relative qualitative concept demanding that the severity of the denial of its protection to a defendant be dependent upon the facts of his case.

Barker v. Wingo, 407 U.S. 514 (1972), and Commonwealth v. Horne, 362 Mass. 738 (1973), make it clear that a balancing approach must be used to determine whether a defendant's constitutional right to a speedy trial has been violated. E.g., Commonwealth v. Beckett, Mass. Adv. Sh. (1977) 1922, Commonwealth v. Dabrieo, 370 Mass. 728 (1976); Commonwealth v. Daggett, 369 Mass. 790 (1976); Commonwealth v. Gove, 366 Mass. 351, 36165 (1974). For purposes of this analysis, the right to a speedy trial under art. 11 of the Massachusetts

Declaration of Rights and under the sixth amendment to the United States Constitution are considered to be coextensive. Commonwealth v. Gove, supra at 356 n.6; Commonwealth v. Underwood, 3 Mass. App. Ct. 522, 526 (1975).

This subdivision puts the constitutional standard into manageable operational terms. Four factors were mentioned by the United States Supreme Court in Barker as among those to be considered: the length of delay, the reason for delay, the resulting prejudice to the defendant, and the assertion of the right by the defendant. This subdivision isolates two essential factors which are the substance of the constitutional protection. These are unreasonable prosecutorial delay and resulting prejudice to the defendant.

Subdivision (c)(1) states that only prosecutorial delay is within the scope of the relief afforded by this subdivision. This protection is compatible with the constitutional protection. Commonwealth v. Lauria, 359 Mass. 168 (1971); Commonwealth v. Thomas, 353 Mass. 491[429] (1967). This subdivision requires the defendant to establish first that the delay he has endured is unreasonable and secondly that it was caused by the prosecutor. If the delay is of that nature, the defendant has conclusively established one of the two requisites to a finding that his motion to dismiss the charges is to be granted.

There is no disagreement with the proposition that only an unreasonable delay is prohibited by the Constitution and that what is unreasonable depends upon the peculiar facts of each case. For example, the amount of time that a prosecutor needs to prepare a case in which several defendants have been joined for trial is normally greater than the time needed to prepare for the trial of a single defendant. See Commonwealth v. Dominico, 364 Mass. 837 (1974).

Subdivision (c)(2) establishes the second element which the defendant must show to support his motion: that he has been prejudiced by the delay. Prejudice in the context of this subdivision is not restricted to prejudice to the preparation or presentation of the defense. The Supreme Court in Barker v. Wingo, supra, listed three distinct functions served by the prohibition against unreasonable delay: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Id. at 532.

If the defendant is able to show that deliberate, unreasonable prosecutorial delay has operated to his prejudice, the appropriate sanction is dismissal of the charges with prejudice to the Commonwealth. Support for such a sanction is even stronger when imposed for constitutional reasons. The Supreme Court in Strunk v. United States, 412 U.S. 434 (1973), declared that dismissal with prejudice was the only permissible remedy for violation of the constitutional speedy trial protection.

The judge is always given discretion in his determination of whether the defendant has been prejudiced to an extent that will require dismissal of the indictment due to prosecutorial delay.

Subdivision (d). This subdivision is based upon G.L. c. 277, §§ 72-72A. See ABA Standards Relating to Speedy Trial, § 3.1(Approved Draft, 1968), Standard 12-3.1 (2d ed., Approved Draft, 1978).

The statement in subdivision (d)(1) that prisoners are entitled to all the safeguards of a defendant whose liberty is not similarly impaired recognizes that a prisoner does not by reason of his status alone lose the protection of the Constitution or of this rule. It is not intended to declare, however, that all substantive rights of an unimprisoned defendant are to be accorded a prisoner. The same rights can apply with equal force in different circumstances and impose differing duties on the Commonwealth. A separate subdivision is devoted to prisoners' speedy trial rights because the substance of those rights is different from that of other accused persons. Imprisonment necessarily affects both the duty which the Commonwealth has to deliver a defendant to trial and the nature of the prejudice that might result from a delayed trial.

Subdivision (d)(2) extends to defendants incarcerated within the Commonwealth for other crimes the same speedy trial rights guaranteed to other defendants by subdivisions (b)(1)and (c).

Subdivision (d)(3) is largely a restatement of G.L. c. 277, § 72A, which is applied to prisoners incarcerated "outside" the Commonwealth. This is to be read to include prisoners within federal custody, although physically present within Massachusetts.

The Constitution has been interpreted to require of the prosecutor only that which he is reasonably able to accomplish. Commonwealth v. McGrath, 348 Mass. 748 (1965). Where a defendant is imprisoned in a foreign jurisdiction and his extradition is impeded—whether by his own opposition or by that of the executive of the incarcerating jurisdiction—it would be unfair to attribute the delay in bringing the defendant to trial to the Commonwealth if it had made all reasonable efforts to secure the defendant's presence. It would be equally unfair to require the Commonwealth to guarantee trial within a specified time limit.

There is disagreement among jurisdictions as to what the speedy trial provision of the Constitution requires of a state seeking to obtain the presence of a prisoner incarcerated in another jurisdiction, although it is clear that where a defendant's presence cannot be obtained because the incarcerating state refuses to deliver him, there is no denial of the defendant's constitutional right to a speedy trial. See ABA Standards Relating to Speedy Trial, § 3.1, comment at 31 (Approved Draft, 1968). It is also clear that Massachusetts is one of the many states to require the prosecution to use all reasonable efforts to obtain the presence of a foreign prisoner for trial upon pending charges, although this position is not universally accepted. Commonwealth v. Green, 353 Mass. 687, 690 (1968).

Uniform acts dealing with extradition have been adopted by many states. The Agreement On Detainers, G.L. c. 276, App. §§ 1-1 et seq., gives prisoners the right to have a trial within one hundred eighty days of their delivery to the jurisdiction where charges are pending. This statute, which has been adopted by thirty-two jurisdictions, gives substance to the rights of prisoners and is to be read as a complement to this rule. The Uniform Criminal Extradition Act, G.L. c. 276, §§ 11-20R, which has been adopted by forty-seven jurisdictions, establishes procedures for orderly extradition; it sets out proper procedures for a request for delivery, the arrest of the alleged criminal, and his delivery to the requesting state. Section 20G of this statute, however, still affords governors the discretion to refuse delivery of prisoners.

Massachusetts courts have required the Commonwealth to use due diligence in seeking to bring a foreign prisoner to trial. In light of the legal limitations of rendition this is a fair standard. This

rule attempts to put the diligence standard in operational terms. The speedy trial rights of a foreign prisoner are defined under this rule as follows: the Commonwealth must diligently notify a foreign prisoner of pending charges and must promptly seek to obtain his presence for trial: if the Commonwealth is dilatory in either filing a detainer or seeking to obtain the defendant's presence and the prisoner is prejudiced by the delay, the charges must be dismissed. The defendant is given the right to make a demand, although the demand under this rule does not affect the Commonwealth's duty to obtain the defendant's presence. The Commonwealth must use due diligence whether or not a demand has been made. However, the demand is relevant to a determination of the prejudice incurred by the defendant, and under the Agreement on Detainers, a demand entitles a defendant to a trial within one hundred eighty days of his delivery.

Subdivision (e). In Commonwealth v. Gove, 1 Mass. App. Ct. 614 (1973), aff'd, 366 Mass. 351 (1974), it was held that a defendant did not have the right to be simultaneously charged with all the offenses which might have been committed in the course of a single act or a closely related series of acts. One result is that a dismissal of the charge of one of a number of related offenses on denial of speedy trial grounds would not bar the Commonwealth from charging the defendant with another of the related offenses. A second result is that if a significant amount of time had elapsed between the filing of charges of two related offenses, and the earlier charge was dismissed because the twelve-month limit of this rule had passed, the Commonwealth could proceed to trial on the later charge. Subdivision (e) effectively vitiates the Gove decision.

Standard 12-4.1 of the ABA Standards Relating to Speedy Trial (2d ed., Approved Draft, 1978), states that if a charge is dismissed on speedy trial grounds, "[s]uch discharge should forever bar prosecution for the offense charged and for any other offense required to be joined with that offense."

The Supreme Judicial Court, citing with approval ABA Standards § 4.1, (Approved Draft, 1968), has held that:

the dismissal of a complaint in the District Court on the ground that the defendant has been denied his right to a speedy trial is a bar to any subsequent prosecution for the same offense whether by later complaint . . . or by an indictment. . . .

Commonwealth v. Ludwig, 370 Mass. 31, 35 (1976) (emphasis supplied). Accord Commonwealth v. Fields, 371 Mass. 274, 275 (1976) (dismissal of complaint in District Court on speedy trial grounds bar to subsequent prosecution of same offense by indictment in Superior Court). While agreeing with the ABA Standards insofar as holding dismissal to constitute an absolute discharge of the prosecution of the offense charged, the Ludwig court did not reach the issue of whether such a discharge was to encompass other offenses.

Subdivision (e) states that a dismissal of any charge ordered pursuant to Rule 36 "shall apply to all related offenses." Offenses are related when they are based on the same criminal conduct or episode or arise out of a course of criminal conduct or series of criminal episodes connected together or constituting parts of a single scheme or plan.

Mass. R. Crim. P. 2(b)(14); 9(a)(1). This subdivision expands the principle of ABA Standard 12-4.1 further, mandating that the dismissal shall be not only as to charges required to be joined

with that dismissed, but also as to any charges which could have been joined under Mass. R. Crim. P. 9(a)(2).

This position is advanced in the interests of fairness to a defendant. Without such a provision, a defendant could be subjected to harassment by a prosecutor who might essentially relitigate the same issues he was barred from litigating for failure to accord the defendant his rights under this rule.

Subdivision (f). Under this rule, the respective clerks are to have the burden of periodically informing the first justice of each District Court division and the Administrative Justice of the Superior Court Department of cases which have been pending longer than six months.

Rule 37: Transfer of Cases

(Applicable to District Court and Superior Court)

(a) Transfer for Plea and Sentence.

(1) District Court. A defendant against whom a complaint is pending and who appears in District Court, whether under arrest or pursuant to a summons, and against whom a complaint is pending in a division other than that in which he appears, may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the division in which the other complaint is pending, and to consent to disposition of the case in the division in which he appears. The District Court in which the defendant appears may order that the other complaint be transferred for disposition, subject to the written approval of the prosecutor in each division.

(2) Superior Court. A defendant against whom a complaint or indictment is pending and who appears in Superior Court, whether under arrest or pursuant to a summons, and against whom a complaint or indictment is pending in a county other than that in which he appears, may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the county in which the other complaint or indictment is pending, and to consent to disposition of the case in the county in which he appears. The Superior Court in which the defendant appears may order that the other complaint or indictment be transferred for disposition, subject to the written approval of the prosecuting attorney in each county.

(3) Effect of Not Guilty Plea. If after a proceeding has been transferred pursuant to subdivision (a) of this rule the defendant pleads not guilty, the clerk shall return the papers transmitted pursuant to subdivision (c) of this rule to the court in which the prosecution was commenced, and the proceeding shall be restored to the docket of that court.

(b) Transfer for Trial.

(1) Transfer for Prejudice. A judge upon his own motion or the motion of a defendant or the Commonwealth made prior to trial may order the transfer of a case to another division or county for trial if the court is satisfied that there exists in the community where the prosecution

is pending so great a prejudice against the defendant that he may not there obtain a fair and impartial trial.

(2) Transfer of Other Cases. A judge, upon motion of a defendant made pursuant to subdivision (3) or (4) of rule 9(a), and after taking into account the convenience of the court, the parties, and their witnesses, may with the written approval of the prosecuting attorney in each division or county order the transfer and consolidation for trial of any or all charges pending against the defendant in the several divisions or counties of the Commonwealth.

(c) Proceedings on Transfer. Upon receipt of the defendant's statement and the written approval of the prosecutor required by this rule, the clerk of the court in which a complaint or indictment is pending shall transfer the papers in the case and any bail taken to the clerk of the court to which the case is transferred. The clerk of the transferee court shall make immediate entry of the case upon the docket of that court and shall so notify the clerk of the transferor court so that the case may be closed on the docket of that court. The prosecution shall continue in the transferee court.

Reporter's Notes

This rule is drawn from Fed. R. Crim. P. 20, 21 and 22 and substantially expands Massachusetts practice relative to the transfer of pending criminal proceedings.

Subdivision (a). Subdivisions (a)(1) and (2), applicable respectively to the District and Superior Court Departments, are modeled after Fed. R. Crim. P. 20(a) and 22. It is intended that the request to consolidate complaints or indictments for plea and sentence is to be made at the initial appearance. The arraignment date is to be set at a time sufficiently after the initial appearance to allow the transmittal of the necessary papers (See subdivision [c], infra). The rule is not to be read to permit the consolidation of an indictment with a complaint for trial or plea in the District Court. Nor may complaints pending in District Court be consolidated with Superior Court proceedings (except where the defendant waives indictment and is bound over so that the case is properly in Superior Court. Mass. R. Crim. P. 3). Where the defendant appears in Superior Court upon a complaint or indictment and there are complaints outstanding in divisions of the District Court within that same county, the District Attorney may proceed by direct indictment (Mass. R. Crim. P. 3[e]), may make an appropriate disposition of the lower court charges pursuant to a plea arrangement (Mass. R. Crim. P. 12[b]), or may nol prosse the charges (Mass. R. Crim. P. 16) if the interests of the parties and the court so dictate.

Subdivision (a)(3) is substantially identical to Fed. R. Crim. P. 20(c).

Subdivision (b). Subdivision (b)(1) parallels Fed. R. Crim. P. 21(a) and has a statutory precedent in G.L. c. 277, § 51.

Under most circumstances a trial is held where the indictment or complaint is pending. This in fact is a constitutional right of the defendant. Article 13 of the Massachusetts Declaration of Rights provides:

In criminal prosecutions, the verification of facts in the vicinity where they happen, is one of the greatest securities of the life, liberty, and property of the citizen.

However, the common law recognized the right of a defendant to have the case removed to another community for the purpose of achieving an impartial trial. Commonwealth v. Handren, 261 Mass. 294, 296-97 (1927); Crocker v. Justices of the Superior Court, 208 Mass. 162, 174-75 (1911). And the right to a fair and impartial trial is guaranteed by the fourteenth amendment to the United States Constitution, which right includes the right "to show that a change of venue is required" in a particular case. Groppi v. Wisconsin, 400 U.S. 505, 511 (1971).

A defendant in a capital case has a statutory right to seek a transfer of the trial to any adjoining county. G.L. c. 277, § 51. This statutory right is, in many cases, too limited to permit removal to a venue uninfected by the prejudice and the statute is not to maintain its vitality except as precedent for the broader rule. See generally Commonwealth v. Turner, 371 Mass. 803, 807 (1977). In some cases, the transfer need not be to another county if an impartial jury panel can be found in another court within the same county.

The motion must be made prior to trial. See Commonwealth v. Noxon, 319 Mass. 495, 550 (1946). If the jury has been impanelled, and the court is satisfied that the jurors are impartial, the defendant cannot later claim that the situs of trial was improper.

The trial court has discretion as to whether pretrial publicity has so infected the community where proper venue lies as to require a transfer to another community. E.g., Commonwealth v. Turner, 371 Mass. 803, 806-07 (1977). The transfer, however, should not be ordered without a substantial showing of prejudice. As the Supreme Judicial Court said in Crocker v. Justices of the Superior Court, 208 Mass. 162 (1911):

Such a motion ought not to be granted upon mere suggestion, nor unless the reason for it is fully established. It is a jurisdiction which should be exercised with great caution and only after a solid foundation of fact has been first established. Manifestly, it should be resorted to only in aid of justice, and it should not be permitted to be employed as an instrument of obstruction or as a means of delay.

Id. at 180.

The mere fact that a juror has been exposed to pretrial publicity concerning the case does not mean that his impartiality has been affected. This normally can be adequately tested during the voir dire. Commonwealth v. Smith, 357 Mass. 168 (1970). In addition to questioning prospective jurors as to their bias, the court should consider the extent of the publicity concerning the case and the nature of the charges. Some crimes give rise to heightened community response more readily than others. See Commonwealth v. Blackburn, 354 Mass. 200, 203-04 (1968); Commonwealth v. Smith, 353 Mass. 487, 489-90 (1968). In some cases the extent of the publicity will be so great as to mandate a transfer of the trial. It is presumed in these cases that an impartial jury cannot be obtained from the mere fact of the exposure of the crime to the public. Rideau v. Louisiana, 373 U.S. 723 (1963).

Subdivision (b)(2), drawn from Fed. R. Crim. P. 21(b), provides for the inter-division or inter-county transfer of charges of related offenses for trial. Such transfer is contingent upon the

approval of the court and of the prosecutors involved. The rule is intended to conserve judicial resources by obviating the need for separate trials of related offenses which were committed in different divisions or counties.

Subdivision (c). This subdivision is in conformity with both Fed. R. Crim. P. 20(a) and 21(c) and with G.L. c. 277, § 52. The language was taken in part from each source.

Other statutes in Massachusetts are applicable to the transfer of cases in specific factual situations, and these are to maintain their vitality. General Laws c. 277, § 53 is applicable when the transfer is to a different county and the defendant is in custody. It should be noted that while this rule is concerned with the transfer of cases which are to be tried in Superior Court upon indictment, it is intended to be equally applicable to cases to be tried in District or Superior Court upon complaint. In this respect, the rule goes beyond the provisions of G.L. c. 277, §§ 51-54 which are, technically speaking, applicable only to trial upon indictment.

Rule 38: Disability of Judge

(Applicable to Superior Court and jury sessions in District Court)

(a) During Trial. If by reason of death, sickness, or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge of that court or properly assigned to that court, upon certifying in writing that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

(b) Receipt of Verdict. Any judge of a court or any judge properly assigned to that court may receive a verdict of the jury.

(c) After Verdict or Finding of Guilt. If by reason of absence, unavailability, death, sickness, or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the judge after a verdict or finding of guilt, any other judge of that court or properly assigned to that court may perform those duties; but if the other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may, in his discretion or upon motion of the defendant, order a new trial.

Reporter's Notes

Rule 38 has no counterpart in the statutory or case law of the Commonwealth. The rule closely parallels Fed. R. Crim. P. 25, although there is some deviation. See Rules of Criminal Procedure (U.L.A.) rule 741 (1974); ABA Standards Relating to Trial by Jury (2d ed., Approved Draft, 1978).

Subdivision (a). This subdivision is drawn nearly verbatim from ABA Standards Relating to Trial by Jury § 4.3 (Approved Draft, 1968), differing in that under the rule the substituted judge must be of the same court in which the proceeding is held, or properly assigned to that court. It has been intimated that the federal analogue to this subdivision, Fed. R. Crim. P. 25(a), is open to constitutional inquiry. 2 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 392 (1969, Supp. 1978). It is suggested further, however, that no substantial constitutional

infirmity exists if a defendant consents to the substitution of judges during the trial. Id. See Rules of Criminal Procedure (U.L.A.) rule 741(e) (1974), which would require the parties' consent to the substitution of a specified judge. Whether or not constitutionally mandated, it would be the better practice to obtain the defendant's consent to substitution in writing to be made a part of the record.

Subdivision (b). This subdivision constitutes the most significant departure from Federal Rule 25. It is felt that the receipt of a verdict is a court function ministerial in nature and need not be performed by the judge who presided at trial. Subdivision (b) is intended to implement the efficient use of judicial manpower by permitting a single judge to take verdicts in more than one trial and to circumvent the need for a judge to interrupt other business to receive a verdict.

Subdivision (c). The constitutionality of the federal equivalent of this subdivision, Fed. R. Crim. P. 25(b), was questioned as to the power of a substitute judge to act in the case. Its validity was sustained in Connelly v. United States, 249 F.2d 576 (8th Cir. 1957), cert. denied, 356 U.S. 921 (1958). See Rules of Criminal Procedure (U.L.A.) rule 741(f) (1974).

The power granted to the succeeding judge to "perform the duties to be performed by the court after a verdict or finding of guilt" is intended to encompass the authority and duty to hear post-conviction proceedings under Mass. R. Crim. P. 30. See former G.L. c. 278, § 31A, which permitted a substitute justice to examine and allow or disallow a bill of exceptions.

The final clause of subdivision (c) gives rise to potential problems of constitutional dimension regarding the ordering of a new trial by a successor judge. Under this rule, the successor judge may order such a trial "in his discretion, or upon motion of the defendant . . . ." A new trial in the latter situation raises no issue and is supported by precedent. See United States v. Tateo, 377 U.S. 463 (1964).

Regarding the former situation, however, for a trial judge to grant a new trial sua sponte, and presumably, over defendant's objection, may raise fifth amendment problems of double jeopardy. 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 551 at 483 (1969, Supp. 1978). See United States v. Smith, 331 U.S. 469, 474-75 (1947).

The current law with respect to the double jeopardy implications of a declaration of a mistrial over a defendant's objections involves a balancing of competing interests:

A defendant has a 'valued right to have his trial completed by a particular tribunal.' [citations omitted]. Because of this right, a court may not declare a mistrial without consent ofthe defendant unless there is a 'manifest necessity for the act,or the ends of public justice would otherwise by defeated.'[citations omitted].

United States v. Lansdown, 460 F.2d 164, 168 (4th Cir. 1972). See Wade v. Hunter, 336 U.S. 684, 689 (1949). This doctrine of "manifest necessity," enunciated in the early case of United States v. Perez,22 U.S. (9 Wheat.) 579 (1824), remains consistently adhered to and approved by the Supreme Court. Illinois v. Somerville, 410 U.S. 458 (1973); United States v. Jorn, 400 U.S. 470 (1971). See also United States v. Wilson, 420 U.S. 332, 344 (1975).

At the same time, the Perez formulation, the Supreme Court has emphasized, is not so rigid as to be mechanically applied:

This formulation . . . abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial *in the varying and often unique situations arising during the course of a criminal trial*. The broad discretion reserved to the trial judge in such circumstances has been consistently reiterated in decisions of this court.

Illinois v. Somerville, supra at 462 (Emphasis added).

The relatively rare, if not unique, issue posed by subdivision (c) presents several new considerations. The "broad discretion reserved," Illinois v. Somerville, supra, will be wielded in this context by a successor to the disabled trial judge. Furthermore, the Court's admonition that trial judges must not "foreclose the defendant's option" to proceed to the first jury until they have completed a "scrupulous exercise" of their discretion, United States v. Jorn, supra at 485, takes on heightened significance where, as here, the defendant has already gone to the first jury.

Nevertheless, it is submitted that the Perez doctrine as refined by the Court today applies to the post-verdict situation in this subdivision. See Illinois v. Somerville, supra at 467, where the Court intimates a distinction between mistrials declared prior to and those declared after verdict. Thus, in the careful exercise of his discretion, a trial judge, or successor judge, must weigh the defendant's "valued right to have his trial completed by a particular tribunal" against "the public's interest in fair trials designed to end in just judgments." Wade v. Hunter, supra at 689. If the judge, then, "is satisfied that he cannot perform . . . [the post-verdict duties of the court], he may . . . order a new trial" without unconstitutionally subjecting a defendant to double jeopardy.

Rule 39: Records of Foreign Proceedings and Notice of Foreign Law

(Applicable to District Court and Superior Court)

(a) Records of Courts of Other States or of the United States. The records and judicial proceedings of a court of another state or of the United States shall be competent evidence in this Commonwealth if authenticated by the attestation of the clerk or other officer who has charge of the records of such court under its seal.

(b) Notice of Foreign Law. The court shall upon request take judicial notice of the law of the United States or of any state, territory, or dependency thereof or of a foreign country whenever it shall be material.

Reporter's Notes

Rule 39 substantially conforms to G.L. c. 233, §§ 69-70. See Fed. R. Crim. P. 26.1.

Subdivision (a). General Laws c. 233, § 69, from which this sub-division is taken, does not require "that a record be fully extended in order to afford proof of judgment if the facts essential there to are set forth." Commonwealth v. Rondoni, 333 Mass. 384, 386(1955). Rondoni should be examined as illustrative of what serves as sufficient attestation by the officer in charge of judicial records. Id. at 385-86.

Subdivision (b). This is taken with little change from G.L. c.233, § 70. Although nearly all of the cases which have construed that section are civil, it applies to criminal proceedings as well. See.g., Commonwealth v. White, 358 Mass. 488, 491 (1970).

The rule states that a court shall notice foreign law upon request when that law is material. This is not intended to limit a court's authority under § 70 to notice foreign law in the absence of a request if the court so chooses. Dicker v. Klein, 360 Mass. 735, 736-37 (1972); De Gategno v. De Gategno, 336 Mass. 426, 431 (1957). Even upon request, however, a court is not required to notice foreign law unless it is brought to the attention of the court. Tsacoyeanes v. Canadian Pac. Ry. Co., 339 Mass. 726 (1959). Massachusetts practice is in accord with Fed.R.Evid. 201 which states that "(c) . . . A court may take judicial notice, whether requested or not [and] (d) . . . shall take judicial notice if requested by a party and supplied with the necessary information." See Me.R.Evid. 201 (c)-(d).

When a party does make a request for the court to take judicial notice of foreign law, that party carries the burden of proof as to what the law is. Finer v. Steuer, 255 Mass. 611 (1926). The attention of the court may be directed to the law of another jurisdiction by oral testimony of a qualified witness as well as by citation of statutes and decisions. Eastern Offices, Inc. v. P. F. O'Keefe Ad. Agency, Inc., 289 Mass. 23 (1935). The requirement of bringing the law to the attention of the court and proving it is not satisfied by simply mentioning the appropriate reference to foreign law. "Merely to direct attention to the law of a foreign country written in a foreign tongue does not make it a matter for judicial knowledge." Rodrigues v. Rodrigues, 286 Mass. 77, 83 (1934). However, where there is not sufficient information available to the litigants as to what is the pertinent foreign law, the court may use other channels available to it in order to determine the law. In Mazurowski, petitioner, 331 Mass. 33 (1954), the court drew upon the superior sources of foreign law and regulations available through the State Department, to which neither party to the litigation has access.

Rule 40: Proof of Official Records

(Applicable to District Court and Superior Court)

(a) Authentication.

(1) Domestic. An official record kept within the Commonwealth, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record, or by his deputy. If the record is kept in any other state, district, commonwealth, territory or insular possession of the United States, or within the Panama Canal Zone or the Trust Territory of the Pacific Islands, any such copy shall be accompanied by a certificate that such custodial officer has the custody. This certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification, or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof, by any other method authorized by law, of the existence of, or the lack of, an official record, or of entry, or lack of entry therein.

Reporter's Notes

This rule is identical to Mass. R. Civ. P. 44. See Fed. R. Crim. P. 27, which incorporates by reference the provisions of Fed.R.Civ.P. 44.

Prior to the promulgation of this rule, no statute or rule expressly provided for the proof of official records in criminal cases. The practice developed of utilizing the law applicable to the proof of such records in civil cases. Rule 40 formally recognizes that practice.

Like its civil counterpart, Rule 40 is addressed only to authenticating an official record or establishing the lack thereof. It does not govern the authentication of unofficial records, nor does it regulate the extent to which the contents of an authenticated official record are admissible.

The term "official record" has been defined generally as including records of any governmental entity, 8A J. MOORE, FEDERAL PRACTICE para. 27.02 at 27-6 (1978), and more particularly as "all documents prepared by public officials pursuant to a duty imposed by law or required by the nature of their offices . . . ." Olender v. United States, 210 F.2d 795, 801 (9th Cir. 1954). See Fed.R.Evid. 901(b)(7), 902(1)-(3).

Subdivision (a). It should be noted that subdivision (a)(1), unlike its federal counterpart, does not require certification by a judge or other officer of the status of the custodial official if the records are kept within the Commonwealth. As for domestic records kept outside the Commonwealth

(subdivision [a][1]) and foreign records (subdivision [a][2]), the requirement of double certification is retained. Subdivision (a)(2) is in all other respects in accord with former Massachusetts practice.

Subdivision (b). This subdivision permits the written statement of a custodial officer that no particular record can be found, authenticated pursuant to subdivision (a), to suffice as proof that no such record exists.

Subdivision (c). Rule 40(c) incorporates all pre-existing statutory methods of proving the existence of, or lack of the existence of, official records. Those statutes are unaffected by the promulgation of this rule. See, e.g., G.L. c. 46, § 19 (records relative to birth, marriage, and death); G.L. c. 233, §§ 76, 76A, 76B (records of departments of government).

Rule 41: Interpreters and Experts

(Applicable to District Court and Superior Court)

The judge may appoint an interpreter or expert if justice so requires and may determine the reasonable compensation for such services and direct payment therefor.

Reporter's Notes

This rule is an abbreviated version of Fed. R. Crim. P. 28 as it appeared prior to amendment in 1975. Federal Rule 28 now deals only with interpreters; the provisions governing expert witnesses, formerly Federal Rule 28(a), are now contained in Fed.R.Evid. 706. See Maine R.Crim.P. 28.

The right of a defendant to be present at trial, see e.g., Lewis v. United States, 146 U.S. 370, 372 (1892)—in the sense of being able to comprehend and participate meaningfully in the proceeding, United States ex. rel. Negron v. New York, 434 F.2d 386 (2d Cir. 1970)—the requirement that a defendant have "sufficient . . . ability to consult with his lawyer with a reasonable degree of rational understanding," Dusky v. United States, 362 U.S. 402 (1960), and the sixth amendment right to be confronted with adverse witnesses, applicable to the states through the fourteenth amendment, Pointer v. Texas, 380 U.S. 400 (1965), mandate that an interpreter to be available to the defendant or witness who cannot effectively communicate. "Otherwise, '[t]he adjudication loses its character as a reasoned interaction . . . and becomes an invective against an insensible object.'" United States ex rel. Negron, supra at 389, quoting Note, Incompetency to Stand Trial, 81 HARV. L. REV. 454, 458 (1969).

Whenever an interpreter is placed between the witness and counsel, the judge, and the jury, problems of distortion and confusion may arise. For example, where some of the jurors understand the language of the witness and the judge or counsel does not, the jurors may hear testimony that should have been excluded. The Supreme Judicial Court has suggested the following:

1. Counsel should address his questions to the witness in the second person, and not to the interpreter.

2. The interpreter should translate the question exactly without any additional or supplementary remarks of his own.

3. The interpreter should then translate the answer of the witness in the first person, neither editing nor adding to the witness' words. Even if the answer is non-responsive, the interpreter should give it and allow the judge to pass on its admissibility, for the interpreter's sole function is to translate.

4. Extraneous conversations between the witness and the interpreter should not be permitted. If such conversations do occur for some reason, they should be translated into English for the judge and counsel to hear.

5. When there are sitting on the jury individuals who understand the language of the witness, they are to be instructed that it is the interpreted testimony in English that is evidence and not their own translations of the witness' answers.

6. Neither party has the right to have a juror excused solely because that juror understands the language of a witness. However, in certain circumstances the judge in his discretion may decide whether to excuse such a juror is appropriate. For example, this action may be desirable on motion of the defendant in a criminal matter in which the progress of the trial will not be interrupted by the removal of the juror, sufficient alternate jurors have been empaneled, and interpreted testimony constitutes a major part of the case.

Commonwealth v. Festa, 369 Mass. 419, 429-30 (1976) (footnote omitted). While the Supreme Court has established that it is within the discretion of the court whether to appoint an interpreter, Perovich v. United States, 205 U.S. 86, 91 (1907), it has not found a right to state-provided interpreters to be a constitutional absolute since that issue has never been squarely presented. Lower federal courts have held, however, that if the court is put on notice that a defendant has a language difficulty, the court must make it unmistakably clear to him that he has the right to have a competent translator assist him, at state expense if he is indigent, throughout the proceeding. United States v. Carrion, 488 F.2d 12, 15 (1st Cir. 1973), cert. denied, 416 U.S. 907 (1974); United States ex rel. Negron v. New York, 434 F.2d 386, 390-91 (2d Cir. 1970). Conversely, if the need for an interpreter's services is not apparent nor are such services requested, it is no abuse of discretion to fail to advise a defendant of their availability. United States v. Barrios, 457 F.2d 680, 682 (9th Cir. 1972).

The justices of the Superior Court, G.L. c. 221, § 92, the Boston Municipal Court, G.L. c. 218, § 67, and the East Boston District Court, G.L. c. 218, § 68, may appoint official interpreters for the sessions of those courts. Other District Courts may employ interpreters as the need therefor arises. G.L. c. 262, § 32. Interpreters are to be compensated for their services by the Commonwealth. G.L. c. 221, §§ 92, 92A; c. 262, § 32. The appointment of interpreters in civil actions is governed by Mass. R. Civ. P. 43(f).

The federal rule does not indicate that it was intended to benefit only the indigent defendant.

The view that the Rule should be restricted overlooks the fact that the interpreter's services, though required by the defendant's own language problem, benefit the court and prosecution as well as the defense. The integrity of the judicial process—not to mention the desirability of

avoiding collateral attacks—demands an accurate and impartial translation. Such a translation can only be guaranteed by court appointment of interpreters.

8A. J. MOORE, FEDERAL PRACTICE Para. 28.02[2] at 28-3 (1978). But see United States v. Desist, 384 F.2d 889, 901-03 (2d Cir. 1967) aff'd on other grounds, 394 U.S. 244 (1969). Former practice in Massachusetts appeared to be that interpreters, unless retained by non-indigent defendants, were paid by the court. Official interpreters are expressly barred from receiving gratuities, bonuses or fees beyond that compensation paid by the Commonwealth. G.L. c. 218, § 67; c. 221, § 92.

The use of interpreters is not limited to situations where the defendant or a witness is not English-speaking. General Laws c. 221, § 92A provides for the appointment of interpreters for the deaf. The court in United States v. Addonizio, 451 F.2d 49, 68 (3d Cir.), cert. denied, 405 U.S. 936 (1972), held that the appointment as interpreter of the wife of a witness whose illness made his speech difficult to understand was not an abuse of discretion. See Fairbanks v. Cowan, 551 F.2d 97 (6th Cir. 1977) (father of retarded adult). The appointment of such a person should only be after a finding that he is disinterested in the outcome of the case. United States v. Addonizio, supra; Price v. Beto, 426 F.2d 875 (5th Cir. 1970) (appointment of husband of deaf-mute victim held violative of due process). See Maine R.Crim.P. 28, which provides for appointment of a "disinterested" interpreter of the court's own selection.

The courts' power to appoint expert witnesses to assist the indigent defendant or the court itself is nowhere express; rather, it is grounded upon the long-standing belief "that it is for the interest of the Commonwealth . . . that all proper investigations should be made, in order to guard against the danger of doing injustice to the prisoner . . . ." Attorney General, petitioner, 104 Mass. 537, 544 (1870). The Supreme Judicial Court has approved the practice of the trial judge's authorization, on a proper showing, of an indigent defendant to expend public funds for expert assistance. See Commonwealth v. Silva, 371 Mass. 819, 821 (1977) (psychiatric expert).

Under Superior Court Rule 54 (1974), the court is not to allow compensation for the services of an expert witness unless his employment by the defendant was authorized by the court. If the compensation of defense experts is approved by the court, it is paid by the Commonwealth. G.L. c. 280, §§ 4, 16; c. 261, §§ 27A-G.

Pursuant to G.L. c. 261, § 27B, applicable by its terms to criminal cases, a defendant may file an affidavit of indigency and request waiver, substitution or payment by the Commonwealth of costs and fees. Substitution means that if an alternative to a translator is available at lower or no cost, the judge may order that this alternative be used if it is "substantially equivalent . . . and does not materially impair the rights of any party." G.L. c. 261, § 27F. If, after hearing, the court finds that certain services are "reasonably necessary to assure the [defendant] as effective a . . . defense as he would have if he were financially able to pay," the court must grant the defendant's request for payment by the Commonwealth of "extra fees and costs," defined in G.L. c. 261, § 27A as including "expert assistance."

The indigent defendant cannot as of right nominate the expert whom he wishes to employ, Commonwealth v. Erickson, 356 Mass. 63 (1969); Commonwealth v. Medeiros, 354 Mass. 193, 199-200 (1968), cert. denied sub nom., Bernier v. Massachusetts, 393 U.S. 1058 (1969), but in

practice most judges will permit the defendant to specify an expert, although a ceiling may be established on the amount which may be expended. 30 MASS. PRACTICE SERIES (Smith) § 492 (1970, Supp. 1978).

In addition to appointing experts to assist the defendant in the preparation or presentation of his defense, the court is empowered to call experts on its own motion to aid in its determination of issues of fact or law. See Commonwealth v. Lykus, 367 Mass. 191 (1975) (Separate opinion of Kaplan J., 206 at 213).

Rule 42: Clerical Mistakes

(Applicable to District Court and Superior Court)

Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be corrected with leave of the appellate court.

Reporter's Notes

This rule is substantially identical to Mass. R. Civ. P. 60(a). See Fed. R. Crim. P. 36; Fed.R.Civ.P. 60(a).

Rule 42 is limited to the correction of "clerical mistakes" or errors "arising from oversight or omission" and does not apply to the correction of errors of substance, such as an illegal sentence or improperly obtained conviction. The federal criminal analogue is said to be typically invoked when the court has authority to impose consecutive as well as concurrent sentences, but the record is ambiguous as to which was in fact given. 8A J. MOORE, FEDERAL PRACTICE Para. 36.02 at 36-1 n.1 (1978). See e.g., Borum v. United States, 409 F.2d 443, 439-41 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1968).

Errors which may be corrected pursuant to this rule must arise out of "misprisions, oversights, omissions, unintended acts or failures to act," First Nat'l. Bank v. National Airlines, 167 F. Supp. 167, 169 (S.D.N.Y. 1958) (construing Fed.R.Civ.P. 60[a]), and not result from deliberate action, Ferrao v. Arthur M. Rosenberg Co., 156 F.2d 212 (2d Cir. 1946). See 8 MASS. PRACTICE SERIES (Smith & Zobel) Reporters' Notes at (1977).

Clerical mistakes are due to a failure to accurately record statements made or action taken by the court or parties. E.g., Costello v. United States, 252 F.2d 750 (5th Cir. 1958). 8A J. MOORE, FEDERAL PRACTICE Para. 36.02 at 36-2 (1978). Errors which are due to oversight or omission generally require correction so as to conform to the intent of the court or a party which may not be reflected in their recorded statements. E.g., Green v. Clerk of Mun. Ct., 321 Mass. 487 (1947); Lott v. United States, 309 F.2d 115 (5th Cir. 1962); cert. denied, 371 U.S. 950 (1963). But cf. United States v. Raftis, 427 F.2d 1145 (8th Cir. 1970); 8A J. MOORE, supra at 36-2.

The term “record” is intended to be broadly read so as to encompass not only process, pleadings, and verdict, but also evidentiary documents, testimony, instructions and all other matters pertaining to the case of which there is a written record. 8 MASS. PRACTICE SERIES, supra at 461; 8A J. MOORE, supra at 36-2.

The entry of an appeal does not divest the trial court of its power to correct error. If the case has been docketed in the appellate court, the trial court is still empowered to correct error, but only with permission of the appellate court. See 8 MASS. PRACTICE SERIES, supra at 461; Fed.R.App.P. 10(a), (e).

Rule 43: Summary Contempt Proceedings

(Applicable to District Court and Superior Court)

(a) When Warranted. A criminal contempt may be punished summarily when

(1) summary punishment is necessary to maintain order in the courtroom;

(2) the contemptuous conduct occurred in the presence of, and was witnessed by, the presiding judge;

(3) the presiding judge enters a preliminary finding at the time of the contemptuous conduct that a criminal contempt occurred; and

(4) the punishment for each contempt does not exceed three months imprisonment and a fine of $2,000.

(b) Procedure.

(1) Upon making a preliminary finding that a criminal contempt occurred, the presiding judge shall give the alleged contemnor notice of the charges and shall hold a hearing to provide at least a summary opportunity for the alleged contemnor to produce evidence and argument relevant to guilt or punishment. For good cause shown, the presiding judge may continue the hearing to enable the contemnor to obtain counsel or evidence.

(2) The presiding judge may order the alleged contemnor held, subject to bail and/or conditions of release, pending the hearing provided for in subsection (b)(1) if the judge finds it necessary to maintain order in the courtroom or to assure the alleged contemnor's appearance.

(3)

(i) If, after the hearing provided for in subsection (b)(1), the presiding judge determines that summary contempt is not appropriate because the appropriate punishment for the alleged contempt exceeds three months imprisonment and a fine of $2,000, the judge shall refer the

alleged contemnor for prosecution under Rule 44. If necessary to maintain order in the courtroom or to assure the alleged contemnor's appearance, the judge may order the alleged contemnor held, subject to bail and/or conditions of release, for a reasonable period of time, not to exceed 15 days absent good cause shown, pending the issuance of a complaint or indictment under Rule 44(a).

(ii) If, after the hearing, the presiding judge determines that summary contempt is not appropriate because one or more of the requirements in subsection (a)(1), (a)(2), or (a)(3) is not satisfied, or for another reason, the judge shall discharge the alleged contemnor. The judge, in his or her discretion, may refer the matter to the government for investigation and possible prosecution, and nothing in this subsection shall preclude such investigation or prosecution, whether undertaken in response to the judge's referral or independently.

(iii) If, after the hearing, the presiding judge determines that summary contempt is appropriate, the judge shall make a finding on the record of summary contempt, setting forth the facts upon which that finding is based. The court shall further announce a judgment of summary contempt in open court, enter that judgment on the court's docket, and notify the contemnor of the right to appeal. The judge may defer sentencing, or the execution of any sentence, where the interests of orderly courtroom procedure and substantial justice require. If necessary to maintain order in the courtroom or to assure the contemnor's appearance, the judge may order the contemnor held, subject to bail and/or conditions of release, pending sentencing.

(c) Appeal. A contemnor may appeal a judgment of summary contempt to the Appeals Court.

Reporter's Notes

(2014) This amendment to Rule 43 is intended to clarify the procedures by which a judge can impose summary punishment for criminal contempt or, alternatively, refer an alleged contemnor for prosecution by complaint or indictment under Rule 44. See Vizcaino v. Commonwealth, 462 Mass. 266, 279 n. 11 (2012) (suggesting a need for clarification in the operation of Rule 43). Amended Rule 43 resolves ambiguities concerning the prerequisites for summary punishment of contempt and the procedural steps in a summary-contempt proceeding. Further, amended Rule 43(b) explicitly recognizes discretionary authority that judges have presumably enjoyed in summary contempt proceedings, principally the common-law authority to hold an accused contemnor if necessary to maintain courtroom order or to assure his or her appearance at any subsequent proceeding. The amended rule also increases the maximum fine permitted from $500 to $2,000.

Rule 43(a) When Warranted

Amended Rule 43(a), like its predecessor, provides for the four conditions necessary to warrant summary punishment for contempt. Such punishment must be necessary to maintain courtroom

order; the contemptuous conduct must occur in the presence of and be witnessed by the judge; the judge must enter a finding of contempt at the time it occurs; and the punishment cannot exceed three months' imprisonment and a fine of $2,000. As discussed below, amended Rule 43(a)(3) clarifies an ambiguity in former Rule 43(a), the amended rule expressly providing that this threshold, contemporaneous finding of contempt be preliminary. As such, it gives notice to the alleged contemnor of the charges, but it is subject to reconsideration after affording the alleged contemnor an opportunity to be heard as required under Rule 43(b)(1).

Former Rule 43(a)(2) referred to the threshold, contemporaneous finding as a "judgment of contempt," leading to possible confusion between it and the final "judgment of contempt" which, under former Rule 43(b), the judge could make only after "giv[ing] the contemnor notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment." Mass. R. Crim. P. 43, 378 Mass. 919 (1979). See Vizcaino v. Commonwealth, 462 Mass. 266, 276 (2012) (holding that an opportunity to be heard followed by entry of the judgment on docket are necessary predicates to a Rule 43 judgment of summary contempt); Commonwealth v. Segal, 401 Mass. 95, 99-100 (1987) (same). Amended Rule 43(a)(3) makes it clear that the judge's threshold, contemporaneous finding of contempt is preliminary. While the Supreme Judicial Court had read former Rule 43(a)(2) to provide that this preliminary "judgment of contempt" be written, see Vizcaino v. Commonwealth, 462 Mass. 266, 272 & n. 7 (2012) (interpreting Rule 43(a)'s contemporaneity requirement to permit reasonable, minor delays in preparing Rule 43(a)(2)'s written judgment of contempt), amended Rule 43(a)(2) neither provides nor contemplates that the preliminary finding of contempt be written. Such a requirement seems unnecessary given that the judge's finding is in open court and presumably subject to transcription if necessary. Moreover, requiring a written finding could delay both the alleged contemnor's opportunity to be heard and the trial in which the contemptuous conduct occurred. Finally, as noted, the amended rule increases the maximum fine for summary contempt from $500 to $2,000, an increase that partially accounts for the inflation that has occurred since the rule's adoption in 1979. This maximum fine is well within the punishment that may be imposed without implicating the Sixth Amendment right to a jury trial. See Blanton v. City of N. Las Vegas, Nev., 489 U.S. 538, 544-45 (1989) (holding no Sixth Amendment right to jury trial for offense the maximum punishment for which was six months imprisonment and $1,000 fine, noting the possible fine was "well below" the $5,000 federal benchmark utilized in identifying petty offenses that can be tried without a jury); Furtado v. Furtado, 380 Mass. 137, 142 n. 5 (1980) (noting Supreme Judicial Court has not interpreted article 12 to impose a stricter jury-trial requirement).

Rule 43(b) Procedure

As did former Rule 43(b), amended Rule 43(b)(1) provides that, following the preliminary finding of contempt under Rule 43(a)(3), the judge must conduct a hearing, affording the accused contemnor at least a summary opportunity to produce evidence and/or argument relevant to guilt or punishment. The amended rule further gives the judge discretion, for good cause shown, to continue the hearing so that the accused contemnor can obtain evidence or counsel.

Rule 43(b)(2) authorizes the judge to hold the accused contemnor, subject to bail and/or conditions of release, pending the summary-contempt hearing if necessary to maintain courtroom order or to assure the contemnor's appearance. Judges presumably had such common-law authority under former Rule 43, see In re Terry, 128 U.S, 289, 307-13 (1888) (recognizing longstanding judicial authority to apprehend, commit, and summarily punish one who engages in contemptuous conduct in the judge's presence); see also G.L. c. 276, § 57 (authorizing justices of the superior and district courts to admit a committed prisoner to bail upon finding that such release will reasonably assure the prisoner's future appearance before the court), but the amended rule makes it explicit.

Amended Rule 43(b)(3) sets out the respective procedures for the three possible results of the Rule 43(b)(1) hearing.

First, under Rule 43(b)(3)(i), if the judge determines that summary contempt is not appropriate because the accused contemnor deserves greater punishment than that permitted for summary contempt, the judge must refer the alleged contemnor for prosecution by complaint or indictment under Rule 44. In that event, if necessary to maintain courtroom order or the appearance of the accused, the rule recognizes the judge's common-law authority to hold the alleged contemnor subject to bail and/or conditions of release for up to 15 days, extendable for 3 good cause shown, pending issuance of the contempt complaint or indictment under Rule 44(a). Although the judge has wide discretion in determining what constitutes good cause to extend the 15-day limitation, it would ordinarily include a superior court referral in which there is no grand jury in session during that 15-day period.

Second, Rule 43(b)(3)(ii) covers the case in which, after considering the facts and arguments presented in the summary-contempt hearing, the judge decides for whatever reason that summary contempt is not appropriate. This possibility, although inferable under former Rule 43(b), is here explicit. Under Rule 43(b)(3)(ii), such a decision to forgo further proceedings and to discharge the alleged contemnor does not bar the alleged contemnor's prosecution for the alleged contempt. The rule explicitly provides that, in spite of this termination of summary-contempt proceedings, the judge has discretion to refer the matter to the government for investigation and possible prosecution, and that, even in the absence of such a judicial referral, the government may investigate and prosecute the alleged contempt. Cf. Vizcaino, 462 Mass. at 274-75 (holding that, where judge had not entered summary contempt judgment on the court's docket as required by Rule 43(b), further prosecution for nonsummary contempt under Rule 44 not barred by double jeopardy).

Third, Rule 43(b)(3)(iii) sets out the procedure if, after the hearing, the judge decides that summary punishment for the contempt is appropriate. The judge must make a finding of summary contempt on the record, setting out the facts on which it is based. Unlike former Rule 43(b), this finding need not be written; a transcript of the factual finding provides an adequate record for purposes of appeal. The rule further provides that, as in any criminal conviction, the court must announce the summary-contempt judgment in open court, enter the judgment on the docket, and notify the contemnor of the right to appeal. See Mass. R. Crim. P. 28(a), 378 Mass. 898 (1979). As did former Rule 43(b), Rule 43(b)(3)(iii) allows the judge discretion to defer

summary-contempt sentencing or its execution where orderly courtroom procedure and substantial justice require. Although the rule does not explicitly limit the purpose or length of such sentence deferral, as was so under former Rule 43(b), it ordinarily would be reserved for cases of summary contempt by one of the parties or lawyers in the trial, see Taylor v. Hayes, 418 U.S. 488, 497-98 (1974), and imposition or execution of sentence would be deferred until after the trial is completed. The rule further permits the judge, if necessary, to order the contemnor held, subject to bail and/or conditions of release, pending sentencing.

Rule 43(c), providing for the right of appeal to the Appeals Court, remains in substance unchanged.

Reporter's Notes

Rule 43 is based upon Fed. R. Crim. P. 42(a) as that rule was affected by the Supreme Court decision of Bloom v. Illinois, 391 U.S. 194 (1968), and upon Fla.R.Crim.P. 3.830 (1975).

Bloom v. Illinois, supra, signaled a departure from the traditional approach to adjudicating criminal contempt. The Court's guidelines established in Bloom, which have been consistently followed and clarified since the issuance of the opinion, comprise the substance of this rule.

In Bloom the Court de-emphasized the long-standing distinction between so-called direct and indirect contempt, focusing instead on the issue of potential penalty. Beginning with the premise that criminal contempts are so similar to other criminal proceedings as to be in their practical— and constitutional— aspects indistinguishable, and following its decision in Duncan v. Louisiana, 391 U.S. 145 (1968), the Court held that while summary punishment of criminal contempt may be necessary to preserve the dignity and efficacy of the judicial process, those interests are outweighed by the need to provide the defendant with all the procedural safeguards deemed fundamental in our judicial system. The Court concluded that a defendant charged with a serious contempt, whether direct or indirect, is entitled to a full jury trial.

Subdivision (a). In Codispoti v. Pennsylvania, 418 U.S. 506 (1974), the Court stated that "where the necessity of circumstances warrants, a contemnor may be summarily tried . . . ." Id. at 514. The Court recognized, however, that where "there is no overriding necessity for instant action to preserve order . . . . [there is] no justification for dispensing with the ordinary rudiments of due process." Id. at 515. The present rule incorporates that principle: summary proceedings are available only when they are necessary to preserve order. Accord Sussman v. Commonwealth, Mass. Adv. Sh. (1978) 754, 758.

By limiting the use of summary disposition of contempts to those cases where the alleged contemptuous conduct was committed in the presence of the trial judge, subdivision (a)(1) conforms to the common law practice based on the direct-indirect contempt distinction and to practice under Fed. R. Crim. P. 42(a). One basis for the common law principle is that the judge cannot determine the facts surrounding an allegation of contempt without a hearing unless he personally viewed the contemptuous conduct.

Subdivision (a)(2) stems from the principle expressed in Taylor v. Hayes, 418 U.S. 488 (1974), that when the adjudication of contempt is delayed until after the contemptuous conduct has occurred, summary disposition is improper. Although in most cases the same principle would

apply when the punishment is delayed, the Supreme Court recognized that in some cases, particularly those involving lawyers, summary punishment is permissible when the punishment alone has been delayed.

Subdivision (a)(2) goes beyond the minimum constitutional requirements that must be afforded to contemnors. Taylor v. Hayes, supra, expressly allows the court to punish without a full scale trial, though it disallows summary disposition of contempts when the judgment of contempt is not entered contemporaneously with the commission of the contempt. Accordingly, under this rule, a trial is required in such situations. The rationale for such requirement is that where necessity does not demand immediate action, a contemnor is to have the same rights as other criminal defendants. See Commonwealth v. Sussman, Mass. Adv. Sh. (1978) 754, 758-59.

Courts have generally defined serious contempt to mean one for which in excess of six months' imprisonment may be imposed, Duncan, supra, or for which a fine or more than $500 may be levied, United States v. Polk, 438 F.2d 377 (6th Cir. 1971). The Supreme Court has not addressed the specific question whether and in what circumstances—if at all—"the imposition of a fine for criminal contempt, unaccompanied by imprisonment, may require a jury trial." Muniz v. Hoffman, 422 U.S. 454, 476 (1975). Muniz has been read narrowly so as to preserve the traditional standard of $500 as constituting serious contempt. Douglas v. First National Realty Corp., 543 F.2d 894 (D.C. Cir. 1976).

Subdivision (a)(3) reflects this demarcation between serious and petty offenses. Any contempt which the trial judge would punish by a sentence of at least three months cannot be tried summarily and must be tried before a jury if the contemnor so elects. See Mass. R. Crim. P. 45(a)-(b).

Codispoti v. Pennsylvania, supra, imposes a further restriction on the availability of summary proceedings that relates to the six-month rule. Where the adjudication of contempt is delayed until after trial and where there are at least two sentences imposed that are consecutive and cumulate more than six months, summary proceedings are not available. This is an interpretation of the six-month rule adopted by Bloom and subsequent cases as applied to consecutive sentences for contempt imposed at one trial. This limitation does not apply where the judgments of contempt are entered serially during the progress of the trial as the contemptuous conduct occurs. Codispoti v. Pennsylvania, supra at 513-15. Sentences will be aggregated for purposes of the six-month rule, however, where the citations for contempt occur during trial but imposition of sentences is delayed until the conclusion thereof. United States v. Prewitt, 553 F.2d 1082, 1087-90 (7th Cir. 1977). The foregoing principles, while fully applicable under this rule, are to be read in terms of three months as dictated by subdivision (a)(3).

Subdivision (b). This subdivision outlines the procedures to be followed in a summary adjudication of contempt. While these procedures go beyond the minimum requirements of due process set out in Taylor v. Hayes, they do comport with suggestions by the Supreme Court as to the proper procedure to be followed.

"Summary punishment always, and rightly, is regarded with dis-favor," Sacher v. United States, 343 U.S. 1, 8 (1952). Accord Taylor v. Hayes, supra, at 497-98; Groppi v. Leslie, 404 U.S. 496, 502-05(1972). Unless the contempt occurs in the presence of the judge and immediate

punishment is needed to prevent demoralization of the court's authority or to enforce lawful orders essential to prevent a breakdown of the proceedings, many of the due process safeguards available in criminal proceedings should apply to a contempt proceeding. Sussman v. Commonwealth, Mass. Adv. Sh. (1978) 754, 758. Except in cases of flagrant contemptuous conduct, the trial judge should not exercise the power of summary contempt in the absence of a prior warning as to the conduct which will place the offender in contempt. Sussman, supra at 759. If an adjudication of, and punishment for, contempt is carried out summarily, the contemnor is denied an opportunity to present facts in mitigation of the charge. See Groppi v. Leslie, supra, 503, 505. It is for this reason that a contemnor should in all cases be given notice and granted at least a summary opportunity to present evidence on his own behalf. An adequate opportunity to defend or explains one's conduct is a minimum requirement before imposition of punishment. Sussman, supra, at 762. As stated in the ABA Standards Relating to the Function of the Trial Judge, § 7.4, comment at 95 (Approved Draft, 1972):

Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, Ex parte Terry, 128 U.S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness, and is likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course.

The last sentence of subdivision (b) is intended to cover those "circumstances, particularly where the offender is a lawyer representing a client on trial . . . [where summary punishment] may be postponed until the conclusion of the proceedings." Taylor v. Hayes, supra at 498. See Sussman v. Commonwealth, supra at 762-63.

It should be recognized that the power to punish for contempt is to be used cautiously and is not an appropriate device to control every act of courtroom disrespect. This rule is intended to authorize summary punishment only for disruptive conduct that is willfully contemptuous and that has been preceded by a prior warning in all but the most flagrant violations. See ABA Standards Relating to the Function of the Trial Judge § 7.2, comment at 93 (Approved Draft, 1972); United States v. Wilson, 421 U.S, 309 (1975).

Subdivision (c). The elimination of the writ of error by Rule 30 necessitated a change in the method of review provided for in criminal contempt cases. Formerly, under G.L. c. 250, § 9, a sentence to punish for criminal contempt was a judgment in a criminal case which could be reexamined upon a writ of error. Hansen v. Commonwealth, 344 Mass. 214, 216 (1962); Dolan v. Commonwealth, 304 Mass. 325, 328 (1939). Review was limited to errors of law and matters of fact not heard and decided at the trial under review. Blankenburg v. Commonwealth, 260 Mass. 369, 376-77 (1927).

Subdivision (c) establishes the taking of an appeal as the sole means of review for criminal contempts. Review by appeal has already gained a foothold in Massachusetts practice for contempt findings against witnesses who have been previously granted immunity and have refused to testify. G.L. c. 233, § 20H. Under subdivision (c) review will be by the Appeals Court.

Rule 44: Contempt

(Applicable to District Court and Superior Court)

(a) Nature of the Proceedings. All criminal contempts not adjudicated pursuant to Rule 43 shall be prosecuted by means of complaint, unless the prosecutor elects to proceed by indictment. Except as otherwise provided by these rules, the case shall proceed as a criminal case in the court in which the contempt is alleged to have been committed.

(b) Special Provisions for District Court. The District Court shall have jurisdiction to try all contempts committed therein except those prosecuted by indictment. Whenever a contemnor asserts his right to a jury trial in District Court, the trial shall be held before a jury in District Court. The contemnor's only right of appeal shall be to the Appeals Court.

(c) Disqualification of the Judge. The contempt charges shall be heard by a judge other than the trial judge whenever the nature of the alleged contemptuous conduct is such as is likely to affect the trial judge's impartiality.

Reporter's Notes

Contempts that are not or cannot be tried summarily in accordance with Rule 43 must be tried under the provisions of Rule 44. Rule 44 carries the recent developments in the law of contempt to a logical conclusion by requiring all contempts not summarily tried to be prosecuted under the procedures established for the trial of other criminal offenses.

In any alleged contempt to be adjudicated pursuant to this rule, the defendant has the right to a jury trial. Bloom v. Illinois, 391 U.S. 194 (1968), adopted the standard established in Duncan v. Louisiana, 391 U.S. 145 (1968) for determining when the right to a jury trial accrues to a defendant and applied that standard to criminal contempt. Duncan accepted the established rule that maximum sentences of under six months denote petty offenses. It was established in Baldwin v. New York, 399 U.S. 66, 69 (1970), that authorized maximum punishment of greater than six months indicated a serious offense. Since the maximum punishment for contempt is often not regulated by statute, the determination of whether a particular contempt charge is a serious or petty offense is to be made with reference to the penalty actually imposed. See Bloom v. Illinois, supra at 211, Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974). Under Mass. R. Crim. P. 43(a)(3), that reference will be to whether the sentence exceeds three months' imprisonment or a fine of $500.

Initiation of prosecution by complaint is an historically recognized manner of bringing charges for indirect contempt in the Commonwealth. Dolan v. Commonwealth, 304 Mass. 325, 337 (1939). See generally the cases cited by the Court in Dolan for further similarities existing between prosecutions for indirect contempt and other criminal prosecutions.

One exception to the claim of similarity between a contempt prosecution under this rule and other criminal prosecutions should be noted: the right to indictment by grand jury, to which contemnors are not entitled to present, is not to be extended to them by interpreting this rule broadly. In ordinary criminal prosecutions, a defendant has the right to indictment for those

crimes punishable by a term in the state prison. Jones v. Robbins, 74 Mass. (8 Gray) 329, 350 (1857). General Laws c. 220, § 14, as interpreted by the Court in Hurley v. Commonwealth, 188 Mass. 443, 448 (1905), precludes contempt commitments other than to the "common jail." Since the maximum term of imprisonment in a jail or house of correction is set at two and one-half years by G.L. c. 279, § 23, and since no grand jury indictment is required to confine a defendant for that period of time (see Mass. R. Crim. P. 3, Complaint; Indictment), it is apparent that no right to prosecution by indictment exists in contempt cases. Federal case law is in accord on this point. Green v. United States, 356 U.S. 165, 183 (1958); United States v. Eichhorst, 544 F.2d 1383, 1386 (7th Cir. 1976); Mitchell v. Fiore, 470 F.2d 1149, 1153 (3rd Cir. 1972); United States v. Bukowski, 435 F.2d 1094, 1101 (7th Cir. 1970).

Rule 45: Removal of the Disruptive Defendant

(Applicable to District Court and Superior Court)

(a) Removal of Defendant. Upon the direction of the trial judge, a defendant may be removed from the courtroom during his trial when his conduct has become so disruptive that the trial cannot proceed in an orderly manner. Gagging or shackling may be employed if the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, he shall enter into the record of the case the reasons therefor. Whenever physical restraint of a defendant or witness occurs in the presence of the jury trying the case, or whenever the defendant is removed, the judge, at the request of the defendant, shall instruct the jury that such restraint or removal is not to be considered in assessing the proof and determining guilt.

(b) Defendant's Rights After Removal. A defendant once removed shall be required to be present in the court building while the trial is in progress. At the time of his removal he shall be advised that he has the right to be returned to the courtroom upon his request and assurances of good behavior. Notwithstanding the failure of a defendant to request to be returned to the courtroom, he shall be returned to the courtroom at appropriate intervals in the absence of the jury, and shall be advised in open court that he will be permitted to remain upon the giving of assurances of good behavior.

Reporter's Notes

Rule 45 is drawn from § 6.8 of the ABA Standards Relating to the Function of the Trial Judge (Approved Draft, 1972), but differs in that the rule requires that at the time of removal the defendant is to be informed of his right to return upon his request and assurance of good conduct. Section 4.1 of the ABA Standards Relating to Trial by Jury (Approved Draft, 1968) in part provides the basis of subdivision (a). See Fed. R. Crim. P. 43(b)(2); Rules of Criminal Procedure (U.L.A.) rule 713(b)(3) (1974).

This rule, in conjunction with Rules 43-44, Summary Contempt and Contempt, provides a means of dealing with obstreperous defendants. In many cases the measures provided by this rule may be viewed as less drastic than invocation of the contempt power to control the unruly defendant.

While the sixth and fourteenth amendments guarantee the right of a defendant to confront the witnesses against him in a state criminal proceeding, that right has been held by the Supreme Court to be less than absolute. In Snyder v. Massachusetts, 291 U.S. 97 (1934), the Court indicated that there was "[n]o doubt the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct." Id at 106. In Illinois v. Allen, 397 U.S. 337 (1970), a unanimous Court affirmed the principle that the sixth amendment right to confront witnesses can be forfeited.

Subdivision (a). The Allen Court recognized three methods of dealing with an obstreperous defendant as constitutionally permissible: (1) binding and gagging the defendant while present in the courtroom; (2) citing the defendant for contempt; or (3) removing the defendant from the courtroom until he promises to conduct himself properly. Id at 343-44.

While gagging, shackling and other unusual measures are obviously less offensive to the defendant's right to be present at trial than his removal, such measures are not without attendant difficulties:

These displays tend to create prejudice in the minds of the jury by suggesting that a defendant is a bad and dangerous person whose guilt may be virtually assumed; they may interfere with a defendant's thought processes and ease of communication with counsel; intrinsically they give affront to the dignity of the trial process.

Commonwealth v. Brown, 364 Mass. 471, 475 (1973) (Footnote omitted). While Brown dealt specifically with defendants who presented unusual security risks, the potential for prejudice to the unruly defendant is no less real, albeit mitigated perhaps by the fact that the jury will have observed the disruptive behavior and not presume guilt of the offense charged. In either case, "[w]hen special restraints are imposed, the judge's charge to the jury should seek to quell prejudice by reasoning and warning against it." Commonwealth v. Brown, supra at 476. Accord Commonwealth v. Cavanaugh, 371 Mass. 46, 58 (1977). See ABA Standards Relating to Trial by Jury § 4.1(c) (Approved Draft, 1968); ABA Standards Relating to the Function of the Trial Judge § 5.3(b)(ii) (Approved Draft, 1972).

In Commonwealth v. Senati, 3 Mass. App. Ct. 304 (1975), on facts similar to Illinois v. Allen, supra, the Appeals Court approved the practice of removing a defendant who refuses to observe standards of courtroom decorum. Section 6.8 of the ABA Standards Relating to the Function of the Trial Judge (Approved Draft, 1972) endorses this practice as preferable to gagging or shackling the disruptive defendant.

Whether the obstreperous defendant is restrained or removed,the trial judge is to state his reasons for such action on the record. See Commonwealth v. Brown, supra at 479; ABA Standards Relating to the Function of the Trial Judge § 5.3(b)(i) (Approved Draft,1972).

Subdivision (b). The defendant who has been removed from the courtroom is accorded certain rights by this subdivision. First, the defendant is to be kept present in the court building while his

trial is in progress. This is not intended to be read literally, but rather only to require that the defendant be kept in custody within reasonable proximity to the court, i.e., in a jail or police station adjacent to the courthouse.

Further, the defendant is to be given the opportunity of learning of the progress of his trial through his counsel at reasonable intervals. ABA Standards Relating to the Function of the Trial Judge § 6.8 (Approved Draft, 1972). Where feasible, the defendant should be provided with means to monitor the proceedings. See concurring opinion of Justice Brennan in Illinois v. Allen, 397 U.S. 337, 351 (1970).

Secondly, the defendant is to be advised at the time of his removal of his continuing right to return upon his request and assurance of good behavior. ABA Standards, supra.

Finally, and notwithstanding the defendant's failure to request return, he is to be returned to the courtroom periodically and advised that he will be permitted to remain upon the giving of assurances of good behavior. To the ABA Standards, supra, is added the provision that the defendant is to be returned with the jury not present.

Rule 46: Time

(Applicable to District Court and Superior Court)

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute or rule, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes any day appointed as a holiday by the President or the Congress of the United States or so designated by the laws of the Commonwealth.

(b) Enlargement. When by these rules or by a notice given thereunder or by order or rule of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if a request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (2) upon motion made after the expiration of the specified period to permit the act to be done where the failure to act was the result of excusable neglect; or (3) permit the act to be done by stipulation of the parties; but the court may not extend the time for taking any action under rules 25 and 29 except to the extent and under the conditions stated therein.

(c) For Motions, Affidavits in Superior Court. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served on all interested parties not

later than seven days prior to the hearing unless a different period is fixed by these rules or by order of the court. For cause shown, such an order may issue upon an ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. Opposing affidavits shall be served not later than one day before the hearing, unless the court permits them to be served at a later time.

Reporter's Notes

Rule 46 is drawn from and closely parallels Mass. R. Civ. P. 6. It is substantially the same as Rule 6 of the Federal Rules of Civil Procedure and Rule 45 of the Federal Rules of Criminal Procedure. This rule does not substantially alter prior Massachusetts practice.

Subdivision (a). Under the common law, Sundays were excluded from the calculation of a limited time period of seven days or less; if the period exceeded seven days, Sundays were included, even if the final day for the performance of an act fell upon a Sunday. 6 MASS. PRACTICE SERIES (Smith & Zobel) Reporter's Notes at 155 (1974). Like Mass. R. Civ. P. 6(a), this rule excludes Saturdays and legal holidays as well as Sundays from prescribed periods of less than seven days. It provides that a limited period shall not end on a Saturday, Sunday or legal holiday, but shall end on the next succeeding business day. See G.L. c. 4, § 9, which does not exclude Saturdays. Those legal holidays which shall be excluded are catalogued in G.L. c. 4, § 7, cl. 18 (as amended, St. 1978, c. 12).

An exception to the first sentence is found in the Case Management rule, which provides that in the computation of that rule's time limits, an excluded period shall include both the first and last days of the excludable act or event. Mass. R. Crim. P. 36(b)(3).

Uniform Rule 753 is also phrased in terms of a "designated period of time" and is intended to "not authorize automatic exclusion of the first day or of Saturdays, Sundays, or holidays in complying with provisions which require action 'promptly,' 'without unnecessary delay,' within a 'reasonable' time, or the like." Rules of Criminal Procedure (U.L.A.) rule 753(a) Comment (1974). Similar requirements prescribed by these rules or by court order are likewise not extended by the excludable days of this rule.

Subdivision (b). This subdivision grants the court discretion to relieve the parties from strict compliance with time requirements in three situations: first, upon request made before the expiration of an original period or a previously-extended period; secondly, upon motion made after the expiration of a period; and thirdly, upon agreement of the parties. In all three instances the party is entitled to relief "for cause shown." In the second situation, the failure to act must have been due to "excusable neglect." Because a motion must state with particularity the grounds on which it is based, Mass. R. Crim. P. 13(b), a bare assertion of excusable neglect without more is insufficient. See 6 MASS. PRACTICE SERIES, supra, comments § 6.4.

Neither the federal civil nor criminal rules expressly authorize enlargement by stipulation. While it is stated that under prior Massachusetts practice a stipulation as to enlargement ordinarily did not need court approval, 6 MASS. PRACTICE SERIES, supra, § 6.5, Mass. R. Civ. P. 6(b)(3) appears to require such approval. It is intended that under this rule the approval of the court is to be obtained.

A motion for a required finding of not guilty must be made at the close of the Commonwealth's or the defendant's case, Mass. R. Crim. P. 25(a). Under subdivision (b)(2) of that rule, the motion, if denied, can be renewed within five days after the jury is discharged. In neither case can the court enlarge the time within which the motion is to be made.

A motion to reduce or revoke a sentence is to be filed within sixty days after the imposition of the sentence and such time is not to be enlarged. Mass. R. Crim. P. 29(a).

Subdivision (c). It should be noted that the provisions that an affidavit in support of a motion must be served with the motion and that opposing affidavits are to be served at least one day before the hearing are applicable to pretrial motions under Mass. R. Crim. P. 13.

Rule 47: Special Magistrates

(Applicable to Superior Court)

The justices of the Superior Court may appoint special magistrates to preside over criminal proceedings in the Superior Court. Such special magistrates shall have the powers to preside at arraignments, to set bail, to assign counsel, to supervise pretrial conferences, to mark up pretrial motions for hearing, to make findings and report those findings and other issues to the presiding justice or Administrative Justice, and to perform such other duties as may be authorized by order of the Superior Court. The doings of special magistrates shall be endorsed upon the record of the case. Special magistrates shall be compensated in the same manner as is provided by the General Laws for the compensation of masters in civil cases.

Reporter's Notes

Under prior law, magistrates served primarily as bail commissioners, G.L. c. 262, §§ 23-24. Sections 62B and 62C of chapter 221 of the General Laws, inserted by St. 1978, c. 478, § 250, established the office of Magistrate in all Departments of the Trial Court and gave to that official certain quasi-judicial powers. This rule is not intended to expand the powers which such statutory Trial Court Magistrates may exercise, but to create the new and separate position of Special Magistrate in the Superior Court Department.

Special Magistrates in criminal cases shall have the authority to assign counsel (Mass. R. Crim. P. 8), set bail, and preside at arraignment (Mass. R. Crim. P. 7), and their duties shall include the supervision of pretrial conferences (Mass. R. Crim. P. 11) and the marking up of pretrial motions for hearing (Mass. R. Crim. P. 13). The rule is broad enough to permit assignment of some fact finding functions to Special Magistrates, although the exact dimension of those functions is left to definition by appropriate order of the Administrative Justice of the Superior Court Department. In this respect the Special Magistrate will differ little from masters as appointed by the Supreme Judicial Court under long-standing practice, especially in habeas corpus proceedings.

It is intended that Special Magistrates under this rule, because of the nature of their quasi-judicial responsibilities, be at the least attorneys admitted to practice before the bar and preferably that

they be retired judges. Special Magistrates are to be compensated as are masters in civil practice. G.L. c. 221, § 55 (as amended, St. 1978, c. 478, § 247); Mass. R. Civ. P. 53(a), Superior Court Rule 49(3) (1974).

While similar to federal magistrates, the office of Special Magistrate under this rule does not carry with it such broad powers. The federal officer can conduct trials for minor offenses and sentence those who are found guilty. 18 U.S.C. §§ 3401-02. Before a federal magistrate can conduct a trial, however, the defendant must consent in writing and specifically waive both a trial before a District Court judge and the right to trial by jury, subject to enumerated qualifications. Under this rule the defendant is to have no objection to proceeding before a Special Magistrate since the functions to be performed by the office of Special Magistrate are administrative rather than adjudicatory.

Rule 48: Sanctions

(Applicable to District Court and Superior Court)

A wilful violation by counsel of the provisions of these rules or of an order issued pursuant to these rules shall subject counsel to such sanctions as the court shall deem appropriate, including citation for contempt or the imposition of costs or a fine.

Reporter's Notes

This rule is intended to supplement rather than supplant the provisions of prior law relative to the power of the courts to regulate the conduct of attorneys who practice therein and to discipline those whose actions fall short of accepted standards. The rule applies equally to attorneys and to defendants who appear pro se.

In addition to the sanctions of citations for contempt and the imposition of costs or a fine, the rule contemplates referral to the Board of Bar Overseers where appropriate.

See e.g., Supreme Judicial Court Rule 3:22A, Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer (Feb. 14, 1979); ABA Standards Relating to the Prosecution Function § 1.1 (Approved Draft, 1971); ABA Standards Relating to the Defense Function § 1.1 Approved Draft, 1971