

EXPLANATION FOR PROPOSED RULE 14(b)(2)(C)

Background

When a criminal defendant intends to rely on his or her own statements to raise a mental-health issue, Rule 14(b)(2)(B) authorizes the judge to order the defendant to undergo a mental examination by a court-appointed examiner. In *Commonwealth v. Hanright*, 465 Mass. 639, 648 (2013), the Supreme Judicial Court held that such an order requires the defendant to disclose to the court-appointed examiner those records necessary to conduct such an examination. Observing that “access to the defendant’s records are part and parcel of a rule 14(b)(2)(B) examination,” *id.* at 645, the Court concluded that full access to these records by both the court-appointed and defendant’s experts is required out of fairness to the parties and in the interest of “produc[ing] a report that describes the defendant’s mental health status at the time of the offense with the greatest accuracy.” *Id.* at 644.

As a temporary rule governing what must be produced, the Court held that the defendant must provide the court-appointed examiner with the same records provided to or considered by the defendant’s expert. However, in search of a more comprehensive rule, the Court asked its Standing Advisory Committee on the Rules of Criminal Procedure (the Committee):

to consider the scope of requisite disclosure and to propose a mechanism whereby both the defense expert and the rule 14(b)(2) examiner have an equal opportunity to access the records they deem necessary to conduct a psychiatric evaluation, while preserving a defendant’s ability to object to such disclosure.

Id. at 648.

In fulfilling the Court’s request, the Committee began by interviewing six recognized experts in forensic mental-health examination (five psychiatrists and one psychologist), the six evenly split between those who typically are retained by the defense and those who typically are retained by the prosecution or appointed by the court. These six separate interviews revealed substantial agreement among the experts concerning the use of a defendant’s records in conducting a forensic examination, including the following:

1. A reputable, competent, mental-health professional’s forensic examination of a criminal defendant at the request of the prosecution or the court is no different in either methodological approach or process than one conducted on behalf of the defendant. Each is a full forensic evaluation that may take hours and involve several interviews with the defendant.
2. Whatever records and materials are reviewed as part of a forensic examination by one of the forensic examiners should be equally available to the other examiner.
3. As an abstract matter, the scope of potentially useful records and collateral sources in a forensic examination is virtually unlimited. While such records would almost

certainly include the defendant's prior psychiatric, psychological, and medical history, *see, e.g.*, American Academy of Psychiatry and Law, *Practice Guidelines for the Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense*, 30 J. Amer. Acad. Law (No. 2, 2002) (Supp.) (identifying nine "common types of collateral information," including psychiatric, substance abuse, and medical records, that may assist the examiner in understanding the defendant's psychiatric symptoms and diagnosis), the utility of any specific record or source in a particular examination cannot ordinarily be assessed prior to the forensic examiner's initial consideration of the case.

4. Mental health professionals conducting forensic examinations have experienced the need for records beyond those provided to them, records that they considered necessary to consider in order to complete a professionally competent report.

5. Persons who are not mental health professionals are not qualified to determine the records necessary to complete a professionally competent evaluation.

After studying the matter, including the information and perspective provided by the forensic examiners interviewed, the Committee unanimously recommends that proposed Rule 14(b)(2)(C) be adopted. If proposed Rule 14(b)(2)(C) is adopted, current Rule 14(b)(2)(C), *Additional Discovery*, must be re-numbered, becoming Rule 14(b)(2)(D), *Additional Discovery*.

Summary of Rule 14(b)(2)(C)

Proposed Rule 14(b)(2)(C), *Discovery for the Purpose of a Court-Ordered Examination under Rule 14(b)(2)(B)*, applies to the records of a criminal defendant who is ordered by a judge to submit to a forensic examination concerning his or her mental condition. The rule has three purposes. First, the rule ensures that the forensic experts conducting a court-ordered forensic examination – both the court-appointed examiner and the defendant's expert – have full access to the records judged necessary to the competent performance of the examination. Second, the rule provides for a process that fairly and efficiently resolves disputes concerning these disclosure requirements. Third, the rule protects the rights of the parties, particularly the defendant's right to avoid compelled self-incrimination through the disclosures.

Rule 14(b)(2)(C)(i) sets out the defendant's disclosure obligation. The rule requires that, after the judge orders the examination, the defendant must disclose to the court-appointed examiner all records provided to, considered by, or generated by the defendant's expert, including any physical, psychiatric, and psychological tests conducted by the defendant's expert. Requiring this breadth of disclosure at the outset of the court-ordered examination not only ensures that the court-appointed examiner will have equal access to all records which the defendant's expert believes to be pertinent, but also results in the efficiency of a reliable, initial source to identify and make available those records.

The fact that the defendant's expert must disclose test results or other records that he or she generated during the defense examination works no unfairness on the defendant. Such records will ultimately be available to both parties once the experts' reports are released under Rule 14(b)(2)(B)(iii), and until that time the records remain protected under Rule 14(b)(2)(B), available only to the court-appointed examiner. And, as noted below, upon completion of the court-ordered examination but before the experts' final written reports are filed, the court-appointed examiner has a reciprocal obligation to disclose to the defendant any records, including test results, that the examiner generated in the court-ordered examination but has not yet disclosed.

Rule 14(b)(2)(C)(ii) provides for the procedures by which the court-appointed examiner may seek additional records and by which the defendant may object to any such additional requests. At some point after reviewing the records initially produced by the defendant or beginning the examination of the defendant, the court-appointed examiner might learn of a record that he or she has yet to see but believes exists and is pertinent, but cannot be obtained from a third party on a voluntary basis. The examiner can request production of the record by completing and filing a prescribed form under seal with the court, identifying the desired record and stating the reason for its request. The court must issue a copy of the request to the defendant, and the defendant has 30 days in which to object in writing. If the defendant objects to the request, the judge may either hold an ex parte hearing on the request or pass upon it based on the papers. If the judge grants any part of the request, the clerk must subpoena those records to which the judge has allowed the court-appointed examiner access. When the records arrive, the clerk must maintain them under seal, where they can be examined and copied by the court-appointed examiner and defendant. While the court-appointed examiner can inform the prosecutor of the record request, he or she cannot inform the prosecutor of its contents.

Rule 14(b)(2)(C)(iii) completes the reciprocity of the record disclosure. Under the rule, once the court-ordered examination is complete, the court-appointed examiner must make available to the defendant all records, including any physical, psychiatric, and psychological tests, considered or generated by the examiner but not previously disclosed to the defendant under Rule 14(b)(2)(C)(i) or (ii).

If, in spite of Rule 14(b)(2)(C), there is a demonstrated necessity for additional discovery, new Rule 14(b)(2)(D), *Additional Discovery*, is available. This extant rule covering extraordinary discovery relating to the defendant's mental condition remains intact but must be renumbered, becoming Rule 14(b)(2)(D), *Additional Discovery*, to allow room for proposed Rule 14(b)(2)(C).