

PROPOSED REPORTER'S NOTES RULE 14(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 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 court-appointed examiner and the defendant's expert – must be given equal access to the records deemed necessary to conduct an effective forensic examination and to produce a competent report. The rule achieves this result, without involving the prosecutor, through a reciprocal discovery process that makes available to each expert the records and test results considered and/or generated by the other.

By ensuring that the experts have access to a common set of records, the rule advances the reliability of the examinations and the ensuing reports as well as the efficiency with which they can be completed. The fact that the rule mandates disclosure of records, including test results, generated by the experts during the course of their respective examinations works no unfair advantage to either since the obligation is mutual, the data in those records will not change, and the records themselves will ultimately be released with the final reports under Rule 14(b)(2)(B)(iii). Finally, the rule provides for a process by which the court-appointed examiner can seek access to records beyond those which the defendant initially provided and by which disputes concerning the mandated disclosure can be fairly and efficiently resolved, all without involving the prosecutor, thus protecting the defendant's rights.

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

Rule 14(b)(2)(C)(i) outlines the defendant's disclosure obligation, requiring that the defendant make available to the court-appointed examiner three categories of records: (a) those that the defendant provided to the defendant's expert, (b) those that were considered by the defendant's expert in examining the defendant, and (c) those generated by the defendant's expert, including any physical, psychiatric, and psychological test(s) conducted by the defendant's expert. Disclosure is required as soon as the judge appoints the examiner and the records are available, thus ensuring that, from the outset of the court-ordered examination, the court-appointed examiner has access to all records relied on by the defendant's expert. Similarly, Rule 14(b)(2)(C)(iii), discussed below, requires court-appointed examiners reciprocally to disclose to the defendant any records that the court-appointed expert considered or generated in the court-ordered examination, including test results.

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

This subsection anticipates the possibility that the court-appointed examiner will learn of additional materials that he or she believes necessary to conducting a professionally competent examination. For example, a record provided by the defendant might refer to an earlier hospitalization of the defendant suggesting that tests were likely administered for which the defense expert did not have records but which, in the court-appointed examiner's judgment, must be reviewed. Rule 14(b)(2)(C)(ii) provides for a procedure by which the court-appointed examiner can file with the court a prescribed form under seal identifying the requested records and stating the reason(s) for the request. While the examiner may inform the prosecutor of such a request, the examiner may not tell the prosecutor of 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, who has 30 days to file in writing any 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. If the judge grants any part of the court-appointed 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 court-appointed examiner and the defendant of the records' availability for examination and copying. Regardless of whether the subpoenaed records are copied, the clerk's office must maintain them under seal.

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

As noted above, once the court-appointed examiner completes his or her examination of the defendant, the examiner must disclose to the defendant all records – including any tests – that the examiner considered or generated in conducting the examination but which have not been made available to the defendant. This ensures full reciprocity between the parties in the exchange of records, with the result that both the court-appointed examiner and the defendant's expert will have full access to the same records in completing and filing their respective reports.