

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 ("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.

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

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.