[REVISED RULE 1]

REPORTERS' NOTES

(Revised, 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 3– COMPLAINT AND INDICTMENT; WAIVER OF INDICTMENT
REPORTERS' NOTES

(Revised 2004)

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 DEFENDANT'S 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).

(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 prosecutor's 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 prosecutor's 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.

(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
REPORTERS' NOTES

(Revised 2004)

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, 415 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-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 person's 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 5 – THE GRAND JURY
REPORTERS' NOTES
(Revised 2004)

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 US 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).

[REVISED RULE 7]

REPORTERS' NOTES

(Revised, 2004)

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-by-case 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 non-party 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.

[REVISED RULE 11]

REPORTERS' NOTES

(Revised, 2004)

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 sec. 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
REPORTERS' NOTES
(Revised 2004)

Although analogous to Fed. R. Crim. P. 11, in its original form in 1979 this rule was drawn from a number of sources. *See, e.g.,* A.B.A. Standards Relating to Pleas of Guilty (Approved Draft, 1968); A.L.I. Model Code of Pre-Arraignment Procedure §§ 350.1--.9 (POD 1975); National Advisory Commission on Criminal Justice Standards & Goals, Courts, Standards 3.1 *et seq.* (1973); President's Commission on Law Enforcement & Administration of Justice, Task Force Report: The Courts 4--13 (1967). The rule was amended in 1987 to remove the option, contained in original subdivision (c)(2)(B), which allowed a judge to sentence a defendant more harshly than the terms of a prosecutor's sentence recommendation without giving the defendant an opportunity to withdraw the plea. In 2004, the rule was further amended, retaining its basic structure but bringing the details of the process up to date, in light of the abolition of trial de novo and other developments in the law.

As the United States Supreme Court has observed:

Whatever may be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned.

Blackledge v. Allison, 431 U.S. 63, 71 (1977). *Accord*, Bordenkircher v. Hayes, 434 U.S. 357, 361--62 (1978). Rule 12 is intended to guarantee the proper administration of the guilty plea and plea bargaining process.

The proffer by a defendant of a guilty plea is a significant step in the criminal process. It represents a decision by the defendant not to put the Commonwealth to the test of proving his or her guilt beyond a reasonable doubt. Plea bargaining, of course, flows from the "mutuality of advantage" to defendants and prosecutors, each with their own reasons for wanting to avoid trial, Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978), but the Commonwealth and the public have an interest in promoting fairness by insuring that each plea is an accurate reflection of guilt and a fair termination of criminal proceedings against a defendant. Rule 12 is intended to promote attainment of those goals.

Subdivision (a).

(a)(1). This subdivision is adopted from A.B.A. Standards Relating to Pleas of Guilty § 1.1 (Approved Draft, 1968), which substantially accords with Fed. R. Crim. P. 11(a)--(b).

Under criminal practice prior to the adoption of rule 12, former G.L. c 227, § 47A (St 1978, c 478, § 298) provided that the defendant could plead not guilty, guilty, or nolo contendere. Rule 12 preserves these options.

The Rule does not establish the precise words a defendant must use in order to plead guilty. While the absence of the actual phrase "I plead guilty" or the word "guilty" is not sufficient by itself to invalidate a purported guilty plea, *see* Commonwealth v. Cavanaugh, 12 Mass. App. Ct. 543 (1981), in order to avoid confusion, a judge should clarify the intent of any defendant who does not use clear language to identify a desire to enter a guilty plea. Stipulations by the defendant to the truth of facts that are conclusive of guilt are the functional equivalent of a guilty plea and fall within the confines of Rule 12. *See* Commonwealth v. Hill, 20 Mass. App. Ct. 130 (1985). On the other hand, if all the defendant stipulates to is that the Commonwealth's witnesses would testify in the manner described by the prosecutor, then the defendant's act would not be the complete waiver that a guilty plea entails, *see* Commonwealth v. Garcia, 23 Mass App 259, 265 (1986).

The requirements of this subdivision are to insure that the fact that the plea was the informed and voluntary act of the defendant appears upon a contemporaneous record of the proceeding, thus reducing the likelihood of a post-conviction attack on the validity of a plea of guilty or nolo contendere. *See, e.g.*, Commonwealth v Foster, 368 Mass 100 (1975).

Therefore, except where a corporation is the defendant, or where the defendant is permitted by the General Laws to pay a fine by mail or by appearing before a clerk personally or by authorized agent, the defendant personally must plead if the plea is to be guilty or nolo contendere. The defendant must also personally plead not guilty except where his or her appearance is excused pursuant to Mass. R. Crim. P. 7(a)(2) and the court enters the plea on the defendant's behalf. Mass. R. Crim. P. 7(d)(2).

The requirement that the plea be accepted in open court is based upon G.L. c. 263 § 6, and furthers the goal that it be free from the suspicion of coercion and that it is a knowing and intelligent waiver of the defendant's right to a trial. Thus, all pleas should be entered under the scrutiny of the judge in formal proceedings and be recorded, whether by stenographic or electronic means.

(a)(2). An admission to sufficient facts to warrant a finding of guilty is a procedural device that had its genesis in the trial de novo system. Rather than entering a guilty plea, which would have had the consequence of limiting the de novo trial to the issue of the sentence, a defendant in the first tier of the de novo system could admit to sufficient facts and preserve his option of a full trial de novo. Admissions to

sufficient facts have proved useful for another reason however. They offer a way to allow the defendant's case to be continued without a guilty finding, something that a traditional guilty plea is ill suited to accomplish. As the Supreme Judicial Court has recognized, a continuance without a finding (cwof) is a procedure that often serves the best interests of both the Commonwealth and the defendant. *See* Commonwealth v. Duquette, 386 Mass. 834, 840 (1982). Admissions to sufficient facts and cwofs were common at both levels of the trial de novo system in the District Courts. After the abolition of trial de novo, they continue to be prevalent in the District Court and Juvenile systems. *See* G.L. c 278 §18 (allowing a District Court defendant to request that a case be continued without a finding and requiring that an admission to sufficient facts be treated as the equivalent of a guilty plea for purposes of the "defense capped plea" procedure discussed *infra* in subsection (c)(2)(B)).

If a defendant desires to admit to sufficient facts, the judge should interrogate the defendant personally to insure that the defendant understands the nature and consequences of such an admission. In the years since Rule 12 was originally promulgated, the Supreme Judicial Court has held that an offer to admit to sufficient facts triggers essentially the same safeguards required when a defendant offers to plead guilty. *See* Commonwealth v. Lewis, 399 Mass. 761, 763 (1987); Commonwealth v. Duquette, 386 Mass. 834, 838 (1982).

(a)(3). Requiring the permission of the court to enter a guilty plea or plea of nolo contendere accords with the practice that prevailed prior to the adoption of Rule 12. By court rule, no defendant was permitted to plead guilty or nolo contendere to a complaint for which a sentence of imprisonment may be imposed unless the judge was fully satisfied that certain conditions had been met. *See* District Court Initial Rules of Criminal Procedure 4 (1971); Rules of the Mun. Ct. for the City of Boston Sitting for Criminal Business 4 (1971).

A defendant does not have a constitutional right to have a guilty plea accepted by the court, *see* North Carolina v. Alford, 400 U.S. 25, 38 n. 11 (1970); Commonwealth v. Dilone, 385 Mass. 281 (1982); Commonwealth v. Kelliher, 28 Mass. App. Ct. 915 (1989). An admission to sufficient facts is very much like an *Alford* plea or a plea of nolo contendere, in that the defendant does not explicitly admit guilt. The same considerations that may inform a judge's decision to refuse to accept that latter two pleas apply equally in the case of the former.

A judge may refuse to accept a guilty plea, admission to sufficient facts, or plea of nolo contendere for a variety of reasons. So long as the judge's decision is not arbitrary or based on an impermissible factor, the sound exercise of discretion supports a decision to refuse to accept a plea. *See* Rossman, Guilty Pleas, 2 Criminal Law Advocacy, ¶ 8.04(3)(a). Among the common reasons to refuse to accept plea are: the plea is involuntary; the defendant does not understand the nature of the charge [c] [5] [A], *infra* or the consequences of the plea [c] [3], *infra*; there is no factual basis for the plea [c] [5] [a], *infra*; or there is a factual dispute that should be litigated at trial.

Subdivision (b). Section (e)(1)--(5) of Federal Rule of Criminal Procedure 11 is the prototype for this subdivision.

(b)(1). This subdivision outlines the scope of agreements as to concessions or other actions which the defendant and the prosecution may arrive at prior to plea proceedings before a judge. It must be emphasized that these negotiations are to be between defense counsel, or the defendant in an appropriate case, and the prosecution. Judges should not "participate as active negotiators in plea bargaining discussions," Commonwealth v. Gordon, 410 Mass. 498, 501 n. 3 (1991).

When a judge takes part in plea negotiations, it raises several troubling possibilities:

[it] 1) can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to the trial before this judge; (2) . . . makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) . . . is inconsistent with the theory behind the use of the presentence investigation report; and (4) the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent.

Commonwealth v. Damiano, 14 Mass. App. Ct. 615, 618 n.7 (1982) (quoting § 3.3(a) of the A.B.A. Standards *supra*). For the type of participation that a judge should avoid, *see* Commonwealth v. Carter 50 Mass App 902 (2000) (judge's statement at side bar that if defendant proceeded with trial and was found guilty, he would impose sentence of 18-20 years, but that if defendant pleaded guilty, sentence would be six years to six years and one day was coercive, making defendant's guilty plea involuntary).

The list of actions set out in this subsection that a prosecutor may include in a plea agreement is not exhaustive and allows for considerable flexibility. For example, the parties may agree to a joint sentence recommendation or to present disparate positions, and may propose that the agreement either does not bind the judge or to one that allows the defendant to withdraw the plea if the judge does not agree. Some of the concessions a prosecutor may make in plea negotiations relate to action over which the judge has control, such as the imposition of a particular sentence. Other concessions, as in an agreement not to bring additional charges, are totally within the purview of the prosecutor. Since the doctrine of separation of powers gives the prosecutor the authority to decide what criminal charge the Commonwealth should bring against a defendant, a judge may not accept a guilty plea to a lesser included offense over the prosecutor's objection. *See* Commonwealth v. Gordon, 410 Mass. 498, 503 (1991).

(b)(2). Early and full disclosure of a plea arrangement reduces the risk of an unfair agreement--unfair to the public because of an unwarranted concession by an overburdened prosecutor anxious to avoid trial, or unfair to the defendant because the concession is either illusory, or so irresistible in light of the inevitable risks of trial as to induce an innocent defendant to plead guilty. *E.g.,* Jones v. United States, 423 F.2d 252, 255 (9th Cir 1970). Disclosure of the terms of a plea agreement also will allow the court to monitor the prosecutor's performance. In addition, placing the agreement on the record will avoid disputes that may arise in an attack on the validity of the guilty plea. For these reasons and to expedite the proceedings, this subdivision requires that the court be informed at the outset of the existence of any agreement. If upon inquiry under subdivision (c)(1), *infra*, the defendant denies any such agreement, it is incumbent upon the prosecutor to notify the court if an agreement in fact has been made. For an example of the difficulties that can arise when the parties do not disclose the terms of a plea agreement, *see* Commonwealth v. Johnson, 11 Mass. App. Ct. 835 (1981).

A judge does not improperly participate in plea negotiations simply by having the parties disclose the substance of a plea arrangement pursuant to this subdivision.

Subdivision (c).

Subdivision (c)(1) is a product of Santobello v. New York, 404 U.S. 257 (1971), where it was held that:

> when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Id. at 262. The Court stated further that the adjudicative element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances and if a plea is induced by promises, their essence must in some way be known. 404 U.S. 261, 262.

If upon inquiry the defendant replies that no promises have been made, the judge should instruct the defendant that any promises relating to the imposition of sentence are in no way binding on the court. *See* Subdivisions (b)(1)--(2), *supra.* This is because defendants are often loathe to disclose such promises, although it is believed that the increased acceptability of the plea arrangement procedure of this rule will obviate such difficulties.

The effect of such an instruction will depend on the facts of each case, but in no case can it cure the prejudice resulting from a broken promise.

The words of the Supreme Court as to the binding character of defense-prosecution agreements deserve repetition:

> when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled.

Santobello v. New York, 404 U.S. 257, 262 (1971). This accords with established doctrine in the Commonwealth long before the adoption of Rule 12. The Supreme Judicial Court, in 1899, stated that:

> When . . . promises are made by the public prosecutor or with his authority, the court will see that due regard is paid to them, and that the public faith which has been pledged by him is duly kept.

Commonwealth v. St. John, 173 Mass. 566, 569 (1899). *See also,* Commonwealth v. Benton, 356 Mass. 477 (1969); Commonwealth v. Harris, 364 Mass. 236, 238 (1973); Commonwealth v. Santiago, 394 Mass. 25 (1985); Commonwealth v. Parzyck, 41 Mass. App. Ct. 195 (1996).

Whether a plea bargain actually exists that obligates the prosecutor to perform a promise upon which the plea is contingent depends on an objective evaluation of the underlying circumstances that led to the plea. *See* Blaikie v. District Attorney for Suffolk County, 375 Mass. 613, 616 n. 2 (1978) (the prosecutor's subjective understanding of the bargain is irrelevant); Commonwealth v. Santiago, 394 Mass. 25, 28 (1985) ("The touchstone for determining whether a defendant has been improperly denied the advantages he expected from a plea bargain is whether that defendant has reasonable grounds for reliance on his interpretation of the prosecutor's promise."); Rossman, Guilty Pleas, 2 Criminal Law Advocacy, ¶7.05(1) (subjective impressions alone never entitle the defendant to the benefit of an illusory agreement).

If the court determines that a plea agreement existed, and that the defendant has fulfilled his or her part of the bargain, the defendant is entitled to the benefit of the prosecutor's performance of the countervailing promise. If the Commonwealth seeks to avoid performance on the ground that the defendant has not lived up to the terms of the agreement, then the prosecutor bears the burden of proof on this issue. *See* Doe v. District Attorney for Plymouth Dist., 29 Mass. App. Ct. 671, 677 n.6 (1991). In the usual course of events, all the defendant need do to fulfill his or her obligation under a plea agreement is to offer a guilty plea. However, the right to enforce a plea agreement may arise beforehand, if the defendant has relied to his or her detriment on a prosecutor's promise. *See id.* at 674 ("concerns about fairness which underlie the requirement that the government abide by its agreements are solidly engaged once an accused person has

relied to his detriment upon a plea agreement, even if that occurs before entry of a guilty plea.") *Compare* Blaikie v. District Attorney for Suffolk County, 375 Mass. 613, 618 (1978) (Specific performance is in no sense mandated where no guilty plea has been entered, and the defendant's position has not been adversely affected).

The purposes of subdivision (c)(1) are fourfold. First, airing plea agreements in open court enhances public confidence in the administration of justice. *E.g.*, Jones v. United States, 423 F.2d 252, 255 (9th Cir 1970). Secondly, disclosure of prosecutorial promises is the best way to test the voluntariness of the plea. By testing the strength of the inducement, the court obtains the best available evidence of its effect upon the defendant. Thirdly, this helps to implement the "factual basis" requirement of subdivision (c)(5)(A), for promises that offer unusual leniency to a defendant are suspect. Finally, this requirement will help to uncover promises that are by their nature improper and thus help to eliminate whatever incentive the prosecution might have to offer improper inducements.

Pursuant to this subdivision and subdivision (b)(2), *supra*, the prosecutor and defense counsel have the duty to come forward and disclose the existence and terms of a plea arrangement if the defendant balks at his opportunity to do so (even if the court does not specifically question the prosecutor or defense counsel on this issue). *See* Commonwealth v. Santon, 2 Mass. App. Ct. 614 (1974). This is important practically because often the defendant will not fully disclose the terms of the arrangement. It is important legally because the prosecutor and defense counsel should inform the court whenever they are aware that testimony offered in court is not in full accord with the truth as they know it. *See* Supreme Judicial Court Rule 3:07, MA Rules of Pro. Conduct, R. 3.3

(c)(2). Under subdivision (c)(2)(A) the judge may inform the defendant that the court is disposed to accept the prosecutor's sentence recommendation, pending the outcome of the hearing required by subdivision (c)(5), and that the judge will not exceed that recommendation without giving the defendant an opportunity to withdraw the plea. As originally promulgated, subdivision (c)(2)(b) allowed the judge an alternative course of action, indicating that the court did not intend to entertain or consider any recommendation, in which event the judge's sentencing discretion would be unrestricted. In 1987, this provision was eliminated from the Rule. The effect of the amendment was to provide defendants pleading guilty pursuant to a sentencing bargain more certainty about their fate.

Prior to the 1987 amendment, a judge could force a defendant who chose to plead guilty on the strength of a plea agreement specifying that he or she should receive a particular sentence to "plead in the dark." If the judge took advantage of option (B) of the original subsection, he or she could categorically refuse to tell a defendant who entered a negotiated plea whether the court would abide by the recommendation or not. Such a judge forced the defendant to bear the risk of waiving the right to trial and receiving nothing in return. After 1987, defendants entering plea agreements based on a joint sentence recommendation knew where they stood prior to irrevocably waiving their right to a trial.

In 2004, this subsection was amended to add new subdivision (c)(2)(B), to reflect the "defense capped plea" procedure provided for by statute in the District and Juvenile Courts. Part of the legislation that abolished the trial de novo system, G.L. c. 278 §18, gave defendants in District Court who did not reach an agreement with the prosecutor the right to offer a guilty plea or admission to sufficient facts contingent upon the judge's accepting any disposition of the case within the court's jurisdiction. The new subdivision (c)(2)(B) reflects this practice. The defense capped plea procedure applies in all District,

Municipal and Juvenile courts. *See* G.L. ch. 119, § 55B. Neither Rule 12 nor G.L. c. 278 §18 establish how many times a defendant may tender a defense capped plea. Individual judges are free to formulate their own policy on this issue as the needs of their particular courts dictate. A District or Juvenile Court judge has the power to accept a proposed disposition under this procedure even if it entails continuing the case without a finding over the objection of the prosecutor. Although ordinarily the separation of powers doctrine prevents a judge from foreclosing the prosecution's effort to conclude a case with either a conviction or acquittal on the original charge, the legislature's specific sanction of the cwof option in the defense capped plea procedure legitimates it. *Compare* Commonwealth v. Pyles, 423 Mass. 717 (1996) (grant of authority by G.L. c. 278 § 18 specifically gives District Court judges authority to continue a case without a finding over the objection of the prosecutor) *with* Commonwealth v. Cheney, 440 Mass. 568 (2003) (Superior Court judge lacks power to dismiss case in the interest of justice over the objection of the prosecutor as this procedure is only available under G.L. c. 278 § 18 which applies only to District and Juvenile Courts); Commonwealth v. Tim T., 437 Mass 592 (2002) (without statutory authority akin to G.L. c. 278 § 18, Juvenile Court judge lacks power to place defendant on pretrial probation over the objection of the prosecutor). However, if a judge does accept the defendant's proposal to continue a case without a finding over the prosecutor's objection, the record should reflect the reasons for the conclusion that this action is in the best interests of justice. *See Pyles, supra,* at 723.

If the defendant has offered a plea or admission under either subdivision (c)(2)(A) or (c)(2)(B), the judge may not impose a sentence harsher than the one upon which the defendant's action is predicated. Judges should pay careful attention to dispositions involving probationary terms or a suspended sentence to ensure that they conform to the legitimate sentence expectation of the defendant. *See e.g.,* Commonwealth v. Glines, 40 Mass. App. Ct. 95 (1996) (where District Court judge imposed a sentence of probation with a suspended term of five years, it was more severe than the defendant's request for probation with 2 1/2 years suspended); Commonwealth v. Barber, 37 Mass. App. Ct. 599 (1994) (where pursuant to a plea agreement, prosecutor recommended the defendant receive a 12-15 year sentence concurrent with other sentences the defendant received, and the judge imposed a suspended sentence of 12-15 years, consecutive to the other sentences the defendant received, and placed the defendant on probation for two years, the judge exceeded the terms of the prosecutor's recommendation).

(c)(3). This subdivision was originally patterned after Fed. R. Crim. P. 11(c)--(d). In addition, it drew upon District Court Initial R. Crim. P. 4 (1971); Sections 1.4 and 1.5 of the ABA Standards Relating to Pleas of Guilty (Approved Draft, 1968); A.B.A. Standards Relating to the Function of the Trial Judge § 4.2 (Approved Draft, 1972); Rules of Criminal Procedure (U.L.A.) rule 444(b) (1974); A.L.I. Model Code of Pre-Arraignment Procedure § 350.4 (POD 1975); and the National Advisory Commission on Criminal Justice Standards &. Goals, Courts, standard 3.7 (1973).

In 2004, this subdivision was amended to eliminate a provision allowing defense counsel to conduct the colloquy with the defendant. The Supreme Judicial Court has disapproved of defense counsel conducting guilty plea colloquies, as far back as Commonwealth v. Morrow, 363 Mass. 601 (1973) ("the spontaneity and flexibility of the dialogue, which supports a conclusion of voluntariness, can best be achieved where the judge asks the questions. This also avoids even the appearance that the colloquy is but a prearranged script. Therefore, we think it would be better practice for the judge to ask the questions.") By statute, defense counsel cannot conduct the part of the colloquy dealing with warnings of immigration consequences, *see* Commonwealth v. Villalobos, 437 Mass. 797 (2002).

The responsibility for conducting a meaningful colloquy with the defendant properly rests on the judge's shoulders. This requires "a continuing effort on the part of trial judges, with the help of counsel, so to direct their questions *as to make them a real probe of the defendant's mind*. . . . It is not to become a 'litany' but is to attempt a live evaluation of whether the plea has been sufficiently meditated by the defendant with guidance of counsel, and whether it is not being extracted from the defendant under undue pressure." Commonwealth v. Fernandes, 390 Mass. 714, 716 (1984) *quoting* Commonwealth v. Foster, 368 Mass. 100, 107 (1975) (emphasis added). The colloquy should include an inquiry into any mental illness from which the defendant may be suffering, and whether the defendant is under the influence of alcohol or drugs. *See* Commonwealth v. Correa, 43 Mass. App. Ct. 714, 717-718 (1997).

The Supreme Judicial Court has suggested the utility of using a checklist to ensure that a plea colloquy is both comprehensive in scope and meaningful in substance. *See* Commonwealth v Colon (2003) 439 Mass 519, 530 *quoting* Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 501-502, (1985):

> [Post conviction attacks on the validity of a plea can] be minimized if not wholly avoided, and justice better and more humanely administered in the first instance, if judges permitted themselves to be assisted by the carefully drafted and fully inclusive model questionnaires that have long been available. . . . We do not suggest that any model should be followed mechanically; indeed such a practice would be unwise because it could interfere with a probing exchange. Nevertheless a model can serve as a guide and checklist. We would suggest, as well, that a duty is cast on the lawyers on both sides to be alert and helpful if it appears that the judge through inadvertence may not be carrying out the full requirements of the rule. (Footnote omitted)

The information about the consequences of a conviction should be part of the oral dialogue between the judge and the defendant. It is not sufficient for a judge to rely on the defendant's acknowledgment of this information on a written form. *See* Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572 (2001); Commonwealth v. Hilaire, 51 Mass. App. Ct. 818, 823 (2001) ("During a colloquy, the judge has the opportunity to observe and interact with the defendant and can communicate the warnings to the . . . defendant with greater assurance than can be supplied by the preprinted . . . form.")

While the judge is the one who conducts the colloquy, all the parties share the responsibility to make certain that defendants are informed of the consequences of a plea or admission. As the United States Supreme Court said, with respect to the obligation of defense attorneys in federal criminal cases:

> **Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo.**

Libretti v. United States, 516 U.S. 29, 50-51 (1995). The prosecutor also has a role to play in ensuring that the court is aware of any information that might bear on the legitimacy of the plea and that the colloquy covers all of the necessary topics. *See* State v. Rodriguez, 112 Ariz. 193, 540 P.2d 665 (1975).

Subdivision (c)(3)(A) enumerates the plea's immediate consequences of which a defendant must be specifically informed. It imposes a responsibility on the judge not only in cases where the defendant has tendered a traditional guilty plea or a nolo contendere plea, but also where a defendant has offered to admit to sufficient facts to warrant a finding of guilty. The Rule was amended in 2004 to cover this last category in

recognition of the fact that in the years since Rule 12 was originally promulgated, the Supreme Judicial Court held that an offer to admit to sufficient facts triggers the essentially the same safeguards required when a defendant offers to plead guilty. *See* Commonwealth v. Duquette, 386 Mass. 834, 838 (1982) (an admission to sufficient facts is the functional equivalent of a guilty plea and the record must reflect the defendant waived the right to trial knowingly and voluntarily); Commonwealth v. Lewis, 399 Mass. 761, 763 (1987).

The United States Supreme Court held in Boykin v. Alabama, 395 U.S. 238, 243 (1969) not only that a defendant must understand that he or she waives the privilege against self incrimination, the right to trial by jury, and the right to confront one's accusers by entering a guilty, but also that a court could not presume a waiver of these rights from a silent record. Prior to the adoption of Rule 12 in 1979, the Supreme Judicial Court held in Commonwealth v. Morrow, 363 Mass 601, 604--05 (1973), that "it would be better practice to include specific inquiry as to the defendant's understanding waiver of the three constitutional rights."

In 2004, this subdivision was amended to require an additional warning of rights be given to the defendant, concerning the right to be presumed innocent until proved guilty beyond a reasonable doubt. Although not constitutionally required, it is sound practice to include it. The Supreme Judicial Court has recommended its use in cases where the defendant is willing to plead guilty but does not acknowledge all of the elements of the factual basis. *See* Commonwealth v. Earl, 393 Mass. 738, 742 (1985) ("when a judge concludes that he is satisfied that there is a factual basis for a charge to which a defendant is willing to plead guilty, but the defendant does not acknowledge all the elements of the factual basis, it would be better practice for the plea judge to advise the defendant that his guilty plea waives his right to be presumed innocent until proved guilty beyond a reasonable doubt.")

It has been recommended that the proper formulation for advising a defendant as to his waiver of a jury trial is that "by pleading guilty he [gives] up his right to a 'trial with or without a jury,'" Commonwealth v. Hamilton, 3 Mass. App. Ct. 554, 557 n. 4 (1975). This instruction will serve to emphasize that, upon acceptance of a guilty plea, no trial will be held and all that remains is the imposition of sentence. However, the judge does not have to include information about the difference between a jury trial and a bench trial. *See* Commonwealth v. Gonsalves 57 Mass App 925 (2003). Nor does the colloquy have to include information about the loss of the opportunity to appeal issues, such as the court's action in denying a suppression motion. *See* Commonwealth v. Quinones, 414 Mass. 423, 435 (1993); Commonwealth v. Hamilton, 3 Mass App Ct 554, 558 n. 6 (1975) (if such information is given, it will "require careful formulation to avoid creating confusion as to the right to appeal to the Appellate Division of the Superior Court and the right to post-conviction remedies under special circumstances.")

Pursuant to subdivision (c)(3)(B), the defendant is to be informed of the sentencing consequences of a conviction based upon the tender of a plea or admission. The judge should inform the defendant of the maximum sentence of each offense to which the defendant is offering a plea or admission. In some circumstances, the maximum sentence will depend on whether the defendant has previously been convicted. The judge must take this possibility into account. General Laws c. 279, § 25, which mandates the maximum sentence for a felony defendant who has been previously convicted of two felonies and sentenced to more than three years on each, is an example of that type of provision contemplated by the "second offense" language of (c)(3)(B).

If probation is not a sentencing option, the judge must inform the defendant of any applicable mandatory minimum sentence as well. If the judge imposes a sentence of straight probation (one without a concomitant suspended term), the judge must inform the defendant of the maximum term, and any mandatory minimum term, that could be imposed if probation is revoked. *See* Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572 (2001). In 2004, this subsection was amended to eliminate the

requirement that the judge inform the defendant of the maximum sentence possible if the defendant received consecutive sentences. *See* United States v. Kikuyama, 109 F.3d 536 (9th Cir. 1997) (where it is not mandatory to impose consecutive sentences, defendant need not be informed of that possibility in order to enter a knowing and intelligent guilty plea); United States v. Hamilton, 568 F.2d 1302, (9th Cir.) *cert. denied* 436 U.S. 934 (1978) (the possibility of consecutive sentences was implicit in the separate explanation of the possible sentence on each charge).

Conviction of certain sex crimes carries with it three consequences that also must be included in the plea colloquy in a relevant case. First, if the defendant is subject to commitment as a sexually dangerous person, *see* G.L. c. 123A, the judge must include notice of that possibility prior to accepting the plea or admission. This provision has been part of Rule 12 since its adoption, changing the practice that prevailed prior to 1979. *See* Commonwealth v Morrow, 363 Mass 601, 606 (1973) (being subject to the "sexually dangerous person" provision "is but one of many contingent consequences of being confined" after conviction, and therefore need not be explained to a defendant). Since a 2004 amendment to G.L. c. 123A § 12 makes a defendant subject to commitment as a sexually dangerous person despite the nature of the offense to which the defendant is pleading guilty, so long as the defendant has been convicted any time in the past of a designated sex offense, a warning of the possibility of commitment under c. 123A should be included as a matter of routine unless it is clear from the defendant's prior record that it is not relevant.

Second, if the defendant is tendering a plea or admission to an offense which might subject him or her to the possibility of community parole supervision for life, a 2004 amendment to this subsection requires the judge to notify the defendant of this possibility. Because the prospect of life time parole is an additional form of punishment, it should be part of the information the defendant receives about the maximum sentence he faces. GL c. 265 § 45 specifically refers to community parole supervision for life as punishment.

Third, a 2004 amendment incorporated into this subsection the requirement of G.L. c. 6, §178E(d), that a court accepting a plea for a sex offense inform the defendant that the plea may result in the defendant's being subject to the provisions of the sex offender registration statute. The statute states that failure to provide this information shall not be grounds to vacate or invalidate the plea, and the inclusion of this requirement in Rule 12(c)(3)(B) does not enlarge the grounds on which a defendant can invalidate a plea after the fact.

The failure to inform the defendant of the sentencing consequences of a plea may result in the conviction being set aside because the plea was not a knowing and intelligent waiver. *E.g.*, Commonwealth v. Rodriguez, 52 Mass. App. Ct. 572 (2001) (failure to inform the defendant of the maximum sentence and mandatory minimum sentence upon revocation of probation). However, "not every omission of a particular from the protocol of the rule . . . entitles a defendant at some later stage to negate his plea and claim a trial." Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 494 (1984). *E.g.*, Commonwealth v. Cavanaugh, 12 Mass. App. Ct. 543, 545-546 (1981) (where defendant received the sentence recommended by the prosecutor, the judge's failure to inform him of the maximum possible sentence was harmless beyond a reasonable doubt).

While there are consequences beyond those enumerated in this subdivision that might influence a defendant's decision to plead guilty, if they are collateral, in the sense of being contingent upon some future event or subject to discretion or under the control of the federal government or that of another state, they need not be incorporated into the plea colloquy. For example, ordinary parole consequences need not be part of the judge's warnings, *see* Commonwealth v. Santiago, 394 Mass. 25, 30 (1985), nor is ineligibility to receive good time deductions from a sentence being served after conviction of certain crimes, *see* Commonwealth v. Brown, 6 Mass. App. Ct. 844 (1978) (rescript).

Subdivision (c)(3)(c) was added in 2004, and is based on the requirement in G.L. c. 278, § 29D, that a defendant who pleads guilty or nolo contendere must be advised that if he or she is not a United States citizen, a conviction may have the consequences of deportation, exclusion of admission, or denial of

naturalization. This subdivision, however, is broader than the statute. The Supreme Judicial Court has held that this warning is also required when the defendant offers an admission to sufficient facts, *see* Commonwealth v. Mahadeo, 397 Mass. 314 (1986), and so the Rule requires an "alien" warning in those cases as well. In addition, the Rule requires the defendant to be warned of the potential adverse impact of the plea or admission, rather than of a conviction, as the statute requires. Under current immigration law, the statute's warning may be misleading since adverse consequences can flow from an admission to sufficient facts not followed by a conviction. *See* Commonwealth v. Villalobos, 437 Mass. 797 (2002). By warning the defendant that a plea or admission can have adverse immigration consequences, the court necessarily conveys not only the message about the effect of an ensuring conviction but also alerts the defendant to the possibility of adverse consequences from the plea or admission itself.

(c)(4). To this point the court has been informed of the existence of and substance of a plea arrangement, has indicated a willingness to entertain that arrangement, and has informed, or caused, the defendant to be informed of the consequences of acceptance of the plea. The defendant now formally tenders a plea or admission to the court, which then conducts a hearing to determine whether it is a knowing, intelligent, and voluntary waiver.

(c)(5). By requiring an inquiry into the "voluntariness" of the plea or admission, this subdivision requires the judge to ensure two basic foundations for a valid waiver. First is that the defendant understands the consequences of his or her act. Courts often refer to this standard as requiring the plea to be a knowing and intelligent act. In addition, the defendant's decision must be free from improper influence. As the Supreme Court, in Johnson v. Zerbst, 304 U.S. 458 (1938), declared, a waiver is "an *intentional* relinquishment or abandonment of a *known* right or privilege." *Id.* at 464 (emphasis supplied).

In order to enter a valid guilty plea, the defendant must be competent. Under both the federal and state constitutions, the test of competence to plead is the same as that for standing trial. *See* Godinez v. Moran, 509 U.S. 389 (1993); Commonwealth v. Blackstone, 19 Mass. App. Ct. 209 (1985). The standard for determining competency to stand trial is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Commonwealth v. Russin, 420 Mass. 309, 317 (1995) *quoting* Dusky v. United States, 362 U.S. 402, 402 (1960). The substituted judgment doctrine, by which the court appoints a guardian to act, is not an appropriate vehicle for an incompetent defendant who offers to plead guilty. *See* Commonwealth v. Del Verde, 398 Mass. 288 (1986).

In Huot v. Commonwealth, 363 Mass. 91, 99--101 (1973), the court recognized that Boykin v. Alabama, 397 U.S. 238 (1969) placed the burden of establishing on review that a guilty plea is made voluntarily and intelligently is on the prosecution. The Commonwealth must meet that burden and the hearing that this subsection establishes is designed to meet that end.

The Supreme Judicial Court, in Commonwealth v. Lopez, 426 Mass. 657, 660, (1998), stated the appropriate standard:

> As a general proposition of constitutional law, a guilty plea may be withdrawn or nullified if it does not appear affirmatively that the defendant entered the plea freely and voluntarily. Boykin v. Alabama, 395 U.S. 238, 242-243 (1969). *See* Brady v. United States, 397 U.S. 742, 748 (1970); Commonwealth v. Foster, 368 Mass. 100, 106 (1975). Rule 12 (c) (3) of the Massachusetts Rules of Criminal Procedure, requires that a defendant be informed on the record of the three constitutional rights which are waived by a guilty plea: the right to trial, the right to confront one's accusers, and the privilege against self-incrimination. *See* Boykin v. Alabama, *supra* at 243; Commonwealth v. Lewis, 399 Mass. 761, 764 (1987). Moreover, the plea record must demonstrate either that the defendant was advised of the elements of the offense or that he admitted facts constituting the unexplained elements. *See* Henderson v. Morgan, 426 U.S. 637, 646, (1976); Commonwealth v. Colantoni, 396 Mass. 672, 678-679 (1986). Finally, the plea

record must demonstrate that the defendant pleaded guilty voluntarily and not in response to threats or undue pressure. *See* Commonwealth v. Foster, *supra* at 107.

The first distinct requirement is that the defendant understand the nature of the charge. A plea may be involuntary because the defendant has such an incomplete understanding of the charge that the plea is an unintelligent admission of guilt. Without adequate notice of the nature of the charge against him, or an indication that the defendant in fact comprehends the charge, the plea cannot stand as voluntary. *See* Smith v. O'Grady, 312 U.S. 329 (1941). In Henderson v. Morgan, 426 U.S. 637 (1976), the Supreme Court held that a guilty plea to a charge of second-degree murder was involuntary because the defendant was not informed that intent to cause death was an element of that crime. The Court assumed, without deciding, that notice of the true nature, or substance, of a charge does not always require a description of every element of the offense, however. *Id.* at 647 n. 18. The Court agreed with the government that in the usual case, the reviewing court should examine the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the defendant, rather than testing the voluntariness of his plea according to whether a ritualistic litany of the formal legal elements of the offenses was read to him.

There are three ways that the record of a plea or admission can serve as satisfactory evidence that the defendant had the requisite knowledge of the elements of the charge: 1) the judge can explain the elements of the crime; 2) counsel may represent that he or she has explained them to the defendant; or, 3) the defendant may admit or stipulate to facts constituting the elements. *See* Commonwealth v. Colantoni, 396 Mass. 672, 679 (1986). The defendant's signature on a form that he or she is aware of the elements of the charge is not sufficient. *See* Commonwealth v. Jones, 60 Mass. App. Ct. 88 (2003).

While in a post-conviction context it may suffice for the record to reflect that counsel stated that the defendant was advised of the elements, or for the defendant to have admitted an act constituting the elements, the judge should not rely on these means as the primary method of establishing the requisite knowledge. *See Colantoni, supra,* 396 Mass. at 679 n. 5. The best way to ensure that the defendant knows the elements of the crime is for the judge to explain them as part of the colloquy. This can be fairly easily done in most cases by reading to the defendant the indictment or complaint. However, in some cases, it may require more than a simple statement of the crime itself. *E.g.* Commonwealth v. Jones, 60 Mass. App. Ct. 88 (2003) (simply telling the defendant that he is charged with assault and battery does not sufficiently apprise him of the elements of the crime); Commonwealth v. Pixley, 48 Mass. App. Ct. 917 (2000) (telling the defendant only that he was charged with possession of cocaine with intent to distribute did not satisfy requirement of explaining the elements as mandated by this subsection).

For an example of the scope of the examination conducted to satisfy the *Boykin* requirement of an affirmative showing of understanding and voluntariness, *see* Commonwealth v Taylor, 370 Mass 141, 144-45 n. 5 (1976). In conducting the examination, the judge is to rely on his or her own observations and discernment in concluding that the defendant understands the questions. *See* Commonwealth v Leate, 367 Mass 689, 696 (1975)

In order for the plea or admission to be voluntary, the defendant's decision to waive a trial must be free from the influence of factors that have no legitimate role to play in the process. *See* Rossman, Guilty Pleas, 2 Criminal Law Advocacy, ¶ 2.03 (listing improper threats, such as physical abuse). Therefore, the judge should inquire whether the defendant's decision to waive a trial is a result of any threats or inducements apart from those identified in the plea agreement. *See* Commonwealth v. Fernandes 390 Mass. 714, 719 (1984). While no particular form of words need be used to make this inquiry, *see* Commonwealth v. Lewis, 399 Mass. 761, 764 (1987), a brief colloquy that does not probe the defendant's mind will not do. *See* Commonwealth v. Quinones, 414 Mass. 423, 434 (1992); *Fernandes, supra,* 390 Mass. at 717-719. It is useful, however, for the judge to include in the colloquy a question about whether the defendant has

consulted with counsel about the decision to waive a trial and is satisfied with counsel's assistance. *Cf. Fernandes, supra,* 390 Mass. at 718.

The pressure of a plea bargain that holds out no more than the possibility of a harsher sentence if the defendant goes to trial and is convicted is not by itself an improper influence that would render a guilty plea not voluntary. *See* Commonwealth v Tirrell 382 Mass 502, 510 (1981):

> neither this court nor the Supreme Court has required total absence of psychological or emotional pressure. In any plea bargaining situation the defendant is necessarily put to a difficult choice -- the risk of a more serious sentence after trial and conviction against the probabilities of the trial judge's accepting the prosecutor's recommended leniency. The defendant's fond hopes for acquittal must be tempered by his understanding of the strength of the case against him, his prior record, and the completely unknowable reaction of the trier of fact. *See* Commonwealth v. Leate, 367 Mass. 689, 694 (1975). Without some showing of peculiar susceptibility, which rendered the defendant so gripped by fear of the . . . penalty or hope of leniency that he . . . could not . . . rationally weigh the advantages of going to trial against the advantages of pleading guilty," Brady v. United States, 397 U.S. 742, 750 (1970). We cannot say that the pressure of the decision per se destroys voluntariness. *Contrast* Pate v. Robinson, 383 U.S. 375, 385-386 (1966) (record of irrational conduct required hearing on defendant's incompetency to stand trial).

(c)(5)(A). This subdivision is based upon A.B.A. Standards Relating to Pleas of Guilty § 1.6 (Approved Draft, 1968) and accords with District Court Initial R. Crim. P. 5 (1971). *See* Fed. R. Crim. P. 11(f).

The "factual basis" standard can be met by having the prosecutor state for the record the evidence that the Commonwealth would have presented had the case gone to trial. In addition, the court may require sworn testimony from a prosecution witness or of the defendant. *See* 8 J. Moore, Federal Practice ¶ 11.03 [3] at 11-75 (1978); A.B.A. Standards Relating to Pleas of Guilty § 1.6, comment at 32 (Approved Draft, 1968).

North Carolina v. Alford, 400 U.S. 25 (1970), establishes that the United States Constitution does not prohibit the court from accepting a guilty plea from a defendant who nevertheless asserts his or her innocence. An *Alford* plea is a permissible way to establish a defendant's guilt without a trial. *See* Commonwealth v. Nikas, 431 Mass. 453 (2000); Hout v. Commonwealth, 363 Mass. 91 (1973). "Under *Alford*, a defendant who professes innocence may nevertheless plead guilty and 'voluntarily, knowingly and understandingly consent to the imposition of a prison sentence,' if the State can demonstrate a 'strong factual basis' for the plea." Commonwealth v. DelVerde, 398 Mass. 288, 297(1986), *quoting* North Carolina v. Alford, 400 U.S. 25, 38 (1970). If a factual basis for such a plea exists, it is only fair to allow a defendant who is aware of the law, the facts, and the consequences of his plea, to attempt to reduce the severity of his or her punishment by pleading guilty. *See* Commonwealth v Hubbard, 371 Mass. 160 (1976). The defendant is free to weigh the strength of the Commonwealth's evidence and on this basis to waive the right to trial. If the waiver is voluntary and intelligent it should be upheld.

Subdivision (c)(5)(A) is not made applicable to nolo pleas. The purpose of permitting a nolo plea is to relieve the defendant of the adverse repercussions that can result from the introduction of evidence from the present criminal proceedings. This purpose would be undermined to the extent that disclosures led to subsequent civil proceedings or evidence to be used at such proceedings, notwithstanding the fact that the disclosures themselves could not be used in evidence. The Federal Rules Advisory Committee stated in its note to Fed. R. Crim. P. 11: "it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual basis for the plea."

(c)(5)(B). At the conclusion of the hearing, if the judge finds that the plea "is the defendant's own, guided by reasonable advice of his counsel, his own knowledge of what he has done, and a fair understanding of the alternatives," it will be considered voluntary. Commonwealth v Manning, 367 Mass 699, 706 (1975).

The judge may then accept the plea or, notwithstanding the fact that it is voluntary, reject it. *See* subdivision (c)(6), *infra*.

(c)(5)(C). If the plea or admission is accepted, the judge shall proceed with sentencing as after a verdict or finding of guilty under Mass. R. Crim. P. 28(b).

(c)(6). This subdivision is drawn in part from Fed. R. Crim. P. 11(e)(3)-(4) and from A.B.A. Standards Relating to Pleas of Guilty § 2.1 (Approved Draft, 1968). *See* Rules of Criminal Procedure (U.L.A.) rule 444(e) (1974). *Compare* Fed. R. Crim. P. 32(d) (plea may be withdrawn after sentence only "to correct manifest injustice") *with* A.L.I. Model Code of Pre-Arraignment Procedure § 350.6 (POD 1975) (defendant may withdraw plea if sentence to be imposed is more severe than that provided in plea agreement).

Previously existing statutes relative to the withdrawal of pleas after imposition of sentence are intended to be unaffected by this rule. General Laws c. 278 §§ 29A (St 1962, c 310, § 2) and 29C (St 1959, c 167, § 1) permitted the retraction of any sentence and the withdrawal of any plea upon which the sentence was imposed within sixty days of sentencing if justice has not been done. Now *see* Mass. R. Crim. P. 29. In a case where the defendant has the right to counsel and is neither represented nor validly waived counsel, General Laws c. 278, § 29B grants the defendant an absolute right to withdraw a plea prior to sentencing.

This subdivision addresses two classes of cases. One is where the defendant's plea or admission is contingent upon a prosecutor's sentence recommendation. The other, referred to in language added in 2004, occurs where the defendant has tendered a defense capped plea. In either case, the judge has many available options. After reviewing the arrangement and, if desired, the probation report, the judge may concur in the disposition; concur in the disposition, but condition the concurrence upon facts being found consistent with representations made by the parties; refuse to accept the disposition; or propose an alternative disposition, giving the defendant a reasonable opportunity to consider the alternative before deciding whether to persist in the plea or admission or proceed to trial. If the judge intends to vary from the recommended or tendered disposition in a manner which is detrimental or prejudicial to the interests of the defendant, the defendant has an absolute right to withdraw the plea or admission.

It should be noted that where a plea or admission is predicated on a promise by the prosecutor to take unilateral action over which the judge has no control, such as entering a nolle prosequi to certain charges, this subsection is not applicable. The "[p]ower to enter a nolle prosequi is absolute in the prosecuting officer . . . except possibly in instances of scandalous abuse of the authority." Commonwealth v. Dascalakis, 246 Mass. 12, 18 (1923). *See* Mass. R. Crim. P. 16. In a case such as this, disclosure to the court prior to the tender of the plea serves no purpose other than determining whether the plea is knowingly and voluntarily made.

While this subdivision is the only provision in Rule 12 that explicitly addresses the issue of a defendant's withdrawing a plea, a judge has authority to entertain such a motion on other grounds. Prior to its amendment in 1987, Rule (c)(2)(B) contained an explicit statement that if the defendant persisted in pleading guilty despite notice of the judge's intention to exceed the prosecutor's recommended sentence, the defendant could not thereafter withdraw the plea except "in the discretion of the judge." This provision was eliminated in 1987. The former subsection (c)(2)(B) gave the judge "broad discretion to allow a defendant to withdraw [a] plea before . . . sentence [has been] imposed." Commonwealth v. DeMarco, 387 Mass. 481, 484 (1982); *see also* Commonwealth v. Clerico, 35 Mass. App. Ct. 407, 413 n. 7(1991). The removal from Rule 12 of the reference to a judge's discretion to allow the defendant to withdraw a plea does not alter the law that otherwise controls in this situation. If the defendant can show that the plea was not voluntary or tendered knowingly, then a motion for withdrawal should be granted, for these

requirements are constitutional prerequisites to the validity of the plea. If, on the other hand, the defendant seeks to withdraw a plea prior to sentencing despite its being knowing and voluntary, the judge should balance the reason put forward by the defendant against any prejudice to the Commonwealth. *Cf.* Commonwealth v. Nolan, 19 Mass. App. Ct. 491, 494 (1984). After sentencing, however, the proper vehicle to seek to withdraw a guilty plea is a motion under Rule 30 (b).

The 2004 revision of Rule 12 deleted subdivision (d), which was designed to discourage the practice of "judge shopping" by tendering, withdrawing, and retendering a guilty plea until a judge is found who will agree to the disposition favored by the defendant. A uniform policy on whether a defendant may ask more than one judge to accept a sentence recommendation or defense capped plea is unnecessary. Individual judges still retain the discretion to refuse to entertain such requests.

(e). The conditions governing the availability to the defendant of the probation report are the same as those which control under Mass. R. Crim. P. 28(d)(3). It is important for the defendant to have access to this information so that he or she can more effectively bargain with the prosecutor and more accurately predict how the court will react to proposed dispositions. The judge need not always view the probation report to properly decide whether it should be released to the defendant. The judge can rely on representations made by the probation department or by the prosecutor in reaching this decision. The judge may examine the defendant's criminal record before accepting a plea or admission. *See* Commonwealth v. Whitford, 16 Mass. App. Ct. 448, 453 (1983).

Subdivision (f). In its original form, this subdivision changed the prior rule in Massachusetts that a plea that has been withdrawn may be introduced in subsequent proceedings as an admission by the defendant. *See* Morrisey v. Powell, 304 Mass. 268 (1939). The current position reflected in this subdivision is consistent with the modern trend and with the rule in federal courts. *See* A.B.A. Standards Relating to Pleas of Guilty, §§ 2.2, 3.4 (Approved Draft, 1968); Rules of Criminal Procedure (U.L.A.) rule 444(f) (1974); A.L.I. Model Code of Pre-Arraignment Procedure § 350.7 (POD 1975). It is drawn from Fed. Cr. Crim. P. 11(e)(6), although it is broader in scope, since unlike the federal rule, its application to statements made in the course of plea negotiations is not limited only to circumstances where the defendant is negotiating with a government attorney. *See* Commonwealth v. Wilson, 430 Mass. 440, 443 (1999). However, simply expressing a desire to plead guilty to a police officer who does not have any authority to bind the Commonwealth does not bring a defendant's statement within the scope of this subdivision. *Id.*

In 2004, the subdivision was amended to include admissions to sufficient facts among the category of actions by the defendant that are not admissible if later withdrawn.

Permitting a prosecutor to offer evidence that a defendant unsuccessfully tendered a plea or admission undermines the rationale behind the decision allowing the plea or admission to be withdrawn in the first place. *See* Kercheval v. United States, 274 U.S. 220 (1927). Additionally, juries tend to give undue weight to the introduction of prior pleas. Of course, if the reason why the plea or admission was withdrawn was that it was not knowing and voluntary, then the federal Constitution prohibits its use in a subsequent proceeding. *Cf.* White v. Maryland, 373 U.S. 59 (1963) (barring use of evidence that the defendant had entered a guilty plea without the assistance of counsel, where the defendant did not validly waive the right to counsel).

While an offer to plead guilty is inadmissible pursuant to this subdivision, the fact that a defendant refused to enter a guilty plea or rejected a plea agreement is not, conversely, admissible by implication. *See* Commonwealth v. DoVale, 57 Mass. App. Ct. 657 (2003).

[REVISED RULE 13]

REPORTERS' NOTES

(Revised, 2004)

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 sec. 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).

[REVISED RULE 14]

REPORTERS' NOTES

(Revised, 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, s. 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. 629 (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 Commonwealth's 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 defendant's 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 s. 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 s. 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, s. 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, s. 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, 40-41 (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 F2d 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 F2d 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 statutes 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.

Blaidell 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. 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).

[REVISED RULE 34]

REPORTERS' NOTES

(Revised, 2004)

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.