

REPORTER'S NOTES

MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

Rule 14.2 Pretrial Discovery Procedures

Reporter's Notes—2025

Rule 14.2 Pretrial Discovery Procedures.

[This is a new section.]

Rule 14.2 combines in one rule procedural and enforcement mechanisms for discovery. These include provisions governing the authority of the rules and stays of discovery obligations (section 14.2(a)); obtaining the record of court activity of defendants and witnesses (section 14.2(b)); requiring notice and preservation of evidence in the possession of third parties (section 14.2(c)); authorizing motions for additional discovery (section 14.2(d)); requiring filing certificates of discovery compliance (section 14.2(e)); excluding work product from discovery obligations (section 14.2(f)); authorizing issuance of protective orders (section 14.2(g)); enabling the court to modify or amend discovery obligations (section 14.2(h)); allowing the waiver of discovery or for discovery by agreement (section 14.2(i)); and empowering the court to impose sanctions for noncompliance (section 14.2(j)).

14.2(a) Authority of Rules; Stays.

Rule 14(b) and Rule 14.1 shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under this rule. However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to Rule 14.2(g) of this Rule and production of the item shall be stayed pending a ruling by the court.

[This section replaces prior section 14(a)(1)(C) but makes no substantive change.]

The provisions governing automatic discovery, from both the prosecution and the defense, have the force and effect of a court order without the separate issuance of a specific court order concerning them. Rule 14.2(a). When either party believes the other has not produced items or information subject to disclosure under these rules, it should move to compel production or seek sanctions for the nondisclosure under Rule 14.2(j). *Commonwealth v. Dirico*, 480 Mass. 491, 502 (2018).

14.2(b) Record of Court Activity of the Defendant, Codefendants, and Prosecution Witnesses. Upon request made in such form as the court may prescribe, the court shall order the Probation Service to provide the defendant with the record of court activity of all defendants and all witnesses identified pursuant to Rules 14, 14.1, and 14.3.

[This is a new section.]

The defendant has constitutional and statutory rights to obtain criminal records of all defendants and witnesses. *Wing v. Commissioner of Probation*, 473 Mass. 368, 371 (2015); G. L. c. 218, § 26A. This section simplifies the method of obtaining these records.

The Massachusetts Probation Service maintains records of individuals' Massachusetts court activity. Providing these records in discovery is mandatory so a motion for discovery is

unnecessary. However, in order to provide the appropriate records the Probation Service needs identifying information for the relevant individuals in each case.

Under the prior rule, at arraignment the court would order the Probation Service to provide the parties with records of defendants and witnesses within five days of its receipt from the prosecutor of identifying information for these persons at a future date. Delay in the Probation Service's receipt of identifying information for defendants and witnesses slowed disclosure of information to which defendants had a right to receive. Defendants seeking records would move to compel the Probation Service to provide them, which created unnecessary litigation and further delay concerning the provision of information that is mandatory.

Under Rule 14.2(b), when the defendant receives identifying information concerning the defendants and witnesses required by Rule 14 (b)(1)(C) and Rule 14.3, the defendant must request the records using the form designated by the court. The defendant may also request such records of witnesses whose identity will be disclosed pursuant to Rule 14.1. The court shall then order that the Probation Service provide the defendant with the requested records.

Commonwealth v. Martinez, 437 Mass. 84, 95 (2002) (The "proper route for [a] defendant to obtain prior convictions of prospective witnesses from the Commonwealth is by requesting the judge to order the probation [service] to produce them.").

Prosecutors separately have direct access to the record of court activity. The prosecutor's access to records includes other information that is available to law enforcement entities, such as the Domestic Violence Registry. Prosecutors may also have access to federal criminal records. In appropriate cases these may be subject to disclosure under Rules 14(b)(2)(C)(i)(b) or 14(b)(2)(C)(i)(c).

14.2(c) Notice and Preservation of Evidence.

(1) Upon receipt of information that any item described in Rule 14(b) exists that is not within the possession, custody, or control of the prosecutor, the prosecuting office, or the prosecution team, as defined in Rule 14(a)(1), the prosecutor shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it.

(2) At any time, a party may move for an order to any individual, agency, or other entity in possession, custody, or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The judge shall hear and rule upon the motion expeditiously. The judge may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

[This section renumbers but makes no change to prior section 14(a)(1)(E).]

This section makes no substantive change to the prior rule. The duty of the prosecutor to notify the defendant of the existence of any item that is subject to automatic discovery but is not within the possession, custody, or control of the prosecutor, prosecuting office, or any member of the prosecution team should be read in conjunction with Rule 14(a)(2)(A)-(E). Rule 14.2(c)(1) requires that the prosecutor notify the defendant of the existence of any items subject to automatic discovery in the possession of third parties. Rule 14.2(c)(2) provides that either party may move for an order requiring that a third party preserve an item in its possession, custody, or control, and that such motions shall be heard expeditiously. Motions under Rule 14.2(c)(2) are distinct from summonses for witnesses or for the production of documents or objects under Mass. R. Crim. P. 17.

14.2(d) Motions for discovery.

The defendant may move, and following its filing of the Certificate of Compliance, the prosecutor may move, for discovery of other material and relevant evidence not required by Rule 14(b) or Rule 14.1 within the time allowed by Rule 13(d)(1).

[This section renumbers but makes no change to prior section 14(a)(2).]

Additional discovery, beyond automatic discovery, is available by motion, subject only to it being relevant. *Commonwealth v. Bernardo B.*, 453 Mass. 158, 169 (2009) (“At the discovery stage, the question is whether the defendant has made a “threshold showing of relevance” under [prior] rule 14(a)(2).”). Discovery by motion may be particularly significant for pretrial litigation as it enables addressing issues the opposing party may not intend to raise at trial.

Commonwealth v. Long, 485 Mass. 711, 723-726 (2020) (In pursuing motion to suppress fruits of stop based on selective enforcement “defendant has a right to reasonable discovery of evidence concerning the totality of the circumstances of the traffic stop; such discovery may include the particular officer’s recent traffic stops and motor-vehicle-based field interrogations and observations.”). “Discovery of items not included in the automatic discovery regime remains subject to the court’s discretion, and may be requested by pretrial motion.”

Commonwealth v. Lewis, 468 Mass. 1001, 1001-1002 (2014) (Citing Reporter’s Notes (Revised 2004) to Rule 14, at 1506). Orders for such additional discretionary discovery must not be unfairly burdensome. *Id.* at 1001 n.3.

14.2(e) Certificate of compliance. When a party has provided all discovery required by Rule 14 or Rule 14.1 or by court order, it shall promptly file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items and information subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items or information provided.

[This section renumbers but makes no change to prior section 14(a)(3).]

This section makes no substantive change to the prior rule. Certificates of compliance must be promptly filed when each party has complied with its obligations for automatic discovery or any additional court-ordered discovery. Certificates must specifically identify each item provided. Notwithstanding the filing of a certificate of compliance, counsel have continuing duties of disclosure under Mass. R. Crim. P. 14(d) (for the prosecutor) and 14.1(b) (for the defense). These include an obligation to correct or supplement disclosures later learned to be incorrect or incomplete, and these duties continue throughout trial. *Commonwealth v. Frith*, 458 Mass. 434, 437 n.4 (2010); *Commonwealth v. O’Neal*, 93 Mass. App. Ct. 189, 198 & n.10 (2018) (Prosecutor’s failure to clarify “equivocal and incomplete discovery response” that booking video was “not available” because it had been destroyed violated its discovery obligation and entitled defendant to new trial.).

Certificates of compliance are affirmative representations to the court. As such, they must comply with the prohibition against an attorney knowingly making a false statement to a tribunal. Mass. R. Prof. C. 3.3(a). Unlike other pleadings, certificates of compliance necessarily concern matters of the lawyer’s personal knowledge, thus may only be made when the “lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.” Mass. R. Prof. C. 3.3(a), Comment, Par. 3. See *Frith*, 458 Mass. at 440-441 (Prosecutor’s duty

of inquiry for compliance with discovery obligations extends beyond circumstances in which prosecutor learns of additional discoverable materials to impose an obligation to ask police prosecutor whether all discoverable materials in a case have been given the Commonwealth.).

14.2(f) Work Product. Unless otherwise required by law or court order, this rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff. This definition of work product does not include any items or information that the prosecutor is obligated to disclose as items or information favorable to the defense.

[This section makes two changes to prior section 14(a)(5).]

This section makes two changes to the prior rule. First, it adds a qualification that other law or court orders may require disclosure of work product. Second, it adds a qualification that work product does not include items or information that must be disclosed because they are favorable to the defense. *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 140 (2001) (While notes of victim witness advocates may be protected as work product, the prosecutor has an "affirmative duty" to review these notes, to inquire about conversations with victims, and to disclose any items or information in them favorable to the defense.). Where a party believes good cause exists for not providing disclosure due to the material being protected as work product, the party must file a motion for a protective order. Mass. R. Crim. P. 14.2(g). *In the Matter of a Grand Jury Investigation*, 485 Mass. 641, 650, n.10 (2020).

14.2(g) Protective Orders. Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of Rules 14, 14.1, or 14.2. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

[This section makes no substantive change to prior section 14(a)(6).]

14.2(h) Amendment of Discovery Orders. Upon motion of either party made subsequent to an order of the judge pursuant to Rules 14, 14.1, or 14.2, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered be available only to counsel for the defendant.

[This section makes no substantive change to prior section 14(a)(7).]

14.2(i) Waiver. A party may waive the right to discovery of an item, or to discovery of the item within the time provided in Rules 14, 14.1, and 14.2. The parties may agree to reduce or enlarge the items subject to discovery pursuant to Rules 14.1 and 14.1. Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

[This section renumbers but makes no substantive change to prior section 14(a)(8).]

14.2(j) Sanctions for Noncompliance.

(1) Relief for Nondisclosure. For failure to comply with any discovery order issued or imposed pursuant to this rule, the judge may make a further order for discovery, grant a continuance, or enter such other order as the judge deems just under the circumstances, including but not limited to the exclusion of evidence, adverse jury instructions, dismissal of charges with or without prejudice, contempt proceedings, and other sanctions.

(2) Exclusion of Evidence. The judge may in an exercise of discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule. Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by Rule 14.4.

[This section makes one change to the prior rule.]

This section sets forth the judge's authority to impose sanctions for noncompliance with discovery obligations and adds to the prior rule examples of possible sanctions. Rule 14.2(j)(1). Sanctions for noncompliance with discovery obligations or discovery orders must be "remedial in nature and tailored appropriately to cure any prejudice resulting from a party's noncompliance and to ensure a fair trial." *Commonwealth v. Issa*, 466 Mass. 1, 17 (2013) (citing *Commonwealth v. Carney*, 458 Mass. 418, 419 n.3 (2010) (internal quotations omitted)). This broad range of orders a judge may impose in response to a failure to comply with discovery orders may include further orders for discovery, continuances, exclusion of evidence, adverse jury instructions, dismissal with or without prejudice, or other appropriate steps. *Commonwealth v. Washington W.*, 462 Mass. 204, 215 (2012) (Holding trial judge's dismissal with prejudice of indictments was not an abuse of discretion where judge properly found Commonwealth deliberately, willfully, and repeatedly failed to comply with discovery order.) Contrast *Frith*, 458 Mass. 434 (Commonwealth's failure to conduct reasonable inquiry concerning existence of other material subject to discovery, although mistaken, was not done in bad faith and imposition of punitive fine on prosecutor was an abuse of discretion).

The propriety of a sanction and what sanction is appropriate are distinct questions. *Commonwealth v. Edwards*, 491 Mass. 1, 7-9 & 9-12 (2022) (Commonwealth's failure to timely disclose certificate of service in defendant's prosecution for violating abuse protection order was sanctionable, even though defendant was aware of the missing certificate, because he structured his defense around its absence from the government's case-in-chief, but dismissal with prejudice was not an appropriate sanction because violation was not egregious misconduct.).