COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on the 26th day of November, in the year two thousand and twenty-four:

present,

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| KIMBERLY S. BUDD | Chief Justice |
| FRANK M. GAZIANO | Justices |
| SCOTT L. KAFKER | |
| DALILA ARGAEZ WENDLANDT | |
| SERGE GEORGES, JR. | |
| ELIZABETH N. DEWAR | |
| GABRIELLE R. WOLOHOJIAN | |

ORDERED: That the Massachusetts Rules of Criminal Procedure adopted by order dated October 19, 1978, as amended, to take effect on July 1, 1979, are hereby amended as follows:

Rule 14 By deleting Mass. R. Crim. P. 14 and inserting in lieu thereof the new Mass. R. Crim. P. 14, 14.1, 14.2, 14.3, and 14.4 attached hereto.

The amendments accomplished by this order shall take effect on March 1, 2025.

ORDERED:

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| KIMBERLY S. BUDD | ) | |
| | ) | Chief Justice |
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| FRANK M. GAZIANO | ) | |
| | ) | Justices |
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| SCOTT L. KAFKER | ) | |
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| DALILA ARGAEZ WENDLANDT | ) | |
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| SERGE GEORGES, JR. | ) | |
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| ELIZABETH N. DEWAR | ) | |
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| GABRIELLE R. WOLOHOJIAN | ) | |

# Mass. R. Crim. P. 14, 14.1, 14.2, 14.3, and 14.4

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## Rule 14: Pretrial Discovery from the Prosecution

**(a) The Prosecutor's Obligations.**

**(1) The prosecution team**. For the purposes of this rule, the prosecution team includes all persons under the prosecuting office's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecuting office or have done so in the case. The prosecution team includes but is not limited to:

**(A)** Personnel of police departments or other law enforcement agencies who were or are involved in the investigation of the case, before or after charges were issued, or were or are involved in the prosecution of the case;

**(B)** Personnel of other governmental agencies who, in conjunction or collaboration with the prosecutor, were or are involved in the investigation or prosecution of the case;

**(C)** Forensic analysts, crime laboratory personnel, and criminalists employed or retained by state or local government who were or are involved in the investigation or prosecution of the case;

**(D)** Victim witness advocates and investigators employed by the prosecuting office; and

**(E)** Members of joint state and federal law enforcement task forces who were or are involved in the investigation or prosecution of the case.

**(2) The prosecutor's duties to inform and inquire, collect and disclose, preserve and notify, and record**.

**(A)** The prosecutor has a duty in each case to inform each member of the prosecution team whom the prosecutor has reason to believe may be in possession of items or information subject to this rule of the discovery and preservation obligations required by this rule, and to inquire of each such person as to the existence of any such items or information.

**(B)** The prosecutor has a duty in each case to collect and to disclose to the defense all items and information required by this rule that are in the possession, custody,

or control of the prosecutor, the prosecuting office, or any member of the prosecution team.

**(C)** When the prosecutor learns of items or information subject to disclosure which cannot be promptly copied or made available for inspection by the defense, the prosecutor has a duty to promptly notify the defense of the existence, and if known the location, of those items or information, and to instruct an appropriate member of the prosecution team to preserve those items or information until they can be disclosed.

**(D)** When the prosecutor learns of items subject to disclosure that have been destroyed, lost, altered, or which have otherwise become unavailable, or items or information subject to disclosure that a member of the team will not provide the prosecutor, the prosecutor has a duty to promptly notify the defense of the destruction, loss, alteration, or unavailability of the items or the refusal to provide the items or information.

**(E)** The judge may inquire of the prosecutor what actions were taken to achieve compliance with this rule.

**(b) Materials subject to automatic discovery**.

**(1) Investigative Materials**. The prosecutor shall disclose to the defense, and permit the defense to discover, inspect, and copy, each of the following items and information, provided it is relevant to the case and in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team:

**(A)** Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.

**(B)** The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.

**(C)** The names, addresses, dates of birth, and known contact information of the Commonwealth's prospective witnesses other than law enforcement witnesses.

**(D)** Written or recorded statements of persons the prosecutor may call as witnesses, and notes of interviews by law enforcement with persons the prosecutor may call as witnesses, unless contained within a disclosed statement or report.

**(E)** The names, business telephone numbers, business email addresses, and business addresses of prospective law enforcement witnesses.

**(F)** Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to Rule 14.4. Such discovery

shall include 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.

**(G)** All photographs, video and audio recordings, or other tangible objects, all police or investigator's reports, and all intended exhibits.

**(H)** Reports of physical examinations of any person or of scientific tests or experiments.

**(I)** A summary of identification procedures, and all written, recorded, or oral statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

**(2) Items and Information Favorable to the Defense**.

**(A) Scope**. The prosecutor shall disclose to the defense, and permit the defense to discover, inspect, and copy, all items and information favorable to the defense in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team. Items and information subject to this section must be disclosed without regard to whether the prosecutor considers the items or information credible, reliable, or admissible and without regard to whether any such information has been reduced to tangible form. The disclosure of any unwritten or intangible information shall be memorialized as soon as there is a reasonable opportunity, manner, and means to do so.

**(B) Definition**. Items and information favorable to the defense are items or information that tend to:

**(i)** Cast doubt on an aspect of guilt as to an element of any count of a charged or lesser included offense;

**(ii)** Cast doubt on the credibility or accuracy of any evidence, including identification or scientific evidence, the prosecutor may introduce;

**(iii)** Cast doubt on the credibility of the testimony of any witness the prosecutor may call;

**(iv)** Cast doubt on the admissibility of any evidence or testimony the prosecutor may introduce;

**(v)** Support the suppression or exclusion of any evidence or testimony the prosecutor may introduce;

**(vi)** Mitigate the charged offense or offenses or any lesser included offense or offenses, diminish the defendant's culpability, or mitigate the sentence;

**(vii)** Establish a defense theory or recognized affirmative defense or exemption to the charged offense or offenses or any lesser included offense or offenses, regardless of whether the defendant has presented such theory or raised such affirmative defense or exemption; or

**(viii)** Corroborate the defense version of facts or call into question a material aspect of the prosecution's version of facts, even if this aspect is not an element of the prosecution's case.

**(C) Examples**. Items or information favorable to the defense include but are not limited to:

**(i)** With respect to any witness the prosecutor may call:

**(a)** Any promise, reward, or inducement sought, requested by, offered to, or given to such witness;

**(b)** Any criminal record of such witness not contained in the court activity record provided pursuant to Rule 14.2(b);

**(c)** Any criminal cases pending against such witness at any relevant time, whether brought by the prosecuting office or by a prosecuting office in any other jurisdiction;

**(d)** Any written statement or oral statement of such witness that is inconsistent with any written statement or oral statement known to the prosecutor by the witness, that recants any written statement or oral statement known to the prosecutor by the witness, or that omits, adds, varies, or supplements any written statement or oral statement known to the prosecutor by the witness;

**(e)** Any written statement or oral statement of such witness that is inconsistent with any written statement or oral statement known to the prosecutor made by any other witness the prosecutor may call;

**(f)** Any information reflecting bias or prejudice against the defendant by such witness or which otherwise reflects bias or prejudice against any class or group of which the defendant is a member;

**(g)** Any crime, charged or uncharged, committed by such witness, if known to the prosecutor, prosecuting office, or any member of the prosecution team;

**(h)** Any information about such witness contained in any database or list of information about law enforcement misconduct maintained by or available to the prosecuting office; and

**(i)** Any information about any mental or physical impairment or condition of such witness that may cast doubt on such witness's ability to testify truthfully and accurately concerning any relevant event.

**(ii)** With respect to any percipient witness, without regard to whether the prosecutor may call such witness:

**(a)** The failure of the percipient witness to make an identification of a defendant, if any identification procedure has been conducted with such a witness with respect to the crime at issue;

**(b)** Any inconsistent written statement or oral statement of the percipient witness regarding the alleged incident or the conduct of the defendant; and

**(c)** Any written statement or oral statement of the percipient witness that is inconsistent with written statements or oral statements about the alleged incident made by other witnesses.

**(iii)** With respect to any expert witness, other than one pertaining to the defendant's criminal responsibility subject to Rule 14.4, the prosecutor may call:

**(a)** Descriptions of any examinations, tests, or experiments performed by the expert in connection with the case that were inconclusive, whose results were inconsistent with those of any examinations, tests, or experiments included in the expert's report, or whose results were inconsistent with any conclusion or opinion offered by the expert; and

**(b)** Descriptions of negative outcomes of proficiency testing or audits of the expert witness or of any testing or laboratory facility used by the expert for tests or experimentation.

**(iv)** With respect to any person the prosecutor does not anticipate calling:

**(a)** Any written statement or oral statement of such person, including an expert, pertaining to the case that is inconsistent with any written statement or oral statement known to the prosecutor made by a witness the prosecutor may call.

**(v)** Items or information that tend to:

**(a)** Support the proposition that another person committed the crime or had the motive, intent, or opportunity to commit it;

**(b)** Establish deficiencies or lapses in the investigation of the case or the failure of any expert witness or member of the prosecution team to follow established protocols, policies, or professional standards;

**(c)** Call into doubt the authenticity of any evidence the prosecutor may introduce, or the reliability or validity of any expert testimony the prosecutor may introduce; and

**(d)** Suggest that any bias or prejudice against any class or group of which the defendant is a member played any role in the investigation or prosecution of the case.

**(3) Statement definitions**.

**(A)** The term "written statement," as used in this rule, means:

**(i)** a writing made, signed, or otherwise adopted by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

**(ii)** a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration, except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing-impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.

**(B)** The term "oral statement," as used in this rule, means any communication, by speech or nonverbal conduct intended as an assertion, of a person having percipient knowledge of relevant facts and which contains such facts that is not a written statement.

**(C)** If information subject to disclosure exists in statements of multiple forms, including written and oral statements, the entirety of the substance of the

information must be fully and completely disclosed, even when such disclosure requires providing written documents and separately disclosing the substance of any unwritten oral statement. The disclosure of any unwritten oral statements should be memorialized as soon as there is a reasonable opportunity, manner, and means to do so.

**(c) Timing of Discovery**. Except as otherwise ordered by the court, the prosecutor shall provide the discovery required by Rule 14(b) at arraignment to the extent that the discovery is in the possession of the prosecutor. The prosecutor shall provide the discovery required by Rule 14(b) then available to the prosecution team by the first pretrial conference.

**(d) Continuing duty**. If the prosecution team subsequently obtains possession of items or information subject to disclosure under Rule 14(b), the prosecutor shall promptly disclose to or notify the defense of its acquisition of such additional items or information in the same manner as required for initial discovery.

## Rule 14.1: Pretrial Reciprocal Discovery from the Defense.

**(a) Defense duties**. Following the prosecutor's delivery of all discovery required pursuant to Rule 14(b), and any court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecutor and permit the prosecutor to discover, inspect, and copy any material and relevant evidence discoverable under Rule 14(b)(1)(F), (G), and (H) which the defendant intends to offer at trial, including the names, addresses, known contact information, dates of birth, and written statements of those persons whom the defendant may call as witnesses, and any promise, reward, or inducement sought, requested by, offered to, or given to such witness. As used in this rule, the term "written statement" shall have the meaning defined in Rule 14(b)(3). The judge may inquire of the defense what actions were taken to achieve compliance with this rule.

**(b) Continuing duty**. If the defendant subsequently learns of additional items or information which would have been subject to disclosure or notification under this rule, the defendant shall promptly disclose to or notify the prosecutor of its acquisition of such additional items or information in the same manner as required for initial discovery under this rule.

## Rule 14.2: Pretrial Discovery Procedures.

**(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) and production of the item shall be stayed pending a ruling by the court.

**(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.

**(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.
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> **(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.

**(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 within the time allowed by Rule 13(d)(1).

**(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.

**(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.

**(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.

**(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.

**(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 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.

**(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.
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> **(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.

## Rule 14.3: Pretrial Discovery of Affirmative Defenses; Self Defense and First Aggressor

**(a) Notice of Alibi**.

**(1) Notice by Defendant**. The judge may, upon written motion of the prosecutor filed pursuant to Rule 14.2(d), stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of the defendant's intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names, addresses, dates of birth, and known contact information of the witnesses upon whom the defense intends to rely to establish the alibi.

**(2) Disclosure of Information and Witness**. Within 7 days of service of the defendant's notice of alibi, the prosecutor shall serve upon the defendant a written notice stating the names, addresses, dates of birth, and known contact information of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

**(3) Continuing Duty to Disclose**. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision Rule 14.3(a)(1) or (2), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

**(4) Failure to Comply**. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

**(5) Exceptions**. For cause shown, the judge may grant an exception to any of the requirements of Rule 14.3(a)(1)-(4).

**(6) Inadmissibility of Withdrawn Alibi**. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

**(b) Notice of Other Defenses**. If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for

cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

**(c) Self Defense and First Aggressor.**

**(1) Notice by Defendant**. If a defendant intends to raise a claim of self defense and to introduce evidence of the alleged victim's specific acts of violence to support an allegation that the alleged victim was the first aggressor, the defendant shall no later than 21 days after the pretrial hearing or at such other time as the judge may direct for good cause, notify the prosecutor in writing of such intention. The notice shall include a brief description of each such act, together with the location and date to the extent practicable, and the names, addresses, dates of birth, and known contact information of the witnesses the defendant may call to provide evidence of each such act. The defendant shall file a copy of such notice with the clerk.

**(2) Reciprocal Disclosure by the Prosecution**. No later than 30 days after receipt of the defendant's notice, or at such other time as the judge may direct for good cause, the prosecutor shall serve upon the defendant a written notice of any rebuttal evidence the prosecutor may introduce, including a brief description of such evidence together with the names of the witnesses the prosecutor may call, the addresses, dates of birth, and known contact information of other than law enforcement witnesses and the business addresses of law enforcement witnesses.

**(3) Continuing Duty to Disclose**. If prior to or during trial a party learns of additional evidence that, if known, should have been included in the information furnished under Rule 14.3(c)(1) or (2), that party shall promptly notify the adverse party or its attorney of such evidence.

**(4) Failure to Comply**. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the evidence offered by such party on the issue of the identity of the first aggressor.

## Rule 14.4: Pretrial Discovery of Mental Health Issues.

**(a) Notice and Filing.**

**(1) Notice**. If a defendant intends at trial to raise as an issue the defendant's mental condition at the time of the alleged crime, or if the defendant intends to introduce expert testimony on the defendant's mental condition at any stage of the proceeding, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

**(A)** whether the defendant intends to offer testimony of expert witnesses on the issue of the defendant's mental condition at the time of the alleged crime or at another specified time;

**(B)** the names, addresses, and known contact information of expert witnesses whom the defendant expects to call; and

**(C)** whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to the defendant's mental condition.

**(2) Filing**. The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

**(b) Examination.**

**(1) Order**. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to the defendant's mental condition will be relied upon by a defendant's expert witness, the judge, on the judge's own motion or on motion of the prosecutor, may order the defendant to submit to an examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

**(A)** The examination shall include such physical, psychiatric, and psychological tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the relevant time. No examination based on statements of the defendant may be conducted unless the judge has found that (i) the defendant then intends to offer into evidence expert testimony based on the defendant's own statements or (ii) there is a reasonable likelihood that the defendant will offer that evidence.

**(B)** No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical examinations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.

**(C)** The examiner shall file with the court a written report as to the mental condition of the defendant at the relevant time.

**(2) Sealing of Examiner Report**. Unless the parties mutually agree to an earlier time of disclosure, the examiner's report shall be sealed and shall not be made available to the parties unless (A) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to the defendant's mental condition at the relevant time or which is otherwise within the scope of the privilege against self-incrimination; or (B) the defendant files a motion requesting that the report be made available to the parties; or (C) after the defendant expresses the clear intent to raise as an issue the defendant's mental condition, the judge is satisfied that (i) the defendant intends to testify, or (ii) the defendant intends to offer expert testimony based in whole or in part on statements made by the defendant as to the defendant's mental condition at the relevant time.

**(3) Discovery of Defense Report**. At the time the report of the prosecution's examiner is disclosed to the parties, the defendant shall provide the prosecutor with a report of the defense psychiatric or psychological expert(s) as to the mental condition of the defendant at the relevant time.

**(4) Content of Reports**. The reports of both parties' experts must include a written summary of the expert's expected testimony that fully describes: the defendant's history and present symptoms; any physical, psychiatric, and psychological tests relevant to the expert's opinion regarding the issue of mental condition and their results; any oral or written statements made by the defendant relevant to the issue of the mental condition for which the defendant was evaluated; the expert's opinions as to the defendant's mental condition, including the bases and reasons for these opinions; and the witness's qualifications.

**(5) Redaction of Reports**. If these reports contain both privileged and nonprivileged matter, the judge may, if feasible, at such time as it deems appropriate prior to full disclosure of the reports to the parties, make available to the parties the nonprivileged portions.

**(6) Failure to Comply**. If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the judge may prescribe such remedies as the judge deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

**(c) Discovery for the purpose of a court-ordered examination under Rule 14.4(b)**.

**(1) Automatic Discovery to Examiner**. If the judge orders the defendant to submit to an examination under Rule 14.4(b), the defendant shall, within 14 days of the court's designation of the examiner, make available to the examiner the following:

**(A)** All mental health records concerning the defendant, whether psychological, psychiatric, or counseling, in defense counsel's possession;

**(B)** All medical records concerning the defendant in defense counsel's possession; and

**(C)** All raw data from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.

**(2) Continuing Duty**. The defendant's duty of production set forth in Rule 14.4(c)(1) shall continue beyond the defendant's initial production during the fourteen-day period and shall apply to any such mental health or medical record(s) thereafter obtained by defense counsel and to any raw data thereafter obtained from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.

**(3) Additional Discovery Requested by Examiner.**

**(A) In General**. In addition to the records provided under Rule 14.4(c)(1) and (2), the examiner may request records from any person or entity by filing with the court under seal, in such form as the court may prescribe, a writing that identifies the requested records and states the reason(s) for the request. The examiner shall not disclose the request to the prosecutor without either leave of court or agreement of the defendant.

**(B) Notice and Hearing**. Upon receipt of the examiner's request, the court shall issue a copy of the request to the defendant and shall notify the prosecutor that the examiner has filed a sealed request for records pursuant to Rule 14.4(c)(3). Within 30 days of the court's issuance to the defendant of the examiner's request, or within such other time as the judge may allow, the defendant shall file in writing any objection that the defendant may have to the production of any of the material that the examiner has requested. The judge may hold an ex parte hearing on the defendant's objections and may, in the judge's discretion, hear from the examiner. Records of such hearing shall be sealed until the report of the examiner is disclosed to the parties under Rule 14.4(b)(3), at which point the records related to the examiner's request, including the records of any hearing, shall be released to the parties unless the judge, in the exercise of discretion, determines that it would be unfairly prejudicial to the defendant to do so.

**(C) Order**. If the judge grants any part of the examiner's request, the judge shall indicate on the form prescribed by the court the particular records to which the examiner may have access, and the clerk shall subpoena the indicated record(s). The clerk shall notify the examiner and the defendant when the requested record(s) are delivered to the clerk's office and shall make the record(s) available to the examiner and the defendant for examination and copying, subject to a protective order under the same terms as govern disclosure of reports under Rule 14.4(b)(3). The clerk's office shall maintain these records under seal except as provided herein. If the judge denies the examiner's request, the judge shall notify the examiner, the defendant, and the prosecutor of the denial.

**(4) Tests and Assessments**. Upon completion of the court-ordered examination, the examiner shall make available to the defendant all raw data from any tests or assessments administered to the defendant by the prosecution's examiner or at the request of the prosecution's examiner.

**(d) Additional discovery**. Upon a showing of necessity, the prosecutor and the defendant may move for other material and relevant evidence relating to the defendant's mental condition.

# REPORTER'S NOTES

# MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

## Rule 14 Pretrial Discovery from the Prosecution

## Reporter's Notes—2025

These are the first comprehensive revisions to the provisions governing pretrial discovery since 2004. They separate prior Rule 14 into five new rules (Rules 14-14.4). They make significant changes to procedures for mandatory disclosure to the defense and delineate in greater detail material subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. These changes to the procedure for ensuring disclosure of "*Brady* material" are in Rule 14.

Rules 14.1-14.4 reorganize the remaining discovery provisions of prior Rule 14. No substantive changes are intended in what was previously Rule 14(a)(1)(B) (Reciprocal Discovery for the Prosecution), 14(a)(1)(C) (Stay of Automatic Discovery; Sanctions), 14(a)(1)(D) (Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses), 14(a)(1)(E) (Notice and Preservation of Evidence), 14(a)(2)-(8) (Motions for Discovery, Certificate of Compliance, Continuing Duty, Work Product, Protective Orders, Amendment of Discovery Orders, and Sanctions for Noncompliance), and 14(b)(1)-(4) (Notice of Alibi, Mental Health Issues, Notice of Other Defenses, and Self Defense and First Aggressor).

The prior discovery provisions of Rule 14 have been reorganized into five new rules as follows:

**Rule 14 Pretrial Discovery from the Prosecution**
*[Replaces Rules 14(a)(1)(A), 14(a)(1)(E)(i), and 14(d)]*
**Rule 14.1 Pretrial Reciprocal Discovery from the Defense**
*[Replaces prior Rule 14(a)(1)(B)]*
**Rule 14.2 Pretrial Discovery Procedures**
*[Replaces prior Rules 14(a)(1)(C), 14(a)(1)(D), 14(a)(1)(E)(ii), 14(a)(2)-(8), and 14(c)]*
**Rule 14.3 Pretrial Discovery of Affirmative Defense; Self Defense and First Aggressor**
*[Replaces prior Rules 14(b)(1), 14(b)(3), and 14(b)(4)]*
**Rule 14.4 Pretrial Discovery of Mental Health Issues**
*[Replaces prior Rule 14(b)(2)]*

**Rule 14 Pretrial Discovery from the Prosecution.**

*[This is a new section.]*

The prosecutor's discovery obligation stems from three sources: the Massachusetts Rules of Criminal Procedure (specifically Mass. R. Crim. P. 14-14.4), the Massachusetts Rules of Professional Conduct, and the due process clauses of the Federal and State constitutions. *Committee for Public Counsel Services v. Attorney General*, 480 Mass. 700 (2018) (*CPCS v. AG*); *Commonwealth v. Ayala*, 481 Mass. 46, 56 (2018). Mass. R. Crim. P. 14 governs automatic discovery from the prosecution, that is, discovery that requires no request by the defense. Automatic discovery from the defense is governed by Rule 14.1. Discovery by motion is governed by Rule 14.2(d). Production of documentary evidence and material from witnesses may also be available under Rule 17(a)(2).

Rule 14 was created in response to the Supreme Judicial Court's decision in *CPCS v. AG*, in which it directed the Standing Advisory Committee to develop a checklist of exculpatory evidence that would clarify the definition of material subject to disclosure and provide detailed guidance to practitioners, as has been done in several federal district courts by local rules. 480 Mass. at 732-733. See Rule 5.1, Rules of the United States District Court for the District of Columbia (eff. September 2015; updated July 2019) (Disclosure of Information); Rule 26.2, Local Rules of the United States District Court for the Northern District of Florida (eff. Nov. 24, 2015) (Discovery in Criminal Cases); Rule 88.10, Local Rules of the United States District Court for the Southern District of Florida (rev. Dec. 1, 2017) (Criminal Discovery); Rule 116.2, Local Rules of the United States District Court for the District of Massachusetts (eff. June 1, 2018) (Disclosure of Exculpatory Evidence).

The use of a written "*Brady* checklist," provided to both the prosecution and defense, and "delineating in detail the general disclosure obligations of the prosecution under *Brady* and its progeny and applicable ethical standards," has been endorsed by the American Bar Association since 2011. American Bar Association, Resolution 104A Revised (adopted February 14, 2011), https://perma.cc/5T2D-2DCR. ABA Journal, *Criminal Courts Should Provide a Brady Checklist* (https://www.abajournal.com/news/article/criminal_courts_should_provide_a_brady_checklist_aba_says).

While a checklist can reduce the risk that a prosecutor inadvertently does not find exculpatory material or does not recognize it as subject to disclosure, the case-specific nature of exculpatory evidence means a checklist is not a panacea. Because "no checklist can exhaust all potential sources of exculpatory evidence" the Court also directed the Committee to consider whether identifying categories of exculpatory material – either those used in these local rules or other categories – would better ensure complete and timely disclosure of *Brady* material. *CPCS v. AG*, 480 Mass. at 733.

The Committee responded to the Court's directive in three ways. First, it modernized the language for materials subject to disclosure under *Brady* and its progeny by using the simpler description of materials "favorable to the defense" in lieu of "facts of an exculpatory nature." Rule 14(b)(2)(A). This is consistent with modern rules of procedure that implement *Brady*. Because the identification of material subject to disclosure under Brady requires a prosecutor to avoid any considerations as an advocate, the description explicitly eliminates several bases for withholding items based on their estimated or perceived effect on the litigation. Rule 14(b)(2)(A). Second, it created a functional definition of eight specific ways in which items or information can be "favorable to the defense." Rule 14(b)(2)(B). Finally, it provided a non-exhaustive list of examples of items and information favorable to the defense. Rule 14(b)(2)(C).

Rule 14 sets forth the prosecutor's discovery obligations in section 14(a) and defines the materials subject to automatic discovery in section 14(b). There are two basic types of materials subject to automatic discovery. First, "Investigative Materials" are items and information, other than exculpatory material, that were previously subject to mandatory discovery. These are defined in section 14(b)(1). Second, "Items and Information favorable to the Defense" are those items and information that form the expanded definition of exculpatory material. These are defined in section 14(b)(2).

**Section 14(a). The Prosecutor's Obligations.**

*[This is a new section.]*

Rule 14(a) sets forth the prosecutor's duties to collect and disclose information, defines the persons from whom and entities from which the prosecutor must seek this information, and specifies the duration of these duties. These obligations arise from the prosecutor's "core duty to administer justice fairly." *CPCS v. AG*, 480 Mass. 700, 730 (2018) (internal citations omitted). Under both the Federal and the Massachusetts constitutions, due process requires that the prosecutor disclose evidence favorable to the defendant where the evidence relates either to guilt or to punishment. *Brady*, 373 U.S. at 87; *Commonwealth v. Ellison*, 376 Mass. 1, 21 (1978).

Prosecutors in the Commonwealth have disclosure obligations exceeding those required by the Federal and state constitutions. Massachusetts "prosecutors have more than a constitutional duty to disclose exculpatory information; they also have a broad duty under [the Rules of Criminal Procedure] to disclose '[a]ny facts of an exculpatory nature.' This duty is not limited to information so important that its disclosure would create a reasonable doubt that otherwise would not exist; it includes all information that would 'tend to' indicate that the defendant might not be guilty or 'tend to' show that a lesser conviction or sentence would be appropriate." *In the Matter of a Grand Jury Investigation*, 485 Mass. 641, 649 (2020) (*Matter of* a *Grand Jury Investigation*) (Holding that immunized grand jury testimony from police officers admitting falsification of use-of-force reports to protect a fellow officer who used excessive force was exculpatory, and that it had to be revealed to defendants in unrelated cases in which the testifying officers were potential witnesses or had prepared reports.).

Because these disclosure obligations extend to information in possession of persons who "participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to [the prosecutor's] office," *Commonwealth v. Daye*, 411 Mass. 719, 734 (1992), they impose on the prosecutor a "duty to inquire" of prosecution team members whether they have information subject to disclosure, unless the prosecutor has no reason to believe that a particular team member may have such information. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995); *Commonwealth v. Martin*, 427 Mass. 816, 823 (1998). The prosecution's duty to disclose exculpatory information to defendants "walks hand in hand with its duty to inquire about such information." *Graham v. Dist. Attorney for Hampden District*, 493 Mass. 348, 367 (2024). "'Reasonableness' is the only limitation on the prosecutor's duty of inquiry." *Commonwealth v. Frith*, 458 Mass. 434, 440-41 (2010).

These obligations are also ethical duties arising from the prosecutor's position as a lawyer and as a lawyer who may be supervising nonlawyers. Rule 3.8(d), Mass. R. Prof. C. (Special Responsibilities of a Prosecutor), Rule 5.3(b), Mass. R. Prof. C. (Responsibilities Regarding Nonlawyer Assistance); see also *Commonwealth v. Bing Sial Liang*, 434 Mass. 131, 136 n.8 (2001). When police officers act as prosecutors, they are subject to the same disclosure obligations. *Commonwealth v. Light*, 394 Mass. 112, 114 (1985) (citing *Commonwealth v. Redding*, 382 Mass. 154, 157 (1980); "The police, acting as prosecutors, are held to the same prosecutorial standard concerning the disclosure of exculpatory evidence as are lawyer prosecutors.").

**Section 14(a)(1). The prosecution team. For the purposes of this rule, the prosecution team includes all persons under the prosecuting office's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecuting office or have done so in the case. The prosecution team includes but is not limited to:**

*[This is a new section.]*

Section 14(a)(1) adds to the rule the term "prosecution team." The prosecution team consists of those persons whose possession of information is, for discovery purposes, imputed to the prosecutor. *Graham*, 493 Mass. at 361-362 ("A prosecutor's duty to disclose extends to all facts within the 'possession, custody, or control' of a member of the prosecution team."). See also *Bing Sial Liang*, 434 Mass. at 135 (describing the work that victim-witness "advocates perform as part of the prosecution team" in holding prosecutor's discovery obligations extend to them) and *Commonwealth v. Beal*, 429 Mass. 530, 532 (1999) ("the prosecutor's duty does not extend beyond information held by agents of the prosecution team").

The prosecutor is imputed to possess material held by two categories of persons. First, those subject to the "direction or control" of the prosecuting office are members of the prosecution team. Second, those who "participated in investigating or evaluating the case and either regularly report to the prosecuting office or did so in the case" are also members of the prosecution team. Some persons will fall within both categories. "A prosecutor's obligations extend to information in possession of a person who has participated in the investigation or evaluation of the case and has reported to the prosecutor's office concerning the case. Such a person is sufficiently subject to the prosecutor's control that the duty to disclose applies to information in that person's possession." *Martin*, 427 Mass. at 824 (citing *Daye*, 411 Mass. at 733, and *Commonwealth v. St. Germain*, 381 Mass. 256, 261 n.8 (1980)). (This rule uses the term "prosecuting office" to identify the prosecuting entity in the case and the term "prosecutor" to identify the lawyer or lawyers handling the case at any stage for that entity.)

This description of two categories of persons who are on the prosecution team comes originally from the A.B.A. Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial, 2.1(d) (Approved Draft, 1970) ("The prosecuting attorney's obligations . . . extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office.").

First, those persons who are "under the prosecuting office's direction or control" are team members. Persons need not be under the direction or control of the individual prosecutor handling the case to be under the prosecuting office's direction or control. *Commonwealth v. Fossa*, 40 Mass. App. Ct. 563, 567 n.5 (1996) (The Commonwealth's argument that non-production of police report identifying additional percipient witnesses was due to one assistant district attorney in one district court signing pretrial conference report while a different prosecutor in a different district court conducted the trial was "not a legally defensible position."). Persons under the prosecuting office's direction and control, then, will *always* be members of the prosecution team, regardless of whether they have participated in the investigation or prosecution of a particular case.

However, simply being a member of a government office, even a law enforcement office, does not thereby render a person under the prosecuting office's direction or control. *Commonwealth v. Torres*, 479 Mass. 641, 648 (2018) (despite some overlapping and advisory responsibilities between the Attorney General and the prosecutor, Attorney General was not under direction or control of prosecutor, thus complainant's victim compensation file held by Attorney General not subject to disclosure). Whether persons are "sufficiently subject to the prosecutor's control that the duty to disclose applies to information in that person's possession" turns on "practical indicia." *Torres*, Id. See *Commonwealth v. Campbell*, 378 Mass. 680, 702 (1979) (in a prison homicide prosecution, the department of correction was not under the direction or control of the prosecutor despite having institutional files on inmate witnesses);

*Commonwealth v. Clemente*, 452 Mass. 295, 311-312 (2008) (in a murder prosecution, State Police and federal Drug Enforcement Agency were not sufficiently subject to the prosecutor's control to become members of the prosecution team when they investigated and interviewed a witness in an unrelated case who reported having sold drugs to one of the murder victims shortly before the killing); *Daye*, 411 Mass. at 733-734 (Boston police department was not acting jointly with the Essex County prosecutor, so its officers were not members of the prosecution team); *Commonwealth v. Thomas*, 451 Mass. 451, 454-455 (2008) (neither the State Police Colonel, who supervised the state trooper and was obligated to keep copies of the trooper's citations and maintain audit sheets of these, nor the Registry of Motor Vehicles, which kept required statistical data on police-issued citations, was thereby under the direction or control of the prosecutor or part of the prosecution team); *Commonwealth v. Williams*, 475 Mass. 705, 722-723 n.23 (2016) (out-of-state forensic analyst who extracted DNA from evidence before the involvement of Massachusetts police or prosecutors was not then under the control of the prosecutor). Doubts as to whether government officials, particularly law enforcement officials, who interact with the prosecuting office might be under its control, like doubts concerning the potentially exculpatory nature of information known to the prosecutor, should be resolved through disclosure. Cf. *Matter of a Grand Jury Investigation*, 485 Mass. at 650.

Second, those 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" are team members. *Commonwealth v. Gallarelli*, 399 Mass. 17, 20 n.4 (1987) (prosecutor was obligated "as a matter of law" to disclose municipal police crime laboratory report that was never in the prosecutor's files and of which the prosecutor had no knowledge); *Commonwealth v. Woodward*, 427 Mass. 659, 679 (1998) (Legislature's contemplation of "coordination of efforts between the medical examiner and the district attorney in investigation of deaths where criminal violence appears to have taken place" makes medical examiner one who regularly reports to the prosecuting office); *Martin*, 427 Mass. at 824 (State police crime laboratory chemist who conducted tests in the case was a member of the prosecution team); *Commonwealth v. Sullivan*, 478 Mass. 369, 380 (2017) (same); *Commonwealth v. Harwood*, 432 Mass. 290, 299-300 (2000) ("Close and coordinated relationship" between Insurance Fraud Bureau (IFB) and Attorney General's office for purposes of investigating insurance fraud and through which IFB investigators provided "ongoing investigatory support" for Attorney General's subsequent inquiries meant IFB's actions were attributable to prosecutor). Contrast *Commonwealth v. Sleeper*, 435 Mass. 581, 605 (2002) (forensic director of the Bridgewater State Hospital who testified that the defendant was not suffering from a mental illness at the time of the crime and did not thereby lack criminal responsibility was not a member of the prosecution team because he testified as a private expert witness for the Commonwealth rather than in his capacity as the forensic director).

Whether a person involved in the investigation of a case is a member of the prosecutor team depends on whether "individuals [are] acting, in some capacity, as agents of the government in the investigation and prosecution of the case." *Beal*, 429 Mass. at 531, 532-33 (complainant, an independent witness, was not converted into an agent of the prosecution through having a good working relationship with the prosecutor). See also *Commonwealth v. Ira I.*, 439 Mass. 805, 810 (2003) (middle school assistant principal who interviewed students for a school disciplinary process was not a member of the prosecution team because doing so provided "no evidence [he] acted as an agent of the prosecution or police"). However, "individuals other than prosecutors and police may be considered agents of the prosecution team." *Commonwealth v. Scott*, 467 Mass. 336, 349 (2014) (misconduct of chemist at state forensic drug laboratory

attributable to prosecution when lab was required to perform analyses on request of law enforcement officials and chemist had reported to prosecutor's office about the case).

Although membership on the prosecution team can depend upon the facts of the case, some persons will always be members of the prosecution team. Therefore, in addition to the definition of the prosecution team in section 14(a)(1), the rule also provides a non-exhaustive list of its members. These persons are set forth in sections 14(a)(1)(A) - (E).

**14(a)(1)(A) Personnel of police departments or other law enforcement agencies who were or are involved in the investigation of the case, before or after charges were issued, or were or are involved in the prosecution of the case;**

*[This is a new section.]*

Foremost among members of the prosecution team are personnel of police departments or other law enforcement agencies involved at any time in the investigation or prosecution of the case. *Daye*, 411 Mass. at 734. Personnel of any police department or law enforcement agency, of any jurisdiction, who were involved in any way in the investigation of a case are members of the prosecution team. Apart from the investigation, any such personnel who were or are involved at any point in the prosecution of the case are also members of the prosecution team. However, when members of law enforcement agencies who are not acting jointly with the prosecutor, or with a police department working with it, investigate separate cases they are not members of the prosecution team. *Daye*, Id. ("The 'police' to which that rule applies are those police who are participants in the investigation and presentation of the case."). Even if some members of a police department participated in an investigation, this does not make all its members part of the prosecution team. *Commonwealth v. Wanis*, 426 Mass. 639, 643 (1998), and *Commonwealth v. Rodriguez*, 426 Mass. 647, 648 (1998) (police department's internal affairs documents were not subject to mandatory discovery under Rule 14 where the officers were not "participants in the investigation and presentation of the case [or] police officers who regularly report to the prosecutor or did so in reference to a given case"); accord *Commonwealth v. Cruz*, 481 Mass. 1021 (2018) (rescript) (discovery order requiring the prosecutor to review all internal affairs records concerning an officer who submitted a search warrant affidavit was improper under Mass. R. Crim P. 14, but could be pursued under Mass. R. Crim. P. 17).

Law enforcement agencies' personnel who are not involved in the investigation or prosecution of the case do not become members of the prosecution team simply by holding records that would be subject to disclosure were they in the prosecutor's possession. *Campbell*, 378 Mass. at 702. Accord *Torres*, 479 Mass. at 647 (Attorney General did not become a member of the prosecution team where there was "no indication . . . the Attorney General participated in the investigation or prosecution of the defendant [and] the district attorney does not have access to the Attorney General's files.").

**14(a)(1)(B) Personnel of other governmental agencies who, in conjunction or collaboration with the prosecutor, were or are involved in the investigation or prosecution of the case;**

*[This is a new section.]*

Members of other government agencies may become members of the prosecution team if they were or are involved in the investigation or prosecution of the case in conjunction or collaboration with the prosecutor. Compare *Ira I.*, 439 Mass. at 810 (Middle school assistant principal who interviewed juvenile suspects did not thereby become an agent of police because

he did so independently, for school disciplinary purposes, and did not disclose the juveniles' statements to the police), and *Campbell*, 378 Mass. at 702 (Department of Correction was not part of the prosecution team in a prosecution of a prison murder, so there was no obligation to disclose institutional records of the victim and the prosecution's inmate witness), with *Scott*, 467 Mass. at 349-350 (State chemist at then-Department of Public Health laboratory was government agent, using Rule 14 analysis to conclude she was member of the prosecution team by conducting both primary and secondary drug analyses, through her responsibility for safeguarding all evidence samples, and the expectation she would testify concerning these samples), and *Commonwealth v. Smith*, 90 Mass. App. Ct. 261, 268 (2016) (When "Norfolk district attorney, Suffolk district attorney, and the State police were communicating with each other concerning Lowe and his involvement in their various investigations" they became members of the prosecution team for the case in which Lowe was the victim and a key witness.). When agencies investigate the same events as the prosecutor for different purposes, they do not thereby become members of the prosecution team. *Commonwealth v. Adkinson*, 442 Mass. 410, 419-420 (2004) (then-Department of Social Services was not acting as an agent of the prosecutor when it denied a defense request to interview children in its custody, despite its statutorily obligated referral of abuse allegations and investigation to prosecutor under G.L. c. 119, § 51A). While most such agencies would typically be in the executive, an agency in another branch of government – such as the Probation Service – could in specific cases become a member of the prosecution team if, for example, a probation officer's actions revealed incriminating items or information that led to a prosecution.

**14(a)(1)(C) Forensic analysts, crime laboratory personnel, and criminalists employed or retained by state or local government who were or are involved in the investigation or prosecution of the case;**

*[This is a new section.]*

Members of the prosecution team include "forensic analysts, crime laboratory personnel, and criminalists employed or retained by state or local government and involved in the investigation or prosecution of the case." The Commonwealth's Medical Examiner, for example, is a member of the prosecution team where an autopsy was conducted for the case. *Woodward*, 427 Mass. at 679 (medical examiner regularly reports to the prosecutor where the "legislature contemplated coordination of efforts between the medical examiner and the district attorney in investigations of deaths where criminal violence appears to have taken place."). The State Police Crime Laboratory and any municipal crime laboratories involved in the investigation or prosecution of the case, as well as private laboratories retained by law enforcement to perform analysis for the case, are also members of the prosecution team. *Commonwealth v. Hallinan*, 491 Mass. 730, 746 (2023) (State Police office of alcohol testing); *Gallarelli,* 399 Mass. at 20 n.4 (Boston Police crime laboratory); *Martin*, 427 Mass. at 823-24 (State Police crime laboratory); *Scott*, 467 Mass. at 349-350 (then-Department of Public Health drug laboratory); *Commonwealth v. Ware*, 471 Mass. 85, 95 (2015) (same). Team members include laboratory personnel and criminalists involved in the investigation or prosecution of the case without regard to the level of their involvement or its period in the case. *Sullivan*, 478 Mass. at 380-384 (state police crime laboratory criminalist who collected evidence and tested it for traces of human blood but did not conduct DNA analysis that implicated defendant was nevertheless team member).

**14(a)(1)(D) Victim witness advocates and investigators employed by the prosecuting office; and**

*[This is a new section.]*

Victim-witness advocates are members of the prosecution team. *Bing Sial Liang*, 434 Mass. at 135 (the "work of [victim-witness] advocates is subject to the same legal discovery obligations as that of prosecutors and their notes are subject to the same discovery rules"). Accord *Torres*, 479 Mass. at 647.

**14(a)(1)(E) Members of joint state and federal law enforcement task forces who were or are involved in the investigation or prosecution of the case.**

*[This is a new section.]*

Members of joint state and federal law enforcement task forces that investigated the case are members of the prosecution team. *Daye*, 411 Mass. at 734; *Commonwealth v. Lykus*, 451 Mass. 310, 326-328 (2008). Whether participants in such a joint task force transform an investigation into a joint action can be a question of fact. *Commonwealth v. Abdul-Alim*, 91 Mass. App. Ct. 165, 169-170 (2017) (Local police officer who was a member of a joint federal-state counterterrorism task force but who arrested the defendant on a gun possession charge did not convert the prosecution into a joint action by informing his FBI task force supervisor of the defendant's arrest or by asking defendant to become a task force informant.).

When there is sufficient cooperation between state and federal officials, the actions of federal law enforcement agencies may be imputed to the Commonwealth and impose a duty on the prosecutor to seek exculpatory material from federal authorities. *Commonwealth v. Donahue*, 396 Mass. 590, 598 (1986). This is because of the risk that a defendant prosecuted by state authorities could be prejudiced by coordinated efforts of separate sovereigns to keep exculpatory material in possession of federal authorities. Ibid., 396 Mass. at 597-601 (Discussing factors in determining whether to impute information held by federal authorities to the prosecutor as including potential unfairness to the defendant, the defendant's lack of access to the evidence, the burden on the prosecutor of obtaining the evidence, and the degree of cooperation between state and federal authorities). See also *Commonwealth v. Manning*, 373 Mass. 438, 442 n.5 (1977) (Federal agent who "was the arresting officer, sole prosecution witness, and . . . the prime mover behind the direct indictment . . . must be considered part of the prosecution team.").

Even without joint investigative efforts by state and federal authorities, the potential unfairness from introducing two sovereignties which can deny a defendant access to exculpatory material that would have been available in state court may impose an obligation on the prosecutor to obtain information for the defendant from federal authorities. *Commonwealth v. Bonnett*, 472 Mass. 827, 844-846 (2015) (prosecutor obligated to seek a confidential informant's identity from federal authorities, where the prosecutor knew of an FBI report of a meeting with local police and FBI at which the informant recounted "word on the street" that someone other than the defendant committed the murder); *Commonwealth v. Liebman*, 379 Mass. 671, 674 (1980) (even without joint state and federal prosecution, cooperation between state and federal prosecutors "is and should be common enough" to place the burden on the prosecutor to obtain federal grand jury minutes for the defendant); cf. *Ayala*, 481 Mass. at 56-61 (Because the witness's status as a confidential informant was in the possession and control of federal authorities rather than the Commonwealth; applying the four-factor test set forth in *Donahue*,

supra, the court did not impose the burden on the Commonwealth to seek the information from federal authorities).

**14(a)(2) The prosecutor's duties to inform and inquire, collect and disclose, preserve and notify, and record.**

*[This is a new section.]*

This section sets forth the prosecutor's obligation to ensure that materials subject to disclosure are identified, collected, disclosed and, where this is not possible, preserved. The prosecutor has discovery obligations with respect to the entire prosecution team which must be discharged in each case. These obligations require a prosecutor to contact all team members who the prosecutor has reason to believe may have information and material subject to disclosure, to inquire about such information, to collect and disclose it, and to take steps to preserve such materials that cannot promptly be disclosed. These affirmative duties to take certain steps arise under this rule as well as under the due process guarantees of the Federal and Massachusetts constitutions, and the ethical obligations of prosecutors as lawyers. *CPCS v. AG*, 480 Mass. at 731; *Grand Jury Investigation*, 485 Mass. at 647-648.

These duties to seek and assess the discoverability of items and information exist absent any specific discovery order by the court. For example, in *Commonwealth v. Daniels*, 445 Mass. 392 (2005), the Supreme Judicial Court held that the prosecutor in a felony murder case involving a robbery was obligated to disclose a witness's statement in a separate case that indirectly undermined the identification of the defendant in the felony murder. This obligation applied even though the trial court had denied the defendant's discovery request for information about the separate murder; the Commonwealth nonetheless had a duty to independently review the material in the separate case to determine whether it had to be disclosed. "While due process does not require prosecutorial clairvoyance[,] it does, however, require continued vigilance . . . for information the Commonwealth knows, or should know, the defendant seeks as material to his defense." 445 Mass. at 403-404.

**14(a)(2)(A) The prosecutor has a duty in each case to inform each member of the prosecution team whom the prosecutor has reason to believe may be in possession of items or information subject to this rule of the discovery and preservation obligations required by this rule, and to inquire of each such person as to the existence of any such items or information.**

*[This is a new section.]*

This section sets forth how the prosecutor is to ascertain the items and information subject to automatic discovery. It should be read in conjunction with the definition of the prosecution team in section 14(a)(1). This section incorporates into the rule the duty in existing case law to seek material subject to disclosure from the team members. *Ware*, 471 Mass. at 95 ("It is well established that the Commonwealth has a duty to learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team.'") (citing *Beal*, 429 Mass. at 532). The duty to inform and inquire applies equally to all materials subject to automatic discovery, whether investigative materials or items and information favorable to the defense. Mass. R. Crim. P. 14(b)(1) and (2).

Each prosecutor handling the case has a constitutional obligation, and a duty under this rule, to determine whether each member of the prosecution team has material subject to disclosure. *Whitley*, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any

favorable evidence known to the others acting on the government's behalf in the case, including the police."); *Martin*, 427 Mass. at 823 ("The prosecution had a duty to inquire concerning the existence of scientific tests, at least those conducted by the Commonwealth's own crime laboratory. That obligation is inherent in the allowance of the motion to produce all scientific tests. It could not satisfy the production order simply by turning over test information that it had in its files. It had a duty of inquiry."). See also *Cruz*, 481 Mass. at 1022 (Vacating discovery order that required the prosecutor to review Boston Police department internal affairs division records concerning search warrant affiant "did nothing to relieve the Commonwealth of its ongoing duty to disclose exculpatory information -- including any material, exculpatory information related to past discipline or internal investigation of the officer in question -- to the extent such information is in the possession, custody, or control of the prosecution team.").

*Informing members of the prosecution team of the disclosure obligation*

The obligation in this section is twofold: to inform members of the prosecution team about the prosecutor's disclosure obligations and to ask whether each member has materials subject to disclosure. The scope of this obligation is necessarily case-specific. It extends to every member of the prosecution team "whom the prosecutor has reason to believe may be in possession" of discoverable material. Mass. R. Crim. P. 14(a)(2)(A). A prosecutor may have reason to believe that a member of the prosecution team may possess discoverable material based on the nature of the team member's role, the prosecutor's experience with the team member, or on information from the team member concerning the case at hand.

The obligation then requires that the prosecutor affirmatively contact "each such person." Although persons may recur as members of the prosecution team in many cases (such as personnel of entities listed in sections 14(A)(1)(A)-(E)), this duty cannot be discharged by a form or blanket communication to the entire organization or office, and it must be affirmatively discharged anew in each case. Individuals, not entities, are members of the prosecution team. Limiting the inquiry obligation to team members whom the prosecutor "has reason to believe may be in possession" of items or information subject to disclosure is designed to prevent such blanket communications and instead focus the prosecutor's inquiry on the individuals most likely to possess such material in each specific case.

The prosecutor's obligation to inform members of the prosecution team of the duty to disclose all information favorable to the defense is a nationally recognized standard. American Bar Association, Standard 3-5.4, Criminal Justice Standards for the Prosecution Function (4th Ed., Nov. 12, 2018) (Identification and Disclosure of Information and Evidence) ("(b) The prosecutor should diligently advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described in (a) above.").

The duty to inform prosecution team members of disclosure obligations and to ask whether there are such materials rests on the prosecutor for two reasons. First, ascertaining materials subject to disclosure is fundamentally a legal determination that requires knowledge of facts in a legal context, and many team members will not be lawyers. Second, whether items or information held by one member of the prosecution team may be subject to disclosure may depend on knowledge about other aspects of the investigation or prosecution. As the Supreme Judicial Court explained in *Bing Sial Liang*, 434 Mass. 131, in which it held that victim-witness advocates are members of the prosecution team:

> Prosecutors have the primary burden of determining whether the [victim-witness] advocates possess exculpatory information. Although advocates may have acquired

> extensive knowledge of the legal system, they generally are not attorneys and may be unable to determine whether their notes contain exculpatory evidence. Further, they may be unaware whether a victim or witness has communicated a different version of events to the police, grand jury, prosecutor, or others. Prosecutors therefore are responsible for asking advocates about their conversations with victims or witnesses, reviewing the advocates' notes, and disclosing any exculpatory evidence therein.

*Bing Sial Liang*, 434 Mass. at 136.

*Inquiring of prosecution team members as to the existence of items or information subject to disclosure*

Prosecutors must discharge the duty to inquire of team members bearing in mind the definition of the prosecution team. The prosecution team consists of those persons whose possession, custody, or control of items or information is *imputed to the prosecutor*. "A prosecutor's duty to disclose necessarily encompasses information that may not even be known to the prosecutor or housed within his or her files, so long as the information is related directly to the crimes at issue and is in the possession of some prosecution team member." *Graham*, 493 Mass. at 362.

The prosecutor's failure to learn of materials subject to disclosure is as harmful to due process as the prosecutor's failure to disclose such materials that the prosecutor possesses. *Commonwealth v. Merry*, 453 Mass. 653, 664 (2009) (Essex County prosecutor's unintentional failure to disclose an accident reconstructionist's opinion concerning the cause of a broken windshield in a vehicular homicide case to the Suffolk County trial prosecutor violated disclosure obligations); *Commonwealth v. Tucceri*, 412 Mass. 401, 406-408 (1992). When the prosecutor is aware that multiple law enforcement agencies are exchanging information concerning a key witness and may be providing the witness with promises or benefits, there is a duty of inquiry. *Smith*, 90 Mass. App. Ct. at 268 (While "a prosecutor has no duty to investigate every possible source of exculpatory information on behalf of the defendant and . . . his obligation to disclose exculpatory information is limited to that in the possession of the prosecutor or police, *Commonwealth v. Campbell*, 378 Mass. 680, 702 (1979), it is clear from the record that the Norfolk district attorney, the Suffolk district attorney, and the State police were communicating with each other regarding [the principal prosecution witness] and his involvement in their various investigations. Any information on other benefits conferred upon [this witness] by these or other entities should have been disclosed.").

Beyond individual prosecutors questioning members of the prosecution team whom the prosecutor has reason to believe may have items or information subject to disclosure, the Supreme Judicial Court has strongly recommended prosecuting offices create policies by which to supplement such material from the agencies with which team members work. *Matter of* a *Grand Jury Investigation*, 485 Mass. at 658-660 n.16. Some of the most critical information subject to disclosure, such as potential impeachment material concerning prosecution witnesses, cannot be expected to reliably be disclosed by those same witnesses. But finding this information known to team members and disclosing it to the defense is a prosecutor's core duty. "For a prosecutor, disclosure of information that may permit a defendant to prove his or her innocence should be equally as important as securing the conviction of a guilty party." Id. at 657. Because of the difficulty of obtaining this information directly from the witness, and ensuring it is complete, the Supreme Judicial Court strongly recommends that prosecuting offices develop policies by which a designated "requesting official" can seek this information from an official of the team member's agency.

The Supreme Judicial Court has specifically endorsed the approach in the Justice Department's "Giglio Policy." First, this policy requires that the prosecutor have a "candid conversation" with each law enforcement witness concerning any potential impeachment material, regardless of whether it is known to the public.

> We note that the United States Department of Justice, through its "Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses," known as its "Giglio Policy," has established a procedure whereby Federal prosecutors obtain potential impeachment information from Federal investigative agencies, such as the Federal Bureau of Investigation, regarding law enforcement agents and employees who may be witnesses in the cases they prosecute. United States Department of Justice, Justice Manual, Tit. 9-5.100 (updated Jan. 2020) (Manual), https://www.justice.gov/jm/jm-9-5000-issues-related-trials-andother-court-proceedings [https://perma.cc/NKL2-YZ2J]. According to the policy:
>
> "Prosecutors should have a candid conversation with each potential investigative agency witness and/or affiant with whom they work regarding any on-duty or off-duty potential impeachment information, including information that may be known to the public but that should not in fact be the basis for impeachment in a federal criminal court proceeding, so that prosecuting attorneys can take appropriate action, be it producing the material or taking steps to preclude its improper introduction into evidence."
>
> Id. at Tit. 9-5.100(1).

Id., 485 Mass. at 658-659.

Second, under the Federal policy each prosecuting office has a designated point person (a "requesting official") who can inquire of specific liaisons ("designated officials") in each investigative agency about the existence of any material subject to disclosure. Use of a designated official avoids the obvious problem of relying on self-disclosure by a team member.

> In addition, each United States Attorney's office designates a "requesting official" who may ask an investigative agency's official to provide potential impeachment information regarding an agency employee associated with the case or matter being prosecuted. Id. at Tit. 9-5.100(2)-(4). When a case is initiated within the United States Attorney's office, the prosecutor responsible for the case, to supplement the information obtained directly from the agency employees involved in the case, may ask the office's requesting official to obtain from the agency's designated official any potential impeachment information regarding those agency employees. Id. at Tit. 9-5.00(4).

The Federal policy also details the broad scope of information subject to disclosure to the prosecutor as potential impeachment information, some of which would be very difficult for the prosecutor to learn of otherwise.

> Potential impeachment information may include, but is not limited to:
>
> > i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding;
> >
> > ii) any past or pending criminal charge brought against the employee;
> >
> > iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;

> iv) prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;
> v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence – including witness testimony – that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence . . .;
> vi) information that may be used to suggest that the agency employee is biased for or against a defendant . . .; and
> vii) information that reflects that the agency employee's ability to perceive and recall truth is impaired.

Id. at Tit. 9-5.100(c)(5).

As the Court explained, this policy "reflects the [Justice] department's recognition of the need for prosecutors to learn of potential impeachment information regarding all the investigating agents and employees participating in the cases they prosecute, so that they may consider whether the information should be disclosed to defense counsel under the *Brady* and *Giglio* line of cases." Acknowledging "[w]e do not possess the authority to require the Attorney General and every district attorney in this Commonwealth to promulgate a comparable policy," the Court nevertheless stated plainly that "we strongly recommend that they do." *Matter of a Grand Jury Investigation*, 485 Mass. at 658-660. See also *Graham*, 493 Mass. at 363 ("To comply with its obligations under Giglio, to disclose information known to the prosecution team, it behooves the prosecutor's office to institute formal disclosure procedures to ensure the communication of all material information to defense counsel.").

The Supreme Judicial Court further cited the practices of three district attorney's offices in the Commonwealth, as well as those of chief law enforcement officers of three states, that have created lists of officers accused of or found to have engaged in misconduct, or protocols to facilitate disclosure of such impeachment material. *Matter of a Grand Jury Investigation*, 485 Mass. at 661 n.16. The district attorney's offices referenced maintained lists of law enforcement officers whose misconduct might need to be disclosed as relevant to the officers' credibility. Id. The Attorney Generals of New Hampshire and New Jersey, and the Association of Prosecuting Attorneys of Washington state have established protocols by which prosecutors can obtain any potentially exculpatory material from law enforcement and investigative agencies. Id. The Supreme Judicial Court has previously suggested that "centralized consideration" by administrative justices or chief administrative justices may be necessary to avoid police misconduct in seeking search warrants and to ensure the adequacy of police procedures for preventing such misconduct. *Commonwealth v. Lewin*, 405 Mass. 566, 586 n.12 (1989). If an office *does* maintain such a database or list, the prosecutor must disclose its information about any prosecution witness as this is information favorable to the defense. Mass. R. Crim. P. 14(b)(2)(C)(i)(h).

All disclosure obligations impose a duty to make "reasonable inquiry" under Rule 14.2(e). Review of material that is subject to disclosure will frequently reference other material that is also subject to disclosure, and counsel cannot comply with disclosure obligations without discharging this duty to make reasonable inquiry concerning the existence of other items or information. *Frith*, 458 Mass. at 440 (Prosecutor failed to discharge disclosure obligation when "even a cursory reading of [one] Incident Report" would have alerted the prosecutor to the

existence of a related report subject to disclosure.). "[I]t is incumbent on an Assistant District Attorney to ask a police prosecutor, or other similar official, whether *all* discoverable materials relating to a particular case have been given to the Commonwealth." Id. (citations omitted) (emphasis in original). "Reasonableness demands, at the very least, that prosecutors ask other members of the prosecution team whether exculpatory information exists, particularly any information specifically requested by defense counsel or required to be disclosed under rule 14." *Graham*, 493 Mass. at 369. See also *Commonwealth v. Diaz*, 100 Mass. App. Ct. 588, 593 (2022) (When police seized defendant's cell phone and defense counsel had requested 'all cell phone data,' "[t]he scope of reasonable inquiry for the prosecutor, informed by the defense request for the call log data, extended to inquiring of the detectives whether that information was accessible to the government."); *Commonwealth v. Elangwe*, 85 Mass. App. Ct. 189, 201 n.18 (2014) (When victim responded that she had no knowledge of whether a civil suit against criminal defendant was pending, "the prosecutor would have been prudent to press [the victim] for an unequivocal answer once the subject was broached."). However, the duty of inquiry does not extend to unadjudicated civil allegations against members of the prosecution team. *Commonwealth v. McFarlane*, 493 Mass. 385 (2024) (Holding prosecutor had no duty of inquiry concerning pending federal suit against police officer, in unrelated case that predated defendant's, alleging malicious prosecution, false arrest, false imprisonment and excessive force.).

**14(a)(2)(B) The prosecutor has a duty in each case to collect and to disclose to the defense all items and information required by this rule that are in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team.**

*[This is a new section.]*

This section sets forth the prosecutor's essential duty with respect to materials subject to automatic discovery: collect and disclose them to the defense. This duty extends to all items and information in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team. *Beal*, 429 Mass. at 531-532. Whether items or information are in the "possession, custody, or control" of the prosecutor is determined according to "practical indicia." *Torres*, 479 Mass. at 648 (victim's compensation claim records in the Attorney General's office were not in the "possession, custody or control" of the district attorney where the Attorney General did not participate in the investigation and the prosecutor lacked access to the Attorney General's files). See also *Cruz*, 481 Mass. 1021; *Wanis*, 426 Mass. at 643-44 (police department's internal affairs files are not under prosecutor's custody or control, but statements of percipient witnesses may be subject to disclosure under Mass. R. Crim. P. 17). "Once a third-party record is obtained by the Commonwealth, however, it becomes part of the prosecutor's case file, triggering discovery obligations." *Commonwealth v. Kostka*, 489 Mass. 399, 412 (2022).

The disclosure obligation applies to all items and information subject to automatic disclosure, even if the items or information are already known to the defendant or are publicly available. *Commonwealth v. Correia*, 492 Mass. 220, 223-225 (2023) (Prosecutor possessed and was obligated to disclose song lyrics defendant composed despite their being publicly available on a third party website because the prosecutor maintained them in its file as shown by quoting from them in cross examination and showing an image displayed alongside them); *Commonwealth v. Eneh*, 76 Mass. App. Ct. 672, 677-680 (2010) (Commonwealth's delayed

disclosure of defendant's inculpatory bank records required a new trial, despite the defendant's knowledge of their existence, because they undermined his lawyer's presentation of his entrapment defense).

**14(a)(2)(C) When the prosecutor learns of items or information subject to disclosure which cannot be promptly copied or made available for inspection by the defense, the prosecutor has a duty to promptly notify the defense of the existence, and if known the location, of those items or information, and to instruct an appropriate member of the prosecution team to preserve those items or information until they can be disclosed.**

*[This is a new section.]*

This section sets forth what the prosecutor must do upon learning of items or information subject to mandatory discovery that cannot promptly be collected and disclosed. In these circumstances, the prosecutor must notify the defendant of the existence of these items or information (and, if known, of their location) and direct an appropriate member of the prosecution team to preserve them until they can be disclosed. *Commonwealth v. Charles*, 397 Mass. 1, 13-14 (1986) ("We have repeatedly stressed the need for prosecutors and police to do their utmost to preserve and present 'exculpatory evidence which is available to the prosecution.'"). See also *Commonwealth v. Sasville*, 35 Mass. App. Ct. 15, 18-20 (1993) (Commonwealth's duty extends to preserving potentially exculpatory evidence).

Separately, under Rule 14.2(c)(1), if the prosecutor learns of items or information held by third parties that would be subject to disclosure if they were in the possession, custody, or control of the prosecutor, the prosecuting office, or the prosecution team, the prosecutor must notify the defendant of their existence and the identity of any persons possessing them. This enables the defendant to seek a preservation order directed to the individual, agency, or entity with possession, custody, or control over them. Rule 14.2(c)(2).

The prosecutor typically has more extensive and earlier knowledge about items and information subject to mandatory discovery than does the defendant and delay in providing these materials can impair the defense. "Modern rules of discovery were created to permit defense counsel to learn, through discovery of the government's evidence, what the defendant faces in standing trial, and to assist in preventing trial by ambush." *Eneh*, 76 Mass. App. Ct. at 677. Because of this asymmetry, this section reinforces the importance of timeliness in alerting the defendant to the existence of material whose provision will be delayed. When items or information subject to disclosure cannot be "promptly" copied or made available, the prosecutor must "promptly" notify the defendant of this situation.

Delayed disclosure of items subject to mandatory discovery may impair a defendant's ability to prepare and present a case. *Commonwealth v. Baldwin*, 385 Mass. 165, 175 (1982) (The issue is "whether the prosecution's disclosure was sufficiently timely to allow the defendant to make effective use of the evidence in preparing and presenting his case."). Delayed disclosure can produce an unfair trial. *Commonwealth v. Lam Hue To*, 391 Mass. 301 (1984) (Delayed pretrial disclosure of evidence adversely affected the defendant's preparation and presentation of his defense, warranting a mistrial and could, in an appropriate case, warrant dismissal of the indictment.). Notification enables the defendant to take any additional steps to ensure disclosure which the defendant deems necessary. See Rule 14.2(c)(2).

**14(a)(2)(D) When the prosecutor learns of items subject to disclosure that have been destroyed, lost, altered, or which have otherwise become unavailable, or items or**

**information subject to disclosure that a member of the team will not provide the prosecutor, the prosecutor has a duty to promptly notify the defense of the destruction, loss, alteration, or unavailability of the items or the refusal to provide the items or information.**

*[This is a new section.]*

When the prosecutor learns that items subject to disclosure have been destroyed, lost, altered, or are otherwise unavailable, prompt notification to the defense is essential. The loss or destruction of materials subject to disclosure can pose particular challenges to the defense and to the court. *Commonwealth v. Williams*, 455 Mass. 706, 714-715 (2010). Loss or destruction of exculpatory or even potentially exculpatory evidence can produce complex remedial issues. See *Commonwealth v. Neal*, 392 Mass. 1, 10-12 (1984); Commonwealth v. Heath, 89 Mass. App. Ct. 328, 337-340 (Commonwealth's failure to preserve booking video of alleged assault on officer required new trial); *Commonwealth v. O'Neal*, 93 Mass. App. Ct. 189 (2018) (same). Prompt notification enables the defense to attempt to make a showing, should it choose, of harm from this loss and to seek an appropriate remedy. *Williams*, 455 Mass. at 718-720. The prosecutor's notification to the defense that items subject to disclosure have been destroyed or are otherwise unavailable must be unambiguous. *O'Neal*, 93 Mass. App. Ct. at 199 (In case of assault on an officer, a prosecutor's terse statement that surveillance video of booking area was "not available" rather than clarifying, as the prosecutor knew, that it was no longer available because the system automatically recorded over the tapes was a failure to disclose material exculpatory evidence.) When a member of the prosecution team will not provide items or information subject to disclosure, notification of the defense will similarly enable the defendant to seek the assistance of the court.

**14(a)(2)(E) The judge may inquire of the prosecutor what actions were taken to achieve compliance with this rule.**

*[This is a new section.]*

Courts have inherent authority to ensure parties comply with their discovery obligations. This section sets forth one means by which the judge may do so, namely by asking the prosecutor what has been done to comply. An identical provision applies equally to the defendant. See Mass. R. Crim. P. 14.1(a).

The court also has specific authority to provide for additional discovery, grant continuances, or make any other order it deems just under the circumstances as relief for noncompliance with discovery obligations. Sanctions for noncompliance may also include the exclusion of evidence, adverse jury instructions, dismissal of charges with or without prejudice, contempt proceedings, or other sanctions. See Mass. R. Crim. P. 14.2(j)(1) and (2); *Commonwealth v. Carney*, 458 Mass. 418, 428 (2010) (although sanctions authority "permits broad range of orders" in response to a failure to comply with discovery orders, a judge is "nonetheless limited to orders that are remedial in nature, aimed at curing any prejudice caused by violation of discovery obligation and ensuring a fair trial").

Given the prospect of judicial inquiry concerning actions taken to achieve compliance with the rule, the prosecutor should adopt a method for recording actions that are done to discharge discovery obligations. This is especially important as multiple prosecutors may be involved in a case, a case may extend over a lengthy period, or it may be subject to post-conviction challenge. Prosecutors are encouraged to send discovery packets accompanied by a cover letter, signed by the prosecutor, that outlines the discovery being provided. If the

discovery is Bates stamped or otherwise numbered, the letter should reference the Bates numbers of the pages of discovery provided.

One prosecutorial manual advises:

> One of the most important steps in the discovery process is keeping good records regarding disclosures. Prosecutors should make a record of when and how information is disclosed or otherwise made available. While discovery matters are often the subject of litigation in criminal cases, keeping a record of the disclosures confines the litigation to substantive matters and avoids time-consuming disputes about what was disclosed. These records can also be critical when responding to petitions for post-conviction relief, which are often filed long after the trial of the case.

U.S. Department of Justice, *Justice Manual*, § 9-5.002 (Criminal Discovery) (https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings).

Disclosure of unwritten or intangible information, such as witness statements that arise shortly before a hearing or in an informal conversation with the prosecutor or a member of the prosecution team, require particular care and prompt attention. Methods of recording actions could include written or electronic versions of communications, requests, or disclosures, as well as memorialization of verbal communications. See Mass. R. Crim. P. 14(b)(2)(A) and 14(b)(3)(C) (specifying that disclosure of unwritten or intangible information, or oral statements, may be memorialized as soon as there is a reasonable opportunity, manner, and means to do so). Methods of memorialization could include a statement on the record at sidebar, or a note or electronic message. Counsel should take care that both the fact of the disclosure and its substance are memorialized. *Commonwealth v. Williams*, 58 Mass. App. Ct. 139, 146 (2003) (Confusion concerning scope of prosecutor's oral disclosures to newly appointed counsel concerning identification procedure "illustrates how important it is . . . for the prosecution to avoid reliance on causal disclosures in discharging its discovery obligations.").

**14(b) Materials subject to automatic discovery**

*[This is a new section.]*

Rule 14(b) defines two categories of materials subject to automatic discovery: investigative materials (Rule 14(b)(1)) and items and information favorable to the defense (Rule 14(b)(2)). "Investigative materials" are those items that were subject to mandatory discovery in prior Rule 14(a)(1)(A), with the exception of "facts of an exculpatory nature" and "promises, rewards or inducements made to witnesses the party intends to present at trial." These two types of materials are now included in the second major category of materials subject to automatic discovery: "Items and information favorable to the defense."

This structure modernizes the descriptions of materials that are subject to automatic discovery and updates them to reflect current practice and technology. The structure provides an entirely new section that replaces the six words "[a]ny facts of an exculpatory nature," with a definition of materials that are favorable to the defense, a description of the scope of items and information to which this definition applies, and a non-exclusive list of examples. Both categories of items and information are equally subject to automatic discovery.

**14(b)(1) Investigative Materials. The prosecutor shall disclose to the defense, and permit the defense to discover, inspect, and copy, each of the following items and information, provided it is relevant to the case and in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team:**

*[This is a new section.]*

This section sets forth the disclosure the prosecutor must provide the defendant for all materials subject to automatic discovery. This section retains all items that were in prior sections 14(a)(1)(A)(i)-(ix) as "Mandatory Discovery for the Defendant," with the exception of sections 14(a)(1)(A)(iii) ("facts of an exculpatory nature") and 14(a)(1)(A)(xi) ("promises, rewards or inducements made to witnesses"). These two categories of material subject to disclosure are included in the new section 14(b)(2) ("Items and Information to the Defense").

Section 14(b)(1) uses the new term "Investigative Materials" to distinguish the items and information that are subject to disclosure without regard to their substance, from items and information subject to disclosure because of their exculpatory nature ("Items and Information Favorable to the Defense."). Both investigative materials and items and information favorable to the defense are equally subject to automatic discovery and to all provisions governing it.

Rule 14(b)(1) retains in sections 14(b)(1)(A)-(I) all items and information for which disclosure by the Commonwealth was previously required and adds to the contact information concerning the Commonwealth's intended prospective non-law enforcement witnesses their "known contact information." See Rule 14(b)(1)(C). The rule separates into three sections what was previously one section that required disclosure of police and investigator's reports, photographs, tangible objects, intended exhibits, reports of physical examinations of any person, scientific tests or experiments that pertain to the case, and statements of intended witnesses. This is done for clarity. See Rules 14(b)(1)(D), (G) and (H).

**14(b)(1)(A) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.**

*[This section makes no change to prior section 14(a)(1)(A)(i).]*

For the definitions of "written statement" and "oral statement," see Mass. R. Crim. P. 14(b)(3)(A) and (B). Note that information subject to disclosure that is contained in statements in multiple forms may require multiple methods of disclosure. See Mass. R. Crim. P. 14(b)(3)(C).

**14(b)(1)(B) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.**

*[This section makes no change to prior section 14(a)(1)(A)(ii).]*

**14(b)(1)(C) The names, addresses, dates of birth, and known contact information of the Commonwealth's prospective witnesses other than law enforcement witnesses.**

*[This section makes two changes to prior section 14(a)(1)(A)(iv).]*

This section adds "known contact information" to the identifying information for the Commonwealth's prospective civilian witnesses that must be disclosed. Since the Rule's last comprehensive revision in 2004, common methods of communication have changed dramatically and now often include mobile telephone numbers or email addresses. Whatever contact information is known to the prosecutor (or any member of the prosecution team) must be disclosed.

Defense counsel has a constitutional obligation to investigate the Commonwealth's case, for which they must be able to identify and reach prospective prosecution witnesses. *Commonwealth v. Garcia*, 66 Mass. App. Ct. 167 (2006) (Defense counsel's concession that it was not his practice to interview government witnesses established first prong of Saferian

standard of ineffective assistance). While witnesses in a criminal proceeding do not belong to either side and may decline to speak with either side, any effort by the Commonwealth to constrain this choice is improper and may violate art. 12. *Commonwealth v. St. Pierre*, 377 Mass. 650, 657-658 (1979), citing *Commonwealth v. Balliro*, 349 Mass. 505, 516 (1965). As with any other forms of contact, a litigant concerned about misuse of discoverable information by a party may seek appropriate protective orders. See Mass. R. Crim. P. 14.2(g).

This section omits the previous requirement that the Commonwealth provide demographic information on civilian witnesses to the Probation Service because the method of obtaining records of witnesses' court activity has been changed. See Mass. R. Crim. P. 14.2(b).

**14(b)(1)(D) Written or recorded statements of persons the prosecutor may call as witnesses, and notes of interviews by law enforcement with persons the prosecutor may call as witnesses, unless contained within a disclosed statement or report.**

*[This is a new section.]*

This section provides for disclosure of statements of persons the prosecutor may call as witnesses, which was provided for under prior section 14(a)(1)(A)(vii). The definition of statements is in section 14(b)(3). This section adds a requirement for disclosure of notes of interviews by law enforcement with persons the prosecutor may call as witnesses, unless these notes are contained within a disclosed witness statement or a report.

The obligation extends to statements of persons who may be called as witnesses that are in the notes of any member of the prosecution team. Law enforcement notes of interviews need not be made contemporaneously to be subject to disclosure. This continues a trend under Massachusetts law of increasing disclosure of witness statements, beyond those that were formally adopted by the witness. See Reporter's Notes to Mass. R. Crim. P. 14(d) (2004) ("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 police have taken a statement of a witness who will testify, it should be discoverable to the defense."). Statements of persons the prosecutor may call as witnesses that were not taken by law enforcement but have been provided to members of the prosecution team are subject to disclosure as well. *Commonwealth v. Walters*, 472 Mass. 680, 704-705 (2015) (Excerpts from victim witness's journal chronicling alleged incidents with defendant that the witness had emailed to an investigator were subject to disclosure, though delayed disclosure not prejudicial.).

**14(b)(1)(E) The names, business telephone numbers, business email addresses, and business addresses of prospective law enforcement witnesses.**

*[This section makes two changes to prior section 14(a)(1)(A)(v).]*

This section adds to the identifying contact information for the Commonwealth's prospective law enforcement witnesses the witnesses' business telephone numbers and business email addresses. The ubiquity of telephonic and electronic communication, and their use in many important and legally significant contexts, makes this change appropriate. Apart from this addition, this section makes no change to prior section 14(a)(1)(A)(v).

Police or investigative reports subject to discovery may identify law enforcement witnesses only by last name, in which case it is appropriate for prosecutors to ensure that disclosure provides individual contact information that adequately identifies the witness, such as a police officer's badge number. Similarly, as officers may be reassigned over the course of a

case and contact information must be current, the prosecutor's continuing duty may require updating location and contact information as appropriate. See Mass. R. Crim. P. 14(d).

**14(b)(1)(F) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to Rule 14.4. Such discovery shall include 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.**

*[This section makes no substantive change to prior section 14(a)(1)(A)(vi).]*

**14(b)(1)(G) All photographs, video and audio recordings, or other tangible objects, all police or investigator's reports, and all intended exhibits.**

*[This is a new section.]*

This section identifies items and information subject to disclosure that were previously in prior section 14(a)(1)(A)(viii). It also now includes video and audio recordings, in addition to police or investigator's reports, photographs, tangible objects, and intended exhibits. This section omits the requirement that the items or information be "material and relevant," which originated in G.L. c. 218, § 26A par. 2, as all investigative materials subject to automatic discovery must be "relevant to the case" pursuant to Rule 14(b)(1). If these items are relevant to the case, the prosecutor must disclose any of them (photographs, video recordings, audio recordings, police or investigator's reports, or other tangible objects) without regard to whether the prosecutor intends to introduce them at trial. This may include, for example, "turret tapes" of police radio transmissions, body-camera recordings, booking videos, or surveillance videos.

Disclosure of the remaining items from the prior section, including statements of persons the prosecution intends to call as witnesses and reports of physical examinations, scientific tests, or experiments, are provided for in sections 14(b)(1)(D) and 14(b)(1)(H).

**14(b)(1)(H) Reports of physical examinations of any person or of scientific tests or experiments.**

*[This is a new section.]*

This section identifies items and information subject to disclosure that were previously in prior section 14(a)(1)(A)(vii). As before, this includes reports of physical examinations of any person or of scientific tests or experiments. This section omits the requirement that the items or information be "material and relevant," which originated in G.L. c. 218, § 26A par. 2, as all investigative materials subject to automatic discovery must be "relevant to the case" pursuant to Rule 14(b)(1).

As under the prior rule, reports of physical examinations of any person or of scientific tests or experiments that pertain to the case must be disclosed regardless of whether they are intended to be introduced at trial and whether they were prepared by an expert. See Reporter's Notes to [prior] Rule 14(a)(1)(vii) (Revised, 2004).

**14(b)(1)(I) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.**

*[This section makes no change to prior section 14(a)(1)(A)(viii).]*

**14(b)(2) Items and Information Favorable to the Defense**

[*This section replaces prior sections 14(a)(1)(A)(iii) and 14(a)(1)(A)(ix).]*

This section implements the Supreme Judicial Court's directive in *CPCS v. AG* to develop a "more thorough baseline of the most likely sources and types of exculpatory information for prosecutors to consider." 480 Mass. at 732. While the Court sought a "Brady checklist," it also recognized that "[n]o checklist can exhaust all potential sources of exculpatory evidence." Id at 733. This section sets forth the scope of the "broad duty" to disclose exculpatory material under the Massachusetts Rules of Criminal Procedure (Rule 14(b)(2)(A)), provides a general definition of material subject to disclosure because it is exculpatory (Rule 14(b)(2)(B)), and gives a non-exclusive list of examples of such material (Rule 14(b)(2)(C)). *Matter of a Grand Jury Investigation*, 485 Mass. at 647 (discussing prosecutor's "broad duty" of disclosure under [the Massachusetts Rules of Criminal Procedure] as "more than a constitutional duty"). Items and information favorable to the defense, like investigative materials addressed in Rule 14(b)(1), are subject to automatic discovery.

Rule 14(b)(2)(A) sets forth the scope of the duty to disclose items and information favorable to the defense. This duty requires that the prosecutor approach identifying these materials from a neutral perspective rather than from the perspective of an advocate for the Commonwealth.

Rule 14(b)(2)(B) sets forth a general definition of material "favorable to the defense" as items or information that "tend to" serve one or more of eight functions in a case. Applying this definition requires that the prosecutor consider how material *could* function for the defendant at any stage of the case, from suppression or exclusion of evidence, through the prosecution's case-in-chief, the defendant's case, rebuttal, and sentencing. Material that is favorable to the defense by tending to serve any of these eight functions at any stage of the case must be disclosed.

Rule 14(b)(2)(C) provides five categories of material as examples of items or information that are favorable to the defense, either because they are potential impeachment material or because they may support one or more theories of defense. They include information that can potentially impeach any witness the prosecutor may call (Rule 14(b)(2)(C)(i)), information that can potentially impeach any percipient witness, without regard to whether the prosecutor may call the witness (Rule 14(b)(2)(C)(ii)), information that can potentially impeach any expert witness (except one related to criminal responsibility) the prosecutor may call (Rule 14(b)(2)(C)(iii)), or statements of any person the prosecutor does not anticipate calling that are inconsistent with the statements of any witness the prosecutor may call (Rule 14(b)(2)(C)(iv)). Finally, material may be favorable to the defense because it supports one or more theories of defense (Rule 14(b)(2)(C)(v)).

Items or information that fall within one of these five categories of Rule 14(b)(2)(C) constitute material that is favorable to the defense and so must be disclosed as part of automatic discovery. These five categories are only examples, however, and they are non-exclusive. Given the relevant facts, and the theories of the prosecutor or of the defendant in any specific case, there may be other ways that material performs one of the eight functions set forth in the general definition of Rule 14(b)(2)(B). Material that performs any of the functions listed in the general definition is favorable to the defense and must be disclosed as part of automatic discovery, without regard to whether it fits any of the example categories in Rule 14(b)(2)(C).

The timing of disclosure for material favorable to the defense is the same as that for all other automatic discovery and it is subject to the same requirement for certification of compliance. Mass. R. Crim. P. 14(c) and 14.2(e). Although material that is favorable to the defense is also subject to disclosure under Federal and state constitutional requirements of due

process, the timing of disclosure required under the Massachusetts Rules of Criminal Procedure is not the same as that required to avoid a due process violation. While a due process violation may be avoided if exculpatory material is disclosed in time for its use at trial, the Massachusetts Rules of Criminal Procedure require disclosure well before that. *Matter of a Grand Jury Investigation*, 485 Mass. at 649-650. The obligation to disclose material favorable to the defense continues well beyond pretrial discovery through trial itself. *Commonwealth v. Ware*, 482 Mass. 717, 724-727 (2019) (Prosecution's failure to disclose its witness had testified falsely, or its allowing false testimony to go uncorrected, was a fundamental miscarriage of justice).

**14(b)(2)(A) Scope. The prosecutor shall disclose to the defense, and permit the defense to discover, inspect, and copy, all items and information favorable to the defense in the possession, custody, or control of the prosecutor, the prosecuting office, or any member of the prosecution team. Items and information subject to this section must be disclosed without regard to whether the prosecutor considers the items or information credible, reliable, or admissible and without regard to whether any such information has been reduced to tangible form. The disclosure of any unwritten or intangible information shall be memorialized as soon as there is a reasonable opportunity, manner, and means to do so.**

*[This is a new section.]*

The obligation to disclose exculpatory material arises from the "prosecutor's core duty" to "administer justice fairly." *CPCS v. AG*, 480 Mass. at 730 (citing *Tucceri*, 412 Mass. at 408). This duty is based on Federal and state guarantees of due process, and the Massachusetts Rules of Criminal Procedure. *Brady*, 373 U.S. at 87 ("suppression by the prosecution of evidence favorable to the 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"); *Matter of a Grand Jury Investigation*, 485 Mass. at 649 ("[I]n Massachusetts, when we speak of a prosecutor's Brady obligation, we mean not only the constitutional obligation to disclose exculpatory information but also the broad obligation under our rules to disclose any facts that would tend to exculpate the defendant or tend to diminish his or her culpability.").

These disclosure duties must be interpreted in light of prosecutors' general ethical obligations as lawyers and their special ethical obligations as prosecutors. Mass. R. Prof. C. 3.4(a) ("Lawyer shall not unlawfully obstruct another party's access to evidence or . . . conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."), Mass. R. Prof. C. 3.8(d) ("Prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."), Mass. R. Prof. C. 3.8(g) ("Prosecutor in a criminal case shall: . . . (g) not avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused") and Mass. R. Prof. C. 3.8(i) (Prosecutor's obligations upon learning of new, credible and material evidence creating reasonable likelihood convicted defendant did not commit an offense of which the defendant was convicted to disclose evidence to court, prosecuting office and defendant).

To properly assess whether information is subject to disclosure under Rule 14(b)(2), the prosecutor must completely set aside the role of advocate and instead adopt the perspective of a neutral reviewer of information who has no interest in the outcome of the case. "These

disclosure requirements are inconsistent with the traditional adversary role of litigants." *Tucceri*, 412 Mass. at 408. This, however, is the essence of the prosecutor's job. "[T]he duties of a prosecutor to administer justice fairly, and particularly concerning requested or obviously exculpatory evidence, go beyond winning convictions." Id.

*Duties of disclosure and inquiry*

The prosecutor's duty to disclose material favorable to the defense necessarily carries with it a corresponding duty to investigate accusations of misconduct by any member of the prosecution team. *Graham*, 493 Mass. at 350 & 367 (Where federal investigation found police department's officers routinely falsified investigative reports and engaged in pattern or practice of unconstitutional uses of force, the District Attorney's office's failure to obtain all documents reviewed by federal investigators violated its duty to investigate and inquire about material favorable to the defense.). The duties of inquiry and disclosure are "inextricably connected." *McFarlane*, 493 Mass. at 392. "Because the prosecution must disclose all evidence in the possession, custody, or control of the prosecution team that 'tends to' exculpate defendants, the prosecution also must inquire about the existence of such evidence among members of the prosecution team." Id. (citing *Matter of a Grand Jury Investigation*, 485 Mass. at 649).

The prosecutor has a "duty to learn of and disclose to a defendant any exculpatory evidence that is held by agents of the prosecution team." *Commonwealth v. Cotto*, 471, Mass. 97, 112 (2015) (internal quotations omitted). See also *Ware*, 471 Mass. at 95 (Where prosecutors had information suggesting a drug analyst had engaged in misconduct at the Amherst drug lab, they "had a duty to conduct a thorough investigation to determine the nature and extent of her misconduct, and its effect on pending cases and on cases in which defendants already had been convicted."). The duty of inquiry is not unlimited. It does not extend to unadjudicated allegations of civil liability. *McFarlane*, 493 Mass. at 391-392. "Findings of civil liability on the part of members of the prosecution team in the performance of their official duties are subject to automatic disclosure and fall within the duty of inquiry." Id., 493 Mass. at 393.

*Favorable to the defense*

Unlike prior section 14(a)(1)(A)(iii), this section uses the term "favorable to the defense" instead of "exculpatory" in order to make clear that items and information subject to disclosure need not offer "complete proof of innocence, but simply imports evidence which tends to negate the guilt of the accused . . . or, stated affirmatively, support[s] the innocence of the defendant." *CPCS v. AG*, 480 Mass. at 732, citing *Ellison*, 376 Mass. at 22 n.9 (quotations omitted). "Evidence may be favorable or exculpatory, and thus required to be disclosed, although it is not absolutely destructive of the Commonwealth's case or highly demonstrative of the defendant's innocence." (quotations and citation omitted). *Commonwealth v. Laguer*, 448 Mass. 585, 595 (2007). Exculpatory "is not a narrow term that connotes an alibi or other complete proof of innocence." Elspeth B. Cypher, Criminal Practice and Procedure, Massachusetts Practice Series, §26.16. Rather, "exculpatory" in this context comprehends all evidence that "provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." *Ellison*, 367 Mass. at 22.

Material that is favorable to the defense includes items or information that would aid the defense but would not alone create a reasonable doubt. "This duty is not limited to information so important that its disclosure would create a reasonable doubt that otherwise would not exist; it

includes all information that would 'tend to' indicate that the defendant might not be guilty or 'tend to' show that a lesser conviction or sentence would be appropriate." *Matter of a Grand Jury Investigation*, 485 Mass. at 649. "So long as there is a reasonable argument that the evidence may be useful to the defense, . . . it is exculpatory." *Diaz*, 100 Mass. App. Ct. at 594.

Doubts as to whether materials are favorable to the defense should be resolved through disclosure. Id., 485 Mass. at 650 (2020) ("[W]here a prosecutor is uncertain whether information is exculpatory, the prosecutor should err on the side of caution and disclose it."). See also *Commonwealth v. Wilson*, 381 Mass. 90, 107 n.37 (1980) ("The present case, therefore, illustrates with some force the wise suggestion that 'prosecuting attorneys . . . 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.'" Commentary to A.B.A. Project on Standards for Criminal Justice, Discovery and Procedure Before Trial, 2.1(d) (Approved Draft 1970)."); *Commonwealth v. Murray*, 461 Mass. 10, 23 n.10 (2011) (same). Of course, if a prosecutor believes there are valid reasons to limit or restrict disclosure, such as privilege, work product, or the safety of a witness, the prosecutor may seek an appropriate protective order and in camera review. See Rule 14.2(f) and 14.2(g); *CPCS v. AG*, 480 Mass. at 733 ("We emphasize, in addition, that where a prosecutor is unsure whether exculpatory information should be disclosed, due to a concern regarding privilege or work product, or for any other reason, the prosecutor must file a motion for a protective order and must present the information for a judge to review in camera."). Note, however, that work product under the Rule specifically does not include items or information the prosecutor is obligated to disclose because they are favorable to the defense. See Mass. R. Crim. P. 14.2(f).

*Disclosure required without regard to prosecutor's view of material's credibility, reliability, or admissibility*

The prosecutor's judgment concerning the quality of the evidence has no bearing on whether it must be disclosed. The obligation to disclose exculpatory material is not discretionary; it is "an obligation, not a decision." *Graham*, 493 Mass. at 364. Favorable evidence need not fully exculpate, or even fully resolve an issue. "Favorable evidence need not be dispositive evidence." *Murray*, 461 Mass. at 19 (citing *Daniels*, 445 Mass. at 401, internal quotations omitted) (New trial ordered for failure to disclose detective's knowledge about murder victim's participation in violent gang that could have supported defendant's self-defense claim by showing basis for his fear and could have impeached Commonwealth's witnesses' testimony that gang was just an informal group of neighborhood friends.).

The prosecutor's judgment concerning the significance of the information to the Commonwealth's own case also plays no role in determining whether it is favorable to the defense. Information may be favorable to the defense without contradicting the prosecution's theory if it could support a theory upon which the defendant might rely. In *Smith*, 90 Mass. App. Ct. 261 for example, the defendant was charged with armed home invasion, and a resident (Lowe) was the principal prosecution witness. The prosecution's theory was that the defendant sought to kill Lowe to prevent him from testifying in an unrelated homicide, while the defendant contended he had simply come to buy drugs when someone else unexpectedly burst in. The prosecution's failure to disclose that Lowe's girlfriend, Semnack, who had also been present, was planning to testify as a prosecution witness the next day in yet another homicide case would have violated its disclosure obligation. If the prosecution failed to "disclose Semnack's witness status, then the defendant was deprived of the ability to present evidence in support of his claim that he was only there to buy drugs." Id. at 267. This information was favorable to the

defendant because evidence of a motive to harm someone other than Lowe could have "rounded out the jury's picture of the case and shed light on other evidence offered by the defendant to show that the gunman acted alone." Id.

Information subject to disclosure as "favorable to the defense" need not be in any particular form and most significantly it need not be reduced to tangible form. This understanding of disclosure obligations pre-dates prior Mass. R. Crim. P. 14. *Commonwealth v. Gilbert*, 377 Mass. 887, 892-893 (1979) (citing *Commonwealth v. Lewinski*, 367 Mass. 889 (1975) and then-future Mass. R. Crim. P. 14, which had not yet taken effect, in holding that prosecutor's failure to disclose witness's changed account after prior statement had been provided defense counsel violated disclosure obligation). Prosecutors and law enforcement personnel regularly communicate with many persons in the investigation of a case and its preparation for trial. Any such communication, whether oral, written, telephonic, or electronic, that is favorable to the defense must be disclosed, whether it is a formal statement or a passing remark. *Commonwealth v. Rodriguez-Nieves*, 487 Mass. 171 (2021) (Prosecutor's failure in murder case to disclose conversation with a key witness, two days before her testimony, in which she added inculpatory details of defendant's laughter after stabbing victim that was directly relevant to Commonwealth's theory of extreme atrocity or cruelty was an "indisputable" Brady violation because of its discrepancy with witness's prior statement to police.).

*Gilbert*, 377 Mass. 887, is instructive. The day before he was to testify, a prosecution witness, whose prior statement to police had been disclosed to the defense, told the trial prosecutor that events were different than he had previously recounted. Even though the witness's recollection was actually *more* incriminating to the defendant, the court nevertheless found that "failing to communicate promptly to the defense the changes in [the witness's] story" violated the prosecution's disclosure obligation. The violation was equally severe despite the non-disclosure being due to the prosecutor's carelessness or inadvertence. Id. at 892-893. Moreover, this violation was not cured by the prosecutor's advice that the witness should testify truthfully. Id. at 892.

The obligation to disclose material that is favorable to the defense, like all disclosure obligations, is a continuing one. Mass. R. Crim. P. 14(d). Thus statements a prospective witness makes to a prosecutor or to law enforcement personnel during trial preparation, as in *Gilbert*, that are inconsistent with the witness's prior statements must be disclosed. Accord *Commonwealth v. Vaughn*, 32 Mass. App. Ct. 435, 439 (1992) (Failure to disclose investigating detective's testimony that he observed three sets of footprints at burglary scene, despite his investigative report, grand jury testimony, and diagram which described or showed only two sets, violated due process as it was "no mere shift in detail only and [went] to the heart of the defendant's case.").

In evaluating differences between a prosecution witness's prior statements to authorities and the witness's anticipated trial testimony, "[e]ven minor evidentiary discrepancies can take on great meaning to the defense." *Baldwin*, 385 Mass. at 174-175 (Discrepancies between prosecution witness's anticipated trial testimony and his prior statement disclosed to defense, suggesting alleged murder weapon might not have been stolen by defendant before crime and that defendant quickly left Massachusetts after crime evincing consciousness of guilt, were exculpatory and should have been disclosed prior to the witness's testimony).

Information that may be "favorable to the defense" is necessarily case-specific and may be innocuous unless considered from the perspective of the defendant. In *Commonwealth v. McMillan*, 98 Mass. App. Ct. 409 (2020), for example, the locations of officers who observed a confidential informant were information that was favorable to the defense. Although the

prosecutor had disclosed a single location from which officers observed the informant conduct the drug transaction at issue, an officer testified at trial that he had observed the transaction from a different location. The delayed disclosure of observation locations "rendered useless counsel's impressively diligent pretrial work" demonstrating obstructed views, and posttrial investigation showed that even the views from these locations were obstructed. The delayed disclosure prevented the defendant from being able to properly cross-examine the officers on their observations as "the defendant would need to know the distance from the observation post to the site of the alleged crime, [and] obstructions or impediments to a clear view." Id., at 417.

*Regardless of tangible form*

Information that is favorable to the defendant need not have been reduced to writing in order to be subject to disclosure. *Gilbert,* 377 Mass. at 892-894 (Assistant district attorney's failure to disclose prosecution witness's oral statement that his previous written statement to police was incomplete violated disclosure obligation, and prosecutor's directive to witness to "tell the truth" in testimony did not substitute for disclosure); *Commonwealth v. Pizzotti*, 27 Mass. App. Ct. 376, 382 (1989) (Fresh complaint witness's statement to prosecutor that varied from her grand jury testimony was thereby exculpatory and should have been disclosed despite not being reduced to writing); *Commonwealth v. Santana*, 465 Mass. 270, 292 (2013) (Eyewitness's statement to state trooper after voir dire on his competence to testify that he did not recognize anyone in the courtroom, when he had previously testified at the grand jury that he had witnessed the homicide, was subject to disclosure.).

*Memorialization of disclosure of unwritten or intangible information*

A witness's oral statement or gesture intended as an assertion that is favorable to the defense is subject to disclosure. If disclosure is made orally, as may occur when a statement is learned during or shortly before a proceeding, the fact of the disclosure must also be memorialized as soon as there is a reasonable opportunity to do so. Memorialization can be done in writing or in other methods appropriate under the circumstances, such as a statement on the record made at a sidebar conference.

**14(b)(2)(B) Definition. Items and information favorable to the defense are items or information that tend to:**

*[This is a new section.]*

This section provides the basic definition of materials subject to disclosure under *Brady* and its progeny, Article 12 of the Massachusetts Declaration of Rights, and the Massachusetts Rules of Criminal Procedure (Mass. R. Crim. P. 14). The definition must be interpreted by prosecutors in light of their general ethical obligations as lawyers and their special ethical obligations as prosecutors. Mass. R. Prof. C., 3.4(a), 3.8(d), (g), and (i).

Items and information are "favorable to the defense" if they tend to perform one or more of eight functions in a case. These functions including tending to cast doubt on elements of, evidence of, or testimony supporting the Commonwealth's case, supporting suppression or exclusion of any evidence or witnesses offered by the Commonwealth, mitigating the charged offenses or lesser included offenses, establishing a defense, or corroborating the defense version of facts.

While the *ways* in which materials can be favorable to the defense are necessarily case-specific, the *degree* to which they are favorable to the defense is irrelevant under Rule 14. "This duty is not limited to information so important that its disclosure would create a reasonable doubt that otherwise would not exist; it includes all information that would 'tend to' indicate that the

defendant might not be guilty or 'tend to' show that a lesser conviction or sentence would be appropriate." *Matter of a Grand Jury Investigation*, 485 Mass. at 649. See also *Commonwealth v. Collins*, 470 Mass. 255, 267 (2014) (citing *Commonwealth v. Hill*, 432 Mass. 704, 715 (2000), "Commonwealth is required to disclose exculpatory evidence to the defendant, including, as is relevant here, evidence that would tend to impeach the credibility of a key prosecution witness."). The prosecutor must not consider how much the information would aid the defense or whether a reviewing court would fault the failure to disclose the information. "A prosecutor should not attempt to determine how much exculpatory information can be withheld without violating a defendant's right to a fair trial. Rather, once the information is determined to be exculpatory, it should be disclosed -- period." *Matter of a Grand Jury Investigation*, 485 Mass. at 650.

The modern approach to defining materials subject to disclosure has been to avoid simply citing *Brady* or describing materials as "exculpatory," because these formulae presume an understanding of how materials can advantage a defendant. Instead, more recent definitions identify specific ways in which materials can favor a defendant. Compare Article 240.20(1)(h), McKinney's N.Y. Crim. Proc. L. ("Anything required to be disclosed, prior to trial, to the defendant by the prosecutor, pursuant to the constitution of this state or of the United States") (Repealed by L.2019, C. 59, Pt. LLL, § 1, eff. Jan. 1, 2020), with its replacement, Article 245.20(1)(k) ("All evidence and information, . . . that tends to: (i) negate the defendant's guilt as to a charged offense; (ii) reduce the degree of or mitigate the defendant's culpability as to a charged offense; (iii) support a potential defense to a charged offense; (iv) impeach the credibility of a testifying prosecution witness; (v) undermine evidence of the defendant's identity as a perpetrator of a charged offense; (vi) provide a basis for a motion to suppress evidence; or (vii) mitigate punishment."). See also Rule 116.2, Local Rules of the United States District Court for the District of Massachusetts (eff. June 1, 2018) (Disclosure of Exculpatory Evidence) ("Exculpatory information is information . . . that tends to: (1) cast doubt on defendant's guilt as to any essential element in any count in the indictment or information; (2) cast doubt on the admissibility of evidence that the government anticipates using in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be appealable pursuant to 18 U.S.C. § 3731; (3) cast doubt on the credibility or accuracy of any evidence that the government anticipates using in its case-in-chief; or (4) diminish the degree of the defendant's culpability or the defendant's Offense Level . . . .").

Materials that are "favorable to the defense" include far more than those that afford an "alibi or other complete proof of innocence," instead they simply mean those which "ten[d] to negate the guilt of the accused . . . or, stated affirmatively, support[t] the innocence of the defendant." *Ellison*, 376 Mass. at 22 n.9 (quotations omitted). In determining whether materials are "favorable to the defense" the prosecutor should ignore whether they are credible, reliable, or admissible. Determinations of credibility, reliability, and admissibility unavoidably place the prosecutor in the role of advocate, but when the prosecutor discharges the obligation under *Brady*, the prosecutor is acting as a neutral minister of justice rather than a partisan advocate. "Litigation strategy plays no role in this process." *CPCS v. AG*, 480 Mass. at 730-731.

Eliminating any requirement that *Brady* material must fully exculpate the defendant, or that it be credible, reliable, or admissible evidence is the modern trend. See, Rule 5.1, Rules of the United States District Court for the District of Columbia (July 2019) [Disclosure of Information]) ("This requirement applies regardless of whether the information would itself constitute admissible evidence.") (available at:

https://www.dcd.uscourts.gov/sites/dcd/files/LocalRulesJuly_2019.pdf); N.Y. McKinney's Crim. Proc. L. § 245.20, supra.

This definition specifically does not use the term "material" to avoid confusion between the *Brady* disclosure obligation prior to trial and the remedy after trial for a failure to disclose exculpatory material. Whether items and information are *subject to disclosure* prior to trial depends only on whether they are favorable to the defense, without regard to whether they are material. "[O]nce the information is determined to be exculpatory, it should be disclosed – period." *Matter of a Grand Jury Investigation*, 485 Mass. at 650. Whether the *remedy* after trial for a *Brady* violation is a new trial can turn on whether the non-disclosed information was "material" in the sense of its effect on the outcome of the trial. *Strickler v. Greene*, 527 U.S. 263, 281 (1999) ("'Brady violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called '*Brady* material'—although, strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."); *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (per curiam) (internal quotations omitted) ("Evidence qualifies as material when there is any reasonable likelihood that it could have affected the judgment of the jury.").

Items and information that tend to perform one or more of these eight functions at any point in the case are favorable to the defense and subject to automatic discovery. As with all provisions of Mass. R. Crim. P. 14(b)(2)(B) and (C), disclosure is to be made without regard to the prosecutor's assessment of the material's admissibility. "Neither a prosecutor's decision to disclose nor a prosecutor's constitutional obligations under Brady v. Maryland are dependent on the ultimate admissibility of the information, but only on their tendency toward exculpating a defendant." *Graham*, 493 Mass. at 362 (internal citations omitted). Disclosure does not preclude the prosecutor seeking to exclude the items or information from trial.

**14(b)(2)(B)(i) Cast doubt on an aspect of guilt as to an element of any count of a charged or lesser included offense;**

*[This is a new section.]*

Materials that cast doubt on an aspect of guilt as to an element of any charged or lesser included offense are favorable to the defense. Naturally, materials suggesting the defendant did not commit the charged offense cast doubt on a fundamental aspect of guilt. *Gallarelli*, 399 Mass. at 19-23 (*Brady* violation from non-disclosure of police laboratory report showing that knife, seized from defendant shortly after victim was stabbed, had no blood on it); *Light*, 394 Mass. at 114 (*Brady* violation, in a prosecution for leaving scene of an accident, by police prosecutor's withholding results of chemical test showing paint chips on bumper of defendant's car differed from paint on the police cruiser she allegedly struck).

Materials may be favorable to the defense by indirectly contradicting an element of the offense. *Ellison*, 376 Mass. at 21 (*Brady* violation when Commonwealth failed to disclose codefendants' statements to authorities that were "favorable to the defendant" because they did not mention defendant's involvement in the crime); *Tucceri*, 412 Mass. at 402-404 (*Brady* violation from failure to disclose booking photograph showing mustachioed defendant arrested minutes after assault by perpetrator victim had described as clean shaven); *Daniels*, 445 Mass. at 401-404 (When a witness's identification of defendant as accomplice in a murder relied on her assumption about the identity of a masked codefendant in the crime, the Commonwealth was

obligated to disclose information from an unrelated case implicating a third party as being the masked codefendant because it weakened the witness's identification of the defendant.).

Materials that cast doubt on an aspect of guilt concerning the defendant's required mental state or *mens rea* are also subject to disclosure. For example, in a first-degree murder case based on a theory of extreme atrocity or cruelty, evidence that a defendant was indifferent to or took pleasure in a victim's suffering is relevant to a finding of extreme atrocity or cruelty. Thus materials that call into question the defendant's indifference are favorable to the defense. *Rodriguez-Nieves*, 487 Mass. at 177-178 (Inconsistent accounts by the only witness who testified the defendant laughed after the victim had been stabbed were exculpatory because witness's testimony was "strong evidence in support of the theory of extreme atrocity or cruelty"). See also *Commonwealth v. Themelis*, 22 Mass. App. Ct. 754, 761-762 (1986) (Statement to prosecutor by defendant charged with conspiracy to commit murder that he would not have killed intended victim was exculpatory and subject to disclosure despite prosecutor's belief that it was immaterial.).

**14(b)(2)(B)(ii) Cast doubt on the credibility or accuracy of any evidence, including identification or scientific evidence, the prosecutor may introduce;**

*[This is a new section.]*

Materials that cast doubt on the credibility or accuracy of any evidence the prosecutor may introduce at any point in the case are favorable to the defense. These include, but are not limited to, identification evidence or scientific evidence. Materials can cast doubt on the credibility or accuracy of identification evidence in multiple ways. A percipient witness's failure to identify a defendant is, of course, favorable to the defense. *Commonwealth v. Imbert*, 479 Mass. 575, 582 (2018) (Disclosure required of police interview notes of witnesses' failure to identify defendant in a photographic array). Changes in a percipient witness's identification details are favorable to the defense, as are inconsistencies in any prosecution witness's accounts, even if the changed account is *more incriminating. Commonwealth v. Vieira*, 401 Mass. 828, 832 (1988). (These disclosure obligations are separate from, and in addition to, the prosecutor's obligation to disclose a summary of identification procedures and written, recorded, or oral statements made in the presence of or by an identifying witness. See Rule 14(b)(1)(I).)

Information can cast doubt on a witness's credibility or the accuracy of their account whether it arises from a formal or informal identification procedure. In *Santana*, for example, a child witness to a murder testified during an initial voir dire to establish his competence to testify. After the judge found the child witness competent to testify, the prosecutor asked a state trooper to see if the witness recognized anyone in the courtroom. The witness recognized several people in the courtroom but did not recognize the defendant sitting at counsel table. Despite learning of this non-identification shortly after it occurred, the prosecutor called the child witness to testify the next day at trial without revealing to the defense his inability to identify the defendant the previous day. This violated the Commonwealth's "absolute obligation" to disclose nonidentification evidence, without regard to whether it could be explained. *Santana*, 465 Mass. at 292. When a witness identifies a defendant, items or information inconsistent with the identification naturally cast doubt on its accuracy and thus are subject to disclosure. *Tucceri*, 412 Mass. at 403-404 (arrest photographs depicting rape defendant as mustachioed were exculpatory when victim and witness described perpetrator as being clean shaven).

Disclosure obligations similarly extend to identification procedures involving inanimate objects. Although the procedures properly may differ from those required for identification of

persons, material that tends to cast doubt on such an identification is also favorable to the defense. *Commonwealth v. Simmons*, 383 Mass. 46, 51-52 (1981) (Due process could be violated by highly suggestive process of identifying inanimate object, but witness's out-of-court identification of automobile as the one in which she had been abducted not so suggestive as to be unfairly prejudicial); *Commonwealth v. Thomas*, 476 Mass. 451, 465-467 (2017) (Same, for identification of a firearm from a single photograph because this was unduly suggestive absent exigent circumstances, and recognizing identification could also violate common law of evidence).

Materials that cast doubt on the credibility of scientific evidence the prosecutor anticipates using, whether by impeaching the Commonwealth's expert or by contradicting their conclusions, are also favorable to the defense. "Evidence tending to impeach an expert witness for incompetence or lack of reliability falls within the ambit of the Commonwealth's obligations under Brady." *Sullivan*, 478 Mass. at 381 (Criminalist's failed proficiency tests cast doubt on his testimony by undermining his claims to rigorous training and testing offered to show his qualifications); *Martin*, 427 Mass. at 822-825 (*Brady* violation from prosecution's failure to disclose attempted confirmatory tests that were inconclusive or negative for the presence of LSD in decedent's body.). See also Mass. R. Crim. P. 14(b)(2)(C)(iii)(a) and (b).

**14(b)(2)(B)(iii) Cast doubt on the credibility of the testimony of any witness the prosecutor may call;**

*[This is a new section.]*

Materials that cast doubt on the credibility of witnesses the prosecutor may call are favorable to the defense. *Commonwealth v. Collins*, 386 Mass. 1, 8 (1982), citing *Baldwin*, 385 Mass. at 175 ("Evidence tending to impeach the credibility of a key prosecution witness is clearly exculpatory."). "Generally, evidence that tends to impeach the credibility of a prosecution witness falls within the scope of Brady." Elspeth B. Cypher, Criminal Practice and Procedure, Massachusetts Practice Series, §26.17.

Materials can cast doubt on a witness's credibility in a variety of ways. Prior instances in which a witness testified untruthfully naturally may call into question their credibility. *Graham*, 493 Mass. at 363 (Prosecutor must disclose adverse credibility determinations concerning members of the prosecution team notwithstanding their own disagreement with these determinations.) Materials may cast doubt on a witness's credibility by impeaching a witness's testimony through contradiction. See *Tucceri*, 412 Mass. at 402-403 (Booking photograph of defendant arrested within minutes of the crime showing him with a moustache would have impeached victim's identification of him as the clean-shaven perpetrator.). See also *Gallarelli*, 399 Mass. at 19-23 (Police laboratory report showing that knife taken from defendant had no blood on it was exculpatory because it contradicted prosecution's theory that knife had just been used to stab the victim); *Daniels*, 445 Mass. at 401-402 (Prosecution's failure to disclose a statement implicating a third party as being the masked accomplice of defendant, which weakened victim's identification of defendant that was made based on his association with masked accomplice, violated *Brady* obligation); *Murray*, 461 Mass. at 20 n.9 (Police lieutenant's affidavit, based on information known to the prosecution team at the time of trial, that Commonwealth's witnesses were not merely a group of neighborhood friends but instead a gang that sold drugs and engaged in violent activity, and that the victim was actually an esteemed gang member, was potentially exculpatory because it could have impeached them by contradiction.).

Materials can also cast doubt on a witness's credibility by showing bias. *Murray*, id., 461 Mass. at 20-21 (Evidence that witnesses were members of a gang, who rarely cooperated with police even when they were crime victims, could have shown their bias to protect one another in testifying for the prosecution.). Items or information suggesting a promise, reward, or inducement to a witness by the prosecution are prime examples of such materials. See Mass. R. Crim. P. 14 (b)(2)(C)(i)(a). "When the Commonwealth promises anything to a witness to induce him to testify, even though it be no more specific than 'consideration' in future proceedings, that communication is a promise, reward, or inducement that must be disclosed to the defendant." *Commonwealth v. Birks*, 435 Mass. 782, 787 (2002) (citing *Hill*, 432 Mass. at 716). Disclosure is required even when the benefits to a witness involve things other than non-prosecution or favorable disposition of charges. *Commonwealth v. Pasciuti*, 12 Mass. App. Ct. 833, 838 (1981) ("[W]e emphasize that the prosecutor who prepared the case should have disclosed to defense counsel the facts that the victim had been placed in protective custody shortly after the incident, that he was still in custody at the time of trial, that he was being furnished with living expenses by the Commonwealth, and, if the prosecutor was aware of it, that there had been some discussion with Federal authorities about the victim's being placed in the Federal witness protection program.").

Items or information suggesting a witness's bias in testifying must be disclosed even though the potential benefit comes from sources other than the prosecutor. For example, a victim witness pursuing a civil suit against the criminal defendant could naturally have a bias in testifying in the criminal case. If this suit is known to the prosecutor, its existence must be disclosed. *Elangwe*, 85 Mass. App. Ct. at 201 ("[P]rosecutor would have been required to disclose the existence of the lawsuit as exculpatory evidence if she became aware of it.").

Materials can cast doubt on the credibility of a witness by showing alternative explanations for the witness's testimony apart from those offered by the prosecution. In *Commonwealth v. Baran*, 74 Mass. App. Ct. 256 (2009), for example, information that children who were alleged victims of sexual assault by the defendant had previously been sexually abused by unrelated third parties was not disclosed. The failure to disclose police reports and reports of child protective services agency's investigation of these incidents "that, among other things, might have supported the inference that one or more of the complainants had been sexually abused by another -- evidence that might have been used either for impeachment or to rebut allegations of age-inappropriate sexual knowledge," violated the prosecution's obligation to disclose exculpatory evidence. 74 Mass. App. Ct. at 298-99 & nn. 51-52.

**14(b)(2)(B)(iv) Cast doubt on the admissibility of any evidence or testimony the prosecutor may introduce;**
**14(b)(2)(B)(v) Support the suppression or exclusion of any evidence or testimony the prosecutor may introduce;**

*[This is a new section.]*

Items or information that cast doubt on the admissibility of any evidence or testimony the prosecutor may introduce, such as items or information that could support a motion to suppress or exclude evidence or testimony, weaken the prosecution's case and are thereby favorable to the defense. Like materials that weaken the credibility of a prosecution witness, materials that impair establishing the required foundation for a witness's testimony are favorable to the defense. Similarly, materials that impair establishing the required foundation for evidence, including authentication and chain of custody, are favorable to the defense.

The Supreme Judicial Court has cited with approval the definition of material favorable to the defense in the Local Rules of the United States District Court for the District of Massachusetts that includes such items and information. *CPCS v. AG*, 480 Mass. at 733 (citing Rule 116.2, Local Rules of the United States District Court for the District of Massachusetts (eff. June 1, 2018) (Disclosure of Exculpatory Evidence)). Local Rule 116.2(a)(2) defines exculpatory information (in part) as information that tends to: "(2) cast doubt on the admissibility of evidence that the government anticipates using in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed, be [subject to interlocutory appeal]." See also McKinney's N.Y. Crim. Pro. L. Article 245.20(1.)(k)(vi) (Automatic discovery) (Prosecution shall disclose all evidence and information that tends to: "(vi) provide a basis for a motion to suppress evidence.").

In cases involving searches or seizures by law enforcement, for example, information that officers lacked the requisite degree of suspicion for the challenged intrusion would be favorable to the defense. In *Lewin*, 405 Mass. 566, the defendant was charged with murder for shooting a detective during the execution of a search warrant for drugs. The defendant showed that an informant who was a critical source of information for the warrant was relied upon with suspicious frequency for many search warrant affidavits and was likely fictitious. Id. at 582-583 ("One reasonable implication from [the officer's] testimony is that [he] made up [the informant] as a means of obtaining search warrants in ostensible compliance with constitutional requirements concerning the issuance of search warrants."). Accord, *Commonwealth v. Ramirez*, 416 Mass. 41, 51 (1993). A prosecutor's recognition of such false or misleading testimony by its witnesses during a hearing must be promptly disclosed. *Hill*, 432 Mass. at 714 ("Regardless [of] whether the government has encouraged the false evidence of one of its witnesses, the prosecutor must advise the court of such false testimony.").

**14(b)(2)(B)(vi) Mitigate the charged offense or offenses or any lesser included offense or offenses, diminish the defendant's culpability, or mitigate the sentence;**

*[This is a new section.]*

Materials that tend to mitigate the charged offense or diminish the defendant's culpability are favorable to the defense. Information that could suggest a defendant lacks the capacity to commit the offense, for example, is favorable to the defense. *Commonwealth v. Dowds*, 483 Mass. 498, 119 (2019) (Statement by defendant's reentry case manager concerning the defendant's having twice been struck by vehicles as a child and having suffered suspected head injury was potentially exculpatory information that should have been disclosed because it could have raised doubt as to his capacity to commit the offense). Materials that could mitigate the sentence are also favorable to the defense. *Commonwealth v. Capparelli*, 29 Mass. App. Ct. 926, 928 (1990) (Police affidavits in support of pen register applications that showed the defendant's falling out with organized crime figures could have rebutted prosecutor's assertions that the defendant was involved with organized crime and so should have been disclosed prior to sentencing as matter of due process). For defendants charged with first-degree murder, material that could suggest a verdict of second-degree murder would be more consonant with justice pursuant to G. L. c. 278, § 33E is favorable to the defense. *Dowds*, 483 Mass. at 119-120.

**14 (b)(2)(B)(vii) Establish a theory or recognized affirmative defense or exemption to the charged offense or offenses or any lesser included offense or offenses, regardless of whether**

**the defendant has presented such theory or raised such affirmative defense or exemption; or**

*[This is a new section.]*

Materials that establish a defense theory or recognized affirmative defense, regardless of whether the defendant has presented such a theory or raised such an affirmative defense, must be disclosed. Items or information that support self-defense, for example, must be disclosed. When the identity of the first aggressor in a case is in dispute and the victim had a history of violence, specific acts of prior violent conduct may be admissible to corroborate the defendant's claim that the victim was the first aggressor. *Commonwealth v. Adjutant*, 443 Mass. 649, 663-666 (2005). The victim's history of violence known to the prosecutor is thus subject to mandatory disclosure. *Murray*, 461 Mass. at 22. (Counsel should note that there are separate disclosure obligations for the defendant, and reciprocal disclosure obligations for the prosecutor, when a defendant intends to introduce evidence to support an allegation that the alleged victim was the first aggressor. See Rule 14.3(c).)

Information that tends to establish alibi is also favorable to the defense. *Donahue*, 396 Mass. at 596 (Failure to disclose FBI interviews with prospective alibi witness that supported defendant's alibi was *Brady* violation).

Information that tends to support a recognized affirmative defense, such as entrapment, is also favorable to the defense. In an entrapment defense, evidence of inducement by a government agent, and of the agent's relationship to law enforcement, is thus favorable to the defense. Similarly, information that tends to support a defendant's eligibility for exemption from prosecution or conviction for an offense is favorable to the defense. *Commonwealth v. Guardado*, 491 Mass. 666, 682-684 (2023) (Statutory exemption from firearm possession offense that criminalizes knowing possession of a firearm, without a license to carry, outside one's residence or place of business is treated as an affirmative defense when defendant offers sufficient evidence to establish firearm's location on defendant's place of business.). See also *Commonwealth v. Kelly*, 484 Mass. 53, 67 (2020) (Existence of a statutory exemption is equivalent to an affirmative defense.).

**14(b)(2)(B)(viii) Corroborate the defense version of facts or call into question a material aspect of the prosecution's version of facts, even if this aspect is not an element of the prosecution's case.**

*[This is a new section.]*

Materials may be favorable to the defense if they corroborate a version of the facts advanced by the defense or question a material aspect of the prosecution's version of the facts, even if this aspect is not an element of the prosecution's case. For example, in a prosecution for a crime of violence, items that could support a theory of self-defense, such as a weapon in possession of a victim, are favorable to the defense. *Lam Hue To*, 391 Mass. at 308-209 (*Brady* violation in homicide when prosecutor failed to disclose that a knife with dried blood was found at the scene and that it belonged to the victim's relatives, as this could have changed defendant's investigation, trial strategy, or both.).

Motive is not typically an element of the prosecution's case, but information that disproves motive, or provides a motive for a third party to have committed the offense, is favorable to the defense and must be disclosed. In *Commonwealth v. Holbrook*, 482 Mass. 596 (2019), for example, email messages on a murder victim's computer could have supported the theory that the victim and a former roommate had been in a romantic relationship which the

victim had wanted to continue. Because the messages could have supported the defendant's theory of a third-party culprit (the former roommate) and impeached the former roommate's testimony that his relationship with the victim had not been intimate, they were subject to disclosure. *Holbrook*, 482 Mass. at 610-611.

Similarly, in *Smith*, 90 Mass. App. Ct. 261, the defendant was charged with armed home invasion and attempted murder on the theory that he had intended to kill a resident who had witnessed his committing a murder. The prosecution did not reveal, however, that another resident of the home was due to testify the next day in an unrelated homicide case. This information was favorable to the defense because it could have suggested a different person had a motive to kill a resident on the day of the crime and inferentially support defendant's theory that he had come only to buy drugs. Id., at 266-267 & n.4. ("[I]t does not matter that motive was not a part of the Commonwealth's case. . . . If the Commonwealth failed to disclose [the other resident's] witness status, then the defendant was deprived of the ability to present evidence in support of his claim that he was only there to buy drugs."). Id. at 267.

A material aspect of the prosecution's version of the facts may be something innocent or innocuous, such as the specific location of a law enforcement witness, but information that calls such an aspect into question is favorable to the defense. In *McMillan*, 98 Mass. App. Ct. 409, for example, the prosecution's case alleging the defendant's hand-to-hand drug sales to a confidential informant relied on police observing the informant throughout the episode. Since the informant did not appear at trial and there was no recording of the transactions, any break in police surveillance could call into question the prosecution's account of the events. Although constant police observation of a controlled drug transaction is not an element of the offense, it was a material aspect of the prosecution's version of the facts in this case so any information that called into question the claim of unbroken surveillance was favorable to the defense. Id. at 415 (Because "the officers' vantage points determined whether they could have conducted continuous surveillance during the controlled purchase by the CI who, on previous occasions during the same joint investigation, had, despite claimed surveillance by officers of the task force, managed to engage in unlawful and unobserved conduct during other controlled purchases," the actual vantage points of the officers were material and exculpatory.).

Similarly, in *Commonwealth v. Bennett*, 43 Mass. App. Ct. 154 (1997), the disclosure obligation was violated in a robbery case when the prosecution failed to reveal two harassing phone calls the robbery victim had received the morning after the crime. While phone harassment is not an element of robbery, because the calls drew on photos from the victim's purse that had been taken in the robbery, they strongly suggested that the caller was the robber. Because the calls were not collect and the defendant was incarcerated and so unable to make such calls at the time, the existence of the calls called into question a material aspect of the prosecution's theory. Id. at 162-163. The calls had to be disclosed notwithstanding the possibility that a third party might have found the discarded stolen purse, or that the harassing calls might have been unrelated to the robbery altogether. Id. at 162 ("The jury might consider the possibility . . . that the defendant, having committed the crime, discarded the pocketbook which happened to be picked up and then exploited by a stranger. Conceivably the caller was just one of [the victim's] mashers. But justice requires that a jury on retrial shall receive the information about the telephone calls and appraise and decide.").

Materials that corroborate the defense version of the facts are thereby favorable to the defense and must be disclosed. In *Merry*, 453 Mass. at 664, for example, a negligent vehicular homicide case, the opinion of the prosecution's accident reconstructionist that defendant's

windshield had been damaged in the crash rather than from impact of his head was subject to disclosure, because it was consistent with the defendant's theory that he had suffered a seizure and fallen over before the impact. In *Commonwealth v. Green*, 72 Mass. App. Ct. 903 (2008), a possession with intent to distribute drugs case, the opinion of the prosecution's drug distribution expert relied heavily on the defendant's possession of $1950 in neatly folded cash as evidence of his intent to distribute drugs. The defendant offered a witness who testified that the money actually belonged to her and that she had called the police station several times the day the defendant was arrested seeking its return. In rebuttal, the prosecutor offered two officers who testified that the call logs at the station showed no record of calls from the defendant's witness. A later search of police records, after the close of proof, revealed logs and multiple recordings of the witness's calls to the station, all of which had been subject to disclosure because they "directly related to the defendant's theory of the case." Id. at 904.

Materials can be favorable to the defense because they foreclose a theory of prosecution even if they do not prevent prosecution altogether. For example, in *Commonwealth v. Cooley*, 477 Mass. 448 (2017), the defendant was tried on a theory of felony murder based on the predicate felony of armed robbery. The prosecution theorized that the defendant committed the robbery with an unidentified person, and either person could have been the principal who shot the victim. A police report from an unrelated homicide in which a witness said a third party admitted being the shooter in Cooley's case was thus exculpatory and subject to disclosure, because it would have forced the prosecution to proceed exclusively on the theory that Cooley had been a coventurer. Id. at 454 n.4.

**14(b)(2)(C) Examples. Items or information favorable to the defense include but are not limited to:**

*[This is a new section.]*

Because "a prosecutor cannot always know that a particular piece of evidence is or might be exculpatory," *Tucceri*, 412 Mass. at 406, this section provides a non-exhaustive list of examples of items or information that are favorable to the defense. These examples are in five groups: material related to witnesses the prosecutor may call, material related to percipient witnesses the prosecutor may call, material related to expert witnesses the prosecutor may call, material related to persons the prosecutor does not anticipate calling, and information that suggests improprieties or shortcomings in the investigation or prosecution of the case. These examples are illustrative minima for items or information that are favorable to the defense.

**14(b)(2)(C)(i) With respect to any witness the prosecutor may call:**

*[This is a new section.]*

The nine types of items or information in Rules 14(b)(2)(C)(i)(a) – (i) are examples of materials that are favorable to the defense because they could affect the credibility of a witness the prosecution anticipates calling in the case-in-chief. These materials are subject to mandatory disclosure regardless of the prosecutor's assessment of their credibility, reliability, or admissibility. Rule 14(b)(2)(A). These materials must be disclosed even if they have not been reduced to tangible form. Id. Thus, for example, information in any of these nine categories concerning anyone the prosecutor may call as a witness, whether learned in a formal interview or a passing remark, must be disclosed.

**14(b)(2)(C)(i)(a) Any promise, reward, or inducement sought, requested by, offered to, or given to such witness;**

*[This is a new section.]*

Promises, rewards, or inducements sought, requested by, or given by the government to any witness have long been subject to disclosure. "To be sure, the Commonwealth is obligated to provide the terms of any cooperation agreement with a witness the Commonwealth intends to call at trial." *Commonwealth v. Goitia*, 480 Mass. 763, 772 (2018) (citing prior Mass. R. Crim. P. 14(a)(1)(A)(ix)). This section adds the additional requirement that such promises, rewards, or inducements "sought or requested" by prosecution witnesses must also be disclosed. An identical provision applicable to defense witnesses is in Rule 14.1(a). Disclosure of benefits that a prosecution witness may receive from third parties in connection with their testimony may be constitutionally required as well. *Commonwealth v. Miranda*, 458 Mass. 100, 108-112 (2010) (Due process required disclosure of witnesses' anticipated contingent monetary rewards from a chamber of commerce for testifying in a murder trial that were verified by prosecutor.).

"Any communication that suggests preferential treatment to a key government witness in return for that witness's testimony is a matter that must be disclosed by the Commonwealth." *Hill*, 432 Mass. at 716 (citing *Commonwealth v. Gilday*, 382 Mass. 166, 175 (1980)). In *Hill*, the prosecutor's failure to disclose her readiness "to give substantial consideration" to a key witness in return for his testimony violated the *Brady* obligation, even though the agreement and its terms were imprecise. As the Court explained, the lack of specificity does not affect whether the information must be disclosed:

> The fact that the terms of the agreement are not clearly delineated does not insulate the arrangement from disclosure. Indeed, the very nature of the situation may well require that its terms be vague as the consideration given may be dependent on the degree of cooperation. But even without precise terms, the government easily can induce a witness to believe that his treatment is dependent on his testimony. Thus, if any communication is reasonably susceptible of such an interpretation, it must be disclosed to the defense.

*Hill*, 432 Mass. at 716–17.

Even an agreement that has been made only with a witness's lawyer rather than with the witness directly must be disclosed. *Gilday*, 382 Mass. at 176-177 ("Although the [witness's] attorney had agreed not to tell [the witness] of the arrangement, the implication of [the witness's] cooperation with the Commonwealth should have been clear to the prosecutor. The prosecutor, from common experience, was chargeable with knowledge that [the witness] testified with expectations of leniency.").

The benefit to the witness need not be specifically contingent on providing testimony that is favorable to the prosecution. *Collins*, 386 Mass. at 10 ("We do not think it necessary . . . that such an 'arrangement' be limited to situations where the favorable recommendation is explicitly hinged to receipt of favorable testimony."). Material suggesting either that a witness will receive or will forego a benefit due to their testimony must be disclosed. "In short, any statement which reasonably implies that the government . . . is likely to confer or withhold future advantages . . . depending on the witness's cooperation" must be disclosed. *Commonwealth v. O'Neil*, 51 Mass. App. Ct. 170, 179-80 (2001) (citing *Commonwealth v. Schand,* 420 Mass. 783, 792 (1995)). Compare *Commonwealth v. Freeman*, 442 Mass. 779, 737 (2004) (No violation from failure to disclose agreement that was not finalized when prosecutor had disclosed to defense counsel the sentence that the Commonwealth would probably recommend for the witness after the witness testified truthfully but cautioned that the agreement had not yet been finalized).

Anything provided by the state to a witness that "could reasonably be interpreted as a promise, reward, or inducement" must be disclosed, regardless of the purpose for which it was provided. *Commonwealth v. Smith*, 456 Mass. 476, 484 n.2 (2010) (Provision by police of six months of hotel accommodations to two witnesses, even if done for the witnesses' own protection, had to be disclosed as a promise, reward, or inducement). See also *Drumgold v. Commonwealth*, 458 Mass. 367, 373-374 (2010) (Prosecution acknowledged food and hotel accommodations provided by police to "significant witness" and promises concerning pending cases were subject to disclosure); *Commonwealth v. Watson*, 393 Mass. 297, 299-301 (1984) (Police promise to help move eyewitness who made identification properly disclosed as an "understanding or agreement"). Compare *Commonwealth v. Lay*, 63 Mass. App. Ct. 27, 33-34 (2005) (A detective's attendance at a cookout with a prosecution witness several months before the incident about which the witness testified and giving the witness money to buy beer for the cookout was not a promise, reward, or inducement for testimony concerning an event that had yet to occur,). Rewards given by any entity of the state in exchange for a witness's cooperation in a prosecution qualify as favorable to the defense. *Commonwealth v. Reed*, 417 Mass. 558, 563 n.5 (1994) (Greater release privileges for patient at state forensic mental hospital, if given in exchange for his cooperation with the prosecution, would require disclosure despite their being given by the Department of Mental Health).

A witness's subjective hope or expectation of leniency or benefit from the prosecution, by contrast, is not subject to disclosure unless the prosecutor is aware of it. *Commonwealth v. Johnson*, 486 Mass. 51, 65-66 (2020) (The "mere fact that a witness may have expected to, and did, receive favorable treatment after the defendant's trial, standing alone, does not constitute an inducement.") (internal quotations omitted). However, when a prosecutor knows that a witness hopes or expects to receive leniency or favorable treatment from the government, even if there is not an agreement for such a benefit, information concerning that hope or expectation is favorable to the defense and must be disclosed. *Commonwealth v. Caldwell*, 487 Mass. 370, 375-376 & n.8 (2021) (The prosecutor's knowledge that a jailhouse informant who obtained a confession from the defendant had previously obtained a jailhouse confession in an unrelated case, after which his sentence was revised and he was released two and-one-half months early, should have been disclosed because it could have shown the informant's anticipated beneficial resolution of his pending cases.). When a witness seeks or requests beneficial treatment from the prosecutor, unless the prosecutor unequivocally refuses this request the prosecutor is necessarily aware of the witness's subjective hope or expectation so the fact of the request is favorable to the defense and must be disclosed.

*Commonwealth v. Chicas*, 481 Mass. 316 (2019), illustrates disclosure requirements for information that might constitute an inducement. In *Chicas*, several prosecution witnesses were undocumented immigrants, and the prosecution "disclosed that during trial preparation, a detective told one of those witnesses that the detective would be willing to write him a letter if he decided to apply for United States citizenship in the future." Id. at 319. "At that point, that witness's citizenship status was relevant to a potential bias in his testimony." Id. at 321. This "appearance of a quid pro quo with one witness" suggested there may have been inducements to other witnesses. Id. When the defendant demonstrates a possibility of bias, a judge cannot bar all inquiry into the subject. *Commonwealth v. Tam Bui*, 419 Mass. 392, 400 (1995). However, once the other witnesses denied such conversations with the prosecution team, the judge could properly find there was no basis for exploring their potential bias concerning their citizenship status. *Chicas*, 481 Mass. at 321.

**14(b)(2)(C)(i)(b) Any criminal record of such witness not contained in the court activity record provided pursuant to Rule 14.2(b);**

*[This is a new section.]*

Criminal records of any witness the prosecutor may call are favorable to the defense because criminal convictions may affect the witness's credibility. While the defendant may receive any record of court activity for prosecution witnesses that is maintained by the Probation Service under Rule 14.2(b), this rule provides that any *other* criminal record not reflected in the Probation Service's record of court activity must be provided. Because criminal convictions from any jurisdiction may be admissible, all such criminal records are favorable to the defense and must be disclosed if they are in the possession, custody, or control of the prosecutor, prosecuting office, or any member of the prosecution team. *Attorney General v. Pelletier*, 240 Mass. 264, 310 (1922) (admissibility of Federal convictions); *City of Boston v. Santosuosso*, 307 Mass. 302, 330 (1940) (admissibility of out-of-state convictions); *Commonwealth v. Gagnon*, 16 Mass. App. Ct. 110, 130-132 (1983) (admissibility of foreign convictions). Any such criminal records must be disclosed without regard to whether the underlying offense involved dishonesty or false statement. *Commonwealth v. Smith*, 450 Mass. 395, 407 (2008).

The traditional theory under which a conviction is thought to affect credibility is "that a witness's earlier disregard for the law may suggest to the fact finder similar disregard for the courtroom oath." *Commonwealth v. Harris*, 443 Mass. 714, 720 (2005) (internal quotations omitted). Disclosure is required without regard to whether any prior convictions, adjudications, or dispositions would be admissible. Mass. R. Crim. P. 14(b)(2)(A). For admissibility of prior convictions, see G. L. c. 233, § 21 and G. L. c. 119, § 60; Mass. G. Evid. § 609 (2021).

**14(b)(2)(C)(i)(c) Any criminal cases pending against such witness at any relevant time , whether brought by the prosecuting office or by a prosecuting office in any other jurisdiction;**

*[This is a new section.]*

Criminal cases pending against a prosecution witness at any relevant time may provide an incentive for a witness to cooperate with the prosecution and thereby show bias. *Commonwealth v. Martinez*, 384 Mass. 377, 380 (1981) (Cross-examination of prosecution witness's pending appeal concerning either promise or expectation of leniency was proper to show bias); *Commonwealth v. Connor*, 392 Mass. 838, 841 (1984) (The "pendency of criminal charges might have inspired hope of lenity and fear of punishment if such lenity were not obtained."); *Commonwealth v. Haywood*, 377 Mass. 755, 760-761 (1979) (Evidence of prosecution witness's otherwise confidential juvenile or criminal records, including arrest records for charges pending at time of the witness's testimony, may be admissible to show bias or motivation to seek favor from the government subject to showing of materiality). Information concerning pending criminal charges, including arrest records for pending charges, is thus favorable to the defense and must be disclosed without regard to its admissibility at trial. Similarly, charges that were pending against a prosecution witness when the witness provided information to the prosecution team relevant to the case against the defendant must be disclosed even if the charges were resolved prior to the start of automatic discovery in the defendant's case.

Information concerning pending charges in other jurisdictions is subject to disclosure. *Commonwealth v. Rodwell*, 394 Mass. 694, 699 (1985) (That the witness's "past beneficial cooperation with the authorities may have involved criminal charges pending in counties other

than the county in which the defendant was tried does not make irrelevant his understanding that by cooperation he could obtain favorable treatment from the Commonwealth."). See generally *Commonwealth v. McGhee*, 472 Mass. 405, 424-425 (2015); *Commonwealth v. Meas*, 467 Mass. 434, 449-450 (2014). Evidence of bias due to a witness's pending charges, or probation status that could be violated, may be admissible under the right of confrontation as well. *Davis v. Alaska*, 415 U.S. 308, 315-318 (1974); *Commonwealth v. Ferrara*, 368 Mass. 182, 185-189 and n.4 (1975) (noting it was not crucial whether the witness was then on probation because the "possibility of excessive desire by [the witness] to please the police and prosecutor was present").

**14(b)(2)(C)(i)(d) Any written statement or oral statement of such witness that is inconsistent with any written statement or oral statement known to the prosecutor by the witness, that recants any written statement or oral statement known to the prosecutor by the witness, or that omits, adds, varies, or supplements any written statement or oral statement known to the prosecutor by the witness;**

*[This is a new section.]*

Any discrepancies or inconsistencies between prior statements of a prospective witness known to the prosecutor are favorable to the defense. "Evidence tending to impeach the credibility of a key prosecution witness is clearly exculpatory." *Collins*, 386 Mass. at 8, citing *Baldwin*, 385 Mass. at 175. See also *Baran*, 74 Mass. App. Ct. at 298 (*Brady* violation from failure to disclose multiple unedited versions of videotaped interviews of alleged victims of sexual abuse that "reveal[ed] significant vacillation and uncertainty on the part of many, if not all, of the children interviewed, as well as considerable material from which it could be inferred that the children's testimony was coached."); *Merry*, 453 Mass. at 659-660 (An accident reconstructionist's opinion, stated to one prosecutor, that damage to defendant driver's windshield did not come from his head striking it, and the conclusion that defendant was not sitting up at time of the accident, were exculpatory because they supplemented the witness's statement to a different prosecutor concerning source of windshield damage.). (For the definitions of "written statement" and oral statement," see Rule 14(b)(3)(A) and (B).)

Inconsistent statements are favorable to the defense even if both statements are inculpatory, and even if the present account or testimony is more incriminating to the defendant. *Commonwealth v. Viera*, 410 Mass. 828, 832 (1988) ("Although the evidence was more incriminating than the earlier statements, it was exculpatory in the sense that the variance with the previous statements permitted challenge to the credibility of a key prosecution witness.") (internal quotations omitted); *Rodriguez-Nieves*, 487 Mass. at 177-178 (The murder victim's wife's "statements, while in and of themselves inculpatory, also were exculpatory because they were not reflected in her report of the events to police on the day of the stabbing. The difference in the two statements provided a basis upon which to impeach [victim's wife], who was the Commonwealth's key witness on the issue of extreme atrocity or cruelty."); *Vaughn*, 32 Mass. App. Ct. at 439-440 (*Brady* violation from police officer's changed testimony, first disclosed at trial, that he had found three sets of footprints outside home that was burglarized rather than the two sets he had noted in his report and to which he had testified before the grand jury.). Compare *Smith*, 450 Mass. at 408-409 (No violation from unanticipated change in ballistician's testimony on cross-examination), with *Gilbert*, 377 Mass. at 892-894 (Prosecutor's failure to disclose the oral statement of a case-in-chief witness that his previous written statement to police was incomplete, before the witness's trial testimony, violated disclosure obligation, and

prosecutor's directive that witness should "tell the truth" did not substitute for disclosure). The Supreme Judicial Court has explained that, for critical witnesses, the impeachment value of even minor discrepancies is high. *Murray*, 461 Mass. at 23 n.10 ("[W]e emphasize that in the case of important witnesses, even minor bases for impeachment are exculpatory."). See also *Commonwealth v. Pope*, 489 Mass. 790, 803 (2022) (New trial ordered where inconsistencies between Commonwealth's key witness's previously undisclosed statements to police and his in-court statements about his girlfriend's name and how he went to her home after the crime were "quite notable.").

**14(b)(2)(C)(i)(e) Any written statement or oral statement of such witness that is inconsistent with any written statement or oral statement known to the prosecutor made by any other witness the prosecutor may call;**

*[This is a new section.]*

Inconsistencies between statements of any witnesses a prosecutor may call are favorable to the defense. *Vaughn*, 32 Mass. App. Ct. at 437-440 (*Brady* violation from police officer's testimony he found three sets of footprints outside home that was burglarized, rather than the two sets that two other responding officers described finding). Just as inconsistencies between prior statements or testimony of a prosecution witness are favorable to the defense (Mass. R. Crim. P. 14(b)(2)(C)(i)(d)) so too are inconsistencies between statements of different witnesses the prosecution may call. (For the definitions of "written statement" and oral statement," see Rule 14(b)(3)(A) and (B).)

*Vaughn* illustrates the prosecutor's continuing obligation to disclose material favorable to the defense, even if it is learned well after discovery or shortly before trial. *Vaughn*, 32 Mass. App. Ct. at 440 ("To make matters worse, the prosecution appears to have been aware of the new evidence in advance and cleverly to have prompted this testimony while [the witness] was on the stand. The Commonwealth's behavior in failing to disclose such a material change in testimony amounts to much more than a mere error of judgment or an instance of inadvertence or carelessness by the prosecutor."). Cf. *Commonwealth v. Ellerbe*, 430 Mass. 769, 780-781 (2000) (An officer's first-time disclosure at trial that defendant, charged with drug possession and offering a $10,000 gift to a police officer, had told officer where she could obtain money for the gift did not violate prosecution's disclosure obligation where officer did not change testimony from prior account of the matter.).

**14(b)(2)(C)(i)(f) Any information reflecting bias or prejudice against the defendant by such witness or which otherwise reflects bias or prejudice against any class or group of which the defendant is a member;**

*[This is a new section.]*

Information that shows bias or prejudice against a defendant on the part of a witness the prosecution may call is favorable to the defense because it can affect the witness's credibility. *Tam Bui*, 419 Mass. at 400 ("The right of a criminal defendant to cross-examine a prosecution witness to show the witness's bias, and hence to challenge the witness's credibility, is well established in the common law, in the United States Constitution (Sixth Amendment), and in the Constitution of the Commonwealth (art. 12 of the Declaration of Rights)."). Disclosure is required without regard to whether the information is admissible.

"Bias is a term used . . . to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a

party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest." *United States v. Abel*, 469 U.S. 45, 52 (1984). See also *Commonwealth v. Martin*, 434 Mass. 1016, 1017 (2001) (citing *Martinez,* 384 Mass. at 380); Mass. G. Evid. §611(b)(2). Witnesses who are crime victims routinely have a bias against the defendant due to what they believe was the defendant's charged conduct, but the bias at issue here must come from some other source.

For example, bias or prejudice against the defendant may arise from antipathy due to prior actions of the defendant or to a witness's prior encounters with the defendant. *Commonwealth v. Ahearn*, 370 Mass. 283, 286-87 (1976) (Error to bar inquiry concerning police officers' knowledge that defendant charged with assault and battery on the officers had sought civilian complaints against them before they decided to file charges against him); *Martin*, 434 Mass. at 1017 (Error to bar inquiry concerning assault complainant's knowledge defendant had obtained criminal complaints against her that could show complainant's bias in seeking her own complaints against the defendant); *Commonwealth v. Magdalenski*, 471 Mass. 1019, 1020 (2015) (Error to bar inquiry concerning complainant's knowledge that defendant had sought complaint against alleged victim); *Commonwealth v. Kindell*, 84 Mass. App. Ct. 183, 189 (2013) (Error to bar inquiry into prosecution witness's hostility toward defendant due to his belief that she was responsible for his stepson's incarceration).

Bias could arise from a witness's interest in the outcome of the case. *Commonwealth v. Elliot*, 393 Mass. 824, 826-830 (1985) (Error to bar all questioning concerning complainant's possible suit against defendant's employer for injuries she suffered from assault at defendant's workplace that could create a financial motive for complainant to testify falsely); *Elangwe*, 85 Mass. App. Ct. at 201 (Existence of victim's pending civil suit against defendant, if known by prosecutor, must be disclosed).

Bias or prejudice could also arise from a witness's views or attitudes toward a group with which the defendant is affiliated or of which the defendant is a member. *Commonwealth v. Hinds*, 487 Mass. 212, 224-225 (2021) (Error to exclude evidence of assault victim's tattoo suggesting affiliation with white supremacist movement as it could support Black defendant's self-defense theory that assault was racially-motivated); *Commonwealth v. Moorer*, 431 Mass. 544, 547-548 (2000) (Error to preclude defense inquiry concerning white victim's upbringing under apartheid in then-Rhodesia because "the victim's comment that the [Black] defendant's face did not quite fit the MIT cap he was wearing created at least a remote possibility that he was racially biased."). Information about a witness's attitudes concerning group-affiliation of a defendant is thus favorable to the defense. *Caldwell*, 487 Mass. at 376 (*Brady* violation from failure to disclose fact that jailhouse informant in rape case had previously obtained confession from a different defendant charged with rape in an unrelated case because it could have supported "theory that the witness was so biased against individuals accused of rape that he would go to any lengths to convict them.").

**14(b)(2)(C)(i)(g) Any crime, charged or uncharged, committed by such witness, if known to the prosecutor, prosecuting office, or any member of the prosecution team;**

*[This is a new section.]*

Information that a witness the prosecution may call has committed any crime is favorable to the defense because it may show a motivation to seek favor with the government. *Haywood*, 377 Mass. at 760 (A "criminal defendant is entitled, as of right, to reasonable cross-examination of a witness for the purpose of showing bias, particularly where that witness may have a

motivation to seek favor with the government.") (internal quotations and citations omitted). Disclosure is required without regard to admissibility of the information. See also *Martinez*, 384 Mass. at 380-381 (bias from prosecution witness's pending appeal); *Commonwealth v. Graziano*, 368 Mass. 325, 329-330 (1975) (bias from critical prosecution witness's actions that made him a likely suspect in defendant's case).

Information that a prosecution witness has committed a crime, even an uncharged crime, may also be favorable to the defense if it shows bias or prejudice against the defendant. *Commonwealth v. Aguiar*, 400 Mass. 508, 514-515 (1987) (Reversible error to prevent defendant charged with murder from introducing evidence that prosecution's key witness and the victim were drug dealers whom the defendant had warned to stop dealing drugs in the community because defendant "had a right to have the whole relationship presented to the jury."). Apart from its use to show bias or prejudice, information that a prosecution witness has committed a crime may be favorable to the defendant in other ways, for example by corroborating a defendant's claim of self-defense when the identity of the first aggressor is in dispute. *Adjutant*, 443 Mass. at 663-666; *Murray*, 461 Mass. at 22. To be subject to disclosure, this information must be known to the prosecutor, the prosecuting office, or a member of the prosecution team.

Even information concerning crimes for which a prosecution witness could not be charged is favorable to the defense and must be disclosed. In *Matter of a Grand Jury Investigation*, 485 Mass. at 647, 651, for example, police officers admitted in grand jury testimony that they had falsified use-of-force reports concerning a fellow officer's misconduct. Even though this testimony was given under transactional immunity, so the officers could not be prosecuted for the crimes they described committing, their admissions were nevertheless subject to disclosure as *Brady* material in any case in which they might be witnesses. 485 Mass. at 654-656. Similarly, in *Graham*, 493 Mass. 348, the Court held that the prosecution could not "shirk its disclosure obligation" in instances of suspected police misconduct involving multiple officers when specific acts could not be attributed to particular individuals. Instead, disclosure of the information was required "in any cases involving any of the officers who could be the possible offenders." Id., 493 Mass. at 365.

**14(b)(2)(C)(i)(h) Any information about such witness contained in any database or list of information about law enforcement misconduct maintained by or available to the prosecuting office; and**

*[This is a new section.]*

Any information concerning misconduct by law enforcement witnesses the prosecution may call is favorable to the defense because it could affect these witnesses' credibility. *Graham*, 493 Mass. at 363 (Prosecutor must disclose adverse judicial determinations of credibility concerning members of the prosecution team); *Matter of a Grand Jury Investigation*, 485 Mass. at 657-658 (Prosecutor's conclusion that officer lied to conceal unlawful use of force or about defendant's conduct had to be disclosed to defense counsel in any case in which the officer was a potential witness or prepared an investigative report). Any such information in a database or list maintained by or available to the prosecuting office must be disclosed. The Supreme Judicial Court has endorsed the creation of policies that would collect this information. 485 Mass. at 660 & n.16.

Lists or databases (variously called "*Brady* lists," "*Brady-Giglio* lists" or "Do not call lists") are one tool to assist prosecutors who often work with law enforcement personnel from various departments in discharging their disclosure obligations. Rachel Moran, 107 MINN. L.

REV. 657, 674-675 (2022). See also, *Tracking Police Misconduct: How Prosecutors Can Fulfill Their Ethical Obligations and Hold the Police Accountable*, INST. FOR INNOVATION IN PROSECUTION (July 2021), https://www.prosecution.org/s/FINALTrackingPoliceMisconductGuide.pdf [https://perma.cc/KT2N-M994] (Describing database as "best way" to ensure prosecutor's office complies with its ethical and legal obligations under *Brady* that also enables prosecutors to more easily assess credibility of law enforcement witnesses, avoid surprise from defense-based databases, and demonstrate readiness to hold law enforcement witnesses accountable.).

**14(b)(2)(C)(i)(i) Any information about any mental or physical impairment or condition of such witness that may cast doubt on such witness's ability to testify truthfully and accurately concerning any relevant event.**

*[This is a new section.]*

Information concerning any condition of a witness that may impair the witness's testimonial capacity is favorable to the defense and must be disclosed. *Commonwealth v. Daley*, 439 Mass. 558, 564 (2003) (A witness may "be impeached by evidence challenging his testimonial faculties (e.g., ability to perceive the events or remember them accurately)"); *Commonwealth v. Caine*, 366 Mass. 366, 369-370 (1974) ("[M]ental impairment, as well as habitual intoxication and drug addiction, may be the subject of proper impeachment if it is shown that such factors affect the witness's capacity to perceive, remember, and articulate correctly."). Disclosure is required without regard to the admissibility of evidence of the condition.

For example, a "witness's use of illegal drugs, legally prescribed medication, or alcohol at the time of the events concerning which [the witness] was testifying, or evidence of a pattern of such drug or alcohol addiction, if it would impair the witness's ability to perceive and to remember correctly, is admissible on cross-examination to attack the witness's credibility." *Commonwealth v. Carrion*, 407 Mass. 263, 273-274 (1990). Compare *Commonwealth v. Bresilla*, 470 Mass. 422, 441 n.8 (2015) (Identification witness's hospitalization six weeks before incident for treatment of psychiatric illness and chemical dependency, during which witness complained of intermittent blurred vision, showed inconsistent memory and engaged in unstable behavior twice requiring chemical restraint all could have cast doubt on witness's ability to accurately perceive and describe events), with *Commonwealth v. Laguer*, 20 Mass. App. Ct. 965, 1063 (1985) (Medication administered when the witness made an identification was properly subject of cross examination, but witness's prior psychiatric history not properly considered without expert testimony that history would have exacerbated effect of medication on witness's ability to perceive or recall attacker).

**14(b)(2)(C)(ii) With respect to any percipient witness, without regard to whether the prosecutor may call such witness:**

*[This is a new section.]*

Percipient witnesses may create material that is favorable to the defense by failing to identify the defendant in an identification procedure or by making statements that are inconsistent with their own statements concerning the alleged incident or with the defendant's conduct, or with statements of other witnesses about the alleged incident. Rules 14 (b)(2)(C)(ii)(a) – 14 (b)(2)(C)(ii)(c). These examples of material favorable to the defense are in addition to the automatic disclosure that must be provided summarizing any identification

procedures and statements made in connection with them. Rule 14 (b)(1)(I). (For the definitions of "written statement" and oral statement," see Rule 14 (b)(3)(A) and (B).)

**14(b)(2)(C)(ii)(a) The failure of the percipient witness to make an identification of a defendant, if any identification procedure has been conducted with such witness with respect to the crime at issue; or**

*[This is a new section.]*

A percipient witness's failure to identify the defendant in an identification procedure is favorable to the defense. *Santana*, 465 Mass. at 290-292 (The prosecutor's failure to disclose a percipient witness's inability to identify defendant was a "failure of constitutional dimension."). A percipient's witness's failure to identify the defendant must be disclosed even if the identification procedure was informal. In *Santana*, for example, after a percipient witness testified in a pretrial hearing to establish the witness's competence, the prosecutor asked an officer to see if the witness had recognized anyone in the courtroom. When the witness named several people in the courtroom but did not name the defendant, this lack of identification was subject to disclosure. Id. at 291. See also *Imbert*, 479 Mass. at 582 (Failure to disclose percipient witness's inability to identify defendant in a photographic array was error, albeit not prejudicial). Even if the witness is not asked to make an in-court identification and does not testify to having previously made an identification, the fact of the prior failure to identify the defendant must be disclosed when the witness testifies to having perceived the crime. Id. The witness's status as a percipient witness necessarily makes any failure to identify the defendant, even if the witness does not testify to having identified the defendant, favorable to the defense.

**14(b)(2)(C)(ii)(b) Any inconsistent written statement or oral statement of the percipient witness regarding the alleged incident or conduct of the defendant; and**

*[This is a new section.]*

Statements of a percipient witness regarding either the alleged incident or the alleged conduct of the defendant that are inconsistent are favorable to the defense. As with all inconsistent statements, even inculpatory statements must be disclosed, as it is the inconsistency between the statements rather than their substance that is favorable to the defense. *Rodriguez-Nieves*, 487 Mass. at 175-77 (Prosecutor's failure to disclose percipient witness's changed account of stabbing victim's last statements and of defendant's response to victim was "indisputable" *Brady* violation); *Connor*, 392 Mass. at 850-851 (Cooperating witness's statement to prosecutor that he had stabbed murder victim in the head with a screwdriver and rotated it become exculpatory when the witness testified to having stabbed victim without rotating screwdriver and to not having told anyone he had done so.).

**14(b)(2)(C)(ii)(c) Any written statement or oral statement of the percipient witness that is inconsistent with written statements or oral statements about the alleged incident made by other witnesses.**

*[This is a new section.]*

Statements of a percipient witness about the alleged incident that are inconsistent with statements of any other witness are favorable to the defense and must be disclosed, without regard to whether the prosecutor anticipates calling the percipient witness. *Rodriguez-Nieves*, 487 Mass. at 178 (Percipient witness's changed account of stabbing victim's last statements and

of defendant's laughing response to victim dying were material exculpatory evidence because no other percipient witness testified to them.).

**14(b)(2)(C)(iii) With respect to any expert witness, other than one pertaining to the defendant's criminal responsibility subject to Rule 14.4, the prosecutor may call:**

*[This is a new section.]*

Disclosure obligations concerning expert witnesses are set forth in several sections of the Rules.

Automatic discovery of experts and expert opinions that are investigative materials, other than those concerning the defendant's mental condition, is governed by Rules 14(b)(1)(F) and 14(b)(1)(H).

The prosecutor's disclosure obligations for automatic discovery of items and information relating to experts that are favorable to the defense are set forth in Rules 14(b)(2)(B)(ii) and 14(b)(2)(C)(iii).

The disclosure of experts called by the prosecutor or the defendant concerning the defendant's mental condition at the time of the alleged crime, or expert testimony concerning the defendant's mental condition at any stage of the proceeding, is governed by Rule 14.4.

Reciprocal discovery from the defense concerning experts and expert opinion, with the exception of experts concerning the defendant's mental condition, is governed by Rule 14.1(a).

**14(b)(2)(C)(iii)(a) Descriptions of any examinations, tests, or experiments performed by the expert in connection with the case that were inconclusive, whose results were inconsistent with those of any examinations, tests, or experiments included in the expert's report, or whose results were inconsistent with any conclusion or opinion offered by the expert; or**

*[This is a new section.]*

Whenever an expert offered by the Commonwealth conducts examinations, tests, or experiments in connection with a case, results of these that are either inconclusive or inconsistent with the expert's report, conclusions, or testimony is favorable to the defense. *Martin*, 427 Mass. at 822-823 (In a murder case based on alleged tainting of victim's food with LSD to produce his heart attack, the failure to disclose inconclusive and inconsistent results of confirmatory tests for presence of LSD in the victim's body fluids violated prosecutor's obligation to disclose exculpatory evidence.). Naturally, test or examination results, either primary or confirmatory, that are inconsistent with the expert's report are favorable to the defense and subject to disclosure. *Commonwealth v. Gaston*, 86 Mass. App. Ct. 568, 573 & n.5 (2014) (State laboratory chemist's affirmative representations of substances as illegal that she had in fact not tested were "exculpatory because they undermined the foundation of the defendant's prosecution and, in turn, triggered the requirement of prosecutorial disclosure."). This disclosure obligation is in addition to the automatic discovery required by Rule 14(b)(1)(F) and 14(b)(1)(H) of intended expert opinion evidence and reports, and reports of scientific tests or experiments that pertain to the case.

**14(b)(2)(C)(iii)(b) Descriptions of negative outcomes of proficiency testing or audits of the expert witness or of any testing or laboratory facility used by the expert for tests or experimentation.**

*[This is a new section.]*

The credibility of an expert's examinations, tests, and experiments depends upon the reliability of the expert's methods and processes. *Sullivan*, 478 Mass. at 381 ("Evidence tending to impeach an expert witness for incompetence or lack of reliability falls within the ambit of the Commonwealth's obligations under *Brady*."). Deficiencies in the performance of examinations, tests, or experiments impeaches that credibility, whether the deficiencies are in the expert's own work or that of the testing facility or laboratory used by the expert. Id. at 381-382 (State police crime laboratory criminalist's failure of proficiency tests was exculpatory information even though the criminalist's involvement in the case at issue was limited to evidence collection). See also *Hallinan*, 491 Mass. at 740-741 (State police office of alcohol testing's failure to disclose internal documents showing failed certifications of alcohol breathalyzer machines violated disclosure obligations.). Information concerning operating deficiencies in the laboratory facility or equipment must be disclosed. *Neal*, 392 Mass. at 14 n.12 ("Information available to the Commonwealth from a manufacturer of breathalyzer equipment or other sources that specific lots of test or reference ampules may be defective, or that the accuracy of breathalyzer results may be otherwise impaired . . . must be disclosed to a defendant.").

Such deficiencies may also be exculpatory by showing shortcomings in the investigation. Id. at 382 (Criminalist's failure of proficiency tests also exculpatory through potential support of a defense under *Commonwealth v. Bowden*, 379 Mass. 472 (1980), that shortcomings in investigation or failure to pursue leads raises reasonable doubt). See also *Commonwealth v. Hernandez*, 481 Mass. 189, 194-196 (2019) (unsatisfactory proficiency tests of state police laboratory chemist who testified as crime scene supervisor were exculpatory). This information may also be subject to disclosure under Mass. R. Crim. P. 14(b)(2)(C)(v)(b).

**14(b)(2)(C)(iv)(a) With respect to any person the prosecutor does not anticipate calling: Any written statement or oral statement of such person, including an expert, pertaining to the case that is inconsistent with any written statement or oral statement known to the prosecutor made by a witness the prosecutor may call.**

*[This is a new section.]*

Advocates properly select witnesses who support their theory of the case and omit those who do not support it. Written or oral statements of persons who the prosecution does not anticipate calling can nevertheless be favorable to the defense if they are inconsistent with statements of persons the prosecutor does anticipate calling. Statements pertaining to the case, by anyone, that are inconsistent with statements of a witness the prosecutor may call are favorable to the defense. By contrast, statements of persons the prosecutor does not anticipate calling that are consistent with statements of persons the prosecutor anticipates calling are not subject to disclosure as exculpatory evidence. Compare *Commonwealth v. Bockman*, 442 Mass. 757, 766-767 n.10 (2004) (Opinions of state police trooper concerning comparison of fingerprints from scene with defendant's prints were not subject to disclosure because they were identical to those of FBI print analyst who was called and whose opinions were fully disclosed to defense) with *Green*, 72 Mass. App. Ct. 903 (Recordings of defense witness's calls to police department claiming money defendant possessed when was arrested should have been disclosed prior to trial because they supported defendant's claim that money belonged to the witness).

**14(b)(2)(C)(v)(a) Items or information that tend to: Support the proposition that another person committed the crime or had the motive, intent, or opportunity to commit it;**

*[This is a new section.]*

Information showing a third party, rather than the defendant, may have committed the crime "is a time-honored method of defending against a criminal charge." *Commonwealth v. Rosa*, 422 Mass. 18, 22 (1996) (internal quotations omitted). "A defendant may introduce evidence that tends to show that another person committed the crime or had the motive, intent, and opportunity to commit it." *Commonwealth v. Lawrence*, 404 Mass. 378, 387 (1989) (quoting *Commonwealth v. Harris*, 395 Mass. 296, 300 (1985)). Indeed, if such "evidence is of substantial probative value, and will not tend to prejudice or confuse, all doubt should be resolved in favor of admissibility." *Commonwealth v. Morgan*, 460 Mass. 277, 291 (2011). See also *Commonwealth v. Conkey*, 443 Mass. 60, 66-70 (2004) (In homicide suggestive of sexual assault, defendant's evidence that victim's landlord had lengthy history of sexual aggression toward women, including other tenants and potential tenants, from seven years to a few months before the murder, admissible as third-party culprit evidence); *Commonwealth v. Keizer*, 377 Mass. 264, 266-268 (1979) (Evidence of similar robbery three days after robbery for which defendant was charged, in the same vicinity by the same number of people of similar description that defendant could not have committed should have been admitted as third-party culprit evidence).

**14(b)(2)(C)(v)(b) Items or information that tend to: Establish deficiencies or lapses in the investigation of the case or the failure of any expert witness or member of the prosecution team to follow established protocols, policies, or professional standards;**

*[This is a new section.]*

Items or information showing the inadequacy of investigation by police, including "failure of the authorities to conduct certain tests or produce certain evidence," can be a permissible ground on which to build a defense and therefore must be disclosed. *Bowden*, 379 Mass. at 485-486. Accord *Commonwealth v. Person*, 400 Mass. 136, 140 (1987) ("The defendant may expose any deficiencies in the police investigation. He may argue to the jury that, had the police done certain aspects of their investigation differently, it would have supported his defense."); *Pope*, 489 Mass. at 804-806 (Prosecutor's preliminary field report and case memorandum reflecting police skepticism about version of events given by Commonwealth's sole percipient witness should have been disclosed because they showed inconsistencies in witness's account; "very existence of [these] documents . . . calls into question aspects of the Commonwealth's investigation or preparation for trial.") (2022); *Commonwealth v. Reynolds*, 429 Mass. 388, 390-391 (1999) (Reversible error where murder defendant was precluded from introducing evidence that police failed to pursue leads from two tipsters that major crime organization's "lieutenants" had argued with victim concerning money he owed them the night of his death); *Commonwealth v. Silva-Santiago*, 453 Mass. 782, 801 (2009) ("The inference . . . from an inadequate police investigation is that the evidence at trial may be inadequate or unreliable because the police failed to conduct the scientific tests or to pursue leads that a reasonable police investigation would have conducted or investigated, and these tests or investigation reasonably may have led to significant evidence of the defendant's guilt or innocence."); *Sullivan*, 478 Mass. at 382 (State police laboratory criminalist's failure to pass proficiency tests was exculpatory because it bolstered *Bowden* defense by allowing defendant to attack thoroughness of investigation); *Commonwealth v. Moore*, 480 Mass. 799, 808-809 (2018) (Audio recordings of police officers relaying perpetrators' descriptions that did not match defendant properly admissible as *Bowden* evidence.).

Information showing egregious government misconduct in the investigation or prosecution of the case is favorable to the defense and must be disclosed. *Manning*, 373 Mass. 438 (Officer's telephone call to defendant disparaging defense counsel and seeking defendant work as an informant violated defendant's right to counsel and right to fair trial and necessitated dismissal of indictment with prejudice); *Lewin*, 405 Mass. 566 (Officer's suspiciously frequent reliance upon single likely non-existent informant created inference of perjurious and fraudulent conduct by police officer that defendant can show at trial, but did not require dismissal because it did not preclude defendant receiving a fair trial). See also *Commonwealth v. Fontaine*, 402 Mass. 491, 497-498 (1988) (Videotaping conversations between defendant and counsel); *Commonwealth v. Salman*, 387 Mass. 160, 165-167 (1982) (Evidence suggesting multiple indictments relying on one detective's testimony may have been obtained through knowing and intentional use of false and misleading testimony). Compare *Commonwealth v. Hine*, 393 Mass. 564, 571 (1984) (Officer's forgery of defendant's signature on Miranda card improper but did not prejudice defendant who orally waived Miranda rights); *Commonwealth v. Teixeira*, 76 Mass. App. Ct. 101, 105 (2010) (Detective's hostile encounter with defendant the day before defendant's trial involving detective's niece was egregious misconduct but did not merit dismissal of charges because it did not interfere with defendant's right to testify).

**14(b)(2)(C)(v)(c) Items or information that tend to: Call into doubt the authenticity of any evidence the prosecutor may introduce, or the reliability or validity of any expert testimony the prosecutor may introduce; and**

*[This is a new section.]*

Because the prosecution must establish the authenticity of any evidence it may introduce, as well as the reliability and validity of any expert testimony it may offer, information that tends to call into question these prerequisites is favorable to the defense. Naturally information showing systemic deficiencies in the collection, analysis, or preservation of a type or category of evidence to be offered at trial is favorable to the defense. *CPCS v. AG*, 480 Mass. at 725-729 (Information that state drug laboratory chemist had tampered with samples that she tested, as well as those tested by other chemists, prevented retesting of the original substances, called into question the accuracy of all the laboratory's drug analysis certificates, and diminished the reliability and integrity of all testing conducted during the chemist's tenure at the laboratory.). See also *Commonwealth v. Francis*, 474 Mass. 816, 826 (2016) (State health laboratory chemist's deliberate falsification of multiple drug test results through "dry-labbing," intentionally contaminating samples, removing samples from evidence locker in violation of lab protocols, postdating entries in evidence logbook, forging evidence officer's initials, and falsifying reports on verification tests for machines used to run confirmatory tests were material exculpatory evidence in any case in which she was the primary or secondary analyst); *Scott*, 467 Mass. at 351-353 & n.9 (Information from investigation of state drug laboratory chemist's mishandling of and tampering with drug samples and falsely claiming to hold graduate degree provided sufficient basis to presume all tests in which she was the primary or confirmatory chemist lacked integrity even if the chemist were to testify she had not mishandled or tampered with a specific sample).

Such deficiencies can come from equipment or technologies as well as human causes. *Neal*, 392 Mass. at 14 n.12 ("[I]nformation available to the Commonwealth from a manufacturer of [alcohol] breathalyzer equipment or other sources that specific lots of test or reference ampules may be defective, or that the accuracy of breathalyzer results may be otherwise

impaired [through radio frequency interference] . . . is *Brady* material."). In these instances of systemic deficiency, the authenticity of evidence offered in a case is affected by actions in factually unrelated cases or investigations, just as it is when information shows that a witness the prosecutor may call has admitted to making false statements in unrelated matters. *Matter of a Grand Jury Investigation*, 485 Mass. at 649, 658 (Immunized grand jury testimony from police officers admitting falsification of use-of-force reports to protect a fellow officer who used excessive force was exculpatory and had to be revealed to defendants in unrelated cases in which the testifying officers were potential witnesses or had prepared reports).

Even without systemic deficiencies, information that shows the original version or copy of evidence has been lost or destroyed may be favorable to the defense. *Neal*, 392 Mass. at 11-12; *Harwood*, 432 Mass. at 295-298 (Destruction of original letter to insurer attesting to defendant's employment deprived defendant of exculpatory evidence in worker's compensation fraud case because it precluded more reliable handwriting analysis than was possible on copies of the letter.). Information that could reduce the probative value of evidence the prosecutor anticipates introducing by putting it into context must be disclosed. *Baran*, 74 Mass. App. Ct. at 298 (When compared to edited videotaped interviews of suspected child abuse victims provided in discovery, unedited videotaped interviews "evaluated in the context of the entire record, are exculpatory and material insofar as they create a reasonable doubt that did not otherwise exist."). (Internal quotes omitted.)

Items or information that could affect the reliability or validity of any expert testimony the prosecution may introduce is also favorable to the defense. Such items or information could apply to the specific expert at issue, the expert's methods or processes, or both. *Neal*, supra, 392 Mass. at 14 (Information could affect reliability of all expert testimony based on tests using particular brand of breathalyzers located in a position in which they could be subject to radio frequency interference); *Hernandez*, 481 Mass. at 195 (Failed proficiency tests by state police crime lab chemist who acted as crime scene supervisor were exculpatory and should have been disclosed); *Sullivan*, 478 Mass. at 381-382 (State police crime lab chemist's failed proficiency tests were exculpatory because they could have suggested he misled the jury concerning his qualifications).

**14(b)(2)(C)(v)(d) Items or information that tend to: Suggest that bias or prejudice against any class or group of which the defendant is a member played any role in the investigation or prosecution of the case.**

*[This is a new section.]*

The exercise of selectivity in law enforcement cannot be based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Commonwealth v. King*, 374 Mass. 5, 20 (1977) (police or prosecutorial policy of selectively enforcing prostitution law against females rather than males violates equal protection guarantees of federal and Massachusetts constitutions). Thus items or information that could support a motion to dismiss for selective prosecution or to suppress or exclude evidence obtained through selective enforcement is favorable to the defense. *Commonwealth v. Lora*, 451 Mass. 425, 439 (2008) ("application of the exclusionary rule to evidence obtained in violation of . . . equal protection . . . is entirely consistent with the policy underlying the exclusionary rule, is properly gauged to deter intentional unconstitutional behavior, and furthers the protections guaranteed by the Massachusetts Declaration of Rights").

In cases involving vehicle or pedestrian stops, for example, information that in any way suggests race or other prohibited classifications played a role, even in part, in the stop or the decision to stop is favorable to the defense. *Commonwealth v. Long*, 485 Mass. 711, 739 (2020) ("[A] traffic stop motivated by race is unconstitutional, even if the officer also was motivated by the legitimate purpose of enforcing the traffic laws."); *Commonwealth .v Robinson-Van Rader*, 492 Mass. 1, 18 (2023) (same standard applies to allegedly discriminatory pedestrian stops). Because constitutionally impermissible motivation may be implicit as well as explicit, information or materials that could suggest unconscious bias had any role in the stop or the decision to stop are favorable to the defense. Id. at 747 (citing *Commonwealth v. McCowen*, 485 Mass. 461, 499 (2010) (Ireland., J. concurring) ("people possess [implicit racial biases] over which they have little or no conscious, intentional control")). See also *Commonwealth v. Buckley*, 478 Mass. 861, 878 and n.4 (2018) (Budd, J., concurring). This information must be disclosed whether it relates to the specific personnel involved, the agency or department, or both. *Long*, 485 Mass. at 739-740 & nn.7-12.

**14(b)(3) Statement definitions.**

*[This is a new section. Prior Rule 14(d)(1) and 14(d)(2) are now renumbered as Rule 14(b)(3)(A) and 14(b)(3)(B).]*

This section defines two types of statements used in Rule 14, "written statements" and "oral statements." These definitions control the scope of automatic discovery of investigative materials and items and information favorable to the defense. See Rules 14(b)(1) and 14(b)(2). (These definitions also apply to the term "written statement" as used in Reciprocal Discovery from the Defense. Rule 14.1(a)).

**14(b)(3)(A) The term "written statement," as used in this rule, means:**

**(i) a writing made, signed, or otherwise adopted by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or**

**(ii) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration, except that a computer assisted real time translation, or its functional equivalent, made to assist a deaf or hearing-impaired person, that is not transcribed or permanently saved in electronic form, shall not be considered a statement.**

*[This is a new section. Prior Rule 14(d)(1) and 14(d)(2) are now renumbered as Rule 14(b)(3)(A) and 14(b)(3)(B).]*

As under the prior rule, written statements of prosecution witnesses are subject to automatic discovery. What had been previously called a "statement" is now called a "written statement" but its definition is unchanged. Prosecution witness statements subject to automatic discovery as investigative materials are limited to those made, signed, or adopted by the witness, or which have been recorded through any means that provides a substantially verbatim recital of an oral declaration, excluding as before real time translations or their functional equivalents made to assist a deaf or hearing-impaired person that is not transcribed or permanently saved in electronic form. Rules 14(b)(3)(A)(i) and 14(b)(3)(A)(ii). Drafts or notes of such statements that have been incorporated into later drafts or a final report are excluded from this definition.

Rule 14(b)(3)(A)(i). The only addition to investigative materials subject to automatic discovery is that oral statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedure are also included. Rule 14(b)(1)(I).

**14(b)(3)(B) The term "oral statement," as used in this rule, means any communication, by speech or nonverbal conduct intended as an assertion, of a person having percipient knowledge of relevant facts and which contains such facts that is not a written statement.**

The rule now defines the term "oral statement" for automatic discovery of the expanded category of items and information favorable to the defense in Rule 14(b)(2). An oral statement is any communication by a witness by speech or nonverbal conduct intended as an assertion that is not a written statement. Rule 14(b)(3)(B). Any communication in any form by a witness the prosecutor may call that is favorable to the defense must be disclosed, even if it is unwritten and unrecorded. These "oral statements" include casual, offhand, or informal remarks, as well as gestures or other nonverbal conduct intended as assertions, such as nodding, shaking one's head, or pointing. For example, passing remarks, whether in person or through telephonic or electronic communication before or after the witness makes a written statement that qualify, limit, or temper the witness's written statement must be disclosed.

Items and information favorable to the defense specifically include *both* oral statements and written statements of a person the prosecutor may call that are at all inconsistent with any prior statements of the person known to the prosecutor or with any statements of any other witness the prosecutor may call. Rules 14(b)(2)(C)(i)(d) and 14(b)(2)(C)(i)(e). Similarly, both oral statements and written statements of any percipient witness, without regard to whether the prosecutor may call the witness, that are either inconsistent with the witness's own oral or written statements or with any other witness's oral or written statements about the alleged incident or the defendant's conduct, are favorable to the defense and must be disclosed. Rules 14(b)(2)(C)(ii)(b) and 14(b)(2)(C)(ii)(c). Finally, any oral statements or written statements known to the prosecutor that were made by any person the prosecutor does not anticipate calling that are inconsistent with any oral or written statements of any witness the prosecutor may call must be disclosed. Rule 14(b)(2)(C)(iv)(a). In short, any statements in any form by any person that are at all inconsistent with any statements of someone who may be a prosecution witness must be disclosed.

**14(b)(3)(C) If information subject to disclosure exists in statements of multiple forms, including written and oral statements, the entirety of the substance of the information must be fully and completely disclosed, even when such disclosure requires providing written documents and separately disclosing the substance of any unwritten oral statement. The disclosure of any unwritten oral statements should be memorialized as soon as there is a reasonable opportunity, manner, and means to do so.**

*[This is a new section.]*

The broader range of items and information subject to automatic discovery as items and information favorable to the defense that includes both oral and written statements means that automatic discovery may be required of information as *both* investigative material *and* items and information favorable to the defense. For example, if a witness the prosecutor may call gives a recorded interview to a member of the prosecution team, that interview is a "written statement"

subject to automatic discovery as investigative materials. If the witness later mentions something in passing to a member of the prosecution team that is inconsistent with their written statement, whether adding, varying, or supplementing the written statement, even by making it more incriminating, that passing remark must be disclosed as material favorable to the defense. Rule 14(b)(3)(C). The "entirety of the substance of the information must be fully and completely disclosed" notwithstanding any part of it having been previously disclosed.

The disclosure of unwritten oral statements should be memorialized as soon as there is a reasonable opportunity, manner, and means to do so. For example, the prosecutor could memorialize by electronic communication the disclosure of a passing remark or offhand comment by a witness that is inconsistent with other statements the witness was made.

**(c) Timing of Discovery. Except as otherwise ordered by the court, the prosecutor shall provide the discovery required by Rule 14(b) at arraignment to the extent that the discovery is in the possession of the prosecutor. The prosecutor shall provide the discovery required by Rule 14(b) then available to the prosecution team by the first pretrial conference.**

*[This is a new section.]*

Unless otherwise ordered by the court, automatic discovery from the prosecution is subject to two deadlines. First, at arraignment the prosecutor must provide all items and information subject to disclosure under Rule 14(b) that are then in the prosecutor's possession. Some materials subject to disclosure are routinely available to the prosecutor at arraignment, such as statements of the defendant and police reports, and delaying provision of these unnecessarily slows preparation of the defense case. Second, by the first pretrial conference the prosecutor shall provide all items and information required to be disclosed by Rule 14(b) that are then available to the prosecution team. While gathering materials from the prosecution team may require additional time, especially in complex cases, the first pretrial conference is the point by which the prosecutor should be able to complete automatic discovery of all investigative materials and items and information favorable to the defense. The prosecutor must promptly file a certificate of compliance certifying completion of discovery and listing each item provided. See Rule 14.2(e).

**(d) Continuing duty**. **If the prosecution team subsequently obtains possession of items or information subject to disclosure under Rule 14(b), the prosecutor shall promptly disclose to or notify the defense of its acquisition of such additional items or information in the same manner as required for initial discovery.**

*[This is section replaces prior Rule 14(a)(4) but makes no substantive change.]*

The prosecutor's disclosure duties are continuing duties. Rule 14(d) provides that the prosecutor's later possession of information or items subject to disclosure requires prompt action. The prosecutor must disclose the item or notify the defendant of the information in the same way as would have been required initially and the prosecutor must file a supplemental certificate of compliance. Rule 14.2(e); *Commonwealth v. Bryant*, 390 Mass. 729, 747 (1984) ("The attorney's duty does not stop with the first compliance with a defendant's request for disclosure. Changes of substance damaging to the defense must be reported to opposing counsel.").

As a matter of due process and the right to a fair trial, the continuing disclosure duty also imposes an obligation on the prosecutor to correct statements made in discovery that the

prosecutor subsequently learns are incorrect. Id. at 747 n.26. See also *Vaughn*, 32 Mass. App. Ct. at 440-441 (Failure to disclose Commonwealth witness's intended change of testimony to something more incriminating violated continuing duty because the discrepancy in the testimony was exculpatory). The same continuing duty applies equally to the defendant under Rule 14.1(b).

# REPORTER'S NOTES

# MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

## Rule 14.1 Pretrial Reciprocal Discovery from the Defense

## Reporter's Notes—2025

**Rule 14.1 Pretrial Reciprocal Discovery from the Defense**.
**(a) Defense duties. Following the prosecutor's delivery of all discovery required pursuant to Rule 14(b)(1), Rule 14(b)(2), and any court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecutor and permit the prosecutor to discover, inspect, and copy any material and relevant evidence discoverable under Rule 14(b)(1)(F), (G), and (H) which the defendant intends to offer at trial, including the names, addresses, known contact information, dates of birth, and written statements of those persons whom the defendant may call as witnesses, and any promise, reward, or inducement sought, requested by, offered to, or given to such witness. As used in this rule, the term "written statement" shall have the meaning defined in Rule 14(b)(3). The judge may inquire of the defense what actions were taken to achieve compliance with this rule.**
**(b) Continuing duty. If the defendant subsequently learns of additional items or information which would have been subject to disclosure or notification under this rule, the defendant shall promptly disclose to or notify the prosecutor of its acquisition of such additional items or information in the same manner as required for initial discovery under this rule.**

*[Rule 14.1 replaces prior Rule 14(a)(1)(B) (Reciprocal Discovery for the Prosecution)]*

With two exceptions, Rule 14.1 makes no substantive changes to what was previously Rule 14(a)(1)(B). It combines the reciprocal discovery provision (formerly Rule 14(a)(1)(B)) and the provision making these discovery obligations continuing duties (formerly Rule 14(a)(4)) into a new rule. Counsel should note that the definition of "statement" as used in Rule 14.1 is provided in Rule 14(b)(3).

When the prosecution complies with its discovery obligations, the automatic discovery obligations of the defendant arise. These obligations parallel those of the prosecutor in Rule 14(b)(1)(F), (G), and (H), provided the defendant intends to offer these materials at trial. Additional discovery may be sought by motion. See Rule 14.2(d).

Rule 14.1 sets forth discovery duties for the defense in section 14.1(a) and specifies in section 14.1(b) that these are continuing duties. This is the same continuing duty to which the prosecutor is subject under Rule 14 (d).

The first substantive change to Rule 14.1 is the addition of "known contact information" that must be disclosed concerning witnesses the defense intends to call at trial. The same additional contact information is also provided in discovery from the prosecution concerning its prospective trial witnesses for the same reasons. See Rule 14(b)(1)(C).

The second substantive change to Rule 14.1 is the affirmative statement of the judge's express authority to inquire about actions taken to achieve compliance with this rule. This is the same affirmative statement that is in Rule 14(a)(2)(E) with regard to actions the prosecutor has taken to achieve compliance with the prosecution's discovery obligations. Any disclosures

concerning actions taken in a matter should be made bearing in mind the duties of confidentiality and the attorney-client privilege. See Mass. R. Prof. C. 1.6.

As under the prior rule, either party may face sanctions for non-compliance with its discovery obligations. See Rule 14.2(j). As under the prior rule, the discovery obligations in 14 and 14.1 do not extend to work product. See Rule 14.2(f).

# 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.).

# REPORTER'S NOTES

# MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

## Rule 14.3 Pretrial Discovery of Affirmative Defenses; Self Defense and First Aggressor

### Reporter's Notes—2025

**Rule 14.3 Pretrial Discovery of Affirmative Defenses; Self Defense and First Aggressor.**

**(a) Notice of Alibi**.

**(1) Notice by Defendant. The judge may, upon written motion of the prosecutor filed pursuant to Rule 14.2(d), stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of the defendant's intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names, addresses, dates of birth, and known contact information of the witnesses upon whom the defense intends to rely to establish the alibi.**

**(2) Disclosure of Information and Witness. Within 7 days of service of the defendant's notice of alibi, the prosecutor shall serve upon the defendant a written notice stating the names, addresses, dates of birth, and known contact information of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.**

**(3) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision Rule 14.3(a)(1) or (2), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.**

**(4) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.**

**(5) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of Rule 14.3(a)(1)-(4).**

**(6) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that**

**intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.**

**(b) Notice of Other Defenses. If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.**

**(c) Self Defense and First Aggressor.**

**(1) Notice by Defendant. If a defendant intends to raise a claim of self defense and to introduce evidence of the alleged victim's specific acts of violence to support an allegation that the alleged victim was the first aggressor, the defendant shall no later than 21 days after the pretrial hearing or at such other time as the judge may direct for good cause, notify the prosecutor in writing of such intention. The notice shall include a brief description of each such act, together with the location and date to the extent practicable, and the names, addresses, dates of birth, and known contact information of the witnesses the defendant may call to provide evidence of each such act. The defendant shall file a copy of such notice with the clerk.**

**(2) Reciprocal Disclosure by the Prosecution. No later than 30 days after receipt of the defendant's notice, or at such other time as the judge may direct for good cause, the prosecutor shall serve upon the defendant a written notice of any rebuttal evidence the prosecutor may introduce, including a brief description of such evidence together with the names of the witnesses the prosecutor may call, the addresses, dates of birth, and known contact information of other than law enforcement witnesses and the business addresses of law enforcement witnesses.**

**(3) Continuing Duty to Disclose. If prior to or during trial a party learns of additional evidence that, if known, should have been included in the information furnished under Rule 14.3(c)(1) or (2), that party shall promptly notify the adverse party or its attorney of such evidence.**

**(4) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the evidence offered by such party on the issue of the identity of the first aggressor.**

*[Rule 14.3 replaces prior Rules 14(b)(1), (b)(3), and (b)(4).]*

Rule 14.3 makes no substantive changes to what was previously Rule 14(b)(1), (b)(3), and (b)(4). It groups together the discovery provisions for affirmative defenses and defense claims that may require rebuttal, other than mental health-related defenses and evidence

(formerly 14(b)(2)) which are in new Rule 14.4. The rule provides for disclosure by the defendant of the same demographic information concerning alibi witness, and by the prosecutor of witnesses to rebut the alibi, as is provided for in Rule 14(b)(1)(C) and Rule 14.1(a) (i.e., name, address, date of birth and known contact information).

# REPORTER'S NOTES

# MASSACHUSETTS RULES OF CRIMINAL PROCEDURE

## Rule 14.4 Pretrial Discovery of Mental Health Issues

## Reporter's Notes—2025

**Rule 14.4 Pretrial Discovery of Mental Health Issues.**

**(a) Notice and Filing.**

**(1) Notice. If a defendant intends at trial to raise as an issue the defendant's mental condition at the time of the alleged crime, or if the defendant intends to introduce expert testimony on the defendant's mental condition at any stage of the proceeding, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:**

**(i) whether the defendant intends to offer testimony of expert witnesses on the issue of the defendant's mental condition at the time of the alleged crime or at another specified time;**

**(ii) the names, addresses, and known contact information of expert witnesses whom the defendant expects to call; and**

**(iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to the defendant's mental condition.**

**(2) Filing. The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.**

**(b) Examination.**

**(1) Order. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to the defendant's mental condition will be relied upon by a defendant's expert witness, the judge, on the judge's own motion or on motion of the prosecutor, may order the defendant to submit to an examination consistent with the provisions of the General Laws and subject to the following terms and conditions:**

**(A) The examination shall include such physical, psychiatric, and psychological tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the relevant time. No examination based on statements of the defendant may be conducted unless the judge has**

**found that (i) the defendant then intends to offer into evidence expert testimony based on the defendant's own statements or (ii) there is a reasonable likelihood that the defendant will offer that evidence.**

**(B) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical examinations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.**

**(C) The examiner shall file with the court a written report as to the mental condition of the defendant at the relevant time.**

**(2) Sealing of Examiner Report. Unless the parties mutually agree to an earlier time of disclosure, the examiner's report shall be sealed and shall not be made available to the parties unless (A) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to the defendant's mental condition at the relevant time or which is otherwise within the scope of the privilege against self-incrimination; or (B) the defendant files a motion requesting that the report be made available to the parties; or (C) after the defendant expresses the clear intent to raise as an issue the defendant's mental condition, the judge is satisfied that (i) the defendant intends to testify, or (ii) the defendant intends to offer expert testimony based in whole or in part on statements made by the defendant as to the defendant's mental condition at the relevant time.**

**(3) Discovery of Defense Report. At the time the report of the prosecution's examiner is disclosed to the parties, the defendant shall provide the prosecutor with a report of the defense psychiatric or psychological expert(s) as to the mental condition of the defendant at the relevant time.**

**(4) Content of Reports. The reports of both parties' experts must include a written summary of the expert's expected testimony that fully describes: the defendant's history and present symptoms; any physical, psychiatric, and psychological tests relevant to the expert's opinion regarding the issue of mental condition and their results; any oral or written statements made by the defendant relevant to the issue of the mental condition for which the defendant was evaluated; the expert's opinions as to the defendant's mental condition, including the bases and reasons for these opinions; and the witness's qualifications.**

**(5) Redaction of Reports. If these reports contain both privileged and nonprivileged matter, the judge may, if feasible, at such time as it deems appropriate prior to full disclosure of the reports to the parties, make available to the parties the nonprivileged portions.**

**(6) Failure to Comply. If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the judge may prescribe such remedies as the judge deems warranted by the circumstances, which**

**may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.**

**(c) Discovery for the purpose of a court-ordered examination under Rule 14.4(b).**

**(1) Automatic Discovery to Examiner. If the judge orders the defendant to submit to an examination under Rule 14.4(b), the defendant shall, within 14 days of the court's designation of the examiner, make available to the examiner the following:**

**(A) All mental health records concerning the defendant, whether psychological, psychiatric, or counseling, in defense counsel's possession;**

**(B) All medical records concerning the defendant in defense counsel's possession; and**

**(C) All raw data from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.**

**(2) Continuing Duty. The defendant's duty of production set forth in Rule 14.4(c)(1) shall continue beyond the defendant's initial production during the fourteen-day period and shall apply to any such mental health or medical record(s) thereafter obtained by defense counsel and to any raw data thereafter obtained from any tests or assessments administered to the defendant by the defendant's expert or at the request of the defendant's expert.**

**(3) Additional Discovery Requested by Examiner.**

**(A) In General. In addition to the records provided under Rule 14.4(c)(1) and (2), the examiner may request records from any person or entity by filing with the court under seal, in such form as the court may prescribe, a writing that identifies the requested records and states the reason(s) for the request. The examiner shall not disclose the request to the prosecutor without either leave of court or agreement of the defendant.**

**(B) Notice and Hearing. Upon receipt of the examiner's request, the court shall issue a copy of the request to the defendant and shall notify the prosecutor that the examiner has filed a sealed request for records pursuant to Rule 14.4(c)(3). Within 30 days of the court's issuance to the defendant of the examiner's request, or within such other time as the judge may allow, the defendant shall file in writing any objection that the defendant may have to the production of any of the material that the examiner has requested. The judge may hold an ex parte hearing on the defendant's objections and may, in the judge's discretion, hear from the examiner. Records of such hearing shall be sealed until the report of the examiner is disclosed to the parties under Rule 14.4(b)(3), at which point the records related to the examiner's**

**request, including the records of any hearing, shall be released to the parties unless the judge, in the exercise of discretion, determines that it would be unfairly prejudicial to the defendant to do so.**

**(C) Order. If the judge grants any part of the examiner's request, the judge shall indicate on the form prescribed by the court the particular records to which the examiner may have access, and the clerk shall subpoena the indicated record(s). The clerk shall notify the examiner and the defendant when the requested record(s) are delivered to the clerk's office and shall make the record(s) available to the examiner and the defendant for examination and copying, subject to a protective order under the same terms as govern disclosure of reports under Rule 14.4(b)(3). The clerk's office shall maintain these records under seal except as provided herein. If the judge denies the examiner's request, the judge shall notify the examiner, the defendant, and the prosecutor of the denial.**

**(4) Tests and Assessments. Upon completion of the court-ordered examination, the examiner shall make available to the defendant all raw data from any tests or assessments administered to the defendant by the prosecution's examiner or at the request of the prosecution's examiner.**

**(d) Additional discovery. Upon a showing of necessity, the prosecutor and the defendant may move for other material and relevant evidence relating to the defendant's mental condition.**

*[Rule 14.4 replaces but makes no substantive change to prior Rule 14(b)(2) (Mental Health Issues).]*

Rule 14.4 makes no substantive changes to what was previously Rule 14(b)(2). It sets forth discovery provisions applicable when the defendant raises an issue of the defendant's mental health at the time of the alleged crime or seeks to offer expert testimony on the defendant's mental condition at any stage of the proceeding. The new rule adds clarifying headings to the sections and removes references to gender.