

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on
the twenty-sixth day of June, in the year two thousand and twelve :
present,

HON. RODERICK L. IRELAND)
)
HON. FRANCIS X. SPINA)
)
HON. ROBERT J. CORDY)
)
HON. MARGOT BOTSFORD)
)
HON. RALPH D. GANTS)
)
HON. FERNANDE R.V. DUFFLY)
)
HON. BARBARA A. LENK)

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 striking Rule 14(b)(2) and inserting the new Rule 14(b)(2) attached hereto;
----------	---

Rule 14:	By inserting the new Rule 14(b)(4) attached hereto;
----------	--

Rule 14:	By inserting after the word "made" in Rule 14(d)(1) the following words: - ,signed, or
----------	---

otherwise adopted - ;

Rule 14:

By deleting the following words from
Rule14(d)(2): - and which is recorded
contemporaneously with the making of the
oral declaration - .

Rule 23:

By striking out said rule.

The amendments accomplished by this order shall take effect on September 17, 2012.

<u>RODERICK L. IRELAND</u>)	Chief Justice
)	
<u>FRANCIS X. SPINA</u>)	
)	Justices
<u>ROBERT J. CORDY</u>)	
)	
<u>MARGOT BOTSFORD</u>)	
)	
<u>RALPH D. GANTS</u>)	
)	
<u>FERNANDE R.V. DUFFLY</u>)	
)	
<u>BARBARA A. LENK</u>)	

Mass. R. Crim. P. 14

Rule 14(b)

(2) Mental Health Issues.

(A) Notice. If a defendant intends at trial to raise as an issue his or her 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 and addresses 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 his or her mental condition.

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. 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 his or her mental condition will be relied upon by a defendant's expert witness, the court, on its 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:

(i) 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 (a) the defendant then intends to offer into evidence expert testimony based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) 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.

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

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 his or her 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 his or her mental condition, the judge is satisfied that (1) the defendant intends to testify, or (2) the defendant intends to offer expert testimony based in whole or in part on statements made by the defendant as to his or her mental condition at the relevant time.

At the time the report of the Commonwealth's examiner is disclosed to the parties, the defendant shall provide the Commonwealth with a report of the defense psychiatric or psychological expert(s) as to the mental condition of the defendant at the relevant time.

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.

If these reports contain both privileged and nonprivileged matter, the court 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.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it 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) Additional discovery. Upon a showing of necessity, the Commonwealth and the defendant may move for other material and relevant evidence relating to the defendant's mental condition.

Rule 14(b)

(4) Self Defense and First Aggressor.

(A) 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 he or she 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 and dates of birth of the witnesses the defendant intends to call to provide evidence of each such act. The defendant shall file a copy of such notice with the clerk.

(B) Reciprocal Disclosure by the Commonwealth. 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 Commonwealth shall serve upon the defendant a written notice of any rebuttal evidence the Commonwealth intends to introduce, including a brief description of such evidence together with the names of the witnesses the Commonwealth intends to call, the addresses and dates of birth of other than law enforcement witnesses and the business address of law enforcement witnesses.

(C) 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 subdivision (b)(4)(A) or (B), that party shall promptly notify the adverse party or its attorney of such evidence.

(D) 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.

REPORTER'S NOTES – 2012

In 2012, Rule 14 was amended in several respects. These revisions are discussed below.

Subdivision (b)(2). Mental health issues. This amendment responds to the Supreme Judicial Court's expansion of the *Blaisdell* procedure to analogous situations such as defenses based on an inability to form the requisite intent for an element of the crime, see *Commonwealth v. Dias*, 431 Mass. 822, 829 (2000), on an inability to premeditate, see *Commonwealth v. Contos*, 435 Mass. 19, 24 n.7 (2001), and where the defendant places at issue his or her mental ability voluntarily to waive *Miranda* rights, see *Commonwealth v. Ostrander*, 441 Mass. 344, 352 (2004). In addition, the Court has indicated in *dicta* that the same would hold true in the case of a defense based on battered woman syndrome, see *Ostrander*, 441 Mass. at 355 (2004).

There are two different dimensions to the problem that this subsection addresses. One concerns giving notice to the Commonwealth of a complex issue that the prosecutor otherwise would have no reason to expect to litigate. The other deals with redressing the unfairness of allowing a defense expert to testify based on statements obtained from the defendant without giving the prosecution an opportunity to obtain equivalent access for its expert.

The proposed amendment addresses the first concern by expanding the scope of the notice provision beyond the context of *Blaisdell* to include all mental health defenses. A mental health defense is one that places in issue the defendant's mental condition at the time of the alleged crime, based on a claim that some mental disease or defect or psychological impairment, such as battered woman syndrome, affected the defendant's cognitive ability. These are complex issues for which the prosecutor should have time to prepare, whether an expert testifies for the defense or not. As used in this subsection, the term "mental health defense" does not include a claim that the defendant's cognitive ability was affected by intoxication, an issue that arises more frequently and does not present the same level of complexity as do the former examples.

The proposed amendment addresses the second concern by requiring notice whenever the defendant intends to rely on expert testimony concerning the defendant's mental condition at any stage of the process on any issue, whether it related to culpability, competency or because it concerns the admission of evidence. Thus, for example, if the defendant intends to introduce expert testimony in support of a claim that a confession was not voluntary, as in *Ostrander*, the notice would specify that the witness would testify as to the defendant's mental condition at the time of the confession. If it appears that the expert will rely on statements of the defendant as to his or her mental condition, then the judge may order the defendant to submit to an examination pursuant to subsection 14(b)(2)(B).

Subdivision (b)(2)(B)(i)

The proposed amendment deletes "physiological tests" from those that may be included in a court-ordered examination. This deletion is not intended to work any substantive change to the rule but rather to eliminate a superfluous term. Under the rule, "physical tests" is meant to include "physiological tests," including but not limited to neurological tests and examinations

such as magnetic resonance imaging (MRI) and positron emission tomography (PET) scans.

Subdivision (b)(2)(B)(iii)

The Rule applies not only to experts who are psychiatrists, but to psychologists as well.

The regime for disclosure of expert reports has been amended in light of *Commonwealth v. Sliech-Brodeur*, 457 Mass. 300 (2010). The timing of the release of the Commonwealth's expert's report was altered only to make clear that the parties can agree on its disclosure at a time earlier than previously set out in the Rule. See *Sliech-Brodeur*, 457 Mass. at 325 n.34 (2010). As required by *Sliech-Brodeur*, defense experts as well as the prosecution's must prepare and disclose reports. In order to avoid infringing on the defendant's privilege against self incrimination, the defense expert's report is released to the prosecution at the same time that the defendant receives the report of the Commonwealth's expert. The Rule also has been amended to address the timing of the exchange of reports. The latest date of exchange would be when the defendant expresses a "clear intent" to rely on mental impairment as an issue in the case, relying in part on the defendant's statements or testimony. This will often occur at the final pretrial conference or comparable event. The Rule attempts to avoid the delay and inconvenience of disclosing the reports only after the defendant's expert offers testimony on direct examination. Finally, the rule as amended makes clear the judge's discretion to review any expert report filed with and sealed by the court, and, if feasible and appropriate, to release to the parties any unprivileged material contained in the report prior to the report's full disclosure to the parties.

Once the reports have been released to the parties, they may be shared with the respective experts for each side.

The Rule has been amended to require more detail in the content of the report that both prosecution and defense experts must file. This portion of the Rule is patterned after 18 U.S.C.S. § 4247(c). In one major respect, however, the Rule goes beyond the federal model by requiring the report to contain a complete account of the statements of the defendant that are relevant to the issue of his or her mental condition. This includes both statements relating to the underlying incident as well as any statements prior to or following it that are relevant to the defendant's mental condition. If the examiner considered written statements of the defendant, the report should contain the relevant portions. If the examiner considered oral statements of the defendant, the report should include the substance of what the defendant said that bears on the question of his or her mental condition. In reporting on the defendant's statements, examiners should not withhold relevant evidence contrary to their own position.

The protection of the work product doctrine and the principle that notes or preliminary drafts are not discoverable if they are incorporated into a final report, applicable elsewhere in the discovery regime that Rule 14 establishes, apply as well in this context.

Subdivision (b)(2)(C)

This provision gives trial judges the flexibility to require the parties to provide additional discovery beyond the information contained in the notice that the defendant must give and the

reports that the experts must file. It is a very limited grant of discretion and should be reserved for cases presenting discovery issues that are out of the ordinary. In this respect, it is more restrictive than the analogous discovery provision in Rule 14(a)(2).

Subdivision (b)(4). Self Defense and First Aggressor.

This amendment implements the discovery obligation created by *Commonwealth v. Adjutant*, 443 Mass. 649 (2005). The procedure it mandates applies only to situations such as those in *Adjutant*, where the defendant intends to rely on self defense claiming that the victim was the first aggressor. The notice procedure established in this amendment does not apply to other instances where prior violent conduct by the victim may be admissible, such as where the defendant intends to introduce evidence of a violent act by the victim of which he or she was aware at the time of the incident that is the subject of the criminal case before the court. See *Commonwealth v. Fontes*, 396 Mass. 733, 735-36 (1986). However, in a case where the defendant wishes to introduce evidence of an act of prior violence by the victim to support a claim based on both *Adjutant* and *Fontes*, the notice provision of this subsection would apply.

Beyond notice of an intent to raise the issue of prior violent acts by the alleged victim as it bears on the identity of the first aggressor, the amendment also requires the defendant to provide specific information about each incident. Where the defendant lacks specific details as to the time and place of a prior incident, the notice should contain as much information as is available, subject to a continuing duty to supplement the notice as counsel becomes aware of further facts.

The reciprocal obligation on the Commonwealth extends to all evidence that it intends to introduce to rebut the defendant's claim that the victim was the first aggressor. This may concern the victim's role in the incidents of prior violence upon which the defendant may rely, or any other evidence the Commonwealth may introduce in rebuttal.

Nothing in this amendment is intended to derogate from the discovery obligations of Rule 14(a)(1)(A)-(B) concerning physical evidence or documents that either party may rely on with respect to prior acts of violence by the victim.

This subsection does not affect the ultimate decision the judge must make on the admissibility of the evidence contained in the defendant's notice, or of any rebuttal evidence the prosecution might offer. The rule does contemplate, however, that failure to provide notice in advance may bar a party from offering evidence that might otherwise be admissible.

Subdivision (d). Definition.

In 2012, Rule 23 was eliminated because the 2004 revision of Rule 14 largely made it irrelevant. Almost all of the statements that Rule 23 required a party to produce after a witness testified were made part of the automatic pretrial discovery mechanism of Rule 14. Because a small class of statements covered by Rule 23 was not included in the definition of a statement in the 2004 revision of Rule 14(d), an amendment to this subsection was made. The amendment brings within the confines of Rule 14 the remaining class of statements that were subject to the

discovery provision of the former Rule 23.

Section 14(d)(1) was amended to include not only writings made by a witness, but also writings made by another and signed or otherwise adopted by the witness. A person otherwise adopts a statement when he or she approves it or accepts it as accurate. *See, e.g., Smith v. United States*, 31 F.3d 1294, 1301 (4th Cir. 1994) ("[n]otes taken by prosecutors and other government agents during a pretrial interview of a witness may qualify as a 'statement' . . . if the witness has reviewed them in their entirety – either by reading them himself or by having them read back to him – and formally and unambiguously approved them – either orally or in writing – as an accurate record of what he said during the interview.")

Section 14(d)(2) was amended to remove the requirement that a witness's statement has been recorded contemporaneously. This is an issue that will only be relevant with respect to written accounts of what the witness said, since by their nature stenographic, mechanical, electrical or other means of recordings must be made contemporaneously. With respect to written accounts, Rule 14(d) includes substantially verbatim statements of a witness that are contained in a document written by someone else, whether the document consists solely of the witness's statement or the witness's statements appear only in part of the document. In the latter case, only that portion of the document that consists of the substantially verbatim account of the witness's statement must be produced. This provision is intended only to require the production of statements that can "fairly be deemed to reflect fully and without distortion" what the witness said. *See Palermo v. United States*, 360 U.S. 343, 352-53 (1959); *United States v. Hodges*, 556 F.2d 366 (5th Cir. 1977) *cert. den.* 434 US 1016 (1978) (that investigators' notes contained occasional verbatim recitation of phrases used by the person interviewed did not make such notes discoverable).