

CHAPTER 11

Criminal Practice and Procedure

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During the *Survey* year the Supreme Judicial Court adopted a new set of rules to govern criminal proceedings in the district and superior courts of the commonwealth. The Massachusetts Rules of Criminal Procedure, which became effective July 1, 1979, were drafted by a committee established by the Massachusetts Judicial Conference. The rules are a product of seven years of study by the committee in consultation with many persons and groups interested in criminal practice. They represent the first attempt at a complete reform of criminal procedure in the history of the commonwealth and bring some profound changes into practice. The rules are intended to constitute a comprehensive code of criminal procedure for trials in the district and superior courts.¹ There are, nevertheless, areas of criminal practice such as arrest and complaint procedures, pretrial diversion, search and arrest warrant procedures, and wiretap procedures that are not dealt with in the rules. The committee believed that the state of the law in such area was so fluid as to defy codification, particularly in light of the constitutional issues involved. It considered that these matters must be dealt with by the courts on an ad hoc basis on the facts of each case.²

Some of the goals that the new rules seek to achieve include the following:

- (1) To ensure that counsel and defendant are not required to make unnecessary court appearances and to see that pretrial routine between defense counsel and the prosecution is conducted outside the courtroom;
- (2) To broaden mutual pretrial discovery so that trial by ambush, by either party, is avoided, and so that cases are prepared out of court;
- (3) To limit the number and kinds of motions that may be filed in order to free the system of as much paper work as possible;

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¹ MASS. R. CRIM. P. 1. See also *id.*, Reporters' Notes.

² *Id.*, Reporters' Notes.

(4) To encourage the disposition of cases by plea agreements and accordingly to protect the defendant from having a sentence imposed which is substantially greater than that agreed upon;

(5) To permit and encourage the consolidation of charges, from whatever county or division, for plea and also, in limited circumstances, for trial;

(6) To give the trial judge more discretion in the handling of jury verdicts and to allow the judge to entertain motions to revise and revoke, even after a verdict has been upheld on appeal;

(7) To broaden the defendant's post-conviction rights, while limiting the number of petitions for relief that a defendant may file;

(8) To place an outside limit on the time for the prosecution of all cases and to provide for dismissal if a case is not prosecuted within that limit.

Many of the reforms effected by the rules are enforced by sanctions.³ The rules are not designed to be traps. Attorneys who do not operate within these rules must seek relief from these sanctions within the discretion of the trial judge. The discussion that follows is intended to highlight some of the important changes brought about both through the modification of previously existing rules and by the enactment of entirely new rules.

Rule 2

Rule 2 sets the standards by which these rules are to be applied and interpreted. It states that "[t]hese rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of expense and delay."⁴ This language is drawn directly from rule 2 of the Federal Rules of Criminal Procedure.⁵ The Massachusetts rules also implement the familiar principle that the interest of the government in a criminal prosecution "is not that it shall win a case but that justice shall be done."⁶ The rules are not to be applied ritualistically. They are to be used with common sense and in a flexible spirit. As with the Federal Rules of Criminal Procedure, these rules are not, and are not intended to be, a rigid code having an inflexible meaning.⁷ Rather, they are to be applied to secure justice

³ MASS. R. CRIM. P. 48.

⁴ MASS. R. CRIM. P. 2(a).

⁵ *Id.*, Reporters' Notes.

⁶ *Berger v. United States*, 291 U.S. 78, 88 (1935).

⁷ *See* *Fallen v. United States*, 378 U.S. 139, 142 (1969).

and fairness in the criminal process for the defendant, the prosecutor, and the public. Rule 2 provides the elasticity essential to the success of any code of procedural rules.

Rule 2 also defines terms, including the new concept of "return day."⁸ In the criminal rules, "return day" means the day on which a defendant is ordered by summons first to appear, or, if under arrest, first does appear before a court to answer the charges against him, whichever is earlier.⁹ "Return day" is a key concept under the rules, because it is the date on which speedy trial rights attach and from which other time limits are measured.¹⁰

Rule 3

Rule 3 outlines the procedure governing the commencement of a criminal proceeding.¹¹ It substantially alters prior practice and merits careful examination. As noted in the rule, a criminal proceeding commences in the district court by complaint and in the superior court by an indictment.¹² A defendant charged with an offense, punishable by imprisonment in a state prison has the right to be proceeded against by indictment.¹³ A defendant charged in the district court with such an offense, however, may waive indictment, except where the offense charged is a capital crime.¹⁴ If indictment is waived, a probable cause hearing must be held in the district court.¹⁵ If the district court declines jurisdiction or if a defendant is arraigned on a charge over which the district court has no jurisdiction, the judge shall advise the defendant that he may waive indictment and proceed upon the complaint.¹⁶

A defendant may waive the right to be proceeded against by indictment and elect a probable cause hearing only by filing in court on return day, or at such other time as the court may order, a written waiver of that right.¹⁷ If probable cause is found, or if the defendant has not waived his right to be proceeded against by indictment, the case is to be transmitted to the superior court.¹⁸ It should be noted that a district

⁸ MASS. R. CRIM. P. 2(b)(15).

⁹ *Id.*

¹⁰ See MASS. R. CRIM. P. 36. For a discussion of rule 36, see text at notes 144-49 *infra*.

¹¹ See *A Juvenile v. Commonwealth*, 370 Mass. 272, 280-83, 347 N.E.2d 677, 684-85 (1976), for procedure with respect to a transfer hearing in a juvenile proceeding.

¹² MASS. R. CRIM. P. 3(a).

¹³ *Id.*, 3(b)(1).

¹⁴ *Id.*, 3(b)(2).

¹⁵ *Id.*

¹⁶ *Id.*, 3(c)(1).

¹⁷ *Id.*

¹⁸ *Id.*, 3(c)(2).

court determination of no probable cause is not conclusive of the defendant's guilt or innocence; hence, such a determination does not bar a subsequent indictment for the same offense.¹⁹

Once the case has reached the superior court, by the methods described above, the defendant may, with the consent of the prosecuting attorney, waive the right to be proceeded against by indictment and elect to proceed on the complaint in the superior court.²⁰ Notwithstanding the defendant's waiver of that right, the prosecuting attorney may proceed by indictment.²¹ While this procedure may have the effect of depriving the defendant of his probable cause hearing, the principal purpose of this provision is to permit the prosecutor to correct complaints transmitted from the district court or to avail himself of the investigative power of the grand jury.²²

Rule 4

Rule 4, to a large extent, merely codifies existing Massachusetts practice. It is worth noting, however, that rule 4 provides that an indictment shall not be dismissed on grounds that evidence presented to the grand jury consisted, in whole or in part, of the record from the defendant's probable cause hearing or that other hearsay evidence was presented to the grand jury.²³ Subsection (c) incorporates the long-established commonwealth rule that an indictment based entirely on hearsay or other evidence inadmissible at trial is not invalid for that reason.²⁴ Such a practice is consistent with the function of the grand jury and is not in violation of constitutionally protected rights.²⁵ By expressly incorporating existing case law into the rule, and by recognizing the propriety of the use of secondary evidence before the grand jury, this rule encourages defendants to request a probable cause hearing in the district court.

Rule 5

Under rule 5, grand jury practice generally differs little from prior practice. A major change is included in subdivision (g), however. This subsection prohibits the prosecuting attorney's presence during grand jury deliberation and voting, except when requested by the grand jury.²⁶

¹⁹ See *Burke v. Commonwealth*, 373 Mass. 157, 365 N.E.2d 811 (1977).

²⁰ MASS. R. CRIM. P. 3(d).

²¹ *Id.*, 3(e).

²² *Id.*, 3, Reporters' Notes.

²³ MASS. R. CRIM. P. 4(c).

²⁴ *Commonwealth v. Gibson*, 368 Mass. 518, 523, 333 N.E.2d 400, 402 (1975).

²⁵ In *United States v. Calandra*, 414 U.S. 338 (1974), the Supreme Court ruled that the "validity of an indictment is not affected by the character of the evidence considered." *Id.* at 344-45.

²⁶ MASS. R. CRIM. P. 5(g).

This departure from prior Massachusetts practice²⁷ is intended to allay fears that the grand jury is “merely a tool of the prosecutor.”

Rule 6

Rule 6 eliminates a number of unnecessary appearances by defendants, witnesses, and attorneys. In addition, it greatly expands the use of the summons. A defendant, not under arrest or otherwise in custody, must be notified of the criminal proceeding against him, and of the return day, by means of a summons.²⁸ A copy of the complaint or indictment must accompany the summons.²⁹ The court may authorize the issuance of a warrant if the prosecutor represents to the court that the defendant may not appear unless arrested.³⁰ This provision represents a substantial change from prior practice, under which arrest warrants were issued in a majority of cases.³¹ The change will reduce unnecessary detention and court appearances. Furthermore, the rule, by reducing the number of instances in which a warrant is used, should enable police to concentrate on more important work.³²

In the event of default by the defendant, rule 6 introduces two new practices. First, the judge may order that expenses incurred as a result of the default be assessed against the defendant.³³ Second, if the judge finds that requiring the attendance at a later time of a witness then present in court would constitute hardship upon that witness, the judge may order that the testimony of the witness be taken and preserved for subsequent use at the trial.³⁴ This practice presumes that the defendant's attorney is in court and that he has a right to cross-examine the witness. The expense of taking and preserving the testimony may be assessed as a cost against the defendant.³⁵ Both provisions are designed to deter wilful default by the defendant by requiring the defendant to pay costs incurred by the default if the court so orders.³⁶

Rule 7

Rule 7, which deals with the initial appearance and arraignment, is based in part on the Federal Rules of Criminal Procedure.³⁷ The rule

²⁷ See *Commonwealth v. Favulli*, 352 Mass. 95, 107, 224 N.E.2d 422, 429 (1967).

²⁸ MASS. R. CRIM. P. 6(a)(1).

²⁹ *Id.*

³⁰ *Id.*, 6(a)(2).

³¹ *Id.*, 6, Reporters' Notes.

³² *Id.*

³³ *Id.*, 6(d)(1).

³⁴ *Id.*, 6(d)(2).

³⁵ *Id.*

³⁶ If the commonwealth defaults, MASS. R. CRIM. P. 10(c) protects the defendant by allowing the court to order that depositions be taken of commonwealth witnesses. MASS. R. CRIM. P. 6, Reporters' Notes.

³⁷ See FED. R. CRIM. P. 5, 5.1, 10.

provides that upon arrest, a defendant shall be brought before the court if then in session, and if not, at its next session.³⁸ This provision is consistent with prior Massachusetts decisions requiring that a defendant be arraigned as soon as possible after arrest.³⁹ Following arrest, the probation department will interview the defendant and report to the court information pertinent to determining bail and indigency.⁴⁰ Counsel will be assigned or appointed to defendants who can not afford counsel and wish to be represented by counsel.⁴¹ Once these matters have been dealt with, the judge will arraign the defendant or set a time for arraignment.

A defendant who has been summoned to appear and has retained counsel may be excused from appearing on the return day if counsel enters an appearance on his behalf prior to the return day.⁴² If the defendant is so excused, a plea of not guilty will be entered by the court on his behalf.⁴³ An appearance entered in the superior court, unlike an appearance in the district court, constitutes a representation that the attorney will try the case.⁴⁴ If an attorney filing an appearance in the superior court on or before the return day wishes to withdraw his appearance, he may do so within fourteen days of the return day, provided that an attorney who will represent the defendant files an appearance simultaneously with the withdrawal.⁴⁵ Thereafter, no appearance may be withdrawn without permission of the court.⁴⁶

Rule 8

Rule 8, relating to assignment of counsel, offers very little that is different from prior practice. Subdivision (d), however, provides that a judge may find that a defendant claiming indigency is financially able to retain counsel; the judge should file such a finding with the papers of the case.⁴⁷ This subdivision also provides that the case may be ordered for trial if the judge finds that the defendant is financially able to retain counsel and has neither waived nor retained counsel after a reasonable time.⁴⁸ A number of Massachusetts cases have likewise recognized the power of the court to take such measures, including

³⁸ MASS. R. CRIM. P. 7(a)(1).

³⁹ See *Commonwealth v. Dubois*, 353 Mass. 223, 224 N.E.2d 462 (1967).

⁴⁰ MASS. R. CRIM. P. 7(a)(1).

⁴¹ *Id.*

⁴² *Id.*, 7(a)(2).

⁴³ *Id.*, 7(d)(2).

⁴⁴ *Id.*, 7(c)(2).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ MASS. R. CRIM. P. 8(d).

⁴⁸ *Id.*

ordering a case for trial, to insure the progress of proceedings against the defendant.⁴⁹ If a defendant should elect to proceed without counsel, the judge may nevertheless assign or appoint counsel to be available to assist the defendant in the course of the proceedings. The defendant's right to represent himself is not interfered with by "standby counsel," provided that such counsel assists the defendant only when the defendant so desires, and calls to the court's attention matters favorable to the defendant upon which the court should rule on its own motion.⁵⁰

Rule 10

Rule 10 governs continuances. It provides that after a case has been entered upon the trial calendar, a continuance will be granted only when based upon cause and when necessary to insure that the interests of justice are served.⁵¹ If a continuance is granted upon the motion of either party without adequate notice to the adverse party and thereby causes the adverse party to incur unnecessary expenses, the court may assess those expenses as costs against the party or counsel requesting the continuance.⁵² The court may order that the testimony of a witness then present in court be taken and preserved for subsequent use at trial or other proceedings. Such an order may be a condition upon which a continuance is granted.⁵³ As noted previously, the witness shall be examined in open court by the party on whose behalf he is presented; the adverse party will have the right of cross-examination.⁵⁴

Rule 11

Rule 11 is the pretrial conference rule. In terms of expediting the preparation and disposition of cases, this is probably the most important rule. The successful implementation of this rule will have an important effect on criminal practice.

The rule provides that the prosecuting attorney and counsel for the defendant shall attend a pretrial conference to consider those matters which will promote a fair and expeditious disposition of the case.⁵⁵ The

⁴⁹ Commonwealth v. Jackson, 1978 Mass. Adv. Sh. 3062, 3070, 383 N.E.2d 835, 839, and cases cited therein.

⁵⁰ Illinois v. Allen, 397 U.S. 337 (1970); Jackson v. Commonwealth, 370 Mass. 855, 346 N.E.2d 714 (1976).

⁵¹ MASS. R. CRIM. P. 10(a)(1).

⁵² *Id.*, 10(b).

⁵³ *Id.* This new practice is similar to court-ordered preservation of testimony pursuant to rule 6(d)(2). See text at notes 34, 35. These procedures are not termed "depositions" and thus are not required to meet the formal summons and notice requirements of rule 35.

⁵⁴ MASS. R. CRIM. P. 10(c). See discussion of rule 6 in text at notes 28-36 *supra*.

⁵⁵ MASS. R. CRIM. P. 11(a)(1). This rule adopts existing Suffolk County Court practice, where pretrial conferences have been conducted pursuant to a standing order since April 1, 1974. *Id.*, Reporters' Notes.

defendant shall be available for attendance at the pretrial conference. Ordinarily, the judge need not be present.⁵⁶ The pretrial conference is intended to aid the court and the parties by identifying the material issues in dispute. Among the issues to be discussed at the pretrial conference are:

- (1) matters which must be raised by pretrial motions;
- (2) whether the case may be disposed of by a plea;
- (3) the nature of the defense(s), including whether the defendant intends to rely upon an alibi defense, a defense of lack of criminal responsibility or a defense based upon license, claim of authority, ownership, or exemption.⁵⁷

The pretrial conference is intended to make trial unnecessary in certain cases. Should trial be necessary, the conference should address, among other things, the setting of a trial date, the availability of necessary witnesses, the probable length of trial, and whether the trial will be by jury.⁵⁸

Rule 11 requires that a pretrial conference report be filed with the clerk of court no later than twenty-one days after the return day; supplemental conference reports may be filed at any time.⁵⁹ When the report contains a waiver of constitutional rights or stipulations concerning material facts, the defendant must sign the report.⁶⁰ The conference report binds the parties to all matters agreed upon.⁶¹ Failure to participate in the pretrial conference or to cooperate in the filing of the conference report will result in the scheduling of the case for trial as early as possible.⁶² Furthermore, a non-cooperating party will be unable to obtain a continuance and may not file pretrial motions, except by leave of court upon a showing of cause.⁶³

Rule 12

Rule 12, dealing with pleas and withdrawal of pleas, is analogous to rule 11 of the Federal Rules of Criminal Procedure. It does not control agreements made between the prosecutor and defense counsel prior to

⁵⁶ *Id.*, 11(a)(1).

⁵⁷ *Id.* See *Commonwealth v. Blaisdell*, 372 Mass. 753, 364 N.E.2d 191 (1977); *Commonwealth v. Edgerly*, 372 Mass. 337, 361 N.E.2d 1289 (1977).

⁵⁸ MASS. R. CRIM. P. 11(a)(1).

⁵⁹ *Id.*, 11(a)(2).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* The judge in his discretion may impose additional sanctions. *Id.*

⁶³ *Id.* Unlike superior court and jury sessions in the district court, pretrial conferences are not mandatory in district court jury-waived sessions. *Id.* 11(b).

proceedings before a judge.⁶⁴ It is drafted as a guide to plea practice. A defendant may offer, and a judge may accept, a plea of guilty or nolo contendere after a determination has been made that the plea is "knowingly and voluntarily" made.⁶⁵ Many of the requirements of the rule are designed to insure that the validity of the plea will not be subject to post-conviction attack. For instance, the rule requires that a hearing be held and a contemporaneous record be kept of the proceedings.⁶⁶ Because entry of a guilty plea necessarily involves the waiver of the right to trial, of the right to confrontation of witnesses, and of the privilege against self-incrimination, great care must be exercised in the acceptance of a plea. The defendant must be informed of these consequences by the judge in open court.⁶⁷

This rule was drafted to protect the defendant from the imposition of a sentence harsher than that agreed upon with the prosecutor. Thus, rule 12(c) requires the judge, once informed that the defendant intends to offer a plea, to advise the defendant either that the judge will not be bound by any plea agreement or that he cannot accept the sentence recommendations.⁶⁸ If the judge determines that he cannot accept the sentence recommendation, he may advise the defendant concerning what sentence he would impose. The defendant then may either withdraw the plea and go to trial, or he may accept the judge's proposal.⁶⁹ This procedure is the limit of permissible judicial involvement in the plea agreement process.

Evidence of a plea of guilty later withdrawn or of nolo contendere is not admissible in any civil or criminal proceedings.⁷⁰ Notwithstanding this general rule, a statement made in connection with a plea is admissible in a criminal proceeding for perjury, if the statement was made under oath, on record, and in the presence of counsel.⁷¹ Prior Massachusetts practice allowed the introduction of a withdrawn plea in a subsequent proceeding as an admission by the defendant.⁷² The change

⁶⁴ For decisions dealing with the binding nature of agreements between prosecutor and defense counsel or defendant prior to plea proceedings before a judge, see *Santo Bello v. New York*, 404 U.S. 257, 262 (1971); *Commonwealth v. Harris*, 364 Mass. 236, 238, 303 N.E.2d 115, 118 (1973). See also *Blaikie v. District Attorney of Suffolk County*, 1978 Mass. Adv. Sh. 1848, 1855, 378 N.E.2d 1368, 1371.

⁶⁵ MASS. R. CRIM. P. 12(a)(2). See *Commonwealth v. Foster*, 368 Mass. 100, 330 N.E.2d 155 (1975).

⁶⁶ MASS. R. CRIM. P. 12(a)(1).

⁶⁷ *Id.*, 12(c)(3).

⁶⁸ *Id.*, 12(c)(2).

⁶⁹ *Id.*

⁷⁰ *Id.*, 12(f).

⁷¹ *Id.*

⁷² See *Morrissey v. Powell*, 304 Mass. 268, 23 N.E.2d 411 (1939).

in Massachusetts practice concerning withdrawn pleas reflects the modern trend in this area.⁷³

Rule 13

Pretrial motion practice is governed by rule 13, which ought to be read in conjunction with rule 11. Rule 13 allows parties to file pretrial motions *only* when they have been unable to agree on such matters at conference.⁷⁴ As such, rule 13 is a rule of judicial economy. Other provisions of the rule govern the form in which a motion is to be made, the grounds on which a motion is based, and service and notice requirements. Specifically, motions to dismiss and motions to suppress evidence, other than evidence seized during a warrantless search, must be accompanied by a memorandum of law, unless otherwise ordered by the judge.⁷⁵ Grounds for pretrial relief which are not stated are deemed waived, unless the judge on a showing of cause permits further grounds to be stated.⁷⁶

Rule 14

Rule 14 deals with pretrial discovery. The rule must be read in keeping with its intended purposes, namely:

- (1) to provide the parties with the opportunity to prepare for trial;
- (2) to provide them with a means to identify triable issues; and
- (3) to permit effective exercise of the defendant's right of confrontation.

The discovery practice enumerated in this rule, while innovative when first written, has since been approved in a series of Supreme Judicial Court cases.⁷⁷ Furthermore, the effect of the rule is somewhat limited, because pretrial conference now provides otherwise discoverable information.

Discovery is essentially divided into three categories under rule 14: mandatory discovery, discretionary discovery, and reciprocal discovery.⁷⁸ The mandatory discovery rule provides for the production of written or recorded statements made by the defendant or a person who has testified before a grand jury, if the defendant so moves.⁷⁹ It also provides for

⁷³ See FED. R. CRIM. P. 11(e)(6) and ABA STANDARDS RELATING TO GUILTY PLEAS §§ 2.2, 3.4 (Approved Draft, 1968).

⁷⁴ MASS. R. CRIM. P. 13(d).

⁷⁵ *Id.*, 13(a)(4).

⁷⁶ *Id.*, 13(a)(2).

⁷⁷ See *Halner v. Commonwealth*, 1979 Mass. Adv. Sh. 1641, 1644, 392 N.E.2d 529, 530-31; *Commonwealth v. Gilbert*, 1979 Mass. Adv. Sh. 1132, 1138-40, 388 N.E.2d 1190, 1193-94.

⁷⁸ MASS. R. CRIM. P. 14(a)(1), (2), (3).

⁷⁹ *Id.*, 14(a)(1).

the production of exculpatory evidence in the possession of the prosecution.⁸⁰ The discretionary discovery rule provides that the judge, upon motion of the defendant, may order discovery of evidence, including reports of physical or mental examinations within the prosecutor's possession, names and addresses of prospective witnesses, and the record of their prior convictions, if any.⁸¹ If the court grants discovery or inspection to the defendant, the reciprocal discovery rule provides that, upon motion of the commonwealth, the court may condition its order by requiring the defendant to permit the commonwealth to discover, inspect, and copy like information that the defendant intends to use at trial.⁸² Notwithstanding the defendant's failure to file a motion for discovery, the commonwealth may file such a motion.⁸³ The court, in permitting such discovery, must condition its order by requiring the commonwealth to make similar discovery available to the defendant.⁸⁴ Hence, the principle of reciprocity operates regardless of which side files its discovery motion first. In addition, the rule establishes upon both sides a continuing duty to disclose subsequently discovered evidence.⁸⁵

Rule 14 also provides special procedures for the defendant's use of an alibi defense, the defense of lack of criminal responsibility and other defenses, including defenses based upon license, claim of authority, or ownership.⁸⁶ Of particular importance is the provision with respect to the use of alibi defenses. In order to prevent the last-minute fabrication of an alibi defense, the rule requires the defendant, if so ordered, to give notice to the prosecutor of the intended use of such a defense.⁸⁷ The defendant need not provide such information unless it is requested in writing by the prosecutor.⁸⁸ If the defendant does give notice of such a defense, he may discover the identity of rebuttal witnesses.⁸⁹ Failure to comply with the rule may result in the exclusion of the testimony of any undisclosed witness concerning the defendant's absence from, or presence at, the scene of the alleged offense.⁹⁰

⁸⁰ See *Commonwealth v. Nichols*, 4 Mass. App. Ct. 606, 607-08, 356 N.E.2d 464, 468 (1976); *Commonwealth v. Clark*, 3 Mass. App. Ct. 481, 485, 334 N.E.2d 68, 71 (1975); *Commonwealth v. Colella*, 2 Mass. App. Ct. 706, 709, 319 N.E.2d 923, 925-26 (1975).

⁸¹ MASS. R. CRIM. P. 14(a)(2).

⁸² *Id.*, 14(a)(3).

⁸³ *Id.*

⁸⁴ *Wardius v. Oregon*, 412 U.S. 470, 472 (1973).

⁸⁵ MASS. R. CRIM. P. 14(a)(4).

⁸⁶ *Id.*, 14(b).

⁸⁷ *Id.*, 14(b)(1)(A).

⁸⁸ See *id.*

⁸⁹ *Id.*, 14(b)(1)(B).

⁹⁰ *Id.*, 14(b)(1)(D). See *Commonwealth v. Edgerly*, 372 Mass. 337, 343-45, 361 N.E.2d 1289, 1292 (1977).

While disclosure of a defendant's intended use of an alibi defense is conditioned upon the commonwealth's request for such information, under rule 14 the defendant has an affirmative duty to disclose the intended use of a defense of lack of criminal responsibility.⁹¹ The disclosure requirement is designed to allow the prosecution to conduct pretrial research necessary properly to cross-examine witnesses offered by the defense. The rule also provides that the court may order the defendant to undergo a psychiatric examination, if the defendant proposes to offer expert testimony that relies upon statements made by the defendant.⁹²

It should be noted that the rule does not deal with the production of oral statements.⁹³ The trial court may, however, order the production of oral statements. Indeed, the Supreme Judicial Court in *Commonwealth v. Ellison*⁹⁴ reversed a conviction where oral statements of an exculpatory nature were not provided to the defendant.⁹⁵ It may reasonably be anticipated that the courts will construe rule 14 in a manner consistent with the spirit of full discovery embodied in the rule and will continue to extend full discovery to exculpatory oral statements.

Rule 15

Rule 15 provides for interlocutory appeals. It gives the commonwealth the right, in both district and superior court, to seek appellate review when a judge grants a motion to dismiss or a motion to suppress evidence.⁹⁶ The defendant has the right, in superior court only, to appeal a motion to suppress evidence.⁹⁷ The rule provides that if an appeal is taken by the commonwealth, the appellate court, upon the defendant's written motion supported by an affidavit, shall order the commonwealth to pay the defendant's cost of appeal.⁹⁸ This provision is mandatory and therefore applies whether or not the defendant is indigent.

Rule 17

Rule 17, modeled after rule 17 of the Federal Rules of Criminal Procedure,⁹⁹ introduces into Massachusetts practice two new concepts in

⁹¹ MASS. R. CRIM. P. 14(b)(2)(A).

⁹² *Id.*, 14(b)(2)(B). This subsection of the rule derives primarily from the procedures outlined by the Supreme Judicial Court in *Blaisdell v. Commonwealth*, 372 Mass. 753, 364 N.E.2d 191 (1977). See MASS. R. CRIM. P. 14, Reporters' Notes.

⁹³ MASS. R. CRIM. P. 14(a)(1).

⁹⁴ 1978 Mass. Adv. Sh. 2072, 379 N.E.2d 560 (1978).

⁹⁵ *Id.* at 2094-95, 379 N.E.2d at 570-71.

⁹⁶ MASS. R. CRIM. P. 15(a), (b).

⁹⁷ *Id.*, 15(b).

⁹⁸ *Id.*, 15(d).

⁹⁹ MASS. R. CRIM. P. 17, Reporters' Notes.

the area of the summons for witnesses. First, it authorizes the issuance of an indigent's summons. Upon written application of a defendant who demonstrates inability to pay the witness fees for an adequate defense, the court will order that such expenses be paid by the commonwealth.¹⁰⁰ The application is to be filed *ex parte* so that the defendant may avoid disclosing the details of expected testimony or the theory of his defense to the prosecutor.¹⁰¹ Second, the rule adds service by mail to the witness's last known address as a permissible method of service procedure.¹⁰²

Rule 20

Rule 20, primarily a distillation of existing statutory law, introduces a new concept in jury practice. Once a case is submitted to the jury, the judge may order that the jurors be permitted to separate, provided that they have not been sequestered during the trial.¹⁰³ Thereafter, at a time fixed by the judge, the jury is to reconvene in the courtroom before retiring to commence deliberations.¹⁰⁴ In addition, even after deliberations have begun, the judge may allow the jurors to separate for a definite time and to reconvene for further deliberation.¹⁰⁵ These provisions are designed to avoid, in cases where sequestration is unnecessary, undue hardship on the jurors and their families.¹⁰⁶

Rule 22

Rule 22 eliminates the need for saving exceptions by providing that exceptions to rulings or orders of the court are unnecessary. Under this present rule, it is sufficient that a party makes known to the court the action desired or the objection to the court's action at the time of the ruling or order.¹⁰⁷ A party may state precise legal grounds for an objection, but he may not comment further unless called upon by the court to do so.¹⁰⁸

Rule 23

Rule 23 deals with witness statements and reports relevant to impeachment. It is modeled after section 3500 of title 18 of the United States Code, commonly referred to as the "Jencks Act." Rule 23, however, expands the definition of the term "statement" as defined by the

¹⁰⁰ *Id.*, 17(b).

¹⁰¹ *Id.*, Reporters' Notes.

¹⁰² *Id.*, 17(d)(1).

¹⁰³ MASS. R. CRIM. P. 20(e)(2).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, 20(e)(3).

¹⁰⁶ *Id.*, Reporters' Notes.

¹⁰⁷ MASS. R. CRIM. P. 22.

¹⁰⁸ *Id.*

Jencks Act to include "those portions of a written report which consist of the verbatim declarations of a witness in matters relating to the case on trial."¹⁰⁹ Additionally, rule 23 provides that the judge may, prior to the examination of a prospective witness, require either party to provide the statements of that witness to the adverse party in order to facilitate the conduct of the trial proceeding.¹¹⁰ In effect, rule 23 complements rule 14, the pretrial discovery rule. Materials that are not producible before trial under rule 14 are obtainable under this rule. This rule is likely to be invoked only where the parties do not move for discovery, have failed to file a conference report, or where a statement was protected by order of the court. Thus, while this rule is important, its significance will be limited because of the broad discovery allowed under rule 14.¹¹¹

Rule 25

Rule 25 introduces the "Motion For Required Finding of Not Guilty," which takes the place of the common law motion for directed verdict.¹¹² The rule permits the defendant to test the adequacy of the case against him at the close of the commonwealth's case.¹¹³ The court must rule on the motion of that time.¹¹⁴ If his motion for a finding of not guilty is denied, he may offer evidence in his defense without having reserved that right.¹¹⁵ The defendant may renew his motion after all evidence has been presented. The court must again consider the sufficiency of the whole case.¹¹⁶ If the motion is denied, the case is submitted to the jury, and a verdict of guilty is returned, the judge may on motion set aside the verdict and order a new trial, or order the entry of a finding of guilty of any lesser included offense.¹¹⁷ This provision permits the trial judge to exercise a certain degree of discretion if the verdict offends his sense of justice.¹¹⁸ This discretion is much like the broad power

¹⁰⁹ MASS. R. CRIM. P. 23(a)(4).

¹¹⁰ *Id.*, 23(e).

¹¹¹ Federal rule 16, the counterpart of Mass. R. Crim. P. 14, has more limited application than does the Massachusetts rule. It limits the discovery of statements of government witnesses or prospective government witnesses until after they have testified at the trial. Under the federal rule, discovery of grand jury testimony is deferred until after the witness has testified in open court. *See* FED. R. CRIM. P. 16. Were the Massachusetts discovery rule this limited in application, rule 23 would be of much greater significance.

¹¹² MASS. R. CRIM. P. 25, Reporters' Notes.

¹¹³ *Id.*, 25(a).

¹¹⁴ *Id.* The requirement that the court rule on the motion at this time is a recent addition to Massachusetts procedure. *Id.*, Reporters' Notes. *See also* Commonwealth v. Kelly, 370 Mass. 147, 149-50 n.1, 346 N.E.2d 368, 370 n.1 (1976).

¹¹⁵ MASS. R. CRIM. P. 25(a).

¹¹⁶ *Id.*, Reporters' Notes.

¹¹⁷ *Id.*, 25(b).

¹¹⁸ *Id.*, Reporters' Notes.

granted to the Supreme Judicial Court to enter a verdict of a lesser of guilt where the verdict is of murder in the first degree.¹¹⁹

Rule 29

Rule 29 deals with revision or revocation of a sentence. It is drawn in part from rule 25 of the Federal Rules of Criminal Procedure and from former sections 29A and 29C of chapter 278.¹²⁰ Unlike sections 29A and 29C, which permitted revocation or revision of a sentence only within sixty days of its imposition, rule 29 permits revocation or revision at any time, as long as the defendant's motion is filed within sixty days of the imposition of the sentence.¹²¹ While the purpose of the rule is to allow modification of a sentence where justice demands, the trial judge has no power to extend the sixty-day period within which a motion for revision or revocation may be filed.¹²²

Rule 30

Rule 30 provides for broad post-conviction relief. Subdivision (a) of the rule consolidates the two post-conviction remedies of habeas corpus and writ of error.¹²³ It states that anyone imprisoned pursuant to a criminal conviction may at any time move for release or correction of the sentence "upon the ground that his confinement or restraint was imposed in violation of the Constitution or laws of the United States or of the Commonwealth of Massachusetts."¹²⁴ Relief may be in the form of revocation or modification of sentence or the grant of a new trial, if the defendant has so moved.¹²⁵ The rule also sets forth procedures to be followed in post-conviction proceedings once such proceedings have been initiated.

Both rules 29 and 30 apply to the district courts as well as to the superior courts. The intent of the rules is that a defendant who had not claimed his right to a jury trial but had accepted the disposition of his case at the bench trial as final should not thereby have lost his right to request relief under these post-conviction rules.¹²⁶ Such treatment would give rise to equal protection challenges and would not be consistent with the principles of justice underlying these rules. It is clear, however, that these rules were not intended to give a defendant

¹¹⁹ See G.L. c. 278, § 33E.

¹²⁰ MASS. R. CRIM. P. 29, Reporters' Notes.

¹²¹ *Id.*, 29(a).

¹²² *Id.*, Reporters' Notes.

¹²³ MASS. R. CRIM. P. 30, Reporters' Notes.

¹²⁴ *Id.*, 30(a).

¹²⁵ *Id.*, 30(a), (b).

¹²⁶ *Id.*, Reporters' Notes.

who has claimed a *de novo* trial the opportunity to return to the bench trial judge for post-conviction relief.

Rule 31

Rule 31 addresses stays of execution pending appeal. The rule restates existing law with respect to stays of sentences of imprisonment. It states that the entry of an appeal will not stay the execution of a sentence unless the trial judge or an appellate judge in his discretion determines that such sentence should be stayed.¹²⁷ With respect to appeals from the imposition of fines, however, the rule provides for a mandatory stay of the payment of a fine.¹²⁸ This subsection was adopted in recognition of the difficulty defendants have, upon successful appeal, in recovering their money.¹²⁹

Rule 33

Rule 33 recognizes that there are a number of defendants who, while not indigent, nevertheless lack sufficient funds to retain private counsel.¹³⁰ This rule contains special provisions for such "marginally indigent" defendants. Simply stated, under this rule a "marginally indigent" defendant is one who can afford to pay some but not all of the fee of a private attorney.¹³¹ A defendant determined to be marginally indigent will have counsel appointed by a judge or special magistrate.¹³² The defendant must pay the appointed attorney a reduced fee according to a fee schedule established by the court or bar association.¹³³ The judge or special magistrate may order payment in a lump sum or by installments or by means of any cash bail deposited with the court.¹³⁴ This rule anticipates that the commonwealth will pay the difference between what counsel would be paid if appointed to represent an indigent defendant and what the defendant has paid under the marginally indigent appointment.¹³⁵ This rule applies only to attorney's fees. Thus, it cannot support a claim for reduced rates for other defense services.¹³⁶

Rule 35

Rule 35 provides for the taking of depositions when exceptional circumstances indicate that the testimony of a witness should be pre-

¹²⁷ MASS. R. CRIM. P. 31(a).

¹²⁸ *Id.*, 31(b).

¹²⁹ *Id.*, Reporters' Notes.

¹³⁰ MASS. R. CRIM. P. 33, Reporters' Notes.

¹³¹ *Id.*, 33(a).

¹³² *Id.*, 33(e).

¹³³ *Id.*, 33(f)(2).

¹³⁴ *Id.*, 33(f)(2), (3).

¹³⁵ *Id.*, Reporters' Notes.

¹³⁶ *Id.*

served.¹³⁷ A witness whose deposition is to be taken may be required to attend at any place designated by the trial judge, taking into account the convenience of the witness and the parties.¹³⁸ The defendant has the right to be present at the taking of any deposition.¹³⁹ If the deposition is taken upon motion of the commonwealth, the commonwealth shall assume expenses associated therewith. Conversely, if the deposition is taken at the defendant's request, the defendant must assume these expenses.¹⁴⁰

The deposition may be used as substantive evidence at trial. Its use is governed by the general rules controlling admissibility of evidence when the judge finds that the witness is unavailable or when the witness gives testimony at trial that is inconsistent with his deposition.¹⁴¹ Unavailability of a witness includes situations in which the witness:

- (1) is exempt by ruling of the judge on grounds of privilege;¹⁴²
- (2) persists in refusal to testify;
- (3) claims lack of memory of the subject matter of the deposition;
- (4) is unable to be present or to testify at trial or hearing because of death, physical or mental illness, or infirmity;
- (5) is absent from the trial and the proponent of the deposition has been unable to procure the witness' attendance by process or by other reasonable means.¹⁴³

Rule 36

Rule 36 is the case management rule. The rule establishes an order of priorities. This order requires that the trials of defendants in custody awaiting trial and of defendants whose pretrial liberty is reasonably believed to present unusual risks to society must be given preference over other criminal cases.¹⁴⁴ In the district court, the court determines the sequence of the trial calendar. In the superior court, the court determines the sequence of the trial calendar from cases selected for prosecution by the district attorney.¹⁴⁵

¹³⁷ MASS. R. CRIM. 34(a). This rule is to be governed by rule 13, relating to pretrial depositions wherever the two rules are not inconsistent. *Id.*, Reporters' Notes.

¹³⁸ *Id.*, 34(b).

¹³⁹ *Id.*, 34(c).

¹⁴⁰ *Id.*, 34(d).

¹⁴¹ *Id.*, 34(g).

¹⁴² See *Commonwealth v. DiPietro*, 373 Mass. 369, 382-83, 367 N.E.2d 811, 819-20 (1977).

¹⁴³ MASS. R. CRIM. P. 35(g).

¹⁴⁴ MASS. R. CRIM. P. 36(a)(1).

¹⁴⁵ *Id.*, 36(a)(2).

This rule also sets the standards for a speedy trial. Except for an initial phase-in period, which permits longer waiting periods, all trials must begin within twelve months of the return day.¹⁴⁶ If the trial is not begun within the specified time limit, the defendant is entitled to have all charges dismissed.¹⁴⁷ This one-year limit, however, is subject to a number of specific excludable periods of delay.¹⁴⁸ Among these are delays resulting from a mental or physical examination of the defendant, another trial of the defendant, interlocutory appeals, hearings on pretrial motions, or absence of the defendant or an essential witness.¹⁴⁹ Thus, the actual period within which a trial may commence can be considerably longer than twelve months.

Rule 37

Rule 37 concerns the transfer of cases and substantially expands Massachusetts practice relative to the transfer of pending criminal proceedings.¹⁵⁰ If complaints are pending against the defendant in more than one district, the defendant, upon making an appearance in district court, may state in writing that he wishes to plead guilty or nolo contendere, to waive trial in the county in which the other complaint is pending, and consent to the disposition of the case in the county in which he appears.¹⁵¹ The district court in which the defendant appears may order that the other complaint be transferred for disposition, subject to the written approval of the prosecutor in each county.¹⁵² This approach permits the consolidation of all district court charges outstanding against the defendant into a single plea arrangement.¹⁵³ The rule provides for like treatment of a defendant against whom a complaint or indictment is pending in the superior court of more than one county.¹⁵⁴ The rule does not, however, permit consolidation of district court complaints with superior court proceedings.¹⁵⁵

The rule codifies the common law right of a defendant to have the case removed to another community in order to receive an impartial trial. The judge may make such a transfer either upon the defendant's motion or his own, if the court is satisfied that there is sufficient preju-

¹⁴⁶ *Id.*, 36(b)(1).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*, 36(b)(2).

¹⁴⁹ *Id.* Under this rule, once a twelve-month lapse has been shown, the burden of proof is upon the prosecutor to explain the delay. *Id.*, Reporters' Notes.

¹⁵⁰ MASS. R. CRIM. P. 37, Reporters' Notes. This rule should be read in conjunction with rule 12 concerning pleas.

¹⁵¹ *Id.*, 37(a)(1).

¹⁵² *Id.*

¹⁵³ *Id.*, Reporters' Notes.

¹⁵⁴ *See id.*, 37(a)(2).

¹⁵⁵ *Id.*, Reporters' Notes.

dice in the community to prevent the defendant from receiving a fair trial.¹⁵⁶ The transfer should not be ordered without a substantial showing of prejudice.¹⁵⁷

Rule 43

Rule 43 is the summary contempt rule. It acknowledges the very narrow function of summary punishment. The United States Supreme Court decision of *Bloom v. Illinois*¹⁵⁸ established the guidelines in this area and forms the basis of this rule. Summary punishment is permissible when it is determined that it is necessary to maintain order in the courtroom and the following requirements are met:

(1) the contemptuous conduct could be seen or heard by the presiding judge and was committed within the actual presence of the court;

(2) a judgment of contempt was entered upon the occurrence of the conduct; and

(3) the punishment does not exceed three months imprisonment or a fine of five hundred dollars.¹⁵⁹

If the judge determines that the punishment imposed would be greater than the stated limitations, the judge shall bind the contemtor over for trial in accordance with rule 44.¹⁶⁰ Should the interests of orderly courtroom procedure and substantial justice so require, the presiding judge may defer imposition or execution of the sentence until after the trial is complete.¹⁶¹

Rule 44

Criminal contempts outside the scope of rule 43 are to be prosecuted as provided in rule 44, by means of complaint or by indictment if the prosecutor so elects.¹⁶² No right to be proceeded against by indictment exists in contempt cases, however.¹⁶³ The case proceeds as a criminal

¹⁵⁶ *Id.*, 37(b)(1).

¹⁵⁷ *Id.*, Reporters' Notes.

¹⁵⁸ 391 U.S. 194 (1968). The Supreme Court noted the similarity between criminal contempt and other criminal proceedings. It held that while summary punishment of criminal contempt may be necessary to preserve the efficacy of the criminal process, this interest is outweighed by the defendant's right to the procedural safeguards necessary to ensure the fundamental fairness of the judicial system. *Id.* at 208. Thus, summary punishment could be used only in very limited circumstances.

¹⁵⁹ MASS. R. CRIM. P. 43(a).

¹⁶⁰ *Id.*, 43(b).

¹⁶¹ *Id.* See generally *Sussman v. Commonwealth*, 1978 Mass. Adv. Sh. 754, 374 N.E.2d 1195.

¹⁶² MASS. R. CRIM. P. 44(a).

¹⁶³ *Id.*, Reporters' Notes.

case in the court in which the contempt allegedly occurred. The defendant will be afforded all rights of any other criminal defendant, including the right to trial by jury.¹⁶⁴ Where the nature of the alleged contemptuous conduct is such that it is likely to affect the trial judge's impartiality, the contempt charges must be heard by a judge other than the trial judge.¹⁶⁵

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*, 44(c).