

# THE NEW RULES OF CRIMINAL PROCEDURE<sup>1</sup>

April 2004

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Rule	Old rule	New Rule	Bottom line
Rule 3(a) Complaint and Indictment	3(a) "Defendant...requests a probable cause hearing, that request shall constitute a waiver of...indictment"	3(a) if "the defendant has waived the right to an indictment...the Commonwealth may proceed by way of complaint."	3(a) The omission of the probable cause language clearly suggests that <b>insisting on a probable cause hearing does not by itself constitute a waiver of indictment.</b> (This appears to have been the practice anyway, but now there should be no ambiguity.)
Rule 3(c) Waiver of indictment	3(c) "a defendant shall not waive the right to indictment and elect to proceed by probable cause hearing..."	3(c) Contemplates a <b>written waiver</b> to indictment with no mention of it being tied into the request for a probable cause hearing	" "
Rule 3(f) Probable cause hearing	No old rule	3(f) for either bind over felonies or felonies for which the District Court declines jurisdiction, the defendant has the right to a probable cause hearing, unless an indictment has returned.	This is identical to the previous legal principle. The location of the language is just different.
Rule 3(g) the complaint process	No old rule	3(g) "The complainant shall convey to the court the facts constituting the basis for the complaint..."either reduced to writing or recorded." under oath requirement	The requirement is essentially what was previously required under the District Court/ Municipal Rules of Criminal Procedure and the Trial Court Rules.
Rule 3.1 Determination for Probable Cause	No old rule	(a) 24 hour rule (b) Police may present the information orally or in writing (e) the judicial officer shall make a determination in writing. (f) "The order and findings...with all the written information submitted by the police" shall be submitted.	" "  Currently, many District Courts will not allow you to copy police reports from a file where you are not filing an appearance. The language creates a strong argument that

<sup>1</sup> The new rules go into effect on **September 7<sup>th</sup>, 2004** and apply only to complaints and indictments initiated after that date.

		“These documents... <b>shall be public record.</b> ”	any police report in a court file is a public record. <sup>2</sup>
Rule 5 The Grand Jury	The old rule mandated a venire of 45 persons.	The new rule requires “the appropriate number of jurors” be summoned.	Under both rules not more than 23 grand jurors are selected.
Rule 7 Initial Appearance and Arraignment	The rule, like all of the new rules, <b>eliminates separate provisions for District Court and Superior Court</b>		This is logical and easier to read.
Rule 7(b) Appearance of Counsel	The old rule only applied to District Court.	(b)(2)“The court may permit an appearance...for such a time as the court may order...”	This codifies what was already the practice in most courts.
Rule 7(c) Arraignment	The old rule was 7(d)	The language of the two rules is identical.	
Rule 7(d) Provision of Criminal Record; Preservation of Evidence	No old rule	“The Court <b>shall</b> ensure that at or before arraignment” (1) the defendant’s criminal <b>record</b> is provided and (2) the parties are provided the opportunity to move for the <b>preservation of evidence</b> pursuant to Rule 14(a)(1)(E)	The record was routinely provided and was required under both the District and Superior Court Rules.  This provision just legislates the opportunity to do something that is good practice in the right case and not a practice that judges typically oppose.
Rule 7(e) Order Scheduling Pretrial Proceedings	No old rule	“At a district court arraignment on a complaint which is outside the jurisdiction of the District Court’s final jurisdiction or on which jurisdiction is declined, the Court <b>shall</b> schedule the case for <b>Probable Cause Hearing</b> . “In all other District Court and Superior Court cases the” the	The old rules implied the right to an interim pretrial date, and the District Court Rules of Criminal Procedure explicitly required one date between the arraignment and probable cause date. <sup>3</sup>

<sup>2</sup> The same argument can be made under the District Court and Municipal Rules; however, it may be a slightly stronger argument now.

<sup>3</sup> See District/Municipal Court Rules of Criminal Procedure rule 4(f). The new rules are silent about resolving any inconsistencies that may exist between separate sets of rules. The most logical assumption is that the new rules trump this provision. Hopefully, the reporter’s notes will address this issue.

		parties shall (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.	This provision clearly mandates two separate and distinct dates for both District and Superior Court.  See rule 11 below for more.
Rule 11 Pretrial Conference and Pretrial Hearing	The old rule had separate provisions that applied to the District Court and the Superior Court	11(a) except on a complaint regarding which the court will not exercise final jurisdiction <b>the parties are required to attend a pretrial conference. The defendant shall be available for attendance at the pretrial conference</b>	The new rules clearly mandate two separate dates and allow for the attendance of the defendant at both dates.  In Superior Court, where in practice the two events are often consolidated, there may be little practical effect, unless the Courts take the intent of the drafters to consolidate the pretrial hearing and discovery motions into one date seriously.  In the District Court, the practice is to have two separate dates, however, the provision requiring the defendant's attendance at both events is new. <b>Practice tip:</b> As a time and cost saving measure, there is a movement in the court system to eliminate as many trips to court for defendants as possible. The defense bar needs to fight for the appearance of the defendants at the pretrial conference.
Rule 11(a)(1)(C)	The old rule contemplated discussion at the pre trial conference” <b>of the nature of the defense”</b>	The new rule omits this language.	Somebody must have realized this was overbroad and absurd. The new rules still trigger very specific obligations on behalf of defense counsel regarding certain defenses.
Rule 11(b) The Pretrial Hearing	There was no equivalent old rule.	The new rule requires the pretrial conference report to be filed and “the court <b>shall hear all discovery</b> motions pending at the time of the pretrial hearing.”  See Rule 13(d)(1)	This apparently is an attempt to consolidate events especially in light of the broadened mandatory discovery in new rule 14. In practice, with the requirement of a separate pretrial conference date where the defendant is entitled to be present, the number of court events should be the same.
Rule 11(c)	No old rule	This new section contemplates a	

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Compliance Hearing		<p>separate compliance date only if there are residual discovery issues from the pretrial hearing/discovery hearing.</p> <p>The rule also allows for the selection of a trial date or a trial assignment date once compliance is completed.</p>	The rules are not crystal clear on this, but presumably you can wait, if you choose to, and schedule any other pretrial motions post compliance.
Rule 12 Pleas and Dispositions	The vast majority of this rule is the same.	Masculine pronouns are replaced with gender neutral pronouns.	
Rule 12(c)(2)(A) Contingent Pleas	The same principle was in a different sub section of the old rule 12.	Allows the defendant to withdraw his plea when the recommendation is agreed and the judges chooses to exceed that recommendation	
Rule 12(c)(2)(B) Defendant Capped Pleas	“ “	Allows the defendant in District Court only to tender a defense capped plea and withdraw the plea if it rejected by the court.	
Rule 12(c)(3) Notice of Consequences of Plea	Same number. With the approval of the Court, the old rule permitted counsel, rather than the judge, to inform the defendant of his various rights.	<p>Omits this language.</p> <p>Broadens the laundry list of what the judge is required to inform the defendant of before his plea can be accepted to include:</p> <ol style="list-style-type: none"> <li>(1) community parole supervision for</li> <li>(2) sexually dangerous persons statute</li> <li>(3) sex Offender registry provisions</li> <li>(4) alien warnings</li> </ol>	<p>Oddly enough, the alien warnings were previously only required by statute and not listed under rule 12.</p> <p>Successful motions for a new trial based on in inadequate colloquies may be a dying breed.</p>
Rule 12(c)(5)(A) Factual Basis For Plea	The old rule is identical and the same number	“The failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea.” <sup>4</sup>	
Rule 12(d) Withdrawal of	Old rule only	Deleted from new rules	The old rule arguably prevented the prosecution from making

<sup>4</sup> This language arguably supports the option of an *Alford* plea. See *North Carolina v. Alford*, 400 U.S. 25 (1970)  
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Plea			the same offer again if a plea was withdrawn. Someone must have decided this was a silly restriction on plea negotiations.
Rule 13(a) Pre Trial Motions	The old rule had District Court only provisions because of de novo system	Other than the one deletion, the rule remains the same	
Rule 13(b) and (c)	The old rule is the same as	the new rule	
Rule 13(d) Filing Motions	Old rule had separate provisions for District and Superior Courts	The new rule consolidates	
Rule 13(d)(1) Discovery Motions	Did not apply specifically to discovery motions.	“Any discovery motions <b>shall be filed prior</b> to the conclusion of the pretrial hearing, or thereafter for <b>good cause</b> shown.”	This change is consistent with the central theme of the rule changes: to expedite the process by creating less court dates and attempting to reduce discovery disputes.
Rule 13(d)(2) Non Discovery Pre Trial Motions	The old rules, which did not seem to be followed in practice, contained different, and in some cases much tighter deadlines. For example, in Superior Court the old rule required disputed pre trial motions to be filed within seven days of the filing of the pre trial conference report.	Any other pre trial motions “shall be filed Before the assignment of a trial date or <b>within 21</b> days thereafter, unless good cause shown.”	The new rules on deadlines do not seem to be that onerous. However, only time will tell to what extent, if any, they are enforced.

<p>Rule 13(e) Hearing on Motions</p>	<p>The old rules did not have an analogous separate section.</p>	<ol style="list-style-type: none"> <li>(1) All pending motions are supposed to be resolved prior to the selection of a trial date.</li> <li>(2) Any non discovery pre trial motions can be litigated at any subsequent court date.</li> </ol>	<p>This provision does not appear like it will have any effect on current practice.</p> <p>Read in conjunction with the rest of rule 13, this seems to contemplate or at least allow for two separate dates; one for filing and one for the hearing.</p>
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<p>Rule 14 (a)(1)(A) Mandatory Discovery</p>	<p>Old rule allowed mandatory discovery “<b>upon motion....</b>”</p> <p>Under the old rule, the mandatory discovery was limited to (A) defendant’s written or recorded statements, (B) statements of a person who testified in front of a grand jury; and (C) facts of an “exculpatory” nature.</p> <p>Under the old rule, the discretionary discovery available on motion included:</p> <p>names and addresses of all Commonwealth witnesses and production by Probation Dept. of record of such witnesses;</p> <p>Old rule did not separately treat police.</p> <p>No analogous provision in old rule.</p>	<p>The new rule refers to it as “<b>automatic</b>”.</p> <p><b>No motion</b> is required for the automatic/mandatory discovery</p> <p>The rule also specifically qualifies, consistent with the case law, what <b>possession, custody or control means</b>.<sup>5</sup></p> <p>The time line for compliance is “<b>at or before the pretrial conference</b>”</p> <p>The new rule expands the old mandatory list by adding to it: <b>(i) co-defendant’s written or recorded statements</b> and the <b>substance of any oral statements</b> of either defendant or co-defendant; and (ii) The grand jury minutes that underlie the indictment.</p> <p>The new rule adds to the list of mandatory discovery automatically available the following items, some borrowed from the old discretionary list, and some completely new:</p> <p>(iv) names, addresses and DOB of prospective witnesses (<b>other than law enforcement witnesses</b>) to be provided both to defendant and to the Probation Dept (see 14(a)(1)(D), requiring Probation Dept to provide record of defendant and of all witnesses so identified);</p> <p>(v) names and business addresses of police witnesses;</p> <p>(vi) intended expert opinion evidence <b>other than for criminal responsibility</b> (covered by 14 (b)), including identity of expert, current c.v., “<b>publications” and reports;</b></p> <p>(vii) police reports, photographs tangible objects, exhibits, scientific tests and experiments and statements of <b>witnesses the Commonwealth intends to call at trial;</b></p>	<p>It remains to be seen how “automatic” this discovery will be in practice.</p> <p>In theory, new rule 14 should stream line the discovery process and limit discovery motion practice.</p> <p>The list is much more extensive than what was previously required and may, if the judges treat it seriously, create some leverage in the plea process.</p> <p>MGL Ch. 218 sec. 26A mandates this discovery in BMC and District Ct., but not subject to automatic production.</p> <p>MGL ch. 218 sec. 26A <b>continues to mandate</b> the old rule’s more general and broader discovery in the BMC and District Ct., but, again, not subject to automatic production</p>
<p><sup>5</sup> See generally <i>Commonwealth v. Martin</i>, 427 Mass. 816 (1998); <i>Kyles v. Whitley</i>, 514 U.S. 419 (1995).</p> <p>THE NEW RULES OF CRIMINAL PROCEDURE.doc</p>			

<p>Rule 14(a)(1)(B) Reciprocal Discovery</p>	<p>The old analogous provision, 14(a)(3)( A) &amp; (B), allowed the court to condition the receipt of discovery on reciprocity by the defense.</p> <p>The old rule also allowed the Commonwealth to move for reciprocal discovery even if the defendant had not moved for discovery discretionary or otherwise.</p>	<p>Under the new rule, the defendant “<b>shall disclose</b>” to the Commonwealth reciprocal discovery of a similar nature but only after the defense has received its discovery.</p> <p>The only limitation imposed in the new rule is consistent with the applicable case law: “<b>which the defendant intends to use at trial</b>”</p>	<p>The new rule <b>broadens the discovery obligations of the defense</b>; however, the limitations imposed are consistent with the existing law. The rule specifically refers to 14(a)(1)(A) and lists vi, vii and ix.</p> <p>The rule does not require a motion from the commonwealth and <b>is mandatory</b> once discovery has been furnished.</p> <p>At least the rule finally uses the word reciprocal correctly.</p>
<p>Rule 14(a)(1)(C) Stay of Discovery; Sanctions</p>	<p>Old rule relating to sanctions was in a different section, and, since the discovery was only on motion (allowing for the opponent to assert any objection) there was no provision for a stay to allow an objecting party to seek a protective order.</p>	<p>In substance the rule as it relates to sanctions is the same. The Court has tremendous discretion and latitude in imposing sanctions, if at all. <b>The new rule now provides for a procedure, including a stay of automatic discovery</b>, to allow an objecting party to seek a protective order. 14(a)(6)</p>	<p>Because so much more discovery is mandatory and because it has to be provided earlier in the game, this issue may rear its ugly head more often and earlier in the process.</p>
<p>Rule 14(a)(1)(D) Record of Convictions</p>	<p>The old rule required a court order and/or a motion</p>	<p>Requires, <b>without a motion</b>, the probation department to provide records of the defendant and any witnesses.<sup>6</sup></p>	<p>Automatic now</p>

<sup>6</sup> The rule is silent on whether this provision applies to NCIC requests.  
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<p>Rule 14(a)(1)(E)</p> <p>Notice and Preservation of Evidence</p>	<p>No analogous provision in the old rule.</p>	<p>The rule requires, “upon receipt of information that any item...exists, except that is not within the possession...of the prosecution..., <b>the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor</b> concerning the item’s location and the identity of any persons possessing it.</p> <p>The rule also contemplates the option of filing a motion to preserve such items.</p>	<p>The rule requires the defense to raise the issue first. Perhaps a specific motion to preserve that echoes the language of the rule could, arguably should, be filed.</p>
<p>Rule 14 (a)(2)</p> <p>Motions for Discovery</p>	<p>No old rule</p>	<p>Allows for the filing of discovery motions by the defendant and the Commonwealth-only after it has filed its certificate of compliance--and refers back to rule 13(d)(1)</p>	<p>The rule’s explicit requirements for the defendant are the same. However, it does preclude the Commonwealth from filing any discovery motions until after they have provided all automatic/mandatory discovery to the defendant.</p>
<p>Rule14 (a)(3)</p> <p>Certificate of Compliance</p>	<p>No old rule</p>	<p>Requires both parties to file a written “certificate of compliance” with the court.</p>	<p>The rule <b>excludes expert reports.</b></p> <p>Under the related rules, the Commonwealth’s obligations are triggered at an earlier date than the defendant.</p>
<p>Rule 14 (a)(4)</p> <p>Continuing Duty</p>	<p>The old rule was 14(a)(3)(B)(4)</p>	<p>Essentially the same rule.</p>	

Rule 14(a)(5-7)  (5) Work Product  (6) Protective Orders  (7)Amendment of Discovery Orders	The old rule was 14(a)(3)(B)(5-7)	The two rules are identical except that (a)(6) relating to Protective Orders adds a sentence making it explicit that just because the objecting party must now move for a protective order, instead of simply opposing the other party's discovery motion, the burden of proof with regard to, e.g., privilege, is not altered.	
Rule 14(a)(8)  Waiver of Discovery	No analogous provision in the old rule.	The new rule expressly permits a party to waive her right to otherwise automatic and mandatory discovery or to its production within the mandated time. Requires <b>written, specific waiver</b> , signed by the party.	This provision is necessitated by the automatic and mandatory nature of most discovery under the new rule, allowing a party to opt out of her right to automatic discovery.
Rule 14(b)(1)(A) Special procedures; Alibi	Same as the old rule		
Rule 14(b)(1)(B) Disclosure of Information re: Alibi	Same number as old rule	Under the new rule the <b>time line is changed to seven</b> days from the notice.	The new rule applies uniformly to both District and Superior Court.
Rule 14 (b)(1)(C-F)	The rules are exactly the same.		
Rule 14 (b)(2) Lack of Criminal Responsibility	The entire rule is the same as the old rule		
Rule 14(c) Sanctions for Non compliance	“ “		
Rule 14(d)	The old rule was the same	The new rule expands <b>14 (d)(1)</b> ,	

<p>Definition of a Statement</p>	<p>number.  <b>Part 1 of the old rule</b> required that to be a “statement,” a writing must be <b>“signed or otherwise adopted or approved”</b> by the writer, and it made no mention of notes or prior drafts that underlay the production of such a writing.</p> <p><b>Part 2 of the old rule</b> did not include “written” recording of an oral statement, although the rule did, and continues to, include “stenographic” recordings.</p>	<p>which covers written statements by a percipient witness, by <b>deleting the requirement of formal adoption or approval</b> by the writer, but it explicitly excludes from these statements <b>“notes” or drafts that have been incorporated into a subsequent draft or final report.</b></p> <p>The new rule expands <b>14(d)(2)</b>, which covers recordings of oral statements, by including <b>“written”</b> recordings.</p>	<p>Arguably, this only makes clear what the case law seems to require. <i>See Com. v. Bing Sial Liang, 434 Mass. 131, 140 (2001)</i>(VWA’s notes of complainant interview protected as work product except for “witness statements” contained therein).</p>
<p>Rule 14(e) Time Limits</p>	<p>The old rule has been deleted</p>	<p>The applicable time limits are sprinkled through out the new rules.</p>	<p>The time limits apply uniformly in both District and Superior Court.</p>
<p>Rule 34 Report</p>	<p>The old rule applied to Superior Court and the District Court jury session only.</p>	<p>The new rule eliminates this limitation.</p>	<p>Judges may report a question of law that arises in any session of either court.</p>

**CHRONOLOGY OF COURT EVENTS UNDER THE NEW RULES OF  
CRIMINAL PROCEDURE** Chris Dearborn

I. **Arraignment** (Rule 7) set both PTC & PTH (Rule 7(e) separate events)

II. **Pretrial conference** (Rule 11(a))

- D has option of being present ; in court event
- CW automatic discovery due
- File PTCR 11(a)(2)(A)

III. **Pretrial hearing** (Rule 11(b))

- D present
- Plea/plea negs.
- Discovery motions to be heard 11(b)(ii) (Unless no automatic discovery yet)
- File PTCR
- Other motions may be heard

IV. **Compliance Hearing** (Rule 11(c) )

- Separate event if discovery incomplete
- Certificate of compliance signed by ADA (*fluid date*)
- Set trial date or Trial Assignment date
- Reciprocal Discovery due? (Rule 14(a)(2) Agreed date only after CW compliance complete) (*fluid date*)

V. **Filing** of other **pretrial motions** (can be done earlier) in court?

VI. **Other Pretrial Motions Hearing** (can be done earlier) Rule 13(d) & 13(e)

- w/in 7 days of filing set hearing date
  - If filed at or b/4 PTH then hearing scheduled for next court date (13(e)(2))
- OR**
- B/4 assignment date or within 21 days there after Rule 13(d)(2)

VII. **Trial Assignment date**

VIII. **TRIAL**

