CHAPTER 13

Summoning Witnesses

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§ 13.1 INTRODUCTION

A summons compels a witness to give testimony or produce documents or other objects at a criminal proceeding.[1] The summons may also include a command that any objects or documents be produced on a day prior to the hearing.[2] Although certain persons or items may not generally be summoned absent special circumstances or a court order,[3] restrictions on the defendant's use of a summons must be measured against the constitutional guarantees underlying the right to summons evidence, including the federal and state compulsory process clauses,[4] the confrontation clauses,[5] the due process clauses [6] and, to the degree that an indigent cannot afford process that an affluent defendant would utilize, the equal protection clauses.[7]

In Massachusetts, Mass. R. Crim. P. 17 governs the summoning of witnesses, in conjunction with statutory and constitutional requirements.[8] Its use of the word *summons* is intended to include

[1] Mass. R. Crim. P. 2(b)(17).

[2] *See infra* § 13.2C.

[3] See infra § 13.4.

[4] U.S. Const. amend. 6; Mass. Const. Declaration of Rights art. 12. In Washington v. Texas, 388 U.S. 14, 18–19 (1967), the compulsory process clause was held to apply against the states and to guarantee the right to obtain testimony to present a defense. See also Blazo v. Superior Court, 366 Mass. 141 (1974); United States v. Nixon, 418 U.S. 683, 709, 711 (1974) (compulsory process essential to ensure that justice is done); Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (few rights more important than right to present witnesses in defense); Webb v. Texas, 409 U.S. 95, 98 (1972) (intimidation of witness by judge prevented him from testifying and denied Sixth Amendment right). *Cf.* United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (compulsory process clause violated by deportation of witness only if some showing of materiality). The compulsory process clauses should also be cited whenever the state denies the defendant the rights to a continuance when necessary to subpoena witnesses, to a writ of habeas corpus ad testificandum in order to obtain a prisoner's attendance, to admit relevant testimony of a witness, or to present a defense.

[5] U.S. Const. amend. 6, Mass. Const. Declaration of Rights art. 12. "A defendant's right to have summonses issued on his behalf may also be grounded in the Sixth Amendment right of confrontation." Reporter's Notes to Mass. R. Crim. P. 17. *See also* Barber v. Page, 390 U.S. 719 (1968) (under confrontation clause, defendant has right to presence of adverse out-of-state witness).

[6] United States v. Nixon, 418 U.S. 683, 711–13 (1974) (essential to federal due process clause that all relevant and admissible evidence be produced). *Compare* United States v. Resurreccion, 978 F.2d 759 (1st Cir. 1992) (absent showing witness would have been helpful, defendant not denied due process right because witness beyond process).

[7] U.S. Const. amend. 14; Mass. Const. Declaration of Rights art. 1. *See also* Blazo v. Superior Court, 366 Mass. 141, 143 (1974) ("the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners," quoting Britt v. North Carolina, 404 U.S. 226, 227 (1971)).

[8] See G.L. c. 263, § 5 (accused has right to produce witnesses and proofs in his favor), and, regarding constitutional rights, notes *supra*.

what is elsewhere referred to as a "subpoena."[9] In most respects the Massachusetts Rule duplicates Fed. R. Crim. P. 17, so that federal case law may be relevant to its interpretation.[10]

A summons should be considered even when the witness appears eager to testify for the defense. Summoning witnesses is the only means of ensuring that the defendant will have the benefit of the witness's testimony, since failure to do so puts counsel in a weak position to seek a continuance if the witness does not appear.[11] A summons also allows the jury to interpret the witness's presence as resulting from obligation rather than partisanship toward the defendant. A cooperating witness may benefit from a summons as well, since it provides both minimal witness fees and a binding, more persuasive excuse for being absent from work that should result in no loss of wages. Since some witnesses might otherwise be upset or indignant if summoned, the benefits to the witness of using a summons should be explained prior to service.

§ 13.2 OBTAINING A SUMMONS

§ 13.2A. WHO MAY ISSUE A SUMMONS

For defense counsel, the simplest method to obtain a summons is to have a notary issue it. Under the law, a clerk of court, notary public, or justice of the peace may issue summonses for witnesses.[12] In criminal cases, the attorney general, district attorney, or other person who acts for the Commonwealth also may issue a summons.[13] A summons issued at the request of the defendant must be identified as such.[14] To assure continued attendance if the witness is not reached, the summons should require attendance on the requested date "and from day to day thereafter, until the action is heard by the court."[15] Summons forms appear in the Criminal Rules, following Rule 6.

Subpoenas to defense counsel. Defense counsel should also become familiar with Mass. R. Prof. C. 3.8, entitled "Special Responsibilities of a Prosecutor."[16] Of special relevance to this chapter is Rule 3.8(f), which forbids a prosecutor to subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor "reasonably believes" that the information sought is:

1. "not protected from disclosure by any applicable privilege;"[17]
2. "the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;" and

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[9] Reporter's Notes to Mass. R. Crim. P. 17.

[10] Reporter's Notes to Mass. R. Crim. P. 17.

[11] *See, e.g.,* Commonwealth v. Scott, 19 Mass. App. Ct. 983, 985 (1985) (rescript), *appeal denied*, 394 Mass. 1104 (continuance to obtain witness denied because no process had been sought and no need shown). *See also* Commonwealth v. Teel, 72 Mass. App. Ct. 1107, at *2 (unpub'd 2008).

[12] G.L. c. 233, § 1. The law provides that a notary public or justice of the peace may only issue a summons at the request of an attorney general, district attorney, or other representative of the Commonwealth *or* the defendant. *See also* Mass. R. Crim. P. 17(a)(1) (clerk or other person authorized by law may issue summons), 36(b) (clerk must issue summons for deposition to perpetuate testimony); Commonwealth v. Odgren, 455 Mass. 171, 180-81 (2009); Commonwealth v. Mitchell, 444 Mass. 786, 791 n.12 (2005).

[13] G.L. c. 277, § 68.

[14] G.L. c. 233, § 1.

[15] *See* Commonwealth v. Brookins, 33 Mass. App. Ct. 626, 630 n.1 (1992), *aff'd on other grounds*, 416 Mass. 97 (1993).

[16] The full text of the rule is reprinted *infra* in Appendix C.

[17] *See* Mass. R. Prof. C. 1.6.

3. "there is no other feasible alternative to obtain the information."

In any case, the prosecutor *must* obtain judicial approval after an opportunity for an adversarial proceeding.[18] (Though federal practice is beyond the scope of this book, counsel should be aware of the decision in Stern v. District Court for the District of Massachusetts[18.5] in which the court found that the First Circuit's adoption of state rule 3.8(f) exceeded the district court's lawful authority to regulate both grand jury and trial subpoenas. Specifically, the Court held that the rule imposes "new substantive requirements for judicial preapproval of grand jury subpoenas, alters the grand jury's historic role, places it under overly intrusive court supervision, curbs its broad investigative powers, reverses the presumption of validity accorded to its subpoenas, undermines the secrecy of its proceedings, and creates procedural detours and delays." The portions of Local Rule 3.8(f) that require a prosecutor, before serving an attorney subpoena, to demonstrate that the information sought is essential, not privileged, and not otherwise feasibly available were found to be significant departures from prior practice, and to raise the bar for obtaining relevant and material evidence. Collectively, the Court concluded that they "work changes too fundamental to be accomplished under the aegis of the district courts' local rulemaking power.")

§ 13.2B. WITNESS FEES; PREPAYMENT REQUIREMENT

1. Statutory Fees

Summoned witnesses are entitled to witness fees, but the time and method of payment differs depending on the type of summons issued. A nonindigent defendant must pay or tender the first day's witness fee at the time of summons service, or the witness is not obligated to appear.[19] If the witness does appear but her testimony is not reached, she should be tendered the next day's witness fee in order to ensure continued attendance.[20] By contrast, a witness served with a summons from an indigent defendant[21] or from the Commonwealth is not paid until after she appears and files a certification of the amount of her attendance and travel costs with the court.[22]

The witness fee is now six dollars per day, plus ten cents per mile to and from home (or business if the witness's work location is in the city or town where the hearing is being held).[23] However, where the witness is involved in joined or simultaneous cases and in other special circumstances the fee may be reduced or apportioned.[24]

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[18] Mass. R. Prof. C. 3.8(f)(2).

[18.5] 214 F.3d 4 (1st Cir. 2000).

[19] G.L. c. 233, § 3. *Cf.* Mass. R. Crim. P. 17(c) (witness paid following certification of amount of travel and attendance).

[20] Although a summons creates a continuing duty to testify, Kent Smith suggests that sanctions for nonattendance on the second day will be applied only if the witness was paid the second day's fees in advance, citing United States v. Snyder, 413 F.2d 288 (9th Cir. 1969), *cert. denied*, 396 U.S. 907. Smith, *Criminal Practice and Procedure*, 30A MASS. PRAC. § 28.33 (3d ed. 2011).

[21] *I.e.*, a defendant who has invoked the procedures for obtaining a summons at the Commonwealth's expense, as detailed *infra* in § 13.3A.

[22] G.L. c. 262, § 29.

[23] G.L. c. 262, § 29.

[24] *See* G.L. c. 261, § 8 (if cases tried jointly, presiding justice may reduce witness fees and other costs, but not below amount due in one case); c. 262, § 59 (if witness in attendance at two or more pending criminal cases at same time before same court, justice or clerk should reduce and apportion fee, allowing at least one case's travel and attendance). *See also* G.L. c. 262, § 60 (if witness induced the crime, fees may be disallowed in judge's discretion), §§ 53–58 (governing witness fees for police and other officers).

2. Other Witness Compensation

It is unprofessional conduct to pay or offer a witness money contingent on the content of testimony or outcome of the case. However, it is permissible to compensate a witness for reasonable expenses incurred by the witness in attending or testifying, including loss of time, or to pay an expert witness a reasonable fee.[25]

§ 13.2C. SUMMONING DOCUMENTS FOR PRODUCTION AT OR PRIOR TO TRIAL

1. Generally

A summons may command the recipient to produce books, papers, documents, or other objects.[26] Under Mass. R. Crim. P. 17(a)(2) the court may order production of such evidence before the court *prior to trial*, for inspection or copying by opposing parties.[27] The Reporter's Notes to Rule 17(a)(2) state that the intent of this provision is not to substitute for discovery but to avoid delay resulting from the production of many documents at the commencement of trial.[28] The party seeking early production has the burden of demonstrating good cause for it.[29]

2. Obtaining Evidence from the Internal Affairs Division of a Police Department

In *Commonwealth v. Wanis*,[30] the Supreme Judicial Court clarified the procedure by which a defendant may obtain evidence from the internal affairs division of a police department. The defendant in *Wanis* had filed a complaint with the Boston Police Department against one of the officers who had arrested him. The internal affairs division then took statements from percipient witnesses that the defendant sought. In an important general holding, the Court concluded that an order to produce such statements is "generally appropriate in criminal cases."[31] More specifically, the Court held that: (1)

[25] *See* S.J.C. Rule 3:07, Mass. R. Prof. C. 3.4(g), 3.8.

[26] Mass. R. Crim. P. 17(a)(2). *See* Commonwealth v. Dwyer, 448 Mass. 122, 139-47 (2006); Commonwealth v. Mitchell, 444 Mass. 786, 790-92 (2005); In re Jansen, 444 Mass. 112, 116-17 (2005).

[27] *See also* G.L. c. 233, §§ 78, 79 (business records produced in court may be inspected by party requiring production prior to court, and authentication may be by affidavit of custodian); Commonwealth v. Lampron, 441 Mass. 265, 268-72 (2004).

[28] *See* S.J.C. Rule 3:07, Mass. R. Prof. C. 3.8(f). *See also* Commonwealth v. Liebman, 379 Mass. 671, 677 (1980) (improper to use grand jury subpoenas for preparation after indictments issued, but no prejudice here); Commonwealth v. Smallwood, 379 Mass. 878 (1980) (prosecutor summoned witness to appear on nontrial day for interview). For more recent cases affirming same, *see, e.g.*, Commonwealth v. Hart, 455 Mass. 230, 242-44 (2009); Commonwealth v. Odgren, 455 Mass. 171, 177 n.14 (2009); Commonwealth v. Lam, 444 Mass. 224, 230 (2005).

[29] United States v. Nixon, 418 U.S. 683 (1974). In *Nixon* the Supreme Court enunciated a federal standard of good cause for advance production as follows: "the moving party most show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.' Against this background, the Special Prosecutor . . . must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." 418 U.S. at 699–700. *See also* Commonwealth v. Dwyer, 448 Mass. 122, 141 n.22 (2006); Commonwealth v. Mitchell, 444 Mass. 786, 792 (2005); Commonwealth v. Lampron, 441 Mass. 265, 270-71 (2004).

[30] 426 Mass. 639 (1998).

[31] Commonwealth v. Wanis, 426 Mass. 639, 640 (1998).

material exempted from disclosure pursuant to the public records law is not automatically privileged from discovery if a criminal defendant moves for its production; (2) a prosecutor who does not have access to the records of an internal affairs division is not properly subject to a motion under Mass. R. Crim. P. 14 for the production of these records; (3) a pretrial motion may, however, be filed under the general auspices of Mass. R. Crim. P. 17(a)(2) seeking a summons for the production of documents and other objects by the keeper of the records of an internal affairs division. (Note that the decision seems to require a motion even though Rule 17(a)(2) does not. This may have been an oversight by the Supreme Judicial Court as it seems that counsel should simply be able to issue a summons for the records without prior court approval.); (4) the internal affairs division can move to quash or modify such a subpoena, thereby placing before a judge the lawfulness of the command to produce and other issues, such as its reasonableness and whether, balancing policy considerations against a defendant's right of confrontation, the subpoena should be honored, restricted, or modified in some way, or quashed; and (5) in the circumstances of that case, the internal affairs division should produce statements received by it from percipient witnesses (including police officers) to events occurring at the time of the alleged crime or crimes and the defendant's arrest.

A defendant who seeks records of an internal affairs division investigation beyond the statements of percipient witnesses should follow the *Wanis* procedure but should also be prepared to prove that there is "a good faith, specific, and reasonable basis for believing that any such record contains exculpatory evidence that might be a real benefit to the defense."[32]

3. Privileged or Contested Materials

Complex problems may arise when defense counsel seeks to summons documents that may arguably be privileged.[33] In 2006 in *Commonwealth v. Dwyer*, the SJC announced a new series of protocols governing a defendant's pretrial access to privileged records of third-party witnesses, including but not limited to rape counseling records, along with a series of form motions and orders now appended to Mass. R. Crim. P. 17.[34]

§ 13.2D. OUT-OF-STATE WITNESSES

1. Right to Summons Out-of-State Witness

[32] Commonwealth v. Wanis, 426 Mass. 639, 640 (1998). The standard may in fact be a bit more liberal than this. *See, e.g.*, Commonwealth v. Rodriguez, 426 Mass. 647 (1998) (defendant held not to have shown that events after the commission of the alleged crimes were "either relevant to, or likely to be helpful in resolving, the question of his guilt").

[33] *See generally infra* § 16.3C.

[34] 448 Mass. 122, 139-47 (2006) ("The amended protocol is designed to give the fullest possible effect to legislatively enacted privileges consistent with a defendant's right to a fair trial …"). Essentially, the *Dwyer* protocol requires: (1) that upon filing of the motion for summons by the defendant, the statutory privilege holder be afforded notice and an opportunity to be heard, and the records shall be deemed "presumptively privileged" unless the privilege holder waives the privilege; (2) that if the judge orders issuance of the summons pursuant to Rule 17(a)(2) and the requirements of *Commonwealth v. Lampron*, 441 Mass. 265, 268-72 (2004), all presumptively privileged records shall be delivered to the court and retained under seal, to be inspected only be defendant's record counsel (after signing and filing a protective order containing "stringent nondisclosure provisions"); and (3) that any subsequent disclosure of the contents of any record to the defendant or any other person be permitted only if subsequently allowed by a judge upon a motion for "specific, need-based written modification of the protective order." *Dwyer*, *supra*, 448 Mass. at 144-46. The full protocol is set out in an Appendix to the *Dwyer* decision at 448 Mass. 122, 147-50 (2006). *See also* Smith, *Criminal Practice and Procedure*, 30A MASS. PRAC. §§ 28.20, 28.21 (3d ed. 2011). Failure of counsel to follow these protocols may result in sanctions and/or disciplinary proceedings.

According to Massachusetts cases, the right to compulsory process "does not automatically extend beyond the territory of the Commonwealth," even though a procedure exists for securing the attendance of out-of-state witnesses;[35] at least when the witness's testimony would be merely cumulative of other available testimony, there is an element of discretion afforded the trial judge.[36] However, it is worth noting that the Supreme Court has cast doubt on the validity of distinguishing between in-state and out-of-state process in a confrontation clause context,[37] provided that the witness is in the United States.[38] Additionally, a First Circuit case found that the prosecution and the INS violated the compulsory process clause by refusing to eliminate immigration obstacles blocking entry of a material witness who was a foreign national.[39]

2. Confrontation Right to Require Presence of Out-of-State Government Witness

Pursuant to the defendant's confrontation rights, the prosecutor may not claim an out-of-state witness is unavailable, and her prior testimony therefore admissible under the hearsay exception, unless the prosecutor has made a good-faith though unsuccessful attempt to utilize the procedures below for securing the witness's attendance.[40] Although the Supreme Court no longer requires "unavailability" as

[35] Commonwealth v. Watkins, 375 Mass. 472, 488 (1978) (citing Commonwealth v. Dirring, 354 Mass. 523, 529 (1968), *denial of habeas corpus aff'd*, 459 F.2d 953 (1st Cir. 1972)). *See also* Commonwealth v. Edgerly, 6 Mass. App. Ct. 241, 255 (1978) ("the right to have witnesses brought in from other states is not a constitutional right").

[36] Commonwealth v. Watkins, 375 Mass. 472, 489 (1978). The case interprets the statutory mechanism, G.L. c. 233, § 13B, as affording discretion whether to summons an out-of-state material witness by its use of the word *may*, and holds that the constitutional right of compulsory process at least allows the discretion to decline a summons for cumulative witnesses. *See also* Commonwealth v. Sellers, 2009 Mass. App. Unpub. LEXIS 870, at *5-6 (2009) (denial of subpoena for out-of-state witness upheld where defendant made no showing of materiality of the witness's testimony); Commonwealth v. Sanders, 451 Mass. 290, 294-95 (2008) (judge properly denied Commonwealth's motion for out-of-state witness summons where defendant established that witness would exercise his fifth amendment privilege and Commonwealth would not immunize witness's testimony); Commonwealth v. Durning, 406 Mass. 485, 495 (1990) ("right to call witnesses is not absolute"); Commonwealth v. Bryer, 398 Mass. 9, 15–16 (1986) (denial of continuance to subpoena out-of-state expert upheld); Commonwealth v. Appleby, 389 Mass. 359, 380–81 (1983), *cert. denied*, 464 U.S. 941 (1983) (denied as out-of-state witness subpoena unnecessary); Commonwealth v. Edgerly, 6 Mass. App. Ct. 241, 255 (1978) (even if materiality of out-of-state witness demonstrated, G.L. c. 233, § 13B leaves judgment to court's discretion); Commonwealth v. Dirring, 354 Mass. 523, 529–30 (1968). In the converse situation, the SJC has recently held that, in enforcing an out-of-state grand jury subpoena served on an in-state prospective witness, a judge in Massachusetts had discretion to rely solely on the certificate of the judge in the requesting state to support his finding, required under G.L. c. 233, § 13A, that the witness was material and necessary to the grand jury proceeding in the requesting state. *See* Matter of Rhode Island Grand Jury Subpoena, 414 Mass. 104, 111 (1993); *see also* Commonwealth v. Gasdik, 2004 Mass. Super. LEXIS 652 (Super. Ct. 2004).

[37] Barber v. Page, 390 U.S. 719, 723–24 (1968); *see* Crawford v. Washington, 541 U.S. 36, 57 (2004) (modifying standards where confrontation rights at issue).

[38] If the witness is in a foreign country, the *confrontation* clause does not guarantee the defendant a right to cross-examine the witness and exclude prior recorded testimony as hearsay, since the state does not have the power to require attendance absent the voluntary assistance of another government. Mancusi v. Stubbs, 408 U.S. 204 (1972). *Compare* 28 U.S.C. § 1783 (procedure for subpoenaing American abroad to testify in *federal* court); United States v. Theresius Filippi, 918 F.2d 244 (1st Cir. 1990) (no Sixth Amendment violation because government without power to subpoena foreign national to testify in federal court).

[39] United States v. Theresius Filippi, 918 F.2d 244 (1st Cir. 1990).

[40] Commonwealth v. Florek, 48 Mass. App. Ct. 414 (2000) (conviction reversed where judge erred in allowing prior recorded testimony of missing witness when efforts by the Commonwealth were insufficient to

a prerequisite to the admission of hearsay, the Massachusetts Constitution and several hearsay exceptions themselves do.[41]

3. Procedure

If the witness is *not a prisoner*, an out-of-state subpoena or a subpoena duces tecum [42] may be issued following the procedures of the Uniform Law to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.[43] Under this procedure, the party applies, ex parte if desired,[44] to the trial court for issuance of a certificate stating that a material, necessary witness is wanted for a designated period to testify in a pending criminal prosecution or grand jury proceeding. Even if the court is persuaded that the witness is material and necessary, Massachusetts courts questionably maintain that issuance of the certificate is discretionary.[45] If issued, the certificate is sent to the other state, which must direct the witness to appear at a hearing on the question of compelling his attendance in the requesting state. (The witness may be taken into custody without notice if the certificate recommends.) The judge may not order the witness removed to the requesting state unless he finds that the witness is material and necessary, that compelling attendance will not cause undue hardship, and that the laws of all states through which the witness must pass will afford him protection from arrest and service of process.[46] Because the subpoena must not cause "undue hardship" to the witness, the court may require compensation for his expenses.[47] Failure to comply with an out-of-state subpoena may result in the same sanctions as in-state subpoenas.[48]

If a witness is in *federal custody* outside Massachusetts, process may be obtained by a federal writ of habeas corpus ad testificandum [49] or a state court writ of habeas corpus ad testificandum.[50] For

show a good faith attempt to produce the witness); Commonwealth v. Childs, 31 Mass. App. Ct. 64, 70 (1991); Barber v. Page, 390 U.S. 719, 722–25 (1968). *See also* Ohio v. Roberts, 448 U.S. 56 (1980); Commonwealth v. Robinson, 451 Mass. 672, 676-78 (2008). However, because the state is powerless to compel the attendance of a witness who is out of the country, the confrontation clause does not prevent the introduction of reliable, prior recorded testimony of the witness. Mancusi v. Stubbs, 408 U.S. 204, 213–16 (1972).

[41] *See infra* § 32.6A(4)(c).

[42] A subpoena duces tecum is authorized by the Act. Application of a Grand Jury of the State of New York, 8 Mass. App. Ct. 760, 767 (1979).

[43] The Uniform Law was passed in Massachusetts as G.L. c. 233, §§ 13A–13D. *See* G.L. c. 233, § 13A, governing out-of-state requests to Massachusetts; § 13B, governing requests by Massachusetts to the other state; and § 13C, providing that an out-of-state witness who is ordered to attend a Massachusetts hearing is not subject to arrest or service of process on matters that arose before delivery of witness under summons; and if passing through Massachusetts en route to testify elsewhere, not subject to arrest or process here.

[44] *Cf.* Commonwealth v. Dotson, 402 Mass. 185, 187 (1988) (prosecutor has no role to play in determination whether indigent funding should be granted as necessary to defense); Commonwealth v. Beneficial Finance Co., 360 Mass. 188, 305–07, *cert. denied*, 407 U.S. 914 (1971) (prosecutor's ex parte application did not deny defendant confrontation rights), *aff'd on habeas corpus sub nom.* Glynn v. Donnelly, 485 F.2d 692 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

[45] *See supra* § 13.2.D(1).

[46] In addition to G.L. c. 233, §§ 13A–13D, *see* Commonwealth v. Edgerly, 6 Mass. App. Ct. 241, 254 (1978) (application failed to explain materiality or include addresses of witnesses).

[47] Application of a Grand Jury of the State of New York, 8 Mass. App. Ct. 760, 768–69 (1979) (because substantial expenses involved in copying and producing summoned records, court may order reimbursement of reasonable expenses, and such an order may be required by the statutory "hardship" provision).

[48] Application of a Grand Jury of the State of New York, 8 Mass. App. Ct. 760, 766–67 (1979). *See infra* § 13.6.

[49] 28 U.S.C. § 2241(c)(5).

state prisoners outside Massachusetts, the party should seek a prosecutorial or court request to the sister state that it utilize a writ of habeas corpus ad testificandum to compel attendance in Massachusetts, including in the request a showing that adequate safeguards would be used to keep the prisoner in custody during travel and court attendance.[51]

§ 13.2E. MATERIAL PROSECUTION WITNESSES

A prosecution witness may be placed on recognizance, with or without sureties, to guarantee attendance at a pending trial. However, a witness unable to post bail may not be jailed unless the pending charge is a felony.[52]

§ 13.3 OBTAINING A DEFENSE SUMMONS AT COMMONWEALTH EXPENSE

§ 13.3A. INDIGENT'S SUMMONS

(*See also supra* § 8.4B (indigent's right to extra fees and costs of defense).)

If a defendant cannot afford the expenses involved in summoning necessary witnesses, she may do so at state expense. This right is constitutionally guaranteed by the compulsory process, due process, and equal protection clauses of the federal Constitution[53] and their state constitutional analogues.[54]

Mass. R. Crim. P. 17(b) establishes a procedure for indigents to obtain process. (It is worth noting, however, that the procedure is a cumbersome way of avoiding what is sometimes a minimal expense — if constable fees are avoided by using a "disinterested party," solely the witness fee.) Under this rule, an indigent summons must be issued "at any time upon the written ex parte application of a defendant which shows that the presence of a named witness is necessary to an adequate defense and that the defendant is unable to pay the fees of that witness." An indigent's summons is available to compel attendance at a Rule 35 deposition as well as at a court hearing.[55]

The defendant should file a written application setting out the witness's names and addresses if known and demonstrating that (1) she is unable to afford process and (2) the witness is necessary to the

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[50] Barber v. Page, 390 U.S. 719, 724 (1968) (noting policy of federal Bureau of Prisons to permit testimony in state courts pursuant to the state writ). *See also* G.L. c. 248, § 25.

[51] Barber v. Page, 390 U.S. 719, 723–25 & n.4 (1968) (many states would "quite probably" comply with such a request).

[52] G.L. c. 277, § 70. *See also* G.L. c. 276, §§ 45–52, 54 (regarding committed material witnesses).

[53] *See* Commonwealth v. Drew, 397 Mass. 65, 69–70 (1986) (compulsory process clause requires indigent summons procedure for necessary witnesses); Blazo v. Superior Court, 366 Mass. 141, 143, 145 (1974) (compulsory process, due process, and equal protection require indigent summons for necessary witnesses); Washington v. Texas, 388 U.S. 14, 18–19 (1967) (Sixth Amendment compulsory process right applies to states through Fourteenth Amendment). Earlier, in Griffin v. Illinois, 351 U.S. 12 (1956), the Supreme Court established that the Fourteenth Amendment guarantees indigents as effective access to state judicial processes as wealthier persons enjoy. The court noted that "there can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." *Griffin v. Illinois, supra,* 351 U.S. at 19.

[54] Blazo v. Superior Court, 366 Mass. 141, 145 (1974) (finding art. 12 of Mass. Const. Declaration of Rights, as well as Sixth and Fourteenth Amendments, guarantee indigents the right to state-paid compulsory process). Art. 12 guarantees the defendant the right to produce all proofs that may be favorable and to meet witnesses against him face-to-face.

[55] *See* Reporter's Notes to Mass. R. Crim. P. 17(a)(1) (proceedings contemplated include Rule 35 depositions to perpetuate testimony). Alternatively, G.L. c. 261, § 27A–G, providing extra fees and costs necessary for an adequate defense, could probably be used.

defense.[56] This application may be filed and heard ex parte to avoid providing discovery to the prosecution that it would not obtain were the defendant wealthy enough to privately arrange for the summons of her witnesses.[57]

There is "inevitably an element of discretion" in the decision whether to grant an indigent's summons, because the court must decide whether there is a need for the witness; therefore the standard of review is abuse of discretion.[58] Last-minute applications may be denied.[59] However, at some point a denial will violate the defendant's rights to compulsory process, due process, and equal protection.[60]

Indigent summonses do not require tender of witness fees in advance of testimony.[61]

§ 13.3B. LIFE FELONY DEFENDANT'S SUMMONS

A defendant indicted for a life felony may summons witnesses necessary to the defense at Commonwealth expense, whether or not indigent.[62] The procedure is to file a "demand" with the

[56] Blazo v. Superior Court, 366 Mass. 141, 145 (1974). *Blazo* required an affidavit be included, but Kent Smith comments that because Rule 17 parallels the federal rule, which has been held not to require an affidavit, a written application is sufficient. Smith, *Criminal Practice and Procedure*, 30A MASS. PRAC. §§ 28.23-28.30 (3d ed. 2011).

[57] Mass. R. Crim. P. 17(b); Commonwealth v. Mitchell, 444 Mass. 786, 794 n.15 (2005); Blazo v. Superior Court, 366 Mass. 141, 145 n.8 (1974). *Cf.* Commonwealth v. Dotson, 402 Mass. 185, 187 (1988) (prosecutor has no role to play in determination whether indigent funding should be granted as necessary to defense).

[58] G.L. c. 261, § 27C; Commonwealth v. Drew, 397 Mass. 65, 70 (1986) (upholding denial of summons for inmate witness whose testimony would have been inadmissible hearsay). *Cf.* Commonwealth v. Blazo, 10 Mass. App. Ct. 324, 328 (1980) (discretion whether to order warrant for nonappearing witness); Commonwealth v. Watkins, 375 Mass. 472, 489 (1978), *denial of habeas corpus aff'd sub nom.* Watkins v. Callahan, 724 F.2d 1038 (1st Cir. 1984).

The standard poses an issue analogous to a motion under G.L. c. 261, §§ 27A–27D for extra fees and costs "reasonably necessary to assure the applicant as effective a . . . defense . . . as he would have if he were financially able to pay." That statute and case law interpreting it are addressed *supra* at § 8.4B.

[59] Commonwealth v. Edgerly, 6 Mass. App. Ct. 241 (1978); Commonwealth v. Dirring, 354 Mass. 523, 529–30 (1968) (delay in seeking summonses allowed judge to conclude defendant not in good faith). *See also infra* ch. 27 (request for continuance); Commonwealth v. Bryer, 398 Mass. 9, 15–16 (1986) (denial of continuance to summons out-of-state expert witness upheld, where simple case had been pending for some time, the defendant had caused multiple delays, and no need for the testimony was established); Commonwealth v. Watkins, 375 Mass. 472, 490 (1978) (whether to grant continuance to obtain attendance of witness is discretionary where compulsory process right does not require it); Commonwealth v. Scott, 19 Mass. App. Ct. 983, 985 (1985) (rescript), *appeal denied*, 394 Mass. 1104 (continuance to obtain witness denied because no process had been sought and no need shown); Commonwealth v. Funderberg, 374 Mass. 577, 580 (1978); United States v. Nivica, 887 F.2d 1110 (1st Cir. 1989) (denial of subpoena sought late in trial not abuse of discretion).

[60] *See supra* notes 4–7, 53, 54.

[61] This is an exception to the general requirements of G.L. c. 233, § 3, requiring that nonindigent defendants tender one day's legal fees and travel expenses before a defense witness may be compelled to appear. Under Mass. R. Crim. P. 17(c), a witness summoned via the indigent's procedure is paid only after certifying in writing the amount of his travel and attendance.

[62] G.L. c. 277, § 66. In Blazo v. Superior Court, 366 Mass. 141, 144 (1974), the court noted that this statute is available without proof of indigency.

clerk.[63] The request should be timely, and in some circumstances a showing of need, competency, and relevance may be required.[64]

§ 13.4 GROUNDS FOR DENYING OR QUASHING A SUMMONS

§ 13.4A. GENERALLY

Mass. R. Crim. P. 17(a)(2) provides that the court may on motion quash or modify a summons ordering production of documents or objects "if compliance would be unreasonable or oppressive, or if the summons is being used to subvert the [discovery] provisions of Rule 14." No similar provision explicitly authorizes a motion to quash a summons that compels only witness attendance and testimony. Although in most cases the compulsory process clause might require the witness to assert any objections or privileges from the stand,[65] some courts have quashed purely testimonial subpoenas.[66]

Several grounds for quashing a grand jury or trial summons are commonly asserted:

1. The summons is unreasonably overbroad, oppressive, or seeks irrelevant material.[67]

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[63] G.L. c. 277, § 66. *See also* Commonwealth v. Binkiewicz, 339 Mass. 590, 591 (1959).

[64] *See, e.g.*, Commonwealth v. Dirring, 354 Mass. 523, 529–30 (1968) (although c. 277, § 66 entitled defendant to compel process for all witnesses necessary to defense, this right does not automatically extend beyond territory of Commonwealth; summonses denied because no prima facie showing testimony of out-of-state witnesses would be relevant or competent, defendant was dilatory, and out-of-state summonses are discretionary).

[65] Asserting the privilege to individual questions in the course of trial might be avoided if the witness's counsel informs counsel for both parties of his client's intention. However, if the witness is forced to testify at trial, counsel should request permission to stand next to his client at the witness stand, or else arrange some method of communicating to the witness when he should claim the privilege. Counsel must be vigilant against an "implicit waiver by testimony" because "if an ordinary witness, not a party to a cause, voluntarily testifies to [an incriminating fact] he waives his privilege as to subsequent questions seeking related facts." Taylor v. Commonwealth, 369 Mass. 183, 189 (1975). *See infra* § 33.6.

[66] Interpreting an analogous provision in Fed. R. Crim. P. 17, the First Circuit stated that "although commentators have indicated that the better practice is to require the witness to appear and claim any privilege or immunity he or she may have . . . , courts have repeatedly, when the interests of justice have so warranted, heard and granted (and denied) motions to quash subpoenas or compel testimony." United States v. Klubock, 639 F. Supp. 117, 123 (1986), *aff'd*, 832 F.2d 649 (1st Cir. 1987), *on rehearing*, 832 F.2d 664 (1st Cir. 1987). *See also* Smith, *Criminal Practice and Procedure*, 30A MASS. PRAC. §§ 28.10, 28.22 (3d ed. 2011); Wright, FEDERAL PRACTICE AND PROCEDURE § 273 at 149 & n.12, § 275 at Supp. 28 & n.7.1 (1982 & Supp. 1989).

If a motion to quash is denied, appeal of a subsequent contempt citation is the general remedy; interlocutory appellate review is generally not available (although in extraordinary circumstances relief under G.L. c. 211, § 3 may be). In the Matter of a Grand Jury Subpoena, 411 Mass. 489 (1992). *See also* Matter of Rhode Island Grand Jury Subpoena, 414 Mass. 104, 107 (1993) (when subpoena directed at allegedly privileged records held by accountant, in order to obtain appellate review of the subpoena, the accountant must disobey it).

[67] Subpoenas duces tecum are valid at common law if they describe the material required with reasonable particularity, if the material is not plainly irrelevant to the authorized investigation, and if the quantum of material required does not exceed reasonable limits. Matter of Civil Investigative Demand Addressed to Yankee Milk, 372 Mass. 353, 360-61 & n.8 (1977). Violation of such a standard would qualify as an "unreasonable or oppressive" summons barred by Mass. R. Crim. P. 17(a)(2). *See also* Finance Comm'n v. McGrath, 343 Mass. 754, 765, 767 (1962). Regarding the parallel federal requirement, *see* In re Grand Jury Subpoena: Subpoena Duces Tecum, 829 F.2d. 1291, 1302 (4th Cir. 1987) (categories in subpoena did not identify specific videotapes; subpoena quashed for lack of specificity and because fishing expedition barred); In re Grand Jury Proceedings: Subpoena Duces Tecum, 827 F.2d 301 (8th Cir. 1987) (unreasonable subpoena because demanded too much irrelevant material); United States v. Lieberman, 608 F.2d 889 (1st Cir. 1979), *cert. denied*, 444 U.S. 1019 (subpoena covered unreasonable period of time, and was properly limited by the court).

2. The summons seeks inadmissible documents or testimony.[68]

3. The summons is designed for discovery or investigative purposes.[69]

4. The summons violates the state and federal constitutional protections against unreasonable searches and seizures or the recipient's privilege against self-incrimination. This subject is addressed *infra* at § 13.4B.

5. The summons violates the first amendment and its state counterpart, article 16 of the Massachusetts Constitution Declaration of Rights.[70]

6. The summons violates a common law or statutory privileges or disqualifications, such as those concerning psychotherapists, sexual assault counselors, attorneys or their work product, spouses, mediators, and social workers.[71] In an important decision that strongly reaffirms the importance of

[68] Rule 17 does not speak to the issue of admissibility. However, the equally ambiguous federal rule has been interpreted as requiring admissibility before production of objects may be compelled. United States v. Nixon, 418 U.S. 683, 700–01 (1974) (in federal prosecution, prosecution had to establish availability of coconspirator exception to compel Watergate tapes). *But see* United States v. R. Enterprises, Inc., 498 U.S. 292 (1991) (*Nixon* standard does not apply to grand jury subpoenas and motion to quash should be denied unless district court determines there is no reasonable possibility that materials sought will produce relevant information). Statutes that require court approval for the issuance of a summons (e.g., out-of-state or indigent summonses issued only if "necessary" to the party) might be construed to require admissibility since inadmissible evidence is not necessary. *See, e.g.*, Commonwealth v. Drew, 397 Mass. 65, 70 (1986) (upholding denial of summons for inmate witness whose testimony would have been inadmissible hearsay).

[69] Mass. R. Crim. P. 17(a)(2) bars the use of a summons as a means of subverting the discovery provisions of Rule 14. *See also* S.J.C. Rule 3:07, Mass. R. Prof. C. 3.8(f); Commonwealth v. Liebman, 379 Mass. 671, 677 (1980) (improper to use grand jury subpoenas for preparation after indictments issued, but no prejudice here); Commonwealth v. Smallwood, 379 Mass. 878 (1980) (prosecutor summoned witness for interview rather than court appearance). *Cf.* United States v. Nixon, 418 U.S. 683, 698 (1974) (Fed. R. Crim. P. 17 not intended as means of discovery).

[70] For example, the First Amendment right to freedom of association has been held to bar compelling production of membership lists. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458–66 (1958) (organization has standing to assert associational rights of members that would be violated by compelled production; "vital relationship between freedom to associate and privacy in one's associations"). *See also* Brown v. Socialist Worker's '74 Campaign Committee (Ohio), 459 U.S. 87 (1982) (campaign expense reporting law violated first amendment); Socialist Workers Party v. Attorney General of United States, 510 F.2d 253 (1974) (enjoining transmission of convention attendees to Civil Service Commission). In Surinach v. Pesquera de Busquets, 604 F.2d 73, 78–79 (1st Cir. 1979), the court struck down a subpoena of documents relating to the financing of Roman Catholic schools, noting that "compelled disclosure of information [in itself] has a potential for substantially infringing the exercise of First Amendment rights" (quoting Buckley v. Valeo, 424 U.S. 1, 66 (1976)); a compelling state interest, with no less intrusive alternative, is required. Where First Amendment freedoms are affected, the party seeking disclosure bears the burden of demonstrating on the justification on record. Baird v. State Bar of Arizona, 401 U.S. 1, 6–7 (1971). *See also* In the Matter of the Enforcement of a Subpoena, 436 Mass. 784 (2002) (subpoena of judge's spouse by Commission on Judicial Conduct upheld because, inter alia, no showing that subpoena would chill witness's rights of expression or association; there was nothing abusive or improper in the commission's inquiry of the judge's friends and supporters as part of the investigation; and privacy interests of both witness and judge were protected by the commission's confidentiality provisions.)

For an argument that compelled production of personal, private papers might unconstitutionally chill freedom of speech, see *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of* Fisher v. United States, 95 HARV. L. REV. 683 (1982).

[71] *See, e.g.*, G.L. c. 233, § 20B (psychotherapist-patient privilege); Commonwealth v. Rosenberg, 410 Mass. 347, 353 (1991) (psychotherapist privilege is not applicable to a psychologist who holds a doctoral degree in education although it might include agents of psychotherapists); Commonwealth v. Kobrin, 395 Mass. 284, 293–95 (1985) (grand jury subpoena of psychiatrist's records limited to exclude patient communications); D.A. for the Norfolk District v. Magraw, 417 Mass. 169 (1994) (representative of decedent's estate has authority to

attorney-client confidentiality, the Supreme Court has held that where an attorney made notes of an initial interview with a client shortly before the client's death, and the Government subpoeneaed those notes for use in a criminal investigation, the notes were protected by the attorney-client privilege.[72]

7. The summons compels the testimony of counsel, which requires special procedures.[73] Note that a summons of a member of the defense team might also violate the constitutional right to counsel.[73.5]

8. The summons seeks production of medical records, which by statute are confidential and may not be released without the patient's consent or a court order.[74]

9. The summons is improperly issued or is beyond the statutory authority of the issuing entity.[75]

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waive psychotherapist privilege); G.L. c. 112, § 135; Commonwealth v. Collett, 387 Mass. 424 (1987) (social worker privilege); G.L. c. 233, § 20A (priest-penitent privilege); G.L. c. 233, § 20J (sexual assault counselor privilege); G.L. c. 233, § 20(1) and (2) (marital disqualification and marital privilege); G.L. c. 233, § 23C (mediator privilege); G.L. c. 111, § 204 (medical peer review); Mass. R. Crim. P. 14(a)(5) and 26(b)(3) (work product).

The defendant is entitled to material, exculpatory evidence even if subject to a state privilege. To effectuate this right, the court must provide an in camera inspection of privileged materials or, in some cases, an opportunity for defense counsel to personally inspect the materials. *See* discussion *infra* § 16.3C.

[72] Swidler & Berlin & Hamilton v. United States, 524 U.S. 399 (1998). *But see* Commonwealth v. Senior, 433 Mass. 453, 456 (2001) (attorney-client privilege, which extends to all communications made to an attorney "for the purpose of facilitating the rendition of legal services" is destroyed when such communications are made in the presence of a non-necessary agent of the attorney or client, and because hospital personnel were not acting as the defendant's or his attorney's agents their records would have been discoverable by the Commonwealth in the same manner as information held by any nonparty witness.)

[73] *See supra* § 13.2A regarding Mass. R. Prof. C. 3.8. Even prior to the adoption of this Rule, the courts required special procedures. *First*, the prosecutor should be required to show a particularized need in advance. Conversely, in Commonwealth v. Blaikie, 375 Mass. 601, 608–609 (1978), *denial of habeas corpus aff'd sub nom.* Blaikie v. Callahan, 691 F.2d 64 (1st Cir. 1982), the defense was barred from calling the prosecutor to testify at trial. The S.J.C. upheld the trial court, stating that "when the defendant resorts to the extraordinary means of calling the prosecutor as a witness . . . he must make a satisfactory offer of proof as to the need for the prosecutor's testimony."

Second, special rules govern grand jury subpoenas of attorneys; *see supra* §§ 5.7D, 13.1A. *See also* Rent Control Board of Cambridge v. Praught, 35 Mass. App. Ct. 290 (1993) (municipal rent control board permitted to issue broad subpoena duces tecum to attorney).

[73.5] *See generally* Commonwealth v. Senior, 433 Mass. 453, 455 (2001). In *Senior*, evidence of defendant's blood alcohol test that was voluntarily taken at a hospital on advice of counsel was held admissible because hospital personnel were not defendant's agents or part of defense team, and nothing indicated hospital's employees had consented to act in that capacity; although the defendant and his attorney "may have hoped and intended that the hospital's employees would be their agents, the record does not suggest that they ever expressly communicated that expectation to the hospital's employees." For the same reason, there was found to be no violation of former S.J.C. Rule 3:08, PF 15, 396 Mass. 1217 (1986). (Current Mass. R. Prof. C. 3.8 (f), 426 Mass. 1397 (1998), was adopted after the subpoena was issued in this case.)

[74] G.L. c. 111, § 70. *See* Lockhart v. Newton-Wellesley Hosp. (Suffolk Sup. Ct. No. 64365) (Order of Tuttle, J., April 22, 1987) (counsel's subpoena not "court order"). *But see* Commonwealth v. Senior, 433 Mass. 453, 456 (2001) (grand jury summons which expressly stated that "this medical information is hereby ordered to be produced pursuant to G. L. c. 111, § 70," and was signed by a judge in the Superior Court satisfies statutory requirements.)

[75] *See, e.g.*, State Ethics Comm'n v. Doe, 417 Mass. 522 (1994) (affirming quash of summons issued by State Ethics Commission). *Cf.* In the Matter of the Enforcement of a Subpoena, 436 Mass. 784 (2002) (affirming broad authority of the Commission on Judicial Conduct.)

Additionally, the court may without motion deny a summons request where court action is required, such as when a defendant seeks an indigent's summons, a life felony defendant's summons, or an out-of state summons. In such cases courts have denied summonses when they would delay the trial[76] or would not obtain testimony necessary for an adequate defense.[77]

§ 13.4B. FOURTH OR FIFTH AMENDMENT OBJECTIONS TO A SUMMONS

(*See also infra* chs. 33 (witness's privilege against self-incrimination) and 17 (search and seizure) and *supra* § 11.7 (attorney's possession of physical evidence incriminating to client; production pursuant to duty or to subpoena).)

In *Boyd v. United States*[78] the Supreme Court found that both the fourth and fifth amendments barred the government from using a subpoena duces tecum to compel a defendant to produce his private books and papers,[79] but that holding has been severely undercut in recent decades. Present case law is ambiguous but might be summarized as follows:

Interpreting the Fourth Amendment, the Supreme Court has held that the particularity and reasonableness requirements, but not the probable-cause requirement, apply to subpoenas.[80] The Supreme Judicial Court has similarly noted that a summons that requires production of objects that are irrelevant to the case or insufficiently described would invoke Fourth Amendment protections.[81]

As to the Fifth Amendment, the Supreme Court now confines the privilege to protecting an individual [82] from (1) government compulsion that creates a (2) self-incriminating [83] (3) "testimonial

[76] If a party has had adequate opportunity to summons a witness and waits until the last minute, threatening to delay an impending trial, that party may not be entitled to a continuance for that purpose, or to an indigent summons. *See supra* note 59.

[77] *See supra* §§ 13.3 (requirement of necessity for summons issued at Commonwealth expense) and 13.2D (criteria for issuing out-of-state summons).

[78] 116 U.S. 616 (1886).

[79] In *Boyd* the lower court had ordered a company to produce an invoice for items it had illegally imported. The court found compelled documentary production constituted "forcible and compulsory extortion of a man's own testimony" and violated "established common law principles." *See* Commonwealth v. Hart, 455 Mass. 230, 242-44 (2009); Commonwealth v. Odgren, 455 Mass. 717, 181-82 (2009); Commonwealth v. Mitchell, 444 Mass. 786, 791-92 n.12 (2005); Commonwealth v. Lampron, 441 Mass. 265, 270 (2004).

[80] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208–09 (1946).

[81] Commonwealth v. Hughes, 380 Mass. 583, 586–87 & n.4 (1980) (dictum). *See also* In re Melvin, 546 F.2d 1 (1st Cir. 1976) (under Fed. R. Crim. P. 17 while *grand jury's subpoena* is not a "seizure" under Fourth Amendment because of exclusive investigative role of grand jury, citing United States v. Dionisio, 410 U.S. 1 (1973), and United States v. Mara, 410 U.S. 19 (1973), *prosecutor's* subpoena to appear in line-up is improper major intrusion on personal liberty); In re Grand Jury Subpoena (Allied Auto Sales), 606 F. Supp. 7, 11–12 (D.R.I. 1983) (three criteria of "reasonableness" are relevance of material to investigation, specification of materials with "reasonable particularity," and reasonable time period covered by record subpoenas); Stornanti v. Commonwealth, 389 Mass. 518, 527 n.14 (1983) (Medicaid records custodian's claim that patient's privacy rights violated by subpoena invalid since patients on notice they were not confidential); Finance Comm'n v. McGrath, 343 Mass. 754, 765 (1962) (subpoena that is overbroad and unreasonable under Fourth and Fourteenth Amendments should be quashed or modified) (citing Hale v. Henkel, 201 U.S. 43, 76 (1906)).

[82] The privilege does not accrue to corporations (Hale v. Henkel, 201 U.S. 43 (1906)), or to other organizations that embody group rather than individual interests. United States v. White, 322 U.S. 694 (1944); Bellis v. United States, 417 U.S. 85 (1974) (particularly structured law firm). Note also that business records required by law to be kept for the benefit of the public may be compelled under the required records exception to both the federal and state privilege. Stornanti v. Commonwealth, 389 Mass. 518, 525–26 (1983); Shapiro v. United States, 335 U.S. 1 (1948). *See also* In the Matter of Kenney, 399 Mass. 431, 437–442 (1987).

communication."[84] Because *preexisting* writings were authored voluntarily rather than compelled, the court has found their *contents*, no matter how incriminating, generally not protected under the privilege.[85] (However, it is undecided whether personal, private papers might retain protection under *Boyd.*[86]) Nevertheless, the Supreme Court has held that a subpoena duces tecum would violate the

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Although the Supreme Court has held that a corporate officer cannot claim the privilege against compelled production of corporate records, even if individually incriminating (Braswell v. United States, 487 U.S. 99 (1988)), art. 12 of the Mass. Const. Declaration of Rights dictates a different result. Commonwealth v. Doe, 405 Mass. 676, 679–80 (1989) (while corporation has no privilege, if records would be incriminating to individual who produced them, he may assert art. 12 privilege). *See also* Metro Equipment Corp. v. Commonwealth, 74 Mass. App. Ct. 63, 67-68 (2009).

[83] The privilege only bars a subpoena duces tecum if the risk of incrimination is "substantial and real," not "trifling or imaginary." United States v. Doe, 465 U.S. 605, 614 n.13 (1984). *See also* Commonwealth v. Hughes, 380 Mass. 583, 590–92, *cert. denied*, 449 U.S. 900 (1980); In re Grand Jury Proceedings, 626 F.2d 1051, 1056–57 (1st Cir. 1980) (where production would incriminate by authenticating object, immunity necessary to compel production, even if other witnesses might also authenticate); Fisher v. United States, 425 U.S. 391, 407, 411 (1976) (on facts of this case, existence and location of papers were foregone conclusion, so production would add little or nothing to the government's case). In the United States v. Balsys, 524 U.S. 666, 671-74 (1998), the Court held that the Fifth Amendment privilege against self-incrimination, based on fear of prosecution by a foreign nation, is beyond the scope of the self-incrimination clause in the context of an administrative subpoena from the Office of Special Investigations of the Criminal Division of the United States Department of Justice (OSI) that sought testimony about respondent's WWII activities and his immigration to the United States.

[84] Compulsion that produces physical rather than communicative evidence is not protected by the privilege. Commonwealth v. Brennan, 386 Mass. 772, 780–83 (1982) (breathalyzer and field sobriety tests not testimonial); Schmerber v. California, 384 U.S. 757, 764–65 (1966) (blood sample; court states that compelled appearance in court also not within privilege because nontestimonial, physical production). *See also* Commonwealth v. Beausoleil, 397 Mass. 206, 222–223 (1986) (ordering defendant to undergo blood test in paternity case doesn't violate privilege); Commonwealth v. Nadworny, 396 Mass. 342, 362–66 (1985) (handwriting exemplar nontestimonial); Commonwealth v. Appleby, 358 Mass. 407, 413 (1970) (benzidine tests of body and fingernail clippings, and analysis of clothing for blood all nontestimonial); Commonwealth v. Burke, 339 Mass. 521, 534–35 (1959) (defendant's assuming physical stance in courtroom was nontestimonial).

[85] United States v. Hubbell, 530 U.S. 27 (2000) (indictment ordered dismissed where evidence that would have been offered at trial was derived from the testimonial aspect of defendant's immunized production of documents pursuant to subpoena and 18 U.S.C. § 6003); United States v. Doe, 465 U.S. 605, 612 & n.10 (1984); Fisher v. United States, 425 U.S. 391, 409 (1976). *See also* United States v. Feldman, 83 F.3d 9 (1st Cir. 1996) (defendant's letter of apology was not protected because it was prepared voluntarily). *Cf.* In re Grand Jury Proceedings, 173 F.R.D. 336 (1997) (First Amendment privilege held to protect sworn affidavit written by target of grand jury investigation which contained potentially incriminating personal statements denying involvement with child pornography — "compelled production of this potentially incriminating personal statement, prepared in the privacy of a lawyer's office, 'would break the heart of our sense of privacy,' and would completely eviscerate that privilege which embodies the citizen's historic protection against the power of government to force a person to incriminate himself by his own words. What little that is left of the Boyd Doctrine dictates that the witness Tanger has a valid Fifth Amendment privilege in this case").

[86] United States v. Doe, 465 U.S. 605, 618, 619 (1984) (O'Connor concurrence and Marshall dissent) (disagreeing whether court has reconsidered *Boyd* holding that content of private papers protected). *See* Packwood v. United States, 114 S. Ct. 1036 (1994) (denying motion for stay of lower court decision enforcing subpoena duces tecum and citing Doe v. United States, 510 U.S. 1091 (1994) (denial of *certiorari* on question whether *Boyd* controls with regard to production of private papers, as proof of the improbability that four justices would vote to grant review on this issue)). *See also* Barrett v. Acevedo, 143 F.3d 449, 456 (8th Cir. 1998) (analyzing current split in circuits on the question of production of private papers and holding that Fifth Amendment did not protect defendant from subpoena duces tecum relating to his journal either on grounds that its contents or the act or producing it incriminated him); United States v. Under Seal, 745 F.2d 834 (4th Cir. 1984), *grant of cert. vacated sub nom.* United States v. John Doe, 471 U.S. 1001 (1985) (content of personal records of purchases and other transactions protected); In re Grand Jury Subpoena Duces Tecum (Passports), 544

privilege if the *act of producing* the object is itself an incriminating communication — such as a communication that the object exists, is authentic, or is in the possession of the defendant.[87] Interpreting article 12 the Supreme Judicial Court has used similar reasoning to bar compelled production of a gun,[88] and has also expressed doubt that the defendant may be compelled to deliver the corpus delicti.[89]

Counsel seeking to quash a summons should additionally always cite article 12 of the state constitution, which affords broader protection than the Fifth Amendment,[90] and in some cases an

F. Supp. 721 (S.D. Fla. 1982) *(Boyd* applies to protect private papers); In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981, 522 F. Supp. 977 (S.D.N.Y. 1981).

[87] United States v. Hubbell, 530 U.S. 27 (2000); Doe v. United States, 487 U.S. 201, 209 (1988); United States v. Doe, 465 U.S. 605, 612–14 & n.13 (1984) (grand jury subpoena of sole proprietor to produce his business records was unconstitutional because it would compel him to tacitly admit existence, possession, and authenticity of records); Fisher v. United States, 425 U.S. 391, 410–13 (1976) (compliance with subpoena in some circumstances would concede existence of papers demanded, possession or control by taxpayer, and his belief these papers are the ones described in subpoena). *See also* 8 WIGMORE, EVIDENCE § 2264 (J. McNaughten rev. 1961) (authentication within borders of privilege).

In Baltimore v. Bouknight, 493 U.S. 549 (1990) the Supreme Court recognized that an order that a mother suspected of child abuse produce her child would compel an incriminating communication that she had control over her son. Explicitly reserving the question of whether evidence of such a compelled production would be admissible in a criminal trial, the court upheld the finding of contempt, on the narrow grounds that (1) in earlier child abuse proceedings, the mother had assumed custodial duties with obligations of disclosure, and (2) production was sought as part of a broadly applied civil regulatory scheme, for compelling reasons having nothing to do with criminal prosecution, citing California v. Byers, 402 U.S. 424 (1971) (law requiring driver in accident to give name and address constitutional). By its logic, *Bouknight* should not alter a criminal defendants motion to quash a prosecutor's subpoena.

[88] In Commonwealth v. Hughes, 380 Mass. 583, 590–92, *cert. denied*, 449 U.S. 900 (1980), the S.J.C., deciding a contempt appeal, held that under both the Fourth Amendment and article 12, compelled production of a gun would itself be testimonial in nature, making an implicit statement about its existence, location, and control by the defendant. "It is extortion of information from the accused himself that offends our sense of justice." *Hughes, supra*, 380 Mass. at 595 (quoting Couch v. United States, 409 U.S. 322, 328 (1973)). *See also* Commonwealth v. Doe, 405 Mass. 676, 679 (1989); In the Matter of Kenney, 399 Mass. 431, 440–41 (1987).

[89] Commonwealth v. Hughes, 380 Mass. 583, 595 (1980). Other courts have invalidated court orders to produce contraband, on the theory that this is equivalent to compelling a confession. *See, e.g.*, State v. Dennis, 558 P.2d 297 (Wash. App. 1976); United States v. Campos-Serrano, 430 F.2d 173, 176 (7th Cir. 1970), *aff'd on other grounds*, 404 U.S. 293 (1971), *cert. denied*, 404 U.S. 1023 (1972). The *Fisher* "act of production" theory would also seem to protect against compelled production of contraband.

[90] *See* Commonwealth v. Doe, 405 Mass. 676, 679–80 (1989); Emery's Case, 107 Mass. 172, 180–82, 185–86 (1871); Metro Equipment Corp. v. Commonwealth, 74 Mass. App. Ct. 63, 68 (2009) (article 12 protection against self-incrimination extends only to natural persons; but protections for record custodians are broader than those under the Fifth Amendment). *See also* Commonwealth v. Burgess, 426 Mass. 206 (1997) (court order that defendant execute an IRS form authorizing the release of tax returns not barred by the privilege against self-incrimination under the Fifth Amendment to the U.S. Constitution or art. 12 of the Mass. Const. Declaration of Rights or by I.R.C. provision that arguably precluded state court from entering the requested order). *But see* Matter of John Doe Grand Jury Investigation, 418 Mass. 549, 552–53 (1994) (custodian of corporate records may invoke art. 12 right when the act of production itself would be self-incriminating, but corporations have no personal privilege against self-incrimination and may not rely on art. 12 protection in refusing to comply with a grand jury subpoena); *cf.* Wilkins, J. (concurring) (there may well be a need for a showing of probable cause to seize the records; the court may not be justified in simply directing a warrantless search for them); *see also* Liacos, J. (dissenting) (asserting that the plurality decision is based on fiction that appointment of alternate keeper of records protects individuals' art. 12 rights).

argument might be made that the summons of private personal or political papers infringes on rights guaranteed by the First Amendment and its state counterpart, article 16 of the Declaration of Rights.[91]

Summons to third-party custodian of records. There are special problems when the summons is directed to a neutral third party who is the custodian of records that might invade the privacy or Fifth Amendment privilege of another, such as a bank directed to produce depositor's records.[92] Lack of standing,[93] or the absence of a legitimate expectation of privacy, might pose an obstacle to a Fourth Amendment objection.[94] Regarding the Fifth Amendment, federal decisions have held that the Fifth Amendment protects only against personally incriminating compulsion and does not protect the privacy or self-incrimination interests of another who was not compelled, with certain exceptions noted in the margin.[95]

§ 13.5 SERVICE; GOVERNMENT ASSISTANCE IN OBTAINING SERVICE

A summons may be served by any disinterested person.[96] The Reporter's Notes to Mass. R. Crim. P. 17(d) state that the law appears to permit attorney service, but notes that the practice has been criticized as "unwise." Many attorneys use investigators or law students for this purpose.

The summons is served by delivering a copy to the recipient personally, by leaving it at his dwelling or usual abode with a resident of "suitable age and discretion," or by mailing it to his last

[91] *See supra* note 70.

[92] *See* Matter of John Doe Grand Jury Investigation, 418 Mass. 549, 552–53 (1994) (the personal privilege against self-incrimination of individual representatives of a corporation does not extend to the corporation's papers and records; even a close corporation may be ordered to appoint an alternate keeper of records to comply with a subpoena).

[93] *See* Matter of a Rhode Island Grand Jury Subpoena, 414 Mass. 104, 111 (1993) (a party claiming a privilege in documents that are in the custody of another has no standing to intervene to move to quash a grand jury subpoena requiring the custodian to produce the documents).

[94] The Supreme Court, interpreting the Fourth Amendment, found depositor transactions not protected from subpoena in United States v. Miller, 425 U.S. 435 (1976); the customer did not have a legitimate, reasonable expectation of privacy in checks and deposit slips voluntarily conveyed to the bank. In Smith v. Maryland, 442 U.S. 735 (1979), the Court held that the government could properly use a record of numbers dialed by a telephone customer, since these numbers, as opposed to the content of the calls, were not entitled to an expectation of privacy. However, some third-party records would, if produced, implicate privacy interests. *Cf.* Stornanti v. Commonwealth, 389 Mass. 518, 527 n.14 (1983) (subpoena of patient's Medicaid records upheld based on a diminished expectation of privacy because patients were warned they might be produced).

[95] *See, e.g.*, Couch v. United States, 409 U.S. 322, 329 (1973) (accountant's production of tax records did not invade taxpayer's privilege). However, where the custodian is an attorney who received the object from the client in a privileged transaction, and the client would have a Fifth Amendment privilege, the court will analyze the case as if the client never made the transfer; that is, the attorney-client privilege incorporates the client's Fifth Amendment privilege. Commonwealth v. Hughes, 380 Mass. 583, 589, n.7, *cert. denied*, 449 U.S. 900 (1980) (citing Fisher v. United States, 425 U.S. 391, 396–405 (1976), which held that an attorney's production of client's tax record's did not violate client's privilege only because the protected communications were not at issue in the case). And if the third party receiving the subpoena is merely a momentary custodian, or is keeping the records solely for the owner, the privilege might apply. *Couch*, *supra*, 409 U.S. at 333; In re Grand Jury Proceedings (Manges), 745 F.2d 1250 (9th Cir. 1984).

[96] Under Mass. R. Crim. P. 17(d)(1) a summons may be served by any person authorized to serve a summons in a civil action or to serve criminal process. This rule thus incorporates the criteria of Mass. R. Civ. P. 45(c) (any person over 18 years old who is not a party may serve a civil summons) and G.L. c. 233, § 2 (summons may be issued by any officer qualified to serve civil process or other disinterested person).

known address.[97] (Mailing, however, may leave defense counsel unable to prove "actual notice" of the summons by a nonappearing witness, which is a prerequisite for a capias. Additionally, mailing is available for a nonindigent's summons only if the witness fee is enclosed, because payment must be tendered with the summons.[98]) A return of service must be filed with the court.[99] A summons may be served anywhere within Massachusetts, or, using procedures detailed *supra*, out of state.[100]

Government's responsibility regarding defense witnesses. The government is generally not obligated to locate or produce a defense witness unless he is a government informant, state inmate, state official, or otherwise within state control, or is someone who the state made unavailable.[101] Secreting a witness or causing her to leave the jurisdiction so that she is unavailable as a witness is unprofessional conduct[102] and, when done by the prosecution, a violation of the defendant's constitutional rights.[103]

§ 13.6 FAILURE OF THE WITNESS TO APPEAR

Knowing failure of a summoned witness to appear is contempt of court and is punishable by fine or imprisonment or both.[104] Additionally, a summoned witness who fails to attend is liable to the aggrieved party in tort for all consequent damages.[105] If a summoned witness has received actual notice and fails to appear, a warrant may issue to bring her before the court both to testify and to answer for contempt,[106] but whether to order a warrant is discretionary with the judge.[107] Also, if a witness is

[97] Mass. R. Crim. P. 17(d)(1). *See also* G.L. c. 233, § 2 (service by reading summons to witness, giving him a copy, or leaving copy at abode).

[98] Reporter's Notes to Mass. R. Crim. P. 17(d), citing advance payment provision of G.L. c. 233, § 3.

[99] Mass. R. Crim. P. 17(d)(3).

[100] Mass. R. Crim. P. 17(d)(2).

[101] Guaraldi v. Cunningham, 819 F.2d 15, 19 (1st Cir. 1987). Regarding prisoners, *see also* G.L. c. 248, § 25 (state habeas corpus exists to obtain prisoner to testify as witness). Regarding informants, it has been held that the Commonwealth cannot obstruct access to an informer whose identity is known to the defense and must offer what it knows of his location. Commonwealth v. Madigan, 449 Mass. 702, 711 n.13 (2007); Commonwealth v. Curcio, 26 Mass. App. Ct. 738, 746–47 (1989).

[102] Mass. R. Prof. C. 3.4; *see also* former S.J.C. Rule 3:07, DR 7-109.

[103] It is also a violation for the prosecution to advise a witness not to talk to a defense investigator or attorney. *See supra* § 11.6D(1).

[104] G.L. c. 233, § 5. The punishment is $200 and/or one month in jail.

[105] G.L. c. 233, § 4.

[106] G.L. c. 233, § 6. *See also* Mass. R. Crim. P. 17(e) (warrant may issue to bring witness to court); G.L. c. 277, § 70 (court may issue warrant to compel Commonwealth witness to appear). It should be noted that although a summons may generally be served by mail, Mass. R. Crim. P. 17(e) requires that the witness had "actual notice" of the summons as a prerequisite to the issuance of a bench warrant.

[107] Commonwealth v. Blazo, 10 Mass. App. Ct. 324, 328 (1980); Commonwealth v. Watkins, 375 Mass. 472, 489 (1978). *See also* Mass. R. Crim. P. 17(e) (warrant *may* issue). The failure of a judge to issue a bench warrant for a material alibi witness has been held to be reversible error where defense counsel had properly subpoenaed the witness, promised in opening that the witness would testify, and the witness was not impeachable on grounds of being a close friend of the defendant or as one who had failed to give exculpatory information to the police. Commonwealth v. Adderley, 36 Mass. App. Ct. 918 (1994).

found to be "unavailable" as demonstrated by a good faith effort to obtain the witness's presence at trial, then reliable prior recorded testimony may be admissible.[108]

[108] Commonwealth v. Robinson, 69 Mass. App. Ct. 576, 579-80 (2007); Commonwealth v. Florek, 48 Mass. App. Ct. 414, 415 (2000); Commonwealth v. Siegfriedt, 402 Mass. 424, 427 (1988); Commonwealth v. Bohannon, 385 Mass. 733, 741 (1982); Ohio v. Roberts, 448 U.S. 56, 65–6 (1980).