

CHAPTER 14

NOVEMBER, 2010

The Pretrial Conference

*Written by Eric Blumenson **

Table of Contents:

§14.1 Generally.....	1
§14.2 Subject Matter of the Conference	3
§14.3 Conference Report and Its Effect on Pretrial Motions Practice.....	5
§14.4 Attendance and/or Signature of the Defendant.....	7

Cross-References:

Pretrial motions generally, ch. 15
Discovery generally, ch. 16
Discovery sanctions, §§ 16.4, 16.8E

§ 14.1 GENERALLY

MASS. R. CRIM. P. 11 governs the pretrial conference, which is mandatory in all criminal cases.¹ Pretrial conferences in district court cases commenced are also governed by DIST./MUN. CTS. R. CRIM. P. 3 and 4.²

At arraignment, the court will docket a pretrial conference “...on a date certain to consider such matters as will promote a fair and expeditious disposition of the case,”³ and also assign a pretrial hearing date except on a complaint regarding which the court will not exercise final jurisdiction.

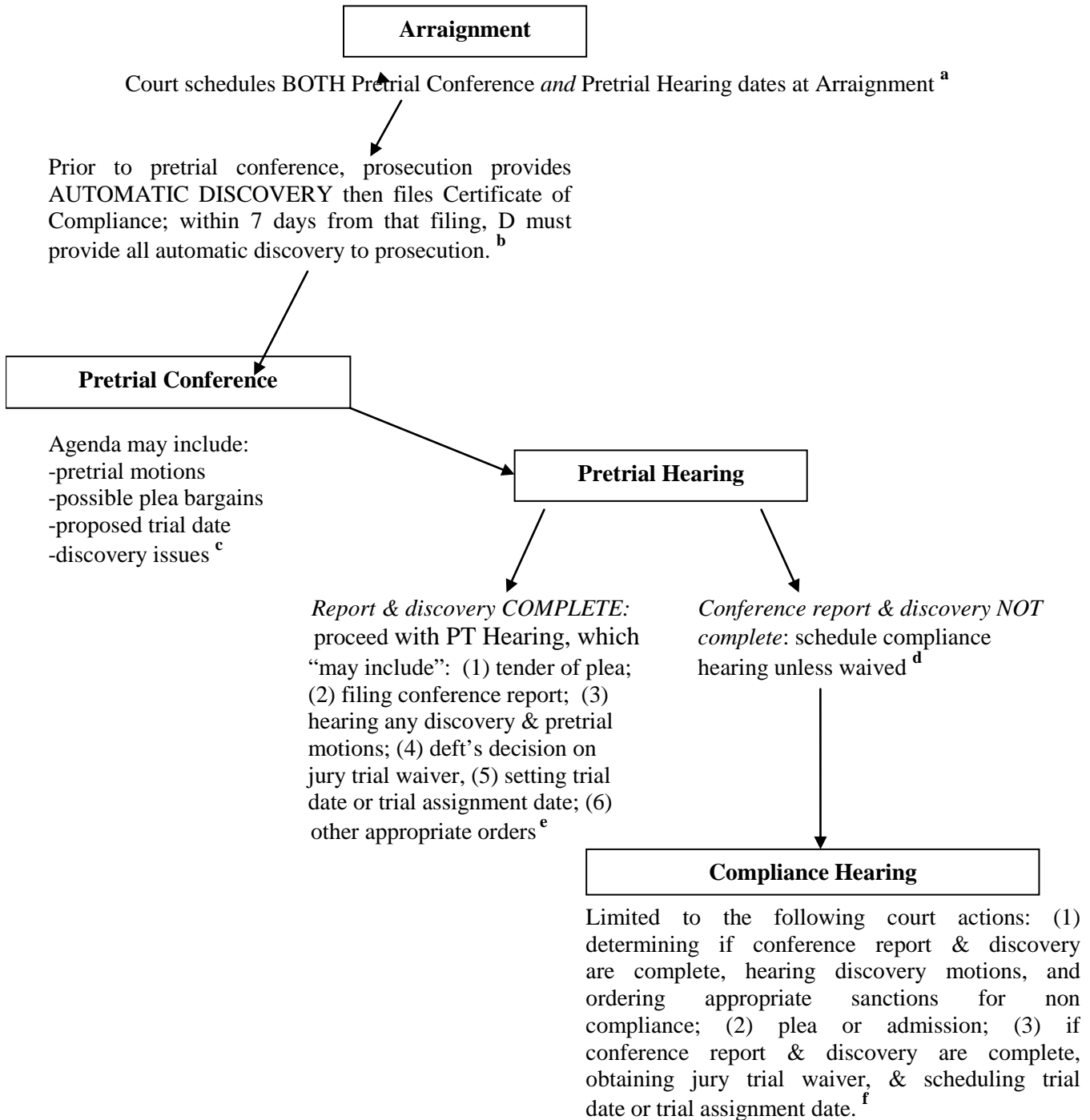
* With thanks to Bridget Mullaly for research assistance.

¹ MASS. R. CRIM. P. 11(a). Due to a 2004 amendment of the Massachusetts Rules of Criminal Procedure, pretrial conferences are now mandatory in all cases docketed in a superior, juvenile, district, or municipal court.

² In the district courts, the pretrial conference — a meeting between the prosecutor and defense attorney to discuss discovery and trial matters — is distinguished from the pretrial hearing, which takes place in open court. The parties are first required by DIST./MUN. CTS. R. CRIM. P. 3(c) to engage in a conference pursuant to MASS. R. CRIM. P. 11. In the BMC, this conference is supposed to take place under the supervision of an Assistant Clerk-Magistrate. The parties are then to appear before the court for a “pretrial hearing” regarding the results of that conference. DIST./MUN. CTS. R. CRIM. P. 3(c), 4.

³ MASS. R. CRIM. P. 11(a).

RULES 11, 13, & 14 SEQUENCE OF EVENTS:



^a MASS. R. CRIM. P. 11(a). See ch.7 on arraignment.

^b MASS. R. CRIM. P. 14(a)(1), (3); 14(a)(1)(B). See ch. 16 on discovery.

^c MASS. R. CRIM. P. 11(b).

^d MASS. R. CRIM. P. 11(b)(2)(iii).

^e MASS. R. CRIM. P. 11(b).

^f MASS. R. CRIM. P. 11(c).

This chapter concerns the pretrial conference; the next chapter concerns the pretrial hearing in court, and the compliance hearing if any. To place the pretrial conference in context, however, it is worth noting the sequence of events of which the pretrial conference is an early part. This sequence is visualized on the flow chart on the second page of this chapter.

At the pretrial hearing, the court must hear all discovery motions pending at that time, and other pending pretrial motions may be heard at the hearing, continued to a specified date for a hearing, or transmitted for hearing and resolution by the trial session.⁴

The pretrial conference controls the scope of subsequent motions practice. Failure to attend or to raise an issue at a pretrial conference may foreclose a subsequent motion and waive that issue forever, as detailed below. The conference sometimes can also be used affirmatively to obtain discovery beyond the mandatory categories of Rule 14, or other benefits, without the necessity of filing “boiler plate” motions, and to get at least an inkling of the prosecution’s strategy. The risks and opportunities of the pretrial conference obligate counsel to be expeditious in preparing the case, since a thorough familiarity with the case is required for intelligent plea bargaining and/or selection of pretrial motions.

The degree of participation in the conference system by a judge or clerk/magistrate varies from court to court.⁵ Additionally, district court cases commenced in 1996 or thereafter, but not superior court cases, are governed by Dist./Mun. Cts. R. Crim. P. 4, which sets out mandatory discovery requirements that must be complied with before a jury waiver.⁶

§ 14.2 SUBJECT MATTER OF THE CONFERENCE

⁴Mass. R.Crim.P. 11(b).

⁵ Re judge or magistrate’s involvement in the conference: MASS. R. CRIM. P. 11(a) provides that the court “may require” the conference to be held at court with a judge or magistrate present. The Reporter’s Notes describe that the Boston Municipal Court practice of holding a conference before a magistrate has provided efficient results. However, it acknowledges that not all district courts have adequate personnel and courtrooms so each court is left to determine this issue.

Additionally, UNIFORM MAGISTRATE RULE 3 provides that the court may establish a procedure by which conferences are conducted in the presence of a magistrate. However, the magistrate may not participate in plea negotiations.

With respect to judicial involvement in plea bargaining, *see infra* § 37.5.

⁶ Absent a plea, the judge will examine the pretrial conference report, rule on discovery issues, and, unless discovery has not been completed, inquire if the defendant wishes to waive the right to a jury trial. The court shall not compel the defendant’s decision on waiver of a jury trial until all discovery issues have been resolved and compliance with any discovery orders has been completed. A trial or probable cause hearing date will, however, be set in the district court, and in the BMC, the case shall be scheduled for a date certain for trial assignment. DIST./MUN. CTS. R. CRIM. P. RULE 4(d)–(f). A party may request a subsequent court hearing to ensure compliance with discovery orders. At that hearing, the court may determine discovery compliance and, if necessary, order appropriate sanctions for noncompliance; receive and act on a tender of plea or admission; and obtain the defendant’s decision on waiver of the right to jury trial and the scheduling of a trial or trial assignment date. MASS. R. CRIM. P. 11(c); DIST./MUN. CTS. R. CRIM. P. 5.

The purpose of a pretrial conference is “to promote a fair and expeditious disposition of the case.” Rule 11(a)(1) provides a non-exhaustive list of the subjects to be discussed at the conference, including:

1. Pretrial motions;
2. Possible plea bargains. In both district and superior court, if a plea arrangement is made at that time, then it should be included in the conference report;⁷
3. If the case will be tried, the trial date, whether there will be a jury waiver, the probable length of trial, the availability of witnesses, and whether issues of facts can be resolved by stipulation. The parties are to propose a trial date subject to the approval of the court, which when fixed by the court, may not then be changed without express permission of the court;⁸
4. While not specifically mentioned in Rule 11, the Reporter's Notes suggest as proper subjects: discovery of the Commonwealth's intent to use prior acts or convictions of the defendant at trial; the possibility of joinder or transfer of charges; agreements to take a Rule 35 deposition; and stipulations concerning whether delays should be considered “excludable” under the speedy trial provisions of Rule 36(b).

MASS. R. CRIM. P. 14 provides a list of mandatory discovery items that the prosecution must produce for the defense at or before the pretrial conference.⁹ Each item must be produced provided it exists and is (1) relevant to the case; (2) within the possession, custody, or control of the prosecution or its agents;¹⁰ and (3) not the subject of a motion for a protective order.¹¹

§ 14.3 CONFERENCE REPORT AND ITS EFFECT ON PRETRIAL MOTIONS PRACTICE

The conference report “control[s] the subsequent course of the proceedings”¹² in three major respects:

- (1) *Report is binding*: If prospective pretrial motions are agreed to at the conference, their substance must be included in the conference report and will bind the parties.¹³ For example, discovery agreements in the report have been held equivalent to a court order and therefore subject to all of the same sanctions for noncompliance.¹⁴

⁷ See MASS. R. CRIM. P. 12(b)(2) (requires counsel to notify the court of the existence of any agreement contingent upon the defendant's plea).⁸ MASS. R. CRIM. P. 14(a)(1)(A); see Chapter 16, Discovery, for further description of the andatory items.

⁸ MASS. R. CRIM. P. 14(a)(1)(A); see Chapter 16, Discovery, for further description of the andatory items.

⁹ The Reporter's Notes for Rule 14 describe that this rule establishes a formal discovery procedure, and it was not intended to discourage those disclosures which may occur at a pretrial conference under MASS. R. CRIM. P. 11 or whatever other informal discovery may be agreed upon by the parties. See *Commonwealth v. Delaney*, 11 Mass. App. Ct. 398 (1981).

¹⁰ Only evidence in the possession, custody or control of the prosecution at the time of the pretrial conference is due at that time. A party can discover or retain an expert later in the course of trial preparation, at which point it must provide discovery under the continuing duty requirement of MASS. R. CRIM. P. 14(a)(4).

¹¹ MASS. R. CRIM. P. 14(a)(1)(A).

¹² MASS. R. CRIM. P. 11(a)(2)(A).

¹³ MASS. R. CRIM. P. 11(a)(2)(A) (“agreements reduced to writing in the conference report shall be binding on the parties and shall control the subsequent course of the proceeding”); *Commonwealth v. Durning*, 406 Mass. 485, 495 (1990) (parties required to

(2) *Failure to participate*: If a party fails to participate in pretrial conference or cooperate in filing the report, it may not file a pretrial motion or obtain a continuance of the trial date without leave of the court on cause.¹⁵ Defense counsel must object to the prosecutor's failure to file, or any resulting delay may be excluded from speedy trial calculations.¹⁶

If the parties fail to appear and file the report, the case will be scheduled for trial at the earliest possible time. The Rule also permits the judge to impose additional, unspecified sanctions.¹⁷

(3) *Report limits subsequent motions*: Only pretrial motions whose subject matter could not be agreed on at the conference may be filed.¹⁸

Under Rule 11(b)(2)(i), the parties are required to file the pretrial conference report at the pretrial hearing if there is no plea or disposition. The report form utilized by the Boston Municipal Court is available [here](#).¹⁹ In practice, the pretrial report may not have been completed at the pretrial conference and will be executed on the hearing date, although the better practice would counsel otherwise. Court-promulgated form is available in court and also on the Massachusetts Court System Website along with other

memorialize agreements in written report). If counsel will be relying on agreements reached at the conference, careful drafting of the report is required. *See, e.g.,* Commonwealth v. Lopes, 25 Mass. App. Ct. 988 (1988) (because neither side could produce the report, judge need not sanction noncompliance with purported discovery agreement).

¹⁴ *See* Commonwealth v. Viriyahiranpaiboon, 412 Mass. 224, 228 (1992); Commonwealth v. Gallarelli, 399 Mass. 17, 20 (1987) (new trial ordered because pretrial report's agreement to provide exculpatory evidence violated); Commonwealth v. Mellone, 24 Mass. App. Ct. 275, 283 (1987) (judge would have been justified in excluding testimony where discovery promised in report was not delivered); Commonwealth v. Dranka, 46 Mass. App. Ct. 38 (1998) (reversing conviction where judge excluded testimony of defendant's expert as sanction); Commonwealth v. Chappée, 397 Mass. 508, 517 (1986) *habeas denied sub nom.* Chappée v. Vose, 843 F.2d 25 (1st Cir. 1988) (upholding exclusion of defendant's evidence for violation of agreement); Commonwealth v. Gliniewicz, 398 Mass. 744, 746–49 (1986) (reversed because destruction of evidence violated pretrial agreement to permit defendant to inspect evidence); Commonwealth v. Pope, 19 Mass. App. Ct. 627, 630 n.3 (1985) (affirming conviction because prosecution did not intentionally conceal identity of witness for advantage); Commonwealth v. Scally, 17 Mass. App. Ct. 224, 230–31 & n.8 (1983) (no violation of agreement and no prejudice). Commonwealth v. Delaney, 11 Mass. App. Ct. 398, 401–05 (1981) (failure to exclude surprise Commonwealth witness was within court's discretion).

The sanctions for noncompliance with a discovery order are contained in MASS. R. CRIM. P. 14(c). *See* full discussion *infra* at §§ 16.4 and 16.8E (sanctions for noncompliance with discovery).

¹⁵ MASS. R. CRIM. P. 11(a)(2)(B).

¹⁶ Barry v. Commonwealth, 390 Mass. 285, 298 n. 16 (1983).

¹⁷ MASS. R. CRIM. P. 11(a)(2)(B).

¹⁸ MASS. R. CRIM. P. 13(d). The Reporter's Notes of Rule 13(d) describe that by requiring the parties to discuss and compare the substance of all of the pretrial motions that they intend to file before trial at the pretrial conference, the conference will be more productive by avoiding "boiler plate" motions.

¹⁹ The pretrial report form that is used at the Boston Municipal Court is available at, <http://www.mass.gov/courts/courtsandjudges/courts/bostonmunicipalcourt/forms/bmc-pretrial-conference-report.pdf>

helpful court forms.²⁰ To provide the details of existing practice, we describe the step-by-step process at the BMC, largely applicable to other courts, in the margin.²¹

§ 14.4 ATTENDANCE AND/OR SIGNATURE OF THE DEFENDANT

Only counsel participate in the pretrial conference, although the Rule requires that the defendant be “available” to attend,²² and some courts now require the defendant to be present either in the courthouse or in the courtroom when the case is called.²³ The defendant's presence may be required for admissions or pleas, to sign stipulations, or to otherwise facilitate and execute the agreements which may be reached at the conference.

²⁰ *Trial Court Forms*, THE MASSACHUSETTS COURT SYSTEM, <http://www.mass.gov/courts/formsandguidelines/forms.html>.

²¹ As shown in the report, the first section consists of “Automatic Mandatory Discovery for the Defendant” pursuant to Rule 14(a)(1)(A). Defense counsel should go through the discovery list on the form and mark off what it has received from the prosecution, and what the prosecution still is required to provide to the defense.

The second section of the report is “Discretionary Discovery.” Here, defense counsel is free to write-in discovery items that either the prosecution agreed to provide to the defense during the pretrial conference, or that defense counsel wants to argue before the judge and have the judge decide if the prosecution must provide that discovery.

The third section of the report describes both parties’ continuing duty pursuant to Rule 14(a)(4). Each party must notify the other party of additional material it subsequently acquires if it would have been under a duty to disclose or produce pursuant to a rule or court order.

In the fourth section of the report, “Automatic Reciprocal Discovery for the Prosecution,” defense counsel will likely only mark the first box, which states that its obligation of automatic reciprocal discovery has not been triggered because the prosecution has not completed all automatic mandatory discovery to the defense. If the prosecution has provided all automatic mandatory discovery to the defense, then defense counsel can mark off what it has provided to the prosecution as of the report date.

In the fifth section, the parties should list “unagreed” pretrial motions that they intend to file, or risk waiving their right to file them at a later date.

In the sixth section, the parties may list any stipulations of fact that have been agreed amongst them during the pretrial conference.

Defense may then leave the partially completed report on the main prosecution table at the pretrial hearing. The prosecution will complete the report, fill in various parts relating to its duties, sign and then present the report to the clerk once the matter is called for pretrial hearing.

The judge will then examine the report, set compliance dates for discovery items, hear arguments for “Discretionary Discovery” items and address other pre-trial matters such as motion hearing and/or trial dates. The court will then keep the original copy of the conference report in the court’s docket of the matter.

²² MASS. R. CRIM. P. 11(a). *Cf.* Commonwealth v. Preston, 10 Mass. App. Ct. 807 (1980) (even assuming defendant thought case was scheduled for pretrial conference rather than trial, must be available so default proper).

²³ Many district courts also require the defendant's presence as ordered in the written notice scheduling the conference. Because MASS. R. CRIM. P. 11(a) requires a defendant to “be available” for attendance at the pretrial conference, Commonwealth v. Feeney, 31 Mass. App. Ct. 144, 145–46 (1991), held that defendant's failure to appear for pretrial conference warranted default under G.L. c. 278, § 24 (§24 subsequently repealed and replaced by c. 278, § 28).

The Rule also provides that the conference report must include the defendants' signature when it contains constitutional waivers or stipulations to material facts.²⁴

²⁴ MASS. R. CRIM. P. 11(a)(2)(A).