

**ADVISORY COMMITTEE
ON
CRIMINAL RULES**

RULE 16 MINI-CONFERENCE

Washington, DC
May 6, 2019

TABLE OF CONTENTS
CRIMINAL RULE 16 MINI-CONFERENCE
May 6, 2019

List of Attendees	5
TAB 1 Introductory Memorandum to Mini-Conference Participants (April 14, 2019)	9
TAB 2 Proposal to Change the Expert-Disclosure Provisions of Rule 16 Suggestion 18-CR-F (Carter B. Harrison IV)	13
TAB 3 Proposed Amendment to Rule 16 with Introductory Memorandum from John S. Siffert (April 15, 2019).....	23
TAB 4 Appendix to Minutes of the October 10, 2018 Meeting of the Advisory Committee on Criminal Rules (DRAFT)	31
TAB 5 Memorandum from Donna Lee Elm Regarding Expert Discovery – Defense Concerns (September 17, 2018) ¹	67

¹ This item was printed separately and circulated during the mini-conference.

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Attendees	
Invited Participants	Subcommittee Members
Marilyn Bernardski, Esq. Marlo Cadeddu, Esq. Prof. Daniel Capra Michael Donahoe, Esq. John Ellis, Jr., Esq. Andrew Goldsmith, Esq. Zachary Hafer, Esq. Robert Hur, Esq. Tracy McCormick, Esq. Mark Schamel, Esq. Elizabeth Shapiro, Esq. John Siffert, Esq. Douglas Squires, Esq. Lori Ulrich, Esq.	Hon. Donald Molloy Criminal Rules Committee Chair Hon. Raymond Kethledge Subcommittee Chair Hon. James Dever Prof. Sara Beale Prof. Nancy King Prof. Orin Kerr Donna Elm, Esq. Susan Robinson, Esq. Jonathan Wroblewski, Esq. Rebecca Womeldorf, Esq. (AOUSC Staff) Julie Wilson, Esq. (AOUSC Staff) Laural Hooper, Esq. (FJC Staff)

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TAB 1

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MEMO TO: Mini-Conference Participants

**FROM: Professors Sara Sun Beale and Nancy King. Reporters
Advisory Committee on Criminal Rules**

RE: Background Information

DATE: April 14, 2019

Judges Jed Rakoff and Paul Grimm have each proposed that Criminal Rule 16 be amended to parallel more closely Civil Rule 26(a)(2)'s requirements for pretrial discovery of expert testimony. They view current disclosures as inadequate. And, in their view, the 2017 DOJ memorandum requiring prosecutors to disclose more than Rule 16 requires is not sufficient to cure the problems because it is subject to change, not enforceable, unevenly applied, and limited to forensic evidence.

In October, the Advisory Committee on Criminal Rules ("Committee") heard presentations from representatives from the Department of Justice about the development and implementation of its new policies governing disclosure, efforts to improve the quality of its forensic analysis, and practices in cases involving forensic and non-forensic evidence. Discussion also included comparing discovery in criminal cases with the discovery provided under Civil Rule 26(a).¹ Draft minutes from that portion of the Committee's meeting may

¹ Rule 16(a)(1)(G) currently requires disclosure by the government of only a written summary of any testimony that the government intends to use under Federal Rules of Evidence 702, 703, or 705 during its case-in-chief at trial. "The summary provided under this sub-paragraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." These summaries may be produced by the prosecutor, not the witness, and may be short and general (a paragraph or two). The rule does not require disclosure of the facts or data considered by the expert, nor the exhibits that will be used to summarize or support the expert's testimony.

In contrast, Civil Rule 26(a)(2)(B) requires that an expert witness who is expected to testify at trial must provide a "written report," with specified contents. It provides:

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report prepared and signed by the witness if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the

provide helpful background and are included in the materials at Tab 4.

The members of the subcommittee charged with considering at these issues are Judge Ray Kethledge (Chair), Donna Elm, Esq., Judge James Dever, Judge Gary Feinerman, Professor Orin Kerr, Susan Robinson, Esq., and Jonathan Wroblewski, Esq. (DOJ). To aid in its consideration of possible changes in Rule 16's provisions concerning expert witnesses, the Subcommittee has convened this mini-conference to learn more about the experiences of trial counsel.

To assist in structuring at least part of the discussion, please prepare to discuss the following questions at the meeting. To the extent you can provide specific illustrations or examples, that would be very helpful.

- (1) What problems if any have you encountered with pretrial disclosure of expert *forensic* information before trial?
- (2) What problems if any have you encountered with disclosure of *non-forensic* expert information before trial?
- (3) What changes or practices would prevent the problems you identify in (1) or (2) above? Do you have any experience with cases where such problems were avoided using particular changes or practices?
- (4) Should the requirements for disclosure of defense expert information to the government be the same or different than the government's disclosure obligations to the defense? Why or why not?

Also, the subcommittee seeks your reactions to two potential approaches to this general issue, each submitted by defense counsel. The two proposals are included in the materials at Tab 2 and Tab 3.

previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

If the witness has not been "retained or specially employed to provide expert testimony in the case" or his duties as the party's employee do not "regularly involve giving expert testimony," Civil Rule 26(a)(2)(C) requires only that the disclosure state the subject matter on which the witness is expected to present evidence under Evidence Rules 702, 703, or 705, and a summary of the facts and opinions to which the witness is expected to testify.

TAB 2

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PEIFER, HANSON & MULLINS, P.A.

18-CR-F

ATTORNEYS AND COUNSELORS AT LAW

20 FIRST PLAZA, SUITE 725

POST OFFICE BOX 25245

ALBUQUERQUE, NEW MEXICO 87125-5245

TELEPHONE (505) 247-4800

FACSIMILE (505) 243-6458

CHARLES R. PEIFER
ROBERT E. HANSON
LAUREN KEEFE
MARK T. BAKER
ELIZABETH K. RADOSEVICH
MATTHEW E. JACKSON
CARTER B. HARRISON IV
WALKER BOYD

CERIANNE L. MULLINS
GREGORY P. WILLIAMS
OF COUNSEL

August 30, 2018

VIA EMAIL ONLY: donna elm@fd.org

Advisory Committee on Criminal Rules
Attn: Donna Lee Elm
400 North Tampa Street, Suite 2700
Tampa, FL 33602

Re: Proposal to Change the Expert-Disclosure Provisions of Fed. R. Crim. P. 16

Dear Ms. Elm and the Committee:

I am a CJA attorney in the District of New Mexico who also does a substantial amount of federal civil work. I am excited to hear that the Committee is considering adopting more civil-style expert disclosure rules, and I wanted to share my thoughts on the matter briefly.

I. Complaints About the Current System

In my opinion, the criminal system for handling expert witnesses – in which opponents of an expert get neither a detailed expert report nor a deposition – is inferior to its civil analogue in virtually every way. Even cost/efficiency, which I believe to be the real justification for many of the comparatively minimal discovery rights afforded in criminal cases, suffers here, because the Court often ends up in the position of having to sit and watch an expert deposition – which in criminal cases is called a “*Daubert* hearing” (not to be confused with the “*Daubert* hearings” in civil cases, in which the Court hears primarily legal arguments and whatever minimal testimony still needs to be developed after the successive issue refinement provided by the expert report and deposition) – unfold live in open court.

In my experience, the way the expert disclosure process often plays out in criminal cases in federal court is that the proponent of the expert will file a two-to-three-page (double-spaced) summary either of the opinions that the proponent *hopes* the expert will say or of the broad topics (barely narrower than the “subject matter”) that the expert *can* testify on. Here, the simple requirement (which exists in Civil Rule 26(a)(2)(B) but not in Criminal Rule 16) that the report be “signed by the witness” is huge. Many summaries from the Government are (1) written by an AUSA and not even *seen* by the expert prior to the *Daubert* hearing; and (2) written before the

expert has formed his actual opinions. The experts that are particularly susceptible to this are those that repeatedly testify to more or less the same opinions in multiple cases, often by stating general principles of their field of expertise and leaving it to the jury to apply those principles to the case at hand.

For example, there might be an out-of-state child psychology expert who has testified for the Government in numerous Districts in sex trafficking cases, and this expert might have become one of the word-of-mouth go-to experts for AUSAs nationwide facing sex trafficking cases that appear to be headed to trial. An AUSA in a case set for trial in a month and a half might contact this expert and ‘sign them up’ with the understanding that the expert will not be expected to know much about the facts of the case, but rather will be called to testify, ‘seminar-style,’ about general principles of the child psychology of sex trafficking. The AUSA might then copy and paste the Rule 16(a)(1)(G) summary of the expert’s testimony in his or her most recent case, perhaps modifying the summary to tie principles that *the AUSA* believes apply to the instant case to the facts (the AUSA is especially likely to do this if, in the prior case, the expert *did* tie principles to facts). At that point, defense counsel is handed a “summary” that is effectively a prior publication excerpt – *i.e.*, a statement by an expert not made in connection with the instant case – that lacks the reliability attendant to actual publication (both the carefulness of the author and the review of the expert’s peers), and that is augmented by the (non-)expert opinion of the AUSA.

There is no built-in penalty for the AUSA for doing this, provided that he or she drafted an over-inclusive summary (*i.e.*, one containing opinions that the expert will not ultimately testify to) rather than an under-inclusive one, as the penalty of having extraneous opinions struck is no penalty at all if the expert was never going to testify to them anyway, and the defense cannot even impeach the expert with the summary because the expert did not write it.¹ The defense counsel might then file a *Daubert* motion that is directed to opinions that the expert does not even have, and the Court will then set a hearing. Cross-examination at criminal *Daubert* hearings, in my view, tends to try to serve the role of both deposition (with open questions for the purpose of discovery) and hearing (with leading questions for the purpose of persuasion), and does neither well.

II. Proposal for Reciprocal Expert-Report Discovery

At a minimum, I believe the Committee should require an *expert signed* disclosure for all retained experts (a term I will use to refer to those experts required to provide a report under Civil Rule 26(a)(2)(B)).² I also see little downside to requiring that this report fulfill all the detailedness requirements of a civil expert report.

¹ Judges seem to vary regarding whether an opponent technically *can* impeach an expert with the summary – *i.e.*, whether reading from the document to contradict the expert is allowed (I always say that the summary is attributable as a prior statement by the expert under FRE 801(d)(2)) – but it certainly is not *effective* impeachment when the expert can honestly explain that he or she neither wrote nor approved the summary.

² I will discuss this more below, *see* Park III, *infra*, but please do ensure, if your rule recognizes a (sensible) distinction in disclosure obligations between retained/‘party-controlled’ experts on the one hand and unretained/independent experts on the other, that case agents who testify in a dual role as both fact and expert

How to handle reciprocity is an interesting issue. My sense is that heightening the current Rule 16(a)(1)(G)/(b)(1)(C) requirements by adding an expert report obligation for retained experts will benefit defendants more than the Government, simply because the Government uses more experts. That said, the current paltry expert disclosure regime of the Criminal Rules incentivizes defendants in some cases – at their selection – to forego *any* reciprocal expert disclosure, and those cases, although somewhat rare, can when they arise put the defendant in a much better situation than the Government, given the ability to effectively circumvent the pretrial *Daubert* motion process. (This might occur if, for example, the defense anticipates that the Government will either not put on expert testimony or will only put on expert testimony in which disclosure will be minimally helpful to the defense – such as chemical identification of drugs testimony, which is obviously *Daubert*-satisfying and where the defense knows what is going to be said – and the defense intends to put on expert testimony either from a less than reputable expert or field of study, or that will be difficult for the Government to anticipate the contours of, such as battered spouse testimony in support of a self-defense claim.) In short, I think the increase from no disclosure to reciprocal “summary” disclosure benefits the Government more than the defense, while the increase from reciprocal “summary” disclosure to reciprocal “report” disclosure benefits the defense more than the Government.

Given that reality, I would retain the obligations imparted by Rule 16(a)(1)(G) and (b)(1)(C) as they currently exist and simply add an *additional* ground of reciprocal discovery that obligates the production of a signed expert report for retained expert witnesses (this would then excuse the obligation of providing a summary for those experts). Here is a proposed redline of the relevant portions of Rule 16, with additions underlined and deletions stricken; where text taken from Civil Rule 26(a)(2)(B) is modified, I have noted it in red:

- (G) **Expert witnesses Summaries.** At the defendant’s request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the

witnesses fall on the party-controlled/higher disclosure side of the divide. This is one area where there is a major difference in context and expectations between the criminal and civil rules and practice. In civil cases, when a judge or attorney thinks of a “dual role” expert who has both facts and expert opinions to testify about, they are probably thinking of a ‘treating physician,’ and the judge’s major concern is probably *encouraging* their use by not weighing down proponents with unrealistic obligations that the proponent then has to pass onto the physician, who may have no particular desire to participate in the case; in short, such witnesses are seen as desirable and trustworthy, and the rules are written and interpreted with that in mind. In criminal cases, dual role experts are usually law enforcement officers who want to explain why their factual observations point to the defendant’s guilt by way of ‘expert’ testimony that (1) may have been developed during the instant case’s investigation (*e.g.*, meanings of code words); (2) may be more suspicion, speculation, or intuition than real expertise; (3) may veer into ‘profile’ evidence of the defendant, which may be unreliable and may violate character-evidence rules; and (4) may invade on the decisionmaking province of the jury. These experts are widely viewed as suspect, and the courts have largely struggled in curtailing the dangers of their use. *See, e.g., United States v. Rodriguez*, 125 F. Supp. 3d 1216, 1248-53 (D.N.M. 2015) (outlining six dangers of law-enforcement expert testimony).

government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(H) Expert Reports. At the defendant's request, the government must give to the defendant a written report – prepared and signed by the witness – for each witness from whom the government intends to elicit testimony under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial, if the witness is one retained or specially employed in an investigative capacity or to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

If an expert report is provided for a witness under this subdivision, the government need not separately provide an expert summary for that witness under subdivision (a)(1)(G).

....

(C) Expert witnesses–Summaries. The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if--

- (i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

- (ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(D) Expert Reports. If a defendant requests disclosure under Rule 16(a)(1)(H) and the government complies, then the defendant must give to the government a written report – prepared and signed by the witness – for each witness from whom the defendant intends to elicit testimony under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial, if the witness is one retained or specially employed in an investigative capacity or to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

If an expert report is provided for a witness under this subdivision, the defendant need not separately provide an expert summary for that witness under subdivision (a)(1)(G).

I fully admit that the addition of an entirely separate subdivision for reports (versus summaries) is not the most elegant draftsmanship, but the Rule already breaks out “reports of examinations and tests” from “documents and objects” and “expert witnesses,” and I think attempting to jam extensive new material into subdivision (a)(1)(G)/(b)(1)(C) will render those subdivisions difficult to read.

III. Proposal for Reciprocal Depositions of Retained Experts

This is probably asking for too much (and too big of a break from the longstanding federal criminal tradition opposing depositions), but I also genuinely believe that providing an additional option for the reciprocal deposition of retained experts would increase both the quality of the truth-seeking function of discovery and the efficiency of the proceedings. The benefits of expert depositions are obvious, and efficiency could be additionally improved by (1) time-limiting the depositions to less than the civil standard of seven hours (I have found that 4 hour depositions work well); (2) reversing or loosening the civil case norm that the deposition taker has primary authority for selecting the date and time of the deposition, and providing a late deadline by which the expert's proponent must make the expert available for deposition – I would think that 7-14 days before the *Daubert*-motions deadline would be sufficient – so that the number of depositions taken in cases that ultimately plead out is minimized; and (3) tying the taking of an expert deposition to a requirement (either explicit in the rule or recognized by convention, although I recommend the former given the strong inertia of convention among the criminal bar) that any *Daubert* motion contain citations to the transcript sufficient for the Court to rule on the motion without a hearing. My state's state court system gives criminal litigants a right to interview *all* of the other side's witnesses – not just experts – and the world has not come to an end; the procedure is widely popular among the bar and believed to produce superior results to a 'blind' system (and the pretrial interview system to which I am referring is, in many ways, *much* more onerous on the prosecution than the reciprocal-at-the-defense's-option system of expert depositions that I am proposing here).

If the Committee were interested, I think such a change could be made by simply adding a new subdivision to the bottom of Rule 16(a)(1), "Depositions of Retained Experts," and adding a couple words long disclaimer somewhere in Rule 15 effectively subjecting expert depositions to the procedural provisions of Rule 15, but not its availability provisions. I would recommend making a condition of the defendant's invocation of the reciprocal deposition option that he waives the right to appear personally at the depositions (either the government's depositions of his experts or his depositions of the government's); Rule 15(c) currently grants the defendant a right to be present at depositions.

Aside from the obvious benefits, an additional plus to implementing this idea is that it will provide some deterrent/drawback to designating fact witnesses aligned with a party (usually case agents) as dual-role expert witnesses, as doing so would expose them to a deposition that they would otherwise not have to go through. *See supra* note 2. I think that this result is entirely appropriate not just as a matter of 'rough justice,' but also because such expert testimony is among the most in need of close examination under Rules 702-705 (and probably really 701); if the Government wants to put on "expert" testimony in the venerable scientific field of "why my client is guilty," then it should at least have to demonstrate how that expertise was developed through *actual* experience *outside* of the instant case – a time-consuming vein of cross-examination that is among the least appropriate things to ask an expert about in front of a jury (which is the current method of handling the task).

Advisory Committee on Criminal Rules
August 30, 2018
Page 7 of 7

Thank you for taking the time to review my concerns. I think this is an important topic where there is significant room for meaningful improvement in the Rules. Best of luck with your changes.

Very truly yours,



Carter B. Harrison IV

CBH/ml

cc: Rebecca A. Womeldorf
(RulesCommittee_Secretary@ao.uscourts.gov)

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TAB 3

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To: Hon. Raymond Kethledge

April 15, 2019

CC: Prof. Sara Sun Beale, Prof. Nancy King

From: John S. Siffert

Memorandum Re: Proposed Rule 16(a)(1)(G) and Comment

Attached is a proposal for an amendment to Rule 16(1)(G), together with a proposed Comment, to modify the Criminal Rules respecting expert discovery.

There is consensus in the defense community that current Criminal Rule 16(a)(1)(G) does not provide sufficient notice in terms of timeliness, substance, or accountability of expected expert testimony. There are abundant examples in the case law and literature of wrongful convictions and so-called expert testimony based on “junk science,” where defense counsel did not have sufficient notice to defend against the witness’s testimony.

The proposal is premised on Rule 26 of the Federal Rules of Civil Procedure, which requires that the proponent of an expert witness must produce a written report signed by the witness that makes specified disclosures pre-trial.

The current proposal incorporates comments from 7 practitioners (including 3 former federal prosecutors), one law professor, and two judges. It represents (mostly) a consensus, with lots of compromises.

The two biggest defense compromises are retaining reciprocity in the disclosure of expert reports and relegating the disclosure of Rule 701 lay opinion testimony to the Comment.

There was some push to require government disclosure 90 days before trial, but the proposal allows the trial judge to require more or less than 45 days, upon a showing of good cause.

One state judge expressed concern that the proposed rule will require training of the federal experts as to what is required, based on her experience in Texas, which has adopted very progressive disclosure requirements. Among other things, the judge suggests that the training include a walk-through of a hypothetical scenario.

I hope the proposal (and this explanation) will be of use in the upcoming deliberations of the mini-conference, the Subcommittee, and the Committee.

Proposed Amendment to Criminal Rule 16

(G) Expert witnesses.

(i) Government's Disclosure: At the defendant's request, the government must give to the defendant, no less than 45 days prior to trial, except for good cause shown, a written report—prepared and signed by the witness—of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies within 45 days thereafter, or as ordered by the court, the government must, at the defendant's request, give to the defendant a written report of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The report must contain:

(a) a complete statement of all opinions the witness will express and the basis and reasons for them;

(b) the facts or data considered by the witness in forming them;

(c) any exhibits that will be used to summarize or support them;

(d) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(e) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(f) a statement of the compensation to be paid for the study and testimony in the case.

(ii) Drafts of any report and communications between any expert and an attorney for the defense or for the government required under subdivisions (a)(1)(G) or (b)(1)(C) need not be produced unless ordered by the court for good cause or unless otherwise required.

...

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

(C) Expert witnesses.--At the government's request, the defendant must give to the government no sooner than 30 days after receipt of the government's report under subdivision (a)(1)(G) a written report, except for good cause shown—prepared and signed by the witness—of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial, if—

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

- (ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

The report must contain the information set forth in subdivisions (a)(1)(G)(i)(a)-(f).

Redline Version of the Proposed Amendment Compared to Existing Criminal Rule 16

(G) Expert witnesses.

(i) Government's Disclosure: At the defendant's request, the government must give to the defendant, ~~no less than 45 days prior to trial, except for good cause shown,~~ a written ~~summary report—prepared and signed by the witness—~~of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies ~~within 45 days thereafter, or as ordered by the court,~~ the government must, at the defendant's request, give to the defendant a written ~~summary report~~ of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. ~~The summary provided under this subparagraph report~~ must ~~describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications~~ contain:

~~(a) a complete statement of all opinions the witness will express and the basis and reasons for them;~~

~~(b) the facts or data considered by the witness in forming them;~~

~~(c) any exhibits that will be used to summarize or support them;~~

~~(d) the witness's qualifications, including a list of all publications authored in the previous 10 years;~~

~~(e) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and~~

~~(f) a statement of the compensation to be paid for the study and testimony in the case.~~

~~(ii) Drafts of any report and communications between any expert and an attorney for the defense or for the government required under subdivisions (a)(1)(G) or (b)(1)(C) need not be produced unless ordered by the court for good cause or unless otherwise required.~~

...

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

~~(C) Expert witnesses.— The defendant must, at the government's request, give to the government a written summary—~~At the government's request, the defendant must give to the government no sooner than 30 days after receipt of the government's report under subdivision (a)(1)(G) a written report, except for

good cause shown—prepared and signed by the witness—of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence ~~as evidence during its case-in-chief~~ at trial, if—

- (i) The defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or
- (ii) The defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant’s mental condition.

~~This summary must describe the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.~~

The report must contain the information set forth in subdivisions (a)(1)(G)(i)(a)-(f).

Proposed Comment to Amendment to Rule 16, Fed. R. Crim. P.

Rule 16(a)(1)(G) is modeled after the analogous Federal Rule of Civil Procedure 26(a)(2)(B). The Rule requires the government to disclose a written report that is prepared and signed by the witness who will be testifying pursuant to Rules 702, 703 or 705 of the Federal Rules of Evidence that pertains to testimony by the expert witnesses, the bases for their opinions, and the facts or data underlying their opinions. The amended Rule 16 is not limited to forensic and scientific experts. It applies to expert testimony based on “scientific, technical, or other specialized knowledge,” that is “based on sufficient facts or data,” is “the product of reliable principles and methods,” where the expert has “reliably applied the principles and methods to the facts of the case.” Rule 702, Fed. R. Evid. It also applies to expert testimony based “on facts or data in the case that the expert has been made aware of or personally observed.” Rule 703, Fed. R. Evid.

Although the Rule does not require signed, written reports of witnesses who are expected to give lay opinion testimony under Rule 701, Fed. R. Evid., the origins of Rule 701 suggest that courts should exercise their discretion in requiring pretrial disclosure of lay opinion testimony. According to the 1972 Advisory Committee Notes to Proposed Rule 701, it was believed that practical necessity required that courts determine on a case by case basis whether the lay opinion would be “helpful to clearly understanding the witness’s testimony or to determining a fact in issue.” According to the Note, it was deemed “too elusive” to create a standardized rule that defined “helpful” that could be applied in all cases; instead, reliance on the adversary system and cross-examination “will generally lead to an acceptable result.” District judges should be alert to situations when Rule 701 lay testimony will be offered as to a material issue in the case without sufficient advance notice, thereby impairing the defendant’s ability to effectively cross-examine.

The requirement that the government disclose a written report signed by the testifying expert replaces the rule that called for disclosure of an unsigned summary of the expected testimony. In order to ensure proper notice to prevent unfair surprise to the defense, the Rule describes what should be included in the content of the report:

- (a) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (b) the facts or data considered by the witness in forming them;
- (c) any exhibits that will be used to summarize or support them;
- (d) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (e) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (f) a statement of the compensation to be paid for the study and testimony in the case.

The Rule requires that the report shall be given to the defendant no less than 45 days in advance of trial. However, the Rule also recognizes that the trial court retains discretion to order the production of the report more than 45 days in advance of trial, or to delay the disclosure of the report upon a showing of good cause.

Like Rule 26(a)(2)(B), Fed. R. Civ. P., the Rule retains reciprocity and requires the defense to produce signed reports written by its experts, if the government complies with a defense request to produce the government expert's report. The Rule provides that the defense should produce its expert reports within 30 days of the government's disclosure of its expert report, but the court retains discretion to change that time.

The Rule adopts the protection to work product and drafts of the expert reports that is afforded in Rule 26(b)(4)(c), Fed. R. Civ. P. However, the Rule provides that this protection does not diminish the discretion of the court to require such disclosure, nor does it relieve the government from its existing obligations under the U.S. Constitution as interpreted by the courts, including in Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972).

TAB 4

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ADVISORY COMMITTEE ON CRIMINAL RULES
APPENDIX TO MINUTES (DRAFT)
October 10, 2018 | Nashville, TN

Judge Molloy announced that the Committee would go next to Tab 6 in the Agenda Book. In anticipation of the mini-conference, one of the things that has been discussed on a number of fronts is the interaction between the rules and practical aspects of discovery in criminal cases. We wanted to flesh out Rule 16 as it relates to expert reports as well as other discovery. Jonathan Wroblewski put together a panel of experts to help us understand what the Justice Department sees as some issues regarding both expert disclosure and discovery in general.

Mr. Wroblewski explained that after the discussion at our last meeting about discovery and forensic cases, the Department undertook various research projects to learn what's going on in the field, where there are problems, and where our guidance has addressed some of those problems. The reporters and Judge Malloy thought it would be a good idea to present some of these developments here, beginning with Andrew Goldsmith, the Department's National Criminal Discovery Coordinator.

Mr. Goldsmith thanked Judge Molloy for inviting him to address the Committee, as he had done in the past. He expressed pleasure at returning and seeing familiar faces, and apologized for having to leave early. Mr. Goldsmith introduced the other speakers on behalf of the Department:

- Zack Hafer, the Criminal Chief in the District of Massachusetts, to discuss examples of discovery in criminal cases involving non-forensic experts;
- Ted Hunt, who is the Senior Advisor on Forensic Science, to talk about the Department's efforts to improve forensic science;
- Erich Smith, from the FBI's Firearms and Toolmarks Unit, to describe an example of forensic analysis and its documentation which is directly relevant to discovery related issues; and
- Jeannette Vargas, Deputy Chief of the Civil Division in the Southern District of New York, to talk about discovery in civil cases involving experts.

Mr. Goldsmith described his experience and the history of his position to provide context for what the Department has done, is doing, and will do, when it comes to discovery. His position was created around 2010 as a short-term detail assigned to the Executive Office of U.S. Attorneys. Mr. Goldsmith described himself as a career prosecutor, first in DA's office and later as an AUSA in New Jersey in the 1990's. He noted that his experience "in the trenches" gives him credibility in developing policies and training prosecutors.

In late 2011, Mr. Goldsmith's position was converted to a career SES level position, in response to concerns raised by the Rules Committee that the Department's discovery efforts might be a temporary fix and may change in a new administration. This is now a career position

at the highest level in the Justice Department. Mr. Goldsmith has now worked for multiple Deputy Attorneys General. When a new administration comes in, he is one of three or four senior career officials remaining in the Deputy's office.

Mr. Goldsmith noted that this discovery is a bedrock priority for the Department. The Deputy Attorney General oversees all 6000 federal prosecutors, both those in U.S. Attorney's Offices and in Main Justice, and all of them receive the policies that Mr. Goldsmith issues on discovery and the related training. In 2014, Mr. Goldsmith became an Associate Deputy Attorney General, which is the fourth highest position in the Justice Department, which is a further indication of how significant criminal discovery is to the Department.

Mr. Goldsmith said that discovery training became mandatory as a direct result of concerns raised at the Criminal Rules Committee's 2010 meeting in Chicago. The Department responded by making training mandatory under the United States Attorney's Manual (which was recently renamed the Justice Manual). There is now online mandatory training as well as live training at the National Advocacy Center, and Mr. Goldsmith has visited 60 U.S. Attorney's Offices. Training topics come from a variety of sources, including defense attorneys, judges, and prosecutors. The Department also has a new criminal discovery bootcamp for prosecutors. There are also extensive resources, including the ESI protocol (for discovery of electronically stored evidence), which was developed in a collaboration between the Justice Department and defender services organizations. Mr. Goldsmith and his colleagues also worked with the Federal Judicial Center to develop a 90-page criminal e-discovery pocket guide for judges. They also answer questions every day from the field.

Mr. Goldsmith described the Department's supplemental guidance for prosecutors regarding criminal discovery involving forensic evidence and experts. After receiving input from various stakeholders (including Judge Rakoff and other judges) regarding criminal discovery in cases involving forensics, the Department decided to take a closer look. Deputy Attorney General ("DAG") Yates asked Mr. Goldsmith to work closely with a working group that consisted of federal prosecutors, law enforcement personnel, and forensic scientists, to develop pragmatic meaningful guidance.

In January 2017, DAG Yates issued what was called the supplemental guidance for prosecutors regarding criminal discovery involving forensic evidence and experts. At the outset, the guidance notes that forensic science covers a variety of fields and specialties such as DNA testing, chemistry, as well as ballistics and impression analysis. Although it specifically informs prosecutors of the parts of Rule 16 that are triggered when it comes to forensics, the guidance goes beyond the rule. It reminds prosecutors of potential disclosure obligations under *Brady*, *Giglio*, and the Jencks Act. It sets forth an easy-to-understand four-step process to ensure the prosecutors meet their disclosure obligations. Although not legally required, the guidance instructs prosecutors to provide the defense with a copy of/access to laboratory or forensic expert's "case file," either in electronic or hard copy form. Finally, it reiterates one of the key parts of the Department's culture in the last decade: "We go further than the law requires. We go farther than the legal minimum."

In 2017, the guidance became part of the Department's mandatory criminal discovery training. Mr. Goldsmith recorded a session, and when prosecutors logged on to watch their discovery training, they listened to him tell them what this guidance means in terms of their day-to-day responsibilities. This is also part of the mandatory training for new prosecutors in discovery boot camp. In fact, today he was initially scheduled to be training new prosecutors on disclosure of forensic evidence under Rule 16.

Finally, Mr. Goldsmith responded to concerns that the 2017 guidance, while extremely helpful, might not continue as a policy under the current administration. To the contrary, he proudly reported, the guidance has become formalized and codified as § 9-5.003 of the Justice Manual (formerly known as the U.S. Attorney's Manual). The Department has also hired Ted Hunt as a Senior Advisor on Forensics, and it is issuing clear and transparent guidance on several key topics including testimony monitoring, and uniform language for testimony of reports.

Next, Mr. Goldsmith discussed why the Department believes that Rule 16, as written, deals well with expert testimony generally. Although it specifically addresses forensics, § 9-.003 of the Justice Manual provides useful framework, setting forth key parts of Rule 16 for experts and a four-step approach that is just as useful for all experts, whether forensic or otherwise. Step 2 emphasizes to prosecutors how critical it is to provide a written summary for expert witnesses that the government intends to call at trial, summarizing the analyses formed, describing any conclusion reached, and explaining the basis and the reason for the expert's inspected testimony. Mr. Goldsmith noted that Rule 16 applies to all experts, not just forensic experts. The Department's position is no change in the law is needed. Rather, practitioners, prosecutors, and defense attorneys alike need to understand how important it is to follow the rules.

Mr. Goldsmith thought it would be a bad idea to incorporate parts of Rule 26 of the Rules of Civil Procedure into the Criminal Rules. Rule 26 itself provides extensive discovery requirements for witnesses who are retained or specifically employed to provide expert testimony in a civil case. But virtually all expert witnesses in civil cases are retained by one of the parties, so it is hardly surprising that under the rule they have extensive discovery obligations. In contrast, most experts in criminal cases are not retained – at least not those called by the government – except in a few circumstances that Mr. Hafer will discuss. The main job of most experts called by the government is investigating and solving crimes, both to help convict the guilty but also exonerate the innocent. To saddle them with far more burdensome discovery obligations means they would spend the bulk of their time writing extensive reports rather than doing that important work.

Mr. Goldsmith also emphasized several other differences between civil and criminal cases. A civil case tends to operate as something of a closed universe: the expert report is generated, it goes to the other side, depositions occur, and the trial is based on all of that information. In contrast, criminal cases are affected by the Speedy Trial Act, the prosecution's higher burden of proof, and constitutional and statutory obligations that require provision of a fair amount of information helpful to the defense. Notwithstanding Rule 16's reciprocal discovery obligations, unfortunately, many defense counsel fail to comply with their obligations.

Frequently the prosecution does not learn until the eve of trial who the defense plans to call, what the defenses are, or if the defendant will testify. This may cause government expert witnesses to change their report as defenses shift and witnesses change up until the last minute. As a result, he said, the requirements in Rule 26 would disproportionately – if not exclusively – be visited on the government.

Moreover, Mr. Goldsmith predicted that if Rule 26's extensive discovery obligations were adopted in criminal cases, they would be unfortunately used aggressively and affirmatively by certain defense attorneys to saddle the government with additional responsibilities, and to suggest to the court that the government is failing to comply. Although some of these would be legitimate, based on seeing the day-to-day administration Mr. Goldsmith said he believes it would burden the court, distract from the search for the truth, and possibly raise challenges under the Speedy Trial Act. He concluded that the expert disclosure would end up being the "tail wagging a much larger dog," because that's where the focus would be if Rule 26 requirements were applied to criminal cases. Mr. Goldsmith's experiences as a career prosecutor, and as the person responsible for ensuring that all federal prosecutors meet their discovery obligations, caused him to conclude that Rule 16 is sufficient for expert witnesses. It is critical that prosecutors understand the law, which is what the Department is striving to achieve with clear policies and increases in regular training.

Judge Kethledge observed that we are going to have a mini-conference, and it was fair to say there is very serious interest in revising Rule 16's expert disclosure requirements to require more detailed and meaningful disclosures for the parties and the court in criminal cases. Obviously, he noted, the Department is strongly opposed to something like adopting Civil Rule 26 wholesale; but it would be very helpful to our Subcommittee (and ultimately for the Department) if the Department gave us a proposal it thinks does make sense, perhaps something between the current rule and the Rule 26 approach. He observed that proposals to the Committee from the other side were coming over the transom, and we hear the Department's objections about certain things in those proposals. But it would be helpful if the Department were more than a critic and gave us a proposal that it thinks makes sense. Mr. Goldsmith replied, "message received."

Judge Molloy asked Mr. Goldsmith how the Department audited compliance. You have all the training, but how do you audit whether it is being followed? Mr. Goldsmith responded that there is no formal audit, but he has a good overview because of the enquiries from the field and his nationwide contacts with prosecutors. That permits him to start to see patterns.

The next speaker was Zach Hafer, the Chief of the Criminal Division in the U.S. Attorney's office in Boston, who supervises more than 100 Assistant U.S. Attorneys. Mr. Hafer addressed non-forensic expert discovery in criminal cases, specifically case-in-chief experts but not rebuttal or sentencing experts. Noting that the distinction between forensic and non-forensic experts is often gray, he said his focus was not lab-type experts, and not DEA agents who might testify about coded drug dealer language. He began by stating that when the government presents a criminal case, the goal is to be stream-lined, and not turn it into an expert battle. In

the vast majority of criminal cases, the Department does not use retained non-forensic experts. He would present three examples in which the government did in fact use retained non-forensic, but he emphasized again that such experts are relatively rare, and not found in the garden variety criminal cases that most of you see day-in and day-out.

Mr. Hafer stated it is relatively straightforward to explain the kinds of cases in which the government will present a non-forensic expert. It depends on the elements of the crimes you've charged, and the prosecutors make a determination whether an expert would provide necessary context on a complex subject or assist in proving an element of one of the offenses beyond a reasonable doubt. He described four kinds of scenarios in which federal prosecutors most commonly determine that they need a non-forensic expert. In the first, and likely least common, during the investigatory phase the AUSAs determine the identity of an actual expert they will need at trial, and they retain the expert, prior to charging. (He noted that he would describe one of those cases, the NECC case out of Boston, later.) In the second scenario, during the investigation at some point the AUSA might realize he or she might need an expert, but they identify only the need for an expert, not the individual expert. In the third scenario, after indictment, within what he called the court-approved pretrial window, the AUSA identifies the need for an expert. The final scenario is what he called eve-of-trial identification due to a last-minute change in defense strategy – perhaps a stipulation has collapsed, for example, and the government realizes in a child pornography case that it needs an expert on pre-pubescent children or something like that. Those would be the four most common ways in which an AUSA to identify experts in a criminal case.

Mr. Hafer said there is little integration of experts into the prosecution's case before charging (though the NECC case was an exception to that rule). After indictment in a case where the prosecutors have recognized a need for an expert, they most likely will consult with several. Often, they will choose not to use one. But if they decide to retain one, they do not want circuit riders or hired guns. The government wants to use experts who maintain impartiality and does not want them to become part of the trial team. To that end, he said, prosecutors control the information that the expert reviews. And if it's an opinion case, forming the opinion, the prosecutor controls what the expert reviews, whether it's 302's, financial documents, or whatever the expert uses to form his or her opinion on the case. He emphasized that the government will never offer expert opinion on the issue of guilt.

Mr. Hafer identified the four most operative rules and statutes: (1) the Speedy Trial Act; (2) Federal Rule of Criminal Procedure 16(a)(1)(G), which provides that the government shall provide a witness summary of its case-in-chief expert testimony including a witness opinion, a basis therefore, and the witness qualifications; (3) the Jencks Act, 18 U.S.C. § 3500, which requires prosecutors to turn over witness statements after the witness has testified; and (4) Massachusetts Local Rule 16.1(c)(1)(A), which requires all information discoverable under Federal Rule 16(a)(1) to be produced to the defendant within 28 days of arraignment.

He observed that the experience in Massachusetts was fairly representative of the country. Notwithstanding that 28-day period set by the local rules, typically during the initial

status conference before the magistrate, the parties will say they have negotiated the date back, and ask the court to set off the trial date for expert disclosures.

Mr. Hafer stated that he had reviewed scores of examples from Massachusetts, and the date for expert disclosures averaged about 45 days prior to trial (though there were longer and shorter ones). But in their experience a date too far in advance of trial is unhelpful because of the nature of criminal cases involving defenses, strategies, and so forth. They generally make expert disclosures about 45 days before trial.

Mr. Hafer premised his description of the disclosures with a comment about the philosophy of expert disclosures. He read Attorney Harrison's proposal [18-CR-F] stating that in a typical case, prosecutors simply disclose a double-spaced 2-3-page summary of what we hope the expert will say on broad topics. Mr. Hafer said that has not been my experience and would not be reflected in the three examples that he would present. He said that their goal is to make comprehensive, specific disclosure regardless of whether there is an expert report. In two of the cases he would review for the Committee, one included an expert report and the other did not.

Mr. Hafer stated that when the expert disclosure comes up short or is inaccurate for whatever reason, there are several existing remedies for defense counsel and the court to address disclosure that is determined to be inadequate. But their goal is to provide comprehensive, case-specific disclosures. They have no per se objection to signed expert reports. There are many, many cases where they are warranted. But they should not be required in every case.

Mr. Hafer described a typical expert disclosure. It will include the expert's CV, and if it does not list his or her publications, the government will provide those separately. It will include the written summary that Rule 16(a)(1)(G) requires of the expected testimony in that case. If it is an opinion as opposed to a context case, the materials that the expert relied on in forming his or her opinion will be disclosed. Obviously, if there is a report, it will be disclosed. In most cases the government also discloses any prior testimony; that could be prior testimony in criminal or civil cases, or Congressional testimony. He noted that there is an ongoing controversy as to whether the government is required to do that, but he noted that when they do so it is with the proviso that it is a courtesy production of the prior testimony and not one required by the Jencks Act. But typically they will provide prior testimony.

Mr. Hafer then turned to the disclosures made in three cases, noting again that it is relatively rare for the government to retain non-forensic experts.

The first case Mr. Hafer described was a Boston case, *United States v. David Wright*. Wright was an ISIS recruiter who plotted to kill a blogger who had organized a Prophet Mohammed cartoon drawing contest. With Wright's blessing, Wright's uncle, Mr. Rahim, decided to go after Boston police officers before going after the blogger. Mr. Rahim was shot and killed on the streets of Boston as he approached several Boston police officers with a large knife. Wright was charged with material support to ISIS. Mr. Hafer explained that the government retained an expert, Aaron Zelin, primarily for two purposes. The first was to provide the jury with background and context on the history and structure of ISIS, a classic

subject beyond the ken of the average juror. The second was more specific, which was to connect known ISIS members to certain [unintelligible] killed by Boston police officers and to offer an opinion with respect to specific items that had been found in the apartment, for example the ISIS magazine. Mr. Zelman did not author a report in this case, but the prosecutor disclosed a summary of his testimony, his CV, and prior testimony in other cases.

Mr. Hafer stated that this expert did not write a report. He is only going over the disclosure to show what actually was disclosed. He projected the material, noting it might be a little hard for the Committee to read, but it was from the actual disclosure. He then described what the Committee was seeing. The government began by disclosing Mr. Zelman's identity, what he was an expert in, and the prior cases in which he had testified on jihadist groups. It provided the transcripts of those proceedings, and then went on in some length in the second paragraph to talk about Mr. Zelman's qualifications as an expert on this subject. This is the second page of the disclosure. Mr. Hafer left it up for a minute, and then focused on the highlighted sections. Again, he said, the point is that this was a very specific and comprehensive disclosure with respect to what Mr. Zelman was going to testify to, beginning not just with ISIS history and structure, which is the beginning of this disclosure, above the first highlighted section, but then as you get into the highlighted section you can see the government specifically disclose that Mr. Zelman would identify and describe the ISIS members with whom Rahim had spoken and explain the fatwahas that were issued using the internet. They gave a specific example. Mr. Zelman would testify that Hussain was an English-speaking ISIS recruiter who used Twitter to encourage terrorist attacks in the United States and Europe until he was killed by an air strike in Syria. The second highlighted section goes into detail about specific code words that Mr. Zelman would testify to, including the meaning of terms like "going on vacation," and "green birds," and how those relate to the jihad and becoming a martyr. And then the disclosure lists other terms and the significance of certain dates. Mr. Hafer explained this case was included as an example of what he described as a comprehensive disclosure. There is no report, but there is a detailed disclosure as to what it is Mr. Zelman is going to testify to, and provision of prior testimony.

Mr. Hafer observed that in the Wright case the government identified the need for an expert prior to indictment, but the actual expert was not identified until after. In such a national security case, where there was a long-term investigation, you may have an unexpected incident on the streets of Boston that requires the government to indict before you have done everything that you would do in a normal case. You might know you are going to need an ISIS expert, but you do not retain that person or identify that person in the grand jury. In this case, the government was forced to bring the case sooner than it otherwise would have because of the act of violence in Boston.

The next case that Mr. Hafer discussed also arose in Boston and was referred to as the NECC ("New England Compounding Center") case. It involved horrible facts, a multi-state outbreak of fungal meningitis among patients who had received contaminated steroid injections that all emanated from a compounding center in Framingham, Massachusetts. He explained that

the contaminated compounds went all across the country, and as a result 800 people were sickened. These were debilitating, and in many instances paralyzing, illnesses. Seventy-six people died as a result of these contaminated steroids. In December of 2012, the United States Attorney's Office brought a RICO case against 14 NECC employees, including the president and the pharmacist. In addition to second degree murder predicates, the principal RICO predicate was fraud, and the government's theory of fraud turned heavily on the conditions in the lab and the compounding center. In other words, he explained, they charged that the NECC had so far departed from the standard custom and practice of high-risk compounding centers that one could infer fraud given the nature of the departures. There are specific standards on cleanliness and everything else at these types of labs, and the government realized very early it would need an expert to describe these standards for high risk compounding centers and compare the conditions that existed at the time that the steroids were contaminated to what they should have been under the USPF protocols (an acronym referring to the standards in high risk compounding labs). This was the very rare case where the government actually identified the expert that it was going to use prior to charging the case. The disclosure here is far shorter because these two experts on this USPF wrote reports summarizing all the work they had done. They worked together, and Professor Newton wrote an 18-page single spaced report. As part of the government's expert disclosure they provided that report and the CV, and then they provided a three-page excel spreadsheet index with all their other publications, and all the documents and materials that these two experts relied on in forming their opinion that in this case the NECC's labs departed so substantially from the standard and custom in high risk compounding labs.

A member asked how long it took to write the report. Mr. Hafer did not know, but guessed 40-50 hours. The government typically pays such experts \$300-400 per hour, at total expense of approximately \$20,000. That would be 40-50 hours to inspect the labs and write the reports.

Mr. Hafer emphasized that the final case he would describe, from Los Angeles, again was not a garden-variety criminal case. It was an arms-export control case: the defendant had tried to purchase and then export American weaponry and military equipment, suppressors, ammunition, 50 caliber rifles, and night vision goggles. He was charged under the AECA with several offenses. The government disclosed an expert report, a CV, and a summary. Mr. Hafer displayed the summary of Dr. Doherty, an expert on Soviet and Russian surface-to-air missile systems. Mr. Hafer characterized the report and the disclosure with respect to Mr. Doherty, as extremely specific and detailed. On the screen he highlighted the two particular sections where the government disclosed that Mr. Doherty would testify regarding specific anti-aircraft missile systems and how they use explosive and incendiary rockets and missiles guided by systems designed to enable the rocket or missile to seek. He said this was a very specific disclosure about these specific missile systems within Dr. Doherty's expertise. The government disclosed that he would testify that these systems employed devices designed to launch or guide a rocket or missile towards an aircraft. And then, in the second highlighted paragraph the government again disclosed that Dr. Doherty may testify about the acquisition of these types of systems.

A member questioned the reference to things the expert “may testify to,” and asked Mr. Hafer to explain why that is appropriate in this context. There was a suggestion in some of the materials that it would be more helpful to the defense, and the defense discovery, for the government to know what is coming and not veer off in directions that may turn out to be irrelevant.

Mr. Hafer said that the default is to disclose as much as possible without being absurd. The goal is not to just put pages and pages of stuff that is very unlikely to come up. Here, he thought (though he had not spoken to the attorneys on the case) you would put ‘may’ assuming we are about 45 days prior to trial, because depending on what the defense is or what the cross-examination of the government’s witnesses is, this may be an area in which expert testimony is useful. At the time of disclosure, 45 days prior to trial, it is unlikely that you would be able to state with 100% certainty that the expert would testify to something. He said this was not semantics as much as it is trying to be comprehensive in the scope of the disclosure, not knowing at the time what issues will actually be litigated at the trial.

Mr. Hafer also noted that further in the disclosure it says the expert ‘may’ describe the common employment of Toyota Hilux trucks as a vehicle of choice. We would put something like that in there if the issue of the use of Toyota Hilux trucks by terrorists was sort of conceded at trial, but we wouldn’t need it if it wasn’t for trying here. And again, the way this works in practice with AUSAs, if you have an order of proof for the witnesses going through the exhibits, the exhibits that are going to come in for each witness. In anticipating defenses, you want to have all your bases covered, but again, you just simply do not know what the defense is going to be. It is very rare that you would get the defense expert report 45 days prior to trial. There are confrontation clause and other issues. Most defense attorneys take the position that they do not have to disclose anything close to strategy at all.

Mr. Hafer concluded with three final points. First, he had tried to pick representative samples of the types of disclosures that AUSAs strive to make to provide notice to the court, to provide notice to the defense council, and to voice any doubtful issues prior to trial. He said that is their goal. He emphasized again that there are existing mechanisms in place, short of a rule change or imposing a report requirement, to address inadequate disclosures.

Second, if the defense feels that the disclosure is inadequate, Mr. Hafer noted the defense has the option of filing a motion for a comprehensive disclosure. Pretrial depositions also remain an option. In a recent case in his district the government decided at the eleventh hour (driven by a late change in the AUSA trying the case), that it needed a money laundering expert, and it disclosed this well past the 45-day deadline. The district court allowed the government to use the expert but gave the defense a 4-hour deposition the weekend before trial. He observed that late or inadequate disclosures can also be addressed by curtailing the scope of what an expert is allowed to testify to. In his experience, district court judges strictly enforce the limits of the disclosure and are very, very reluctant to admit testimony beyond the scope of the disclosure. And obviously there is the remedy of exclusion.

Finally, referring back to Mr. Harrison's proposal for signed expert reports, Mr. Hafer reiterated that there are many cases involving signed expert reports provided in discovery. But, he said, we have just as many cases where that requirement seems unnecessary and needlessly costly. It would certainly slow things down if it is 45 days prior to trial, you provided the first signed report, then the defense changes, because you'd have to go back to your expert, get a revised report, and go back and forth. In the Department's view, he said, the rule is working, there are existing remedies, and changing the rule to require reports in all cases taking any measure of discretion out of the process is, and would be, costly and inefficient.

A member asked Mr. Hafer what, in his view, would be required by Civil Rule 26 that is not already required by the Criminal Rule 16(a)(1)(G).

Mr. Hafer said the ISIS case would be one example. The expert witness, who had previously testified on ISIS's nature and structure, was able to review materials, and talk about things like the magazine. The government did not pay him in that particular case to create and sign a report. It would impose a cost that – in his view as a practitioner – is unnecessary in many instances given, among other things, cases that plead prior to trial. Mr. Hafer said there are many cases where a report is needed. But in a case like that you can make a comprehensive disclosure, putting the other side on notice about the scope of the testimony without a requirement that will make experts a lot more expensive, without adding anything, if the government has met both the letter and spirit of Rule 16(a)(1)(G).

The member asked how heavy a lift would it be to take your disclosure from criminal Rule 16(a)(1)(G) disclosure, which is a summary, and turn that into a report. What would have to be added if it were a report, other than the expert's signature?

Mr. Hafer said it would be necessary to give the expert a lot more information about the litigation in the first instance than is done now, because the government typically fronts everything it foresees as a possible issue at trial. The disclosure will say the expert may testify to this, this is his background, and he may testify to that. But it would involve a lot more time with the experts and a lot more education of the experts regarding the procedural posture of the case, to satisfy both Rule 16(a)(1) and the signed report requirement. It would be a significant addition.

A member asked what specifically are you concerned about in transforming the summary that was given in that case into a report that looks like a Rule 26(b)(2)(B) report?

Mr. Hafer was not sure there is a particular substantive concern, instead, it isn't clear what problem that would solve, given his view that the government is generally making very good disclosures, and when they are not, there are other remedies. He did not know what benefit there would be to imposing a report, undoubtedly it would be a costly requirement.

A member observed that Mr. Hafer said this would be a costly requirement. But if the Rule 16(a)(1)(G) summary looks a lot like what a Rule 26(a)(2)(B) report would look like, there should not be much additional cost.

Mr. Hafer responded that the Rule 16(a)(1)(G) summary was written by the prosecutor. That is the AUSAs work product. The prosecutor has a phone call with the expert, who may educate the prosecutor on specific things like the missile defense system, but the summary is really the prosecutor's work. In contrast, a signed report must be the expert's work. Mr. Hafer noted he is very reticent about spoon-feeding information to experts, when it is going to become their opinion. In his view, as a practical matter, it would be costly to require the expert to prepare the report. It is a big difference in terms of whose work product it is.

Noting that Mr. Hafer had said he was not talking about a DEA agent's testimony about gang language, a member asked him if it was his view that a disclosure similar to the one you displayed in the Wright case would be feasible for a DEA agent's expert testimony on gangs. It presents the expert's prior experience with this, former testimony, what the person will say and so forth. The follow up question was: is that what you do?

Mr. Hafer responded, yes. The first question is: do we take the position that that's permissible expert testimony, for a DEA agent to testify in that capacity to drug dealers' use of code words and that sort of thing. We do with a hedge. The government typically says it does not necessarily concede that this is expert testimony – because there are some cases that suggest it is lay opinion – but we disclose it anyway. And yes, the goal is to make those disclosures specific so if it is an organization that is using particular phrases for kilos and particular phrases for fentanyl versus heroin and that sort of thing those should go into the disclosure. The AUSA is sort of following the guidance and practice. He disclosed the agent's background, and the number of cases and investigations they have worked. Then you would go into: in this particular case, he or she would testify to and list the references to the stash house and the code for particular drugs and that sort of thing. With the hedge usually, and he thought in the First Circuit the government does not concede that that's FRE 702. It says, in essence, it might be, and in case it is, here is the disclosure. We also have several district court judges who do not like to qualify experts in front of the jury. We still have to lay the foundation, and if the judge determines that we laid the proper foundation, we can elicit the opinion testimony. But there is sort of a recent reticence in our district to have the judge make some type of finding in front of the jury that the individual is an expert. They certainly will not do it for the DEA witness. You have to lay the foundation, then you can move on and ask the appropriate questions. But it will not be with a judicial blessing that that agent is an expert. That would even go in a recent capital case where we had all sorts of forensic psychiatrists and other things on either side the judge would not find that the person was an expert in front of the jury.

A member asked whether there is anything in the department's policies that requires the disclosure of prior testimony of witnesses, specifically your DEA agent for example who may have testified in 15 court cases concerning the use of code words.

Mr. Hafer described an ongoing conversation about whether that counts as Jencks. He said he would disclose, and would follow up with the agent. If he was aware that the agent had testified similarly in other federal cases, he would disclose that.

In response to the question whether that meant there is no uniform policy throughout the United States, Mr. Hafer responded that he did not think disclosure of the DEA agent as an expert is required by Department policy, though he was not certain. Assuming it is not Brady, if it is Brady it is obviously required that we turn it over. If there is some type of exculpatory material in the prior testimony, then it is disclosed.

Following up, a member observed that assumes that you were actually reading all of those 15 prior testimonies to determine if it's Brady. So what extra cost is there to identify prior testimony that an agent has given as an expert? What extra costs or steps would be required to do that?

Mr. Hafer thought several steps would be required. You have to have a conversation with the agent and obviously trust and believe in their credibility. You ask the agent for a list of all the cases he or she has testified in, in a similar manner. The case that he referred to with the money laundering expert, we were aware that he had testified three or four times as a money laundering expert. We were going to use that same model, when we learned [that he was?] an IRS agent, we pulled the testimony. Whether something is Jenks turns on whether it is related. He does not think it is generally a good practice to dance on the head of that pin. The extra cost, I think would just simply be that the AUSA would have to both consult with the expert that he's putting on and have to find some sort of PACER search, and there are Westlaw and Lexis expert databases where you can run names and do stuff like that as a double check. He thought most federal agents know when they have offered that type of testimony, so you probably capture the vast, vast, vast majority by asking them.

A member thanked Mr. Hafer for his presentation and confirmed with Mr. Hafer that in the NECC case the reports were prepared by the expert him or herself. But in the other two examples rather than have expert reports, basically you have [unintelligible] reports. Assuming that's so, what accounts for the difference?

Mr. Hafer responded that the practical thing is cost, though he did not want to make it seem like that is absolutely a practical decision. If the expert has to write a report, the goal post is that it costs \$15,000- 20,000. Beyond that, it really turns on whether it is helpful. In the NECC case it was clearly necessary and was going to be very deep in the weeds. So the AUSA made a determination that they should write a report and lay all this out. He thought that the ISIS thing is a little more common, in terms of the government does national security cases fairly regularly providing some type of background and context on terrorist groups. It is a little more common, so he actually talked to the AUSA in that case before he came down here and she said, "It never even entered my mind to ask him to write a report, I didn't think that we needed one, I made the disclosure, I passed his prior testimony, I turned all that over." So the discussion is framed now as whether we should require the report or default to Rule 16(a)(1)(G). And day-to-day confronting this, it is not really a seminal decision in the case, should I get a report here, or should I not get a report here. It evolves much more organically based on the facts of what it is the expert is going to opine on or provide.

A member commented that there is some interaction with the expert just for the prosecutor to be able to write the report that you're seeing in the other cases, and Mr. Hafer agreed. So the member asked what change is involved for experts to just write out what seems to be a relatively simple report in those cases, as opposed to the lawyer doing so.

Mr. Hafer said it is really a time thing. The Department does not have a principled objection to signed expert reports. There is a place for them in a lot of instances.

Members pressed for a sense of how much more time it would take to prepare an expert report in for example, the case of the anti-aircraft missiles. You are just reciting some very basic points about the nature of those missile systems.

Mr. Hafer said that the expert in that case did prepare a report and summary. The only cases he described that did not include reports were Zelin and ISIS. The ISIS expert Doughty actually wrote a report analyzing the specific military equipment that particular defendant had tried to get out of the country. So it is the time, how much work would it have been for Zelin to write a report. Probably somewhere between 10 and 20 hours, as opposed to several.

A member expressed surprise, asking whether it is really a 10-hour project to just to recite some of those terms and say I'm going to talk about some guy who got killed in an airstrike and how he recruited people, and so forth.

Mr. Hafer said experts will not form an opinion until they have reviewed the actual evidence in the case even if it is consistent with evidence they have seen in a lot of cases. Once they look at what was taken from the search warrant, if there are intercepted phone calls, they'll want to listen to the phone calls so that they can talk about those particular terms in the context of that case. So there is lead time. Really it is reviewing the discovery, and we don't want to put someone on the witness stand with his pedigree and then we ask well did you listen to any of the recorded phone calls in this case, and have him say no. So that's less so than the actual drafting is the review of the discovery.

A member pressed Mr. Hafer, noting that he had said he could not possibly put an expert on unless he did all of this preparation that the witness is going to do anyhow. So it is just when he writes the report, and whether the defense gets it.

Mr. Hafer said given how many criminal cases we have it is really a matter of where you post the requirements. Does it make sense that early in the litigation given the very, very high likelihood there is going to be a plea (and the expert is not going to testify) to require that level of analysis? But yes, point very well taken ultimately. But I think that is where the nature of criminal cases and the percentage of resolutions to plea deals need to factor into this.

The member said it seems there is some real value to having the expert look at the record and confirming that he or she is actually going to say things that the lawyers are assuming he or she would say. The other question is at what point are you making these decisions about expert reports as opposed to lawyer reports, and I gather it is tied to whether the case is going to trial.

Mr. Hafer said, that is a very big part of it. For example, in the NECC case it was so clear to the AUSA that just to get to probable cause on their fraud theory, they needed expert testimony on the standard of care in these labs. So that was a very early determination that they needed a report. In something like the ISIS case, after indictment for example, within the first 28-30 days before there would be an expert disclosure requirement, if there are conversations and it's clear the defendant is looking to plead guilty, then in the government's view it would not be a good use of its resources, taxpayer resources. It is perhaps unsatisfying, but it depends on the case.

Judge Campbell observed that Mr. Goldsmith had addressed the Department's policies on disclosure forensic expert information, and Mr. Hafer had described detailed disclosures where there is a retained expert in a complex case. But in Judge Campbell's experience, the far more common expert in a criminal case is the agent on the language or the IRS employee who is describing IRS procedures and why, in a tax fraud case, something was misleading to the IRS. Is there any department policy to the level of detail that those kinds of experts, or the AUSAs using them, must include in the Rule 16 disclosure?

Mr. Hafer responded that he did not think that was in the 2017 Memo, and Mr. Wroblewski responded that the 2017 memo was specifically addressed to forensic experts. Mr. Hafer noted that the case law deals with Rule 16, and what does it mean to have a basis, or opinions, so there's plenty of case law about these reports, and how extensive they have to be. He wished it could be as simple as writing 2-3 single space pages and the expert signs them. But there is a lot of case law holding that is not an acceptable Rule 16 report in many, many circumstances. So the short answer is that he did not think there is any guidance beyond the rules themselves and the case law about the rules, about how detailed it has to be. He reminded the Committee that Rule 16 says you have to lay out the opinions and the basis and methodology anyway, and there is case law surrounding that.

Mr. Hafer added that the guidance we get in Massachusetts is that increasingly specific disclosure is better than a less specific one. As he read Mr. Harrison's proposal, it would only apply to the team, which he thought would include the DEA/IRS agent types. So he did not focus on that. But what we do and what we encourage is to make it as specific, and to tailor to the case, as much as possible.

Judge Molloy thanked Mr. Hafer for the presentation, and broke for lunch. After a lunch break, the Department presentations turned to forensics, beginning with a short discussion by Ted Hunt, and then an FBI presentation on a forensic examination and about what is in a case file.

Mr. Hunt introduced himself as Senior Advisor on Forensic Science at the Department of Justice, since his appointment by the Attorney General in April of 2017. He relocated from Kansas City where he was a prosecuting attorney for about 26 years, focusing on the investigative use, disclosure, and presentation of forensic science. He was also a member of the National Commission on Forensic Science that concluded in April of 2017. He was tasked by

the Attorney General with reviewing the Department's forensic practices, policies, and what needed to happen to improve the science and quality assurance measures to ensure things are done the right way all the time. He reports to the DAG and, like Andrew Goldsmith, he has direct access to Department leadership.

Mr. Hunt said that DAG Rosenstein is very involved in this topic of forensic science and improving forensic science. Mr. Hunt stressed the Department's total commitment to the integrity of what we do. He said the DAG emphasizes to his staff every day: "to get it right and to do whatever it takes to get it right." Mr. Hunt's colleague Kira Antell is Senior Counsel, Office of Legal Policy, and most of her portfolio is with forensic science. So in essence the Department has two people (Hunt and Antell) devoted full time to the improvement and advancement of forensic science, including transparency. Hunt's job involves interacting with leadership and meeting with stakeholders in many different realms to work on internal departmental policies, practices, and procedures, and to constantly look for ways to increase the reliability of what the Department does. He met with DAG Rosenstein at least once a week about forensics, and there is an in-depth meeting every month about forensics. Hunt also leads a standing departmental working group on forensic science, which is a high-level group of people who are laboratory heads or laboratory system heads – the very top of the food chain at these laboratory systems within the various component agencies like the FBI, DEA, ATF, Criminal Division, and others. They are at the table twice a month, hammering through issues some of which really go down pretty far into the weeds.

Mr. Hunt said that the Department believes that the best way to prevent potential mishaps with forensic science is to have a robust quality assurance system and to improve measures in that field. Public dissemination has also been a focus, as well as the continual promotion and advancement of the Department's methods.

The Department's techniques and quality assurance systems are particularly important. Mr. Hunt emphasized five key DOJ is doing right now to improve forensic science.

First, the Department is discontinuing the use of the phrase "reasonable degree of scientific certainty," a topic that was originally brought up at the National Commission on Forensic Science. DAG Yates issued a memo directing the Department's prosecutors and laboratory examiners not to use that phrase unless required to do so by a part of a judge's ruling or a legal precedent. This began in a previous administration and has been continued by the current administration. The policy is about two years old now. Unless directed otherwise, the Department does not use that terminology.

Mr. Hunt's second topic was the creation of something called uniform language for testimony and reports. He noted that on the Department website there is a page (displayed onscreen), and a menu bar at the top of the page. You can click and find various document. The page that was just displayed showed the uniform language for testimony and reports. These are the Department's quality assurance measures for forensic disciplines practiced in their laboratories. And, basically they amount to this. This is mandatory terminology used by

examiners within and across labs for expert testimony and reports. It is present in both the report itself and in the subsequent testimony should it occur. There is uniform language for those terms and statements of conclusions. Each uniform language document covers a different discipline. There are 13 published and online, each of which has several elements.

First, there is a list of approved conclusions that the examiner may use to articulate his or her opinion. Second, there is a definition of that term. It is very difficult to encapsulate in a single term and the richness and the fullness of what an examiner is trying to say. So there is a definition of that term. Third, there is a concise statement of the scientific or technical basis for the conclusion. And fourth, there is a list of qualifications and limitations for the approved conclusions and statements for that type of examination. The qualifications and limitations element relates to things an expert should say to round off or give context to the opinion, and things that an expert should not say or should not go too far in overstating. This is geared to trying to appropriately calibrate the probative value of that statement. This information is available online and in discovery. It is turned over once these documents are constructed, they are approved and they are published.

The Department now has 13 qualifications and limitations, which will go out in discovery. They have to be appended to the report, incorporated by reference, or included in every case file so that the prosecutor or the defense attorney and the judge will all see with this particular type of analysis or this method, these are the things that I'm relying on, and here's what this means, here's what I'm saying in terms of a single word or phrase, and here's a fuller statement, and here is the basis for that. So that's going to be included in discovery. They are also available online at the top of the page. You can click on uniform language for testimony reports and look at the 13 that have already been published.

Mr. Hunt's third topic was the creation of a testimony monitoring program. Before Mr. Hunt joined the Department, the DAG announced there would be a testimony monitoring program. This program will be a routine way that examiners and digital analysis experts will have their testimony observed and reviewed by a colleague. Mr. Hunt could not say categorically that the Department would monitor every expert's testimony, but the goal is to get as many as possible. This going to be a substantive review. The criteria that the Department is looking at have to do with things like did you follow the laboratory policies and procedures that are mandatory for the evaluation of evidence? Did you correctly state and not oversell the basis for your opinion? Did you add qualifications to your opinions, so that you properly stated the probative value, neither over nor underselling, but rather hitting the sweet spot, getting it just right? And did you follow the approved language for testimony and reports, if there is a document applicable. This is going to be something that is routinely done. It is another quality assurance measure so that we catch any missteps before this becomes a systemic problem.

A member asked whether this has been implemented.

Mr. Hunt confirmed that it has been. The new framework for testimony monitoring is publicly available on this website as well. You can go to the document online. And this is a

framework for the different agencies and components with laboratory systems and digital analysis entities. They are going to create – some of them have already created – their own internal policies to fit their particular situation in-house, their laboratory ecology if you will. They are using these criteria here as a guideline. And there are a few mandatory components (“a few shalls”) that need to be incorporated into those individual policies. So again, this is a substantive review but it is not a cursory review or a request that the litigants send in their impressions about how they did. They do that as well, but this is a significant change in that the Department is trying to get up to 100% compliance with a testimony review by an in-person observation or a transcript review. This is going to be done, either in real time, or within 30 days, as fast as we can get the transcript and review it in a substantive way with that examiner to make sure they got it right in that case. The FBI has already preceded the mandatory program that came from the DAG’s office. They started testimony monitoring before that became required, and they have had great success. Some minor misstatements were caught and reported out to both the prosecutor and defense in one or two cases. It was a defense attorney who called one of our witnesses, and the parties were notified as well as the court in those cases. So, it is already paid dividends and we are catching things quickly. Mr. Hunt did not think any of the misstatements made any difference in any of those cases, but again it gets back to the Department’s commitment to make sure there is not a substantive problem when we’re reporting that out and we’re getting it right. And so we’re really excited about this program, it is being built up now. He did not have any data to report back about it yet. With the ULTRs, the uniform language, there will be feedback in the next year as we gather information. But he thinks this is a really good improvement in quality assurance and real-time catching of issues or misstatements.

In response to a question, Mr. Hunt said that these documents will be provided in discovery in every case, depending on what the specialty is. When asked if the production will be paper or digital, Mr. Hunt said that the labs will have a choice on format of disclosure. Obviously if you know about it, it is online and publicly available. The labs can make reference to it, incorporate it by reference, print it off in paper, or dump it onto a disc that is disclosed in discovery, in any event it is going to be there. We are not dictating how it will be disclosed, just that it be disclosed with the balance of the discovery. So we think this is a good idea because it’s going to make sure that testimony reports are consistent with those laboratory policies that are mandatory, again a proper qualification not exceeding the scientific and epistemic limitations of the discipline and the conformity with our uniform language documents.

Mr. Hunt emphasized the online posting of internal laboratory documents at all of our labs across the Department. These have been available as part of discovery for a good while, but recently all our components labs have completed the process of posting these internal documents online. And you can go again to the menu, up there and we have a link to the quality management system documents for the FBI, DEA, and ATF. So, if a litigant, a judge, or any member of the public chooses to do so, they can go to the internet, click on these documents and go through them in detail and read step-by-step how the evidence in each case was processed, the criteria by which the expert’s conclusions in that case were formulated and expressed – it is all

there. These are the same documents that our laboratory folks, our examiners, have to follow, that they get trained to follow, and they are there for anybody to read. Again, available at justice.gov/forensics.

Mr. Hunt emphasized that all of the Department's quality assurance measures – lab policies, protocols, procedures, standard operating procedures – are online. Before any methodology goes online it has to be scientifically validated. Summaries of all those reports are online for any litigant to read, to cross examine on, and to use however they choose. They are assessed using procedures based on international standards. He noted that there is an international standard for calibration and testing laboratories whether it is for forensic labs, labs that test groundwater, do clinical work, or diagnose diseases. All testing laboratories have to follow a particular document. If the lab is accredited, like all of the Department's labs, they must follow ISO (International Organization for Standardization is the acronym) ISO-17025.

The Department's laboratories follow ISO-17025 just like any other laboratory does and they get assessed to the requirements of those international standards at regular intervals. What they do is not only in compliance with what they believe is appropriate internally but is also based on international standards for testing laboratories, whatever the subject matter may be. Mr. Hunt emphasized that it is believed more than 90% of forensic laboratories in the country are now accredited. In the last 10 years, tremendous progress has been made, and the Department is approaching the point of getting the vast majority of labs accredited in the United States. He noted that all documents are available online for anybody to look at, read, download, or use during cross examination on the basis for a conclusion. He explained that these are not case specific bases because they are standard operating procedures ("SOPs"), but if anyone wants to look at the steps an expert had to take to reach a conclusion in a particular case, it's all spelled out.

The Department sees several benefits from these postings. First, it is consistent with the scientific value of transparency, which is very important in science because if you say that you can prove something, you have to show us, and another scientist will take what you show and kick the tires to see if it withstands their scrutiny. Second, it is enhancing the efficiencies of the Department's discovery and disclosure obligations. The information is freely available online, and anyone could use it case-to-case-to-case. They can go back, create a new copy, and put it in a case file for the current case. Mr. Hunt noted that this is somewhat duplicative because the quality assurance SOPs that were in place at the time that the test occurred are going to be disclosed in discovery anyway. Third, the Department believes that sharing what it deems are high quality policies and procedures with other labs is a very good thing for them; they can look and assess our standards against what they use. The hope is that this will raise the bar. The SOPs are also there for academics, lawyers, and judges to peruse, critique, and read all the way through.

Finally, Mr. Hunt turned to ongoing research in the field of forensic science within the Department. He reiterated that quality assurance measures are the best way to try to prevent any missteps, along with accountability that comes with testimonial review and the requirements to

follow uniform language. Hand in glove with that is to make sure that the statements that we are making on the witness stand are consistent with good science.

Mr. Hunt described current research in the field of forensic science, specifically at the FBI laboratory. The FBI lab is currently involved in the planning and execution of a number of important studies. These involve commonly used feature comparison methods. They are large-scale, discipline wide studies. They are both internal and external to the Department. The Department is not just testing in house, it will be sending tests out to state and local labs, anywhere across the country, to get a larger population. Having more people involved makes the study more reliable.

The studies will involve hundreds of examiners, thousands of samples, and tens of thousands of collective decisions. There will be an open experimental design, and the test taker will not know if the answer is included somewhere in that set. The set will be biased hard in order to identify the baseline for when experts start to fail and where they get it right most of the time. To identify these outer limits, experts will be given really hard comparisons. This will be a multi-year project that will generate a tremendous amount of data that is all going to be collated and published in publicly available, leading scientific journals.

These types of studies take a long, long time to plan for, to prepare, to execute, and then to crunch the data. But this is all in process, and not only inside the Department; there is an extraordinary amount of on-going NIJ funded research outside the Department. Those studies have provided a better focus and understanding of where forensics gets it right and where it gets it wrong compared to 10 years ago. Mr. Hunt noted that the Department has advanced enormously and cautioned that sometimes people read things that are very dated; many of the cases where bad things happened are a decade or more old. He also cautioned against using those cases as the benchmark against which forensic science is judged, because a lot has changed since then.

In conclusion, the Department's current focus is coordination and collaboration with all of the stakeholders, state, local, tribal, and on both sides of the bench and across the table. On a regular basis, the Department talks to defense attorneys, innocence folks, and brings in all the stakeholders who have something to say, such as academics and researchers, to get their input. It is also trying to increase the capacity of forensic services so that they can promptly and properly analyze evidence and get answers out to defendants, investigators, and prosecutors in a timely manner, and to continually enhance the quality, reliability, and transparency of what is being done inside the Department.

Professor Beale commented that this is all very interesting and encouraging, but she was puzzled about how it related to the National Commission headed by Judge Rakoff, who wrote to the Committee suggesting an amendment. She heard him make a presentation last summer, and he said that the Commission had asked to be extended. It had reached the end of its two-year period and asked to be extended to continue its work. Judge Rakoff said that request was rejected. Given the extensive outreach and effort to move forward, why was the Commission not

a useful vehicle, particularly since it had proposed approaches that were adopted by this administration?

Mr. Hunt noted that he was not yet at the Department when the decision was made not to extend the Commission, but he provided his perspective as a member of the Commission. The Commission met four times a year, and moved at an extraordinarily slow pace. He thought it was very inefficient in the way that the work products were developed. A lot of what concerned him as a commissioner was that the underlying bases for many recommendations were highly controversial. Though members of the Commission agreed much of the time with the recommendations, there were lots of disagreements about the bases for those recommendations and what justified them. So, he thought that was a part of the process that was very inefficient, a very, very slow-moving process.

In contrast, the Department has the flexibility to bring people in at any time. They do not have to wait for four months to do things and need not make recommendations that the attorney general has to consider. Mr. Hunt emphasized his direct access to leadership and direct access to the community. He tries to get input from lots of different sources both written and expertise that he has personal access to, and to weigh it all and come up with the best products. He noted, the Commission had some strengths, but was terribly inefficient and slow moving. The Department can now address things more quickly, more efficiently and effectively with the mechanisms they have in place now.

Professor King asked what percentage of forensic experts who testify in federal criminal cases are from unaccredited state labs.

Mr. Hunt did not know, but guessed that now, in 2018, it is very few. If they are from a laboratory, he thinks we are north of 90% of all laboratories being accredited now. That gap is going to get further closed as time goes on, because the Department has a directive to use accredited forensic laboratories whenever possible. That's the Department's goal. Everything in house is accredited that we use in terms of a traditional forensic laboratory. So we have those layers and layers and layers of quality control before anything ever goes out from the report.

Professor King asked whether there are specific types of science or states that have a higher percentage of unaccredited labs.

Mr. Hunt identified digital evidence, relatively new on the scene, as an area where things are having to catch up. Digital evidence was traditionally something that was in an investigative unit of a police department. It was not a traditional laboratory setting, and there is a lot of work underway about considering the right fit for an accreditation scheme. If you have a testing calibration lab, you take those requirements and overlay that on a digital analysis entity, it is not a good fit. But a number of organizations are now working on this. One is called the scientific working group on digital evidence. Another is the organization of scientific areas committees, which has a digital evidence subcommittee. They are actively looking at trying to do this. There is a lot of work that is underway. It is his impression that digital has a lot of catching up to do because they are not a traditional forensic discipline.

The next Department speaker was Erich Smith, who is a firearms and tool marks examiner at the FBI laboratory. He noted that usually he appeared briefly in the courtroom as a witness, and was pleased to have a chance to talk to the committee.

He wanted to return to Mr. Hunt's comments about the quality assurance. As far as review of testimony, he said I am the technical leader in my unit, so it is my responsibility to look at all the transcripts that come in. I am checking them for accuracy, and whether they are within the confines of the science. Within the laboratory manual operation system, there is a document that spells it out exactly what I am to do, and how to record that. It is all maintained for a long period of time through the Department's accreditation process as well.

Mr. Smith walked the Committee through the case file. He noted that he is often asked what the difference is between firearms and tool marks, which seem like two different things. But a firearm is just a specialized tool to create work. So when we are looking at bullets or cartridge cases, we are looking at the tool marks that are left behind in the production of that firearm to try to identify. This is typically what I am going to see at the laboratory for communication. We call them electronic communications in the FBI, but it could come from the state laboratory or state agency that is sent to the FBI lab for analysis. Basically, we want to examine these items, and they give us some information about the case as well. Looking at the material displayed on the screen, he noted P1700006 was a laboratory number that's been assigned to it, and then we have some information about who sent it in as well. There will be some synopsis about the case, a generic synopsis of what's going on, where the evidence was collected, maybe something about the case itself, and then typically at the end the contributor will have a request to examine the items for their forensic value. That initiates it in the lab. We have a separate unit that is going to take in the evidence, and everything gets a unique identifier. Item 1 through whatever. They are introduced into the chain of custody, so they are tracked continuously in the lab. There will be some communication with the contributor to say I received the evidence in this case. This is the report that is generated at the end. you can see in this particular case five cartridge cases were submitted. There was a pistol, that is the item 6. And then the secondary evidence is evidence that was generated in house. We test fired this gun and produced samples.

The first thing you get is the result of the examination. What did the examiner conclude? In this particular case, the examiner identified the gun, said it functioned properly, and he was able to identify three cartridge cases as having been fired from that particular gun. The other two cartridge cases were identified as having been fired from a separate gun. In this case, although he has one gun present, the evidence represents two different guns.

Laboratory reports contain a lot of information because the examiner may not be in the courtroom when the trial happens. The Department felt it was necessary to have information on the methods and limitations included in the report. For each exam that was conducted in this case, the report describes the firearm's function, and explains what was done in that case. The report then will move through each exam.

NCIC stands for the National Criminal Information Center. This is a database search to see if the gun was stolen, then we're going to talk about the cartridge case in that examination, how they were compared and how they were identified or not identified to a particular firearm. Then we are going to do another national database search which is called the National Integrated Ballistic Information Network. Next, we are going to see if there are any open cases out there that are unsolved that these guns might have been involved with and we are going to search that. Then we are going to spell out the limitations of each one of these examinations.

A member noted the Committee was just talking about uniform language in the reporting as well as testimony. There is language in this report on "identifying." The member asked for clarification, noting an understanding with forensics that an examiner could say it is consistent or it is similar to, but "identifying" is like excluding evidence absolutely from this gun. Is that one of the problems in terms of testimony?

Mr. Smith said if he were testifying he would state that the cartridge cases were identified as having been fired from this gun. Now in the straight context of that sentence, yes, you would attribute that as being absolute, but I would have to give context that that is based on my certitude of practical certainty based on the sureness of my opinion because this is an opinion-based discipline. Based on all of the training and all of the validation work and science that precedes it, there is an understanding that an examiner can identify a particular item to a common source by looking at individual characteristics. It would be improper to say that it was identified as having been fired in that gun. But the hearer of that information be it the jury needs to understand what the certitude of that decision is.

There are two stages of the examination: class characteristics and then the individual characteristics. There are standard forms within the Department's quality system that outline the minimal things that the examiner has to record. It is imperative so that if I am a technical reviewer; I can look at these documents and I can understand the process and what occurred in the examination. If it is sent out for review by another entity, they will understand what I was doing and how I was examining these items. On this particular one, we have the firearm. This whole sheet talks about Item 6. The class characteristics, that is something that is predetermined before manufacturing. In this case, the company, Ruger, decided to make a 9mm pistol. Accordingly, I have determined the class. I also know the diameter of the bullet, and the length of the cartridge case. Of all pistols, I am only talking about 9mm. Along the way, the examiner test fired the gun; so if you look under examinations and rifling, it tells you 6 right. Ruger decided that when they make this barrel, they will put 6 lands and grooves inside the barrel. And that is specific to that brand of manufacturer. If I had a whole array of guns here, I can now whittle it down to being Ruger by class characteristics. That is before I even get to looking at the individual weapon. So the examiner is required to record all this information up front. It is at this level where I can make my first decision. If there is a divergence in class characteristics, the pistol is 10mm, and this is 9mm – that is an elimination. There is a difference in class characteristics.

This just represents the record for the NCIC search. Was this gun stolen? It was not stolen. It came from the Department's collection, so I know it was not stolen. Next, he discussed the cartridge cases. These were submitted to the examiner to determine, were they fired from this particular firearm. And you can see the tech review that took place at the time. So the examiner, he recorded the shape of the firing pin, which is hemispherical. Think of a bowl. If I took a bowl and dropped it into some sand, it would make a hemispherical shape. If it was a cylinder and I dropped it in, it would make a flat bottom. So that's a class characteristic. If there was a difference there, I could eliminate. But in this situation, all the cartridge cases are hemispherical, they have the same class characteristics. In tech review, which Smith did for this case, the examiner was asked to make some corrections so part of the Department's quality assurance. He has to strike it out. We have to have an awareness about what he corrected, and he initialed it as well.

This is a spread sheet of all the class characteristics for each one of the cartridge cases. So we can understand the brand, the Remington federal, the material the case is made from, some are nickel some are brass some are copper, the firing pin shape. So he has consistency with the firing pin shape, he cannot eliminate, but then he can eliminate right here. The breach face marks. The breach face is that part of the firearm that supports the cartridge case when it's fired and when that tool cuts it, if it moves east to west, it's going to make parallel lines. In this situation, this tool was spinning and it made arching lines. At this point he could eliminate this cartridge case as having been fired from these two.

Mr. Smith commented that the documents he had provided are very typical of what the Department turns over in discovery. This is the NIBIN [National Integrated Ballistic Information Network] report, so he is put into NIBIN "Item 1: Cartridge Case." He wants to see if there is a gun out there, or a shooting out there, that this cartridge case may have been involved with. And with this system, you have to think of it as a Google search. You put an image in, you ping it against the database, and it gives you a list of choices. And in this case, the examiner has to sit at a terminal that is got tile screens and starts looking at the different images to see if any of these might match to his case. If they do, then the evidence must be brought into the lab and we do a microscopic comparison at that point, if we recognize anything.

A member asked do you do this when you do not know the firearm that the cartridge is from, or do you do it every time?

Mr. Smith said they do it every time with a gun, because we want to know, "was this gun involved in any other shooting?" In this case he has two cartridge cases that identify as having come from another gun. So, he needs to know is there another gun still out there involved in another shooting. So it depends on the examination if you are going to put all of them or just a select few into the database. Further, there is a lot of detail because of putting three items in there. And he searched different regions of the country. The database is partitioned based on regions, so if the contributor is in Milwaukee you're going to search Milwaukee but you're also going to search the FBI database to make sure that it hasn't been put into that database as well.

So everything that we talked about first was about the level one, the class characteristics. And you can see that there were two cartridge cases that had similar class characteristics. So at this point we are going to move to level two, which is the actual the comparison of the individual characteristics.

Mr. Smith explained that individual characteristics are formed when the tool is actually cutting the metal. The metal is going to break randomly, fracture, crack, and in the process the tool that is cutting is under a constant state of wear. It is changing, and debris that is falling away is interrupting, creating more individual characteristics. So now this is where we move to the comparison microscope, which is an instrument that allows us to look at two specimens side by side. And we are going to look at what may appear as small scratches, small impressions, and see if they repeat between the pistol and the test-fired cartridges.

And so, Mr. Smith continued, this is Cartridge Case 1, 3, and 4 that he is identified as having been fired from the pistol. This is tough to look at because it is been photographed, scanned, and you have lost a lot of the detail. But what does stand out is the firing pin impression right here. That defect is on the firing pin. It has a chip, a notch in it, and it is reproduced. There is a dividing line right here. Item 3 is right here, and a test fire from the Item 6 pistol is on this side. He is comparing the two firing pin impressions and he is trying to illustrate this defect that repeated between the two. Over here, this particular firearm has a dropping breech.

Part of the quality control system, Mr. Smith explained, is that the examiner must indicate the areas that he used for his identification. What was it that he compared? For example, these are cartridge cases so think of them as a small little can, and the powder's going to be inside. Well, the breech face is going to hit one end, and that is what you are seeing right here. And you have the firing pin impression. And then you have chamber marks. So you've got one, two, three, four independent surfaces that were manufactured independently that he can use for identification. This just represents a bookmark of what he did in his examination. It does not share the totality of everything that he did.

The quality system also requires verification that all identifications include some eliminations. And in this block here, you can see this person signed to verify that these are the items he looked at, and this is the date he verified that the decision was made. So this is the second examiner's agreement with the first examiner's opinion.

A member asked for clarification. This is not Mr. Smith's signature as the reviewer? There were three then, two initially and then you reviewed? Mr. Smith answered affirmatively, and continued. You have the verifier, who is just verifying the opinion. And then the packet's turned over. In this case, it was turned over to Mr. Smith to do the technical review. Did this person follow all the proper procedures? Did they document everything correctly? That is my purpose. That goes on the report as the technical reviewer. Finally, there is an administrative reviewer that is just going to read the report and look at the information to make sure the report reads accurately. So essentially there's three checks along the way.

In response to the question whether everything being shown will be in the file that is going to be disclosed to the defense, Mr. Smith responded that was correct. They will see everything, who did it, at what time. It is all turned over.

Mr. Smith then continued, noting the other two cartridge cases with the gun that is not present. He is identified these as well. This is the firing pin impression. Item 2 and Item 5...here's the center line and he is homing on this defect in the firing pin as well. We cannot see the shearing here that is represented, but he also includes the magnification and what he used for making his decision. And here is the verifier on this one as well.

Mr. Smith reminded the Committee that they began talking about the chart, and were pointing out the examiner can eliminate here. There is a difference in class characteristics. Well, that is what he is trying to illustrate: that these two cartridge cases were excluded as having been fired from the Item 6 pistol.

Next, Mr. Smith pointed out the test fire from the pistol. There is that defect, and then here is the other two cartridge cases. If you look closely...see these lines right here? Those are the arcing lines. Those represent the milling tool that cut this surface. They are different than what is on this side over here. These actually were cut with a broaching tool that made parallel lines.

Mr. Smith drew the Committee's attention to a series of other forms. The secondary evidence form records the number of times, or the quantity of test fires, that he made in-house. And these become evidence and they are returned to the contributor. The tech and administrative review forms include certain things that we want to make the reviewers pay attention to when they are doing the review. In this case, you either affirm, or point out things that might be incorrect. In this situation, I had some issues with the report language, how he was phrasing things, I sent it back to him, he changed them, and it is recorded. At the bottom of this there is the administrative reviewer. Their information is recorded as well.

This is the laboratory information management system. So back at the front end when the evidence came into the lab, this initiated the forms that fall under the case record report. So, in this particular case, we are going to see who did the review, and who did the administrative review at the end.

Mr. Smith pointed out the listing of the items that were produced. Here is the chain of custody. You can see where it is initiated, a description of what the items might be, how the packaging was. And when there's a transfer, even if I'm finished for the night and I need to put it away, there's storage containers I can put them in and I can designate it on the chain of custody as well. So at the end, when we turn this over in discovery, the defense can see who handled it, at what time, and where the evidence was in the laboratory.

This is the communication log. We record everything we talk to the contributor about, including if there is something administratively that we need to record about the case, we can put it into the com log. There will be a record of communications, what might have been spoken

about. At the end we actually send out a form to the contributor to find out feedback from them (how was the laboratory?). And you can see they recorded it right here, that it was emailed out on this date.

And then they have all the other information that came in, so you can see the EC (electronic communication) is here as well, shipping information, and then a copy of the secondary evidence. So, that is all turned in.

Mr. Smith then drew the Committee's attention to a typical CV that would go out for him to explain where he works, how long he has been there, his duties as a program manager, prior work experience (working at the Virginia Division of Forensic Science) and then his educational background, as well as any military background.

This actually is a [unintelligible] that we might turn over to the court. Because we are going to talk about terms; people watch television so they think they have an idea about what certain things are called, and they are usually incorrect. Typically, and I am going to pick on the attorneys here, they call this a bullet, but for us that is a cartridge. So we want the jury to have a complete understanding about the terms we are going to talk about, so they are not thinking about one item when it's actually a different item.

This is a good example, walking through, just simple terms. Here is a cartridge case. Here's the cartridge, the bullet is at the front, here is the powder, this is the breech end, and there is the primer. So, the little donut, or little compression, is going to be in that silver section right back here. So the jury understands what it looks like when it is fired as opposed to not being fired. So you can see we have a hemispherical firing pin shape, this is the bottom of the cartridge, the primary [tongue?] fired. This is what it should look like after being fired.

Here's the breech face. That is called the firing pin aperture. That is the hole that the firing pin protrudes through, to create that impression that you see right there. So you can imagine this silver area is resting right here. You can see an outline of where, from previous shootings, that it is starting to leave some residue behind, right around the opening of the hole.

These are the cartridge cases from the actual notes. There is the defect in the firing pin impression. This is the elimination photo that he had.

A member asked whether this PowerPoint file is given to the defense, with all the notes. Mr. Smith said that it was in this situation, but not always. The member asked if you are doing demonstration evidence, what does the defense get?

Mr. Smith said there are two hurdles. It is up to the prosecution. It is their case, and how they want it to be presented in court. But the judge may not allow it. The defense may make a motion that, hey, this does not pertain to this case, we do not want this evidence, so it may not even get into court. But we do turn it over if the prosecution wants us to give some sort of story, or explanation of what it is that we are going to talk about.

This was the elimination. Now you can clearly see the marking lines here, difference in aperture size. That was the elimination. You can clearly see the defect, but he is also looked at the aperture sheer. So I highlighted that little hole that the firing pin protruded through. While this is very malleable foil, it will go into that opening, and when the firing opens up it creates all these individual characteristics that can be used for identification. So he has two really nice areas to look at for an ID. And here is the defect in the firing pin for Item 295. This is the gun that we do not have in this case. He is also found some detail in the breech face.

Mr. Smith highlighted one of the SOPs. He was in charge of developing this SOP and has presented it to a professional organization. Some laboratories have adopted it.

He turned to verification. In the Department's laboratory we do blind verification. If the original examiner collected all that information, and if this case was going to be blind verified, he would not be allowed to get somebody to come in and sit down and offer an opinion on his decision. So all the notes that you saw there, minus the verifier, would be turned over to the unit chief. The unit chief acts as a referee in the situation.

Now, say I am assigned to be the blind verifier. Now I have to get the evidence and do the same comparison and generate the same results, and they're turned over to the unit chief. It is the unit chief's responsibility to look at the two examiners' notes to see if they are congruent. In that situation, if I had agreed with him, I would essentially be the verifier. I did it independently and they matched the original. But say I did not agree. Let us say on one of those identifications I said, no, it is inconclusive. That is going to initiate another quality assurance component where we are going to have a dispute resolution.

I am going to sit with the unit chief as well as the other examiner and we are going to talk about the examination. The minutes from that meeting will be recorded and they will be included into the 1A.

It will go through dispute where another examiner will come in, take another look at the evidence, and try offer opinions. If it continually goes up and there is no agreement it functionally ends up in the laboratory director's wheelhouse and they are going to make a decision in the end. But that whole process is cataloged, and it will be turned over into 1A. The defense would have a record and be able to see what took place.

Mr. Smith was asked to quickly summarize or go through the rest of the quality assurance documents.

Mr. Smith turned to how we produce a report. In discovery you will get everything that we do, including the report-writing language, whether we did it or not. This document tells us how to write a report, so you will get that information as well.

Mr. Hunt talked about validating new techniques, and Mr. Smith said he was very proud of his unit because there is no other unit in the world that has the instruments we have in-house. We are looking at those individual characteristics to see if we can quantify the decision. In doing that I have to follow this procedure. I have to come up with a plan. How am I going to validate

this? I have to keep all the information that is done along the way. And in one particular case in which we validated one instrument for virtual comparison microscopy...all those documents are available if needed for discovery.

Estimation of uncertainty primarily deals with the quality system, things that are driven are by statute. That would be like barrel length, overall length, things where there is a criminal charge based on that. So, we have to figure out the uncertainty that would be applied to any measurement, be it for a barrel or for overall length for a firearm. If I have to report out-of-measurement, I am still going to have to figure out the uncertainty behind that measurement, and this tells you how to do it.

Proficiency testing. I take four proficiency tests a year. It is going to be in the core disciplines: gunshot residue; so that's distance determination; how far was the firearm from the victim; tool marks; serial number restoration, as well as firearms. this outlines the interval and the deadlines that have to be met when doing a proficiency test. And, if you are unsuccessful in the proficiency test, what is the outcome and what is the mitigation?

This is the FBI laboratory's scientific testimony report language. This is the document I use when I do a review of testimony, or the opinion offered by the examiner. It is going to explain what we can and cannot say. I am going to testify next week in Alabama. So, this is what is going to happen. When I get back to the lab tomorrow, hopefully, I'm going to have to go in and record that I've read the [aster?] before I leave, and that goes into a database and a case record so that the quality assurance will understand I'm going to Alabama. What is the case record, so they can pull the transcript, and I have also read this to make sure that I am [compliant?] with the testimony? So this talks about the conclusion of identification and then exclusion and inconclusive. Those are the three decisions that I can make with my opinion. At the end, these are statements that I cannot say. I cannot say to an absolute certainly about an identification. The reason being is that I am not going to see every firearm made, or has been made. But I do have a trueness and an understanding of individual characteristics that are produced, and when there's sufficiency in their agreement for making that identification. Nor can I offer any numerical certainty. "I'm 99% sure." We do not do that. That is not appropriate. So that is a responsibility that I have to take, when I go to testify its part of the quality system. That is what I have been doing for a few years now.

You saw the end product for the cartridge case examination. This is the SOP that the examiner has to follow and that will also be used to evaluate his work during a technical review. So it lays out how the process takes place, what is used, and are there any standards of controls. There actually are standards in this situation for the virtual comparison microscopy. We do use standards for that. Performance checks for the instruments as well. And then the workflow. How will you perform the examination, and what to require?

A member asked if all these procedures and regulations are part of the quality assurance system. Is that turned over, is that put on the web? Discovery is the focus here.

Mr. Smith responded that everything that he is showing is turned over. Now that we have it on the web that makes it a lot easier. I can point somebody directly to the website, but we're still burning them to a CD so they will have access to all of the SOP's that we use including the LOM (the laboratory operations manual) and quality manual.

Mr. Smith said they work with two manuals. One is the quality manual, which outlines everything in laboratory, responsibilities, and directing certain tasks. You can just see by the outline that there is document control, organization, and reviews. That is the quality manual. It is easy to talk about technical requirements as far as education, competency testing, but the LOM (laboratory operating manual) is going to go into the detail of each one of these elements and how it is achieved because this is just the framework.

A member commented that although Mr. Smith said that all this material is turned over; the member did not see anything about bench notes when they are doing things.

Mr. Smith said the bench notes were there and pointed them out again. The ones with the photographs that were dark. In response to a question whether there are things examiners produce that are not turned over to the prosecution, Mr. Smith said that everything involved in a case is turned over if it would impact the case. There might be elements of the LOM that have no bearing on what I did in the exam. The LOM is going to be turned over to the defense, or rather to the prosecution, and his understanding is that the prosecution decides whether to turn material over to the defense.

A member asked Mr. Smith about his quality control review of prior testimony. What happens if it discloses an individual case where somebody overstated something valid forensics matter?

Mr. Smith said that in one case he was involved with a technical review they informed the court. We found an inconsistency or something that was stated not appropriately, and then the court and then OPEC is notified. That's the practice. I cannot speak for other directorates but that is what we did.

The final presenter was Jeannette Vargas, Deputy Chief of the Civil Division in the U.S. Attorney's Office for the Southern District of New York. Her focus was Federal Rule of Civil Procedure 26(a)'s disclosure requirements for expert witnesses and DOJ's experiences with expert disclosures in civil cases. She supervises approximately 50 line AUSAs. This work runs the gamut of both affirmative and defensive litigation, including tort cases, medical malpractice, car accidents, slip-and-falls, employment defense, and civil rights defense. On the affirmative side their work is also quite varied, including claims concerning fraud and healthcare, mortgage industry and financial institutions, procurement, federal grants, and civil rights. They enforce the civil-rights statutes, the Americans with Disabilities Act, fair-lending for housing, environmental, and shelter litigation.

In their experience, the majority of federal civil cases that enter discovery involve some level of expert discovery. Ms. Vargas said that, excluding programmatic litigation (cases that are

confined to administrative records), in cases that go into discovery regardless of subject matter, whether affirmative or defensive, they regularly use retained expert witnesses.

When in the process do we retain experts in the majority of cases? Assuming the case is not likely to be resolved at the pleading stage, she said it is generally their practice to identify experts at the outset of the case. In affirmative cases, they may even obtain experts in the investigatory stage before bringing a complaint. Their routine experts play a very critical role in determining what is going to be needed in fact-discovery going forward. So what documents do we need to obtain, where those documents are likely to be found? What witnesses should be deposed? Generally speaking, civil litigators are not subject matter experts. They are litigation experts and our experts are the subject matter experts who educate us on whatever it is that the case concerns. So that allows us to go forward with the case and help us to formulate what questions should we even be asking very early on.

Federal Rule of Civil Procedure 26(a)(2) imposes robust disclosure requirements for retained experts in civil cases. First, Rule 26(a)(2) states that a party must disclose the identity of any witness it may use at trial to present evidence under Federal Rules of Evidence 702, 703 or 705. And in addition to disclosing the identity of the witness, of course, there are additional disclosures regarding the substance of the witness's testimony, and the extent of those disclosures depends upon the type of expert witness that you're talking about. Essentially, Rule 26 divides experts into three categories.

The first is the retained expert. The second is the employee whose duties regularly involve giving expert testimony. Third is the catch-all of all others who are going to be providing 702 opinion testimony. A retained expert, for purposes of the rule, is one who is paid for the specific purpose of giving expert opinion in litigation. They do not have prior knowledge of the facts at issue. They were not personally involved in the events giving rise to the litigation. And in the case of government-retained experts, they are not federal employees. They are typically retained pursuant to a contract. They are paid either a flat-fee or an hourly-rate. More usually the hourly-rate for the specific purpose of examining the record in the case, consulting with the attorneys and providing their opinion which will be embodied eventually in a report and giving a deposition regarding that opinion.

In contrast, a retained expert is not a percipient witness. That is one whose knowledge obviously is premised on their personal knowledge or involvement in the case, they are not considered a retained expert even though it may be the case. For example, the treating physician is usually considered the exception to that retained expert rule, where a party pays them. Usually for example the treating physicians for the plaintiff are paid. But they have come by their knowledge not because they have been specifically retained for litigation, but because they were involved in the course of treatment. That kind of witness is not considered a retained expert for purposes of the rules. In almost every case in which the government uses an expert witness in a civil case, the expert we are talking about is a retained expert.

The expert disclosure requirements for retained experts are set forth and Rule 26(a)(2). They include an expert report that contains the following elements:

- a complete statement of all opinions the witness will express and the basis and reasons for them, all the facts and data considered in forming those opinion, any exhibits used to summarize those opinions;
- the CV or otherwise a summary of qualifications that needs to include a list of all publications for the prior ten years;
- a list of cases in which the expert has provided deposition or trial testimony in the prior four years, and;
- a statement of the compensation to be paid usually up to that date, or you can provide the hourly-rate with some evidence regarding how much work has been done and how much work is estimated to be done.

The length of an expert report can vary. At a minimum, I do not think I have ever seen one that is less than five pages. Typically, it is at 10 to 20 pages in a very garden-variety case, like a tour case or something like that. A medical opinion in the range of 10 to 20 pages is fairly standard. In complex cases, expert reports easily exceed that length, particularly in affirmative cases where the government has the burden of proof, for which the cases tend to be more complex. The expert reports can run quite a bit longer. It is not at all uncommon for such reports to run between 50 to 100 pages, including appendices and worksheets.

Ms. Vargas showed a sample of an expert report on a false-claims-act case. It involves claims that were allegedly tainted by the unlawful kickbacks. This report was prepared by a Nobel Prize winning economist who worked with the Department for several years doing data-analytics and preparing this report. It took quite a long time. He had a team working with him under his supervision who did the analysis of the claims submitted to various federal health-care programs, in order to demonstrate a causal link between the payment of kickbacks and changes in prescribing behavior. This report, with appendices and various calculations, was 119 pages in length, of which 35 pages are substance and the remaining pages provide various calculations and data analytics. There was also a separate production of the work papers that included all the actual analysis broken down, which numbers several hundred pages more. Files were also produced at the same time as this disclosure was made.

Ms. Vargas turned to the other types of experts on the Rule 26(a)(2). The second category of experts are those whose regular duties include providing expert testimony – those who are a party's employees. These expert employees are subject to the same disclosure requirements as retained experts. It bears emphasis that as a matter of practice, and across subject-matter-areas, this provision really does not have much relevance for government civil litigation because the Department does not typically use its employees, or agency employees, as expert witnesses in civil trials. It would be a very rare circumstance where we would produce an expert report from a federal employee. Ms. Vargas noted that she had never done it, and to her knowledge no one in her office has. She could not, however, eliminate the possibility that it has been done somewhere across the DOJ, though it would be a very rare circumstance.

That is not to say, Ms. Vargas noted, that the Department does not have employees with in-house expertise in various practice areas. They have in-house architects, in-house auditors and accountants, economists. But as a matter of practice, they do not use those employees as expert witnesses. They do not call on them to provide testimony. They do not ask them to prepare expert reports. If there is a litigation need for an expert to provide testimony in trial, they retain an outside expert to do that work. This is their practice for a variety of reasons, but a primary reason is the burden of asking employees to regularly produce expert reports. It would take those employees away from doing other mission-critical tasks. When it comes down to it, and the Department sees a litigation need for an expert, they go outside.

Ms. Vargas drew the Committee's attention to a slide providing an example of a situation on which there was relevant in-house expertise, but the Department nonetheless retained an outside expert when it came time to prepare for trial. A case from the Southern District of Texas required a forensic analysis of a computer to determine if certain information had been deliberately wiped. At the outset, the Department had the computer examined by someone from the FBI who gave them an in-house analysis of that computer. But, when it was time for trial, the Department does not generally in civil cases have employees do expert reports. Therefore, the analysis was redone by an outside expert who then produced a report which was approximately 30-odd pages in length and the Department used him as the testifying expert for that civil case.

Finally, we get to the third category of experts under the federal rules. This is essentially, a catch-all of everyone who does not fall within the category of a retained expert or an employee whose regular duties include giving expert testimony. The disclosure requirements for this third category are much more abbreviated than those of retained experts. They do not have to provide an expert report or other expert disclosures. In 2010, Rule 26 was amended to include a requirement for summary disclosure of opinions to be offered by all expert witnesses not otherwise required to provide a report. Prior to that there was no such requirement, and there was some confusion about whether those individuals needed to provide any kind of disclosure or not.

Adopting this rule, requiring summary disclosure for non-retained experts, the advisory committee made clear that these disclosures for non-retained experts are considerably less extensive than the report required under Rule 26(a)(2)(B) for retained experts. Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

Ms. Vargas explained that occasionally a federal employee may be used as a summary-expert in this way. They are not retained and are not someone whose job regularly involves giving testimony, but in a particular case, they might have a relevant opinion. They are not subject to the report requirements, because they are not normally in court giving testimony (that is not part of their job duties), but in a one-off case we may need them to provide an opinion.

For example, there was an employee at one of the Department's VA buildings, who was chief of engineering services. This case involved a slip and fall at the VA, and the issue was whether there was a water-leak in one of the pipes. The employee worked at the VA and was there to provide expert-opinion about the piping system and how it worked. His testimony falls within the summary disclosure requirements because he does not normally give testimony. That is not part of his job duties. He is not a forensic analyst, he does not do this for a living, but in this particular case the Department needed him to provide opinion testimony and provided a summary disclosure. The disclosure is about two pages in length and briefly states the subject-matters on which he is expected to provide evidence and a little summary of his opinions.

Judge Campbell observed that the two most common experts in civil cases are treating physicians and police officers in cases that involve car accidents. Neither is specially retained, so neither has to produce a report. Thus, Rule 26(a)(2) requires the lawyer to give a summary of what those witnesses would say.

Ms. Vargas stated that the summary expert report provision is often called the treating physician exception for that very reason. The treating physician is not considered a retained expert because he has personal knowledge based upon his treating history with the party, usually the plaintiff. And it is considered unfair to make that kind of witness produce a report in civil litigation because typically they are not within a party's control. They are outside the case. The disclosure rules for these types of catch-all experts require that the subject matter on which the expert is expected to present evidence be disclosed, in addition to a summary of the facts and opinions to which the expert is expected to testify.

Ms. Vargas turned to the sequence and timing for expert disclosures in civil cases. In most cases, the timing and sequence is dictated by a scheduling order that is issued by the district court at the outset of the case. Typically, discovery in civil cases proceeds in two phases: fact-discovery followed by expert-discovery. The need to proceed in this kind of dual phases is fairly self-evident. The experts are going to rely very heavily on the information that is gathered during the fact discovery phase.

In the first phase you have the process of document requests, interrogatories, maybe contention-interrogatories, fact-witness depositions, to create the record in the case. At that point, the parties really hone in on the issues to be tried., *i.e.*, what is really going to be in dispute. In the second phase, which is expert discovery, expert disclosures are made. Typically, although not always, the plaintiff's expert disclosures come first followed by the defendant's disclosures. If the court does not set a date, the Federal Rule presumptively says expert disclosures are due 90 days before the date set for trial or the trial ready date. And again, if there is no court order, or the court has not ordered otherwise, parties can produce rebuttal reports within 30 days of the other party's disclosures. In the final stage of civil expert discovery are expert depositions, which follow expert disclosures. Depending upon the number of experts and the complexity of the case, courts typically designate a certain amount of time for expert depositions to take place after all the expert disclosures have been made. Rule 26 provides that depositions of retained experts cannot take place until after the disclosure.

To sum up, Ms. Vargas said, their experience in civil cases is that working with retained experts is really an intensive and sustained process. It can take many months, and sometimes years depending upon the nature of the experts, the nature of the case, and the complexity of the expert disclosures including expert depositions. Even a simple case can take time and impose a burden. Accordingly, the Department primarily relies on retained experts because they are employed for that specific purpose. It is not imposing a burden on them, they are paid to do this. In contrast, the Department is reluctant to take employees away from their mission-critical work to have them serve as experts in civil cases, given the process and procedures that really require a sustained and systematic disclosure, requirements that really do impose a burden on those employees.

Judge Campbell explained the development of the civil rule, and the distinction between retained experts and others. In 1993, the Civil Rules Committee decided that robust disclosures were needed. In deciding who should be required to give reports, the Committee concluded that it should be limited to retained experts because it is hard to get a doctor who treated the patient after an accident, or a police officer investigating an accident, to produce a report.

In 1993, the expert report requirement was adopted which said the report has to set forth a complete statement of what the expert will say in trial. Some judges view that as a virtually verbatim statement of what would be said by experts during testimony. Those who were not specially retained, such as treating physicians or police officers, did not have to produce anything and the lawyers did not have to disclose anything. As a result, there was a gap in the rules for about fifteen years. If you were on one side, you did not know what the other side was going to ask the treating physician or the police officer. To plug that gap in 2010, the Civil Rules Committee adopted this summary idea. We are still not going to require the treating physician to write a report, but we will require the lawyer to tell the other side what that lawyer intends to call them to testify about, what the subject is, and what the reason and basis for the opinions will be. It is much less detailed than the expert report, but at least it gave the other side notice of what the treating physician would say and then the other side could choose to oppose the treating physician if they wanted to. That is how the dichotomy came about, and how the rule was developed over time.

Discussion turned briefly to a comparison of the development of the Civil and Criminal Rules. There was agreement that in the 1990s the parallel provisions for discovery in civil and criminal cases were advanced.

Judge Campbell noted that the summary that was added in 2010 for non-retained experts is very close to what is in Criminal Rule 16. The wording is a little different, but very close. In a civil context, this is permitted for a non-retained expert. But a retained expert required the production of a detailed report. Another speaker interjected, however, that in the civil context the non-retained expert could be deposed. Judge Campbell agreed, and noted that the parties could also get all medical records.

TAB 5

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Memo
Criminal Rules Committee

To: Criminal Rules Committee Members
From: Donna Lee Elm
Date: September 17, 2018
Re: Expert Discovery – Defense Concerns

In preparation for the meeting, I sent an email survey to federal defenders as well as CJA Panel practitioners concerning problems that they had encountered with the existing federal expert discovery under Rule 16(a)(1)(G). As is common with email survey blasts, there was little response. However while a number of those responding summarily bemoaned the Rule as insufficient and “toothless,” I was provided with quite a few instances where the Rule fell short of adequately apprising the Defense so that the government’s expert testimony could be effectively challenged.¹ Furthermore, I asked about traditional experts, not the thorny problem of officers offering “expert” testimony as is common in interpreting drug trafficking language and behavior. I nonetheless had a groundswell of complaints about the latter – suggesting it may be something to consider going forward.

Criminal Defense Attorneys with Civil Experience

CJA A: A long-time CJA panel member from the southwest, who has an active civil practice, was pleased that the Committee was considering productive changes of the Rule. “The criminal system for handling expert witnesses – in which opponents of the expert get neither a detailed report nor a deposition – is inferior to its civil analogue in virtually every way.” He noted that it is costly to use Court time for a *Daubert* hearing, which essentially allows the defense to discover the opinions and their bases, as opposed to the civil practice which would provide all that information without Court intervention and hearing.

Rule 16’s disclosure requirement results in “a two-to-three page (double-spaced) summary either of the opinions the proponent of the expert *hopes* he will say or of the broad topics ... that the expert *can* testify on.” The simple civil requirement that the expert sign the disclosure was “huge,” especially because “Many of the summaries written by the Government are (1) written by an AUSA and not even *seen* by the expert prior to a *Daubert* hearing; and (2) written before the expert had formed his actual opinions.” He offered as an example experts such as child psychology and human trafficking experts who testify “seminar style” about typical effects and behaviors in these cases. He noted that the criminal Rule offers no penalty for providing this type of disclosure, provided that the AUSA drafted “an over-inclusive disclosure.” Another

¹ This serves only to alert us to some problem areas we may want to focus on for any testimony.

Memo
Criminal Rules Committee

drawback of the unsigned notice is that the expert cannot be impeached with it when varying from the Government's notice.²

He recommended some changes to the criminal rule. At a minimum, the rule should require the expert to sign the disclosure, and "there is little downside to requiring that this report fulfill all the detailedness requirements of a civil expert report."

When so little is disclosed by the Government so late, he has seen current reciprocal discovery obligations "incentivize defendants in some cases ... to forego any reciprocal expert disclosure."³ Noting that those are rare occurrences, the government's late/lax disclosure can place the defense at an advantage. Hence the Government could strategically use its Rule 16 obligations to obfuscate, and the Defense can do the same with its reciprocal obligation – gaming instead of principally deciding a controversy.

He went on to offer redlined changes to Rule 16. He followed with a thoughtful and fleshed-out proposal for reciprocal expert depositions. Acknowledging that it would be a significant departure from the current Rule, he believed that that would nonetheless "increase both the quality of the truth-seeking function of discovery and the efficiency of the proceedings."

AFPD B: A Midwest AFPD who had worked in civil practice for a number of years was deeply troubled by the difference between civil and criminal expert discovery rules. She had found that all expert disclosures by AUSAs were "pretty bare bones." She also noted that the government often claimed that they do not need to disclose non-forensic experts "such as the accountant from the victim company or the investigating agency, claiming that they are fact or lay witnesses," even though they testify about matters within their particular expertise.

She also saw a significant difference in disclosure of the substance of the expert's testimony. "The AUSA's summary is often a lot shorter and less detailed than what the expert is ultimately going to testify to. My experience was that a lot more detail was required in civil to pass muster."

Finally, local rules and procedures did not ensure adequate notice. Defense lawyers "have to push the government and court for a deadline for expert disclosures." She usually did not receive those disclosures early enough to sufficiently investigate, prepare for, and hold *Daubert* hearings. "Unlike motions in limine, expert disclosures should not be submitted just a couple weeks before trial because trial judges are often reluctant at that point to hold *Daubert* hearings when appropriate." The defense

² He conceded that he has sometimes been allowed to impeach an expert with the Government's Rule 16 notice, but that confrontation "certainly is not *effective* impeachment when the expert can honestly explain that he or she neither wrote nor approved the summary."

³ This can occur when the Defense is not fully informed until a thorough *Daubert* hearing that sets out the expert position, hence the Defense must secure an expert at the eleventh hour at no fault of its own.

Memo
Criminal Rules Committee

therefore sometimes faces “shoddy prosecution experts offering either junk science or untestable conclusions that are cloaked in expert mystery.”

CJA C: A CJA and civil rights practitioner in the North Central part of the country acknowledged “how vital it is to get a full report in advance of trial.”

CJA D: A recently retired west coast CJA Attorney (who had 25 years of civil litigation experience that was rife with experts) felt our existing criminal expert discovery rules failed to require important background information about expert opinions. He suggested that Rule 16 spell out more detailed disclosure requirements, including:

- All documents/data provided to the expert to review;
- A copy of the expert’s CV (not just a summary of his experience);
- All raw testing data used to prepare reports;
- All graphics generated by the expert regarding reaching his opinion; and
- Identify computer applications used to test/analyze the data.

Unfair/Inadequate Expert Notice

Often inadequate disclosure coupled with inadequate court procedures result in expert testimony that was not anticipated, went untested, and could not be confronted on short notice.

AFPD E: A Southwest AFPD detailed her experience in a lengthy high stakes bomb-making trial where the Government’s expert disclosure was inadequate. The notice “read something like we will call an electrical engineering expert who will testify about various items and why they were significant to him and then will opine that this was an IED cache.” Upon the Defense objection, the AUSA conceded that the notice was insufficient,⁴ but claimed that they had produced the opinions/conclusions of their experts in standard discovery. Per the Court’s Order, the Government produced over 80 engineering reports by the FBI spanning 2,000 pages. A new judge took over the case and never ruled on the objection, initiating trial. During the expert’s testimony, the Defense found out that this expert had only read 5-10 of those 80+ “expert reports” disclosed. “Worse, his testimony directly contradicted those reports on material points.” His testimony was nevertheless allowed over objection.

CJA F: Another veteran CJA Panel member from the Southeast noted much the same problem with expert notices. He complained of common “data dumps” of discovery regarding expert information that hid rather than clarified the opinions, and their bases, that experts relied on. Given that, “It would be great to get some kind of rule requiring indexing.”

⁴ This was also on the eve of trial and well after the expert notification deadline imposed by the Court.

Memo
Criminal Rules Committee

CJA G: A CJA Panel attorney from the central plains area complained that he regularly got late and inadequate notice. “After several discovery requests by letter and even a motion, you are still waiting for this to happen with trial approaching.” He believes this is done to thwart Defense preparation to confront the Government expert, noting that sometimes the AUSA has offered an acceptable plea agreement instead of disclosing the expert or his report.

Police Agent as Expert Inadequate Disclosure

Although I was not asking about these types of experts, several concerned practitioners raised the issue. Moreover, the problems inherent with notice of traditional forensic experts also plague these witnesses, thus informing the discussion of forensic experts.

FPD H: A 2-decade Federal Defender from the Northeast felt that the problem of police witnesses serving as experts on drug quantities and packaging being consistent with distribution, or on gang structure and drug code words, was a bigger problem than abuses of standard forensic expert disclosures.

CJA A: The long-time CJA lawyer from the Southwest who was also engaged in a civil practice felt that the most abused aspect of the criminal expert practices was using a lay witness (like the case agent) as an expert. “This is one area where there is a major difference in the context and expectations between the criminal and civil rules and practice.” Such experts are “among the ones most in need of close examination under Rules 702-705 (and probably really 701).” His discussion of these types of experts is quite worthy of our regard when we turn to that subject.

CJA I: A CJA attorney from a Southern state has been frustrated by the AUSA using “a DEA agent as an expert on ‘drug interdiction’ and Narcotics investigation.” He continuously asked for clarifications of what testimony these experts would offer, and provided as an example serial responses filed by an AUSA. Those Rule 16 notices were overbroad and unspecific. The original Rule 16 disclosure is quoted in whole below. The Government would call the DEA agent:

as an expert witness in the field of drug interdiction and drug trafficking investigations if the case proceeds to trial. A copy of his curriculum vitae is attached. [He] will testify to his knowledge of drug interdiction and drug trafficking investigations.

After being pressed for greater information, the prosecutor added more verbiage but hardly more content; he reported that his DEA agent “is expected to testify as an expert on drug trafficking, drug investigation techniques, drug-trafficking ‘tools of the trade,’ as well as the modus operandi used by drug traffickers.” Additional “expected” testimony included that “drug-trafficking ‘tools of the trade’ were seized in this case and that defendants follow the drug-trafficking modus operandi to traffic cocaine.” The agent would also be expected to opine as to “cocaine quantities and prices, and related

Memo
Criminal Rules Committee

matters.” Consistent to the belief expressed by CJA A, that response appears to confirm that no discussions to ascertain the scope of expert testimony had taken place even by the point that that second disclosure was made. When pressed, he provided some meaningful substance of the expert testimony relating to details that in fact pertained to the case – presumably after finally discussing anticipated testimony with the DEA agent. This Defense attorney went on to note the need for “a report requirement or a summary requirement provided by the expert not the attorney as to what the testimony is going to be. ... At a bare minimum the Rules of Criminal Procedure need to match the Civil Procedure Rules as a person’s liberty interest is at stake in a criminal prosecution.”

CJA C: The CJA and civil rights attorney mentioned in the first section also commented on the police expert dilemma: “So many cases involve opinions by law enforcement on anything from supposed drug code language to how cartels or canine alerts work. The methodology or generally accepted standards are often ambiguous in the summaries. So Rule 26 would be a great change.”

CJA J: A CJA attorney from a west coast state reported that the Government hid the fact that they were going to solicit from their case agent expert testimony about child exploitation, referring to him merely as a percipient fact witness. This was done to prevent disclosure to the Defense. “His opinions became a moving target at trial, and continued to evolve even between trial and sentencing.” Recognition in Rule 16 that there may be mixed fact/expert witnesses like this, and specifying necessary disclosures for these individuals, is recommended.

CJA K: A CJA Panel member from the Northwest reported on a trial (a single drug transaction) where the Government “sought to introduce expert testimony about methods and techniques of drug traffickers.” The Defense successfully moved to preclude this testimony. (I have the motion and response.)