COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Raymond M. Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: June 1, 2021

I. Introduction

The Advisory Committee on Criminal Rules (Advisory Committee) met on a videoconference platform that included public access on May 11, 2021. Draft minutes of the meeting are attached.

The Advisory Committee's report presenting a draft emergency rule for publication is included above with the joint report.

In this report, the Advisory Committee seeks final approval for a proposed amendment to Rule 16 previously published for public comment. The proposal and a summary of public comments are included as an appendix to this report. The Advisory Committee also considered several other items, which are information items in Part III of this report.

II. Action Item for Final Approval After Public Comment: Rule 16

The proposed amendments to this rule arose from three suggestions that the Advisory Committee consider amending Rule 16 to expand pretrial disclosure in criminal cases, bringing it closer to civil practice. *See* 17-CR-B (Judge Jed Rakoff); 17-CR-D (Judge Paul Grimm); and 18-CR-F (Carter Harrison, Esq.). With the aid of an extensive briefing session presented by the Department of Justice (DOJ) and a miniconference bringing together experienced prosecutors and defense lawyers, the Advisory Committee concluded that the two core problems of greatest concern to practitioners were the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure.

The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Because the Advisory Committee concluded that these problems were not limited to forensic experts, the proposed amendments address all expert testimony. The Advisory Committee also concluded that the new provisions should be reciprocal. Like the existing provisions, amended subsections (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) generally mirror one another.

A. The Public Comments

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes in the text and the committee note. As described more fully below, after considering these suggestions, the Advisory Committee decided against adopting any of them.

1. Setting a Default Time for Disclosures

Many commenters focused on the amendment's timing for disclosures, which was an issue that the Advisory Committee considered at length during the drafting process. Rather than setting a default date for disclosures, (a)(1)(G)(ii) and (b)(1)(C)(ii) specify that the disclosure must be made "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence. Although the California Lawyers Association supported this approach, the Federal Magistrate Judges Association (FMJA), the National Association of Criminal Defense Lawyers (NACDL), and the New York City Bar Association (NYC Bar) all urged the Advisory Committee to include a default deadline, though they did not agree on what that deadline should be.

The NYC Bar did not specify a preferred deadline. Noting the variety of deadlines set in other jurisdictions (ranging from 60 days to 21 days before trial), it urged that setting some default date would provide helpful certainty to the parties while allowing the courts discretion to increase or decrease the time period on particular cases. It added that some members took the view that default dates should not be set "too far in advance of trial," so that the government would not have to undertake such discovery in smaller cases that were unlikely to go to trial.

The FMJA commented that busy trial judges contending with large caseloads and the demands of the Speedy Trial Act would "appreciate the guidance" of a default deadline, and they suggested a default of 21 days before trial, as well as a requirement that rebuttal experts be disclosed 7 days before trial. Finally, the FMJA commented that some (though not all) of its members expressed concern about allowing deadlines to be set by local rules, which could be a trap for defense lawyers unfamiliar with the local rule.

NACDL agreed that the rule should set a default date for expert disclosures, but it supported earlier default deadlines: no later than 30 days before trial for the initial disclosures, and 14 days before trial for reciprocal disclosures. It argued these earlier deadlines are needed "to minimize any risk of surprise and to ensure an adequate opportunity for the defense to prepare." Further, NACDL argued that the rule should require the court to set a case-specific deadline in writing, in order to minimize any risk of confusion or misunderstanding.

During the drafting process, the Advisory Committee carefully considered whether to include a default deadline—and declined to do so. The draft amendment seeks to ensure enforceable deadlines that the prior provisions lacked by requiring that either the court or a local rule *must* set a specific time for each party to make its disclosures of expert testimony to the other party. These disclosure deadlines, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Because caseloads vary from district to district, the amended rule does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order. The rule requires the court to set a time for disclosure in each case if that time is not already set by local rule or standing order. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party, and deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Finally, under the new Rule 16.1, the parties must "confer and try to agree on a timetable" for pretrial disclosures, and the court in setting times for expert disclosures should consider the parties' recommendations.

Many members initially favored a specific deadline as the best way to ensure that the parties have sufficient time to prepare for trial. After extensive consideration and discussion, however, the Advisory Committee was unable to come up with specific times that would fit every case and comply with the Speedy Trial Act. Given the enormous variation in cases and caseloads, the Advisory Committee decided unanimously to adopt a flexible and functional standard focused on the ultimate goal of ensuring that the parties have adequate time to prepare. Although some defense members had initially pressed for default deadlines, they came to the view that the defense might be benefited by this flexible approach. Some members also suggested that the functional approach would be more efficient since it would avoid the need for motions to adjust the default deadlines in individual cases. Finally, there was significant support for recognizing in the text that individual districts might adopt local rules setting default deadlines.

After considering the NYC Bar, FMJA, and NACDL comments, the Advisory Committee rejected the suggestion that it set a default deadline and reaffirmed its support for the amendment's flexible and functional approach. Responding to the concern expressed by some FMJA members and NACDL that local rules setting disclosure deadlines would create unnecessary confusion or be an unfair trap for unwary counsel, the Advisory Committee concluded it was reasonable to expect counsel to consult the local rules. Indeed, the amendment itself puts readers on notice that they should check the local rules. Proposed (a)(1)(G)(ii) and (b)(1)(C)(ii) state "The court, by order *or local rule*, must set a time [to make] disclosures." (emphasis added).

2. Deleting the Requirement that the Parties Disclose a "Complete" Statement of the Expert's Opinions

The parallel requirements of (a)(1)(G)(iii) and (b)(1)(C)(iii) require the parties to provide "a complete statement of all opinions" the party will elicit from any expert in its case in chief. In order to underscore the difference between this requirement and that imposed by Civil Rule 26, the California Lawyers Association urged the Advisory Committee to remove the word "complete."

The requirement that a party's statement of its expert's opinions be "complete" goes to the heart of the amendment. The Advisory Committee extensively discussed the requirement of a "complete statement" at its fall meeting in 2019. After discussing the possibility that district judges would mistakenly assume that the amended rule in all respects adopts Civil Rule 26, the Advisory Committee decided to retain the phrase "complete statement" as well as the current statement in the note.

The amendment remedies the problem of insufficient pretrial disclosure of expert witnesses. In doing so it moves criminal discovery closer to civil discovery, though without replicating civil discovery in all respects. On this point, as published, the amended rule reflects a number of delicate compromises that allowed the proposal to receive unanimous support. First, the amendment requires a "complete statement" of the expert's opinions in order to clearly signal the need for more complete disclosures. The Advisory Committee also decided not to require a "report," which some members felt would suggest an unduly onerous requirement. Rather than put a label on the disclosures, the amendment allows the specific requirements set forth in (a)(1)(G)(iii) and (b)(1)(C)(iii) to speak for themselves. Finally, the committee note states that the amendment does not "replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases."

In sum, the requirement for disclosure of a "complete" statement is critical to addressing the problem of insufficiently complete disclosures under the current rule. The Advisory Committee therefore declined to remove it.

3. Enlarging the Required Disclosures

NACDL urged that the Advisory Committee expand the required disclosures to include two additional elements:

- transcripts in the party's possession of any testimony by the witness in the past four years; and
- any information in the government's possession favorable to the defense on the subject of the expert's testimony or opinion or any information casting doubt on the opinion or conclusions.

NACDL also urged that the proposal be amended to require the same disclosures to other stages in the proceedings, including preliminary matters and sentencing.

The Advisory Committee rejected these suggestions for two main reasons. First, the inclusion of some or all of these proposed changes would require further study and republication to obtain public comments, slowing the process by at least one year. Some elements of the proposal would likely be controversial.[1] Second, expanding the scope of the amendment by including additional elements might imperil the consensus enjoyed by the current narrowly targeted proposal.

4. Additional Note Language

Three comments suggested changes in the committee note. The Advisory Committee decided against making them.

a) The FMJA Proposal

The FMJA urged the addition of note language. It expressed concern that the specific limitations for government disclosures in (a)(1)(G)(iii) concerning publications within the past 10 years and testimony within the past 4 years "could be misconstrued as defining the scope of disclosures required by the Jencks Act, 18 U.S.C. § 3500, or *Brady v. Maryland*, 373 U.S. 83 (1963)."

The Advisory Committee concluded that these concerns did not warrant revisions to the committee note. Members viewed it as unlikely that readers would mistakenly believe that the amendment sought to govern the constitutional obligation imposed by *Brady v. Maryland*, or to define the scope of disclosures required by the Jencks Act, now supplemented by Rule 26.2. Indeed, Rule 26.2, which governs *midtrial* disclosures after a witness has testified, includes in subdivision (f) a detailed description of a statement *for purposes of that rule*.

b) The NACDL Proposal

On pages 2-3 of its comments, NACDL described a Tenth Circuit decision, *United States v. Nacchio*, 555 F. 3d 1234 (10th Cir. 2009) (en banc), ruling that a defendant's expert disclosure

[1] Indeed, NACDL implicitly recognizes that its proposal would be in conflict with 18 U.S.C. § 3500 and Rule 26.2, and specifies that the proposed disclosure would be required notwithstanding Rule 26.2 and any contrary statute.

must, on its face, be sufficient to withstand a *Daubert/Kumho Tire* challenge. NACDL proposed language stating that the amendment:

> should not be read as a requiring that the disclosure must itself be sufficient to allow the expert's option to pass muster under [*Daubert* and/or *Kumho Tire*] or otherwise conform with the expert disclosure rules associated with civil practice. Instead, and notwithstanding some contrary authority, *see, e.g.*, *United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009) (en banc), the disclosure need only be sufficient to give the opposing party reasonable notice of the general basis for the expert's opinion, so as to permit that party to file an appropriate motion, if it so chooses.

For a variety of reasons the Advisory Committee chose not to include this language in the note. First, the Advisory Committee previously decided not to detail the differences between civil and criminal discovery in the committee note. Second, as a matter of practice and style, committee notes do not normally include case citations, which may become outdated before the rule and note are amended. Finally, the reporters expressed concern that the *Nacchio* case was not in fact on point, and they urged the subcommittee not to include this citation.

c) The Department of Justice

Mr. Wroblewski relayed a concern from the Drug Enforcement Administration (DEA) regarding the requirement that the parties disclose "a list of all publications authored in the previous 10 years" by the expert. The DEA expressed concern that this language might be interpreted "to require the government to identify every publication, regardless of relevance, including sensitive intelligence documents published within a law enforcement component, within the DOJ or within the executive branch, for example even classified scientific papers provided to the White House or the CIA could conceivably be included." In research to explore this concern, Mr. Wroblewski found little case law defining the term "publication" under the Civil or Criminal Rules. The few cases that did address the definition of "publication" focused on disclosure of the information to the public, and the common meaning of the term "publication" seems to exclude internal materials not available to the public.[2]

The DEA's concerns arose from the common use of the term "publication" to refer to the circulation of internal documents within the executive branch. Mr. Wroblewski suggested the adding language to the committee note to reassure government entities that use of the term "publication" does not include internal circulation.

Although the subcommittee recommended note language to address the DEA's concern, the Advisory Committee decided against including it. For two reasons, members concluded that note language carving out "internal government documents" was neither necessary nor desirable. First, nobody thought that the courts would construe the amended rule to include internal government documents. The term "publication" has long been included in Civil Rule 26, and no

[2] *See, e.g.*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "publication" as "the act of declaring or announcing to the public," and in the context of copyright law "offering or distributing copies of a work to the public").

one knew of any case in which it had been applied to internal government documents. Second, the inclusion of a carve-out would wrongly imply that absent this limitation the term "publication" was broad enough to include internal documents that had never been released publicly. After discussion, the DOJ's representatives declined to press for the change, noting that the concerns cited by various members were legitimate.

III. Clarifying Changes Made During and After the Meeting

In response to issues raised at the meeting, the Advisory Committee made several clarifying changes. Most were made during the meeting, but one set of issues was set aside for further consultation with the style consultants.

A. Changes in (a)(1)(G)

On lines 18-19, the Advisory Committee corrected a cross reference to a request for discovery "under the second bullet point in subdivision (b)(1)(C)(ii)." The style consultants were helpful in determining how the bullet could be cited.

On lines 25-28, the Advisory Committee moved the phrase "at trial" to parallel its placement on line 11, so that both refer to "use at trial." On lines 27-28 it deleted as superfluous the phrase "as evidence," since use under Federal Rule of Evidence 702, 703, or 705 would necessarily be as evidence.

The Advisory Committee considered at length the remaining differences between the first and second sentences in this subsection, and it found no reason to make additional changes. The first sentence currently limits the government's general disclosure obligation to expert testimony it intends to use in its "case-in-chief." The amendment adds the requirement that the government also disclose expert testimony it intends to use "during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)." The addition of a requirement that the government disclose this specified rebuttal evidence responded to one of the major concerns practitioners raised at the miniconference. The second sentence, which governs disclosure of expert testimony concerning the defendant's mental condition, fits into a specialized disclosure regime under Rule 12.2. Because the government would not necessarily address a potential insanity defense in its case-in-chief, the current text refers to testimony the government intends to use "at trial." During the process of studying the proposed amendments, the Advisory Committee received no comments that there were any problems with pretrial disclosure in the cases governed by this sentence, and it concluded that the best course was to leave that language unchanged.

B. Clarifying Changes to Distinguish Between General Disclosure Obligations and Disclosures Regarding Specific Expert Witnesses

At the meeting, Judge Bates raised a concern about potential confusion from the use of the word "disclosure" in a collective sense (a disclosure that itself includes multiple disclosures regarding individual witnesses) as well as to refer to a disclosure for a particular witness. As he noted, the government may have multiple witnesses, with separate disclosures for each. In

addition, disclosures for some government experts must be made at a different time than disclosures for others. A disclosure for a rebuttal witness is required only after the defendant makes a disclosure under (b)(1)(C) (which will be after the government has made its disclosure of evidence it intends to use in its case-in-chief). Finally, disclosure of mental health witnesses may take place at a separate time, potentially creating a third different disclosure deadline (although it will often be the same time as government rebuttal witnesses). Similarly, the defense may have multiple experts, and may make disclosures at different times.

Whether this language needed revision was unclear at the meeting. No comments during the process leading up to publication or received during the comment period raised this issue, and the context seemed to make it clear that (a)(1)(G)(ii) referred to all of the witness disclosures, while (a)(1)(G)(iii), (iv), (v), and (vi) referred to the required disclosures regarding individual witnesses. For example, one witness could not be expected to sign a disclosure that includes information about the statements to be made by other witnesses.

After consultation with the style consultants, however, clarifying language was developed to address Judge Bates's concern. The changes distinguish the parties' general disclosure obligations—in parallel items (i), (ii) and (vi)—from the requirements for a disclosure for a particular expert witness—in items (iii), (iv), and (v). Although the changes were intended to be stylistic only, they were circulated to the Advisory Committee by email asking members to raise any concerns or objections. None were raised.

IV. Information Items

The Advisory Committee reports the following information items:

- The Advisory Committee's continuing review of proposals to amend Rule 6(e), governing grand jury secrecy, including new proposals for additional changes.
- The Advisory Committee's decision to place two suggestions on its study agenda:
  - to amend Rule 16 to require the court to inform prosecutors of their constitutional *Brady* obligations; and
  - to amend Rule 11 to allow the court to accept a negotiated plea of not guilty by reason of insanity; and
- The Advisory Committee's decision not to move forward with a suggestion that it amend Criminal Rule 29.1 to eliminate prosecutorial rebuttal in closing arguments.

A. Proposals to Amend Rule 6

The Advisory Committee received a progress report from the Rule 6 Subcommittee.

The Advisory Committee is reviewing several suggestions that it consider amending Rule 6(e)'s provisions on grand jury secrecy. Many of these suggestions propose adding an additional exception to grand jury secrecy for materials of historical or public interest, though they vary

significantly in how they would define that exception. *See* 20-CR-B; 20-CR-D; 20-CR-J; and 21-CR-F. In 2012, the Advisory Committee declined to pursue a similar proposal by the DOJ, finding no need for such an exception in light of decisions allowing release under appropriate conditions. The situation has changed, however, in light of recent appellate decisions holding the district courts have no inherent authority to disclose material not included in the exceptions to Rule 6(e). *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020); *Pitch v. United States*, 953 F.3d 1226 (11th Cir.) (en banc), *cert. denied*, 141 S. Ct. 624 (2020).

Two other proposals also arose from the decisions holding the district courts have no inherent authority to release grand jury materials, and the Advisory Committee referred these proposals to the Rule 6 Subcommittee as well.

The DOJ requested consideration of an amendment to authorize the issuance of temporary non-disclosure orders to accompany grand jury subpoenas in appropriate circumstances. In the past, courts had issued such orders based on their inherent authority over grand jury proceedings. In response to the *McKeever* decision, however, some district courts are now stepping back from issuing delayed disclosure orders, pointing out that Rule 6(e) does not explicitly permit such an order. *See* 20-CR-H.

Chief Judge Beryl Howell and Judge Royce Lamberth of the District Court of the District of Columbia wrote to request consideration of an amendment to allow the court to continue its practice, which relied on the court's inherent authority, of issuing redacted judicial opinions that might be thought to disclose matters occurring before the grand jury in violation of Rule 6(e). *See* 21-CR-C.

The Rule 6 Subcommittee held a day-long virtual miniconference in April to gather more information about the proposals to allow the disclosure of historical or public interest materials, and the authority to issue temporary non-disclosure orders. It obtained a wide range of views from academics, journalists, private practitioners (including some who had previously served as federal prosecutors but also represented private parties affected by grand jury proceedings), representatives from the DOJ, and the general counsel of the National Archives and Records Administration. The miniconference provided important perspectives on the issues raised by the proposals, and the participants also agreed to serve as resources to the subcommittee as it continued its work.

Some of the pending proposals seek amendments explicitly addressing the courts' inherent authority to disclose grand jury materials. The Advisory Committee is closely following a case in the Supreme Court that presents the question whether the exceptions in Rule 6 are exclusive. The respondent in *Department of Justice v. House Committee on the Judiciary*, No. 19-1328 (*cert. granted*, July 2, 2020), has relied on the courts' inherent authority as an alternative ground for upholding the decision below. Following the election, on November 20, 2020 the Court granted the respondent's motion to remove the case from the Court's December argument calendar,[3] but it

[3] The motion noted that after a new Congress was convened and Joseph Biden inaugurated as president, the newly constituted House Judiciary Committee would have to determine whether it wished to continue pursuing the application for the grand-jury materials that gave rise to this case.

remains on the Court's docket.

Finally, the Advisory Committee received, and referred to the Rule 6 Subcommittee, a proposal to amend Rule 6 to expressly authorize forepersons to grant individual grand jurors temporary excuses to attend to personal matters. *See* 21-CR-A. The forepersons have this authority in some, but not all, districts.

The Rule 6 Subcommittee will be very active over the summer, and it plans to present recommendations to the Advisory Committee at its fall meeting.

B. Additions to the Advisory Committee's Study Agenda

The Advisory Committee decided to place two suggestions on its study agenda.

1. Informing Prosecutors of their Constitutional Duties

Suggestions 21-CR-A and 21-CR-B propose amending Rule 16 to require courts to inform prosecutors of their constitutional *Brady* obligations. Although the recently enacted Due Process Protections Act, Pub. L. No. 116-182, 131 Stat. 894 (Oct. 21, 2020), requires individual districts to devise their own rules, these suggestions urge the Advisory Committee to develop a national standard.

The Act allows for significant discretion and variety. It gives responsibility to the Judicial Council in each circuit to promulgate a model order, but each individual court in the circuit may use the model order as it determines is appropriate.

The Advisory Committee determined that it would not be appropriate to propose a national rule at this time. It placed the suggestions on its study agenda to follow the developments in the various circuits and districts, and to consider further whether the Advisory Committee has the authority to depart from the dispersion of decision making Congress specified in the Act.

2. Amending Rule 11 to Allow the Court to Accept a Negotiated Plea of Not Guilty by Reason of Insanity

Suggestion 21-CR-D proposed amending Rule 11 to allow a negotiated plea of not guilty by reason of insanity. Initial research disclosed several cases where the parties agreed that a verdict of not guilty by reason of insanity was appropriate, and the court conducted a stipulated bench trial. The Advisory Committee deferred any decision on whether to pursue an amendment to allow for further research on the use of this alternative.

C. A Suggestion Removed from the Advisory Committee's Agenda

The Advisory Committee decided not to pursue Suggestion 20-CR-I, which proposed amending Rule 29.1 to eliminate government rebuttal in closing arguments at trial. The Advisory Committee was not persuaded that the current rule was causing difficulties, and it noted that analogues to rebuttal (such as reply briefs) are common, useful, and not controversial.