LAW OFFICE OF JOHN D. CLINE

September 2, 2025

VIA EMAIL
Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, DC 20544

Re: Proposal to Amend Fed. R. Crim. P. 15

Dear Ms. Dubay:

I write in support of amending Fed. R. Crim. P. 15 to permit discovery depositions of potential witnesses. The amendment would promote fairness in federal criminal trials and would provide defendants and their counsel a more informed basis on which to decide whether to plead guilty or go to trial. My views are informed by almost forty years as a federal criminal defense lawyer and by seven years as a defense lawyer in the state courts of New Mexico, where the rules of criminal procedure permit both parties to obtain statements and depositions from potential witnesses. Based on this experience, I strongly urge an amendment to Rule 15.

I. THE PROBLEM.

Federal prosecutors have the power to obtain pretrial statements from potential witnesses, either through interviews conducted with FBI or other law enforcement agents or, if necessary, through preindictment grand jury subpoenas. Prosecutors can grant informal immunity to potential witnesses who otherwise would assert their Fifth Amendment rights or, if necessary, obtain statutory immunity for potential witnesses.

Counsel for federal criminal defendants have no such power. They cannot compel witnesses to provide pretrial testimony or any other form of statement. They cannot grant immunity to witnesses concerned about self-incrimination. Defense counsel can ask potential witnesses to provide voluntary interviews, but many witnesses decline to speak with the defense, either from reluctance to become involved or out of fear that they will incur the wrath of law enforcement. Potential witnesses who are cooperating with the prosecution are especially unlikely to provide voluntary interviews to defense counsel, out of concern that prosecutors will take a dim view of any assistance provided to the defense. Without the ability either to compel testimony or, in most instances, even to conduct interviews, defense counsel generally must gauge the testimony of potential witnesses based on memoranda of interviews prepared by FBI agents or other federal law enforcement officers. (For the sake of simplicity, I will refer to these memoranda

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collectively as "FBI interview memos.") These memoranda usually are not verbatim or substantially verbatim and may be incomplete or inaccurate. Although Fed. R. Crim. P. 26.2 and the Jencks Act require production of grand jury transcripts and other substantially verbatim statements of prosecution trial witnesses, prosecutors rarely put lay witnesses--and especially cooperating witnesses--before the grand jury and thus the defense almost never receives sworn testimony from such witnesses.

The inability to question potential witnesses before trial poses critical problems for the defense. First, because of the non-verbatim nature and limited scope of FBI interview memos, defense counsel often cannot effectively advise clients whether to plead guilty or go to trial. Clients deciding whether to plead want to know how strong the evidence against them will be at trial. Without access to witnesses, counsel cannot provide an accurate answer to that question. Second, many federal judges forbid or sharply limit the use of FBI interview memos for impeaching a witness who testifies contrary to what he or she is reported to have told the government. Even attempts to refresh the witness' recollection run into roadblocks--and if the witness denies that his or her recollection is refreshed by reviewing the FBI interview memo, there is often little defense counsel can do to challenge that testimony. Third, for witnesses whom the government has not interviewed, often including the most likely defense witnesses, the defense does not have even the modest benefit of an FBI interview memo.

The lack of defense access to witnesses thus leads to uninformed decisions whether to plead guilty or go to trial; to trials at which prosecution witnesses cannot be cross-examined effectively because defense counsel do not want to ask questions to which they do not know the witness' answer; and to decisions not to call potentially exculpatory witnesses in the defense case, because the defense cannot be confident the witness will testify favorably. Collectively, these problems call the fairness of the federal criminal process into question.

II. THE SOLUTION.

The solution to these problems is simple: provide both parties--but particularly the defense, given the problems identified above--pretrial access to witnesses, either by deposition or by some other mechanism, enforceable by subpoena if necessary and subject to appropriate protective measures. A number of states allow depositions or other forms of witness access, and these procedures are reported to work well. I will address my own experience in one of those states, New Mexico, where I defended state court criminal cases ranging from fraud to murder.

The New Mexico rules of criminal procedure provide two avenues through which parties can question potential trial witnesses. First, a party may compel any person, other than the defendant, with information subject to discovery to give a "statement." NMRA 5-503(A) (Rule 5-503 is attached as Exhibit A). Statements are unsworn interviews. Typically, the parties record the questions and answers on a phone or other device and prepare a transcript later if needed for trial. In my experience, the vast majority of pretrial

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witness questioning occurs through the inexpensive and efficient mechanism of the "statement." Because a statement lacks the formal trappings of a deposition, witnesses tend to be more relaxed and candid in that setting.

Second, the parties may take formal depositions, either by agreement or, if no agreement can be reached, by order of the court "upon a showing that it is necessary to take the person's deposition to prevent injustice." NMRA5-503(B). The rules provide detailed requirements for the notice and conduct of depositions. NMRA 5-503(D)-(I), 5-503.1, 5-503.2, 5-504.

A statement or deposition is subject to the court's control, on motion of a party or the witness made before or during the examination. NMRA 5-503(G); NMRA 5-507 (Rule 5-507 is attached as Exhibit B). For "good cause shown," the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery or economic reprisals." NMRA 5-507(A) (providing non-exclusive list of protective measures court may impose).

In my experience, these mechanisms--statements, depositions, and protective orders--work well to ensure fairness in the New Mexico criminal justice system. Defendants and their counsel learn before trial what witnesses will say about the underlying facts and how credible those witnesses appear, permitting informed decisions about whether to plead guilty or go to trial. (The prosecution gains similar insight, and may adjust its view of a fair outcome accordingly.) If the case proceeds to trial, defense counsel has the means--in the form of a verbatim transcript or recording--to impeach prosecution witnesses who embellish on the stand. And the defense can determine whether potential defense witnesses are worth calling in the defense case.

The arguments against depositions or other access to witnesses are, in my view, without merit. First, concerns about witness safety and witness tampering are overblown, and, to the extent legitimate, can be readily addressed. In the vast majority of federal criminal cases, the identity of potential prosecution witnesses and the outline of what they will say are known to the defense through the pretrial production of FBI interview memos. Most of those witnesses experience neither threats nor efforts to influence their testimony. That is because federal criminal defendants who may be tempted to threaten or tamper with witnesses are usually deterred by the potential consequences, including revocation of bond and witness tampering or obstruction charges. In the relatively small number of cases where witness safety and tampering present real concerns, despite these deterrents, courts can address those dangers through protective orders, including barring the deposition or other statement entirely.

Second, some have voiced concern that permitting depositions will cause delays in criminal cases. Based on my experience in New Mexico, I do not see this as a problem. The statements and depositions in which I participated proceeded expeditiously. The date, time, and place were agreed among the parties and the witness, and the questioning itself

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focused on the merits of the case. Had a party attempted to use the deposition or statement process to drag out the proceedings, the other party could always have sought a protective order from the court under NMRA 5-507--and lawyers on both sides knew that courts do not take kindly to discovery disputes that the parties should be able to resolve by agreement. And even if depositions were to cause occasional delays in federal criminal cases--contrary to my New Mexico experience--that is a small price to pay for the substantial gain in fairness that pretrial access to witnesses would provide.

Finally, some have argued that granting pretrial access to witnesses will result in "trial by deposition." In my view, this is a fanciful concern. Prior sworn testimony is generally admissible only when the witness is unavailable at trial. Fed. R. Evid. 804(b)(1). Witnesses will rarely become unavailable between deposition and trial; in most instances, the deposition will serve solely as a means of impeachment or refreshing recollection. And unsworn statements (if federal courts were to adopt the New Mexico practice) are even less likely to be admissible for their truth at trial, since they do not fall within Rule 804(b)(1).

III. CONCLUSION.

It is both bizarre and shameful that the parties to a routine civil fraud case, with only money at stake, get to depose the key witnesses while a federal criminal defendant facing fraud charges that threaten decades in prison does not. The states have long been laboratories for criminal justice reform, and here too they have shown how to eliminate this injustice. In my view, the New Mexico approach has much to commend it, but there are undoubtedly other mechanisms that provide similar pretrial access to witnesses. It is past time for the federal courts to adopt one of these mechanisms.

Respectfully submitted,

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Enclosures

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EXHIBIT A

5-503 NMRA

Court rules current with updates received by the publisher as of June 20, 2025.

NM - Michie's Annotated Local, State & Federal Court Rules Of New Mexico > Chapter 5. Rules of Criminal Procedure for the District Courts > Article 5. Discovery

5-503. Depositions; statements.

A. Statements. Any person, other than the defendant, with information which is subject to discovery shall give a statement. A party may obtain the statement of the person by serving a written "notice of statement" upon the person to be examined and upon each party not less than five (5) days before the date scheduled for the statement. The notice shall state the time and place for taking of the statement. A subpoena may also be served to secure the presence of the person to be examined or the materials to be examined during the statement. If a subpoena is served to secure a witness or materials, a copy of the subpoena shall be served upon each party.

B. Depositions; when allowed. A deposition may be taken pursuant to this rule upon:

(1) agreement of the parties; or

(2) order of the court at any time after the filing of the indictment or information or complaint in the district court, upon a showing that it is necessary to take the person's deposition to prevent injustice.

C. Scope of discovery. Unless otherwise limited by order of the court, parties may obtain discovery regarding any matter, not privileged, which is relevant to the offense charged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

D. Time and place of deposition. Counsel must make reasonable efforts to confer in good faith regarding scheduling of a deposition or statement before serving a notice of deposition or a notice of statement. Unless agreed to by the parties, any deposition allowed under this rule shall be taken at such time and place as ordered by the court. The attendance of witnesses at depositions may be compelled by subpoena as provided in these rules.

E. Notice of examination: general requirements; special notice; notice of non-appearance; nonstenographic recording; production of documents and things; deposition of organization; deposition by telephone.

(1) A party taking the deposition of any person upon oral examination pursuant to court order shall give at least ten (10) days notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party

may arrange for a transcription or copy of the deposition or statement to be made from the recording of a deposition or statement at the party's expense.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders. If the deposition is taken by an official court reporter, the official transcript shall be the transcript prepared by the official court reporter.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 5-503.1 NMRA and shall begin with a statement on the record by the officer that includes:

(a) the officer's name and business address;

(b) the date, time, and place of the deposition;

(c) the name of the deponent;

(d) the administration of the oath or affirmation to the deponent; and

(e) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (a) through (c) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) A party may, in the party's notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph does not preclude taking a deposition by any other procedure authorized in these rules.

(6) The parties may agree in writing or the court may, upon motion, order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rule 5-503.1(A) NMRA, 5-503.2(A)(1) NMRA and 5-503.2(B)(1) NMRA, a deposition taken by such means is taken in the county and at a place where the witness is to answer questions. The officer taking the deposition must be physically present with the witness.

F. Depositions; examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses in depositions may proceed as permitted at trial under the New Mexico Rules of Evidence, except Rule 11-103 NMRA and Rule 11-615 NMRA. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by Paragraph D(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

G. Statements; depositions; motion to terminate or limit examination. At any time during a deposition or statement, on motion of a party, the witness or the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the witness or the deponent, the court in which the action is pending, or the court in the county where the deposition or statement is being taken, may order the examination to cease or may limit the scope and manner of the taking of the deposition or statement pursuant to Rule 5-507 NMRA. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party, the witness or the deponent, the taking of the deposition or statement shall be suspended for the time necessary to make a motion for an order.

H. Depositions; review by witness; changes; signing. If requested by the deponent or a party before completion of the deposition, the deponent shall have thirty (30) days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by Paragraph I(1) of this rule whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

I. Certification by officer; exhibits; copies; notice of transcription.

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. If the deposition is transcribed, the officer shall provide the original of the deposition or statement to the party ordering the transcription and shall give notice thereof to all parties. The party receiving the original shall maintain it, without alteration, until final disposition of the case in which it was taken or other order of the court. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may:

(a) offer copies to be marked for identification and annexed to the deposition or statement and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; or

(b) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) Any party filing a deposition shall give prompt notice of its filing to all other parties.

J. Final disposition of depositions. The original deposition may be destroyed as provided in the judicial retention of records schedule.

History

[As amended, effective July 1, 1973; July 1, 1980; September 1, 1981; October 1, 1983; February 1, 1991; August 1, 1992; May 15, 2000; as amended by Supreme Court Order No. 05-8300-013, effective September 15, 2005.]

Annotations

Notes

EXHIBIT B

5-507 NMRA

Court rules current with updates received by the publisher as of June 20, 2025.

NM - Michie's Annotated Local, State & Federal Court Rules Of New Mexico > Chapter 5. Rules of Criminal Procedure for the District Courts > Article 5. Discovery

5-507. Depositions; statements; protective orders.

A. Motion. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition or statement, the court in the district where the deposition or statement is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery or economic reprisals. The order may include one or more of the following restrictions:

(1) that the deposition or statement requested not be taken;

(2) that the deposition or statement requested be deferred;

(3) that the deposition or statement may be had only on specified terms and conditions, including a designation of the time or place;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that the deposition or statement be conducted with no one present except persons designated by the court;

(6) that a deposition or statement after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

B. Written showing of good cause. Upon motion, the court may permit the showing of good cause required under Paragraph A of this rule to be in the form of a written statement for inspection by the court in camera, if the court concludes from the statement that there is a substantial need for the in camera showing. If the court does not permit the in camera showing, the written statement shall be returned to the movant upon request. If no such request is made, or if the court enters an order granting the relief sought, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court having jurisdiction in the event of an appeal.

C. Denial of order. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

History

[As amended, effective August 1, 1992; May 15, 2000.].

Annotations