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September 16, 2025

Via Electronic Mail
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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, D.C. 20544

Dear Ms. Dubay:

I write to you in support of the proposed amendment to Rule 15 of the Federal Rules of Criminal Procedure by Messrs. Acosta and Kelly, which would allow defendants to make a motion to a federal district court to take a limited number of pretrial depositions if the district judge determines the depositions are in the interest of justice. I am a former Assistant United States Attorney in the Southern District of Indiana (2012-2017). I am currently a partner at Frost Brown Todd, LLP, where my practice is comprised of both criminal (approx. 90%) and civil litigation. In addition to retained criminal cases, I routinely accept appointments to represent indigent defendants as a member of the Southern District's Criminal Justice Act panel since 2018. I am also a member of the Board of Directors of the Indiana Federal Community Defenders.

As an attorney practicing criminal defense in Indiana, I have experienced firsthand the positive effects of pretrial depositions on the state criminal justice system. As you are aware, Indiana is one of several States that allow pretrial depositions in criminal cases. In addition to the search for truth that is the goal of our justice system, pretrial depositions serve a number of practical purposes. First, they are often the only time prior to trial that a busy prosecutor has to think deeply about the strengths and weaknesses of his or her case. Most prosecutors do not have the luxury of pondering their case file searching for potential pitfalls in their proof. They cannot prioritize re-interviewing witnesses, instead relying exclusively on often very dated interview summaries by law enforcement officers who are also busy. Pretrial depositions shift the burden of re-interviewing witnesses to the defense. The State benefits by being able to simply show up to a scheduled deposition and sit face-to-face with their witness. As well, the State has the opportunity to cross-examine their witness to develop any testimony left untouched by a crafty or unfocused defense attorney. In these and other ways, pretrial depositions benefit the prosecution.

Second, pretrial depositions often lead to plea bargaining or outright dismissals in cases that would otherwise have taken valuable court and jury time. In addition to the focused attention that pretrial depositions require of both sides, the parties naturally discuss resolving the case prior to trial when they are in the same room together without interruptions. Understandably, since the COVID-19 pandemic, many attorneys still minimize their exposure to public places like courtrooms and busy offices. The only regular contact a defense attorney may have with a prosecutor prior to trial is at a routine hearing where there is no ability for the prosecutor to discuss the case prior to the next one on his or her docket. By bringing the parties together in a quiet, exclusive setting, pretrial depositions foster effective plea discussions.

Third, pretrial depositions allow a defendant the similar opportunity to evaluate his or her case and reach a result that meets with his or her perception of justice. Interview reports of witness testimony are often met with much deserved skepticism from my federal clients who sometimes have a close personal relationship with the government's witness and feel that they would know best what that person would be likely to say at trial. When a witness will not agree to a pretrial interview from a defense attorney, as is often the case, a defendant is put in a no-win situation. Either proceed to trial and risk harsher penalty if the witness testifies consistent with the government's report or plead guilty with a reasonable doubt as to what the witness would have said under oath. This Hobson's choice is more salient in fraud cases which are often investigated and prosecuted without the use of real time surveillance. In my mind, federal fraud cases share some similarities to state battery cases. Often in a battery case there is no contemporaneous surveillance of the incident at issue, leaving the parties to grapple with emails and text messages that were sent before and after the incident. Through deposing the State's witnesses a defendant obtains a valuable face-to-face confrontation with a witness that not only informs the defendant of the strength or weakness of the State's case but also gives him or her a sense that they had a fair opportunity to evaluate all of the evidence. I believe that one of the biggest practical problems with the lack of depositions in federal criminal cases is that convicted defendants have an open window to attack the process that led to their conviction by arguing that their lawyer did not interview a particular witness or that it was later discovered that a particular interview report did not accurately recount a witness' testimony, which had it been discovered before trial would have affected the outcome of the case. By providing a process to afford defense counsel an opportunity to ask the Court to grant defense depositions, the proposed amendment to Rule 15 would also lead to more efficient post-conviction proceedings in federal court.

I cannot think of a case that I have heard of where the practice of conducting pretrial depositions in a state criminal case has been abused. To the contrary, I have been involved in several cases (and am aware of scores more from my colleagues) where pretrial depositions have resulted in guilty pleas or dismissals of charges. Please let me know if I can provide any additional information that would be helpful to your consideration of the proposed amendment to Rule 15.

Sincerely,

FROST BROWN TODD LLC

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EN21768.Public-21768 4923-8977-1617v1