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VIA E-MAIL (RulesCommittee_Secretary@ao.uscourts.gov)

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

Dear Ms. Dubay:

We write in support of the proposed amendment to Federal Rule of Criminal Procedure 15. Allowing limited, court-permitted pretrial depositions is a necessary and significant step towards a more fair and efficient criminal justice system. Others have written in support of the amendment, highlighting how it would address the imbalance of power between the government and defense, save time and resources, and facilitate more informed plea deals. We agree that properly implemented pretrial depositions can serve to advance these important goals. But in order to avoid repetition, we raise two additional points.

First, the amendment would balance the playing field in complex, document-heavy cases, especially those involving significant financial records and data, or market data such as in criminal antitrust cases. Typically, the government has a cooperating witness who can explain the information and the scheme in detail. Even if a bill of particulars is requested and granted to help the defense navigate better within the mass of documents and data provided by the government under Federal Rule of Criminal Procedure 16, such guidance does not shed light on the overall narrative or tone that comes from a deposition. A pretrial deposition would give defense counsel the opportunity to understand the theory of the case, the financial records and data at play, and the witness's view before trial – thus allowing them to better prepare and advocate for their client. In antitrust trials, the ability to obtain remote witness testimony in a videotaped deposition can be crucial. This can serve as a supplement to a bill of particulars or another means to allow the defense to understand the crux of the government's case as it relies on critical documents.

Second, we wish to address the expressed opposition to the amendment that it would fail to protect witnesses already under threat for testifying in a criminal trial, and that allowing pretrial depositions would unnecessarily risk witness safety for efficiency's sake. Some critics assert that pretrial depositions may even discourage cooperation with the justice system or put victims in harm's way. These concerns are valid and important; witnesses can and do face intimidation, harassment, and even threat of physical harm.

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But the obstacles are not insurmountable. An amendment can be crafted that would not grant defense attorneys an unlimited right to depose any witness they chose, whenever they chose. Whether implemented in the rule or in limited implementation in certain districts to allow interim assessment of its benefits and risks, it can be done to authorize courts to consider whether to allow a deposition to occur, accounting for the safety and security of the witness. In a case where there is credible risk to witness security, a judge can deny the request, delay the deposition to closer to the trial date, or impose strict conditions to mitigate potential harm. Permitting judges to make the decisions on a case-by-case basis encourages a fairer process while still addressing legitimate safety concerns. It would be unreasonable to reject the amendment and leave defense counsel unprepared when there are legitimate guardrails that can be put in place. There are ample examples of such an approach in state courts with great success.

In practice, the protections would allow the benefits of pretrial depositions – such as clarifying facts, promoting informed case resolution, dealing with complex market facts as in criminal antitrust trials, and evaluating witness credibility – to be realized without exposing witnesses to undue danger. Simply put, adoption with these limitations in the control of the court allows the salutary goal of enabling much-needed additional pretrial discovery to occur, avoiding rejection of needed change because of slippery slope arguments against doing so that can be overcome with such an approach.

Respectfully submitted,

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