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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 Federal Rule of Criminal Procedure 15

Dear Ms. Dubay:

We write in support of amending Rule 15 of the Federal Rules of Criminal Procedure to permit depositions of potential witnesses for purposes of trial preparation. This amendment will enhance the truth-seeking function of criminal trials, lead to better, more focused, and more efficient advocacy, save time and expense, and increase both the perception and the reality of fairness in our justice system. We see no significant drawbacks to the change.

We have each been practicing criminal trial and appellate attorneys for more than three decades and are both past presidents of the New York Council of Defense Lawyers. One of us is a former federal prosecutor; the other is a former federal defender. We have both been involved in dozens of criminal trials, running the gamut from securities fraud to murder. One of us has a practice focused on criminal appellate advocacy, and has prepared and argued many appeals, including in the United States Supreme Court. We both also have considerable experience in civil litigation and have taken and defended many depositions.

Our colleagues who have written in support of amending Rule 15 have discussed a range of likely benefits to our system of justice. The amendment will help redress the imbalance in access to information that tends to favor the prosecution. Only the government can send law enforcement agents to witnesses' doors. Only the government can obtain grand jury subpoenas and compulsion orders. Only the government can leverage threats and inducements to persuade witnesses to sit for interviews—often multiple interviews, until the government has exhausted its questions, rehearsed its direct examination, and put the witness through mock cross-examination. The defense, in contrast, may ask witnesses for a meeting, but such requests are often declined. We understand why. Witnesses understandably do not want to become involved in a federal criminal case, and those that have already had contact with the government may believe, and

may even have been encouraged to believe, that cooperation with the defense is not in their interest.

As others have noted, the flow of information obtained through pretrial depositions would give both sides greater insight into the likely trial evidence and will lead to better informed plea bargaining. To put it simply, more cases that should go to trial will go to trial, more cases that should plead will plead. The amendment will also increase the efficiency of pretrial document review, a process that, in this age of electronic data, vastly increases the burden and the expense of trial preparation. Others have addressed the experience of those states that already make use of depositions in criminal cases. That experience strongly suggests that the federal system would benefit from the use of depositions, and that depositions will not lead to delays or harassment of witnesses.

Our focus here is on how the lack of pretrial depositions distorts criminal trials and diminishes the truth-seeking function of the justice system.

It should be an article of faith that in an adversarial system of justice both sides should be able to fully advocate for their position. Both sides should be able to ask the best questions and place the best evidence in front of the jury. That's how trials in civil cases proceed. Take a typical employment case. The plaintiff offers evidence of discriminatory treatment; the defendant offers evidence of the plaintiff's poor job performance. Or take a contract case, with competing accounts of whether certain goods conformed to the specifications in the agreement. Both sides will have deposed the key witnesses, and counsel for both sides will be able to put on their best case and ask the best questions.

The contrast with federal criminal trials is stark. Defendants who lack the ability to explore witnesses' knowledge prior to trial are too frequently funneled into a reasonable doubt defense. Counsel will have received summaries of witness interviews, such as FBI 302s, often on the eve of trial. But those summaries are not verbatim and are often inaccurate or incomplete. Not being a record of sworn testimony, such summaries are not admissible as prior inconsistent statements under Rule 801(d)(1)(A). Such summaries also only reflect the government's questions—questions relevant to the government's theory of the case, not that of the defense. Even more significantly, the authors of the 302s or interview memoranda are often not trial witnesses, and the actual trial witnesses are not bound by these author's written statements. This creates room for deniability and gamesmanship that would be removed by sworn deposition testimony.

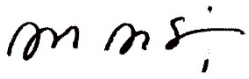
The defense's inability to probe witnesses on the record before trial—an inability the prosecution does not face given its unique access to grand jury process—severely distorts trial strategy. Defense counsel will use cross-examination to chip away at witness credibility, probing inconsistencies in statements witnesses have given to the government and exploring the pressure the government has brought to bear on cooperating witnesses. Counsel will also use documents produced in discovery to ask safe questions that help establish the defense's themes. This is all well and good. But every criminal lawyer knows that there are many trials in which the defense's inability to explore witness testimony before the trial prevents the defense from putting on its best case. Trials are public performances, credibility is the coin of the realm, and it is

exceedingly dangerous to ask any question without knowing the answer. The result: counsel will often shy away from asking the most important questions, the questions that go to the heart of what happened. This is where depositions will make a difference. With greater insight into what the witness will say, trial cross-examinations will be more efficient and focused, and they will be more likely to get at the truth.

We do not believe that depositions in criminal cases are a panacea. Effective defense counsel will not necessarily make use of depositions in every case or with every witness who might offer important testimony. However, we have no doubt that a rule permitting the defense to use limited, judicially controlled depositions prior to trial will go some way to levelling the playing field and improve the fairness and efficiency of our federal criminal justice system.

Respectfully submitted,

Jonathan P. Bach



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