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VIA EMAIL

March 11, 2026

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
RulesCommittee_Secretary@ao.uscourts.gov

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

Dear Ms. Dubay,

We write in support of amending Rule 15 of the Federal Rules of Criminal Procedure to provide for discovery depositions in federal criminal cases.

We are professors at the University of Iowa College of Law.[1] Alison K. Guernsey is the Herschel G. Langdon Clinical Professor of Trial Advocacy, Director of the Federal Criminal Defense Clinic, and teaches courses in criminal law, criminal adjudication, and the federal courts. In her Clinic, students represent people facing charges in the U.S. District Courts for the Northern and Southern Districts of Iowa. Prof. Guernsey frequently advises people and organizations across the country on the intersection of the Rules of Professional Conduct and the criminal legal system. Prior to entering the academy, she was the Supervising Attorney for the Federal Defenders of Eastern Washington and Idaho.

Megan K. Graham is an Associate Clinical Professor and Director of the Technology Law Clinic and teaches courses in surveillance law and national security law. In her Clinic, students represent organizations that face challenges at the intersection of technology and the criminal legal system. She and her students frequently advise clients on federal procedural and substantive criminal law, constitutional questions, and evidentiary law.

[1] We submit this letter in our individual, not institutional, capacities.

At its core, the lack of discovery depositions in federal criminal cases places defendants at a significant disadvantage and entrenches a profound informational asymmetry. The government—armed with ample investigative resources, an almost unfettered ability to conduct witness interviews, and unrestricted access to grand-jury testimony—has far greater insight into the evidence than the defense has any meaningful opportunity to test before trial. This imbalance is not incidental; it is built into the current structure of federal criminal procedure. Amending Rule 15 is therefore necessary to mitigate this asymmetry and to ensure that criminal trials function as genuine tests of the evidence rather than exercises in strategic surprise.

Beyond this fundamental fairness concern, the current system creates two specific problems within our individual areas of expertise that expanding Rule 15 would help address: (1) ethical tensions concerning witness and evidence access and (2) substantial barriers to adequately assessing whether and how the technologies that are relied on in criminal investigations work—and thus whether the evidence they generate should be relied on—before trial.

First, the ethical tensions. Expanding Rule 15 would bring federal criminal practice into closer alignment with the goals of contemporary ethical standards by ensuring both sides have meaningful and enforceable access to witnesses and evidence. Just as importantly, it would reduce the pressure on lawyers to operate in the murky space between advising witnesses of their rights and strategically discouraging cooperation with opposing counsel.

As a baseline principle, "[a]n accused and his counsel have rights of access to potential witnesses that are no less than the accessibility to the potential prosecutors and their investigatory agents."[2] And Model Rules of Professional Conduct 3.4(a) and 3.4(f)[3] embody this principle by prohibiting "unlawfully obstructing another party's access to evidence" or "request[ing] a person other than a client to refrain from voluntarily giving relevant information to another party."[4]

Yet one of the most common factual contexts in which concerns about compliance with Rule 3.4 arise—apart from *Brady*[5] violations—involves allegations

[2] United States v. Rich, 580 F.2d 929, 934 (9th Cir. 1978).

[3] Most jurisdictions have adopted the relevant provisions of Rule 3.4. *See* Am. Bar Ass'n, *Alphabetical List of Jurisdictions Adopting Model Rules* (Mar. 28, 2018); *see also* Restatement (Third) of the Law Governing Lawyers § 116 (2000).

[4] Model R. Prof'l Cond. 3.4.

[5] Brady v. Maryland, 373 U.S. 83 (1963).

that a lawyer has improperly instructed a witness not to speak with the other side.[6] This is not surprising because, despite our ethical rules, the current procedural structure of criminal litigation invites precisely the kinds of disputes the ethical rules are meant to prevent, as lawyers frequently navigate the "fine" line between "informing a witness of the right not to cooperate or to cooperate only under restrictive conditions and attempting to induce noncooperation"[7] So while, in theory, the parties stand on equal footing, in practice, they do not. The government's institutional advantages, combined with the absence of discovery depositions, means that access to witnesses is often unequal and contested.

Amending Rule 15 will directly address this problem by dismantling the persistent fallacy of "witness ownership" and providing a structured mechanism for both sides to obtain testimony and earlier testing of witness reliability. The result would be more informed client counseling, fewer ethical disputes over witness access, and a reduced risk that convictions are obtained without full transparency regarding the evidence.

In short, expanding Rule 15 would not merely modernize federal criminal procedure; it would give real effect to the fairness principles already embedded in Rule 3.4—the very principles that serve as the lodestar of the legal profession's commitment to integrity in the adversarial process and the rules that guide our behavior in our self-regulating profession.

Second, expanding Rule 15 would allow the parties to more fully vet the accuracy, reliability, and constitutionality of technology in the criminal legal system prior to trial. Federal investigations involve an ever increasing and changing landscape of technological tools, from cell phone and other device evidence to software that analyzes DNA and other evidence samples to cameras and myriad forms of surveillance. Two core questions in litigation are often (1) whether and (2) how such technologies work, which is a necessary precursor to a host of constitutional, evidentiary, and factual questions with which judges and juries must grapple.

Without depositions, the opposing party may be unable to prepare for cross-examination, particularly as it relates to topics that are foundational to an expert's report but are not contained within it. Thus, the opposing party cannot assess whether the technology at issue—or the technical expert—presents an issue under Federal Rule of Evidence 702 or *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.

[6] The general rule for witness access is that both the prosecution and the defense have an equal right to access and interview witnesses pre-trial. *See Callahan v. United States*, 371 F.2d 658, 660 (9th Cir. 1967) ("Both sides have the right to interview witnesses before trial."). In other words, witnesses do not "belong" to one side or the other—with the exception of the accused, who has the right to remain silent. *See* Const. amend. V.

[7] Restatement (Third) of the Law Governing Lawyers § 116 (2000).

579 (1993) and its progeny. Nor can the opposing party determine whether the use of a particular type of technology presents due process, Fourth Amendment, Confrontation Clause, or other legal issues in the case.

Expanding Rule 15 would allow both sides of a case to learn what technical experts who understand the computer code and hardware that is deployed to gather and analyze evidence in criminal cases will testify about before the issues go before a fact-finder. It would enable attorneys to better vet the evidence and advise clients on the strengths or weaknesses of a case. Attorneys will be better positioned to decide whether to call an expert with a different perspective or to simply address concerns through cross-examination. Such testing of the evidence at a pre-trial stage will better enable courts to assess the relevant scope of an expert witness's testimony, the reliability and accuracy of the evidence, and to understand the legal issues that may come up at trial, if not before.

In conclusion, Rule 15 needs reform to mitigate the informational asymmetry between the government and defense; alleviate ethical tensions surrounding witness access that arise given the current structure; and to ensure that defense lawyers are able to more fully vet the technology being increasingly used in cases across the nation. Allowing for discovery depositions would increase reliability and help create a system that functions more as an actual test of the evidence, as opposed to a system that reflects strategic surprise.

We thank the Committee for its consideration of the proposal to amend Rule 15 of the Federal Rules of Criminal Procedure.

Sincerely,

Alison K. Guernsey
Clinical Professor

Megan K. Graham
Clinical Associate Professor