



AACJ
ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE EST. 1986

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE
3200 N. Central Ave., Ste 2250
Phoenix, AZ 85012
(602) 492-7999
info@aacj.org

March 25, 2026

Carolyn A. Dubay, Esq., Secretary
Committee on Rules of Practice & Procedure
Judicial Conference of the United States
One Columbus Circle NE, Suite 7-300
Washington, DC 20544
VIA E-MAIL: RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendments to Fed. R. Crim. P. 15

To the Committee and Staff:

I am writing as President of Arizona Attorneys for Criminal Justice (AACJ), the state affiliate of the National Association of Criminal Defense Lawyers, in support of the Akerman proposal to amend Federal Rule of Criminal Procedure 15 to permit depositions in criminal cases.

I am currently serving my second term as AACJ President, the first being in 2014. I have been employed with the Pima County (Tucson) Public Defender's Office for more than twenty years, and I have supervised our appellate unit since 2012. My practice is exclusively in Arizona state courts, where I have more than 100 published opinions and have participated in about 90 oral arguments, evenly divided between the Arizona Supreme Court and Arizona Court of Appeals. Additionally, I am a Professor of Practice at the James E. Rogers University of Arizona College of Law, and I am co-author with Prof. Barbara Bergman of the most comprehensive treatise on Arizona law, *ARIZONA CRIMINAL PRACTICE MANUAL*, first published in 2021 by Thomson Reuters. I have been appointed to serve on several task forces to rewrite rules of procedure in Arizona courts by Arizona Supreme Court Chief Justices Scott Bales and Robert Brutinel. Although I have virtually no practical experience in federal criminal law, my experience with the Arizona rules that are referenced in the Akerman proposal permits me to say that the interests of justice are better served by more robust discovery practices.

In 1973, as part of its overhauling of the Rules of Criminal Procedure, the Arizona Supreme Court added significant discovery obligations on both parties but especially on the prosecution. Rule 15 is divided into eight separate rules. Rule 15.1 places duties on the State to disclose all reports and all recorded statements to the defense and to make available for copying any documents, 911 calls, etc., that it intends to use at trial. Rule 15.2 places reciprocal duties on the defendant, should the defense intend to call witnesses or admit exhibits.



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These enhanced pretrial discovery procedures “enable an accused to advisedly prepare his defense.” *State v. Fisher*, 686 P.2d 750, 770 (Ariz. 1984). Rule 15 is “quite broad,” and “the underlying purpose of the discovery rules . . . [is] to give full notification of each side’s case-in-chief so as to avoid unnecessary delay and surprise at trial.” *State v. Dodds*, 537 P.2d 970, 972 (Ariz. 1975). “Trial by ambush [is] a tactic no longer countenanced in Arizona courts.” *Wells v. Fell*, 297 P.3d 931, 934 (Ariz. Ct. App. 2013) (quotation omitted). “Indeed, “[t]he underlying principle of our disclosure rules is the avoidance of undue delay or surprise.” *Id.* (quoting *State v. Rienhardt*, 951 P.2d 454, 461 (Ariz. 1997)). “The object of discovery is to assist the search for truth by providing the parties with all the evidence possible so that the crucial facts may be presented at trial and a just decision made.” *State v. Helmick*, 540 P.2d 638, 640 (Ariz. 1975) (quoting *Wright v. Superior Court*, 517 P.2d 1261, 1263 (Ariz. 1974)).

By requiring the prosecution to produce all this discovery at the beginning stages of the case, the defendant is better able to evaluate the strength (and weakness) of the government’s case when deciding whether to accept a plea agreement. It is true that the expansive duty to disclose places a greater onus on staff members tasked with preparing disclosure packets, but it frees up significant attorney and judicial resources by encouraging early resolution of criminal cases.

In preparing for trial, no tool is more useful than the pretrial interview of all witnesses. Rule 15.3 does not specifically describe the process by which witnesses must comply with interviews; instead, it describes the process for the subpoena and deposition of witnesses who do not “cooperate in granting a personal interview.” Rule 15.3(a)(2). The Rule leaves it to the parties to manage discovery and to come to court to resolve disputes under Rule 15.7. With the exceptions of victims and the defendant, the parties do not control the witnesses, so a witness may choose to give an interview to one side’s attorney absent other counsel, so long as all counsel have an opportunity to conduct an interview of the witness.

In practice, the process runs relatively smoothly. The side that is calling the witness typically arranges for the interview of the witness in that side’s office. The attorneys sometimes have an investigator or other personnel conduct the interview. In the case of law enforcement witnesses in less serious cases, it is not uncommon for the prosecution to have a paralegal cover the interview for purposes of recording it, or for the prosecution to waive its appearance at the interview altogether. The parties are responsible for preparing their own transcripts, but without a court reporter, the cost is significantly reduced. Although the lack of a court reporter also means the witness is not placed under oath, but this is not a problem – witnesses who testify inconsistently with their interview statements are easily impeached.

Having the opportunity to interview witnesses prior to trial also facilitates the filing and resolution of motions *in limine*. It is typical for witnesses to reveal something for the first time in an interview that may be subject to preclusion under Evidence Rule 403. In the case of disputes, the court can review a transcript rather than rely on the parties’ representations (or worse, speculation) about the witnesses’ potential testimony. Without prior knowledge of extremely prejudicial statements that a witness is capable of making, mistrials would be more common.



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Furthermore, it is unfortunately commonplace for prosecutors to neglect their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), to find and disclose exculpatory material. Questioning witnesses before trial often produces information that was previously unknown to the prosecution that results in a *Brady* disclosure. Even in cases where the prosecution acted in good faith, sometimes information does not come to light until a defense attorney has the chance to ask questions. Lawyers cannot investigate new discoveries mid-trial after cross-examination of a key witness; such matters need to be known prior to trial.

The Arizona Rules of Civil Procedure, Arizona Rules of Criminal Procedure, and Federal Rules of Civil Procedure share the expectation that the parties will engage in full discovery before filing dispositive motions and proceeding to trial. There is no good reason for the Federal Rules of Criminal Procedure to lag behind in this regard. There may be added cost in any one case by interviewing or deposing witnesses prior to trial, but in the aggregate, the cost is reduced by the increased likelihood of a non-trial disposition. At the very least, the trial would be more efficient, and it may also include stipulations, agreements to allow witnesses to appear virtually, and other such cost-saving measures.

Thank you for your consideration.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

David J. Euchner
President

euchner.aacj@gmail.com

cc: Michael Kelly, Akerman LLP
via e-mail: michael.kelly@akerman.com