

WEST LAW FIRM

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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, D.C. 20544
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**Re: Comment in Support of Rules Suggestion 26-CR-23 — Amendment of
Federal Rule of Criminal Procedure 15 to Permit Discovery Depositions**

Dear Ms. Dubay and Members of the Committee:

I write in support of the proposal to amend Rule 15 of the Federal Rules of Criminal Procedure to permit discovery depositions in federal criminal cases, subject to the supervision of the court. I serve as the Panel Attorney District Representative for the Criminal Justice Act panel of the United States District Court for the District of Rhode Island. I have practiced federal criminal defense in this District since 1984, and for more than forty years I have represented indigent defendants by appointment under the Criminal Justice Act, 18 U.S.C. § 3006A. I offer this comment in that representative capacity, and from that experience. I have also reviewed the comment submitted by the New York Council of Defense Lawyers dated March 24, 2026, and I join in its reasoning.

The substantial majority of persons charged with federal crimes cannot afford to retain counsel. They are represented by federal defender organizations and by private attorneys appointed from CJA panels such as the one I represent. Whatever the Committee concludes about Rule 15 will therefore operate, in most federal prosecutions, upon defendants who did not choose their lawyers, who cannot pay for investigation out of pocket, and whose access to the facts of their own cases depends entirely on what the rules of procedure afford them. A rule that limits pre-trial access to witness testimony limits it most severely for these clients.

The information imbalance in federal criminal practice is structural. The government investigates with grand jury subpoena power, with the ability to compel testimony under grants of immunity, and with teams of federal agents whose requests for interviews are rarely refused. The government may meet with its witnesses as often as it wishes before trial, and it does. The defense has none of these tools. Appointed counsel may retain an investigator only upon court approval under § 3006A(e), within budgetary limits, and the investigator so retained has no power to compel

anyone to speak. In my experience, most civilian witnesses in federal criminal cases decline to be interviewed by the defense, and many are advised not to speak with us. Counsel then cross-examines at trial without knowing what the witness would have said if asked, because there was no lawful means to ask. The New York Council of Defense Lawyers describes this as blind cross-examination. The description is accurate.

Rule 15 as written offers no remedy. The rule permits a deposition only *to preserve testimony for trial*, and only upon a showing of exceptional circumstances. Fed. R. Crim. P. 15(a)(1). The First Circuit has enforced that limit from the beginning. When a district court granted a defendant leave to depose two prospective government witnesses on a bare assertion that they might not appear at trial, the court of appeals vacated the order on mandamus, reasoning that so thin a showing would convert Rule 15 into a general discovery tool. *In re United States*, 348 F.2d 624 (1st Cir. 1965). The court later made the principle explicit: the discretion to permit criminal depositions is not broad and must be exercised carefully, precisely because of the risk that parties would use them as a discovery device. *United States v. Mann*, 590 F.2d 361 (1st Cir. 1978). My own district applies the same rule, permitting Rule 15 depositions only to preserve trial testimony and denying motions cast as discovery motions. *In re Grand Jury Proceedings*, 697 F. Supp. 2d 262 (D.R.I. 2010). In four decades of practice I have used Rule 15 for its intended preservation function, but I have never been able to invoke it to learn, before trial, what a government witness knows. The rule does not permit that, and no motion practice can make it do so. Only amendment can.

The history of the rule shows that this design was not the product of considered principle. As Professor Ion Meyn has documented, the first draft of the Federal Rules of Criminal Procedure in 1941 adopted the discovery architecture of the Civil Rules nearly in full, including depositions, and the Advisory Committee's own Reporter commended that approach. Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 Fordham L. Rev. 697 (2017). The draft was abandoned within days of the full Committee's September 1941 meeting, principally on the objections of the Committee's Secretary and members who followed him, and on a committee that included no member of the defense bar. *Id.* at 712, 729. The asymmetry we now treat as settled law originated in a rushed reversal by a body from which the affected constituency was absent. Eighty years of familiarity have given that asymmetry the appearance of inevitability. It was never inevitable.

The asymmetry is also difficult to square with what the Supreme Court has said about discovery in criminal cases. In *Wardius v. Oregon*, 412 U.S. 470 (1973), the Court observed that the State possesses inherent advantages in gathering information, and reasoned that any imbalance in discovery rights ought therefore to run in the defendant's favor rather than against him. Federal practice runs precisely the other way. A civil litigant defending a claim for money may depose every adverse witness as of right. A criminal defendant facing loss of liberty may depose none. The Constitution guarantees the accused compulsory process to obtain witnesses in his favor, *Washington v. Texas*, 388 U.S. 14 (1967), but that guarantee operates only at trial, after the moment when knowing what a witness would say could have shaped the defense, informed a plea decision, or identified the witnesses worth calling at all.

The overwhelming majority of federal criminal cases are resolved by guilty plea, not by trial. Every one of those pleas is negotiated and entered on the defense's necessarily incomplete

picture of what the government's witnesses would actually say. Appointed counsel advising a client whether to plead must estimate the strength of testimony counsel has never heard and could not lawfully test. Discovery depositions would ground those estimates in fact. In the civil system, depositions are understood to promote settlement precisely because they let both sides assess their positions accurately. There is no reason the same mechanism would not produce better-informed, and therefore more just, pleas. The empirical evidence points the same way. A study surveying prosecutors and defense attorneys in open-file and closed-file jurisdictions found that broader pre-plea disclosure improved the flow of information to the defense, reduced discovery disputes, and sped dispositions, and found little evidence that it endangered witnesses. Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 Wash. & Lee L. Rev. 285 (2016).

The experience of the states demonstrates that the traditional objections are manageable. At least thirteen states permit some form of pre-trial deposition in criminal cases: seven as a matter of right, and six upon leave of court for good cause shown. Altman, *Can't We Just Talk About This First?: Making the Case for the Use of Discovery Depositions in Criminal Cases*, 75 Ark. L. Rev. 1, 38–39 (2022). Florida has allowed criminal discovery depositions since 1972, and a commission convened in 1989 to evaluate that experience concluded that the practice contributed significantly to fair and efficient factfinding and should be retained. Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 Wis. L. Rev. 541, 613. The concerns voiced in 1941—delay, fabrication, harassment of witnesses—are the same concerns courts manage every day in civil litigation, through scheduling orders, protective orders, and sanctions. A criminal deposition rule can be drafted with those safeguards built in, including provisions addressing witness safety and cooperating witnesses, and with the district court supervising throughout. Court supervision is the answer to the objections, not a reason to forgo the reform.

From the vantage of a district CJA panel, the reform also serves the interests of the courts themselves. Trials conducted after both sides know the testimony are shorter, more focused, and less prone to mid-trial surprise and its attendant continuances. Pleas entered on accurate information are less likely to generate post-conviction litigation claiming counsel misjudged the government's case. The efficiency argument and the fairness argument point in the same direction.

I therefore urge the Advisory Committee to undertake a careful study of Rule 15 and to propose an amendment permitting discovery depositions in federal criminal cases under the supervision of the district courts. The defendants my panel colleagues and I represent have waited a long time for the rules to treat their liberty with the procedural seriousness the civil rules accord to money. I appreciate the Committee's consideration of this comment, and I would welcome the opportunity to provide any further information the Committee may find useful.

Respectfully yours,

/George J. West

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