

September 1, 2026

Via email: 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, D.C. 20544

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

Dear Ms. Dubay and the Committee on Rules of Practice and Procedure:

I write in support of amending Rule 15 of the Federal Rules of Criminal Procedure to provide for discovery depositions in federal criminal cases. I am an Associate Professor of Law at the University of Wisconsin, where my research examines the historical development of procedural rules and the ways in which informational asymmetries can deprive criminal proceedings of facts essential to fair outcomes.

I agree with the letters linking depositions to greater factual accuracy and will not repeat their well-articulated arguments here. Instead, I advance three propositions: historical defects in the formation of the criminal rules continue to shape modern practice; the adequacy of the process afforded criminal litigants should be assessed in light of civil practice; and trial is no substitute for pretrial discovery. I conclude by addressing recurring arguments against formal discovery in criminal cases.

Why does the history of federal reform matter? Whenever the propriety of formal discovery in criminal cases is at issue, this history is important for two reasons: one, prosecutorial interests dominated the rulemaking process, while the defense community was unrepresented; and two, reform occurred during the height of Jim Crow, when allowing a defendant of color to question White witnesses would have transgressed the prevailing racial order. These illegitimate features of the process contributed to the removal of a formal discovery phase from criminal matters.

I say removal, because the first draft of the federal rules proposed in 1941 contained formal discovery provisions, including document requests and depositions.¹ To review this draft, the Supreme Court appointed a committee that included ten current or former prosecutors.² The glaring omission was the lack of any criminal defense attorneys, despite the existence of established public defender offices at the time.³ This prosecutor-dominated committee adopted innovations from civil

¹ ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE, RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES r. 2 (Sept. 8, 1941). I have attached an excerpt of the first draft of the federal rules as Exhibit A. *See, e.g.*, Rule 26 (Depositions) and Rule 34 (Requests for Documents and Things). Note, that restrictions articulated in Rule 27 reflected those in the civil analogue at the time. Fed. R. Crim. P. 2, missing from the attached copy, read, “Each of these Rules of Criminal Procedure which duplicates or which corresponds to a Federal Rule of Civil Procedure bears the same rule number as the civil rule which it duplicates or to which it corresponds in title or in function. The procedure under these rules is designed to conform as closely as possible to the procedure under the Federal Rules of Civil Procedure, and these rules shall be construed with that purpose in view.”

² Meyn, *Why Civil and Criminal*, 86 FORDHAM L. REV. 697, 728-29 (2017). Also included: two legal academics and five civil litigators—reflecting the Court’s openness to borrowing from the civil model.

³ SARA MAYEUX, *FREE JUSTICE*, at 30, 50 (2020).

reform that only benefitted the prosecutor—including notice pleading and the joinder of charges and defendants.⁴ The committee in turn rejected proposed rules that could frustrate prosecutorial intentions; most significantly, a pretrial discovery phase. The resulting framework left defendant dependent on the prosecutor for facts.⁵ In the context of Jim Crow, excluding a formal discovery phase also preserved the color line.⁶ Adopted in 1946, the criminal rules were *retrogressive* for the accused.

This history remains with us. Since 1946, any amendment to the Federal Rules of Criminal Procedure must contend with a template that, however deeply flawed in its creation, has been normalized by over 80 years of practice. The rules have yet to provide a formal discovery period as robust as what was originally proposed.

The due process afforded to criminal litigants should be assessed against the benchmark of modern civil practice. Foundational to the rules of civil procedure are efforts to balance access to courts with adequate notice, factual disclosure with litigation costs, and procedural efficiency with resolution on the merits.⁷ Measured against this model, the criminal rules fall short of minimum expectations of procedural fairness. Imagine asking a civil defense attorney to settle a case based on the findings of plaintiff. However implausible that scenario in civil litigation, its criminal analogue occurs every day when defendants enter guilty pleas with little opportunity to participate in the case’s factual development. The values that animate civil procedure should be no less central to criminal procedure.

Trial is no substitute for pretrial discovery. Civil reformers viewed pretrial discovery as essential to a fair trial. Fact revelation requires two participants in an adversarial proceeding. Under modern standards, the lack of a formal discovery period threatens to render a defendant a spectator in their own case.

Liability is not an on and off switch; a person is rarely guilty of the charges or innocent. Civil discovery reflects this reality: the question is often not whether defendant *is* liable, but rather *how* liable. Sentencing ranges express this reality, as mitigating or aggravating factors shape the appropriate outcome; pretrial discovery is essential to getting this right. Most civil and criminal cases resolve pretrial, which only highlights the importance of formal discovery. Going to trial in the absence of pretrial discovery presents fairness concerns that were raised by civil reformers a hundred years ago. Whether trial is actually a crucible of truth depends on informed parties. Trial does not permit discovery. Trial strategies are based on the information made available during the pretrial period. Pretrial discovery permits parties to understand the dispute and seek resolutions that come closer to achieving fair and just outcomes. Pretrial discovery also establishes a procedural justice norm that further legitimizes outcomes.

⁴ Special Assistant to the Attorney General Alexander Holtzoff remarked it would now be sufficient to simply allege, “that the defendant murdered John Smith by a fatal gunshot wound.” HEARING BEFORE THE ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE, United States Supreme Court 201 (Sept. 8-10, 1941).

⁵ The Court would later clarify that a prosecutor’s failure to disclose pretrial facts, however relevant, would not violate the Constitution. Ion Meyn, *Flipping the Script on Brady*, 95 IND. L.J. 883, 897-901 (2020). *See also*, Justin Murray, *Brady’s Shadow*, 112 VIRGINIA L. REV. (Forthcoming 2026).

⁶ Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1, 28-38 (2021).

⁷ Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993, 1005-20 (2012); Martin Reddish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundation of Modern Procedure*, 64 FLORIDA L. REV. 845, 856, 871 (2012).

Formal discovery also reinforces protections that constitutional rights are meant to provide. First and foremost, the right to effective assistance of counsel is inseparable from the discovery tools that are made available to defense counsel. When I began practicing criminal law after years as a civil litigator, I felt as though I entered a boxing ring with my hands tied behind my back. How could I meaningfully test the government's case in the dark? Police reports were available in state court, but they reflected only the officers' accounts. I did not know what questions the officers had asked witnesses, and I could not treat their reports as reliable narratives or adequate substitutes for conducting my own witness examinations. Second, the lack of pretrial discovery impairs the effective litigation of suppression motions. A suppression hearing should not serve as a substitute for discovery. Counsel should be able to use pretrial discovery tools to determine whether a suppression motion is warranted, and if so, to inform the motion and hearing.

Responding to recurring arguments against formal discovery in criminal cases. Two common justifications for the status quo are that: (1) a criminal defendant's Fifth Amendment right against self-incrimination makes it unfair to grant the accused formal discovery rights, and (2) criminal defendants will use formal discovery rights to commit perjury and intimidate witnesses.⁸

The first justification is that defendant should not receive discovery because the Fifth Amendment prevents the State from obtaining certain information. Justice William Brennan thought this argument reflected an "intolerance upon any suggestion that the accused may have rights."⁹ If exercising a constitutional right justifies imposing a procedural disadvantage on its beneficiary, why should the State not face a corresponding disadvantage because it possesses constitutionally derived police powers? Similarly, should a civil litigant who invokes the spousal privilege receive less discovery merely because the opposing party cannot invoke the same privilege? In the end, the objection seeks to prove too much, as the Fifth Amendment poses little obstacle to many forms of discovery.¹⁰

Generalized concerns about intimidation and perjury are likewise insufficient to justify withholding formal discovery from every defendant. As an initial matter, "intimidation" is an incredibly imprecise term. A report posted by the Office of Justice Programs, for example, observes, "some victims and witnesses have reported that even when simply executing their duties, law enforcement officers, prosecutors, defense attorneys and judges can be intimidating."¹¹ Second, the availability of discovery

⁸ RONALD JAY ALLEN, ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE*, 1176 (6th ed.) (2025) (stating, "Opponents of 'civil-style' discovery frequently cite the possibility that defendants will misuse discovery—to intimidate witnesses...or concoct plausible but perjurious defenses that result in false acquittals" and raising Fifth Amendment argument); ERWIN CHEMERINSKY & LAURIE LEVENSON, *CRIMINAL PROCEDURE*, 863 (5th ed. 2025) (stating, "most jurisdictions limit the discovery available to the defense, in part because of concerns about witness intimidation and the fabrication of evidence. Conversely, concerns about interference with the defendant's Fifth Amendment privilege against self-incrimination limit the prosecutor's right to reciprocal discovery from the defense."); MARC MILLER, ET AL., *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION*, 251 (Aspen 7th ed.) (2023) (stating, "Rules that limit disclosure of prosecution witnesses also reflect worries that defendants will engage in witness tampering, bribery, and intimidation."); JOSHUA DRESSLER, ET. AL., *CRIMINAL PROCEDURE: PROSECUTING CRIME* 948 (8th ed.); YALE KAMISAR, ET AL. *MODERN CRIMINAL PROCEDURE* 1020 (West 16th ed.) (2023) (stating that the approach of Rule 16 is informed by the "risk of witness intimidation" as well as prosecutorial concerns that witnesses were "fearful of retaliation or harassment").

⁹ William Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth; A Progress Report*, 68 WASHINGTON U. L. Q. 1, 14 (1990).

¹⁰ *Williams v. Florida*, 399 U.S. 78 (1970) (expanding permissible prosecutorial discovery through a narrow construction of the Fifth Amendment privilege against compelled self-incrimination).

¹¹ United States Department of Justice, Office of Justice Programs, *Evading Justice: The Pervasive Nature of Witness Intimidation*, NCJ Number 244050, fn 11.

tools has an unclear causal connection to intimidation. With respect to severe (and rare) forms of intimidation, a National Institute of Justice report identifies fear, strong community ties, and deep-seated distrust of law enforcement as reasons for witnesses' reluctance to cooperate—factors that exist independently of whether defendants possess formal discovery rights.¹²

Moreover, acts of witness intimidation may be admitted as evidence of consciousness of guilt and may expose a defendant to additional serious charges. Focusing exclusively on misconduct by defendants also obscures the other side of the problem: formal discovery can expose perjury by government witnesses, while its absence can conceal perjury or intimidation by institutional actors, including law enforcement and informants. A witness on probation, for example, may believe that contradicting the government will jeopardize the witness's liberty. Depositions are especially effective at exposing these pressures and testing their effect on a witness's account. The architects of the civil rules likewise anticipated that litigants might commit perjury; they concluded that pretrial discovery was a means of detecting it, not a reason to leave adverse parties uninformed.

Finally, concerns about perjury and intimidation may derive unearned credibility from persistent narratives of racial dangerousness. Those narratives are not always explicit. One criminal-procedure casebook, for example, quotes a 1953 decision for the proposition that “[m]any witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime.”¹³ The decision was written by Arthur Vanderbilt, chair of the original advisory committee that removed discovery provisions from the original draft of the federal rules. In that same opinion, Vanderbilt arguably invoked a racialized rationale for restricting the disclosure of information to criminal defendant.¹⁴

A final point. Any policymaking body in the United States considering procedural reform should confront two defining features of the criminal legal system: mass incarceration and racial disparity.¹⁵ In civil litigation, heightened pleading requirements and a formal discovery phase acts as a check against plaintiffs that asks them to consider the strength of the claim *and* its importance. In contrast, the criminal rules have lower barriers to charging while preserving restrictions on formal discovery, a framework that facilitates mass incarceration by removing justified points of friction from the system's pipeline—procedural safeguards that might otherwise test constitutional concerns or the factual basis for prosecution before conviction.¹⁶

Relatedly, the resulting informational asymmetry also impairs prosecutors' ability to exercise their discretion in a fully informed manner. When defense counsel lacks timely access to the evidence, prosecutors are less likely to encounter facts that might warrant dismissal, a charge reduction, or a more favorable plea offer. In addition, defense attorneys should be able to question motivations for

¹² Kerry Murphy Healey, *Victim and Witness Intimidation: New Developments and Emerging Responses*, (National Institute of Justice, Oct. 1995) (NCJ No. 156555).

¹³ DRESSLER, CRIMINAL PROCEDURE at 948 (citing to *State v. Tune*, 13 N.J. 203, 98 A.2d 881 (1953)).

¹⁴ When the dissent noted the disclosures sought by defendant were available to defendants in Britain, Vanderbilt responded, “disrespect for law” had not “disappeared as the criminal statistics indicate in certain segments of the American population.” *Tune*, 98 A.2d 881 at 889.

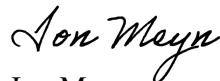
¹⁵ See, *Commentary*, ABA CRIMINAL JUSTICE STANDARDS, DIVERSION.

¹⁶ Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOKLYN L. REV. 1091, 1108-1120 (surveying consequences of lack of formal discretionary discovery powers for criminal defendants) (2013); Meyn, *The Haves*, at 1804-1805; Russell Gold, Carissa Hessick & Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1610 (2017) (showing how criminal rules and severe sentencing regimes force “defendants to settle meritless cases or proceed to trial and risk substantially greater sentences”).

stops and arrests, especially motivations that may constitute Fourteenth Amendment violations, but absent deposition power and other formal discovery tools, are impossible to determine.¹⁷

Thank you for your consideration of my comments. Please do not hesitate to contact me with any questions or concerns.

Sincerely,

A handwritten signature in cursive script that reads "Ion Meyn".

Ion Meyn

¹⁷ This last point recognizes the influence that amendments to the federal rules have on shaping state rules.

Exhibit A

Excerpt of the first proposed draft of the Federal Rules of Criminal Procedure
Excerpt includes: Table of contents, as well as proposed Rules 26-36 (Discovery Section)

Rules of Criminal Procedure

First Tentative Draft (9/8/1941)

2691(DK)

Tentative Draft - September 8, 1941
 Confidential * Not Published

(26)

Mr. Glueck - 9078 12

*U.S. Supreme Court Advisory Committee on rules
 of criminal procedure.*

RULES OF CRIMINAL PROCEDURE

cf

FOR THE

DISTRICT COURTS OF THE UNITED STATES

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Advisory Committee on Rules of Criminal Procedure
Supreme Court of the United States
Washington, D. C.

Office of the Reporter
152A Supreme Court Building
August 29, 1941

To the Members of the Advisory Committee:

A tentative and confidential draft of Rules of Criminal Procedure is transmitted for consideration at the meeting called for September 8, 1941. The draft rules are on the right-hand pages. Opposite the draft rule, on the left-hand pages, are (1) the Civil Rule to which the Criminal Rule corresponds or which it duplicates and (2) constitutional and statutory provisions and proposals such as those of the American Law Institute Code. (3) Recommendations received from judges, lawyers, and others are on the right-hand pages following the Criminal Rule. State statutes, federal and state decisions, and commentaries will be presented at the meeting.

The governing principles which are being followed in the preparation of the draft will be presented at the meeting. Several questions of policy, as well as many questions of detail, about both the present draft and future drafts, have been formulated for the consideration of the Advisory Committee.

A specimen discussion outline and some abstract forms are placed at the end of the rules. A supply of these forms will be available, if desired, for use by members of the Committee at the meeting and in preparation of future drafts.

Members of the Committee will find available at the Reporter's office in Room 152A stenographic assistance, telephone facilities, and any other services which can be provided for their convenience.

Sincerely yours,

James J. Robinson

James J. Robinson
Reporter

1133243

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The criminal rules follow as closely as possible in organization, in numbering and in substance the Federal Rules of Civil Procedure. The criminal rules omit those civil rule numbers which designate civil rules which are not duplicated by criminal rules or to which no criminal rules correspond in title or in function. This draft of the criminal rules also omits a few civil rule numbers for which analogous criminal rules are in preparation.

I SCOPE OF RULES

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Rule 4. Process:

- (a) Warrant or Summons: Issuance
- (b) Same: Form
- (c) Same: By Whom Served
- (d) Same: How Served
- (e) Same: Other Service
- (f) Territorial Limits of Effective Service
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- (e) Pleading to be Concise and Direct; Consistency
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Rule 10. Form of Pleadings

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- (b) Paragraphs; Separate Statements
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- (d) Motion to Terminate or Limit Examination
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V. DEPOSITIONS AND DISCOVERY

1 Rule 26. Depositions Pending Criminal Proceeding.

2 (a) When Depositions May be Taken. By leave of court after
3 jurisdiction has been obtained over any defendant ~~or over property~~
4 ~~which is involved in the proceeding~~ the testimony of any person,
5 whether a party or not, subject to any privilege or right secured
6 to the defendant by the Constitution or laws of the United States,
7 may be taken at the instance of the defendant, or at the instance
8 of the government if the defendant shall have taken the deposition
9 of a witness as a prospective witness for the government, by deposi-
10 tion upon oral examination or written interrogatories for use as
11 evidence in the proceeding. The attendance of witness may be com-
12 pelled by the use of subpoena as provided in Rule 45. Depositions
13 shall be taken only in accordance with those rules. If a deposition
14 is about to be taken without compliance with these rules or for the
15 purpose of delay or other obstruction of the progress and purpose
16 of the proceeding, the court may vacate the application for a
17 commission to take the deposition or may strike out the deposition

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18 if the deposition shall have been so taken. The deposition of a
19 person confined in prison may be taken only by leave of court on
20 such terms as the court prescribes.

21 (b) Scope of Examination. Unless otherwise ordered by the
22 court as provided by Rule 30 (b) or (d), the deponent may be
23 examined regarding any matter, not privileged, by provision of the
24 Constitution or laws of the United States, which is relevant to
25 the subject matter involved in the pending action, whether relating
26 to the defense or to the formal accusation of the examining party
27 or to the defense or formal accusation of any other party, including
28 the existence, description, nature, custody, condition, and location
29 of any books, documents, or other tangible things and the identity
30 and location of persons having knowledge of relevant facts.

31 (c) Examination and Cross-Examination. Examination and cross-
32 examination of deponents may proceed as permitted at the trial
33 under the provisions of Rule 43 (b), except that if the deposition
34 is a deposition of the defendant taken at the instance of the
35 defendant, the government may cross-examine the defendant upon

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36 subject matter other than that of his examination-in chief.

37 (d) Use of Depositions. At the trial or upon the hearing of
38 a motion or an interlocutory proceeding, any part or all of a
39 deposition so far as admissible under the rules of evidence, may
40 be used against any party who was present or represented at the
41 taking of the deposition or who had due notice thereof, in accord-
42 ance with any one of the following provisions:

43 (1) Any deposition may be used by any party for the pur-
44 pose of contradicting or impeaching the testimony of a deponent
45 as a witness.

46 (2) The deposition of a witness of the government or of
47 a defendant under subdivision (a) of this rule or of any one
48 who at the time of taking the deposition was an officer,
49 director, or managing agent of a public or private corporation,
50 partnership, or association which is a party may be used by
51 an adverse party for any purpose. If a defendant waiving his
52 privilege has given a deposition, the deposition shall not be
53 admitted in evidence or otherwise used at the trial unless

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54 the defendant testifies at the trial, If the defendant
55 testifies at the trial either he or the government may make
56 use of his deposition for any purpose.

57 (3) The deposition of a witness, whether or not a party,
58 may be used by any party for any purpose if the court finds:
59 1, that the witness is dead; or 2, that the witness is at a
60 greater distance than _____ miles from the place of trial or
61 hearing, or is out of the United States, if the government or
62 the defendant offering the deposition satisfies the court that
63 the absence of the witness was not procured by the party so
64 offering the deposition; or 3, that the witness is unable to
65 attend or testify because of age, sickness, or infirmity at-
66 tested by the verified statement of a physician, or imprison-
67 ment; or 4, that the party offering the deposition has been
68 unable to procure the attendance of the witness by subpoena;
69 or 5, upon application and notice, that such exceptional
70 circumstances exist as to make it desirable, in the interest
71 of justice and with due regard to the importance of presenting

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72 the testimony of witnesses orally in open court, to allow
73 the deposition to be used.

74 (4) If only part of a deposition is offered in evidence
75 by a party, an adverse party may require him to introduce all
76 of it which is relevant to the part introduced, and any party
77 may introduce any other parts. Any change in the identity or
78 the number of the defendants does not affect the right to use
79 depositions previously taken; and, when a criminal proceeding
80 in any court of the United States or of any state has been
81 disposed of, or where a superseding written accusation has
82 been filed, or where another criminal proceeding based on the
83 same criminal act or transaction is afterward brought to trial
84 against one or more of the same defendants, all depositions
85 lawfully taken and duly filed in the former proceeding may be
86 used in the latter as if originally taken therefor.

87 (e) Objections to Admissibility. Subject to the provisions of
88 Rule 32 (c), objection may be made at the trial or hearing to re-
89 ceiving in evidence any deposition or part thereof for any reason

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90 which would require the exclusion of the evidence if the witness
91 were then present and testifying.

92 (f) Effect of Taking or Using Depositions. A defendant or
93 the government shall not be deemed to make a person his own witness
94 for any purpose by taking his deposition. The introduction in
95 evidence of the deposition or any part thereof for any purpose
96 other than that of contradicting or impeaching the deponent makes
97 the deponent the witness of the party introducing the deposition,
98 but this shall not apply to the use by an adverse party of a
99 deposition as described in paragraph (2) subdivision (d) of this
100 rule. At the trial or hearing any party may rebut any relevant
101 evidence contained in a deposition whether introduced by him or by
102 any other party.

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1 Rule 27. Depositions Before Trial or Pending Appeal.

2 (a) Before Trial.

3 (1) Petition. A defendant who desires to take the
4 deposition of any person upon oral examination may, prior to
5 arraignment or not more than _____ days thereafter, file in
6 the district court in which the proceeding against him is
7 pending a verified petition, which shall show: 1, the facts
8 which he desires to establish by the proposed testimony and
9 his reasons for believing that the establishing of such facts
10 is necessary to prevent a failure or delay of justice, 2, the
11 names and addresses of the persons to be examined and the
12 place where the examination is desired to be held, 3, the
13 substance of the testimony which he expects to elicit from
14 each, 4, the reasons for the defendant's inability to produce
15 such persons in open court and for his inability to prove the
16 substance of their proposed testimony in any manner other
17 than by their depositions, and 5, if depositions of more than
18 one witness are to be taken, that the testimony of such persons

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19 will not be merely cumulative; and the defendant shall ask
20 for an order issuing a commission to take the depositions of
21 the persons to be examined. In the event that the government
22 shall desire to take depositions pursuant to Rule 26, the
23 attorney for the government shall follow the same procedure as
24 that which is provided for the defendant by this rule.

25 (2) Notice and Service. The defendant shall, within ____
26 days after filing the petition, serve a notice upon the
27 attorney for the government, together with a copy of the
28 petition, stating that the defendant will apply to the court,
29 at a time and place named therein and not more than ____ days
30 after service of the notice, for the order described therein.

31 Within ____ days after such service the attorney for the
32 government may file a petition in accordance with paragraph
33 (1) of this subdivision, and shall, within ____ days after
34 such filing, serve a copy thereof upon the defendant.

35 (3) Order and Examination. After a petition for taking
36 a deposition is served, the party served may within ____ days,

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37 or within such further time as may be prescribed by the court,
38 file an answer [under oath] in opposition to the petition.
39 The court may in its discretion, on its own motion or on ap-
40 plication of either party, hold a hearing on the petition.
41 Unless from the facts established by the petition or hearing,
42 or both, it appears to the satisfaction of the court that the
43 taking of the deposition is necessary to prevent a failure or
44 delay of justice, it shall deny the petition; but if the court
45 is so satisfied it may issue a commission, in accordance with
46 law, to take such testimony, designating the persons whose
47 depositions may be taken and the officer or officers before
48 whom such depositions shall be taken, and specifying the
49 subject matter of the examination, the time and place thereof,
50 and whether the depositions shall be taken upon oral examina-
51 tion or written interrogatories. The depositions may then be
52 taken in accordance with these rules.

53 (4) Use of Deposition. If a deposition is taken under
54 these rules it may be used in any proceeding based on the

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55 same criminal act or transaction brought in a district court
56 of the United States, in accordance with the provisions of
57 Rule 26 (d).

58 (b) Pending Appeal. If an appeal has been taken from a
59 judgment of a district court or before the taking of an appeal if
60 the time therefor has not expired, the district court in which
61 the judgment was rendered may allow the taking of depositions of
62 witnesses to perpetuate their testimony for use in the event of
63 further proceedings in the district court. In such case the party
64 who desires to perpetuate the testimony may file in the district
65 court a verified petition for leave to take the depositions and
66 serve notice and a copy of such petition upon the other party as
67 provided in paragraph (2) of subdivision (a) of this rule. The
68 requirements of the petition shall be the same as those specified
69 in paragraph (1) of subdivision (a) of this rule. An answer to the
70 petition may be filed, and a hearing held, as provided in paragraph
71 (3) of subdivision (a) of this rule. If the court finds that the
72 perpetuation of the testimony is necessary to avoid a failure or

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- 73 delay of justice, it may issue a commission to take such testimony,
- 74 and thereupon the depositions may be taken and used in the same
- 75 manner and under the same conditions as are prescribed in these
- 76 rules for depositions before trial.

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1 Rule 28. Persons before Whom Depositions May be Taken.

2 (a) Within the United States. Within the United States or
3 within a territory or insular possession subject to the dominion
4 of the United States, depositions shall be taken before an officer
5 authorized to administer oaths by the laws of the United States or
6 of the place where the examination is held.

7 (b) In Foreign Countries. In a foreign country depositions
8 shall be taken (1) before a secretary of embassy or legation, consul
9 general, consul, vice consul, or consular agent of the United States,
10 or (2) before such other person or officer as may be appointed by
11 commission. Officers may be designated in commissions either by
12 name or descriptive title.

13 (c) Disqualification for Interest. No deposition shall be
14 taken before a person who is a relative or employee or attorney or
15 counsel of any of the parties, or who is a relative or employee of
16 such an attorney or counsel, or who is otherwise interested in the
17 proceeding.

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- 1 Rule 29. Stipulations Regarding the Taking of Depositions.
- 2 If the defendant and the attorney for the government so stipulate
- 3 in writing, depositions may be taken before any person, at any
- 4 time or place, upon any notice, and in any manner and when so
- 5 taken may be used like other depositions.

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1 Rule 30. Depositions Upon Oral Examination.

2 (a) Notice of Examination; Time. If, after a commission to
3 take the testimony of any person is issued in accordance with the
4 provisions of Rule 27 (a) (3), either party finds it necessary to
5 take the deposition at a time other than that specified in the com-
6 mission, he shall give reasonable notice in writing to the other
7 party of the time he desires to take the same. On motion of the
8 party upon whom the notice is served, the court may for cause shown
9 enlarge or shorten the time.

10 (b) Orders for the Protection of Parties and Deponents. At
11 the time a commission to take testimony is issued, or at any time
12 thereafter upon motion seasonably made by any party or by the
13 person to be examined and upon notice and for good cause shown,
14 the court may make an order (1) that the deposition shall not be
15 taken, or (2) that it may be taken only at some designated place
16 other than that stated in the commission, or (3) that it may be
17 taken only on written interrogatories, or (4) that certain matters
18 shall not be inquired into, or (5) that the scope of the examination

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19 shall be limited to certain matters, or (6) that the examination
20 shall be held with no one present except the parties to the pro-
21 ceeding and their officers and counsel, or (7) that after being
22 sealed the deposition shall be opened only by order of court, or
23 (8) that secret information need not be disclosed, or (9) that the
24 parties shall simultaneously file specified documents or informa-
25 tion enclosed in sealed envelopes to be opened by the court, or
26 (10) the court may make any other order which justice requires to
27 to protect the party or witness from annoyance, embarrassment, or
28 oppression.

29 (c) Record of Examination; Oath; Objections. The officer
30 before whom the deposition is to be taken shall put the witness on
31 oath and shall personally, or by some one acting under his direction
32 and in his presence, record the testimony of the witness. The
33 testimony shall be taken stenographically and transcribed unless
34 the parties agree otherwise. All objections made at the time of
35 the examination to the qualifications of the officer taking the
36 deposition, or to the manner of taking it, or to the evidence

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37 presented, or to the conduct of any party, and any other objection
38 to the proceedings, shall be noted by the officer upon the deposition.
39 Evidence objected to shall be taken subject to the objections. In
40 lieu of participating in the oral examination, parties other than
41 the party taking a deposition may transmit written interrogatories
42 to the officer, who shall propound them to the witness and record
43 the answers verbatim.

44 (d) Motion to Terminate or Limit Examination. At any time
45 during the taking of the deposition, on motion of any party or of
46 the deponent and upon a showing that the examination is being con-
47 ducted in bad faith or in such manner as unreasonably to annoy,
48 embarrass, or oppress the deponent or party, the court in which
49 the proceeding is pending or the court in the district where the
50 deposition is being taken may order the officer conducting the
51 examination to cease forthwith from taking the deposition, or may
52 limit the scope and manner of the taking of the deposition as
53 provided in subdivision (b). If the order made terminates the
54 examination, it shall be resumed thereafter only upon the order of

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55 the court in which the proceeding is pending. Upon demand of the
56 objecting party or deponent, the taking of the deposition shall be
57 suspended for the time necessary to make a motion for an order.
58 In granting or refusing such order the court may impose upon either
59 party or upon the witness the requirement to pay such costs or
60 expenses as the court may deem reasonable.

61 (e) Submission to Witness; Changes; Signing. When the
62 testimony is fully transcribed the deposition shall be submitted to
63 the witness for examination and shall be read to or by him, unless
64 such examination and reading are waived by the witness and by the
65 parties. Any changes in form or substance which the witness desires
66 to make shall be entered upon the deposition by the officer with a
67 statement of the reasons given by the witness for making them. The
68 deposition shall then be signed by the witness, unless the parties
69 by stipulation waive the signing or the witness is ill or cannot
70 be found or refuses to sign. If the deposition is not signed by
71 the witness, the officer shall sign it and state on the record the
72 fact of the waiver or of the illness or absence of the witness or

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73 the fact of the refusal to sign together with the reason, if any,
74 given therefor; and the deposition may then be used as fully as
75 though signed, unless on a motion to suppress under Rule 32 (d)
76 the court holds that the reasons given for the refusal to sign
77 require rejection of the deposition in whole or in part.

78 (f) Certification and Filing by Officer; Copies; Notice of
79 Filing.

80 (1) The officer shall certify on the deposition that the
81 witness was duly sworn by him and that the deposition is a true
82 record of the testimony given by the witness. He shall then
83 securely seal the deposition in an envelope indorsed with the
84 title of the action and marked "Deposition of [here insert
85 name of witness]" and shall promptly file it with the court in
86 which the proceeding is pending or send it by registered mail
87 to the clerk thereof for filing.

88 (2) Upon payment of reasonable charges therefor, the
89 officer shall furnish a copy of the deposition to any party
90 or to the deponent.

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91 (3) The party taking the deposition shall give prompt
92 notice of its filing to all other parties,

93 (g) Failure to Attend or to Serve Subpoena; Expenses.

94 (1) If the party upon whose petition a commission to
95 take depositions has been issued fails to attend and proceed
96 therewith and another party attends in person or by an attorney
97 pursuant to the commission, the court may order the party upon
98 whose petition the commission was issued to pay the other
99 party the amount of the reasonable expenses incurred by him or
100 by his attorney, or by both, in so attending, including
101 reasonable attorney's fees, if any.

102 (2) If the party upon whose petition a commission to
103 take depositions has been issued fails to serve a subpoena upon
104 the witness and the witness because of such failure does not
105 attend, and if another party attends in person or by attorney
106 because he expects the deposition of that witness to be taken,
107 the court may order the party upon whose petition the commission
108 was issued to pay the other person the amount of the reasonable

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109 expenses incurred by him or by his attorney, or by both,
110 in so attending, including reasonable attorney's fees, if
111 any.

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1 Rule 31. Depositions of Witnesses Upon Written Interrogatories.

2 (a) Serving Interrogatories; Notice. A defendant desiring to
3 take the deposition of any person upon written interrogatories shall
4 file them in the district court in which the proceeding against him
5 is pending, together with a verified petition as required in the
6 case of depositions upon oral examination by the provisions of
7 Rule 27 (a)(1), and shall serve copies of the petition and inter-
8 rogatories upon the attorney for the government within the time
9 prescribed by Rule 27 (a)(2). Within _____ days thereafter the
10 attorney for the government, in the event that he shall desire to
11 take depositions pursuant to Rule 26 (a), shall file interroga-
12 tories in the district court, together with a similar verified
13 petition, and shall serve them upon the defendant. Within 10 days
14 after service of interrogatories the party served may serve cross
15 interrogatories upon the party proposing to take the deposition or
16 may file an answer [under oath] in opposition to the petition, or
17 may do both. Within 5 days thereafter the latter may serve
18 redirect interrogatories upon a party who has served cross

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19 interrogatories. Within 5 days after being served with redirect
20 interrogatories, a party may serve recross interrogatories upon
21 the party proposing to take the deposition. If the court finds,
22 pursuant to the provisions of Rule 27 (a)(3), that the answering
23 of the interrogatories is necessary to prevent a failure or delay
24 of justice, it may issue a commission in accordance with the rule
25 to take such testimony.

26 (b) Officer to take Responses and Prepare Record. A copy of
27 the commission and copies of all interrogatories served shall be
28 delivered by the party upon whose petition the commission has been
29 issued to the officer designated in the commission, who shall pro-
30 ceed promptly, in the manner provided by Rule 30 (c), (e), and (f),
31 to take the testimony of the witness in response to the interroga-
32 tories and to prepare, certify, and file or mail the deposition,
33 attaching thereto the copy of the commission and the interroga-
34 tories received by him.

35 (c) Notice of Filing. When the deposition is filed the party
36 taking it shall promptly give notice thereof to all other parties.

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37 (d) Orders for the Protection of Parties and Deponents. At
38 the time a commission to take testimony is issued, or at any time
39 thereafter prior to the taking of the testimony of the deponent
40 on motion promptly made by a party or a deponent and upon notice
41 and good cause shown, the court in which the proceeding is pending
42 may make any order specified in Rule 30 which is appropriate and
43 just or an order that the deposition shall not be taken before the
44 officer designated in the commission or that it shall not be taken
45 except upon oral examination.

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1 Rule 32. Effect of Errors and Irregularities in Depositions.

2 (a) As to Commission. All errors and irregularities in the
3 commission for taking a deposition are waived unless written object-
4 ion is promptly made to the court.

5 (b) As to Disqualification of Officer. Objection to taking
6 a deposition because of disqualification of the officer before
7 whom it is to be taken is waived unless made before the taking of
8 the deposition begins or as soon thereafter as the disqualification
9 becomes known or could be discovered with reasonable diligence.

10 (c) As to Taking of Deposition.

11 (1) Objections to the competency of a witness or to the
12 competency, relevancy, or materiality of testimony are not
13 waived by failure to make them before or during the taking of
14 the deposition, unless the ground of the objection is one which
15 might have been obviated or removed if presented at that time.

16 (2) Errors and irregularities occurring at the oral exam-
17 ination in the manner of taking the deposition, in the form
18 of the questions or answers, in the oath or affirmation, or in

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19 the conduct of parties and errors of any kind which might be
20 obviated, removed, or cured if promptly presented, are waived
21 unless seasonable objection thereto is made at the taking of the
22 deposition.

23 (3) Objections to the form of written interrogatories
24 submitted under Rule 31 are waived unless served in writing
25 upon the party propounding them within the time allowed for serv-
26 ing the succeeding cross or other interrogatories and within
27 3 days after service of the last interrogatories authorized.

28 (d) As to Completion and Return of Depositions. Errors and
29 irregularities in the manner in which the testimony is transcribed
30 or the deposition is prepared, signed, certified, sealed, indorsed,
31 transmitted, filed or otherwise dealt with by the officer under
32 Rules 30 and 31 are waived unless a motion to suppress the deposi-
33 tion or some part thereof is made with reasonable promptness after
34 such defect is, or with due diligence might have been, ascertained.

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- 1 Rule 33. Interrogatories to Parties.
- 2 [No criminal rule is proposed which is comparable to Civil
- 3 Rule 33.]

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1 Rule 34. Discovery and Production of Documents and Things for
2 Inspection, Copying, or Photographing. Upon motion of any party
3 showing good cause therefor and upon notice to all other parties,
4 the court in which the proceeding is pending may, subject to the
5 privileges and rights secured by the Constitution or laws of the
6 United States, (1) order any party to produce and permit the in-
7 spection and copying or photographing, by or on behalf of the mov-
8 ing party, of any designated documents, papers, books, accounts,
9 letters, photographs, objects, or tangible things, not privileged;
10 which constitute or contain evidence material to any matter in-
11 volved in the proceeding and which are in his possession, custody,
12 or control; or (2) order any party to permit entry upon designated
13 land or other property in his possession or control for the purpose
14 of inspecting, measuring, surveying, or photographing the property
15 or any designated relevant object or operation thereon. The order
16 shall specify the time, place, and manner of making the inspection
17 and taking the copies and photographs and may prescribe such terms
18 and conditions as are just.

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1 Rule 35. Physical and Mental Examination of Persons.

2 (a) Order for Examination. In a proceeding in which the
3 mental or physical condition of a party is in controversy, the court
4 in which the proceeding is pending may, subject to the rights and
5 privileges secured to the party by the Constitution or laws of the
6 United States, order him to submit to a physical or mental examina-
7 tion by a physician. The order may be made only on motion for good
8 cause shown and upon notice to the party to be examined and to all
9 other parties and shall specify the time, place, manner, conditions,
10 and scope of the examination and the person or persons by whom it is
11 to be made.

12 (b) Report of Findings.

13 (1) If requested by the person examined, the party caus-
14 ing the examination to be made shall deliver to him a copy of
15 a detailed written report of the examining physician setting
16 out his findings and conclusions. After such request and de-
17 livery the party causing the examination to be made shall be
18 entitled upon request to receive from the party examined a like

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19. report of any examination, previously or thereafter made, of
20 the same mental or physical condition. If the party examined
21 refuses to deliver such report the court on motion and notice
22 may make an order requiring delivery on such terms as are just,
23 and if a physician fails or refuses to make such a report the
24 court may exclude his testimony if offered at the proceeding.

25 (2) By requesting and obtaining a report of the examina-
26 tion so ordered or by taking the deposition of the examiner,

27 the party examined waives any privilege he may have in that
28 proceeding or in any other involving the same criminal act or
29 transaction, regarding the testimony of every other person who
30 has examined or may thereafter examine him in respect of the
31 same mental or physical condition.

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1 Rule 36. Admission of Facts and of Genuineness of Documents.

2 (a) Request for Admission. At any time after the pleadings
3 are closed, a defendant or the government may serve upon any
4 other party to the proceeding a written request for the admission
5 by the latter of the genuineness of any relevant documents de-
6 scribed in and exhibited with the request or of the truth of any
7 relevant matters of fact set forth therein. Copies of the docu-
8 ments shall be delivered with the request unless copies have
9 already been furnished. Each of the matters of which an admis-
10 sion is requested, except matters which are privileged against
11 disclosure by the Constitution or laws of the United States,
12 shall be deemed admitted unless, within a period designated
13 in the request, not less than 10 days after service thereof
14 or within such further time as the court may allow on motion
15 and notice, the party to whom the request is directed serves
16 upon the party requesting the admission a sworn statement either
17 denying specifically the matters of which an admission is requested
18 or setting forth in detail the reasons why he cannot truthfully or

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19 should not as a matter of privilege or of legal right either admit

20 or deny those matters.

21 (b) Effect of Admission. Any admission made by a party pur-

22 suant to such request is for the purpose of the pending action

23 only and neither constitutes an admission by him for any other pur-

24 pose nor may be used against him in any other proceeding.