



October 12, 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

Re: Proposal to Amend Federal Rule of Criminal Procedure 15
Rules Suggestion 25-CR-B

Dear Ms. Dubay:

I am the founder of Gruenstein Law PLLC, a boutique law firm in New York that focuses on white-collar defense, government and internal investigations, and civil litigation. Earlier in my career, from 2002 to 2008, I served as an Assistant United States Attorney in the Criminal Division of the United States Attorney's Office for the Southern District of New York, where I handled numerous criminal trials and appeals. For the last 18 years, I have been a white-collar defense lawyer and commercial litigator, including as a litigation partner and founding member of the government investigations practice at Cravath, Swaine & Moore LLP. My views are informed both by my trial experience as a prosecutor and by my experience as a civil litigator, where pretrial depositions are an essential part of trial preparation.

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. Though I agree with many of the reasons offered by other supporters for adopting the proposal in full, I write to highlight two categories of witnesses for whom the case for pretrial depositions is particularly compelling: (1) case agents and (2) expert witnesses. These witnesses are often the backbone of the government's case, yet under the current rules the defense ordinarily has no opportunity to examine either before trial. A pretrial deposition would allow the defense to uncover gaps in the government's investigation and to test the bases of its experts' opinions in time to act on what it learns, including in the many cases that never reach trial. At the same time, the concerns that have traditionally counseled against discovery depositions in criminal cases—that witnesses may be intimidated, harassed or improperly influenced, or that depositions will impose undue burden and delay—have little force with respect to such professional witnesses.

1. Case agents—the lead investigators on a case, whether federal agents or local law enforcement officers—are typically the face of the government's case at trial. Through them, the government often introduces much of the evidence seized or developed during the investigation and presents critical background testimony. Defense lawyers typically spend hours cross-examining case agents in an effort to “poke holes” in the government's investigation. However, such cross-examination at trial often has limited effect, because juries are routinely reminded that it is the defendant, not the government's investigation, that is on trial. Courts commonly instruct that, while the jury may consider the evidence or



lack of evidence in deciding whether the government has met its burden, “there is no legal requirement that the government use any of these specific investigative techniques or all possible techniques to prove its case.” Third Circuit Model Criminal Jury Instruction 4.14; *see United States v. Saldarriaga*, 204 F.3d 50, 52–53 (2d Cir. 2000) (per curiam) (approving similar instruction).

While a defense lawyer at trial can elicit from a case agent testimony about lines of investigation that the government did not pursue, or witnesses that the government did not interview, the force of that testimony will be largely blunted by the instruction that the investigation is not on trial, unless the defense can show how those gaps either undermine the evidence the government presented or reveal an absence of evidence. Defense counsel can argue that, had the government interviewed a particular witness, it would have obtained evidence favorable to the defendant, but unless the defense calls that witness, the argument will often be viewed as speculative. And by the time the case agent has testified, it is usually too late for the defense to locate, interview and subpoena that witness.

Allowing a deposition of the case agent before trial would give the defense a meaningful opportunity to conduct its own investigation with an eye toward “filling the holes” in the government’s investigation. Because the *Brady* doctrine requires the government to disclose exculpatory evidence it has, not to go looking for evidence it never gathered, it is critical that the defense know which potential witnesses the government has, and has not, interviewed. Yet nothing in the rules requires the government to disclose before trial whom it has interviewed. The Jencks Act, 18 U.S.C. § 3500, and Rule 26.2 entitle the defense to a witness’s prior statements, but only for witnesses the government calls; notes of interviews with people the government chose not to call need never be produced unless they rise to the level of *Brady* material.

Just as the government need not identify the witnesses it has interviewed, there is also no requirement to identify all the documents that the government has collected. Rule 16 generally provides only that, upon request, the government must permit the defense to inspect and copy documents within the government’s possession, custody or control that are material to preparing the defense, that the government intends to use in its case-in-chief or that were obtained from or belong to the defendant. Fed. R. Crim. P. 16(a)(1)(E). It does not require the government to describe the scope of its collection, much less identify what it never gathered. When a defendant learns at trial that the government never searched for or obtained a particular category of documents, it will generally be too late to obtain them. Having that information before trial would allow defendants to obtain documentary evidence that the government did not collect, and to mine that evidence for information that will be beneficial to the defense.

A deposition of the government’s lead investigator would also allow the defense to test the government’s account of what other witnesses have said. Witness interviews are typically memorialized in law enforcement reports that are not transcripts but the agent’s after-the-fact, selective paraphrased accounts. The agent who conducted or attended the interviews is best suited to say what the witness actually said, what the report left out and



how the witness's account changed from one interview or proffer session to the next. Exploring these accounts at a deposition would allow the defense to identify inconsistencies and omissions in time to investigate them.

The benefits of deposing the case agent are thus substantial: a pretrial deposition would allow the defense to identify witnesses the government never interviewed and documents it never collected, and to test the government's account of what other witnesses said, including what its reports omitted or misstated—and to do so in time to act on what it learns, including for the many defendants who never reach trial. At the same time, the concerns that have historically counseled against discovery depositions in criminal cases do not apply to case agents. Those concerns center on civilian witnesses, who may be intimidated, harassed or improperly influenced. Case agents are trained law enforcement officers who are not vulnerable to intimidation in the way civilian witnesses may be. They testify routinely, are prepared by government counsel and would be defended at any deposition by a federal prosecutor. Nor would a deposition impose an undue burden: the case agent is a single, readily available witness whom the government almost always calls at trial anyway.

One potential concern specific to case agents is that a deposition could expose the identities of confidential informants or cooperating witnesses, or compromise ongoing investigations. That concern is legitimate, but existing law already addresses it. Informants' identities are protected by the informer's privilege, which permits the government to withhold an informant's identity unless disclosure is relevant and helpful to the defense or essential to a fair determination of the case, *Roviaro v. United States*, 353 U.S. 53, 60–62 (1957); by protective orders under Rule 16(d)(1), which allow the court, for good cause, to deny, restrict or defer discovery; and by the court's power to limit the scope of any deposition—for example, by precluding questions about informant identities or ongoing investigations. These tools protect informants without denying the defense access to the case agent altogether.

2. Like case agents, expert witnesses are professional witnesses whose testimony at trial often frames the government's case for the jury, yet whose foundations the defense ordinarily cannot probe until cross-examination. Recent changes in the federal rules have already introduced heightened pretrial discovery requirements for experts that point the way forward. Since 2022, Rule 16(a)(1)(G) has required the government to make a complete, pretrial statement of its expert witnesses' opinions, bases and qualifications at the defendant's request. A pretrial deposition is a natural next step that would address significant concerns with the government's use of expert witnesses.

One such concern is that many defendants cannot afford to retain experts of their own. Without one, defense counsel can test the government's expert only on cross-examination at trial, which, as civil practice shows, is very difficult to do without the benefit of a pretrial deposition. And for indigent defendants, who must obtain court approval for expert funds over a certain threshold under 18 U.S.C. § 3006A(e), a deposition would assist their counsel in showing the court exactly why a rebuttal expert is needed.



Another concern is that the bases government experts, particularly law enforcement experts, offer for their opinions are often opaque, serve as a conduit for hearsay or rest on circular reasoning. Experts who testify about drug jargon, gang structure or how trafficking organizations operate frequently base their opinions on “training and experience.” In practice, that “training and experience” may consist of information obtained from confidential informants, debriefings of cooperating witnesses or other investigations that the government will not or cannot disclose. Probing the foundations of an expert’s opinion is the kind of methodical, open-ended inquiry that is naturally done at a deposition, not in front of a jury, where the defense must ask questions that risk eliciting damaging testimony. And where an expert’s opinion rests on informant information or other investigations that cannot be disclosed, the defendant should have the opportunity to explore, before trial, what the expert actually relied on, so that the defense and the court can assess whether the opinion is reliable, whether it is a conduit for inadmissible hearsay and whether it should be admitted at all. Any legitimate confidentiality concerns can be managed through protective orders and limits on the scope of the deposition.

Finally, depositions would give real effect in criminal cases to the 2023 amendment to Federal Rule of Evidence 702. That amendment was adopted because many courts had treated “the critical questions of the sufficiency of an expert’s basis, and the application of the expert’s methodology,” as “questions of weight and not admissibility”—rulings the Advisory Committee called “an incorrect application of Rules 702 and 104(a).” Fed. R. Evid. 702 advisory committee’s note to 2023 amendment. The amended rule makes explicit that the proponent must show the court, by a preponderance of the evidence, that the expert’s opinion rests on sufficient facts or data and reflects a reliable application of reliable methods, and the Advisory Committee observed that the amendment is “especially pertinent to the testimony of forensic experts in both criminal and civil cases.” *Id.* But a court can perform that gatekeeping function only on the record before it. In civil litigation, that record is built through expert depositions, which establish exactly what the expert relied on and how the expert got from the data to the conclusion. In a criminal case, the defendant has only the written Rule 16 disclosure, which typically describes the expert’s bases at a high level of generality. A defendant cannot show that an expert’s basis is insufficient, or that a methodology was misapplied, without first learning what the basis was and how the methodology was applied. As a result, the very questions the amended rule assigns to the judge before the testimony is admitted are, in practice, still left to cross-examination in front of the jury. A pretrial deposition would give defendants the means to bring the challenges Rule 702 now contemplates and courts the record needed to decide them.

As the Supreme Court has observed, the government’s “inherent information-gathering advantages” suggest that “if there is to be any imbalance in discovery rights, it should work in the defendant’s favor.” *Wardius v. Oregon*, 412 U.S. 470, 475 n.9 (1973). Those advantages are considerable. Long before charges are filed, the government can compel testimony before a grand jury, obtain search warrants and wiretaps, subpoena records and secure the cooperation of witnesses. The defense has no comparable tools, and once charges are filed, the rules give it comparatively little with which to catch up.



Depositions of the government's key witnesses are among the few tools that would allow the defense to begin closing that gap. Yet the defense is denied them for reasons rooted in the protection of civilian witnesses—reasons that have no bearing on case agents and expert witnesses, who are professional witnesses. Permitting their depositions would not erase the government's structural advantages, but it would be a meaningful step toward reducing them.

Thank you for your consideration.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'B. Gruenstein', with a horizontal line extending to the right.

Benjamin Gruenstein

cc: Michael Kelly, Esq.