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Changes to Criminal Rule 16

Changing Tide in Expert Witness Procedures in Criminal Cases

By Anthony J. Battaglia, U.S. District Judge

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The drafters of the Federal Rules of Criminal Procedure have proposed amendments to Rule 16 addressing two “shortcomings” in the current disclosure practice for expert witnesses. The amendments have been approved by the U.S. Supreme Court and will take effect December 1, 2022, unless Congress legislates otherwise under the Rules Enabling Act. Congressional action is not contemplated at this point. The amendments will apply to all pending actions unless a court finds their application not feasible or would work an injustice, in which case the former rules apply. 28 U.S.C. § 2074.

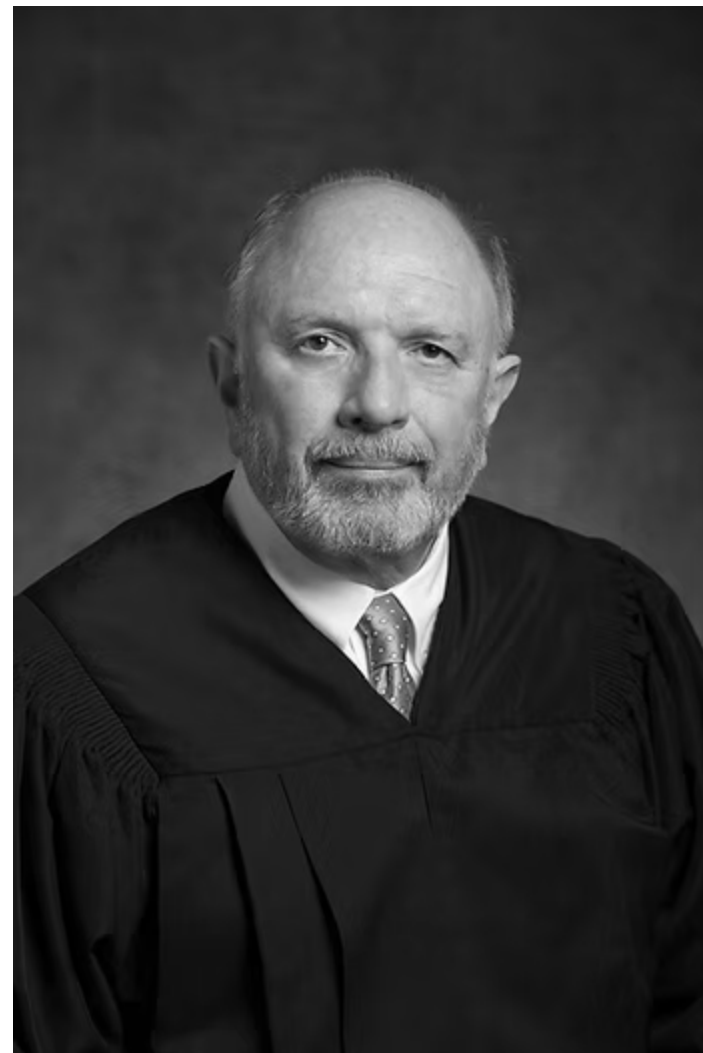
While not a full adoption of the extensive Civil Practice and Rules in this regard, the amendments will move the two practices closer. Here's a little history and how this practice will evolve.

The expert witness rule was promulgated in 1993 recognizing the "increased use of both scientific and nonscientific testimony." Fed. R. Crim. P. 16, advisory committee's note to 1993 amendment.*1 Noting "counsel's most basic need is to learn that an expert is expected to testify," Rule 16 added provisions intended to disclose "what the testimony will consist of and the bases of the testimony." *Id.* The Rule targeted testimony for a witness within the definition of Federal Rule of Evidence 702 and disclosure of evidence under Rules 703 and 705. Rule 701 witnesses (lay opinion) are excluded, as are witnesses testifying from a summary under Rule 1006 (unless they offered opinions beyond the summary evidence).

The 2022 Committee Notes to the Rule 16 proposed amendments offer a realistic observation that the rule on expert witness disclosure had two shortcomings. *See* Advisory Committee on Criminal Rules, Report of the Advisory Committee on Criminal Rules at 2 (June 1, 2021).*2

The first shortcoming was a lack of enforceable deadlines. *Id.* This is cured by a mandate to courts (the court must) to set a time for the disclosures sufficiently before trial to allow a fair opportunity for each side to meet the other's evidence.*3 *Id.* (citing proposed subsections (a)(1)(G)(ii) and (b)(1)(C)(ii)).

The court can set the timing by order or local rule. *Id.* at 3. Clearly, counsel's meet and confer efforts under Rule 16.1 should soon include the need for expert witnesses and timing of expert disclosures in their case management plans.*4 *Id.* The Committee states the court should consider the



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recommendations of the parties. *Id.* Note that disclosure dates may vary in each case based on the issues (e.g., the government's rebuttal to a Rule 12.2 notice and disclosure). *Id.*

The second larger issue was the current rule's "lack of adequate specificity regarding what information must be disclosed." Report of the Advisory Committee at 2. Indeed, the Committee has stated "insufficient pretrial disclosure of expert witnesses" is a problem. *Id.* at 4. As previously noted, the rule drafters' intent is to "facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross examine expert witnesses and secure opposing expert testimony if needed." *Id.* at 2.

Under the proposed Rule 16 amendments, the disclosures must be in writing, covering any testimony to be used in either side's case-in-chief or the government's rebuttal to counter testimony disclosed by the defense. The disclosures must be signed by the witness, with limited exceptions, and must include (per subsections (a)(1)(G)(iii) and (b)(1)(C)(iii)): 5

1. A complete statement of all opinions;

- a. Note that the former terminology of "a written summary" has been replaced. More than a summary is required, but the Rule does not direct the experts to author reports (with some exceptions) contrary to civil practice.
- b. The government's "complete statement" must include "all opinions that the government will elicit from the witness in its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed."
- c. The defendant's "complete statement" must include "all opinions that the defendant will elicit from the witness in the defendant's case-in-chief."
- d. "Complete" is defined as all opinions that will be elicited from the witness and the bases and reasons for those opinions.

2. The bases and reasons for the opinions;

- a. Specificity is the key here.
- b. The Committee Notes provide that a verbatim recitation of the testimony the expert will give at trial is not required.

3. The witness's qualifications, including all publications authored in the previous 10 years;

- a. "Publication" is to be given its common meaning of "the act of declaring or announcing to the public." Report of the Advisory Committee at 6 n.2 (citing Black's Law Dictionary (11th ed. 2019)).
- b. "Internal government documents" are not "publications" under this rule. *Id.* at 6–7.
- c. No substantive impact on Jencks Act disclosures or disclosures/discovery under *Brady v. Maryland* are intended by this procedural rule. *Id.* at 5.

4. A list of all other cases during the previous 4 years where the expert has testified by deposition or trial; and

5. An approval and signature by the witness.

- a. The witness must approve and sign the disclosure.
- b. This is a new requirement with two exceptions:
 - i. Where the proponent states in the disclosure why they could not obtain the witness's signature through reasonable efforts; and
 - ii. Where a report was previously provided under Rule 16 (a)(1)(F) (Reports of Examination and Tests) that was signed by the witness and contains all the opinions and the bases and reasons for them.

Sound a lot like Federal Rule 26 on the civil side? You bet. But, unlike Rule 26, no specific sequence or timing is set out or suggested. The Committee Notes do reflect the drafter's intent not to replicate all aspects of practice under the civil rule in criminal cases. Report of the Advisory Committee at 4. The matter is left to the trial judge, who also must deal with the Speedy Trial Act.

Finally, there is a continuing duty to supplement or correct each side's disclosures in new subsections 16(a)(1)(G)(vi) for the government and 16(b)(1)(C)(vi) for the defense. Each of these provisions incorporates section 16(c), the more general continuing duty to disclose material evidence.

As in the rule's current iteration, failure to comply with Rule 16 requirements may prohibit a party from introducing undisclosed evidence. Fed. R. Crim. P. 16(d)(2)(C). The court may also grant a continuance or other just relief. *See id.* 16(d)(2).

It should also be noted that the current and future Rule 16 will contain the court's discretion to grant, for good cause, modifying orders regulating discovery. Any issue with compliance with disclosure requirements and schedules should be raised as soon as practicable and supported by a showing that despite the exercise of reasonable diligence, the party cannot comply.

So, in the end, you may ask: "Why now?" Simply put, this is the next step in an evolution of more court- and rule-mandated influence on discovery. It has been ongoing in both civil and criminal arenas, albeit more so in the civil cases. Expert witnesses have taken on a greater role in litigation over the last 50 years. From fingerprints, DNA, and all things digital/electronic to advances in all scientific disciplines, experts have become more commonplace in litigation. As mentioned earlier, the increased use of expert witness testimony led to the first expert amendments to Rule 16 in 1993. The hope then was to "minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination." Fed. R. Crim. P. 16, advisory committee's note to 1993 amendment.

This was not a novel notion in 1993. In 1975, the House Committee on the Judiciary expressed similar sentiments in reviewing expanding discovery under prior amendments to the Rule. They noted that promoting greater pretrial discovery was "desirable" in contributing "to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence." Fed. R. Crim. P. 16, house judiciary committee's note to 1975 amendment.

Now in 2022, with the broadest rule on expert disclosure in criminal cases on its way, we take the next step in to reach these long sought-after goals.

1. Over time the notes of the Advisory Committee have been referred to by varying title. This article will use the current convention of simply "Committee Notes" throughout.
2. The report is available at https://www.uscourts.gov/sites/default/files/criminal_rules_report_-_june_2021_0.pdf.
3. The disclosure obligation is reciprocal, as it always has been, but has several possible "triggers." Thus, the Rule restates the court's obligation as well as the scope of disclosure twice. The government's disclosure is triggered when the defense requests discovery, and the defendant's is triggered by receiving government compliance or giving a Rule 12.2(b) notice. Perhaps a future reorganization of the Rule would be more straightforward.

4. Enacted in 2019, the parties must meet and confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16. Called a “Discovery Conference,” it must occur no later than 14 days after the arraignment. After the Discovery Conference, the parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial. Some courts require the parties to submit a written plan. See Local Crim. R. 16.1.a, U.S. District Court, Southern District of California, available at [https://www.casd.uscourts.gov/assets/pdf/rules/2022.05.20%20Local%20Rules%20\(Revised\).pdf](https://www.casd.uscourts.gov/assets/pdf/rules/2022.05.20%20Local%20Rules%20(Revised).pdf).

5. Unless otherwise cited, the following direct quotations are from the text of the proposed amendment. See Proposed Amendments to the Federal Rules of Criminal Procedure, Rule 16. Discovery and Inspection (Apr. 11, 2022), available at https://www.supremecourt.gov/orders/courtorders/frcr22_llh2.pdf.