COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Ray Kethledge, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 20, 2020

Introduction

The Advisory Committee on Criminal Rules met by videoconference on May 5, 2020. Draft minutes of the meeting are attached to this report.

This report focuses principally on one action item: the Advisory Committee's recommendation that its draft of amendments to Rule 16, which expand the scope of expert discovery, be published for public comment. It also briefly describes two information items: (1) the Committee's response to the statutory directive to develop proposals for emergency rules; and (2) the Committee's response to two suggestions that Rule 6(e)'s provisions governing grand jury secrecy be amended.[1]

[1] The Committee was also informed of a suggestion that the committee note to Rule 41 be amended to draw attention to an erroneous cross reference in 18 U.S.C. § 981(b)(3). Ms. Wilson advised the Committee that no action was required. She had drawn the problem to the attention of the Office of

I. Action Item: Rule 16; Discovery Concerning Expert Reports and Testimony (for Publication)

At its May meeting, the Advisory Committee unanimously approved a draft amendment to Rule 16 and an accompanying committee note for transmittal to the Standing Committee. The Advisory Committee recommends they be published for public comment. The draft amendment and committee note are attached as an appendix to this report.

The Advisory Committee developed its proposal in response to three suggestions to amend Rule 16 to follow more closely Civil Rule 26 regarding expert-witness disclosures. *See* 17-CR-B (Judge Jed Rakoff); 17-CR-D (Judge Paul Grimm);18-CR-F (Carter Harrison, Esq.). In developing its proposal, the Committee drew upon two informational sessions:

- Presentations from the Department of Justice at the Advisory Committee's fall 2018 meeting in which the Department detailed the development and implementation of new policies governing disclosure of forensic evidence, efforts to improve the quality of its forensic analysis, and practices in cases involving forensic and non-forensic expert evidence; and

- An April 2019 miniconference where experienced practitioners from both the prosecution and defense presented perspectives on the pretrial discovery of expert witnesses in different districts and different kinds of cases.

The Advisory Committee's December 2019 report to the Standing Committee included a draft of the amendment. The current proposal reflects revisions adopted by the Advisory Committee at its May 2020 meeting after further review by the Rule 16 Subcommittee and consideration of comments received at the Standing Committee's meeting.[2]

The proposed amendment addresses two shortcomings of the current provisions on expert witness disclosure: (1) the lack of an enforceable deadline for disclosure; and (2) the lack of adequate specificity regarding what information must be disclosed.[3] The amendment clarifies the timing and content of expert witness disclosures. It is intended to facilitate trial preparation by

---

Law Revision Counsel of the House of Representatives (OLRC). OLRC inserted a footnote directing readers to the correct subsection of Rule 41 and will also include the error in its annual compilation of issues provided to the Office of Legislative Counsel of the House of Representatives. According to OLRC, next time the statute is amended, the Office of Legislative Counsel should include a corrected reference to Rule 41 in the amended statutory language. Until that time, the footnote will direct readers to the correct subsection of Rule 41.

[2] Various technical changes were also made to the committee note, including reorganization to more closely parallel the text of the rule.

[3] Defense practitioners reported they sometimes received expert witness summaries a week or even the night before trial, which significantly impaired their ability to prepare for trial. They also said they do not receive disclosures in sufficient detail to prepare for cross-examination. They recounted several examples of this problem.

allowing the parties a fair opportunity to prepare to cross-examine expert witnesses who testify at trial and to secure opposing expert testimony if needed.

The proposal preserves the reciprocal structure of the current rule. The government's obligation to disclose information about its experts is triggered only if the defendant requests that disclosure under (a)(1)(G). The defense is required to disclose information about its experts under (b)(1)(C) only if it has made that request and the government has complied. This sequencing remains unchanged by the draft amendment. Once triggered, the disclosure obligations of the prosecution and defense under (a)(1)(G) and (b)(1)(C) are generally parallel under the current rule, and the expanded discovery obligations required of the prosecution and defense under the draft amendment generally mirror one another.

The draft amendment achieved unanimous support because members agreed that serious problems can be addressed by amending the current rule; that the proposed changes would address those problems; and that the amendment constitutes a fair and workable compromise reflecting the needs of both the prosecution and the defense. The Advisory Committee believes that adding these provisions would be a significant improvement to the current rule.

A. The Timing of Disclosures

The Advisory Committee concluded that the amendments should include specific and enforceable provisions on the timing of disclosure. Although many members initially supported the inclusion of a default deadline for the disclosures (e.g., 45 days before trial for the government's disclosures), the Committee ultimately concluded that approach was unworkable. Given the enormous variation in the caseloads of different districts, as well as the circumstances in individual cases, a default deadline would inevitably generate a large number of requests for extensions of time, burdening both the parties and the courts. Members also noted that default deadlines might prove problematic—rather than helpful—to the defense because there are structural reasons that might delay its determination whether to use expert testimony. The Committee therefore chose to adopt a functional approach, focusing on the goal of providing specific and enforceable deadlines that would allow each party to prepare adequately for trial.

To ensure there are in fact enforceable deadlines in each case, subparagraphs (a)(1)(G)(ii) and (b)(1)(C)(ii) provide that the court "must" set a time for the government and defendant to make their disclosures of expert testimony to the opposing party. These disclosure times, the amendment mandates, must be "sufficiently before trial to provide a fair opportunity for each party to meet" the other side's expert evidence. The committee note provides additional guidance on the appropriate considerations for the deadlines. This portion of the note reflects information developed at the miniconference, the experience of Committee members, and comments received at the Standing Committee meeting in January. For example, the note states that a party may need to secure its own expert to respond to expert testimony disclosed before trial by the other party, and that deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness. The note also reminds counsel and the courts that deadlines for disclosure must be sensitive to the requirements of the

Speedy Trial Act. Finally, it explains that, because caseloads vary among districts, the rule allows courts to tailor disclosure deadlines to local conditions or specific cases.

At the September meeting, members debated how best to word the requirement that the court set a date for these disclosures. That could be done by local rules, standing orders, or orders in individual cases—all of which, in a sense, are orders of the court. But the Committee chose to emphasize the possibility of setting a default deadline by local rulemaking. Accordingly, proposed (a)(1)(G)(ii) provides that "[t]he court, by order or local rule, must set a time for the government to make the disclosure." Subsection (b)(1)(C)(ii) contains a parallel provision for setting the time for the defendant's disclosures.

The amendment does not specify *when* the court must enter the order setting the deadline, leaving that decision to the discretion of the judge. To respond to concerns that courts (or parties) might mistakenly assume that these deadlines must be set very early in the prosecution, perhaps before the parties and the court have a sufficient understanding of the individual case, the Committee added language to the note emphasizing the court's discretion in deciding when to set—and if necessary alter—the deadlines for disclosure. The note states:

> Subparagraphs (a)(1)(G)(ii) and (b)(1)(C)(ii) require the court to set a time for disclosure in each case if that time is not already set by local rule or other order, but leaves to the court's discretion when it is most appropriate to announce those deadlines. The court also retains discretion under Rule 16(d) consistent with the provisions of the Speedy Trial Act to alter deadlines to ensure adequate trial preparation. In setting times for expert disclosures in individual cases, the court should consider the recommendations of the parties, who are required to "confer and try to agree on a timetable" for pretrial disclosures under Rule 16.1.

This portion of the note also draws attention to the connection between the timetable for disclosure and the requirement under new Rule 16.1 (which went into effect December 1, 2019), that the parties meet to "confer and try to agree on a timetable" for pretrial disclosures no later than 14 days after arraignment.

B. The Content of Disclosures

The current rule states that the parties have a duty to provide "a written summary." The Committee concluded that the word "summary" was responsible, at least in part, for the very cursory and incomplete information sometimes provided about expert testimony. To ensure that parties receive adequate information about the content of expert witness testimony and potential impeachment, the amendment deletes from (a)(1)(G) and (b)(1)(C) the phrase "written summary" and substitutes an itemized list of what a party must disclose.

Subsections (a)(1)(G)(iii) and (b)(1)(C)(iii) require that the parties provide "a complete statement" of the witness's opinions, the bases and reasons for those opinions, the witness's qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years.

Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate practice in civil cases, which of course differs in many ways from criminal cases. Like the existing provisions of Rule 16, the proposed amendment departs from Civil Rule 26 in important respects. For example, as noted above, the government's obligation to disclose expert witness information is triggered only by a defense request. And unlike Civil Rule 26, the rule does not create different classes of expert witnesses with different disclosure requirements. (Indeed, Mr. Goldsmith, the Department's National Criminal Discovery Coordinator, cautioned against any attempt to bifurcate experts in criminal cases into two distinct categories, citing concerns about the Department's ability to control certain government experts.)

The Department of Justice and several judges, including Judge Campbell, were concerned that the use of language drawn from Civil Rule 26 might suggest, erroneously, that the amendment is meant to incorporate civil practice concerning expert discovery. To address this concern, the note states (emphasis added):

> To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment, subparagraphs (a)(1)(G)(i) and (iii)—and the parallel provisions in (b)(1)(C)(i) and (iii)—delete the phrase "written summary" and substitute specific requirements that the parties provide "a complete statement" of the witness's opinions, the basis and reasons for those opinions, the witness's qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years. Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases. The amendment requires a complete statement of all opinions the expert will provide, but does not require a verbatim recitation of the testimony the expert will give at trial.

The committee note also addresses two recurring situations in which more flexibility might be needed. The first involves experts who testify very frequently (such as local police or state forensic experts who may testify virtually every week in state court). Another situation—as noted by a member of the Standing Committee at the January meeting—is when a party knows the opinions it will elicit at trial, but not the identity of the expert who will offer them. For example, any number of experts within the ATF might opine on a particular issue, but the government does not know which ones will be available at the time of trial. At the May meeting, Committee members focused on the importance of determining on a case-by-case basis whether the opposing party (typically the defense) could prepare for trial with timely disclosure of only the expert opinion (and the bases and reasons for it), without knowing the expert's name and her prior testimony and publications.

To address both situations, the note draws attention to Rule 16(d), which allows the court "for good cause," to "deny, restrict, or defer discovery" on a case-by-case basis. The proposed note now provides:

> On occasion, an expert witness will have testified in a large number of cases, and developing the list of prior testimony may be unduly burdensome. Likewise, on occasion, with respect to an expert witness whose identity is not critical to the opposing party's ability to prepare for trial, the party who wishes to call the expert may be able to provide a complete statement of the expert's opinions, bases and reasons for them, but may not be able to provide the witness's identity until a date closer to trial. In such circumstances, the party who wishes to call the expert may seek an order modifying discovery under Rule 16(d).

In addition to addressing potential concerns from prosecutors, this part of the note guides litigants and the courts as to when to modify discovery under Rule 16(d), emphasizing the importance of the opposing party's ability to prepare for trial.

C. Exempting Previously Disclosed Information

In some situations, the amended provisions might require a party to disclose information already disclosed to the opposing party in a report of an examination or test under (a)(1)(F) or (b)(1)(B), or in materials accompanying those reports. The amendment states that such information need not be provided again in the expert disclosure. This exemption might be particularly important for disclosures regarding forensic experts, whose professional standards might require them to repeat time-consuming procedures for each new report.

Accordingly, subsections (iv) in both (a)(1)(G) and (b)(1)(C) state that, if a previously provided report of an examination or test already included information required under the proposed amendment, "that information may be referred to, rather than repeated, in the expert-witness disclosure." The requirement that the information be "referred to" ensures that the opposing party is made aware that the prior report contained this information, particularly where voluminous material has been provided under (F) or (B).

D. Preparing, Approving, and Signing Disclosures

The proposal distinguishes between the preparation, approval, and signing of expert witness disclosures. Unlike Civil Rule 26(a)(2)(B), the amendment does not require the witness to prepare the disclosure. The Committee concluded that in some circumstances it may be appropriate for the prosecutor or defense counsel to draft the disclosure. Disclosures drafted by counsel must, however, accurately portray the witness's testimony. Thus, with two exceptions, proposed (a)(1)(G)(v) and (b)(1)(C)(v) require the disclosure to be "approved and signed" by the expert.

The first exception to this requirement grew out of the Committee's recognition that in criminal cases (as in civil cases) some experts are not under the control of the party who will present their testimony. Examples could include a member of a local police department, a treating physician, or an accountant employed by a defendant but called by the government. Although these persons can be subpoenaed to testify, the party who will introduce their testimony might not be able to obtain the witness's signature on the pretrial disclosure. The first

bullet in subsection (a)(1)(G)(v) and (b)(1)(C)(v) therefore includes an exception to the approve-and-sign requirement when the party who will call the witness states in the disclosure "why [that party] could not obtain the witness's signature through reasonable efforts." The committee note explains:

> First, the rule recognizes the possibility that a party may not be able to obtain a witness's approval and signature despite reasonable efforts to do so. This may occur, for example, when the party has not retained or specially employed the witness to present testimony, such as when a party calls a treating physician to testify. In that situation, the party is responsible for providing the required information, but may be unable to procure a witness's approval and signature following a request. An unsigned disclosure is acceptable so long as the party states why it was unable to procure the expert's signature following reasonable efforts.

The second exception to the approve-and-sign requirement dovetails with the provisions allowing information previously provided in an expert report to be referenced rather than repeated in a disclosure under (a)(1)(G)(i) and (b)(1)(C)(i). The second bullet in subsection (a)(1)(G)(v) and (b)(1)(C)(v) provides an exception from the signature requirement when the party "has previously provided under [the rule] a report, signed by the witness, that contains all of the opinions and the bases and reasons for them required by (iii)." The committee note explains:

> Second, the expert need not sign the disclosure if a complete statement of all of the opinions, as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided under subparagraph (a)(1)(F)—for government disclosures—or (b)(1)(B)—for defendant's disclosures. In that situation, the prior signed report and accompanying documents, combined with the attorney's representation of the expert's qualifications, publications, and prior testimony, provide the information and signature needed to prepare to meet the testimony.

E. Supplementing and Correcting Disclosures

To deal with the possibility that a party might decide to have the expert testify on additional, different, or fewer issues than those covered in the first disclosure, subsections (a)(1)(G)(vi) and (b)(1)(C)(vi) require that a party promptly supplement or correct each disclosure to the other party in accordance with Rule 16(c). As the committee note explains, this provision is meant to ensure that a party will receive prompt notice of any modification, expansion, or contraction of the opposing party's expert testimony, or any change in the identity of an expert, after the initial disclosure.

The Committee considered but decided to make no change to address a concern, raised at the Standing Committee meeting, that the supplementation requirement might encourage or permit gamesmanship or pro forma disclosures intended to prompt the other side to reveal its strategy. The supplementation requirement is already in the current rule and has not generated

these kinds of problems. But the Committee will be alert to this issue during the public-comment period.

F. Limiting the Disclosure Obligation of the Defense to Expert Testimony to be Presented in its "Case-in-Chief"; Clarifying Obligation Regarding Government Rebuttal Witnesses

The proposal makes an additional change to the current rule to ensure that the defendant's disclosure obligations remain no broader than those of the government. A close comparison of current (a)(1)(G) and (b)(1)(C) revealed one difference in the two provisions: subsection (a)(1)(G) requires the government to disclose testimony it intends to use in its "case-in-chief," whereas subsection (b)(1)(C) requires of the defendant to disclose any expert testimony it intends to use "as evidence at trial." The Reporters and the Rules Committee Staff were unable to find any explanation for this difference in the Committee's archives, and members were unable to identify any explanation for it. The Committee concluded that the defendant's disclosure should be no broader than the government's. Indeed, any rule requiring the defense to disclose more information than the government would likely be unconstitutional. *See Wardius v. Oregon*, 412 U.S. 470 (1973).

Subsection (b)(1)(C)(i) of the proposed amendment therefore requires the defense to disclose testimony it intends to use in its "case-in-chief[.]" This revision, as explained in the draft committee note, is not intended to require any change from current practice, which has treated the parties' disclosure obligations as identical.

The Committee revisited this issue in May, in response to Judge Campbell's comments at the Standing Committee meeting, in January. Judge Campbell suggested then that perhaps both parties should be required to disclose all the expert testimony they intend to use "at trial," rather than the testimony they intend to present in their "case-in-chief." The reporters noted, in their memorandum and at the May meeting, that the phrase "case-in-chief" was used throughout the remainder of Rule 16—specifically in the provisions governing pretrial disclosure of documents, objects, and reports of examinations and tests. Thus, any decision to substitute the phrase "evidence at trial" for "case-in-chief" might require revision of the other subsections of Rule 16. After considerable discussion, the Committee reaffirmed its decision to use the phrase "case-in-chief" to describe the scope of the defendant's disclosure obligation.

The Committee also decided to propose new text to deal directly with the issue of rebuttal expert witnesses. Specifically, in (a)(1)(G)(i), the Committee added language requiring the government to disclose not only testimony it intends to use in its case-in-chief, but also testimony it intends to use "during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)."[4] The Committee concluded this change was needed to address the core challenge addressed by the proposal: providing adequate notice to the defendant of expert testimony that the government knew—before trial—that it would use at trial. Members agreed

[4] As discussed above, Rule 16(b)(1)(C), if amended as proposed, would require the defense to disclose by the deadline set "sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence."

that it would be unfair to require the defense to disclose its experts before trial and not require the government to disclose before trial the experts it knows it will use to rebut that testimony.

Committee members unanimously supported this change, so long as the obligation was limited to experts intended to rebut testimony the defendant had timely disclosed under (b)(1)(C). There was no support for requiring a defendant to disclose an expert the defendant would use to rebut a government's rebuttal expert. The government had not suggested that lack of notice regarding such surrebuttal experts was a problem, and members agreed that under the current rule district judges can manage that situation. As revised, (a)(1)(G)(i) requires the government to disclose:

> any testimony that the government intends to use at trial under Federal Rules of Evidence 702, 703, or 705 during its case-in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C).

At the May meeting, a representative of the Department of Justice expressed concern that this language might prevent the government from introducing a rebuttal witness to respond to a defense expert whose testimony had not been disclosed before trial. Members carefully reviewed the amendment and concluded that it would not prevent the government from responding to a midtrial surprise defense expert. First, (a)(1)(G)(i) requires the government to disclose rebuttal witnesses *only* when it is responding to "testimony that *the defendant has timely disclosed* under (b)(1)(C)" (emphasis added). Timely disclosure is defined under (b)(1)(C)(ii) as disclosure "sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence." Unexpected expert testimony from the defense would not have been "timely disclosed" and thus would not trigger the government's disclosure obligation. The Reporters also noted that the committee note emphasizes that the disclosure deadlines should reflect "the time the government would need to find a witness to rebut an expert disclosure by the defense."

G. Constitutional Concerns

At the Standing Committee meeting, Judge Campbell also asked the Advisory Committee to address any constitutional issues that might be raised by the proposal, and other members expressed concern that requiring the defendant to provide expanded expert witness disclosures (or perhaps any disclosures of his defense) before trial would violate the defendant's constitutional rights.

Fifth Amendment objections to Rule 16 are governed by the Supreme Court's opinion in *Williams v. Florida*, 399 U.S. 78 (1970). Over a strong dissent by Justice Black, the Court upheld a Florida rule that required the defendant to provide pretrial notice that he intended to raise an alibi defense, and to disclose the witnesses he intended to call to make this defense. The Court held that the rule did not violate the privilege against compelled self-incrimination because it merely accelerated the choice the defendant would have to make at trial, avoiding the need for the court to grant a continuance.[5]

[5] The Court stated:

Similarly, Rule 16 leaves to the defendant the choice whether to present evidence or remain silent. But the rule requires the defendant to disclose certain evidence before trial, during reciprocal discovery. Under *Williams*, Rule 16's provisions requiring reciprocal discovery withstood any Fifth Amendment challenges. The proposal's codification of the need to set a time for disclosure and the minimum content required should not change that. Nor would restricting the scope of defense disclosure to witnesses to be presented in the defendant's case-in-chief.

II. Information Items

A. Implementing the CARES Act; Emergency Rules

Enacted in response to the COVID-19 emergency, the CARES Act directs the Judicial Conference to "consider rule amendments . . . that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act." Judge Kethledge has appointed a subcommittee, chaired by Judge Dever, to develop proposals for consideration at the Committee's fall meeting.

At the Advisory Committee's May meeting, Judge Campbell provided guidance to the Committee on two points. The first was an aspirational timeline for the Committee's work. He commented that given the legislative directive and the current situation, his goal was publication of proposed amendments in August 2021, revisions as needed in the spring of 2022, and transmittal to the Judicial Conference after the Standing Committee's meeting in June 2022.

> The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses, he must reveal their identity and submit them to cross-examination which in itself may prove incriminating or which may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. The pressures generated by the State's evidence may be severe but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in catastrophe for the defendant. However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled' within the meaning of the Fifth and Fourteenth Amendments.
>
> Very similar constraints operate on the defendant when the State requires pretrial notice of alibi and the naming of alibi witnesses. Nothing in such a rule requires the defendant to rely on an alibi or prevents him from abandoning the defense; these matters are left to his unfettered choice. That choice must be made, but the pressures that bear on his pretrial decision are of the same nature as those that would induce him to call alibi witnesses at the trial: the force of historical fact beyond both his and the State's control and the strength of the State's case built on these facts. Response to that kind of pressure by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.

399 U.S. at 834-85.

Following transmission to the Supreme Court and then Congress, the rules could go into effect December 1, 2023. That is fast by the normal standards of the Rules Enabling Act process, but slow in comparison to the legislative process. Judge Campbell also emphasized, however, that it was ultimately more important to be correct than to be quick. Second, he emphasized that the Committee's work need not be limited to national emergencies, but should anticipate the wide range of emergencies that federal courts might face at a local, regional, or national level.

Members identified several overriding issues and principles for consideration by the subcommittee. These included the need to allow for variation among districts facing different conditions, concerns about the heavy reliance on technology (which increases the vulnerability to hacking and exposes the limitations of the current platforms), the need for broad consultation including Criminal Justice Act attorneys, and the need to preserve public and media access and victims' rights. Members also began to identify particular rules for consideration, including Rule 53 (which prohibits broadcasting and thus restricts public access), filing deadlines in Rules 33 and 35, and the rules governing jury trials and grand jury proceedings.

One member proposed several issues to be considered by the subcommittee:

- How to define the kinds of circumstances that would give rise to the authority to vary the normal procedural rules? What conditions would impair the authority or ability of the courts to perform their constitutional functions?

- Who should decide if the triggering conditions are met? Which decision makers would be most apolitical and unbiased? (The Judicial Conference of the United States has authority under the CARES Act to terminate the emergency procedures.)

- Should there be different processes when the emergency is local or regional? (COVID-19 is national, but Hurricane Katrina and Superstorm Sandy were regional, and the Oklahoma City bombing was local.)

- What procedures not permitted by the existing rules should be authorized?

- How would the emergency authority be terminated?

The subcommittee will meet throughout the summer by teleconference, with the goal of having proposals for discussion at the Advisory Committee's fall meeting.

B. Rule 6(e); Grand Jury Secrecy

The Advisory Committee has received two formal suggestions that it consider amending Rule 6(e)'s provisions on grand jury secrecy. In addition, two recent judicial decisions contain statements in support of considering an amendment to the secrecy provisions of Rule 6.

The proposal from Public Citizen Litigation Group and five associations of historians and archivists[6] (collectively, "Public Citizen") seeks a change in Rule 6 to allow disclosure of historical materials because of recent decisions holding that Rule 6 does not permit district courts to release such materials. Public Citizen argues that the recent decisions provide a basis for revisiting the Committee's decision in 2012 not to pursue Attorney General Eric Holder's proposal to authorize disclosure of historical materials under specified circumstances. Public Citizen notes that the circuits have conflicting decisions on this issue. Moreover, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer stated "the Rules Committee both can and should revisit" this issue. *Id.* at 598 (Breyer, J., concurring).

PCLG and the other groups propose two changes: an exception to the rule of secrecy for grand jury materials of "historical importance" and an explicit statement that "Nothing in this Rule shall limit whatever inherent authority the district courts possess to unseal grand-jury records in exceptional circumstances."

The Committee also received a suggestion from the Reporters Committee for Freedom of the Press and 30 additional media organizations. These groups urge that Rule 6 be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." The Reporters Committee and media organizations propose language that, in their view, "mirrors the flexible test that has been applied by courts in this context, [and] better balances the public's interest in obtaining access to grand jury materials of particular historical and public interest with the interests underlying grand jury secrecy." They support not only authority addressing materials of "historical or public interest," but also an explicit statement that "Nothing in this rule shall limit whatever inherent authority courts possess to unseal grand jury records in exceptional circumstances."

The most recent judicial decision on the district court's authority, the Eleventh Circuit's en banc decision in *Pitch v. United States*, 953 F.3d 1226, 1229 (11th Cir. 2020), held that district courts have no inherent authority to authorize the release of grand jury materials not included in Rule 6(e)(3)'s enumerated exceptions. In a concurring opinion in *Pitch*, Judge Jordan urged the Committee to consider amending the rule.

> Although the Advisory Committee deemed Attorney General Holder's proposed amendment unnecessary, its determination implicitly contemplated that a historical importance exception might be ripe for consideration at some future date. Given the current circuit split and the Supreme Court's recent denial of certiorari on the issue, see *McKeever v. Barr*, —— U.S. ——, 140 S. Ct. 597, 205 L.Ed.2d 529 (2020), it appears that day is upon us. *See id.* at 598 (Breyer, J., respecting the denial of certiorari) (noting that this is an "important question" that the Rules Committee "can and should revisit"). I therefore urge the Advisory Committee on Criminal

[6] The other groups supporting PCLG are the American Historical Association, American Society for Legal History, National Security Archive, Organization of American Historians, and Society of American Archivists.

> Rules to consider whether Rule 6(e) should be amended to permit the disclosure of grand jury materials for matters of exceptional historical significance and, if so, under what circumstances.

*Id***.** at 1250 (footnote omitted).

Members briefly discussed the proposals at the spring meeting. The Department of Justice expressed its continued support of some amendment that would authorize the release of historically important grand jury material and requested that any consideration of these proposals also include whether to authorize delayed disclosure of witnesses or material subpoenaed by the grand jury. The discussion also touched upon the challenges that any effort to address the scope of the courts' inherent authority to act outside the rule would encounter.

The Advisory Committee unanimously agreed that a subcommittee should be appointed to consider the proposals.

THIS PAGE INTENTIONALLY BLANK

APPENDIX

THIS PAGE INTENTIONALLY BLANK

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[1]

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

(1) Information Subject to Disclosure

* * * * *

(G) Expert witnesses.

(i) Duty to Disclose. At the defendant's request, the government must ~~give~~ disclose to the defendant, in writing, the information required by (iii) for ~~a written summary of~~ any testimony that the government intends to use at trial under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence~~ during its case-in-chief ~~at trial~~, or during its rebuttal to counter testimony that the

[1] New material is underlined in red; matter to be omitted is lined through.

defendant has timely disclosed under (b)(1)(C). If the government requests discovery under ~~subdivision~~ (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, ~~give~~ disclose to the defendant, in writing, the information required by (iii) for ~~a written summary of~~ testimony that the government intends to use under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence~~ as evidence at trial on the issue of the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court, by order or local rule, must set a time for the government to make the disclosure. The time must be

sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence.

(iii) Contents of the Disclosure. The disclosure ~~summary provided under this subparagraph~~ must contain:

- a complete statement of all ~~describe the witness's~~ 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 under (b)(1)(C);
- the bases and reasons for ~~those opinions~~ them; ~~and~~

- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the government previously provided a report under (F) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the government:

- states in the disclosure why it could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting the Disclosure. The government must supplement or correct the disclosure in accordance with (c).

* * * * *

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure

* * * * *

(C) Expert witnesses.

(i) Duty to Disclose. At the government's request, ~~T~~the defendant must~~, at the government's request,~~ disclose ~~give~~ to the government, in writing, the information required by (iii) for ~~a written~~ ~~summary of~~ any testimony that the defendant intends to use under Federal Rule~~s~~ of Evidence 702, 703, or 705 ~~of the Federal Rules of Evidence as evidence~~ during the defendant's case-in-chief at trial, if:

~~(i)~~ ● the defendant requests disclosure under ~~subdivision~~ (a)(1)(G) and the government complies; or

~~(ii)~~ ● the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

(ii) Time to Provide the Disclosure. The court, by order or local rule, must set a time for the defendant to make the disclosure. The time must be sufficiently before trial to provide a fair opportunity for the government to meet the defendant's evidence.

(iii) Contents of the Disclosure. ~~This~~The ~~summary~~ disclosure must contain:

● a complete statement of all ~~describe the witness's~~ opinions~~,~~ that the defendant will elicit from the witness in the defendant's case-in-chief;

- the bases and reasons for them~~those opinions~~; ~~and~~
- the witness's qualifications, including a list of all publications authored in the previous 10 years; and
- a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.

(iv) Information Previously Disclosed. If the defendant previously provided a report under (B) that contained information required by (iii), that information may be referred to, rather than repeated, in the expert-witness disclosure.

(v) Signing the Disclosure. The witness must approve and sign the disclosure, unless the defendant:

- states in the disclosure why the defendant could not obtain the witness's signature through reasonable efforts; or
- has previously provided under (F) a report, signed by the witness, that contains all the opinions and the bases and reasons for them required by (iii).

(vi) Supplementing and Correcting the Disclosure. The defendant must supplement or correct the disclosure in accordance with (c).

* * * * *

Committee Note

The amendment addresses two shortcomings of the prior provisions on expert witness disclosure: the lack of adequate specificity regarding what information must be disclosed, and the lack of an enforceable deadline for disclosure. The amendment clarifies the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is intended to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed.

Like the existing provisions, amended subsections (a)(1)(G) (government disclosure) and (b)(1)(C) (defense disclosure) generally mirror one another. The amendment to (b)(1)(C) includes the limiting phrase—now found in (a)(1)(G) and carried forward in the amendment—restricting the disclosure obligation to testimony the defendant will use in the defendant's "case-in-chief." Because the history of Rule 16 revealed no reason for the omission of this phrase from (b)(1)(C), this phrase was added to make (a) and (b) parallel as well as reciprocal. No change from current practice in this respect is intended.

The amendment to (a)(1)(G) also clarifies that the government's disclosure obligation includes not only the testimony it intends to use in its case-in-chief, but also testimony it intends to use to rebut testimony timely disclosed by the defense under (b)(1)(C).

To ensure enforceable deadlines that the prior provisions lacked, subparagraphs (a)(1)(G)(ii) and

(b)(1)(C)(ii) provide that the court, by order or local rule, must set a time for the government to make its disclosure of expert testimony to the defendant, and for the defense to make its disclosure of expert testimony to the government. These disclosure times, the amendment mandates, must be sufficiently before trial to provide a fair opportunity for each party to meet the other side's expert evidence. Sometimes a party may need to secure its own expert to respond to expert testimony disclosed by the other party. Deadlines should accommodate the time that may take, including the time an appointed attorney may need to secure funding to hire an expert witness, or the time the government would need to find a witness to rebut an expert disclosed by the defense. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. Because caseloads vary from district to district, the amendment does not itself set a specific time for the disclosures by the government and the defense for every case. Instead, it allows courts to tailor disclosure deadlines to local conditions or specific cases by providing that the time for disclosure must be set either by local rule or court order.

Subparagraphs (a)(1)(G)(ii) and (b)(1)(C)(ii) require the court to set a time for disclosure in each case if that time is not already set by local rule or other order, but leave to the court's discretion when it is most appropriate to announce those deadlines. The court also retains discretion under Rule 16(d) consistent with the provisions of the Speedy Trial Act to alter deadlines to ensure adequate trial preparation. In setting times for expert disclosures in individual cases, the court should consider the recommendations of the parties, who are required to "confer and try to agree on a timetable" for pretrial disclosures under Rule 16.1.

To ensure that parties receive adequate information about the content of the witness's testimony and potential impeachment, subparagraphs (a)(1)(G)(i) and (iii)—and the parallel provisions in (b)(1)(C)(i) and (iii)—delete the phrase "written summary" and substitute specific requirements that the parties provide "a complete statement" of the witness's opinions, the bases and reasons for those opinions, the witness's qualifications (including a list of publications within the past 10 years), and a list of other cases in which the witness has testified in the past four years. Although the language of some of these provisions is drawn from Civil Rule 26, the amendment is not intended to replicate all aspects of practice under the civil rule in criminal cases, which differ in many significant ways from civil cases. The amendment requires a complete statement of all opinions the expert will provide, but does not require a verbatim recitation of the testimony the expert will give at trial.

On occasion, an expert witness will have testified in a large number of cases, and developing the list of prior testimony may be unduly burdensome. Likewise, on occasion, with respect to an expert witness whose identity is not critical to the opposing party's ability to prepare for trial, the party who wishes to call the expert may be able to provide a complete statement of the expert's opinions, bases and reasons for them, but may not be able to provide the witness's identity until a date closer to trial. In such circumstances, the party who wishes to call the expert may seek an order modifying discovery under Rule 16(d).

Subparagraphs (a)(1)(G)(iv) and (b)(1)(C)(iv) also recognize that, in some situations, information that a party

must disclose about opinions and the bases and reasons for those opinions may have been provided previously in a report (including accompanying documents) of an examination or test under subparagraph (a)(1)(F) or (b)(1)(B). Information previously provided need not be repeated in the expert disclosure, if the expert disclosure clearly identifies the information and the prior report in which it was provided.

Subparagraphs (a)(1)(G)(v) and (b)(1)(C)(v) of the amended rule require that the expert witness approve and sign the disclosure. However, the amended provisions also recognize two exceptions to this requirement. First, the rule recognizes the possibility that a party may not be able to obtain a witness's approval and signature despite reasonable efforts to do so. This may occur, for example, when the party has not retained or specially employed the witness to present testimony, such as when a party calls a treating physician to testify. In that situation, the party is responsible for providing the required information, but may be unable to procure a witness's approval and signature following a request. An unsigned disclosure is acceptable so long as the party states why it was unable to procure the expert's signature following reasonable efforts. Second, the expert need not sign the disclosure if a complete statement of all of the opinions, as well as the bases and reasons for those opinions, were already set forth in a report, signed by the witness, previously provided under subparagraph (a)(1)(F)—for government disclosures—or (b)(1)(B)—for defendant's disclosures. In that situation, the prior signed report and accompanying documents, combined with the attorney's representation of the expert's qualifications,

publications, and prior testimony, provide the information and signature needed to prepare to meet the testimony.

Subparagraphs (a)(1)(G)(vi) and (b)(1)(C)(vi) require the parties to supplement or correct each disclosure to the other party in accordance with Rule 16(c). This provision is intended to ensure that, if there is any modification, expansion, or contraction of a party's expert testimony, or change in the identity of an expert after the initial disclosure, the other party will receive prompt notice of that correction or modification.