

AMENDMENTS TO THE FEDERAL RULES OF  
CRIMINAL PROCEDURE

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COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT  
OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE, THE RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, AND THE RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS, PURSUANT TO 2072 U.S.C. 28



SEPTEMBER 20, 2016.—Referred to the Committee on the Judiciary and  
ordered to be printed

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U.S. GOVERNMENT PUBLISHING OFFICE



SUPREME COURT OF THE UNITED STATES,  
*Washington, DC, April 25, 2019.*

Hon. NANCY PELOSI,  
*Speaker of the House of Representatives,*  
*Washington, DC.*

DEAR MADAM SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 24, 2018; a redline version of the rules with committee notes; an excerpt from the September 2018 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2018 report of the Advisory Committee on Criminal Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,  
*Chief Justice.*

April 25, 2019

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Criminal Procedure are amended to include new Rule 16.1.
2. The Rules Governing Section 2254 Cases in the United States District Courts are amended to include an amendment to Rule 5.
3. The Rules Governing Section 2255 Proceedings for the United States District Courts are amended to include an amendment to Rule 5.

[*See infra* pp. \_\_\_ \_\_\_.]

4. The foregoing amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts shall take effect on December 1, 2019, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

5. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts in accordance with the provisions of Section 2074 of Title 28, United States Code.

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CRIMINAL PROCEDURE**

**Rule 16.1. Pretrial Discovery Conference; Request for Court Action**

- (a) **Discovery Conference.** No later than 14 days after the arraignment, the attorney for the government and the defendant's attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.
- (b) **Request for Court Action.** After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.

**RULES GOVERNING SECTION 2254 CASES IN  
THE UNITED STATES DISTRICT COURTS**

**Rule 5. The Answer and the Reply**

\* \* \* \* \*

- (e) **Reply.** The petitioner may file a reply to the respondent's answer or other pleading. The judge must set the time to file unless the time is already set by local rule.

**RULES GOVERNING SECTION 2255  
PROCEEDINGS FOR  
THE UNITED STATES DISTRICT COURTS**

**Rule 5. The Answer and the Reply**

\* \* \* \* \*

- (d) Reply.** The moving party may file a reply to the respondent's answer or other pleading. The judge must set the time to file unless the time is already set by local rule.





JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

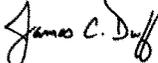
THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

October 24, 2018

MEMORANDUM

To: Chief Justice of the United States  
Associate Justices of the Supreme Court

From: James C. Duff 

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF  
CRIMINAL PROCEDURE, THE RULES GOVERNING SECTION 2254 CASES IN  
THE UNITED STATES DISTRICT COURTS, AND THE RULES GOVERNING  
SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court new Rule 16.1 of the Federal Rules of Criminal Procedure, and amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts, and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts, which were approved by the Judicial Conference at its September 2018 session. The Judicial Conference recommends that the amendments be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) a copy of the new and amended rules, and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2018 Report of the Advisory Committee on Criminal Rules.

Attachments



**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF CRIMINAL PROCEDURE<sup>1</sup>**

- 1 **Rule 16.1. Pretrial Discovery Conference; Request for**  
2 **Court Action**
- 3 **(a) Discovery Conference.** No later than 14 days after the  
4 arraignment, the attorney for the government and the  
5 defendant's attorney must confer and try to agree on a  
6 timetable and procedures for pretrial disclosure under  
7 Rule 16.
- 8 **(b) Request for Court Action.** After the discovery  
9 conference, one or both parties may ask the court to  
10 determine or modify the time, place, manner, or other  
11 aspects of disclosure to facilitate preparation for trial.

**Committee Note**

This new rule requires the attorney for the government and counsel for the defendant to confer early in the process, no later than 14 days after arraignment, about the timetable and procedures for pretrial disclosure. The new requirement is particularly important in cases involving electronically

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<sup>1</sup> New material is underlined.

## 2 FEDERAL RULES OF CRIMINAL PROCEDURE

stored information (ESI) or other voluminous or complex discovery.

For practical reasons, the rule does not require attorneys for the government to confer with defendants who are not represented by counsel. However, neither does the rule limit existing judicial discretion to manage discovery in cases involving pro se defendants, and courts must ensure such defendants have full access to discovery.

The rule states a general procedure that the parties can adapt to the circumstances. Simple cases may require only a brief informal conversation to settle the timing and procedures for discovery. Agreement may take more effort as case complexity and technological challenges increase.

Moreover, the rule does not (1) modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, (2) displace local rules or standing orders that supplement and are consistent with its requirements, or (3) limit the authority of the district court to determine the timetable and procedures for disclosure.

Because technology changes rapidly, the rule does not attempt to state specific requirements for the manner or timing of disclosure in cases involving ESI. However, counsel should be familiar with best practices. For example, the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) have published “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” (2012).

## FEDERAL RULES OF CRIMINAL PROCEDURE 3

Subsection (b) allows one or more parties to request that the court determine or modify the timing, manner, or other aspects of the disclosure to facilitate trial preparation.

This rule focuses exclusively on the process, manner and timing of pretrial disclosures, and does not address modification of the trial date. The Speedy Trial Act, 18 U.S.C. §§ 3161-3174, governs whether extended time for discovery may be excluded from the time within which trial must commence.

**RULES GOVERNING SECTION 2254 CASES IN  
THE UNITED STATES DISTRICT COURTS<sup>1</sup>**

1 **Rule 5. The Answer and the Reply**

2 \* \* \* \* \*

3 (e) **Reply.** The petitioner may ~~submit~~file a reply to the  
4 respondent's answer or other pleading ~~within a time~~  
5 ~~fixed by the judge.~~ The judge must set the time to file  
6 unless the time is already set by local rule.

**Committee Note**

The petitioner has a right to file a reply. Subsection (e), added in 2004, removed the discretion of the court to determine whether or not to allow the petitioner to file a reply in a case under § 2254. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (e) makes it even clearer that the petitioner has a right to file a reply to the respondent's answer or pleading. It retains the word "may," which is used throughout the federal rules to mean

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

2 RULES GOVERNING SECTION 2254 CASES

“is permitted to” or “has a right to.” No change in meaning is intended by the substitution of “file” for “submit.”

As amended, the second sentence of the rule retains the court’s discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule. Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.

**RULES GOVERNING SECTION 2255  
PROCEEDINGS FOR  
THE UNITED STATES DISTRICT COURTS<sup>1</sup>**

1 **Rule 5. The Answer and the Reply**

2 \* \* \* \* \*

3 (d) **Reply.** The moving party may ~~submit~~file a reply to the  
4 respondent's answer or other pleading ~~within a time~~  
5 fixed by the judge. The judge must set the time to file  
6 unless the time is already set by local rule.

**Committee Note**

The moving party has a right to file a reply. Subsection (d), added in 2004, removed the discretion of the court to determine whether or not to allow the moving party to file a reply in a case under § 2255. The current amendment was prompted by decisions holding that courts nevertheless retained the authority to bar a reply.

As amended, the first sentence of subsection (d) makes it even clearer that the moving party has a right to file a reply to the respondent's answer or pleading. It retains the word "may," which is used throughout the federal rules to mean

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

2 RULES GOVERNING SECTION 2255 PROCEEDINGS

“is permitted to” or “has a right to.” No change in meaning is intended by the substitution of “file” for “submit.”

As amended, the second sentence of the rule retains the court’s discretion to decide when the reply must be filed (but not whether it may be filed). To avoid uncertainty, the amended rule requires the court to set a time for filing if that time is not already set by local rule. Adding a reference to the time for the filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.



Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure

**REPORT OF THE JUDICIAL CONFERENCE  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES:**

\* \* \* \* \*

**FEDERAL RULES OF CRIMINAL PROCEDURE**

*Rules Recommended for Approval and Transmission*

The Advisory Committee on Criminal Rules submitted a proposed new Criminal Rule 16.1, and amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts, with a recommendation that they be approved and transmitted to the Judicial Conference.

New Rule 16.1 (Pretrial Discovery Conference; Request for Court Action)

The proposed new rule originated with a suggestion that Rule 16 (Discovery and Inspection) be amended to address disclosure and discovery in complex cases, including cases involving voluminous information and ESI. While the subcommittee formed to consider the suggestion determined that the original proposal was too broad, it determined that a need might exist for a narrower, targeted amendment. A mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. Consensus developed during the mini-conference regarding what sort of rule was needed. First, the rule should be simple and place the principal responsibility for implementation

**Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure**

on the lawyers. Second, it should encourage the use of the ESI Protocol.<sup>1</sup> Participants did not support a rule that would attempt to specify the type of case in which this attention was required. The prosecutors and Department of Justice attorneys also felt strongly that any rule must be flexible given the variation among cases.

Guided by the discussion and feedback received at the mini-conference, as well as examples of existing local rules and orders addressing ESI discovery, the subcommittee drafted proposed new Rule 16.1. Because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, the subcommittee concluded it warrants a separate position in the rules. A separate rule will also draw attention to the new requirement.

The proposed rule has two sections. Subsection (a) requires that, no later than 14 days after the arraignment, the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Subsection (b) states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.” The phrase “determine or modify” contemplates two possible situations. First, if there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to “determine” when and how disclosures should be made. Alternatively, if the parties wish to change the existing discovery schedule, they must seek a modification. In either situation, the request to “determine or modify” discovery may be made jointly if the parties have reached agreement, or by one party. The proposed rule does not require the court to accept the parties’ agreement or otherwise limit

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<sup>1</sup>The “ESI Protocol” is shorthand for the “Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases” published in 2012 by the Department of Justice and the Administrative Office in connection with the Joint Working Group on Electronic Technology in the Criminal Justice System.

**Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure**

the court's discretion. Courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and through local rules and standing orders.

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure in cases involving ESI. The committee note draws attention to this point and states that counsel "should be aware of best practices" and cites the ESI Protocol.

Six public comments were submitted, and each comment supported the general approach of requiring the prosecution and defense to confer. The Advisory Committee made some changes in response to concerns raised by the comments. First, the Advisory Committee agreed to revise proposed Rule 16.1(b)'s reference to "timing, manner, or other aspects of disclosure" to mirror Rule 16(d)(2)(A)'s reference to "time, place, or manner, or other terms and conditions of disclosure." Second, the Advisory Committee emphasized in the committee note that the proposed rule does not modify statutory safeguards. Finally, in response to two comments that addressed the applicability of the proposed rule to pro se parties, the Advisory Committee made two changes: amending the rule to make it clearer that government attorneys are not required to meet with pro se defendants; and adding to the committee note a statement about the courts' existing discretion to manage discovery and their responsibility to ensure that pro se defendants "have full access to discovery." The Advisory Committee also made several non-substantive changes recommended by the Committee's style consultants.

Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply)

Proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for

**Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure**

the United States District Courts make clear that the petitioner has an absolute right to file a reply.

As previously reported, a member of the Standing Committee drew the Advisory Committee's attention to a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings. That rule – as well as Rule 5(e) of the Rules Governing Section 2254 Cases – provides that the petitioner/moving party “may submit a reply . . . within a time period fixed by the judge.” Although the committee note and history of the rule make clear that this language was intended to give the petitioner a right to file a reply, the Advisory Committee determined that the text of the rule itself has contributed to a misreading of the rule by a significant number of district courts. Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the reference to filing “within a time fixed by the judge” as allowing a petitioner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The proposed amendments confirm that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence, providing that the moving party or petitioner “may file a reply to the respondent’s answer or other pleading. The judge must set the time to file, unless the time is already set by local rule.” The committee note states that the proposed amendment “retains the word ‘may,’ which is used throughout the federal rules to mean ‘is permitted to’ or ‘has a right to.’” The proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

Three comments were submitted, two of which addressed issues fully considered before publication: the need for an amendment, and whether to replace “may” with a phrase such as

**Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure**

“has a right to” or “is entitled to.” The Advisory Committee considered these two issues at length prior to publication and determined not to revisit the Advisory Committee’s resolution.

A third comment supported the proposal but suggested additional rule amendments that would require that inmates be informed about the reply and when it should be filed at the time the court orders the respondent to file a response. Although the Advisory Committee declined to expand the scope of the proposed amendments to the rules, it did approve the addition of the following sentence to the committee notes: “Adding a reference to the time for filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties.” In the Advisory Committee’s view, this additional language will serve as a helpful reinforcement of best practices.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts and committee notes are set forth in Appendix C, with an excerpt from the Advisory Committee’s report.

**Recommendation:** That the Judicial Conference approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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Excerpt from the September 2018 Report of the Committee on Rules of Practice and Procedure

Respectfully submitted,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive style with a large initial 'D'.

David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Daniel C. Girard	Carolyn B. Kuhl
Robert J. Giuffra Jr.	Rod J. Rosenstein
Susan P. Graber	Amy J. St. Eve
Frank M. Hull	Srikanth Srinivasan
Peter D. Keisler	Jack Zouhary

Excerpt from the May 17, 2018 Report of the Advisory Committee on Criminal Rules

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

DAVID G. CAMPBELL  
CHAIR  
REBECCA A. WOMELDORF  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES  
APPELLATE RULES

SANDRA SEGAL IKUTA  
BANKRUPTCY RULES

JOHN D. BATES  
CIVIL RULES

DONALD W. MOLLOY  
CRIMINAL RULES

DEBRA ANN LIVINGSTON  
EVIDENCE RULES

MEMORANDUM

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

**FROM:** Hon. Donald W. Molloy, Chair  
Advisory Committee on Criminal Rules

**RE:** Report of the Advisory Committee on Criminal Rules

**DATE:** May 17, 2018

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**I. Introduction**

The Advisory Committee on Criminal Rules met on April 24, 2018, in Washington, D.C. This report presents two action items. The Committee unanimously recommends that the Standing Committee transmit to the Judicial Conference the following proposed amendments that were previously published for public comment:

- (1) New Rule 16.1 (pretrial discovery conference), and
- (2) Amendments to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings (right to file a reply).

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## Excerpt from the May 17, 2018 Report of the Advisory Committee on Criminal Rules

Report to the Standing Committee  
Advisory Committee on Criminal Rules  
May 17, 2018

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**II. Action Item: New Rule 16.1**

Proposed new Rule 16.1 has its origins in a request from the National Association of Criminal Defense Lawyers (NACDL) and the New York Council of Defense Lawyers (NYCDL) that the Committee address discovery problems in complex cases that involve “millions of pages of documentation,” “thousands of emails,” and “gigabytes of information.” The Committee’s work on the proposal revealed that discovery issues involving electronically stored information (ESI) could be adequately addressed in most cases by an early discussion between counsel, and were not limited to “complex” cases, or cases with a high volume of ESI. Accordingly, the proposed rule is not limited to such cases, and provides a process that encourages the parties to confer early in each case to determine whether the standard discovery procedures should be modified.

The proposed amendment is not included in Rule 16 itself, but would instead be a new Rule 16.1. Because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, the Committee concluded it warrants a separate position in the rules. A separate rule will also draw attention to the new requirement.

The new rule has two sections.

The first section requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Members agreed that 14 days was an appropriate period, noting that the proposal permits flexibility. Because the proposed rule requires a meeting “no later than” 14 days after arraignment, it permits the parties to meet before arraignment when that would be desirable. And in cases in which 14 days is not sufficient for the parties to accurately gauge what discovery may entail, the rule requires no more than an initial discussion, which can then be followed by additional conversations. Subsection (b) bears some resemblance to Civil Rule 26(f), but is more narrowly focused than the Civil Rule.

The second section states that after the discovery conference the parties may “ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.” The phrase “determine or modify” contemplates two possible situations. First, if there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to “determine” when and how disclosures should be made. Alternatively, if the parties wish to change the existing discovery schedule, they must seek a modification. A modification would be required, for example, if the schedule or manner of discovery in the case is governed by a standing order or local rule. In either situation, the request to “determine or modify” discovery may be made jointly if the parties have reached agreement, or by one party alone if no agreement has been reached. The rule does not prescribe a time period for seeking judicial assistance.

The proposed rule requires the parties to confer and authorizes them to seek an order from the court governing the manner, timing and other aspects of discovery. But it does not require the

## Excerpt from the May 17, 2018 Report of the Advisory Committee on Criminal Rules

Report to the Standing Committee  
 Advisory Committee on Criminal Rules  
 May 17, 2018

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court to accept their agreement or otherwise limit the court's discretion. Under the proposed rule, district courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and through local rules and standing orders. To avoid any confusion, this point is emphasized in the Committee Note, which states: "Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the court to determine the timetable and procedures for disclosure."

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure in cases involving electronically stored information (ESI). The Committee Note draws attention to this point and states that counsel "should be aware of best practices." As an example of these best practices, it cites the ESI protocol developed by the Department of Justice, the Administrative Office of the U.S. Courts, and the Joint Working Group on Electronic Technology in the Criminal Justice System (JETWG) (Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases (2012)). The Committee hopes that including the reference to this protocol will help bring it to the attention of both courts and practitioners.

Publication of the rule produced six comments. Although all were supportive of (or did not question) the amendment's general approach of requiring the prosecution and defense to confer about discovery soon after arraignment, several expressed concerns and/or suggested changes in the text or Committee Note. The comments raised the following issues:

- (1) Should the text or note state that the amendment does not preclude shorter times for discovery required by local court rules or court orders?
- (2) Should the text or note be amended to state that the amendment does not grant new discovery authority or override current statutory limitations (e.g., the Classified Information Procedures Act (CIPA) and the Jencks Act)?
- (3) Should the rule explicitly state that it does not apply to pro se defendants?
- (4) Should the amendment be relocated or renumbered?
- (5) Should the rule require the parties to confer "in good faith"?
- (6) Should the rule require the parties to file a joint discovery report?

The Committee concluded that the existing Committee Note was sufficient to address the concern about local rules and orders setting shorter times for discovery, but it agreed to propose revisions to the Note addressing statutory limitations such as CIPA and the applicability of the rule to pro se defendants. It also accepted the suggestion that the wording of subsection (b) should be revised to parallel Rule 16(d)(2)(A). With the exception of a few minor changes recommended by the style consultants, the Committee declined to make other changes in the rule as published.

a. Local rules

Two comments (CR-2017-0009 and CR-2017-0011) expressed concern about the effect of the proposed rule in districts where local rules already require the government to make specific disclosures at particular times, especially where those disclosures must be made before the time