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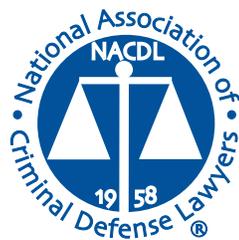
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February 15, 2018

Rebecca A. Womeldorf, Esq.  
Secretary, Committee on Practice & Procedure  
Judicial Conference of the United States

AMENDMENTS TO RULES OF CRIMINAL AND HABEAS  
PROCEDURE, PROPOSED FOR COMMENT IN AUGUST 2017

Dear Ms. Womeldorf:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed addition of a Rule 16.1 to the Federal Rules of Criminal Procedure and the proposed clarification of Rule 5 of Habeas and 2255 Procedure.

Our organization has nearly 10,000 direct members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of some 40,000 private and public defenders. NACDL, founded in 1958, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

**CRIMINAL RULE 16.1 – MANAGEMENT OF COMPLEX  
DISCOVERY**

Although NACDL had endorsed a bolder and more detailed proposal, we support the committee's Proposed Rule 16.1 of the Federal Rules of Criminal Procedure. This Rule will require the government and the defense to discuss the state of discovery no later than 14 days after arraignment. The benefit for defendants is that the government will now have a duty to confer with defense counsel about the timing, method, cost and place of the exchange. Defense counsel will then have the ability to seek the court's assistance when the prosecution's cooperation is incomplete.

In another age, when voluminous discovery consisted mostly of paper documents, rarely numbering above 1000 pages, the process merely involved making those documents available to photocopy. Today, discovery regularly includes electronically stored information (ESI), sometimes in enormous quantities. The ability to search and read that data may require proprietary software or decryption. Those advances compound the difficulties in providing information, as well as the challenges involved in sifting, organizing, and reviewing it prior to trial (or to evaluate the strengths and weaknesses of a case in fashioning a disposition by plea agreement). This proposed procedure is flexible enough to deal with those changes by requiring the parties to address issues early and with resort to the court's assistance. Therefore, contrary to the comment from the Department of Justice, we understand the amended rule to rightly empower trial judges to demand that the government provide discovery that is timely, complete and accessible to the defense, according to the particular nature and circumstances of any given case. We urge the Advisory Committee to reject the Department's effort to gut the impact of the Proposed Rule. The Committee should ensure that its explanatory Note makes the judge's discretion and authority to manage discovery in each case in the interest of fairness and trial management unambiguously clear.

We also do not agree with the Department of Justice suggestion that a blanket exception be established for cases with *pro se* defendants. The expression "attorney for the defendant" is properly understood to include defendants representing themselves; perhaps the Advisory Committee Note should be amended to confirm this understanding. If special circumstances, such as detention of the *pro se* defendant in a distant location, call for an exception, the government can invoke Rule 2 to ask for relief on a case-by-case basis.

#### HABEAS CORPUS RULE 5(e) AND § 2255 RULE 5(d) – RIGHT TO REPLY

NACDL is pleased to see the proposal to clarify that a habeas petitioner or § 2255 movant has an unambiguous right to file a reply to the respondents' or government's Response. Particularly where there is no requirement or even an expectation that the petitioner will file a memorandum of law with the petition, and given the Form petition/ motion's express discouragement to "cite law," the Reply is often the petitioner or movant's first real opportunity to explain the legal basis for his or her claims. And of course, the Reply will also serve its traditional function of pointing out any omissions, misstatements or weaknesses in the respondents' or government's arguments. A right to reply was the law under 28 U.S.C. § 2248 (referring to the petitioner's "traverse") prior to adoption of the habeas rules, and we are quite sure that this important procedural right was never intended to be abrogated.

We do have one suggestion for improvement: The proposed Rules 5(d) and 5(e) do not advise the court when or how it is that the petitioner/movant should be advised of the right to reply and the time during which s/he may do so. NACDL suggests that the time and place for such notice is in the court's Order under Rule 4 directing the filing of an Answer or Response. In other words, together with adoption of the proposed amendments, language should be added to Rule 4 of the 2254 Rules stating, "If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order, and must specify the time during which the petitioner may file a reply under Rule 5(e)." Likewise, Rule 4(b) of the 2255 Rules should be amended to read, "If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other

response within a fixed time, or to take other action the judge may order, and must specify the time during which the moving party may file a reply under Rule 5(d).” The intent of this suggestion is simply to ensure the practical implementation of the published proposal, not to add anything new. It could therefore be adopted in this cycle, without further publication for comment.

We thank the Committee for its excellent work and for this opportunity to contribute our thoughts. NACDL looks forward to continuing our longstanding relationship with the advisory committee as a frequent attendee at public meetings and a regular submitter of written comments.

Respectfully submitted,  
THE NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS

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*In Memoriam:*  
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