

February 28, 1995

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Re: Proposed Changes in Federal Rules of Evidence,
Federal Rules of Appellate Procedure,
and Federal Rules of Criminal Procedure
Request for Comments, Issued September 1, 1994

Dear Mr. McCabe:

As President of the National Association of Criminal Defense Lawyers and Co-Chairs of its Committee on Rules of Procedure, we are pleased to submit the following comments on behalf of the 8700 members of our association, and its 70 state and local affiliates with a total membership of about 28,000.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

1. Jencks Act Reform: Witness Lists and Statements

NACDL has long supported an extensive broadening of the scope of criminal discovery, so we are pleased to support the Committee's modest step in this direction. The checkered history of such efforts is well known to the Committee, and we will not repeat it. The defense bar has always believed that Jencks v. United States, 353 U.S. 657 (1957), was correctly decided, and that the Jencks Act, 18 U.S.C. § 3500, represents a far too limited implementation of the due process rights recognized in that landmark case. Today, that Act, and the rules that reflect it, such as Fed.R.Crim.P. 26.2, are inadequate and anachronistic. The proposed amendment to subdivision (a)(1)(F) is a good start in the direction we should really be going, and we would support it if the Committee really believes that that is as far as we can go now. The opportunity for real reform may

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not come again soon, however. The opponents of discovery reform will not accept any pre-compromised version, so why should the Committee not promulgate the rule it would really prefer?

In several respects, NACDL would like to see a better rule. First, the government should be required to disclose not only names and statements but also addresses (and telephone numbers, for that matter). One purpose of the amended rule is to prevent trial by ambush. This requires not only preparation for cross-examination from prior statements but also follow-up pretrial investigation, which often means attempting to interview witnesses to pursue or clarify points raised in the statements disclosed. Denial of addresses only obstructs and delays that investigation, while favoring the wealthy defendant, with access to professional investigators, over the average accused. We note that 18 U.S.C. § 3432, which has long required pretrial disclosure of witness names in capital cases, also requires disclosure of those witnesses' addresses.

Second, the requirement that disclosure need not occur until seven working days before trial [see Rule 45(a)] allows the disclosure to be made much too late in most cases. Some ninety per cent of federal criminal cases do not go to trial. Facilitation of informed decisions whether to plead guilty is very much in the interest of the court, as well as of the government and defendant alike. Disclosure of those statements which already exist should be made promptly after arraignment, at the same time as the rest of the mandatory discovery material is provided, with a continuing duty to provide others as they come into being. This revision would not be tantamount to requiring an open file, although we would support such a system, which works well in many districts. As a matter of professional ethics, federal prosecutors are expected not to seek the indictment of any individual whom they do not already believe could be proven guilty at trial. The U.S. Attorney must therefore have already imagined how a trial of each defendant could be successfully conducted. The witnesses that the prosecution would call in its case-in-chief to meet that standard are the witnesses whose statements should be disclosed immediately.

In any event, the rule should be amended to supersede the part of § 3432 that affords a three-day minimum disclosure period in capital cases. The rights of the capital accused should be at least equal to, if not greater than, those of the ordinary defendant.

For the same reasons as our comment on timing, the definition of a "statement" adopted in the new rule from Rule 26.1(f), which in turn is derived from the overly-restrictive Jencks Act, must be amended. As all federal practitioners know, there are almost

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no statements which actually come within that definition. Nevertheless, DEA 6's, FBI 302's, and other similar reports, although not "substantially verbatim," purport to contain the substance of oral statements of witnesses and are universally treated as such. See Jencks, supra, 353 U.S. at 668 (holding included required production of witnesses' statements "orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial"). The revised rule should make perfectly clear that reports of that type are intended to be disclosed under this provision.

Implementation of this reform would also require revision of the language of proposed Rule 16(a)(2), which excludes disclosure of "reports" and "memoranda" of "government agents." First of all, when an agent would be a witness in the government's case in chief, all of his or her statements concerning the case must be disclosable under Rule 16(a)(1)(F), like those of any other witness. Second, as noted, reports of agents which summarize interviews are functionally statements of the witnesses that were interviewed, and should be treated as such under the Rule. Only the prosecutor's own notes (unless adopted by a witness, see Goldberg v. U.S., 425 U.S. 94 (1976)), and those reports which are core work-product should be protected.

The proposed rule is also far too generous to the government in allowing the filing of unreviewable ex parte statements in lieu of disclosure. We note that the ex parte statement is unreviewable only if the prosecutor "believes in good faith that pretrial disclosure of this information will threaten the safety of any person or will lead to an obstruction of justice." We therefore assume that the existence of this condition precedent would be subject to being tested in court. Even so, a "good faith" belief may nonetheless be erroneous, or even unreasonable. (Or does "good faith," in this context, mean not only subjectively honest but also objectively reasonable? It hardly matters if the statement is unreviewable.) As trial approaches, the prosecutor's focus on the worst in the defendant often distorts his or her perceptions. Only an adversarial testing of such assertions will reveal which have any foundation; therefore, the submission should not be ex parte. At the least, we cannot fathom why a federal trial judge cannot be trusted to review such a statement for the existence of "probable cause" or an "articulable basis" for believing that the Sixth Amendment interests of the accused in a fair trial are outweighed by concern for the immediate safety of a witness whose identity and address must, after all, be disclosed very soon anyway.

The rule should not place any reciprocal disclosure obligation on the defense. The two parties in a criminal case are not similarly situated. The "balance of advantage" heavily favors

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the government. The government has no information deficit and faces no risk of trial by ambush that would call for such a radical revision in our adversary system. More important, the government has the entire burden of proof. Wholesale disclosure of anticipated witnesses is not comparable to the existing alibi and insanity rules, where the particular nature of the issue may require a special investigative effort by the prosecution. While the defense may have a contingency plan to present witnesses, there is no obligation on the defense to do so, and the accused may properly rely in every case on the possibility that the government will fail to meet its burden. Yet under the proposed rule, for fear of preclusive sanctions, the defense will often fear it has no choice but to disclose the witnesses it might call if it had to present a case. Not only will such disclosures inevitably assist the government in shoring up its own case in chief, but the government's army of agents -- never remotely matched by the defense -- will also immediately fan out to investigate and intimidate (whether or not intentionally) any defense witnesses.

We find it ironic that the "reciprocal" rule not only fails to provide "reciprocal" authority for defense counsel to avoid disclosure by filing an unreviewable, ex parte statement based on nothing more than a "good faith belief," it does not even allow the defense to defeat disclosure by proving a basis to fear intimidation or attempted obstruction of justice by government agents. Nor is it necessary for agents actually to threaten potential witnesses to consolidate the prosecution's already unfair advantage; fear of the government's power of accusation engendered by the flash of a badge and a highly-trained and effective interviewing style is enough to discourage many potential defense witnesses from coming forward to contradict the government's version.

In a federal case tried by a colleague of one of this letter's authors, the judge required defense counsel -- over objection -- to name her witnesses during the voir dire. One witness who had been prepared to testify was then visited by an ATF agent, who informed him that he might get himself in trouble by testifying. After telling counsel of this conversation, the witness said that his "memory was not that good" and withdrew his agreement to testify. ATF agents also knocked on the doors of the defendant's neighbors, asking whether they had "seen him with drugs or guns." (The case had nothing to do with drugs.) None would testify for him. A fact witness for the defense who happened to be a local policeman was called down by the internal affairs office, based on a written complaint made by the U.S. attorney's office, and asked why he had testified for an accused criminal. (By the way, after a new trial was granted on account of prosecutorial misconduct in closing argument, this defendant

was acquitted.) Whether the intimidation is in the agents' words or in the citizens' minds does not matter; the parties are not in equal positions in their ability to secure witnesses, and it is not only the government's witnesses who may need protection in a given case from intimidation. We do not suggest that this happens in every case, but it is far from rare.

If there is to be any reciprocal duty on the defense, the timing should not favor the government as it would under the Committee's proposal. In many cases, an obligation on the defense to disclose its witnesses "before trial" will give the government more notice and time to prepare before the defense puts on its case than the seven days allowed to the defense. No compulsory disclosure by the defense should be required until the prosecutor informs defense counsel that the government is calling its final witness, at the earliest.

In any event, the wording of Rule 16(b)(1)(D) should be amended to make clear that when a prosecutor exercises the option of withholding disclosure, the government has not "complie[d]" so as to trigger any duty of disclosure by the defense. The present language, stating that in such a case the court "may limit" the reciprocal disclosure, is too lax and potentially grossly unfair. Moreover, subsection (b)(1)(D) should be amended to provide that in no event must prior statements of the defendant be disclosed.

2. Discovery of Defense Mental Health Expert

This proposal is not unreasonable; however, the government's reciprocal discovery under Rule 16(a)(1)(E) should extend as well to evidence to be presented under Fed.R.Evid. 701. In insanity defense cases, the prosecutor's opinion evidence from lay witnesses is often as important as that of its experts, and the defense is as much in need of an opportunity to investigate and prepare to rebut it as it is of the government's experts.

Rule 32(d). Criminal Forfeiture Hearing Before Sentencing

We welcome and endorse the Committee's proposed amendment to Rule 32(d), to the extent that it clarifies the procedure for turning a verdict of forfeiture into an order, and then making it part of the judgment. Confusion has long prevailed on these procedural points, with adverse effects on the government, the defendant, and the courts of appeals, which have faced problems of finality with respect to judgments of sentence which do not reference or incorporate related orders of criminal forfeiture, which now are sometimes entered at the time of sentencing but

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sometimes after. We are glad that the rule encourages judges to hold separate hearings on criminal forfeiture, prior to the traditional sentencing proceedings. Such issues as value of forfeitable property, the identity of property derived from property ordered forfeited (where made relevant by statute), whether the defendant has an interest in certain property, and, where relevant, the existence of substitute assets can and often do turn into virtual quasi-civil trials, which have little in common with the rest of a sentencing.

However, two aspects of the proposal concern us. We are concerned that early entry of an order of forfeiture may interfere with the court's duty under the Eighth Amendment, as construed in Alexander v. United States, 509 U.S. --, 125 L.Ed.2d 441, 455-56 (June 28, 1993), to ensure that a statutory criminal forfeiture is nonetheless "proportional" under the Eighth Amendment. The court may not be in a position to ensure this protection until after reading the pre-sentence investigation report and giving full consideration to the other terms of the sentence to be imposed. In addition, if the forfeiture is entered as an order, but not yet incorporated into a judgment, it would seem that the order would be enforceable but not appealable. This would threaten defendants' rights against excessive or unlawful forfeitures.

We have not observed that the government is experiencing any problems in conducting investigations into defendants' potentially forfeitable assets, notwithstanding the temporal limitations of 18 U.S.C. § 1963(k) and 21 U.S.C. § 853(m). The ample resources of federal investigative agencies, coupled with the power to obtain and use subpoenas duces tecum referencing the upcoming forfeiture hearing, seem to serve more than adequately. We think that the government's interim interests are adequately protected by existing provisions for temporary restraining orders, and that the rule revisions should make clear that a criminal forfeiture is simply part of the criminal sentence. At very least, language should be added to the rule to make clear that an order of forfeiture may be modified at any time until the formal entry of judgment, and either the rule or the Advisory Committee Note should reference the court's power under Fed.R.Crim.P. 38(e) to stay enforcement of an order of forfeiture, once entered.

FEDERAL RULES OF EVIDENCE

We were intrigued by the report of the new Evidence Committee that after study it had determined not to propose any amendment to any of a long list of rules, including Rule 403. NACDL has long supported the creation of either an evidentiary

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privilege or a relevancy rule protecting the right to counsel. Too many judges and prosecutors seem to think that an adverse inference can be drawn from a person's interest in or act of contacting or retaining an attorney, particularly a criminal defense attorney. Compare United States v. Tille, 729 F.2d 615, 622 (9th Cir. 1984) (permitting inference of defendant's guilty knowledge from fact that "[w]hen arrested, he carried the name and address of a Seattle criminal defense attorney"), with United States v. Ritchie, 15 F.3d 592, 599-601 (6th Cir. 1994) (rejecting district court's reliance on this factor in finding IRS summons reasonable). See also United States v. Hale, 422 U.S. 171 (1975) (Rule 403 bars adverse use of defendant's privileged silence after receiving Miranda warnings). On the other hand, several cases have viewed as misconduct suggestions by prosecutors, in closing argument or on cross-examination, that such conduct is indicative of consciousness of guilt. See, e.g., Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983) (per curiam) (habeas granted for prosecutorial argument imputing guilt from hiring of attorney and attacking counsel for meeting with witness), cert. denied, 469 U.S. 920 (1984).

We ask the committee to consider the following proposal as a public policy rule in the relevancy chapter, akin to Rules 407-411 on subsequent remedial measures, offers to compromise, and the like, protecting any party in any case against an unfair inference which may nonetheless appeal emotionally to some jurors and even to some judges. Subject to the Committee's expertise in draftsmanship, our proposal states:

Proposed Rule 416. Irrelevance of Contacting or Retaining Counsel

The act of contacting or retaining an attorney for professional advice, as well as an expression of interest in contacting or retaining or of an intent to contact or retain an attorney for such advice, is not admissible against any individual or entity, unless the circumstances would bring the act or expression within the crime-fraud exception to the attorney-client privilege.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 21. Writs of Mandamus, etc.

We continue to support these reforms. As we wrote in 1994, "This proposal would amend and clarify the procedures in mandamus cases under 28 U.S.C. § 1651. We think the new procedures represent a helpful modernization of the mandamus process, and a useful effort to depersonalize the action by discouraging the trial judge from becoming a party."

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Rule 25. Filing and Service

We continue to support these reforms. As we pointed out in 1994, however, in addition to first class mail, the rule should authorize priority mail and express mail, two other forms of expeditious U.S. mail. The Advisory Committee Note says that the rule is clear that first class is "sufficient" but the language of the rule seems to make it the exclusive acceptable method of filing by mail, perhaps "and other classes of mail that are at least equally expeditious" is the needed wording.

The requirement of a certification, while slightly burdensome, is much better than last year's postmark requirement. The rule should provide that the certification of mailing may properly be consolidated with the certificate of service under FRAP 25(d) as a "Proof [or Certificate] of Filing and Service."

The requirement that service be made, when feasible, in a manner at least as expeditious as that used for filing is a welcome response to petty gamesmanship. For example, our members often experience receipt of papers from the government by first class mail, sometimes four or more days after those papers were filed by hand, even in situations in which opposing counsel knows that a prompt response will be in our clients' interests. The advisory committee note should therefore be amended to specify that when the "brief or motion is filed with the court by hand or by overnight courier, the copies [etc.]"

We are also pleased to see the authorization for progress toward electronic filing.

Rule 26. Computation and Extension of Time

We do not oppose the rule as drafted, but do not see why three days should be added, rather than one (or two), if delivery is made by overnight (or second-day) carrier.

Rule 27. Motions

We are delighted to see the demise of such local anomalies as the Second Circuit's required printed form for a Notice of Motion -- which cannot be prepared on word-processing equipment -- and the Seventh Circuit's requirement that the main contents of the motion be in an affidavit of counsel, thus defeating the intended "single document" approach. The proposed uniform, modern approach is highly commendable.

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Rule 32. Form of Briefs, etc.

1. Typeface, Spacing, etc.

As we noted in our comments last year, we are fond of certain highly readable sans-serif typefaces, but will yield to the Committee's opinion that serif type is more readable. We appreciate the simple yet flexible manner in which the proposed rule would accommodate both proportional and monospaced typefaces, by adjusting margin width, and allowing either underlining or italics for citations. We also appreciate the Committee's receding on the question of single-spaced footnotes and headings.

2. Length of briefs

As national practitioners, we appreciate the Committee's attempt to regularize the formalities of briefs and appendices. We are pleased to see the abolition of Rule 28(g), in particular its local option provision. (The Advisory Committee Note on this aspect [last paragraph concerning Rule 32(a)] is too weakly phrased; local options would be invalid under the revised rule. See FRAP 47.)

It seems to us that a word count rule is a fine, simple cornerstone to a reasonable solution to the vexing problem of length. However, a 12,500 word length for principal briefs, at 280 words per page, averages to 45 pages, where the former rule allowed 50. (Likewise, a 6250 word reply brief, at 280 words per page, is 22.3 pages, as compared with the present 25.) This proposed 10% reduction in the standard maximum length for briefs is not justified or explained in the Committee's notes. In addition, the revision's safe harbor length of 40 pages (15 for a reply) appears to suggest a preference for 20% shorter opening briefs and 40% shorter replies.

We strongly oppose this reduction in the true allowable length of briefs. Yes, we, too, have read many annoying, verbose briefs that cry out for the strong hand of a good editor. Nevertheless, many federal criminal appeals present several serious issues, arising on a detailed and sometimes lengthy trial record, often coupled with a separate sentencing record, which require 50 typed pages to explicate properly, particularly for the appellant, who has the burden of presenting a full and fair exposition of the facts and procedural history. We urge the Committee as emphatically as we can to add 10% to each of the proposed word counts and safe harbor page counts.

The requirement to include a certification of compliance for briefs outside the safe harbor seems like demeaning overkill

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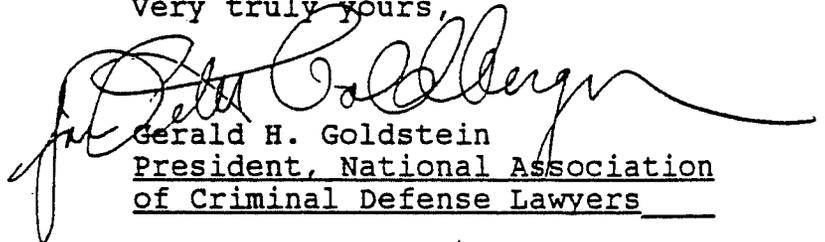
to us. If the purpose of the requirement is simply to remind counsel of the formatting rules, why can't that be done in the standard notice from the Clerk, rather than filling every brief with the same verbiage?

3. Form of a petition for rehearing

Subdivision (b) provides that a petition for rehearing or suggestion for rehearing in banc may produced with simple binding, such as stapling, and without a cover. We thank the committee for its responsiveness to our 1994 suggestion to this effect.

NACDL appreciates the opportunity to offer our comments on the Standing Committee's proposals. We look forward to working with you further on these important matters.

Very truly yours,



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