



NEW YORK COUNCIL OF DEFENSE LAWYERS

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March 1, 2016

Hon. Donald W. Molloy
United States District Judge
Russell E. Smith Federal Building
201 East Broadway Street
Missoula, MT 59802

Re: Enclosed Proposed Amendments to Rule 16

Dear Judge Molloy:

This letter is submitted to you on behalf of the New York Council of Defense Lawyers (the “NYCDL”) and the National Association of Criminal Defense Lawyers (“NACDL”). We write to you in your capacity as Chair of the Advisory Committee on the Federal Rules of Criminal Procedure. We respectfully request that the Advisory Committee consider proposing to the Judicial Conference amendments to Federal Rule of Criminal Procedure 16. The NYCDL and NACDL support the proposed amendments for the reasons stated below.

The NYCDL is an organization comprised of more than 250 experienced attorneys whose principal area of practice is the defense of complex criminal cases in federal court and before New York courts and regulatory tribunals. Our membership includes numerous former state and federal prosecutors, and we regularly submit *amicus curiae* briefs on major questions of criminal law and advocate for reforms of penal statutes and procedural rules, both federal and state. Our members are among the most active trial lawyers in New York’s federal courts, and in virtually any complex criminal case in New York City, a member of the NYCDL will appear for one or more of the defendants. Many of our cases are document-intensive “white collar” cases of the sort that require extensive and detailed preparation, such as insider trading, securities fraud and mail and wire fraud. Indeed, I believe it is fair to say that, given the location of the financial markets here, the Southern and Eastern Districts of New York are two of the principal venues where a large number of complex federal criminal cases are brought and tried.

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,200 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system. Our members represent persons and entities in federal criminal cases throughout the country, and they frequently confront the difficulties of complex criminal cases with enormous amounts of discovery. NACDL is a longstanding participant in the Judicial Conference's rules promulgation process, sending a representative to attend meetings and regularly submitting comments on proposed changes of interest to the criminal defense bar.

The amendments we propose are enclosed with this letter. These amendments are meant to address a growing problem in the defense of complex federal criminal cases nationwide. It is now routine in many jurisdictions for defense counsel to receive enormous amounts of information at the outset of the discovery process, with relatively little guidance as to what might be relevant to the prosecution or defense of the charges contained in the indictment. In the 21st Century, defense counsel are often handed a computer hard drive at the first appearance in court, and told that it contains the government's first production of discovery, consisting of millions of pages of documentation and thousands of emails culled from the server of a client's employer. Thousands more pages of documentation and emails typically follow that first production, and, occasionally, more gigabytes of documentation will be dropped into defense counsel's laps on the eve of trial.

In such cases, the indictment itself is often a fairly "bare bones" document, not revealing much about the government's theory of the case or the evidence the government intends to rely on. Because the decisional law permits indictments to be pleaded sparsely, with relatively little factual description (indeed, many conspiracy statutes do not even require the pleading of "overt acts" committed in furtherance of the conspiracy), and because the decisional and statutory law also does not typically require the government to provide bills of particulars, defense counsel is left with little guidance as to the specific facts the government intends to prove or the documents the government intends to rely on at trial. Absent indices of the government's production, a listing of the exhibits the government intends to use at trial, or other guidance to defense counsel, it is virtually impossible for defense counsel to wade through the mountains of material produced by the government and identify the critical documents important to the defense of the case.

The experience of the federal courts in New York under district judges' pretrial orders shows that a rule-based solution for this nationwide problem is feasible. The enclosed proposals are based on the real experiences of our membership in complex cases. District Judges in the Southern and Eastern Districts of New York typically enter orders requiring procedures like those set forth in the enclosed proposals, because they recognize that without these procedures, the trial of a complex case cannot proceed smoothly and will not be fair to the defendants. If rules like those in our proposal are followed, the jobs of both the prosecution and the defense are made easier, because the defense gets an early glimpse at the government's proof, and knows where to focus in order to assess the strength of the government's case and mount a defense. These procedures also provide a significant benefit to the prosecution, because the defense's

identification of the evidence it will use gleaned from the government's own proof gives the government advance notice of the facts that will be disputed at trial, signals to the prosecution where the weaknesses in its proof may be and what the factual defenses are likely to be, and better enables the government to prepare its response. And with this pre-trial exchange of information, evidentiary issues and potential in limine motions are identified, and made easier for the Court to address before trial. We also observe that the procedures recommended in the enclosed proposals often encourage the early disposition of complex criminal cases, because it is easier for defense counsel to identify the relevant evidence, and defense counsel are therefore better able to counsel their clients on the strength of the government's case and the clients' defenses.

Finally, the Advisory Committee should know that even though procedures like those described in our proposed amendments are commonly adopted in the New York federal courts, we are unaware of any case in which these procedures have resulted in witness tampering or threats from the defendants. We have yet to see a case in which early disclosure of the sort advocated in the enclosed proposals resulted in obstruction of justice or other improper conduct. And if there were a complex case in which such issues were a valid concern, the Court would always be free to modify the procedures described in the enclosed proposals by way of protective order.

We appreciate the opportunity to submit the NYCDL's and NACDL's proposal to you, and are available to provide any additional information the Committee may require.

Very truly yours,



Roland G. Riopelle
President, NYCDL



Peter Goldberger, Esq.
Chair, NACDL Federal Rules Committee



William Genego, Esq.
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Cc: John Siffert, Esq.
Rebecca A. Womeldorf, Secretary, Committee on Rules of Practice & Procedure
Prof. Sara Sun Beale, Reporter, Advisory Committee on Criminal Rules

PROPOSED MODIFICATIONS TO RULE 16

RULE 16. Discovery and Inspection

(b) Government's Additional Disclosure in a Complex Case.

(1) Applicability. This subsection of the rule shall apply in any case in which the court finds that the case is complex for the purposes of discovery production and review. The time periods for production and scheduling set forth in this subsection are subject to the requirements of the Speedy Trial Act, 18 U.S.C. § 3161 et seq., and scheduling orders pursuant to a finding of complexity under this rule must also include the requisite findings under that statute.

(2) Application for Finding of Complexity. The government or the defendant may make an application to the court for a finding that a case is complex for the purposes of discovery production and review, within 30 days of arraignment or at such other time as the court may require. The court may also make such a finding *sua sponte*.

(3) Complexity

A. Considerations.

i. In determining whether a case is appropriate for treatment as a complex case under this Rule, the trial court shall consider the degree of difficulty of the case and the time needed for the government and defense to prepare adequately for trial and to ensure a fair trial for the defendant. Among other factors, the court should take into account the complexity of the subject matter, the technical difficulty to understand and analyze the evidence, the existence of scientific, economic or similarly technical evidence, the number of documents, the number of defendants, the number of witnesses and such other factors as may make it necessary to provide additional time for the parties to be prepared adequately for trial.

B. Presumption of Complexity. There shall be a presumption that a case is complex for the purposes of discovery, production and review:

i. if the government's obligation to disclose materials pursuant to this rule would require it to disclose or permit inspection of:

(1) more than 50,000 physical pages of material consisting of books, papers, documents, photographs or copies of those items;

(2) more than one gigabyte of data;

(3) more than 100 audio and visual recordings; or

ii. if more than 10 defendants are joined in a single indictment.

(4) Extended Period for Discovery. If the court finds that a case is complex for the purposes of discovery production and review:

A. the government shall be permitted to produce the materials required to be produced pursuant to section (a) of this rule over a period of up to six months following the arraignment of the defendant; and

B. the court shall not set any trial date until the certification described in sub-paragraph (5) below has been made.

(5) Certification of Substantial Disclosure. In a complex case, the government shall certify that it has produced substantially all the materials or data it is required to produce pursuant to section (a) of this rule, no later than six months after the arraignment of the defendant. The government may continue to produce additional materials or data to the defendant after this date, upon a showing that the materials were only discovered or accessible to the government after the date of its certification that it has produced substantially all the materials or data it is required to produce pursuant to this rule.

(6) Trial Date. The court may not set a trial date that is earlier than 12 months from the date of the government's certification required by sub-paragraph (5) above, unless the defendant consents to such earlier date.

(7) Index. Simultaneously with the certification required by subparagraph (5), the government shall provide the defendant with an index of materials produced pursuant to section (a) of this rule. Such index shall include a

description of the following: (A) any books, papers, documents, photographs or copies of those items produced by the government; (B) the source from which the materials were obtained; (C) the location at which the items were acquired during the execution of a search warrant; (D) the date and time of any recordings; and (E) the names of the persons whose voices and/or images the government contends were recorded.

(8) Tentative Exhibit List, and Copies of Exhibits. At least six months before the trial date set pursuant to sub-paragraph (6) above, the government shall produce all exhibits the government intends to offer in evidence, together with a tentative exhibit list that cross-references the exhibits to the index described in sub-paragraph (7) above.

(9) Corrective Measures. In the event that the tentative exhibit list produced pursuant to sub-paragraph (8) above is materially incomplete, or misleading, or fails to provide sufficient notice as to which materials produced pursuant to section (a) of this rule the government intends to offer at trial, the court may take such corrective action as it deems just, including an adjournment of the previously scheduled trial date; preclusion of exhibits not included on the tentative exhibit list; a directive to provide adequate notice of the evidence the government will offer at trial; or such other remedy as may be required.

(10) The Government's Right to Amend the Tentative Exhibit List and Index. The government shall have the right to amend the index and tentative exhibit list described in sub-paragraphs (7) and (8) above for any reason at any time until 90 days before the trial date set by the court pursuant to sub-paragraph (6) above. Thereafter, the government shall have the right to further amend the index and tentative exhibit list, upon a showing that the amendment to the index and tentative exhibit list relates to materials that were only discovered or accessible to the government after the date on which the index and tentative exhibit list were produced, or for other good cause shown. In the event the government amends the index and tentative exhibit list within 90 days of the previously set trial date, the court shall entertain an application by the defendant for an adjournment of the trial date. Such an adjournment shall be sufficient to allow the defendant to prepare for the newly identified items, but shall in no event be less than 30 days, unless the defendant so consents.

(11) Reciprocal Disclosure. In a complex case, the defendant shall produce to the government copies of those items from the government's index

produced pursuant to sub-paragraph (7) that the defendant intends to offer in evidence at trial, either through government or defense witnesses. The defendant shall also produce a tentative exhibit list of such materials. The defendant's production under this sub-paragraph shall be made the sooner of: (A) 30 days before the defendant's case in chief begins, or (B) the date the parties make their opening statements. The production of the defendant's tentative exhibit list and the copies of the defendant's exhibits does not require the defendant to call any witness or offer any exhibit during the trial, and the defendant is not required to produce any document or other material which the defendant only intends to use to impeach a government witness, and which the defendant does not intend to offer in evidence. The defendant's tentative exhibit list may be amended at any time upon a showing that newly designated materials were only discovered or accessible to the defendant after the date on which the defendant's tentative exhibit list was produced, or for other good cause shown. In the event that the tentative exhibit list produced by the defendant fails to provide sufficient notice as to what materials from the government's index the defendant intends to offer in evidence, the court may grant a continuance of the trial sufficient to allow the government to prepare for the newly identified items. The defendant shall not be required to include in its tentative exhibit list any item that is not contained in the government's production under Section (a) of this rule.