MEMORANDUM

SEAN BRODERICK, NATIONAL LITIGATION SUPPORT ADMINISTRATOR
DEFENDER SERVICES OFFICE TRAINING DIVISION
FEDERAL PUBLIC DEFENDER
1301 CLAY STREET, SUITE 1350N
OAKLAND, CA 94612
TELEPHONE: (510) 637-1950

Date: February 29, 2020

To: CJA Panel Attorneys

From: Sean Broderick, National Litigation Support Administrator

Re: ***New Rule relevant to Criminal e-Discovery: Rule 16.1 Pretrial Discovery Conference; Request for Court Action***

This memorandum is to provide you background on the new Federal Rules of Criminal Procedure, Rule 16.1 which took effect in December 2019. Attached to this memo is an excerpt from the 4/25/2019 congressional rules package regarding Rule 16.1 (which provides context to the rule and the committee note on the proposed rule).

What is the new rule?
The Judicial Conference Advisory Committee on Criminal Rules proposed a new rule to address the issue of electronic discovery production. Rule 16.1 provides that within 14 days after the arraignment, the attorneys for the government and the defendant **must** confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16. Subsection (b) of the proposed rule would allow one or more parties to request that the court modify the timing, manner, or other aspects of the disclosure to facilitate trial preparation. In addition, the Committee Note for the new rule directs that counsel "should be familiar with best practices" and cites the *Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases*, also known as the ESI Protocol, as an example of these best practices. The Advisory Committee on Criminal Rules included the reference to the ESI protocol for the express purpose of bringing it to the attention of both courts and practitioners.

What is the ESI Protocol?
The ESI Protocol promotes early conferences with the Government to ensure discovery is produced in a usable format. An early meet-and-confer is a valuable opportunity, because voluminous e-discovery cases present difficult challenges for both prosecutors and defense counsel. Missteps at the outset are costly to unwind or correct, and waste time and money. To get the parties to address e-discovery issues early, the ESI Protocol recommends three steps:

1) at the outset, the parties should meet and confer about the nature, volume, and mechanics of producing e-discovery;
2) at the meet-and-confer, the parties should address what is being produced, a table of contents of the discovery, the forms of production, volume, software and hardware

limitations, inspection of seized hardware, and a reasonable schedule for producing e-discovery; and

3) the producing party should transmit its e-discovery in sufficient time to permit reasonable management and review, and the receiving party should be proactive about testing the accessibility of the ESI when received.

Resource

An excellent resource for you and other CJA panel attorneys to review is the Criminal e-Discovery: A Pocket Guide for Judges (can be found here: https://www.fd.org/sites/default/files/litigation_support/pocket-guide_criminal-e-discovery.pdf.) Written for judges, it provides guidance on common e-discovery issues in CJA cases including providing questions that judges may ask at an e-discovery status conference. There are several quotes I could reference from the pocket guide, but if I had to choose one, I would point out this: "[t]o benefit from the information available in e-discovery, attorneys must know what format the original data was in, what formatting options are available, and how those options affect their potential review of the data. Attorneys who do not understand the various formats should consult with a litigation support or IT expert before receiving or processing their e-discovery." (page 15-16 of Criminal e-Discovery Pocket Guide).

This rule is not a panacea to problems associated with e-discovery. Unfortunately, with the complexity of e-discovery and digital evidence, there isn't just a form letter that people can submit to the government and expect to get e-discovery in an easy form to review and digest. There is too much complexity in cases, and too many variables to consider. But I believe that this new rule provides an opportunity to develop better processes to get a handle on e-discovery productions you will be getting in your cases.

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.

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

on the lawyers. Second, it should encourage the use of the ESI Protocol.[1] 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

[1]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.

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

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

"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.

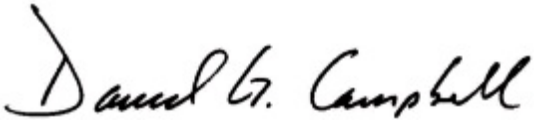
A third comment supported the proposal but suggested additional rule amendments that would require that inmates be informed about the reply and when it should be filed at the time the court orders the respondent to file a response. Although the Advisory Committee declined to expand the scope of the proposed 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.

* * * * *

Respectfully submitted,



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

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. Donald W. Molloy, Chair
Advisory Committee on Criminal Rules

RE: Report of the Advisory Committee on Criminal Rules

DATE: May 17, 2018

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).

* * * * *

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

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

set for the pretrial discovery conference (14 days after arraignment). The comments suggested changes to the text or Committee Note. In the drafting process the Committee sought to preserve the authority of district courts to impose additional discovery requirements by local rule or court order. As published, the Committee Note states (emphasis added):

> The rule states a general standard 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 challenge increase. Moreover, the rule does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

The Committee concluded that no further clarification is needed, in either the text or the Committee Note, to respond to the concerns about local rules requiring early disclosures.

b. New discovery authority

The Department of Justice (CR-2017-0010) expressed concern that the language in (b) might be read to "grant[] new discovery authorities that could cause serious problems and undermine important protections contained in other laws." As published, (b) provided (emphasis added):

> (b) Modification of Discovery. After the discovery conference, one or both parties may ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial.

The Department noted that this language varies slightly from current Rule 16(d)(2)(A).

The Committee agreed to conform the language of the proposed rule to the phrasing of Rule 16(1)(b). There is no substantive difference between the phrasing used in the rule as published ("the timing, manner, or other aspect of disclosure") and the parallel words in Rule 16 ("time, place, or manner, or other terms and conditions of disclosure"). Although it seems unlikely that these slight differences would form the basis for a successful argument that Rule 16.1 was intended to be different in some important respect, the Committee had no objection to tracking the phrasing of Rule 16(d)(2)(A) in new Rule 16.1(b). As revised, the proposed rule provides:

> After the discovery conference, one or both parties may ask the court to determine or modify the ~~timing, manner, or other aspect of disclosure~~ time, place, or manner, or other terms and conditions of disclosure to facilitate preparation for trial.

The Department also suggested that the text of the rule be amended to state that the court may determine or modify the disclosure "in accordance with Rule 16 and other applicable law," and that the following language be added to the Committee Note:

> . . . nothing in this new rule is designed to change substantive discovery rules, grant the courts authorities in addition to what is provided for under Rule 16 and other applicable law, or change the safeguards provided in various security and privacy laws such as the Jencks Act or the Classified Information Procedures Act ("CIPA").

In its comment on the rule, NACDL (CR-2017-0012) opposed that suggested change, praising the flexibility of the rule as published and stating its understanding that the rule "rightly empower[s] 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."

The Committee did not accept the Department's suggestion that the text of the rule be revised to add references to Rule 16 "and other applicable law." Adding a requirement that the court must act "in accordance with . . . other applicable law" to this rule might suggest that unless the same language is added to other rules the courts have carte blanche to ignore other relevant laws. The style consultants were unanimous in rejecting this language.

The Committee agreed, however, that it would be appropriate to add language to the Committee Note addressing the Department's concern by recognizing the limited nature of the new rule. The placement of the new language (underlined below) shows that the new rule alters neither existing statutory safeguards for security and privacy, nor local rules or standing orders:

> The rule states a general standard 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 challenge increase. Moreover, the rule does not <u>modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, nor does it</u> displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure.

c. Pro se parties

Two comments addressed the application of the amendment to pro se parties, though they disagreed on the proper approach. The Department of Justice (CR-2017-0010) suggested that the Committee Note squarely address the point, implicit in the text, that the requirement of a pretrial conference is applicable only to attorneys and hence not to pro se defendants. NACDL (CR-2017-0010) disagreed, suggesting that "'attorney for the defendant' is properly understood to include defendants representing themselves." Further, NACDL argued, the Committee Note should confirm this understanding. It observed that where conferring with a pro se defendant would be impractical, the government can seek relief on a case-by-case basis.

These comments squarely presented for Committee discussion the question whether the prosecution should have a duty to confer with a pro se defendant concerning discovery within 14 days after arraignment, assuming that it would be feasible to do so. On the one hand, most pro se

defendants lack the training and experience to understand the discovery process, and conferring in such circumstances would often be difficult. On the other hand, cases involving pro se defendants may include quantities of ESI, and such defendants–even more than those represented by counsel–have a very significant interest in the timing and form of discovery.

The Committee again concluded, consistent with its assumption prior to publication, that for a variety of practical reasons it would not be appropriate to require the government to confer about discovery with each pro se defendant within 14 days of arraignment, and that the text should make this point more clearly. As published subsection (a) required "the attorneys for the government and the defendant" to confer and try to agree on the timetable and procedures for pretrial disclosures. As revised, subsection (a) refers to "the attorney for the government and the defendant's attorney."

Although the Committee agreed that it is not practical to require discovery conferences with pro se defendants, it also recognized that it is essential for such defendants to have pretrial access to material necessary to prepare their defense. To emphasize this point, the Committee unanimously supported adding to the Committee Note a statement about the courts' existing discretion to manage discovery and their responsibility to ensure pro se defendants "have full access to discovery." An addition to the Committee Note reads:

> 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.

d. Relocating or renumbering the amendment

Two comments addressed the location of the new provision. The Justice Department suggested that it might be desirable to delete subsection (b) and move the new provision imposing a duty to confer to Rule 16. A Concerned Citizen suggested (CR-2017-005), instead, that the new rule come after Rule 10 (arraignment) and before Rule 16 (discovery). This would, Concerned Citizen urged, preserve the present order of the rules, which follows the chronology of the typical criminal case. Citizen favored placing the new rule between Rules 11 and 12.

The Committee concluded that no change should be made in the numbering or location of the rule. A new, separate rule will be much more visible than placement within Rule 16, which is already very long and complex. A simple freestanding rule also parallels Rule 17. The Committee saw no reason to relocate the new rule.

e. Additional requirements of good faith and joint discovery reports

One commentator, Professor Daniel McConkie (CR-2017-0007), suggested that Rule 16.1, like the Civil Rules, should expressly impose the requirement of conferring in "good faith." He

noted that there are situations in which one party is not engaged and the other party "needs the ability to file a motion with some teeth to call out that bad behavior." In the drafting process the Committee considered including a good faith requirement, but it declined to do so. Indeed, members noted that discovery in criminal cases currently proceeds more smoothly than it does in civil cases, despite the explicit requirement of "good faith."

Professor McConkie also described local rules that require both discovery conferences and pretrial joint discovery reports, and he urged the Committee to add similar provisions to Rule 16.1. Although the Committee did not specifically consider the requirement of a joint defense report, in the drafting process it did consider–and decided against–more detailed requirements beyond conferring within 14 days after arraignment. Members were not persuaded that it would be desirable to add such a requirement.

f. Style changes

The Committee accepted several changes recommended by the style consultants, which did not affect the substance of the proposed rule.

The consultants recommended changes in the captions to more accurately reflect the subject of subsection (b). The revised caption is "Request for Court Action."

The consultants recommended the text in subsection (a) refer, for clarity, to "the attorney for the government and the defendant's attorney" rather than the "the attorneys for the government and the defendant."

Finally, the consultants recommended the deletion of a comma.

The Committee unanimously recommends that the Standing Committee approve new Rule 16.1 and the accompanying Committee Note, as amended after publication, for transmittal to the Judicial Conference.

III. Action Item: Rule 5(d) of the Rules Governing Section 2255 Proceedings and Rule 5(e) of the Rules Governing Section 2254 Cases

Judge Richard Wesley first drew the Committee's attention to a conflict in the cases construing Rule 5(d) of the Rules Governing § 2255 Proceedings. The Rule states that "The moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." Although the Committee Note and history of the amendment make it clear that this language was intended to give the inmate a right to file a reply, some courts have held that the inmate who brings the § 2255 action has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right.

After a review of the cases, the Committee concluded that the text of the current rule is contributing to a misreading of the rule by a significant number of district courts. A similar problem was found in cases interpreting parallel language in Rule 5(e) of the Rules Governing 2254 actions. Both rules currently provide that a prisoner may file a reply "within a time fixed by the judge." Apparently the reference to filing "within a time fixed by the judge" can be read as allowing a prisoner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The amendment published for public comment makes it clear that the moving party (or petitioner in 2254 cases) has a right to file a reply by placing the provision concerning the time for filing in a separate sentence:

> 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.

The Committee Note states that the Rule "retains the word 'may,' which is used throughout the federal rules to mean 'is permitted to' or 'has a right to.'"

A parallel amendment for Rule 5(e) of the Rules Governing 2254 Proceedings was also published for public comment. Although the case brought to the Committee by Judge Wesley concerned Rule 5 of the Rules Governing Section 2255 Proceedings, the Committee concluded that parallel treatment was warranted. The Committee that revised the amendments saw no reason to treat them differently, the same division of authority appears in both Section 2254 and 2255 cases, and the reasoning in the Section 2254 cases mirrors that in the 2255 cases.

Only three comments were received. Two addressed issues that had been considered before publication: whether there was any need for an amendment, and whether to replace "may" with a phrase such as "has a right to" or "is entitled to." These issues had been debated at length before publication, and the Committee decided there was insufficient reason to revisit them.

The third comment, from NACDL, expressed support for the proposed amendments to Rule 5 of both the 2254 and 2255 Rules, but suggested a related change. NACDL argued that inmates should be told about the reply and when it should be filed at the time the court orders the respondent to file a response; it proposed an additional amendment to Rule 4 of the Section 2254 and 2255 Rules. Although the Committee was not persuaded that an amendment to the Rules was warranted, it did approve the addition of the following sentence to the Committee Notes accompanying the Rule 5 amendments dealing with notice to prisoners of the time to reply:

> 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.

In the Committee's view, this addition would serve as a helpful reinforcement of best practices, and it would not require republication.

With this change to the Committee Notes for both Rules 5, the Committee voted unanimously to approve the Rule 5 amendments for transmittal to the Standing Committee.

The Committee unanimously recommends that the Standing Committee approve the amendment to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings, and the accompanying Committee Notes as amended after publication, for transmittal to the Judicial Conference.

* * * * *

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[1]

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.

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

[1] New material is underlined.

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).

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.