

WHITE-COLLAR CRIME

Expert Analysis

## Coming Changes to Federal Criminal Discovery Rule?

After years of expressing frustration with the barriers to trial preparation in complex criminal cases, with little to show for it, the organized defense bar has again called for revisions to the main rule governing pretrial discovery, Rule 16 of the Federal Rules of Criminal Procedure. Buoyed by a recognition among the judiciary that current practices must come to terms with the proliferation of electronically stored information, and by the Department of Justice's acceptance of the principle that amending the Rule would be useful, it now appears likely that an amendment will result. Whether any such changes will effectively address the real difficulties counsel face in preparing for trial in complex white-collar cases, however, remains to be seen.

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Procedure held a day-long “mini-conference” in Washington, D.C., to explore possible amendments to the Rule. The conference included lawyers, judges and academics, including a number of prominent practitioners from New York City, to gather facts and hear the broad spectrum of views on the topic. The Advisory Committee is now considering proposed options to amend Rule 16.

### Issues With Current Rule 16

The informational imbalance between the government and defense, present in all criminal cases but particularly problematic in complex white-collar cases, has long been a lament of defense counsel. The rules governing trial preparation in criminal cases, of which the

discovery rule is a major part, are the product of an era when the great bulk of federal prosecutions were in the areas of narcotics trafficking, organized crime and bank robbery. Prosecutions of business fraud, securities violations and other white-collar crimes were the exception. The rules thus reflect “an overarching concern about witness tampering,

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intimidation, and obstruction of justice, based in large part on the severity of punishments meted out and the characteristics of individuals accused of those hard core crimes.”<sup>1</sup>

The system's problems have been magnified by the continued growth of white-collar criminal prosecutions in recent decades, combined with the more recent explosive growth

of electronically stored information. One of the most significant current problems is the phenomenon of the “document dump”: in discovery the government buries the defendant in literally millions of documents and data, gathered over a years-long investigation, large portions of which may be of marginal or no relevance to the charges or expected trial. The problem is compounded by the structure of Rule 16 which requires the government to produce documents and tangible items if: they are material to preparing the defense; the government intends to use them in its case-in-chief; or the government obtained them from a defendant. Neither the text of the rule nor the weight of applicable court decisions require the government to specify in which of those three categories any particular material fits—most relevantly, to specify which items it intends to use in its case-in-chief.<sup>2</sup>

Further, the ubiquity and growth in volume of electronically stored information have exacerbated another longstanding problem: government follow-up productions of large quantities of new material on the eve of trial. The language of Rule 16 contains no mechanism governing the timing of discovery.

Some courts respond effectively to these concerns by issuing detailed pretrial scheduling orders in complex cases. Sometimes, either with or without court prompting, the government will provide discovery indexes, or even better, a list of “hot

documents” and a trial exhibit list, as well as such other critical aids to effective trial preparation as witness lists and early disclosure of witness statements and impeachment or *Giglio* material. The federal courts and Department of Justice do not, however, uniformly address the problems defendants face under the current Rule 16, and none of these useful mechanisms are directed by current rules.

### NYCDL and NACDL Proposal

Current efforts to amend Rule 16 kicked into gear with a March 1, 2016 letter to the Advisory Committee coauthored by the New York Council of Defense Lawyers and the National Association of Criminal Defense Lawyers.<sup>3</sup> The NYCDL/NACDL proposed modifications to the government’s discovery obligations under Rule 16 to require additional disclosure in complex cases upon application by either party. Under the organizations’ proposal, in determining whether a case qualifies as “complex,” the court should consider a number of factors including the complexity of the subject matter, the technical difficulty to understand and analyze the evidence, the number of documents, the number of defendants, the number of witnesses, and other factors that may necessitate additional time for preparation.

The proposed amendment includes an extended period for discovery in complex cases, allowing the government up to six months after arraignment to produce documents

accompanied by an index. The government also would be required to issue a certification of substantial disclosure during this time period. The court could not set a trial date earlier than one year from the date of the government’s certification. The government would be required to identify the exhibits it intends to use long in advance of trial.

### Reaction to the Proposal

The organizations’ proposed amendment was discussed at an April 2016 meeting of the Advisory Committee and met with resistance. Although they acknowledged the validity of the issues identified by the defense bar, some members believed resolution of discovery matters in complex cases should not be addressed by specific rule, but left to the discretion of the trial judge. The Justice Department echoed this sentiment, favoring the development of “best practices and guidance” in collaboration with the defense bar that easily could be updated to respond to changes in technology.<sup>4</sup> A subcommittee of the Advisory Committee was established to more closely study the NYCDL/NACDL proposal and the more general issue of discovery in complex criminal litigation.

Ultimately, the subcommittee set aside the NYCDL/NACDL proposal, finding it too prescriptive, but recognized the value in a “more modest proposal,” expressing concern that some trial judges may default to standard Rule 16 procedures without appreciating the difficulties the

Rule creates for defense counsel in complex cases. Three alternatives were prepared: one by the Department of Justice, and two by Professors Sara Sun Beale and Nancy King, Reporters to the Advisory Committee. The subcommittee also determined that it would benefit from a fact-finding mini-conference with all constituents—defense attorneys, prosecutors, federal judges, and academics—to discuss the nature and extent of the problem and potential solutions.<sup>5</sup>

### February 2017 Mini-Conference

As of the date of this publication, no report or minutes from the Feb. 7, 2017 mini-conference have been made public. The topics discussed at that gathering, however, can be gleaned from the materials, including the agenda, set forth on the U.S. Courts website.<sup>6</sup> First, the subcommittee put forth a series of questions for discussion, including whether amendment of Rule 16 is needed given that experienced judges already effectively manage complex criminal cases, and the view of some that providing additional resources and training to less experienced judges would be sufficient.

If an amendment is necessary, the subcommittee asked for information regarding the specific kinds of cases that pose the problem. In response to the NYCDL/NACDL proposal, the Justice Department expressed concern that the term “complex” is too broad and that any amendment should be narrowly targeted to specific types of

cases. The subcommittee asked participants at the mini-conference to discuss, among other questions: Is it the difficulty managing electronically stored documents, or the quantity of discovery in any form? Are there problems in cases with a large number of charges or defendants? Should a new rule specify factors to assess when a non-standard approach is warranted? Should the rule require a party request? Should the rule identify specific measures that might be appropriate? Should the language be mandatory or permissive? Should there be an amendment to current

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Rule 16, or a new, stand-alone rule?

Three alternative options were circulated to the mini-conference participants for consideration and comment. Option 1 is an amendment to Rule 16 drafted by the Justice Department. The DOJ draft adds a subsection to current Rule 16(d) entitled “Regulating Discovery.” It provides that where the “volume or nature of discovery materials” increases the complexity of the case, courts may enter a scheduling order or grant other appropriate relief to address disclosure under Rule 16.

The proposed advisory committee note to accompany the amendment states that it is intended specifically to address cases that involve “exceptionally large amounts of discovery, which is increasingly being provided in the form of electronically stored information, or ESI.”

Option 2, referred to as the “Stand-Alone Alternative,” sets forth a new Rule 16.1 limited to cases that are “complex, based on factors including the quantity and nature of discovery materials and charges.” The new rule would authorize alterations from the nature, scope and timing of discovery as set forth in current Rule 16 and requires courts to make a determination regarding a case’s complexity upon a timely motion of a party. The court’s decision in this regard presumably is subject to appellate relief given the mandatory language of the provision.

Option 3 is limited in scope, proposing the addition of text to existing Rule 16 that would require parties to produce ESI in a “reasonably stored format that conforms to industry standards and includes a suitable table of contents.”

The advisory notes accompanying each of the three proposed options include a reference and link to the Federal Judicial Center’s 2015 Publication “Criminal E-Discovery: A Pocket Guide for Judges.”<sup>7</sup> The ESI Pocket Guide focuses on addressing technical issues in the handling of ESI. Authored by a committee that included representatives from the Justice Department, defense counsel

and the judiciary, the Guide offers prepared colloquies to be used by trial judges in managing e-discovery at various stages of a case. The ESI Pocket Guide also contains the ESI Protocol, produced in 2012 by another group of representatives of the judiciary, defense counsel and the Justice Department. The ESI Protocol sets forth detailed technical recommendations on e-discovery issues and includes checklists for lawyers and judges to follow. Based on 10 guiding principles, the Protocol envisions a collaborative approach to e-discovery. Many of the guiding principles are based on procedure and logistics, such as formatting and transmission methods, and direct the parties to confer at the case outset regarding ESI discovery.

## Conclusion

The Rule 16 Subcommittee was right to focus on the defining the problem—and the heart of the problem is that the discovery system is designed primarily to mitigate concerns with witness intimidation and obstruction, rather than to provide defendants the tools they need to prepare to defend document intensive cases addressing complex subject matters. Any effective amendment to Rule 16 must provide that courts may vary from the minimum existing standards when the complexity of the case, the volume of discovery, or the low risk of obstruction warrant such variation. Such amendment must not simply cross-reference technical protocols for handling ESI. Rather, if it does not

mandate such practices, it should list suggested steps to be considered, such as extension of the pretrial period; notification that discovery is substantially completed; discovery indices and “hot document” lists; and the exchange of trial exhibit lists, as well as other critical aids to effective trial preparation such as witness lists and early disclosure of witness-related material.<sup>8</sup>

The options currently under consideration, particularly Option 2, are welcome steps in the right direction: directing courts to consider changes to the discovery process in complex cases. They are, however, either too narrow in defining the applicable cases or too limited in proposing solutions. The problem is not merely the technical handling of large volumes of ESI. Including the practices set forth above directly in the text of an amended Rule 16 (or new stand-alone rule) would most effectively convey the message that such practices—already in use by experienced judges, prosecutors and defense counsel—are salutary and appropriate options to achieve fairer adjudication of complex criminal cases.



1. See generally, Robert G. Morvillo, Barry A. Bohrer and Barbara L. Balter, “Motion Denied: Systematic Impediments to White Collar Criminal Defendants’ Trial Preparation,” 42 Am. Crim. L. Rev. 157 (Spring 2005). The most significant manifestation of this concern is how the rules generally carve out witness statements from the government’s regular discovery obligations, requiring their production only at the last possible moment. See Fed. R. Crim. P. 26.2; 18 U.S.C. §3500.

2. Id.; see also Sarah Kropf, Andrew George, William C. Cleveland, and Julie Rubinstein,

“The ‘Chief’ Problem with Reciprocal Discovery Under Rule 16,” *The Champion* (September/October 2010).

3. Letter to Donald W. Molloy, U.S. District Judge, from Roland G. Riopelle, President NYCDL, Peter Goldberger, Chair, NACDL Federal Rules Committee, and William Genego, Chair, NACDL Federal Rules Committee (March 1, 2016).

4. Memorandum from Hon. Donald W. Molloy, Advisory Committee on Criminal Rules, to Hon. Jeffrey S. Sutton, Chair, Committee on Rules of Practice and Procedure (May 14, 2016).

5. See Excerpt, Draft Minutes of Criminal Rules Meeting (September 2016) (attached to Criminal Rule 16 Mini-Conference Agenda (Feb. 7, 2017).

6. Criminal Rule 16 Mini-Conference Agenda (Feb. 7, 2017).

7. Available at [http://www.fjc.gov/public/pdf.nsf/lookup/Criminal-e-Discovery.pdf/\\$file/Criminal-e-Discovery.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Criminal-e-Discovery.pdf/$file/Criminal-e-Discovery.pdf).

8. Although any directive that the government provide early disclosure of witness statements is barred by federal statute, 18 U.S.C. §3500, the government often agrees to such disclosure, sometimes prompted by notice from the court that without disclosure the government can expect adjournments to be granted during trial. Also, there is no statutory impediment to a court directing early disclosure of witness impeachment material, which often will induce the early production of witness statements as well.