

**ADVISORY COMMITTEE
ON
CRIMINAL RULES**

RULE 16 MINI-CONFERENCE

Washington, DC
February 7, 2017

TABLE OF CONTENTS
CRIMINAL RULE 16 MINI-CONFERENCE
February 7, 2017

AGENDA	5
TAB 1 Reporters’ Memorandum to Mini-Conference Participants (January 12, 2017).....	9
TAB 2 Draft Rule Text	
Option 1: DOJ Draft	21
Option 2: A Stand-Alone Alternative.....	25
Option 3: New Section for Electronically Stored Information.....	31
TAB 3 List of Mini-Conference Participants	35
TAB 4 Suggestion 16-CR-B (New York Council of Defense Lawyers and National Association of Criminal Defense Lawyers).....	39
TAB 5 Excerpt from the Draft Minutes of the September 2016 Meeting of the Advisory Committee on Criminal Rules	49

AGENDA
CRIMINAL RULE 16 MINI-CONFERENCE
February 7, 2017

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Washington, DC 20544

Mecham Conference Center

- | | |
|------------------------|--|
| 8:00-9:00am | <i>Breakfast</i> |
| 9:00-9:15am | Welcome and Introduction |
| 9:15-10:30am | Discussion of whether there is a need for an amendment |
| 10:30-10:45am | <i>Break</i> |
| 10:45am-12:00pm | Discussion of the categories of cases that should be subject to an amendment |
| 12:00-1:00pm | <i>Lunch</i> |
| 1:00-3:30pm | Discussion of drafting issues including comments on Options 1, 2, and 3 |
| 3:30pm | Adjourn |

TAB 1

MEMO TO: Participants in Rule 16 Mini-Conference

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 16 Proposals

DATE: January 12, 2017

I. Introduction

The Advisory Committee on Criminal Rules is considering amending the Rules to address discovery in complex cases. This conference is the result of the Committee's decision that it would be useful to collect additional information about the problem(s) such an amendment might address and potential responses, and to obtain focused comments and critiques of specific proposals. Conference participants have been invited to share their experience and advice with the members of the Advisory Committee's Rule 16 Subcommittee:

Judge Raymond Kethledge (Sixth Circuit Court of Appeals) (chair)
Judge Gary Feinerman (N.D. Illinois)
Judge Donald Molloy (D. Montana) (Advisory Committee chair)
Mark Filip, Esq.
John Siffert, Esq.
Prof. Orin Kerr
Jonathan Wroblewski (U.S. Department of Justice)
Michelle Morales (U.S. Department of Justice)
Judge Amy St. Eve (N.D. Illinois) (Standing Committee liaison) (ex officio)

A list of participants is included at the end of this memo.

This memo lists issues on which the Subcommittee seeks conference participants' views and provides three versions of a proposed rule for participants to critique (Options 1, 2, and 3). Participants are also welcome to raise additional issues.

As additional background for the discussion, we have included a letter from the New York Council of Defense Lawyers and National Association of Criminal Defense Attorneys proposing an amendment to Rule 16 for complex cases, and excerpts of the draft minutes of the Advisory Committee's fall meeting at which there was a preliminary discussion of the NYCDL/NACDL proposal and other options for amending Rule 16.

II. Issues for Discussion

1. **Is any amendment needed? Do existing Rules address this adequately? Is the problem better addressed by non-Rules actions such as judicial training?**

The most fundamental question is whether there is any need to amend Rule 16. Some have suggested that experienced judges already manage these complex cases and problems well, and that providing resources and training to the less experienced judges would be sufficient. But others maintain that even experienced judges sometimes fail to recognize or refuse to address the difficulties that defendants face in these cases, and that an amendment to the Criminal Rules is warranted (though providing resources and training would also be helpful).

This issue is closely related to the next question, about the kinds of cases—if any—that pose the problems that may warrant a change in the Rules of Criminal Procedure.

We would like participants to (1) describe their experiences in complex cases involving particularly voluminous discovery (including, but not limited to ESI), and (2) share their initial views on the question whether an amendment to the Rules would be desirable in light of those experiences.

2. **If Rules action is warranted, how should the category of cases warranting separate treatment be defined and limited by the text of the proposed rule? Cases involving ESI? Cases involving “voluminous” discovery? Is it “complexity” that creates these problems? How specifically should these cases be described?**

We would like participants to discuss the specific problem or problems they think the Rules should address. Is it the difficulty navigating and managing electronically stored documents? Does digital information in the form of audio or video pose problems as well as text and data? Are there other types of evidence, such as expert or scientific evidence, that existing rules do not adequately address? Is it the quantity of material, regardless of its nature, that poses difficulties? Are there problems in cases with a large number of charges or defendants?

Another key question is how specific to make the description of the type of case warranting modified procedures. An advantage of using a general term like “complex” is that it would accommodate change and permit maximum flexibility. A disadvantage of a general term is that it provides little guidance for judges and lawyers.

If the Rule itself did not specify what factors or features would warrant departures from default schedules and rules, some guidance to counsel could be provided by illustrations in the Committee Note. It would be helpful to hear participants’ views on the desirability of using the Committee Note for this purpose.

We list below a variety of more specific questions we hope participants will address.

3. Should a new rule specify which factors a judge should consider in assessing whether a non-standard approach is warranted?

See discussion about specificity of description in point 2, supra.

4. Should the language of a new rule require or reference a party or defense request?

If the rule is mandatory (see point 7 below), then the terms under which judicial action is required should be very clear. For example, the rule might require that the defendant raise the issue by a motion (and might set a time limit for the motion). Only when the specified conditions are met would the rule mandate action by the judge. (It is also possible that such a motion might become routine, like a Brady request, and raised in every case.)

If the rule is permissive and non-enforceable, then a defense request seems less essential.

If a request is to be specified in the text of the rule, should it be limited to defendants, or also include the government?

5. Should the language identify specific measures that might be appropriate, such as the provision of an index?

We think answering this question requires first deciding whether timing alone is at issue. If the proposed rule is only about granting the defense more time, then further specifics about potential measures are probably unnecessary. Some believed that accommodation should or at least may include more than scheduling adjustments (which, as some observed, are already contemplated by 18 U.S.C § 3161(h)(7)(B)(ii) for cases that are “complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law”). The problem in some cases, they argued, is not just timing, it is that information is provided in a form that cannot be electronically searched or is otherwise unusable.

6. Should the text or note address the Jencks Act or other parts of Rule 16 limiting judicial power to order pretrial disclosure of witness information?

If the new rule could be interpreted as authorizing a judge to order pretrial disclosure of witness statements, it may conflict with Rule 16(a)(2) and 18 U.S.C. § 3500(a). To make it clear that the Rule is not intended to have that effect, clarifying language could be added to the text or Committee Note.

7. Should the language be mandatory and enforceable on appeal, or permissive?

Whether a rule regarding judicial management of discovery in complex cases should be mandatory or permissive may turn in part upon whether and to what degree appellate oversight of district court compliance is desired. A new rule mandating that the judge make a specified determination or consider specified factors would presumably be enforceable on appeal, like other rules requiring that judges do or refrain from doing something. Examples of rules

requiring the court to make a specified determination include Rule 11(b)(3) requiring determination of factual basis, Rule 30(b) mandating a ruling on instructions before closing arguments, Rule 32(i)(3)(B) requiring ruling on disputes about the PSR, and Rule 32.2(b)(1)(A), mandating forfeiture determinations. Examples of rules or statutes requiring the court to consider specified factors include Rule 18 (“due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice”), Rule 60(a)(2) (consider “reasonable alternatives to exclusion”), and of course 18 U.S.C. § 3553(a).

In general, appellate review of judicial action or inaction prior to trial must await a final judgment. A claim on appeal that the trial judge violated a mandatory rule could result in remand for new trial if the trial court abused its discretion and the error was not harmless.¹ The abuse of discretion standard is applied to other rulings under Rule 16(d), but conceivably a different standard of review could be specified for any new obligations.

A permissive rule would not be enforceable on appeal, but it could both “send a signal” regarding preferred judicial behavior and eliminate any argument that the action described was NOT permitted. Rule 17.1 is such a rule, making a pretrial conference entirely optional, but regulating aspects of that conference if held. See also Rule 14(b) (providing court may order in camera disclosure of defense statement), Rule 21(b) (providing a court may transfer a case upon defense motion), and Rule 28 (providing the court may appoint an interpreter). Rules may suggest but not require considerations of certain factors as well, such as Rule 35(b)(3), stating the court may consider the defendant’s presentence assistance.

8. Should proposed text addressing discovery in these cases be folded into existing Rule 16, or rather appear in a new, stand-alone rule, numbered Rule 16.1

Most of Rule 16 requires or prohibits certain actions by parties, not the court. Only section (d) regulates judicial action. New mandates or advice to judges concerning managing discovery could easily be added to this section and would be easy to find. Amending section (d) also has the advantage of not requiring a duplicate sanctions provision.

On the other hand, a new rule might bring more attention to this particular problem. It also suggests a more radical departure from all of Rule 16 than a new subsection in existing Rule 16 suggests.

III. Example Proposals

Three possible alternatives for an amendment are included here.

A. Option 1: DOJ Draft

At the request of the Committee, the Department of Justice has submitted an amendment that the Department (under the current administration) has agreed to support. Given how

¹ Interlocutory review may, however, be available for a judicial decision to impose certain sanctions.

difficult it has been in the past to secure DOJ agreement for amendments to Rule 16, we believe it would be prudent to include the DOJ's draft as one of the examples that the Subcommittee circulates to conference participants.

Note that the DOJ draft resolves the issues listed above as follows.

1. Assumes an amendment would be useful. (But note DOJ has not advocated for an amendment.)
2. Limited to “cases where the volume or nature of discovery materials, including electronically stored information, significantly increases the complexity of the case.”
3. Does not specify factors to consider in the text; references ESI protocol and STA in note.
4. Does not require or reference a defense request.
5. Limits suggested judicial responses to alteration of timing of disclosure or inspection only. Does not authorize alterations from the nature or scope of disclosure. States: “enter a scheduling order or grant other appropriate relief *to address the timing of the parties’ disclosure or inspection.*” Does, however, reference ESI protocol in the Committee Note.
6. Limits authority to “relief to address the timing of the parties’ disclosure or inspection pursuant to this Rule.” Addresses changes in timing of disclosure and does not alter substance of disclosure.
7. Permissive, not mandatory. A court is free to ignore the new language or stick with Rule 16 standards if it chooses: “the court may enter a scheduling order or grant other appropriate relief.” Any order a court chooses to enter would be enforceable as any other discovery order.
8. Adds text to existing Rule 16.

B. Option 2: A Stand-Alone Alternative

Option 2 shows a version of what a new Rule 16.1 might look like. This draft resolves the issues above as follows.

1. Assumes an amendment would be useful.
2. Limited to cases that are “complex, based on factors including the quantity and nature of discovery materials and charges.”

3. Specifies the following required, but non-exclusive factors to consider in the text: “including the quantity and nature of discovery materials and charges.”
4. Limits defense entitlement to such a determination to cases in which a motion is made within 30 days of arraignment. Does not preclude a court’s sua sponte determination without defense motion.
5. Bracketed language would authorize alterations from the nature or scope of disclosure as well as timing, limits to measures that would facilitate the parties’ ability to prepare for trial and that are in the interests of justice. States: “modifying the timing [or other aspects] of disclosure or inspection in order to facilitate the parties’ ability to prepare for trial.”
6. Does not mention Jencks or other restrictions of Rule 16 directly, but alteration in timing or other aspects of disclosure or inspection leave open that possibility.
7. Mandatory, not permissive. The text **REQUIRES** the court to make a determination upon timely motion. The text also **REQUIRES** the court to consider, at least, “the quantity and nature of discovery materials and charges,” and **REQUIRES** the court to consider, if it determines the case is complex, “whether, in the interests of justice, to adopt measures modifying the timing [or other aspects] of disclosure or inspection in order to facilitate the parties’ ability to prepare for trial.”

These three mandates presumably would support appellate relief, just as other mandates in Rule 16 can be enforced. Claims regarding discovery must await a final judgment. Assuming the claim is adequately preserved, an appellate court could decide that a new trial is required if a trial court abused its discretion by failing to (1) make a determination, (2) consider the specified factors, *or* (3) consider whether the interests of justice require modifications, assuming that the error was not harmless. Certain sanctions for discovery violations may be the subject of interlocutory appeal.

8. Creates a separate rule.

C. Option 3: New Section for Electronically Stored Information

Option 3 addresses only the format and table of contents for ESI, and resolves the issues listed above as follows.

1. Assumes an amendment would be useful.
2. Limited to disclosure of electronically stored information.
3. Does not specify factors to consider.

4. Does not require or reference a defense request.
5. Requires that the format must be “reasonably usable,” that the format “conform to industry standards,” and that the information include a “suitable table of contents.” A court may allow a party to dispense with one or more of these requirements upon a showing of good cause.
6. Limits requirement to format and table of contents; does not mention Jencks or other restrictions of Rule 16.
7. Mandatory, unless party first shows good cause.
8. Adds text to existing Rule 16.

TAB 2

OPTION 1

32 interest in ensuring that ESI discovery is managed effectively.
33 Although courts currently have the authority to enter or modify
34 scheduling orders in complex cases pursuant to Speedy Trial Act
35 (18 U.S.C § 3161(h)(7)(B)(ii)), and the qualifications and
36 protections under that Act still apply, the amendment is intended to
37 serve as a reminder that in a subset of complex cases where
38 discovery is voluminous, standard or standing scheduling orders
39 may not be appropriate. Rather, courts may instead enter
40 scheduling orders modified or designed to best serve the specific
41 case before the court. In such cases, the courts and the parties may
42 also benefit from the guidance provided by the Federal Judicial
43 Center’s publication: “*CRIMINAL E-DISCOVERY: A Pocket*
44 *Guide for Judges*” found at
45 [http://www.fjc.gov/public/pdf.nsf/lookup/Criminal-e-](http://www.fjc.gov/public/pdf.nsf/lookup/Criminal-e-Discovery.pdf/$file/Criminal-e-Discovery.pdf)
46 [Discovery.pdf/\\$file/Criminal-e-Discovery.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Criminal-e-Discovery.pdf/$file/Criminal-e-Discovery.pdf), as well as the
47 “*Recommendations for Electronically Stored Information (ESI)*
48 *Discovery Production in Federal Criminal Cases*,” found at
49 <https://www.fd.org/docs/litigation-support/final-esi-protocol.pdf>,
50 as issued by the Joint Working Group on Electronic Technology in
51 the Criminal Justice System; and the *Guidance for the Provision of*
52 *ESI to Detainees*.

OPTION 2

Option 2: A Stand-Alone Alternative

1 **Rule 16.1. Complex Cases: Pretrial Disclosure.**

2 **(a) Determining Whether a Case Is Complex.** Upon a
3 party's motion filed within 30 days of arraignment, the court
4 shall determine whether the case is complex. The court may
5 also make the same determination on its own motion at any
6 time.

7 **(b) Determining Whether to Modify Pretrial**
8 **Disclosure.** If the court determines that a case is complex,
9 the court shall consider whether, in the interests of justice, to
10 adopt measures modifying the timing [or other aspects] of
11 disclosure in order to facilitate the parties' ability to prepare
12 for trial.

13 **(c) Remedies for Failure to Comply.** If a party fails to
14 comply with an order entered under this rule, the court may
15 enter any order that is just under the circumstances.

16 17 **ADVISORY COMMITTEE NOTE**

18 This new rule allows the court to modify pretrial
19 disclosure in cases of unusual complexity, such as cases
20 involving exceptionally large amounts of discovery
21 provided in the form of electronically stored information
22 (ESI). In a subset of complex cases, standard scheduling
23 orders and discovery procedures may not be appropriate.
24 Rather, courts may instead enter scheduling and discovery
25 orders modified or designed to best serve the specific case
26 before the court and ensure adequate preparation for trial.

27 The new rule allows the parties to seek a
28 determination at an early stage in the proceedings whether
29 the unusual complexity of a case warrants modifications of
30 standard scheduling orders and discovery procedures.

31 Within 30 days after arraignment, a party may by motion
32 seek a ruling that the case is complex. A court may also
33 rule, sua sponte, that a case is complex.

34 If the court rules that a case is complex, it may
35 adjust the standard scheduling orders. Courts have the
36 authority to enter or modify scheduling orders in complex
37 cases pursuant to Speedy Trial Act (18 U.S.C §
38 3161(h)(7)(B)(ii)), and the qualifications and protections
39 under that Act apply to orders under the new rule.

40 The new rule also makes clear that courts have the
41 authority modify other aspects of the discovery process in
42 complex cases to facilitate the parties' preparation for trial.
43 For example, cases in which discovery includes
44 voluminous ESI may require that disclosure include an
45 index, that material be provided in a searchable format, or
46 other measures. In such cases, the courts and the parties
47 may also benefit from the guidance provided by the Federal
48 Judicial Center's publication: "*CRIMINAL E-DISCOVERY:
49 A Pocket Guide for Judges*" found at
50 [http://www.fjc.gov/public/pdf.nsf/lookup/Criminal-e-
51 Discovery.pdf/\\$file/Criminal-e-Discovery.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Criminal-e-Discovery.pdf/$file/Criminal-e-Discovery.pdf), as well as
52 the "*Recommendations for Electronically Stored
53 Information (ESI) Discovery Production in Federal
54 Criminal Cases,*" found at
55 [https://www.fd.org/docs/litigation-support/final-esi-
56 protocol.pdf](https://www.fd.org/docs/litigation-support/final-esi-protocol.pdf), as issued by the Joint Working Group on

57	Electronic Technology in the Criminal Justice System; and
58	the <i>Guidance for the Provision of ESI to Detainees</i> .
59	

OPTION 3

Option 3: New Section for Electronically Stored Information

1 **Rule 16 Discovery and Inspection.**

2 * * * * *

3 **(c) Disclosure of Electronically Stored Information.** Unless good
4 cause is shown, electronically stored information subject to production
5 must be produced in a reasonably usable format that conforms to industry
6 standards and includes a suitable table of contents.

7 **(ed) Regulating Discovery.**

8 * * * * *

9 **COMMITTEE NOTE**

10 The amendment adds a new section (c), to address discovery of
11 electronically stored information. The new section includes three
12 requirements for producing such information: that the format must be
13 “reasonably usable,” that the format “conform to industry standards,” and
14 that the information include a “suitable table of contents.” A court may
15 allow a party to dispense with one or more of these requirements upon a
16 showing of good cause. Courts and the parties may also benefit from the
17 guidance provided by the Federal Judicial Center’s publication:
18 “*CRIMINAL E-DISCOVERY: A Pocket Guide for Judges*” found at
19 [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), as well as the
20 “*Recommendations for Electronically Stored Information (ESI) Discovery*
21 *Production in Federal Criminal Cases*,” found at
22 <https://www.fd.org/docs/litigation-support/final-esi-protocol.pdf>, as issued
23 by the Joint Working Group on Electronic Technology in the Criminal
24 Justice System; and the *Guidance for the Provision of ESI to Detainees*.

25 Current subdivision (c) has been renamed (d).
26

TAB 3

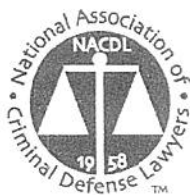
Mini-Conference Participants

Advisory Committee on Criminal Rules	
<p>Hon. Donald W. Molloy Chair U.S. District Court, Missoula, MT</p>	
<p>Prof. Sara Sun Beale Reporter Duke Law School, Durham, NC</p>	<p>Prof. Nancy King Associate Reporter Vanderbilt University Law School, Nashville, TN</p>

Criminal Rule 16 Subcommittee	
<p>Hon. Raymond M. Kethledge Chair U.S. Court of Appeals, Ann Arbor, MI</p>	
<p>Hon. Gary Feinerman U.S. District Court, Chicago, IL</p> <p>Mark Filip, Esq. Kirkland & Ellis LLP, Chicago, IL</p> <p>Prof. Orin Kerr George Washington Law School, Washington, DC</p> <p>Michelle Morales, Esq. DOJ Policy & Legislation Office, Washington, DC</p>	<p>Hon. Amy J. St. Eve (ex officio) U.S. District Court, Chicago, IL</p> <p>John Siffert, Esq. Lankler Siffert & Wohl LLP, New York, NY</p> <p>Jonathan Wroblewski, Esq. DOJ Policy & Legislation Office, Washington, DC</p>

Participants	
<p>David Adler, Esq. Bellaire, TX</p> <p>Russell Aoki, Esq. Aoki Law PLLC, Seattle, WA</p> <p>Sean Broderick AO Defender Services Office, Oakland, CA</p> <p>Amy Harman Burkart, Esq. Assistant U.S. Attorney, District of MA, Boston, MA</p> <p>Donna Lee Elm, Esq. MDFL Federal Public Defender, Tampa, FL</p> <p>Hon. Jonathan W. Feldman U.S. District Court, Rochester, NY</p> <p>Emma Greenwood, Esq. Emma Greenwood Law Office, New York, NY</p>	<p>Andrew Goldsmith, Esq. DOJ Deputy Attorney General Office, Wash., DC</p> <p>John Haried, Esq. Assistant U.S. Attorney, District of CO, Denver, CO</p> <p>David Markus, Esq. Markus Moss PLLC, Miami, FL</p> <p>David Patton, Esq. Federal Defenders of NY, Brooklyn, NY</p> <p>Catherine Recker, Esq. Welsh & Recker, Philadelphia, PA</p> <p>Roland Riopelle, Esq. Sercarz & Riopelle, LLP, New York, NY</p> <p>Alexandra Shapiro, Esq. Shapiro Arato, New York, NY</p>

TAB 4



NEW YORK COUNCIL OF DEFENSE LAWYERS

Peter Goldberger, Esq.
William Genego, Esq.
 Federal Rules Committee Chairs

Roland G. Riopelle
 President

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.
Chair, NACDL Federal Rules Committee

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.

TAB 5

EXCERPT, DRAFT MINUTES OF CRIMINAL RULES MEETING, SEPTEMBER 2016

B. Rule 16.1 (15-CR-B)

Judge Kethledge, Chair of the Rule 16 Subcommittee, stated that at the last meeting the Committee considered a proposal by NYCDL and NACDL to amend Rule 16 to govern judicial management of discovery in complex cases. The proposal was extremely prescriptive, and there was widespread opposition to it at the meeting. The Committee set the specific proposal aside and discussed cases that involve extremely complex financial transactions or massive quantities of data, including a case with hundreds of thousands of audio tapes. The Committee recognized that if the judge fails to recognize and address the difficulties that this overwhelming discovery can pose for defense counsel, counsel's ability to prepare for trial can be impaired; cases that perhaps should be litigated and go to trial may be settled for reasons unrelated to the merits. Judge Molloy appointed a subcommittee and asked it to look at the issue.

At the Subcommittee's first call, Judge Kethledge reported, members decided that the bar proposal was a non-starter, because you can't prescribe wisdom. But the Subcommittee thought it was worth considering a more modest proposal, and the consensus was that it would be useful to create a process that would allow counsel to direct the court's attention to the problems that the defense faces in these kinds of cases. Judge Kethledge stated that this problem is not going to arise in the courtroom of an experienced judge, highly engaged, who will craft case management orders to accommodate these situations. The concern is that if the judge is inexperienced or not as engaged as he should be, Rule 16 procedures become the default and as a result counsel will have great difficulty preparing for trial. The Subcommittee tried to come up with a mechanism to allow defense counsel to engage the court with the problems these cases pose and discussed a number of factors the court could use to consider whether a case is "complex" (a term that is probably too broad).

Several alternatives were drafted after the call, he stated. One was longer, intended to assist judges dealing with this sort of thing for the first time. The first section listed a number of factors to get the court thinking about the difficulties counsel is facing dealing with the volume of data. The second section provided measures that the court could consider if the court determines that a case is complex. The third section provided actions the court could take if the court has implemented measures and one of the parties does not comply. A second version was much shorter and did not lay out all the factors and measures, leaving these to the accompanying Committee Note. Subcommittee members' feedback before the second telephone conference suggested that something in between would be better. A third alternative was drafted that simply says the party can move to have the court determine if a case is complex; if it is complex the court can consider measures that would facilitate preparation for trial; and finally non-compliance could be met with any measure that would advance the interest of justice.

During the Subcommittee's second call, Judge Kethledge said, DOJ expressed the concern that the term "complex" is broader than the problem at hand. If the problem is overwhelming discovery, the term complex captures more than that, such as cases in which expert testimony is particularly difficult. Judge Kethledge reported that the Subcommittee has asked the Department to suggest more narrowly tailored language that would not raise these

concerns. He suggested that the Committee's process might parallel its development of the amendments to Rule 41: the Department came to the Committee with some general language, and the Committee revised the proposal to be more narrowly tailored to address the particular problem the Department had raised.

Ms. Morales agreed that the Department believes using the term "complex" will invite a host of problems. DOJ could support an amendment that would be narrowly targeted to specific sorts of cases, that invites the court to stop and consider whether these cases require some adjustments. But the language of the Subcommittee drafts opened Pandora's box and raised a lot of issues. The Department has drafted two versions which have yet to be approved for submission to the Committee, but she was optimistic that a compromise can be reached.

Another member suggested that the proposed amendment might use "may" instead of "must," and he spoke against narrowing the potential rule. He said that some members had suggested that the rule would make sense in electronic discovery cases, but he is not sure what "an electronic discovery case" is. For example, he described a case in the SDNY, with 18 defendants and 24,000 calls with wiretap materials, and another case with 500,000 audio tapes. "Complexity" does cover more than digital issues, he asserted. He recognized that there may be a need to triage and deal with electronic issues specifically, but the Criminal Rules should be able to accommodate another avenue. This is needed to ensure that judges cannot force trials without allowing proper discovery and without the defense having the opportunity to understand what the charges are and the proof will be. He said he was not sure what the Pandora's box would be other than fairness to the defense.

One member noted there is a lot of scar tissue in this area, as generations of proposals to amend Rule 16 have come and gone, making it more difficult to address. He hoped that compromise language can be reached, and that it will result in a small positive step forward. But the reality, he said, is that you have to trust the common sense, pragmatism, and practicality of district judges, and you can't legislate through Rule or otherwise how to handle pretrial proceedings or access. For every litigant operating in good faith, he commented, there is another trying to figure out reasons to delay a trial or put 400 associates on a case to generate a gajillion gigabytes of data. Sometimes judges get frustrated. Sometimes the tribunal doesn't give as much access as it should. But that would be hard to deal with by rule or otherwise. Appellate courts, knowing how successful trial judges have been in the past, are not going to be keen about trying to manage, outside the bounds of abuse of discretion, how trial judges handle this.

Another member said it may be more helpful to have something in the rules about electronically stored information than it would be to attempt to regulate the discretion of district judges in designating particular complex cases. He said it may be helpful to have hearings or engage in fact-finding efforts to find out exactly what the problem is and what would solve it, to obtain a better understanding of the facts from the defense bar and the government regarding which cases need the most attention.

One member said he was pleased the NYCDL/NACDL proposal was a non-starter with the Subcommittee. He also saw real downsides to the drafts. One draft was so general it didn't say anything at all. Another would transform whatever litigation now takes place concerning

claims that the trial judge in a big criminal case has not adequately accommodated the interests of the defendant in a fair trial, whether by aggressive scheduling or insufficient discovery. He said the draft would turn the current claim--that the judge's abuse of discretion resulted in a fundamentally unfair trial that didn't conform to due process--into an argument that nitpicks every term in the Rule. He warned that litigation would question whether the judge adequately considered the complexity of the charged conduct, what quantity of documents is too many, what is the meaning of "likely to be disclosed," etc. Any rule carries unforeseen complications beyond the due process we have now. The problem of inexperienced judges encountering one of these cases also occurs on the civil side, and the solution is very different than what is being proposed here. There is a manual for complex litigation and conferences to educate judges with multi-district litigation. That has worked well without any rule amendments. This approach should be pursued instead of a Rule, if the problem is inexperienced judges.

Another member agreed that these training opportunities could be a supplement to a Rule, but also noted that the Civil Rules—unlike the Criminal Rules—provide for discovery, requiring that the defense be provided with the evidence and witnesses. Normally you can figure out the charge, he said, but when you have hundreds of thousands of tapes and gigabytes of data with no index, and you do not know what evidence the government is going to use to prove its case, it is impossible for the defendant to figure out the defense. It is essential for the defense to know where to find the evidence that is relevant is and what the government is relying on. Unless judges are required to consider how to give the defense access to that information, there cannot be a fair trial. This member also disagreed that the defense would ever want to pour through hundreds of thousands of tapes; the defense wants to know which tapes are relevant and might rebut the government's interpretation of the evidence. He noted that even sophisticated judges sometimes do not feel the need to allow access needed for a fair trial. If the defense were given the index and the government were forced to identify what its exhibits were, the likelihood is that there would be more dispositions sooner. Professor Beale asked if these issues are heightened in the criminal context because of the bare-bones pleading requirements. The member replied that it was both the pleadings and the discovery rules. He added that in criminal cases—unlike civil cases—there are no special masters, magistrate judges closely handling discovery, or interrogatories for the witnesses that will be called.

Another member stated that if the defense could get the civil discovery rules and the time to conduct discovery, she would give up this proposed rule in a minute. The differences between civil and criminal discovery are overwhelming. In 85- 90% of cases defenders in federal cases represent poor people, and in those cases they must go to the judge if they want an expert. That complicates the situation enormously because the judges rightfully have discretion as to how much to spend, who you can hire, at what point you can hire them. Most defense counsel who get huge electronic discovery cases and huge multi defendant cases need someone to give their time and expertise to work on those cases. Although the protocol for sharing electronically stored information exists, and many people worked really hard on it, it isn't followed, though not because the Department of Justice is deliberately failing to follow it. But the Department of Justice is huge. And its lawyers change. They got the protocol, and they understood it, and then they left. So Federal Defenders are constantly trying to work to get just a table of contents for these huge cases, and they don't always get even that. This is a real problem, she concluded, it

impacts all criminal defendants, and it would be worth this Committee's time to do something to make the situation better, even a small first step.

Ms. Morales responded that this may be more of a resource and training issue, rather than a rules issue. She expressed concern that the language of the drafts under consideration by the Subcommittee would invite litigation and confuse Rule 16 further, and hope that the Departments' proposed language will address the issues raised. The ESI protocol includes a pocket guide for judges, which is the result of years of work of collaboration between the Department and Federal Defenders. She said the Department's drafts will reference it. Technology moves quickly, raises many different issues, and requires very careful consideration. The protocol and pocket guide address these issues, and the draft could point directly to the pocket guide or summarize some of those measures.

A judge member stated this is an issue that needs to be addressed, noting he has had several cases in which just before trial defense counsel said "We just had dumped on us this many audio tapes and this many documents." The member's initial reaction was wishing this had been brought to his attention earlier so he could have done something about it, or that the parties could have worked this out. A judge has the authority to regulate these matters and facilitate discovery in this way if the parties cannot work it out themselves. As to how best to bring these issues to the attention of the bench and bar, although the non-rules mechanisms are great ideas, this member said but the best way would be by a rule. If there is a rule, everybody knows about it. Any rule, he said, should put the onus on defense counsel to bring this issue to the court's attention. It is the defendant who is being burdened, and judges should not have to guess when a problem might arise or raise something that might be a can of worms that otherwise wouldn't have been opened. The member favored brevity in a rule as opposed to some sort of detailed code, and thought that electronic discovery is an acceptable way to define the types of cases, but only if that term encompasses voluminous audio tapes.

A member noted that managing criminal discovery is different than civil discovery where lawyers have to do more work. This judge said she took the lead from the defense counsel in criminal cases as to what they need and that in her experience at least one of the defense counsel will take the lead and ask for what they need. Any rule should tell judges what kinds of things make a case complex. Sometimes a case is not complex in a general sense, but there are thousands of wiretapped conversations, and it is the quantity of discovery and how time consuming they are that causes problems. A new judge would want to know what are the things that make the case complex, so if it is the volume of discovery, the rule should say that so that a judge new to criminal cases will know. The judge may not see this until somewhere later down the road, and if the judge needs the reins a little bit early on, it would be good to have a laundry list of factors.

Another member agreed with the comments of the last two speakers and added that like Rule 17.1 (which states the court may hold pretrial conferences) a new rule could highlight the judge's options. The note could probably explain hypothetical cases that might need attention. Just like 17.1, a short rule could let judges know you can do this on your own, without a defense motion (though it will be the defense lawyer making the motion in the vast majority of cases). And an amendment could help with the case budgeting process, knowing the defense will be

going over the CJA limit because they anticipate this sort of discovery, which will be more involved than the ordinary case. A rule would bring it to everyone's attention. Manuals and conferences are also avenues, but this member favored something brief like Rule 17.1 that leaves the discretion to the judge.

One member observed that the proposal was asking for more active judicial management in handling discovery in criminal cases, and also strongly supported the idea of having the Federal Judicial center provide complex criminal case training.

A member responded to an earlier comment about the impact of a rule on appellate litigation, saying he didn't know what would be so bad about the courts of appeals having to articulate guidelines for what constitutes a fair trial. He asked why is it a problem to tell trial judges that defense lawyers need to know what the evidence will be, and that they need an index so that they can find it.

Judge Campbell observed that what is proposed in this rule is something judges already have the authority to do. Judges already can hold status conferences, set schedules, and at least in one circuit, require witness lists from the government and exhibit lists in advance of trial. The question is what do you do with the weakest of judges in order to get them to focus on it and think about it. He noted that the Civil Rules Committee has wrestled with this on the civil side. You write rules for the worst case managers recognizing that the good judges don't need the rules at all, he said.

He said he was surprised that there are complex cases in other districts that are not already coming to the attention of the judges early in the case. Complex cases come to his attention regularly by motions, filed primarily by defense attorneys, asking him to designate a case as complex for purposes of the Speedy Trial Act. The motion is invariably accompanied by a request for a case management conference. He orders the parties to work this out, they provide their agreement, and he tweaks it a bit. If a complex case does not come to his attention under the Speedy Trial Act, he said, they come in under the Criminal Justice Act because the defense lawyers want to get that budget early on, anticipating that it is going to exceed the prescriptive amount.

On fact finding, Judge Campbell reported that the Civil Rules Committee found it useful to hold a focus group meeting, called a mini-conference, with about 25 lawyers, judges and some academics representing a broad spectrum of views, who meet for a day with the subcommittee that is addressing an issue. He said that a month or two ahead of the meeting attendees were sent a list of things being considered, including proposed language changes. They were asked to come prepared to address those issues. The Committee tried to invite people who were involved in bar groups, who would canvas the position of those groups. The day-long session with these very well informed people helped the Civil Rules Committee get a much better sense of what is happening on the ground and how the rules may make a difference.

Judge Sutton expressed support for the criminal equivalent of the manual for complex civil litigation. He agreed with the suggestion that the Committee should study how the ubiquity of email and new technology has changed discovery in criminal cases, whether that leads to

rulemaking or not. He expressed some skepticism about a rule. He reported that about 10 years ago the Appellate Rules Committee met at Emory to ask Professor Freer to critique the Rules process. Freer's basic thesis was that the Rules Committees do way too much "small ball," enacting one technical amendment after the other to correct whatever silly problem, on the assumption that such amendments do no harm. But 10% of the time there is harm from amendments because of unintended consequences. And the broader harm is that the Rules have become too complex, increasingly inaccessible to someone who just graduated from law school. Judge Sutton recommended being more careful with the small-ball amendments and not assuming they are cost-free. Professor Freer was very frustrated that we rarely took on big bold projects or stepped back and asked what we are doing here. What concerns me about the proposals before the Committee, Judge Sutton said, is that they seem to be the epitome of small ball. What is added by the language in the shortest version of the rule, which seems so obviously true? On the other hand, he was very skeptical that we could get bolder versions of the amendments done. They would be similar to the Rule 16 Brady amendments. Rule 16 has a big graveyard of proposals, he noted, and DOJ will oppose any bold proposal. So it looks like the options are an amendment that accomplishes very little or facing difficulties in getting approval for a bolder proposal. He suggested further study, including a conference to bring in experts and people who know what is going on. Finally, he said, he was skeptical of importing anything from the civil rules on discovery into the criminal rules.

A member followed up, stating that a substantial body of precedent with the Jencks Act and bills of particulars will make it hard to do anything really bold. He also observed that this discussion about post-indictment discovery is primarily about prosecutions of individuals, because corporations tend not to get to this point.

Judge Kethledge stated that he heard that more clarity about the problem we are addressing is needed, and that the suggestion of more fact finding at a mini conference is a good one. Judge Molloy stated the Subcommittee with its current chair should consult with Judge Campbell about past conferences. He said the proposal makes a legitimate point, but we can use the conference to explore whether this is a judge problem or a rule problem.