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18-CR-F

August 30, 2018

VIA EMAIL ONLY: donna_elm@fd.org

Advisory Committee on Criminal Rules
Attn: Donna Lee Elm
400 North Tampa Street, Suite 2700
Tampa, FL 33602

Re: Proposal to Change the Expert-Disclosure Provisions of Fed. R. Crim. P. 16

Dear Ms. Elm and the Committee:

I am a CJA attorney in the District of New Mexico who also does a substantial amount of federal civil work. I am excited to hear that the Committee is considering adopting more civil-style expert disclosure rules, and I wanted to share my thoughts on the matter briefly.

I. Complaints About the Current System

In my opinion, the criminal system for handling expert witnesses – in which opponents of an expert get neither a detailed expert report nor a deposition – is inferior to its civil analogue in virtually every way. Even cost/efficiency, which I believe to be the real justification for many of the comparatively minimal discovery rights afforded in criminal cases, suffers here, because the Court often ends up in the position of having to sit and watch an expert deposition – which in criminal cases is called a "*Daubert* hearing" (not to be confused with the "*Daubert* hearings" in civil cases, in which the Court hears primarily legal arguments and whatever minimal testimony still needs to be developed after the successive issue refinement provided by the expert report and deposition) – unfold live in open court.

In my experience, the way the expert disclosure process often plays out in criminal cases in federal court is that the proponent of the expert will file a two-to-three-page (double-spaced) summary either of the opinions that the proponent *hopes* the expert will say or of the broad topics (barely narrower than the "subject matter") that the expert *can* testify on. Here, the simple requirement (which exists in Civil Rule 26(a)(2)(B) but not in Criminal Rule 16) that the report be "signed by the witness" is huge. Many summaries from the Government are (1) written by an AUSA and not even *seen* by the expert prior to the *Daubert* hearing; and (2) written before the

expert has formed his actual opinions. The experts that are particularly susceptible to this are those that repeatedly testify to more or less the same opinions in multiple cases, often by stating general principles of their field of expertise and leaving it to the jury to apply those principles to the case at hand.

For example, there might be an out-of-state child psychology expert who has testified for the Government in numerous Districts in sex trafficking cases, and this expert might have become one of the word-of-mouth go-to experts for AUSAs nationwide facing sex trafficking cases that appear to be headed to trial. An AUSA in a case set for trial in a month and a half might contact this expert and 'sign them up' with the understanding that the expert will not be expected to know much about the facts of the case, but rather will be called to testify, 'seminar-style,' about general principles of the child psychology of sex trafficking. The AUSA might then copy and paste the Rule 16(a)(1)(G) summary of the expert's testimony in his or her most recent case, perhaps modifying the summary to tie principles that *the AUSA* believes apply to the instant case to the facts (the AUSA is especially likely to do this if, in the prior case, the expert *did* tie principles to facts). At that point, defense counsel is handed a "summary" that is effectively a prior publication excerpt – *i.e.*, a statement by an expert not made in connection with the instant case – that lacks the reliability attendant to actual publication (both the carefulness of the author and the review of the expert's peers), and that is augmented by the (non-)expert opinion of the AUSA.

There is no built-in penalty for the AUSA for doing this, provided that he or she drafted an over-inclusive summary (*i.e.*, one containing opinions that the expert will not ultimately testify to) rather than an under-inclusive one, as the penalty of having extraneous opinions struck is no penalty at all if the expert was never going to testify to them anyway, and the defense cannot even impeach the expert with the summary because the expert did not write it.[1] The defense counsel might then file a *Daubert* motion that is directed to opinions that the expert does not even have, and the Court will then set a hearing. Cross-examination at criminal *Daubert* hearings, in my view, tends to try to serve the role of both deposition (with open questions for the purpose of discovery) and hearing (with leading questions for the purpose of persuasion), and does neither well.

II. Proposal for Reciprocal Expert-Report Discovery

At a minimum, I believe the Committee should require an *expert signed* disclosure for all retained experts (a term I will use to refer to those experts required to provide a report under Civil Rule 26(a)(2)(B)).[2] I also see little downside to requiring that this report fulfill all the detailedness requirements of a civil expert report.

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[1] Judges seem to vary regarding whether an opponent technically *can* impeach an expert with the summary – *i.e.*, whether reading from the document to contradict the expert is allowed (I always say that the summary is attributable as a prior statement by the expert under FRE 801(d)(2)) – but it certainly is not *effective* impeachment when the expert can honestly explain that he or she neither wrote nor approved the summary.

[2] I will discuss this more below, *see* Park III, *infra*, but please do ensure, if your rule recognizes a (sensible) distinction in disclosure obligations between retained/'party-controlled' experts on the one hand and unretained/independent experts on the other, that case agents who testify in a dual role as both fact and expert

How to handle reciprocity is an interesting issue. My sense is that heightening the current Rule 16(a)(1)(G)/(b)(1)(C) requirements by adding an expert report obligation for retained experts will benefit defendants more than the Government, simply because the Government uses more experts. That said, the current paltry expert disclosure regime of the Criminal Rules incentivizes defendants in some cases – at their selection – to forego *any* reciprocal expert disclosure, and those cases, although somewhat rare, can when they arise put the defendant in a much better situation than the Government, given the ability to effectively circumvent the pretrial *Daubert* motion process. (This might occur if, for example, the defense anticipates that the Government will either not put on expert testimony or will only put on expert testimony in which disclosure will be minimally helpful to the defense – such as chemical identification of drugs testimony, which is obviously *Daubert*-satisfying and where the defense knows what is going to be said – and the defense intends to put on expert testimony either from a less than reputable expert or field of study, or that will be difficult for the Government to anticipate the contours of, such as battered spouse testimony in support of a self-defense claim.) In short, I think the increase from no disclosure to reciprocal "summary" disclosure benefits the Government more than the defense, while the increase from reciprocal "summary" disclosure to reciprocal "report" disclosure benefits the defense more than the Government.

Given that reality, I would retain the obligations imparted by Rule 16(a)(1)(G) and (b)(1)(C) as they currently exist and simply add an *additional* ground of reciprocal discovery that obligates the production of a signed expert report for retained expert witnesses (this would then excuse the obligation of providing a summary for those experts). Here is a proposed redline of the relevant portions of Rule 16, with additions underlined and deletions stricken; where text taken from Civil Rule 26(a)(2)(B) is modified, I have noted it in red:

> **(G)** **Expert ~~witnesses~~ Summaries.** At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the

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witnesses fall on the party-controlled/higher disclosure side of the divide. This is one area where there is a major difference in context and expectations between the criminal and civil rules and practice. In civil cases, when a judge or attorney thinks of a "dual role" expert who has both facts and expert opinions to testify about, they are probably thinking of a 'treating physician,' and the judge's major concern is probably *encouraging* their use by not weighing down proponents with unrealistic obligations that the proponent then has to pass onto the physician, who may have no particular desire to participate in the case; in short, such witnesses are seen as desirable and trustworthy, and the rules are written and interpreted with that in mind. In criminal cases, dual role experts are usually law enforcement officers who want to explain why their factual observations point to the defendant's guilt by way of 'expert' testimony that (1) may have been developed during the instant case's investigation (*e.g.*, meanings of code words); (2) may be more suspicion, speculation, or intuition than real expertise; (3) may veer into 'profile' evidence of the defendant, which may be unreliable and may violate character-evidence rules; and (4) may invade on the decisionmaking province of the jury. These experts are widely viewed as suspect, and the courts have largely struggled in curtailing the dangers of their use. *See, e.g.*, *United States v. Rodriguez*, 125 F. Supp. 3d 1216, 1248-53 (D.N.M. 2015) (outlining six dangers of law-enforcement expert testimony).

government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(H) **Expert Reports.** At the defendant's request, the government must give to the defendant a written report – prepared and signed by the witness – for each witness from whom the government intends to elicit testimony under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial, if the witness is one retained or specially employed in an investigative capacity or to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

If an expert report is provided for a witness under this subdivision, the government need not separately provide an expert summary for that witness under subdivision (a)(1)(G).

. . . .

(C) **Expert ~~witnesses~~ Summaries.** The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if--

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(D) Expert Reports. If a defendant requests disclosure under Rule 16(a)(1)(H) and the government complies, then the defendant must give to the government a written report – prepared and signed by the witness – for each witness from whom the defendant intends to elicit testimony under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial, if the witness is one retained or specially employed in an investigative capacity or to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

If an expert report is provided for a witness under this subdivision, the defendant need not separately provide an expert summary for that witness under subdivision (a)(1)(G).

I fully admit that the addition of an entirely separate subdivision for reports (versus summaries) is not the most elegant draftsmanship, but the Rule already breaks out "reports of examinations and tests" from "documents and objects" and "expert witnesses," and I think attempting to jam extensive new material into subdivision (a)(1)(G)/(b)(1)(C) will render those subdivisions difficult to read.

III. Proposal for Reciprocal Depositions of Retained Experts

This is probably asking for too much (and too big of a break from the longstanding federal criminal tradition opposing depositions), but I also genuinely believe that providing an additional option for the reciprocal deposition of retained experts would increase both the quality of the truth-seeking function of discovery and the efficiency of the proceedings. The benefits of expert depositions are obvious, and efficiency could be additionally improved by (1) time-limiting the depositions to less than the civil standard of seven hours (I have found that 4 hour depositions work well); (2) reversing or loosening the civil case norm that the deposition taker has primary authority for selecting the date and time of the deposition, and providing a late deadline by which the expert's proponent must make the expert available for deposition – I would think that 7-14 days before the *Daubert*-motions deadline would be sufficient – so that the number of depositions taken in cases that ultimately plead out is minimized; and (3) tying the taking of an expert deposition to a requirement (either explicit in the rule or recognized by convention, although I recommend the former given the strong inertia of convention among the criminal bar) that any *Daubert* motion contain citations to the transcript sufficient for the Court to rule on the motion without a hearing. My state's state court system gives criminal litigants a right to interview *all* of the other side's witnesses – not just experts – and the world has not come to an end; the procedure is widely popular among the bar and believed to produce superior results to a 'blind' system (and the pretrial interview system to which I am referring is, in many ways, *much* more onerous on the prosecution than the reciprocal-at-the-defense's-option system of expert depositions that I am proposing here).

If the Committee were interested, I think such a change could be made by simply adding a new subdivision to the bottom of Rule 16(a)(1), "Depositions of Retained Experts," and adding a couple words long disclaimer somewhere in Rule 15 effectively subjecting expert depositions to the procedural provisions of Rule 15, but not its availability provisions. I would recommend making a condition of the defendant's invocation of the reciprocal deposition option that he waives the right to appear personally at the depositions (either the government's depositions of his experts or his depositions of the government's); Rule 15(c) currently grants the defendant a right to be present at depositions.

Aside from the obvious benefits, an additional plus to implementing this idea is that it will provide some deterrent/drawback to designating fact witnesses aligned with a party (usually case agents) as dual-role expert witnesses, as doing so would expose them to a deposition that they would otherwise not have to go through. *See supra* note 2. I think that this result is entirely appropriate not just as a matter of 'rough justice,' but also because such expert testimony is among the most in need of close examination under Rules 702-705 (and probably really 701); if the Government wants to put on "expert" testimony in the venerable scientific field of "why my client is guilty," then it should at least have to demonstrate how that expertise was developed through *actual* experience *outside* of the instant case – a time-consuming vein of cross-examination that is among the least appropriate things to ask an expert about in front of a jury (which is the current method of handling the task).

Thank you for taking the time to review my concerns. I think this is an important topic where there is significant room for meaningful improvement in the Rules. Best of luck with your changes.

Very truly yours,

Carter B. Harrison IV

CBH/ml

cc: Rebecca A. Womeldorf
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