Rule 15. Depositions.

(a) **When Taken**.

(1) *In General*. (i) A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. (ii) A party may also move that a prospective witness be deposed for purposes of discovery. The court shall grant the motion for up to five deponents, so long as it finds that the testimony of the prospective witness(es) will likely be material to the issues at trial, and that there are no compelling reasons to deny the deposition. The court may impose whatever conditions it deems necessary for the conduct of the deposition, and may permit additional depositions in its discretion. (iii) If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

(2) *Detained Material Witness*. A witness who is detained under 18 U.S.C. §3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) **Notice**.

(1) *In General*. A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.

(2) *To the Custodial Officer*. A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

(c) **Defendant's Presence**.

(1) *Defendant in Custody*.

(a) Except as authorized by Rule 15(c)(3), as to a deposition to perpetuate testimony, a defendant in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. The court shall order that the the officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(b) As to a discovery deposition, the defendant shall have no right to attend, but the court may permit such attendance in the interest of justice, subject to any conditions deemed necessary. In the event the defendant's presence is permitted, the court shall order that the officer who has custody of the defendant produce the defendant at the deposition and keep the defendant in the witness's presence during the examination.

(2) *Defendant Not in Custody*. Except as authorized by Rule 15(c)(3), as to a deposition to perpetuate testimony, a defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant – absent good cause – waives both the right to appear and any objection to the taking and use of the deposition based on that right. As to a discovery deposition, the defendant shall have no right to attend, but the court may permit such attendance in the interest of justice, subject to any conditions deemed necessary.

(3) *Taking Depositions Outside the United States Without the Defendant's Presence*. The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

(d) **Expenses**. If the deposition was requested by the government, the court may-or if the defendant is unable to bear the deposition expenses, the court must-order the government to pay:

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

(e) **Manner of Taking**. Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) **Admissibility and Use as Evidence**. An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

(g) **Objections**. A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

Rule 15. Depositions.

(a) **When Taken**.

(1) *In General*. (i) A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. (ii) A party may also move that a prospective witness be deposed for purposes of discovery. The court shall grant the motion for up to five deponents, so long as it finds that the testimony of the prospective witness(es) will likely be material to the issues at trial, and that there are no compelling reasons to deny the deposition. The court may impose whatever conditions it deems necessary for the conduct of the deposition, and may permit additional depositions in its discretion. (iii) If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

(2) *Detained Material Witness*. A witness who is detained under 18 U.S.C. §3144 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) **Notice**.

(1) *In General*. A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.

(2) *To the Custodial Officer*. A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

(c) **Defendant's Presence**.

(1) *Defendant in Custody*.

(a) Except as authorized by Rule 15(c)(3), as to a deposition to perpetuate testimony, a defendant in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. The court shall order that the the officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(b) As to a discovery deposition, the defendant shall have no right to attend, but the court may permit such attendance in the interest of justice, subject to any conditions deemed necessary. In the event the defendant's presence is permitted, the court shall order that the officer who has custody of the defendant produce the defendant at the deposition and keep the defendant in the witness's presence during the examination.

(2) *Defendant Not in Custody*. Except as authorized by Rule 15(c)(3), as to a deposition to perpetuate testimony, a defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant – absent good cause – waives both the right to appear and any objection to the taking and use of the deposition based on that right. As to a discovery deposition, the defendant shall have no right to attend, but the court may permit such attendance in the interest of justice, subject to any conditions deemed necessary. (3) *Taking Depositions Outside the United States Without the Defendant's Presence*. The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

(d) **Expenses**. If the deposition was requested by the government, the court may-or if the defendant is unable to bear the deposition expenses, the court must-order the government to pay:

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

(e) **Manner of Taking**. Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) **Admissibility and Use as Evidence**. An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

(g) **Objections**. A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

Federal Bar Council Quarterly

June/July/Aug. 2023 www.federalbarcouncil.org Vol. XXX, No. 4

In This 4th (Yes, 4th!) 30th Anniversary Issue:

We invite you to connect with us on LinkedIn.

In My View

No Depositions in Federal Criminal Cases? It's Time to Revisit That Rule

By Larry H. Krantz

I have a recurring nightmare. I represent a client charged with securities fraud. He is facing 20 years. The indictment against him tracks the language of the statute, but provides no particularity. My request for a bill of particulars was denied. I have deposed none of the witnesses because the rules do not permit it. Nor have I interviewed any witnesses, because they refused to speak with me. They did not want to be involved and feared provoking the ire of the government. I have spoken with my client, who tearfully denies his guilt.

The trial starts. The prosecutors present a smooth case. They have prepared their witnesses in dozens of prep sessions. They have spoken to them all, in private, and know what they will say. I have been given notes of those conversations but they contain only what the law enforcement agents who were present chose to write down. In the last several prep sessions no notes at all were taken. Those few witnesses who refused to speak with the prosecutor were subpoenaed to testify in the grand jury. I could not be present or submit questions. I do have transcripts of that grand jury testimony, but the questions were barebones and designed to elicit only information helpful to the prosecution.

At trial there are a slew of new allegations against my client. I am left to blindly cross-examine. I ask only questions where:

(1) The witness's answer is locked in, based on documents;

(2) Logic compels only one answer; or

(3) I have a good plan of action regardless of the answer given.

I call no witnesses, because I cannot take the risk of calling them blind. I do my best to cross-examine but it feels like I have one hand tied behind my back. In summation, I hammer the presumption of innocence and the reasonable doubt standard, but it is not enough and the result is predictable: my client is convicted.

I wake-up in a cold sweat. But then I fall back to sleep.

I dream again. This time I have another federal criminal trial. I am representing the same client against the same allegations of securities fraud. But this time it is a civil case. All that is at issue is money. For this trial, the complaint spelled out the fraud with particularity, as required by the rules. Then, in discovery, I deposed every meaningful witness. I learned how their testimony was helpful and how it was damaging. I learned the holes in their testimony. I previewed areas of potential cross-examination. At trial I am prepared. There are no surprises. I know the questions to ask and the witnesses to call. Through cross-examination and presentation of my own witnesses, I prove what is needed. I sum up with confidence and the jury quickly finds for my client. I wake with a smile.

The Real World

As you have no doubt gathered, my nightmare and my dream are not just fantasies. They are reflections, albeit oversimplified, of the striking dichotomy between criminal and civil practice under the federal rules. That dichotomy is perhaps nowhere more glaring than as to the right to depositions. One need only compare Federal Rule of Civil Procedure 30 with Federal Rule of Criminal Procedure 15. Rule 30 encourages depositions as a critical part of the truth-seeking process:

Rule 30.

(a) When a Deposition May Be Taken.

(1) *Without Leave*. A party may, by oral questions, depose any person, including a party, without leave of court. . . . The deponent's attendance may be compelled by subpoena under Rule 45.

Rule 15 does the opposite. It eliminates depositions, except in the rarest instance where they are necessary to preserve testimony:

Rule 15. Depositions
(a) When Taken.

(1) *In General*. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. . . .

This opposite treatment of the right to depositions under the civil versus criminal rules cries out for an answer to the question: Why? Intuitively, one would think that the criminal rules would be more permissive as to discovery, given that liberty rather than money is at stake. But the reverse is true.

So how did the rules on civil discovery become so different from the criminal rules? The answer lies in a decision made 80 years ago, and may surprise you.

The Dichotomy Between the Civil and Criminal Rules

The roots of the split between the civil and criminal rules are examined by Professor Ion Meyn in his article "Why Civil and Criminal Procedure Are So Different: A Forgotten History." 86 Fordham L. Rev. 697 (2017) ("Meyn"). As he explains, for centuries under the common law, federal criminal and civil procedure operated under the same rules – and in neither instance were depositions generally permitted. Rather, it was a two-step process: pleading to trial. Meyn at 701. But the civil rules underwent a radical transformation with the enactment of the Federal Rules of Civil Procedure in 1938. Under those rules, civil practice went to a three step process that included an in-between phase, discovery, which became the "heart" of litigation. *Id*. at 705-06.

The reforms embodied in the Rules of Civil Procedure were widely praised. The U.S. Supreme Court itself said a few years later in *Hickman v. Taylor*, 329 U.S. 495, 501 (1947):

> [C]ivil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for parties to obtain the fullest possible knowledge of the issues and facts before trial.

With the enactment of the civil rules complete, in 1940 Congress authorized the Supreme Court to draft rules of criminal procedure. Meyn at 707. The Supreme Court delegated its authority to a new advisory committee, just as it had done for the civil rules. *Id.* at 705-706. The Supreme Court appointed New York University Law Professor Arthur Vanderbilt as chair, Professor James Robinson as reporter, and Alexander Holtzoff, a special assistant to the U.S. Attorney General, as secretary. *Id.* at 707-708. The committee members were all prosecutors or academics. There was no representation from the defense bar. *Id*. at 729.

In a slice of history largely lost until Professor Meyn's research, the committee's initial approach to drafting the criminal rules was to mirror the reforms embodied in the recently enacted civil rules. According to documents uncovered by Professor Meyn, the first draft of the criminal procedure rules, which were written in 1941, adopted the civil rules "almost [in] whole cloth." *Id*. at 720. As the committee's reporter wrote about the draft: "[The] criminal rules follow as closely as possible in organization, in numbering and in substance the Federal Rules of Civil Procedure." *Id*. at 710. As justification, the reporter explained: "[T]he civil rules . . . have won a deserved prestige. There is no reason why the criminal rules might not well follow as closely as possible the plan and content of the civil rules and in that way gain some of the same confidence that has been afforded the criminal rules." *Id*. at 711. This mirroring of the civil rules in the first draft of the criminal rules included key aspects of the newly created discovery phase, including "depositions, document requests, physical and mental examinations, and requests for admission." *Id*. at 720.

Professor Meyn's conclusion is confirmed in a 1957 law review article by Professor Lester Orfield, who served on the original advisory committee. He wrote that "Rules 26 through 32 of the First Draft of the Federal Rules of Criminal Procedure dated September 8, 1941, were modeled on Rules 26 through 32 of the Federal Rules of Civil Procedure." Lester Orfield, *Depositions in Federal Criminal Cases*, South Carolina Law Review, Vol. 9: Iss. 3, Article 4, p. 2 (1957) ("Orfield").

The full committee met in September 1941 to consider this first draft. While the draft had taken six months to complete, it "was undone in four days." Meyn at 712. According to the committee's internal notes, uncovered by Professor Meyn, this was principally because of objections loudly asserted by the committee's secretary, Holtzoff, and a few committee members who followed his lead. These opponents feared that defendants would misuse depositions to cause delay. They also believed that depositions simply did not belong in criminal cases, with one opponent opining that to "go into the other side's case to examine anybody . . . before trial is a thing you would never think of in a criminal case." *Id*. at 721. As another opponent said: "This is a way of getting discovery before trial and preparing evidence to meet it with, which means that unscrupulous defendants may fabricate evidence with which to meet the [government's] evidence." *Id*. at 722.

With these reservations expressed, Holtzoff – a strong opponent of engrafting the civil rules into the criminal context – volunteered to draft the second version of the rules. That version was drafted following the September 1941 meeting and dramatically altered the deposition (and other discovery) rights, limiting depositions to situations where there would otherwise be a "failure or delay of justice." In subsequent committee drafts over the next two years, the rule was further eroded: It was limited to instances where a witness would not otherwise be available for trial. *Id*. at 726. The other discovery reforms of the civil rules, including document requests, interrogatories and requests to admit, were also jettisoned.

In this way, the criminal rules ultimately adopted by Congress in 1944 parted ways materially from their sister civil rules. As documented by Professor Meyn, this rejection was most likely the result of the lack of criminal defense lawyers on the advisory committee, and Holtzoff's "force of personality." *Id*. at 736. As to why Holztoff pushed so hard to cleave the new criminal rules from the new civil rules, he appears to have had an overly zealous "tough on crime" mentality. His approach was blind to any consideration that some defendants might actually be innocent, or that in any event they were presumed innocent and entitled to a fair trial. As Holtzoff was later quoted as saying: "[P]erpetrators of crimes must be detected, apprehended and punished. The conviction of the guilty must not be unduly delayed. . . . The protection of the law-abiding citizen from the ravages of the criminal is one of the principal functions of government. Any form of criminal procedure that unnecessarily hampers and unduly hinders the successful fulfillment of this duty must be discarded or radically changed." *Id*. at 733. These views reveal Holtzoff's one-sided thinking about the criminal justice system. The rules ultimately drafted reflected this stilted view.

After 80 Years, It Is Time to Revisit the Rules

The prohibition against discovery depositions has not changed since the enactment of the criminal rules in 1944 (despite other amendments to the language of Rule 15). And there has been little to no organized pushback. The principle that a criminal defendant has no deposition rights has become so entrenched that it feels almost blasphemous to suggest that the rule be otherwise. The absence of depositions in federal criminal cases has become an immutable truth.

This is highly unfortunate. Based on my experience in trying both civil and criminal cases in federal courts, the absence of depositions in criminal cases does great harm to the truth-seeking process. In civil cases, the ability to conduct depositions is the great equalizer. Depositions allow both sides to uncover the facts needed to present the full picture at trial. And by presenting that full picture the factfinder is far better situated to evaluate the evidence and reach a just result.

The absence of depositions makes federal criminal trials lopsided events characterized by a cavernous witness access imbalance. One side knows everything that a prospective witness will say on a subject, while the other side knows little if anything. One side can tiptoe around the landmines, while the other side has to stay miles away from a potential explosion. This does not further the truth-seeking process or make for a fair trial. Just the opposite.

To make matters worse, this problem is largely invisible to participants other than defense counsel. It can often not be seen by prosecutors or even the judge. To understand the problem requires getting inside defense counsel's mind. It requires knowing the questions defense counsel does *not* ask because the answers are unknown. It requires knowing the witnesses defense counsel does *not* call because they have refused to interview. When I was a federal prosecutor earlier in my career, I was

oblivious to these problems. To me, the system was just perfect as is.

These invisible problems are the real costs of the absence of depositions. And they underscore the need for reconsideration of the 80-year-old rule under which there are no depositions.

In reconsidering the rule, much can be learned from 13 states that have rejected the federal model and that do allow depositions in criminal cases, with varying limitations. Seven states – Vermont, Florida, Indiana, Missouri, Iowa, North Dakota and New Mexico – allow for depositions as a matter of right without prior court approval. Bryan Altman, *Can't We Just Talk About This First?: Making the Case for the Use of Discovery Depositions In Criminal Cases*, 75 Ark. L. Rev. 1, 38 (2022). Six states – New Hampshire, Texas, Arizona, Nebraska, Montana and Washington – allow for discovery depositions upon leave of court for good cause. *Id.* at 39. While there is great variation among the rules adopted, there is a unifying principle: These states have determined that the benefits of allowing depositions – with appropriate restrictions – outweigh the dangers cited by those who oppose depositions in criminal cases. In a 1989 study conducted in Florida, a commission created to evaluate the deposition rules that had been in effect since 1972 concluded: "[Discovery depositions in criminal cases] make a unique and significant contribution to a fair and economically efficient determination of factual issues in the criminal process. . . . [Criminal discovery depositions] should not be abolished or significantly curtailed." Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 Wisconsin Law Review 541, 613 (quoting the study). And while there currently are bills pending in Florida to prohibit the deposition of children and other vulnerable witnesses in criminal cases, the basic right to discovery depositions has remained in place for 50 years. *See* Jim Ash, *Defense Attorneys Wary of Bill to Limit Some Depositions in Criminal Cases,* The Florida Bar News (March 9, 2023) (floridabar.org); John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?,* 16 Fla. St. U. L. Rev. 675 (1988). In all 13 of these states, the availability of depositions has remained in effect and the fears of deposition opponents – such as Holtzoff – have not been realized.

Conclusion

There are arguments on both sides of the debate over whether discovery depositions should be available in criminal cases, and if so, how they should proceed. But that debate has been muffled for decades because the existing rule is taken as a given. It is time for reconsideration. Even original committee member Orfield advocated for change in his 1957 law review article, writing:

> What about amending the Rule so as to adapt the wider scope of the Federal Rules of Civil Procedure? Much can be said for such a proposal. . . . [I]t should be the policy of the law to permit as broad a scope of inspection and deposition in criminal cases as apply in civil trials. I cannot believe that anyone will be deprived of a right by the promulgation of a rule which seeks to provide a means for unearthing facts, whether those facts are pertinent in a criminal prosecution or a civil action. (quotations omitted.)

Orfield at 38.

To be sure, any change in the rule to allow discovery depositions would have to be carefully tailored to deal with issues including witness safety, victim trauma, trial delay, and the consequences of the defendant's Fifth Amendment privilege (which precludes deposing the defendant absent waiver). But these issues can be addressed, particularly with the aid of judicial supervision over the process. And the presence of tough issues is no reason to avoid the debate entirely, or to throw out the proverbial "baby with the bathwater."

It is time for careful study and a more nuanced approach to the problem, rather than the current "one-size-fits all" solution that simply eliminates discovery depositions altogether. Justice demands it. In the words of Justice William J. Brennan, given in a lecture (later converted to an article) in which he advocated for more expansive discovery in criminal cases:

> Depositions have proved an important discovery tool in civil cases, and when a defendant's freedom, rather than civil liability, is at stake, we should enhance rather than limit the discovery that is available. Neither witness statements nor an opportunity to cross-examine at a preliminary hearing, when one is held, provide an adequate substitute for a deposition.

William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for the Truth? A Progress Report,* 68 Washington University Law Quarterly 1, 12 (1990).

These words ring just as true today. We should listen to them.

Author's note: My thanks to Marjorie Berman, who assisted in the drafting of this article.

Editor's note: Readers with comments or differing views are encouraged to send their thoughts to the editor-in-chief, Bennette Kramer, at bkramer@schlamstone.com.