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2/23/04

MEMORANDUM

03-CR-007

TO: Secretary of the Committee on Rules and Practice and Procedure  
Administrative Office of the United States Courts  
Washington, DC 20544

FROM: Kevin J. Cloherty  
Chair, Federal Bar Association ("FBA") Criminal Section

DATE: February 16, 2004

RE: Comments on proposed change to Rule 12.2 of the Federal Rules of Criminal Procedure ("Rule 12.2").

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This memorandum outlines comments from the FBA's Criminal Section on the proposed change to Rule 12.2.

Under the proposal, Rule 12.2 would be amended to codify the court's power to exclude expert evidence on the issue of mental health if the defense has failed to provide the government with the proper disclosures prior to trial. On its face, it is hard to criticize a rule that makes the defense bear the same responsibility as the government to provide information about expected expert testimony. However, we feel the proposal goes to far from a practical perspective. If a defense counsel fails to give proper notice where there is some merit to the defense and the evidence is excluded because of late disclosure,<sup>1</sup> any conviction would be subject to attack for ineffective assistance of counsel, both on direct appeal and in collateral attack under 28 U.S.C. § 2255. This is especially true in death penalty cases.

Thus, we believe a better course of action would be to have Rule 12.2 make clear that the government should be given ample opportunity (including a continuance of the trial) to have the defendant examined. In addition, the government should be given fair and adequate time to prepare a potential rebuttal to any late-disclosed defense. However, excluding the evidence because of late disclosure could actually result in a waste of judicial and prosecutorial resources because a defense counsel's failure to provide adequate notice, that results in the exclusion of evidence, will increase the number of successful direct appeals and collateral attacks based on ineffective assistance of counsel.

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<sup>1</sup> We have no objection to excluding such evidence where the defendant continues to refuse to submit to an examination.