

National Association of Criminal Defense Lawyers
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Submitted online

Secretary, Committee on Practice & Procedure
Judicial Conference of the United States

Hon. Raymond M. Kethledge
Chair, Advisory Committee on Criminal Rules

AMENDMENT TO CRIMINAL RULE 16 PROPOSED FOR COMMENT, Aug. 2020

Dear Judge Kethledge and committee staff:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rule 16 of the Federal Rules of Criminal Procedure. Our association has as direct members more than 8500 private and public defenders, along with many academics. Including NACDL's 94 state and local affiliates, in all 50 states, our combined membership numbers some 40,000. Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients.

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The proposed amendments to Criminal Rule 16 would tighten and clarify the requirements for pretrial disclosure of expert testimony in federal criminal cases. NACDL has long urged broad-based reforms aimed at expanding the government's pretrial disclosure obligations, with the aim of achieving greater fairness to the accused by minimizing the risk of injustice that results from surprise, concealment and ambush in criminal cases. As an important step in that direction, NACDL generally supports the proposed Rule 16 changes. If adopted, these amendments would more clearly define the minimum time for disclosure of expert testimony, and increase the extent and specificity of those disclosures. That said, NACDL has a few suggestions.

Timing. Proposed amended subsection (a)(1)(G)(ii) would provide that "the court, by order or local rule, must set a time for the government to make the disclosure." We suggest instead that the rules be amended to provide that "the court, by written order, must set a deadline for making the disclosures called for by this paragraph, which in no event shall be later than 30 days before the date set for trial." These suggested changes reflect three concerns:

- First, we agree with the already-submitted comment of the Magistrate Judges' Association that the deadline should be case-specific, rather than set by local rule. Requiring that the court's order be made in writing would further minimize any risk of later confusion or misunderstanding.

- Second, we suggest a minimum of 30 rather than 21 days (as proposed by the MJA) to further minimize any risk of surprise and to ensure an adequate opportunity for the defense to prepare. (We suggest that the reciprocal defense deadline under (b)(1)(C)(ii) should be no more than 14 days before trial.)
- Finally, it seems to NACDL that the proposed rule is not really setting a date for making the disclosures, as presently worded. Rather, it establishes a *deadline* not later than which the disclosures must occur. In addition, the Rule really provides for several disclosures, not just one, which will not necessarily all occur at once. We suggest clarifying the language in the rule to match these understandings.

Content of the disclosure. NACDL also has a few comments for improvements in relation to the amended Rule’s description of the content aspect of the required disclosures, that is, proposed subsections (a)(1)(G)(iii) and (b)(1)(C)(iii):

- First, although we appreciate the inclusion in the Reporter’s Note of the important reminder that the revision “is not intended to replicate all aspects of practice under the civil rule in criminal cases,” there is one potential misapplication of this sort which we believe should be expressly disavowed in the Note. We are concerned that courts may misread the revised Rule, in light of certain existing precedents, to suggest that the mandatory disclosure of “the bases and reasons for” an expert’s opinion requires that the written disclosure be sufficient, on its face, to withstand a *Daubert/Kumho Tire* challenge. We would therefore suggest including language to the following effect in the Reporter’s Note:

The requirement that expert disclosures include the “bases and reasons for” the expert’s opinion should not be read as a requiring that the disclosure must itself be sufficient to allow the expert’s opinion to pass muster under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and/or *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or otherwise conform with the expert disclosure rules associated with civil practice. Instead, and notwithstanding some contrary authority, *see, e.g. United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009) (en banc), the disclosure need only be sufficient to give the opposing party reasonable notice of the general basis for the expert’s opinion, so as to permit that party to file an appropriate motion, if it so chooses.

Consistent with that understanding, and in contrast with the preceding bullet point of the proposed amended rule, which calls for a “complete statement” of all that the prosecutor expects to “elicit” from the witness during trial, the “bases and reasons” clause does not require a “complete statement,” and the written disclosure of “bases and reasons” is separate from the required disclosure of the substance of the opinion. We support this distinction, since the “bases/reasons” disclosure relates to reliability, which is principally a pretrial *Daubert* question, for determination by the court under the Rules of Evidence, and potentially for exploration through cross-examination at trial.

In *United States v. Nacchio*, 555 F.3d 1234 (10th Cir. 2009) (en banc), however, applying the present wording of Rule 16, the Tenth Circuit (by 5-4 vote) held otherwise, precluding a defendant from calling his expert to testify at trial because the judge, invoking civil litigation principles, found the pretrial disclosure of the basis for the opinion to be insufficient. The judge ruled out the proffered testimony on the basis of the written expert disclosure alone, without hearing argument from counsel or testimony from the witness regarding the reliability of his methodology. The trial court based this ruling on a mistaken belief that a Rule 16 expert disclosure had to anticipate and refute any hypothetical *Daubert* challenge to the testimony. Overturning a panel reversal, the closely divided *en banc* court affirmed.

The four dissenters in *Nacchio* (per McConnell, J.) observed:

The judge based this ruling on what is now agreed was a mistaken interpretation of the rules of criminal procedure. The panel reversed that ruling, and in its petition for rehearing *en banc* the government did not even attempt to defend the district court's rationale. Instead, the government argues – and the *en banc* majority agrees – that the exclusion of this witness was the defendant's fault, for failing to establish the foundation for his testimony in advance of putting him on the stand or to file a motion for permission to establish the foundation through testimony.

The flaw in the government's argument is that the rules of criminal procedure, unlike the rules of civil procedure, do not require a criminal defendant to establish the foundation for expert testimony through advance written submissions. Unless the criminal defendant is otherwise directed by the district court – something which did not happen here – he may establish the foundation for witness testimony by putting the witness on the stand for voir dire examination.

555 F.3d at 1259. The *Nacchio* opinion thus interpreted Rule 16(b)(1)(C), as it then (and presently) stands (*i.e.*, prior to the proposed amendment) to require – or at least to allow a judge to require – that the methodological reliability of the expert evidence be established in the expert disclosure itself (without the court's even first calling for amendment or supplementation, if dissatisfied). The Tenth Circuit's *en banc* decision construed the Rule to allow the trial judge to burden the parties (in that case, the defense) with the unfair requirement of anticipating and refuting potential *Daubert* challenges and of asking for a hearing, even in the absence of any motion by the other side, where ordinarily each party's evidence is presumed admissible unless the adverse party objects and challenges it.

One of the reasons given by the trial judge in *Nacchio* for his understanding that the defendant's notice had to address any potential *Daubert* issues was that the disclosure requirement in Rule 16 was “pretty close to what is required in the civil area.” *Id.* 1263. The dissenters, by contrast, relied in part on the fact that the Rule 16 differed from the civil rule, because only the latter required a “complete statement” of the witness's opinions and the “basis and reasons for them”; all data, other information, and exhibits on which the testimony is based; and the witness's

qualifications, publications, previous testimony, and a compensation statement. As the present proposed amendment would incorporate these very words from the civil rule into the criminal, albeit in a different form, a potential for misinterpretation arises.

Although no other Circuit in the ensuing decade-plus has followed *Nacchio*'s misreading of Criminal Rule 16 (so far as a WestLaw search reveals), care must be taken to ensure that courts do not infer that the Judicial Conference, by amending the Rule, has now endorsed that mistaken decision.

For this reason, NACDL strongly suggests that language acknowledging *Nacchio*, as proposed above, be added to the Note, including a clear statement that the amended Rule does not endorse the result in that case. After all, the *methodology* underlying expert opinions in criminal cases (apart from the conclusions in particular cases) is very often undisputed, such as gas chromatography to identify drugs, or accountancy to identify unreported income. An expert disclosure of "bases and reasons" in such cases can be general or conclusory. If the adverse party wishes to challenge the evidence on this basis (or if the proponent for any reason wishes to take the initiative), that party may file a motion *in limine* for a *Daubert/Kumho Tire* hearing or other appropriate relief, a matter outside the scope of Rule 16. The Committee Note should therefore call attention to the critical (and proper) difference in wording of the two bullet points, and clarify that the amended Rule does not adopt or endorse the *Nacchio* decision.

- Second, NACDL suggests that proposed (a)(1)(G)(iii) and (b)(1)(C)(iii), fourth bullet point (the list of recent cases), be amended to add ", and (notwithstanding any provision of Rule 26.2 or statute to the contrary) a copy of the transcript of the witness's testimony in each of those proceedings, if the [government/defendant] possesses such transcript or can obtain a copy from the expert."
- Third, NACDL urges that an additional bullet point be added to proposed (a)(1)(G)(iii), stating that the government's disclosure must include, at the same time, "if not earlier disclosed, any information in the possession of the government that is favorable to the defendant on the subject of the expert witness's testimony or opinion, including information in any form casting doubt on the expert's opinion or conclusions and matters potentially affecting adversely the credibility of the expert." This would make clear that however the matter of *Brady* and *Giglio* disclosures is otherwise being handled in the case, the timing of such disclosures in relation to the subject matter of the expert's proposed testimony must be no later than the time of the principal expert disclosure.

Applicability of the Rule to preliminary and other nontrial matters. Expert testimony in criminal cases is not limited to trials. It may also be offered in relation to a preliminary matter (such as a motion to suppress, a motion challenging the jury array, or a motion *in limine* on some other evidentiary issue), in connection with some other kind of motion (such as to determine competency, or to withdraw a guilty plea), or in connection with sentencing. NACDL therefore suggests adding a final subparagraph to the amended Rule 16(a)(1)(G) stating:

(vii) Applicability. The preceding subparagraphs of this paragraph (G) also apply to the government's use of expert testimony at other stages of the criminal case, including preliminary matters and sentencing; provided, however, that the minimum notice required in that event is 21 days before the hearing.

In the absence of such a provision, courts may wrongly infer (given the lack of parallel amendments to Rules 12 and 32, for example) that no such expert disclosures are required – or even worse, that none can be required – outside the trial context.

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We thank the Committee for its excellent work and for this opportunity to contribute our thoughts. NACDL looks forward to continuing our longstanding relationship with the advisory committee as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

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