Avoiding Trial by Ambush: Why It's Time to Revise the Federal Rules of Criminal Procedure to Require the Parties to Disclose Witness Lists

by Emma Cecil and Carl Lietz

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Lawyers who practice law in federal court generally practice in either the civil or criminal arena. Those who practice in the civil arena are accustomed to broad discovery rules that allow the parties—through initial disclosures requests for admission, requests for production of documents and things, and interrogatories—to obtain a preview of the other side's evidence and to discover facts that are significant to the preparation or defense of the case and known only to the opposite party. Depositions, which are used in nearly every civil case, are another powerful discovery device that allow the parties to question opposing witnesses under oath before trial and to commit them to their testimony. They also give the lawyers a flavor of the personalities of the witnesses they may cross-examine at trial.

Limited Nature of Discovery in Federal Criminal Cases

In contrast to civil discovery, discovery in federal criminal cases is significantly more restricted. For starters, federal criminal discovery, which is primarily governed by Rule 16 of the Federal Rules of Criminal Procedure, is not mandatory.[1] It is triggered by the defendant, who then incurs reciprocal discovery obligations. And, when the defendant does request discovery from the government, there are no timelines prescribing how far in advance of trial the discovery must be produced.[2] Most problematically, however, Rule 16 contains no requirement that the government provide the defense with a witness list before trial. Rather, in non-capital federal criminal cases, the defense often hears witnesses' names for the first time when they are called at trial.[3]

In theory, our federal criminal justice system is one of the most advanced and transparent systems in the world. But the failure of the federal criminal discovery rules to require the disclosure of witness lists before trial is inconsistent with the principles of basic fairness that underlie criminal cases and runs counter to rules adopted in the vast majority of states[4] and the United States military,[5] which require that the accused be notified before trial of the witnesses to be called against him or her. Rule 16 is also at odds with the ABA Standards for Criminal Justice, which include provisions for the discovery of prosecution-witness lists.[6]

The American Bar Association (ABA), the military, and those states that require pre-trial exchange of witness lists all recognize that the names and criminal histories of potential government witnesses are critical to the preparation of an adequate defense. In addition to recognizing and attempting to equalize the power disparities between individual defendants and the federal government—which has virtually unlimited investigative resources—expanded discovery, including disclosure of witness lists, encourages not only a more equitable system but also a more efficient one. By providing criminal defendants with sufficient information to make informed decisions about whether to plea, such disclosures result in more accurate determinations of guilt or innocence and have the practical effect of increasing pleas, shortening trials, reducing the number of appeals, and minimizing surprise at the trial.[7]

Historical Background on Efforts to Liberalize Rule 16

To address these concerns at the federal level, a substantial effort was made in the 1970s to amend Rule 16 to allow for broader discovery in criminal cases.[8] The proposed amendments "enlarge[d] the scope of the defendant's discovery to include … a list of the names and addresses, plus record of prior felony convictions, of all witnesses the prosecution intend[ed] to call during its case-in-chief."[9] The proposed rule required both the government and the defendant to turn over witness lists in every case, capital or non-capital, and required that witness lists be furnished to the adver-

sary upon that party's request.[10] After exhaustive study and consideration, the Judicial Conference adopted the proposed modifications to Rule 16 and forwarded them to the Supreme Court for promulgation. The Supreme Court, in April 1974, forwarded the proposed changes to Congress for review and approval.[11]

Days before the amendments were to go into effect, however, Congress suspended the effective date of the witness-disclosure provisions so that it could study the proposed revisions and conduct hearings. At those hearings, the Department of Justice (DOJ) vigorously opposed the proposed witness-disclosure requirements, arguing that disclosing the identities of government witnesses before trial would pose an untenable risk of witness harm and intimidation. In concluding that such "risk is not as great as some fear that it is," the House Judiciary Committee apparently relied in part on the testimony of Harry Steward, then U.S. attorney for the Southern District of California, in whose district a pilot program had been conducted to test the impact of mandatory pre-trial disclosure of witness lists. California had been chosen for the pilot program since its courts had for decades followed the witness-disclosure procedures outlined in the proposed amendments. To no one's great surprise, the evidence before the committee "indicate[d] that there ha[d] been no unusual problems with witness intimidation in that district."[12]

In his testimony, Steward thus eschewed the notion that mandatory discovery of witness lists would result in or create an insurmountable risk of witness tampering or harm. Emphasizing the court's safety valve function, he added, "We have not had any untoward results by following this program, having in mind that the courts will, and have, excused us from discovery where the circumstances warrant."[13] The chief trial attorney for the Federal Defenders of San Diego Inc., who also testified before the House, also refuted the government's purported reasons for opposing the witness disclosure amendments:

> The government in one of its statements to this committee indicated that providing the defense with witness lists will cause coerced witness perjury. This does not happen. We receive government witness lists as a matter of course in the Southern District, and it's a rare occasion when there is any overture by a defense witness or by a defendant to a government witness. It simply doesn't happen except on the rarest of occasion. When the government has that fear it can resort to the protective order.[14]

In a similar vein, the House Judiciary Committee observed that numerous states required prosecutors to turn over a list of witnesses prior to trial, and, like the Southern District of California, "these states ha[d] not experienced unusual problems with witness intimidation."[15] The committee was thus "convinced that in the usual case there is no serious risk of danger to prosecution witnesses from pre-trial disclosure of their identities."[16] And although there may be risk of danger in exceptional cases, the proposed rule would be "capable of dealing with those exceptional instances while still providing for disclosure of witnesses in the usual case."[17] Accordingly, the committee "endorse[d] the principle that witness lists are discoverable" after finding that "broader discovery … will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence."[18]

Notwithstanding the House's approval of the proposed witness-disclosure provisions, the Senate version of the bill, which the Conference Committee adopted, did away with the disclosure provisions.[19] To justify itself, the Conference Committee merely offered the following summary statement:

> [A] majority of the conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.[20]

The Need for Reform

Remarkably, in the more than 40 years since Congress rejected the proposed witness-disclosure provisions, no meaningful action has been taken to bring Rule 16 in step with the rules adopted by the military and the majority of states and advocated for by the ABA. This is notwithstanding that most legal scholars and federal criminal practitioners agree that such reform is both necessary and long overdue.[21] As one district judge observed several decades ago, "the idea that the prosecution should furnish an accused before trial in any criminal case with its witness list is not so revolutionary."[22] Rather, the need for expanded discovery in criminal cases—in particular, for pre-trial disclosure of witness lists—is an essential component of a fair criminal justice system that yields accurate results. Additionally, and of paramount importance, requiring the pre-trial provision of witness lists enables criminal defendants to adequately prepare for trial and to respond to the government's evidence, thereby giving maximal effect to a defendant's right, enshrined in the Constitution's Sixth Amendment, to confront witnesses against him.

Further, even assuming the DOJ's professed concern about the potential for witness harm is not entirely illusory, a rule requiring pre-trial discovery of witness lists would in no way preclude a court from exercising its discretion to issue a protective order or to prevent disclosure altogether where circumstances so warrant. An adequate safety valve thus exists in cases where witness intimidation or harm is actually a real risk.[23] In our view, however, the need to invoke such safeguards would be exceedingly rare given the lack of any persuasive evidence that early disclosure of witness identities necessarily imperils government witnesses or leads to other abuses. This argument, which was flatly rejected by the U.S. attorney for the Southern District of California, finds support in neither the experiences of the several states in which such disclosure is required, and where the vast majority of cases involving violent crimes are tried,[24] nor in the experiences of federal practitioners who know that witness intimidation is simply not an issue in the overwhelming majority of federal criminal cases.

Early disclosure of witness lists is even more imperative today in light of the increasing complexity of federal criminal cases and the volume of discovery produced by the government in those cases. Indeed, it is not uncommon for the government to produce hundreds of thousands of pages of discovery in even run-of-the-mill federal cases, making meaningful review of such discovery not merely difficult, but often impossible. Requiring parties to exchange witness lists, then, would alleviate some of the burden on defense counsel by enabling the use of targeted search terms, including the names of witnesses.

Conclusion

No credible reasons for the federal criminal justice system's reluctance to require the production of witness lists before trial have been articulated in the 43 years since the issue was last taken up by the Supreme Court. On the other hand, many reasons compel the undertaking of renewed efforts to amend Rule 16 to include mandatory disclosure of witness lists sufficiently in advance of trial. In addition to enhancing judicial efficiency, avoiding unnecessary trial delays, and ensuring reliable outcomes at trial, such a rule is necessary to ensure that our federal criminal justice system can vindicate the foundational principle that an accused is entitled to a fair trial. Because discovery of the names of prospective government witnesses is essential to the preparation of an adequate defense, neither the fear of witness harm nor any burden on the government occasioned by pre-trial discovery of witnesses should be permitted to outweigh the presumptively innocent criminal defendant's right to a fair opportunity to mount a defense. If, as Justice William J. Brennan cautioned over 55 years ago, "we are to continue to maintain that our system of criminal justice, if not favoring the accused, at least keeps the scales evenly balanced in his contest with the state,"[25] we must reconsider allowing federal criminal defendants advance notice of the witnesses to be called against them. In short, the federal criminal justice system succeeds in many ways in providing critical protections to defendants that should be commended. But as to the disclosure of witness lists, it is far behind and must catch up. ⊙

Endnotes

[1]*See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a [federal] criminal case.").

[2]Timelines for disclosure are often set by local rule or standard pretrial order.

[3]Defendants in federal capital cases are entitled to a list of witnesses' names and addresses at least three days prior to trial, unless the court determines that providing the list may jeopardize the life or safety of any person. 18 U.S.C. § 3432.

[4]*See* Manual for Courts-Martial, Rule 701.3(a)(3)(A) ("Before the beginning of trial on the merits the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call … [i]n the prosecution case-in-chief.").

[5]Currently, 40 states either allow or require pre-trial disclosure of witness lists. *See, e.g.*, Alaska (Alaska R. Crim. P. 16(b)(1)(A)(i)); Arizona (16A Ariz. R. Crim. P. 15.1(b)(1)); Arkansas (Ark. R. Crim. P. 17.1(a)(i)); California (Cal. Pen. Code § 1054.1(a)); Colorado (Colo. Rev. Stat. Ann. § 16-5-203); Connecticut (CPB § 40-13); Florida (Fla. R. Crim. P. 3.220(b)(1)(A)); Georgia (O.C.G.A. § 17-16-8(a)); Hawaii (Hawaii R. Penal P. 16(b)(1)(i)); Idaho (I.C.R. 16(b)(6)); Illinois (725 ILCS § 5/114-9; Ill. Sup. Ct. R. 412(a)(i)).

[6]*See* ABA Standards for Criminal Justice, Discovery, Stan. 11-2.1(a)(i) (3d ed. 1996).

[7]*See* Fed. R. Crim. P. 16 advisory committee's note to 1974 Amendment; Notes of Comm. on the Judiciary, H. R. No. 94-247 (1975 Amendment).

[8]The Advisory Committee on Criminal Rules is a subcommittee of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, which, pursuant to statutory mandate, recommends appropriate revisions on a periodic basis. If the Advisory Committee recommends a rule amendment, it issues the proposed amendments to the public for comment. A final version of the proposed amendment is then submitted for approval to the Standing Committee. If the Standing Committee approves the proposed amendment, it transmits the amendment to the Judicial Conference. Amendments approved by the Judicial Conference are then transmitted to the Supreme Court, which must approve and then forward the proposed amendment to Congress. Absent legislative action rejecting or delaying the proposed rule, the rule takes effect by Dec. 1.

[9]*See supra* note 7.

[10]*Id.*

[11]At the same time the Supreme Court forwarded to Congress the proposed amendments to Rule 16 regarding the disclosure of witness lists, the Court also forwarded other proposed amendments, including a new rule requiring defendants to provide to the government a list of names, addresses, and telephone numbers of any alibi witnesses the defendant intended to call at trial. Prior to sending this proposed amendment to the Court, the Advisory Committee raised questions concerning the constitutionality of the rule. The Advisory Committee ultimately concluded that the new alibi witness rule was likely to pass constitutional scrutiny, due in part to the revisions to Rule 16 requiring the parties to exchange witness lists. *See* Fed. R. Crim. P. 12.1 advisory committee note (1974) ("Under the revision of Rule 16, the defendant is entitled to substantially enlarged discovery in federal cases, and it would seem appropriate to conclude that the rules will comply with the 'reciprocal discovery' qualification of [*Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970)].").

[12]See *supra* note 7.

[13]*Id.*

[14]*Id.*

[15]*Id.*

[16]*Id.*

[17]*Id*.

[18]*Id.*

[19]*See* Fed. R. Crim. P. 16; Conf. Comm. Notes, H.R. Rep. No. 94-414 (1975 Amendment).

[20]Conf. Comm. Notes, H. R. Rep. No. 94-414 (1915 Amendment).

[21]*See* Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 Cardozo L. Rev. 59, 68 n. 32 (2017).

[22]*United States v. Houston*, 339 F. Supp. 762, 765 (N.D. Ga. 1972).

[23]*See* William J. Brennan Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 Wash. U. L. Q. 1, 14 (1990); *see also* William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U. L. Q. 279, 292, 294 (1963) (arguing that where the possibility of danger exists, "a trial judge's discretion affords an ample safeguard … [w]here dangers do exist, and abuses are threatened, not denial of discovery but appropriate safeguards to prevent such dangers and abuses, should be our effort.").

[24]*See* Advisory Comm. on Criminal Rules, GAP Report, Rules 16 & 32, at 8 (May 1995).

[25]*Supra* note 23.

President's Message *continued from page 3*

- Reduces risk of chronic illness
- Reduces medications
- Prevents or combats substance abuse
- Prevents cancer
- Improves mental health and mood
- Increases happiness
- Increases civility toward others
- Controls weight
- Helps with weight loss
- Relieves stress
- Improves overall well-being
- Increases confidence
- Strengthens muscles and bones
- Increases energy levels
- Helps brain health and memory
- Helps with relaxation and sleep quality
- Reduces pain
- Provides structure to daily life

I hope that these statistics motivate you to focus on increasing physical fitness, happiness, civility, and your overall well-being. ☉

Endnotes

[1]*Wellness*, Dictionary.com, http://www.dictionary.com/browse/wellness (last visited Dec. 3, 2018).
[2]Dina Roth Port, *Lawyers Weigh In: Why is There a Depression Epidemic in the Profession?,* Am. Bar Ass'n J. (May 11, 2018, 7:00 AM), http://www.abajournal.com/voice/article/lawyers_weigh_in_why_is_there_a_depression_epidemic_in_the_profession.
[3]*Lawyers & Depression,* Dave Nee Found., http://www.daveneefoundation.org/scholarship/lawyers-and-depression.
[4]*Id.*
[5]*Id.*
[6]*Top 11 Professions With Highest Suicide Rates,* Mental Health Daily, https://mentalhealthdaily.com/2015/01/06/top-11-professions-with-highest-suicide-rates (last visited Dec. 3, 2018).
[7]*Supra* note 3.
[8]Patrick Krill, *What Do the Statistics About Lawyer Alcohol Use and Mental Health Problems Really Mean?,* Fla. Bar J. (Jan. 2018), https://www.floridabar.org/news/tfb-journal/?durl=/DIVCOM/JN/jnjournal01.nsf/Articles/11768BD4A5B6EE1F852581FD006F963B.
[9]David J. Bilinsky, *Lawyers and Heart Disease,* Thoughtful Legal Mgmt. (Jan. 23, 2017) (quoting Jennifer Pirtle, *Stressing Yourself Sick*, ABA J. (Sept. 2006), http://www.abajournal.com/magazine/article/stressing_yourself_sick), http://thoughtfullaw.com/2017/01/23/lawyers-and-heart-disease.
[10]Elie Mystal, *In Re the Passing of a Skadden Associate,* Above the L. (June 30, 2011, 11:39 AM), https://abovethelaw.com/2011/06/in-re-the-passing-of-a-skadden-associate.
[11]*Crawford v. JPMorgan Chase Bank, N.A.,* 195 Cal. Rptr. 3d 868 (Cal. App. 2d Dist. Dec. 9, 2015).
[12]*Id.* at *873.