

White Collar Criminal Defense

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New Rule of Criminal Procedure Can and Should Be Used to Assist Defense at Trial

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What You Need To Know:

- There is a new Federal Rule of Criminal Procedure requiring the parties to meet and confer no later than 14 days after arraignment.
- At this conference, the parties must attempt to agree on a timetable and procedures for pretrial disclosures.
- Experienced defense attorneys should use this rule to accelerate the production of Jencks Act material—i.e., statements of government witnesses—before trial.

New Federal Rule of Criminal Procedure 16.1 has taken effect. The rule originated from a request from the National Association of Criminal Defense Lawyers and the New York Council of Defense Lawyers in response to discovery issues that arise in complex cases involving large quantities of electronically stored information. Rule 16.1 reads:

Rule 16.1 Pretrial Discovery Conference; Request for Court Action

(a) Discovery Conference. No later than 14 days after the arraignment, the attorney for the government and the defendant's attorney must confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16.

(b) Request for Court Action. After the discovery conference, one or both parties may ask the court to determine or modify the time, place, manner, or other aspects of disclosure to facilitate preparation for trial.

triggering a criminal defendant's reciprocal discovery obligations under Rule 16(b), and for the government, material produced pursuant to the Jencks Act, 18 U.S.C. § 3500 (i.e., the statements of government witnesses). Section 3500 material is typically produced on the eve of trial over defendants' protests, but experienced defense lawyers are likely to, and should, invoke the spirit of Rule 16.1—which emphasizes advance planning and cooperation—to obtain Section 3500 material earlier. This would represent an enormous victory for defendants, as it would afford defense attorneys additional time to prepare for cross-examination. To be sure, courts still cannot order the government to produce Jencks Act material earlier than the rule provides, but it is nevertheless commonplace for courts to pressure the government to produce such material earlier at the behest of defense counsel. This new rule is an additional weapon for defense attorneys to apply such pressure.

Although the rule requires no more than a conference and encourages the parties to try to agree on the timing and procedure for disclosures, the rule could radically change the timing of discovery in criminal cases—including

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