

RULE CR-15B. DEPOSITION AND RELEASE OF MATERIAL WITNESS IN CUSTODY

(a) Scope.

(1) This rule provides for the deposition and release of a material witness who:

(A) is held pursuant to 18 U.S.C. § 3144;

(B) is found by the court to be an alien illegally in the United States; and

(C) has not been released on conditions under 18 U.S.C. § 3142.

(2) This rule does not affect the determination whether a material witness should be released under 18 U.S.C. § 3142.

(b) Deposition.

(1) *Entry and Service of Order.*

(A) Immediately after a material witness described in subsection (a) makes his or her first appearance before the court, the officer must enter an order setting the time and place for taking the deposition of the witness. No motion or notice is required by either the witness or any party. The order must comply with Federal Rule of Criminal Procedure 15. A form order is appended to this rule.

(B) An order entered under subsection (b)(1)(A) will serve as the notice of deposition required by Federal Rule of Criminal Procedure 15(b). The clerk of the court must serve the order on counsel for all parties; on counsel for the material witness; on an interpreter; and on the U.S. Marshals Service.

(2) *When Taken; Cancellation or Continuance.*

(A) The court must order that the deposition be taken not later than 35 days after the witness first appeared before the officer.

(B) The deposition may be continued or canceled only on order of the court. If the government and the defendant or defendants reach an agreement disposing of related criminal charges before the deposition is taken, they must notify the court, which will then promptly determine whether to cancel or continue the deposition. The deposition cannot be continued beyond the 45-day deadline for release of the witness set out in subsection (c)(1).

(C) Subject to a finding of additional exceptional circumstances under Federal Rule of Criminal Procedure 15(a), the court must cancel the deposition if the material witness is released on conditions of release before the scheduled date of the deposition.

(3) **Discovery.** The parties must exchange all required discovery reasonably in advance of the date of the deposition.

(4) **Location.** Unless impracticable, the deposition should be taken in a court facility.

(5) **Attendance.**

(A) All parties and persons served under subsection (b)(1)(B) of this rule must attend the deposition, except that any defendant may waive attendance by filing a written waiver before the date of the deposition, in accordance with Federal Rule of Criminal Procedure 15(c)(1).

(B) The U.S. Marshals Service must make available the witness and defendant in its custody, at the time and place of the deposition ordered by the court.

(6) **How Taken.** The deposition must be recorded by videotape. The U.S. Attorney's Office must provide a videographer to record the deposition, and will bear the costs and expenses of taking the deposition. Other expenses will be borne by the parties, except as provided in Federal Rule of Criminal Procedure 15(d).

(7) **Review and Certification.**

(A) After the deposition is completed, the videotape recording must immediately be played back in the presence of the witness, the interpreter, and all parties attending the deposition, and their attorneys. Any corrections or modifications to the deposition must be recorded on the same videotape used to record the deposition, and should immediately follow the deposition on the recording.

(B) The deposition must be certified consistent with Federal Rule of Civil Procedure 30, except as otherwise provided by this rule or ordered by the court. It is not required for certification that the videotape recording be transcribed.

(C) The material witness and all interested parties may waive review and certification in writing, in accordance with Rule CR-15.

(8) **Custody of Deposition.** The government must maintain custody of the videotape deposition and certification, or any waiver of certification. Upon request, the government must provide a copy of the deposition to the witness or any defendant.

(9) **Use as Evidence.** The use and admissibility of the deposition are governed by Federal Rule of Criminal Procedure 15, the Federal Rules of Evidence, and applicable court precedent. The presiding judge should rule on any objections to the deposition at or before trial. Nothing in this rule relieves the proponent's burden of demonstrating the unavailability of the material witness under Federal Rule of Evidence 804(a).

(c) Release.

(1) *Mandatory Deadline for Release.* A material witness described in subsection (a) must be ordered released from the custody of the U.S. Marshals Service by the first to occur of the following deadlines:

(A) within 24 hours of the taking, and the certification or waiver of certification, of the witness' deposition; or

(B) within 45 days of the witness' first appearance before a court.

(2) *Earlier Release.* If the deposition is canceled under subsection (b)(2)(B), the court should determine promptly whether to order the release of the material witness from U.S. Marshals Service custody.

Committee Notes

1. Rule CR-15B is a new rule that prescribes procedures for deposing and releasing material witnesses in custody. The Committee notes that there is a conflict between Appendix I and CR-15B in that the appendix, which likely was drafted with civil depositions in mind, imposes the cost of copies on the party seeking the copy whereas CR-15B requires the government to furnish copies to the witness and defendant upon request. This conflict is addressed by language on the form order.

2. Notwithstanding subsection (b)(2)(B), the court may continue the deposition for "good cause." See Rule CR-1(e).

3. Subsection (b)(3) does not provide for discovery other than that ordered by the court. The Committee contemplates that the parties will exchange information as would be required as if the witness were testifying at trial, including discovery required by Fed. R. Crim. P. 15(e), Fed. R. Crim. P. 16, and Fed. R. Crim. P. 26.2; statements covered by the Jencks Act, 18 U.S.C. § 3500; and impeachment information under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972).

4. The use of an interpreter should accord with 28 U.S.C. § 1827 and applicable directives of the Administrative Office of the U.S. Courts. The government bears the burden of providing an interpreter for the deposition.

5. The rule does not require a written transcript of the deposition but leaves to the court and the parties to determine whether a written transcript is necessary in any given case. The Committee notes that, unlike the U.S. Attorney and the Federal Public Defender, private counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A, cannot obtain a written transcript without a court order. See 28 U.S.C. § 1915(c). The proposed order appended to the rule provides that a Criminal Justice Act panel attorney may request a written transcript.

Appendix to Local Court Rule CR-15B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

UNITED STATES OF AMERICA, §
Plaintiff,

v. § **CRIMINAL NO. __-__-CR-__**

Defendant(s). §

ORDER SETTING MATERIAL WITNESS DEPOSITION

Before the Court is the matter of the taking of the deposition of material witnesses in the above-styled and numbered cause. The Court finds that _____ (names of material witnesses) are aliens not lawfully admitted to the United States, that they are material witnesses in the case styled United States v. (Name of Defendant, cause no.), being held pursuant to 18 U.S.C. § 3144, and that they have not been released on conditions pursuant to 18 U.S.C. § 3142. As such, the Court finds that this case presents "exceptional circumstances" and that the "interest of justice" requires the taking of the deposition of the material witnesses. Rule 15(a), Fed.R.Crim.P. The Court further finds that there will be no failure of justice if the material witnesses are released after their depositions have been taken and certified in accordance with 18 U.S.C. § 3144 and Local Court Rule CR-15B.

IT IS THEREFORE ORDERED that the depositions of _____ (names of material witnesses) are set for _____ (date and time) at _____ (place).

IT IS FURTHER ORDERED that the depositions shall be recorded by videotape. The videotape must provide an electronic sound recording which is sufficient to comply with 28 U.S.C. §1827(d)(2). They also may be recorded by stenographic means at the party's own expense. Notwithstanding the foregoing, subsequent to the completion of the deposition, a CJA panel attorney may request that a stenographic transcript of all or part of a deposition. Each deposition shall be certified consistent with Rule 30, Fed.R.Civ.P. and Local Rule CR-15B, and shall be accomplished by the immediate playback of the videotape recording in the presence of the material witness, the interpreter, all parties attending the deposition, and their attorneys. Any corrections or modifications to the deposition shall be recorded on the same videotape, following the recording of the deposition. Playback of the recording and certification may be waived in writing in accordance with Local Rule CR-15A. The government shall retain custody of the videotape depositions and written statements of certification or waiver of certification pending trial. Notwithstanding Appendix I to the Local Rules, the government shall, upon request, promptly provide to any defendant, material witness or counsel, copies of the videotape deposition and written statements of

certification or waivers of certification.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve a copy of this order on the following: All defendants, counsel for defendants, the material witnesses, counsel for the material witnesses, counsel for the government, an interpreter, and the United States Marshals Service.

IT IS FURTHER ORDERED that the United States Marshals Service shall make the named witnesses and defendants in their custody available on the date, time and place in conformity with this order. If any defendant desires to waive appearance, that defendant must file a written waiver with the Clerk of the Court prior to the date of the deposition.

IT IS FURTHER ORDERED that within 24 hours after the deposition and certification or waiver have been completed, the material witness shall be brought before the court for release from the custody of the U.S. Marshals Service.