

### **Rule 12.3. Notice of a Public-Authority Defense**

#### **(a) NOTICE OF THE DEFENSE AND DISCLOSURE OF WITNESSES.**

(1) *Notice in General.* If a defendant intends to assert a defense of actual or believed exercise of public authority on behalf of a law enforcement agency or federal intelligence agency at the time of the alleged offense, the defendant must so notify an attorney for the government in writing and must file a copy of the notice with the clerk within the time provided for filing a pretrial motion, or at any later time the court sets. The notice filed with the clerk must be under seal if the notice identifies a federal intelligence agency as the source of public authority.

(2) *Contents of Notice.* The notice must contain the following information:

(A) the law enforcement agency or federal intelligence agency involved;

(B) the agency member on whose behalf the defendant claims to have acted; and

(C) the time during which the defendant claims to have acted with public authority.

(3) *Response to the Notice.* An attorney for the government must serve a written response on the defendant or the defendant's attorney within 14 days after receiving the defendant's notice, but no later than 21 days before trial. The response must admit or deny that the defendant exercised the public authority identified in the defendant's notice.

(4) *Disclosing Witnesses.*

(A) *Government's Request.* An attorney for the government may request in writing that the defendant disclose the name, address, and telephone number of each witness the defendant intends to rely on to establish a public-authority defense. An attorney for the government may serve the request when the government serves its response to the defendant's notice under Rule 12.3(a)(3), or later, but must serve the request no later than 21 days before trial.

(B) *Defendant's Response.* Within 14 days after receiving the government's request, the defendant must serve on an attorney for the government a written statement of the name, address, and telephone number of each witness.

(C) *Government's Reply.* Within 14 days after receiving the defendant's statement, an attorney for the government must serve on the defendant or the defendant's attorney a written statement of the name of each witness—and the address and telephone number of each witness other than a victim—that the government intends to rely on to oppose the defendant's public-authority defense.

(D) *Victim's Address and Telephone Number.* If the government intends to rely on a victim's testimony to oppose the defendant's public-authority defense and the defendant establishes a need for the victim's address and telephone number, the court may:

(i) order the government to provide the information in writing to the defendant or the defendant's attorney; or

(ii) fashion a reasonable procedure that allows for preparing the defense and also protects the victim's interests.

(5) *Additional Time.* The court may, for good cause, allow a party additional time to comply with this rule.

#### **(b) CONTINUING DUTY TO DISCLOSE.**

(1) *In General.* Both an attorney for the government and the defendant must promptly disclose in writing to the other party the name of any additional witness—and the address and telephone number of any additional witness other than the victim—if:

(A) the disclosing party learns of the witness before or during trial; and  
(B) the witness should have been disclosed under Rule 12.3(a)(4) if the disclosing party had known of the witness earlier.

(2) *Address and Telephone Number of an Additional Victim-Witness.* The address and telephone number of an additional victim-witness must not be disclosed except as provided in Rule 12.3(a)(4)(D).

(c) FAILURE TO COMPLY. If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness regarding the public-authority defense. This rule does not limit the defendant's right to testify.

(d) PROTECTIVE PROCEDURES UNAFFECTED. This rule does not limit the court's authority to issue appropriate protective orders or to order that any filings be under seal.

(e) INADMISSIBILITY OF WITHDRAWN INTENTION. Evidence of an intention as to which notice was given under Rule 12.3(a), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

#### COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2009 and 2010 amendments to *Federal Rule of Criminal Procedure 12.3*. In accordance with the 2009 amendments to the federal rule, the 10-day time periods were expanded to 14 days—an amendment that reflects the time-calculation changes made to Rule 45. The 2010 amendments to sections (a) and (b) implement the federal Crime Victims' Rights Act (*18 U.S.C. § 3771*).

#### COMMENT TO 2016 AMENDMENTS

This rule, new to the Superior Court, is identical to the federal rule.