April 16, 2025

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Re: Proposed Amendments to Rule 17 of the Federal Rules of Criminal Procedure

Dear Secretary Byron and Professors Beale and King:

The National Association of Criminal Defense Lawyers ("NACDL") writes in response to the Draft Revised Rule and Draft Committee Note for Fed. R. Crim. P 17 published March 28, 2025, for consideration at the Advisory Committee's April 24 meeting. NACDL is the largest American criminal defense bar association and includes private practitioners as well as public defenders and law professors among its 10,000 members. Our perspective – representing lawyers who are retained as well as appointed — should be considered by the Advisory Committee.

NACDL submitted a comprehensive letter regarding Rule 17 that was received by the Committee last Fall. We enclose a copy of our previous letter. For the reasons we provided in that letter, NACDL maintains that defense counsel should generally be permitted to issue subpoenas *duces tecum* without leave of the court and *ex parte*. A Rule requiring a motion and order for most subpoenas would

present a heavy and unnecessary burden for both the defense and the courts that would consider such motions.

We have reviewed the recent Draft Revised Rule before the Committee for its upcoming meeting, and we wish to provide additional specific comments on three areas of concern to NACDL.

First, the Draft Revised Rule contains a suggestion in brackets to expand the motion requirement applicable to "personal or confidential" information or data of victims to "prospective witnesses." Prospective witnesses are precisely the sources of information most likely to hold relevant documentary information. Indeed, there are also instances where it is disputed or unclear whether a witness is a "victim" (as defined in Rules 1(b)(12) and 60). And it is particularly unclear what is meant by "personal" information. For example, a witness's emails or bank records could reasonably be considered "personal," but may be highly relevant and favorable to the defense. Indeed, protecting such information from disclosure under this provision would effectively swallow the remainder of the Rule.

Second, we urge the Committee to adopt the option in the Draft Revised Rule permitting subpoenas for information likely to both *be* and *lead to* admissible evidence. Our suggestions in the enclosed letter would have allowed defense subpoenas to issue for investigative purposes, albeit not as freely as in ordinary federal civil litigation. We adhere to that position, which reflects the practice in some federal districts today, and would go at least part way to leveling the playing field as between the prosecution and defense in ferreting out the true facts of a case. But at a minimum the Committee should adopt the broader of the two alternative standards in the revised draft. No compelling argument exists for denying defendants access to information described with particularity likely to be in the sole possession of a third party that is likely to lead to admissible favorable evidence.

Third, the Draft Revised Rule (17(c)(1)(B)) is far too limited in specifying only trials and three or four particular types of hearings to which witnesses or materials could be subpoenaed by the defense. There are other hearings not named in the draft Rule for which counsel should be allowed to subpoena records, including detention hearings, *Daubert* hearings and similar proceedings under Fed. R. Evid. 104(c), certain double jeopardy motions, and motions *in limine* where factual determinations will be required. As drafted, the Rule would restrict the use of subpoena drastically over the practice in many, if not most federal districts nationally. Broader access to source documents and information, not the opposite, is in the interests of justice. Although the draft Committee Note "recognizes the

discretion of the court to permit a Rule 17 subpoena to produce items in other evidentiary hearings not listed in the Rule," we believe this renders the Rule unclear, and the Rule should include an "other evidentiary hearings" catch-all in its text.

We appreciate the time and effort expended in considering amendments to Rule 17 and hope our analysis will be considered by the Advisory Committee in formulating proposed amendments.

Respectfully,

Christopher A. Wellborn
President, NACDL

NACDL Rule 17(c) Task Force

enclosure