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February 15, 2026

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Members and Reporters, Advisory Committee on Criminal Rules
Judicial Conference of the United States
Administrative Office of U.S. Courts
One Columbus Circle
Washington, DC 20544

Re: Amendment to Criminal Rules Proposed for Comment, Aug. 2025

To the Committee and Staff:

The National Association of Criminal Defense Lawyers (NACDL) is pleased to submit our comments on the proposed amendments to Rule 17 of the Federal Rules of Criminal Procedure. While we had argued for more extensive reforms during the Advisory Committee deliberation process, the proposed amendments would resolve many ambiguities in the current rule and would overall constitute an improvement. Accordingly, with a few relatively minor exceptions, NACDL supports the amendment.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has more than 10,000 direct members. With NACDL's 90 state and local affiliates spanning nearly every state, we represent a combined membership of some 40,000 private attorneys, public defenders, and interested academics.

CRIMINAL RULE 17 – SUBPOENAS

NACDL adheres to its position, advanced throughout the Criminal Rules Advisory

Committee's consideration of this amendment,¹ that *ex parte* subpoena power should be made available to defense counsel for investigative purposes as soon as charges are brought, as would be allowed in a federal civil case. (Such investigative subpoenas are sometimes referred to as

¹ The chair of NACDL's Rule 17 Task Force appeared before the subcommittee on October 27, 2022, and the Task Force submitted detailed letters to the subcommittee and then to the Advisory Committee during its deliberations, dated February 13, 2024, and April 16, 2025, respectively.

“third-party discovery.” Defense discovery from the government is regulated solely by Rule 16, of course.) In particular, our suggested approach would have allowed subpoenas for information likely to “lead to” the revelation of admissible evidence, and not just for the potential evidence itself. Likewise, we favored allowing the use of subpoenas not tied to any scheduled hearing. Those reforms would still have fallen short of “leveling the playing field” – given the Government’s exclusive access to search warrants and grand jury subpoenas – but would have served as a powerful if imperfect check on erroneous accusations and overcharging.

At the same time, we recognize that these suggestions found insufficient support in the Advisory Committee. Accordingly, we do not rely on them here in response to the reforms now proposed for comment. NACDL recognizes that others of our concerns were heard and implemented, at least in part, in the current proposal. Because adoption of the Advisory Committee’s proposal would represent a significant improvement over the existing Rule, NACDL supports the published draft, subject only to a few points identified in this comment. As these points seek clarification rather than change, we do not think they would require republication if adopted.

A. Scope and Organization of the Revised Rule

Our principal critical comment calls for a bit of (hopefully non-controversial) reorganization and/or clarification of the revised rule. A subpoena may require the testimony of a person (traditionally called *ad testificandum*), the production of documents or other evidentiary items (*duces tecum*), or both (requiring a witness to appear for testimony and to produce one or more specified items in court at the same time). On its face the proposed rule appears not to address the third category, however. *See* Prop.R. 17(a) (subpoena may require recipient to “attend and testify or produce designated items”) (emphasis added). That leaves unclear whether the protections and restrictions set forth in Proposed Rule 17(c) apply to subpoenas requiring testimony and production at a hearing, which are not uncommon, or only to subpoenas calling for production prior to the hearing (the innovation the original Rule 17(c) introduced).

The Advisory Committee wisely suggests addressing “testimony” expressly in Proposed Rule 17(a), which the current Rule 17 does not. But the Proposed Rule’s use of “or” between “testify” and “produce designated items” creates ambiguity about a common practice: does instructing a witness to produce designated items *in court* when the witness appears to testify convert the subpoena from one governed by Proposed Rule 17(a) to one governed by Proposed Rule 17(c)? We think not, and suggest the rule say so clearly. Our first suggestion is therefore to amend the language at line 6 to read, “to attend and produce designated items and/or to testify” The proposed amendment to section (b) is fine; that rule does not address subpoenas *ad testificandum* in general, but only the special case of such subpoenas when needed by an indigent defendant. And Rule 17(c), then, would apply only – as it always has – to the special case of production of things prior to a hearing, that is, not in connection with a subpoena to testify.

Courts and litigants understand the restrictions of the current Rule 17(c) to apply only when a party seeks to inspect documents and things *in advance* of the subject proceeding – not when a witness is subpoenaed to produce them in court in conjunction with testimony. A subpoena *duces tecum* is not necessarily a “Rule 17(c) subpoena.” The Supreme Court drew that distinction in *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951), explaining that the “chief innovation” of Rule 17(c) “was to expedite the trial” by permitting courts to direct advance production for inspection by a litigant. It noted in contrast that “Rule 17 provided” – in general, that is – “for the usual subpoena *ad testificandum* and *duces tecum*, which may be issued by the clerk.” *Id.* (emphasis added). And then the Criminal Rules added, as an important innovation codified in Rule 17(c), the possibility of compelling production of evidentiary material prior to the hearing (and necessarily, then, not accompanied by compelled testimony).

We think it unlikely that the Advisory Committee intended in the current proposal to discard, particularly without saying so, the distinction that has animated practitioners’ and the Supreme Court’s understanding of Rule 17 from its first iteration, that is, the difference between production in advance of a hearing (Rule 17(c)) and production in connection with testimony (the traditional subpoena power, as now to be referenced in Prop. R. 17(a)). Nor can we think of any rationale for such a substantial change. A non-17(c) subpoena requiring production *in conjunction with testimony* is by definition a subpoena requiring production in court *at a hearing or trial*, where the court will control the disposition of the items produced. Otherwise, it would be a subpoena for a sort of deposition, which is plainly not at present allowed outside the exceptional circumstances covered by Rule 15.

Because Rule 17(c), as a matter of history and structure, applies only to subpoenas that call for production at a time or place *other than* at a scheduled hearing, it follows that none of the *limitations* in Prop. R. 17(c)(2) (*i.e.*, subsections (c)(2)(A)–(D), in large part²) should be understood to apply to subpoenas under Prop. R. 17(a) for testimony *at a hearing*, even if that subpoena calls as well for production by the witness, at that proceeding, of certain items. At the same time, it should be made clear that the addition of specific protections for counsel’s authority to issue subpoenas under Prop. R. 17(c)(2) (e.g., the authority to issue such subpoenas *ex parte* ((c)(2)(E)) and without prior judicial approval ((c)(2)(C), in part)) should not be understood as implying any limitations on the traditional availability of subpoenas under the general rule of 17(a). This could be accomplished by amending the Advisory Committee Note (perhaps at line 191 *et seq.*) to say expressly that nothing in Prop.R. 17(c) limits the existing authority of counsel to serve subpoenas, both *ad testificandum* and *duces tecum*, that are returnable at any scheduled court proceeding.

² In short, paragraph (A) under Prop.R. 17(c)(2) makes explicit that a subpoena *duces tecum* is available for hearings as well as for trial, but introduces the limitation that leave of court is required if the hearing is not one of four specified kinds. Paragraph (B) articulates and thus limits the characteristics of the items that may be sought. Paragraph (C) states when a motion is required seeking leave to serve a Rule 17(c) subpoena, while paragraph (D) articulates what must be included in such a motion.

B. Relaxation of the “*Nixon* test” that elaborated the prior version of Rule 17(c)

The so-called “*Nixon* test” derives from the Supreme Court’s 1974 decision allowing the Watergate Special Prosecutor’s Rule 17(c) subpoena for specified Oval Office recordings in anticipation of the trial of certain White House aides and others. NACDL supports the committee’s proposal to replace the standard articulated there for the substantive scope of a permissible Rule 17(c) subpoena with a more realistic rule that does not require that the issuing party be able to describe with precision, before seeing the evidence, what the evidence will show. “Reasonable particularity” will suffice, and the material summoned need only contain information that is “likely to be admissible as evidence” in the kind of proceeding to which it relates. We note with approval that under this wording the scope of information subject to subpoena for a sentencing or revocation proceeding (particularly as mitigation) is significantly broader than that which applies at trial. *See* Fed.R.Evid. 1001(d)(3) (rules of evidence, other than privileges, do not apply at revocation or sentencing). For these reasons, NACDL supports the proposed amendment codified at Rule 17(c)-(2)(B).

C. Procedural aspects

The published draft authorizes the issuance of 17(c) subpoenas by counsel – both defense attorneys and AUSAs – without leave of court, for use at trial as well as in connection with a short list of four specified types of evidentiary hearings. Prop. R. 17(c)(2)(A). NACDL supports that provision insofar as it makes expressly clear that the right to issue a subpoena in counsel’s professional discretion is not limited to trial, nor is it limited to subpoenas returnable at the proceeding.

But this reform does not go far enough. We cannot see why leave of court should be required for the issuance of a subpoena *duces tecum*, wherever returnable, in connection with other, equivalent evidentiary hearings, just as there is no such requirement for subpoenas *ad testificandum* at those hearings. No particular risk of abuse has been identified, nor any special risk of unfair burden on third parties. Accordingly, NACDL opposes the limitation in Prop. R. 17(c)(2)(A) to the four types of proceedings. Instead, we suggest that this paragraph be revised to authorize issuance of a subpoena *duces tecum* in counsel’s sound professional judgment in connection with “any scheduled evidentiary hearing, including” any of the four listed examples.

NACDL fully supports the proposed rule insofar as it requires that any subpoena issued to a third party for production of records may, in counsel’s professional discretion, be made returnable to counsel’s office. Prop. R. 17(c)(5).³ This allows orderly review of records and preparation for the

³ The proposed Advisory Committee Note requires correction at lines 322–326. As published, the Note mistakenly states that under Prop. R. 17(c)(5) “the court has discretion ... to order that the recipient produce the items to the court instead of directly to the requesting party’s counsel.” In fact, under proposed (c)(5) such judicial discretion applies only to subpoenas issued by *pro se* defendants, where greater judicial control is required to compensate for the lack of professional responsibility and judgment that counsel representation ensures.

hearing, while protecting the privacy of the defense function. Similarly, as already noted, NACDL supports allowing counsel to issue a subpoena *duces tecum* without prior leave of court (Prop. R. 17(c)(2)(C)). And we support the rule authorizing issuance *ex parte*, even where a motion may be required (Prop. R. 17(c)(2)(E,F)).

We are concerned, however, about the allowance of an override of each these reforms by local rule. The Federal Rules are intended to establish a national set of procedures based on the Advisory and Standing Committees' best, considered judgment. We are not aware of any other significant points of practice and procedure where local rules have been expressly authorized to reject a national reform wholesale, in contravention of the uniformity and consistency standard established by Rule 57(a)(1). There is no sound reason to depart from that norm here. Disallowing an override by local rule would still leave the option of a "court order" for a particular case if specially warranted. At the very least, if these opt-outs are not removed then NACDL strongly suggests that language be added to the Committee Note (at line 448 *et seq.*) discouraging a particular district from effectively overriding these reforms by general local rule. For the same reason, a showing of special local circumstances should be required to justify maintaining or imposing the more restrictive past practices, formerly prevalent in a minority of districts, that these amendments now wisely reject.

NACDL agrees with the committee that the Victims Rights Act, 18 U.S.C. § 3771(a)(8), is reasonably understood to justify a motion requirement before issuance of a subpoena to a third party for "personal or confidential" information about an alleged crime victim. Prop. R. 17(c)(3). But we note with concern that the quoted term has not been defined, leaving this exception open to abuse, to the detriment of defendants' due process rights and the legitimate exercise of the defense function. NACDL suggests that the Advisory Committee Note (at line 402 *et seq.*, be amended to clarify that "personal or confidential," as used in this provision, is to be narrowly construed. It should be made clear, for example, that criminal history information, security camera footage in the hands of a third party, non-content telephone toll and usage records, and bank records of an alleged crime victim, for example, are not "personal or confidential" within the meaning of this new rule.

D. Relationship with Rule 26.2

NACDL agrees with the comment submitted by the New York City Bar that the words "from the other party" should be added to the amended Rule 17(h), to clarify that this Rule does not extend Jencks Act-type limitations to otherwise-permissible subpoenas issued to third parties.

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NACDL thanks the Committee for its valuable work and for this opportunity to contribute our thoughts. We look forward to continuing our longstanding relationship with the Advisory Committees as a regular submitter of written comments.

Respectfully submitted,

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