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March 24, 2026

VIA EMAIL

Carolyn A. Dubay, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, D.C. 20544
RulesCommittee_Secretary@ao.uscourts.gov

**Re: Comments of the NYCDL Supporting Proposal to Allow Discovery
Depositions Under Federal Rules of Criminal Procedure 15**

Dear Ms. Dubay and Committee on Rules of Practice and Procedure:

This letter is submitted on behalf of the New York Council of Defense Lawyers (the “NYCDL”). The NYCDL is a not-for-profit professional association comprised of approximately 300 experienced attorneys whose principal area of practice is the defense of criminal cases in federal court, primarily in the Southern and Eastern Districts of New York (“SDNY” and “EDNY”). Among its members are former Assistant United States Attorneys, including previous Chiefs of the Criminal Divisions in the SDNY and EDNY. Its membership also includes current and former attorneys from the Office of the Federal Defender, including the immediate past Executive Director and Attorney-in-Chief of the Federal Defenders of New York, and a former Commissioner of the United States Sentencing Commission (the “Commission”). The NYCDL’s members have intimate, practical working knowledge of the Federal Rules of Criminal Procedure, both as prosecutors and as defense lawyers. The NYCDL, therefore offers the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

The NYCDL’s membership overwhelmingly supports proposals to amend Rule 15 to

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permit discovery depositions in federal criminal cases. We believe allowing such depositions, subject to the supervision of the court, will have a profoundly beneficial effect in leveling what is now a sharply tilted playing field in favor of the prosecution in federal criminal cases. Allowing discovery depositions will promote the search for the truth, and result in more just outcomes in federal criminal cases, both at trial and in cases resolved by plea.

In civil cases, pre-trial depositions are routine and are seen as the heart of the discovery process. They allow both sides to uncover the facts needed to present the full picture at trial. And by presenting that full picture, the factfinder is far better situated to evaluate the evidence and reach a just result. In the civil context, depositions also promote settlements because they allow both sides to assess the strengths and weaknesses of their case before a trial begins.

In contrast, the absence of depositions in federal criminal cases makes them lopsided events characterized by a cavernous information imbalance. One side—the government—has grand jury subpoena power, the power to immunize witnesses, and the ability to interview most of the witnesses with whom it wishes to speak. It also has the ability to prepare its witnesses for testimony through countless preparation sessions, learning all the information it could possibly need for trial. Not so for the defense. The defense has no pre-trial testimonial subpoena power, no ability to conduct pre-trial discovery depositions, and limited means to conduct even pre-trial interviews of witnesses, because most witnesses are reticent to speak with defense counsel. This leads to an information imbalance that often makes a fair trial impossible. Instead, the defense goes into trial with extremely limited knowledge of what a witness will say or might say if asked. It is relegated to conducting blind cross-examination, while the prosecution is able to vet and shape in the pre-trial process any aspect of the testimony it wants to present. The result is a polished and practiced presentation that cannot be duplicated by a defense lawyer who is relegated largely to blind cross-examination. Many of our members practice both civil and criminal litigation in the federal courts, and have seen firsthand the dramatic impact this information imbalance has on the fairness of the proceeding. It is striking and unfair.

To make matters worse, this problem is largely invisible to participants in a criminal trial other than defense counsel. To understand the problem requires getting inside defense counsel's mind. It requires knowing the questions defense counsel does not ask because there was no ability in the pre-trial process to vet the answers. It requires knowing the witnesses defense counsel chose *not* to call, because those witnesses refused to interview with defense counsel during the pre-trial process. These invisible problems are a direct result of the lack of authorized pre-trial depositions under the Federal Criminal Rules.

This opposing treatment of the right to depositions under the civil versus criminal rules cries out for an answer to the question: why? Intuitively, one would assume that the criminal rules on discovery would be more permissive than the civil rules, given that liberty rather than money is at stake. But the reverse is true.

The roots of the split between the civil and criminal rules as to discovery depositions were examined by Professor Ion Meyn in his article "*Why Civil and Criminal Procedure Are So Different: A Forgotten History.*" 86 Fordham L. Rev. 697 (2017) ("Meyn"). As he explains, for centuries under the common law, federal criminal and civil procedure operated under the same

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rules—and in neither instance were depositions generally permitted. *Id.* at 701. But the civil rules underwent a radical transformation with the enactment of the Federal Rules of Civil Procedure in 1938. Under those Rules, the centerpiece of civil practice became the discovery phase, with the most essential aspect being pre-trial depositions. *Id.* at 705–06.

With the enactment of the Civil Rules complete, in 1940, Congress authorized the Supreme Court to draft rules of criminal procedure. *Id.* at 707. The Supreme Court delegated its authority to a new Advisory Committee, just as it had done for the civil rules. *Id.* at 705–06. But the committee members *were all prosecutors or academics*. There was no representation from the defense bar. *Id.* at 729.

Ironically, in a slice of history largely unknown until Professor Meyn’s research, the first draft of the Federal Rules of Criminal Procedure, which were written in 1941, adopted the Civil Rules “almost [in] whole cloth.” *Id.* at 720. As the Advisory Committee’s Reporter wrote about the draft: “[the] criminal rules follow as closely as possible in organization, in numbering and in substance the Federal Rules of Civil Procedure.” *Id.* at 710. The Reporter explained: “[T]he civil rules . . . have won a deserved prestige. There is no reason why the criminal rules might not well follow as closely as possible the plan and content of the civil rules and in that way gain some of the same confidence that has been afforded the criminal rules.” *Id.* at 711.

But the full Advisory Committee met in September 1941 to consider this first draft, and that draft “was undone in four days.” *Id.* at 712. According to the Advisory Committee’s internal notes, reviewed by Professor Meyn, this was principally because of objections asserted by the Advisory Committee’s Secretary, and a few committee members who followed his lead. These opponents feared that defendants would misuse depositions to cause delay. They also believed that depositions simply did not belong in criminal cases, with one opponent opining that to “go into the other side’s case to examine anybody . . . before trial is a thing you would never think of in a criminal case.” *Id.* at 721. As another opponent said: “[t]his is a way of getting discovery before trial and preparing evidence to meet it with, which means that unscrupulous defendants may fabricate evidence with which to meet the [Government’s] evidence.” *Id.* at 722. With no defense lawyers on the Advisory Committee, there was limited ability to rebut these arguments.

Based on these reservations, the ultimate version of Rule 15 proposed by the Advisory Committee, and adopted by Congress in 1944, materially parted ways from its sister Civil Rule. Under Rule 15 as enacted, discovery depositions were eliminated, except in the narrow instance where a witness would not otherwise be available for trial. *Id.* at 726.

And that is where Rule 15(a)(1) has remained for the past 80+ years: “A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice.” Fed. R. Crim. P. 15(a)(1).

Given the passage of time, the “no depositions” rule in federal criminal practice has become entrenched and accepted as an almost immutable truth. But it does not *have* to be that way. For example, at least 13 states *permit* some form of pre-trial depositions in criminal cases. Seven states—Vermont, Florida, Indiana, Missouri, Iowa, North Dakota and New Mexico—allow for

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depositions as a matter of right without prior court approval. *See Altman, Can't We Just Talk About This First?: Making the Case for the Use of Discovery Depositions In Criminal Cases*, 75 Ark. L. Rev. 1, 38 (2022). Six states—New Hampshire, Texas, Arizona, Nebraska, Montana and Washington—allow for discovery depositions upon leave of court for good cause shown. *Id.* at 39. While there is variation among the deposition rules adopted by these states, there is a unifying principle: these jurisdictions recognize that the benefit of allowing depositions in criminal cases, with appropriate restrictions, outweighs the dangers cited by those who oppose depositions. In a 1989 study conducted in Florida, a commission created to evaluate the deposition rules that had been in effect since 1972 concluded: “[discovery depositions in criminal cases] make a unique and significant contribution to a fair and economically efficient determination of factual issues in the criminal process. . . . [Criminal discovery depositions] should not be abolished or significantly curtailed.” Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 Wisconsin Law Review 541, 613 (quoting the study).

In light of the obvious potential benefits to the criminal justice system by allowing discovery depositions, the NYCDL believes the Advisory Committee should engage in a careful study of Rule 15, and consider an amendment that would permit such depositions, subject to the supervision of the court. Justice and fair practice demand no less.

Respectfully yours,

/s/ Marjorie J. Peerce

Marjorie J. Peerce
Chair of the NYCDL Rules Committee

/s/ Justine A. Harris

Justine A. Harris
President, NYCDL