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VIA E-MAIL

Jeffrey M. Wasileski, Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
Harrisburg, PA 17106-2635

Re: ***Proposed Amendment to, and Proposed Revision to the Comment of, Pennsylvania Rule of Criminal Procedure 231***

Dear Mr. Wasileski:

We write on behalf of the Pennsylvania Association for Criminal Defense Lawyers (PACDL) at the invitation of the Pennsylvania Supreme Court's Criminal Procedural Rules Committee to address the Report of the Committee proposing an amendment to Pennsylvania Rule of Criminal Procedure 231, and proposing revisions to the Comment to Rule 231, as published for comment in the Pennsylvania Bulletin on March 30, 2019. The proposed amendment to Rule 231 – as the covering Memorandum to the Report indicates – seeks to clarify the secrecy obligation of counsel representing a witness in the grand jury in light of the decision of the Court in *In re Fortieth Statewide Investigating Grand Jury*, 191 A.3d 750 (Aug. 21, 2018). Yet, despite the appropriateness of this goal, the proposed language falls short for three principal reasons.

First, for the reasons set forth below, the proposed amendment to Rule 231 does not resolve the ambiguity of existing language that improperly suggests that it is generally appropriate to swear ***witnesses*** to secrecy. The Rule, even as amended, would still improperly invert the statutory presumption permitting witnesses to disclose their testimony by stating they should ordinarily be sworn to secrecy.

Second, although we recognize the Court's recent opinion endorses the Rule's requirement that ***counsel*** for witnesses be sworn to secrecy, PACDL maintains its longstanding opposition to this practice because routinely requiring counsel to utter such oaths is improper and unnecessary. Indeed, requiring secrecy oaths by counsel disserves witnesses by fettering the ability of counsel to vigorously represent them.

Third, the Committee has missed the opportunity to improve upon the Rule in several important respects. This lost opportunity is particularly significant because recent opinions by several Pennsylvania Supreme Court Justices reveal the Justices' reluctance to make substantive changes to rules or statutes – even when, as written, they implicate constitutional concerns – because the Justices believe such changes are more appropriately made by the General Assembly (in the case of statutes) or by this Committee (in the case of rules like Rule 231). We therefore respectfully urge the Committee to address gaps the Court has deferred to the Committee to fill.

In sum, while we appreciate the efforts of the Committee, we respectfully believe that the Court's recent jurisprudence invites and indeed requires – both explicitly and implicitly – a more

thorough-going revision of Rule 231. We elaborate upon this view in the sections that follow. Specifically, (1) in Part I, we provide background to the proposed amendment to Rule 231 and revisions to its Comment; (2) in Part II, we examine the ambiguity in the current language of Rule 231 that would remain even if the proposed amendment is adopted; (3) in Part III, we review other needed changes to Rule 231 and offer alternative proposed language; and (4) in Part IV, we explain the critical need for this Committee to adopt the proposed changes PACDL recommends, given the reluctance of judiciary and legislature to do so, despite the pressing constitutional import of these issues.

I. Relevant background

Pennsylvania's Investigating Grand Jury Act ("IGJA"), and Rule 231 by extension, permit counsel to appear in the grand jury room on behalf of testifying witnesses. *See* 42 Pa. C.S. § 4549(c)(1) ("A witness subpoenaed to appear and testify before an investigating grand jury or to produce documents, records or other evidence before an investigating grand jury shall be entitled to the assistance of counsel, including assistance during such time as the witness is questioned in the presence of the investigating grand jury."); Pa. R. Crim. P. 231(A) ("Counsel for the witness under examination may be present as provided by law."); *cf.* Pa. R. Crim. P. 556.9(A) (adopting same provision in the context of indicting, rather than investigating, grand juries).

The IGJA also permits witnesses to disclose their testimony, unless the supervising judge issues an order barring disclosure, for good cause. *See* 42 Pa. C.S. § 4549(d) ("No witness shall be prohibited from disclosing his testimony before the investigating grand jury except for cause shown in a hearing before the supervising judge. In no event may a witness be prevented from disclosing his testimony to his attorney."). In other words, as noted below, the effect of § 4549(d) is to presumptively ***permit*** – not restrict – a witness' disclosure of testimony.

But in this regard witnesses are different from all others who appear before a grand jury. For everyone except witnesses, the rules of grand jury secrecy apply, requiring that they not reveal what transpires in the grand jury room. And this restriction, the Pennsylvania Supreme Court has now held, applies even to counsel for witnesses. *See In re Fortieth Statewide Investigating Grand Jury*, 191 A.3d 750, 758 (Pa. 2018) ("*In re Fortieth*") ("[P]rivate counsel are 'attorney[s]' and are thus explicitly made subject to the general requirement of secrecy by Section 4549(b).").

And yet, the Court has also recognized, this secrecy obligation is not without limit. Indeed, in the same opinion recognizing the applicability of grand jury secrecy to counsel for witnesses, the Court held the obligation does not extend to ***all*** matters merely relating to the grand jury proceeding about which counsel may become aware in the course of the representation. Indeed, the Court held that a version of the entry of appearance form requiring counsel to be sworn to secrecy was overbroad to the extent it required counsel to maintain secret not only (1) "all that transpires in the Grand Jury room," and (2) "all matters occurring before the Grand Jury" – which is consistent with the terms of the Investigating Grand Jury Act ("IGJA") – but also more broadly, (3) ***"all matters and information concerning th[e] Grand Jury obtained in the course of the representation."*** *In re Fortieth*, 191 A.3d at

753 (emphasis added).[1] As the Court explained, "the terms of the non-disclosure requirement, as it appears on the entry-of-appearance form, exceed the secrecy requirements of the Investigating Grand Jury Act. *See* 42 Pa. C.S. § 4549(b) (requiring nondisclosure only of 'matters occurring before the grand jury')." *Id.* at 760.

The Court therefore held that the secrecy requirement did not bar counsel for witnesses from disclosing any and "all matters and information concerning th[e] Grand Jury," and that counsel is permitted to disclose a client's testimony to the same extent the client, as a witness, is permitted to do so. *Id.* at 761 ("In sum, we do not read Section 4549(b) as preventing an attorney – with the explicit, knowing, voluntary, and informed consent of a client-witness – from disclosing the content of the client's own testimony, when the client is otherwise free to do so of his or her own accord. Otherwise, however, we hold that Section 4549(b) straightforwardly forbids attorneys – including private attorneys – from revealing matters occurring before an investigating grand jury, absent permission from the supervising judge.").

II. Rule 231 Presently Creates An Ambiguity – Left Unresolved By The Proposed Amendment – That Incorrectly Suggests Swearing Witnesses To Secrecy Is Generally Appropriate

A. The Ambiguity the Current Version of Rule 231 Creates

As presently written, Rule 231(C) states:

> ***All persons*** who are to be present while the grand jury is in session shall be identified in the record, ***shall be sworn to secrecy*** as provided in these rules, and shall not disclose any information pertaining to the grand jury ***except as provided by law.***
> Pa. R. Crim. P. 231(C) (emphasis added).

The Rule therefore improperly suggests that "[a]ll persons" – without distinguishing witnesses from others – "shall be sworn to secrecy." The "except as provided by law" clause may be a reference to § 4549(d), but this reference is not sufficient to put the supervising judge, the Commonwealth attorney, the witness, or the witness' counsel, on notice that witnesses may never be prohibited from disclosing their testimony except under limited circumstances.

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[1] We note in passing the Report's inadvertent mischaracterization of the Court's opinion where the Report suggests petitioners challenged the entry of appearance form's secrecy requirement as overbroad – and the Court agreed – because the requirement that all "matters occurring before the grand jury" be kept secret was overbroad. In fact, as noted above, and as the Court's opinion states, *In re Fortieth,* 191 A.3d at 761-62, the overbreadth did not have to do with that quoted language (which derives from 42 Pa. C.S. § 4549(b) itself, and so could not be overbroad because it parrots the plain language of the statute), but rather with the third aspect of the entry appearance form's requirement that attorneys also keep secret the much broader category of "all matters and information concerning this Grand Jury obtained in the course of the representation."

Thus, the phrasing of Rule 231(C) inverts the default presumption that witnesses shall ***not*** be sworn to secrecy unless and until the supervising judge finds good cause for the gag, and only following a hearing. *See* 42 Pa. C.S. § 4549(d) ("No witness shall be prohibited from disclosing his testimony before the investigating grand jury except for cause shown in a hearing before the supervising judge. In no event may a witness be prevented from disclosing his testimony to his attorney.").

To further confuse the issue, the statement "shall be sworn to secrecy ***as provided in these rules***" suggests that guidance is to be found elsewhere in the Rules regarding the nature of the secrecy oath, yet no such guidance exists. These faults in the current phrasing of Rule 231(C) are remedied in the proposal offered in Part III, below.

B. Even if Amended as the Committee Proposes, Rule 231's Ambiguity Would Remain

The proposed amendment to Rule 231(C) would not cure the ambiguity identified above. The language of the proposed amendment is set forth below (proposed deletion in bracketed text; proposed replacement text underlined):

> All persons who are to be present while the grand jury is in session shall be identified in the record, shall be sworn to secrecy as provided in these rules, and shall not disclose **[any information pertaining to the grand jury except as provided by law] <u>anything that transpires in the Grand Jury room and all matters occurring before the Grand Jury, except when disclosure is authorized by law or permitted by the supervising judge of the grand jury.</u>**

Furthermore, the proposed revision to the Comment to Rule 231 explains the proposed amendment to Rue 231 as follows:

> **<u>Section 4549(d) [of the IGJA] permits a witness to disclose his or her testimony before the investigating grand jury unless prohibited for cause shown in a hearing before the supervising judge. This testimony also may be disclosed by the witness' attorney with the explicit, knowing, voluntary, and informed consent of the client witness. *See In re Fortieth Statewide Investigating Grand Jury,* 191 A.3d 750 (Pa. 2018).</u>**

Thus, the proposed amendment to the Rule and revision to the Comment indicate that the Rule is equally applicable to ***witnesses*** (as well as ***counsel*** for witnesses), and perpetuate an improper requirement that witnesses be sworn to secrecy, contrary to the statutory presumption that such witnesses are entitled to disclose their testimony, which is rebuttable only by an order of the supervising judge, following a hearing, and upon a showing of good cause. *See* 42 Pa. C.S. § 4549(d) ("No witness shall be prohibited from disclosing his testimony before the investigating grand jury except for cause shown in a hearing before the supervising judge. In no event may a witness be prevented from disclosing his testimony to his attorney.").

III. The Committee's Proposal Fails To Address Other Faults In Rule 231 That Can Be Easily Addressed With Alternate Language

A. The Proposed Amendment To Rule 231 Falls Short For Various Other Reasons

To the extent the proposed amendment to Rule 231 applies to ***counsel*** for witnesses, we recognize a change is required by the Court's recent opinion and the proposed change is a modest improvement upon the existing Rule. Regrettably, however, the proposal does not go far enough in protecting the rights of grand jury witnesses to effective counsel (or the responsibility of counsel to effectively represent their clients). This is because it remains the position of PACDL that in all but the most unusual circumstances, counsel – *i.e.*, officers of the court who are well aware of the professional rules of conduct to which they are subject – should ***not*** be sworn to secrecy without a hearing and an opportunity to be heard, and only after which the court finds compelling reasons to swear them.

The routine application of secrecy oaths to experienced counsel already well familiar with the requirements of grand jury secrecy, and their own ethical obligations to maintain client confidences, risks unnecessarily and improperly hamstringing defense counsel to the detriment of grand jury witnesses (as well as targets and subjects). Witnesses are constitutionally and statutorily entitled to effective representation by counsel. *See* U.S. Const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."); *see also* 42 Pa. C.S. § 4549(c)(1), (3). Such representation requires defense counsel to obtain sufficient information to conduct their own parallel investigation, and to engage in confidential discussions with other defense counsel under the extended privilege of joint defense and common interest understandings. *See In re Fortieth*, 191 A.3d at 763 ("As the Attorney General concedes, federal courts recognize that the common interest and joint defense privileges extend into the grand jury setting, and we have no reason to conclude those privileges should be denied to those involved with grand jury proceedings in Pennsylvania." (citations omitted)). But an overly cautious attention to grand jury secrecy – including through the application of secrecy oaths to counsel – risks limiting defense counsel's ability to obtain information and evidence essential to the defense, and necessary to engage in effective parallel investigations, and to freely communicate in a joint defense or common interest arrangement.

The proposed amended text of Rule 231(C) also leaves open the risk – without further clarification in the rule – that a supervising judge or overly cautious Commonwealth attorney, could construe "matters occurring before the grand jury" too broadly to deny counsel for a witness access to information about the nature, scope, and basis for a grand jury subpoena – *i.e.*, information to which a witness is entitled. *See, e.g.*, *Robert Hawthorne, Inc. v. County Investigating Grand Jury*, 412 A.2d 556 (Pa. 1980) (recognizing right of witness to basic information as to the basis of a subpoena, including information contained in a Schofield affidavit).

Or, an excessively cautious supervising judge or prosecutor may believe incorrectly that the government cannot share with defense counsel the prosecution's theory of liability for a particular target. This would inhibit discussion between defense counsel and the prosecutor about this theory even though it is in the interest of all parties for the Commonwealth's attorney to share this theory with defense counsel, including so that the parties may openly arrive at a reasonable pre-charging disposition

of the matter, with all the savings in prosecutorial resources this entails. A too crabbed conception of "matters occurring before the grand jury" without any definition of that phrase therefore risks chilling open dialogue to the detriment of all parties.

In sum, although some of the proposed changes to Rule 231 are necessary under the Court's recent opinion, they do not sufficiently address PACDL's longstanding concerns for defense counsel, targets, subjects, and witnesses.

B. Additional Modifications to Rule 231 Would Eliminate Ambiguity

For the reasons set forth above, a better wording of Rule 231(C) that would address many of PACDL's concerns is the following formulation (proposed deletion in bracketed text; proposed replacement text underlined):

> All persons who are to be present while the grand jury is in session shall be identified in the record, **and – with the exception of witnesses and their counsel, unless the supervising judge requires upon a showing of good cause following a hearing –** shall be sworn to secrecy **[as provided in these rules]**, and shall not disclose **[any information pertaining to the grand jury except as provided by law] anything that transpires in the Grand Jury room, except as provided in 42 Pa. C.S. § 4549.**

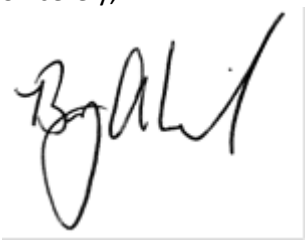
Courts and parties in this Commonwealth would benefit greatly from the clarity of these suggested changes.

CONCLUSION

The need for this Committee to adopt more thorough-going changes is even more critical in light of its unique institutional role. The recent opinions of several Justices of the Pennsylvania Supreme Court reflect their reluctance to tinker with statutes and rules relating to grand jury practice they perceive to be more appropriately within the province of the General Assembly, or this Committee. *See, e.g.*, *In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712, 721 (Pa. 2018) (Todd, J.) ("In responding to the present constitutional challenge, our Court may not usurp the province of the legislature by rewriting the Act to add hearing and evidentiary requirements that grand juries, supervising judges, and parties must follow which do not comport with the Act itself, as that is not our proper role under our constitutionally established tripartite form of governance."); *id.* at 724-25 (Baer, J., concurring) (stating "this Court should provide guidance to the Commonwealth regarding how it may comport with due process in conducting future investigating grand juries where an individual's right to reputation is implicated, pending any legislative action to address the constitutional deficiencies in the Investigating Grand Jury Act"); *see also In re Fortieth*, 191 A.3d at 776-77 (Wecht, J., dissenting) ("[T]he Majority disregards this plain language, determines that the General Assembly could not have intended exactly what it said, and proceeds to graft onto the statute another exception to the general secrecy rule, permitting lawyers to speak if authorized to do so by the testifying witness. However far our supervisory authority reaches, it does not allow us to rewrite statutes."). But, as we all know, a court's invitation for legislative action, or rulemaking – despite the importance of such action – is the kind of invitation for which the host may never receive an RSVP.

Thus, absent timely action by the judiciary or legislature which is not in the offing, this Committee's importance in adopting rules that ensure due process protections for grand jury subjects and their counsel increases significantly. It simply cannot be that a Rule that presently disserves witnesses and their counsel – and which the judicial and legislative branches have, for their own institutional reasons, not corrected, but which the executive will continue to deploy improperly to the detriment of witnesses and their counsel – will remain uncorrected by the very Committee with the power to do so. We strongly and respectfully urge such correction.

Sincerely,



Bradley Winnick, President