WHITE COLLAR CRIME COMMITTEE

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February 17, 2022

Honorable Raymond M. Kethledge
Chair, Advisory Committee on Criminal Rules
United States Court of Appeals
Federal Building
200 East Liberty Street, Suite 224
Ann Arbor, MI 48104

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

Dear Judge Kethledge:

This letter is submitted on behalf of the New York City Bar Association (the "City Bar"), to accompany a proposal formulated by the City Bar's White Collar Crime Committee (the "Committee").[1] We write to you in your capacity as Chair of the Advisory Committee on Criminal Rules of the Judicial Conference of the United States (the "Advisory Committee") to respectfully request that the Advisory Committee consider proposing to the Judicial Conference certain amendments to Federal Rule of Criminal Procedure 17 ("Rule 17"). The proposed amended rule is attached to this letter, both with changes tracked, *see* Exhibit A, and as a clean copy, *see* Exhibit B.

These changes seek to modernize and fine-tune Rule 17—a rule that has not been significantly updated since 1944 and that represents the only means by which criminal defendants can obtain information by subpoena in advance of trial—to reflect the reality of evidence-gathering in the electronic age and to eliminate ambiguities in the current rule as to when a court order is required. The City Bar supports the proposed amendments for the reasons stated below.

The mission of the City Bar is to equip and mobilize the legal profession to practice with excellence and to promote the rule of law and access to justice in support of a fair society in our

[1] The proposal was also endorsed by the City Bar's Federal Courts, Criminal Justice Operations, and Criminal Courts Committees and its Mass Incarceration Task Force.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

community, our nation, and throughout the world. The City Bar's White Collar Crime Committee is comprised of over 35 experienced attorneys whose principal area of practice is the defense of complex criminal cases in federal and state courts and before regulatory tribunals. Our membership includes former state and federal prosecutors and career criminal defense attorneys, who regularly submit *amicus curiae* briefs on major questions of criminal law and advocate for reforms of penal statutes and procedural rules, both federal and state. Our members are among the most active trial lawyers in New York's federal courts. Our Committee has decades of hands-on experience with the Federal Rules of Criminal Procedure and is well-qualified to understand those places where the Rules, as currently written, have sown confusion in the criminal courts or appear to fall short of ensuring equal access to justice for all, irrespective of a defendant's wealth or status.[2]

Introduction and Reason for Proposed Amendments to Rule 17(c)

The complexity and breadth of federal criminal prosecutions have grown considerably in recent years as Congress has passed legislation expanding the reach of federal criminal law into new areas,[3] prosecutors have focused on novel theories of prosecution,[4] and the gathering of evidence in the digital age has become ever more sophisticated and technical.[5] But even as such developments have increased the burden on defense attorneys to adequately prepare to defend criminal cases, the rules governing the availability of subpoenas in criminal cases have not kept up. Rule 17 has stood relatively unchanged since it was adopted in 1944 and has been applied extremely narrowly by trial courts, largely based on the reasoning of two Supreme Court cases which, as discussed below, did not even address defense subpoenas directed to non-governmental third parties.

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[2] The Committee also includes within its membership prosecutors and enforcement attorneys from federal government agencies; these government attorneys abstained from taking a position on this proposal, and this letter and the proposal thus do not reflect their views or those of the agencies with which they are employed.

[3] In one example, Congress enacted an anti-spoofing statute as part of the Dodd-Frank Act, and the Justice Department has dedicated a team to specifically address the conduct. *See* Pub. L. No. 111-203, § 747, 124 Stat. 1376, 1739 (2010); *see also* Dave Michaels, *Justice Department Presses Ahead with "Spoofing" Prosecutions Despite Mixed Record*, WALL ST. J. (Feb. 7, 2020, 1:55 PM), https://www.wsj.com/articles/justice-department-presses-ahead-with-spoofing-prosecutions-despite-mixed-record-11581095386.

[4] Two recent examples include prosecutions under the wire fraud statute in the NCAA bribery case and prosecutions under the Computer Fraud and Abuse Act. For a discussion of the propriety of the "right to control theory" of wire fraud, see Harry Sandick & Jared Buszin, *Justices Should Revisit 2nd Circ. Theory in NCAA Bribe Case*, LAW360 (Feb. 3, 2021), https://www.law360.com/whitecollar/articles/1350039/justices-should-revisit-2nd-circ-theory-in-ncaa-bribe-case (discussing *United States v. Gatto*, 986 F.3d 104 (2d Cir. 2021)). For a discussion of expanding criminal liability under the computer trespass statute, see Peter A. Crusco, 'Van Buren v. United States'*: 'Unauthorized Access' in the Virtual World of Expanding Federal Criminal Liability*, N.Y.L.J. (Dec. 21, 2020), https://www.law.com/newyorklawjournal/2020/12/21/van-buren-v-united-states-unauthorized-access-in-the-virtual-world-of-expanding-federal-criminal-liability.

[5] For an extensive examination of the unique challenges—including cost, volume, and complexity—that electronic discovery presents in the fair and accurate resolution of criminal cases, see, e.g., Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. CRIM. L & CRIMINOLOGY 237 (2019).

The constrictive limitations on such subpoenas under Rule 17 stand in stark contrast to the rules controlling the government's discovery obligations, which have expanded to keep pace, at least to some extent, with changing times. As originally drafted, the rule governing the government's discovery obligations, Rule 16, provided for only limited discovery and, significantly, preserved the absolute discretion trial courts had previously exercised in permitting or denying any discovery in criminal cases. *See* FED. R. CRIM. P. 16 advisory committee's note to 1944 adoption. In a nod to prevailing practice at the time, the Advisory Committee's note observed that the permissibility of discovery in criminal cases as a matter of law "[was] doubtful" under "existing law." *See id; see also United States v. Rosenfeld*, 57 F.2d 74, 76-77 (2d Cir. 1932) (declining to extend the right to discovery in civil cases to criminal cases). But since 1944, that rule has been amended multiple times—in recognition of defendants' need for access to potentially exculpatory information, the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequent case law—so that it now permits discovery without the necessity of a court order and requires the government to produce all items in its "possession, custody or control" which are "material to preparing the defense."

As a result, if documents material to the preparation of the defense are in the possession of the government, the defense should have access to them under Rule 16. But if, as is often the case, documents and other items of potential value to the defense are in the possession of third parties, defense counsel face significant and often insurmountable barriers to obtain those materials. In most cases, the government develops much of its evidence through the grand jury investigative process. Even after indictment, use of grand jury subpoena authority remains available to the government provided that there is an ongoing investigation into any (1) potential new charges against the defendant in a superseding or separate indictment, or (2) possible addition of a new defendant or defendants to the existing indictment, a frequent occurrence. The result is an unfair imbalance between the prosecution and the defense in preparing for trial—an imbalance that is particularly acute where, as in the majority of cases, defendants and their counsel have limited resources to employ alternative means (such as private investigators) to obtain needed information, not only to address evidence already in the government's possession, but also to develop affirmative defenses.

The amendments we propose are enclosed with this letter.[6] These amendments have been drafted to address the systematic impediments to criminal defendants' ability to obtain documents and objects in support of their defenses and thus to promote fairness and accuracy in criminal adjudication, ensure equal access to justice, and prevent wrongful convictions; at the same time, the amendments have also been tailored to protect the privacy of individual third parties and empower courts to prevent misuse of the rule. We hope you will agree that the amendments we propose are consistent with the ideals that motivated the Supreme Court's decision in *Nixon*: "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. *The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts*, within the framework of the rules of evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974) (emphasis added).

[6] We have set forth the proposal in two attachments: (1) Exhibit A, a redline against the current rule to reflect the proposed changes, and (2) Exhibit B, a clean copy of the proposed amended rule.

We first address a proposed amendment to Rule 17(c)(1), which currently authorizes subpoenas to obtain documents and other tangible items subject to certain limitations. We then discuss proposed amendments to sections concerning personal or confidential information ((17(c)(3)), information not subject to subpoena (17(h)), and judicial authority to issue modifying or protective orders (17(i)).

Proposed Amendments to Rule 17(c)(1) and (2)—Changes Directed at Scope of Items Sought

As currently drafted, Rule 17(c) provides:

> (c) *Producing Documents and Objects*.
>
> (1) *In General*. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.
>
> (2) *Quashing or Modifying the Subpoena*. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

In *theory*, subsection (c) of Rule 17 permits criminal defendants to use subpoenas to obtain documents from third parties, although, unlike the subpoenas *ad testificandum* described in subsection (a) and while the language contains some ambiguity, prior judicial approval is arguably required before issuance of a subpoena *duces tecum* pursuant to Rule 17(c). In *practice*, however, Rule 17(c) is rarely, if ever, useful to criminal defendants because courts have interpreted its application so narrowly. The narrow interpretation stems from the initial but now outdated purpose of the rule when adopted in 1944 and from two Supreme Court opinions which applied the rule in unique circumstances, which had nothing to do with the defense's need to obtain material evidence from third parties.

Rule 17 has not changed significantly since its enactment almost 80 years ago. *See* FED. R. CRIM. P. 17 advisory committee's notes to amendments. Rule 17(c) in particular has not been amended apart from the general restyling of the criminal rules in 2002 and the inclusion of protective measures for victims in 2008. *See id.* It was not intended to provide a means of fact or defense development for criminal cases, but as a way to expedite the trial by bringing documents into court "in advance of the time that they are offered in evidence, so that they may then be inspected in advance, for the purpose . . . of enabling the party to see whether he can use (them)." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 n.5 (1951) (internal citation omitted). The stated intention of the rule was consistent with the thinking of the time that defendants were entitled to little discovery.[7]

[7] *See* Benjamin E. Rosenberg and Robert W. Topp, *The By-Ways and Contours of Federal Rule of Criminal Procedure 17(c): A Guide Through Uncharted Territory*, CRIM. L. BULL., Vol. 45 No. 2 (2009), at page 8 & n. 19. ("Rosenberg Article").

The Supreme Court has twice addressed Rule 17(c), but neither case involved a defense subpoena of documents or information from a third party. In *Bowman Dairy*, the defendant, in an effort to circumvent the then-narrow scope of Rule 16 with respect to discovery from the government, served a broad subpoena on *the government.* *Bowman Dairy*, 341 U.S. at 215-16. Not surprisingly, the Court held that despite the seemingly broad language of Rule 17(c), the subpoena could not exceed the scope of Rule 16. *Id.* at 220-21. *Bowman Dairy* was followed by *United States v. Nixon*, 418 U.S. 683, 707 (1974), a case best remembered for ordering the production of the incriminating White House tapes that led shortly thereafter to President Nixon's resignation. In a less well-known part of the opinion, the Court addressed a motion *by government prosecutors*, not a criminal defendant, seeking a Rule 17(c) subpoena. Relying on *Bowman Dairy*, the Court held that when *government prosecutors* wish to issue a Rule 17(c) subpoena returnable before trial, the government must show:

> (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Id. at 699-700. The *Nixon* test is strict and reflects to an important degree the fact that the prosecutors had served the subpoena after a grand jury had returned the indictment; the Court was apparently sensitive to the rule that the government cannot cause grand jury subpoenas to issue after an indictment to bolster its evidence for trial. Indeed, it is our experience that government prosecutors rarely attempt to satisfy the *Nixon* standard, but instead rely on grand jury subpoenas or search warrants to obtain documents from third parties.

Neither *Bowman Dairy* nor *Nixon* addressed the situation where a defendant was seeking documents from a third party. Nevertheless, most lower courts have embraced the *Nixon* standard and applied it to defense subpoenas of third parties. *See, e.g.*, *United States v. Wey*, 252 F. Supp. 3d 237, 253 (S.D.N.Y. 2017) (applying *Nixon* standard to third-party subpoenas); *United States v. Henry*, 482 F.3d 27, 30 (1st Cir. 2007) (affirming lower court's application of *Nixon* standard to third-party subpoena); *United States v. Stevenson*, 727 F.3d 826, 831 (8th Cir. 2013) (noting that the Eighth Circuit has applied the *Nixon* standard to third-party subpoenas).

Criminal defendants, however, unlike government prosecutors, do not have an alternative means of issuing subpoenas *duces tecum*. For this reason, a growing number of courts and commentators alike have questioned whether the strict *Nixon* standard should apply to third party subpoenas issued by a *defendant.* *See, e.g.*, *United States v. Tucker*, 249 F.R.D. 58, 63 (S.D.N.Y. 2008) ("It is [ ] fair to ask whether it makes sense to require a defendant seeking to obtain material from a non-party by means of a Rule 17(c) subpoena to meet the *Nixon* standard."); *United States v. Rajaratnam*, 753 F. Supp. 2d 317, 321 n.1 (S.D.N.Y. 2011) ("[I]t remains ironic that a defendant in a breach of contract case can call on the power of the courts to compel third-parties to produce any documents '*reasonably calculated to lead to the discovery of admissible evidence*,' . . . while a defendant on trial for his life or liberty does not even have the right to obtain documents '*material to his defense*' from those same third-parties. Applying a materiality standard to subpoenas *duces tecum* issued to third parties under Federal Rule of Criminal Procedure 17(c) would resolve that

puzzle at great benefit to the rights of defendants to compulsory process and at little cost to the enforcement of the criminal law, since Rule 17(c) permits the government to issue subpoenas as well."); *United States v. Smith*, No. 19-cr-00669, 2020 WL 4934990, at *3-4 (N.D. Ill. Aug. 23, 2020) (questioning appropriateness of *Nixon* admissibility standard but quashing subpoena for CFTC documents on deliberative process grounds).[8]

Despite this growing recognition, most trial courts still apply the narrow *Nixon* standard and restrict defense subpoenas on third parties.[9] The problems that result from this interpretation of Rule 17(c) cannot be overstated. For example, without a meaningful ability to require production of documents from third parties prior to trial, the defense is effectively restricted to information the government gathers in the scope of its investigation and is severely constrained in its ability to develop affirmative defenses. Why should this matter? Consider the following hypothetical posed by the authors of a recent article:

> The defendant is the CFO and 25 percent owner of a family-owned business. He is indicted for utilizing his position to embezzle several million dollars from that business by creating both a wholly owned company and false invoices from it to the family-owned business.
>
> He then [allegedly] used his position of trust to pay the false invoices to his own company from the family business. The defendant advises his counsel of the wrongdoing of his accuser and other exculpatory facts that, if true, could constitute a defense at trial, mitigation of punishment, and/or impeachment of the government's primary accuser. The family-owned business uses a highly sophisticated, respected financial software package . . . . The defense forensic accountant concludes that the truth or falsity of the defendant's allegations would be fully disclosed by the accounting software and its data.

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[8] S*ee also* Peter J. Henning, *Defense Discovery in White Collar Criminal Prosecutions,* 15 GA. ST. U.L. REV. 601, 647 (1999) (*"Nixon* do[es] not forestall completely a defendant's efforts to secure documents before trial from third parties, but make[s] it unnecessarily difficult by imposing a high threshold for invoking Rule 17(c) that focuses on the evidentiary nature of the requested documents without reference to the defense at trial."); Robert G. Morvillo et al., *Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation*, 42 AM. CRIM. L. REV. 157, 160 n.12 (2005) ("It is extraordinarily difficult for a defendant, who has limited ability to investigate, to know enough about the discovery he is seeking such that he can comply with the *Nixon* requirements."); Hon. H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption,* 43 RUTGERS L. REV. 1089, 1089 (1991) ("It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters."); Rosenberg Article at pages 17-20 (discussing cases that have questioned appropriateness and applicability of *Nixon* standard to defense efforts to obtain materials from non-parties).

[9] *See Henry*, 482 F.3d at 30 (noting that under Rule 17, "the defense may use subpoenas before trial to secure admissible evidence but not as a general discovery device" and affirming district court decision to quash third-party subpoena); *United States v. Bergstein*, 788 F. Appx 742, 746 (2d Cir. 2019) (citing *Nixon* standard for third-party subpoenas and noting that the Second Circuit has "applied the *Nixon* standard to Rule 17(c) subpoenas requested by a defendant") (summary order); *United States v. Tokash*, 282 F.3d 962, 971 (7th Cir. 2002) (citing *Nixon* standard without analysis as governing third-party subpoena); *Stevenson*, 727 F.3d at 831 (noting that the Eighth Circuit has applied the *Nixon* standard to third-party subpoenas); *United States v. Sleugh*, 896 F.3d 1007, 1012 (9th Cir. 2018) (citing *Nixon* rule in context of Rule 17 subpoenas to phone companies).

Alan Silber and Lin Solomon, *A Creative Approach for Obtaining Documentary Evidence From Third Parties*, NEW & INSIGHTS (July 17, 2017), https://www.pashmanstein.com/publication-a-creative-approach-for-obtaining-documentary-evidence-from-third-parties.

As the authors explain, the lawyer in this scenario has no way of knowing if the client's allegations are true and whether the client has a viable defense, and the only way to make that determination is to obtain and analyze the financial data in the business software. But under the *Nixon* standard employed by most courts, it is likely that the defendant's 17(c) subpoena for that financial data would be quashed because until the defense sees the evidence, it cannot establish that it is "evidentiary and relevant."[10]

This problem pertains not just at criminal trials, but also in the pre-plea stage of criminal cases. In this regard, it is worth noting that only 2% of federal criminal cases proceed to trial. A rule that limits the pre-trial ability of 98% of criminal defendants to obtain documents that may be relevant to their case (other than those documents produced by the government) has the effect of restricting virtually all defendants' ability to make a fully informed decision concerning the strengths or weaknesses of the government's case against them, incentivizes defendants to plead guilty without full exploration of the merit of the government's case, and, therefore, increases the risks of wrongful convictions of defendants who may have had a meritorious defense. This is especially true in cases where guilt depends not necessarily on what the defendant did or did not do, but how it was perceived and understood by others, such as in cases where the materiality of a false statement is at issue. Without the ability to subpoena documents from third parties to test the government's allegations or to develop an affirmative defense of which the government was not aware, a defendant may find himself pleading guilty instead of pursuing what could have been a meritorious defense. These perverse results cannot have been intended by the Federal Rules of Criminal Procedure.

The Committee therefore proposes that the Advisory Committee revise Rule 17(c) to grant both parties to a criminal proceeding the ability to marshal documents and information, so long as they are "relevant and material to the preparation of the prosecution or defense." Notably, this standard, which the Committee proposes incorporating by adding a new section (c)(2) to Rule 17, and which is taken from the standard defining the government's obligations under Rule 16, would still be markedly higher than the civil discovery standard,[11] and thus would not open the door to burdensome fishing expeditions. The new proposed section (c)(2) would authorize parties to subpoena impeachment material in advance of trial (and not just admissible evidence under the *Nixon* standard) because the ability to effectively confront and impeach a witness is essential to a fair adversarial process. *See*, *e.g.*, *United States v. Rodriguez*, 496 F.3d 221, 225 (2d Cir. 2007) (describing *Giglio* obligation to disclose impeachment information as "serv[ing] the objectives of

[10] *See also* Rosenberg Article at 12-13 (discussing difficulty of meeting *Nixon* evidentiary standard without even seeing documents that are being sought).

[11] *See* FED. R. CIV. PRO. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.").

both fairness and accuracy in criminal prosecutions"). To further minimize the risk of undue burdens, we propose adding to the section of Rule 17(c) governing quashing or modifying the subpoena—section (c)(2) in the existing rule and section (c)(3) in the Committee's proposal—a provision for the subpoena to be quashed or modified not only if compliance would be "unreasonable or oppressive," as the rule currently provides, but also if the documents sought "are . . . otherwise procurable reasonably in advance of trial by exercise of due diligence," a standard drawn from *Nixon*. *See Nixon*, 418 U.S. at 699.

Next, the Committee proposes removing the last two sentences from Rule 17(c)(1) because they do not reflect how material is exchanged, as a practical matter, in the digital age. The change also makes clear that no court order is required to issue a subpoena, regardless of whether the documents and objects sought are to be produced in advance of trial.[12] Under current practice, courts differ on whether a court order is required when a subpoena seeks the production of materials in advance of trial.[13] In our view, such a requirement is unnecessary. Eliminating the requirement of a court order (except for circumstances set forth in Rule 17(c)(3), as discussed below) obviates the need for parties to reveal trial strategy in seeking court approval, unless they succeed in convincing the court to permit them to proceed *ex parte.* Any concerns about abusive subpoena practice can adequately be addressed either through motions to quash and rulings on the introduction of evidence obtained via Rule 17 subpoena or through the new modifying order that would be authorized by proposed Rule 17(i).

Proposed Amendment to Rule 17(c)(3)—Obtaining Personal or Confidential Information

The Committee also proposes amending the current Rule 17(c)(3) (which would become Rule 17(c)(4)) that currently governs subpoenas for personal or confidential information from a victim in two ways: (a) to broaden the provision so that it requires advance court approval for a subpoena for personal or confidential information from any individual, not just a victim, and (b) to make clear that such a subpoena, issued pursuant to Rule 17(c)(4), is the *only* type of Rule 17(c) subpoena that requires judicial approval prior to issuance.

This change would make clear that the Advisory Committee's previous inclusion of such a requirement for subpoenas seeking personal or confidential information was not intended merely to be surplusage, and that other subpoenas issued to other third parties—which do not call for personal or confidential information about an individual—do not require judicial approval prior to issuance and may be issued pursuant to the procedures set out in Rule 17(a).

In addition, the Committee proposes including within the rule examples of what constitutes "personal or confidential information," both to guide courts and counsel, while leaving the precise definitional contours of the phrase to case development. And the Committee proposes limiting the applicability of this portion of the rule to subpoenas that call for personal or confidential information about an individual who is a natural person, as opposed to a corporate entity. This change would serve to prevent corporate victims from claiming that virtually *all* of their documents

[12] We have also proposed a conforming change to Rule 17(a).

[13] Rosenberg Article at page 31 et seq.

and information are "confidential" and disregarding the original purpose of the rule, which was to ensure that individual crime victims were treated with "dignity and respect."

Proposed Amendment to Rule 17(h)—Scope of Limitation on Obtaining Witness Statements

The Committee also proposes adding language to Rule 17(h) to clarify the Rule's scope. Rule 17(h) currently provides:

> (h) *Information Not Subject to a Subpoena*. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

As originally enacted, Rule 17(h) provided that "[s]tatements made by witnesses or prospective witnesses may not be subpoenaed *from the government or the defendant* under this rule, but shall be subject to production only in accordance with the provisions of Rule 26.2." *See* Order of the Supreme Court, 207 F.R.D. 89, 440 (2002) (emphasis added). This Rule implements the Jencks Act, which requires the government to produce witness statements "in [its] possession" only after the witness has "testified on direct examination." 18 U.S.C. § 3500(a), (b). Neither the Jencks Act nor Rule 26.2 imposes any restrictions or obligations regarding statements that are in the possession of third parties. When this provision was amended to its current version in 2002, the italicized language above was removed. But the Advisory Committee made clear that this "change[] [was] *intended to be stylistic only*," and was simply "part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules." 207 F.R.D. at 443 (emphasis added). Since that time, however, the Committee has seen an increasing number of cases in which third party subpoena recipients and/or the government have argued that Rule 17(h) does not allow the use of a Rule 17 subpoena to obtain *any* witness statements, even those in the hands of third parties. *See, e.g.*, *United States v. Yudong Zhu*, No. 13-cr-761, 2014 WL 5366107, at *3 (S.D.N.Y. Oct. 14, 2014); *United States v. Vasquez*, 258 F.R.D. 68, 72-73 (E.D.N.Y. May 20, 2009). Thus, the Committee proposes a revision to Rule 17(h) expressly limiting the applicability of the rule to subpoenas that call for witness statements "from the other party."

Proposed Addition of Rule 17(i)

To ensure that the broader availability of Rule 17(c) subpoenas to prosecution and defense counsel is not misused, the Committee proposes the addition of a new provision authorizing courts to issue modifying orders to require advance approval for all such subpoenas in individual cases, upon a showing of good cause and specific and articulable facts—including through an *ex parte* submission if necessary. This provision, whose language was drawn from Rule 16(d)(1), will enable courts to balance the proposal's goal of broadening subpoena authority to promote fairness and accuracy in criminal adjudication, ensure equal access to justice, and prevent wrongful convictions, with the need in specific cases to prevent misuse of subpoenas for intimidation or personal embarrassment.

Conclusion

This proposal to modernize Rule 17 is based on the real experiences of our membership regarding the limitations on the ability of criminal defendants to obtain critical documents, data, and information in complex cases in New York federal courts, as well as other federal courts throughout the country. The proposal would further the goal of increasing access to justice for all participants in the criminal justice system, a goal we understand to be shared by the government and defendants alike. We appreciate the opportunity to submit the City Bar's proposal to you and are available to provide any additional information the Advisory Committee may require.

Respectfully submitted,

Marshall L. Miller
Chair, White Collar Crime Committee
New York City Bar Association

Cc: Prof. Sara Sun Beale, Co-Reporter, Advisory Committee on Criminal Rules
Prof. Nancy King, Co-Reporter, Advisory Committee on Criminal Rules

EXHIBIT A

Rule 17. Subpoena (*WITH CHANGES TRACKED*)

(a) CONTENT. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command ~~the witness to attend and testify at the time and place the subpoena specifies.~~each person to whom it is directed to do the following at a specified time and place: attend and testify or produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) DEFENDANT UNABLE TO PAY. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) PRODUCING DOCUMENTS AND OBJECTS.

(1) *In General*. A subpoena may order the witness to produce ~~any books, papers,~~ documents, ~~data~~electronically stored information, or ~~other objects the~~ tangible things in that person's possession, custody, or control. A command in a subpoena ~~designates. The court~~to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials at the time and place the subpoena specifies.

(2) *Scope*. A subpoena may ~~direct~~order the witness to produce ~~the designated~~ items ~~in court before trial or before they~~described in (1) that are ~~to be offered in evidence. When the items arrive, the court may permit~~ relevant and material to the ~~parties and their attorneys to inspect all or part of them~~preparation of the prosecution or defense, including for the impeachment of a potential witness.

(~~2~~) 3) *Quashing or Modifying the Subpoena*. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive, or if the documents or objects sought are otherwise procurable by exercise of due diligence.

(~~3~~) 4) *Subpoena for Personal or Confidential Information ~~About a Victim.~~* . After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about ~~a victim~~an individual may be served on a third party only by court order. This is the only type of subpoena that requires judicial approval prior to issuance, absent entry of a modifying order under subsection (i). Personal or confidential information includes medical records, psychological records, school records, and other similar information. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the ~~victim~~individual so that the ~~victim~~individual can move to quash or modify the subpoena or otherwise object.

(d) SERVICE. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender

to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) PLACE OF SERVICE.

(1) *In the United States*. A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.

(2) *In a Foreign Country*. If the witness is in a foreign country, 28 U.S.C. §1783 governs the subpoena's service.

(f) ISSUING A DEPOSITION SUBPOENA.

(1) *Issuance*. A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(2) *Place*. After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(g) CONTEMPT. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. §636(e).

(h) INFORMATION NOT SUBJECT TO A SUBPOENA. No party may subpoena a statement of a witness or of a prospective witness, from the other party, under this rule. Rule 26.2 governs the production of the statement.

(i) MODIFYING ORDER. At any time the court may, for good cause and based on specific and articulable facts, require a party to obtain court approval before issuing a subpoena under this rule. The court may permit a party to show good cause and provide specific and articulable facts by a written statement that the court will inspect ex parte.

EXHIBIT B

Rule 17. Subpoena (*CLEAN*)

(a) CONTENT. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command each person to whom it is directed to do the following at a specified time and place: attend and testify or produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) DEFENDANT UNABLE TO PAY. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) PRODUCING DOCUMENTS AND OBJECTS.

(1) *In General*. A subpoena may order the witness to produce documents, electronically stored information, or tangible things in that person's possession, custody, or control. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials at the time and place the subpoena specifies.

(2) *Scope*. A subpoena may order the witness to produce items described in (1) that are relevant and material to the preparation of the prosecution or defense, including for the impeachment of a potential witness.

(3) *Quashing or Modifying the Subpoena*. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive, or if the documents or objects sought are otherwise procurable by exercise of due diligence.

(4) *Subpoena for Personal or Confidential Information*. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about an individual may be served on a third party only by court order. This is the only type of subpoena that requires judicial approval prior to issuance, absent entry of a modifying order under subsection (i). Personal or confidential information includes medical records, psychological records, school records, and other similar information. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the individual so that the individual can move to quash or modify the subpoena or otherwise object.

(d) SERVICE. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) PLACE OF SERVICE.

(1) *In the United States*. A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.

(2) *In a Foreign Country*. If the witness is in a foreign country, 28 U.S.C. §1783 governs the subpoena's service.

(f) ISSUING A DEPOSITION SUBPOENA.

(1) *Issuance*. A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(2) *Place*. After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(g) CONTEMPT. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. §636(e).

(h) INFORMATION NOT SUBJECT TO A SUBPOENA. No party may subpoena a statement of a witness or of a prospective witness, from the other party, under this rule. Rule 26.2 governs the production of the statement.

(i) MODIFYING ORDER. At any time the court may, for good cause and based on specific and articulable facts, require a party to obtain court approval before issuing a subpoena under this rule. The court may permit a party to show good cause and provide specific and articulable facts by a written statement that the court will inspect ex parte.