REPORT BY THE WHITE COLLAR CRIME COMMITTEE

COMMENTS ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO FEDERAL RULE OF CRIMINAL PROCEDURE 17 PUBLISHED AUGUST 2025

The New York City Bar Association ("City Bar") appreciates the opportunity for public comment provided by the Judicial Conference's Committee on Rules of Practice and Procedure on the proposed amendments to Rule 17 of the Federal Rules of Criminal Procedure ("Rule 17").[1]

The City Bar, founded in 1870, has over 20,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. It includes among its membership lawyers in many areas of law practice, including current and former prosecutors, public defenders, and other attorneys who represent corporate and individual defendants in criminal cases. The City Bar's White Collar Crime Committee focuses on legal practice in the white-collar criminal space. It includes former federal prosecutors, public defenders, and other defense attorneys with substantial experience in federal criminal cases.[2]

The City Bar, by and through the White Collar Crime Committee, respectfully submits the following comments to the Advisory Committee on Criminal Rules ("Advisory Committee") in response to the request for comments on the proposed amendments to Rule 17.

I. INTRODUCTION

The City Bar previously submitted a letter to the Advisory Committee proposing amendments to Rule 17 on February 17, 2022 (the "2022 Letter").[3] As we noted in our 2022 Letter, Rule 17 has not been significantly amended since 1944 and has failed to keep up with the realities of modern federal criminal practice. Federal courts across the country have been forced

[1] *See* Judicial Conference Committee on Rules of Practice and Procedure, Preliminary Draft: Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence 68–99 (2025), *available at:* https://www.uscourts.gov/sites/default/files/document/preliminary-draft-of-proposed-amendments-to-federal-rules_august2025.pdf. (All websites last accessed February 12, 2026)

[2] Any members of the City Bar who are current government attorneys abstained from taking a position on this letter. Accordingly, this letter does not reflect their views or those of the agencies with which they are employed.

[3] Letter from New York City Bar to the Hon. Raymond M. Kethledge, Chair of Advisory Committee on Criminal Rules (Feb. 17, 2022), *available at:* https://www.nycbar.org/wp-content/uploads/2023/05/2022979-ModernizeRule17FedRulesCriminalProcedure.pdf.

About the Association
The mission of the New York City Bar Association, which was founded in 1870 and has over 20,000 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.

to grapple with an ambiguous, outdated rule, often arriving at different interpretations of the scope of Rule 17. Many of these interpretations have resulted in unduly narrow constructions of Rule 17 that curtail the ability of defendants to obtain pertinent information from third parties. As a result, and in stark contrast to the government's ability to obtain information via grand jury subpoenas, many criminal defendants are left without a way to obtain facts or information that would help them make informed decisions and defend themselves at trial.

The City Bar is grateful for the Advisory Committee's recognition that Rule 17 needs to be reformed and for its careful consideration of the proposals set forth in our 2022 Letter. We believe that the Advisory Committee's thoughtful work on Rule 17 will promote clarity, uniformity, fairness, and, ultimately, greater trust in our criminal justice system. As drafted, the proposed amendments represent a substantial step in the right direction toward much-needed reform of Rule 17. For example, the proposed amendments address several procedural issues that have split the courts, including by codifying the position adopted in many districts that a motion and court order are not typically required to issue a Rule 17 subpoena.[4] Similarly, the proposed amendments promote uniformity in the law by clarifying that a court must, upon showing of good cause, allow a party to file *ex parte* a motion if required for issuance of a subpoena under Rule 17.[5]

While the City Bar fully supports the proposed amendments, in the following comments, we offer one suggested revision to the amendments to Rule 17(c) and an additional amendment to Rule 17(h) for the Advisory Committee's consideration. We believe these edits would further strengthen and clarify application of Rule 17.

II. COMMENT ON PROPOSED AMENDMENTS TO RULE 17(C)

The proposed amendments to Rule 17(c) would permit a party to issue a subpoena *duces tecum* when, *inter alia*, the items sought "are, or contain information that is, likely to be admissible as evidence in the designated proceeding." Proposed Amendments at 82. As the Advisory Committee noted, this change is intended to clarify that courts should not adopt a strict reading of the requirements set forth in *United States v. Nixon*, 418 U.S. 683, 700 (1974). Proposed Amendments at 75. Certain courts have adopted an unduly rigid standard that requires defense counsel specifically to identify the contents of each item sought in a Rule 17 subpoena in order to establish their admissibility. Because parties were seldom able to meet this standard, these interpretations had the effect of essentially barring the use of Rule 17 in some districts.

By relaxing the stringent standard imposed by certain courts, the proposed "likely to be admissible" standard is a significant step towards addressing some of the concerns that we raised in our 2022 Letter. We also appreciate the Advisory Committee's proposed commentary to this amendment that "impeachment evidence should be available to a party by subpoena for use at trial

[4] *See* Proposed Amendments at 76. As the Advisory Committee noted, a motion requirement puts an excessive burden on both practitioners and the courts. *Id.* Meanwhile, the proposed amendments to Rule 17 safeguard against any dangers of abuse by requiring a motion and court order for subpoenas seeking "certain victim information" and when the issuing party is proceeding *pro se*. *Id.*

[5] *See* Proposed Amendments at 76. The Advisory Committee recognized that the unavailability of *ex parte* motions in some districts left counsel with "two untenable options: either risk harming the client by revealing defense strategy or even uncovering inculpatory information the government would not otherwise have known, or forego a subpoena, abandoning pursuit of information that they believe is essential to defend the client." *Id.* at 73.

when the party knows that a witness will or is likely to testify." Proposed Amendments at 93. This would be an important step forward to promote fairness in our criminal justice system.

The City Bar, however, believes that the "likely to be admissible" standard may still lead to the same issues that animated our initial concerns. Most notably, the "likely to be admissible" standard could lend itself to differing interpretations and applications by federal courts. Courts will be faced with the task of conducting a hypothetical inquiry into whether certain information or items would likely be admissible at a particular future proceeding for which they are sought. Admissibility, however, frequently turns on a nuanced understanding of the evidence at issue, the other evidence presented, and arguments advanced by the parties—all reasons why courts frequently defer admissibility decisions until trial itself, or shortly before trial in the context of *in limine* motions. Moreover, given the numerous circuit splits that currently exist with respect to evidentiary issues, a standard hinging on admissibility will mean that Rule 17 is applied differently depending on where a defendant is charged.[6] Overall, given the complicated nature of the hypothetical inquiry, the City Bar is concerned that the "likely to be admissible" standard will continue to result in non-uniform applications of Rule 17 across the courts. We, therefore, maintain that the Advisory Committee should reconsider adopting the language we initially proposed for Rule 17(c) that would allow a party to obtain information by subpoena based on a showing that the materials sought are "relevant *and material* to the preparation of the prosecution or defense." *See* 2022 Letter at 7.

In addition, as noted by other organizations and practitioners, the proposed "likely to be admissible" standard might still be impossible for parties to meet in certain cases, even though the information sought is relevant and material to the proceeding.[7] For example, if defense counsel is aware that a third party possesses certain relevant footage or phone records, the admissibility of those records may hinge on the application of the hearsay rules, the content of those records (such as whether the probative value of the contents outweighs the danger of unfair prejudice), other facts that would be admitted into evidence at trial, and whether a privilege applies.[8] Yet most of these determinations require the ability to review and understand the content of the materials being requested. As a result, there is a risk that parties find themselves in a "Catch-22" situation. As one practitioner explained to the Advisory Committee, it is a "mystery . . . how [one] could know something was admissible when he had not yet seen it." Minutes of Meeting of Oct. 27, 2022, Advisory Committee on Criminal Rules, at 24.

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[6] *See generally* Capra, *supra* note 6, at 128

[7] *See* Letter from NACDLS to the Hon. James C. Dever, Chair of Advisory Committee on Criminal Rules (Feb. 14, 2023) at 3, 14, available at https://www.nacdl.org/getattachment/9e9a087e-f880-4b1c-983b-0f9305257fd2/nacdl-letter-to-rules-committee-re-rule-17-amendments-02132024.pdf (describing the difficulty of proving admissibility before having access to the materials sought); Proposed Amendments at 70 (quoting a practitioner who stated that "he cannot pass the *Nixon* standard unless he knows 'exactly what this camera is going to show or exactly what the phone records will say.'"); Minutes of Meeting of Oct. 27, 2022, Advisory Committee on Criminal Rules, at 24, available at https://www.uscourts.gov/sites/default/files/2022-10_criminal_rules_committee_meeting_minutes_final_0.pdf

[8] For this reason, courts often reserve decision on admissibility issues until trial. *See, e.g.*, *New Am. Mktg. FSI LLC v. MGA Ent., Inc.*, 187 F. Supp. 3d 476, 481 (S.D.N.Y. 2016) ("A court considering a motion *in limine* may reserve judgment until trial so that the motion is placed in the appropriate factual context.") (citing *Wechsler v. Hunt Health Sys., Ltd.*, 381 F. Supp. 2d 135, 140 (S.D.N.Y. 2003))

A standard based on relevance and materiality would avoid these issues. Courts are already familiar with determining whether certain categories of information may be relevant and material to the prosecution or the defense. This standard, taken from Rule 16 of the Federal Rules of Criminal Procedure, aligns with the policy trend over the last several decades of affording the defense greater opportunities for discovery in criminal cases.[9] Further, as we noted in our 2022 Letter, there is minimal risk of abuse with the relevance and materiality standard. It is substantially more stringent than the standard for civil discovery in federal cases, which allows parties broadly to obtain any discovery that is relevant to a claim or defense and is proportional to the needs of the case. *See* Fed. R. Civ. P. 26(b)(1). As the Advisory Committee noted in its May 15, 2025 report, "[d]espite repeated inquiries to practitioners and other experts, no one reported that 'fishing expeditions,' harassment, unwarranted disclosure, or other abuses of Rule 17 existed or were more of a problem in the jurisdictions that follow more flexible interpretations of the rule." *Id.* at 71–72. The same would be true of a standard based on relevance and materiality. Indeed, the proposed amendments include sufficient safeguards for any potential abuse by requiring a motion and court order in the case of self-represented parties. *See* Proposed Amendments at 84.

Relatedly, we believe that the proposed relevant and material standard, along with the additional safeguards included in the proposed amendments, will adequately protect victims from any potential abuse of Rule 17. We are sensitive to the concerns raised by victims' advocates during the January 22, 2026 public hearing regarding the proposed amendments. Many of their concerns focused on the potential harm and violation of privacy that victims could experience if the standard for issuing a Rule 17 subpoena were loosened. As members of the Advisory Committee rightfully noted at the hearing, however, the proposed amended Rule 17(c) will adequately protect victims from such potential harm and abuse. For instance, a subpoena seeking personal or confidential information about a victim would require a motion and could only be served with court approval. This gatekeeping function will enable federal judges to intervene if a proposed Rule 17 subpoena poses any risk of harm or abuse to a victim. *See* Proposed Amendments at 84. Federal courts are well equipped to balance the need to protect a victim from such harm or abuse with the right of criminal defendants to obtain evidence that is material to their defense. Indeed, every case will present unique facts and circumstances, and the current proposed amendments will provide courts with discretion in evaluating these weighty and competing interests. Furthermore, unless a defendant can demonstrate exceptional circumstances, notice to a victim must be provided when a Rule 17 subpoena seeks production of personal or confidential information. *See* Proposed Amendments at 85. The "exceptional circumstances" standard, as described in the Advisory Committee's notes to the 2008 amendments to Rule 17(c), is a high bar that courts can be trusted to apply.[10] This standard will also ensure that victims have an opportunity to move to quash the Rule 17 subpoena or to move for a protective order. Lastly, the Advisory Committee has already thoroughly considered and decided against adopting amendments

[9] *See, e.g.*, *United States v. Stevens*, 985 F.2d 1175, 1180 (2d Cir. 1993) ("Relevance, within the meaning of [Rule 16,] is to be interpreted broadly in deference to the policy judgment that 'disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.'" (quoting *Dennis v. United States*, 384 U.S. 855, 870 (1966))).

[10] The Advisory Committee notes explain that the "exceptional circumstances" standard may be met when "evidence . . . might be lost or destroyed if the subpoena were delayed" or "where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy." Fed. R. Crim. P. 17(c)(3) Advisory Committee's note to 2008 amendment.

that would impose separate substantive standards for subpoenas that seek protected and unprotected information. *See generally* Minutes of Meetings of Nov. 6-7, 2024, Advisory Committee on Criminal Rules. As several participants explained, a bifurcated approach based on the type of information requested by a Rule 17 subpoena would create burdensome and unnecessary litigation. *See e.g., id.* at 19, 43.

III. SUGGESTED AMENDMENT TO RULE 17(H)

We urge the Advisory Committee to consider amending Rule 17(h) as the City Bar proposed in our 2022 Letter.[11] When first 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." Order of the Supreme Court, 207 F.R.D. 89, 440 (2002) (emphasis added). As our 2022 Letter noted, this rule was intended to implement the Jencks Act, which directs the government to produce witness statements in its possession after the witness "testified on direct examination." 18 U.S.C. § 3500(a), (b). Rule 26.2 of the Federal Rules of Criminal Procedure similarly governs the production of witness statements after testimony. Neither Rule 26.2 nor the Jencks Acts, however, provide any limitations on the production of witness statements in possession of third parties.

The italicized language above was removed in 2002 when the Advisory Committee made certain stylistic changes to the rules. It is clear, however, that these amendments were not intended to effect a substantive change. *See* Order of the Supreme Court, 207 F.R.D. at 443 (Committee Note explaining that, with the exception of Rule 17(c)(1), "[t]hese changes are stylistic only."). Nonetheless, the government has argued in several cases that Rule 17(h) prohibits the use of a subpoena to obtain witness statements not just from the government, but also from third parties. Courts have taken different positions on this issue, with some barring the use of Rule 17 to obtain *any* witness statements, including those possessed by third parties. *Compare United States v. Yudong Zhu*, No. 13 Cr. 0761, 2014 WL 5366107, at *3 & n.3 (S.D.N.Y. Oct. 14, 2014) (holding that any statements of a witness or of a prospective witness are not subject to a Rule 17 subpoena); *United States v. Vasquez*, 258 F.R.D. 68, 73 (E.D.N.Y. 2009) (same), *with United States v. Goldstein*, No. 21 Cr. 550 (DC), 2023 WL 3662971, at *5-6 (E.D.N.Y. May 25, 2023) (adopting defendants' view that "Rule 17(h) operates to prevent discovery only of statements in the possession of the Government"); *United States v. Hussain*, No 16 Cr. 0462, 2018 WL 1091083, at *2 (N.D. Cal. 28, 2018) ("Rule 17(h) only applies to statements in the possession of the government.").

To resolve this ambiguity and inconsistent application of Rule 17(h), we urge the Advisory Committee to reconsider our proposed amendment to Rule 17(h). Specifically, we propose amending Rule 17(h) to state that "[n]o party may subpoena a statement of a witness or of a prospective witness, <u>from the other party,</u> under this rule. Rule 26.2. governs the production of the statement." By explicitly stating that Rule 17(h) applies only to requests for a statement "from

[11] The Advisory Committee thoroughly considered many of the proposals included in our 2022 Letter, but we have not been able to locate any discussion regarding our proposal to amend Rule 17(h).

the other party," the Advisory Committee can clarify that parties are still free to seek witness statements from third parties by subpoena.

IV. CONCLUSION

The City Bar fully supports the amendments to Rule 17 proposed by the Advisory Committee and appreciates this opportunity to provide our comments. For the reasons set forth above, we urge the Advisory Committee to consider replacing the "likely to be admissible" standard with a "relevant and material" standard for Rule 17(c), as we originally proposed in 2022. In addition, we urge the Advisory Committee to consider amending Rule 17(h) to make clear that parties may seek witness statements from third parties by way of subpoena.

White Collar Crime Committee
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