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WHITE-COLLAR CRIME

Fifty Years After Nixon, Progress on Amending Rule 17(c)

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Commentators long have pointed to the unfairness of applying the strict test used to assess a prosecutor's subpoena to a sitting president in *United States v. Nixon*, 418 U.S. 683 (1974), to run of the mill subpoenas criminal defendants utilize to seek documentary material from third parties pursuant to Fed. R. Crim. P. 17(c). *See* Robert J. Anello & Richard F. Albert, *Escaping 'Nixon's' Legacy: the Proper Standard for Rule 17(c) Subpoenas*, N.Y.L.J. (April 2, 2013). Triggered by a 2022 request from the New York City Bar Association, a subcommittee of the Advisory Committee on criminal rules, the official body charged with addressing proposed federal rule changes, has undertaken a comprehensive review of Rule 17.

As of October 2024, the Rule 17 subcommittee made public a discussion draft of an amended rule that, although falling short of all that defense counsel would desire, makes real progress in addressing some of the most pressing concerns. Most importantly, the draft rule would allow counsel to obtain most documentary materials from third parties so long as they are "material and relevant" to the preparation of the defense, dispensing with *Nixon*'s requirement that a defendant make the often-impossible prior showing that unseen documents are "admissible," and enabling defendants to obtain documents that may constitute critical impeachment material but may not themselves be admissible.

As reflected at a public meeting of the Advisory Committee held in New York on Nov. 7, 2024 to allow for comment, full consensus is elusive, and the draft is not a final recommendation. Speakers from the Department of Justice, which in practice makes liberal use of grand jury subpoenas and thus very rarely has to meet the Rule 17(c) standard, voiced strong concerns about revisions that would serve to reduce hurdles for defendants to obtain documentary evidence to

aid their defense. Although significant further effort likely will be needed to get the long-awaited improvements reflected in the draft across the goal line, the Advisory Committee's progress so far provides reason for hope that, with continued attention from the bar, the end result will be a much-needed step toward greater fairness.

The Nixon Problem

Rule 17(c) has remained essentially unchanged since 1944. Rule 17(c)(1) currently states that "[a] subpoena may order a 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."

Subsection (c)(2) provides that a court "may quash or modify the subpoena if compliance would be unreasonable or oppressive." The Rule does not set forth the standard for obtaining a subpoena, nor provide much guidance about the process for obtaining one, and the Supreme Court has not interpreted the Rule in the context of a defense subpoena seeking materials from a third party.

The Supreme Court has addressed Rule 17(c) in other contexts on two occasions. In *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951), a defendant charged with violations of the Sherman Antitrust Act sought to enforce a broad Rule 17(c) subpoena addressed to the government in lieu of the then narrower scope of discovery provided for under Rule 16 of the Federal Rules of Criminal Procedure. The court held that any government materials subject to a Rule 17(c) subpoena must be evidentiary, that is, "part of a good-faith effort . . . to obtain evidence" and Rule 17(c) cannot be used to undermine the limits on discovery set by Rule 16. *See Bowman*, 341 U.S. at 220-21.

Following *Bowman*, the court addressed Rule 17(c) in the context of the Watergate special prosecutor's subpoena addressed to President Nixon, seeking the infamous White House tapes. The court concluded, 8-0, that the special prosecutor had demonstrated the necessary "(1) relevancy; (2) admissibility; [and] (3) specificity" of the materials sought. *Nixon*, 418 U.S. at 699 n.12. The case was highly unusual in two ways.

First, the subpoena was issued by the prosecution team, which in practice very rarely need to resort to Rule 17(c). Second, the subpoena sought bombshell evidence from a sitting U.S. president. The *Nixon* Court explained that it "need not decide whether a lower standard exists" when a subpoena is issued to a nongovernment third-party. *Nixon*, 418 U.S. at 700. Many courts, however, have since applied the strict *Nixon* standard to defendants' Rule 17(c) subpoenas addressed to third parties.

That standard poses critical problems for defendants. First, defense counsel often cannot demonstrate the "relevancy" and "admissibility" of the third-party material they seek without first getting access to the material. Second, the "admissibility" standard may prevent defendants from subpoenaing material useful only for impeachment, which is often crucial to a fair adversarial process. Courts that have analyzed the constitutional interests at stake have remarked on the irony that, if the *Nixon* standard is applied to a defendant's Rule 17(c) subpoenas, a civil defendant in a breach of contract matter has a far broader

right to obtain needed documentary evidence than a criminal defendant on trial for her life.

The City Bar Proposal

In an effort to address the problems posed by the *Nixon* standard, and to otherwise clarify and modernize Rule 17 to reflect the realities of modern evidence gathering, by letter dated Feb. 22, 2022 the New York City Bar Association's White Collar Crime Committee sent the Advisory Committee a proposal to revise the Rule.

The City Bar's proposal recommends replacing the *Nixon* standard with the requirement that parties demonstrate only that the requested documents are "relevant and material to the preparation of the prosecution or defense, including for the impeachment of a potential witness." White Collar Crime Committee Report, *Proposed Amendment to Rule 17 of the Federal Rules of Criminal Procedure*, New York City Bar (Feb. 17, 2022). The City Bar asserts that this standard, which is taken from the test defining the government's discovery obligations under Rule 16, would allow defendants to obtain information needed to prepare for trial effectively, including to develop affirmative defenses, without opening the door to burdensome fishing expeditions.

The City Bar additionally proposes removing the last two sentences from Rule 17(c)(1) to make clear that no court order is generally required to issue a subpoena. Current practice under Rule 17(c) varies across the districts regarding whether a prior motion is required, with some courts permitting counsel to issue subpoenas on their own, though a motion and court order often is needed to require the production of material in advance of the start of the trial or hearing.

Practices also vary across different districts and even individual judges on whether such motions may be made *ex parte* in order to avoid requiring defendants to reveal their trial strategy. The City Bar explains that any concerns about abusive subpoena practice can be addressed through motions to quash or a proposed modifying order issued upon a showing of good cause. Consistent with the current Rule, the City Bar proposal includes a provision providing that a subpoena seeking "personal or confidential information about an individual" can be issued to a third party only after obtaining prior judicial approval.

Rule 17(c) Amendment Progress

In response to the City Bar's proposal, the Advisory Committee formed a Rule 17 subcommittee, which has met thirteen times since March 2022. The subcommittee agreed to work on potential revisions that would clarify several procedural issues that have generated disagreement across districts, and, critically, to expand access to third party information beyond that available in districts that strictly apply the *Nixon* standard. The result was a discussion draft of an amended Rule 17, made public in an Oct. 13, 2024 memorandum. The draft amendment, and accompanying draft Committee Note, reflect real progress in addressing some of the most pressing issues for defendants.

First, and most significantly, the draft amendment adds two new provisions to Rule 17, subsections (c)(4) and (5), that each establish a specific "showing required for issuance" that replaces the *Nixon* standard. The required showing varies depending on whether the subpoenaed information is legally "protected," such as "personal or confidential information about a victim," or constitutes material that is not legally protected.

For both categories of information, the item sought must be described "with reasonable particularity" and not reasonably available from another source. For protected information, a party must show that the information "is likely to be admissible" as evidence or, if not admissible, likely to cast doubt on an element of a charged offense or support an affirmative defense. For unprotected information, the standard is lower -- subpoenaed documents must "contain information material to preparing the prosecution or defense," which is consistent with the City Bar's proposed standard. Under either standard, pure impeachment material would be obtainable. The draft accompanying Committee Note states explicitly that the new standard replaces the *Nixon* test, which "as applied in most districts . . . has at times prevented the defense from obtaining material it needs from third parties."

Second, the subcommittee's draft includes a new provision expressly providing that, for good cause, a court may grant a party's *ex parte* motion for a subpoena. To avoid the practice in some districts requiring that any material obtained by subpoena be provided to the opposing party, the draft further provides that material obtained pursuant to an *ex parte* subpoena shall not be provided to the opposing party, except that it must be produced as required under other applicable rules governing discovery.

Contrary to the City Bar's proposal, and contrary to existing practice in the Southern and Eastern Districts of New York for subpoenas returnable on the date of a trial or hearing, the draft's third key proposed revision requires prior judicial approval via motion before any subpoena (other than a grand jury subpoena) can issue. The draft Committee Notes states that judicial oversight is needed because a subpoena is compulsory process and "[p]arties should not be able to use the threat of contempt of court to coerce third parties" to produce material "in hopes of finding something useful" without a court first finding that a subpoena meets the required standard for issuance.

November 7 Committee Meeting

On Nov. 7, 2024, the Committee held a public meeting in New York City, inviting comment on the draft revision from twelve speakers including Department of Justice officials, federal public defenders, white-collar defense counsel, a law professor, and the CEO of a victim rights group. Although DOJ previously had not stated any official position, at the public meeting DOJ officials voiced strong concern about making any significant changes to Rule 17.

DOJ officials asserted that the current Rule 17 subpoena issuance standard, which in practice is regularly applied to defendants and very rarely applied to the government, is working effectively. The DOJ representatives expressed concern for recipients of subpoenas who might not know their rights to object, and concern for potential abuse of material obtained through Rule 17(c) subpoenas, citing examples of defendants abusing documentary evidence obtained through regular discovery to harass or intimidate witnesses or victims. Defense counsel forcefully supported the draft's move away from the *Nixon* standard, while questioning the draft's proposal of a different issuance standard for "protected" versus "unprotected" information.

At the close of the meeting, the Committee reporter noted that further work needed to be

done on how much of the *Nixon* standard should be discarded and how much should be retained, and on the question of whether the rule should expressly address *ex parte* procedure. The meeting concluded with the Chair expressing the view that significant disputed issues should be addressed in the body of the revised Rule rather than in a Committee Note's. The Chair observed that substantial differences of view remained between the DOJ and the defense bar, but the subcommittee would continue to push forward to balance the competing interests.

Next Steps

As the revision process continues, we submit that, consistent with the City Bar proposal, prior judicial approval via motion should not generally be required to issue a subpoena. Rule 17(c) currently contains a provision for courts to modify or quash a subpoena if compliance is unreasonable or oppressive, and any concern about the abuse of material obtained by subpoena can be addressed through a protective order, which are commonplace in current criminal discovery practice.

Further, concerns about subpoena recipients who may be unaware of their rights to object can be addressed through requiring the inclusion of appropriate language on the face of the subpoena, providing that the recipient may contact the court to seek to modify or quash the request. We also agree with defense practitioners who have argued against a different issuance standard at the outset to obtain "protected" versus "unprotected" materials. The current rule already requires prior judicial authorization for subpoenas seeking sensitive materials, and issuing judges are well situated to balance relevant competing interests at that point; thereafter they can be most efficiently addressed, as they are in civil discovery, through negotiation by the subpoena recipient and when necessary, post-issuance motion practice.

Conclusion

Notwithstanding these suggestions, the subcommittee's draft revision of Rule 17 represents an important step in the right direction, moving on from the *Nixon* standard to help realize defendants' constitutional rights to confrontation and due process by enabling them to obtain critical documentary material in the hands of third parties. The Advisory Committee's thorough and thoughtful process thus far provides reason for hope that a revised rule promising greater fairness is on the horizon.

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