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THE BY-WAYS AND CONTOURS OF FEDERAL RULE OF CRIMINAL PROCEDURE 17(C): A GUIDE THROUGH UNCHARTED TERRITORY

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The By-Ways and Contours of Federal Rule of Criminal Procedure 17(C): A Guide through Uncharted Territory

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A defendant in a federal criminal case may subpoena witnesses and documents to appear or be produced at his or her trial. The defendant's right to do so is assured by the compulsory process clause of the Sixth Amendment;[1] the right is codified and the procedures by which the subpoena may be obtained are set forth in Federal Rule of Criminal Procedure 17(a).[2] In many instances, it may be useful — indeed, invaluable — for the defendant to obtain documents *before* trial: Documents may take a long time to examine and decipher; depending on the subject matter of the case, it may be necessary to have an expert review the documents; the documents may identify the need for additional, hitherto unknown, witnesses.

Recognizing that the defendant may need documents before a trial, Rule 17(c) provides explicitly for such early production:

(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. [Emphasis added.]

(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.

(3) **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

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[1] U.S. Const. amend. VI, cl.3.

[2] Fed. R. Crim. P. 17(a) provides:

> 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. The clerk must issue the blank subpoena — signed and sealed — to the party requesting it, and that party must fill in the blanks before the subpoena is served.

Rule 17(b) provides that if the defendant does not have adequate funds to pay for the prospective witness's fees the defendant must make an *ex parte* application to the court, and ''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.'' Both 17(a) and 17(b) are discussed, *infra*, in the notes and text accompanying notes 116 and 126.

victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

Although apparently straightforward, Rule 17(c) raises a number of issues both procedural and substantive, the difficulty of which is exacerbated by the fact that there are not many reported cases on Rule 17(c). There are especially few appellate or Supreme Court cases interpreting the Rule,[3] and very little academic writing on it. The questions include:

- What standards guide a court in ruling on an application for a subpoena pursuant to Rule 17(c)?
- Do the standards differ if the subpoena is issued to an opposing party than if it is issued to a non-party?
- When the subpoena is issued to a non-party to the case, can a party move to quash or modify the subpoena?
- Must one apply to the court for a subpoena pursuant to Rule 17(c), or can the clerk issue such a subpoena without intervention of the judge?
- If one does apply to the court for a subpoena, can one apply *ex parte*, or must one give notice to the opposing side?
- Under what circumstances are a district court's orders with respect to Rule 17(c) subpoenas immediately appealable, and what appellate standards apply to such orders?

The purpose of this Article is to answer these and other questions regarding Rule 17(c). Where the law is settled, the Article will state it; where significant questions or confusion reign, the Article will provide authority for extant positions and propose the preferred resolution.

I. Advisory Committee History and Supreme Court Precedents

The drafters' history of Rule 17(c) is sparse, and the two Supreme Court cases that discuss the rule do not provide clear guidance as to its application.

A. The Advisory Committee Notes

Rule 17(c) was part of the original Federal Rules of Criminal Procedure adopted in 1944.[4] As to Rule 17(c), the Advisory Committee Notes state

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[3] In fact, as discussed below, there are only two Supreme Court cases that discuss Rule 17(c) in any detail, U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), and Bowman Dairy Co. v. U.S., 341 U.S. 214, 71 S. Ct. 675, 95 L. Ed. 879 (1951). The cases present unusual circumstances, far removed from most applications of Rule 17(c), thus rendering them poor guides to many questions arising under the Rule. *See infra* notes and text accompanying notes 10-44.

[4] Peter J. Henning, *Defense Discovery in White-Collar Criminal Prosecutions*, 15 GEORGIA ST. UNIV. L. REV. 601, 630 (1999); *see also* U.S. v. Tucker, 249 F.R.D. 58, 62 (S.D. N.Y. 2008), as amended, (Feb. 20, 2008).

simply ''[t]his rule is substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure.''[5] Rule 45(b) as it existed then (it has since been amended multiple times), provided for the production of documentary evidence by subpoena.[6] Rule 45(b), when read in conjunction with Rule 45(d)(1), permitted subpoenas for the production of documents before trial, as part of discovery, as well as during trial itself.

With the exception of Rule 17(c)(3), which was added on December 1, 2008, there have been no substantive amendments to Rule 17(c). The only changes have been in 2002, when the word ''data'' was added to the Rule.[7] The Advisory Committee Notes to the amendment explain that ''the word 'data' has been added to the list of matters that may be subpoenaed. The Committee believed that inserting that term will reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.''[8]

One other amendment to the Rules affected the scope of Rule 17(c), although it was not an amendment to the Rule itself. In 1979, Rule 26.2, relating to the production of witness statements, was added to the Federal Rules of Criminal Procedure, as was Rule 17(h). Rule 17(h) provides:

> **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.

Rule 17(h) thus establishes that one cannot use the subpoena power under Rule 17 to obtain a person's grand jury testimony, deposition, or other signed or sworn statement.[9]

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[5] FED. R. CRIM. P. 17(c) Advisory Committee Notes. The Advisory Committee Notes are ''analogous to legislative history.'' U.S. v. Hayes, 983 F.2d 78, 82 (7th Cir. 1992).

[6] The Rule stated:

> A subpoena may also command the person to whom it is directed to produce the book, paper or documents designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash the subpoena if it is unreasonable or oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable costs of production the books, papers, or documents.

[7] *See* FED. R. CRIM. P. 17(c)(1) (''A subpoena may order the witness to produce any books, papers, documents, *data,* or other objects the subpoena designates.'') (emphasis added); *see also Tucker*, 249 F.R.D. at 62 (Rule 17(c) has not been amended); U.S. v. Najarian, 164 F.R.D. 484, 488 n.3, 106 Ed. Law Rep. 1185 (D. Minn. 1995) (noting that ''in the half-century or so, in which Rule 17(c) has been operative, the provisions at play here have not been the subject of any substantive modification.''); Henning, *supra* note 4, at 630 (''Rule 17(c) remains unchanged since the adoption of the Federal Rules of Criminal Procedure in 1944.'').

[8] Advisory Committee Notes to 2002 amendments.

[9] One piece of evidence of the drafters' intent — the Committee notes to the Second Preliminary Draft of the criminal rules of procedure — indicate a narrow role for Rule 17(c) (which was then referred to as Rule 19(c)). Those notes state:

B. The Supreme Court Precedents — *Bowman Dairy and Nixon*

1. *Bowman Dairy*

The first Supreme Court case interpreting Rule 17(c) was *Bowman Dairy Co. v. United States*.[10] The defendants in that case were indicted for violating the Sherman Act. Prior to trial, the defendant moved (i) pursuant to Federal Rule of Criminal Procedure 16 for disclosure of all documents obtained from the defendants themselves or from anyone else pursuant to seizure or process, and (ii) pursuant to Rule 17(c) for an order directing the government to produce all materials — other than materials protected by attorney-client privilege or work product — that had been provided to the government by any other means. In connection with the second motion, defendants also served a subpoena *duces tecum* on the government, seeking the same documents referred to in that motion.[11]

The government opposed the second motion and moved to quash the subpoena on the ground that they would require the government to provide material to the defendant that had been ''furnished [to] the government by voluntary and confidential informants.''[12] The district court denied the government's motion to quash, the government attorney refused to comply with the subpoena, and thus went into contempt of court. The circuit court reversed the district court's finding of contempt, and the Supreme Court took the case ''because of the importance of the scope of Rule 17(c) in federal practice.''[13]

Notwithstanding the Court's reason for granting certiorari in the case, its opinion did little to clarify the scope of Rule 17(c). The Court's analysis began by discussing the defendant's rights under Rule 16. The Court stated that Rule 16 gave the defendant the right to inspect, copy and photograph materials ''in the custody of the government accumulated in the course of an investigation and subpoenaed for use before the grand jury and on the trial.''[14] The Court stated that ''Rule 16 provides the only way the defendant can reach such materials so as to inform himself.''[15]

Then what is the role for Rule 17(c)? The Court suggested that Rule

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> The last sentence [of Rule 19(c)] provides for a method by which the court may permit either side to inspect subpoenaed documents or objects under the supervision of the court. It is inserted in the interests of fairness and for the purpose of preventing delay during trial, particularly in cases where numerous documents may have been subpoenaed.

Quoted in U.S. v. Carter, 15 F.R.D. 367, 369 (D. D.C. 1954). The Committee notes should not be accorded great weight, as they are not the official advisory committee notes on the final version of the rules.

[10] Bowman Dairy Co. v. U.S., 341 U.S. 214, 71 S. Ct. 675, 95 L. Ed. 879 (1951).

[11] *Bowman Dairy Co.,* 341 U.S. at 216-17.

[12] *Bowman Dairy Co.,* 341 U.S. at 218.

[13] *Bowman Dairy Co.,* 341 U.S. at 217-18.

[14] *Bowman Dairy Co.,* 341 U.S. at 219.

[15] *Bowman Dairy Co.,* 341 U.S. at 219.

17(c) served to give the defendant access to materials that he had inspected pursuant to Rule 16, but that the government chose not to place into evidence. Thus, immediately after its discussion of Rule 16, the Court continued:

> But if such materials [i.e., in the custody of the government accumulated in the course of an investigation and subpoenaed for use before the grand jury and on the trial] or any part of them are not put in evidence by the Government, the defendant may subpoena them under Rule 17(c) and use them himself. It would be strange indeed if the defendant discovered some evidence by the use of Rule 16 which the Government was not going to introduce and yet could not require its production under Rule 17.[16]

To this point, the Court's analysis gave a very limited role to Rule 17(c), based on an idiosyncratic reading of Rule 16. According to the Court, Rule 16 allowed the defendant only the right to inspect and copy documents in the possession of the government, but if the defendant wanted to introduce any of the documents into evidence, he needed to procure the documents pursuant to Rule 17(c). The Court's reading thus made Rule 17(c) a device to satisfy the best evidence rule, as to evidence that the defendant had seen and copied pursuant to Rule 16. The Court then changed direction, however, and suggested that Rule 17(c) operated separately from Rule 16:

> There may be documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary. That is not to say that the materials thus subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence.[17]

This passage indicates that, contrary to the prior passage, Rule 17(c) operates independently from Rule 16, giving the defendant the right to obtain any ''evidentiary'' material. The breadth of the rule thus depends on what ''evidentiary'' means, and the Court was quick to make clear that it was to be narrowly construed:

> It was not intended by Rule 16 to give a limited right to discovery, and then by Rule 17 to give a right of discovery in the broadest terms . . .. Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was to expedite the trial by providing a time and place *before* trial for the inspection of subpoenaed materials . . .. In short, any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena.[18]

Given the importance that this paragraph plays in later Rule 17(c) opinions, it is worth analyzing carefully. The central proposition of the paragraph is that ''Rule 17(c) was not intended to provide an additional means of discovery.'' The Court did not cite to any authority in support of the proposition; nor did it cite to either the text of the Rule or any portion of

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[16] *Bowman Dairy Co.,* 341 U.S. at 219.

[17] *Bowman Dairy Co.,* 341 U.S. at 219-20.

[18] *Bowman Dairy Co.,* 341 U.S. at 220-21 (citation omitted).

the Advisory Committee Notes. (As we will discuss below, the Advisory Committee Notes, by referencing Rule 45(b) of the Federal Rules of Civil Procedure, are somewhat contrary to the *Bowman Dairy* Court's position.) We must therefore suppose the grounds for the Court's central proposition, and can imagine three such grounds.

First, the Court may have observed that the first sentence of Rule 17(c) plainly contemplates subpoenaing documents for use at trial, and the third sentence, which provides for the return of documents prior to trial, should be read as relating only to the timing of document production, not the nature of documents to be produced. Second, there is a general skepticism against discovery in criminal cases,[19] and the *Bowman Dairy* Court may have felt that Rule 17(c) was insufficiently clear to overcome that bias against criminal discovery. Third, the Court was plainly of the belief that Rule 16 provided a carefully balanced approach to defendants' discovery rights, and Rule 17(c) could not be used to upset the Rule 16 balance.[20]

As to the first point, Rule 17 is in a section of the Federal Rules of Criminal Procedure captioned ''Arraignment and Preparation for Trial.''[21] There is a section of the Federal Rules of Criminal Procedure captioned ''Trials,'' which covers other rules, not Rule 17.[22] The inference that the rule pertains to discovery is thus at least as strong as the textual evidence suggesting that it does not.

As to the second argument, the skepticism against criminal discovery is diminishing. It is certainly much weaker than it was when *Bowman Dairy* was decided, and it cannot justify a reading of Rule 17(c) that denies it any value as a discovery tool.

The third argument is the strongest, but also the narrowest. Rule 16 does, indeed, set forth in some detail the defendant's right to discovery from the government. Insofar as Rule 16 reflects a deliberate balance of competing interests, Rule 17(c) cannot be allowed to upset it.[23] But Rule 16 says noth-

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[19] Criminal discovery was especially limited when *Bowman Dairy* was decided, and although it has broadened considerably since, it is still far more limited than civil discovery. For example, depositions, the staple of civil discovery under the Federal Rules of Civil Procedure, are virtually never used in criminal cases. *See generally* 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 3d §§ 251-51 (3d ed. 2000).

[20] *See* U.S. v. Stein, 488 F. Supp. 2d 350, 366, 99 A.F.T.R.2d 2007-2425 (S.D. N.Y. 2007) (''The Bowman-Iozia-Nixon standard exists to reconcile the broad language of Rule 17(c) with the limitations on pretrial discovery inherent in the far narrower language of Rule 16.'').

[21] *See* FED. R. CRIM. P. (table of contents) (showing that rules 10-17.1 are part of Section IV, which is labeled ''Arraignment and Preparation for Trial.'').

[22] *See* FED. R. CRIM. P. (table of contents) (showing that Section VI, under the label ''Trials,'' covers Rules 23-31).

[23] *See* Part II(B)(3) of our Article, *infra*.

ing of the defendant's right to discovery from other sources, and thus the argument should not affect Rule 17(c) subpoenas directed to non-parties.[24]

Notwithstanding the absence of compelling support for its proposed standard, the *Bowman* Court applied the standard to the subpoena before it and found that the subpoena was an overbroad ''fishing expedition'' because it sought materials ''relevant to the allegations or charges contained in [the] indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants.''[25] Because, in the Court's view, the subpoena called for some materials that should be produced, and some that should not be produced, it vacated the judgment of the court of appeals, and remanded the case.[26]

2. *Nixon*

Twenty-three years after *Bowman Dairy* came *United States v. Nixon*,[27] which arose out of the fabled Watergate investigation. The grand jury had indicted seven men, each of whom had had a position on the staff of President Richard Nixon or on his nefarious Committee for the Re-Election of the President,[28] charging them with, among other things, conspiracy and obstruction of justice for activities undertaken in connection with or on behalf of the President, who was named as an unindicted conspirator.[29] Upon a motion by the Special Prosecutor, the district court issued a subpoena pursuant to Rule 17(c) to the President, calling for the pretrial production of tape recordings, memoranda and transcripts relating to certain ''precisely identified meetings between the President and others.''[30]

The President moved to quash the subpoena on three grounds, including that the Special Prosecutor had ''failed to satisfy the requirements of'' Rule 17(c).[31] The motion was denied by the district court, and the case went immediately to the Supreme Court, which affirmed the district court's decision. Of course, it was this decision that, in no small part, led to the President's resignation, approximately two weeks later.

Stressing, following *Bowman Dairy*, that a Rule 17(c) subpoena was not a discovery device,[32] the *Nixon* Court, citing a prominent district court

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[24] U.S. v. King, 194 F.R.D. 569, 573 n.3 (E.D. Va. 2000) (noting that problem addressed in *Bowman Dairy* of potentially allowing Rule 17(c) to be used as discovery alternative to Rule 16 is not present where Rule 17(c) subpoena is issued by defendant to third-party); *see infra* notes and text accompanying notes 54-88.

[25] *Bowman Dairy Co.,* 341 U.S. at 217.

[26] *Bowman Dairy Co.,* 341 U.S. at 221-22.

[27] U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

[28] On the Committee for the Reelection of the President, referred to as CREEP, see CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN (1974).

[29] *Nixon*, 418 U.S. at 687.

[30] *Nixon*, 418 U.S. at 688.

[31] *Nixon*, 418 U.S. at 689.

[32] *See Nixon,* 418 U.S. at 698.

opinion[33] and the agreement of the parties, applied the following test to analysis under Rule 17(c):

> [I]n order to require production prior to trial, the moving party 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.''[34]

This four-factor test — referred to as the *Nixon* test — has become the touchstone for all Rule 17(c) analysis, cited or quoted in virtually every case analyzing Rule 17(c). The key factor of the test is the first, that the materials be ''evidentiary and relevant.'' This factor echoes *Bowman Dairy*'s statement that the materials must be ''evidentiary,'' which presumably means ''admissible.'' But if that is so, then the first *Nixon* factor is certainly redundant, because anything that is admissible is certainly relevant, and the fourth factor is also redundant because if the material is ''evidentiary'' and thus satisfies the first factor, then it is surely not part of a ''fishing expedition.''

It remained to determine how heavy the burden was on the party seeking materials pursuant to Rule 17(c). On this point, the Court stated that the ''Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity.''[35] It is never made clear, however, how the four factors of the *Nixon* test square with the three factors cited by the Court on the issue of burden. Once again, redundancy reigns: If the materials sought are ''admissib[le],'' then they are by definition ''relevan[t].''

Acknowledging that its ''own view of the record necessarily affords a less comprehensive view of the total situation than was available to the trial judge,''[36] the Court nonetheless found that ''there was a sufficient likelihood

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[33] U.S. v. Iozia, 13 F.R.D. 335 (S.D. N.Y. 1952) (cited and expressly followed by U.S. v. Nixon, 418 U.S. 683, 699, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)).

[34] *Nixo*n, 418 U.S. at 699-700 (footnote omitted).

[35] *Nixon*, 418 U.S. at 700.

[36] *Nixon*, 418 U.S. at 700. The Court observed that ''[e]nforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17(c).'' *Id.* at 702 (citations omitted). The Court stated that it had been ''particularly meticulous'' in the case before it, however, because the subpoena had been directed to the President. *Id.* (citing U.S. v. Burr, 25 F. Cas. 30, 34, No. 14692d (C.C.D. Va. 1807)).

that each of the tapes contains conversations relevant to the offenses charged in the indictment.''[37] The basis for the Court's finding was that

> [w]ith respect to many of the tapes, the Special Prosecutor offered the sworn testimony or statements of one or more of the participants in the conversations as to what was said at the time. As for the remainder of the tapes, the identity of the participants and the time and place of the conversations, taken in their total context permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment.[38]

With respect to the second, admissibility hurdle, the Court found that the Special Prosecutor had made a ''sufficient preliminary showing.''[39] As far as the Court could see, the only issue was whether the tapes would be barred by the hearsay rule, and the Court found that most of the tapes ''apparently contain conversations to which one or more of the defendants'' was a party.[40] Such statements, the Court observed, would certainly be admissible against the speaker himself,[41] and might also be admissible against the other defendants ''upon a sufficient showing, by independent evidence, of a conspiracy among'' the defendants.[42] The Court also observed that the tapes might be useful impeachment material for a testifying witness, but stated that ''[g]enerally the need for evidence to impeach witnesses is insufficient to require its production in advance of trial.''[43]

The *Nixon* Court expressly left open one question of potentially great significance. In setting forth the first factor in the *Nixon* test — ''that the documents are evidentiary and relevant'' — the Court placed a footnote next to the word ''evidentiary'' and noted, but did not resolve, the question whether that requirement applies when the subpoena is issued to a non-party[44] — that is, neither the defendant nor the government. The footnote states in relevant part:

> The Special Prosecutor suggests that the evidentiary requirement of Bowman Dairy Co. and Iozia [cited, *supra*, note 32] does not apply in its full vigor when the subpoena duces tecum is issued to third parties rather than to the government prosecutors. We need not decide whether a lower standard exists because we are satisfied that the relevance and evidentiary nature of the subpoenaed tapes were sufficiently shown as a preliminary matter to warrant the District Court's refusal to quash the subpoena.

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[37] *Nixon*, 418 U.S. at 700.

[38] *Nixon*, 418 U.S. at 700.

[39] *Nixon*, 418 U.S. at 700.

[40] *Nixon*, 418 U.S. at 700-01.

[41] *Nixon*, 418 U.S. at 701 & n.13.

[42] *Nixon*, 418 U.S. at 701.

[43] *Nixon*, 418 U.S. at 701 (citation omitted).

[44] *Nixon*, 418 U.S. at 699 n.12.

II. The Evidentiary Standard

A. The Narrow Strictures of the Evidentiary Standard

Although questions about Rule 17(c) abound, one point is clear: The rule gives the defendants the right to *evidentiary*—i.e., admissible — materials only. It is not a rule of discovery. Both *Bowman Dairy* and *Nixon* make this point emphatically, and it is repeated in virtually every lower court case analyzing Rule 17(c).[45]

That Rule 17(c) is not a discovery tool is the reason most often cited by courts in quashing Rule 17(c) subpoenas. The party seeking issuance of the subpoena must demonstrate that the materials that it is seeking are authentic, relevant, and either not hearsay or admissible under an exception to the hearsay rules. This showing, difficult enough under ordinary circumstances, is made especially so by the facts that (i) the party seeking the materials must make the showing *before it has even seen the documents*,[46] and (ii) numerous courts have held the party seeking the subpoena to a very high

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[45] *See, e.g.*, U.S. v. Haldeman, 559 F.2d 31, 75 n.82, 1 Fed. R. Evid. Serv. 1203 (D.C. Cir. 1976); U.S. v. Purin, 486 F.2d 1363, 1368 (2d Cir. 1973); U.S. v. Dent, 149 F.3d 180, 191, 50 Fed. R. Evid. Serv. 171 (3d Cir. 1998); Gilmore v. U.S., 256 F.2d 565, 568 (5th Cir. 1958); U.S. v. Justice, 14 Fed. Appx. 426, 432 (6th Cir. 2001); U.S. v. Tokash, 282 F.3d 962, 971 (7th Cir. 2002); U.S. v. Bueno, 443 F.3d 1017, 1026 (8th Cir. 2006); U.S. v. MacKey, 647 F.2d 898, 901, 1981-1 Trade Cas. (CCH) ¶ 64106, 8 Fed. R. Evid. Serv. 728 (9th Cir. 1981); U.S. v. Gonzalez-Acosta, 989 F.2d 384, 389 (10th Cir. 1993); U.S. v. Silverman, 745 F.2d 1386, 1397, 16 Fed. R. Evid. Serv. 1316 (11th Cir. 1984); U.S. v. Ashley, 162 F.R.D. 265, 266 (E.D. N.Y. 1995) (''Initially, the court notes that the subpoena *duces tecum* in criminal cases 'was not intended to provide a means of discovery for criminal cases.''') (quoting U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)); *but see* U.S. v. Nachamie, 91 F. Supp. 2d 552, 562-63 (S.D. N.Y. 2000); U.S. v. Tomison, 969 F. Supp. 587, 593 n.14 (E.D. Cal. 1997); U.S. v. Solomon, 26 F.R.D. 397, 406 (S.D. Ill. 1959) (''While Rule 17 does not purport to be a discovery rule, the proviso for production of documents for inspection in advance of trial does establish a procedure which is, in effect, a right of discovery.''). However, it has been noted that the *Nixon* standard only applies to subpoenas requesting pre-trial production. *See Cuthbertson I*, 630 F.2d at 145 (''We do not think the Nixon test applies where, as here, the district court has modified the subpoena to preclude pretrial production to or inspection by the moving party.''); U.S. v. James, 2007 WL 914242 (E.D. N.Y. 2007) (quoting *Cuthbertson I*).

[46] ''Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?'' U.S. v. Burr, 25 F. Cas. 187, 191, No. 14694 (C.C.D. Va. 1807) (Marshall, C.J.) (*quoted in Haldeman*, 559 F.2d at 76 n,92). One court has stated that this is not as ''unduly restrictive'' as it seems: ''While, at first glance, this burden may seem unduly restrictive, it is only because the term 'subpoena,' most often encountered in the civil practice context, carries with it a strong connotation of 'discovery.' . . . Unlike subpoenas in other contexts, however, the criminal trial subpoena is not a tool for discovery. Because a criminal

standard — it is not enough that the materials *may be* or *are likely* admissible, the showing must be closer to certainty.[47] This high standard can make preparation for trial, especially in complicated cases, difficult.[48]

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trial subpoena is designed as a means of providing compulsory process for obtaining specific, identifiable documents, there is no unfairness in requiring the party issuing such a subpoena to detail, with substantial specificity, precisely what documents it seeks and why . . ..'' U.S. v. Crosland, 821 F. Supp. 1123, 1129 (E.D. Va. 1993). Yet, ''[a]s the Supreme Court has noted, the proponent of a subpoena cannot be expected to identify the materials he seeks in exacting detail, when (as demonstrated by the fact that he must employ a subpoena) he does not have access to them.'' U.S. v. Reyes, 239 F.R.D. 591, 599 (N.D. Cal. 2006).

[47] *See, e.g.*, U.S. v. Hardy, 224 F.3d 752, 755 (8th Cir. 2000); U.S. v. Hang, 75 F.3d 1275, 1283-84, 144 A.L.R. Fed. 803 (8th Cir. 1996); U.S. v. Mason, 2008 WL 1909115 (D. Or. 2008) (citing U.S. v. Bookie, 229 F.2d 130, 133 (7th Cir. 1956)); U.S. v. Eye, 2008 WL 1776400 (W.D. Mo. 2008); U.S. v. Shanahan, 2008 WL 619213 (E.D. Mo. 2008); U.S. v. Wittig, 247 F.R.D. 661, 663 (D. Kan. 2008); U.S. v. Johnson, 2008 WL 62281 (N.D. Cal. 2008); U.S. v. Shinderman, 232 F.R.D. 147, 152 (D. Me. 2005) (''It is not enough that the documents have some *potential* of relevance and evidentiary use.''); U.S. v. Ary, 2005 WL 2372743 (D. Kan. 2005); RW Professional Leasing Services, 228 F.R.D. at 162 (''In order to meet its burden, the proponent has to show that the documents sought are both relevant and admissible at the time of the attempted procurement. The fact that they are potentially relevant or may be admissible is not sufficient.'') (citations omitted); U.S. v. Jenkins, 2003 WL 1461477 (S.D. N.Y. 2003) (documents must meet test for relevance at time they are sought; ''potential relevance or admissibility is not sufficient''); U.S. v. Ball, 1999 WL 974028 (D. Kan. 1999); U.S. v. Anderson, 31 F. Supp. 2d 933, 944 (D. Kan. 1998); U.S. v. Hunter, 13 F. Supp. 2d 586, 593-94 (D. Vt. 1998) (Rule 17(c) subpoena cannot be ''for discovery purposes;'' the documents sought must be relevant and admissible when they are sought); U.S. v. Ruedlinger, 172 F.R.D. 453, 456 (D. Kan. 1997); U.S. v. Carroll, 1996 WL 442213 (D. Kan. 1996); U.S. v. Skeddle, 178 F.R.D. 167, 168 (N.D. Ohio 1996) (''The party issuing a subpoena must do more than speculate about the relevancy of the materials being sought.''); U.S. v. King, 164 F.R.D. 542, 545 (D. Kan. 1996); U.S. v. Jackson, 155 F.R.D. 664, 667 (D. Kan. 1994); U.S. v. Ausbrook, 1993 WL 270506 (D. Kan. 1993); U.S. v. Burger, 773 F. Supp. 1419, 1425 (D. Kan. 1991); U.S. v. Rich, 1984 WL 845 (S.D. N.Y. 1984) (''Rule 17(c) requires a showing that the materials sought are currently admissible in evidence.''); Robert G. Morvillo, Barry A. Bohrer & Barbara L. Balter, *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.''); *but see* U.S. v. Moultrie, 2008 WL 3539745 (N.D. Miss. 2008) (''Rule 17's admissibility requirement does not require the court to make a determination that the requested documents are admissible — only that they may reasonably be used as admissible evidence.''); U.S. v. Libby, 432 F. Supp. 2d 26, 31, 34 Media L. Rep. (BNA) 1933 (D.D.C. 2006) (''Admittedly, it will often be difficult at the pretrial stage to determine with precision the admissibility of certain documents; therefore, if a document is arguably relevant and admissible under the Rules of Evidence, the *Nixon* 'evidentiary' requirement is likely satisfied.''); U.S. v. Shinderman, 432 F. Supp. 2d 157, 160 (D. Me. 2006) (following *Libby*); U.S. v. Orena, 883

Courts have consistently held that, under Rule 17(c), a document may not be subpoenaed for production in advance of trial if its sole evidentiary purpose is impeachment;[49] the holding is consistent with *Nixon*.[50] The ratio-

F. Supp. 849, 868 (E.D. N.Y. 1995) (stating ''it is difficult to predict in advance of trial which documents will be held admissible,'' and holding that defendants cleared ''evidentiary'' hurdle where documents sought were ''potentially'' and ''arguably'' admissible); U.S. v. McCollom, 651 F. Supp. 1217, 1224-25 (N.D. Ill. 1987), judgment aff'd, 815 F.2d 1087 (7th Cir. 1987) (stating that defendant's contention that documents government sought through subpoena are irrelevant or inadmissible ''may ultimately prove to be correct,'' but finding that this contention ''does not justify quashing the government's subpoena'' because '[i]t is only required that a good-faith effort be made to obtain evidence.''') (quoting *Bowman Dairy,* 341 U.S. at 219-20).

[48] *See, e.g.*, Henning, *supra* note 4, at 645-46 (''A discovery right limited to the Government's documents [obtainable under Rule 16], and those few instances in which a defendant can meet the Nixon requirements, makes adequate preparation, especially in a white collar prosecution, far from meaningful.''); *see also* Morvillo et al., *supra* note 47, at 160 n.12 (''Theoretically, defendants may also obtain documentary evidence from third parties through subpoenas issued pursuant to Rule 17(c). However, courts have interpreted 17(c) so narrowly that it is rarely useful by criminal defendants, and instead serves as an additional tool for the prosecution.''). An occasional court has taken the complexity of a trial into account when ruling on a Rule 17(c) subpoena. *See* U.S. v. Myerson, 684 F. Supp. 41, 45 (S.D. N.Y. 1988) (''In ruling that documents are 'evidentiary and relevant' the Court is taking a liberal view of these terms. In the Court's view, the complexity of this trial together with its expected length . . . mandate that the defense have discovery in advance of trial to obviate delay during the course of trial.'').

[49] *See* U.S. v. Jackson, 345 F.3d 59, 76, 62 Fed. R. Evid. Serv. 796 (2d Cir. 2003); *Hardy*, 224 F.3d at 756; U.S. v. Hughes, 895 F.2d 1135, 1146 (6th Cir. 1990); U.S. v. LaRouche Campaign, 841 F.2d 1176, 1180, 15 Media L. Rep. (BNA) 1502 (1st Cir. 1988); U.S. v. Fields, 663 F.2d 880, 881 (9th Cir. 1981); U.S. v. Cuthbertson, 651 F.2d 189, 195, 7 Media L. Rep. (BNA) 1377, 8 Fed. R. Evid. Serv. 458 (3d Cir. 1981); U.S. v. Cuthbertson, 630 F.2d 139, 144-45, 6 Media L. Rep. (BNA) 1545, 6 Fed. R. Evid. Serv. 635 (3d Cir. 1980) (''Cuthbertson I''); U.S. v. Aguilar, 2008 WL 3182029 (N.D. Cal. 2008); U.S. v. Wright, 2008 WL 2414848 (M.D. La. 2008); U.S. v. Mason, 2008 WL 1909115 (D. Or. 2008); U.S. v. Wingers, 2008 WL 1730320 (E.D. Wis. 2008); U.S. v. Shanahan, 2008 WL 619213 (E.D. Mo. 2008); *Wittig*, 247 F.R.D. at 664; U.S. v. Johnson, 2008 WL 62281 (N.D. Cal. 2008); U.S. v. Ferguson, 2007 WL 4577303 (D. Conn. 2007); U.S. v. Ferguson, 2007 WL 2815068 (D. Conn. 2007); U.S. v. Corona, 2007 WL 1894288 (E.D. Tenn. 2007); U.S. v. Jordan, 73 Fed. R. Evid. Serv. 948 (E.D. Tenn. 2007), adopted, 2007 WL 2220410 (E.D. Tenn. 2007); U.S. v. Smith, 245 F.R.D. 605, 610 (N.D. Ohio 2007), on reconsideration in part, 2007 WL 2156260 (N.D. Ohio 2007); U.S. v. Ail, 2007 WL 1229415 (D. Or. 2007); U.S. v. Hughes, 2007 WL 896157 (E.D. Tenn. 2007), decision aff'd, 2007 WL 1894288 (E.D. Tenn. 2007); U.S. v. James, 2007 WL 914242 (E.D. N.Y. 2007); U.S. v. Henry, 2007 WL 219885 (E.D. Pa. 2007); *Reyes*, 239 F.R.D. at 601; U.S. v. Tabi, 2006 WL 568619 (S.D. N.Y. 2006); U.S. v. Nektalov, 2004 WL 1574721 (S.D. N.Y. 2004); U.S. v. Young, 2004 WL 784840 (W.D. Tenn. 2004); U.S. v. Segal, 276 F. Supp. 2d 896, 901 (N.D. Ill. 2003); U.S. v. Jasper,

nale for Rule 17(c) is that the document becomes evidentiary only when, and if, a witness testifies — therefore, it is not eligible for pre-trial production.[51]

The tight confines of the evidentiary standard may be loosened by the trial court's deft use of case administration techniques. For example, some courts have modified subpoenas requesting pre-trial production of impeachment materials so as to require production during the trial, or have allowed defendants to renew such subpoenas after the relevant witness testifies.[52]

2003 WL 21709447 (S.D. N.Y. 2003), aff'd, 104 Fed. Appx. 781 (2d Cir. 2004); U.S. v. Jasper, 2003 WL 1107526 (S.D. N.Y. 2003); U.S. v. Holihan, 248 F. Supp. 2d 179, 183 (W.D. N.Y. 2003); U.S. v. Weissman, 2002 WL 31875410 (S.D. N.Y. 2002); U.S. v. Clark, 2001 WL 759895 (W.D. Va. 2001); U.S. v. Merlino, 2001 WL 283165 (E.D. Pa. 2001); U.S. v. Coriaty, 2000 WL 1099920 (S.D. N.Y. 2000); U.S. v. King, 194 F.R.D. 569, 574 (E.D. Va. 2000); U.S. v. Shabazz, 1998 WL 355500 (D. Or. 1998); U.S. v. Colima-Monge, 1997 WL 325318 (D. Or. 1997); U.S. v. Beckford, 964 F. Supp. 1010, 1032 (E.D. Va. 1997); U.S. v. Jenkins, 895 F. Supp. 1389, 1393-94 (D. Haw. 1995); U.S. v. Louis Trauth Dairy, Inc., 162 F.R.D. 297, 300 (S.D. Ohio 1995); *Cherry*, 876 F. Supp. at 554; U.S. v. Scaduto, 1995 WL 130511 (S.D. N.Y. 1995); U.S. v. Dale, 155 F.R.D. 149, 152 (S.D. Miss. 1994); U.S. v. Daigle, 1993 WL 85936 (E.D. La. 1993); U.S. v. Giampa, 1992 WL 296440 (S.D. N.Y. 1992); U.S. v. Palermo, 21 F.R.D. 11, 13, 57-2 U.S. Tax Cas. (CCH) P 9911, 52 A.F.T.R. (P-H) P 986 (S.D. N.Y. 1957); 8A Federal Procedure: Lawyers Edition § 22:435 (June 2006).

[50] *Nixon*, 418 U.S. at 701 (quoted *supra* at text accompanying note 43).

[51] *See, e.g.*, LaRouche Campaign, 841 F.2d at 1180; *Cuthbertson I*, 630 F.2d at 144; U.S. v. Wittig, 250 F.R.D. 548 (D. Kan. 2008); U.S. v. Ferguson, 2007 WL 4577303 (D. Conn. 2007); U.S. v. Corona, 2007 WL 1894288 (E.D. Tenn. 2007); U.S. v. Jordan, 73 Fed. R. Evid. Serv. 948 (E.D. Tenn. 2007), adopted, 2007 WL 2220410 (E.D. Tenn. 2007); U.S. v. Ail, 2007 WL 1229415 (D. Or. 2007); U.S. v. James, 2007 WL 914242 (E.D. N.Y. 2007); *Holihan*, 248 F. Supp. 2d at 183; U.S. v. Coriaty, 2000 WL 1099920 (S.D. N.Y. 2000); *King*, 194 F.R.D. at 574; U.S. v. Scaduto, 1995 WL 130511 (S.D. N.Y. 1995); *Palermo*, 21 F.R.D. at 13; U.S. v. Carter, 15 F.R.D. 367, 371 (D. D.C. 1954); Diana D. Parker, Defending Federal Criminal Cases: Attacking The Government's Proof § 7.02[2] at 7-10 (2006); *see also* U.S. v. Nixon, 418 U.S. 683, 701, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (''Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial.''); U.S. v. Nachamie, 91 F. Supp. 2d 552, 564 (S.D. N.Y. 2000) (impeachment materials ''should not be produced in advance of the witness' testimony''); U.S. v. Giampa, 1992 WL 296440 (S.D. N.Y. 1992) (''rationale behind the well-established rule that impeachment materials are generally not subject to pretrial production applies with equal force to a request that such documents be produced on the first day of trial.''). Of course, this is not the case when the government seeks documentation of a defendant's prior statements because such statements may be admitted at trial as admissions. *See* U.S. v. Shay, 21 Media L. Rep. (BNA) 1415, 1993 WL 128728 (D. Mass. 1993).

[52] *See* U.S. v. Libby, 432 F. Supp. 2d 26, 37-38, 34 Media L. Rep. (BNA) 1933 (D.D.C. 2006) (allowing defendants to re-request production of certain materials pursuant to Rule 17(c) after direct examination of relevant witness where materials ''will clearly be admissible as impeachment evidence'' and there was ''no doubt'' that witness would testify); *Reyes*, 239 F.R.D. at 601 (modifying subpoenas to

Some courts have even ordered the production of impeachment material before trial where it is known with certainty that a witness will testify at trial.[53]

B. Must the Evidentiary Standard Apply in All Cases?

The existence of the evidentiary standard is thus clear, less so its wisdom. Surely, both *Bowman Dairy* and *Nixon* enunciated this standard, but those

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''compel the production of [potential impeachment] materials to the Court for in camera review and, when necessary, disclosure''); *Orena*, 883 F. Supp. at 869 (denying government's motion to quash third-party subpoena seeking impeachment materials where defendant agreed to modify subpoena so that it was returnable when relevant witness was called to testify); U.S. v. Messino, 882 F. Supp. 115, 116 (N.D. Ill. 1995) (granting motion to quash Rule 17(c) for impeachment materials without prejudice to renewed subpoenas if relevant witness testifies); U.S. v. Giampa, 1992 WL 296440 (S.D. N.Y. 1992) (modifying subpoena for impeachment materials to make it returnable at time when relevant witness testifies); *see also* U.S. v. Compton, 28 F.3d 1214 (6th Cir. 1994) (issuance of subpoena on first day of trial that sought impeachment materials not abuse of discretion); *Cuthbertson I*, 630 F.2d at 144-45 (affirming district court decision to quash Rule 17(c) subpoena for impeachment materials only to extent that subpoena sought pre-trial production); U.S. v. Marchisio, 344 F.2d 653, 669 (2d Cir. 1965) (in affirming trial court's refusal to order government to produce certain materials, noting that trial court afforded defendants opportunity to renew their request for production of materials after materials became relevant due to testimony at trial); *cf.* U.S. v. Ferguson, 2007 WL 4577303 (D. Conn. 2007) (enforcing, as modified, defendants' subpoenas seeking production to court, for *in camera* review and possible production after witness testified, of impeachment material related to certain individuals on government's witness list).

[53] *See* LaRouche Campaign, 841 F.2d at 1180; U.S. v. Shinderman, 432 F. Supp. 2d 157, 160 (D. Me. 2006); *Libby*, 432 F. Supp. 2d at 42-43 (allowing pre-trial production of impeachment materials where relevant witness would ''inevitably'' testify at trial); U.S. v. Tucker, 249 F.R.D. 58, 67 n.56 (S.D. N.Y. 2008), as amended, (Feb. 20, 2008) (allowing pre-trial production of impeachment material concerning cooperating witnesses because ''requiring [defendant] to wait until their testimony is complete to begin reviewing the recordings would result in an unreasonable delay''); *King*, 194 F.R.D. at 574 (if rationale for not allowing subpoena to garner materials to be used solely for impeachment is that the materials become evidentiary only when, and if, a witness testifies, then ''[i]t follows, therefore, that where it is known with certainty before trial that the witness will be called to testify, the admissibility determination, within the meaning of Nixon, can be made before trial, and the statements properly may be considered evidentiary''); U.S. v. Liddy, 354 F. Supp. 208, 209-12 (D.D.C. 1972) (granting pre-trial motion for Rule 17(c) subpoena for impeachment materials related to testimony of ''a key Government witness''); PARKER, *supra* note 51, § 7.02[2] at 7-10; *see also* U.S. v. Ball, 1999 WL 974028 (D. Kan. 1999) (ordering production of subpoenaed materials where materials would be relevant and admissible as impeachment evidence if relevant witness testified, as was anticipated); *compare* U.S. v. Weissman, 2002 WL 31875410 (S.D. N.Y. 2002) (subpoena seeking impeachment materials quashed where government had not confirmed that non-parties receiving subpoenas would testify at trial).

cases were in particular circumstances that should limit their precedential value. *Bowman* involved a blunderbuss Rule 17(c) subpoena served on the government, and the *Bowman* decision must be read as a response to the defendant's obvious attempt to do an end-run around Rule 16. *Nixon* involved a subpoena issued to the President of the United States, and it is obvious that such a subpoena must be evaluated under the strictest standards.

To evaluate the evidentiary standard applied to Rule 17(c) subpoenas, it is necessary to consider separately four situations: (1) subpoenas issued by defendants to non-parties, (2) subpoenas issued by the government to non-parties, (3) subpoenas issued by the defendant upon the government, and (4) subpoenas issued by the government on the defendant. As set forth below, the standard should apply differently depending on the situation.

(1) Defendant subpoenas on non-parties.

Far more common than the *Bowman* and *Nixon* situations is that in which a defendant seeks a Rule 17(c) subpoena to obtain material from a non-party, typically a potential witness. *Nixon* itself held open the possibility that the evidentiary standard might not apply in such circumstances,[54] but most courts have not explored the possibility, instead simply repeating and applying the evidentiary standard, thus interpreting Rule 17(c) quite narrowly.

We believe, however, that the evidentiary standard should not apply where the defendant seeks to serve a Rule 17(c) subpoena on a non-party. There is nothing in the text of Rule 17(c) that supports the evidentiary requirement. Rule 17(c) provides simply that the subpoena ''may order the witness to produce any books, papers, documents, data or other objects the subpoena designates.'' It further provides that the court may quash or modify the subpoena ''if compliance would be unreasonable or oppressive.'' Neither provision suggests an evidentiary limitation.[55]

That the *Nixon* standard applies to subpoenas issued by a defendant to the government does not mean that the same standard must apply to subpoenas issued by a defendant to non-parties. Four courts have held or suggested that the limitation does not apply when the subpoena is issued on behalf of a defendant upon a non-party. In *United States v. Nachamie*,[56] after quoting the canonical four-part *Nixon* test,[57] the court stated

> That high standard, of course, made sense in the context of a Govern-

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[54] *Nixon*, 418 U.S. at 699 & n.12 (quoted *supra*).

[55] *See Tucker*, 249 F.R.D. at 62 (''This brief overview [contained in the Advisory Committee Notes] may indicate that the rule drafters initially thought Rule 17(c) would govern discovery from non-parties, while Rule 16 would govern discovery from the Government.''); U.S. v. Stein, 488 F. Supp. 2d 350, 366, 99 A.F.T.R.2d 2007-2425 (S.D. N.Y. 2007) (''The text of Rule 17(c) alone strongly suggests the conclusion that the subpoena should be enforced unless compliance would be unreasonable or oppressive.'').

[56] U.S. v. Nachamie, 91 F. Supp. 2d 552 (S.D. N.Y. 2000).

[57] *Nachamie*, 91 F. Supp. 2d at 562 (quoting *Nixon*, 418 U.S. at 700 (quoted, *supra*, at text accompanying note 34)).

> ment subpoena, especially one seeking evidence from the President. It must be recalled that the Government's use of a subpoena occurs *after* the completion of a grand jury investigation . . .. A real question remains as to whether it makes sense to require a defendant's use of Rule 17(c) to obtain material from a non-party to meet this same standard. Unlike the government, the defendant has not had an earlier opportunity to obtain material by means of a grand jury subpoena. Because the rule states only that a court may quash a subpoena "if compliance would be unreasonable or oppressive," the judicial gloss that the material sought must be evidentiary — defined as relevant, admissible and specific — may be inappropriate in the context of a defense subpoena of documents from third parties.[58]

Nachamie relied on *United States v. Tomison*.[59] Like *Nachamie*, *Tomison* involved a challenge to a defendant's Rule 17(c) subpoena to a third party. Observing that ''[a] criminal defendant has both a constitutional right to obtain evidence which bears upon the determination of either guilt or punishment, and a Sixth Amendment right to [compulsory] process,''[60] the court explained that ''Rule 17(c) implements both the right to obtain the evidence and to require its production,''[61] and that in cases where the materials sought were ''too massive for the defendant to adequately review unless obtained prior to trial, pre-trial production through Rule 17(c) is necessary to preserve the defendant's constitutional right to obtain and effectively use such evidence at trial.''[62]

The *Tomison* Court noted that the defendant had satisfied the evidentiary requirement, but, in a footnote, addressed the question whether that standard should apply where the defendant seeks materials from non-parties, and in doing so distinguished *Bowman Dairy*:

> The government has argued that to the extent defendants are using the Rule 17(c) subpoenas to discover evidence they are unjustified . . .. [T]he Supreme Court has observed that "[i]t was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms." The notion that because Rule 16 provides for discovery, Rule 17(c) has no role in the discovery of documents can, of course, only apply to documents in the government's hands; accordingly, Rule 17(c) may well be a proper device for discovering documents in the hands of third parties.[63]

In *Stein*, defendants issued a Rule 17(c) subpoena upon their former

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[58] *Nachamie*, 91 F. Supp. 2d at 562-63 (footnote omitted). The *Nachamie* court, like *Nixon*, did not decide the issue whether a lower, and presumably non-evidentiary, standard existed for defense subpoenas to third parties. *See id*. at 563 (''Under either the standard laid out in *Nixon* or the standard contained in Rule 17(c) itself, the Government's motion to quash these subpoenas is, with one exception, denied.'').

[59] U.S. v. Tomison, 969 F. Supp. 587, 593 (E.D. Cal. 1997).

[60] Tomison, 969 F. Supp. at 593 (citations omitted).

[61] *Tomison*, 969 F. Supp. at 593 (citations omitted).

[62] *Tomison*, 969 F. Supp. at 593 (citations omitted).

[63] *Tomison*, 969 F. Supp. at 593 n.14 (quoting *Bowman Dairy*, 341 U.S. at 220). The final sentence of the passage was quoted by the *Nachamie* Court, immediately following the passage quoted in the text accompanying note 56; *see also* United

employer, KPMG, who had entered into a deferred prosecution agreement with the government, seeking certain documents material to their defense.[64] KPMG and the government sought to quash the defendants' subpoena, arguing that the subpoena failed to satisfy the *Nixon* standard. The court, however, found that the *Nixon* standard was not applicable. Defendants had a right to the documents it sought under Rule 16(a)(1)(E) because the documents were within the legal control of the government[65] and were material to the defense.[66]

The court refused to apply reflexively the *Nixon* standard because ''*Nixon* should not so readily be divorced from the concerns that produced it.''[67]

> The *Bowman-Iozia-Nixon* standard exists to reconcile the broad language of Rule 17(c) with the limitations on pretrial discovery inherent in the far narrower language of Rule 16 . . .. there is no reason to limit the plain language of Rule 17(c) where, as here, there is no conflict between the limited discovery afforded by Rule 16 and the broad words of Rule 17(c).[68]

Instead, the court applied the standard set forth in the language of Rule 17(c) itself, and denied KPMG and the government's motion to quash because compliance with the subpoena would not be unreasonable or oppressive.[69]

Last year, in *United States v. Tucker*,[70] Judge Scheindlin of the United States District Court for the Southern District of New York issued the most comprehensive analysis to date of the *Tomison* line of cases.[71] After reviewing the history, purpose and prior treatment of Rule 17(c), as well as the structure of criminal discovery in general, Judge Scheindlin remarked that it was ''fair to ask whether it makes sense to require a defendant seeking to

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States v. King, 194 F.R.D. 569, 573 n.3 (E.D. Va. 2000) (*Bowman Dairy*'s worry that Rule 17(c) would be used as discovery alternative to Rule 16 is not present where Rule 17(c) subpoena is issued by defendant to third-party).

[64] U.S. v. Stein, 488 F. Supp. 2d 350, 99 A.F.T.R.2d 2007-2425 (S.D. N.Y. 2007).

[65] Under KPMG's deferred prosecution agreement, the government had the right to require KPMG to produce documents for the purpose of enabling the government to produce those documents to the defendants. *See Stein,* 488 F. Supp. 2d at 355.

[66] *Stein,* 488 F. Supp. 2d at 366.

[67] *Stein,* 488 F. Supp. 2d at 365.

[68] *Stein,* 488 F. Supp. 2d at 366; *see also* Xydas v. United States, 445 F.2d 660, 664 n.8 (D.C. Cir. 1971) (holding that after 1966 amendment broadening Rule 16, ''there is no longer any information obtainable via (Rule 17) subpoena which is not covered by Rule 16'' and evaluating defendants Rule 17 subpoena under Rule 16 because ''we see no relevant differences between Rules 16 and 17 in the criteria governing disclosure of the documents sought here'').

[69] *Stein,* 488 F. Supp. 2d at 366. The *Stein* decision establishes that defense counsel should seek, pursuant to Rule 17(c), documents and information material to their defense from cooperating witnesses and those entities that have entered into deferred prosecution agreements and nonprosecution agreements with the government. *See* Harry Sandick & Brian J. Fischer, *Recent Decision Expands Use of Rule 17 Subpoena*, N.Y L.J., Aug. 9, 2007, at 4.

[70] U.S. v. Tucker, 249 F.R.D. 58 (S.D. N.Y. 2008), as amended, (Feb. 20, 2008).

[71] Judge Scheindlin also authored the *Nachamie* decision.

obtain material from a non-party by means of a Rule 17(c) subpoena to meet the *Nixon* standard'' since unlike the government, a defendant does not have the chance to obtain non-party discovery through the grand jury process or Rule 16.[72] The court answered its own question in the negative:

> Because Rule 16 only addresses discovery between the parties, if defendants seek documents from non-parties, it must be pursuant to some other rule. If this were not the case, the government could prevent defendants from obtaining material by choosing not to obtain it for itself. This perverse result cannot be intended by the Federal Rules of Criminal Procedure.[73]

Therefore, holding a Rule 17(c) subpoena issued to non-parties to a very stringent standard because of the existence of Rule 16 made little sense. Following *Tomison*, the court held that the *Nixon* standard was not applicable to the instant Rule 17(c) subpoena, which was directed to a non-party.[74] Rather, the court applied a less-stringent standard based on materiality. ''Under this standard, Rule 17(c) subpoenas are not to be used as broad discovery devices, but must be reasonably targeted to ensure the production of material evidence.''[75]

In contrast, however, four other courts have expressly disagreed with the Rule 17(c) reasoning articulated in *Nachamie* and *Tomison*:

● In *United States v. Modi*,[76] the defendants sought to serve a Rule 17(c) subpoena upon the government's expert medical witnesses. The court acknowledged that *Nixon* and *Nachamie* both ''hinted'' that a ''more relaxed test'' than the *Nixon* standard may apply to a Rule 17(c) subpoena served upon a non-governmental third-party witness, but held that the *Nixon* standard was applicable to the instant situation ''where the object of the subpoena is a compensated government expert witness.''[77]

● In *United States v. Drakopoulos*,[78] the defendant sought through a Rule 17(c) subpoena tape recordings from a non-governmental third-party entity. The court applied the *Nixon* standard and held that the defendant could not satisfy the standard.[79] In a footnote, the court dismissed defendant's assertion (citing *Nachamie*) that a relaxed standard applied to his subpoena,

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[72] *Tucker*, 249 F.R.D. at 63-64.

[73] *Tucker*, 249 F.R.D. at 65 (internal footnote omitted).

[74] The court's ruling was explicitly limited to the circumstances of the subpoena before the court: ''But the standard is inappropriate where production is requested by (A) a criminal defendant; (B) on the eve of trial; (C) from a non-party; (D) where the defendant has an articulable suspicion that the documents may be material to his defense.'' *Tucker*, 249 F.R.D. at 66.

[75] *Tucker*, 249 F.R.D. at 65-66.

[76] U.S. v. Modi, 2002 WL 188327 (W.D. Va. 2002).

[77] U.S. v. Modi, 2002 WL 188327 (W.D. Va. 2002).

[78] U.S. v. Drakopoulos, 2003 WL 21143080 (E.D. N.Y. 2003).

[79] U.S. v. Drakopoulos, 2003 WL 21143080 (E.D. N.Y. 2003).

stating that the relaxed standard proposed in *Nachamie* was *dicta* and not binding.[80]

● The court in *United States v. Reyes*[81] addressed the question of whether a lesser standard than *Nixon* may be applicable to certain Rule 17(c) subpoenas issued by defendants. In addressing the defendant's argument that the Rule 17(c) standard is different from the standard set forth in *Nixon* where a defendant is seeking documents from a third-party, the court characterized *Tomison*'s ''scholarly rumination about the potential broad use of Rule 17(c)'' as ''the purest form of dicta,''[82] and held that such an ''expansive construction'' of Rule 17(c) had already been rejected by the Ninth Circuit.[83]

● Most recently, in *United States v. Ferguson*, the court concluded that the *Nixon* test applied to subpoenas issued by defendants to non-parties.[84] In doing so, the court explicitly rejected *Nachamie*, finding that application of the *Nachamie* test ''would eviscerate Rule 17's limitations on criminal discovery, a result for which there is no support in *Nixon*.''[85] Moreover, because the government ''may not use the grand jury to conduct discovery in a pending criminal case,'' the court rejected the claim that there is a ''sufficiently significant'' disparity between the power of the government and defendants to obtain documents prior to trial.[86]

The argument that the *Nixon* standard does not apply to subpoenas issued to third-parties by a defendant appears absolutely correct. *Bowman Dairy* and *Nixon* neither covered nor considered the broad range of situations in which Rule 17(c) issues arise, and the evidentiary standard that they impose should not apply to defendants' subpoenas on non-parties. That is, the question left open in *Nixon* should be answered as have the *Nachamie* and *Tomison* line of cases.[87]

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[80] U.S. v. Drakopoulos, 2003 WL 21143080 (E.D. N.Y. 2003).The court also said that it was unclear whether defendant's subpoena even met the requirements proposed in *Nachamie*. *Id.*

[81] U.S. v. Reyes, 239 F.R.D. 591 (N.D. Cal. 2006).

[82] *Reyes*, 239 F.R.D. at 597 n.1.

[83] *Reyes*, 239 F.R.D. at 597 n.1 (quoting U.S. v. Fields, 663 F.2d 880, 881 (9th Cir. 1981) (''[W]e see no basis for using a lesser evidentiary standard merely because production is sought from a third party rather than from the United States.'')); *see also* U.S. v. Johnson, 2008 WL 62281 (N.D. Cal. 2008) (same; quoting *Fields*); U.S. v. Dale, 155 F.R.D. 149, 152 (S.D. Miss. 1994) (same; quoting *Fields*).

[84] U.S. v. Ferguson, 2007 WL 2815068 (D. Conn. 2007).

[85] U.S. v. Ferguson, 2007 WL 2815068 (D. Conn. 2007) (noting that *Nachamie* court ultimately applied *Nixon* test to subpoena at issue). The decision also distinguished *Stein* by explaining that the *Stein* opinion relied on Rule 16 and ''did not reach the issue of whether the subpoenas should have been analyzed under *Nixon*.'' *Id.* at *3 n.8.

[86] U.S. v. Ferguson, 2007 WL 2815068 (D. Conn. 2007).

[87] Indeed, it has been argued that the *Nixon* standard should not apply to defendants at all. *See* Henning, *supra* note 4, at 641-47. Henning argues that the

(2) Government subpoenas to non-parties

A subpoena issued by the government pursuant to Rule 17 is significantly different from a subpoena issued by the defendant because whereas the defendant has very limited investigatory powers that would allow him to obtain information from non-parties, the government has been able to use the most potent investigatory tool of all, the grand jury.

The grand jury's investigatory reach is almost unlimited. Before it issues an indictment, the grand jury can issue subpoenas ''merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.''[88] ''A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'''[89]

Although the grand jury's powers pre-indictment are virtually unlimited, there are recognized limits on the government's right to use the grand jury after the issuance of an indictment: The government cannot use a grand jury post-indictment to prepare for trial.[90] That limitation has important implications for the analysis of government-issued Rule 17 subpoenas, for if the government were permitted to issue Rule 17 subpoenas before trial, then the post-indictment limit on the use of the grand jury would be a nullity. Instead of issuing grand jury subpoenas, the government would simply cause the issuance of Rule 17 subpoenas for the same information. Thus, whereas, for the reasons discussed above, the evidentiary limitation makes little sense for subpoenas issued by a defendant, there is a compelling reason to keep that limitation for government-issued Rule 17 subpoenas.

Although the text of Rule 17(c) would not appear, on first consideration, to distinguish between subpoenas issued by the government and subpoenas issued by defendants, closer consideration reveals a textual basis for the distinction. Rule 17(c) provides that a subpoena may be quashed or modified ''if compliance would be unreasonable or oppressive.''[91] This provision will be considered in some detail below;[92] for present purposes, the key is the reasonableness limitation, which has been explained by the Supreme Court

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''reasonableness'' requirement set forth in the language of Rule 17(c) itself should be the standard applied to defendants issuing subpoenas because ''a reasonableness requirement lower than that of Nixon better reflects the defendant's position as a person without the investigatory authority or resources of the Government.'' *Id.* at 645.

[88] U.S. v. Morton Salt Co., 46 F.T.C. 1436, 338 U.S. 632, 642-43, 70 S. Ct. 357, 94 L. Ed. 401 (1950).

[89] Branzburg v. Hayes, 408 U.S. 665, 701, 92 S. Ct. 2646, 33 L. Ed. 2d 626, 1 Media L. Rep. (BNA) 2617 (1972) (quoting U.S. v. Stone, 429 F.2d 138, 140 (2d Cir. 1970)).

[90] *See, e.g.*, U.S. v. Jones, 129 F.3d 718, 723 (2d Cir. 1997).

[91] FED. R. CRIM. P. 17(c)(2) (quoted *supra*).

[92] *See infra* notes and text accompanying notes 105-16.

in *United States v. R. Enterprises*.[93] That case involved a subpoena-recipient's motion to quash a grand jury subpoena on the ground, among others, that it was ''unreasonable or oppressive'' under Rule 17(c). The court of appeals had quashed the subpoena on the ground that it did not satisfy the *Nixon* requirements, but the Supreme Court reversed, finding the *Nixon* standard applicable to trial subpoenas only, not grand jury subpoenas. Essential to the Court's analysis was its recognition that the grand jury was an investigatory body, which needed the ability to explore broadly. The Court stated that '''what is reasonable depends on the context,'''[94] and found that it was reasonable for the grand jury to issue broad subpoenas.[95]

Rule 17(c) subpoenas issued by the government arise in a completely different ''context'' than do those issued by the defendant, precisely because the government-issued subpoenas come after the government has had access to the grand jury; unlike the defendant, the government has already had available to it a powerful investigatory tool. Thus, Rule 17(c)(2)'s reasonableness restriction should apply more strictly to the government than to the defense. Whereas, for the reasons stated above, the *Nixon* standard should not be applied to defendant-issued Rule 17(c) subpoenas, that standard fits government-issued Rule 17(c) subpoenas — which are, of course, the kinds of subpoenas at issue in *Nixon* itself.

(3) Defendants' subpoenas issued to the government

As discussed above, analysis of a defendant's subpoenas to the government raises issues not present upon consideration of a defendant's subpoenas to third parties. As the *Bowman Dairy* Court recognized, the government's obligations to provide discovery to the defendant is covered by other provisions. *Bowman Dairy* referred expressly to Rule 16.[96] Since *Bowman Dairy*, the government's discovery obligations have been increased by *Brady v. Maryland*,[97] and the Jencks Act.[98] A fair inference from the existence of these obligations and provisions is that they set the limits on what discovery a defendant can obtain from the government, and that Rule 17(c) cannot be

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[93] U.S. v. R. Enterprises, Inc., 498 U.S. 292, 111 S. Ct. 722, 112 L. Ed. 2d 795 (1991).

[94] *R. Enterprises*, 498 U.S. at 300 (*quoting* New Jersey v. T.L.O., 469 U.S. 325, 337, 105 S. Ct. 733, 83 L. Ed. 2d 720, 21 Ed. Law Rep. 1122 (1985)).

[95] *R. Enterprises*, 498 U.S. at 302-03.

[96] *See also* U.S. v. Nachamie, 91 F. Supp. 2d 552, 561 (S.D. N.Y. 2000) (history of Rule 17(c) ''may indicate that the drafters initially thought that Rule 17(c) governed discovery from non-parties, while Rule 16 governed discovery from the Government.'').

[97] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (due process requires the government to provide the defendant with exculpatory information in the government's possession).

[98] 18 U.S.C. § 3500 (2007) (requiring production of certain kinds of statements of government witnesses); *see also* Fed. R. Crim. P. 26.2 (same).

used to change the balance.[99] Indeed, Rule 17(h) makes clear that Rule 26.2

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[99] *See* U.S. v. Nixon, 418 U.S. 683, 698-99, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (''courts must be careful that Rule 17(c) is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases found in Fed.R.Crim.P. 16''); Bowman Dairy Co. v. U.S., 341 U.S. 214, 220, 71 S. Ct. 675, 95 L. Ed. 879 (1951) (''It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms.''); U.S. v. Eisenhart, 43 Fed. Appx. 500, 505 (3d Cir. 2002); U.S. v. Arditti, 955 F.2d 331, 345 (5th Cir. 1992) (''Although rule 17 extends to materials not subject to rule 16 discovery, it is not intended to provide an additional means of discovery.''); *Cuthbertson I*, 630 F.2d at 146; U.S. v. Aguilar, 2008 WL 3182029 (N.D. Cal. 2008); U.S. v. Mason, 2008 WL 1909115 (D. Or. 2008); U.S. v. Guild, 2008 WL 110466 (E.D. Va. 2008); U.S. v. Johnson, 2008 WL 62281 (N.D. Cal. 2008); U.S. v. Clason, 2007 WL 1259138 (D. Ariz. 2007); U.S. v. Ail, 2007 WL 1229415 (D. Or. 2007) (''It is clear, however, that Rule 17(c) was not intended to expand the scope of criminal discovery under Rule 16.''); U.S. v. Henry, 2007 WL 219885 (E.D. Pa. 2007); U.S. v. Fletcher, 461 F. Supp. 2d 1101, 1102-03 (D. Ariz. 2006); U.S. v. Caro, 461 F. Supp. 2d 478, 481 (W.D. Va. 2006) (''a Rule 17 subpoena duces tecum cannot substitute for the limited discovery otherwise permitted in criminal cases''); U.S. v. San Diego Gas & Elec. Co., 2006 WL 3913456 (S.D. Cal. 2006); U.S. v. Libby, 432 F. Supp. 2d 26, 30, 34 Media L. Rep. (BNA) 1933 (D.D.C. 2006); U.S. v. Leaver, 358 F. Supp. 2d 273, 275 n.6 (S.D. N.Y. 2005); U.S. v. Nektalov, 2004 WL 1574721 (S.D. N.Y. 2004) (quoting *Nixon*); U.S. v. Segal, 276 F. Supp. 2d 896, 900 (N.D. Ill. 2003); U.S. v. Salvagno, 267 F. Supp. 2d 249, 252 (N.D. N.Y. 2003); U.S. v. Jenkins, 2003 WL 1461477 (S.D. N.Y. 2003); U.S. v. Jasper, 2003 WL 1107526 (S.D. N.Y. 2003); U.S. v. Agboola, 2001 WL 1640094 (D. Minn. 2001) (''Rule 17(c) is not a broad adjunct to the discovery provisions of Rule 16.''); U.S. v. Merlino, 2001 WL 283165 (E.D. Pa. 2001) (quoting Cuthbertson I); U.S. v. Louis Trauth Dairy, Inc., 162 F.R.D. 297, 300 (S.D. Ohio 1995) (''The ordinary vehicle for obtaining pretrial discovery under the Federal Rules of Criminal Procedure is Rule 16. Rule 17(c) 'is not intended to provide an additional means of discovery.'''') (quoting U.S. v. Arditti, 955 F.2d 331, 345 (5th Cir. 1992)); U.S. v. Peterson, 196 F.R.D. 361 (D.S.D. 2000); U.S. v. Ruedlinger, 172 F.R.D. 453, 457 (D. Kan. 1997); U.S. v. Brown, 1995 WL 387698 (S.D. N.Y. 1995); U.S. v. Messercola, 701 F. Supp. 482, 484-85 (D.N.J. 1988); U.S. v. Vanegas, 112 F.R.D. 235, 238 (D.N.J. 1986); U.S. v. Buck, 1986 WL 14970 (S.D. N.Y. 1986) (''It is now well-settled that since the 1966 amendments to Rule 16, . . ., the discoverability of items under Rule 16 determines whether those items are subject to a Rule 17(c) subpoena.'') (citing Xydas v. U.S., 445 F.2d 660, 664, (D.C. Cir. 1971)); U.S. v. Rich, 1984 WL 845 (S.D. N.Y. 1984); U.S. v. Walters, 558 F. Supp. 726, 727-28 (D. Md. 1980); U.S. v. Van Allen, 28 F.R.D. 329, 334 (S.D. N.Y. 1961); U.S. v. Wortman, 26 F.R.D. 183, 208, 61-1 U.S. Tax Cas. (CCH) P 9289, 7 A.F.T.R.2d 1253 (E.D. Ill. 1960); U.S. v. Jannuzzio, 22 F.R.D. 223, 227, 58-2 U.S. Tax Cas. (CCH) P 9670, 2 A.F.T.R.2d 5121 (D. Del. 1958); U.S. v. Louie Gim Hall, 18 F.R.D. 384, 385 (S.D. N.Y. 1956) (''Unlike Rule 16, Rule 17(c) was not intended as a discovery device, and to permit its use for discovery would negate the restrictions of the former Rule.''); U.S. v. Kiamie, 18 F.R.D. 421, 423 (S.D. N.Y. 1955); U.S. v. Peltz, 18 F.R.D. 394, 404 (S.D. N.Y. 1955) (''Although the language of Rule 17(c) is broad, it must be read particularly with Rule 16 in mind. It should not be construed so that the carefully drawn limitations in Rule 16 become meaningless.'');

''trumps'' Rule 17(c) with respect to witness statements: It provides that ''[n]o 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.''[100]

(4) Government subpoenas issued to a defendant

Government Rule 17(c) subpoenas to defendants are perhaps the hardest of all to justify. If the defendant is an individual, then any questions regarding such subpoenas are moot, as a practical matter, because the defendant can, and invariably will, assert her or his Fifth Amendment right against self-incrimination, and thus refuse to comply with any such subpoena.

If the defendant is not a natural person, however, or if the government grants act of production immunity to a defendant who is a natural person, then the Fifth Amendment assertion is not available.[101] Even so, the grounds

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U.S. v. Carter, 15 F.R.D. 367, 369 (D. D.C. 1954) (''To construe Rule 17 as a discovery rule would render Rule 16 nugatory and meaningless and would defeat its limitations.'') (Holtzoff, J. (a member of the Advisory Committee)); U.S. v. Iozia, 13 F.R.D. 335 (S.D. N.Y. 1952). As Judge Goldberg elucidated in a concurring opinion in *Arditti*, a defendant can use Rule 17(c) to reach documents and materials possessed by the government but not discoverable under Rule 16, as long as the documents and materials are evidentiary. *Arditti*, 955 F.2d at 347 (Goldberg, J., concurring); *see* U.S. v. Louis, 2005 WL 180885 (S.D. N.Y. 2005) (Rule 17(c) allows ''use of a trial subpoena to obtain for use at trial materials that are outside the scope of Rule 16 'as long as they are evidentiary''' — ''Rule 17(c) was not intended to provide an additional means of discovery.''); *see also* U.S. v. Palermo, 21 F.R.D. 11, 13, 57-2 U.S. Tax Cas. (CCH) P 9911, 52 A.F.T.R. (P-H) P 986 (S.D. N.Y. 1957) (rejecting argument that Rule 17(c) necessarily allows pre-trial inspection of Jencks materials); *but see* U.S. v. Gross, 24 F.R.D. 138, 140 (S.D. N.Y. 1959) (''if a subpoena is directed towards a good-faith effort to obtain evidence there is no reason why such evidence may not be reached under Rule 17(c), even though not obtainable under Rule 16'').

[100] FED. R. CRIM. P. 17(h) (quoted *supra*). Rules 17(h) and 26.2 apply only to materials in the government's possession. These rules to do not apply to subpoenas seeking materials in witness' possession. *See, e.g.*, U.S. v. Young, 2004 WL 784840 (W.D. Tenn. 2004).

[101] *See* Braswell v. U.S., 487 U.S. 99, 108 S. Ct. 2284, 101 L. Ed. 2d 98, 88-2 U.S. Tax Cas. (CCH) P 9546, 25 Fed. R. Evid. Serv. 609, 25 Fed. R. Evid. Serv. 632, 62 A.F.T.R.2d 88-5724 (1988) (discussing and re-affirming collective entity doctrine pursuant to which collective entities, such as corporations or partnerships, do not have Fifth Amendment rights against self-incrimination); U.S. v. Hubbell, 530 U.S. 27, 120 S. Ct. 2037, 147 L. Ed. 2d 24, 2000-1 U.S. Tax Cas. (CCH) P 50499 (2000) (discussing contours of act of production immunity); U.S. v. Gel Spice Co., Inc., 601 F. Supp. 1214, 1235 (E.D. N.Y. 1985); *see also* U.S. v. Eli Lilly & Co., 24 F.R.D. 285, 287-88 (D.N.J. 1959) (holding that government could issue a Rule 17(c) subpoena to defendant corporation). In addition, an individual defendant cannot rely on the protections of the Fifth Amendment to ward off a Rule 17(c) subpoena when the government seeks materials, such as a handwriting exemplar, that are non-testimonial in nature. *See, e.g.*, U.S. v. Anapol, 1994 WL 139408 (E.D. Pa. 1994); *Vanegas*, 112 F.R.D. at 237-38; *cf.* U.S. v. Nguyen, 2000 WL 976782

for a Rule 17(c) subpoena would be quite weak for two reasons that we have already encountered. First, the government has already been able to avail itself of grand jury subpoenas, and thus the government would have a difficult time in demonstrating that a Rule 17(c) subpoena was reasonable.[102] Second, the government has discovery rights from the defendant pursuant to Rule 16, and thus, just as the defendant's Rule 17(c) rights against the government are limited, so are the government's against the defendant.[103]

III. Who Can Move to Quash a 17(c) Subpoena?

When a defendant causes a Rule 17(c) subpoena to be issued on a non-party, it is clear that the non-party on whom the subpoena is served may move to quash it. The party may, for example, argue that compliance would be burdensome,[104] or that the materials sought are privileged and thus beyond discovery.[105] Rule 17(c)(3) expressly provides that under specified circumstances the victim may move to quash a subpoena.

In many instances, however, it is the government, not the non-party, who moves to quash. There is currently a significant split of authority regarding the propriety of the government's moving to quash a defendant-issued Rule 17(c) subpoena served on a non-party.[106]

The argument that the government does not have standing is straightfor-

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(E.D. La. 2000) (non-party may not assert Fifth Amendment to avoid complying with government subpoena for handwriting exemplar); U.S. v. McKeon, 558 F. Supp. 1243, 1246, 12 Fed. R. Evid. Serv. 1921 (E.D. N.Y. 1983) (same); *see generally* Gilbert v. California, 388 U.S. 263, 266-67, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967) (holding that handwriting exemplars are outside the protections of the Fifth Amendment).

[102] *See supra* notes and text accompanying notes 88-95.

[103] *See Walters*, 558 F. Supp. at 727-28; *supra* note and text accompanying note 98.

[104] *See, e.g.*, U.S. v. Ail, 2007 WL 1229415 (D. Or. 2007); U.S. v. Grass, 2003 WL 25487584 (M.D. Pa. 2003).

[105] *See, e.g.*, U.S. v. Nixon, 418 U.S. 683, 703-14, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); In re Martin Marietta Corp., 856 F.2d 619, 622 (4th Cir. 1988); U.S. v. LaRouche Campaign, 841 F.2d 1176, 1180-82, 15 Media L. Rep. (BNA) 1502 (1st Cir. 1988); U.S. v. Stein, 488 F. Supp. 2d 350, 367-68, 99 A.F.T.R.2d 2007-2425 (S.D. N.Y. 2007); U.S. v. Reyes, 239 F.R.D. 591, 598 (N.D. Cal. 2006); U.S. v. Libby, 432 F. Supp. 2d 26, 43-50, 34 Media L. Rep. (BNA) 1933 (D.D.C. 2006); U.S. v. Grass, 2003 WL 25487584 (M.D. Pa. 2003); U.S. v. Harry, 1987 WL 30695 (E.D. N.Y. 1987); *see also* U.S. v. Holihan, 248 F. Supp. 2d 179, 185 (W.D. N.Y. 2003) (federal law prevented disclosure of requested materials).

[106] Plainly, the government can move to quash when a defendant causes a Rule 17(c) to be issued on the government itself. Also, the government can oppose a defendant's motion for leave to serve a Rule 17(c) subpoena upon a non-party without raising the standing issue discussed herein. *See, e.g.*, U.S. v. Wittig, 250 F.R.D. 548, 551 (D. Kan. 2008) (government, as opposing party, has right to oppose motion for leave to serve subpoena).

ward: A party should be able to move to quash only if it has a protectable interest in the materials being subpoenaed, and the government will not often have such an interest in materials held by a non-party. As explained by the *Tomison* Court:

> A party only has standing to move to quash the subpoena issued to another when the subpoena infringes upon the movant's legitimate interests. In many instances the opposing party in a criminal case [i.e., the government when the defendant issues a subpoena on a non-party or the defendant when the government does so] will lack standing to challenge a subpoena issued to a third party because of the absence of a claim of privilege, or the absence of a proprietary interest in the subpoenaed material, or of some other interest in the subpoenaed documents.[107]

Notwithstanding this argument, many courts have found that the government has standing to move to quash 17(c) subpoenas issued to non-parties.[108] The reasons proffered by these courts, however, have often been

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[107] United States v. Tomison, 969 F. Supp. 587, 596 (E.D. Cal. 1997) (internal citations and quotations omitted); *see also* United States v. Williams, CR 07-35, 2007 WL 2287819, at *2 (E.D. La. Aug. 8, 2007) (holding that government lacked standing to quash subpoena issued to non-parties where law enforcement privilege was not applicable and government failed to establish that the subpoena would delay trial or result in undue harassment of the subpoena recipients); United States v. Daniels, 95 F. Supp. 2d 1164 (D. Kan. 2000) (''The government will often lack standing to challenge a subpoena issued to a third party absent a claim of privilege, proprietary interest in the subpoenaed material, or some other interest in the subpoenaed material.'') (citing United States v. Beckford, 964 F. Supp. 1010, 1023 (E.D. Va. 1997)); *see also* United States v. Bodkins, Civ. A. 4:04 CR 70083, 2004 WL 2491615, at *3 (W.D. Va. Nov. 5, 2004) (government lacked standing to challenge subpoena to local Division of Forensic Science); United States v. Nachamie, 91 F. Supp. 2d 552, 560 (S.D.N.Y. 2000) (government lacked standing to challenge subpoenas served on non-parties); *cf.* United States v. Justice, 14 Fed. Appx. 426, 432 n.2 (6th Cir. 2001) (questioning whether defendant ''has standing to challenge the validity of a subpoena issued under Rule 17(c) to a third party''); United States v. Compton, 93-1649, 93-1712, 1994 WL 328303, at *3 (6th Cir. July 1, 1994) (Rule 17(c) ''contains no express provision permitting the defendant to challenge the validity of subpoenas''); United States v. Eye, No. 05-00344-01-CR-W-ODS, 2008 WL 1776400, at *5 (W.D. Mo. Apr. 15, 2008) (''there is some question'' whether defendant would have standing to challenge validity of subpoenas issued by government to third parties); United States v. Tucker, 249 F.R.D. 58, 60 n.3 (S.D.N.Y. 2008) (''It is not immediately clear that the government has standing to object to Tucker's subpoena (which is directed to toward the Bureau of Prisons.'').

[108] *See, e.g.*, U.S. v. Raineri, 670 F.2d 702, 712 (7th Cir. 1982); Khouj v. Darui, 248 F.R.D. 729, 731 (D.D.C. 2008); U.S. v. Wai Lun Ng, 2007 WL 3046215 (W.D. N.C. 2007); U.S. v. Smith, 245 F.R.D. 605, 610 (N.D. Ohio 2007), on reconsideration in part, 2007 WL 2156260 (N.D. Ohio 2007) (government had standing to move to quash one of three subpoenas issued to non-parties); U.S. v. Ail, 2007 WL 1229415 (D. Or. 2007); U.S. v. Hughes, 2007 WL 896157 (E.D. Tenn. 2007), decision aff'd, 2007 WL 1894288 (E.D. Tenn. 2007); U.S. v. Bodkins, 2004 WL 2491615 (W.D. Va. 2004); U.S. v. Nektalov, 2004 WL 1574721 (S.D. N.Y. 2004); U.S. v. Segal, 276 F. Supp. 2d 896, 900 (N.D. Ill. 2003); U.S. v. Clark, 2001 WL 759895 (W.D. Va. 2001) (''courts have routinely granted the government's motion

unconvincing. In *United States v. Raineri*,[109] for example, the court found that the government had standing to move to quash a subpoena served on a non-party when the government had a concern that the subpoenaed material would unduly lengthen the trial or would be harassing for a government witness.[110] The concern that subpoenaed materials would lengthen the trial is not well-founded. If the materials are *admitted* then they might lengthen the trial, but questions of admissibility are trial questions not relevant to the subpoena itself. Furthermore, Rule 17(c)(2) provides the grounds on which a party may seek to quash a Rule 17(c) subpoena. Rule 17(c)(2) provides that ''the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.'' The effect that admission of certain documents might have at trial has nothing to do with the question whether compliance with the subpoena — that is, producing the documents — would be ''unreasonable or oppressive.''

The second reason considered by the *Raineri* Court — that witnesses were being harassed by the subpoenas — is a valid ground for quashal, so long as it is understood that only ''unreasonable or oppressive'' subpoenas can cause harassment. But this reason does not explain why the government has standing to move for quashal: If government witnesses are allegedly harassed by subpoenas, then the witnesses can move to quash. There is no need for the government to become involved.

Other cases have held that the government may move to quash when the subpoena is served on a non-party who is a government witness, simply on account of the non-party's status as a government witness.[111] That a person is a government witness should not, however, give the government standing to move to quash a Rule 17(c) subpoena directed to that person. Being a

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to quash a subpoena duces tecum where a defendant requests records from a third party''); U.S. v. Jenkins, 895 F. Supp. 1389, 1393 (D. Haw. 1995); U.S. v. Chen De Yian, 1995 WL 614563 (S.D. N.Y. 1995); U.S. v. Orena, 883 F. Supp. 849, 869 (E.D. N.Y. 1995); U.S. v. Giampa, 1992 WL 296440 (S.D. N.Y. 1992); *see also* U.S. v. Novack, 1985 WL 1588 (N.D. Ill. 1985) (government has standing ''to object to subpoenas issued to other governmental entities with whom the government cooperated in investigating the defendants before the court'').

[109] U.S. v. Raineri, 670 F.2d 702 (7th Cir. 1982).

[110] *See Raineri*, 670 F.2d at 712; *see also* U.S. v. Ail, 2007 WL 1229415 (D. Or. 2007); *Jenkins*, 895 F. Supp. at 1393; U.S. v. Giampa, 1992 WL 296440 (S.D. N.Y. 1992). Although *Raineri* is cited frequently by subsequent courts addressing the question of whether the government has standing to quash a Rule 17(c) subpoena returnable prior to trial, the subpoena at issue in *Raineri* was actually a testimonial subpoena issued during trial. *Raineri*, 670 F.2d at 712; *see also* U.S. v. Williams, 2007 WL 2287819 (E.D. La. 2007) (distinguishing *Raineri* on grounds that it did not address a subpoena returnable before trial); *Nachamie*, 91 F. Supp. 2d at 559 (same). The fact that *Raineri* involved a subpoena issued during trial probably explains the court's emphasis on the potential for delay of the trial. *See id.* at 559 (*Raineri* involved ''preventing a redundant and time-consuming reexamination of a witness'').

[111] *See, e.g.*, *Smith*, 245 F.R.D. at 611; U.S. v. Ail, 2007 WL 1229415 (D. Or. 2007); U.S. v. Nektalov, 2004 WL 1574721 (S.D. N.Y. 2004).

''government witness'' means simply that one has agreed to testify when called by the government; it gives the government no right to the person's confidences or information — it certainly does not give the government any right to prevent the defendant from gathering information from the person.[112]

It makes no difference that the witness may be a ''cooperating witness,'' i.e., one who entered a written agreement with the government pursuant to which he or she would cooperate with the government — typically by agreeing to testify without being subpoenaed, and agree to be interviewed by government agents — in exchange for a government recommendation of leniency at sentencing. The cooperating witness, like any other witness, does not belong to the government; the government has no cognizable interest that it must protect through a motion to quash. Of course, the government would *prefer* that its cooperating witness not provide information to the defendant. But, the government's preference does not create standing.

The argument in the preceding paragraph requires one qualification: Expert witnesses are different. Just as the Federal Rules of Civil Procedure address the discovery of expert witnesses differently from other witnesses, so do the Federal Rules of Criminal Procedure. Rules 16(a)(1)(G) and 16(b)(1)(C) address what information either party is required to provide with respect to expert witnesses, and the balance struck in those rules should not be upset or altered by a Rule 17(c) subpoena.[113]

Some courts have considered whether the government has standing when it has been asked by the subpoena recipients to move to quash the

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[112] ''If the Government had standing to move to quash whenever a subpoena was served on a potential witness, then it could move to quash virtually every Rule 17(c) subpoena merely by claiming that the recipient might become a witness.'' *Nachamie*, 91 F. Supp. 2d at 560.

In one case, the government argued that it had standing to quash a subpoena directed to a third party because the subpoena sought material protected by the government's work product privilege. *See* U.S. v. Ail, 2007 WL 1229415 (D. Or. 2007). The court accepted this argument without addressing how documents outside of the government's possession, and shared with third parties, could possibly be considered as protected by the work product privilege. *Id.* Another court granted standing to the government where the defendant's subpoena to a non-party sought ''witness information,'' including witness statements. *See* U.S. v. Bodkins, 2004 WL 2491615 (W.D. Va. 2004). Again, no attempt was made to show why the government had a ''legitimate interest'' in such materials. Indeed, federal law forbids only those subpoenas that seek the pre-testimony disclosure of witness statements ''in the possession of the United States.'' 18 U.S.C. § 3500 (2007). There is no law barring subpoenas for witness statements in the possession of the witness herself or himself.

[113] This is, of course, the same reasoning used by the Court in Bowman Dairy Co. v. U.S., 341 U.S. 214, 220, 71 S. Ct. 675, 95 L. Ed. 879 (1951) (''It was not intended by Rule 16 to give a limited right to discovery, and then by Rule 17 to give a right of discovery in the broadest terms.'') (quoted *supra* at text accompanying note 18).

subpoenas.[114] Such ''standing by invitation'' is problematic. Private parties have private interests, and it is not the government's job to promote any particular party's interests. Some private parties may not have the resources to move to quash, but the same is true in civil cases involving private parties, and the government does not step in then. Similarly, what if the government caused a Rule 17(c) subpoena to be issued upon a private party, and the private party wants to move to quash but cannot afford to do so? Could it ask the government — the very party that caused the subpoena to be issued — to represent it in such a motion? Of course not. But the government should not offer a service to those subpoenaed by defendants that it does not offer to those it subpoenas itself.[115]

IV. The Propriety of *Ex Parte* Applications for Rule 17(c) Subpoenas

The procedures for obtaining the issuance of a Rule 17(c) subpoena are anything but clear. There is disagreement and doubt on even the most fundamental points.

A. Who Issues the Subpoena — the Clerk Or the Court?

The first question that a party seeking a Rule 17(c) subpoena must answer is to whom it should apply, the clerk of the court or a judge. Rule 17(c) does not say one way or the other, but Rule 17(a), which governs the requisite content of a subpoena, provides that ''[t]he clerk may issue a blank

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[114] *See, e.g.*, U.S. v. Williams, 2007 WL 2287819 (E.D. La. 2007) (''courts have routinely found that the Government does not have the ability to stand in another's shoes and move to quash a subpoena''); U.S. v. Nektalov, 2004 WL 1574721 (S.D. N.Y. 2004) (holding that government has standing because, *inter alia*, subpoena recipient asked government to intervene of his behalf); *Nachamie*, 91 F. Supp. 2d at 561 (refusing to allow ''standing by invitation''); U.S. v. Chen De Yian, 1995 WL 614563 (S.D. N.Y. 1995) (holding that government had standing to challenge subpoena to non-party sheriff's office where the sheriff's office ''in effect requested that the United States Attorney's Office represent it'').

[115] One court (*Nachamie*) has indicated that it would consider assigning an attorney to an impecunious non-party served with a Rule 17(c) subpoena, and paying for the attorney pursuant to the Criminal Justice Act, 18 U.S.C. § 3006(A) (2007). *See Nachamie*, 91 F. Supp. 2d at 560-61. It is not clear whether the Criminal Justice Act would, by its terms, permit the assignment of counsel to a non-party who has received a Rule 17(c) subpoena. *See* 18 U.S.C. § 3006(A)(a)(1)(A-J) (2007).

Some courts have avoided the question of standing, or provided an additional ground for allowing a government challenges of subpoena issued to a non-party, by ruling that it is the court's responsibility to ensure that a subpoena complies with Rule 17. *See, e.g.*, U.S. v. Wittig, 250 F.R.D. 548 (D. Kan. 2008); U.S. v. Wecht, 2007 WL 4563516 (W.D. Pa. 2007); U.S. v. Weldon, 2006 WL 905932 (E.D. Ky. 2006) (court has ''inherent authority to review the propriety of trial subpoenas issued pursuant to Rule 17''); U.S. v. Weissman, 2002 WL 31875410 (S.D. N.Y. 2002); *Nachamie*, 91 F. Supp. 2d at 561.

subpoena — signed and sealed — to the party requesting it, and that party must fill in the blanks before the subpoena is served.''[116] Rule 17(a), then, states that no motion to the judge is required. It is not clear, however, whether the procedure set forth in Rule 17(a) applies equally to subpoenas issued pursuant to Rule 17(c). Most courts addressing the issue agree that leave of court is not required for a Rule 17(c) subpoena that is returnable on the first day of trial or later.[117] However, as to subpoenas returnable prior to trial, some courts have held that a motion is required,[118] while others have held that a motion is not required, although they have indicated that proceeding by motion is recommended.[119]

The better answer would be to require a motion for the issuance of a

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[116] FED. R. CRIM. P. 17(a). If the subpoena is not signed by the clerk of court, it is unenforceable. *See* U.S. v. Bueno, 443 F.3d 1017, 1026 (8th Cir. 2006).

[117] *See* U.S. v. W.R. Grace, 434 F. Supp. 2d 869, 871 (D. Mont. 2006); U.S. v. Clark, 2001 WL 759895 (W.D. Va. 2001); U.S. v. Gel Spice Co., Inc., 601 F. Supp. 1214, 1224 (E.D. N.Y. 1985); U.S. v. Van Allen, 28 F.R.D. 329, 334 (S.D. N.Y. 1961) (in context of motion to serve subpoena requiring production at trial, holding ''[p]ermission of the court is not needed to serve a subpoena pursuant to Rule 17(c)''); *but see* U.S. v. Wecht, 2008 WL 250549 (W.D. Pa. 2008), for additional opinion, see, 2008 WL 336298 (W.D. Pa. 2008) (''in light of defendant's questionable use of Rule 17(c) to date,'' requiring a motion for Rule 17(c) subpoenas issued during trial).

[118] *See, e.g.,* U.S. v. Eye, 2008 WL 1776400 (W.D. Mo. 2008) (admonishing government for using Rule 17(c) subpoena without a court order even though such conduct had been acceptable practice in the court for years); *W.R. Grace*, 434 F. Supp. 2d at 871; U.S. v. Neely, 2002 WL 32302114 (W.D. Va. 2002); U.S. v. Clark, 2001 WL 759895 (W.D. Va. 2001); U.S. v. King, 194 F.R.D. 569, 573 (E.D. Va. 2000); U.S. v. Beckford, 964 F. Supp. 1010, 1023 (E.D. Va. 1997); U.S. v. Jenkins, 895 F. Supp. 1389, 1395-96 (D. Haw. 1995); U.S. v. Noriega, 764 F. Supp. 1480, 1493-94 (S.D. Fla. 1991); U.S. v. Ferguson, 37 F.R.D. 6, 8 (D. D.C. 1965); *see also* U.S. v. Medley, 130 Fed. Appx. 248, 249-50 (10th Cir. 2005) (where defendant filed motion for leave to serve Rule 17(c) subpoenas, but served subpoenas before court ruled on motion, district court did not abuse its discretion in quashing ''the unauthorized subpoenas''); U.S. v. Aguilar, 2008 WL 3182029 (N.D. Cal. 2008) (noting that Local Criminal Rule 17-2 requires a motion before a subpoena may issue requiring production of materials prior to trial).

[119] *See, e.g.,* U.S. v. Gonzalez, 2002 WL 31641109 (S.D. N.Y. 2002) (requiring defendant to ''secure judicial authorization'' for Rule 17(c) subpoenas because such motions are an ''orderly and desirable procedure'' although not required by Rule 17) (internal quotation mark omitted); U.S. v. Weissman, 2002 WL 1467845 (S.D. N.Y. 2002); U.S. v. Finn, 919 F. Supp. 1305, 1329-30 (D. Minn. 1995), adopted, 911 F. Supp. 372 (D. Minn. 1995), aff'd, 121 F.3d 1157 (8th Cir. 1997) and aff'd, 121 F.3d 1157 (8th Cir. 1997); U.S. v. Ashley, 162 F.R.D. 265, 266 (E.D. N.Y. 1995) (following *Urlacher*); U.S. v. Urlacher, 136 F.R.D. 550, 554-55 (W.D. N.Y. 1991) (finding that a motion for a Rule 17(c) subpoena is ''appropriate, though not strictly necessary, and should be entertained by the court''); *see also* 8 J. Moore, MOORE'S FEDERAL PRACTICE ¶ 17.06 (2d ed. 1996) (use of a motion is ''an orderly and desirable procedure and one often followed''); 2 WRIGHT, *supra* note 19, § 274 at 244-45; *but see* U.S. v. Smith, 245 F.R.D. 605, 610 (N.D. Ohio 2007), on

Rule 17(c) subpoena. In the first place, the second and third sentences of Rule 17(c)(1) make express reference to ''the court,'' and are plainly referring to a judge, not to the clerk. Thus, the second sentence provides that ''the court may direct the witness to produce the designated items in court before trial and before they are to be offered in evidence,'' and the third provides that when the items arrive ''the court may permit the parties and their attorneys to inspect all or part of them.''[120] The discretion granted by these two sentences (''the court *may* . . .'') is more appropriate for a judge than a

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reconsideration in part, 2007 WL 2156260 (N.D. Ohio 2007) (order of court not required before issuing Rule 17 subpoena); Kent v. United of Omaha Life Ins. Co., 2006 DSD 7, 430 F. Supp. 2d 946, 950 (D.S.D. 2006), aff'd in part, rev'd in part and remanded, 484 F.3d 988 (8th Cir. 2007) (''[Rule 17(c)] [s]ubpoenas are none of the judge's concern and any practice of asking the judge to approve in advance the issuance of a subpoena . . . has never been the practice in the District of South Dakota.'').

[120] FED. R. CRIM. P. 17(c)(1). Courts have struck portions of subpoenas requiring pre-trial productions be made directly to counsel rather than the court. ''Because the purpose of Rule 17(c) is to provide a method by which the court may permit either side to inspect subpoenaed [items] prior to the trial under the supervision of the court, allowing documents to be produced outside the Court's presence would defeat the Court's role of managing the orderly screening of documentary trial evidence.'' U.S. v. Agboola, 2001 WL 1640094 (D. Minn. 2001) (internal quotation marks omitted); *see also* U.S. v. Wecht, 2007 WL 4563516 (W.D. Pa. 2007) (production to defense counsel's law office not permitted); U.S. v. Fieger, 2008 WL 474084 (E.D. Mich. 2008), subsequent determination, 2008 WL 659766 (E.D. Mich. 2008) (quashing subpoena requesting that documents be delivered to the U.S. Attorney's Office); *Smith*, 245 F.R.D. at 610-11 (modifying subpoena to make it returnable to court); U.S. v. Santiago-Lugo, 904 F. Supp. 43, 45-46, 33 Fed. R. Serv. 3d 1289 (D.P.R. 1995) (quashing subpoenas made returnable to private investigators); *see also Bowman Dairy*, 341 U.S. at 220 n. 5 (''there is a provision in [Rule 17(c)] that the court may, in the proper case, direct that [the subpoenaed documents] be brought *into court* in advance of the time that they are offered in evidence . . ..'') (quoting Statement of G. Aaron Youngquist, Member of Advisory Committee, Federal Rules of Criminal Procedure, Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), pp. 167-168)) (emphasis added); U.S. v. Bermingham, 2007 WL 1052600 (S.D. Tex. 2007) (''If the Court authorizes the production in advance of trial, the subpoenaed documents are to be produced in Court.'') (citing Bowman and Youngquist statement); *cf.* U.S. v. Eye, 2008 WL 1776400 (W.D. Mo. 2008) (noting as problematic practice of third parties receiving Rule 17(c) subpoenas from government mailing requested material before trial to FBI agent); U.S. v. Hughes, 2007 WL 896157 (E.D. Tenn. 2007), decision aff'd, 2007 WL 1894288 (E.D. Tenn. 2007) (''A person who receives a Rule 17(c) subpoena must appear at the time and place specified, and must have the items requested, but the person is not required to surrender possession of them . . .. The Court, however, . . . has the discretion to allow either side to inspect subpoenaed documents or items prior to trial under the supervision of the court.''); *but see* Khouj v. Darui, 248 F.R.D. 729, 730-31 (D.D.C. 2008) (denying motion to quash subpoenas where subpoenas directed that materials be returned to defense counsel because ''the plain language of Rule 17(c) does not place an absolute requirement on parties to direct subpoenaed entities to return items

clerk of the court; certainly it is for a judge, not a clerk of the court to determine which documents may be inspected and when the documents are to be produced.[121]

Second, that Rule 17(a) makes express provision for the role of the clerk and that such express provision is absent from Rule 17(c) may further weigh in favor of interpreting Rule 17(c) as requiring a motion — that is, as excluding the role for the clerk of court.

Third, and most importantly, there could be real harm caused if parties were entitled to obtain Rule 17(c) subpoenas without judicial involvement. The harm is illustrated by *United States v. Noriega*,[122] in which the government served Rule 17(c) subpoenas on a correctional center without first making a motion to the court. The subpoena sought production of the tape recordings of the defendant, made while he was in prison. The court found that the subpoenas were ''precisely the kind of unwarranted expedition which Rule 17(c) does not permit,''[123] and emphasized the necessity for judicial involvement before the issuance of the subpoena:

> While it is generally assumed that courts can protect against abuse through rulings on motions to quash or modify, this in turn assumes that the recipient of the subpoena has some interest or incentive in filing such a motion. Yet it is wishful thinking to expect that prison officials will either oppose a government-requested subpoena which implicates an incarcerated defendant's interests or else enable the defendant to file his own motion to quash by notifying him that such subpoenas have been issued. If anything, the coinciding interests of prosecutors and prison authorities in law enforcement renders these subpoenas mere formalities and all but guarantees that prosecutorial overreaching such as that present here will go unchecked, a reality which . . . should have made manifest the need for prior court authorization. Given the potential for

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to the Court'' and the court's order allowing issuance of the subpoenas ''placed no restriction on where the subpoenaed materials should be delivered); U.S. v. Smith, 2007 WL 1725356 (E.D. Ark. 2007) (where trial scheduled for six months in future, permitting documents to be produced directly to defense counsel).

[121] *See* U.S. v. Neely, 2002 WL 32302114 (W.D. Va. 2002) (quoting the second sentence of Rule 17(c) and holding that ''[t]he Rule clearly anticipates that parties seek leave of court if they want to obtain items sought via subpoena prior to trial''); *cf.* U.S. v. Clark, 2001 WL 759895 (W.D. Va. 2001) (court has discretionary power to ''allow, deny, or modify'' a party's subpoena request); U.S. v. Beckford, 964 F. Supp. 1010, 1020-21 (E.D. Va. 1997) (''The 'may direct' language confers judicial discretion to determine the time of production 'prior to the trial.' That, of course, affords the court authority to decide whether production before trial is permissible at all, and, if so, when.'').

[122] U.S. v. Noriega, 764 F. Supp. 1480 (S.D. Fla. 1991).

[123] U.S. v. Noriega, 764 F. Supp. 1480 (S.D. Fla. 1991). The issue was raised on a motion to dismiss the indictment. The fact of the subpoenas and the resulting examination of the defendant's telephone conversations was only discovered when CNN obtained copies of the tapes from an ''undetermined source.'' *Id.* at 1484.

> abuse apparent to the court, it is clear that the limitation on advance production of subpoenaed materials must be strictly enforced . . .[124]

The best way to avoid the type of abuse of process that occurred in *Noriega*, and otherwise to effect the judicial intervention required by *Nixon* and *Bowman*, is to require a leave of court before the issuance of a Rule 17(c) subpoena that is returnable before trial.[125]

B. May a Party's Motion For a Subpoena Be *Ex Parte?*

One of the most frequently discussed topics in Rule 17(c) cases is whether one's motion for a Rule 17(c) subpoena may be made *ex parte*. Once again, a different section of Rule 17 bears on the question — this time, Rule 17(b), which contains the caption ''**Defendant unable to pay**,'' and states that

> 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 . . ..

Rule 17(b) thus expressly contemplates an *ex parte* application in some circumstances. That Rule 17(c) has no similar provision supports the inference that *ex parte* applications are not permissible under Rule 17(c).[126] Moreover, by allowing the court to permit the parties to inspect the documents

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[124] *Noriega*, 764 F. Supp. at 1493-94. In *United States v. Eye*, the court was faced with a practice in which third parties voluntarily mailed to the government before trial materials requested by the government in Rule 17(c) subpoenas despite the fact that the subpoenas themselves directed that the materials be delivered to the court on the first day of trial. *Eye*, 2008 WL 1776400, at *7 n.3. In holding that an order was necessary before issuance of a Rule 17(c) subpoena, the court noted that such a practice created the possibility that the government ''will fail to share all of the material with the defense . . . with no one being the wiser — the very thing that Rule 17(c) was designed to prevent.'' *Id.*; *see also Beckford*, 964 F. Supp. at 1023-24 (relying on motions to quash insufficient ''to provide adequate assurance that the pre-trial subpoena satisfies the *Nixon* standard'' because in many instances defendants lack standing to oppose subpoena and judicial review of subpoena would therefore hinge on filing of motion to quash by third party, who may lack incentive or means to file motion).

[125] *Beckford*, 964 F. Supp. at 1023-24; U.S. v. Finn, 919 F. Supp. 1305, 1329 (D. Minn. 1995), adopted, 911 F. Supp. 372 (D. Minn. 1995), aff'd, 121 F.3d 1157 (8th Cir. 1997) and aff'd, 121 F.3d 1157 (8th Cir. 1997) (without pre-issuance motion, court would be forfeiting its obligation and responsibility under to assure that Rule 17(c) subpoenas are used properly); U.S. v. Jenkins, 895 F. Supp. 1389, 1396 (D. Haw. 1995); U.S. v. Ferguson, 37 F.R.D. 6, 8 (D. D.C. 1965) (requirement of leave of court is ''a vital protection against misuse or improvident use of such subpoenas *duces tecum*.''); *see also* U.S. v. Neely, 2002 WL 32302114 (W.D. Va. 2002) (holding that *Bowman* ''clearly indicated that Rule 17(c) requires leave of court before obtaining documents prior to trial via subpoena'').

[126] *See* U.S. v. Hart, 826 F. Supp. 380, 381 (D. Colo. 1993) (no suggestion in Rule 17(b) cases that ex parte procedure extends to ''financially able defendants'');

produced pre-trial and providing for motions to quash or modify a pre-trial subpoena, Rule 17(c) ''contemplates that litigation over the scope of such subpoenas will be conducted upon notice which, unless provided otherwise, would run to all parties to the case.''[127] Several courts have found that motions pursuant to Rule 17(c) may not be made *ex parte*.[128]

Notwithstanding the language of 17(b), the majority of courts have held that *ex parte* motions are permitted in appropriate circumstances,[129] and

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Peterson, 196 F.R.D. at 361; U.S. v. Stewart, 1997 WL 103700 (E.D. Pa. 1997); U.S. v. Urlacher, 136 F.R.D. 550, 555 (W.D. N.Y. 1991); U.S. v. Najarian, 164 F.R.D. 484, 488 n.2, 106 Ed. Law Rep. 1185 (D. Minn. 1995); *see also* U.S. v. Hang, 75 F.3d 1275, 1281-82, 144 A.L.R. Fed. 803 (8th Cir. 1996) (noting, but not accepting, the argument); *Beckford*, 964 F. Supp. at 1026 (noting that this has been the dispositive factor for several courts that have found *ex parte* procedure impermissible); *cf.*, *supra*, text following note 121 (applying similar reasoning to textual differences between Rule 17(a) and Rule 17(c)).

[127] *Beckford*, 964 F. Supp. at 1026-27 & nn.20-21 (but finding that the suggestion of an adversarial process is undercut by facts that ''inspection under Rule 17(c) is entrusted to the sound discretion of the court'' and ''where an adverse party does not itself have standing to be heard on [a motion to quash or modify the subpoena], as is often the case, an ex parte disposition of the motion would not infringe upon the rights of the adverse party''); *see Hart*, 826 F. Supp. at 381.

[128] *See, e.g.,* U.S. v. Castaneda, 571 F.2d 444, 446-48 (9th Cir. 1977), opinion supplemented, 571 F.2d 448 (9th Cir. 1977) (holding in ethics investigation report that when a court order is required under Rule 17(c) notice is required); U.S. v. Eye, 2008 WL 1776400 (W.D. Mo. 2008); U.S. v. Fox, 275 F. Supp. 2d 1006, 1009-12 (D. Neb. 2003) (''Rule 17(c)[] does not ordinarily permit the use of ex parte applications by the government or the defense for subpoenas seeking pretrial production of documents unless the sole purpose of seeking the documents is for use at trial''); *Peterson*, 196 F.R.D. at 361; U.S. v. Stewart, 1997 WL 103700 (E.D. Pa. 1997) (but suggesting that *ex parte* motions might be permitted ''in extraordinary circumstances''); *Najarian*, 164 F.R.D. at 487-88; *Finn*, 919 F. Supp. at 1330; *Hart*, 826 F. Supp. at 381-82; *Urlacher*, 136 F.R.D. at 552, 555-58; U.S. v. Hiss, 9 F.R.D. 515, 516-17 (S.D. N.Y. 1949); *see also* U.S. v. Ashley, 162 F.R.D. 265, 266-67 (E.D. N.Y. 1995) (citing cases finding against ex parte procedures, but not deciding issue).

[129] *See* U.S. v. Johnson, 2008 WL 62281 (N.D. Cal. 2008) (Local Criminal Rule 17-2(a)(1) of the Northern District of California permits issuance of a Rule l7(c) subpoena on, ''for good cause, an *ex parte* motion without advance notice to the opposing party.''); U.S. v. Peters, 2007 WL 4105671 (W.D. N.Y. 2007); U.S. v. Clason, 2007 WL 1259138 (D. Ariz. 2007); U.S. v. Johnson, 2004 WL 877359 (E.D. La. 2004) (limiting holding to indigent defendants); U.S. v. Wells, 2005 WL 3822883 (E.D. Cal. 2005)); U.S. v. Agboola, 2001 WL 1640094 (D. Minn. 2001); U.S. v. Daniels, 95 F. Supp. 2d 1160, 1162-64 (D. Kan. 2000); U.S. v. Tomison, 969 F. Supp. 587, 595 (E.D. Cal. 1997); U.S. v. Colima-Monge, 1997 WL 325318 (D. Or. 1997) (limiting holding to indigent defendants); U.S. v. Venecia, 1997 WL 325328 (D. Or. 1997); *Beckford*, 964 F. Supp. at 1030; U.S. v. Hildebrand, 928 F. Supp. 841, 856 n.3 (N.D. Iowa 1996), on reconsideration in part, (May 30, 1996) (citing *Hang, supra*, in *dicta* for more general proposition); *Jenkins*, 895 F. Supp. at 1395-97 (limiting holding to indigent defendants); U.S. v. Reyes, 162 F.R.D. 468, 471 (S.D. N.Y. 1995); *see also* U.S. v. Bermingham, 2007 WL 1052600 (S.D. Tex.

those courts have the sounder arguments.[130] The case of *United States v. Daniels*[131] sets forth those arguments. First, it points out that the permissive nature of the final sentence of Rule 17(c) — ''the court may order production of documents and may permit inspection by the adverse party'' — implies that the court *need not* permit inspection by the other side, i.e., that the party seeking the issuance of the subpoena may proceed *ex parte*.[132] ''If the court can deny the opposing party access to the information subpoenaed, it follows that the party may make an ex parte application.''[133]

Daniels next points out that Rule 45(b) of the Federal Rules of Civil Procedure, on which Rule 17(c) was based,[134] provides that ''[p]rior notice of any commanded production of documents and things or inspection of premises before trial *shall* be served on each party.''[135] *Daniels* draws attention to the distinction between ''shall'' in Rule 45(b) and ''may'' in Rule 17(c), and points out that ''[t]he use of the word 'shall' in Rule 45(b) is strong evidence that the drafters of Rule 17(c) contemplated the use of ex

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2007) (granting without comment motion to file under seal motion for leave to file Rule 17(c) subpoena); U.S. v. Edwards, 142 F.R.D. 177, 177-78 (M.D. Fla. 1992) (without addressing propriety of ex parte procedure, granting in part indigent defendant's ex parte motion for issuance of subpoena duces tecum). In addition, some courts have permitted ex parte consideration of an indigent defendant's Rule 17(c) subpoena requesting the production of materials at trial. *See Hang*, 75 F.3d at 1282-83; U.S. v. Florack, 838 F. Supp. 77, 79-80 (W.D. N.Y. 1993); *see also* U.S. v. Fox, 276 F. Supp. 2d 996, 997 (D. Neb. 2003) (distinguishing *Hang* and *Florack* from circumstance of pre-trial subpoena); *Beckford*, 964 F. Supp. at 1026 n. 17 (same). The determination as to whether to allow an *ex parte* application must be made on a case-by-case basis. *See Daniels*, 95 F. Supp. 2d at 1163; *Beckford*, 964 F. Supp. at 1026, 1029.

[130] The court in *Beckford* details the circumstances under which an *ex parte* procedure should be allowed: ''In those rare situations where mere disclosure of the application for a pre-trial subpoena would: (i) divulge trial strategy, witness lists or attorney work-product; (ii) imperil the source or integrity of subpoenaed evidence; or (iii) undermine a fundamental privacy or constitutional interest of the defendant . . ..'' *Beckford*, 964 F. Supp. at 1030; *see* U.S. v. Clason, 2007 WL 1259138 (D. Ariz. 2007) (following Beckford); U.S. v. Johnson, 2004 WL 877359 (E.D. La. 2004) (same).

[131] U.S. v. Daniels, 95 F. Supp. 2d 1160 (D. Kan. 2000).

[132] *Daniels*, 95 F. Supp. 2d at 1162 (citing *Tomison*, 969 F. Supp. at 591); *see also Beckford*, 964 F. Supp. at 1026; *see also* U.S. v. Colima-Monge, 1997 WL 325318 (D. Or. 1997) (ordering that both parties be allowed to inspect subpoenaed materials, but noting that court has discretion in deciding who may inspect subpoenaed materials); *Beckford*, 964 F. Supp. at 1026.

[133] *Daniels*, 95 F. Supp. 2d at 1162.

[134] *See supra* at notes and text accompanying notes 4-6 (discussing Advisory Committee Note to Rule 17(c)); *Daniels*, 95 F. Supp. 2d at 1162.

[135] *Daniels*, 95 F. Supp. 2d at 1162 (quoting Fed. R. Civ. P. 45(b)) (emphasis added by *Daniels*).

parte applications for subpoenas duces tecum when they chose the word 'may.'''[136]

Finally, *Daniels* noted the ''strong public policy reasons in favor of an ex parte procedure.''[137] If parties were not able to make *ex parte* applications for Rule 17(c) subpoenas, the court reasoned, then they would be deterred from seeking such subpoenas where their applications would necessarily reveal their trial strategy.[138] Quoting *United States v. Beckford*, *Daniels* stated: '''Forcing any defendant to confront the choice between issuing a pre-trial subpoena duces tecum and disclosing his defense to the government places an unconstitutional limitation on the defendant's right to compulsory process.'''[139] The Sixth Amendment, therefore, ''supplies justification for interpreting Rule 17(c) to permit *ex parte* procedures respecting the issuance of pre-trial subpoenas duces tecum in the rare instance in which a defendant would be required to disclose trial strategy, witness identities or attorney work-product to the Government in his pre-issuance application.''[140] And, since Rule 17(c) is ''unqualifiedly even-handed in its approach to applications from defendants and the Government,'' the government is also entitled to *ex parte* process where in the absence of such a procedure the government

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[136] *Daniels*, 95 F. Supp. 2d at 1162-63; *see also Tomison*, 969 F. Supp. at 591 (''Rule's structure appears to anticipate the possibility of an ex parte request—use of ''may'' contemplates that Rule 17(c) allows the court to deny an adverse party access to subpoenaed materials, which has ''the same practical effect as denying [the party] the opportunity to know that such documents were subpoenaed.''). Although *Daniels'* emphasis on the word ''may'' is compelling, it bears note that the contrast that it draws between Rule 17(c) and Rule 45(b) of the Federal Rules of Civil Procedure may rest on an anachronism. As the *Daniels* court noted, and as noted above, Rule 17(c) was based on Rule 45(b), but when Rule 17(c) was enacted, Rule 45(b) did not include the provision on which *Daniels* relied — ''[p]rior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party — which was added to Rule 45(b) in 1991.

[137] *Daniels*, 95 F. Supp. 2d at 1163.

[138] *Daniels*, 95 F. Supp. 2d at 1163; *see also, e.g.,* U.S. v. Johnson, 2008 WL 62281 (N.D. Cal. 2008); U.S. v. Peters, 2007 WL 4105671 (W.D. N.Y. 2007); U.S. v. Reyes, 162 F.R.D. 468, 470 (S.D. N.Y. 1995); *Tomison*, 969 F. Supp. at 592-93; U.S. v. Beckford, 964 F. Supp. 1010, 1027 (E.D. Va. 1997).

[139] *Daniels*, 95 F. Supp. 2d at 1163 (quoting *Beckford*, 964 F. Supp. at 1027); U.S. v. Florack, 838 F. Supp. 77, 79 (W.D. N.Y. 1993).

[140] *Tomison*, 969 F. Supp. at 593-94; *Beckford*, 964 F. Supp. at 1027. Some courts have also argued that the Fifth Amendment requires *ex parte* consideration, as under Rule 17(b), because otherwise an indigent defendant, in having to make an application upon notice for a Rule 17(c) subpoena in order to allay the cost to her of process costs and witness fees, would be in a different position than the government, who would not have not make such a motion concerning costs and fees. *See* U.S. v. Jenkins, 895 F. Supp. 1389, 1396-97 (D. Haw. 1995); *Florack*, 838 F. Supp. at 79. However, another courts has noted that this Fifth Amendment concern does not arise in the circumstance of a motion for leave to issue a pre-trial Rule 17(c) subpoena because all parties, not just indigent defendants, are required to file such a motion. *See Beckford*, 964 F. Supp. at 1027 n.22.

would be forced ''prematurely to disclose to the defense its trial strategy, witness list, or other privileged information in its application to the court.''[141]

The rationales offered by those courts finding that Rule 17(c) does not permit *ex parte* procedures are not convincing.[142] Several of these courts rely on the language of Rule 17(c) noting that, as discussed above, unlike Rule 17(b), there is no provision in Rule 17(c) for *ex parte* proceedings.[143] There is some force to this argument, but not enough: Rule 17(c) does not specifically permit an *ex parte* procedure, it does not explicitly foreclose the use of an *ex parte* process — it is just silent on the issue.[144] And, with important policy considerations supporting the need for *ex parte* process, such a weak textual argument should not carry the day.

Some ''anti-*ex parte*'' courts have found that the use of an *ex parte* process would be futile because Rule 17(c) empowers the court to compel the subpoenaing party to produce the subpoenaed material to other parties.[145] Thus, these courts reason, it would be futile to permit an *ex parte* motion for a Rule 17(c) subpoena. But the court has the discretion whether to compel pre-trial production of the subpoenaed materials to the other parties; as discussed below, it is not required to do so in all cases.[146] And even in those

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[141] *Beckford*, 964 F. Supp. at 1028 (noting that premature disclosure was of particular concern in case at bar due to fact that four defendants were alleged to have committed multiple murders and had expressed their willingness to harm law enforcement officers); *cf.* U.S. v. Finn, 919 F. Supp. 1305, 1330 n.28 (D. Minn. 1995), adopted, 911 F. Supp. 372 (D. Minn. 1995), aff'd, 121 F.3d 1157 (8th Cir. 1997) and aff'd, 121 F.3d 1157 (8th Cir. 1997) (Rule 17(c) is ''unqualifiedly even-handed in its approach'').

[142] *See generally Beckford*, 964 F. Supp. at 1028-30 (addressing the arguments offered by courts holding against the use of *ex parte* procedures).

[143] *See Peterson*, 196 F.R.D. at 361; U.S. v. Hart, 826 F. Supp. 380, 381 (D. Colo. 1993); U.S. v. Stewart, 1997 WL 103700 (E.D. Pa. 1997); U.S. v. Urlacher, 136 F.R.D. 550, 555 (W.D. N.Y. 1991); *see also* U.S. v. Najarian, 164 F.R.D. 484, 488 n.2, 106 Ed. Law Rep. 1185 (D. Minn. 1995) (noting that when drafters of Rule 17 envisioned *ex parte* proceedings under other subparagraphs of Rule 17, they ''implicitly allow[ed] for, or expressly permit[ed], an *ex parte* application'').

[144] *See* U.S. v. Hang, 75 F.3d 1275, 1282, 144 A.L.R. Fed. 803 (8th Cir. 1996) (Rule 17(c) ''does not describe *any* process for obtaining the subpoena'') (quoting *Florack*, 838 F. Supp. at 79); *Tomison*, 969 F. Supp. at 590; U.S. v. Venecia, 1997 WL 325328 (D. Or. 1997); *Beckford*, 964 F. Supp. at 1029. The court in U.S. v. Reyes, 162 F.R.D. 468, 469 (S.D. N.Y. 1995), argued that although Rule 17(c) does not address procedure, its language suggests that applications for Rule 17(c) subpoenas are governed by the procedural aspects of Rules 17(a) and (b), which allow *ex parte* applications.

[145] *See Hart*, 826 F. Supp. at 381 (''there can be no right to an ex parte procurement of subpoenaed documents pretrial if the court has discretion to supervise their production by permitting both parties to inspect them prior to trial''); U.S. v. Stewart, 1997 WL 103700 (E.D. Pa. 1997); *Urlacher*, 136 F.R.D. at 556.

[146] *See Beckford*, 964 F. Supp. at 1029; U.S. v. Jenkins, 895 F. Supp. 1389, 1397 (D. Haw. 1995); *Florack*, 838 F. Supp. at 80; U.S. v. Venecia, 1997 WL 325328 (D.

cases in which it compels production, the subpoenaing party's trial strategy may not be evident from the documents themselves.[147]

Finally, some courts have based their refusal to permit *ex parte* procedures under Rule 17(c) on the public's right of access to court proceedings.[148] In this circumstance, however, the public's right of access is a slender reed. As the court in *United States v. Beckford* rightly noted, the public's right is not absolute and the ''slight burden imposed upon the free access to the courts by the secrecy of the pre- and post-issuance process of a subpoena duces tecum'' will usually be outweighed by the constitutional and public policy considerations militating in favor of *ex parte* process.[149]

C. In an *Ex Parte* Procedure, What, If Anything, Must Be Disclosed to the Opposing Side?

To say that one's motion for issuance of a Rule 17(c) subpoena may be *ex parte* leads to the following questions:

(i) Even if the motion is *ex parte*, is the opposing side given notice that a motion for a Rule 17(c) subpoena is being made?

(ii) Even if the motion is *ex parte*, should the opposing side be provided a copy of the subpoena itself, once that subpoena is issued?

(iii) If the recipient of the subpoena moves to quash it, must the quashal proceedings be placed under seal?

(iv) Once documents are produced to the subpoenaing party, must that party provide the documents to the opposing side?

We address these questions in turn. For most of them, there is no author-

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Or. 1997); *Reyes*, 162 F.R.D. at 470; *see also supra* notes and text accompanying notes 126-28.

[147] *See* U.S. v. Daniels, 95 F. Supp. 2d 1160, 1163-64 (D. Kan. 2000) (refusing to lift seal as to motion papers because they contained ''trial strategy'' information, but permitting adverse party to inspect subpoenaed documents); U.S. v. Venecia, 1997 WL 325328 (D. Or. 1997) (same). For this reason, the several courts that have permitted an *ex parte* process but nonetheless conceded that the process would be unnecessary if both parties viewed the subpoenaed materials beforehand are mistaken. *See Beckford*, 964 F. Supp. at 1029 n.27. While the pre-trial viewing of the subpoenaed materials by the adverse party in some circumstances may make superfluous an *ex parte* process, the process would not be superfluous in every circumstance. *See Tomison*, 969 F. Supp. at 591 n.8 (''while permitting examination of the subpoenaed documents may provide the government with insight to the defense's strategy, it is not equivalent to providing the government with access to the documents filed by defendant justifying the subpoena in the first place'').

[148] *See Hart*, 826 F. Supp. at 382; *Urlacher*, 136 F.R.D. at 556-57.

[149] *Beckford*, 964 F. Supp. at 1029-30; *see* U.S. v. Clason, 2007 WL 1259138 (D. Ariz. 2007) (following *Tomison*); *Daniels*, 95 F. Supp. 2d at 1163 (right of access to courts is not absolute may be overcome to preserve rights of criminal defendants); *Tomison*, 969 F. Supp. at 595 (''Given that this is a pre-trial production process, it hardly fits as an historically open proceeding.''); *Jenkins*, 895 F. Supp. at 1397 (*Urlacher* ''overemphasizes the public nature of the post-issuance process over the necessary secrecy of the pre-issuance application process.'').

ity of which we are aware, and therefore we simply present the answers that we think make the most sense, and our explanation for those answers.

(i) & (ii) Must the fact of the subpoena or the subpoena itself be disclosed to the other side? The better answer to these questions is that the subpoenas should generally not be disclosed to the other side for the same reason that the application for the subpoenas should not be: Revelation of the fact of the subpoenas — including the identities of the subpoena recipients and the items sought from them — would reveal either party's trial strategy. There is, moreover, no need to disclose the subpoena or its contents because, as discussed above, in most instances the only entity with a right to quash the subpoena is the subpoena recipient itself,[150] and thus the other side would not be unfairly disadvantaged by not being given notice of the subpoena.

The exception to this rule is that a party who has a protectable interest in the materials subpoenaed may have standing to move to quash.[151] The government will not often have such an interest, and while a defendant might — in, for example, materials in the possession of her or his attorney, doctor or clergyperson — we expect that in most instances the subpoena recipient would recognize the interest of the defendant and inform her or him. In such instances, however, the court issuing the subpoena might balance (i) the government's interests in protecting its work-product and trial strategy against (ii) the likelihood that a protectable interest of the defendant may be compromised if materials are produced pursuant to a subpoena without the defendant being given notice and an opportunity to move to quash the subpoena. Depending on the balance, the court may decide to apprise the defendant of the subpoena.

(iii) Quashal proceedings should be placed under seal for the same reasons that the fact of the subpoena and the subpoena itself should not be disclosed: To give the adversary access to the quashal proceedings might reveal the issuing party's trial strategy to that party's adversary — precisely the situation sought to be avoided by placing the subpoena under seal.

(iv) A party that receives materials from non-parties pursuant to Rule 17(c) is not automatically required to share those materials with other parties to the case. As noted above, Rule 17(c)(1) provides that ''[w]hen the [subpoenaed] items arrive, the court *may* permit the parties and their attorneys to inspect all or part of them,''[152] and the permissive nature of the direction indicates that sharing is not required in all cases.[153]

Courts should be reluctant to order sharing of materials pursuant to the rule. In the first place, sharing documents may reveal trial strategy. The ad-

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[150] *See supra* Part III of our Article.

[151] *See supra* at note and text accompanying note 107.

[152] FED. R. CRIM. P. 17(c)(1) (emphasis added), quoted *supra* at text preceding note 3 and text accompanying note 120.

[153] *See, e.g.*, U.S. v. Beckford, 964 F. Supp. 1010, 1029 (E.D. Va. 1997) (allowing *ex parte* procedure and noting ''upon a proper showing, the court could exercise its discretion under Rule 17(c) to permit pre-trial inspection by only the requesting party'').

versary who inspects documents will learn from whom the subpoenaing party sought documents, and what documents the subpoenaing party sought — both of which may reveal the subpoenaing party's trial strategy. Second, Rule 16 sets forth what documents must be disclosed by each party,[154] and imposes a continuing duty to disclose such documents whenever a party discovers them.[155] That rule reflects the considered judgment of what materials must be disclosed, and, with one exception, there is no reason that materials obtained pursuant to Rule 17(c) subpoena should come under any other standard. The exception is as follows: If the subpoenaing party has obtained from a non-party the only copy or version of a document, then the case for mandatory disclosure is strong. In such an instance, the adversary could not obtain the document from the non-party.

V. Appellate Standards

If the district court refuses to grant a motion for a Rule 17(c) subpoena, or grants a motion to quash or modify such a subpoena, then the party seeking the subpoena may want to appeal the district court's ruling. Such an order by the district court would be — almost by definition — a non-final, interlocutory, order, and thus would not be appealable as of right.[156] Thus, it could be appealed only as a collateral order, or pursuant to a writ of mandamus — both being quite unusual and difficult.[157] As a consequence, there are few appellate opinions containing in-depth discussions concerning Rule 17(c).[158] Most cases interpreting the Rule come following a conviction,

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[154] *See* FED. R. CRIM. P. 16(a)(1)(E) (government disclosure to defendants); Fed. R. Crim. Pro. 16(b)(1)(A) (defendant's reciprocal discovery obligation).

[155] *See* FED. R. CRIM. P. 16(c).

[156] *But see* U.S. v. Nixon, 418 U.S. 683, 683-84, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (treating district court's order requiring *in camera* review of documents responsive to subpoena *duces tecum* issued to President of the United States as a ''final'' order because it fell within the ''limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claim'') (internal quotation marks omitted).

[157] *See, e.g.*, U.S. v. Winner, 641 F.2d 825 (10th Cir. 1981) (rejected by, In re Kessler, 100 F.3d 1015, 36 Fed. R. Serv. 3d 636 (D.C. Cir. 1996)) (denying government's request for a writ of mandamus where court refused to quash defendant's Rule 17(c) subpoena). An interlocutory appeal by the United States will be allowed, pursuant to 18 U.S.C. § 3731, when the United States is appealing an order ''suppressing or excluding'' evidence in a criminal case and when the United States Attorney certifies that the appeal is not for purposes of delay and the evidence sought is ''substantial proof of a fact material in the proceedings.'' U.S. v. Smith, 135 F.3d 963, 967, 26 Media L. Rep. (BNA) 1457, 50 Fed. R. Evid. Serv. 1584 (5th Cir. 1998) (interlocutory appeal of order quashing government's Rule 17(c) subpoena allowed).

[158] There is another likely appellate route for Rule 17(c) issues, but it is beyond the control of either the defendant or the government in most cases: If a non-party receiving a Rule 17(c) subpoena loses a motion to quash or modify the subpoena,

in which the Rule 17(c) issue is most likely one of several. For reasons discussed immediately below, the Rule 17(c) issues are often not the strongest for the defendant.

When Rule 17(c) issues arise at the appellate level, the defendant usually faces at least three significant obstacles. First, the standard of review is ''abuse of discretion,''[159] which gives great deference to the trial court's decisions. Second, if the *Nixon* evidentiary standard is adhered to strictly,

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then the non-party may refuse to comply and thus go into civil contempt. The order of civil contempt could be appealed. In fact, this is how the *Bowman Dairy* case reached the appellate courts. *See* U.S. v. Bowman Dairy Co., 185 F.2d 159, 162 (7th Cir. 1950), judgment vacated, 341 U.S. 214, 71 S. Ct. 675, 95 L. Ed. 879 (1951); *see also* U.S. v. LaRouche Campaign, 841 F.2d 1176, 15 Media L. Rep. (BNA) 1502 (1st Cir. 1988); In re Martin Marietta Corp., 856 F.2d 619 (4th Cir. 1988); U.S. v. Fields, 663 F.2d 880 (9th Cir. 1981); U.S. v. MacKey, 647 F.2d 898, 1981-1 Trade Cas. (CCH) ¶ 64106, 8 Fed. R. Evid. Serv. 728 (9th Cir. 1981); U.S. v. Cuthbertson, 630 F.2d 139, 6 Media L. Rep. (BNA) 1545, 6 Fed. R. Evid. Serv. 635 (3d Cir. 1980); *but see* U.S. v. Walker, 982 F. Supp. 288, 293 (S.D. N.Y. 1997) (''It is well established that a party to a proceeding may not appeal from an order of civil contempt except as part of an appeal from a final judgment'') (emphasis added) (citing U.S. v. Johnson, 801 F.2d 597, 599 (2d Cir. 1986)). In addition, Rule 17(c) issues have reached the appellate courts in several other uncommon circumstances. *See, e.g.*, U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (appellate review of order requiring *in camera* review of documents responsive to subpoena *duces tecum* issued to President of the United States); United States v. Bueno, 443 F.2d 1017 (8th Cir. 2006) (appeal of sentence following guilty plea); U.S. v. Berrios, 501 F.2d 1207, 87 L.R.R.M. (BNA) 3029, 74 Lab. Cas. (CCH) P 10254 (2d Cir. 1974) (government appeal of granting of motion to dismiss due to failure to disclose certain documents to defendants). Moreover, an appeal could conceivably arise from a third-party's filing of a declaratory judgment action seeking a judgment that certain materials are not subject to a Rule 17(c) pre-trial or trial subpoena in a particular criminal action. Such declaratory judgment actions have been used by newspapers to address in advance the question of whether certain materials are privileged from a Rule 17(c) grand jury subpoena. *See* The New York Times Co. v. Gonzales, 459 F.3d 160, 166, 34 Media L. Rep. (BNA) 2126 (2d Cir. 2006) (holding that district court did not abuse discretion in entertaining such a declaratory judgment action).

[159] *See Nixon*, 418 U.S. at 702; U.S. v. Green, 2008 WL 4104220 (2d Cir. 2008); U.S. v. White, 280 Fed. Appx. 317 (4th Cir. 2008), cert. denied, 129 S. Ct. 423, 172 L. Ed. 2d 307 (2008); U.S. v. Betancourt, 277 Fed. Appx. 708 (9th Cir. 2008); *Bueno*, 443 F.2d at 1026; U.S. v. Abdush-Shakur, 465 F.3d 458, 467, 71 Fed. R. Evid. Serv. 470 (10th Cir. 2006), cert. denied, 549 U.S. 1238, 127 S. Ct. 1321, 167 L. Ed. 2d 130 (2007); U.S. v. Medley, 130 Fed. Appx. 248, 250 (10th Cir. 2005); U.S. v. Carter, 65 Fed. Appx. 559, 561 (7th Cir. 2003); U.S. v. Eisenhart, 43 Fed. Appx. 500, 505 (3d Cir. 2002); U.S. v. Tokash, 282 F.3d 962, 967 (7th Cir. 2002); U.S. v. Morris, 287 F.3d 985, 991 (10th Cir. 2002); U.S. v. Justice, 14 Fed. Appx. 426, 433 (6th Cir. 2001); U.S. v. Hardy, 224 F.3d 752, 756 (8th Cir. 2000); U.S. v. Mays, 246 F.3d 677 (9th Cir. 2000); U.S. v. Oates, 173 F.3d 651, 658, 51 Fed. R. Evid. Serv. 1136 (8th Cir. 1999); U.S. v. Dent, 149 F.3d 180, 191, 50 Fed. R. Evid. Serv. 171 (3d Cir. 1998); U.S. v. Roach, 164 F.3d 403, 412, 50 Fed. R. Evid. Serv. 1483 (8th Cir. 1998); U.S. v. Hang, 75 F.3d 1275, 1283, 144 A.L.R. Fed. 803 (8th Cir. 1996);

then it may be very difficult for the defendant to establish error on the part of the trial court, because to establish error the defendant must show that the materials sought would have been admissible. As discussed above, that is an extremely difficult standard for the defendant to meet — all the more so at the appellate level. Third, even if the defendant can establish error, the government might still be able to demonstrate that the error was harmless.[160]

VI. Summary and Conclusion

Legal issues surrounding Rule 17(c) may not be familiar to many criminal lawyers on account of the relatively few cases extensively discussing the rule. In this Article we have addressed some of the most common procedural issues attendant to Rule 17(c) — how to obtain a subpoena, who can move to quash the subpoena, whether Rule 17(c) proceeding should be *ex parte*, and when should the district court order the subpoenaing party to permit inspection of the subpoenaed materials; and we have also analyzed the most significant substantive issue raised by the Rule — whether the *Bowman Dairy* and *Nixon* evidentiary standard should apply to subpoenas issued by defendants to non-parties.

Although this Article did not have a single unifying thesis or theory of Rule 17(c), a theme has emerged through the discussion of the various issues: Rule 17(c) can and should be a potent weapon in the criminal defendant's arsenal. Permitting the defendant to subpoena materials from non-parties without satisfying the evidentiary standard; disallowing the government from moving to quash such subpoenas; allowing *ex parte* ap-

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U.S. v. Vought, 69 F.3d 1498, 1501 (9th Cir. 1995); U.S. v. Lewis, 53 F.3d 343 (10th Cir. 1995); U.S. v. Compton, 28 F.3d 1214 (6th Cir. 1994); U.S. v. Kalter, 5 F.3d 1166, 1169 (8th Cir. 1993); U.S. v. Idiado, 8 F.3d 32 (9th Cir. 1993), as amended, (Dec. 7, 1993); U.S. v. Gonzalez-Acosta, 989 F.2d 384, 388 (10th Cir. 1993); U.S. v. Brooks, 966 F.2d 1500, 1505 (D.C. Cir. 1992); U.S. v. Concemi, 957 F.2d 942, 949 (1st Cir. 1992); U.S. v. Arditti, 955 F.2d 331, 345 (5th Cir. 1992); U.S. v. Ashman, 979 F.2d 469, 495, R.I.C.O. Bus. Disp. Guide (CCH) P 8138, 36 Fed. R. Evid. Serv. 1020 (7th Cir. 1992); U.S. v. Fowler, 932 F.2d 306, 311, 33 Fed. R. Evid. Serv. 340 (4th Cir. 1991); U.S. v. Hughes, 895 F.2d 1135, 1145 (6th Cir. 1990); U.S. v. Komisaruk, 885 F.2d 490, 495, 28 Fed. R. Evid. Serv. 13 (9th Cir. 1989); U.S. v. LaRouche Campaign, 841 F.2d 1176, 1178, 15 Media L. Rep. (BNA) 1502 (1st Cir. 1988); Martin Marietta, 856 F.2d at 621-22; U.S. v. Reed, 726 F.2d 570, 577, 15 Fed. R. Evid. Serv. 51 (9th Cir. 1984); U.S. v. Silverman, 745 F.2d 1386, 1397, 16 Fed. R. Evid. Serv. 1316 (11th Cir. 1984); U.S. v. Eden, 659 F.2d 1376, 1381, 9 Fed. R. Evid. Serv. 501 (9th Cir. 1981); *MacKey*, 647 F.2d at 901; *Cuthbertson I*, 630 F.2d at 145; U.S. v. Lieberman, 608 F.2d 889, 904, Fed. Sec. L. Rep. (CCH) P 97167 (1st Cir. 1979); *Berrios*, 501 F.2d at 1212; U.S. v. Bearden, 423 F.2d 805, 809-10 (5th Cir. 1970); Gilmore v. U.S., 256 F.2d 565, 567 (5th Cir. 1958).

[160] *See* FED. R. CRIM. P. 52(a); U.S. v. Friedman, 854 F.2d 535, 571, 26 Fed. R. Evid. Serv. 444 (2d Cir. 1988); U.S. v. Duncan, 598 F.2d 839, 867, 4 Fed. R. Evid. Serv. 848 (4th Cir. 1979); U.S. v. Keen, 509 F.2d 1273, 1275-76 (6th Cir. 1975); Fryer v. U.S., 207 F.2d 134, 137-38 (D.C. Cir. 1953).

plications for Rule 17(c) subpoenas; requiring the subpoenaing party to make the subpoenaed documents available for inspection in only limited circumstances — all of these steps would strengthen Rule 17(c) for the defense, and allow defendants better to exercise their right to compulsory process