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A Creative Approach for Obtaining Documentary Evidence From Third Parties

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From the Champion
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In all criminal cases, but especially in white collar cases, the importance of a defense lawyer's ability to have and study documents in the early stages of trial preparation is hard to overstate. If documents material to the preparation of the defense are in the possession of the government, defense counsel will have access to them. However, if the same documents that the defense lawyer needs to examine (to understand if they are helpful or harmful) are in possession of a third party, defense counsel faces unjustified barriers to obtaining the documentary evidence. This article addresses the outdated jurisprudence that has created the obstacle course as well as the reform advocated by commentators and judges.

A hypothetical dramatizes and illustrates the invalid basis of the current jurisprudence most frequently applied to evaluate a defendant's discovery demands on third parties.

The Hypothetical

The defendant is the CFO and 25 percent owner of a family-owned business. He is indicted for utilizing his position to embezzle several million dollars from that business by creating both a wholly owned company and false invoices from it to the family-owned business. He then used his position of trust to pay the false invoices to his own company from the family business.

The defendant advises his counsel of the wrongdoing of his accuser and other exculpatory facts that, if true, could constitute a defense at trial, mitigation of punishment, and/or impeachment of the government's primary accuser. The family-owned business uses a highly sophisticated, respected financial software package that is fraud

resistant (i.e., it is difficult to change entries). The defense forensic accountant concludes that the truth or falsity of the defendant's allegations would be fully disclosed by the accounting software and its data.

The lawyer, of course, has no way of knowing if defendant's allegations are true. Does the defendant have a defense? Does evidence that might mitigate the potential punishment exist? Will the data yield evidence that will severely impeach the government's star witness? Without access to the financial data of the family business in the software, the lawyer is flying blind. Thus, defense counsel moves under Federal Rule of Criminal Procedure 17(c) for the production of the software and data. It is neither oppressive nor time-consuming for the third party to comply since defense counsel has the software program and needs only to copy the data into it, which is a relatively short and easy process. The program will then permit the preparation of a variety of reports that will disclose whether the defendant's allegations have documentary support.

The Procedure

A subpoenaed third party will, in all probability, have two bites at the apple. While there is a split of authority, it seems the majority rule requires application to the district court if a defendant wants the subpoenaed material to study and review in advance of trial rather than merely at trial. Thus, in the first instance, the court will evaluate whether the defendant may even serve such a subpoena. Many cases arise in that procedural context. If the court grants the 17(c) subpoena, the third party may still file a motion to quash addressing the specific details of the actual subpoena served. Should the third party fail to produce the subpoenaed records without filing a motion to quash, that third party risks contempt.[1]

Material to the Preparation of the Defense

For purposes of this article, it should be assumed that the data sought "might" be favorable to the defense, but also might not be. There is no way to know whether the data is exculpatory or valuable without reviewing the contents of the family business's financial software. Of course, every defense lawyer knows that it is just as important to be fully aware of harmful evidence as well as favorable. Either type of evidence is "material to the preparation of the defense."

If the software and data were in the client's possession and given to his lawyer, who ignores the material and fails to analyze it, that lawyer without question would be providing ineffective assistance of counsel.

Of course, if the software and data were in the government's possession, the material would be discoverable under Fed. R. Crim. P. 16.

The Majority Rule of *United States v. Nixon*

Fed. R. Crim. P. 17(c)(2) authorizes a court to deny a defendant such a subpoena only "if compliance would be unreasonable and oppressive." Critically, in *United States v. Nixon* the U.S. Supreme Court held that Rule 17(c) was not a rule of discovery, and added several requirements for a subpoena served *by the government prosecutors* on the

president of the United States *after a grand jury investigation* had resulted in the indictment of presidential advisors.[2] Most courts have applied the requirements added by *Nixon* when evaluating subpoenas applied for by defendants when seeking materials from nongovernmental third parties, even though the Court issued the *Nixon* opinion in a unique procedural and political setting, and even though the Court specifically reserved the question regarding whether its test applied in its full vigor when the object of defendant's subpoena *duces tecum* is a nongovernmental third party. The *Nixon* Court relied on the 1951 case of *Bowman Dairy v. United States*[3] for its jurisprudential underpinning that 17(c) was not a rule for discovery.

The defense subpoena in *Bowman Dairy* was served on *the prosecution* (not a third party) for materials in its possession that were not discoverable under the restrictive 1951 version of Rule 16. The *Bowman Dairy* Court had written, "[n]o good reason appears to us why [records held by the government but not discoverable under the 1951 version of Rule 16] may not be reached by subpoena under Rule 17(c) as long as they are evidentiary." [4]

Hence, this is the birth of the requirement that the subpoenaed documents be "evidentiary" to avoid the evisceration of (then) Rule 16's discovery limitations by an otherwise expansive reading of Rule 17(c). The *Nixon* Court adopted the evidentiary requirement of *Bowman Dairy* for a post-indictment subpoena issued by the prosecution, and adopted a four-part test for determining what constitutes "evidentiary" material for a 17(c) subpoena:

- the documents are evidentiary and relevant;
- the documents are not otherwise procurable in advance of trial by the exercise of due diligence;
- the party cannot properly prepare for trial without such production and inspection in advance of trial, and that failure to obtain such inspection would unreasonably delay the trial; and
- the application is made in good faith and is not a "fishing expedition."

That four-part test was boiled down by the Court to a simple three-part requirement: (a) relevancy; (b) admissibility; and (c) specificity. [5] Trial and circuit courts have used the *Nixon* factors to deprive defendants of access to documents and data that were clearly material to the preparation of the defense under a Fed. R. Crim. P. 16 standard.

If the Same Documents Were in Possession of Government, Defendant Would Be Entitled to Production Pursuant to Rule 16(a)(1)(E)(i)

Fed. R. Crim. P. 16(a)(1)(E)(i) requires that the government make available the material described in the hypothetical "if the item is within the government's possession, custody or control and (i) is material to preparing the defense." Since materiality of the sought documents is not only obvious, but also stipulated in the hypothetical, there is no argument that if the documents were in the government's possession, a defendant would have access to them. The pertinent issue for courts deciding subpoena applications under Fed. R. Crim. P. 17(c) is what justifies the imposition onto a defendant of a more demanding barrier to obtain documents material to preparing a defense simply because the documents are in the hands of a third party rather than the government.

The Nixon Standard Is Not Appropriate Where a Defendant Applies for the Subpoena

Courts and commentators have criticized the Supreme Court admonition that Rule 17(c) is not a discovery device. They have decried the rationale for such a pronouncement as no longer procedurally or jurisprudentially supportable, and perhaps even constitutionally defective. The prosecutors in *Nixon* served the subpoena after a grand jury had returned the indictment. A prosecutor's ability to use grand jury subpoenas for obtaining relevant documents during the investigation justified a more rigorous post-indictment standard. However, a defense attorney has no process that is in any manner analogous to a grand jury subpoena to obtain data from third parties for trial preparation. This justifies a less rigorous standard when it is the defense seeking the documents pursuant to Rule 17(c).

In *United States v. Nachamie*, Judge Shira Scheindlin held that the *Nixon* standard did not apply to cases in which defendants were seeking documents from a third party, and instead applied the standard set out in Fed. R. Crim. P. 17(c) itself. The court observed:

[The] high [*Nixon*] standard, of course, made sense in the context of a government 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. Indeed, the Supreme Court has held that "the *Nixon* standard does not apply in the context of grand jury proceedings. ..." *United States v. R. Enterprises*, 498 U.S. 292, 299-300, 112 L. Ed. 2d 795, 111 S. Ct. 722 (1991). 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 nonparty to meet this same [*United States v. Nixon*] 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. As one court has noted, "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." [quoting *United States v. Tomison*, 969 F. Supp. 587, 593 n.14
(E.D. Cal. 1997)][6]

In his seminal article on defense discovery, Professor Peter J. Henning has argued persuasively that Rule 17(c) should be construed as the operative discovery rule for obtaining documents from third parties, analogous to Rule 16(a)(1)(E)(i) for obtaining documents from the government. He argues that the limiting factor should be identical for each rule — "material to preparing the defense."[7]

Judge Scheindlin rejected the Nixon test in *Tucker*, another well-reasoned opinion.[8] She found the *Nixon* standard inappropriate where a criminal defendant subpoenas material from a third party, and "where the defendant has an articulable suspicion that the documents may be material to his defense. A defendant in such a situation need only show that the request is (1) reasonable, construed as 'material to the defense,' and (2) not unduly oppressive for the producing party to respond."[9] This formulation adequately addresses situations where there is an articulable suspicion that the documents may shed light or lead to documents that shed light — one way or another — on relevant issues for trial.

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