Professional Perspective

Ex Parte Defense Subpoena Practice in Criminal Cases

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One of the key challenges facing white-collar criminal defendants is the prosecution's ability to shape the narrative of the case through the evidence it chooses to collect and not collect. Federal Rule of Criminal Procedure 17(c) permits defendants to counteract this advantage by obtaining trial evidence from third parties. To protect defendants' rights to confidential work product and trial strategy, courts increasingly have agreed to adjudicate Rule 17(c) pretrial subpoena applications ex parte.

This article offers pointers for navigating the pretrial-subpoena process, and identifies pitfalls to avoid in connection with the often-nuanced challenge of how best to obtain the evidence necessary to present a compelling defense.

Pretrial Subpoenas

The majority of evidence presented in criminal cases originates with the prosecution's investigative powers. Prosecutors collect evidence through search warrants, grand jury subpoenas, foreign treaties, and other methods. But they have no obligation to gather exculpatory evidence: The government can purposefully refrain from gathering evidence that could contradict the prosecution case or damage the credibility of prosecution witnesses.

When defendants in federal cases wish to collect trial evidence, they may do so by subpoenas under Federal Rule of Criminal Procedure 17. Rule 17(c)(1) permits a defendant's subpoena to seek "books, papers, documents, data or other objects." A Rule 17(c) subpoena may require production either at trial or before trial:

- A defendant seeking production at trial does not need court approval to issue and serve the subpoena. In some instances, third parties receiving a subpoena may agree voluntarily to a pretrial production date, but such concessions are not routine.
- A defendant who needs to review the documents in question "before trial" generally must first obtain the court's permission. Given the complexity of typical white-collar prosecutions, pretrial production is often the only feasible way to digest the subpoenaed documents for effective trial use.

The U.S. Supreme Court addressed the conditions that warrant pretrial subpoenas in its famous opinion relating to President Richard Nixon's impeachment proceedings. Under *Nixon*, a party seeking a pretrial subpoena must establish three key elements: the "relevancy" of the evidence he or she seeks, that evidence's likely "admissibility," and sufficient "specificity" in the subpoena's identification of the evidence. *United States v. Nixon*, 418 U.S. 683, 699-700 (1974). *Nixon* also requires defendants to show that they cannot reasonably obtain the evidence from other sources, and that pretrial inspection is necessary to avoid unreasonable delay at trial. Courts often apply the *Nixon* standard to all pretrial defense subpoenas, though judges and commentators have observed that that standard is excessively stringent when applied to third-party subpoenas (as opposed to government-directed subpoenas, as in the *Nixon* matter).

Ex Parte Practice

Rule 17(c) and the *Nixon* requirements create a dilemma for defendants. Ordinarily, defense counsel guard the confidentiality of their work product and defense strategy with zeal. A motion seeking a pretrial subpoena could endanger this goal. Such a motion discloses, at the very least, the defendant's intention to gather evidence from a third party. The details of such a motion almost invariably also disclose the target of the subpoena, and—especially given *Nixon*'s "relevancy" requirement—elements of the anticipated defense.

Courts have increasingly permitted defendants to avoid such disclosures through ex parte subpoena applications. An influential decision from the *Beckford* capital case explains that "[f]orcing any defendant to confront the choice between issuing a pretrial subpoena duces tecum and disclosing his defense to the Government places an unconstitutional

limitation on the defendant's right to compulsory process." *United States v. Beckford*, 964 F. Supp. 1010, 1027 (E.D. Va. 1997).

Few judicial precedents discuss this practice in detail. At least two of the U.S. Courts of Appeals have noted the practice's existence with apparent approval, but with little discussion. *United States v. Kravetz*, 706 F.3d 47, 53 n.4 (1st Cir. 2013); *United States v. Sleugh*, 896 F.3d 1007, 1010 (9th Cir. 2018). District court opinions such as *Beckford* are proliferating, but not binding.

A template subpoena published by the Administrative Office of the U.S. Courts illustrates the absence of uniform, well-known ex parte procedures under Rule 17(c). At the foot of that form, the Administrative Office warns defendants to "consult the rules of practice of the court … to determine whether any local rules or orders establish requirements in connection with the issuance of such a subpoena." But most jurisdictions provide little guidance about ex parte Rule 17(c) practice, and many offer none at all.

District	LR No.	Guidance
California, Northern	Crim. 17-2	Pretrial subpoenas may be issued ex parte on a showing of "good cause"
California, Southern	Crim. 17.1	Pretrial subpoenas may be issued ex parte on a showing of "good cause"
Kentucky, Eastern & Western	Crim. 17.2	Pretrial subpoenas may be issued ex parte on a showing of "good cause"
Michigan, Eastern	Crim. 17.1	Pretrial subpoena applications "may be made ex parte"
Minnesota	49.1	Pretrial subpoena applications must be filed "under seal"
Mississippi, Northern & Southern	Crim. 17	Pretrial subpoenas may be issued ex parte on a showing of "good cause"
Nebraska	Crim. 17.2	Pretrial subpoenas may be issued ex parte in "exceptional" circumstances
Rhode Island	Crim. 17	Pretrial subpoenas may be issued ex parte on a showing of "good cause"
South Dakota	Crim. 17.1	If subpoenas are obtained ex parte, then they are protected by a confidentiality rule
Washington, Eastern	Crim. 17	Pretrial subpoenas may be issued ex parte in "exceptional" circumstances

As a practical matter, three basic options are available to defendants who seek pretrial subpoenas:

> **Method 1.** Submit an ex parte filing requesting both permission to proceed ex parte, and the subpoena itself. This method offers maximal protection to the defendant's strategy, because it discloses not even the existence of a subpoena application; but it may generate uncertainty or delay.
>
> **Method 2.** Publicly file a motion that discloses the defendant's wish for a subpoena and seeks leave to provide the supporting details ex parte. This option reveals the defendant's quest for third-party evidence, but potentially no more. And it enables the judge or magistrate to adjudicate publicly any dispute over the availability of ex parte practice. The Administrative Office's template form recommends essentially this approach in the absence of applicable local rules.

Method 3. Forgo ex parte practice, and file all motion papers on the public docket. This method discloses elements of the defense's work product and trial strategy, but eliminates the need to argue or litigate the threshold question of whether ex parte proceedings are permissible.

All three methods are in use, sometimes concurrently. Indeed, a single case sometimes involves multiple motions for pretrial subpoenas using different methods.

The best strategy will depend on the specific circumstances. Three considerations merit especially close attention: the likelihood that the subpoena application or subpoenaed documents will disclose confidential information important to the defense's effectiveness; the prevalence of ex parte subpoena applications in the forum; and the likelihood, discussed below, that the third-party subpoena recipient ultimately will reveal information about the subpoena to the prosecutors.

Promise and Pitfalls

Ex parte subpoenas can win the case, undermining the prosecution with exculpatory evidence that prosecutors did not collect.

For example, the authors represented a businessman who faced tax-fraud charges supported by the transaction ledgers of a government cooperator, who was our client's former business associate. We sought pretrial subpoenas for account records from the cooperator's bank, to show that the information in his ledgers was false and unreliable. The approach we took was Method 2, i.e., a public motion for subpoenas, requesting leave to present the subpoenas' targets, requests, and purposes ex parte.

Over the government's objection, the presiding magistrate judge, writing a detailed opinion, allowed presentation of the subpoenas' details and supporting reasons ex parte, and she then authorized the subpoenas. *United States v. Diamont*, No. 05-cr-10154 (D. Mass. Nov. 22, 2005) (ECF No. 33). The bank records undercut the trustworthiness of the government's primary evidence and the credibility of its key witness. After a pretrial evidentiary hearing, the government dismissed the charges. The cooperating witness subsequently pleaded guilty to perjury charges.

But things do not always go so smoothly. The main problem for the defense is that an ex parte subpoena imposes no confidentiality obligations on the third party to whom the subpoena is directed.

Prosecutors do not share this problem. Technically, they cannot forbid recipients of grand jury subpoenas to disclose the subpoenas' existence and contents. But prosecutors can and often do request that the subpoenas remain confidential; they may even warn subpoena recipients that disclosures concerning a subpoena could "impede the investigation and interfere with the enforcement of criminal law." *United States v. Swartz*, No. 11-cr-10260, 2012 BL 437849 (D. Mass. Aug. 1, 2012). Most third parties are likely to acquiesce, enabling prosecutors to control the disclosure of their subpoenas and of documents responsive to them.

Defendants lack such leverage. Third parties receiving defense subpoenas may disclose the existence of the subpoena and its contents to the government or anyone else. They also may produce to the government any documents responsive to the subpoena. Heavily regulated entities in particular will often contact the prosecutors immediately upon receiving a subpoena to seek guidance and offer disclosures.

The problem is exacerbated when a defendant needs documents from a third party that is itself under investigation. A common scenario involves investigations into the conduct of a public company, where both the company and its employees face potential charges. In other contexts, courts have recognized that criminal charges would be so destructive to a public company that the mere threat of indictment can convert the company into the government's "agent." *United States v. Stein*, 541 F.3d 130, 151 (2d Cir. 2008); *United States v. Connolly*, 16-cr-370, 2019 BL 163330 (S.D.N.Y. May 2, 2019). Serving an ex parte subpoena on a company in this situation creates a high probability that the subpoena will reach the prosecutors as well.

We encountered this problem in a recent prosecution of company employees, whose case headed to trial while the company negotiated a deferred prosecution agreement. The company's attorneys told defense counsel candidly that, as part of the company's quest for cooperation credit, the company would disclose to the government the existence of any defense subpoena and all documents responsive to it.

We sought a protective order preventing these disclosures. Our position was that, by tacitly pressuring the company to disclose subpoena-related materials, the government was invading the defendants' right to effective counsel. Our motion succeeded only in that it prompted the prosecutors to promise that they would "refuse any offer by third parties to disclose [the subpoena requests] themselves." But the court declined to bar the company from sending the government copies of all documents responsive to the subpoena.

Finally, third-party subpoena recipients may also resist the subpoena, in whole or in part. If negotiations fail, the result is typically a motion to quash. In their motion papers, absent a court order or agreement to the contrary, third parties are free to disclose the existence of the subpoena, as well as a copy of it, to the court and to the public—defeating in part the protections that the ex parte motion practice had temporarily appeared to provide.

Concluding Lessons

Pretrial document-gathering can be critical to the defense's success in complex white-collar cases, especially given the prosecution's ability to leave exculpatory evidence outside its case files. Defense counsel seeking a pretrial subpoena should consider protecting their work product and strategy through ex parte practice, taking into account the methods and considerations outlined above.

It appears that ex parte practice has become more widely accepted in recent years. Indeed, requests for ex parte proceedings no longer draw automatic opposition from the government. The compromise approach of a public motion seeking ex parte disclosures (Method 2 above), which reveals the existence of some kind of subpoena, may soon be outmoded.

Defense counsel should remember that the third-party subpoena recipient retains the power to undo, in part, the apparent benefits of ex parte practice. But, generally, the third party will not be able to disclose the defense's more detailed discussion, made in the initial motion papers, of the subpoena's strategic value. Moreover, defense counsel should consider asking the court to enjoin the third party from making subpoena-related disclosures to the government.

Lastly, judges and litigants would all benefit from additional guidance addressing the availability of ex parte practice on motions for pretrial subpoenas, and specifying the governing procedures. Courts lacking applicable Local Rules should consider promulgating them. And the federal Advisory Committee should consider the potential benefits of a uniform, nationwide rule.

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