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Recent Decision Expands Use of Rule 17 Subpoena

The wording of Federal Rule of Criminal Procedure 17 suggests that it can be used to obtain documents from third parties prior to trial, almost without limitation. In practice, since the Supreme Court's decision in *United States v. Nixon*,[1] courts have placed sharp limitations on the use of Rule 17.

Recently, U.S. District Judge Lewis A. Kaplan rendered a decision in *United States v. Stein*[2] which expands the ability of defendants to use Rule 17 as a meaningful tool for trial preparation. Judge Kaplan held that when a company enters into an agreement that obligates it to produce any and all documents requested by the government, defendants can use a Rule 17 subpoena to obtain those same documents from the company so long as they are material to the defense.

This article reviews the background law, discusses the *Stein* decision, and offers some recommendations.

The Rule 17 Subpoena

• ***A Tool of Limited Use Under Current Law.*** Federal Rule of Criminal Procedure 17 sets forth the metes and bounds of the subpoena power in criminal cases. Under Rule 17(c), the court "may" require pretrial production from a "witness" of "any books, papers, documents, data, or other objects the subpoena designates." Upon a timely motion, "the court may quash or modify the subpoena if compliance would be unreasonable or oppressive."

Although Rule 17 appears to confer a generous subpoena power, in practice, district courts have limited its reach based in large measure on *United States v. Nixon*. Though the decision is widely known for rejecting President Richard Nixon's absolute formulation of executive privilege, the Court also found that the government's subpoena to President Nixon seeking recordings and documents (in the prosecution of John Mitchell and others) satisfied Rule 17(c). The Court articulated a standard now largely used to refuse defendants pretrial access to documents and materials in the possession of nonparties.

In *Nixon*, the Supreme Court turned to its earlier decision in *Bowman Dairy Co. v. United States* which, "interpreting" Rule 17(c)'s "unreasonable or oppressive" restriction, found that a document subpoena in a criminal case is "not intended to provide a means of discovery" but instead primarily "expedite[s] the trial by providing a time and place before trial for the inspection of subpoenaed materials."[3] The Court adopted a four-part standard enunciated by Judge Edward Weinfeld in *United States v. Iozia*,[4] under which "in 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 to unreasonably delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" The Court distilled these requirements into "three hurdles" the party seeking the subpoena "must clear": relevancy; admissibility and specificity.[5] The subpoena in *Nixon* was deemed to have passed the three hurdles.

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Nixon has since posed a greater obstacle to criminal defendants in pursuit of documents from nonparties than to the government, which, unlike defendants, enjoys the power to conduct a grand jury investigation unchecked by *Nixon's* limitations.[6] A criminal defendant may obtain files from the government prior to trial under Federal Rule of Criminal Procedure 16, but only if those files are in the government's "possession, custody or control" and are also "material to preparing the defense" or intended for "use" in the government's case-in-chief. Thus, Rule 17 is generally the only means by which a criminal defendant may compulsorily obtain a nonparty's documents prior to trial.

Since *Nixon*, "[t]here is no question that courts confronted with subpoenas in criminal cases, at least subpoenas seeking pretrial production, have applied *Nixon* almost without exception," and post-*Nixon* case law is replete with defendants rebuffed in their efforts to obtain nonparty documents before trial under Rule 17(c).[7] To take but one example, in *United States v. Jenkins*, the defendant sought to subpoena from the New York City Police Department reports and memo book entries relating to his stop. The Court quashed the subpoena because police department "investigative files" are "normally…inadmissible as hearsay."[8] In general, courts have held that nonparties should not be compelled to produce documents for the reason first espoused in *Bowman Dairy*: Rule 17(c) should not be "turned into a broad discovery devise, thereby undercutting the strict limitation of discovery in criminal cases found in Rule 16."[9]

'United States v. Stein'

• ***An Expanded Role for Rule 17 Subpoenas.*** *Stein* is the KPMG tax shelter prosecution that has led to developments in the area of "right-to-counsel" jurisprudence. The prosecution arose out of an Internal Revenue Service (IRS) investigation into allegedly abusive tax shelters that KPMG developed, marketed and implemented. In 2005, KPMG entered into a deferred prosecution agreement (DPA) with the U.S. Attorney's Office for the Southern District of New York. As part of the DPA, KPMG agreed to take several steps, including to waive indictment, to admit extensive wrongdoing in an agreed-upon "statement of facts," to pay a $456 million fine, and to provide documents within its possession to the government.[10] At about the same time, the grand jury returned an indictment (alleging conspiracy, substantive tax evasion and obstruction of justice) relating to the KPMG tax shelters against a number of individual defendants, including former KPMG partners.[11]

In November 2006, the defendants applied for a Rule 17(c) subpoena that required KPMG to produce three categories of documents: (1) documents relating to expert opinions prepared by or for KPMG concerning the legality of the tax shelters; (2) documents relating to communications between KPMG and the government; and (3) copies of certain KPMG manuals, calendars, and deposition transcripts from litigation relating to the tax shelters. The government moved to quash the subpoena's specifications relating

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to the first two categories of documents, contending that the subpoena was insufficiently specific and sought documents that were not "evidentiary material." When the government promised to request the third category of documents from KPMG pursuant to the DPA and then produce them to the defense, Judge Kaplan described this concession as "a tacit acknowledgment—which subsequently has been made explicit—that the government has the legal right to require KPMG to produce documents for the purpose of enabling the government to disclose them to the defense."[12]

Thereafter, the Court issued the subpoena and asked the parties for briefing and argument on KPMG's motion to quash. KPMG contended that the documents were privileged, that compliance would be unduly burdensome and that the defendants did not satisfy *Nixon*. The court, in advance of argument, asked the parties to address three questions: (a) whether the subpoenaed documents would be discoverable under Rule 16(a)(1)(E)(i) if they were in the possession of the prosecution team; (b) whether they are in the government's "possession, custody or control" due to the government's rights under the DPA; and (c) if these standards are met, whether Rule 16(a)(1)(E)(i) or *Nixon* should control determination of KPMG's motion to quash.[13]

The court first addressed the Rule 16 issues, ruling that most of the documents sought by the defendants—including KPMG's correspondence with the IRS, the Senate subcommittee that investigated KPMG, and the Department of Justice (including drafts of the DPA and a special memorandum for the government aimed at avoiding indictment), and documents relating to this correspondence—were material to the defense. The court then ruled that the requested documents were within the government's "possession, custody or control" because the DPA gave the government "the unqualified right to demand production by KPMG of any documents it wishes for purposes of this case."[14]

The court then turned to KPMG's motion to quash the defendants' Rule 17 subpoena. KPMG argued that the defendants did not satisfy three of *Nixon's* four requirements. Judge Kaplan described the limits *Nixon* placed on Rule 17 and observed that district judges (including himself) have "applied *Nixon* almost without exception." However, he explained that "it is vitally important never to let the frequent repetition of a familiar principle obscure its origins and thus lead to mindless application in circumstances to which the principle was never intended to apply," adding that "*Nixon* should not so readily be divorced from the concerns that produced it."[15]

Judge Kaplan proceeded to explain how the "concerns that produced" *Nixon* were not at issue here. After the promulgation of the Federal Rules of Criminal Procedure, "the question quickly arose whether the seemingly generous availability of Rule 17 subpoenas returnable before trial would trump Rule 16's limitations on pretrial disclosure from the government." He explained how *Bowman Dairy* and *Iozia*, which led to *Nixon*, were meant to

> reconcile the broad language of Rule 17(c) with the limitations on pretrial discovery inherent in the far narrower language of Rule 16. In other words, its function is to prevent the "exception" (i.e., the broad language of Rule 17(c)) from swallowing the "rule" (i.e., the Rule 16 limitations on the discovery available to criminal defendants). Here, however, no reconciliation of Rules 16 and 17(c) is necessary to the extent that the documents defendants seek are material to the preparation of their defense. *Nixon* therefore does not even address, much less resolve, the issue of the appropriate standard where a Rule 17(c) subpoena is sought to compel production by a person in physical possession of materials that are within the legal control of the government and to which defendants have a right under Rule 16(a)(1)(E).[16]

The court thusly rejected KPMG's argument that the subpoena should be quashed under *Nixon*. Judge Kaplan concluded that "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)," particularly since "[t]he text of Rule 17(c) strongly suggests the conclusion that the subpoena should be enforced unless compliance would be unreasonable or oppressive." Judge Kaplan also saw no reason "to go[] through the charade of ordering the government to request the documents from KPMG so that the government may turn them over to the defendants." In conclusion, the court "applie[d] Rule 16's standard and decline[d] to quash the subpoena to the extent it seeks documents that it has held are material to the preparation of the defense and within the possession, custody or control of the government."[17]

Significance of 'Stein'

First, defense attorneys should ask the courts to issue a Rule 17 subpoena on any company that has entered into a nonprosecution agreement or a deferred prosecution agreement with the government. These agreements typically require the company to make promises similar to those made by KPMG in the DPA. Under *Stein*, if a company has documents that are material to the defense under Rule 16, and if that company has a standing obligation to provide documents to the government, then the defendant should be able to use a Rule 17 subpoena to obtain the documents directly from that company. Judge Kaplan's decision treats these cooperating companies as if they were part of the prosecution team for Rule 16 analysis. Defense attorneys should make sure that the subpoena only seeks documents that are "material to the defense." In *Stein*, the defense carefully limited the subpoena's scope, which led the government and KPMG not to object to three of its nine specifications. Also, the reasoning in *Stein* seems to permit the use of a Rule 17 subpoena to obtain information from individual cooperating witnesses, and not only companies. In theory, *Stein* could also support a Rule 16 request to the government for files from companies or individuals believed to be cooperating with the government, a step which might even allow the defendant to learn the identity of entities or individuals cooperating with the government at an early stage in the proceedings.

Second, although *Stein* speaks only to the special situation that exists when a company has entered into an agreement with the government that commits the company to produce documents on the government's request, Judge Kaplan's opinion raises the broader question about whether *Nixon* has been too reflexively applied.[18] *Stein* certainly gives defense lawyers an opportunity to see if additional inroads can be made on limiting *Nixon*. For example, if Rule 17 was construed narrowly in *Nixon* to prevent it from being broader than Rule 16, then perhaps Rule 17 should only require a showing that the documents sought are material to the defense. These bedrock issues may now be open for debate—it is too soon to say whether other courts will follow *Stein*, or try to limit the decision to the particular facts in *Stein*.

Conclusion

Finally, an attorney representing a company that is negotiating a nonprosecution or deferred prosecution agreement with the government needs to bear in mind that these form agreements typically include broad promises of cooperation by the company, including a promise to provide all documents related to the subject of the company's cooperation. In such circumstances, attorneys should advise the company that this could result in something approaching open-file discovery of the company for defendants. This may not change a company's view about whether to reach a settlement with the government, but the company's in-house lawyers and executives should be advised about this possibility.

1. 418 US 683 (1974).
2. *United States v. Jeffrey Stein, et al.*, __FSupp2d__, 2007 WL 1258926 (SDNY May 1, 2007) (Stein).
3. *Nixon*, 418 US at 699-700.
4. 13 FRD 335 (SDNY 1952).
5. *Nixon*, 418 US at 700.
6. See *United States v. R. Enterprises*, 498 US 292 (1991); see also *United States v. Nachamie*, 91 FSupp2d 552, 562-65 (SDNY 2000) ("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 standard. Unlike the government, the defendant has not had an earlier opportunity to obtain material by means of a grand jury subpoena.").
7. *Stein*, 2007 WL 1258926, at *11.
8. 02 Cr. 1384 (RCC), 2003 WL 1461477 (S.D.N.Y. March 21, 2003).
9. *United States v. Cuthbertson*, 630 F2d 139, 146 (3d Cir. 1980).
10. *Stein*, 2007 WL 1258926, at * 1-*3. Paragraph 8(d) of the DPA states that "KPMG agrees that its continuing cooperation with the Office's investigation shall include…(d) Assembling, organizing, and providing, in responsive and prompt fashion, and upon request, expedited fashion, all documents, records, information and other evidence in KPMG's possession, custody, or control as may be requested by the Office or the IRS." This type of language has become fairly standard in most deferred prosecution agreements.
11. *Stein*, 2007 WL 1258926, at * 3.
12. *Stein*, at *3-*4.
13. *Stein*, at *4.
14. *Stein*, at *4.
15. *Stein*, at *10-*11.
16. *Stein*, at *10-*11.
17. The Court also addressed certain privilege claims by KPMG that it retained the right to make under the DPA.
18. See *Nachamie*, 91 FSupp2d at 562-65 (questioning whether *Nixon* should apply to defense Rule 17 subpoenas).