Honorable James C. Dever
Chair, Advisory Committee on Criminal Rules
United States District Court
310 New Bern Avenue
Raleigh, NC 27601

Honorable Jacqueline H. Nguyen
Chair, Rule 17 Subcommittee
United States Court of Appeals
125 South Grand Avenue
Pasadena, CA 91105

February 13, 2024

Re: Proposed Amendments to Rule 17 of the Federal Rules of Criminal Procedure

Dear Judge Dever and Judge Nguyen:

On behalf of the National Association of Criminal Defense Lawyers, which has more than 10,000 direct members and 40,000 affiliate members,[1] we write to address the need to amend Rule 17 of the Federal Rules of Criminal Procedure to allow the parties to issue subpoenas for documents and tangible items to third parties without leave of Court.

[1] NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. We, the undersigned, are members of a task force that NACDL formed to study Rule 17. In October 2022, the Chair of NACDL's Rule 17 take force, James Felman, spoke to the Advisory Committee about Rule 17. See Minutes, Advisory Committee on Criminal Rules, pp. 17–18 (Oct. 27, 2022).

In particular, we agree with the Rules Subcommittee that it "would be beneficial to expand the parties' authority to subpoena material from third parties before trial."[2] The current Rule 17 is ambiguous in critical respects, leading to disparate application that threatens the ability of defense counsel to adequately investigate, develop, and present available defenses, and thus to provide the level of assistance required by the Constitution. The realities of modern life have changed the ways facts are recorded and thereafter investigated, making compulsory process at the pretrial defense-investigation stage a necessity if the parties are to have a nearer-to-level playing field in the search for truth and defense counsel are to fulfill their constitutional function.[3]

We believe Rule 17(c) should be amended to allow defendants to issue *ex parte* third-party subpoenas for documents and tangible objects without advance leave of Court, and to remove any suggestion that such subpoenas are proper only to obtain evidence intended to be used at a hearing, trial or sentencing. Moreover, Rule 17 should be revised to clarify that the defense may issue subpoenas without having to predict exactly what records exist or their evidentiary status if later used at trial. If the recipient of a subpoena believes compliance would be unreasonably burdensome or oppressive, the recipient may challenge the subpoena by bringing a motion to quash before the District Court. Any materials produced would then be shared with the opposing party to the extent directed by the relevant provisions of Rule 16. Rule 17 should not amend other rules by implication.

We address additional complexities and subsidiary issues in our letter as well, some of which were discussed in the Subcommittee Letter. The challenge before the Committee is to identify revisions that facilitate the parties' efficient, equitable, and timely receipt of records while avoiding revisions that burden the courts with unnecessary motions practice and intrude unnecessarily on the defense function. We hope the Committee will find useful NACDL's perspective on the intersection of defense counsel's constitutional role with the questions before the Committee, and that the Committee will not hesitate to call on NACDL for further comment as it continues its important work on Rule 17.

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[2] Letter of Professors Sara Sun Beale and Nancy King to Members, Criminal Rules Advisory Committee (Sep. 25, 2023) at 1 ("Subcommittee Letter").

[3] NACDL expresses no opinion in this letter as to whether any amendment to the Rule should also authorize the government to issue pretrial investigative subpoenas.

Rule 17 should be amended because it is ambiguous and inadequate.

Although the Rules Subcommittee has already been appropriately persuaded Rule 17 should be amended and expanded, we believe a brief summary of why Rule 17 should be amended may assist the Committee in drafting the final rule.

Largely unchanged since 1944, Rule 17 permits the issuance of pretrial subpoenas, but specifies no standards or practices governing their issuance. In practice, this ambiguity has led to disparate application and, too frequently, the denial of defense access to material information—when the defense overcomes the barriers to seeking it at all. For example, some courts have applied the so-called *Nixon* standard, and require a strict showing of specificity and admissibility before permitting pretrial subpoenas.[4] But proving what a third-party has and how it might lead to information to be admitted at trial is exceedingly difficult to do *before* the defense has access to records. Moreover, requiring a threshold showing of admissibility precludes the production of vital information that could lead to the discovery of admissible evidence.

In other courts or through agreement of the parties, pretrial subpoenas are frequently issued without application of *Nixon*. But even then, some courts view Rule 16 as the sole source of defense discovery. In others, the defense may issue pretrial subpoenas without a court order, subject to modification through a motion to quash by either the recipient of the subpoena or the other party. And in still others, the defense may seek a court order *ex parte*. The ambiguity in current Rule 17 practice is such that one district court judge recently pointed out that the "wide variance in local and individual practices has resulted in a caveat in the official form subpoena issued by the Administrative Office of the United States Courts." *United States v. Goel*, No. 22-cr-396 (PKC), 2023 U.S. Dist. LEXIS 48722, at *5 (S.D.N.Y. Mar. 22, 2023). The AO's form instructs parties to "consult the rules of practice of the court in which the criminal proceeding is pending to determine whether any local rules or orders establish requirements in connection with the issuance of such a subpoena." *Id.* According to the form's disclaimer, there are no uniform standards on judicial pre-approval, the site of a subpoena's return, or obligations to disclose subpoenaed records.

[4] In *United States v. Nixon*, 418 U.S. 683 (1974), the Court held that *the government* must show that documents sought via a pretrial subpoena for use at trial will be "evidentiary and relevant" and "not otherwise procurable reasonably in advance of trial," among other requirements.

This disclaimer is not surprising—Rule 17's current form presents too little guidance to courts and counsel concerning the means and manner by which defense counsel can issue subpoenas *duces tecum* returnable before trial. After learning the rule might be amended, NACDL polled our members to better understand how Rule 17 is currently used and interpreted. We found out that, although over 80% of our survey respondents "often" or "sometimes" seek or issue subpoenas *duces tecum* to third parties in their cases, nearly just as many (80%) think the rules governing third-party subpoenas need improvement.[5]

Rule 17's ambiguity has resulted in disparate application. Consequently, counsel must follow widely varying procedures, depending on the venue.[6] Our survey results show significantly varied experiences on what rules or standards of practice govern third-party subpoenas across jurisdictions:

- **42%** local rules
- **28%** a standard practice exists, but no local rules
- **22%** neither local rules nor a standard practice
- **8%** none of those previous categories applies

As a practical matter, the wide variation in local and individual practices requires parties to spend their limited resources on motions practice about *process* rather than the merits of the case—meaning that uncertainty or expense, or both, chills many defense counsel from what would otherwise be appropriate uses of the rule to fulfill their obligations.

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[5] We received survey responses from 165 members; the results included in this letter have been rounded to the nearest whole number.

[6] *E.g.*, *United States v. Lawson*, No. 14-20115, 2016 U.S. Dist. LEXIS 13066, at *2–3 (E.D. Mich. Feb. 3, 2016) ("Under the plain language of Fed. R. Crim. P. 17, it is debatable whether Defendant must secure the authorization of this Court. . . .Nonetheless, the Court acknowledges that the case law is unclear as to whether a defendant must secure a court's pre-approval of a Rule 17(c) subpoena that seeks the pretrial production of materials . . . . *See United States v. Llanez-Garcia*, 735 F.3d 483, 498-500 (6th Cir. 2013) (noting the split of authority on this question and declining to 'provide controlling guidance concerning [the] Rule 17(c) procedures' that govern this process).").

Access to pre-trial subpoenas is particularly critical for the defense now that most cases are resolved by plea bargain.[7] Early and comprehensive access to information is critical because, "with plea bargaining the norm and trial the exception, for most criminal defendants a change of plea hearing is the critical stage of their prosecution." *Wright v. Van Patten*, 552 U.S. 120, 127 (2008) (Stevens, J., concurring). Trial used to be viewed as the "primary evidence generating event."[8] However, today, if defense counsel simply wait until Jencks materials are produced at trial, it is likely too late to help our clients. Moreover, defense counsel have Sixth Amendment and ethical obligations to investigate potential defenses in time to make effective use of them. *See, e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986); *Strickland v. Washington*, 466 U.S. 668, 691 (1984). The defense function is materially impeded if defense counsel cannot obtain materials that may generate additional investigative leads and allow them to timely develop defenses for use in, *e.g.*, plea negotiations, pretrial suppression hearings, and perhaps at trial. "The duty to investigate is essential to the adversarial testing process[.]" *Greiner v. Wells*, 417 F.3d 305, 320 (2d Cir. 2005) (referencing case-by-case reasonableness standard guided by national norms of practice). It is unethical and ineffective assistance for defense counsel to simply rely on the government's narrative and theory of prosecution. *See Garza v. Idaho*, 139 S. Ct. 738, 744 (2019) (noting "prejudice is presumed 'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing'"). The same is true of counsel's duty to provide informed advice as to the propriety of any potential plea agreement.

The government's Rule 16 and discovery obligations do not suffice for a constitutionally adequate defense. To be sure, Rule 16, *Brady v. Maryland*, 373 U.S. 83 (1963); the Due Process

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[7] *See generally* National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 5 (2018), www.nacdl.org/trialpenaltyreport ("Guilty pleas have replaced trials for a very simple reason: individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose.").

[8] *Cf.* Darryl K. Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 Am. Crim. L. Rev. 155, 168–69 (2018) ("The limits on discovery obligations, on pretrial depositions, and on related constitutional disclosure rules all implicitly look to the trial for its older function…as the primary *evidence-generating* event…. The federal rules, and the large number of state systems with similar rules, still reject the contemporary model of civil procedure that shifts evidence production to the pretrial discovery stage.") (citation omitted).

Protections Act, Pub. L. No. 116-182, 134 Stat. 894 (2020);[9] and the Jencks Act, 18 U.S.C. § 3500[10] require the disclosure to the defense of many of the materials collected by the government. These protections are substantial, but do not adequately address the defense need to investigate because the government's investigative efforts are often focused on the search for guilt.[11] Prosecutors are not responsible for producing favorable evidence they do not have, at least when its existence is unknown to the agents. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (describing disclosure duty in terms of evidence prosecutors have or that is known to "others acting on the government's behalf in the case, including the police"). And more commonly, the government may not know about the existence or location of all relevant or favorable materials.

Simply put, materials collected by the government and produced to the defense in discovery often do not tell the whole story of "what happened." And while in 1944 it may have been possible to conduct a complete factual investigation without pre-trial subpoenas, the Rule has not kept pace with advancements in technology and the electronic storage of information. In today's society, communications and documents are often created, transmitted, and stored electronically. It is, quite literally, impossible to learn what happened in a complex transaction without access to electronic information in the hands of third parties. The volume of this electronic information requires its production and review by the defense well in advance of any trial or other evidentiary hearing. In the civil context, permissive subpoena practice has evolved as the

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[9] *See* Fed. R. Crim. P. 5(f).

[10] *See* Fed. R. Crim. P. 26.2 (Producing a Witness's Statement).

[11] *See* Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Defense Investigations*, 68 UCLA L. Rev. 212, 222–23 (May 2021) [hereafter *Privacy Asymmetries*] ("At no point, from pretrial investigations through to conviction, does law enforcement have any constitutional, legal, or formal ethical obligation to affirmatively investigate evidence of innocence or to seek out any evidence in the possession of a third party that would support a defendant's theory of the case. Of course, *Brady v. Maryland* and its progeny require prosecutors to disclose material, exculpatory evidence that is in their constructive possession. And statutory discovery rules require prosecutors to disclose certain material information over which they have possession, custody, or control. But disclosure requirements are not investigative duties."); Rebecca Wexler, *Life, Liberty, and Data Privacy: The Global CLOUD, the Criminally Accused, and Executive Versus Judicial Compulsory Process Powers*, 101 Tex. L. Rev. 1341, 1360–61 (May 2023) (noting that NACDL "has repeatedly lobbied the Senate for amendments to MLAT [Mutual Legal Assistance Treaties] language that would permit judges to order the DOJ to use MLAT channels on behalf of the defenses").

technology and volume of documents have evolved. There is no reason the same should not be true in criminal matters.

An overarching point bears mention before we delve into specifics. The Subcommittee leaves for another day the question of what substantive standard should replace *Nixon*. That is understandable; we offer our suggestion below (Section V). But at several points, the Subcommittee appears to suggest that more rigorous procedural hurdles are necessary, or at least appropriate, to counterbalance a less forbidding substantive standard. We respectfully submit instead that identifying the fairest and most effective revamp of Rule 17(c) will require addressing at least three distinct questions:

(1) the substantive standard governing what materials may be obtained via Rule 17(c);
(2) the procedure for issuing a Rule 17(c) subpoena; and
(3) the procedure and substantive standards for challenging a Rule 17(c) subpoena.

The best version of the rule will reflect judgment about each of these individually as well as the interplay among them. For example, the Subcommittee's accurate recognition that the *Nixon* standard thwarts the truth-seeking function without advancing legitimate interests is welcome. *Nixon* should be jettisoned, full stop. But as summarized above *Nixon* is not the only culprit. The barriers to truth-seeking Rule 17(c) currently imposes are many: the time- and resource-intensive process of ascertaining individual judicial practices; the immense challenge of describing with specificity records one has never seen and explaining why the defense needs them; which is typically followed by motion practice on each and every subpoena against an adversary with a lengthy head-start on investigating the facts; with a low likelihood of success when facing harsh or subjective substantive standards—and all at the intangible, but weighty, "cost" of disclosing attorney work-product to both adversary and decisionmaker (as discussed further below). We respectfully request that as the Subcommittee evaluates the many options before it, it consider whether each such barrier is necessary to secure the equitable administration of justice.

We turn next to addressing what we respectfully submit are the issues at the fulcrum of the optimal balance among the interests of litigants, the courts, and subpoena recipients.

Revisions to Rule 17 should recognize the structural and constitutional reasons that protecting the confidentiality of defense strategy is essential.

As previewed above, we advocate a rule that allows the defense to issue pretrial subpoenas *ex parte* and without judicial pre-approval, as civil litigants do, subject to the same substantive standards and procedural protections for subpoena recipients. We acknowledge the Subcommittee's view that "judicial oversight is important to regulate [the] use" of compulsory process "in criminal cases" (Report at 2-3), though the Subcommittee does not explain why it believes judicial regulation of compulsory process is important in criminal cases but not in civil ones. Report at 2-3. We address that point in specific contexts below.

For background, we briefly explain the structural and constitutional reasons that routine judicial oversight, and a presumptively adversary process—with the concomitant disclosure of core attorney work product, defense strategy—pose disproportionate and unfair risks to criminal defendants *more* than civil litigants—suggesting that if anything, the rules should give greater protection to the criminal defense function, and certainly not less.

The breadth of the judicial role in criminal cases is one reason. In the more than 90% of federal criminal cases where the accused is convicted,[12] the judge decides the eventual penalty—unlike in civil cases, where the jury typically assigns damages after finding liability. For example, the U.S. Sentencing Guidelines require judges to consider uncharged "relevant conduct," which the court may find on a bare preponderance standard from materials untested at trial and not subject to the Rules of Evidence. As a result, a defendant in, say, a bank fraud case runs a grave risk when alerting the judge who (statistically) is nearly certain to sentence her eventually that she needs to examine records from a bank other than the one she is charged with defrauding. The Sentencing Reform Act requires the judge to consider an even broader range of information, including, *e.g.*, the "history and characteristics of the defendant." 18 U.S.C. §3553(a)(1). Thus defense counsel who needs to subpoena, *e.g.*, the defendant's psychiatric records, for plea negotiations or to

[12] *See* U.S. Courts, U.S. Dist. Courts, Criminal Statistical Tables for the Federal Judiciary, tbl. D-4 (December 31, 2022), *available at* https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2022/12/31 (showing that approximately 91% of federal defendants were convicted for the 12-month period ending December 21, 2022).

evaluate a diminished capacity defense, must weigh the risk of alerting the sentencing judge to a stigmatized diagnosis or troubling history.

Similar concerns apply at trial. Rulings on the scope of a conspiracy (Fed.R.Evid. 801(d)(2)(E)), the admissibility of other wrongs evidence (Fed.R.Evid. 404(b)), even relevance (Fed.R.Evid. 401), are driven by the broader context. Might a judge with foreknowledge of the cards the defense is holding give the government more leeway to counter them anticipatorily—effectively depriving the defendant of his constitutional right to decide not to present a defense when the government's case went badly? Perhaps more frightening for the defense is a judge who knows in advance which theories of the defense *did not pan* out, as the judge who approved pretrial subpoenas will know when the defendant never mentions again the line of inquiry the judge authorized him to pursue. That situation may even compromise the defendant's ability to highlight the government's genuine failure to prove a point on which the defense tried and failed to identify helpful evidence. A judge may deem a line of cross-examination or argument off-limits because she knows the defense explored it but turned nothing up.

The problems are compounded when the defense is barred from seeking judicial approval *ex parte*, which the Subcommittee recommends become the norm (*removing* protections defendants enjoy in many jurisdictions; see discussion below, at Section IV. The prosecution gets core work product of the type a civil adversary is conclusively barred from getting. *Cf.* Fed.R.Civ.P. 26(b)(3)(B). It may get insight into privileged communications, based on the facts asserted to support the request. It, too, will know pretrial where the defense is going, and be prepared to counter it—and it will be free to exploit its knowledge of defense theories that failed in all the ways described above. That power will carry into sentencing, given prosecutors' ability to control the Sentencing Guideline and statutory ranges via plea negotiations, and given DOJ's commitment to sharing with the U.S. Probation Office all information that may bear on the sentence.

The problems are compounded yet again if materials returned in response to a Rule 17(c) subpoena are routinely, or presumptively, produced to the prosecution as well—a question the Subcommittee leaves open for now. No defense lawyer can risk genuinely *investigating* the facts—asking questions to which they don't know the answers—in that situation. Yet as discussed above, in today's world no meaningful investigation is possible without subpoena authority. The

defense lawyer representing the person accused of bank fraud faces a colossal dilemma in that situation: find out whether another bank was affected, at the risk of handing the prosecution inculpatory evidence? Or rely on the prosecution for the facts? Relying on the prosecution for the facts violates ethical obligations and the Sixth Amendment. *See* citations above. But would rolling the dice on what the judge and prosecution will learn do otherwise? A rule that requires defense counsel to risk grievous harm to her client in order to fulfill her duties to the client is a rule that advances no interest of justice.

Defense counsel's duty to investigate, and the accused's right to the assistance of counsel who has done so, are prescribed in the constitution. Disclosing attorney work-product to the decision-maker and adversary cannot be the price of a constitutionally adequate defense. We urge the Subcommittee to allow these principles to guide its analysis, and we explain below how they relate to specific aspects of the proposed revisions.

Rule 17 should not require judicial approval before issuance of a third-party subpoena.

Although we strongly agree with the Subcommittee's view that Rule 17 must be amended and expanded, we respectfully suggest there is no need for a "requirement that the party seeking a subpoena do so by filing a motion."[13] Such a process would chill discovery and burden courts with unnecessary motion practice—particularly when the defendant and the subpoena recipient agree on the scope of discovery. Moreover, there is no reason to believe criminal defense counsel (or criminal law practitioners in general, should the final rule apply to the government as well) are more likely to abuse subpoena authority than are civil litigators. Instead, the Court should adopt criminal standards and procedures mirroring the civil ones, which are familiar to courts and counsel alike.

First, the government already engages in document discovery without court oversight. The prosecution (and supporting federal investigative agencies with their respective personnel and resources) amasses voluminous information pre-indictment through grand jury subpoenas issued without court pre-approval and motions practice. As in the civil arena, a recipient that believes a grand jury subpoena unduly burdensome has recourse to the courts—but the importance of the government's investigative interest allocates the burden of seeking redress to the aggrieved party.

[13] Subcommittee Letter at 3.

The constitutional importance of adequate defense investigation counsels the same balance of interests post-indictment. If defense counsel issues a subpoena the recipient deems unduly burdensome, the recipient may ask the court to intervene. But if the recipient deems compliance routine or simple, there is no reason to interpose barriers to defense access—and even less reason to embroil the courts in motion practice. There is no principled reason to allocate these burdens differently for post-indictment document discovery and pre-indictment discovery by the government, particularly given that post-indictment discovery will be subject to *some* substantive standard (see Section V, below), whereas grand jury subpoenas are not. Perhaps more to the point, the balance of interests should not favor greater access for civil litigators than for criminal defendants.

Second, requiring a motion disadvantages the defense because, at the time of the indictment, an informational imbalance often separates the prosecution and the accused. By then, the prosecution will have already amassed information by subpoenas, warrants, disclosure requests, and grand jury testimony.[14]

Because defendants and their counsel are often in the best position to know where these items are and who is their custodian, the defense must have the authority to obtain documents believed to be relevant to a matter. But requiring the defense to file a motion to justify its subpoenas adds nothing to the process. At the beginning of the case, the defense will undoubtedly know less than the government, potentially resulting in an unfair advantage in the motions process. Moreover, when defense counsel are pursuing theories of the defense, any motions requirements risks unfairly previewing these defenses for the government. The defense should not be put to the choice of relevant discovery versus tactical disadvantage in each case.

Ex Parte Subpoenas Should Be Allowed

For these reasons, NACDL believes that *ex parte* subpoenas should be permitted—though as explained below, that should be the default rule. In many district courts today, defense counsel

[14] *Cf.* Dept. of Justice, *Technology & Law*, 69 DOJ J. FED. L. & PRAC. 174, no. 3, 2021, https://www.justice.gov/media/1169626/dl?inline ("[L]aw enforcement has been permitted to obtain those [IP address] records with legal process less rigorous than a search warrant—including through grand jury and administrative subpoenas and emergency disclosure requests under 18 U.S.C. § 2702.").

may not issue any subpoenas without the court's preapproval, with full disclosure to the government of defense counsel's application *and* the material produced, thus revealing to them the nature of the evidence and potential witnesses that may be offered by the defense. In our survey, nearly one-third of respondents (32%) reported needing a court order to issue a subpoena.

Hence the need for *ex parte* subpoena applications. To require otherwise would reveal defense strategy to the government and potentially jeopardize potential defense witnesses. In our survey, only a slight majority of criminal defense lawyers reported that, in jurisdictions where a court order is required to issue a subpoena, the defense may seek it in an *ex parte* filing. A minority reported they sometimes can use an *ex parte* filing, and a slightly smaller minority reported that they cannot at all. The government's interest is usually to oppose the subpoena and gain litigation advantage over the defendant. The government can always send its agents to demand (or appear to demand) information from the subpoenaed source—a power not afforded defense counsel or their investigators. The power imbalance of the parties under the current Rule is one major reason for seeking its amendment.

We respectfully disagree with the Subcommittee's position that "good cause" should be required to proceed *ex parte*. As explained above, there is no upside to involving the Court in discovery unless and until the subpoena recipient disputes the subpoena's scope or applicability.[15] To the extent the Committee adopts the Subcommittee's view that "good cause" is necessary for an *ex parte* subpoena, we submit that the Committee should clarify that premature disclosure of defense strategy constitutes good cause.

Finally, although the Subcommittee has yet to take a position, any amendment to the Rules should be clear that *ex parte* subpoenas should be returnable only to the party seeking such discovery. More specifically, the Rule should allow defense counsel to receive these records directly. Disclosure to the court undermines the defense in the ways described above even if they are not disclosed directly to the prosecution (*see* discussion above), and courts frequently decide to release records to both parties in any event.

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[15] We also respectfully note that the Subcommittee's suggestion that the government assist *pro se* defendants in showing good cause not to require disclosure to the government—which would be helping them make that showing—points to the layers of complications a good-cause standard would create.

NACDL also opposes any requirement that the items sought by the pre-trial subpoena be not "otherwise reasonably procurable," as has been proposed to this Committee.[16] If subpoenas cannot issue unless counsel successfully makes a series of threshold showings—including proof that materials are not otherwise procurable—subpoenas may become out of reach to practitioners with limited resources and heavy caseloads. Perhaps more importantly, it is difficult to overstate how intrusive into the defense function that standard would be.

Privacy interests of third parties may be protected while also permitting defense access.

There is no dispute that "personal and confidential information" should be protected. To whom such protections apply and the scope of such protections, however, should vary.

As for victims, NACDL agrees that "personal and confidential information" should be protected and subject to a heightened standard for discovery. We favor a narrow definition of this exception to provide greater certainty to parties and to conserve resources by limiting motions practice.[17] In addition, because victims' interests are protected by Rule 17(c)(3), we have proposed that the Committee clarify that standing to challenge a subpoena under Rule 17(c)(4) is limited to the witness to whom the subpoena is directed, and that a motion must be filed either before the time of compliance or within 14 days of receipt of the subpoena, whichever is earlier.

Regarding personal or confidential information for non-victims, such information should be discoverable to the extent it is relevant and proportional. Discovery regarding these sensitive issues is addressed every day in civil matters for topics including protected personal information, health records, and critical trade secrets. The Subcommittee's proposal to create a bifurcated standard for all confidential information—including email and texts—will lead to increased

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[16] We are concerned that this proposed addition to Rule 17 will add ambiguity. It is not clear what kind of showing would be satisfactory. Before issuing a subpoena, would a party need to hire an investigator to try to interview a witness, or try to convince a social media company to voluntarily disclose information? And does the quantity or quality of "otherwise" available data (and metadata) matter to the analysis?

[17] The AO's form includes the vague admonition to "Please note that Rule 17(c) (attached) provides that a subpoena for the production of *certain information* about a victim may not be issued unless first approved by separate court order." *See* AO 89B (07/16) Subpoena to Produce Documents, Information, or Objects in a Criminal Case, https://www.uscourts.gov/sites/default/files/ao_089b_0.pdf (last visited Aug. 9, 2023) (emphasis added).

confusion and significant litigation.[18] Furthermore, the answer to confidential information is not to preclude discovery of such relevant materials, but to protect them. Courts are well-versed in crafting appropriate protective orders to shield public disclosure of such materials. And to the extent parties are concerned about producing such materials, they can file a motion seeking either to limit the subpoena's reach or enactment of an appropriate protective order.

Relevance should be the substantive standard governing Rule 17 subpoenas.

Although the Subcommittee has not offered its preferred standard for seeking discovery pursuant to third party subpoenas, we respectfully suggest that the criminal standard mirror the discovery standards established by the Federal Rules of Civil Procedure—that the discovery sought be "relevant" and "proportional"—and the procedures established in Civil Rule 45.

For the reasons cogently explained by the New York City Bar and others cited in their February 17, 2022, letter to the Committee, the *Nixon* standard and similar restraints on pre-trial subpoenas by the defense unreasonably frustrate the truth-seeking function. Until the defense sees the evidence at issue, it is virtually impossible to show that it is "evidentiary and relevant." But NACDL parts company with the New York City Bar in its suggestion of importing Rule 16's "relevant and material" standard into Rule 17. This standard sets the bar too high for parties seeking records during the post-indictment, pre-trial investigative stage. "Material" works for the government applying Rule 16 because the government already has records in its "possession, custody, or control" *before* it decides whether Rule 16 requires their production. A more flexible standard should apply when records are in third-parties' possession. We suggest a standard at least as permissive as the discovery standards established by the Federal Rules of Civil Procedure (*e.g.*, "relevant" and "proportional").[19] A better standard would be even more permissive given the

[18] If there were separate standards for emails and texts as opposed to business records, a request that sought "all documents regarding the company's purchase of asset X" would be subject to two different standards to the extent it reached both sales documents and emails about those sales documents. Such a standard would be unworkable in practice.

[19] *See* Fed. R. Civ. P. 26(b)(1). Notably, the government already has experience with the civil standard. *See generally* Dept. of Justice, *eLitigation*, 68 DOJ J. FED. L. & PRAC. 1, no. 3, 2020, https://www.justice.gov/media/1070351/dl?inline ("A constellation of changes in the quantity and variety of data, records, and electronic evidence collected in our criminal

constitutional rights at stake. After all, Rule 17 helps defense counsel implement the accused's constitutional rights to compulsory process, due process, and the effective assistance of counsel.

Conclusion

NACDL supports revisions to Rule 17 that will enhance the timely, efficient, and equitable access to records. Judicial gatekeeping and restrictive standards before a subpoena may issue are unnecessary: legitimate third-party and privacy interests may be adequately protected by motions to quash or for protective orders; subpoenas in criminal cases should have at least as much investigatory power as in civil litigation. As Justice Holmes emphasized more than 100 years ago, "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States v. Oppenheimer*, 242 U.S. 85, 87, 37 S. Ct. 68, 69 (1916).

Respectfully,

Michael P. Heiskell, President, NACDL[20]

National Association of Criminal Defense Lawyers Rule 17(c) Task Force:

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investigations and prosecutions, as well as in our civil practice, requires a new approach to all phases of civil and criminal litigation.").

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