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Court Restricts Use of Rule 17(c) Subpoena for Gathering Pretrial Discovery



Although not intended to be used as a broad discovery device, Federal Rule of Criminal Procedure 17(c) permits a party in a criminal case to issue a "17(c) subpoena" to order the production of documents in the possession of third parties.

The rule specifically provides that *only the court* may direct pre-trial production of materials compelled by a 17(c) subpoena—and only when the court is convinced that the subpoena is not issued as part of a "fishing expedition" for discovery. It is not uncommon, however, for parties to include language in 17(c) subpoenas that permit the recipient to comply through immediate pre-trial production--thereby circumventing the process of obtaining court approval for "early return." However, after a recent reprimand from the District Court for the District of Columbia, that practice may be coming to an end. In *United States v. Vo*, the government issued 17(c) subpoenas to a correctional facility, one of which compelled defendant's visitation logs, call logs, and recorded telephone calls. That subpoena included return dates that coincided with the defendant's trial, but also stated that "[i]n lieu of personally appearing before the Court on the date indicated, you may comply with this subpoena by promptly providing [the requested documents to] the undersigned Assistant U.S. Attorney." The correctional facility promptly complied with the subpoena. Soon thereafter, the defendant moved to quash the subpoena, arguing that the government had abused Rule 17(c) to obtain discovery. The Court agreed, finding that the subpoena conflicted with the general structure of Rule 17(c). The rule first permits the issuance of subpoenas without the Court's involvement to command a third party's presence at a hearing with the possible production of documents. The rule also allows for production before the hearing, but only when directed to do so by the court. The Vo Court noted that the face of the government's subpoena appeared to comply with this rule, in that it required the appearance of the correctional facility, and the production of documents, on the date of the trial. The Court held, though, that the subpoena strayed from the rule when it invited the correctional facility to produce directly and immediately to the government. In doing so, the Court held that the government turned Rule 17(c) into a discovery rule, by effectively compelling the production of documents "backed by the threat of court-imposed sanctions for non-compliance." The Court further held that it was immaterial that the subpoena merely *invited* early compliance, rather than *compelling* it, and that it would not retroactively approve the subpoena,

given that it appeared to be precisely the sort of "fishing expedition" prohibited under Rule 17(c). More careful judicial policing of Rule 17(c) stands to impact both prosecutors and defense counsel alike, given that the 17(c) subpoena is used as a tool by both. Although practitioners should note, unlike the recent decision from the District of Columbia, [other courts](#) addressing the scope of Rule 17(c) have claimed that it does *not* require court intervention, even when the subpoena purports to seek pre-trial production.

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