

From: "████████ (USANYS)" <████████>
To: ██████████ (USANYS)" <████████>

Subject: RE: final meeting before summer!

Date: Mon, 03 May 2021 20:40:25 +0000

Attachments: 2021.04.27_Order_re_Rule_17_subpoenas.pdf

From: ██████████ (USANYS) <████████>

Sent: Monday, May 3, 2021 4:29 PM

To: ██████████ (USANYS) <████████>

Subject: RE: final meeting before summer!

Nice. If you have it handy, can you send it (or I can ask Lara)?

From: ██████████ (USANYS) <████████>

Sent: Monday, May 3, 2021 4:28 PM

To: ██████████ (USANYS) <████████>

Subject: RE: final meeting before summer!

Good. We also recently got a strong opinion from AJN in Maxwell on a motion to quash a Rule 17 subpoena.

From: ██████████ (USANYS) <████████>

Sent: Monday, May 3, 2021 4:16 PM

To: ██████████ (USANYS) <████████>

Subject: RE: final meeting before summer!

Yes. I weighed in, strongly, about this.

From: ██████████ (USANYS) <████████>

Sent: Monday, May 3, 2021 4:03 PM

To: ██████████ (USANYS) <████████>

Subject: RE: final meeting before summer!

Yes, thanks. Glad to see some of our discussion in the bullets below.

From: ██████████ <████████>

Sent: Monday, May 3, 2021 3:59 PM

To: ██████████ (USANYS) <████████>

Subject: FW: final meeting before summer!

FYI, as discussed some time ago.

From: Marshall L. Miller <████████>

Sent: Monday, May 3, 2021 3:45 PM

To: Jenna Dabbs <████████>

Subject: final meeting before summer!

All,

EFTA00031694

I am looking forward to tomorrow's White Collar Crime Committee meeting. Hard to believe it will be our last meeting before the summer.

Upcoming Events

We'll begin the meeting by discussing two exciting events scheduled for the fall: (1) the International Symposium, which will take place on November 29-30, 2021, and (2) the panel event featuring authors of prominent books on white collar crime, which is calendared for September 13, 2021. Although these events aren't for a few months, given the summer break, we'll spend a few minutes discussing tomorrow.

Speaker

During the second half of the meeting, we will be joined by Ken Blanco. Ken served for many years as a Deputy Assistant Attorney General in the Criminal Division, after service as an AUSA in the Southern District of Florida. After a stint as Acting Assistant Attorney General for the Criminal Division, Ken joined the Treasury Department's Financial Crimes Enforcement Network (FinCEN) as its Director. Ken recently left the government to join Citi as Chief Compliance Officer of its newly created financial crimes unit.

Rule 17 Project

The bulk of the meeting will involve a continuation of our discussion of the Rule 17 advocacy project. Since our last meeting, the working group and I have engaged in productive dialogue with the federal defenders and the federal prosecutors on our committee. Based on those conversations, we propose striking the "other than the victim" language we had proposed adding to Rule 17(c), which, in our initial proposal read "After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about an individual (non-corporate) victim may be served on a third party, other than the victim, only by court order." Striking the "other than the victim" language is intended to address concerns from both the Government (about victim safety) and from the Federal Defenders' liaison to the Rules Committee. In addition, we have also tweaked the cover letter to the Rules Committee to address these concerns, to emphasize that our proposal is intended to reduce ambiguity in the Rule as currently drafted, and to emphasize the fact that, without meaningful subpoena power, many criminal defendants are effectively limited to building their defense around information gathered and provided by the Government and are severely constrained in building their own affirmative defenses to meet the Government's allegations.

Both groups provided feedback (all in their individual capacities and not on behalf of their organizations), which we summarize below and hope to discuss tomorrow:

- The proposed revisions actually increase the authority of prosecutors by allowing them to more easily use trial subpoenas to obtain documents from third parties in advance of trial.
- Permitting subpoenas without judicial "gate-keeping" could spark backlash to the proposal.
- The Committee should consider revisions to Rule 17(b), which requires court approval of subpoenas for "named witnesses" where the defendant can't pay witness fees – a requirement that is logically challenging and only applicable to indigent defendants.
- The letter overstates equity arguments in describing the Government's access to more powerful investigative tools because: (i) the Government must satisfy a very high burden and (ii) the Government is constrained by Federal Rule of Criminal Procedure 6, the Privacy Act, and Department of Justice Policy with respect to the information it may subpoena and how that information may be used.
- The letter overstates the flaws of the *Nixon* standard, since the Government's robust discovery obligations adequately enable a defendant to understand the strengths and weaknesses of a case against him.
- Significantly expanding a defendant's Rule 17 subpoena capabilities may negatively influence the willingness of victims and witnesses to cooperate, and motions to quash provide an insufficient remedy to address this issue.
- The letter offers an inadequate rationale for limiting court approval to subpoenas regarding victims.

We hope to reach consensus on if/how to address the feedback above as well as on any remaining open issues. Ideally, the working group—with the Committee's approval—will then finalize and submit the proposal over the coming weeks. I have once again attached the latest version of the revised rule proposal (in clean and redlined versions), as well as the draft letter to the Advisory Committee on Criminal Rules that the working group has put together.

As always, please do not hesitate to reach out with any questions or comments regarding anything related to the Committee.

Best regards,

Marshall

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(W) [REDACTED] | (M) [REDACTED]

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