ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES
November 6-7, 2024
New York, New York

Attendance and Preliminary Matters

The Advisory Committee on Criminal Rules ("the Committee") met on November 6-7, 2024, in New York, New York. The following members, liaisons, reporters, and consultants were in attendance:

Judge James C. Dever III, Chair
Judge André Birotte Jr.
Judge Jane J. Boyle
Judge Timothy Burgess
Judge Robert J. Conrad, Jr.
Dean Roger A. Fairfax, Jr. (via Microsoft Teams on Nov. 7)
Judge Michael Harvey
Marianne Mariano, Esq.
Judge Michael Mosman
Shazzie Naseem, Esq.
Judge Jacqueline H. Nguyen
Brandy Lonchena, Esq., Clerk of Court Representative
Catherine M. Recker, Esq.
Justice Carlos Samour
Finnuala Tessier, Esq.[1]
Judge John D. Bates, Chair, Standing Committee
Judge Paul Barbadoro, Standing Committee Liaison
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Catherine Struve, Reporter, Standing Committee
Professor Daniel R. Coquillette, Standing Committee Consultant (via Microsoft Teams)

The following persons participated to support the Committee:

H. Thomas Byron, Esq., Secretary to the Standing Committee
Kyle Brinker, Esq., Law Clerk, Standing Committee
Shelly Cox, Management Analyst, Rules Committee Staff (via Microsoft Teams)
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Laural L. Hooper, Esq., Senior Research Associate, Federal Judicial Center
Rakita Johnson, Administrative Analyst, Rules Committee Staff
S. Scott Myers, Esq., Counsel, Rules Committee Staff (via Microsoft Teams)
Dr. Timothy Reagan, Federal Judicial Center (via Microsoft Teams)

[1] Ms. Tessier represented the Department of Justice.

Additional persons attended, at the request of the Committee, to discuss a proposal to amend Rule 17. They are listed on pages 17, 25, and 31 of these minutes.

Opening Business

Judge James Dever, Chair of the Criminal Rules Committee, began the meeting by welcoming meeting participants and thanking the staff from the Administrative Office of the United States Courts for arranging the meeting. Judge Dever specifically welcomed Judge Robert Conrad, Director of the Administrative Office of the U.S. Courts; Ms. Finnuala Tessier, who represented the Department of Justice in place of Principal Deputy Assistant Attorney General Nicole Argentieri; Professor Daniel Coquillette, Consultant to the Standing Committee; and Dr. Tim Reagan, from the Federal Judicial Center. Judge Dever noted three members had been reappointed to the Committee: Judge André Birotte, Judge Jane Boyle, and Catherine Recker.

Judge Dever then welcomed three new members to the Committee: Justice Carlos Samour, Shazzie Naseem, and clerk of court representative Brandy Lonchena. Judge Dever noted that Kyle Brinker began as rules law clerk for the Committee on Rules of Practice and Procedure and that Allison Bruff, former staff attorney for the Committee, had departed for a new career opportunity. Judge Dever welcomed members of the public attending the meeting in person or by video and thanked them for their presence. Judge Dever said that the Committee's next meeting would be in Washington, D.C., on April 24, 2025.

A motion to approve the minutes of the spring meeting passed unanimously.

Judge Dever asked the Rules staff to present updates on pending rules and legislation. Thomas Byron, Secretary to the Standing Committee, said that no proposed criminal rule amendments were expected to come into effect this year or next year. Other proposed rule amendments appeared in the meeting agenda book at page 90.

Mr. Brinker noted that pending legislation of interest was collected in the agenda book beginning on page 97. He mentioned the Trafficking Survivors Relief Act of 2024, which provided that a person who has been convicted of a nonviolent federal offense as a result of having been a victim of trafficking may move the convicting court to vacate the judgment of conviction, to enter a judgment of acquittal, and to order that references to the arrest and criminal proceedings be expunged from all official records. Mr. Brinker said he brought the bill to the Committee's attention because the provisions would not fit within Rule 29(c)'s requirement that a motion for judgment of acquittal be filed within 14 days after a jury verdict or the discharge of a jury. He also noted that bill's provisions did not appear to fall within the rules governing Section 2255 proceedings.

Rule 53

Judge Dever recognized Judge Mosman to provide an update on the work of the Rule 53 Subcommittee. Judge Mosman thanked Professors Beale and King for their assistance providing written materials to the Subcommittee both before and after the Subcommittee's last meeting. He also thanked Laural Hooper and others at the FJC for a comprehensive memorandum surveying a

wide variety of articles on this subject as well as relevant state and federal court procedures and experiences. Lastly, he thanked Zachary Hawari, the former rules law clerk, for a memorandum on the history of Rule 53.

Judge Mosman noted that the Subcommittee was formed to consider requests from various organizations to amend Rule 53 to allow broadcasting of some criminal proceedings and that the Committee continued to receive supporting materials from interested parties. Judge Mosman said that the request was to end, in whole or in part, Rule 53's general ban on broadcasting in federal criminal cases. He said it required an understanding of the policies underlying Rule 53.

Judge Mosman explained that there is a right to a public trial under the First and Sixth Amendments of the Constitution, but no interested party had suggested that current practice falls below any constitutional standard. Rather, the request sought to further greater transparency, increase trust in the judicial system, and improve civic education and understanding of how courts work. Judge Mosman recognized that the Committee on Court Administration and Case Management had recommended, and the Judicial Conference then approved, a policy permitting audio broadcasting of non-trial proceedings in civil and bankruptcy cases when no testimony is being taken.

Judge Mosman expressed Subcommittee members' concerns about fundamental differences between civil and criminal cases, including heightened due process, privacy, and security concerns in criminal cases. With the help of the Federal Judicial Center, the Subcommittee reviewed state-court experiences with broadcasting proceedings. Judge Mosman noted that the Minnesota Supreme Court undertook a similar review before amending its rules to allow expanded broadcasting.

Judge Mosman stated that the Subcommittee's review found little empirical research on court systems that allow broadcasting. He noted that the agenda book materials included a memorandum to the Minnesota Advisory Committee, which concluded that the methodology on most data regarding how cameras in the courtroom impact judicial outcomes is flawed. The memorandum explained that existing data is generally not applicable to populations other than the exact population studied because existing studies suffered from low sample size, self-reporting bias, and the inability to be replicated. The memorandum also stated that the data did offer a limited perspective on how cameras impact courts, but Judge Mosman questioned the reliability of that comment based on the memorandum's critiques of the existing data.

The research identified by the Subcommittee was fundamentally anecdotal. The Subcommittee found no reliable, empirical study from a state court that looks at whether potential jurors withhold sensitive information from broadcasted trials more than unbroadcasted trials. The Subcommittee also found no empirical study looking at whether jurors convict more often in broadcasted trials than unbroadcasted trials. The Subcommittee found no study that alleviates concerns that broadcasting criminal trials would have a negative impact on communities of color, both in conviction rates and in community perception of crime rates.

Judge Mosman reviewed social science studies not grounded in state-court experience. As an example, Judge Mosman explained that one study, entitled *Cameras in the Courtroom: The*

Effects of Media Coverage on Witness Testimony and Juror Perceptions, provided unreliable conclusions because it involved undergraduate college students serving as witnesses or jurors in fake trials that had (or did not have) cameras. The study showed the witness students a video of a fake robbery and compared the students' factual recall. Judge Mosman next noted one empirical study that found that expanded media coverage leads to an increase in sentencing lengths, although the study was limited to proceedings before elected judges.

Judge Mosman said that the materials also contained testimonials, including from individuals once opposed to cameras but who had changed positions. Judge Mosman pointed out that the Derek Chauvin trial was cited as a success of broadcasting in the courtroom, including by the trial judge. But a public defender in that trial noted that a defense expert witness had a severed pig's head placed on his doorstep in California and a defense counsel met a mob outside the courthouse that damaged his car. She attributed both incidents to increased media exposure. Judge Mosman concluded that state-court experiences provide few lessons for the Subcommittee. He invited interested parties to provide the Subcommittee with additional research.

Judge Mosman said that the identified research did not rebut the Subcommittee's concerns, including privacy and security concerns for those compelled to participate in criminal proceedings. These concerns were described by a memorandum by Professors Beale and King, which was included in the agenda book starting on page 105. Judge Mosman asserted that trial participants retain a degree of privacy and security interests even though they may be compelled to provide testimony. He thought the appropriate question was one of degree: to what degree do we require people who show up in court to sacrifice their privacy and security concerns?

Judge Mosman stated that these concerns are very real for jurors. He estimated that every trial judge in the Committee meeting has regularly had people in court tell them something that the person had never told anybody in their lives. But because they were obligated by oath to do so, the participants reveal sensitive information, such as their sexual and criminal histories. Judge Mosman commented that it is difficult to measure the amount of information that court participants might forego providing, but this should be a critical consideration. He said that this was similarly true for witnesses. Judge Mosman said there is already enormous reluctance to testify in federal court, particularly in cases involving sex crimes, Indian country, minors, and violence. Judge Mosman recalled a recent RICO case involving a motorcycle gang where the government had to compel a delivery driver to testify that he had delivered a package.

Judge Mosman noted that exceptions can be made, but he said that the result would be a patchwork system for who has to be subjected to enhanced media coverage. "What does that mean that not everybody is subjected to the same rules?" He also observed that it is difficult to know who has heightened privacy concerns. Judge Mosman said that he has had older victims who were as ashamed to admit that they had been defrauded and lost their money as they were to admit any other fact in their lives. Judge Mosman suggested that making an exception for this concern would be placing a broad exception into the rule.

Judge Mosman then surveyed other arguments in favor of broadcasting. He stated that one argument was that live broadcasting impairs the opportunity for artificial intelligence to misrepresent federal court proceedings. Judge Mosman questioned whether live broadcasting

would be the most appropriate way to counter AI misrepresentations. A second argument contended that broadcasting is needed for civic education. Judge Mosman agreed that civic education is important, but he questioned whether state courts had shown that broadcasting is an effective vehicle for civic education and whether civic education should trump privacy and security concerns for court participants. Citing *United States v. Donald Trump*, a final argument contended that some cases are of such particular importance that barring cameras "threatens to undermine democracy itself." Judge Mosman replied that conducting business as usual, where the same rules apply no matter who shows up in court on a particular day, is a critical element of democracy.

Accordingly, Judge Mosman stated that the Subcommittee recommended no action on the suggestion to amend Rule 53 but expressed an interest in observing future developments in court broadcasting and receiving additional studies.

Judge Dever invited Professor Beale to make additional comments. Professor Beale noted that the agenda book listed relevant state provisions and that the FJC study that Judge Dever referenced was expected to become available later in the month. Professor Beale also observed that one study cited to support broadcasting involved Chinese students viewing video materials but that the study's context likely differed substantially from American criminal proceedings. Professor Beale said that it would take several years to study the effects of the recent Judicial Conference broadcasting policy.

Judge Dever invited Committee members and liaisons to comment on the proposal to change Rule 53 and repeated that the Subcommittee unanimously recommended no change. A practitioner member agreed with the Subcommittee's recommendation and suggested that as the number of participants in a proceeding increases, the potential for harm increases. The member recalled a civil case in which the court regularly conducted virtual hearings with hundreds of participants. In the virtual hearings, one could see the attorneys and the background of their offices. At the close of one hearing, a participant in the virtual proceeding notified someone who was waiting outside the office of counsel for the receiver that the hearing ended. The individual then attacked the receiver's counsel, putting him in the hospital.

A judge member thought that there are ways to reduce the Subcommittee's concerns. He provided an example of a state rule that gives state trial judges discretion to permit expanded media coverage in a particular case, which the judge could decline to exercise when the case involves heightened concerns. He said that the rule works well and he had not confronted issues with it. The judge member suggested that broadcasting would not be appropriate in trials involving certain subject matters, types of victims, or other particular concerns. He observed that some cases garner increased community attention and allowing expanded access would permit the community to understand the proceedings better.

As an example, the member said that he had presided over a high-profile state case related to a shooting in the Aurora Theater. He observed that the case affected the community at large, and the community was very interested in it. The member recalled that he permitted media organizations to broadcast the feed from the court camera. Several victims had written the judge member letters protesting his decision, but later thanked him for allowing expanded access so that they could follow proceedings without being in the courtroom. He said that it also allowed the

community to learn about the proceedings without relying on the media to describe the proceedings. The member recognized that certain limitations to broadcasting he implemented, including restricting broadcasting during voir dire and having the court control the camera, reduced the risk of harm. The judge member said that he would not favor requiring broadcasting, but expanded media access can work when the rule gives the trial judge discretion. He recognized that getting relevant empirical evidence will be difficult, but he supported continuing to study state court experiences.

Judge John Bates, Chair of the Standing Committee, inquired whether the Subcommittee discussed the option of giving trial judges discretion to make decisions about whether to broadcast a particular proceeding. Judge Mosman responded that the Subcommittee had discussed this discretionary option. Judge Mosman observed that most states with expanded media access provide judges with discretion, but their limited experiences did not rebut the Subcommittee's concerns about the possible broad impact on justice. He said that individual cases do not answer how broadcasting impacts justice in quantifiable ways. For example, does it result in more convictions or fewer in some kinds of cases? Do people withhold information? Judge Mosman also asserted that expanded access in a few specific cases would not give the public a representative picture of how the justice system works.

Ms. Tessier identified two considerations for the Committee. First, Rule 53 prohibits broadcasting to the public, but it does not necessarily prohibit remote participation, such as a closed-circuit television at a remote courthouse to allow victims to watch proceedings. Second, she pointed out that a pilot project studying broadcasting would likely conflict with Rule 53.

Judge Dever invited Professor Beale to comment on the Subcommittee's pilot project discussion. Professor Beale agreed that a pilot project could not be authorized because it would conflict with the existing rule. She noted that there had been pilot projects under the civil rules, which do not include a total ban on broadcasting. But because it contains a total ban, Rule 53 would need to be changed to allow a broadcasting pilot project in criminal proceedings.

Professor Beale noted that the Subcommittee did not recommend changing Rule 53 to allow a pilot project. She explained that, even if authorized, a pilot project would require recruiting districts that want to participate. This itself could be problematic because districts that would want to participate could be different than districts that would not want to participate. Professor Beale said that the courts that participated in the civil broadcasting pilot program were pleased with the results, yet the Standing Committee and Judicial Conference determined that the pilot project was not positive enough and broadly applicable enough to justify amending the civil broadcasting rules.

Professor Struve, Reporter to the Standing Committee, recalled that two districts participated in the civil pilot project. Judge Bates noted that the pilot project also required the parties in each case to consent.

Judge Dever emphasized the importance of cooperating witnesses in criminal cases and the need to protect their physical safety. He noted that the Committee participated in a larger working group related to the topic of protecting cooperators because of the serious physical threats to cooperators in criminal cases. Judge Dever said that the recent broadcasting policy provided judges

with discretion in civil and bankruptcy cases when the proceeding does not involve witness testimony, but participants in criminal proceedings often reference cooperating witnesses even when no testimony is being taken. Judge Dever stated that the risk of additional exposure to cooperating witnesses influenced the Subcommittee's decision to recommend no change to Rule 53.

Judge Conrad commented on broadcasting's possible effect on the prevalence of jury trials. He stated that criminal trials are already a rare occurrence, and he expressed concern that broadcasting would increase security risks for participants and further discourage trials. Judge Conrad also agreed that broadcasting exacerbates safety concerns for trial participants. He recalled cases involving interstate criminal activity where people came to the courtroom and threatened prosecutors and jurors, and Judge Conrad asserted that broadcasting would increase this concern.

A judge member agreed with the Subcommittee's recommendation. She noted that courts of appeals often broadcast arguments, but how broadcasting could impact trial courts was less clear. She recalled the broadcasted trial of O.J. Simpson and expressed concern that broadcasting may have impacted how the lawyers in that case presented evidence. The member suggested that the more high-profile the case, the more access the media may want and the more broadcasting may impact the presentation of evidence. She cited the recent trial involving Johnny Depp as the latest example. She said that many state court judges had received requests for expanded media access in certain cases and predicted that the Committee would need to confront the broadcasting issue again in the future.

Another judge member recognized that an interested party indicated it intended to present additional information, and he asked how the Committee would proceed with new materials coming in.

Professor Beale explained that the Committee had several options. It could retain the subcommittee and put the matter on its study agenda, take no action and defer consideration, or take a final vote.

Judge Dever invited further comment on how the Committee should proceed. He thanked the FJC for its extensive study on state-court approaches to broadcasting.

Professor King explained that a final vote would remove the matter from the agenda, but the matter could be reproposed at any time.

Judge Dever observed that the Committee often receives suggestions related to matters that it had previously studied and resolved. Judge Dever affirmed that the Committee would continue to review suggestions that are submitted.

Judge Mosman suggested that the Committee vote on the Subcommittee's recommendation to take no action. He said that the matter could be appropriate for study if the Committee expects to receive a study soon but questioned whether a relevant, reliable study could be produced in the near future.

Judge Dever noted that the Subcommittee's recommendation was unanimous, and he proposed voting on the recommendation, acknowledging that the Committee may reexamine the matter in the future.

A vote to take no action passed, with one member voting nay and the DOJ representative abstaining. Judge Dever thanked Judge Mosman and Judge Conrad for leading the Subcommittee. Judge Dever repeated that the Committee will continue to review additional studies or other information brought to the Committee's attention. He thanked Judge Mosman and Judge Conrad for their work with the Subcommittee.

Rule 49.1

Judge Dever recognized Judge Harvey to discuss the Subcommittee's work related to Rule 49.1, noting that the agenda book materials on this topic began on page 237. Judge Harvey thanked Professor Beale, Professor King, and staff for compiling materials for the Subcommittee.

Judge Harvey said that he would speak about three topics related to Rule 49.1.

First, the DOJ suggested the use of pseudonyms to identify minors in public criminal filings instead of the minor's initials. Two bar associations that represent victims made a similar suggestion for the use of gender-neutral pseudonyms. The bar associations suggested that gender-neutral terms would serve as an additional safety precaution. Judge Harvey stated that the Subcommittee unanimously supported the DOJ proposal. He noted that the public defender representative had no objection to the proposal and that many federal public defender offices said they already use aliases or pseudonyms for minors. Judge Harvey also noted that this had been DOJ policy. Judge Harvey said that the Subcommittee discussed the option of using a consistent pseudonym for each minor across jurisdictions, but such a change would require a more complicated rule amendment. Tracing restitution across jurisdictions would be better addressed through collaborative discussion. Judge Harvey said that a concern arose that using a gender-neutral pseudonym would be difficult in cases where a minor's gender is relevant to the government's evidence. Accordingly, the Subcommittee agreed that it would not want a rule that requires the use of gender-neutral identifiers where the evidence is not gender neutral. Judge Harvey commented that the DOJ was open to the possibility of including a committee note that would encourage the use of gender-neutral identifiers where possible and necessary to protect the identity of the minor. Judge Harvey concluded that the Subcommittee would likely propose an amendment to Rule 49.1 consistent with the DOJ proposal and perhaps with a committee note encouraging the use of gender-neutral terms.

Second, Senator Wyden had proposed a change to fully redact social security numbers in public filings. Judge Harvey said that the Privacy Rules Working Group had been considering the issue for a number of years and that a Bankruptcy Rules Subcommittee decided that including the last four digits of social security numbers was still important in public bankruptcy filings. That subcommittee recommended, and the Bankruptcy Rules Committee agreed, to continue permitting the last four social security number digits in filings.

Judge Harvey said that the Subcommittee discussed the benefits and consequences of including the last four digits of social security numbers in criminal filings. He commented that the Subcommittee sensed no need for the last four digits, and an informal survey of federal public defender offices showed no objection to excluding the last four digits. He noted that the DOJ did not raise concerns about the full redaction of social security numbers, and the court clerk liaison did not see a need for their inclusion. Judge Harvey indicated that the Subcommittee would continue to research the possible consequences of including the last four digits in criminal filings.

Judge Harvey asked the Committee what the consequence to uniformity would be if the Subcommittee recommended a change to redact individuals' full social security numbers and other Committees declined to make a similar change.

Third, the Privacy Working Group recommended no further consideration on issues identified in pages 252 through 254 of the meeting agenda book. These issues were not the subject of any specific suggestion. Judge Harvey explained that these were areas where Rule 49.1 and other related rules could be clarified. He asserted that the Privacy Working Group made its recommendation because the Committee has limited resources and the Working Group found no evidence that the rules caused real-world problems.

Judge Harvey said that the Subcommittee unanimously agreed with the Working Group's recommendation, and he recommended that no further action be taken with respect to those issues. Judge Harvey then invited comment by the Committee.

Professor Beale observed that a change requiring pseudonyms may cause uniformity concerns. She said that the Committee should monitor related discussions in other rules committees so that the rules committees could collaborate on any proposed change.

Mr. Byron noted that the pseudonym suggestion was docketed as an agenda item for other committees, but the other rules committees had not yet discussed the issue. He said that the other rules committees hoped to first hear the views of the Criminal Rules Committee on the issue because the suggestion was first addressed to the Criminal Rules Committee. Mr. Byron agreed that rules uniformity is important and encouraged the Committee to make any change in alignment with the other rules committees.

Professor Beale observed that including the last four digits of individuals' social security numbers in public criminal filings presents a risk because a person's full number could be gleaned from the last four digits in conjunction with other personal information. She encouraged the Rules Office staff to research the risk of including the last four digits in public filings and to monitor how the issue progresses before the other rules committees.

Dr. Reagan noted that the Federal Judicial Center was conducting a project looking at civil and criminal public filings to find out why and how often social security numbers are not redacted. He said that the information could help the Committee understand the need, if any, for social security numbers in public filings. Already, he observed many cases where a person's social security number was included in an exhibit but was irrelevant to the litigation. Mr. Reagan said that the FJC would share the results when the study is completed if asked by the Committee.

Ms. Tessier said that the use of pseudonyms for minors is particularly important in criminal cases. She explained that 18 U.S.C. § 3509 reflects Congress's view that it is particularly important to protect the identity of minors in criminal cases and said that the DOJ would support a change to the criminal rules even if other rules committees decided not to make similar changes.

Judge Dever invited further comments. Hearing none, Judge Dever thanked Judge Harvey for chairing the Subcommittee. He said that the Subcommittee's goal is to make a recommendation regarding these issues at the spring meeting.

Rule 40

Judge Dever turned the Committee's attention to the suggestion, materials for which started at page 261 of the agenda book, regarding procedures for revoking or modifying pretrial release under Rule 40. He noted that the Magistrate Judge's Advisory Group (MJAG) submitted a comprehensive suggestion, which was included in the agenda book at page 266. Judge Dever said that he was inclined to appoint a subcommittee to study the matter. He invited Professor Beale to comment.

Professor Beale observed that the Committee previously encountered this issue but did not have enough information at that time to warrant exploring a rule revision. She thought that the MJAG suggestion provided the additional information to show that there is a need for a subcommittee to research the issue.

Judge Dever indicated that he would appoint Judge Harvey to chair the subcommittee and invited him to comment. Judge Harvey agreed that a subcommittee should study the issue, noting his personal experiences with Rule 40 demonstrated that the rule was confusing, and he observed that the Federal Magistrate Judges Association supported researching changes to Rule 40.

Rule 43

Judge Dever turned to the suggestion at page 284 in the agenda book regarding Rule 43 and the expanded use of videoconferencing in federal court. Judge Dever noted that Rule 43 had previously been the subject of proposals from judges advocating for the use of videoconferencing for Rule 11, sentencing, and revocation proceedings. Judge Dever commented that the proposals had always been from judges, never from the National Association of Criminal Defense Lawyers or from the Association of Assistant U.S. Attorneys. He said that the issue for the Committee was whether to appoint a subcommittee to study Rule 43, and he invited Professor King to comment.

Professor King said that the proposal argued changes to Rule 43 would promote efficiency and appease parties and counsel who would prefer videoconferencing for some proceedings. She explained that the proposal would change Rule 43 so that all kinds of pretrial proceedings could be held by videoconference, including Rule 11 and sentencing hearings. Professor King noted an FJC survey showing that most judges polled were amenable to some additional videoconferencing, but the survey did not specify which proceedings the judges would be amenable to. Professor King said that she did not see anything in the proposal that changed or supplemented the concerns that

were raised in prior Committee deliberations and asked whether the Committee believed reconvening a subcommittee would be proper.

A practitioner member observed that the Committee had previously determined that in person proceedings are best when a person is pleading guilty to a criminal offense, and he agreed that convenience and efficiency should not trump the importance of being in person for these types of proceedings. Accordingly, he recommended against continued consideration of the issue.

A judge member agreed that convenience benefits alone did not justify changing the rule. However, he said that a change could be valuable in circumstances where a party in a sparsely populated district must make substantial efforts to get to the federal courthouse.

Judge Dever noted that parties already may appear via videoconference with consent for initial appearances, arraignments, and in misdemeanor cases. He asked the Committee for its views on allowing videoconferences for proceedings in addition to what the rules already allow but excluding critical proceedings, for example, a proceeding where a defendant pleads guilty to a serious offense.

A judge member thought that parties should have some flexibility because litigants in large districts sometimes must travel many hours for a short proceeding. But he thought that some proceedings, such as sentencings, generally should not be conducted by videoconference. He indicated that he was undecided about whether the rules should allow a change of plea to be conducted remotely.

Ms. Tessier commented that the proposal would require the defendant's consent, which the DOJ considered important for the issue, and that a subcommittee had not considered an issue with the defendant's consent since the CARES Act. She suggested that a subcommittee could research whether there were issues with videoconferencing during proceedings under the CARES Act.

A practitioner member observed that this issue had been studied before, and though the CARES Act allowed for expanded videoconferencing for a period, she thought that the experience did not change the considerations that led the Committee to decide against changing the rule. She said that when the Committee previously considered similar changes, defense participants had suggested that any change should include a requirement of the defendant's consent. The member agreed with Judge Conrad that criminal trials are becoming more uncommon. Thus, she commented, many defendants appear in court only for their initial appearance, plea, and sentencing. She said that in-person appearances for such proceedings promote respect for the judicial system and keep proceedings focused on defendants.

Another practitioner member expressed a concern that defendants would feel pressured to consent to videoconferencing and observed that a similar concern was raised during discussions related to proposed changes to Rule 62.

A practitioner member commented that a distinguishing feature of the CARES Act period was that defendants were similarly situated during the pandemic, since proceedings were conducted regularly by videoconference. The member suggested that defendants were more

accepting of videoconference because "we were all doing it remotely." He agreed that defendants could feel coerced to consent now that defendants are not similarly situated and proceedings are not conducted regularly by videoconference. He thought that proceedings where defendants could be deprived of their freedom demand in-person appearances.

A practitioner member recalled a case near the end of the CARES Act period when courts also conducted proceedings in person. In the case, the court was scheduling a proceeding that would determine whether the defendant remained detained. The member said that conducting the proceeding in person, rather than by videoconference, would have delayed the proceeding and possibly caused unnecessary detention. She offered this as evidence that the process itself could be coercive by adding delay if a defendant wishes to appear in person.

A judge member observed that in his experience requests to appear remotely usually came from the defense. He asked whether the Committee thought that most defense attorneys would prefer in-person appearances at all proceedings.

A practitioner member responded that defendants often appreciate the option to waive appearance or appear remotely for routine matters, such as status conferences. He said that for proceedings that may deprive them of their liberty, defendants want to be present with their attorney so that they can better communicate with counsel. He noted that poor video quality could impair communication and cause the defendant distress. The practitioner member emphasized that communication between defendants and their attorneys is important, and appearing in person helps improve the lawyer-client relationship because it creates an opportunity for discussion outside of the proceeding.

A judge member thought that a rule change, if any, should be driven by the defense and not only for the convenience of the court.

Judge Dever observed that Rule 43 already allows a defendant to be absent from conferences about legal questions. He asked if the Committee could identify proceedings for which the rule should be changed to allow videoconferencing.

Judge Bates recalled fielding questions from judges about whether the rules permit videoconferencing for status conferences and said that these experiences demonstrated that the rules are not clear regarding when judges can use videoconferencing. He also said that he had held many proceedings by videoconference in misdemeanor cases since the end of the CARES Act period and had not experienced problems. He suggested that many in the federal judiciary supported expanding the use of virtual proceedings, though he acknowledged the support may have been because judges did not know they may already use videoconference for many proceedings. Judge Bates wondered whether judicial support alone warranted a subcommittee to study the issue. He said that he did not believe that felony pleas and sentencings should be remote, but he signaled that he was open to arguments that a rule change could alleviate the concerns previously raised.

Judge Dever indicated an intent to appoint a subcommittee and said that the first question to discuss would be what universe of proceedings should be covered by a rule change. He said that

the Committee appeared to agree that a change should not cover pleas and sentencings, and the rules already allow with the defendant's consent videoconferencing for initial appearances and arraignments.

A judge member asked whether the Committee should vote on the decision to form a subcommittee and questioned whether the Committee agreed in the way outlined by Judge Dever.

Judge Dever asked the judge member if it was the member's opinion that the issue had been studied enough by the Committee, and the member answered affirmatively.

Judge Dever asked the Committee to identify a proceeding that should be covered by a rule change. Judge Conrad offered competency hearings as an example. A judge member responded that he thought competency hearings would be excluded. Judge Dever said that he preferred to conduct competency hearings in person. Another judge member said that the Committee should consider permitting videoconferencing for competency hearings because transporting some defendants to court for such hearings can be difficult.

A judge liaison said that courts should conduct status of counsel hearings and similar critical proceedings in person.

Judge Dever invited further comment. Hearing none, Judge Dever thought that the Committee raised enough issues worth studying to appoint a subcommittee. He stated that he would appoint a subcommittee to report at the next meeting.

Rule 42

Judge Dever recognized Professor Beale to discuss contempt proceedings under Rule 42. Professor Beale stated that the proposal was based on a long and detailed law review article exploring contempt proceedings and finding possible improvements. She said that the article suggested changes to statutes and other changes that would be substantive or that at least sit on the border between procedure and substance. Accordingly, Professor Beale recommended that the Committee remove the suggestion from the agenda.

Judge Dever agreed with Professor Beale and invited comments. Hearing none, the Committee unanimously voted to remove the suggestion from the agenda.

Attorney Admission

Judge Dever recognized Professor Struve to report on attorney admissions. Professor Struve said that a Subcommittee had been formed to study a proposal to change the current attorney admissions practice, which results in some attorneys seeking to practice in multiple federal districts being required to take the bar exam in multiple states. She stated that the Committee previously dropped from consideration a proposal for a national bar of the United States District Courts, but it was continuing to consider other possibilities. Professor Struve thanked Judge Birotte, Ms. Recker, and Dr. Reagan for their support with the Subcommittee.

Professor Struve said that one proposal under consideration was to adopt a national rule that would foreclose federal districts from requiring attorneys practicing before a court in the district to be a member of the bar of the encompassing state. Professor Struve said that another possibility was to adopt a rule providing for admission to any federal district court for an attorney who is a member of any state bar or any federal court and is of good moral and professional character, similar to Appellate Rule 46. She noted that some contend that practice before trial courts is different than practice before courts of appeals. Professor Struve said that the Committee remains mindful of the need to consider whether there is rulemaking authority to address the topic consistent with statutory requirements. She said that the Subcommittee would continue to receive information on the topic.

Professor Struve said the Subcommittee also discussed requirements that out-of-district attorneys associate with local counsel. She recalled that the Subcommittee raised potential concerns about mandating that some districts have more permissive admissions procedures and concerns with how a change could affect local legal culture or impact client protection. She said the Subcommittee also discussed whether a change could implicate the regulation of unauthorized practice of law. Professor Struve stated that the Subcommittee was gathering information about views from state authorities on that topic.

Judge Dever invited comments. Professor Coquillette agreed that the judiciary's rulemaking authority to address attorney admissions was an important question. He observed that most federal districts have promulgated rules regulating attorney admissions.

Judge Dever invited further comment. Hearing none, he turned to the next topic.

Electronic Filing and Service by Self-Represented Litigants

Judge Dever noted that Judge Burgess chaired the Subcommittee and that Professor Struve had prepared a report on developments considered by a working group including participants from other rules committees as well.

Judge Burgess said that the working group focused on increasing electronic access and service by self-represented litigants. Judge Burgess explained that the draft rule would presumptively permit self-represented litigants to file electronically and require alternatives if a court order or rule bars such filings. Judge Burgess said that the working group was using Civil Rule 5 as a template.

Professor Struve explained that the project raised two policy ideas, one concerning service and one concerning filing. She said that the first idea would eliminate the requirement that a self-represented litigant separately effect paper service on litigants who are already receiving electronic notice. Professor Struve said that the second idea would presumptively allow self-represented litigants to access a court's electronic filing system. Professor Struve noted that courts would likely approach incarcerated self-represented litigants differently, recognizing that these litigants may lack consistent internet access. She concluded that many incarcerated litigants therefore would not be affected by the electronic filing change.

Professor Struve commented that the Committee would now have the benefit of other rules committees' discussions on the issue. She said that the Bankruptcy Rules Committee raised concerns about cases with multiple pro se litigants, a concern particularly salient to bankruptcy practice because a bankruptcy case can involve many creditors whose amount at issue does not justify hiring an attorney. In these cases, self-represented litigants may not understand their service responsibilities. Professor Struve said that the Bankruptcy Rules Committee appeared least likely to allow self-represented litigants to use bankruptcy courts' electronic filing systems. She also said that several Bankruptcy Rules Committee members were highly skeptical of a rule that would go further than presumptively allowing access to a court's electronic system.

Professor Struve said that the Appellate and Civil Rules Committees tended to think those concerns are distinct to bankruptcy because the committees thought having multiple pro se litigants in a single appellate or civil matter is unlikely. Professor Struve said that these two committees thus seemed open to considering this proposal. Professor Struve and Judge Dever invited the Committee's thoughts.

A judge member asked if the Committee wanted to continue studying the issue if the outcome might differ from the Bankruptcy Rules Committee.

Professor Struve said that the Committee did not need to vote on the issue, but a discussion would be helpful. Judge Dever thought the Committee would not be deterred by the Bankruptcy Rules Committee acting differently.

Judge Dever questioned whether the current rule—which allows pro se litigants access to electronic filing only when permitted by a court order or local rule—is adequate. He asked Committee members if they would object to the Criminal Rules treating the issue differently than the Bankruptcy Rules.

Professor Struve noted that the draft rule took into consideration court clerk concerns by allowing for alternatives. She predicted that if the draft rule was published for comment, the Committee would learn much from the public feedback. Professor Struve noted that the FJC was also discussing ways to provide additional helpful information.

A practitioner member noted that incarcerated individuals could have trouble accessing electronic filing systems. He also asked how courts would respond if an individual failed to file in a timely fashion due to difficulty accessing technology.

Professor Struve thanked the practitioner member for raising the questions and emphasized that the draft rule change would, at most, permit but not require electronic access. Professor Struve also noted that the federal rules do not account for the prison mailbox rule in the era of electronic filing.

Federal Judicial Center Research and Education Report

Judge Dever recognized Dr. Reagan to provide a report from the FJC. Dr. Reagan explained that the FJC had resumed reporting to rules committees and added to its report information on the

FJC's education division and history office because education had sometimes been suggested as an alternative to rulemaking.

Judge Dever thanked Dr. Reagan and noted that the full report appeared on page 428 of the agenda book.

Rule 17

Judge Dever turned the Committee's attention to Rule 17. He said that the Committee had been studying the issue for two years and began by discussing problems with the current rule. Judge Dever explained the timeline of the next day's panel discussion. He said that the panel discussion would help the Committee gather information, but it was not intended to be a drafting session for the Committee. Judge Dever recognized Judge Nguyen to further introduce the next day's discussion.

Judge Nguyen commented that the Subcommittee met 13 times over the preceding two and a half years and thanked all participants for their support. She said that the Subcommittee began by asking whether there was a problem with the existing rule and how the rule could be improved. The Subcommittee heard from many interested parties and learned that subpoena practice differs across the country. Some districts strictly apply the *Nixon* standard, a practice that discourages parties from using third-party subpoenas. In addition, districts have different procedures on how a party requests a third-party subpoena.

Judge Nguyen said that the Subcommittee studied several different issues. The Subcommittee studied procedural issues, such as ex parte and protective order procedures. The Subcommittee also discussed whether and how the *Nixon* standard should be changed. Judge Nguyen explained that in doing so the Subcommittee thought about two types of information: unprotected information and protected personal or confidential information. She said that the Subcommittee drafted frameworks for each type of information, but the draft language was merely a starting point to facilitate discussion.

Professor Beale noted that pages 442 and 443 of the agenda book had the list of questions for the speakers. She said that the speakers were encouraged to share personal experiences with the rule and to react to the draft rule language. Professor Beale explained that the Subcommittee invited speakers from varying districts and professional backgrounds, including a mix of prosecutors and defense attorneys, a privacy expert, and an individual speaking from the perspective of victims. Professor Beale detailed the timeline of the panel presentations and opportunities for Committee questions.

Judge Dever said that the Subcommittee studied the varying subpoena practices under Rule 17 and acknowledged that some districts have a limited third-party subpoena practice. He agreed that the draft language was not a recommendation but a way of thinking through issues. Judge Dever identified two questions for the Committee: is the draft rule an improvement and how would it affect court and lawyer workloads. A judge member observed that the proposal would permit parties to obtain more information than they could under the current Rule 17 as interpreted by *Nixon*.

Judge Dever noted that speaker biographies appeared in the agenda book. A judge member asked if the speakers had access to the draft language. Judge Dever answered that the panel members did.

Judge Nguyen commented that the agenda book included the draft rule language as well as a redlined version. Judge Dever asked for further comment. Hearing none, Judge Dever said that the meeting would resume at 8:30 a.m. the following day. Judge Dever adjourned the Committee until the next day.

The next day, Judge Dever welcomed meeting participants and noted that the meeting was intended for discussion of the proposal to amend Rule 17 of the Federal Rules of Criminal Procedure. He explained that the White Collar Crime Committee of the New York City Bar submitted the proposal and that Judge Nguyen was serving as chair of the Subcommittee. Judge Dever explained that the Subcommittee was studying potential problems with the current rule and potential solutions.

Judge Dever noted that the material for this issue began at page 438 of the agenda book. He repeated that the meeting was not meant to be a drafting session, but instead the Committee is interested in finding out how Rule 17 is being applied and if there are ways to improve it. Judge Dever thanked the panel for their time and asked meeting participants to introduce themselves.

Judge Nguyen again thanked the panel participants and explained the structure of the panel discussion. The first panel included:

Eóin Beirne, partner, Mintz Levin, Boston, Massachusetts;

Geremy Kamens, Federal Public Defender, Eastern District of Virginia, Alexandria, Virginia;

Professor Stephen Henderson, Judge Haskell A. Holloman Professor of Law, University of Oklahoma School of Law, Norman, Oklahoma; and

Alixandra Smith, Criminal Chief, United States Attorney's Office, Eastern District of New York, Brooklyn, New York.

Judge Nguyen recognized Mr. Beirne to begin the panel discussion. Mr. Beirne said that the *Nixon* standard is outdated and does not afford defendants their constitutional rights. He offered to illustrate this with his experience in the Varsity Blues cases from the District of Massachusetts, where more than 50 defendants—including parents of college applicants, school coaches, administrators, and testing proctors—were charged with conspiracy to commit fraud, bribery, and money laundering by bribing university officials to admit their children as athletes in sports they did not play or would never play at college level. The government took the position that the schools were victims of the fraud, that the students would not have been admitted if they had known they were not going to play the sports, and that donations have no role in admissions. Mr. Beirne explained that for the parents who did not plead guilty, the millions of documents and recordings subject to discovery contained a lot of highly sensitive information about people who had not been charged that the government had obtained through grand jury subpoenas, including academic

records, medical and mental health records of minors, and communications between spouses and between other family members. The Magistrate Judge entered a "very, very strict protective order" agreed to by all that covered who could access the material, for what purpose, to whom could it be shown as part of trial preparation, and how it must be redacted, stored, and destroyed. Mr. Beirne said that through snippets received from the government it became apparent to defense counsel that the schools' claims that donations didn't matter to admissions were false. As a trial date had not yet been set, the defense moved for Rule 17(c) subpoenas to two schools, which resulted in a large production of documents that refuted the schools' claims that donations played no part in admission. Later, in the trial of the first two parents, the court ruled that documents relating to school donations were inadmissible and could not be used to impeach witnesses from the school who testified that donations didn't matter to admissions. Those defendants were convicted. (The defendants included the exclusion of the documents in an appeal, and the Court of Appeals vacated the convictions on other grounds, Mr. Beirne explained.) In another case in front of a different judge, the court permitted the defense to use the documents to "thoroughly" impeach the testimony of the school witnesses that donations played no role, and that defendant was acquitted.

Mr. Beirne provided several takeaways. First, he said the government had no incentive to search for this "highly exculpatory" information because it did not fit within the government's theory of wrongdoing, and the defense met the *Nixon* standard only because it had received a snippet of the information by chance. Mr. Beirne asserted that a less onerous standard would afford defendants the constitutional right to compulsory process to properly prepare a defense, after which the judge would decide whether the information is admissible, a decision that may be appealed in the event of a conviction. Access to the material and use or disclosure of that material are very different things, he said.

Second, Mr. Beirne stressed the right solution for protecting sensitive material is a protective order, not in camera review. He stated that in the Varsity Blues case, it would have been practically impossible for the court to review the tens of thousands of documents received under the negotiated protective order; almost all would have been considered protected material under the draft. The protective order, he said, also required filing under seal, redactions, and anonymizations to protect privacy.

Third, Mr. Beirne said that the court correctly agreed that the government had no right to learn defense strategy when the defense was requesting documents, or to learn what the defense received. The process involved ex parte filings and an ex parte motion, and the court in his case correctly granted the motion to quash the government's subpoena to the school asking for everything it had produced to the defense. He noted that as with a grand jury subpoena, a recipient of a Rule 17 subpoena cannot be prevented from disclosing the subpoena, especially if they have a notification obligation under statute, such as FERPA.

Fourth, he said virtually all of the materials the defense received that were to be used at trial were turned over to the government per Rule 16. Everything else stayed hidden and governed by the strict protective order.

Fifth, Mr. Beirne commented that an interesting situation occurred where, due to ex parte filings, the court learned that the government may have possessed information that it did not know

was exculpatory. The judge gave the defense a choice: disclose documents in order to broaden the scope of *Brady* or hold the documents until required to be turned over, but not insist that the government violated its *Brady* obligations.

Sixth, regarding how to incorporate laws and other regulations into the decision about whether a defendant can access documents, in his case, Mr. Beirne said, the school cited FERPA as a basis for it not to turn over the relevant records, and the school provided notice to students, who got lawyers and intervened in the case. All that resulted was a reaffirmation of the protective order that was already in place, with the judge finding that the defendant's right to compulsory process outweighed any restrictions FERPA placed on the school's ability to disclose the relevant information.

Mr. Beirne recommended that to protect privacy, the Committee should leave it to the courts to impose strict protective orders which the parties and the recipient of the subpoena can negotiate, rather than distinguish between protected and unprotected information at the front end, which would lead to unnecessary delay and complication. Mr. Beirne further recommended that the rule not require the return of materials to the court for in camera review in white collar or large conspiracy or RICO cases, as it would be too unwieldy and impractical. He added that he agreed with the local rules in the District of Massachusetts that permit service of subpoenas without court permission once a trial has been set.

Judge Nguyen recognized Mr. Kamens. Mr. Kamens said that he was no fan of the *Nixon* standard but that the subpoena practice in his district works fairly well. Motions to quash do not require a substantial amount of the court's attention, parties serve trial subpoenas for witnesses and documents without first obtaining court permission, and subpoenas for documents before trial also work reasonably well, although he took issue with the *Nixon* standard.

Mr. Kamens provided as an example a case (being appealed by the Department of Justice) where the defendant was charged as a felon in possession of a firearm after a traffic stop. The defense argued that the court should dismiss the indictment due to selective enforcement by law enforcement in violation of the Equal Protection Clause, citing data showing a racial disparity in traffic stops. The court had granted the defense request for an ex parte subpoena for data on five months of traffic stops by the police department, data that a state law required it collect. After receiving the subpoena, instead of moving to quash, the police department representative negotiated with defense counsel and agreed that the department would produce a narrower set of information. The defense expert was able to conduct a regression analysis using the data and show the stops of black drivers far exceeded what would be expected based on the racial composition of the locations in which the stops occurred.

Mr. Kamens offered this example as a demonstration of the importance of negotiation in subpoena practice. He expressed concern that the language in the discussion draft would upend the practice of obtaining subpoenas that works reasonably well in most cases in his district. It would, he warned, increase litigation over terms such as "substantial doubt," "personal," and "confidential"; require more judicial involvement; and largely eliminate negotiations between the recipient and the parties about confidentiality issues and an appropriate protective order before the matter comes to the court.

Judge Nguyen thanked Mr. Kamens and recognized Professor Henderson. Professor Henderson supported expanding Rule 17 and emphasized the critical value of information privacy. He noted that a criminal defendant has constitutional rights not afforded to the prosecution. Professor Henderson suggested that Rule 17 should acknowledge this asymmetry by ensuring that if a defendant is denied access by statute, a court must consider the defendant's Sixth Amendment rights. Perhaps this could be phrased as whether the interests of justice and fair trial require access. Professor Henderson recommended requiring federal prosecutors—but not federal criminal defendants—to comply with state privacy laws. He noted that it was criminal defense attorneys who are seeking a revision of the rule, not prosecutors, who are very well able to operate under the current rule with the grand jury, special agents, cooperation agreements, and more at their disposal. He thought that the draft rule would substantially improve subpoena practice for defendants in districts that operate under the extremely narrow *Nixon* framework, and supported the disclosure restrictions in the draft.

Professor Henderson said that the draft rule should distinguish between protected and unprotected information by looking only to existing positive law, stating it would not be realistic to require judges to determine what is private or personal in every instance, and added that protected information should include trade secrets. He advised against using language that would encourage litigation about the scope of existing privacy protections and inquired whether the rule could allow a party to certify in good faith that information is unprotected. Professor Henderson recommended using a single exception for grand jury subpoenas rather than repeatedly referring to subpoenas other than grand jury subpoenas. He supported the draft's provisions regarding subpoenas sought by pro se defendants, and its ex parte procedures, but suggested that the rule give more guidance on what circumstances constitute good cause. Lastly, Professor Henderson recommended using a showing of "reasonably likely" in place of "likely" in subdivisions (c)(4)(B)(i) and (c)(4)(B)(iv).

Judge Nguyen turned to Ms. Smith. Ms. Smith began by expressing her general concerns with the draft rule. She said that she had seen no evidence that Rule 17 as interpreted by *Nixon* was causing problems. She thought the *Nixon* standard provides a transparent, flexible, and reasonable framework for the implementation of Rule 17, and judicial oversight of that standard is critical, because it allows each judge to tailor the standard to the needs of the particular case. Ms. Smith commented that she had not heard of a single case where the existing standard prevented defense counsel from obtaining materials necessary to defend their client. From the earlier description of the Varsity Blues case, she thought the standard did not prevent counsel from obtaining materials necessary to defend their client; the issue was a second line question about the court's decision to allow the defense to use those materials at trial. She said the government has the burden of proof; has a responsibility to protect the rights of parties, victims, witnesses, and third parties; and is constrained by laws, regulations, and policies not applicable to criminal defendants including Rule 6(e), the Privacy Act, the Crime Victims Rights Act, and Department of Justice Policy, which restrict what the government can or cannot use when it receives information pursuant to subpoena. Defense counsel are responsible to their client alone and are not subject to the restrictions on obtaining and disseminating information that regulate the government. Ms. Smith said that there is nothing unfair about the government having greater investigative tools.

Ms. Smith thought that the draft was vastly disproportionate to concerns that the *Nixon* standard is too narrow, that the draft would negatively affect the safety and privacy rights of third parties and cause extensive litigation. She anticipated increased litigation over the interaction with rules governing Jencks material, Rule 16, and the Fourth Amendment.

Ms. Smith observed that the draft rule did not sufficiently protect victim and witness privacy interests. She said that under the draft showing for protected information it would be significantly easier to obtain a subpoena than under the *Nixon* standard—allowing a subpoena for information that is not in fact admissible at trial without restrictions prohibiting the party from using the information for nefarious purposes, such as to embarrass or harass witnesses, making victims and witnesses less likely to cooperate in certain criminal cases. She criticized the draft as asymmetric, allowing the defense to subpoena information to disprove the offense, but not information to prove the offense, even though the government bears the burden of proof, and allowing defendants to obtain materials ex parte from victims and witnesses without the guardrails applicable to the government and without sufficient judicial oversight.

Ms. Smith asserted that protective orders are important but not sufficient to protect information in cases involving violence and the draft rule would particularly hurt the most vulnerable victims and witnesses who are less likely to have counsel that can advocate for their interests. These third parties may not understand terms in the subpoena or what information would be protected from disclosure. For example, a person receiving the subpoena might not know what "non content" information is and end up providing materials that should not be obtained by subpoena, or could reveal privileged information when they don't know what information is privileged. They may not know that the date on the subpoena must be the hearing date and not an earlier arbitrary date, she said, noting that there have been problems in her circuit with defense counsel putting dates on subpoenas that were not the hearing or trial date.

Ms. Smith said that though the rule would permit a third party to move to quash an inappropriate subpoena, many victims and witnesses may not be able to afford an attorney. Lastly, Ms. Smith suggested that the protection for personal and confidential information should be expanded to cover additional non-victim witnesses, such as eyewitnesses, cooperating witnesses, or other individuals whose personal and confidential information, like a home address, might be just as dangerous to obtain as for a victim. The draft also moves to a much earlier stage litigation about who is a victim; the facts that determine victims are often not litigated until sentencing.

Judge Nguyen invited questions from the Committee. A practitioner member asked Ms. Smith if she was referring to the Eastern District of New York or a broader area when she said that there was no evidence that Rule 17(c) prevents defendants from accessing needed information. Ms. Smith said that her assertion that she has seen no cases where defendants were unable to access information they needed for trial or that was exculpatory was based on her past experiences and review of the meeting materials. A member said she didn't understand how it is possible to say there is no evidence when in some districts the judges are not open to Rule 17(c) subpoenas and the court of appeals so closely adheres to *Nixon*; it is not an active area for the defense.

A judge member asked Ms. Smith if she was wholly opposed to the draft proposal. Ms. Smith responded that she had significant concerns with the draft. The judge member asked Ms.

Smith if she agreed that the defense does not receive information prior to trial under Rule 17 that is not trial related. Ms. Smith responded that it is supposed to be for trial, so that if the information is trial related the defense should get that and she did not know of information that is not trial related that the defense should obtain.

Another judge member asked if the issue stemmed from a disagreement over the purpose of the rule—for obtaining evidence for trial, or as an investigative tool. Ms. Smith agreed that the White Collar Committee would like the rule to be more of an investigative tool, but the purpose of Rule 17 is to gather evidence for trial, not to be used as a general investigatory tool, that the rule should be tailored to relevant and admissible evidence for trial and not open civil discovery.

Professor Henderson disagreed and said that the rule is meant for criminal defendants to prepare a defense, not simply to gather evidence for trial. There are no criminal trials in many jurisdictions anymore; it is a system of pleas, and this is the opportunity for the defense to make its case, and it would be too narrow-minded to think of this for trial only.

Mr. Kamens noted a conversation he'd had with an experienced judge who said he'd not experienced defense attorneys sending out subpoenas to harass people, because most cases don't go to trial. Mr. Kamens said that the risk that defense counsel would use a subpoena to harass a witness or for another improper purpose is low and any such case would be an outlier, that most cases are handled by public defenders and CJA lawyers who have an interest in not harassing but simply doing their job. If it was a risk, you should see it in his district where subpoenas are issued relatively freely, but the problem did not exist in his district. He said the rule should focus on the vast majority of cases, not outliers. The rule already provides specific protection for a victim's personal or confidential information. The comment that lawyers are providing dates that are not hearing or trial dates is not at all true in his district, the clerk's office always look to see if that date is correct. He agreed with Professor Henderson that compulsory process requires the defense get the evidence (*Washington v. Te*xas). He also objected to the draft provision that required a defendant to show "substantial" doubt about an element, barring access to material that cast some doubt. All are issues better addressed on the back end, not the front.

A judge member asked Mr. Kamens if he recommended keeping the current rule. Mr. Kamens thought that the *Nixon* standard is too restrictive, and a targeted proposal that would address that would be beneficial, but he did not support the broader, wholesale revision, which he thought would upend the practice in a number of districts around the country.

Ms. Tessier asked Professor Henderson how the rule could ensure the protection of the Fourth Amendment rights of the individual whose information is sought from a third party, and gave an example of a subpoena for a person's email from Google. Professor Henderson responded that it is unclear what Fourth Amendment interests would be implicated by that example, noting that a subpoena has long been treated differently than a search warrant, and the party of true interest is not the party being subpoenaed. But a recipient could protect the rights of the person through a motion to quash. Since Apple made it a market issue, he thought that similar companies would file those motions in the appropriate cases. He also added that in the decades he has been working on privacy, he has never heard someone say that criminal defendants defending themselves are a threat to Fourth Amendment interests. Ms. Tessier asked if the draft sufficiently protects the Fourth

Amendment rights of the person whose information is sought from unrepresented subpoena recipients, such as a subpoena to witnesses' employers asking for emails. Professor Henderson responded that the rule likely did not sufficiently consider the issue, though it is not a problem unique to Rule 17. It arises when a grand jury asks for the information and has not been well addressed.

Judge Bates asked the panel members whether the district in which they practice requires court approval before a trial subpoena can issue. Mr. Kamens, Ms. Smith, and Mr. Beirne responded that court approval is not required for a subpoena tied to a specific hearing or trial date, but court approval is required for production of documents in advance of trial. Judge Bates asked if they all believe that is the way Rule 17 should stay, and they responded yes. Mr. Kamens said that he would be concerned about a rule requiring judicial approval for trial subpoenas in all circumstances. Ms. Smith said the practice in the Eastern District and Southern District of New York, for trial subpoenas, is that unless you get a court order the documents are returnable to the court. So they go to both parties, and there have been difficulties with defense not providing those documents in a timely manner. There is no court approval before the subpoena is issued, but there is litigation after they come back about whether those documents can be admitted.

A judge member asked if a subpoena duces tecum is issued before trial, say there is a hearing but not a trial, is it returned to the court or to the issuing party. Ms. Smith said they are returnable to the issuing party, and then as a matter of practice they must be provided to the other party, unless the party seeks a court order not to disclose them to the other party. As a technical matter they don't go to the court unless there is a dispute over the subpoena itself or the documents. Mr. Beirne added that defense counsel often adds to a subpoena that orders the recipient to show up with the documents on the first day of the trial or hearing, "In lieu of appearing in court, call me and we'll negotiate," and that's often what happens. The production is a voluntary one and the subpoena recipients don't turn up in court. Rule 16 governs whether or not it is turned over to the government. Mr. Kamens agreed that is what happens in the Eastern District of Virginia as well.

A judge member asked how the current practice prevents disclosure of personal or confidential information to a party who serves a subpoena before trial. Mr. Kamens said that a recipient can move to quash but that typically the bar to disclosure is a privilege. Generalized concerns about confidentiality are not sufficient to outweigh the defendant's interest in a fair trial and compulsory process. He said it is a mistake to pair a privilege, which is a bar to disclosure, generally, with general notions of confidentiality—which are important but typically not sufficient to overcome the weighty interests of a criminal defendant defending himself.

Judge Nguyen asked Mr. Beirne how routine Rule 17 subpoena practice is in his district. Mr. Beirne said that Rule 17 subpoena practice is quite routine, it happens most of the time, and does not typically result in significant litigation because the production is negotiated. He recommended that a good practice of the magistrate judges in his district is to admonish the parties at the outset that if a 17(c) subpoena is served to obtain confidential information, the parties should agree on a mechanism to protect that information. If the parties can't agree, the magistrate judge would order something. A judge member asked in what percentage of cases Rule 17 subpoenas are litigated. Mr. Beirne estimated maybe 5% of cases involve a motion to quash.

Professor King understood that the judge asks the parties to agree on protective steps, but what happens when there is an ex parte request. Mr. Beirne responded that the judge issues a directive to each side: if you serve trial subpoenas, you are charged with making sure private information stays private. There is an understanding that each party may use ex parte subpoenas.

Ms. Smith contested earlier assertions that information obtained by defense counsel or defendants is not used improperly. She provided two recent examples, both in non-white collar cases, where even with protective orders, there was abuse. In one, the defense attorney filed a motion with photographs of the minor victim of sexual abuse that were subject to a protective order, and another in which defendants used discovery materials to obtain personal and confidential information of potential witnesses and threaten legal and retaliatory action against those witnesses. She expressed concern that a rule change expanding the information defendants can obtain would create an environment more conducive to abuse. A practitioner member asked Ms. Smith how the information in her examples was obtained and whether a protective order was violated. Ms. Smith responded that the information in both cases was obtained under Rule 16, which she said has more protections than Rule 17, and that the actions did violate the protective orders.

The practitioner member asked Ms. Smith if she had ever moved for a Rule 17 subpoena and if she had to make a motion to do that. Ms. Smith responded that she had not had to make a motion and said that the practice in her district is that the materials she receives are immediately made available to the other party. There is no judicial involvement on the front end, the party obtains the subpoena from the clerk's office and serves it.

Judge Nguyen turned the Committee's attention to the next panel, which included:

Michael Caruso, Assistant Federal Public Defender, Southern District of Florida, Miami, Florida;

Eric Olshan, United States Attorney, Western District of Pennsylvania, Pittsburgh, Pennsylvania;

Guy Petrillo, partner, Petrillo Klein Boxer, New York, New York; and

Renée Williams, Chief Executive Officer, National Center for Victims of Crime, Hyattsville, Maryland.

Judge Nguyen recognized Mr. Caruso, who began by saying what he liked in the proposal: the explicit ex parte process and the revision to the *Nixon* standard would be beneficial in many districts, and would slightly increase their ability to represent clients in his district. He had several concerns about the draft rule, however, including that the motion requirement for every subpoena would drain their limited time and resources, the category for protected information may be too vague, the standard for the disclosure of protected information was too restrictive, and the provision on unprotected information may provide less information than the subcommittee intended. He described the practice in his district—they do not need to go to the clerk's office to get a subpoena, the clerk of the court supplies subpoenas to them, and he has one on his desktop

that he can fill out and have one of his investigators serve. No motion is required unless the subpoena seeks pretrial production. Mr. Caruso said that a motion requirement for every subpoena would be a significant burden for practice in his district, which involves the second highest number of cases filed and the second highest number of trials, and a median time from appearance to sentencing for a case that pleads of seven months and for a case that proceeds to trial of fourteen and a half months. The motion requirement would delay the disposition of cases while not providing a corresponding benefit. He described a cooperative subpoena practice, where except in fewer than five very complex cases, he has called the owner of the information to ask if that person has the information, to agree on the best language for the subpoena, and whether service by email is acceptable. He offered an example that reflected his typical subpoena practice: his client was the CEO of a company, accused by the government (and by bank officers who were civil defendants) to have stolen money from a bank, causing its insolvency. They called the FDIC, who said they had the information and would respond to a subpoena, and they worked to narrow the scope of the subpoena so it wouldn't waste anyone's time. He said he knows no one in his office or the CJA panel, who together represent 90 – 95% of defendants in his district, who had ever used a subpoena to harass or coerce a witness. If we can't agree, he explained, the dispute goes to the court and the court resolves a motion to quash or modify, which is a rare occurrence.

Mr. Caruso thought that the category of protected information "personal *or* confidential" in the draft was too broad. He agreed with Professor Henderson that a rule change should be tied to existing law and promote certainty and uniform application across the country. There is uneven application of Rule 17 across the country and even within a single district. Mr. Caruso also identified language that he regarded as too restrictive: "cast substantial doubt, on the accuracy of evidence," which sounded to him like outcome altering information, wasn't clear as to whether it referred to only the information sought or combined with other evidence, and didn't clarify if an attorney would have to ask the judge to revisit the decision should a witness provide testimony suggesting a stronger basis for believing it would "cast substantial doubt." Similarly, "accuracy" may not include bias evidence. Combining these two hurdles, he said, is too restrictive and would lead to uneven application. Considering multiple levels of review—motion to quash and back-end review—there is already plenty of protection and deterrence, including protective orders, reputational and financial harm, and defense counsel are too busy and interested in representing clients effectively to use Rule 17 to harass or coerce an information holder.

Mr. Caruso closed with concerns about the standard "information material to preparing the defense" for unprotected information as a standard that could be applied unevenly and more restrictively than intended. He noted that the Court in *Armstrong* recognized the word "defense" could include both sword and shield claims, but that the context of Rule 16 supported a narrow interpretation. Also, the Court was concerned about the defendant's ability to compel government work product, which is not a concern present in the Rule 17 context.

Judge Nguyen recognized Mr. Olshan. Mr. Olshan agreed with Ms. Smith that the *Nixon* standard appropriately balances permitting defendants to obtain admissible evidence with avoiding unnecessary and resource consuming fishing expeditions. He questioned whether a problem existed to justify a complete rewrite of Rule 17. In his view, any lack of uniformity that exists in its application is more likely to benefit the defendant, with a broader interpretation of admissibility that permits defendant to obtain more than *Nixon* allows, rather than a narrower interpretation that

bars a defendant from obtaining what *Nixon* permits. Mr. Olshan said that the draft rule would cause even wider variation than currently exists under *Nixon* and its progeny, and increase the risk of harassment and embarrassment for victims, other witnesses, and non-witnesses, that is significantly minimized under the current *Nixon* regime.

Turning to the draft rule's privacy protections, Mr. Olshan thought that the protections afforded to victims would require litigation to define "personal and confidential" and should be expanded to all whose information is sought. For example, a person testifying about past conduct for which the statute of limitations has run, a child or other person who experienced trauma by witnessing the charged offense, cooperating witnesses, and codefendants are no less deserving of protection for their personal or confidential information than the victim of the charged offense. Mr. Olshan also thought that the draft rule's reliance on external privacy laws was misplaced and unclear about what information it protected. For example, would records subject to HIPAA be protected all the time, only when HIPAA might preclude disclosure, or only when HIPAA does preclude disclosure. Would medical records in the patient's possession or a family member's possession be protected? What if the patient signed a waiver several years earlier or had received notice of the subpoena? What if the issuing district is in a state that has one set of privacy laws, and the subpoena recipient is in a different state that has a different set of privacy laws? He said these ambiguities in the draft rule would cause cumbersome litigation, multiple times in a case, and often close before trial. And these decisions about the scope of privacy laws could affect noncriminal proceedings, without the benefit of expert practitioners in those areas. This would be especially burdensome where ex parte subpoenas are issued for recipients who are unrepresented or cannot afford counsel.

Regarding the issuance of subpoenas for non-trial proceedings, Mr. Olshan said that they do not object to Rule 17 subpoenas for sentencing or other specific hearings, like suppression hearings, a practice that happens in his district and many others. But by only using the word "upcoming," and rejecting the word "scheduled," the draft effectively decoupled subpoenas from any hearing, allowing subpoenas to issue at any time, and thereby would permit the kind of fishing expeditions that *Nixon* prohibits, because upon charge there will be a trial in theory "upcoming."

Mr. Olshan also expressed concern that the draft rule's standard for obtaining a subpoena for protected information was asymmetrical between the defense and prosecution, and provide the defense more access to information by subpoena than the government even though the government had the burden of proof and is subject to more stringent privacy laws than private parties, including Rule 6(e) and the Fourth Amendment. The defense could obtain inadmissible evidence for an affirmative defense, but the government could not obtain inadmissible evidence under the draft to disprove an affirmative defense.

He also was concerned about jettisoning the requirement of admissibility, which ensures that the information is linked to a particular hearing and prevents the type of fishing expedition *Nixon* criticized. Mr. Olshan said the draft standard allows the defense to obtain information, regardless of whether that information is reliable or admissible, such as extrinsic evidence of misconduct that would not be admissible under the Rules of Evidence, from subpoena recipients who may not have the wherewithal to challenge the subpoena.

For unprotected information, Mr. Olshan said that the draft rule would permit broad access to information from third parties including private journals and files stored on their personal computers or their personnel files at work, just on a hunch that they might contain information damaging to a witness's reputation. Unrepresented witnesses without the knowledge, resources, or incentive to move to quash a subpoena may respond with overproduction, and the volume of additional subpoenas would overwhelm the courts. It is not necessary to create a new, broad investigative tool for defendants from scratch in order to respond to the concerns expressed at the 2022 meeting.

Judge Nguyen recognized Mr. Petrillo. Mr. Petrillo welcomed the Committee's effort to amend Rule 17 and said that courts apply the rule with a great deal of variability. He noted that in a recent case in Connecticut, the judge ruled that all Rule 17 subpoenas require a motion, that defense counsel refrain from engaging with counsel for subpoenaed parties, and that any questions be directed to the court on the day of return. Other courts accept ex parte motions for Rule 17 subpoenas on a routine basis. In some districts, subpoenas are permitted for impeachment material, in others they are not. He believed the Rule calls out for textual clarity.

He recommended excluding business entities from the protections that the draft rule provides to victims, and to exclude business entity confidential information, because businesses are routinely represented by counsel, protective orders are routinely ordered and can be made applicable to businesses, and defense counsel routinely negotiates with the counsel for entity receiving the subpoena. It is rare that an accommodation cannot be reached and there is a motion to quash. Parties often agree to limit confidential information to attorney's eyes only or experts, and Rule 17 subpoenas are often used to obtain this information.

Mr. Petrillo also recommended that the standard for privacy protection be changed to "is protected under established state and federal law" to avoid litigation overload. He thought that the rule should not require a different factual showing to obtain personal and confidential information, as the measures that courts apply to protect confidential information, including in camera review, address the concerns. Further, Mr. Petrillo said that requiring a party to show substantial doubt about accuracy (in subdivision (c)(4)(B)(iv)) would be an extremely high burden that may not be possible to meet without viewing the documents. He recommended a reasonableness standard instead. Lastly, Mr. Petrillo commented that the draft rule's requirement (in the same subdivision) that the defense show that the information sought would likely support an affirmative defense would impose too high a burden. He urged abandoning the bifurcation of the standard and adoption of a simpler, more straightforward standard for both.

Judge Nguyen recognized Ms. Williams. Ms. Williams provided background about the National Center for Victims of Crime and said that her comments were from the perspective of individual, rather than institutional, victims. She stated that the premises of the proposed rule change—that *Nixon* prevents access to information that the defendant should be able to obtain and that Rule 17 prevents timely access to such information—were flawed regarding private or confidential information about victims. Ms. Williams explained that the draft rule would cause victims to turn over everything and further chill victims from coming forward. Victims are not represented, and already shoulder a burden when motions come up. She agreed with Ms. Smith that there are important differences between criminal proceedings and civil proceedings, where

they are represented and have put themselves at issue. Ms. Williams said that victims should always receive notice about subpoenas for personal or confidential information, be given reasonable time to be heard on a subpoena, be provided with information about potential legal support, and be entitled to a hearing on a motion for a subpoena. Ms. Williams said that the scope of protected information should include information protected by law and other personal and confidential information. She was concerned that removing *Nixon's* admissibility requirement would lead to untethered fishing expeditions, and that the standard for admissibility at a hearing other than at trial could be much lower and this could be a workaround for some defense attorneys. She added that everyone seems to agree that the lack of a definition of what is personal or confidential is very concerning.

Judge Nguyen invited questions from the Committee. A judge member asked if clarifying Rule 17 to promote uniformity would be more appropriate than implementing a more substantial change. Mr. Petrillo responded that clarification would be helpful for courts who do not deal with Rule 17 as often as others, and urged the Committee to consider extensive commentary.

Judge Nguyen asked if the restrictive interpretation of Rule 17 Mr. Petrillo described by the judge in Connecticut was common in that District. Mr. Petrillo responded that another judge in that district had also required a motion with redactions to protect defense strategy, but had not barred communication with the subpoena recipient.

Professor Beale asked whether small and large business entities are sufficiently similar to treat them the same under a proposed rule change. Mr. Petrillo answered that he did not have experience with subpoenas to small business entities who don't have a legal department and outside counsel.

Professor Beale asked all panelists whether judicial permission or additional information is required to issue a non-trial subpoena. Mr. Caruso said that he had used blank subpoena forms provided by the clerk of the court for hearings, trials, and sentencing proceedings. He said he'd never used that subpoena for plea negotiations or working out terms of a plea; each subpoena has to be tied to a particular hearing. Mr. Olshan said that in his experience subpoenas issue for sentencing and suppression hearings without prior court permission, but there has to be a scheduled date. Otherwise you have to go to court for approval. In his district, they do not have trial dates until much later. It could be a year or two even three years before they have a trial date. Mr. Petrillo said his district's practice is consistent with Mr. Olshan's description. Mr. Caruso said that in their district they get a trial date a week or two after arraignment, and the sentencing is scheduled on the date of the plea or the jury's verdict. He had experienced issues with timing where the judge schedules a suppression hearing for three days later and obtaining information by subpoena within that short period of time was burdensome.

Professor King asked each panelist whether the judges that they practice before permit subpoenas to obtain impeachment evidence and how the panelists negotiate subpoena terms with unrepresented subpoena recipients. Mr. Caruso said that he can obtain impeachment evidence by subpoena and that he also cooperates with unrepresented recipients about the terms of a potential subpoena, that he has never subpoenaed a victim directly, and that he found that the small mom-and-pop employers are often more protective of their employees' information because they often

view them as a family. His process is to ask do you have this information, would you be willing to provide it, and would you accept a subpoena. It had never been acrimonious. Mr. Olshan acknowledged that courts take varying approaches to impeachment evidence under the existing rule and he always comes back to the concept of admissibility, the impeachment information must be admissible. Mr. Olshan raised concern that if there is a set date, the government may not learn how many subpoenas have been issued by the defense or what information was obtained. In his district, there is no reciprocal production to the government if the defense obtained a Rule 17(c) subpoena. They might find out about if an unrepresented person receives a subpoena and the person contacts the government. He described a capital case in which a defense subpoena had issued to a third-party educational institution for a government witness's educational records, and the entity called the former student, which is how the government learned about it and negotiated the production of a set of records. That situation where third parties are producing records in response to a subpoena and no one would ever know about it would be amplified under the draft rule. Say the subpoena is issued to the friend of a victim or witness to a crime that says you are directed to produce all text messages and communications to the other person, the recipient says, "I better do it, this is from a court." Mr. Petrillo said when the defense seeks impeachment material it always comes to the attention of the government, it is generally not thought to be an area where defense strategy is implicated, and that he had seen courts take varied approaches to subpoenas for impeachment evidence. Mr. Petrillo supported a potential rule change that would require courts to address potential subpoenas to unrepresented parties at the outset.

A practitioner member asked how courts in complex cases treat subpoenas that are not necessarily tied to a hearing date, where the investigation has been ongoing, but the defense needs more than the government is providing through discovery and is unable necessarily to describe it with specificity or show it would be admissible. Mr. Caruso said that he had not experienced a case where a subpoena could not be tied to a hearing date. Mr. Olshan said that in his district (where hearing or trial dates are not routinely set), his practice had been to cooperate with defense counsel, but defense counsel retained the ability to file a motion for early production. Mr. Olshan also said that even where the defense had to obtain court permission, the court was often willing to take a permissive approach to admissibility, relevance, and specificity under *Nixon*. Mr. Petrillo said that defense counsel often raises potential Rule 17 subpoenas in the first pretrial conference to receive a ruling or guidance from the court as to how to proceed absent a date.

Professor Beale observed that Rule 17 currently requires notice when seeking personal or confidential information about a victim. She asked whether the panel had experienced problems under the current rule with victims not receiving notice or not understanding the subpoena or their rights as victims, including when a subpoena was issued to another individual seeking information about a victim. Ms. Williams responded that even sophisticated victims do not understand notices and do not know their rights. That's when they call her organization, because they are terrified and don't know what the notice means. Mr. Olshan said that the concern also would apply to nonvictim third parties. Mr. Caruso stated that there are significant guardrails in the draft, including motions to quash to handle these kinds of outlier issues. Defendants are entitled to exculpatory information in the hands of third parties, the question is are there sufficient guardrails, and he thought the judicial oversight at the front end, back end, and through the motion to quash are sufficient. Ms. Williams noted that there is very little litigation under the CVRA and there is no guidance, because victims' rights are not enforced. Mr. Petrillo said that the draft rule addressed what should happen

when a subpoena is issued to an unrepresented party and that the return should go to the court for review.

A judge member asked if the panelists had further comment about the concern over a lack of uniformity. Mr. Olshan said that there was not such variability in practice to justify the proposed changes, and the courts and parties around the country are managing. Mr. Caruso said that the lack of uniformity is caused by the *Nixon* standard and the inability of many defendants to submit ex parte applications under Rule 17. This means defendants must either reveal defense strategy through a public motion or to forego seeking the information. That is a significant unevenness that really rebuts the notion that defendants are all getting what they need, because in districts where you cannot file ex parte they are not filing.

Ms. Tessier asked Ms. Williams if her organization provided services to those negatively affected by crime but who do not meet the statutory definition of victim. Ms. Williams answered that her organization did. Ms. Tessier asked if victims have difficulty dealing with subpoenas under current practice. Ms. Williams said her organization provides different advice to those who meet the statutory definition of victim from those who do not. A practitioner member asked Ms. Williams if her organization worked with victims who had received grand jury subpoenas. Ms. Williams answered that she did not know and could provide the Committee with an answer later.

A practitioner member asked Mr. Olshan if he had ever served a Rule 17(c) subpoena. Mr. Olshan answered that he had. The practitioner member asked Mr. Olshan if he had ever made a motion to meet the *Nixon* standard. Mr. Olshan said that he may have but it would have been rare and a situation where there was no court date so we had to file a motion like the defense would. Mr. Olshan said that more often any such motion would have sought missing material like a certificate of authenticity for business records.

Judge Nguyen thanked the panel and said that the Committee would resume with the next panel after a break. After the break, the Committee turned its attention to the next panel, which included:

Matthew Fishbein, retired partner, Debevoise & Plimpton, New York, New York;

Lisa Miller, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, Washington, District of Columbia;

David Patton, partner, Hecker Fink LLP, New York, New York; and

Craig Randall, Chief, Criminal Division, Western District of North Carolina, Huntersville, North Carolina.

Mr. Fishbein described the process leading to the New York City Bar subcommittee's proposal, which requires a motion when the subpoena seeks personal or confidential information. He said the current rule is ambiguous and imprecise, and inconsistently applied. The *Nixon* standard does not balance the interests among the government, defense, and subpoena recipient, it involved a government subpoena not a defense, and its narrow requirements can be explained by the Court's discomfort that the government was circumventing the prohibition on using grand jury

subpoenas to obtain evidence against an already indicted defendant. *Nixon* was never meant to apply to defense subpoenas. Lower court applications of *Nixon* have hampered defense counsel's ability to obtain from third parties information that is often critical to preparing a defense. Prosecutors are hampered by *Nixon*, but less so because of their ability to obtain information from third parties by other means. Mr. Fishbein supported expanding the scope of Rule 17 to give the defense an investigative tool.

Turning to the discussion draft, Mr. Fishbein opposed the additional hurdles for obtaining a subpoena for protected information and the motion requirement for seeking a subpoena for nonprotected information. The City Bar's proposal also includes a distinct procedure for obtaining personal or confidential information. But Mr. Fishbein thought that a subpoena for protected information should be the only type where a party must first obtain court permission. In such a case, the court might issue a protective order, redaction, or other limitations. He opposed any requirements for issuance other than a showing that the information is material to preparing the defense. The drafts required showings are substantial burdens that are also problems with the *Nixon* rule. If the defense can't identify a specific item, it can't advocate its admissibility. How is the party supposed to know before obtaining the documents if they will cast substantial doubt on the evidence or establish an affirmative defense? The standard of material to preparing the defense is sufficient to prevent baseless fishing expeditions. The draft puts the concerns of individuals whose protected information that may be in the hands of third parties over the needs of criminal defendants whose liberty is at stake. In the civil context, when a subpoena seeks confidential information, the rule does not impose a higher burden on the party serving the subpoena, the party receiving the subpoena may file a motion to quash.

Mr. Fishbein also opposed requiring a motion for a Rule 17 subpoena. The Rule does not require a motion, and presently many courts do not require a motion, and the sky has not fallen. The comment's explanation for requiring a motion does not explain why a motion is required for a Rule 17 subpoena when it is not required for a grand jury or civil subpoena. Compulsory process with the threat of contempt is the point of a subpoena. The threat of abuse or harassment is present with grand jury and civil subpoenas, but typically there is no need for court involvement, the parties work it out, and no reason to believe it wouldn't work as well with Rule 17 subpoenas. He cautioned against additional court involvement because a party seeking a subpoena would have to reveal its strategy, creating a dilemma for defense counsel—defense would have to make a motion in the hopes of obtaining information material to the defense or abandon the attempt because of the risk of revealing strategy or the risk that information harmful to the defense would be revealed to the government. Requiring court permission would also impose an unnecessary burden on the court for subpoenas seeking unprotected information.

Judge Nguyen recognized Ms. Miller who said that the *Nixon* standard largely works, and even with the *Nixon* standard there are some examples of abuse, like attempts to use Rule 17 as a general discovery device and otherwise. Ms. Miller said she had not experienced this with the defenders in Miami, but more with private counsel. She said precedent post-*Nixon* has not limited the case to government subpoenas because the Rule itself does not distinguish between the government and the defense. A modest revision based on *Nixon* would be far more workable than the draft rule to address concerns about the lack of uniformity and that some defense counsel feel the *Nixon* standard is too stringent.

She discussed current practice under *Nixon*, stating that relevance is a low bar and many courts already apply the admissibility requirements as "likely admissible." As for impeachment, she said it often depends on whether it is admissible, and noted impeachment evidence has been sought improperly under Rule 17 in the context of post-trial Rule 33 proceedings. Ms. Miller thought that the lack of uniformity was not unique to Rule 17. She noted that districts vary greatly in the volume of litigation and crime rates, and such factors help explain the variations in how judges manage their own dockets. She said that the draft rule would increase variation in the courts in unexpected ways, such as variations in state laws governing privacy, and offered case examples where courts reached different conclusions about state laws.

Ms. Miller also argued that expanding defense access to information could lead to harm to witnesses and cooperators, despite protective orders. Under the draft, before a witness list is provided or a trial date is set, defense counsel could issue ex parte subpoenas to obtain jail calls of coconspirators and codefendants on the theory that information in those jail calls is material to the defense, even if not admissible, if the calls are not protected by state law, and the court would not review the returns. The calls could include information about cooperation, and the location of cooperators or witnesses, leading to harm. She provided examples of cases in which information disclosed to the defendant by the government during discovery was used by the defendant to harm and intimidate third parties:

- a case where counsel released material to the defendant in violation of a protective order, allowing the defendant to determine the identity of a cooperator, who subsequently was found murdered with discovery material scattered around his body;
- a case where a defendant posted on Instagram the statement of a codefendant he'd received in discovery, and falsely labeled the codefendant a snitch, leading to threats against the codefendant in detention; and
- a case in which a gang ordered the killing of a witness disclosed in discovery.

Ms. Miller turned to what would happen if the defendant was unrepresented and sought an ex parte subpoena. The motion would go to the court, but she questioned whether the court will be positioned without input from the government to evaluate whether the subpoena was appropriate and who would have standing to litigate that because the government may still be identifying victims at sentencing. She related a case in which the defendant had threatened to murder two victims and served a subpoena in violation of 17(c)(3) through standby counsel for the victim's personnel file with highly sensitive information, which was delivered to standby counsel and into defendant's possession.

Without the *Nixon* standard, Ms. Miller suggested, there may be no limits on the timing for obtaining impeachment evidence from third parties, as there are for obtaining impeachment information from the government. She suggested that the draft rule would improperly expand the scope of Rule 17 to provide criminal defendants with discovery tool beyond the limits of Rule 16. She recommended that the protections afforded to victims should also be afforded to other witnesses. Ms. Miller said that the draft rule would chill cooperation, create delay the disposition of cases when subpoenas are sought close to trial, and burden unrepresented and under-resourced individuals.

Ms. Miller, noting again that she could not speak for the Department of Justice, proposed codifying *Nixon* in part but changing the standard from "admissible" evidence to "likely admissible." She also proposed adding to a modified *Nixon* standard a carve out in the rule that would permit a trial judge to issue a subpoena, upon a party's motion, if it doesn't otherwise satisfy the requirements of the rule but is in the interest of justice and compliance would not be unreasonable or oppressive. She argued it would allow the judge who is best positioned to direct its case, a clear indication they could issue subpoenas more broadly, and allow for incremental change rather than dramatic change.

Judge Nguyen recognized Mr. Patton. He said that there is enormous variation in Rule 17 practice among and within districts. They not only apply the *Nixon* factors differently, but more important is the huge variation on ex parte policy. There are judges who will turn over material meant to be ex parte to the government, others will respect ex parte submissions, and others who will give you the benefit of the doubt, but it is possible they will disagree and disclose the material to the government. He also mentioned for the same reasons defense counsel may not go to the judge when a subpoena recipient refuses to respond.

Mr. Patton said it is quite common for the government to issue grand jury subpoenas post-indictment, beyond search warrants. He said the risk of abuse is greater but there is very little barrier to subpoena practice in the civil side. He also identified problems with the current rule, saying that defendants often do not receive material information and have fewer tools than the government. He thought that the most important changes to Rule 17 would be having a clear ex parte provision and making clear that Rule 17 subpoenas are appropriate for investigative purposes. Mr. Patton questioned why the rule would have a higher standard for obtaining protected information than unprotected information, rather than dealing with that through a protective order. Lastly, he thought that the draft rule would not contribute to violations of protective orders or abuse of information received under Rule 16.

Judge Nguyen recognized Mr. Randall. Mr. Randall agreed with several prior panelists that the proposed change was disproportionate to the harms cited for the change. He said that the *Nixon* standard established a reasonable and clear framework with workable boundaries for protecting privacy rights while permitting parties to obtain needed information for criminal hearings. Mr. Randall said it works well because it relies on well-established rules about what is admissible. The draft rule would create confusion, cause additional litigation, and raise concerns about the potential for abuse by allowing parties to obtain personal information. He termed the draft a complete overhaul that would add to Rule 17 a set of functions that the Rule was never designed to serve. Questions raised include how the rule would interact with the Speedy Trial Act, the Fourth Amendment, HIPAA laws and others.

Mr. Randall suggested the rule would be used primarily to obtain information to shame a witness and discourage the witness from testifying. He agreed with some other panelists that it would burden unrepresented individuals who would be unlikely to resist the subpoena and questioned why the additional protections applied only to victims and not all potential witnesses. For example, a child who witnessed a violent assault would not fit within the CVRA definition of a victim but should have the same protections under the rule.

Next, Mr. Randall recommended that the rule provide more guidance about the circumstances that would constitute good cause to obtain an ex parte subpoena. He raised concern that every defense subpoena would be an ex parte subpoena if the defense cites defense strategy, and without the *Nixon* standard the defense could seek vast amounts of information without input from the opposing party that would help the court determine if it involved victim information, or guide appropriate restrictions. Mr. Randall commented that defense counsel already fail to provide reciprocal discovery and the rule will enhance the disparity in discovery disclosures, and that the draft rule's procedures for in camera review would cause trial delays, raising questions about how the draft rule would interact with the Speedy Trial Act.

Judge Nguyen asked whether the DOJ thought there was a greater risk to victims and witnesses in jurisdictions in districts that interpret *Nixon* more permissively compared to districts that have no subpoena practice or interpret *Nixon* very strictly. Ms. Miller said that she had not noted a trend. Mr. Randall said that he also did not have a sense of current abuses.

A practitioner member responded to the expressions of uncertainty about what the defense needs that it is not getting by noting a case in which the defense asked for a certain group of emails it discovered it needed after reviewing discovery, but the government said it didn't think the emails were necessary. Because the perspective of the government is different than the defense, a rule change that would provide defendants with expanded investigative power is needed. He asked Mr. Randall for his thoughts about Ms. Miller's proposal to change the "admissible" standard to "likely admissible." Mr. Randall responded that he thought Ms. Miller's proposal was a reasonable approach. Mr. Fishbein said that a "likely admissible" standard would not provide defendants with sufficient tools to find admissible evidence because they need information that would lead to admissible evidence. Mr. Fishbein observed that the draft rule would also provide protections for nonvictims and questioned the risk of abuse identified by other panelists.

Another practitioner member asked Mr. Randall if he had ever issued a Rule 17(c) subpoena. Mr. Randall responded that he had. The practitioner member asked if a motion is required in such circumstances. Mr. Randall said that there is not a motion requirement and that there is little Rule 17 litigation in his district. He said that he had typically made Rule 17(c) motions for business records not provided earlier. The member asked if both the defense and government can serve Rule 17(c) subpoenas without court permission in his district. Mr. Randall answered that both parties can.

Judge Nguyen thanked the panelists and said that the Committee would resume after a break. After the break, the Committee asked questions to all panelists. Judge Nguyen started by asking the panelists if they had a reaction to Ms. Miller's proposal to change *Nixon's* admissible standard to likely admissible.

Mr. Fishbein repeated that likely admissible was a better standard than admissible, but he supported an even broader definition because the rule should have a mechanism for the defense to obtain information that could lead to admissible evidence. He said that a better standard would be the New York City Bar's proposed standard of "material to the prosecution or defense" from Rule 16 because it would address the concerns about fishing expeditions and was a phrase already well-known and understood.

Judge Bates asked Ms. Miller if an acceptable standard would be "likely admissible or likely to lead to the discovery of likely admissible evidence." Ms. Miller said that she understood why her defense colleagues would like the standard and preliminarily indicated that she may personally support it, but Ms. Miller repeated that she preferred a catchall interest of justice standard combined with a likely admissible standard. Ms. Miller said that this would better capture a broader set of circumstances because she had confidence that trial judges are best positioned to make these determinations, like Federal Rule of Evidence 403 determinations for a particular case.

Ms. Tessier explained that Ms. Miller's proposal included putting *Nixon* into Rule 17 and allowing for a court in a particular case to determine that the interests of justice or exceptional circumstances warrant a subpoena that does not satisfy even the loosened *Nixon* standard, which would require a court order. Ms. Tessier asked the panelists if this proposal addressed their concerns.

Mr. Fishbein responded that that proposal could be a broad standard, but he was concerned that the proposal was open to interpretation in different ways. He asked if the proposal would mean that a subpoena seeking nonprotected information under a likely admissible standard would not require a motion, but a similar subpoena based on the "interest of justice" would require a motion. Mr. Fishbein said that this would make a difference because he thought the rule should not typically require a party to make a motion before issuing a subpoena.

Ms. Tessier, repeating the caveat that the Department is not able to take a position on language that is not published for comment, explained that she was referring to a narrower, more tailored amendment where the change would leave in place subpoena practice as it had developed in different districts because the practice in different districts is attuned to the needs of those particular districts, but adding a loosened *Nixon* standard to the rule because that standard is not in the rule, so that most subpoenas have to abide by a loosened *Nixon* standard, and requiring court approval before obtaining a subpoena that does not satisfy the loosened *Nixon* standard.

Judge Nguyen assured participants that the draft rule was merely a starting point for discussion, not a recommendation by the Subcommittee. Judge Nguyen also emphasized that any participant's comments would not be construed as a commitment to that position, and that questions such as whether the rule should have more front-end protections or focus on the back end with protective orders are still very open. Judge Nguyen thought that even an incremental change to *Nixon* could have a significant impact on districts that apply *Nixon* strictly.

Professor Henderson expressed concern with a rule change attuned to particular districts because criminal defendants' constitutional rights are the same in every jurisdiction. He said that the variation among jurisdictions in subpoena practice is almost a secret code. Reading the rule gives you no idea what is going on and how varied this is. He said that is deeply problematic. The Federal Rules should be understandable and followed, and he stressed the need to spell out in the rule what is actually happening to promote more uniformity.

Mr. Kamens said that Rule 17 currently is not a viable vehicle for defendants in some districts because of the distance between the defense's good faith belief—based on reasons the defense can put in a motion—that a custodian of information has information that would be

material to the defense, and the complete absence of any knowledge about the content, source, or form of that information, which is critical to admissibility. The variation, aside from the ex parte issue, stems from some courts allowing movants to make reasonable guesses about the information and some not allowing movants to do so. Mr. Kamens said that a "likely admissible" standard would still have this problem if courts continue to demand information about the form, content, and source of the information sought.

A practitioner member asked if a "possibly admissible" standard would be a narrower change that would alleviate concerns about obtaining information without knowing the form and content of it, suggesting it would not be a fishing expedition but indicate good faith as an officer of the court that the custodian has some information but can't yet articulate that it is likely admissible.

Judge Dever also asked the panel if a potential narrower amendment that would (1) loosen the *Nixon* test slightly by allowing a subpoena for information described specifically, is relevant, and is likely to lead to the discovery of admissible evidence; (2) permit subpoenas to issue ex parte and (3) retain all the back end protections including protective orders and the motion to quash, would address the two problems they had heard about. Namely, the problem that in many districts defense counsel acting in good faith, with no interest in a terabyte of data because they will not get their fees and don't have the time, cannot obtain a subpoena. He said the defense should be able to get the camera outside the place where the Hobbs Act robbery happened, because the video was not in the discovery provided and they got the wrong guy. Or in a fraud case where the government didn't produce any of the information from an accounting firm that the defendant says he relied on in good faith, the defense in the Eastern District of Pennsylvania should be able to get that and they cannot. And the other problem is that some districts courts require anytime you issue a subpoena, whatever you get, you have to give it all over, even inculpatory information, which the defense would have no obligation to produce under the rules. The better practice is to recognize that the defense will comply with Rule 16's requirement to turn over whatever it will use at trial.

Mr. Beirne supported Judge Dever's suggestion because untethering the standard from admissibility is what judges are doing in the districts where the rule is working, and is the right thing to do. Mr. Patton agreed and said that a narrow fix to *Nixon* and an ex parte provision would solve 90% of the problems.

Ms. Miller asked how an ex parte provision would interact with the requirement of notification to victims. Judge Dever responded that such a change would not change the notification requirement in (c)(3). Judge Dever also stated that the fundamental problems are that meeting the *Nixon* standard is too difficult in some districts and that courts require all information produced by any subpoena to be disclosed to the other side. Ms. Miller thought the crime scene video should be obtainable, and that Judge Dever's suggested change would raise the floor, similar to her own unofficial proposal.

Mr. Fishbein said that he preferred a likely to lead to admissible evidence standard more than a likely admissible standard, but he thought that defense counsel could live with Judge Dever's suggestion. Mr. Fishbein also thought that the rule should have a mechanism so that parties are not required to share the information, but another way to do that other than an ex parte motion

is not requiring a motion to issue a subpoena so there is no notice to the other side about why the subpoena is necessary. Mr. Fishbein questioned the need to seek an ex parte order in every circumstance with the possible exception of when a subpoena seeks personal or confidential information.

Judge Dever said that he was referring to having no need for a motion before the issuance of a subpoena but having a protective order that the parties agree to, the opportunity for negotiation of the scope and if needed, a motion to quash. A judge member asked if this would apply to both protected and nonprotected information. Judge Dever responded that for purposes of getting others' reaction, yes it would.

Mr. Randall supported a narrower change similar to Ms. Miller's proposal. He thought that the standard should remain tied to admissibility but could be changed to likely admissible. Mr. Randall stated that this change would lessen the concern about ex parte procedures because there would be greater ability to identify and set bounds on what can be obtained through that standard, providing more control on the front end of the process. Mr. Kamens also supported the suggestion.

Professor Henderson said that the suggestion would be an improvement and proposed including a provision that would permit obtaining potentially exculpatory evidence regardless of its admissibility. Mr. Caruso said that an explicit ex parte process was critical, but he thought that districts that read *Nixon* very restrictively would continue to do so under a likely admissible standard. Mr. Caruso preferred a standard where a defendant could obtain information helpful to the defense, which would also incorporate exculpatory evidence.

Judge Bates questioned the feasibility of applying a "possibly" admissible standard. He thought that this standard was nearly limitless but could imagine applying a "likely" admissible standard.

Judge Conrad thought that a fundamental question was whether Rule 17 relates to trial documents or is a discovery tool. Judge Conrad said that when defendants receive information through an open file policy, that is giving the defense more than it's entitled to constitutionally. He acknowledged that defendants may sometimes not receive admissible or exculpatory evidence through an open file policy because the government does not possess the evidence, or because its theory of the case is fundamentally different from the defense perspective. Judge Conrad asked the government representatives if they opposed thinking of Rule 17 as a potential discovery tool for documents not in their possession, or if they still thought of Rule 17 as limited to the production of trial documents.

Mr. Kamens asked Judge Conrad if he meant discovery tool in the Rule 16 sense or as an investigatory tool. Judge Conrad responded that Rule 17 could be reformed, and the government could continue to allege that defendants are trying to use Rule 17 as a discovery tool in a way not intended by the rule. Mr. Kamens answered that Rule 17 is a tool of investigation, when we are seeking information prior to trial. Ms. Miller said that the government may still oppose the use of Rule 17 as a general discovery tool, but she asserted that the Committee did not need to decide the question when deciding whether to amend Rule 17. She explained her position was in part based on the many cases, like *Kaley*, discussing how discovery is limited in criminal matters because of

the important differences in criminal and civil systems and the interests served by those systems. She said that one could conceive of Rule 17 as a quasi-discovery device for something that is admissible or implicates a trial issue, but not a general discovery device for broad discovery purposes.

Professor Henderson encouraged the Committee to think about how a change could implicate the Sixth Amendment's right to a public trial. Judge Conrad responded that the Committee was thinking of tying subpoenas to a hearing or trial date, which would be inconsistent with using Rule 17 as a general investigative tool. Ms. Miller clarified that she was including the use of Rule 17 for trials or other evidentiary proceedings, including a suppression hearing.

A practitioner member said that like a grand jury subpoena, production under Rule 17 is an investigative tool, and the information received may be information that the party must provide in discovery. The member said she was struck by how many districts do not require an up front motion. She noted that if counsel issues a subpoena, currently the information is returned to counsel. She asked how it would impact practice if a change required certain protected information such as victim information to be returned to the court, perhaps not necessarily for in camera review, but for the court to decide how the information would be released to the requesting party. Mr. Caruso said that for his practice the change would be slightly impactful by changing the time it would take to receive information. He thought that at the beginning it would take longer, but as local practice developed it would be shorter.

Professor King observed that there was support for the ability to secure a subpoena without a motion in some circumstances. She asked for confirmation that the current practice was that (1) a motion is not required for a subpoena for a document for trial; (2) it should be required if the requesting party is pro se; and (3) it may be required for an ex parte subpoena, depending on the jurisdiction. She asked whether that description was consistent with the panelists' understanding of the current practice or what the panelists thought would be appropriate.

Mr. Kamens responded that in his district a motion is not required when the subpoena is tied to a trial or hearing, but a motion is required when asking for a return before a trial date and the subpoena is not tied to a specific hearing. That motion would be ex parte if they did not want to share the rationale for seeking the subpoena. Mr. Caruso said that practice in his district is similar, a motion is not required when tied to a hearing, trial, or sentencing date, but a party would need to make a motion to receive information before a hearing when a hearing has no date set but he is fairly confident a date will be set. He also noted that if he served a trial subpoena and the recipient refused to produce the information until the trial date, he would file a motion asking that information be produced immediately. Mr. Patton said that the previous descriptions were consistent with practice in his district where they can freely get a subpoena from the clerk that is stamped and signed and send it out without bothering the judge. He noted that subpoena recipients often produce the information well in advance of the hearing date, because the recipient just sends it or through discussion.

Ms. Miller provided an example case where the defense moved ex parte and under seal for the issuance of subpoenas to the defendant's employer and multiple state agencies, directing compliance on a date before the trial that was not tied to any hearing. The government argued that

it violated Rule 17 because the defendant needed advanced court permission when the subpoena was not tied to a particular hearing or trial date. The court later questioned the relevance of the requested information and specificity of the requests. Ms. Miller said that in her experience parties usually did not need a motion if no victim issues were implicated and the subpoena was tied to a specific hearing or trial. But a motion would be required to receive prehearing production.

Mr. Kamens said that practice in his district is similar, that as long as we put the trial date, the clerk's office will comply. He said he could ask for the documents to be produced earlier so the recipient need not show up at trial and there is often negotiation about that. Mr. Fishbein questioned the need for a motion to seek prehearing production, particularly in districts where trial dates are not set for many months, and did not understand what purpose is served by the motion requirement. Mr. Randall said that in his district parties need not make a motion when the subpoena is tied to a hearing or trial date. Mr. Randall also thought that the more the standard for issuing a subpoena becomes untethered from admissibility, the more concerns arise from subpoenas that are not tied to a specific hearing or trial date. Admissibility is what tethers it to the trial or hearing; if you sever that, it becomes a completely different beast.

Professor King observed that the admissibility standard seems to be not only the lynchpin to a particular proceeding as opposed to wide open investigation, it also prevents parties from obtaining certain information, like privileged information that would not be admissible, or impeachment information when the relevant witness may not testify. She asked if a likely admissible standard would change how courts approach impeachment and privileged information. Ms. Miller said that in practice some courts currently use a likely admissible standard and adopting it would do the same work. But she raised concern that a loosened standard such as possible would pose too much risk that defendants could use subpoenas to advance interests other than defending their criminal case. She noted that often there are parallel civil suits, particularly in white collar cases, for example, where information inadmissible in the criminal case could provide an advantage. Mr. Kamens questioned whether the admissibility standard is what bars disclosure of privileged information and suggested that privilege bars disclosure regardless of the Rule 17 standard and that a recipient is entitled to invoke that privilege in response to the subpoena. Mr. Kamens also emphasized the importance of impeachment information and said many places will not allow a subpoena for impeachment alone, but that impeachment is often critical to the defense and the outcome of the case. Mr. Caruso questioned the risk raised by Ms. Miller that defendants would seek subpoenas to advance improper interests, and that those are outlier cases. The defense attorneys he knows are not interested in that; they are interested in advancing the interests of their clients under the Sixth Amendment.

A judge member said that a core disagreement was the purpose of Rule 17: one side viewed Rule 17 as limited to information needed for a hearing or trial and the other side viewed Rule 17 as an investigatory tool. He didn't know how the Committee can amend the rule without knowing its purpose. He invited Ms. Miller to address this point. The judge member also asked how an interest of justice standard would improve uniformity, because any trial judge can justify a decision one way or the other under that standard. Ms. Miller responded that she thought the disagreement about the rule's purpose did not need to be resolved to achieve a modest, incremental change in a rule and referenced Judge Dever's statement that it can be better even if not perfect. She asked whether Rule 16 should be amended in addition to or instead of Rule 17 if the Committee decided

that the defendant should have a general discovery tool. Rule 17 is a procedural rule, in her view, and if the Committee wants to take on the broader project maybe it should consider the interplay with Rule 16. Mr. Randall agreed with Ms. Miller. Ms. Miller also pointed out that courts vary in how they approach other issues, such as Fourth Amendment protection. Professor Henderson commented that the Rules should be written clearly to apply to everyone. Rule 16 is about discovery rather than investigation, and he questioned whether a defendant has a right to investigation at all if Rule 17 does not provide it. Mr. Patton supported discussing the purpose of Rule 17 and questioned whether the current rule focused only on trials. He said that Rule 17(c) currently contemplates documents being produced well in advance of trial, and no one expects that documents are dumped on someone's desk the morning of opening statements. So he did not view the changes being discussed as radical.

A judge member said that he thought Ms. Miller's position was that one could take a limited view of Rule 17 and still enact within that view the modest changes that Judge Dever proposed and save for another day changes that would transform the purpose of the rule. Ms. Miller said that description was correct and repeated that she preferred adding a provision giving modest discretion to the trial judge through an interest of justice provision. The judge member asked if both proposals kept the rule within a limited purpose. Ms. Miller answered that they did.

Another judge member asked Ms. Miller if her proposal would still allow some investigatory discovery and whether likely to lead to admissible evidence is investigative. Ms. Miller responded that the status quo allows some investigation with the *Nixon* standard, it just has to be tied to the concepts in that standard. The judge member asked if a loosened *Nixon* standard would be permissible for investigative purposes and not merely what is admissible for trial. Ms. Miller answered that it would, but repeated that the status quo permits some investigation.

Judge Nguyen invited more comment. Ms. Tessier asked defense counsel what protective measures beyond protective orders they would recommend for protecting witnesses and cooperators if the *Nixon* standard were loosened, given that that has already occurred under Rule 17. Mr. Patton recommended the measures outlined in the New York City Bar's proposal. Ms. Tessier asked if he was referring to the provision requiring a motion if a subpoena requests personal or confidential information. Mr. Patton said that he was but only as long as the other changes were adopted as well. Mr. Fishbein also identified subsection (i) of their proposal as a protective measure, that provides that the Court may for a good cause and based on specific and articulable facts require a party to obtain court approval before issuing a subpoena, so if the government thought that there were vulnerable witnesses or victims, this would be a way for them to raise that issue and ask for the court's oversight.

Professor Beale asked the prosecution panelists about any concern they had with the draft rule allowing a subpoena for unprotected information material to the prosecution or defense and that is not reasonably available from another source without meeting the higher standard for protected information. Maybe it is the camera pointed toward the robbery, or casino records in a case where the defendant says he won money at a casino and the money is not drug proceeds. Ms. Miller said that such a provision should not be adopted. She said that such material is not constitutionally required to prepare an adequate defense. Ms. Miller inquired whether there could be a pilot project for a proposed rule and suggested a modest change would be most appropriate.

Professor Beale asked if her suggestion represented the modest change she referred to. Ms. Miller responded that the modest change she would propose was closer to the likely admissible standard.

Judge Nguyen thanked the panelists.

After a break, Judge Dever reconvened the Committee to discuss the issue. Judge Nguyen encouraged the Committee to think about unintended consequences. She observed that many panelists agreed that the Rule 17 practice should not be changed or restricted for those districts that have their practice settled. She invited comments from the Committee members.

A judge member asked if there was agreement on a solution that would help and not harm subpoena practice. He said that his district rarely confronted Rule 17 issues.

A practitioner member questioned whether a change to a likely admissible standard would have any practical effect.

Another practitioner member agreed and questioned whether a modest change would solve the problem and said he could imagine reasons why the interest of justice standard will not work. The practitioner member expressed interest in resolving the disagreement about the purpose of Rule 17.

A judge member thought the only critical distinction was Rule 16 versus Rule 17, intraparty or third party, not discovery versus investigation. He said that he did not believe the discovery label was important. The judge member favored a much more limited approach, like what has been discussed today, and noted there was lot of common ground among the members and panelists. He acknowledged the defense would not be as happy as they would be if we did something much more drastic, but it would solve many of the problems.

Another judge member agreed that an incremental change to the *Nixon* standard was probably warranted and wanted to study how the issue develops.

Ms. Lonchena noted the difference in districts on whether blank subpoenas are handed out freely or available only by motion.

A judge liaison thanked the Subcommittee and reporters. He thought that *Nixon* is too restrictive and should be incrementally broadened. The judge liaison agreed with Judge Dever's approach and favored allowing investigation in connection with a proceeding or hearing. He said that he thought judicial review should be limited to what is needed to serve the purposes of that review, but that front end judicial review was needed when there is an unrepresented party, and for the victim provision already in the rule. He questioned the value of additional judicial review before subpoena issuance, noting that when the subpoena sought protected information the rule could require production to the court and protective orders.

A practitioner member asked a judge member how he thought courts would apply a likely admissible standard, which she thought practitioners favored. The judge member responded that he thought it would not change anything and that likely admissible is already the de facto standard

because at the front end there is too little knowledge of the case for him to make a decision about what is admissible and he ends up deciding what is likely admissible.

Ms. Tessier agreed with an incremental approach. She too thought that the distinction between investigation and discovery was less important than the question of what information a party may obtain. Rule 17 is already used for investigative purposes, but it is for investigating information that is admissible or likely admissible. She said her concern was allowing investigation into tangential or collateral issues. She thought the Committee would find more support among prosecutors with a narrow, incremental change and that they agree likely admissible is how *Nixon* is interpreted in most districts and would accept that change. Ms. Tessier repeated her support for an interest of justice exception, noting there is a good example of that in Rule 15 for depositions. There might be particular information that is very important to the defense, but they cannot yet articulate why it would meet the likely admissibility standard, and it would be left to the judge's discretion, so that courts could assure that subpoenas are not misused.

A judge member supported a narrow change by addressing *Nixon* directly along the lines of the proposals by the prosecution panelists and expressed interest in the interest of justice exception. He expressed concern about the burden on the court if the rule were changed to require more judicial involvement before issuance, and that ex parte motions would be difficult for judges to decide on the front end. The judge member also supported acknowledging that the rule is an investigative device.

A judge member said that discussing the purpose of Rule 17 was important and supported acknowledging that Rule 17 is investigatory. He said the thought they were all on the same page in the view that the rule is investigatory because it allows the defense to obtain information that it would not otherwise obtain. It is the only way the defense can get anything from a third party. The judge member supported adopting a standard similar to likely to lead to admissible evidence or material to the defense, which are more consistent with the investigatory purpose. He said that he was not inclined to tie the rule to admissibility. He observed that many were happy with current Rule 17 practice, and he agreed that incremental change would be appropriate, including changing the admissibility standard and ex parte procedures. The judge member supported a procedure for a defendant to obtain information ex parte without revealing defense strategy, and suggested that the rule could incorporate procedures where practitioners are happy with Rule 17 practice.

Judge Conrad supported a minimal modification, baby steps. He agreed that the correct distinction would be that Rule 16 relates to intraparty discovery and Rule 17 relates to third party practice. He thought the important issues were fixing the *Nixon* standard and resolving ex parte procedures so that it is viable but does not overburden judges. He thought the defense shouldn't have to turn over all the information received by a subpoena if they don't want the prosecution to know about it.

Judge Bates thanked everyone for the great job on very difficult and important issues, and recommended looking at a narrower approach because it could solve identified problems and avoid unintended consequences. He said that it may be unnecessary to decide the investigation versus discovery distinction to propose a rule change.

Professor King said that the next effort was likely drafting a narrower draft amendment relating to ex parte procedures based on places where that is working well, loosening the admissibility requirement, and reducing the burden on trial judges particularly regarding motions up front. She asked whether the full *Nixon* standard should be included in the text of the rule amendment—describing the item with reasonable particularity, stating facts that it is likely to be possessed by the recipient and not reasonably available from another source? Professor King observed that there was disagreement about ex parte procedures, whether the rule should require more than good cause for an ex parte subpoena, or whether it should require a motion at all. She also asked what the committee note should include if the proposed amendment includes an interest of justice exception, such as mentioning exculpatory evidence, or the absence of legal protection for the information sought, or that it should be an exceptional circumstance. She also observed that many panelists disfavored distinguishing between protected and unprotected information.

Professor Beale asked if a proposed rule should include more protections from misuse or abuse of Rule 17 and encouraged the Committee to think about the issue.

Judge Dever thanked all participants and invited more comment. He supported incremental change and questioned whether the problem stemmed from some districts reading *Nixon* too narrowly. He said that he observed a consensus on at least raising the floor to correct some districts reading *Nixon* too restrictively, prohibiting ex parte motions, and requiring the defense to produce Rule 17 information to the government. He agreed with the characterization that Rule 16 is intraparty discovery, whereas Rule 17 relates to third party information, and Rule 17 should permit ex parte process. Judge Dever also asked for comment on the proposed interest of justice exception and suggested that the exception would introduce ambiguity and expand the change beyond the problems identified. He suggested someone could try to use a subpoena in connection with a compassionate release motion to get proof of innocence. He questioned whether the proposed exception would be proper.

A judge member thought that the interest of justice exception would be unnecessary and said that the Committee should avoid it.

Judge Nguyen thanked the reporters, Professors Beale and King, for their incredible work and time spent on Rule 17 issues. She also thanked Judge Dever for having the panelists appear before the full Committee. Judge Nguyen commented that the feedback from the panelists was much more meaningful with the questions and input from the full Committee.

Judge Nguyen said that the current rule does not speak to many of the issues discussed by the panelists. She thought that there was a consensus that a protective order may be sufficient for protected information, for example, and on an incremental change that does not try to address all of the problems raised. Judge Nguyen asked if the Committee had other views. Judge Nguyen also said that an incremental approach meant that many issues would not be addressed, at least in the text of the rule. She suggested that the committee note could provide guidance if the Committee seeks to adjust *Nixon*, and the note may advise that *Nixon's* admissibility standard is too tough and that the revision is meant to correct it. Judge Nguyen asked for feedback on what should be included. Lastly, she questioned the value of an interest of justice exception and suggested that it would cause an increase in litigation.

Ms. Tessier explained that the interest of justice provision meant to account for unpredicted circumstances because the DOJ had understood that defendants cannot identify the cases where they have not been able to receive needed information because they didn't know what they didn't get. Thus, it was meant as a narrow exception that pulled from language already in the rules. Ms. Tessier also cautioned against thinking that a small textual change to the rule would also be a narrow change. She said that the differences among the proposed changes to the admissibility standard—such as between likely admissible and possibly admissible or between likely admissible and likely to lead to admissible evidence—were enormous, and she raised a concern that a change to only the admissibility standard could lead to a significant change in practice. Ms. Tessier encouraged the Committee to consider the practical effect of any proposed change.

Judge Conrad said that the discussion had been helpful in clarifying that Rule 16 relates to intraparty information and Rule 17 relates to third-party information. He noted that the title of Rule 17 is "Subpoena" and inquired whether changing the titles of Rule 16 and Rule 17 could help understand the rules.

A practitioner member said that an issue that was raised as prohibitive in some districts at the Arizona conference was how the return for an ex parte motion is handled. She stated that some districts require the return to go to both parties. The member stated that an amendment should address who should receive the return from a subpoena, or the change would not have a meaningful impact on practice.

Judge Bates observed that the Committee appeared to have narrowed the proposed amendment it would consider. But he cautioned against putting broad ideas into the committee note that should rather be expressed in the rule text. Judge Bates stated that the committee note is not the place to make changes to the rules. Judge Dever agreed and clarified that changes cannot be made only to the committee note without changing the rule text.

A judge member said that he was most concerned about disclosure of personal or confidential information in the ex parte context. He recognized that it may make sense not to include this kind of amendment in the rule if the Committee seeks to make only a narrow change. However, the member encouraged the Committee to consider this risk and how districts like Ms. Smith's handle it when discussing ex parte procedures.

Judge Nguyen invited further comment. A practitioner member said that she would want to review the relevant case law, but an interest of justice exception seemed like it would be a radical departure. She said that the few circumstances in which she had participated in Rule 15 depositions were somewhat dramatic. Another practitioner member also questioned an interest of justice exception and agreed that it may cause additional litigation.

Professor King asked whether an amendment should discuss or mention *Nixon*. "How much of *Nixon* do you want to put in the text?" Ms. Tessier said that the rule should address all parts of *Nixon*. She said that discussing only one part of *Nixon* in a change would cause confusion. She noted that includes that the requested documents are not otherwise procurable reasonably in advance of the hearing, not limited to trial, that the party cannot properly prepare for the proceeding without the documents and the request is made in good faith. A judge liaison agreed and said that

the rule should specify which parts of *Nixon* the rule would change or retain. He was less sure about the concept of impeachment.

Professor King asked how a rule should phrase the requirements for issuance. A judge liaison said that the rule should phrase the standards as requirements for issuance even if there is no front-end motion requirement. It would serve as a check on lawyers as officers of the court, and could be invoked by a motion to quash.

Concluding Remarks

Professor Beale noted that the Rule 17 Subcommittee would continue its work and report its progress at the next Committee meeting. Judge Dever thanked Judge Nguyen and the reporters for their excellent work and again welcomed Mr. Naseem, Ms. Lonchena, and Justice Samour to the Committee. Judge Dever said that the Committee's next meeting would be in Washington, D.C., on April 24, 2025. He also thanked Mr. Byron and the members of the team at the Administrative Office. Judge Dever noted that Judge Birotte would chair the Rule 43 Subcommittee and Judge Harvey would chair the Rule 40 Subcommittee.

Judge Dever then announced that the meeting was adjourned.